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# Evaluation and Facilitation: Moving Past Either/Or

Richard Birke\*

## I. INTRODUCTION

In 1996, Professor Leonard Riskin published a widely-read and widely-cited article on mediator styles.<sup>1</sup> He described a grid, one vector of which was defined by a mediator's tendency to evaluate or to facilitate.<sup>2</sup> This article sparked an enormous amount of debate among practitioners and academics.<sup>3</sup> Practitioners split into two camps, one composed of those who identified themselves as evaluative mediators and the other who called themselves facilitative mediators. Many academics took positions in the debate, and the net effect was a polarization of the field.<sup>4</sup> This four year-old split<sup>5</sup> had educational value when it was first announced,<sup>6</sup> but the polarizing effect has eclipsed the educational value. The time has come to put this debate to rest.

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1. Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid For The Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). As a measure of its impact on debate, I input the search term "Riskin /s Grid" and a September 2000 Westlaw search returned 89 articles. Of course, after the publication of this symposium issue, that number will rise. Furthermore, such a search does not begin to count the number of meetings, trainings, conferences and other events at which the "facilitative/evaluative" discussion was the central event. I have personally attended many such events. I am told that Professor Riskin is now in the process of updating or revising his grid.

2. *Id.* The other vector corresponds with "broad" or "narrow" question definition. *Id.* This aspect of the article seems to have engendered relatively little discussion. *Id.*

3. *Id.* At least two prior symposia issues of law reviews have been devoted to this topic, and a great many other articles. See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 29 FLA. ST. U. L. REV. 839; Forrest S. Mosten, *Special Issue: Mediation 2000: Training Mediators for the 21st Century*, 38 FAM. & CONCILIATION CTS. REV. 17 (2000).

4. See, e.g., Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is an Oxymoron*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31, 32 (1996). Cf. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA ST. U. L. REV. 937 (1997); Jonathan B. Marks, *Evaluative Mediation-Oxymoron or Essential Tool?*, AMN. LAWYER, May 1996, at 48A (contending that there are cases in which the mediator's responsibility is to "step over the threshold from facilitator to evaluator"); Joseph P. Stulberg, *Facilitative Versus Evaluative Mediation Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

5. While the Riskin article, *supra* note 1, is only some four years old, my argument that it is antiquated is somewhat revealing of the pace at which mediation practice and the understanding of best practices moves. Our field is perhaps akin to computer technology, a field in which the shelf life of new technology is at best 6 to 12 months. A four year-old computer bears almost no internal resemblance to the "state of the art." While computers are not new, and mediation is not new, our understanding of each is still in its relative infancy, and like any infant, a short period of time yields a dramatic change.

6. I will argue herein that the split served as notice to consumers and practitioners that not all mediation is alike, a fairly intuitive idea but one that had not risen to an appropriately high level of discussion. See *infra* pp. 6-7.

In this essay, I argue that there is no such thing as a purely facilitative mediation of a legal dispute.<sup>7</sup> Neither is there such a thing as a purely evaluative mediation of a legal dispute. Mediation of legal disputes is, by its nature, always facilitative and evaluative. The evaluative-facilitative divide is an artificial artifact of history.

Following this introduction, I offer a brief description of the development of the field of legal mediation, and I attempt to place the Riskin grid in historical context. I then hope to push the debate toward a new moment, one in which all mediation is deemed both evaluative and facilitative. In this section, I describe a rudimentary equation that portrays all mediation of legal matters as involving two indispensable and unavoidable kinds of activity, one inherently evaluative and the other inherently facilitative. In the conclusion of this essay, I suggest that we address other equally important but long-neglected questions about mediators and mediation.

## II. A BRIEF HISTORY OF THE MEDIATION OF LEGAL DISPUTING IN AMERICA— THE MEDIATION EXPLOSION

The history of mediation in America is too long for me to offer a detailed account.<sup>8</sup> Instead, I will offer a brief partition<sup>9</sup> of the moments that led from mediation's rare use to its domination of the ADR field.

Until the so-called "litigation explosion,"<sup>10</sup> it was possible to get a case before a judge and jury in a reasonably short period of time, and resolution by trial of civil matters was fairly common and expedient. However, in the 1960s, a combination

7. The distinction between legal disputes and all other disputes is central to my argument. A legal dispute is generally thought of as one in which there exists a filed complaint or in which the filing of a complaint is imminent. The relevance of the existence of the legal claim is that there must exist a valuable, tradeable right that is recognized by the formal justice system in order for my thesis to hold. In other realms, say a personal dispute between siblings over where to spend a vacation or a dispute between neighbors about a barking dog, there is, respectively, either no legal right or the legal right is of such little value that the transaction costs of filing and litigation vastly outweigh any benefit that might be achieved by success in court.

8. For a good history of the rise of mediation in this time period, see John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000). See also Harry M. Webne-Behrman, *The Emergence of Ethical Codes and Standards of Practice in Mediation: The Current State of Affairs*, 1998 WIS. L. REV. 1289, 1298; Developments, *The Paths of Civil Litigation: ADR*, 113 HARV. L. REV. 1851, 1852 (2000).

9. For an alternative to my division, see Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3. My own divisions of the important moments in mediation's history are many. For an alternative Birke division, see Richard Birke, *Mandating Mediation of Money: The Implications of Enlarging the Scope Of Domestic Relations Mediation from Custody to Full Service*, 35 WILLAMETTE L. REV. 485, 516 (1999). For more extensive treatment, see CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 20-40 (2d ed. 1996).

10. The famous Pound Conference of 1976 in which Professor Frank Sander first announced his idea of a "multi-door" courthouse was a conference designed to address dissatisfaction with the then-current perceived crisis in access to justice. *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (A. Levin & R. Wheeler eds., 1979). For a more thorough discussion of the litigation explosion, see Judith Resnik, *Failing Faith, Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 516 (1986); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59-94 (1985). Of course, there are commentators such as Marc Galanter who believe that such an explosion never occurred. See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

of events made civil trials a rarer commodity. Increased priority of criminal cases and more procedural rights afforded to criminal defendants took up much of the time and attention of sitting judges.<sup>11</sup> New causes of action increased the number of ways aggrieved citizens could take up court time. These new causes of action tended to be fairly complex and time consuming for courts to prepare and try. Increased access to attorneys through the creation of public law projects, creation of contingent fee arrangements, relaxations on the bans on attorney advertising, whistleblower statutes, and increased awareness of the ability to proceed pro se provided more avenues for people to access the courts. Disputes over discovery bloomed with the advent of the photocopier and the computer, and the pre-trial activities of judges further limited their ability to process claims through verdicts. By the time that the litigation explosion had finished exploding, the courts were backlogged and litigants unsatisfied with the wait for court had to look for alternatives.<sup>12</sup> Mediation was among the beneficiaries of this backlog.

While mediation had first become popular in labor management disputes and in neighborhood disputes,<sup>13</sup> some of the first serious forays by traditional lawyers into mediation were made by practitioners of domestic relations law.<sup>14</sup> Practitioners learned that voluntary agreements about post-dissolution parenting issues, "private ordering,"<sup>15</sup> were more likely to be in the best interests of the child than were judicially-created resolutions. Many mediation programs in domestic relations became mandatory.<sup>16</sup> The mandatory nature of these programs produced a great many critics, but experience showed that even reluctant parties benefited from the process. As litigants and lawyers watched the process, even those who were forced into mediation learned to like it and to use it in the first instance rather than the last.<sup>17</sup>

11. For discussion of the expansion of defendant rights, see John B. Mitchell, *What Went Wrong With the Warren Court's Conception of the Fourth Amendment?*, 27 NEW ENG. L. REV. 35, 38 n.8 (1992).

12. See POSNER, *supra* note 10; Resnik, *supra* note 10.

13. KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 19-20 (1994).

14. JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 290 (2d ed. 1996); Daniel G. Brown, *Divorce and Family Mediation: History, Review, Future Directions*, 20 FAM. & CONCILIATION CTS. REV. 1, 11-20 (1982).

15. The debate over private ordering was made prominent in fields other than family law. See Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979). See, e.g., Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Jeffrey Evans Stake et al., *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535 (1998).

16. For a discussion of the array of statutory plans including variations on the mandatory theme, see Colleen N. Kotyk, *Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick*, 6 WM. & MARY BILL RTS. J. 277, 284 (1997). For particular emphasis on mandatory mediation see *id.* at 304. For a list of states (as of 1992) mandating mediation in domestic relations matters, see Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 272 n.2 (1992).

17. For one example of a program that happily forces mediation on domestic relations disputants, see Donna Maciorowski, *The Success of the Supreme Court's Pilot Mediation Program*, 2000 W. VA. L. REV. 32, 33. Most other states with which I am familiar run parallel with West Virginia.

For more extensive discussion of the general concept, see Dane A. Gaschen, *Mandatory Custody Mediation: The Debate Over its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469 (1995) and Christy L. Hendricks, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 J. FAM. L. 491 (1994).

Through repetition, the domestic relations bar established a reasonably high comfort level with the process, at least for custody decisions.

Buoyed by the domestic relations experience, proponents of mediation spread it to all civil arenas and even some criminal areas.<sup>18</sup> Legislators were informed that mediation proved to be faster and cheaper than court (or at least they believed folk wisdom to this effect) and so they financed a plethora of state and federal programs.<sup>19</sup> The field expanded with the help of overburdened judges,<sup>20</sup> reform-minded legislators, unsatisfied litigants, people who were disillusioned with arbitration, and more than a handful of so-called "recovering" litigators.<sup>21</sup>

Once consumers demanded mediation, the supply side responded.<sup>22</sup> Law schools started the 1960s with barely a course in the entire nation devoted to mediation skills and training, and they entered the 1990s with barely a school that didn't offer such training.<sup>23</sup> In 1996, the powerhouse attorney directory service Martindale-Hubbell published its first "Dispute Resolution Directory" containing state-by-state lists of many thousands of dispute resolution professionals.<sup>24</sup> Organizations such as JAMS,<sup>25</sup> Endispute, Bates-Edwards, and Conflict Management, Inc. entered the mediation game, and older organizations such as the American Arbitration Association ("AAA") began to offer mediation as an

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18. See, e.g., Katherine L. Joseph, *Victim-Offender Mediation: What Social & Political Factors Will Affect Its Development?*, 11 OHIO ST. J. ON DISP. RESOL. 207 (1996).

19. For a discussion of the proliferation of types of mediation and an argument that mediation has come to dominate the ADR field, see Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed Into Mediation: Standards Of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 852 (1998).

20. Visions of the future suggest that the courts' ability to provide a trial to civil litigants is already impaired, and is likely to worsen in the future. See, e.g., Leonidas Ralph Mecham, *The Civil Justice Reform Act of 1990 - Final Report*, 175 F.R.D. 62, 69 (1997); John G. Baker, *The History of the Indiana Trial Court System and Attempts at Renovation*, 30 IND. L. REV. 233, 234 (1997); Steven C. Ames, *Justice in the Year 2020*, OREGON ST. B. BULL., Jan. 1995, at 9. These commentators, and many others, suggest the use of ADR, and usually mediation, as a congestion relieving mechanism.

21. Typically, these litigators are "recovering" from a career characterized by a financially successful but spiritually impoverishing practice. See, e.g., Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283 (1996); Susan M. Hammer, *Redefining the Practice of Law*, OREGON ST. B. BULL., Jan. 1993, at 15 ("Last June I participated in a full-day meeting on alternative dispute resolution. The program suggested that speakers would talk about mediation and personal injury, mediation and business disputes, mediation of workers' compensation, etc. But what I heard were self-identified 'recovering litigators' engaged in repetitious revelations about how mediation 'really works' and how they came to see the light.").

22. Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?* 13 GEO. J. LEGAL ETHICS 427, 429 n.2 (2000) (describing "the proliferation of recent ADR initiatives [as] remarkable").

23. The AALS Directory of Law Teachers lists teachers of ADR. Virtually every law school in the nation is represented. See ABA SECTION OF DISPUTE RESOLUTION, DIRECTORY OF LAW SCHOOL ALTERNATIVE DISPUTE RESOLUTION COURSES AND PROGRAMS (2d ed. 1997). See also Sarah Cole et al., *Sustaining Incremental Expansion: Ohio State's Experience in Developing the Dispute Resolution Curriculum*, 50 FLA. L. REV. 667 (1998).

24. The 1996 directory contains no complete pagination, but my estimate is that it is well over 1000 pages. It is substantially larger than my 1500 page law dictionary that sits next to it on a shelf in my office. MARTINDALE-HUBBELL DISPUTE RESOLUTION DIRECTORY (1996).

25. JAMS is the new formal name of the organization formerly known as Judicial Arbitration and Mediation Services.

alternative to arbitration.<sup>26</sup> Naturally, there have been mergers, acquisitions, failures and successes in the large-scale providing of mediation services,<sup>27</sup> but the fact remains that mediation is now offered by courts, by individuals, by small groups, and by large organizations.

Another boost for mediation came with a resentment at the growth of mandatory arbitration in contracts. Cases like *Gilmer*<sup>28</sup> and state analogues caused consumer and employee unrest. In response, the writers of mass contracts for employment and consumer matters began to write tiered contracts in which mediation was an option before mandatory arbitration.<sup>29</sup> The corporate world learned that in-house use of mediation was a valuable way to lessen or avoid the costs of litigation or contested cases.<sup>30</sup>

Of course there were and are critics of the rise of mediation, but these critics tend to be seen as either old-school civil procedure die-hards<sup>31</sup> or mediation advocates who plead that the field not develop so fast that best practices are given too little attention.<sup>32</sup> But by and large, the litigation explosion spawned a mediation explosion, or at least a strong aftershock.

With growth came growing pains. Once mediation became popular, some participants had bad experiences. They brought their cases to mediation and found that it was something less than a panacea.<sup>33</sup> In some instances, it was merely a waste of time and money. In others, it was worse — a negative confrontation between disputants who should never have been together in the same room, or a misused

26. While I am uncertain of the date when AAA started mediating, they now regularly tout their mediation successes and expertise in the AAA-published *Dispute Resolution Journal*. See, e.g., *ADR in the News*, DISP. RESOL. J., Mar. 1994, at 3 (describing the evolution of a hybrid “mediation after last offer arbitration” process they call MEDALOA). In that article AAA refers to its commercial mediation rules that had been in existence for several years by the time of the 1994 article. *Id.* at 5.

27. In fact, Bates-Edwards first merged with Endispute, and then the new organization merged with JAMS. For more on the story, see Richard C. Reuben, *King of the Hill*, CAL. LAW., Feb. 1994, at 55.

28. *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991). For a discussion of the negative position of various agencies toward mandatory arbitration of employment claims, see John W.R. Murray, Note, *The Uncertain Legacy of Gilmer: Mandatory Arbitration of Federal Employment Discrimination Claims*, 26 FORDHAM URB. L.J. 281 (1999). See also George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications For Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMP. L. 177, 188 (1998).

29. Murray, *supra* note 28.

30. See John Lande, *Getting the Faith: Why Corporate Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000); David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, DISP. RESOL. J., Feb. 1999, at 66; David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133 (1998).

31. I am indeed casting aspersions on Owen Fiss’ article, *Against Settlement*, 93 YALE L. J. 1073 (1984). My observation is that Fiss’ discomfort is shared by relatively few professors who do not teach civil procedure and by almost no practicing lawyers.

32. I hope to be one of these advocate-critics. For a discussion of my rationale, see Birke, *supra* note 3, at 516. Thankfully, I am not alone, and many colleagues recognize that critiques of our field no longer threaten its survival or are acts of traitorousness, but are instead necessary for the proper development of the field.

33. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53.

process where one or both sides attended and attempted to use the process as discovery or a bad-faith stall tactic.<sup>34</sup>

In addition, flocks of people of all stripes attended relatively short training sessions and declared themselves to be qualified mediators. Certificates of completion became surrogates for competency, and the field became crowded with underemployed but trained people. Stories of highly paid and very satisfied practitioners of mediation acted as a continuing lure for the neophyte lawyer, the burnt-out gladiator, the nonlawyer would-be mediator, and many others. A great many mediators, qualified and unqualified alike, struggled for business. Disputes were everywhere, and now so were mediators, but still, many mediators wanted for paid work.

The problem was that mediation had come to be the dominant form of dispute resolution of legal disputes, yet it was very poorly understood by litigants, and indeed by lawyers. If a person knew what mediation was,<sup>35</sup> they were still unlikely to understand the complex differences between various mediators' styles. Disputants needed some guidelines for how to decide who to hire as their mediator.

Professor Riskin's influential article gave a partial answer to this important question.<sup>36</sup> He showed that mediation was not all alike, he gave the public a tool to distinguish between them, and he gave the mediators a tool to distinguish themselves from their competitors. Some mediators, like ex-judges, tended to evaluate disputes and engage in techniques that encouraged evaluation.<sup>37</sup> They "beat parties up" about their cases and encouraged settlement by creating anxiety about the likelihood of partial or complete failure in court.<sup>38</sup> Other mediators, like social workers, helped people to talk about how they could work together and accomplish a better, less binary result than what might happen at trial.<sup>39</sup>

The implicit message was that mediation covers a broad swath of the dispute resolution landscape, and one bad experience should not sour one's attitude. After all, if a restaurant served a bad meal, it would not turn the patron off to all restaurants, and "mediation" is almost as generic and vast a term as "restaurant." Participants, both actual and potential, needed to be taught to pick the right type of mediation for their dispute; just as one might strive to choose a restaurant appropriate to one's event, appetite, preferences or budget.

However, the overt (and I believe, unintended) message was that mediation was divisible into simplistic categories. Mediators tended to distill all differences into a stark evaluative-facilitative dichotomy. So-called facilitative mediators are process oriented, gently guiding parties through a productive conversation about how they might best solve their problem. They presume that the barrier to the negotiated

34. See articles cited *supra* note 33.

35. I posit that if you stopped virtually any person on the street and asked them what a trial is, that you would get a fairly accurate response. However, I also believe that if you asked what a mediation is, that the answers would vary substantially, with many responses describing arbitration and something less than half getting it right. If you then asked the people who got it right to describe anything they knew about variation in mediator technique or style, my guess is that the average respondent would have no idea that mediation varied from one instance to the next.

36. Riskin, *supra* note 1.

37. Riskin, *supra* note 1, at 26, 44.

38. Riskin, *supra* note 1, at 26.

39. Riskin, *supra* note 1, at 32, 45.

resolution of the conflict is rooted in a failure to communicate effectively. So-called evaluative mediators are oriented toward the underlying substance of the dispute. They presume that the failure of the parties to negotiate a resolution is rooted in inflated perceptions by one or both sides of the value of their claim; if the mediator is an effective “agent of reality” the parties will settle.

The debate over styles masked a somewhat political agenda: “Choose me and my type of mediation — it’s the right type for you.” Nonlawyers refer to settlement judge models as a travesty of mediation, perhaps in part, because of concern that evaluative mediation may be the practice of law.<sup>40</sup> They suggest that mediation is not about being told what your case is worth — that “real” mediation is a dialogue between disputants who should search for a common ground, that evaluative mediation is an oxymoron.<sup>41</sup> Many lawyers joined this camp.<sup>42</sup> Litigation-minded evaluative mediators are equally strident and suggest that the real reason parties come to mediation is because their negotiation is stuck, and the reason is largely related to party overconfidence and unrealistically high expectations.<sup>43</sup> If the parties want “touchy-feely” relationship work, they should see a counselor, not a mediator. After all, mediators are not schooled in the counseling arts, and any “facilitative” activities are out of bounds for legal matters.

In his attempt to add sophistication to the conversation, Professor Riskin put forward a set of dimensions along which mediators differed,<sup>44</sup> and the mediators took that observation and lofted it like two flags for armies engaged in a turf war.

### III. A NEW DAY

The stylistic split shrouds a simple reality. A case settles if and when the deal at the table is better than the continuation of conflict. Every mediator looking to create a settlement tries to see if a deal can be created that meets this criterion. The balance can be tipped if the deal at the table can be made to be very attractive, or if the prospect of continued battle appears very unattractive. The simple equation,  $V(S) \geq EV(t) - C$ , describes the truism that settlement occurs if the value of the settlement is at least equal to the net expected value of trial.

In order to explore whether this is true, mediation of a legal dispute is necessarily both facilitative and evaluative. Any mediator who believes that any mediation of a legal dispute can be entirely facilitative or entirely evaluative and still settle is suffering from a delusion.<sup>45</sup>

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40. Joshua Schwartz, *Laymen Cannot Lawyer, But is Mediation the Practice of Law?*, 20 CARDOZO L. REV. 1715, 1737 (1999).

41. See Kovach & Love, *supra* note 4.

42. See Kovach & Love, *supra* note 4.

43. Dwight Golann & Marjorie Corman Aaron, *Using Evaluations in Mediation*, DISP. RESOL. J., Spring 1997, at 26, 27.

44. Riskin, *supra* note 1, at 8.

45. In this respect, I part company from several colleagues whom I deeply respect, but who have, I feel, attempted to forge a truce between camps. The correct view (in my humble opinion) is that the conflict is false. I refer to articles by Professor Jeffrey Stempel, herein, Professor Robert Moberly, in Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669 (1994) and Professor Scott Hughes, Scott H. Hughes, *Facilitative Mediation or Evaluative*



In any legal dispute, parties have alternatives that involve continuing the conflict and going to court. Typically, the parties perceive their Best Alternative to a Negotiated Agreement (“BATNA”)<sup>46</sup> as continuing with litigation. In some instances they may choose to simply drop the case (in the case of plaintiffs) or pay the demand (in the case of defendants), but more frequently they see their no-agreement alternatives as court and trial. This right to pursue litigation, sometimes referred to as one’s legal endowment,<sup>47</sup> influences the bargain that a party is willing to accept at the negotiation or mediation table.

When the time comes to settle a legal dispute the parties compare the deal offered on the table to the deal available away from the table. To determine the value of the deal away from the table, a party must determine what their case is worth if they go to court — they look at the net expected value of trial. This is a calculation that involves the sum of the products of the likelihood of each possible outcome with its payoff, less costs.<sup>48</sup> Only after a party has looked at the value of their litigated case does one know whether or not the deal at the table meets their interests better or worse than continued litigation. The determination of one’s litigated outcome is necessarily an evaluative process.<sup>49</sup> The evaluation involves a hard look at the probability of various possible outcomes, the value attached to each

*Mediation: May Your Choice Be a Wise One*, 59 ALA. LAW. 246 (1998). Professor Stempel suggests that there may be appropriate times to use various techniques, and Professor Moberly suggests that there is an active market for mediators who are facilitative and for mediators who are evaluative. Professor Hughes also suggests that there is a choice issue, assuming that mediators can be purely in one or the other camp. There are dozens more articles making this type of assumption.

I am somewhat more in line with the arguments advanced by Professor Joseph Stulberg in his article. See Stulberg, *supra* note 4 (suggesting that the definition of “facilitation” can be recrafted to included some evaluation).

46. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 97-106 (2d ed. 1991).

As long as this essay is the place where I am getting things off my chest, let me add to my rant. Anyone who works with the concepts of Worst Alternative (“WATNA”), or Likely Alternative (“LATNA”), etc., is, I believe, not correctly understanding the concept of BATNA. If it isn’t within your power to create it by yourself, it isn’t an alternative, according to *Getting to Yes*. The whole point of the BATNA analysis is to choose from among the list of things you can definitely accomplish by yourself, and pick the one that meets your interests better than any other. This is your best alternative. If you are focusing on the worst of those, a meaningless alternative has been picked – it is the same as choosing a worse than worst case scenario. The same is true with respect to LATNA. Sometimes your BATNA will involve an expected value calculation – and in the domain of risky alternatives, likelihood is not a useful indicator unless it is indexed to payoffs as defined by interests. Thus, BATNA analysis should be a complete and total substitute for other analyses of alternatives when following the *Getting To Yes* model of negotiation preparation. This is why, in my opinion, there is no WATNA or LATNA analysis in *Getting To Yes*. End of rant.

47. See, e.g., Mnookin & Kornhauser, *supra* note 15.

48. For more information about how to calculate expected value in the context of legal disputes, see Bruce L. Beron, *Litigation Risk Management Analysis: A Comprehensive, Logical Approach to Litigation Decision-Making*, 550 PLI/Lit 27, 33-35 (1996) (arguing that expected value calculations can assist in settlement determination), Marc B. Victor, *How Much Is a Case Worth*, TRIAL, July 1984, at 48 (demonstrating that decision analysis is an excellent tool for formulating litigation strategy) and Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*, 40 BUS. LAW. 617, 619 (1985) (discussing role of expected value calculations in discovery decision). See also Marjorie Corman Aaron & David P. Hoffer, *Using Decision Trees as Tools for Settlement*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 71 (1996).

49. See Stulberg, *supra* note 4, at 997.

of those outcomes and the costs associated with obtaining each outcome. Parties must necessarily perform some form of litigation risk analysis in order to determine what the case is worth. Naturally, there is too much uncertainty in the common legal case for litigation risk analysis to be an exact or precise science and the best that one might hope for is a reasonable estimate of the value of the case.<sup>50</sup> Some mediators emphasize the uncertainty attendant to moving forward with trial and suggest to parties in mediation that the value of their litigated case is lower than the parties believe.<sup>51</sup> A subset of these mediators may forecast the outcome of the case if it were to go to trial.<sup>52</sup> In this manner, the mediator performs the evaluation themselves and announces it to the parties. This is, I believe, an exception to much mediation practice. The more common kind of evaluation that occurs is where the mediator picks apart weaknesses in the parties case (typically in caucus) and highlights the areas of the parties' case that are potential weaknesses or shortcomings.<sup>53</sup> These mediators push parties to evaluate their cases anew.

But they cannot stop there. A mediator who evaluates a case for a party or who pushes a party to evaluate their own case has not created a settlement. She has merely created a reference point above which a plaintiff should settle or below which a defendant should accede to a settlement. Assuming the parties retain the ability to say yes or no to any given deal, the onus is on the mediator to push the parties together somehow, *i.e.*, to find a zone of possible agreement that leaves both parties better off than does continued litigation. In this respect, the so-called evaluative mediator evaluates until a reference point is set after which time a facilitative discussion yields a bargaining range. It is then up to the parties to find the agreeable set of outcomes within the bargaining range and arrive at one. Therefore, an evaluative mediator evaluates only part of the time. Facilitation creates the agreement if one is reached.

On the other hand, the so-called facilitative mediator emphasizes the parties' interests and options and looks for agreements that have as their characteristics the ability to parse out value where it is most highly valued. Facilitative mediators look for confluences of interests. If plaintiff values interest X more than interest Y and the reverse is true for defendant, then a deal that gives more of X to plaintiff and more of Y to defendant is more likely to be satisfying to the parties than if X and Y are distributed evenly. It is the hope of the facilitative mediator that by finding shared and different interests a bargaining range may be created and, furthermore, that conflicting interests can be overcome.

However, while the facilitative mediator may aid the parties in finding the best way to maximize gains from trade, the parties will remain insecure unless they are assured, either by their lawyer, their mediator or their intuition (or some combination of all of these) that the deal at the table they are about to accept is at least of similar value to the legal right that they forever give up in return for accepting the

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50. James E. McGuire, *Practical Tips for Using Risk Analysis in Mediation*, DISP. RESOL. J., May 1998, at 19 (discussing question of manipulability of analysis).

51. See Golann & Aaron, *supra* note 43.

52. For a discussion of the range of techniques in "evaluative" mediation, see James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 784-92 (1997).

53. *Id.*

settlement. Thus, the so called facilitative mediator must at least pay lip service to this insecurity and allow the parties to compare the best deal at the table to the deal away from the table, *i.e.*, to the value of their case.

This simple equation with expected value of trial on one side and the deal on the other is an equation that pervades all legal disputing, not just mediation. It is the same question any litigant asks of herself when trying to decide whether to settle a case: is the deal at the table better than the expected payoff of continued fighting? The only difference between the negotiated settlement and the mediated settlement is that in the latter, a neutral has pushed the consideration of the question. An “evaluative” mediator may appear to push the parties hard to understand that the value of their case is minimal so that the parties accept a settlement — he works one side of the equation more explicitly, but the other is always implied. However, while the primary activity of the mediator may be evaluation, he is merely spending more time on the expected value side of the equation than on the settlement side. He knows, as do all mediators, that when the deal at the table appears to be better than the deal away from the table that there will be a settlement. Otherwise, there will not be. The “evaluative” mediator makes the expected value side look low and in so doing creates a comparative advantage for settlement. The “facilitative” mediator makes the value of the deal at the table appear to be high and in so doing, similarly creates a comparative advantage for the settlement.

I am aware that there are some mediators who spend virtually all of their time in mediation telling the parties their predictions of the outcomes of the cases should they proceed to trial. I am also aware that there are mediators who discourage mention of the suit as if discussion of trial is some sort of evil incantation. I suggest that the former mediator knows he must find a deal that both parties will accept, and that the latter knows that the best deal will be compared to trial before the time comes to sign the waiver of liability or release forms.

In my experience, the best mediators spend a fair amount of time on each side of the equation. They force parties to understand the risks and uncertainties and costs of going forward and they explore with parties possible benefits of reaching a negotiated resolution of the conflict.

#### IV. CONCLUSION

All mediation is necessarily both facilitative and evaluative, and therefore, it follows that all mediators are both facilitative and evaluative. I do not mean to suggest that all mediators are the same, as I would never suggest that all disputes or all lawyers are the same. They differ, and one of the dimensions along which they differ is in the degree to which they emphasize each side of the settlement equation described above. However, this single distinction has outgrown its usefulness. I believe that Professor Riskin would agree that he meant to describe a dimension along which mediator behavior differs, but that too much has been made of this distinction. The enthusiasm with which practitioners have greeted this important observation-cum-announcement has distorted its relative importance in the world of mediation. Too many mediators self-identify as members of one of two seemingly distinct camps. Parties glom onto these labels and use them to interview mediators,

as if there is the potential for an honest or accurate response to the question “are you facilitative or evaluative” and as if this will tell the parties everything they need to know about the mediator’s suitability for a particular dispute.<sup>54</sup> To the extent that “facilitative” has become a code word for “nonlawyer” or “lawyer who de-emphasizes the law” and “evaluative” has become code for “ex-judge” or “litigator,” this artificial division has glossed over a much more important debate about who should mediate and what constitutes best practices. The distinction has caused divisions in the field that are of little value, has lulled some clients into believing that they know the magic question to ask to find a good mediator, and has given some mediators a falsely complete sense of identity.

The debate about when to evaluate or facilitate, and how, is important. But it is not a debate about whether to do one or the other, as every mediation of a legal dispute will involve both. It is also not the only debate that needs to occur about mediation, and perhaps not even the most important. However, it has become the dominant debate, and I for one am tired of it. I hope that we can move on, and colleagues with whom I discuss the debate suggest that they feel as I do.<sup>55</sup> Perhaps this symposium issue is one more signal of our collective readiness to make the debate more nuanced and sophisticated. I applaud Professor Riskin for introducing into our lexicon a useful tool for differentiating between certain aspects of our practice, and I decry the dominance that difference has come to have on our debates about best practices.

The factors that make a mediator suited or unsuited for a particular dispute cannot be reduced to a simple one or two factor analysis, and the over-reliance on tendencies to evaluate or facilitate is a poor substitute for care and rigor. Let’s have symposia on whether substantive expertise matters, whether mediation should presumptively be multi-session or whether single sessions can work, whether team mediation makes good sense and if so when, what roles gendered and race-based assumptions play in our mediations, whether absolute confidentiality is really a prerequisite for successful mediation, what constitutes meaningful training, and other important questions. I do not mean to suggest that we ever stopped thinking of such questions, but our debate has been rather less robust, preoccupied as we have been with a dichotomy that we might now put into proper historical perspective.

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54. See, e.g., Hughes, *supra* note 45; Nancy Kaufman & Barbara Davis, *What Type of Mediation Do You Need?*, DISP. RESOL. J., May 1998, at 8.

55. Some, with whom I have not had the pleasure of discussing this topic, have put their desire into print. See Sander, *supra* note 9, at 7 (arguing explicitly for a mending of this divide); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997) (suggesting that inclusiveness of many viewpoints will benefit the profession).

