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Toward More Sophisticated Mediation Theory

John Lande

University of Missouri School of Law, landej@missouri.edu

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Toward More Sophisticated Mediation Theory

*John Lande**

I. INTRODUCTION

In the lead article in this symposium, Professor Jeffrey Stempel provides a very thoughtful analysis of the mediation field.¹ He focuses on the debate over facilitative and evaluative mediation² and he is critical of many of the arguments made by proponents of facilitative mediation. I have expressed some similar concerns,³ and I generally agree with his analysis (with a quibble here and there). I do think that the facilitation-evaluation debate has been productive (though admittedly wearisome), and that proponents of facilitative mediation deserve more credit than he gives them in his article. To balance the analysis, this commentary outlines some of the benefits of the debate and the important contributions of facilitation proponents.

Before discussing the issues supplemental to Stempel's analysis, it is worth summarizing Stempel's key points that I believe are well taken. First and foremost, there is an important value in having a range of styles of mediation, including evaluative mediation. Mediators frequently mix facilitative and evaluative techniques in individual cases, which is often appropriate and beneficial.⁴ Appropriate use of predominantly one approach or the other may vary in part depending on the type of case.⁵ Some facilitation proponents take a rigidly orthodox view that facilitative mediation is the only legitimate form of mediation,⁶ predicated on an ideology that uses a false and overly formalistic dichotomy.⁷ At least some of the discord over facilitative and evaluative techniques is based on whether the mediators are lawyers or not, with lawyers tending toward a more evaluative

* Associate Professor and Director, LL.M, Program in Dispute Resolution, University of Missouri-Columbia School of Law. Thanks to Lela Love, Bobbi McAdoo, Len Riskin, Jean Sternlight, and Nancy Welsh for comments on an earlier draft, with the usual absolution of responsibility for my sins.

1. Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247. Professor Stempel presented his paper at the University of Missouri-Columbia Center for the Study of Dispute Resolution Annual Lecture on September 29, 2000.

2. For definition of these terms, see *infra* Part II.

3. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 872-74 (1997).

4. Stempel, *supra* note 1, at 248-49, 263-69. For my similar views, including advocacy for pluralism in mediation practice, see Lande, *supra* note 3, at 854-56, 869-71, 895-96. Some facilitation proponents also endorse a mixture of facilitation and evaluation as long as the process is clearly labeled. See, e.g., Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 296-97.

5. Stempel, *supra* note 1, at 285-90. For a discussion of the appropriateness of facilitative and evaluative techniques in different types of cases, see *infra* Part IV.

6. Stempel, *supra* note 1, at 249-51.

7. Stempel, *supra* note 1, at 269-71.

approach and nonlawyers tending toward a more facilitative approach. This tension is related to conflict over control of the field between lawyers and nonlawyers.⁸

I believe that the facilitation-evaluation debate has helped generate at least four major benefits that Stempel's article does not adequately acknowledge. Some of these benefits are due to the particular arguments of facilitation proponents, while others involve a general development of the field resulting from the debate. The first benefit is that facilitation proponents have highlighted how mediation can promote many important values such as party self-determination, and they have cautioned about risks of unfairness created by mediator evaluation as described in Part III. Second, the facilitation-evaluation debate has stimulated a better appreciation of the appropriateness of these techniques in different types of cases, as described in Part IV. Third, the debate has contributed to reducing ill-considered evaluation practice, as discussed in Part V. Fourth, the debate may cause many mediators to consider and reject simple assumptions, developing a more sophisticated understanding of the process. Re-examination of mediator evaluation could become part of a broader, healthy questioning of taken-for-granted mediation theory more generally, as considered in Part VI. Before examining these propositions, Part II provides a brief review of terminology used in the debate and what I suggest are overly law-centered assumptions embedded in Stempel's use of certain terms.

II. A BRIEF REVIEW OF TERMINOLOGY AND STEMPEL'S UNDERLYING ASSUMPTIONS

Analyzing terminology used in the debate is important for conceptual clarity as well as for revealing important assumptions embedded in the terms of debate. The terms "facilitative" and "evaluative" mediation derive from the work of Leonard Riskin. They represent opposite ends of one dimension of a grid intended to illustrate some variations in mediation practice.⁹ Mediators using a facilitative style focus on eliciting the principals' opinions and refrain from pressing their own opinions about preferable settlement options. Mediators using an evaluative style

8. Stempel, *supra* note 1, at 275-84. Stempel offers valuable insights into some general differences in perspectives between mediators who are lawyers and those who are not. He suggests that lawyers tend to be more evaluative and nonlawyers tend to be more facilitative, though he rightly notes that some attorney-mediators embrace a philosophy of facilitation. Stempel, *supra* note 1, at 275, 282. Indeed, many of those leading the effort to promote facilitation are lawyers. I think that Stempel makes too broad a generalization that nonlawyers tend to prefer facilitative techniques. I suspect that one of the main factors affecting mediators' approaches is whether they believe that they were retained for their substantive expertise. Thus I suspect that engineers who mediate construction disputes, for example, may tend to use evaluative techniques even though they are not lawyers.

9. The grid was first published in a brief version in 1994. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO THE HIGH COST OF LITIG. 111 (1994). Riskin published an extended version two years later. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

develop their own opinions about preferable settlement options and may try to influence principals to accept them.¹⁰

Some people use the terms “facilitation” and “evaluation” interchangeably with concepts of “settlement” and party “empowerment,” most identified with the work of Robert A. Baruch Bush and Joseph Folger,¹¹ even though the two pairs of terms refer to distinct concepts. Settlement is the goal of terminating the dispute on any mutually acceptable basis.¹² Empowerment is the goal of using mediation to promote the parties’ self-determination to resolve the dispute on whatever terms they think best. Moreover, Bush and Folger describe empowerment as a goal of “transformation” in which mediation is used to “engender[] moral growth toward both strength and compassion,” not just for the dispute being mediated, but for changing people in the way that they deal with others and handle future disputes.¹³

I think of empowerment and settlement as goals for mediation whereas facilitation and evaluation are techniques that mediators use. It makes sense that mediators whose primary goal is empowerment would most often use facilitative techniques and that mediators who are primarily oriented to settlement would be more likely to use evaluative techniques. There are exceptions. The technique of “selective facilitation,”¹⁴ where mediators facilitate discussion toward some options and away from others, tends to be oriented to settlement. On the other hand, some mediators believe that it is important for parties to have the mediators’ evaluations in order to make informed decisions, but these mediators are careful to avoid pressing the parties to settle.¹⁵

Stempel’s article challenges the use of various terms that project too great a status of mediation in his view. I have several quibbles with his points which seem to focus on lawyers, law, and courts as the norm¹⁶ more than I think is appropriate

10. Riskin, *Grid*, *supra* note 9, at 23-24. Love and Kovach distinguish reality testing and evaluation, generally suggesting that “reality testing” is oriented to stimulate the parties’ evaluation whereas “evaluation” is where mediators provide their opinions to influence the negotiation outcome and/or adversely affect the parties’ self-determination. Love & Kovach, *supra* note 4, at 303-05. They note that there is a gray area between the two. Love & Kovach, *supra* note 4, at 305. This gray area is huge and dependent on many contextual factors. It is the source of much of the confusion and controversy as some of the ostensible reality testing can be quite coercive whereas some of the evaluation can be quite benign.

11. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

12. See Lande, *supra* note 3, at 851-53.

13. BUSH & FOLGER, *supra* note 11, at 28-32.

14. See David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC’Y REV. 613 (1989).

15. See GARY J. FRIEDMAN, *A GUIDE TO DIVORCE MEDIATION: HOW TO REACH A FAIR, LEGAL SETTLEMENT AT A FRACTION OF THE COST* 35 (1993).

16. This has been called a “legal centralist” perspective which, not surprisingly, is often taken for granted by lawyers. See Marc Galanter, *The Portable Soc 2; or, What to Do Until the Doctrine Comes*, in *GENERAL EDUCATION IN THE SOCIAL SCIENCES: CENTENNIAL REFLECTIONS ON THE COLLEGE OF THE UNIVERSITY OF CHICAGO*, 246, 250-53 (J.J. MacAloon ed., 1992); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. OF LEGAL PLURALISM, 1, 1-3 (1981). An alternative perspective is “legal pluralism,” where courts of state law are not necessarily the only or primary system of adjudication. See also *infra* note 21 and accompanying text. See generally Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869 (1988); John Lande, *The Diffusion of a Process Pluralist Ideology of Disputing: Factors Affecting Opinions of Business Lawyers and Executives* 7-8 (1995) (unpublished Ph.D. dissertation, University of Wisconsin-Madison).

or helpful. These quibbles are significant because they relate to what I think is Stempel's unduly narrow view of mediation, as described in Part III. For example, Stempel writes:

[M]any mediators have taken to referring to the disputing parties as the mediator's "clients" or "principals" rather than merely the disputants who have retained the mediator. Although this characterization is touching in its connotative closeness, it misperceives the relationship. A disputant does not use a mediator as an "agent" in the way in which clients or other principals use lawyers or representatives as agents. In addition, of course, the party has no particular claim to the mediator's zealous advocacy or fiduciary duty (far from it). Rather, the mediator has a duty to serve the parties and the situation in the aggregate rather than to represent either party as such.¹⁷

Accountants, realtors, hairdressers, and mediators, *inter alia*, can have clients without owing them a duty of zealous advocacy. While the term "principal" can be used in the context of legal agency rules, it also has a broader meaning in common usage, referring to the main decision maker.¹⁸ Although mediators are not agents of parties in mediation, when parties are represented in mediation, it is appropriate to refer to parties as principals, in contrast to their attorneys, who in fact are their agents.¹⁹

Another example of Stempel's narrow focus on the law as a standard of reference is his preference to retain the qualifier "alternative" in the term "alternative dispute resolution." He advocates this usage to signal that mediation, arbitration, and other non-litigation techniques do not belong at the same status level as litigation, which he argues is the "default means of dispute resolution in society."²⁰ I do not believe that litigation is, in fact, the default dispute resolution mechanism; empirical evidence supports everyday experiences (of nonlawyers) that people turn to lawyers and courts in only a small fraction of their problems.²¹ Moreover, making such

17. Stempel, *supra* note 1, at 263 n.65.

18. See Lande, *supra* note 3, at 842-43 n.11.

19. Lande, *supra* note 3, at 881-86.

20. Stempel, *supra* note 1, at 271 n.96.

21. See BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 175 n.109 (1977) (finding similar statistics regarding lawyer usage); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 537, 542-43 (1980-81) (finding in study of claims of \$1000 or more that lawyers were used in average of only 23% of disputes and cases were filed in court in average of only 11.2% of disputes, which varied by type of dispute). As Galanter points out, many discussions of ADR seem oblivious to the wide range of non-court-related disputing mechanisms:

[C]uriously those dispute institutions that flourish and enjoy relative autonomy tend to be omitted from discussions of ADR. Our social institutions are honeycombed by indigenous forums that elaborate and enforce complex codes of conduct – in hospitals, schools, condominiums, churches, the NCAA, and a multitude of other settings. Far more disputing is conducted within these indigenous forums than in all the free-standing and court-annexed institutions staffed by arbitrators, mediators and other ADR professionals. This profusion of indigenous law reminds us that the world of disputing includes much more than traditional adjudication and the new ADR institutions.

status comparisons seems counterproductive. I try to avoid them by using the term “dispute resolution” to refer to all methods of dispute resolution including litigation.²²

A final example involves Stempel’s objection to use of the term “professional” as applied to mediators because mediation does not have the “historical pedigree” of five traditional professions and does not satisfy “historical criteria of society,” including required course of study, examination or other entrance requirements, and self-regulation.²³ In common usage, “professional” has a much broader usage, referring to people who use some skill to engage in an activity as a source of livelihood or as a career.²⁴ The term “professional” is commonly accepted to refer to unpedigreed groups such as athletes, artists, business executives, and plumbers. Thus it is appropriate to refer to mediators as professionals who serve clients without using the legal system as the standard for measuring mediation’s legitimacy. I believe that these examples of Stempel’s legal centralist perspective underlie the inadequate appreciation of the values of a facilitative approach to mediation as well as his excessive faith in an evaluative approach, as described in the next Part.

III. FACILITATION IS A GOOD PRACTICE THAT SHOULD BE PRESERVED, MOREOVER MEDIATOR EVALUATION CREATES RISKS OF UNFAIRNESS

Using a facilitative approach is a good thing for mediators to do for many of the reasons that facilitation proponents contend. Facilitation by mediators emphasizes the principals’ abilities to do their own critical evaluation and creative problem-solving.²⁵ While this may not be the best approach for every person in every problem that is mediated, mediation truly offers a distinctive opportunity for parties to exercise responsibility over their own disputes and their own lives. This is an important social value that other dispute resolution processes generally do not promote.²⁶ Many parties deeply appreciate the opportunity to work through problems themselves based on their own standards of fairness. These parties prefer to resolve their disputes themselves, without much substantive direction or pressure by the neutrals or reliance on the law as the presumptive standard for decision

Marc Galanter, *Compared to What? Assessing the Quality of Dispute Processing*, 66 DENV. U. L. REV. xi, xiii (1989) (footnote omitted).

22. By the same token, I am not a fan of using the currently popular term “appropriate dispute resolution” to imply that mediation, arbitration etc. are presumptively more appropriate than litigation, as the term stirs up similarly unproductive status competitions. Some would use “appropriate dispute resolution” to suggest the use of whatever means of dispute resolution is most appropriate in a given case, including litigation in some cases.

23. Stempel, *supra* note 1, at 282-83.

24. WEBSTER’S NEW ENCYCLOPEDIA DICTIONARY 806 (rev. ed. 1995).

25. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 944-45 (1997). For the record, I should disclose that I generally prefer to use more facilitative approaches when I mediate. I have referred to this as promoting the principals’ quality of consent. Lande, *supra* note 3, at 857-79. This would be better termed the quality of *decision making* as the same considerations generally apply regardless of whether the mediations result in agreement.

26. Love, *supra* note 25, at 943-44. See generally Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator’s Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1991).

making.²⁷ Moreover, facilitation provides an opportunity to avoid or reduce adversarial dynamics embodied in traditional litigation and often mirrored in evaluative mediation.

Facilitation proponents are also right to express alarm about real and serious risks entailed in evaluative techniques. Although mediator evaluation is sometimes just what is needed to help parties seriously confront and resolve the issues in their dispute, it also risks perpetuating adversarial dynamics and entrenchment of positions.²⁸ More important, mediator evaluation risks creating injustice through heavy-handed pressure tactics and questionable evaluations by the mediators.²⁹ Stempel argues that eclectic mediation that includes mediator evaluation can provide an "antidote" to unfairness caused by passive facilitative mediators who permit stronger parties to take advantage of weaker ones.³⁰ I think that it is at least as likely that evaluative mediators will side with the stronger party and thus arguably aggravate the distributional problems that Stempel is legitimately concerned about.³¹ This analysis of fairness in mediation is premised on the notion that to promote fairness mediators can and should equalize power, a highly arguable proposition in my opinion.

If instead we use the law (defined as the likely results of litigation) as a standard of fairness, good evaluative mediation certainly can help smooth the way toward fair outcomes. However, this presumes that the legal rules provide fair results,³² the rules are reasonably clear, judges and juries consistently follow the rules, and that mediators can accurately assess the likely results. These are all debatable assumptions. Often, cases go to mediation precisely because the likely results are unclear.³³ Thus, having mediators evaluate – and especially when they forcefully press those evaluations on the disputants – creates a risk of manufacturing injustice if the mediators' predictions are incorrect.

27. This is similar to Zumeta's argument. Zena Zumeta, *A Facilitative Mediator Responds*, 2000 J. DISP. RESOL. 335, 336.

28. Love, *supra* note 25, at 940, 945-46.

29. Love, *supra* note 25, at 942-43.

30. Stempel, *supra* note 1, at 254-56, 265-66.

31. See Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 J. DISP. RESOL. 141. Although Honeyman argues that mediation can provide weaker parties with significant gains, he notes that mediator interventions in the "crunch" are likely to bear more heavily on weaker parties:

Some may object that [the perception that agreement to mediate is a sign of weakness] is contrary to the well-known definition of a mediator as someone who listens to and reasons politely with both parties only until he is sure which is weaker, and then jumps on that one with both feet. There is no contradiction, however, because by the time any mediator becomes that aggressive, the substantive concessions and the procedural or posture improvements obtainable from the stronger party have already been made, or indicated to be acceptable contingent on a comprehensive settlement. Pressing the weaker party at what is aptly called "crunch" time is not evidence of bias, because it is necessary to recognize differences in power. If mediators ignored the "real world" and attempted to base all settlements on reason and brotherly love, stronger parties would obtain little benefit from mediation and would soon avoid it. No mediator can long forget that though both parties may be injured in an open collision, some are in a better position to survive a clash than others.

Id. at 146.

32. As Stempel points out, this is not necessarily a valid assumption. Stempel, *supra* note 1, at 265.

33. Here I echo an argument made by my colleague, Chris Guthrie, at Professor Stempel's lecture.

As Stempel noted, the amount of evaluative mediation practice seems to have increased in recent years, particularly in court-connected mediation.³⁴ If this trend continues, there is a serious risk that facilitative mediation could be completely overtaken. Just as I argued that there should be a place in the field for evaluative mediation (rather than being defined out of existence by facilitation proponents),³⁵ I believe that there should be an important and continuing place in the field for facilitative approaches as well. This pluralist view is based on the value of providing disputants with distinct choices of dispute resolution processes. But for the persistence of the facilitation proponents, it is conceivable that facilitative practice would virtually die out, barely noticed, and society would lose the important value of process diversity.

Some of the arguments on both sides of the debate, particularly in listserv postings and casual conversation, have seemed rigid, orthodox,³⁶ extremist,³⁷ narrow,³⁸ purist,³⁹ dogmatic,⁴⁰ emotional, strident,⁴¹ and even just plain irritating,⁴² resulting in a general weariness with the topic. However, as tiresome as the debate has been at times, I believe that it has been productive and that, overall, the facilitation proponents make a valuable contribution and should be honored for it.

IV. THE FACILITATION-EVALUATION DEBATE HAS PROMPTED A MORE REFINED UNDERSTANDING OF THE APPROPRIATENESS OF DIFFERENT MEDIATION TECHNIQUES IN VARIOUS SITUATIONS

Stempel repeats the common notion that facilitation is more commonly used and appropriate for family cases, and evaluation is more commonly used and appropriate for commercial and tort cases, among others.⁴³ Although he uses qualifying language at times and there is clearly some merit to his arguments, I think that Stempel overstates the significance of the distinctions between different types of cases.⁴⁴ This notion may be a function of the limited procedural imagination of some lawyers, mediators, and commentators.⁴⁵ Some lawyers and evaluative mediators

34. Stempel, *supra* note 1, at 264-66.

35. Lande, *supra* note 3, at 856.

36. Stempel, *supra* note 1, at 254-56.

37. Stempel, *supra* note 1, at 258-60.

38. Stempel, *supra* note 1, at 254-55.

39. Stempel, *supra* note 1, at 252.

40. Stempel, *supra* note 1, at 270.

41. Stempel, *supra* note 1, at 269.

42. Cf. Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309, 319 (expressing frustration, feeling "tired" of the debate). I confess that I sometimes feel this way too. This may be similar to the reaction that many mediators (myself included) have about passionately assertive disputants and attorneys. I think that most mediators would agree that passionate partisans are entitled to respect if they are acting in good faith and have valid concerns, even if we believe that their positions and manners seem unreasonable.

43. Stempel, *supra* note 1, at 285-92.

44. Similar points are made by Love and Kovach, *supra* note 4, at 300-03.

45. Cf. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 789-94 (1984) (referring to "limited remedial imagination" of courts); Leonard L. Riskin, *Mediators and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982) (referring to

refer to some cases as “just money cases” in which the goal is to settle “for what the case is worth.” I suspect that in most such cases, there are many other significant issues if they would look carefully. Money is often a symbol of other things, such as finding a fair and honorable result, validation of injury, vindication of injustice, “winning,” demonstration of savvy, attribution of fault, perception of (not) being “taken,” scoring points against opposing counsel or other antagonists – and what the disputants will say about the case to their superiors, colleagues, friends, and relatives.

Let me note some examples highlighting the weakness of the idea that family cases are especially appropriate for facilitation, and that tort cases are especially appropriate for evaluation. Some mental health professionals mediating family cases use evaluative techniques, and perhaps appropriately so, when dealing with issues about the best interests of the children. On the other hand, a lawyer told me about a workers’ compensation case (where Stempel’s formulation would suggest that facilitative techniques would not be particularly suitable because of the lack of a continuing relationship between the plaintiff and insurance carrier) in which evaluative techniques were ineffective with a stubborn plaintiff who was unwilling to accept “what the case was worth.” Further questioning revealed the plaintiff’s interest in using the settlement money to buy a certain pickup truck, information which led to a settlement. While these examples are obviously only anecdotal, I think that they suggest that the family/tort distinction may be as unhelpful as the facilitation/evaluation dichotomy that Stempel rightly criticizes.

V. THE FACILITATION-EVALUATION DEBATE HAS PROMPTED THE MEDIATION FIELD TO BECOME MORE SELF-CONSCIOUS ABOUT MEDIATION PRACTICES

Until recently, the facilitative perspective has been the stated orthodoxy of the mediation field generally, not simply one faction. It has been socially unacceptable in most mediation circles for mediators to admit expressing substantive opinions in mediation. With the publication of Leonard Riskin’s “Grid”⁴⁶ and the ensuing debate,⁴⁷ mediators began discussing this in earnest.⁴⁸

At a meeting of Florida mediators in 1997, I administered a questionnaire of mediation techniques based on Riskin’s Grid.⁴⁹ The vast majority of mediators gave

lawyers’ “standard philosophical map”).

46. See *supra* text accompanying note 9.

47. See sources cited by Lande, *supra* note 3, at 842 n.9; Stempel, *supra* note 1, nn.1 & 17.

48. Obviously Riskin’s Grid reflected practices that had been going on for some time. When I was in practice in the mid-1980s, I recall whispered conversations between mediators about how certain mediators seemed quite directive. This was an accusation that would have caused a real stir if made publicly. Similarly, Alfini reported on angst about evaluative techniques in the late 1980s and early 1990s. See generally James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation?”*, 19 FLA. ST. U. L. REV. 47 (1991).

49. John Lande, *Learning Your Mediation Style*, Workshop at the Florida Academy of Professional Mediators Annual Meeting (Apr. 12, 1997). The survey is presented at Jeffrey Krivis & Barbara McAadoo, *A Style Index for Mediators*, 15 ALTERNATIVES TO THE HIGH COST OF LITIG. 157 (1997).

answers suggesting that they predominantly use facilitative techniques. Given the widespread use of evaluative practice in much of the Florida mediation culture, the image projected from the survey responses strained credulity. Assuming that the results of these self-administered questionnaires were inconsistent with what objective observers would report about the mediators' behavior, there are several possible explanations. One is that evaluative mediators were aware of the evaluative nature of their techniques but were too embarrassed to give honest answers publicly. Another (not necessarily inconsistent) explanation is that the mediators were not entirely aware of their own behavior. I recently observed a bright and experienced mediator conducting a public policy mediation. This mediator subscribes to a pure facilitation philosophy and was surprised and disturbed when afterwards, in privately debriefing the mediation, I pointed out two relatively minor occasions when she had expressed opinions about what she thought the parties should do.⁵⁰ If not for the facilitation-evaluation debate, neither one of us might have been that sensitive to these concerns.

I suspect that the facilitation-evaluation debate has prompted mediators who use evaluation to do so more self-consciously and perhaps reduce sloppy evaluation practices.⁵¹ I lived in Florida for part of the time when the rules regarding mediator evaluation were being debated and this deeply engaged members of the Florida mediation community.⁵² On a national level, practitioners have published numerous articles suggesting methods for providing appropriate mediator evaluation.⁵³ It seems likely that communications like these have prompted at least some mediators to be more self-conscious in their use of evaluation.

I mention all this to suggest that this debate has served a valuable purpose and led to some improvements in the field. "Closet" evaluators have been freed to

50. For what it is worth, the mediator's expression of opinions seemed relatively innocuous and her statements did not appear to unduly influence the parties.

51. Dwight Golann presents an intriguing bit of evidence in analyzing four simulated mediations of the same dispute by four experienced mediators with different actors playing the participants' roles in the four simulations. Golann found a common pattern of mediators beginning by using facilitative moves and generally shifting to more evaluative moves during the mediation. The mediators' use of facilitative or evaluative tactics was largely a response to the ways that the parties played their roles, which also seemed to be more of a factor in the outcomes than the mediators' tactics. Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 60-61. This certainly does not prove that mediators have become more self-conscious in recent years about use of evaluative techniques or that the facilitation-evaluation debate caused any increased sensitivity. These observations are, however, consistent with the theory that the debate has had that effect.

52. For an insightful analysis of the recent revision of the Florida Rules for Certified and Court-Appointed Mediators, see Stempel, *supra* note 1, at 256-63.

53. See, e.g., Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 62 (1996); Tom Arnold, *How Much Evaluation Should Be Mixed into a Mediation Session?* 16 ALTERNATIVES TO THE HIGH COST OF LITIG. 54 (1998); John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 70 (1996); Lawrence D. Connor, *How to Combine Facilitation with Evaluation*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 15 (1996) (stating that innovative procedure is appropriate only by consent of principals); Carl T. Hahn, *Using Evaluative Techniques: The Virginia Approach*, 17 ALTERNATIVES TO THE HIGH COST OF LITIG. 149 (1999);

“come out of the closet”⁵⁴ and now discuss mediation practices more openly.⁵⁵ Indeed, if not for the facilitation-evaluation debate, the knowledge in the mediation field would be stuck at a more basic level.⁵⁶ Moreover, it has prompted discussion about techniques for providing evaluation with useful safeguards⁵⁷ as well as improved theoretical understanding and policy analysis.⁵⁸ While I realize that some facilitation proponents would not view all these developments as positive nor wish to take credit (or blame) for them, I view them as positive steps that resulted, in significant part, from the persistence of facilitation proponents and the responses that they stimulated.

VI. THE INCREASED SOPHISTICATION OF THE FIELD RESULTING FROM THE FACILITATION-EVALUATION DEBATE MAY CONTRIBUTE TO A MORE GENERAL WILLINGNESS TO EXAMINE MEDIATION THEORY

The experience of the facilitation-evaluation debate may be contributing to a maturation of the mediation field to deal with a range of issues that are not necessarily related to this particular debate. If so, this debate may have contributed by causing reactions (like Stempel's) against assumptions based on rigid false dichotomies propounded with intense partisan passion as well as by increasing appreciation of the complexities of mediation practice and the contexts in which mediation is used. I have some qualms about advancing this proposition of maturation of the field because it is obviously speculative and perhaps it will be proved quite wrong. Even if it turns out to be true in part, I would not expect a complete or immediate transformation of the field, but rather a subtle and uneven growth taking place in some areas more than others. If this maturation is occurring, I would expect increased willingness to question many different strongly-held assumptions based more on faith and self-interest than careful observation and analysis.

54. Obviously there are significant differences between disclosing one's mediation style and disclosing one's sexual orientation, so this analogy is imperfect, though hopefully appropriately evocative. I suspect that there is a similarity in that there has been a public debate which prompted proponents of both sides to publicly articulate their positions and that having people publicly “come out” has emboldened others to come out as well.

55. See *supra* note 54.

56. When Riskin published his Grid in the mid-1990s, I believe that the majority view among mediators was that mediators should not give evaluations in mediation. I agree with Stempel that this is probably no longer the case, as some version of his eclectic vision is probably the dominant view today. Stempel, *supra* note 1, at 250 n.10. See Birke, *supra* note 42; Golann, *supra* note 51; Zumeta, *supra* note 27; sources cited at *id.* nn.6 & 67 (supporting Stempel's eclectic vision);

57. For an excellent set of prescriptions for careful mediator evaluation, see DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 267-305 (1996) (Marjorie Corman Aaron, contributing author) (offering good advice about whether, when, and how mediators should offer evaluations).

58. For an excellent analysis of self-determination, the key value underlying facilitation theory, and a provocative policy proposal, see Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. (forthcoming 2001) (using courts' assessments of allegations of mediator coercion to define self-determination and proposing a three-day non-waivable cooling-off period before mediated settlement agreements become binding).

assumptions based more on faith and self-interest than careful observation and analysis.

Mediation statutes, codes of conduct, texts, promotional literature, and even law review articles are full of assumptions about the essential nature of mediation. Many of these assumptions are highly debatable. Let me mention two.

Recent debates over the drafting of a Uniform Mediation Act⁵⁹ raise questions about the necessity of confidentiality for mediation. Confidentiality is widely assumed to be essential for mediation to work properly.⁶⁰ Without commenting on the merits of the Uniform Mediation Act, which is well beyond the scope of this commentary, I have increasing doubts about the necessity—and empirical reality—of confidentiality in mediation.⁶¹ In child protection mediations that I conducted under the protection of a state mediation confidentiality statute, attorneys and parties regularly seemed cautious about what they would say in mediation. Sometimes in the mediations, attorneys would instruct their clients not to say anything; more often, attorneys and participants would simply “clam up” when sensitive topics were raised. This experience is consistent with many reports I have heard from attorneys who are very wary about what their clients might say in mediation. Some of this hesitance may be due to concern about possibly weakening one’s bargaining position within the mediation, but that did not seem to be the usual motivation as the hesitant participants seemed to be more concerned about possible consequences if the information would be presented in court. Moreover, it does not suggest that participants have a lot of confidence that “everything will stay in the room,” as some mediators promise.

Here are some examples to illustrate problems with assumptions about the necessity of confidentiality. I recently talked with two Missouri attorneys who are frequent users of mediation and who are convinced that not only do the court-appointed mediators discuss the cases with the judges assigned to the cases, but that mediators write notes about the cases that are included in the court files. Despite the lack of confidence in the confidentiality of mediation, these two attorneys—and many others—are generally quite satisfied users of mediation. For them, confidentiality is clearly not as important as having what they consider to be knowledgeable, reasonable, and fair-minded mediators. Another illustration is a child protection mediation program in Michigan which generally operates well despite a local rule explicitly negating confidentiality in mediation.⁶² The point of

59. Uniform Mediation Act (visited Sept. 29, 2000) <<http://www.pon.harvard.edu/guests/uma>>.

60. See, e.g., Society of Professionals in Dispute Resolution, *Ethical Standards of Professional Responsibility* (1986), reprinted in MARK D. BENNETT & MICHELE S.G. HERMANN, *THE ART OF MEDIATION* 169-72 (1996) (“Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues, and a neutral’s acceptability.”).

61. Even though confidentiality may not be as needed or effective as many people assume, it may nonetheless be appropriate to statutorily preclude use of mediation as a means of manufacturing evidence for later proceedings.

62. Telephone Interview with Susan Butterwick, Coordinator of the Dispute Resolution Center Permanency Planning Mediation Project of the Washtenaw County (Michigan) Family Court (Oct. 17, 2000). Under the state Child Protection Law, only the attorney-client privilege is recognized in child protective proceedings. See *In re Brock*, 499 N.W.2d 752, 759-61 (Mich. 1993). As a result, the attorneys and mediators working in these cases operate as if statements in mediation are not confidential and may be introduced as evidence in later proceedings. The Mediation Project is therefore careful to

all of this is that most mediators have been operating on a stated assumption that participants generally rely on confidentiality and that such reliance is necessary for mediation to work properly. Having had the courage to come out of the closet on evaluation, perhaps the mediation community may be more willing to take a careful look at confidentiality.

A second example has to do with a cherished assumption that mediators must be neutral. This is a premise underlying much professional mediation in the United States. As Moore has shown, this is a narrow, culture-bound conception of mediation activity that does not reflect the fact that much mediation is done by powerful members of organizations, tribes, and communities who have strong interests and opinions about the outcomes of the problems they mediate.⁶³ A study of in-house mediation of employment cases from the United States Postal Service ("USPS") found that disputants were fairly satisfied with mediators from within the Postal Service even though they were not perceived to be as neutral as outside mediators.⁶⁴ Similarly, many ombuds practitioners regularly operate effectively despite lack of complete "independence" from their organizations.⁶⁵ This heretical notion was nicely captured in the title of a workshop at a recent conference, "Agency Neutrals: An Oxymoron Whose Time Has Come?"⁶⁶

Will mediators, in fact, take that hard look at the realities of confidentiality, neutrality, and the rest of accepted mediation theory?⁶⁷ And if they do, will that have been influenced by the increased sophistication from the debate over evaluation? If so, this facilitation-evaluation debate would admittedly be a limited and indirect influence. Yet it is not completely implausible that this episode has had some general maturing effect on the field.

VII. CONCLUSION

In his article in this Symposium, Jeffrey Stempel makes a valuable contribution to our understanding of the mediation field. While I believe that his article fairly analyzes some deficiencies in the perspectives of facilitation proponents, in my view, it does not adequately credit their important contributions to the field. Though disputes over facilitation and evaluation in mediation have been strident and

select cases where the lack of confidentiality protection is not expected to cause problems.

63. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 41-53 (2d ed. 1996).

64. Lisa Bingham et al., *Mediating Employment Disputes at the United States Postal Service: A Comparison of In-House and Outside Neutral Mediator Models*, 20 REV. OF PUB. PERSONNEL ADMIN. (forthcoming) (finding that although disputants were more satisfied with outside mediators, disputants who used in-house mediation reported being fairly satisfied).

65. See generally Howard Gadlin, *The Ombudsman: What's in a Name?*, 16 NEGOT. J. 37 (2000).

66. Session 3.11 at the Society of Professionals in Dispute Resolution Annual Conference (Sept. 24, 1999).

67. Birke's commentary in this symposium lists many issues that are worthy of the more sophisticated analysis I am suggesting. See Birke, *supra* note 42, at 319. Assumptions about the nature of power and the effects of mediators' interventions on power imbalances are particularly ripe for re-examination in my view. For a discussion of some problems with conceptions of power imbalance, see *supra* text accompanying notes 29-33.

unpleasant at times, the debates have moved the field forward to more refined understandings and practices.

I share Stempel's preference for eclectic approaches by mediators. I think that the reference to "ideology" in the title of Stempel's article gets closer to the heart of the matter. But rather than "liberating" the field from ideology, I advocate refinement and respectful embrace of an eclectic variety of mediation ideologies and practices.⁶⁸ Thus, I hope that as the mediation field develops, shoppers for mediation services will have many clear choices of distinct types of mediation so that they can choose from mediators with reputations for emphasizing many different goals and approaches including empowerment, settlement, facilitation, and evaluation, as well as eclectic.⁶⁹

There is the potential for using the lessons learned from this episode to foster a more general sophistication in our thinking. The extent to which that occurs, if any, will largely depend on the determination of members of the diverse dispute resolution community to engage in the ideals we generally aspire to, including honest self-analysis, respect for differing perspectives, and creative interest-based problem solving.

68. See Lande, *supra* note 3, at 895-97.

69. Thus I wholeheartedly agree with Love and Kovach's advocacy of "an eclectic array of processes, rather than one eclectic process." Love & Kovach, *supra* note 4. I believe that it is possible to include a variety of elements in this array that are labeled as different types of mediation. Lande, *supra* note 3, at 856 n.73.

