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# A Facilitative Mediator Responds

Zena Zumeta\*

I appreciate the thoughtfulness and conclusions of Professor Jeffrey Stempel in his article. His title, "The Inevitability of the Eclectic," seems completely right to me. Most mediators I know who have had training in mediation are more eclectic than squarely in one camp or another. They use techniques that are geared both to their own personalities and to the needs of the case. This, indeed, is a level of sophistication that is a heartening indication of the maturity of the field of mediation. However, there are many points in Stempel's argument that I disagree with, including some of his most basic premises.

## I. THE EVOLUTION OF MEDIATION

Mediation started as a social movement in the 1960s and 1970s.<sup>1</sup> With funding from the federal government, several community mediation centers were started, and their approach was strictly facilitative. I should point out that mediation actually began in the United States in labor disputes during World War II and was transposed into community mediation.<sup>2</sup> Labor mediation often includes an evaluative component, so that even in the 1940s there was a facilitative-evaluative difference. However, Stempel leaves out a new thrust in mediation, the transformative mediation movement. The beginnings of a transformative mode were present in community mediation, the approach used by the Community Boards was less facilitative and more convenors and witnesses, allowing the parties to work out their own process as well as outcomes.

However, it is the facilitative approach that has been the vast middle of the mediation movement ever since. Stempel identifies this as the nonlawyer portion of the mediation community.<sup>3</sup> Many of those who led the beginnings of this movement are lawyers, including Linda Singer in Washington, D.C.; Margaret Shaw in New

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1. American Bar Association, *Report on the National Conference on Minor Disputes Resolution*, May 1977, at 2 n.2; David N. Smith, *A Warmer Way of Disputing: Mediation and Conciliation in the United States*, Paper delivered at the Tenth Congress of Comparative Law (1978), in 26 AM. J. COMP. L. 205 (Supp. 1978) (comparing the movement toward simplified dispute resolution with the trend towards a return to midwifery in child delivery).

2. WILLIAM E. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 253-54 (1971) (discussing War Labor Boards).

3. Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 275.

York; and Edith Primm in Atlanta.<sup>4</sup> Indeed, many of the most fervent supporters of facilitative mediation and its more radical cousin, transformative mediation, are lawyers or law professors. Therefore, I do not agree with the lawyer-nonlawyer division that Stempel puts forth. I rather think that the divide is between lawyers who have not been trained in mediation and those (lawyers and others) who have been trained in mediation.

Stempel quotes Richard Birke on the four-phase evolution of the field of mediation: “(1) an initial period in which mediation existed but was not generally used in legal disputes; (2) a state when mediation entered the legal arena but bench and bar activity fought mediation; (3) a period largely the past 15-20 years) in which mediation attained legitimacy and popularity; and (4) a current period of expansion, evolving maturity, and ‘a robust and vigorous acceptance of ADR.’”<sup>5</sup> I would add that phase four was the period where the bar stopped fighting mediation and attempted to take it over and craft it in the image of settlement conferences so familiar to them.

## II. THE LAWYERIZATION OF MEDIATION

The lawyerization of mediation is problematic in several ways that Stempel does not mention. He seems to buy into the attempted lawyer takeover of mediation and acts as if the response of facilitative mediators is simply a power struggle between nonlawyers and lawyers.<sup>6</sup> I do not see the power struggle in that way.

All of us, including lawyers, tend to like what is familiar to us, and want to continue it. Therefore, lawyers who have not been trained in mediation tend to want to change mediation into something more like settlement conferences that are provided by judges and judicial personnel. These conferences are useful because they are evaluative: attorneys receive some insight into the outcome of the case should it be tried by that judge or court. Having found settlement conferences useful, lawyers want to perpetuate them by hiring nonjudicial personnel to do the same thing. Attorneys do not choose facilitative mediation because they are not trained in it and are unfamiliar with it. They do not know how facilitative mediation can be useful to them or their clients or what its potential is to solve the parties’ problems.

However, there are several problems with using only evaluative mediation. First, this approach provides a narrow view of how settlement becomes possible. People really can talk and resolve disputes. They don’t always require someone to decide their disputes for them. Second, the further one goes from the judge in the case, the less reliable are the evaluations that result from the process. Retired judges are popular as third party neutrals because their evaluations are much more credible

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4. For example, Linda Singer was present at the May 1977 National Conference on Minor Disputes Resolution and Edith Primm was the first Executive Director of the Atlanta Neighborhood Justice Center in 1976.

5. 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).

6. See Stempel, *supra* note 3.

than other lawyer or nonlawyer mediators' evaluations. Third, evaluative mediation relies on the lawyers and legal interpretations to resolve issues that may be much broader than just the legal issues involved.

Let me elaborate on this third point. One of the problems that I have with the lawyerization of dispute resolution in general is that the legal system is in the business of resolving legal disputes, but most people don't have legal disputes. Instead, they have factual, emotional, and procedural disputes. Lawyers and courts translate "people" disputes into legal disputes, resolve the legal disputes and act as if that were the resolution to the "people" disputes. It is not. Hopefully it is the resolution of a part of the dispute. How does the rest of the dispute get resolved? In the legal system, it does not get resolved, and no one seems to notice until the parties end up back in court, still unresolved.

This is one of the reasons that, as Stempel continually points out, family disputes tend to be mediated in a facilitative fashion rather than evaluative. The courts have become convinced that legal resolutions are not sufficient in the family arena because they see too many families returning to court despite having received their legal-evaluative resolutions from the lawyers, referees, magistrates, masters, or the judges themselves. This is the reason that many "facilitative" mediators say that ongoing relationships require less evaluation and more facilitation or even transformation in mediation. What happens when the parties have their next dispute? Do they still need the evaluator? Evaluative mediation may work for a while, but eventually the evaluators, and even the advocates, wish the parties would go away.

### III. POWER STRUGGLES

Stempel seems to see the divide between facilitative and evaluative mediators in terms of a power struggle and a market struggle.<sup>7</sup> I think he is off in his analysis

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7. "One explanation of the evaluative-facilitative divide is that the chasm is one separating those with greater ties to litigation and arbitration (the lawyer segment of ADR) from those without such ties (the nonlawyer segment of ADR)." Stempel, *supra* note 3, at 275.

Although it may sound a note of class warfare, I am suggesting that a good deal of the evaluative-facilitative division stems from a lawyer-nonlawyer division in the mediation and ADR communities. Nonlawyer mediators bring a different perspective to the issue of apt mediation style. Their training, background, temperament, and experience all point away from evaluation just as these same factors of the lawyer's orientation point toward evaluation. Mediators with a background in sociology and psychology would logically be attracted to the facilitative approach rather than a seemingly more adversarial evaluative mode. Mediators who are architects, engineers, or contractors may not have the same professional education in facilitation but probably have life experiences and practical orientation toward facilitation at least as much as to evaluation.

Nonlawyers in mediation thus have a different orientation, one more likely to favor facilitation and disfavor evaluation. Their orientation shares similarity with law (e.g., an ethic of preserving confidences) but lacks the adversarial and evaluative component of legal education and professional norms. Not surprisingly, nonlawyer mediators are more likely to see good mediation as facilitative and evaluative mediation as misplaced.

*Id.*

"Also, where lawyers have supported ADR they have frequently sought to ensure that ADR is

on both. I agree that there is a power struggle going on, but to me it looks a little different. It is a power struggle in the resolution of disputes, not the types of dispute resolvers. Who has the power in dispute resolution? Who ought to have the power? Who owns the dispute and its resolution? The players include the parties, the advocates and the neutrals. In litigation, the neutrals (court personnel) have ultimate power, and the lawyers have great influence because they are the spokespeople. The parties have indirect power and influence since they choose their advocates and can approve or decline settlements. But they do not have direct power or influence, because they do not have much voice in litigation.

In evaluative mediation, the neutral still has great and direct influence, and the lawyers have even more power than in litigation, just as they do in lawyer negotiation. The parties have more or less indirect influence, depending on how the evaluative mediation is run. In some evaluative mediations, the parties speak very little; in others, they are encouraged to speak.

It is in the facilitative mediation that the power begins to reverse between the advocate and the parties. The parties have direct power and influence, and the advocates have only indirect influence. The neutral still has fairly direct influence, but no power.

I am sure this is why the transformative mediation movement has grown up. In transformative mediation, the neutral also has indirect influence. The parties are the only ones with direct influence. Power to the parties!

Well, whose dispute is it, anyway? Once a case has been filed in court, is it now the court's dispute? Who should have the power? And what should be the basis for resolution? Legalities? Practicalities? Values? Relationship? This is where I see the struggle emerging. Traditional lawyers want disputes to continue to be resolved with the neutrals and the advocates having the most direct influence and power. Facilitative mediators think the parties should have all the power and influence. No wonder lawyers are feeling threatened. Even though they complain about clients who refuse to be controlled, lawyers want and have tremendous power and influence in the traditional dispute resolution methods. Mainstream mediators, lawyers and nonlawyers alike, have the audacity to suggest that the client should have this power and influence.

#### IV. THE ROLE OF MEDIATION TRAINING

I have had the privilege of training mediators for over fifteen years. The number of attorneys in my training is rising. However, lawyers usually believe that they really don't need training in mediation — that they already know how to do it. After all, they know what to do in settlement conferences. It comes as a surprise when mediators and often judges, legislatures, and administrative officers of the courts believe otherwise.

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conducted by attorneys rather than nonlawyers. In view of this history, one can hardly be surprised that many mediation advocates, especially the nonlawyer mediators, demonstrate an aversion to lawyers and the legalistic." *Id.* at 273.

I provide forty hours of training in divorce and custody mediation, following the requirements of the Academy of Family Mediators,<sup>8</sup> and usually two to four days of civil mediation training. I find that it often takes litigation attorneys almost half the time to stop resisting and begin to learn about mediation. What are they resisting? They are resisting the idea that parties should be responsible for the resolution of their own disputes. Additionally, when I do training for courts and bar associations, most congratulate themselves for being enlightened enough to know their lawyers need training. However, they want one day of training, six to eight hours, and don't understand that isn't enough. The idea that they will learn new skills and approaches, which takes time, is not part of the contract. They are truly surprised to find that there is a lot to this mediation stuff, and that the two or three days of training they grudgingly allow is filled with new information and skills to learn.

To their credit, the attorneys who have taken two or more days of facilitative mediation training get it. They understand that these are new skills that take time to learn, and that they come out of the training not only with new skills, but often with new attitudes. Some groups of attorneys in court-sponsored training have talked to the court at the end of the training about ways to make the court process less adversarial so as to have a better chance to help clients settle in mediation. Others have questioned the way they have practiced law in the past or note that they now have better skills for dealing with their own clients during litigation and attorney negotiation. They begin to see things from their clients' point of view, instead of just their own.<sup>9</sup> The attorneys also begin to look at helping clients resolve their disputes, instead of resolving it themselves and persuading the clients to accept this resolution.

## V. MARKET ANALYSIS

It is here that my last important difference with Stempel lies. Stempel believes that the market shows that clients want evaluative mediation. He says:

It appears that many disputants themselves want a dose of evaluation as an aid to resolving their disputes. There is significant demand for mediators who are willing to inform the parties of legal options and possible outcomes and to provide some "reality check" on the positions of disputing parties. As previously discussed above and discussed further below, mediators who evaluate (at least a little) seem particularly sought for commercial disputes.<sup>10</sup>

It is not at all clear that the clients are the ones choosing evaluative mediation. The attorneys are choosing it. And, if the clients choose evaluative mediation, I would argue that they are doing so on the advice of their attorneys. It is also not

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8. The Academy of Family Mediators and the Society of Professionals in Dispute Resolution are now part of a merged organization, whose name has not yet been chosen.

9. In fact, many attorneys tend to confuse their own proclivities and decisions with those of the client.

10. Stempel, *supra* note 3, at 277 (footnotes omitted).

clear that the attorneys are able to explain the differences between facilitative and evaluative mediation well, or to be neutral about explaining the differences, in order for the clients to have an unbiased choice. This confusion is widespread. Many of the statistics about the market choices use explanations with words about client choice, when in fact it is attorney choice.

I once had a client interested in facilitative divorce mediation who traveled quite a distance to see me. He was a labor lawyer, very familiar with the differences between facilitative and evaluative mediation. In his county, the divorce mediation being offered was evaluative mediation, which he did not want. He told me that most of the lawyers he had spoken with had no idea what he was talking about or said that evaluative mediation was the only thing available. Finally, he talked to an attorney who understood and who said it was a bad idea, but if he really wanted it, he could travel to my county and see me, which he obviously did.<sup>11</sup> I do not mean to infer that lawyers who advocate facilitative mediation give their clients full explanations or choices either. Just like evaluative mediation advocates, they simply refer their clients to what they call mediation and give recommendations as to good mediators.

However, this facilitative-versus-evaluative confusion warps all of the statistics about client choice in type of mediation. We really do not know what clients would choose if they understood the differences and were not influenced in their choice by their attorneys. There are, however, some indications that they would not choose evaluative mediation.

My own state, Michigan, has a long tradition of evaluative mediation. What Michigan has called "mediation" for many years is in fact straight evaluation, without any facilitative component. Even the lawyers object to this process. Where this process was applied to family law, the participants have proved quite discontent. As a facilitative mediator in the family arena in a state where evaluation is king, I have received constant complaints from clients who had participated in evaluative mediation and were quite offended by the process. They felt they were not really heard, and that they did not have any influence on the outcome. These clients often felt strong-armed by both the mediator and their own attorney.

Thus, I do not agree with the premise that clients would choose evaluative mediation if given an understanding of the processes and the choice uninfluenced by their attorneys. My bet is that they would choose facilitative mediation.

## VI. SUMMARY AND CONCLUSION

I agree with Stempel's premise that eclecticism is an important part of the future and success of mediation. He says that "[m]ediation is likely to accomplish even more if not distorted by continuing ideologically-driven debate divorced from the reality of dispute resolution in practice in the context of particular types of disputes."<sup>12</sup> Despite my agreement with this basic premise, I cannot agree with his

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11. By the way, facilitative mediation actually was available in his county, but by the time he and his wife found me, they weren't interested in further referrals.

12. Stempel, *supra* note 3, at 293.

assumptions about facilitative mediation, or about nonlawyers and their competitiveness with lawyers, or about the comparative strengths of evaluative mediation versus facilitative mediation. We see the world differently but agree that ideological debates over style or process are holding the profession back.



