Mediation, Improvisations, and All That Jazz

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I. INTRODUCTION

Mediation is jazz. The purpose of this article is to explore the validity of this verbal equation. Similar to my other articles in the Pracademic Series, and in

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1. The tenth in the author's "Pracademic" Series, this article grew out of more than twenty-five years of reading, thinking, and talking about the relationship between music, improvisation, and jazz on the one hand and mediation on the other. It also arose out of a lifetime of performing and composing music and conducting mediations. My principal source of encouragement in this endeavor has been Professor John Buccheri, a close friend, a wonderful teacher, a former Chair of the Music Department of Northwestern University, and an outstanding jazz pianist in his own right. He has been a constant inspiration and perennial sounding board for my ideas communicating parallels between music (particularly jazz) and mediation. I am extremely grateful for all the knowledge and insight he has shared with me over the years as I developed the ideas for this article.

particular, *Mediation, Music, and Superstrings: The Quest for Universal Harmony,* this article began with a simple concept and then curiosity drove my efforts to see relationship, to perceive the obscure, to discover the obvious (always more difficult), to test and to make connections, to find possible answers, to mine for common essences, to make sense of and to merge seemingly incongruous ideas—that is, to mediate. To be more accurate, it is to mediate between disciplines, between paradigms. This is what a mediator does as a profession. A mediator seeks to do the seemingly impossible. A mediator seeks to find sameness in differences, to find commonality among diversity, to find beauty in dissonance, to find treasure in abandoned effects, to find correspondence in incongruity, but more than anything, a mediator seeks to find even the slightest notion of resonance—that which is considered to be the essence of everything.

My thesis in the *Mediation, Music, and Superstrings* article to which the present article is a sequel, was that to be an *effective* mediator, one needs to be a musician at heart (if not in fact)—both a composer and performer. Music is what a mediator does, what a mediator makes. To design or perform well, a mediator must at least understand music composition and performance in all its aspects. A mediator has no choice in the matter because music, in a broad sense, permeates nature and is considered to be the quintessential ingredient of all matter and energy, of everything or "unthing" in the universe. In the present article, I graft onto this thesis an additional one: to be a masterful mediator and/or mediation advocate one has to not only be a musician at heart, but also a jazz musician—an improvisational artist. I intentionally avoided discussing improvisation in the *Mediation, Music, and Superstrings* article because it is a topic so central to the mediator’s and mediation advocate’s function that it deserves special treatment and analysis.  

I want to emphasize at the outset that:

There is nothing extraordinary about improvisation. We all improvise constantly, but in words, not in tones. We begin a conversation with a topic, draw in related observations, digress to subtopics, and add moments of emphasis or wit. Likewise, a jazz pianist begins by playing a theme, takes it through variations, weaves in a second theme, attaches ornaments. The conversationalist draws upon a well-organized hierarchy of knowledge about the world, the pianist upon a well-organized hierarchy of musical ideas. In either case, the quality of the performance depends on the depth and flexibility of the hierarchy, and upon the performer’s ability to exploit the hierarchy quickly, in real time. You’re not allowed to halt a conversation for thirty seconds to conceive your next sentence. You just keep talking, reaching for the best idea that presents

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4. Id. at 227, 266-67.
itself and stating it in the most eloquent words that come to mind. [And so also in the jazz performance.]^5

In the present article, we will be exploring the subject of improvisation generally from the perspective of mediation and jazz as performance arts; the roles of the jazz musician, the mediator, and the mediation advocate as creative problem solvers; the elements of jazz in mediation; and the collective conversation in jazz as compared with the collective conversation in mediation.

II. IMPROVISATION—GENERAL

A. Improvisation in the Performance Arts

1. Improvisation in Theater Performance—Improvisation as Problem Solving and Playing the Game

Improvisation, used in any context, has common elements.\(^6\) Two of its most basic generic elements are problem solving and playing the game. Renowned expert on improvisation in theater, Viola Spolin, defined improvisation in the theater context, in part, as follows:

Playing the game; setting out to solve a problem with no preconception as to how you will do it; permitting everything in the environment (animate or inanimate) to work for you in solving the problem; it is not the scene it is the way to the scene; a predominate function of the intuitive .. . setting object in motion between players as in a game; solving of problems together; .. an art form; transformation; brings forth details and relationships as organic whole; living process.\(^7\)

The intuitive, she has written, "comes bearing its gifts in the moment of spontaneity, the moment when we are freed to relate and act, involving ourselves in the moving, changing world around us."\(^8\) Spontaneity, in her view, consists of seven aspects: games, approval/disapproval, group expression, audience, techniques and

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6. VIOLA SPOLIN, IMPROVISATION FOR THE THEATER 3 (7th ed., Northwestern University Press 1972) (1963). In his landmark treatise, Alfred Appel Jr. has drawn parallels and shown common elements between jazz performance (Louis Armstrong, Thomas "Fats" Waller, and Duke Ellington) on the one hand and painting (Henri Matisse and Pablo Picasso), sculpture (Alexander Calder, Constantin Brancusi, and Gaston Lachaise), fiction writing (James Joyce and Ernest Hemingway), and photography (Walker Evans), on the other. ALFRED APPEL JR., JAZZ MODERNISM (2002).
7. SPOLIN, supra note 6, at 383-84.
8. From the minute they step onstage, it is important for the actors to make offers, and to understand each other's offers while setting up the who, where, and what of the scene; that is, who are they to each other, where they are located, and what is going on between them. Chet Harding, Improvisation and Negotiation: Making It Up as You Go Along, 20:2 NEGOT. J. 205, 209 (2004).
8. SPOLIN, supra note 6, at 4.
styles, carrying the learning process into daily life; and physicalization. 9 We will concentrate for the moment on the aspect of "games," leaving the other six aspects for discussion in other sections of this article.

In the context of theater improvisation, "the game" has been defined as "a natural group form providing the involvement and personal freedom necessary for experiencing."10 Playing games develops the players’ personal skills and techniques relating to mastering the game itself. Players acquire game skills at the precise moment that they are having fun and excitement engaging in the game.11 This is so because it is at that moment the players are truly open to receive these playing skills. While playing, it is understood by the players that they are free to engage their ingenuity and inventiveness and to reach the game’s objectives (spontaneity and personal freedom) in any style they choose. Any unusual or extraordinary way of playing is appreciated by their fellow players. As one author has observed:

Playing a game is psychologically different in degree but not in kind from dramatic acting. The ability to create a situation imaginatively and to play a role in it is a tremendous experience, a sort of vacation from one’s everyday self and the routine of everyday living. . . . [T]his psychological freedom creates a condition in which strain and conflict are dissolved and potentialities are released in the spontaneous effort to meet the demands of the situation.12

The game is a highly social experience, and it has a problem that needs solving within it—an objective point in which each player must become involved. The group must agree on the rules of the game, however informal, and focus on the objective(s) of the game if it is to be played effectively.13 A person’s capacity to involve himself or herself in the problem of the game and to put forth effort to handle the multiplicity of stimuli provoked by the game determines the extent of the person’s growth.

A type of this interactive dramatic gamesmanship is also prevalent in the jazz ensemble setting. This gamesmanship occurs among the musical improvisers (the

9. Id. at 4-17.
10. Id. at 4. The remainder of this section is an adaptation of Id. at 4-6.
   When children play any game, what is most evident is joy and spontaneity exhibited with intensity and depth of feeling. . . . Often the five-year-old game player shows more openness and honesty than his adult friends do in their complex world drama. . . . The improv recreates for the young actor the field of action that allows him to once again be young, honest and spontaneous.
   If the game is played in this open manner, there are no losers. All participants win and grow via the process. . .
12. SPOLIN, supra note 6, at 5 (quoting Neva L. Boyd).
13. Constantin Stanislavski has said:
   Every invention of the actor’s imagination must be thoroughly worked out and solidly built on a basis of facts. . . . Sometimes he will not need to make all this conscious, intellectual effort. His imagination may work intuitively. . . . To imagine in general without a well-defined and thoroughly founded theme is a sterile occupation.
   Sperber, supra note 11, at 57.

https://scholarship.law.missouri.edu/jdr/vol2007/iss2/1

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actors) as well as between the improvisers and the listeners (the audience). As one well known ethnomusicologist has observed:

Every music performance is a dramatic presentation for listeners and improvisers alike. In a sense, both groups play interactive roles as actors from their respective platforms. Just as the design of the hall, the stage and the lighting frames the band's activity for the audiences' observation, it also frames the audience's activity for the band to observe. Performers and listeners form a communication loop in which the actions of each continuously affect the other. Although sound serves as the principal medium binding improvisers to audience, the audience typically responds to the inseparable mixture of the music created by the improvisers and their theatrical image or stage presence.\(^\text{14}\)

2. Improvisation in Dance Performance

Martin Sperber, in *Improvisation in the Performing Arts: Music, Dance, and Theatre*,\(^\text{15}\) observed:

When discussing dance improvisation, one is faced with a set of confusing facts. Unlike speech with words, and music with sounds, dance and the abstract quality of its movement seem at the outset to be an improvised affair, raw and basic. This quality or state of being cannot in itself convey meaning, purpose and vitality; defined goals of composition are necessary to channel and order these movements. As expressive as modern dance presumes to be, it does not lend itself easily to improvisation within performance.

When I asked a friend who has danced professionally with the Paul Taylor Dance Company about the role of improvisation, she thought for a moment and said, "At the beginning of everything is improvisation." She quickly added that by the time of a performance it was important for her to have things set. As we shall see, improvisation as an end in dance does not have the same role as improvisation in music. . . .

Improvisation has a definite place in the dance and its creation, but control and purpose must be present before any significant, artistic result can emerge. People involved with dance seem to agree that the major function of improvisation in dance is preparatory; that is, it is used to ready the body and to explore possibilities of movement.\(^\text{16}\)


\(^{15}\) Sperber, *supra* note 11, at 39-41.

\(^{16}\) Id.
3. Improvisation in Comedy Performance

Noted author and mediation expert Jeffrey Krivis has discussed a kind of structured improvisation in the context of a comedy performance:

The similarities between stand-up comedy and mediation are remarkable. 

A mediator, like the comedian, needs to jump into the fray and mix it up with the audience (the disputants). This puts the mediator directly in the face of his number one fear, possible rejection by the parties. Mediators, like comedians, run the risk of being rejected each and every time they make contact with parties. That possibility prevents many talented people from ever becoming expert enough to serve as mediators.

A joke, like a mediation, has a very specific structure. A joke has a set up, connector and punch line. A comedian plays many roles, not the least of which is an orchestrator of the room. He creates a target assumption upon which the story is built (the set up). He then introduces a connector (a thing that is interpreted at least two ways), and surprises the audience by shattering or interpreting that assumption (the punch line), getting the laugh. They then follow with various “tag lines” in order to get more laughs out of one joke. Watch Leno tonight and you’ll see what I mean.

The structure of a mediation is much like the structure of a joke. A mediation also has a set up (the opening statements), connector (the part when a mediator facilitates communication and negotiation between the parties) and a punch line (closing the deal). Like the comedian, the mediator also plays many roles, including the orchestrator of the negotiation. In that role he sets the stage for further discussions; organizes the discussions in a structure which keeps the parties moving forward rather than harping on the past; and considers closure techniques that will eventually make the deal a reality.

Similar to a comedian, the mediator “sets up” the negotiation by allowing the parties to speak their mind freely, and position themselves as if they were in court. In essence, the parties are now moving toward a target assumption, namely, that they have a better case then the other party. True to form, the mediator, like the comedian, connects these assumptions with considerations about how they might hold up in court. The connector is a way of gently challenging the target assumptions about the case. The mediator does this by simply asking questions and focusing attention on areas of concern about their basic assumptions. This results in the parties rethinking those assumptions and perhaps expressing a willingness to bend in the negotiation.
Like the comedian, the mediator then uses some of the information revealed while connecting with the parties during the question and answer sessions to arm himself with acceptable outcomes provided to him by the parties in confidence. The mediator then pulls the rabbit out of the hat by ostensibly shattering the original assumptions of the parties by revealing or recommending an outcome that the parties will find more pleasant than going to trial. Obviously, the goal in this circumstance is a settlement, not a laugh.  

4. Improvisation in Musical Performance

a. Improvisation in Musical Performance—General

Improvisation has long been integral to the Western musical tradition. One of the great trailblazers of improvisation on the viola da braccio was Leonardo da Vinci. He and his friends staged entire operas in which both the poetry and the music were spontaneously composed. Several well known classical music composers and performers were known to improvise on musical themes. As one commentator has noted:

In classical times, the cadenzas of violin, piano, and other concertos were meant to be improvised—a chance for the player to put his own creative display into the total artwork. Both Bach and Mozart were renowned as very free, agile, imaginative improvisers, and many stories, both moving and amusing, are attached to their exploits in this field. Beethoven, when he first came to Vienna, became known as an astounding improviser on the piano, and only later as a composer. . . . He knew how to make such an impression on every listener that frequently there was not a single dry eye, while many broke out into loud sobs. For there was a certain magic in his expression aside from beauty and originality of his ideas and his genial way of presenting them. When he had concluded an improvisation of this kind, he was capable of breaking out into boisterous laughter.

b. Improvisation in Jazz Performance

Paul F. Berliner, professor of ethnomusicology formerly at Northwestern University and experienced jazz trumpeter, is the author of Thinking in Jazz: the Infinite Art of Improvisation. A landmark twentieth century study of jazz, the book revealed, as never before, how jazz musicians, both individually and collectively, learn to improvise. The book, a product of more than fifteen years of

18. STEPHEN NACHMANOVITCH, FREE PLAY: IMPROVISATION IN LIFE AND ART 6-7 (1990).
19. Id. at 7.
20. See generally BERLINER, supra note 14. It should be noted that jazz groups do work out some musical passages in advance. Jazz groups often rehearse melodies that are to be played in unison or harmony. Also, introductions and endings are sometimes rehearsed, memorized, and used again and again. MARK C. GRIDLEY, JAZZ STYLES: HISTORY AND ANALYSIS 5 (1947).
Berliner's immersion in the jazz world, emerged as a result of his personal observations, meticulous review and analysis of the available jazz literature, and interviews with more than fifty professional musicians. In seeking to learn "just what is jazz improvisation," he noted:

Energized by its vitality, transported by its affective powers, and awed by its elegance and cohesion, listeners might well imagine that jazz was thoroughly composed and rehearsed before its presentation. Yet jazz artists commonly perform without musical scores . . . and may never have met before the event nor played together in any other setting. . . . [E]ach performance's evolving ideas, sustained momentarily by the airwaves, vanish as new developments overtake them, seemingly never to be repeated. . . . [T]here is no music for improvisers to prepare for performance. Indeed, they must perform spontaneously and intuitively.21

Berliner noted that even well-known jazz musicians cannot articulate how improvisation occurs. Trumpeter Doc Cheatham observed, "I have no idea what I am going to do when I take a solo. . . . I never know any more about what I am going to play than you do."22 String bassist George Duvivier explained that he never goes into "a solo with anything preconceived." He finds it "best to go in with an open mind and let it develop."23 Trumpeter Wynton Marsalis grew up around some of the jazz greats of the twentieth century. He noted early on that, although the improvisations of these artists on the same tune varied from event to event, he could recognize aspects of the artists' styles in their improvisations. He was initially baffled by their ability. All of these "giants could play and sound different," time after time, whenever they soloed on the same tune.24

B. Mediation as a Performance Art

Mediation has been defined as a performance art in various ways. In their book, The Art of Mediation, Mark D. Bennett and Scott Hughes describe the mediation art as performing functional roles:

The primary function of mediators is to manage the mediation process in order to provide enough structure so opportunities for resolution can be developed and explored. Managing the process includes encouraging the parties to tell their stories and talk broadly about the issues that brought them to the mediation table. . . .

The mediator's job is to manage the expressions of conflict so that she does not hurt any of the parties or inhibit the safety of the environment. . . . The mediator must be wary of substituting her own reactions for those of the parties. . . . There is a delicate balance in mediation between the

22. Id. at 2.
23. Id.
24. Id.
Mediators care about the fairness and durability of resolution, not resolution for its own sake. A key part of fairness and durability is the influence of power on the outcome. Mediators must be alert to potential power imbalances between the parties. These . . . may be created by larger socioeconomic, psychological, or intellectual forces outside the mediation such as gender, ethnicity, age, sexual orientation, education, occupation, and financial status.

Mediators can serve the parties well by guiding them in activities and exchanges that open doors and provide room to move when parties feel stuck and uncertain.  

Robert D. Benjamin, a well-known expert in mediation, sees mediation as a performance art in terms of the ritual and drama of its core process, negotiation. He writes:

At core, formal mediation is nothing more than a three-party or multiple party negotiation. . . . Therefore, how the mediator understands and presents negotiation and, in some instances, actually teaches the parties the ways of negotiation is critical to the success of the mediation process. . . .

Successful negotiation requires creating a drama in which the parties to the negotiation need each other. Curiously, the deal that is made as a result of negotiation can be viewed as a good deal or a fraudulent swindle, depending on who is judging the result. . . . “Every selling situation, ‘lawful’ or not, involves the creation of drama and of roles in that drama designed to move toward the same denouement, a completed sale.” . . . [U]nderstanding of the negotiation process as essentially a social interaction ritual is important for the effective mediation of a dispute.

C. Jazz as a Performance Art

1. Definition of Jazz

Jazz lore recounts a conversation between Fats Waller, the famous jazz pianist, and an elderly lady who asked him, “What is jazz, Mr. Waller?” The late,
great Fats is supposed to have responded, "Madam, if you don't know by now, DON'T MESS WITH IT."27

Actually, jazz as a type of music has been defined in various ways,28 and many attempts have been made to identify the origin of the word itself, none of them completely successful.29 Musically, it has been described as "a language,"30 "music of a certain distinct rhythmic and melodic character . . . that constantly involves improvisation . . . on the spot,"31 "controlled freedom,"32 "more similar to a conversation than to a text,"33 "collective improvisation . . . [which] is formless,"34 "swing,"35 "a dynamic art,"36 and "an inseparable but extremely variable mixture of relaxation and tension."37 George Gershwin observed that "jazz is music; it uses the same notes Bach used."38 It is true that Bach was a master of improvisation,39 and after Gershwin's observation was publicized, the fashion of coupling Bach's name with jazz became commonplace for certain jazz intellectuals.40 Bach was known to improvise at the organ for as long as two hours.41


Waller would become, after Armstrong, the jazz musician best known and most loved by the population at large. From May 1934 until his sudden death in 1943 at the age of thirty-nine, Waller recorded a staggering 402 numbers for RCA . . . only twenty of them as a piano or organ soloist. During the same period Armstrong recorded 235 numbers, for Decca, the most commercial of the major labels. . . . Even if Waller could have summoned the discipline to write more songs as fine as his 'Honeysuckle Rose,' 'Ain't Misbehavin,' 'Keepin' Out of Mischief Now' . . . he still couldn't have come close to satisfying the demands placed upon him by his own success.

APPEL, supra note 6, at 92.
28. GRIDLEY, supra note 20, at 4.
29. BILL CROW, JAZZ ANECDOTES 19 (1990). One source describes the origin of the word as follows:

[T]he French had brought the perfume industry with them to New Orleans, and the oil of jasmine was a popular ingredient locally. To add it to a perfume was called "jassing it up." The strong scent was popular in the red-light district, where a working girl might approach a prospective customer and say, "Is jass on your mind tonight, young fellow?" The term had become synonymous with erotic activity and came to be applied to the [New Orleans] music as well.

Id.
30. BERLINER, supra note 14, at 16.
When talking about his experience with the Miles Davis Quintet in the early 1960s, pianist Herbie Hancock wrote:

We were sort of walking a tightrope with the kind of experimenting we were doing in music. Not total experimentation . . . we used to call it "controlled freedom" . . . just like conversation—same thing. I mean, how many times have you talked to somebody and . . . you got ready to say, make point, and then you kind of went off in another direction, but maybe you never wound up making that point but the conversation, you know, just went somewhere else and it was fine. There's nothing wrong with it. Maybe you like where you went.

Id. (quoting Herbie Hancock).
33. Id.
34. SIDNEY FINKELSTEIN, JAZZ: A PEOPLE'S MUSIC 108 (1948).
36. Id. at 31 (quoting Marshall Stearns).
37. Id. at 39 (quoting André Hodeir).
38. Id. (quoting George Gershwin).
40. OSTRANSKY, supra note 31, at 25.
It gave him particular pleasure, when improvising, to go into all possible keys, and to move about even in the most distant ones in such a way that his hearers did not observe it, but thought he had only modulated within the inner circle of a single key.42

One famous story describes Bach’s visit to the palace of King Frederick the Great. The King invited Bach to play, and Bach went from room to room with pianofortes, improvising original compositions on many of the palace’s fifteen pianofortes. The King wanted him to play a fugue43 with six Obligato44 parts, and he immediately accommodated the King, executing an original fugue with the requested parts, much to the amazement of the King and all present. The next day, the King arranged for Bach to be taken to all the organs in Potsdam where he continued his improvisations.45

One commentator has viewed jazz as possessing seventeen features. Some of these features are described briefly below.46

Improvisation. To improvise means “to compose and perform simultaneously.”47 This feature is an important element of jazz, but it is not the sole element.48 Most analysts agree, however, that to be significant, improvisation in jazz “must contain the unexpected; it must produce the feeling of excitement and exhilaration that comes from the illusion of spontaneity, and the sound of surprise.”49

Syncopation. This has been said to be the most common rhythmic characteristic of jazz. It may be defined as the occurrence of accent at times when it is not normally anticipated. Although European music is known for having some syncopation (e.g. in works of Mozart and Haydn), it is more prevalent in West African music.

Harmony. Jazz relies heavily on chord progressions of the type that has been recognizable in European music since the 1500s.

Collective approach. Dixieland jazz is an example of collective improvisation in which several melodies are improvised by various instruments at the same time. This approach has its roots in African music, in which each member of an ensemble is free to spontaneously vary his part while performing, and in informal European dance music and parade music in which more than one musician at a time may engage in spontaneous variation.

42. Id. at 210.
43. A fugue is “a type of contrapuntal composition or technique of composition for a fixed number of parts, normally referred to as ‘voices,’ irrespective of whether the work is vocal or instrumental.” Fugue – Definition, http://en.wikipedia.org/wiki/Fugue.
44. In classical music an obligato is an elaborate accompaniment part played by a single instrument. Originally, the term indicated a passage of music that was to be played as written, without changes or omissions, as opposed to ad libitum. Obligato – Definition, http://encyclopedia.thefreedictionary.com/obligato.
46. GRIDLEY, supra note 20, at 43-55.
47. Id. at 4.
48. OSTRANSKY, supra note 31, at 65.
49. Id. at 69. Paul F. Berliner notes that a prestigious music dictionary has defined improvisation to be the “art of performing music spontaneously, without the aid of manuscript, sketches or memory.” BERLINER, supra note 14, at 1.


Counterpoint. This feature consists of the simultaneous sounding of several different melodic lines. An example of this feature may be found in the music of John Philip Sousa, particularly the intricate piccolo melody which is played over the brass instrument melody in the final strain of the piece. Sousa’s counterpoint technique had a long history in European music and was imported into the early jazz music of the twentieth century.

Prominent role of percussion. In jazz, a drummer plays almost continuous timekeeping sounds and adds excitement to the music. The use of drums in this manner largely has its origin in African music. In contrast, European concert music uses drums primarily for emphasis and dramatic effect. European military music and folk dance music, however, rely on continuous percussion.

Extensive use of short term repetition. Repetition of brief musical patterns is prominent in African music, and it is thought that African music is responsible for this feature appearing in jazz. Examples are: left-hand figures of boogie woogie pianists; repetition of riffs in jazz-rock style; in big band, brass riffs played against saxophone riffs; and highly syncopated bass riffs pitted against equally intricate drum patterns.

Polyrhythmic construction. Filtering into jazz by means of ragtime, this simultaneous sounding of different rhythms, finds its source in African music.

Blue notes. This feature is primarily an African music contribution. It is the equivalent, for example, of a trumpet with a key depressed so as to produce a sound between the cracks of a piano keyboard.

Major keys sounding as though minor. The origin of this feature derives from the same type of description applying to blue notes. Some jazz pianists achieve this feature by striking several neighboring piano keys at the same time, thus eliminating any difference between major and minor. More technically speaking, many jazz musicians attain this effect by lowering the third and seventh steps of the major scale by one-half step (a chromatic semitone).

2. Origins of Jazz

Jazz emerged as a musical form in the City of New Orleans, Louisiana, around the turn of the twentieth century. It was the product of a century-long blending of the African and European musical cultures. In the late 1700s and early 1800s, it was the French who largely inhabited New Orleans and its environs. These French inhabitants were connoisseurs of the arts and took pleasure in music and dancing, probably more so than their neighbors to the north. In fact, it is said that in the 1800s, New Orleans had more musical organizations than any other American city, and, because of New Orleans’ work opportunities, social activities, and diverse ways of life, it became a preferred destination for many

50. Id.
51. See Gridley, supra note 20, at 38-43.
52. It should be noted that New Orleans’ culture was to some degree influenced by the Spanish. In the 1750s, France and Spain fought a war against Prussia resulting in a 1763 treaty in which France gave the land mass known as Louisiana to Spain as a gift. Spanish rule did not solidify there until 1769, and despite Spanish rule for the next thirty years or so, the language and customs in New Orleans remained primarily French. In 1801, Spain ceded Louisiana back to France, but Spain continued to govern Louisiana until the United States bought the territory from France in 1803. Id. at 41.
freed and escaped slaves in the South. In this way, the musical traditions of European colonists were mixed with those of African slaves. The City also became a bustling center of commerce because of its proximity to the mouth of the Mississippi River, and it soon developed a party atmosphere, having one of the largest and most well known brothel districts in America. This district eventually was called "Storyville" in honor of an alderman named Story who, in 1897, proposed that prostitution in the City be limited geographically to the district's boundaries. Storyville has a famous importance in jazz history. Notorious for its singing, dancing, sex, and liquor, Storyville provided a comfortable environment for the birth of jazz, primarily because the activities there generated work for musicians.

In the 1800s, the City served as a melting pot for diverse musical styles. As one jazz historian put it:

Diverse styles bumped into each other, with characteristics of one rubbing off on another. Opera coexisted with sailors' hornpipes. Music for the formal European dances of the minuet and quadrille coexisted with African music used in voodoo ceremonies. Band music, in the style of Sousa, was especially popular during the late 1800s. There were also the musical cries of street vendors selling their wares.

Another contributing factor to the emergence of jazz in New Orleans—which may have put the finishing touches on the gradual blending of African and European musical traditions—was a syncopated musical form with Afro-American origins called "ragtime." Thus, the Afro-American vocal techniques, described above, affected the way band instruments were played (in a blues style), while ragtime influenced the rhythmic style (by introducing syncopation). The ragtime compositions, such as "Maple Leaf Rag," written and performed by pianist Scott Joplin (1868-1917), provided material upon which many of the earliest jazz musicians based improvisations. In addition, some experts contend that it was the polyrhythmic construction of ragtime that may have been directly responsible for carrying African rhythmic traditions into jazz.

3. Performing Jazz

Oscar Peterson, one of the most brilliant jazz pianists of all times, has exquisitely described in his autobiography what it means to perform jazz with a trio as a way of life:

One of the regular comments that my various trios would elicit from listeners concerned the tightness and driving control we had on our night club and concert hall performances. However, these qualities were hard-
earned, and only achieved after much discomfort and dedicated work. We aimed for total cohesion and pulsation, where the three of us thought and played as a single unit.

The differing musical environments formed the source of our main problem. I did not feel that we maintained our rhythmic groove or proper depth of pulsation in larger arenas. We eventually sat down at rehearsal and worked at a solution. [Bassist] Ray [Brown] declared that he was pulling as hard as possible and that the adjustment would have to be made in some other area; [Guitarist] Herb Ellis said he too was operating at maximum volume already. After a lengthy discussion we decided that the first people who had to be musically serene were ourselves, and that the overall volume would have to come down to a more comfortable level of playing.

As soon as we took this step, there was an almost instant meld of cohesiveness evident amongst us. Not only could I hear the rhythmic pulsation much more easily, but the harmonic pavement that Ray and Herb laid down for me became much clearer and more distinct. The one basic discovery we made was that we first had to make it happen for ourselves before it could possibly happen for the audience. 57

D. Jazz as a Metaphor for Improvisation in Mediation

Professor Michelle Le Baron, in discussing the general usefulness of metaphors to gain insight into concepts has written:

Metaphors are more than poetic ways of looking at what we do. They are windows into who we think we are, our purpose, and our approach. They show us what our blind spots are, where our attention is likely to go, and how we situate ourselves relative to others.

Metaphors are powerful tools for third parties who understand and use them artfully. They help make explicit what are otherwise hidden: assumptions, perceptions, judgments, and world views. 58

Jazz, as all music, is an unusual art form in that it has three discrete types of creative products: a visual space (written symbols—composition); audible tones (performed composition); and time. The art form of mediation also shares these discrete end products. Mediation has a visual aspect that consists of written and non-written symbols (i.e. compositional—agreement to mediate, settlement agreement—and nonverbal (body) language), an audible aspect that is in the nature of performance, and a time aspect (which permits the mediator to expand or contract time to meet the needs of the performance). This correlation of creative

57. OSCAR PETERSON, A JAZZ ODYSSEY: MY LIFE IN JAZZ 82-83 (2002).
aspects between jazz and mediation preliminarily indicates that jazz may serve as a useful metaphor to describe mediation and to acquire insight into the mediation process and the roles of the mediator and mediation advocate.

III. THE JAZZ MUSICIAN, THE MEDIATOR, AND THE MEDIATION ADVOCATE AS CREATIVE PROBLEM SOLVERS

The energy released to solve the problem, being restricted by the rules of the game and bound by group decision, creates an explosion—or spontaneity—and as is the nature of explosions, everything is torn apart, rearranged, unblocked. The ear alerts the feet, and the eye throws the ball.59

-Viola Spolin (On spontaneity)

A. Introduction60

Having reviewed much of the literature available on the subject of achieving creative results,61 I have been able to distill out two basic principles: (1) conflict or incongruity of some type precedes all creative results; and (2) conflict or incongruity resolution, involving the application of creativity, is the process which produces creative results.62 For example, creative artists—playwrights, novelists, sculptors, poets, impressionist painters, music composers (as opposed to performance artists63)—all ply their separate art forms, in part, by designing or constructing conflict, and then by either resolving the conflict themselves or by permitting their audiences to resolve the conflict cerebrally.64 Playwrights and novelists, in particular, thrive on constructing conflict. In creating their stories, they design conflicts, and then they resolve them. Character conflicts may occur in “the divided heart of a single character,” between two or more characters, or between man and his destiny. Personality conflicts might be generated through a clash of ideas, temperaments, incompatible codes of behavior, or nonconforming values. Resolution does not always happen through synthesis, but sometimes through competition and survival. But even so, in any play or novel, dramatic

59. SPOLIN, supra note 6, at 6.
61. “Creativity” must be distinguished from “creative result.” Creativity is “a behavior resulting from particular constellations of personal characteristics, cognitive abilities, and social environments.” Theresa M. Amabile, The Social Psychology of Creativity: A Componential Conceptualization, 45 J. PERSONALITY & SOC. PSYCHOL. 357, 367 (1983). A creative result is the idea or solution which is caused by the application of one’s creativity. See generally JOHN W. COOLEY, CREATIVE PROBLEM SOLVER’S HANDBOOK FOR NEGOTIATORS AND MEDIATORS (2005).
63. Performance artists—including actors, symphony musicians, reproduction painters, etc.—on the other hand, follow the instructions (scripts, scores, portraits) of the creative artists. Their goal is to convey what the creative artist intended. See Cooley, Joke Structure: A Source of Creative Techniques for Use in Mediation, supra note 60, at 86, n 5.
64. See generally JOHN W. COOLEY, APPELLATE ADVOCACY MANUAL Chapter 1 (1989).
conflict yields a discovery—a paradox which is latent in the mind, its resolution often occurring in its mere acceptance or acknowledgment.  

Similarly, other creative artists first design conflicts and then resolve them. They give order and meaning to seeming chaos. Poets, for example, design and resolve conflicts by combining seemingly incompatible words or phrases to achieve synthesis and a new meaning. Music composers do likewise through techniques of dissonance and resolution of tones, layering and syncopation of rhythm patterns, and the juxtaposition and resolution of incompatible moods by modulating through various movements. Sculptors resolve the conflict between formless and form by giving shape to the amorphous. Impressionist painters employ their skills in the realm between the real and the unreal, allowing the perceiv-er of their work to resolve the conflict between the two.  

Jazz musicians, improvisational actors and comics, and song stylists are in a special category of creative artist. They are hybrids of both creative and performance artists, and their simultaneous creative and performance functioning is quite complex.

\[B. \text{ Jazz and Humor}\]

Humor assumes its rightful place in jazz when improvisers demonstrate their mastery over the traditions of jazz by deliberately flaunting its conventions in the creation of musical jokes. Commonly, an improviser’s humor involves a con-scious distorting of specific musical elements, and stretching the limits of form.  

Often an improviser’s humor allows him to operate for a time out of formal constraints and to tease the listener’s expectations. Artists also create humor by deliberately juxtaposing patterns that are incongruous, incorporating a trite popular song within a complex solo or by changing a solo’s mood unexpectedly. Sometimes incongruous figures recur throughout a performance. For example:

[Pianist] Bill Evans had a way of playing “Take Me Out to the Ball Game” in which the melody was displaced rhythmically, and it . . . was terribly funny. He also did a version of “Tenderly” in which each individual note in the melody was harmonized with a chord which fit it but which didn’t fit with the chord that either preceded it or followed it. If you just froze each beat and listened to the melody with its chord, it was just beautiful. But the progression that the chords created together was absolute gibberish and wonderfully funny.  


66. See Cooley, supra note 64, at § 1:05B, D, F.; see also Koestler, supra note 65, at 311-19, 325-32, 546-48.

67. Berliner, supra note 14, at 257.

68. Id. at 258 (quoting Chuck Israels).
C. Mediation and Humor

Not surprisingly, like jazz musicians and song stylists, creative mediators and creative mediation advocates are also hybrid artists in that they must not only create, but they must also simultaneously perform. In my view, to be effective in achieving high mutual-gain solutions, they must apply techniques known to both creative artists and performance artists; and, it is my thesis that their role is most closely identified with a combination of the creative and the performance comic.

Needless to say, it is difficult to be both types of comics. It is one thing to tell jokes; it is quite another to write (create) jokes. Most professional joke tellers (comedians), I submit, would concede that they would “bomb” without their joke writers. Stated another way, most anyone, with a little practice, can tell jokes; but it requires a special skill to be able to create them. It is this second craft—creating or designing jokes—that mediators and mediation advocates need to study and master. It is there, in the design and structure of jokes, that many creative techniques reside, and it is there that the ways to produce creative results can be carefully analyzed and studied.

IV. ELEMENTS OF JAZZ IN MEDIATION

A. Understanding Structure

Every part of the person functions together as a working unit, one small organic whole within the larger organic whole of the agreed environment which is the game structure. . . . With no outside authority imposing itself upon the players, telling them what to do, when to do it, and how to do it, each player freely chooses self-discipline by accepting the rules of the game (“it’s more fun that way”) and enters into the group decisions with enthusiasm and trust. With no one to please or appease, the player can then focus full energy directly on the problem and learn what he has come to learn.

-Viola Spolin (On game structure)

1. Structure in Jazz

Wynton Marsalis has said, “Jazz is not just, ‘Well, man, this is what I feel like playing.’ It’s a very structured thing that comes down from a tradition and requires a lot of thought and study.”

69. The information in this section is an adaptation of Cooley, Mediation and Joke Design: Resolving the Incongruities & Joke Structure: A Source of Creative Techniques for Use in Mediation, supra note 60.

70. Spolin, supra note 6, at 6.

71. BERLINER, supra note 14, at 63 (quoting Wynton Marsalis).

[When [Wynton] Marsalis moved north to New York in 1979, things look fairly grim for jazz because, in terms of aesthetic troops, younger musicians didn’t seem to have much interest in the true identity of the art. Marsalis changed that situation dramatically. By example, through recruitment, teaching, and his own accomplishments, he became, as [jazz vocalist] Betty Carter said, ‘the face of the music. I believe he arrived here to bring music back.’]

Professor Berliner notes:

Composed pieces or tunes, consisting of a melody and an accompanying harmonic progression, have provided the structure for improvisations throughout most of the history of jazz. . . . Performers commonly refer to the melody or theme as the head, and to the progression as chord changes. . . . It has become the convention for musicians to perform the melody or and its accompaniment at the opening and closing of a piece’s performance. In between, they take turns improvising solos within the piece’s cyclical rhythmic form. A solo can comprise a single pass through the cycle, known as a chorus, or it can be extended to include multiple choruses.72

In an interview conducted by Martin Sperber in the 1970s, pianist Dave Brubeck had this to say about structure in jazz:

MS: As long as we are talking about discipline, let’s inject the idea of lessening discipline or controls. How do you feel about the expansion of improvisational boundaries in the “free jazz” music of artists like Ornette Coleman?

Brubeck: I have discussed this with musicians who have worked with me. The subject of structure and improvisation was a live one in the first group I formed on the west coast in the late forties. We could compare the structure of a song with a house. Each musician could rearrange the inside without touching the outside. He could let light in, darken it, and use different colors. Now some musicians are saying that there is no outside structure.

MS: Do you mean that they don’t have it or don’t want it?

Brubeck: Either or neither. I don’t know. I think that the question is—Can you create a form as you are playing and improvising? Apparently some feel they can, though I doubt if it can be made to work. I suppose if enough minds are working in a certain direction a form could evolve as you went along and one could say that was the form. Who will know? Perhaps if it has a feeling of a beginning, a middle and end it is a form.73

a. Learning Standard Compositions

As students become more familiar with jazz repertory, they develop a comparative perspective on its forms. In[bassist] Chuck Israels’ experience, the “essential ingredient in learning to be a musician is the ability to recognize a parallel case when you are confronted with one. If things remind you of other pieces when you approach a new piece,” he states

72. BERLINER, supra note 14, at 63 (footnote omitted).
73. Sperber, supra note 11, at 74 (quoting Dave Brubeck).
“you generally catalogue them very quickly so that you can draw upon your accumulated knowledge.” . . . [D]espite the unique melodies of compositions, some pieces share their entire underlying structure in common. Sonny Rollins’ "Oleo" and Charlie Parker’s "Anthropology" are based on "I Got Rhythm." Parker’s "Donna Lee" is based on "Indiana"; his "Bird Gets the Worm" is based on "Lover Come Back to Me"; "Warming Up a Riff" on "Cherokee"; "Marmaduke" on "Honeysuckle Rose." There are countless examples.74

b. Learning Vocabulary

The vocabulary that students acquire from the improvisations of their mentors varies in origin and in character. Some derive from the common language of jazz. As the "kinds of things that everybody plays," they include short melodic figures like traditional blues licks and repeated riffs known as shout patterns. . . . Such figures were once associated with particular soloists or repertory genres like the blues but have since been passed anonymously from generation to generation and put to more general use. . . . Primary materials for the jazz artist’s vocabulary also include excerpts of jazz pieces, popular songs, Western classical compositions, and compositions from other musical traditions that appeal to a soloist.75

c. Learning Improvising Models and Patterns

[An] integrated theory of improvisation and teaching method . . . well illustrates the practice of combining models from different approaches to improvisation. . . . [M]ajor scales and . . . dominant seventh scales . . . serve as focal points for the mixture of other compositional elements. . . . [One notable top jazz teacher] begins by teaching a basic set of rules governing the scales’ chromatic embellishment and the embellishment of arpeggios, chords, and intervals found diatonically "on scale." Within an initial framework of two-measure phrases, students practice performing simple scale patterns in descending streams of eighth notes, occasionally ornamenting them with spare embellishments.76

In an interview conducted by Martin Sperber in the 1970s, pianist Dave Brubeck had this to say about patterns in jazz:

MS: In speaking to actors the term "taking a risk" comes up when talking about acting and improvising. In a play that runs a hundred performances they want to avoid the temptation of remembering what worked for them the night before, feeling that their acting will become a static,

74. BERLINER, supra note 14, at 78 (footnote omitted).
75. Id. at 102-03.
76. Id. at 165 (footnote omitted).
analytical affair. What are your feelings about taking a chance and risking yourself?

Brubeck: If you really get into improvisation that is exactly what you have to do. One can’t use one’s analytical and creative mind at the same time.

MS: You can’t think and do it at the same time? This is interesting. Can you elaborate on this?

Brubeck: This is the crucial thing about the making of an improviser. One or the other takes over. Are you going to be analytical and play established patterns, going into your bag of tricks, or be truly creative? I think this is the essence of creativity. Let me say something about Art Tatum whom I thought was the greatest jazz pianist . . . unbelievable. He was predictable. He would play pieces the same way from one jam session to another. He really “set” his improvisations, feeling that they were in a sense compositions based on the tunes of the day. I imagine he felt that, played in a certain way, they best expressed himself. 77

In his book The Musical Mind: The Cognitive Psychology of Music, John Sloboda observes that a jazz performer’s improvisation occurs within a formal structural frame of patterns that have worked well in the past. He writes:

Because this frame persists over many improvisations, the performer builds up a repertoire of “things that have worked well in the past.” Commentators on jazz have emphasized that there is often less improvisation on the concert platform than one might imagine. The musician [for example, pianists Art Tatum and Oscar Peterson] is often “playing safe” by using improvisatory devices which have worked well in other circumstances, so as to create the best effects he knows how. A so-called improvisation may, in fact, be a carefully planned and rehearsed performance; although there is nothing about the performance as such that would allow us to know this. 78

One of the purest examples of the improvisational pianist learning and applying models and patterns is provided by the figure of the silent film accompanist. As one author has noted:

In the early days of film before the advent of talkies, pianists would accompany the events on screen, working from a “fake” book filled with themes purported to describe a particular mood or activity. Some themes were overtly emotional, such as “anger” and “consolation,” but others represented what we would think of as physical activities such as “climbing” and “hard work,” and some represented feelings that seem neither

77 Sperber, supra note 11, at 73.
emotional nor functional, such as "confusion" and "weariness." Such music is by definition programmatic—it is written to represent something happening in the world. And because of the way such music is employed, we tend to listen to it programmatically: we watch the villain fall from a cliff and the accompanying music sounds like falling; we see a panther creep along and the music sounds like creeping. 79

d. Learning by Observation of Skilled Improvisers

Many expand their knowledge by learning directly from experts outside of performances. Leora Henderson recalls [trumpeter] Louis Armstrong teaching her "how to make riffs," a prelude to her learning to play "hot trumpet" in her own right. Just as Red Nichols showed Armstrong the alternate fingering patterns he had worked out for jazz trumpet figures in the twenties, two music generations later Freddie Hubbard learned Dizzy Gillespie's system of "auxiliary fingerings" from his demonstration. . . . Kenny Washington expanded his repertory with rhythmic patterns that [trumpeter Dizzy] Gillespie's drummer Rudy Collins demonstrated for him during private sessions. 80

e. Fusing of Knowledge and Transformation

Although successful imitation requires the invention of new solos within the distinct bounds of an artist's style, conventional wisdom ultimately encourages musicians to cross over these boundaries by exploring the relationships between and among the ideas of different improvisers. "When you're playing, play by all of them. Play by all of them because you learn from them all," a sax player once advised [trumpeter Lonnie] Hillyer. [Saxophonist] Arthur Rhames similarly views great jazz players as those who have "the ability to take different musical perspectives and integrate them into their own. They symbolize the potential that everyone has to draw on many sources and bring different understandings together in the perspective of their own lives." 81

f. Applying Knowledge for Original Composition

Experimentation also teaches students to create new figures by applying to model phrases the same techniques they had learned for embellishing jazz tunes and by combining fragments of different phrases, both those of other artists and those of their own design. Don Friedman invented his "own melodies" to complement voicings he copied from [pianist] Bill Evans. Fred Hersch has combined musical traits from his principal jazz

79. JOURDAIN, supra note 5, at 294-95.
80. BERLINER, supra note 14, at 109 (footnote omitted).
81. Id. at 138.
mentor, Herbie Hancock, with the "contrapuntal practices" of classical music Composers like Mozart.82

2. Structure in Mediation

a. Learning Standard Compositions

Just as jazz has structure, mediation also has structure. There are a number of standard improvisations—standard compositions, if you will—that mediators draw upon from time to time to achieve a harmonious resolution. These standard improvisations are generally known to professional mediators and used by mediators "off the shelf," so to speak. These standard improvisations correlate to the familiar jazz tunes that were newly improvised when first composed: "Satin Doll," "Green Dolphin Street," etc. After a while, the familiar jazz tunes become distinct parts of the jazz landscape that can be launched to provide a structure for the jazz musician's extemporaneous improvisations. In mediation, these standard improvisations may be used individually, in combination, or in conjunction with a new improvisation, tailor-made for the setting. Here are a few examples:

Mediator's ownership of settlement proposal. "It is not uncommon that conversations with the mediator during caucuses generate ideas for possible ways to settle the case. Some of these ideas might initially seem absurd or arrogant to the receiving side if presented as the idea of the proposing side." If the mediator presents the idea to the receiving side in such a way as to imply that he or she is making the suggestion, it is likely that the other side will give the idea serious consideration.

Conditional settlement proposal without communicating a commitment of a party. Mediators frequently use a tactic whereby they say to one side in caucus, "If I can get the other side to do X, will you do Y?" or "If I can get the other side to pay Z, will you accept it in full settlement?" Of course the mediator already knows when he or she asks those questions that the other side will do X or that the other side will pay Z. In this way, the mediator can make a proposal without having the proposing side actually make a concession which would alter its bargaining position. If the receiving side accepts, the parties reach a settlement. If the receiving side says it cannot do Y or cannot pay Z, then the proposing side has lost nothing, and can consider other possible proposals to have the mediator communicate to the other side.

Structured settlement or payment in installments. In situations involving large money resolutions where plaintiffs are young and healthy enough to have a long life expectancy, structured settlements can provide a mutual gain solution. Through a structured settlement, the insurance company can deposit an agreed amount now, and a plaintiff can receive annuity

82. Id. at 143.
payments over a period of time which total perhaps much more than the plaintiff could have received in a lump sum payment presently.

*Future business arrangement.* In an inter-company dispute, often there are opportunities for the disputants to resolve their differences through future business transactions which allow the aggrieved party to recoup any present losses over time. These types of solutions are particularly attractive where there is an advantage, because of the specific market or of the status of industry competition, for both companies to continue to do business together.

*Apology.* A simple apology may be of great value to a complaining party. Indeed, in a defamation case for instance, an apology might be worth millions if coupled with a public retraction. Even in a small personal or business dispute, a sincere apology, particularly in written form, can provide an important element of a settlement package. Be vigilant for situations appropriate for its use.

*Confidentiality agreement.* A defendant's fear that the settlement in the present case will cause many other individuals to file claims and seek similar settlements often constitutes a formidable barrier to a settlement. This fear can sometimes be overcome and a settlement reached where the parties enter into a confidentiality agreement as part of the settlement which imposes severe sanctions for violating confidentiality.\(^{83}\)

**b. Learning Vocabulary**

Similar to the vocabularies that the jazz musician needs to develop, novice mediators must develop extensive vocabularies on many levels. Mediators need to know the meaning of different types of mediation (facilitative, evaluative, transformative, and combinations). They also need to know and understand the various types of alternative dispute resolution processes—for example, arbitration, high-low arbitration, baseball arbitration, summary jury trial, mini-trial, simulated juries, and expert panels, among others. Mediators should also understand when it is appropriate to use these other processes. For mediators who conduct online mediations, it is necessary for them to develop a vocabulary of cyberspace terms (e.g. URL, hyperlink, hypertext, html, web server, etc.). English-speaking mediators who practice cross-culturally must use special care in using the correct vocabulary words in their discussions with parties who speak English only marginally. Professor Jeanne M. Brett has noted:

Language can . . . be a source of misunderstanding. English was the working language of the . . . team, but not all team members were equally fluent. A French team member addressing a U.S. team member saying "I demand . . ." was perceived as rude until both members realized that the

French member was using a direct but erroneous translation of je demande, a perfectly polite way of saying "I am asking . . .".84

There are many words in jazz that also find their counterparts in mediation. For example, the word "bridge" in jazz means a melody that links the primary melody of a tune to the ending melody. In mediation, the mediator helps parties bridge gaps in monetary bargaining by discussing relative strengths and weaknesses of their cases. In jazz, the word "resolution" usually refers to changing tones of a dissonant sound to a sound of harmony. In mediation, resolution refers to changing a state of party dissonance to a state of harmony. The chart below collects a vocabulary of terms that is shared by both jazz and mediation.

**SHARED VOCABULARY OF JAZZ AND MEDIATION**

<table>
<thead>
<tr>
<th>Accents</th>
<th>Form</th>
<th>Natural</th>
<th>Structure</th>
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</thead>
<tbody>
<tr>
<td>Anticipation</td>
<td>Harmony</td>
<td>Notate</td>
<td>Style</td>
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<tr>
<td>Bridge</td>
<td>Interval</td>
<td>Parallel Motion</td>
<td>Suspension</td>
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<td>Cadence</td>
<td>Inversion</td>
<td>Phrase</td>
<td>Sympathy</td>
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<td>Chord</td>
<td>Key</td>
<td>Progression</td>
<td>Symphony</td>
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<td>Chromatic</td>
<td>Listening</td>
<td>Pulsation</td>
<td>Syncopation</td>
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<td>Consonance</td>
<td>Major</td>
<td>Relative</td>
<td>Temperament</td>
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<tr>
<td>Counterpoint</td>
<td>Melody</td>
<td>Resolution</td>
<td>Tempo</td>
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<tr>
<td>Dissonance</td>
<td>Meter</td>
<td>Resonance</td>
<td>Tenor</td>
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<td>Dominant</td>
<td>Minor</td>
<td>Rhythm</td>
<td>Theme</td>
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<td>Dynamic</td>
<td>Modulation</td>
<td>Root</td>
<td>Tie</td>
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<tr>
<td>Empathy</td>
<td>Mute</td>
<td>Sharp</td>
<td>Tone</td>
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<tr>
<td>Flat</td>
<td>Overtones</td>
<td>Slur</td>
<td>Transposition</td>
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<tr>
<td>Improvisation</td>
<td>Overture</td>
<td>Sound</td>
<td>Vibrations/vibes</td>
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**c. Learning Improvising Models and Patterns**

Robert A. Baruch Bush and Joseph P. Folger, call the mediator's improvising models and patterns "maps." They write:

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84. JEANNE M. BRETT, NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES 145 (2001).
[P]ractitioners know that there are common patterns in the way cases flow and unfold in mediation sessions. Based on their sense of those patterns, mediators carry an internal "map" that gives them a sense of familiarity with the general terrain and the direction they are going, even if the details are new each time they travel the road.

The problem-solving mediator comes to a session ready to hear a barrage of factual and emotional information, which can be sorted and organized into negotiable issues that are parts of a problem faced by the parties. The mediator expects that, once this information is organized, options can be found or constructed that will address the various issues, and the options can be considered and rated by the parties as more or less desirable. . . .

The "map" carried by the transformative mediator is very different. This practitioner comes to the session ready to witness an intense interaction and exchange between the parties that, because it involves difficulties faced by each party as well as hostile perceptions of each by the other, is filled with myriad opportunities for empowerment and recognition. . . . The mediator has a certain idea of the kinds of interactive patterns that may give rise to empowerment and recognition opportunities.85

Kenneth Cloke and Joan Goldsmith see the creative problem solving process itself as a model or pattern that must be learned by mediators. They have observed:

Problem solving is a five-step process. First we need to become aware of the existence of the problem, and accept it as something that needs to be solved. Second, we need to analyze the elements of the problem so we can understand how to approach it strategically. Third, we need to generate options and assess alternative criteria. Fourth, we need to take specific concrete, committed action to address the problem. Finally, we need to evaluate our results, and give each other feedback so we can learn from what we did.86

d. Learning by Observation of Skilled Improvisers

Just as jazz musicians learn from the style and improvising of other jazz musicians, mediators similarly can learn much about innovation and improvising from observing other mediators. This can be accomplished by in-session observation, in training programs, or by observing mediation videos. The mediator can

then incorporate this learning in the creation of his or her own improvisational style.

e. **Fusing of Knowledge and Transformation**

Christopher Moore gives an example of improvisation by fusing knowledge and transformation when he describes model agreements. He has noted:

*Model Agreements.* This procedure identifies and uses experience, options, or agreements reached in other similar disputes as catalysts for developing now mutually acceptable solutions. Models or agreements reached by other parties who are not involved in the current conflict are explored and modified to meet the needs of the situation. The procedure is often employed in business disputes in which past contract language can be used as a basis for developing a customized agreement in the new situation. 87

*f. Applying Knowledge for Original Composition*

Mediation advocates who want to be innovative in a mediation session may benefit from the suggestions of the mediator. Christopher Moore observes:

Mediators who have been listening to parties discussing their issues and interests often develop significant insights regarding what might constitute or go into an acceptable agreement. Mediator suggestions are often helpful to parties especially late in the option-generation process. Mediator suggestions can open doors to new ideas that may merit further consideration; bring a more objective outsider’s view on what is possible, fair, or reasonable; . . . propose options that parties are reluctant to raise themselves. 88

**B. Understanding the Roles of the Players**

*Very few of us are able to make . . . direct contact with our reality. Our simplest move out into the environment is interrupted by our need for favorable comment or interpretation by established authority. We either fear that we will not get approval, or we accept outside comment and interpretation unquestionably. In a culture where approval/disapproval has become the predominant regulator of effort and position, and often the substitute for love, our personal freedoms are dissipated.* 89

——Viola Spolin (On approval/disapproval)

88. Id. at 288.
89. Spolin, supra note 6, at 6-7.
1. Understanding the Roles of the Players in Jazz

a. The Rhythm Section

A rhythm section in a jazz group normally consists of a string bass and drums, although in recent years the piano has been thought to play a valuable role in a rhythm section also.90 In general, the rhythm section's collective function is to "comp," a term incorporating the connotation of accompanying and complementing.91 To become proficient rhythm section players, novice bass players, drummers, and pianists must master performance conventions of their instruments through disciplined study, trials, and discoveries.92

(1) The bassist

Bass players regulate various interrelated features of rhythm, harmonic color, and contour according to fundamental principles of tension and release. More specifically:

[General conventions . . . allow bass players great liberty in formulating their parts. Their options encompass a vast world of possibilities. They can describe each chord and its rhythmic boundaries unequivocally by playing the tonic on the downbeat of the change . . . . [They can adhere] . . . to the progression strictly from chord to chord and . . . emphasize vertical melodic constructions . . . . For contrast, bass players can emphasize horizontal constructions such as diatonic or chromatic scalar passages, carrying the listener over the barlines of measures toward longer-range goals . . . .

Managing . . . movements from phrase to phrase and from chorus to chorus, bass players concern themselves throughout with matters of continuity and development. . . . Like soloists carrying on their internal conversation, bass players sometimes generate ideas through repetition, stressing a particular idea as a theme, or through motivic development, expanding on the features of previous patterns . . . .

Over the larger performance's course, bass players make comparable determinations about harmonic features of their lines. They may consistently bring the character of certain chords within the progression into clear profile as structural markers, whereas they take great liberties in the interpretation of other chords. . . . [Bass players] may favor, generally, a greater emphasis on "outside" harmonic invention than on "inside" playing.93

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90. BERLINER, supra note 14, at 332.
91. Id. at 315.
92. Id.
93. Id. at 317-319.
In addition to providing harmonic direction and a steady beat, the bassist draws on a wide array of musical options:

Harmony, rhythm, pedal points, melodic ideas, timbre, and register can all be employed in a manner that provokes responses from other band members and enhances or detracts from the overall musical development of the ensemble. The bass player balances the recurrent demand of keeping good time and harmony with the inventiveness of responding to particular musical occurrences in the band in a manner that creates (or fails to create) musical climaxes.  

(2) The drummer

The drummer is the member of a jazz ensemble that generally is most underrated by the audience:

Since drummers don’t play harmonics and melodies in the same way as the other instrumentalists, audience members and even some musicians have a tendency to deprecate the musical knowledge of the person sitting behind the drum set. Many mistakenly assume that the drummer just plays rhythm and therefore doesn’t participate in the melodic and harmonic flow of the music. From an interactive perspective, however, the drum set represents a microcosm of all the interactive processes . . . Including harmonic and melodic sensitivity.

The drummer’s role in a rhythm section is a diverse one, including various foundational and interpretive aspects.

Drummers propel the ensemble rhythmically through driving cymbal patterns that include subtle variations in the interpretation of the beat, syncopation, and corresponding effects of tension and release . . .

Drummers pursue their diverse options in accord with the music’s requirements and their own improvisational system. Like their counterparts, they draw upon a common vocabulary pool, transforming patterns to personalize them . . .

The improvisational significance and the stamina demanded of the jazz bassist are signal victories for Western music. The jazz bassist interprets the various structures of songs through the invention of bass lines, chorus after chorus, while the meter and the tempo are defined, usually in a two-bar phrasing cycle of quarter notes in 4/4 time. The bass notes and rhythms are responses to a number of things – the chordal forms, the modes, or the harmonically free creations of the other members of the rhythm section and the ideas of the featured player. The physical power is a melding of the aesthetic and the athletic . . .

CROUCH, supra note 71, at 100-01.
94. MONSON, supra note 32, at 42-43.
95. Id. at 51.
Applying their vocabulary uniquely, . . . [drummers] emphasize time keeping over conversational interplay in their parts, or vice versa. In the latter instance, they allow the developmental possibilities of their own inventions or those of other players to dictate their part’s formulation, at times improvising constantly . . . . Overall, each drummer individually may favor such differing values as relatively stable, repetitive expression, on the one hand, or dynamic contrast, on the other. Within these aesthetic parameters, they structure their accompaniment according to different designs. . . .

Over the accompaniment’s larger course, drummers typically create different designs by alternately increasing and decreasing rhythmic density. They may also shape their part by gradually increasing rhythmic density throughout.96

(3) The pianist

Many pianists believe that their instrument is the most important in a jazz ensemble. Pianist and cellist Roland Hanna explains, “The piano in jazz is like three instruments. It’s the chord instrument, it’s the rhythm instrument, and it’s the bass instrument at the same time. Then it’s enhanced by the drums, the bass, and the guitar. . . .”

Pianist and music educator Michael Weiss [has] argued that in certain situations the piano can lead like no other instrument:

The piano is in a very sort of pivotal place. . . . Let’s say there’s a situation where somebody gets lost or not everybody is sure they’re in the same place, let’s say in a fast tempo, very fast tempo tune. When the piano player plays a chord deliberately on a certain beat, everybody will respond to that more than almost anything else. And will react to that, so in that respect . . . the piano player can have a dominant role in the rhythm section.97

As noted above, since jazz’s early period, the pianist has come to play a fundamental role within the jazz rhythm section.

In its unique capacity, the piano typically shares various tasks with the string bass and drums. Like the bass, the piano can suggest harmonic form through the performance of its own bass line, but it can also represent the harmony explicitly through the performance of chords. Like the drums, the piano can punctuate the music rhythmically, yet it

96. BERLINER, supra note 14, at 327-29. “Unlike the metronome, which rigidly ticks and tocks its way, jazz drumming keeps the tempo and functions as part of the highly nuanced antiphony among the players that helps define and determine the quality of the improvising. Time is played and played with. It speaks and is spoken to.” CROUCH, supra note 71, at 230.
97. MONSON, supra note 32, at 50.
has the ability to mix short accentuating punches with long sustained sound. Introducing constantly changing shapes, the pianist can repeat the same rhythmic pattern while altering chord voicings, or hold particular voicings constant while applying them to different rhythmic patterns. . . .

Beyond the general characteristics of individual comping styles, pianists make decisions within the boundaries of each composition and from one soloist to the next to lend distinctiveness to a group’s music. Pianists constantly determine what emphasis to place on particular rhythmic patterns, where precisely to emphasize repetition and change, when to provide formal markers, and when to withhold them. . . .

To portray large structural units, pianists can punctuate the music rhythmically with block chords over an A section, then create a contrasting texture by improvising sweeping free-rhythmic arpeggios over the B section . . . . [Pianists] may use different kinds of voicings to set off a piece’s features, for example shifting the balance between explicit and implicit interpretations of chords from one section of the larger progression to another. Additionally, they may embellish progressions with personal chord substitutions.98

(4) The audience

The presence of an audience heightens the pressure and reward for the artist, and can move the artist to excel in his or her performance. As all artists know, every audience is different. Some audiences include musically sophisticated members, such as other jazz musicians. Other audience members might include serious fans with ties to the jazz community, such as jazz album collectors or fans of particular artists. Some members are simply listeners who lack serious interest in jazz, but just appreciate the nightclub setting. It is not uncommon for artists to “take the tastes and anticipated responses of [the] audience[] into account when planning performance strategies.”99 For example, the length of solos may be shortened for unsophisticated audiences; and may be expanded for more knowledgeable audiences.100 Artists also know that every music performance is a dramatic presentation for the improvisers and audience alike.

98. BERLINER, supra note 14, at 332-35.
99. BERLINER, supra note 14, at 458.
100. Id. at 459.
In a sense, both groups play interactive roles as actors from their respective platforms. "Just as the design of the hall, the stage, and the lighting frames the band’s activity for the audience’s observation, it also frames the audience’s activity for the band to observe. Performers and listeners form a communication loop in which the actions of each continuously affect the other." Although sound serves as the principal medium binding improvisers to audience, the audience typically responds to the inseparable mixture of the music created by the improvisers and their theatrical image or stage presence.

**b. The Soloist**

When learning new solos, some musicians imitate solo patterns from recordings.

Once musicians have learned a solo’s discrete phrases, they seek to reconstruct the whole solo, performing it along with the recording from memory. Initially, youngsters are satisfied to anticipate the proper sequence of figures and approximate their phrasing, but as they gain greater confidence, they listen more intently to the recording artist, playing and regulating their parts accordingly. With practice, musicians come to penetrate more deeply into the solo, hearing the music as if their ears had developed greater powers.

Amid their drills at solo formulation, performers sometimes find that specific approaches to improvisation work most effectively within the contexts of particular compositions. Subsequently, they may adopt approaches as guidelines for different solos based on the same composition. From a practical standpoint, aspiring players discover that it can be helpful to narrow their options for individual improvisations to a manageable size. Additionally, as students become more discriminating and attune themselves to each piece’s subtleties, they strive to interact with its features in ways that preserve the piece’s integrity.

In some respects, there is usually tension between the group and the individual in a jazz ensemble, and the role of the horn soloist in some ways is both the most independent and the most dependent. Ingrid Monson explains:

> [T]he soloist’s ability to float on top of the rhythmic energy generated by the rhythm section is an independence that the members of the rhythm section do not as fully share. This musical independence is perhaps a factor in the high prestige accorded to horn soloists in the jazz tradition. At the same time, the soloist’s ability to be an effective voice requires

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101. Id.
102. Id.
103. Id. at 96-97.
104. BERLINER, supra note 14, at 230.
considerable support from the rhythm section. The horn player, for example, cannot define a change in groove as clearly as a rhythm section member, nor can he or she as fully accompany another soloist. Nevertheless, the role of soloist is the most prestigious in the jazz ensemble. To be a jazz musician, one must be able to play solos as well as fulfill the ensemble responsibilities of one’s instrument.\footnote{COOLEY, supra note 83, at 30-31.}

2. Understanding the Roles of the Players in Mediation

a. The mediator

The mediator is considered to be the most important functionary in the mediation ensemble. The mediator has three primary functions, instrumental to the effectiveness of the process. The mediator is: (1) a leader who takes the initiative to move the negotiations forward procedurally and substantively at an appropriate tempo for the particular stage of the process; (2) an opener of communication channels who initiates communication or facilitates improved communication; and (3) a problem explorer who enables people in dispute to examine a problem from a variety of viewpoints, who assists them in defining basic issues and options, and who looks for mutually satisfactory options.

Apart from these functions, the mediator often serves as an agent of reality who helps build a reasonable and implementable settlement, and questions and challenges parties who have extreme and unrealistic goals.

The mediator also serves as a legitimizer who helps parties recognize the rights of others in the mediation and a resource expander who links parties to outside experts and resources that may enable them to enlarge acceptable settlement options.\footnote{MONSON, supra note 32, at 71-72.}

b. The mediation advocate

In a facilitative mediation, the advocates ideally engage in respectful conversation in an atmosphere of joint problem solving in which the advocates will be expected to disclose, in caucus, the weaknesses of their case, as well as the strengths. The advocates will also be doing a lot of listening as well as speaking. They may even express empathy toward the opposing advocate in joint sessions, with the purpose of encouraging a mutually acceptable resolution. Usually, advocates will not discuss at length the law pertinent to the dispute. They will normally explore creative solutions having non-monetary, yet valuable elements.

In an evaluative mediation, the advocates will emphasize the relative strengths of their respective legal positions, and they will discuss the application of the case law relevant to the dispute. They will approach the problem legalisti-
cally and with the goal of persuading the mediator that the mediator's evaluation should favor their respective client's interests.

In some evaluative mediations, advocates will design alternative arguments in order to test them against the evaluative mediator's analytical template. In other evaluative mediations, advocates may increase the density of adversarial combat by using arguments directed to emotions rather than substance.

c. The party

In mediation, parties can be represented by an advocate or be unrepresented. If represented, a party is generally confined to following the directions of his or her advocate and has a subdued role. In such situations, the advocate generally specifies the extent of the party's verbal participation in the process. If allowed to speak, a party is expected to speak to be understood and should only state unembellished facts. A party should never argue with an opposing party or answer or ask difficult questions. A party should listen carefully to the statements of the opposing party and should not interrupt him or her.

If a party is unrepresented, the party, as a "soloist" has much more leeway "to toot his or her own horn." An unrepresented party has an independence that his or her opposing represented parties do not share.

d. The observer(s)

Unlike a live audience in a jazz performance, ordinarily the observers of a mediation are not intended to have an impact on the process they are observing. If the observers are family members, however, they may have a direct impact on the resolution, particularly if a party must rely on a family member observer to help him or her decide whether to accept or reject a particular offer of settlement.

C. Understanding Conversation

A healthy group relationship demands a number of individuals working interdependently to complete a given project with full individual participation and personal contribution. If one person dominates, the other members have little growth or pleasure in the activity; a true group relationship does not exist.\(^\text{107}\)

—Viola Spolin (On group expression)

1. Understanding Conversation in Jazz

In a jazz ensemble there are at least two types of conversations that take place. One conversation is between the individual musicians and the piece of music; and the other is a conversation that occurs between and among the artists playing their instruments.

\(^{107}\) Spolin, supra note 6, at 9.
a. Conversing with Self About the Piece

Prior to extensive improvising, some artists routinely warm up by practicing a piece's melody—conversing with the piece so to speak. The rendition of the melody, typically the first event in a formal jazz presentation, assists musicians in making a transition from their normal world of verbal thought and visual imagery to the melodic world of sounds, stimulating thought and imagination:

Before their performance, artists also commonly consider the meanings of compositions. Song texts often provide a key to a piece's meaning. "The oldtimers always used to tell horn players to learn the lyrics just like a singer does, so that they know the meaning of the piece," [drummer] Max Roach recalls. This enabled them "to get underneath the piece, to really sing with their instruments and play with more feeling."108

b. Conversing with the Players

When jazz musicians are playing "in the groove" (See Section V.A.1., infra), they experience a great sense of relaxation which increases their powers of expression and imagination.

At such times, the facility artists display as individual music thinkers combines with their extraordinary receptiveness to each other. It is the combining of such talents in the formulation of parts that raises these periods of communal creativity to a supreme level. "When you're really listening to each other and you're performing together, it's like everyone is talking to each other through music,"[trombonist] Curtis Fuller says. "When groups like [pianist] Dave Brubeck's or [trumpeter] Miles Davis's or [drummer] Art Blakey's play, they have good conversations, group conversations. When that's really happening in a band, the cohesiveness is unbelievable. Those are the special, cherished moments. When those special moments occur, to me, it's like ecstasy. It's like a beautiful thing. It's like when things blossom." . . . [Drummer] Ronald Shannon Jackson asserts similarly that "this music is really about relationships between all the players. When the relationship is happening, you don't hear piano, bass, and drums. . . . You hear the total communication of the individuals."109

Bassist Richard Davis has used the image of conversation to characterize the interactive process that occurs in a jazz ensemble:

108. BERLINER, supra note 14, at 171. As Max Roach has further pointed out, [Trumpeter] Louis Armstrong proved that everybody could think and play at the same time. In European music, only one person really thinks -- the composer. The other musicians only think interpretively. Armstrong liberated everybody. Now you can hear a band, and everybody up there is thinking, playing, listening, fitting their ideas in with the other music that is being created on the spot.

109. BERLINER, supra note 14, at 389.

https://scholarship.law.missouri.edu/jdr/vol2007/iss2/1
That happens a lot in jazz, that it's like a conversation and one guy will . . . create a melodic motif or a rhythmic motif and the band picks it up. It's like sayin' that you all are talking about the same thing. . . .

In such moments, the bass player temporarily breaks from the more routine task of laying down the time and harmonic progression and responds to something linear coming from elsewhere in the ensemble—the soloist or another member of the rhythm section. A responding figure need not be imitative. . . . [Bassist] Richard Davis likened interjections to a communicative process, which indeed they are. The bass player, along with the rest of the musicians, is constantly deciding when to make such interjections. If a bassist makes them too frequently, the rest of the band might turn and stare or otherwise communicate the equivalent of [drummer] Michael Carvin's metaphorical "Where's the dinner?" 110

2. Understanding Conversation in Mediation

a. Conversing with Self About the Case

Kenneth Cloke offers wise advice to mediators and mediation advocates as to how to converse with oneself about how to prepare for creative problem solving prior to mediation. He writes:

Problem solving is a five-step process. First, we need to become aware of the existence of the problem, and accept it as something that needs to be solved. Second, we need to analyze the elements of the problem so we can understand how to approach it strategically. Third, we need to generate options and assess alternative criteria. Fourth, we need to take specific, concrete measures, committed action to address the problem. Finally, we need to evaluate our results, and give each other feedback so we can learn from what we did.

There are also three important conceptual or attitudinal shifts to prepare ourselves for engaging in the problem-solving process. To begin with, we need to encourage positive attitudes toward the problem-solving process by opening possibilities for resolution through imagination and creativity, putting aside the assumption that ours is the only solution. Second, as we release ourselves from the rigidity of assuming that the only possible solution is the one we suggested, we will discover creative possibilities we could not have imagined beforehand. We will see that the problem-solving process works best when it is open, honest, collaborative, and inclusive of everyone involved in the problem. . . .

Finally, we need to address the problem of how we will go about solving our problems. If we approach them with a learning, transformational

110. MONSON, supra note 32, at 32.
orientation that thrives on the paradoxes, enigmas, riddles, and contradictions that are at the core of most of our problems, we will be far more successful in discovering fresh options. This shift in thinking is perhaps the most powerful of all.111

b. Conversing with Participants

Kenneth Cloke recommends that mediators and mediation advocates use a collaborative style when conversing with participants.

There are two fundamentally different negotiating styles from which you can choose. Aggressive negotiators move against their opponents in a competitive struggle for domination. They feel it is acceptable to reduce or destroy trust by being inflexible, intimidating, demoralizing, or threatening. They browbeat their opponents, conceal facts and motivations, and refuse to listen or compromise, attributing blame, defining problems as caused only by their opponent, and manipulating the process to get what they want.

Collaborative negotiators move toward their opponents in a mutual effort at improvement, and use listening, establishing common ground, emphasizing shared values, and taking responsibility for problems and solutions. They try to behave in a trustworthy, fair, objective and reasonable way, and refuse to manipulate the process other than to get what both sides want. . . .

There are more failures and a stronger likelihood of retaliation even when . . . [the aggressive] approach wins. Where there are ongoing relationships, an aggressive style results in smaller gains over the long run than a collaborative one.112

D. Composing in the Moment

*Experiencing is penetration into the environment, total organic involvement with it. This means involvement on all levels; intellectual, physical, and intuitive. Of the three, the intuitive, most vital to the learning situation, is neglected.*113

—Viola Spolin (*On total organic involvement*)

1. Composing in the Moment in Jazz

There is a fundamental difference between extemporaneous improvisation and time-unlimited composition.

111. CLOKE & GOLDSMITH, supra note 86, at 199-200.
112. Id. at 213-14.
113. Spolin, supra note 6, at 3.
The composer rejects possible solutions until he finds one which seems to be the best for his purposes. The improviser must accept the first solution that comes to hand. In both cases the originator must have a repertoire of patterns and things to do with them that he can call up at will; but in case of improvisation the crucial factor is the speed at which the stream of invention can be sustained, and the availability of things to do which do not overtax the available resources. In composition, fluency becomes less important; but it is much more important to keep long-term structural goals in sight, and to unify present material with what has gone before.114

Composing “in the moment” in jazz is about inner dialogue, storytelling, and basic techniques of improvisation.

a. Inner Dialogue

The famous drummer Max Roach, in describing what composing “in the moment” means, has said:

After you initiate the solo, one phrase determines what the next is going to be. From the first note that you hear, you are responding to what you’ve just played: you just said this on your instrument, and now that’s a constant. What follows from that? And then the next phrase is a constant. What follows from that? And so on and so forth. And finally, let’s wrap it up so that everybody understands that’s what you’re doing. It’s like language: you’re talking, you’re speaking, you’re responding to yourself. When I play, it’s like having a conversation with myself.115

Trumpeter Lonnie Hillyer also thinks of himself while improvising a solo as “making statements and answering them.”116 His objective is to expand on musical patterns, trying to get the notes to grow into something, shaping them into different ideas. According to Hillyer, it’s like taking a couple of words and expounding with them. Similarly, pianist Tommy Flanagan believes that the phrases one plays are the musician’s message while playing. The phrases should relate to one another. The vital part, saxophonist Lee Konitz says, is thinking while you’re moving, and once the momentum has been started, he doesn’t like to break it. He’s concerned with continuity in motion. He thinks that if you’re not affected and influenced by your own notes when you improvise, then you’re missing the whole essential point.117

114. SLOBODA, supra note 78, at 149.
115. BERLINER, supra note 14, at 192 (quoting Max Roach).
116. Id. (quoting Max Roach).
117. Id. at 192-93. “[Saxophonist] [Lee] Konitz is almost always a thrilling player because his work is so free of cliches, his tone backs away from any overt versions of emotion based upon effect. It is a tabula rasa. If you don’t hear a melody, don’t play, might be his motto.” CROUCH, supra note 71, at 336.
One writer compares what jazz improvisers do when they compose in the moment to Mozart’s technique of music composition:

Mozart did not necessarily develop note-perfect compositions in memory. Instead, he may have contrived only a composition’s basic structure in his mind’s ear—its melodies, harmonic sequences, and overall form. Then, in a second pass, and working largely on paper rather than in memory, he could have brought to bear the fabulous technical training for which he was so envied by his contemporaries. He would hammer out the details of chord progressions, instrumentation, and ornamentation as quickly as he could move a pen . . . . This is, in fact, just the kind of skill that jazz improvisers acquire through years of practice and training, and which they apply in real time to the ready-made structures of popular tunes.\(^{118}\)

\[b.\] Storytelling

Professor Berliner has observed that “the metaphor of storytelling suggests the dramatic molding of creations to include movement through successive events ‘transcending’ particular repetitive, formal aspects of the composition and featuring distinct types of musical material.”\(^{119}\) He further states that:

A related feature of storytelling involves matters of continuity and cohesion. [One jazz expert] . . . advises his students that in initiating a solo they should think in terms of developing specific “characters and plot . . . . You introduce these little different [musical] things that can be brought back out later on; and the way you put them together makes a little story. That can be on the scale of a sentence or paragraph . . . . The real great cats write novels.” Throughout a performance, [these great improvisers] . . . creatively juxtapose ideas that they introduced in their initial “character line,” and at just “the right time” in their story, they can “pull out” and develop ideas that they only “hinted at” earlier in the performance but have borne in mind all along. “That’s what’s really fantastic about a solo.”\(^{120}\)

\(\sum 118.\) JOURDAIN, supra note 5, at 179.
\(\sum 119.\) BERLINER, supra note 14, at 201.
\(\sum 120.\) Id. at 202.
c. Techniques of Improvisation

(1) Altering Melody

As pointed out by this author in a prior article on mediation and music, melody has been defined as a series of tones that make sense. Melodies in music often consist of thematic patterns—melodic fragments that have no intrinsic harmonic life of their own; they must rely on the support of accompanying chords. These melodic fragments occur both in classical music and jazz. “Thematic patterns can only be discerned by persons having a good ear for harmony and a good memory capable of retaining melodic fragments over several bars to identify melodic relations.”

One way jazz improvisers “compose in the moment” is by remembering the melody of a tune and then altering that melody. Trumpeter Lonnie Hillyer explains:

Sometimes, the performer plays part of the melody and then he improvises something . . . then he plays something else from the melody and improvises some more . . . [as if] answering or accompanying himself . . . Of course, artists may decide to pursue the radical course and ignore the melody of the piece altogether, in effect . . . composing their own songs from wholly new melodies.

(2) Altering Harmony

Harmony results from the design of tones around tonal centers of a given key. Tonal centers establish the probabilities that predict which tones are most likely to follow a given tone. Some musical artists improvise in the moment by altering harmony. For example:

[It] is the relative mixture of pitches inside and outside of the harmony that creates interesting melodies. “Playing inside the changes means playing enough of the important notes of the chord progression at important times.” . . . [Pianist] Kenny Barron . . . [makes] this point. “The more your level of hearing gets better, the more you can hear complicated kinds of ideas, and assuming you are technically proficient enough, you can execute those ideas. By more complicated ideas, I mean ideas

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121. On April 30, 2007, Marilyn Smith, Director of the Center for Conflict Resolution in Chicago, and I narrated a program for members of the Chicago Bar Association’s Alternative Dispute Resolution Committee and the Center for Conflict Resolution in which a jazz trio — pianist (John Buccheri, emeritus professor of music at Northwestern University), bassist Chris Carani (Chicago attorney), and drummer John Huston (Chicago attorney)—demonstrated six techniques of improvisation in jazz while the narrators and the musicians explained how these same improvisational techniques are used by mediators and mediation advocates in mediation.
122. Cooley, supra note 3, at 252.
123. Id. at 253.
124. BERLINER, supra note 14, at 172-73.
125. Cooley, supra note 3, at 256.
that would be both longer in length and make use of notes that might be considered outside the chord. Being able to play complicated ideas means being able to position those notes in such a way that they flow back and forth between the notes that are in the chord."126

(3) Changing Form

Composing in the moment can also be achieved by changing form by using substitute chords and insertion chords, as described below:

The artist also has the option of substituting a new chord with a different root for the original chord . . . . Chords can usually serve as effective replacements for one another when they are closely enough related through common tones to perform the same function within the piece’s structure, preserving “essential lines of the original progression.” At times, substitute chords can have the effect of modifying a distinctive portion of the conventional progression, as when minor chords substitute for diminished chords . . . .

Artists commonly use the terms turnarounds or turnbacks when referring to insertion chords found at the end of either a major harmonic phrase or a complete chorus. Typically, they are excursions of four chords that lead back to the initial chord, providing a smooth transition to the next harmonic phrase or returning to the start of the progression.127

(4) Modifying Rhythm/Tempo

Drummer Leroy Williams describes how unique approaches to rhythm and tempo can lend intriguing uncertainty to performances:

Everybody interprets time differently, but some bass players not only have good time, but creative time. . . . [Bassist Wilbur Ware] had an uncanny way of being there when you thought he wasn’t. He might go off rhythmically and you’d say, “How is he going to come back from there?” Some players can stretch the time to that fine line of almost turning the beat around, but they can always come back . . . . It has to do with where you put your accents when you’re improvising.128

(5) Varying Dynamics

Trumpeter Cecil Bridgewater has used dynamic variations to compose in the moment:

126. BERLINER, supra note 14, at 250.
127. Id. at 84-85 (footnote omitted).
128. Id. at 381 (quoting LeRoy Williams).
At the first concert, Bridgewater introduced an effective device that teased the audience's perceptions during each solo. Subjecting rapidly repeating pitches to subtle dynamic changes, he created the impression that the source of the pitches was moving alternately closer and farther away from the listener. Ultimately it trailed off, but in a distant echo.  

(6) Using Combinations of Variations

Although a tune's character sometimes warrants the use of one approach over another, in many situations, the tune lends itself to a variety of combined improvisational approaches:

Pianist Fred Hersch ... [sometimes ... [finds himself] ... wanting to "look at a tune from a whole bunch of different perspectives—from a textural point of view, from a melodic point of view, or from a rhythmic point of view." On a recording of one of trumpeter Booker Little's compositions ... [each time Little came to the first part of the progression, he improvised intricate nonmotivic melodic lines, but when he came to the bridge, he deliberately changed his approach to "show the form of the tune, as improvisers sometimes "like to do" ...]. There he played "lyrical melodies" with sustained pitches, "left more space between his figures," and occasionally performed single-note riffing figures or developed simple patterns as sequences.

2. Composing in the Moment in Mediation

a. Inner Dialogue: Improvisation versus Use of Conventions

Michelle LeBaron describes a jazz-like inner dialogue in conflict as inner, creative play. She writes:

Making transitions ... in our personal and interpersonal stories asks lightness of us. We take ourselves so seriously—doubly so in conflict, earnestly maintaining our perspectives even as we tenaciously try to unwind our differences. When we see that our perspectives are rooted in stories from the past, maintained by imagination, we see that transforming conflict is an inside job as well as an interpersonal one. When we are literally at odds with ourselves and with others, we may be pulling in two directions at once. In the process of unwinding old stories held in place by imagination, we need more than our intellects to move forward. We need imagination, intuition, and the willingness to play. ...

Carl Jung wrote that the creation of something new is not accomplished by the intellect but by the willingness to play with inner and outer experience "borne on the stream of time." Play may seem remote when we

129. Id. at 230.
130. Id. at 233-34.
are in the throes of negotiating stuck conflict, but this may be the time we need it the most. 131

b. Storytelling

As with jazz, storytelling is an important part of the mediation process:

As we have seen, stories are rich vessels of culture; careful listeners will gain from them much insight into values, communication norms, and cultural dynamics. Astute trainers and third parties spend time listening to stories from parties and participants before and during processes. Of course, when we ask parties to tell us their conflict stories, they are not always forthcoming. Asking about conflict is a bit like asking about sexual behavior; it can be personal, intrusive, and difficult. Even if someone wants to be helpful and reveal his or her "cultural common sense of conflict," this is something that is often not transparent, even to the subject. So we find stories where they lie, sparkling crystals on the beach when the sun shines at a certain angle, invisible moments later. And we pay attention. 132

c. Techniques of Improvisation

As in jazz, mediators and advocates composing in the moment have, at a bare minimum, six techniques of improvisation. They include altering melody, altering harmony, changing form, modifying rhythm/tempo, varying dynamics, and using combinations of variations.

(1) Altering Melody

Similar to jazz musicians, mediators and creative advocates combine imagination and memory as a prelude to and as preparation for finding imaginative outcomes in mediation. In other words, they use memory and imagination to conceive the mediation "melody"—the mediation's primary theme. As Professor Michelle LeBaron points out:

When we are doing something we feel uncertain about or something we are unfamiliar with, we rehearse both physically and mentally. We prepare by imagining ourselves in the situation. When I played piano concerts, I would see myself on the stage in front of a full auditorium. I imagined details of how I would walk onto the stage, the moment I would take to breathe deeply after sitting down, placing my hands on the keyboard in position before sounding a single note. I imagined playing passionately, flawlessly, in a way that invited the audience into dialogue with the music, within themselves. Imagining this scene playing out the concert from my simple living room as though it were a grand concert

131. LeBARON, supra note 58, at 123.
132. Id. at 244.
hall, I created memories that helped me in the actual performance. *Memory selects and recreates experience. To imagine in this way is to use the selecting function of memory to open possibilities for the future.*

One improvisation technique that can be used in mediation is to alter its melody—that is, to alter its combination of thematic patterns used to develop the basic theme described by Professor LeBaron immediately above. Building on this basic theme (melody) of mediation, we can look to the writings of Professor LeBaron to understand what it means to alter the melody in mediation. She explains:

Resolving conflict asks us for . . . clarity and courage. As long as we remember selectively, . . . conflicts will remain static or escalate, fueled by concentric circles of self-fulfilling reinforcement. *To break this pattern, we have to change the memories we access, expanding our pools of recollections, allowing them to become tempered and deepened through dialogue. In dialogue, . . . parties become aware of how they have kept their old experiences of physical and emotional damage alive through memory. These memories and warehoused conflict stories limit the field of imaginative possibility from which the future is created. They act like a deep freeze, keeping views static and frozen, away from the sunlight of contact with others. . . .*

Dialogue processes invite participants to set their well-worn stories aside, making room for new stories reflecting multiple perspectives. As we access more complete and balanced memories of the past, we come to imagine new futures.

Thus, one helpful improvisational technique in mediation is to alter the melody of the conflict by first remembering accurately the basic theme of the conflict (melody) and then by looking for or integrating remembered melodic fragments in order to create a new melodic theme.

We can also gain a better understanding of what it means to alter the melody in mediation by referring to the writings of Robert D. Benjamin on the subject of reframing. He has observed:

*Reframing is one of the most fundamental techniques used by mediators to transform the context of a dispute. The mediator . . . takes the communication of a party and, without abrogating his or her meaning entirely, alters and redirects that meaning to allow more constructive use in the settlement process.* Thus, when parties are actively fighting, the mediator might compliment the parties on how well they fight and then go

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133. Id. at 110 (emphasis added). "It is, of course, one thing to examine the concepts and theories underlying improvisation, but in the end it must be pulled off 'in the moment.' Success significantly depends on an individual's personality and natural abilities, notably how comfortable they are with uncertainty and discomfort." Lakshmi Balanchandra, Mary Crossan, Lee Devin, Kim Leary, & Bruce Patton, Improvisation and Teaching Negotiation: Developing Three Essential Skills, 21:4 NEGOT. J. 435, 438 (2005).

134. LeBARON, supra note 58, at 107-08 (emphasis added).
on to reframe their negative statements into positive meanings by noting that "people who fight well can negotiate well." . . . Reframing is a technique by which resistance can be surreptitiously bypassed. When an issue is reframed, more ways of looking at the dispute emerge, and the parameters of the conflict become more fluid. In reframing, the mediator operates to reposition each antagonist so that the dispute is amenable to resolution.135

In addition, Peter T. Coleman offers an explanation of reframing in mediation that finds a direct correlation to a jazz musician who improvises by altering melody. He writes:

Although reframing makes a conflict more amenable to a solution, the ability to reframe the reframed mutual problem so that, in turn, one can find a solution to it is dependent on the availability of cognitive resources . . . and any factors that broaden the range of ideas and alternatives available to the participants in a conflict are useful. Intelligence, exposure to diverse experiences, interest in ideas, preference for the novel and complex, receptivity to metaphors and analogies, the capacity to make remote associations, independence of judgment, and the ability to play with ideas are some of the personal factors that characterize creative problem solvers.136

These same factors are characteristic of a jazz musician whose goal, as a creative problem solver, is to improvise in the moment by altering the melody of a piece.

(2) Altering Harmony

In mediation, as in jazz, harmony can be both consonant and dissonant. This is so because disputes involve both compatible interests as well as conflicting ones. The pursuit of harmony in mediation involves quickly identifying important compatible interests of the parties and minimizing the dissonant effects of the conflicting ones. Once the interests of the parties are identified, they normally will fall into one of three categories: (1) mutually exclusive, in that satisfaction of one party's needs precludes satisfaction of another party's interest; (2) mixed, in that the parties have some compatible and some competing interests; or (3) compatible, in that the parties have similar and nonexclusive needs. It is well known in mediation that the parties' stated positions often masquerade as their interests, when in fact a minor move off a position (a small or "chromatic" concession or alteration) by a party may result in resolution.137 When a mediator or a creative advocate identifies the relevant interests and implements means by which the parties' perception of the issues can be altered to create a different relationship of

135. Benjamin, supra note 26, at 116 (emphasis added).
interests, he or she effectively alters the harmony of the situation much in the same way a jazz musician alters harmony when improvising in the moment.

In her writings, Professor Michelle LeBaron explains a phenomenon similar to altering harmony in mediation when she describes the technique of "dancing on a dime." She writes:

Dancing on a dime is a pivotal practice for successfully bridging cultural differences. To dance on a dime is to be graceful and flexible while responding to the movements and behaviors of others and to changing conditions all around. It is to have plans and agendas but to be willing to let go of them when the relationship or situation requires it. . . .

Recall a time when you were working with a group or were a member of a group and things weren't working. Perhaps a conflict was escalating, or things were going sideways that were meant to go straight ahead. Sometimes this momentum continues, and meetings or gatherings get off track or end with damaged relationships. But sometimes someone steps into place at just the right moment and intercepts the pattern gone awry. The interception or shift may be dramatic or it may be subtle. Either way it works. This is dancing on a dime. 138

What Professor LeBaron describes as "dancing on a dime" is very similar to what Kenny Barron describes in the section above (Altering Harmony in jazz) as (1) playing enough of the important notes of the chord progression at important times; and (2) being able to play complicated ideas by positioning notes outside the chord in such a way that they flow back and forth between the notes that are in the chord.

(3) Changing Form

As noted above in Section IV(D)(1)(c)(3), another technique for improvisation in jazz is changing the form. This is accomplished by using substitute chords and insertion chords.

Christopher Moore describes a mediation technique similar to using substitute chords to change form when he discusses the technique of fractionation. He writes:

Issues are divided into smaller components because (1) disputants may see and understand smaller issues more easily than those that are complex and many-faceted; (2) dividing issues into components unlinks them and prevents moves to join unrelated subjects, which may block agreement; and (3) dividing issues into components may depoliticize or isolate specific issues that prevent settlement.

138. MICHELLE LEBARON, BRIDGING CULTURAL CONFLICTS: A NEW APPROACH FOR A CHANGING WORLD 204-05 (2003).
There are two ways to divide issues into smaller components. The first is for the mediator to suggest that the definition of what is being discussed be narrowed. The second is for the mediator or negotiator to ask parties to look at an issue and split it into component subissues.\footnote{MOORE, supra note 87, at 274.}

Robert D. Benjamin describes a technique for changing chordal form in mediation by substitution of dissonance for consonance. For example:

One of the first steps in transforming the context of a dispute is to create dissonance in the thinking of each party. If parties believe they are right . . . and that a court will predictably determine they are right . . . ., then there is little motivation to mediate. For parties who are entrenched in their positions, the mediator needs to raise sufficient question and cast doubt over the parties’ presumed expectations about the outcome of the dispute to generate the necessary motivation to mediate. In other words, “Pull the rug out from under them.” . . .\footnote{Benjamin, supra note 26, at 113.}

Professor Le Baron’s apparent notion of chord-like substitution in mediation is called “shifting frames”:

The practice of shifting frames comes from the therapeutic and narrative literatures. Simply it is the idea that we operate with certain frames or ways of seeing the world and the issues we face. These frames give our worlds order and structure and lend coherence by forming an outline around what we attend to. . . . The practice of shifting frames is simple; notice one part of how you see an issue. . . . Then change that dimension.\footnote{LEBARON, supra note 138, at 193-94.}

Professor Kathleen Kelley Reardon apparently sees changing form (or the chordal substitution) in mediation to involve the use of deception. She notes that there are various levels of deception. These levels of deception, of course, are substitutions for pure truth during the course of a mediation. Benign types of deception might include: falsely implying that there is a competitor in the wings; creating the impression that something is of greater value than it actually is; dressing in a manner unlike your usual style, to give the impression of competence or wealth. Strategic deception might include: misrepresenting by omission and feigning scarcity of an item. Ulterior motive deception might include: threatening someone with power you do not have or making intentional misrepresentations. The ulterior motive type of deception in negotiation or mediation is generally considered to be unethical.\footnote{KATHLEEN KELLEY REARDON, THE SKILLED NEGOTIATOR: MASTERING THE LANGUAGE OF ENGAGEMENT 196-99 (2004).}
(4) **Modifying Rhythm/Tempo**

Christopher Moore observes, "[T]iming is a critical component in final bargaining and settlement" and deadlines "are limits that delineate the period of time in which an agreement must be reached." 143 As he notes, "Mediators can assist parties in enhancing positive use of deadlines in several ways. First they can help parties to design offers that contain fading opportunities. They can also create artificial mileposts by which to measure progress before the ultimate deadline is reached." 144

(5) **Varying Dynamics**

Professor LeBaron sees improvisational results occurring in mediation through varying dynamics or dynamic engagement, as she calls it:

Shifts happen throughout dynamic engagement, marked by emotional "ah-hah's" and cognitive realizations. They are not associated with any one part of the process, though they may happen more frequently as foundations of trust are built. The dialogic spirit that accompanies each part of dynamic engagement is an essential component of shift. 145

Peter T. Coleman and Morton Deutsch see encouraging improvisation and creativity to be an important dynamic of a facilitator. They write:

A conflict specialist who supports and encourages the ideas of the disputants, highlighting those aspects of their ideas that are particularly useful or innovative, is likely to draw out a flow of ideas that expand the menu of perspectives and alternatives. It is important for facilitators to remember that the open flow of ideas and information is a dynamic responsive to the support (and playfulness) of the facilitator. 146

(6) **Using Combinations of Variations**

As pointed out above, in many situations in jazz, the tune lends itself to a variety of combined improvisational approaches. The same is true of mediation—particularly in relation to negotiating through impasse. Kenneth Cloke and Joan Goldsmith offer these combinations of various techniques to break impasse: go on to other issues that might be easier to resolve; explore hidden agendas and the willingness to compromise; look for possible trade-offs or exchange of services, among others. 147

143. **MOORE, supra** note 87, at 323.
144. *Id.* at 330-31.
147. **CLOKE & GOLDSMITH, supra** note 86, at 229-35.
Kathleen Kelley Reardon offers these combinations of variations to break impasse: break the problem into parts—fractionate it; focus on process instead of substance; take a break to strategize, and others.\footnote{148. \textit{Kelley Reardon}, supra note 142, at 181.}

\section{V. The Collective Conversation}

Because of the nature of the . . . [players'] problems, it is imperative to sharpen one's whole sensory equipment, shake loose and free one's self of all preconceptions, interpretations, and assumptions (if one is to solve the problem) so as to be able to make direct and fresh contact with the created environment and the objects and the people within it.\footnote{149. Spolin, \textit{supra} note 6, at 15.}

\cite{149} Viola Spolin (On carrying the learning process into daily life)

A. The Collective Conversation in Jazz

When a piece is performed, everybody in the group has the opportunity to speak on it, to comment on it through their performance. . . . [I]n a jazz performance, everyone has an opportunity to create a thing of beauty collectively, based on their own musical abilities.\footnote{150. \textit{Berliner}, supra note 14, at 417 (quoting Max Roach).}

\cite{150} Drummer, Max Roach

1. Striking a Groove

A groove, as a noun, is a rhythmic feeling that has emotional and interpersonal characteristics. Groove, used as a verb, is synonymous with other terms used in the jazz community.

\cite{148} [Clarinetist] Don Byron . . . described grooving as "a euphoria that comes from playing good with somebody." [Pianist] Michael Weiss explained it as a type of personal and musical chemistry:

Every bass player and drummer [and] piano player sort of feels the rhythm their own way, and some are more sensitive or flexible than others. . . . It's not . . . different than when you meet somebody and you find a compatibility of personalities that's just there. And it's not something that you have to try to do. And sometimes it just isn't there and it's nobody's fault. . . .

Once established, there is something inexorable about groove as well. [Drummer] Kenny Washington talked of the feeling that the "instrument is playing by itself." [Drummer] Michael Carvin compared it to a "trance" in which you experience "being out of yourself." He also spoke about musicians being "so relaxed that they weren't forcing anything out." The physical pleasure of being in a groove is captured in Carvin's
image of soaking in a bathtub and feeling, “Oh, that’s what I needed,” as well as in [clarinetist] Don Byron’s comment that “it’s about feeling like time itself is pleasurable.”

The bassist and drummer are most responsible for striking a groove:

Although potentially involving all band members, [striking] the groove depends especially on the rhythm section’s precise coordination, the relationship between the drummer and the bass player usually being the most critical. “For things to happen beautifully in the ensemble,” [drummer] Charlie Persip metaphorizes, “the drummer and the bass player must be married. When I listen to the drummer and the bass player together, I like to hear wedding bells.” One basic obligation of this union involves the synchronization between the walking bass line and the cymbals’ time-keeping pattern . . . . “You play every beat in complete rhythmic unison with the drummer,” [bassist] Chuck Israels explains, “thousands upon thousands of notes together, night after night after night. If it’s working, it brings you very close. It’s a kind of emotional empathy that you develop very quickly. The relationship is very intimate.”

Other jazz musicians describe “striking the groove” as follows:

Typically, the highest points of improvisation occur when group members strike a groove together, defining and maintaining a solid rhythmic ground for their musical explorations. “When you find a group that is rhythmically attuned to one another, it’s the most beautiful thing that you would ever want to hear in your life.” . . . “Every jazz musician wants to be locked in that groove where you can’t escape the tempo,” [saxophonist] Franklin Gordon declares. You’re locked in so comfortably that there’s no way you can break outside of it, and everyone’s locked in there together. It doesn’t happen to groups every single night, even though they may be swinging on every single tune. But at some point when the band is playing and everyone gets locked in together, it’s special for the musicians and for the aware, conscientious listener. These are the magical moments, the best moments in jazz.

2. Listening and Interpreting Ideas

Exercising their skills of immediate apprehension, improvisers engage in effective musical discourse by interpreting the various preferences of

151. MONSON, supra note 32, at 68.
152. BERLINER, supra note 14, at 349-50.

During the second set . . . Kenny Washington rose up on those drums and began to take us down through the myriad timbres and strokes of percussive instigation that removed all doubt that he is one of the great scholars of his instrument. . . . Those three were playing so well that they gave one definition of jazz that was as pure as it gets because it stood in for the spirit of all jazz styles.

CROUCH, supra note 71, at 338.
153. BERLINER, supra note 14, at 388-89.
other players for interaction and conveying their own personal preferences. Sometimes they are familiar with their cohorts on the bandstand, and sometimes they play with artists of whom they know practically nothing. By reputation, some horn players like to “converse rhythmically when they solo; different things played behind them give them ideas. Others don’t like any of that. They just want straight time played behind them.” . . . [Saxophonist] Sonny Rollins doesn’t need very much in the way of you chording for him, because he covers the whole thing in his solos; he plays the chords and the rhythmic part. [Trumpeter] Miles [Davis] plays with a lot of spaces, so that leaves more room for the rhythmic part.154

3. Shaping the Larger Performance

In their responses to other players, musicians typically seek to preserve a general continuity of mood. . . . At times . . . [jazz artists] select a common vocabulary pattern or tune quotation introduced in the solo prior to its final idea . . . . [Pianist] Count Basie was known for “prepar[ing] an entrance for the next man” at the close of his own solos. . . . When soloists trade eights or fours and other short improvised phrases, they sometimes respond to the most general features of each other’s phrases, for example, extending their contours gracefully to create such continuity between the parts that the resultant line sounds as if conceived by one mind. Other times, they adopt comparable practices . . . . imitating or transforming, to varying degrees, the precise features of the previous player’s ideas.155

4. Surprises in Group Interaction

[I]mprovisers must respond creatively to surprises that constantly arise during performances. Unexpected turns of events occur everywhere: in the ever-changing detail of each part and in the periodic large-scale changes in repertory programs and formal structures that guide improvisations. The latter occur typically when the natural flow of ideas conceived in performance leads a particular improviser outside the group’s agreed-upon formats and other players follow along. Ultimately, the flexibility with which musicians treat repertory and musical arrangements, whether subtly ornamenting or substantially altering their features, enhances the improvisatory spirit of performances.156

5. Handling Error

A miscalculation on the soloist’s part can call into question the representations of other musicians and potentially obscure formal landmarks for

154. Id. at 363.
155. Id. at 368-69.
156. Id. at 374.
everyone. If someone is not aware of the problem he or she has created, other members may alert the musician by calling softly on the bandstand or, to avoid distracting the audience, by signaling visually. . . . [B]efore performances, [drummer] Roy Haynes used to decide upon the best place for [bassist] Don Pate to stand, because eye contact between them was crucial. "Sometimes, just a look, just eyes meeting, can tell you what's required of one musically," Pate explains. . . . Between Roy and . . . [Don], a look might indicate that . . . [Roy] wanted to pick up the tempo a little more or that he wanted to play more laid back. 157

6. Interplay Between and Precomposition and Improvisation

In the final analysis, the spontaneous and arranged elements of jazz presentations continually cross-fertilize and revitalize one another. Precomposed background lines or riffs, which add interest to the performance and, as musical landmarks, help soloists keep their bearings over a progression, also provide material that soloists can incorporate into their extemporaneous inventions. Conversely, supporting players, without external direction, can adopt a soloist's interesting phrase extemporaneously as the basis for a new accompanying riff. . . . In the renowned interplay within the Creole Jazz Band, [trombonist, cornetist] Joe Oliver would, at times, introduce a new break figure at the end of one chorus, and [trumpeter] Louis Armstrong would instantly absorb it to perform it subsequently in unison with Oliver at the break in the middle of the next chorus. 158

B. The Collective Conversation in Mediation

1. Striking a Groove

Kenneth Cloke comes very close to capturing the essence of groove in jazz when he explores the definition of spirit in mediation. He writes:

Defining spirit means defining the essence of life. The more specific we become in trying to define it, the less we understand it. This is because any effort to define a whole reduces it to a mere sum of its parts. . . . Spirit exists only in flux, in being rather than in thought, feeling, or sensation. It is domiciled nowhere, yet dwells everywhere. . . .

Spirit can be located in what we feel when we unite or collaborate, or when we act as one. These moments occur accidentally, without planning, sometimes in emergencies and crises, sometimes in the midst of extraordinary natural beauty . . . . They also occur when we discover com-

157. Id. at 379-80.
158. Id. at 383-84.
mon ground in mediation, feel deeply connected through honesty, empa-
thy, and compassion, resolve conflicts, and reach forgiveness.159

2. Listening and Interpreting Ideas

The jazz musician’s concept of listening and interpreting ideas closely parallels the concept as described by mediation professionals. Michelle LeBaron says that "[i]n deep listening, we pay exquisite attention to those with whom we work. . . [and] we are really willing to put ourselves out, stepping out of self-absorption into a liminal space where our agenda is clarity of mind and heart."160 Christopher Moore points out that active listening performs several functions in mediation such as: assuring the speaker that he or she has been heard; allowing the speaker and listener to verify that the precise meaning of the message has been heard; and allowing the speaker to explore his or her emotions about a subject, and to clarify what he or she really feels and why.161 This is very close to what the jazz musician does when listening and interpreting ideas. As in jazz, drawing correct inferences for purposes of interpretation is an important aspect of mediation. Roger Schwarz observes:

Process inferences are about the quality of conversation and the effectiveness of the group’s process and structure. You make a process inference when you privately conclude that the group members are acting consistently or inconsistently with a particular ground rule, . . . [or] operating out of a unilateral control theory in use . . . . In making a process inference, you try not to focus especially on the content of the conversation. In other words, you are interested in how the group members say whatever they say. . . . When you infer that some aspect of process is hindering the group, you make a decision about whether to intervene.162

In his trend-setting book, Improvisational Negotiation,163 mediation expert Jeffrey Krivis explains the importance of knowing when to listen and interpret in a mediation and when to act. He writes:

Each case has a rhythm of its own, a tempo that emerges during the session that will tell you when it’s time to listen and when it’s time to act.

160. LEBARON, supra note 58, at 134.
161. MOORE, supra note 87, at 176.
Actions that don’t follow that rhythm will be counterproductive. To succeed, you’ll need to feel the tempo of the mediation, getting in synch with the parties and their counsel by listening and following their cues. It’s almost like a drummer who maintains the beat of a jazz trio. The drummer listens for the clues from the lead player and learns quickly to adapt a beat to the music. You do the same by stepping into the shoes of each party and looking at the dispute through their eyes. To do this, be conscious of your preconceived notions about the outcome and let them go. The parties will get a sense that you understand them and are pulling for them to achieve their desired outcome. In this way you build a reservoir of trust you can draw from later.

3. Shaping the Larger Performance

In mediation, the counter-part to shaping the larger performance in jazz is setting the agenda. Barbara Gray defines this type of shaping as “direction setting”. She writes:

During the direction-setting phase, positive outcomes are associated with important procedural and substantive issues. During direction setting, stakeholders identify the interests that brought them to the table. They sort out which of their interests are the same, which are opposed, and which are unique or different and can form the basis for eventual trade-offs. . . . [S]takeholders articulate the values that guide their individual pursuits and begin to identify and appreciate a sense of common purpose or direction.164

In explaining one type of agenda setting—alternation of issues—Christopher Moore describes something very similar to shaping the performance by trading eights or fours in jazz. He writes, “A third model for agenda construction is the alternating issue approach. In this method, the parties alternate in choosing the topic of discussion. This structural solution allows the parties to proceed and often inhibits development of deadlocks.”165

Alternation is also a settlement option technique. He observes:

When there is no way to expand resources, the parties may alternate between the options each of them favors. In an alternating scheme, neither side forsakes his or her preferred option, but each is allowed to enjoy it at a different time. For example, to settle a domestic conflict over where to vacation, a couple might go to the mountains this year and to the seashore next year.166

164. BARBARA GRAY, COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS 74 (1989).
165. MOORE, supra note 87, at 245.
166. Id. at 279.
4. Surprises in Group Interaction

As we learned above, jazz musicians must at times respond creatively to surprises that constantly arise during performances. The same is true of mediation. Creating surprise and managing the participants’ response to it are important elements of dispute resolution. Robert Benjamin describes this mediation phenomenon in the context of the trickster:

Tricksters have traditionally used shock and humor to create dissonance. Among the Pueblo Indians, the trickster would become a clown, doing acts that were otherwise viewed as taboo to cause a rupture with the normal and ordinary patterns of thinking. . . . Breaking up established thinking frames allows people the opportunity to see matters differently and yields a greater openness to new ideas and options.167

Michelle LeBaron discusses surprise in the context of group interaction in terms of intuition. She observes:

On the surface, intuition may be difficult to see in action. Because we experience it as a surprise, we are unaware of its route. . . . In moments of surprise or surrender when we don’t know what to do, intuition emerges with an answer that does not come from nowhere. It comes from the somewhere of our experiences, deepened in the fire of reflection and gently held memories.168

5. Handling Error

Robert Benjamin has observed that the mediator’s use of his or her own errors, both intended and unintended, can be an effective technique to shift the context of the dispute. Much in the same way that a jazz musician detects and/or handles his jazz mates’ unintended error, the mediator uses his or her own vulnerability to normalize and relax the atmosphere. He writes:

[I]f the response of the mediator [to a party’s pointing out the mediator’s unintended error] is to listen effectively and give credence to her reality, acknowledge his vulnerability, and encourage her to bring any future “error” to his attention, then the result can be bolstering of the mediator’s credibility.169

168. LEBARON, supra note 58, at 125-26.
169. Benjamin, supra note 26, at 120.
Occasionally, a jazz musician will make an intentional error for its humorous effect or to test whether his jazz mates are paying close attention to the melody, harmony, or tempo of the tune as originally composed. Mediators do something very similar. Robert Benjamin notes:

There are some circumstances when the mediator might intentionally make a mistake for the parties to catch. This antic can work to foster the parties’ joint cooperation in checking the mediator. For example, purposeful miscalculation of numbers, or a request by the mediator for help in tabulating numbers, presses the parties into responsibility for their agreement. Mistakes allow the mediator to use his or her own vulnerability constructively to turn what appears to be a disadvantage into an advantage.170

6. Interplay Between Precomposition and Improvisation

As discussed above, precomposed background lines or riffs ("precompositions") serve as musical landmarks, helping soloists keep their bearings over a progression and also providing material that soloists can incorporate into their extemporaneous improvisations. Stated another way, precompositions are musical idioms recognizable by jazz musicians and inserted in a musical performance to lend structure to otherwise limitless improvisation. The interplay between precomposition and improvisation finds several counter-parts in negotiation and mediation.

Robert H. Mnookin speaks of a similar interplay when he describes the tension present when parties attempt to create value in the distributive aspects of a negotiation. He refers to the interplay as managing tension. He observes:

The challenge of problem-solving negotiation is to acknowledge and manage this tension. Keep in mind that this tension cannot be resolved. It can only be managed. The goal is to design processes for negotiation that allow value creation to occur, when possible, while minimizing the risks of exploitation.171

He further points out that preparation is the cornerstone of successful negotiation. Preparation consists of several items that we could call "precompositions." These are well known idioms recognizable by experienced negotiators and mediators alike that lend structure and organization to the process. They include: (1) identifying the issues and thinking about interests (yours and theirs); (2) contemplating value-creating opportunities; (3) knowing your BATNA (best alternative to a negotiated agreement) and seeking to improve it if possible; (4) establishing an ambitious but realistic aspiration level.172

170. Id.
172. Id. at 28.
Michelle LeBaron might describe the interplay between improvisation and precompositions in mediation in terms of the practice of “catching and releasing”—that is, engaging in creative activity interspersed with periods of changed activity, familiar movements, or even stillness. She explains:

The practice of catching and releasing is related to somatic intelligence because the answers we seek arise from our bodies and these answers are often related to movement. Tired of negotiating, we take a walk in a place that feeds our senses. Weary of concentrating, we find a beautiful image and drink it in with our eyes. Frustrated with our attempts to make progress on an issue or an outcome, we choose stillness and find energy. Needing to build a foundation for negotiation, we share a meal and find ourselves in a more constructively open place than we were before. Our bodies thus become instruments not only to receive and process information but to move us from stuck places to smooth places, from impasse to progress. In partnership with other practices, the practice of catching and releasing helps us work and play across differences more productively.173

Finally, Peter T. Coleman and Morton Deutsch might find the open (divergent) and closed (convergent) modes of thinking in mediation to be somewhat parallel to the interplay between precomposition and improvisation in jazz. They have observed:

The open and closed modes of experience are in opposition to each other, in that it is difficult to remain open to new alternative possibilities while trying to close in on a final decision. It is therefore useful to alternate from one mode to another during the problem-solving process.174

VI. EVALUATING THE PERFORMANCE

When there is understanding of the role of the audience, complete release and freedom come to the player. Exhibitionism withers away when the ... [player] begins to see members of the audience not as judges or censors or even as delighted friends but as a group with whom he is sharing an experience. When the audience is understood to be an organic part of the theater experience, the ... [player] is immediately given a host's sense of responsibility toward them which has in it no nervous tension.175

—Viola Spolin (On role of audience)

A. Evaluating the Jazz Performance

You have good nights and bad nights. ... But no night is ever just fantastic from beginning to end. You never put it all together the way you would like to....

173. LeBaron, supra note 138, at 192.
175. Spolin, supra note 6, at 13.
You're always on your way somewhere. To me, playing is generally a never-ending state of getting there.\textsuperscript{176}

--Bassist Art Farmer

Some years ago, Hod O'Brien was playing piano on a cold January night at Gregory's in New York, with Joe Puma on guitar and Ronnie Markowitz on bass. It was near closing time and there were only three male customers in the place. A big limousine pulled up outside the window, and Stan Getz and a friend hopped out and came into the tiny club for a drink. After listening for a bit, Stan got out his horn and sat in with the trio. While the he was playing, the front door opened and a guy looked in, apparently casing the place for single girls. Seeing none, he stood for a moment and listened to the saxophonist. Then he turned back toward the door. As he left, he said to the owner, "Well, he ain't no Stan Getz."\textsuperscript{177}

While the impromptu spectator's evaluation of saxophone playing in the above example may have been way off the mark, it is well known that, during collective improvising in a jazz performance, activities of creating, listening, and evaluation by the performers themselves become integral parts of the same process:

Outside of their performances, to refine their grasp of the abilities upon which improvisation depends, players constantly hone their skills as critics and expert listeners. When studying recordings or attending concerts by other players, they divide their attention among the individuals participating in a group's varied musical stream, evaluating the cogency and continuity of each part and following their interrelationships. "When I discovered the records [pianist] Bill Evans made at the Village Vanguard," [pianist] Fred Hersch says, "I especially appreciated that chamber music concept of real spontaneous give-and-take—that unity of direction established by a great solo, accompanied well." [Trumpeter] Bobby Ro-govin articulates the views of many others when he asserts that "you can only really appreciate jazz if you listen to the whole group. The soloist's part by itself is just one line in a whole painting. In a lot of cases, the most interesting things are what the rhythm section is playing. It's what those cats are playing that makes the soloists sound as great as they do."\textsuperscript{178}

B. Evaluating the Mediation Performance

Similar to jazz musicians, mediators and mediation advocates need to take time to evaluate their performance in mediation. Michelle LeBaron describes a real-life experience in which a group she was facilitating took time to evaluate what was happening in the group discussion and the effect that evaluation had on the continuation of the process:

\textsuperscript{176} BERLINER, supra note 14, at 284-85 (quoting Art Farmer).
\textsuperscript{177} CROW, supra note 29, at 153.
\textsuperscript{178} BERLINER, supra note 14, at 387.
After . . . initial discussions, I moved the entire [culturally diverse] group into the next planned exercise, a paper-and-pencil exploration of their cultural styles during conflict.

As we moved into this activity the energy level in the room dropped. I felt exhausted, as though suddenly overwhelmed with an intense need for sleep. I noticed that others were flagging as well. Listening with my body I began to inquire of myself: "What is tired in this moment? What has drained the lifeblood from this moment? What needs refreshment and revitalization?" Of course the obvious answers presented themselves as possibilities: perhaps people needed a break; perhaps we had tried to do too much in too short a time. But the issue seemed to be more than these garden-variety things.

I decided to ask the group the questions I had asked internally: "What's going on here? Have we missed an important junction?" As they looked up from their papers, checking in with themselves in the process, visible light bulbs went on in some faces. As we paused and talked, we realized that the previous topic had been brought to closure too quickly and that other things remained to be said.

As we shifted gears back to where we had left off, momentum and energy returned—both to me and the group. Their discussion deepened and more was learned about the things that had divided them in the past.179

VII. CONCLUSION

In any art form we seek the experience of going beyond what we already know. Many of us hear the stirring of the new, and it is the artist who must midwife the new reality that . . . (the audience) eagerly await[s]. . . . A player can dissect, analyze, intellectualize, or develop a valuable case history for his part, but if [s]he is unable to assimilate it and communicate it physically, it is useless.180

—Viola Spolin (On physicalization)

We began our journey into mediation, improvisation, and jazz with the thesis that in order to be a masterful negotiator, mediator and/or mediation advocate one has to not only be a musician at heart, but also a jazz musician—an improvisational artist. To prove this thesis we have approached the subject of improvisation generally from the perspective of mediation and jazz as performance arts, the roles of the jazz musician, the mediator, and the mediation advocate as creative problem solvers; the elements of jazz in mediation; and the collective conversation in jazz as compared with the collective conversation in mediation. What has come from this exploration is a recognition, at a minimum of the important role that creativity and inspiration play both in the mastery of jazz and of mediation. In an interview

conducted by Martin Sperber in the 1970s, Dave Brubeck had this to say about creative inspiration:

MS: How do you relate the concepts of creativity and inspiration to improvisation?

Brubeck: I have thought about this idea of inspiration and being inspired by the musicians of the group. It is important. It happens. It is a rare thing when everything seems to come together, maybe a half-dozen times a year. I imagine if one discovered all the secrets that make it happen, it could occur more often.

MS: You consciously take risks?

Brubeck: I have done it in the hope that I can eventually be this totally inspired person who can do things never thought of before. There have been times that I have played things beyond my technique and that had never been rehearsed. I think it is possible to "lock into" something beyond yourself that might be termed creative inspiration.  

Dave Brubeck could just as easily have been talking about mediation.

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181. Sperber, supra note 11, at 73-74 (quoting Dave Brubeck).