What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles

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I. INTRODUCTION

A great deal of discussion in the evolving dispute resolution literature has centered on the notion of mediator orientation or "style" and what model or models of mediation are (or will become) accepted in the field.[1] In this discussion, mediators who use a facilitative (or elicitive) approach are typically contrasted with those who use an evaluative (or directive) approach and much debate has examined the propriety of these differing approaches.[2] A parallel discussion has been occurring concerning the role of attorneys in both adversarial and nonadversarial disputing.[3] At the intersection of these two discussions, commentary has begun to examine the role of attorneys in shaping the practice of mediation.[4]

In this Article, we focus on how attorneys shape mediation in their role as buyers of mediation services. Specifically, we examine the role an attorney's predispositions about how best to handle conflict plays in the selection of a mediator and, thus, in shaping the norms of mediation practice. In this way, we attempt to shed some light on "the role of the parties and lawyers [in mediation] and the complex relationship between what they want and do and what the mediator wants and does"[5]—focusing in particular on how the attorney, in selecting the mediator, may influence the conduct of the mediation.

In Part I, we describe different orientations to mediation, the role of attorneys in selecting mediators, and how attorney conflict style may influence the mediator selection process. In Part II, we present the results of an empirical study designed to explore the relationship between conflict style and preference for different orientations to mediation. In Part III, we discuss the implications of our empirical results for the field of mediation. In particular, our study provides the first empirical examination of the widely used contrast between facilitative and evaluative mediation, finding empirical support for these constructs, but demonstrating that they are not opposite poles on a continuum. In addition, the results of the study show interesting relationships between conflict styles and preferences for particular mediator behaviors. Less directly, we explore the implications of our results for the

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[1] *See infra* notes 6–23 and accompanying text.

[2] *Id.*

[3] See *infra* notes 24–46 and accompanying text.

[4] *See infra* notes 198–204 and accompanying text.

[5] Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 34 n.130 (2003) [hereinafter Riskin, *New New Grid*] (arguing that this relationship has been neglected).

question of how attorneys, as buyers of mediation services, may influence mediator orientations. We conclude that the variety of conflict styles exhibited by our participants and the range of mediator behaviors they valued suggest that a narrowing of the field to one form of mediation is unlikely.

II. THE SELECTION OF MEDIATORS

A. *Orientations to Mediation*

At its most basic, mediation may be defined as a facilitated bargaining process in which a neutral third party assists disputants to reach an accord, but generally has no authority to impose an agreement.[6] Over the past two decades, however, scholars and practitioners have debated the contours of the dispute resolution processes and practices that appropriately fall within the rubric of "mediation"—i.e., what it is that mediators do or should do. A variety of ways to categorize these various processes and practices have emerged from this discussion.[7] In the most influential (and most debated) of these, Professor Leonard Riskin developed "a vocabulary and a set of concepts for distinguishing among disparate processes that were commonly labeled mediation," in which he contrasted "evaluative" and "facilitative" mediator orientations.[8] By now, the concepts of evaluation as contrasted with

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[6] *See generally* Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982).

[7] *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION (1994) (distinguishing transformative mediation); James Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of 'Good Mediation'?*, 19 FLA. ST. U. L. REV. 47 (1991) (categorizing mediators as engaging in "trashing," "bashing," or "hashing it out"); Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOT. J. 217 (1995) (reviewing different models of mediation); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986) (describing "bargaining" and "therapeutic" styles); Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1 (1997) (distinguishing mediators on the basis of how "transparent" they are); Ellen Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997) (distinguishing "norm-generating," "norm-educating," and "norm-advocating" mediation processes). *See generally* Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69 (2005).

[8] Riskin, *New New Grid*, *supra* note 5, at 4. *See* Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994); Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) [hereinafter Riskin, *Mediator Orientations*]. Riskin also distinguished different mediator orientations to the definition

facilitation have become part of the standard mediation nomenclature.

The evaluative mediator "assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement—based on law, industry practice or technology—and that she is qualified to give such guidance by virtue of her training, experience, and objectivity."[9] Thus, an evaluative "move" in mediation is one where the mediator communicates to one or more parties her ideas about the strengths or weaknesses of a party's claims, about how that claim may fare in court, about what is a fair or reasonable outcome in the dispute, or about other matters in which the mediator relies on her own knowledge or experience to provide analysis or information to the parties.[10]

In contrast, a facilitative mediator "assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do."[11] A facilitative move, then, is one that encourages the parties *themselves* to provide information, consider the merits of their arguments, develop and offer proposals, and generally to take responsibility for both the process and substantive aspects of the mediation.[12]

Recently, in response to a variety of criticisms of the evaluative/facilitative distinction,[13] Riskin revised his conceptual framework

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of the problem(s) to be addressed in mediation. This dimension runs from a narrow problem definition—focusing on litigation issues—to a broad definition of the problem—including "business interests," interests in personal or professional relationships, and the interests of the broader community. *Id.* at 19–22. Crossing Riskin's two dimensions results in four basic orientations: evaluative-narrow, evaluative-broad, facilitative-narrow, and facilitative-broad. *Id.* at 24. For examples of the debate generated by Riskin's Grid, see symposia in J. DISP. RESOL. (2002); FLA. ST. U. L. REV. (1997); and sources cited *infra* note 13.

[9] Riskin, *Mediator Orientations*, *supra* note 8, at 24.

[10] *See id.*

[11] *Id.*

[12] *See id.*

[13] For criticism of the evaluative/facilitate distinction, see, for example, Kimberlee Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31–32 (1996); Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid"lock*, 24 FLA. ST. U. L. REV. 985, 1001–03 (1997). Professor Stulberg has criticized the grid for failing to distinguish between evaluation and directiveness on the part of the mediator:

> The central values of the mediation process appear least congruent with the notion of the 'evaluative' mediator as portrayed by the grid. In its rich, widespread history, mediation is not a process designed for having an expert apply some external criteria to assess the strengths and weaknesses of the parties' cases.

to focus on "directive" mediator behaviors as contrasted with "elicitive" behaviors.[14] This new conception "focus[es] on the extent to which *almost any conduct* by the mediator *directs* the mediation process, or the participants, toward a particular procedure or perspective or outcome, on the one hand or, on the other, *elicits* the parties' perspectives and preferences—and then tries to honor or accommodate them."[15] Thus, an important dynamic across the range of evaluations that a mediator might offer during mediation is the degree to which the information or analysis influences—or is intended to influence—the parties to act in a particular manner.[16] More than the fact of an evaluation, it is the directive quality of evaluations that, when present, causes the greatest concern among commentators and theorists, as directiveness is often seen as undermining party autonomy, which is a key value in mediation.[17] An extreme—and in the eyes of many commentators, problematic—example of such directive behavior is the mediator who pushes or prods parties to accept a particular settlement.[18] Riskin contrasts these directive mediator moves with elicitive behaviors that honor the parties' decisionmaking autonomy.[19]

The focus on these mediator orientations—or styles—has generated much useful discussion and debate.[20] Despite one's ultimate conclusion

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Id. at 1001. Professor Chris Guthrie argues that "[a]lthough most in the mediation community accept Riskin's *positive* assertion that mediation as currently practiced includes both facilitation and evaluation, a vocal group of critics rejects Riskin's pluralist view of mediation on *normative* grounds." Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 146–47 (2001).

[14] Riskin, *New New Grid*, *supra* note 5, at 18–20.

[15] *Id.* at 30 (emphasis in original).

[16] In looking back at his grid, Professor Riskin has argued:

> [A]s best as I can reconstruct, I *meant* the term "evaluate" to include a certain set of predictive or judgmental or directive behaviors by the mediator that tend (or by which the mediator means) to direct (or influence or incline) the parties toward particular views of their problems, toward a particular outcome, or toward settlement in general.

Riskin, *New New Grid*, *supra* note 5, at 18–19 (emphasis in original).

[17] *See, e.g.*, Stulberg, *supra* note 13, at 1001–03.

[18] Riskin, *New New Grid*, *supra* note 5, at 20. *But cf.* John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 851 (1997) [hereinafter Lande, *Transform*] (asserting that many parties or their attorneys prefer "strong" mediators and dismiss others as too "touchy-feely").

[19] *See* Riskin, *New New Grid*, *supra* note 5, at 30.

[20] Riskin, *New New Grid*, *supra* note 5, at 4 n.5 (collecting articles discussing

about what processes and procedures are appropriately called "mediation," it is clear that in order to understand how a mediator is likely to conduct a mediation, it is useful to consider the mediator's style or orientation to the process.[21] Understanding mediator orientations can inform a variety of decisions by the disputants and their attorneys, including the selection of a dispute resolution process, decisions about how to prepare for mediation, and the approach taken within the mediation.[22] Importantly, understanding different mediator orientations is also useful for parties or attorneys attempting to choose a mediator.[23]

B. *Lawyers and Mediator Selection*

In this context, it is important to note the growing involvement of lawyers as advocates in the mediation of disputes, and the common intuition that this development is both changing the way mediations are typically conducted, and changing the predominant view of the nature of the process itself.[24] In court-sponsored mediation programs, disputants are frequently represented or advised by legal counsel in mediation.[25] In such circumstances, there is every reason to expect that disputants will be greatly

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Riskin's grid). *See also* Stulberg, *supra* note 13, at 1004–05 (arguing that maintaining a revised understanding of the evaluative and facilitative distinction will assist advocates preparing for mediation, will ground mediators in a dominant approach, and assist policy makers in developing standards for mediators); Lande, *Transform*, *supra* note 18, at 850 n.40 ("[I]t is probably impossible to create a truly valid measure of [the evaluative-facilitative] dimension. This need not, however, prevent theorists and participants in the mediation market from finding the concept useful.").

[21] Riskin, *New New Grid*, *supra* note 5. For another recent summary of the literature on mediation orientation, see E. Patrick McDermott & Ruth Obar, *"What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 80–89 (2004).

[22] *See* Riskin, *New New Grid*, *supra* note 5, at 4.

[23] *Id.*; *see also id.* at 6 n.11 (asserting that original grid has been used to aid the selection of mediators).

[24] *See* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?* 79 WASH. U. L.Q. 787, at 788–89 (2001); Lande, *Transform*, *supra* note 18, at 841 ("Where mediation becomes routinely integrated into litigation practice, we can expect that this will significantly alter both lawyers' practices in legal representation and mediators' practices in offering and providing mediation services.").

[25] *See* Welsh, *supra* note 24, at 796–97 (noting that in the 1970s, "[l]awyers were not welcome" in mediations, but that now, in court-connected nonfamily mediation, "attorneys attend and dominate these mediation sessions while the disputants play no or a much-reduced role").

influenced by their attorney's advice and will have little or no role in the selection of a mediator.[26] There is growing suspicion, and some empirical evidence, that attorneys "increasingly are the gatekeepers to ADR [alternative dispute resolution] processes."[27]

1. *Involvement of Lawyers in Mediation*

At the beginning of the modern mediation movement, in the 1970s and 1980s, many viewed mediation as a distinct alternative to court-connected procedures, and the participation of lawyers was generally thought to be unnecessary and even undesirable.[28] Since that time, lawyers have played a growing role in alternative dispute resolution (ADR) processes. Significantly, mediation programs have been adopted in increasing numbers across the country, in both state and federal courts.[29] More and more jurisdictions require mediation before trial[30] or require attorneys to advise their clients about dispute resolution processes.[31] There is now widespread familiarity with mediation among attorneys,[32] and substantial numbers of attorneys now report that they have represented clients in mediation, have taken courses in mediation or dispute resolution in law school, or have served as neutrals.[33]

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[26] *See infra* notes 36–46.

[27] Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyers' Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 391 (1997). We focus here primarily on court-connected mediation in the context of non-family civil litigation. In some other substantive areas, such as family mediation, clients may play a more central role.

[28] *See* Welsh, *supra* note 24, at 794–96.

[29] *See generally* Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459, 460 (2004) [hereinafter Wissler, *Barriers*] (assessing empirical studies); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 144–47 (2000) [hereinafter Lande, *Getting the Faith*].

[30] *See* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE APP. B (2d ed. 1994 & Supp. 1997) (listing legislation).

[31] Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L.J. 199, 206 n.33 (2002) [hereinafter Wissler, *Does Familiarity Breed Content?*] (collecting examples of state and federal statutes and rules requiring consideration of ADR).

[32] Wissler, *Barriers*, *supra* note 29 at 479, (finding that 83% of civil litigators surveyed said they are able to explain "very well" the process of mediation to their clients).

[33] *See* Wissler, *Does Familiarity Breed Content?*, supra note 31, at 208–10. Wissler,

Studies have found that attorneys who have represented clients in ADR processes or served as neutrals are more likely to refer their clients to such processes.[34] Therefore, we can expect that this increased exposure to mediation will drive further increases in its use.

Some view the trend toward increased involvement of lawyers as a natural response to the growing use of mediation in court-connected disputes, and see mediation primarily as an enhancement to the settlement process.[35] Others lament this development as corrupting the movement's original values and vision.[36] However viewed, as a broader range of cases is routinely involved in mediation, lawyers will increasingly be in a position to advise clients about the use of mediation and the selection of mediators for their disputes.[37]

2. *Lawyer Selection of Mediators*

As a general matter, clients typically look to attorneys for guidance on court-related processes. For example, clients usually play a limited role in negotiations that occur outside mediation,[38] and the decision whether to settle is likely to be influenced to a significant degree by their attorney's views.[39]

Barriers, *supra* note 29 at 460 (reporting that a majority of attorneys in most studies have reported having used ADR at least once).

[34] *See* Wissler, *Does Familiarity Breed Content?*, *supra* note 31, at 214–15 (collecting studies).

[35] Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 4–5 (2001).

[36] *Id.* at 3–4.

[37] *See* Lande, *Transform*, supra note 18, at 881 ("As mediation becomes more common, and especially where the courts are authorized to order cases into mediation, most lawyers will feel the need to be able to advise clients about the use of mediation, select appropriate mediators, and competently represent their clients in mediation."); *see generally* Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999) (discussing approaches to attorney role in mediation); Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369 (1998) (same).

[38] Sternlight, *supra* note 37, at 273 n.15, 333.

[39] *See id.* at 318–19 ("[C]lients are largely dependent upon their agents or attorneys for information as to the strengths and weaknesses of each side's case and for an evaluation of the advantages and disadvantages of a proposed settlement."); Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC.

Similarly, clients may play a somewhat limited role even within the context of mediation.[40] Consistent with this, we would expect to find that most litigants will tend to defer to their attorney regarding the choice of a suitable mediator when a case is referred to mediation. Roselle Wissler, reviewing empirical research examining the use of alternative dispute resolution processes, finds that attorneys do wield significant influence on clients' decisions regarding ADR, including mediation.[41] In particular, there is evidence that litigants are generally unfamiliar with ADR[42] and that they typically do not initiate consideration of the use of ADR.[43] She concludes that a "key factor in litigants' willingness to use ADR is the recommendation and encouragement of their attorneys."[44] Similarly, Professor John Lande found that a substantial percentage of the business executives he studied received much of their information about ADR from their attorneys.[45] As attorneys become more involved in mediation and are increasingly able to claim the role of dispute resolution specialists, they are likely to present themselves as experts who can faithfully guide clients through the process.[46]

INQUIRY 795, 800 (1998) (describing the ways in which lawyers influence clients' settlement decisions as "creating initial expectations, preparing clients for the settlement negotiations, and selling the settlement proposal to the client"); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82, 119–21 (1997) (concluding from experimental results that attorneys, at least under some circumstances, are likely to persuade their clients to adopt the attorney's preferred analysis about whether to settle).

[40] *See* Welsh, *supra* note 24.

[41] *See* Wissler, *Does Familiarity Breed Content?*, *supra* note 31, at 204–05.

[42] *See* Wissler, *Barriers*, *supra* note 29, at 462 n.11; Wissler, *Does Familiarity Breed Content?*, *supra* note 31, at 203 n.19 (collecting authorities).

[43] *See* Wissler, *Barriers*, *supra* note 29, at 462 n.11; Wissler, *Does Familiarity Breed Content?*, *supra* note 31, at 204 n.22 (reviewing studies).

[44] Wissler, *Does Familiarity Breed Content?*, *supra* note 31, at 205. That choice may be more or less appropriate depending upon the nature of the dispute, the nature of the clients, and the needs and interests of the clients. Sternlight, *supra* note 37, at 348–49 (asserting that attorneys need to discuss with clients their mutual roles and responsibilities in advance of a mediation, and divide them appropriately).

[45] Lande, *Getting the Faith*, *supra* note 29, at 209.

[46] *See id.* at 155–57 (explaining how claims of specialized knowledge are key to professional legitimacy); Guthrie, *supra* note 13, at 166 ("[L]awyers are likely to find that non-lawyers perceive them as professionals to whom they should defer because of their perceived intelligence and substantive expertise in innumerable legal areas."). Professor Guthrie also cites polling evidence of the public's perception that lawyers are "smart, knowledgeable, and competent problem solvers in civil disputes." *Id.* at 167 (citing Gary A. Hengstler, *Vox Populi*, 79 A.B.A. J. 60, 60 (1993)).

Professor Lande has suggested that, as a consequence of their central role as advocates in mediation, attorneys become the de facto "buyers" of mediation services.[47] Specifically, Professor Lande explains:

> In a large, diverse, and somewhat impersonal market of mediation services, buying those services considered appropriate for particular cases is an important and difficult task, which is often performed by the principals' lawyers. The lawyers are repeat players who become familiar with the disputing practices and practitioners in their community and thus are usually in a better position than their clients to serve as expert shoppers for mediation services.[48]

Therefore, it is attorneys who will frequently play the central role in selecting neutrals to mediate their clients' cases.

As is likely the case with any effort to procure professional services, a variety of factors are likely to come into play in selecting a mediator, including considerations of cost, experience, expertise, reputation, or the recommendations of colleagues.[49] One predominant consideration is likely to be the mediator's orientation or style—or how the mediator is predisposed to conduct the mediation.[50] In the professional literature, attorneys are frequently advised to consider carefully the choice of a mediator, including the style the mediator employs.[51] Attorneys have been given a vocabulary to use in selecting mediators based on their orientation or style,[52] and mediators

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[47] *See* Lande, *Transform*, *supra* note 18, at 847. *See also* Welsh, *supra* note 24, at 805 (asserting that attorneys "generally choose the mediation process and the mediator").

[48] Lande, *Transform*, *supra* note 18, at 847.

[49] *See id.* at 848–49.

[50] *Id.* at 849 ("Mediation buyers may be especially interested in distinguishing mediation services based on what mediators actually *do* in mediation.").

[51] *Id.* at 896 ("[l]awyers should become familiar with the various styles of mediation practice in their local culture so they can competently . . . select mediators appropriate for particular cases . . . ."); *see also* Michael J. Roberts, *Choosing the Right Mediator: A Guide to Effective Mediation Styles*, MEDIATE.COM, http://mediate.com/articles/roberts3.cfm (last visited Oct. 24, 2006); Paula M. Young, *The Who Of Mediation-Part I: A New Look at Mediator Styles?*, MEDIATE.COM, *available at* http://www.mediate.com/articles/young15.cfm?nl=75 (last visited April 29, 2005); Paula M. Young, *The Who of Mediation - Part II: Wisely Choosing a Mediator*, MEDIATE.COM, April 2005, http://www.mediate.com/articles/young16.cfm?nl=75 (discussing the evolution of the debate over mediation styles, and reviewing prescriptive literature regarding choosing mediators).

[52] Riskin, *Mediator Orientations*, *supra* note 8, at 38–39; Riskin, *New New Grid*, *supra* note 5, at 4.

have been provided with tools for assessing their style.[53] Indeed, one of the reasons theorists have attempted to describe mediator styles is to "help parties in conflict and their lawyers decide . . . how to select a mediator."[54]

C. *Conflict Style and Mediator Selection*

In this attorney-driven consumer model of mediation, an attorney's "own general preferences about mediator styles and goals" are likely to play a significant role in the selection process.[55] Various characteristics of the case, the parties, and the attorneys may influence the selection of a mediator. One factor that is likely to influence an attorney's choice of a mediator is the compatibility between the attorney's perception of the mediator's orientation to mediation and the attorney's own conflict style or general predispositions about how to handle conflict. Conflict or bargaining styles are "relatively stable, personality-driven clusters of behaviors and reactions that arise in negotiating encounters" such as mediation.[56] How an attorney is typically inclined to approach conflict more broadly is likely to influence the attorney's preferences and expectations about how dispute resolution within mediation should proceed.

One influential conception of conflict style, the dual concern model, proposes that an individual's preferred method of handling conflict is based on two underlying dimensions: assertiveness and empathy.[57] The

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[53] *See also* Jeffrey Krivis & Barbara McAdoo, *A Style Index for Mediators*, 15 ALTERNATIVES TO HIGH COST LITIG. 157 (1997) (self-scoring Mediator Classification Index).

[54] Riskin, *Mediator Orientations*, *supra* note 8, at 38–39; Riskin, *New New Grid*, *supra* note 5, at 4.

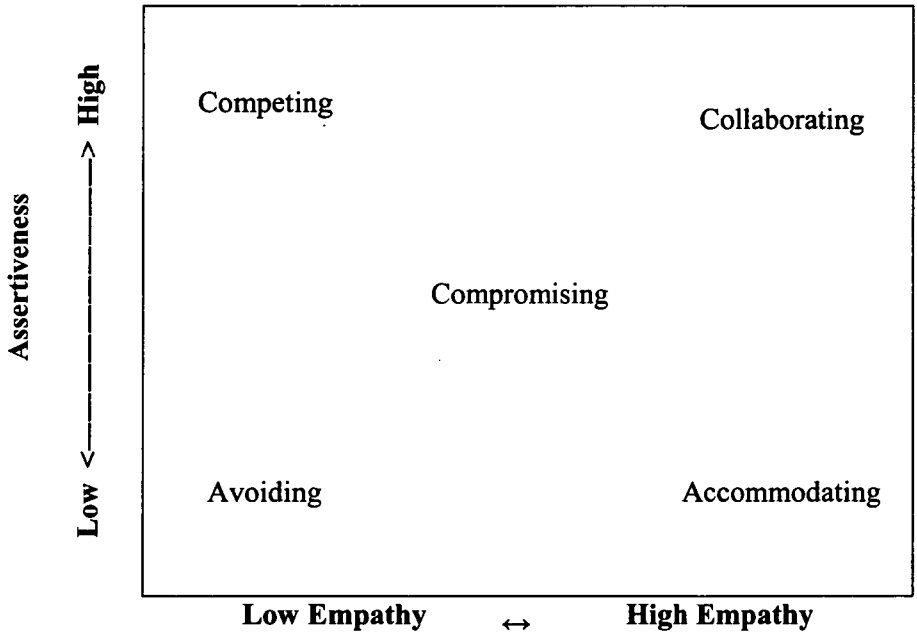
[55] Lande, *Transform*, *supra* note 18, at 849.

[56] G. Richard Shell, *Bargaining Styles and Negotiation: The Thomas-Kilmann Conflict Mode Instrument in Negotiation Training*, 17 NEGOT. J. 155, 156 (2001).

[57] Many theorists in a variety of disciplines have adopted this dual concern approach to describing and assessing conflict and negotiation behavior, and have used a variety of descriptive terms for the relevant dimensions. *See, e.g.*, ROBERT R. BLAKE & JANE S. MOUTON, THE MANAGERIAL GRID; KEY ORIENTATIONS FOR ACHIEVING PRODUCTION THROUGH PEOPLE (Gulf Publishing Co. 1964) (articulating the dual concerns as concern for production and concern for people/disputants); Robert H. Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOT. J. 217, 223 (1996) (assertiveness and empathy); M. Afzalur Rahim, *A Measure of Styles of Handling Interpersonal Conflict*, 26 ACAD. MGMT. J. 368 (1983) (concern for self and concern for others); KENNETH W. THOMAS & RALPH H. KILMANN, THOMAS-KILMANN CONFLICT MODE INSTRUMENT 7 (2002) [hereinafter *TKI*] (assertiveness and cooperativeness); *see also* JEFFREY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION (1975)

assertiveness dimension focuses on the degree to which one is concerned with satisfying one's own needs and interests.[58] In contrast, the empathy (or cooperativeness) dimension focuses on the extent to which one is concerned with satisfying the needs and interests of the other party.[59] The intersection of these two dimensions of concern yields five "conflict handling modes," or strategic conflict preferences—competing, collaborating, avoiding, accommodating, and compromising (see Figure 1).[60]

Figure 1. Conflict Handling Styles



(interpersonal orientation and negotiation); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002) (adversarial and problem solving negotiators); GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983) (cooperative and competitive negotiation styles).

[58] *See* BLAKE & MOUTON, *supra* note 57; Mnookin et al., *supra* note 57, at 221; Rahim, *supra* note 57; *TKI*, *supra* note 57.

[59] BLAKE & MOUTON, *supra* note 57; Mnookin et al., *supra* note 57, at 219–21; Rahim, *supra* note 57; *TKI*, *supra* note 57.

[60] *See* BLAKE & MOUTON, *supra* note 57; Mnookin et al., *supra* note 57, at 223–24; Rahim, *supra* note 57; *TKI*, *supra* note 57.

A "competitive" conflict style maximizes assertiveness and minimizes empathy.[61] Competitive types enjoy negotiation, seek to dominate and control the interaction, and tend to look at it as a game or a sport with a winner and a loser; they pay less attention to the relationship underlying the dispute since they are focused on winning and claiming the biggest piece of the pie.[62] Competitive types approach conflict saying: "This looks like a win-lose situation, and I want to win."[63]

An "accommodating" conflict style, in contrast, maximizes empathy and minimizes assertiveness.[64] Accommodating types derive satisfaction from meeting the needs of others, are perceptive and intuitive about emotional states, detect subtle verbal and nonverbal cues, and tend to have good relationship building skills; they tend to deflect or give up in the face of conflict out of concern for the relationship, and tend to be vulnerable to competitive types.[65] Accommodating types tend to believe that "[b]eing agreeable may be more important than winning."[66]

An "avoiding" conflict style is both low in assertiveness and low in empathy.[67] Avoiders can be adept at sidestepping pointless conflict, are able to exercise tact and diplomacy in high-conflict situations, and can artfully increase their own leverage by waiting for others to make the first concession.[68] At the same time, however, they may "leave money on the table" and miss the opportunities for mutual gain that conflict can present, neglect underlying relationships, and allow problems to fester by ignoring them.[69] Avoiding types worry that: "I don't want to give in, but I don't want

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[61] *TKI*, *supra* note 57.

[62] *See, e.g.*, Shell, *supra* note 56, at 169 (stating that competitive negotiators, such as "litigation attorneys who enjoy their work," do very well in "tough, traditional bargaining"); Mnookin et al., *supra* note 57, at 223; Melissa L. Nelken, *The Myth of the Gladiator and Law Students' Negotiation Styles*, 7 CARDOZO J. CONFLICT RESOL. 1, 4 (2005); *see also* Sarah Childs Grebe, *Building on Structured Mediation: An Integrated Model for Global Mediation of Separation and Divorce*, 12 MEDIATION Q. 15, 20–21 (1994).

[63] Alan K. Johnson, *Conflict-handling Intentions and the MBTI: A Construct Validity Study*, 43 J. PSYCHOL. TYPE 29, 29 (1997).

[64] *TKI*, *supra* note 57.

[65] *See, e.g.*, Shell, *supra* note 56, at 167; Mnookin et al., *supra* note 57, at 224; Nelken, *supra* note 62, at 9.

[66] Johnson, *supra* note 63, at 29.

[67] *TKI*, *supra* note 57.

[68] *See, e.g.*, Shell, *supra* note 56, at 168; Mnookin et al., *supra* note 57, at 224–25; Nelken, *supra* note 62, at 6.

[69] *See, e.g.*, Shell, *supra* note 56, at 168; Mnookin et al., *supra* note 57, at 224–25;

to talk about it either."[70]

"Collaborative" types are highly assertive and highly empathetic at the same time,[71] therefore they are concerned about the underlying relationship and are sensitive to the other person's needs while simultaneously being committed to having their own needs met.[72] Collaborators often see conflict as a creative opportunity and do not mind investing the time to dig deep and find a win-win solution, but may be inclined to spend more time or resources than are called for under the circumstances.[73] Collaborative types approach conflict saying: "Let's find a way to satisfy both our goals."[74]

Finally, a "compromising" conflict style is intermediate on both the assertiveness and empathy dimensions.[75] Compromisers value fairness and expect to engage in some give and take when bargaining.[76] A compromise approach allows those in conflict to take a reasonable stance that often results in an efficient resolution to the conflict.[77] However, compromisers sometimes miss opportunities by moving too fast to split the difference, failing to search for trades and joint gains, and may neglect the relational aspects of the dispute.[78] Compromisers approach conflict saying: "Let's meet halfway on this issue."[79]

Although individuals are likely to show stronger and weaker preferences for each mode of handling conflict, these approaches are not mutually exclusive of one another and individuals may be predisposed to favor several different strategies.[80] Ranking the preferences of an individual for each mode is thought to suggest the tactical order in which that individual would prefer to employ each approach in a conflict situation if possible, though individuals may adapt their conflict resolution style to the specifics of a

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Nelken, *supra* note 62, at 6.

[70] Johnson, *supra* note 63, at 29.

[71] *TKI*, *supra* note 57.

[72] *See, e.g.*, Shell, *supra* note 56, at 168–69; Nelken, *supra* note 62, at 5.

[73] *See, e.g.*, Shell, *supra* note 56, at 168–69; Nelken, *supra* note 62, at 5.

[74] Johnson, *supra* note 63, at 29; *see also* Mnookin et al., *supra* note 57, at 226, (characterizing those with high assertiveness and high empathy as "effective negotiators").

[75] *TKI*, *supra* note 57.

[76] *See, e.g.*, Shell, *supra* note 56, at 167–68; Nelken, *supra* note 62, at 5–6.

[77] *See, e.g.*, Shell, *supra* note 56, at 167–68; Nelken, *supra* note 62, at 5–6.

[78] *See, e.g.*, Shell, *supra* note 56, at 167–68; Nelken, *supra* note 62, at 5–6.

[79] Johnson, *supra* note 63, at 29.

[80] *See* Shell, *supra* note 56, at 166.

particular dispute.[81] Thus, one's conflict style predispositions reflect general preferences for how to handle conflict across situations, but are surely not the sole determinants of behavior in particular conflicts.[82]

We posit that an attorney's preferences for these different modes of handling conflict are likely to influence the attorney's selection of a mediator based on the attorney's perceptions of the mediators' predispositions.[83] For example, if an attorney advocates for clients in a competitive fashion but generally prefers to avoid direct confrontation in mediation, the attorney may prefer a relatively evaluative, narrowly focused, and directive mediation style. Similarly, such an attorney may prefer mediators whose orientation to mediation enables strategic bargaining behavior through frequent caucusing, who emphasize the legal merits and economic claims of the parties, and who minimize the involvement of clients. Conversely, an attorney who prefers advocating for clients in a cooperative effort to resolve the dispute and who believes that clients can and ought to play a substantial role in the mediation, might prefer a mediator whose orientation serves to encourage client participation and who seeks primarily to facilitate each side's presentation of facts and information along with their respective interests and concerns related to settlement. In other words, we might expect attorneys to choose mediators with an orientation they believe will complement their own strengths and predispositions.

III. CONFLICT STYLES AND MEDIATION PREFERENCES: AN EMPIRICAL STUDY

Despite the growing role of attorneys in mediation generally, and in the selection of mediators in particular, there has been little empirical examination of how attorneys select mediators. This part reports an empirical

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[81] Johnson, *supra* note 63, at 29–30 (noting that situational factors are also thought to have an influence on the conflict resolution style used to resolve a particular dispute).

[82] *See* Terrance Q. Percival et al., *Myers-Briggs Type Indicator and Conflict-Handling Intention: An Interactive Approach*, 23 J. PSYCHOL. TYPE 10–11 (1992) ("[T]here is general agreement that both personality and situational variables significantly influence the approaches people use to handle conflict."); Johnson, *supra* note 63, at 29–30 (asserting that situational factors "have a strong influence" on the conflict style, and that conflict style scores tend to reflect "intentionality and general preferences" rather than predict behavior in specific conflict situations).

[83] For evidence that conflict-style preferences influence disputing behavior, see Roger J. Volkema & Thomas J. Bergmann, *Conflict Styles as Indicators of Behavioral Patterns in Interpersonal Conflicts*, 135 J. SOC. PSYCHOL. 5 (1995) (reporting empirical results and reviewing studies with mixed results).

study that was designed to explore one aspect of this selection process—the relationship between conflict style and preferences for different mediator behaviors and qualifications.

A. *Method*

The participants for this study were sixty-eight upper-class law students at two law schools.[84] Faculty asked for volunteers, and participation occurred during or at the end of class. Each student was asked to complete the Thomas-Kilmann Mode Instrument (TKI), respond to a survey designed to explore preferences concerning the stylistic qualities and behaviors of mediators, and to provide brief demographic information.

The TKI is a standardized personality inventory[85] consisting of thirty forced choice questions[86] that measure conflict-handling preferences along two dimensions: assertiveness and cooperation (or empathy).[87] Respondents receive scores indicating the strength of their preferences for each of five conflict-handling preferences: Competing (high assertiveness, low empathy),[88] Accommodating (low assertiveness, high empathy),[89] Avoiding (low assertiveness, low empathy),[90] Collaborating (high assertiveness, high

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[84] The participants were enrolled in courses in Conflict Theory (N = 23), Estates and Trusts (N = 22), Negotiation (N = 16), and Professional Responsibility (N = 7). The participants ranged in age from twenty-two to fifty with a mean of twenty-eight; approximately one-half of the participants were female and one-half male.

[85] *See* Kenneth W. Thomas & Ralph H. Kilmann, *Comparison of Four Instruments Measuring Conflict Behavior*, 42 PSYCHOL. REP. 1139 (1978) (examining test-retest reliabilities, internal consistencies, and convergent test validities).

[86] Each of the thirty questions contains a pair of statements, with each statement describing a tendency that is consistent with one of the five modes of handling conflict, and the respondent is asked (i.e. "forced") to choose between the two as to which best represents his or her approach to handling a typical conflict; each mode is paired with the other four modes an equal number of times. *See* Thomas & Kilmann, *supra* note 85, at 1140; TKI, *supra* note 57, at 1.

[87] TKI, *supra* note 57, at 7.

[88] Examples of responses that indicate a competitive orientation include: "I am usually firm in pursuing my goals," "I press to get my points made," and "I try to show the other person the logic and benefits of my position." TKI, *supra* note 57, at 2–4.

[89] Responses that indicate an accommodating orientation include, for example: "Rather than negotiate the things on which we disagree, I try to stress those things on which we both agree," "I might try to soothe the other's feelings and preserve our relationship," and "Sometimes I sacrifice my own wishes for the wishes of the other person." *Id.*

[90] Responses indicating an avoiding orientation include, for example: "There are

empathy),[91] and Compromising (intermediate in both assertiveness and empathy).[92]

The mediator preference survey asked respondents to assume the role of an attorney who represented clients in disputes that could end up in mediation. They were asked to rate the importance of each of twelve mediator qualifications[93] and their preferences for sixteen typical mediator behaviors[94] on five-point scales.[95] Relationships between participants' preferences for these mediator qualifications and behaviors and their conflict styles were examined.

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times when I let others take responsibility for solving the problem," "I try to do whatever is necessary to avoid useless tensions," and "I try to postpone the issue until I have had some time to think it over." *Id.*

[91] Examples of a collaborative orientation include these responses: "I attempt to deal with all of his/her and my concerns," "I consistently seek the other's help I working out a solution," and "I attempt to get all concerns and issues immediately out in the open." *Id.*

[92] Examples indicating a compromising response include: "I try to find a compromise solution," "I give up some points in exchange for others," and "I try to find a fair combination of gains and losses for both of us." *Id.*

[93] Ranging from (1) "not at all important" to (5) "very important."

[94] Ranging from (1) "never" prefer to (5) "always" prefer.

[95] The mediator qualifications and behaviors were drawn from surveys given to lawyers by Professor Bobbi McAdoo. *See* Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002); BOBBI MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT: THE IMPACT OF RULE 114 ON CIVIL LITIGATION IN MINNESOTA (1997), *reprinted in* 25 HAMLINE L. REV. 401 (2002).

B. *Findings*

1. *Attitudes Toward Mediator Behaviors and Qualifications*

To determine whether participants' assessments of the array of mediator qualifications and behaviors could be grouped into smaller groups of related characteristics, we conducted a principal components factor analysis on these questions. Five clusters of mediator qualifications and behaviors emerged (see Table 1).[96]

[96] Factor analysis is a statistical procedure that is used to determine whether a larger set of variables cluster together into a smaller number of constructs. The procedure is "applied to a single set of variables where the researcher is interested in discovering which variables in the set form coherent subsets that are relatively independent of one another. Variables that are correlated with one another but largely independent of other subsets of variables are combined into factors." BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS 597 (2d ed. 1989). The factor analysis was conducted on twenty-eight questions; varimax rotation was utilized to enhance the interpretability of the factors. The analysis demonstrated that the items comprised seven orthogonal factors. Scales based on the first five factors were determined to be interpretable and were labeled "Elicitive," "Directive," "Creative," "Training/Experience," and "Lawyer."

Table 1. Mediator Qualifications and Behaviors

Factor	Item	Loading[97]
Elicitive	Encourages clients to speak for themselves.	.821
	Asks clients to talk about their concerns and goals.	.746
	Primarily speaks with/to the lawyers.	-.655
	Encourages addressing issues beyond the legal causes of action.	.647
	Helps parties to understand each other's perspective.	.596
	Encourages parties to assess strengths and weaknesses of their case for themselves.	.532
Directive	Proposes particular settlements.	.755
	Pushes parties to accept a specific settlement.	.689
	Takes responsibility for the fairness of a settlement.	.643
	Presses for settlement.	.639
	Predicts court outcomes.	.621
Creative	Knows how to find creative solutions.	.741
	Suggests creative solutions that wouldn't be likely outcomes in court.	.735
	Knows how to help parties clarify issues.	.622
Training/ Experience	Has substantial mediation experience.	.820
	Has taken mediation training.	.633
	Has a reputation for settling cases.	.616
Lawyer	Is a lawyer.	.816
	Has experience as a litigator.	.756

[97] The factor loading value indicates the degree to which a variable is related to the factor (higher absolute values indicate stronger relationships). A negative loading means that the variable is inversely related to the factor (e.g., preferences for mediators who primarily speak with the lawyers are negatively associated with an elicitive approach). Variables were included in a factor if their factor loading for that factor was greater than .5. *See* TABACHNICK & FIDELL, *supra* note 96, at 639–640.

The first and second factors derived reflect the types of mediator behaviors that Professor Riskin has now labeled Elicitive and Directive.[98] The first factor, which we have accordingly labeled "Elicitive,"[99] comprises the participants' evaluations of the following mediator behaviors and qualifications: whether the mediator asks clients to talk about their concerns and goals, encourages clients to speak for themselves, encourages addressing issues beyond the legal causes of action, helps parties to understand each other's perspective, encourages parties to assess strengths and weaknesses of their cases for themselves, and does not primarily speak with the lawyers.[100] The second factor, labeled "Directive," comprises characteristics that reflect an emphasis on the mediator's *own* knowledge, experience, and sense of whether or how a particular dispute might or ought to be resolved.[101] This factor included assessments of the following mediator behaviors and qualifications: that the mediator presses for settlement, predicts court outcomes, proposes particular settlements, pushes parties to accept a specific settlement, and takes responsibility for the fairness of the settlement.

Several other sets of characteristics clustered into independent factors as well. The third factor, labeled "Creative," encompassed participant evaluations of the desirability of mediators knowing how to find creative solutions, knowing how to help parties clarify issues, and suggesting creative solutions that would not be likely outcomes in court.[102] The fourth factor, labeled "Training/Experience," brought together preferences for mediators who have taken mediation training, have a reputation for settling cases, and who have substantial mediation experience.[103] Finally, the fifth factor,

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[98] *See* Riskin, *New New Grid*, *supra* note 5.

[99] We borrow from Riskin the "elicitive" label for this category, along with the "directive" label for the next category described, as these groupings reflect an underlying concern about party decisionmaking autonomy with respect to both procedure and substance. *See supra* discussion accompanying notes 14–19. The items comprising the "Elicitive" factor, also appear to draw in aspects of a broad problem definition. *See supra* note 8. For simplicity, we will refer to this factor with the "Elicitive" label.

[100] This factor accounted for 18.8% of the variance in participant responses. The resulting scale had an alpha of .82.

[101] This factor accounted for 14.3% of the variance in participant responses. The resulting scale had an alpha of .75.

[102] This factor accounted for 7.3% of the variance in participant responses. The resulting scale had an alpha of .75. This "creativity" factor could also be conceptualized as comprising a tendency toward a broad problem definition. *See* Riskin, *Mediator Orientations*, *supra* note 8.

[103] This factor accounted for 6.2% of the variance in participant responses. The resulting scale had an alpha of .58.

labeled "Lawyer," included preferences for mediators who are lawyers or who have experience as litigators.[104]

The participants found all of these factors, or sets of mediator characteristics, at least somewhat important; their preferences were ordered as follows (from most preferred to least): creative mediators (mean = 4.29), mediators who use elicitive techniques (mean = 4.04), mediators with mediation training and experience (mean = 4.00), mediators with legal and litigation backgrounds (mean = 3.14), and mediators who use directive techniques (mean = 2.95).[105]

Preferences for elicitive behaviors and directive behaviors, while not comprising opposite poles of a single dimension, were negatively correlated—participants who demonstrated a stronger preference for elicitive behaviors were likely to show a lower preference for directive behaviors.[106] In addition, participants with stronger preferences for directive techniques also demonstrated stronger preferences for lawyer/litigator mediators.[107] In contrast, participants with stronger preferences for elicitive techniques also demonstrated stronger preferences for mediator creativity.[108]

Several individual items did not load on these factors, but had significant relationships with conflict strategies. Participants had relatively strong preferences for mediators who have "substantive expertise in a field of law relevant to the case,"[109] as well as moderate preferences for mediators who "give their own opinion about the strengths and weaknesses of the case"[110] and who "use joint sessions almost exclusively."[111]

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[104] This factor accounted for 5.8% of the variance in participant responses. The resulting scale had an alpha of .66.

[105] These preferences all differed significantly from each other ($ps < .05$), except preferences for elicitive mediator behaviors and qualifications and mediator training and experience ($t = .437$, $p = .664$). Preferences for directive mediator behaviors and qualifications were marginally less preferred than a mediator who is a lawyer or litigator ($t = -1.754$, $p = .084$).

[106] $r = -.33$, $p = .007$.

[107] $r = .29$, $p = .015$.

[108] $r = .48$, $p < .001$.

[109] Mean = 3.94. Participants' preferences for mediators with substantive legal expertise were positively correlated with their preferences for lawyer mediators ($r = .27$, $p = .025$).

[110] Mean = 2.96. Participants' preferences for mediators who give their own opinions about the case was marginally positively correlated with their preferences for directive mediators ($r = .21$, $p = .082$).

[111] Mean = 2.79. Participants' preferences for mediators who primarily use joint sessions were positively correlated with their preferences for creative mediators ($r = .34$,

2. *Preferred Conflict Strategies*

Participants' scores on the TKI (see Table 2) showed an overall preference for compromising as a conflict strategy. The next most preferred strategies were avoiding, competing, and accommodating. Collaborating was the least preferred strategy.[112]

Table 2. Preferred Conflict Strategies

	Raw Score† (mean)	Rank* (mean)
Compromising	7.64	2.03
Avoiding	5.86	2.92
Competing	5.79	2.95
Accommodating	5.76	2.97
Collaborating	4.93	3.38

†Higher scores indicate more preferred. Maximum score is 12.
*Conflict strategies were rank ordered (from 1 to 5) for each participant. Lower mean rank indicates more preferred.

While compromising was the most preferred conflict strategy, collaborating the least preferred, with avoiding, competing, and accommodating falling in between, the participants in this study embraced a broad range of conflict style preferences (see Table 3). Each of the conflict styles was preferred to the others by a considerable number of participants, ranging from 17% who most preferred collaboration to 42% who most preferred compromise. In addition, many participants were inclined toward more than one conflict style—half (50%) of the participants had one or fewer points between their two most preferred conflict styles.[113] This finding is consistent with the notion that the conflict styles are not mutually exclusive

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$p = .005$) and for elicitive mediation techniques ($r = .24$, $p = .051$).

[112] Compromising was preferred to avoiding ($t = 3.691$, $p < .001$), competing ($t = -3.435$, $p = .001$), accommodating ($t = 4.003$, $p < .001$), and collaborating ($t = -7.129$, $p < .001$). Avoiding, competing, and accommodating were all equally preferred (avoiding and competing ($t = -.136$, $p = .892$); avoiding and accommodating ($t = .265$, $p = .792$); competing and accommodating ($t = .048$, $p = .962$)). Collaborating was less preferred than compromising ($t = -7.129$, $p < .001$) and marginally less preferred than avoiding ($t = -1.674$, $p = .099$), competing ($t = 1.524$, $p = .132$), and accommodating ($t = -1.627$, $p = .109$).

[113] Two-thirds (67.6%) of participants had two or fewer points between their two most preferred conflict strategies.

and that individuals may favor several different strategies.[114]

Table 3. Order of Participant Conflict Strategies

	Most preferred	2d	3d	4th	Least preferred
Compromising	42%	26%	21%	8%	3%
Avoiding	21%	23%	15%	24%	17%
Competing	26%	18%	17%	14%	11%
Accommodating	18%	21%	23%	21%	17%
Collaborating	17%	8%	26%	21%	29%

*Columns may not sum to 100% due to ties.

3. *Relationships Between Conflict Strategies and Mediator Preferences*

Our primary goal was to examine the relationships between preferred conflict resolution strategies and preferences for different mediator behaviors and qualifications. To this end, we employed two strategies for data analysis. First, as reported in Table 4, we examined the correlations between the participants' scores on each conflict style scale and their preferences for the mediator characteristics we identified. Second, using a median-split technique, we divided the participants into groups with relatively low or high preferences for each of the conflict resolution strategies[115] and compared the groups' preferences for each dimension of mediator behaviors and qualifications.

[114] *See* Shell, *supra* note 56.

[115] For each conflict-handling style we calculated the median score. Those with scores above the median were considered to have high preferences for that style; those with scores below the median were considered to have low preferences for that style; those participants with scores exactly at the median were excluded for these analyses.

Table 4. Correlations—Conflict Styles and Mediator Preferences

	Elicitive	Directive	Creative	Training
Compromising	.04	.09	-.23*	.25**
Avoiding	-.19	.05	.15	-.03
Competing	-.17	.12	-.18	-.14
Accommodating	.21*	-.03	.29**	-.07
Collaborating	.19	-.26**	-.02	.06
Assertive	-.02	-.05	-.24**	-.002
Empathetic	.32**	-.20	.14	.07

	Lawyer	Own Opinion	Joint Sessions	Substantive Legal Expertise
Compromising	-.04	-.16	.08	.10
Avoiding	.03	-.04	-.11	-.01
Competing	.12	.32**	-.26**	.04
Accommodating	-.11	.00	.09	-.27**
Collaborating	-.03	-.24*	.27**	.15
Assertive	.07	.07	-.01	.17
Empathetic	-.13	-.24*	.32**	.07

** $p < .05$
* $p \leq .10$

A tendency toward compromise was associated with a preference for mediators with training and experience and lower preferences for creative mediation techniques. As reported in Table 4, participants' scores on the compromising dimension were positively correlated with their preferences

for mediators with training and experience[116] and negatively correlated with their preferences for creative mediation techniques.[117] In addition, participants with scores above the median on the compromising scale had stronger preferences for mediators with training and experience than did those who had scores below the median on the compromising scale.[118]

In contrast, a tendency to prefer collaboration was associated with stronger preferences for elicitive techniques and for joint sessions in mediation, and lower preferences for both directive techniques and mediators who give their own opinions about the case. Specifically, participants' scores on the collaborations scale were positively correlated with their preferences for joint sessions[119] and negatively correlated with their preferences for directive mediator behaviors.[120] Collaboration scores were also marginally negatively correlated with their preferences for mediators who give their own opinion about the strengths and weaknesses of the case.[121] In addition, participants who scored above the median on the collaboration scale had stronger preferences for elicitive techniques[122] and lower preferences for directive techniques[123] than did those who scored below the median on the collaborating scale. Highly collaborative participants also had higher preferences for joint sessions[124] and lower preferences for mediators who give their own opinions about the case[125] than did those who had below median scores on the collaborating scale.

Participants with a stronger tendency to avoid conflict were somewhat less likely to prefer elicitive mediation techniques than those low in avoidance (see Table 4), although this relationship did not quite reach

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[116] $r = .25$, $p = .046$.

[117] $r = -.23$, $p = .046$.

[118] $F\ (1, 45) = 8.007$, $p = .007$. High Compromising mean = 4.1; Low Compromising mean = 3.5.

[119] $r = .27$, $p = .029$.

[120] $r = -.26$, $p = .035$.

[121] $r = -.33$, $p = .057$.

[122] $F(1, 56) = 5.201$, $p = .026$. High Collaborating mean = 4.2; Low Collaborating mean = 3.9.

[123] $F(1, 56) = 3.981$, $p = .051$. High Collaborating mean = 2.8; Low Collaborating mean = 3.1.

[124] $F(1, 56) = 4.507$, $p = .038$. High Collaborating mean = 3.0; Low Collaborating mean = 2.6.

[125] $F(1, 56) = 4.563$, $p = .037$. High Collaborating mean = 2.8; Low Collaborating mean = 3.3.

traditional levels of statistical significance.[126]

A tendency to prefer competition was associated with stronger preferences for mediators who use directive techniques and who give their own opinions about the case, and lower preferences for training and experience, creativity, and the use of joint sessions. Specifically, participants' scores on the competing scale were positively correlated with their preferences for mediators who give their own opinions about the case.[127] In addition, the participants who scored above the median on the competing scale had marginally stronger preferences for directive techniques[128] and marginally lower preferences for creative mediators[129] and for mediators with training and experience[130] than did those who scored below the median on the competing scale. The most highly competitive participants also had higher preferences for mediators who give their own opinion[131] and marginally lower preferences for mediators who primarily use joint sessions[132] than did those with scores below the median for competition.

Finally, a tendency to prefer accommodation was associated with preferences for mediators who use elicitive techniques and who are creative and lower preferences for mediators with substantive legal expertise. As reported in Table 4, participants' scores on the accommodation scale were positively correlated with their preferences for both elicitive[133] and creative[134] mediation techniques and negatively correlated with their preferences for mediators with substantive legal expertise than were low accommodators.[135] In addition, the participants with scores above the median on the accommodation scale had a stronger preference for creative

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[126] $r = -.19$, $p = .118$.

[127] $r = .32$, $p = .009$.

[128] $F(1, 52) = 3.150$, $p = .082$. High Competing mean = 3.1; Low Competing mean = 2.8.

[129] $F(1, 52) = 3.955$, $p = .052$. High Competing mean = 4.0; Low Competing mean = 4.4.

[130] $F(1, 52) = 2.666$, $p = .108$. High Competing mean = 3.8; Low Competing mean = 4.1.

[131] $F(1,52) = 10.960$, $p = .002$. High Competing mean = 3.2; Low Competing mean = 2.5.

[132] $F(1, 52) = 2.868$, $p = .096$. High Competing mean = 2.6; Low Competing mean = 3.0.

[133] $r = .21$, $p = .091$.

[134] $r = .29$, $p = .018$.

[135] $r = -.27$, $p = .026$.

mediators[136] and a marginally stronger preference for mediators who use elicitive techniques[137] than did those who were lowest on the accommodation scale.

Examining the two underlying dimensions of the conflict styles, empathy and assertiveness,[138] revealed positive correlations between empathy and preferences for elicitive mediator characteristics[139] and joint sessions, [140] such that those participants with a stronger tendency toward empathy preferred mediators who engage in elicitive behaviors and who primarily use joint sessions more than did those less inclined toward empathy. In contrast, we found a marginally significant negative correlation between participants' empathy scores and their preferences for mediators who give their own opinion about the case,[141] and a negative correlation between participants' scores on empathy and their preferences for mediators who engage in directive behaviors; although this latter relationship did not quite reach traditional levels of statistical significance.[142] In addition, we found that those with scores above the median for empathy had a stronger preference for elicitive mediation techniques than did those with the lowest empathy.[143]

Assertiveness was negatively correlated with mediator creativity, such that participants with a stronger tendency toward assertiveness were less likely to desire mediator creativity than were those who were less assertive.[144] Consistent with this correlation, we found that those who had scores above the median on assertiveness had lower preferences for creative

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[136] F(1, 52) = 10.466, p = .002. High Accommodating mean = 4.6; Low Accommodating mean = 4.0.

[137] F(1, 52) = 3.124, p = .083. High Accommodating mean = 4.2; Low Accommodating mean = 3.9.

[138] Indexes for assertiveness and cooperativeness/empathy can be calculated by combining individual scales as follows:

> assertiveness = (competing + collaborating) – (avoiding + accommodating)
> cooperativeness [empathy] = (collaborating + accommodating) – (competing + avoiding).

See Volkema & Bergmann, *supra* note 83, at 9.

[139] r = .32, p = .008.

[140] r = .32, p = .010.

[141] r = -.24, p = .055.

[142] r = -.20, p = .117.

[143] F(1, 60) = 4.661, p = .035. High Empathy mean = 4.2; Low Empathy mean = 3.9.

[144] r = -.24, p = .050.

mediators than those who were the least assertive.[145]

IV. IMPLICATIONS

A. *Orientations to Mediation*

One particularly important finding of our study is related to the relationships among a variety of mediator behaviors central to the debate over facilitative and evaluative mediation. Facilitative and evaluative behaviors have been discussed and debated as falling on opposite ends of a continuum.[146] Riskin's original conception clearly placed the two at opposite ends of a continuum of possible mediator activities,[147] and subsequent efforts to compare and contrast the two have often focused on the poles of the continuum.[148] However, the initial identification of facilitative and evaluative styles of mediation and the subsequent debate generated by this categorization have, to date, been theoretical and anecdotal. The present study is the first to empirically examine these constructs.

The factor analysis technique we used to create clusters of related variables is designed to group related variables into relatively independent factors.[149] We found separate groupings for mediator behaviors that are elicitive in nature—e.g., speaking directly with the parties rather than the attorneys, focusing on party goals, and so on—and those that are directive—such as suggesting particular settlements or pushing for settlement. Thus, participants clearly distinguished between mediator behaviors and qualifications that were directive and elicitive. While these two sets of behaviors were negatively correlated with each other (that is, stronger

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[145] (1, 59) = 4.397, p = .040. High assertiveness mean = 4.2; low assertiveness mean = 4.5.

[146] *See, e.g.*, Lande, *Transform*, *supra* note 18, at 850 n.40 ("it is more useful to think of this as a continuum rather than a discrete dichotomy"); Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 248 [hereinafter Stempel, *Inevitability of the Eclectic*] ("evaluation and facilitation are two ends of a continuum").

[147] Riskin, *Mediator Orientations*, *supra* note 8.

[148] *See* Stempel, *Inevitability of the Eclectic*, *supra* note 146, at 247 (noting the tendency to focus on a "false dichotomy"); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997) [hereinafter Stempel, *Beyond Formalism*].

[149] "Variables that are correlated with one another but largely independent of other subsets of variables are combined into factors." TABACHNICK & FIDELL, *supra* note 96, at 597.

preferences for directive behaviors were associated with lower preferences for elicitive behaviors and vice versa), they did *not* comprise opposite poles of a single dimension.[150]

This finding is consistent with recognition that evaluative or directive behaviors on the one hand and facilitative or elicitive behaviors on the other hand are not opposites on a continuum, but are distinct, and not necessarily incompatible, sets of behaviors.[151] Professor Riskin himself has recently come to understand that "*evaluating and facilitating are not opposites.*"[152] Thus, mediators can, and do, use techniques from both sets of behaviors and may be simultaneously highly elicitive and highly directive, highly elicitive and not directive, highly directive and not at all elicitive, or other combinations. As Professor Jeffrey Stempel has argued, "[m]any mediation actions are not compromises between the evaluative and facilitative poles of the dichotomy but are instead actions not fully susceptible of categorization within either school of thought."[153] Riskin now notes that "there is a complex, dynamic quality in the relationships between directive and elicitive mediator moves. They often travel in tandem, and a particular move can have both directive and elicitive motives and effects."[154]

A second important finding with respect to the participants' responses to different mediator characteristics and techniques is their overall relative preference for client participation and for generating creative or nonlegal options for resolution. Participants showed a preference for mediators with the ability to be creative in facilitating settlement. The next most preferred mediator behaviors and qualifications were that the mediator uses elicitive techniques and has training and experience as a mediator. Participants showed significantly weaker preferences for mediators who are lawyers or litigators and for more directive mediator behaviors. This relative preference for creative and elicitive mediator behaviors over more directive behaviors suggests that participants favored a process that "belongs" to the parties and

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[150] *See supra* note 96. Had these behaviors comprised two poles of a single dimension, they would have had significant loadings on a single factor with one group of behaviors loading positively and the other group loading negatively.

[151] *See* Riskin, *New New Grid*, *supra* note 5, at 17–18; Stempel, *Beyond Formalism*, *supra* note 148, at 950 ("Conceptual oversimplification occurs when the debate is cast in the wooden form of evaluation versus facilitation.").

[152] Riskin, *New New Grid*, *supra* note 5, at 17–18 (emphasis in original); *see also id.* at 13 (noting that "the continuum structure . . . [has] caused problems").

[153] Stempel, *Inevitability of the Eclectic*, *supra* note 146, at 264. *See also id.* at 263 ("the effective mediator engages in a range of behaviors that span the facilitative-evaluative continuum").

[154] Riskin, *New New Grid*, *supra* note 5, at 33.

that is less driven by the mediator's own beliefs and opinions about whether and on what basis the dispute should be settled in mediation.

At the same time, however, ratings for mediators who were lawyers or litigators, and for more directive mediator behaviors, indicated that these characteristics were at least sometimes preferred and somewhat important, falling at approximately the mid-point of the rating scales.[155] In addition, mediators with substantive legal expertise were preferred.[156] Thus, the participants still valued these dimensions of mediation, at least in some instances. They did not appear to believe that evaluation or the use of directive behaviors in mediation are undesirable per se. Rather, they may believe that when used selectively or in conjunction with a range of creative and elicitive behaviors that allow high-quality decisionmaking, such directive and evaluative behaviors may add value to the mediation process.[157]

B. *Conflict Styles and Mediation*

Our data also reveal preferences for a wide range of approaches to handling conflict. Compromise, the most preferred strategy, was a dominant strategy for 42% of the participants.[158] Nevertheless, even the least preferred conflict handling strategy, collaboration, was a dominant strategy for fully 17% of the participants.[159] Thus, each of the primary conflict handling modes was preferred to the others by a considerable number of participants.[160]

In addition, our data reveal patterns suggesting important relationships between each of these conflict styles and mediator preferences. Our participants evidenced the strongest preference for handling conflict through compromising, which indicates moderate scores on both the assertiveness and empathy dimensions.[161] This might suggest that they possess a balanced and pragmatic view of conflict, and recognize that many disputes will not have clear winners and losers. A preference for handling conflict through

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[155] *See supra* note 105 and accompanying text.

[156] *Id.*

[157] *See* John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321 (discussing "quality of decision making"); Lande, *Transform*, *supra* note 18, at 868–879 (discussing "high-quality consent"); Nolan-Haley, *supra* note 37 (discussing party decision-making and informed consent in mediation).

[158] *See supra* Table 3.

[159] *Id.*

[160] *Id.*

[161] *See supra* Table 2.

compromise may lead attorneys to gravitate toward experienced mediators who can reliably guide them to a basis for agreement based on existing legal or financial norms around which they can split the difference. Indeed, we found a positive correlation between an orientation toward compromising and a preference for mediators who have had training and experience as mediators and who are known for their ability to settle cases, but a negative correlation with mediators known for their creativity.[162] A preference for compromising, then, suggests a desire to work efficiently within established norms of fairness and to settle on relatively straightforward terms, and a relative disinclination toward mediators whose creativity might incline them to raise complicated issues.

It is perhaps not surprising that, in contrast, collaborating was the least favorite conflict handling strategy among our participants.[163] Individuals with a high preference for collaboration, which involves high assertiveness *and* high empathy, are thought to enjoy and be skilled at focusing on underlying interests and finding integrative solutions to problems.[164] Consistent with this mode of handling conflict, we found that those with a stronger preference for collaboration demonstrated a stronger preference for more elicitive mediator behaviors and techniques and for joint sessions, and a correspondingly weaker preference for directive mediation and for mediators who give their own opinions about the case.[165] Elicitive mediation may be seen as facilitating the quest for simultaneously maintaining good relationships and meeting one's own needs through engaging in cooperative efforts to explore integrative resolutions.

Between these two most and least highly preferred conflict handling styles fell those who prefer to resolve conflict through avoidance, competition, or accommodation.[166] Participants evidencing each of these conflict handling styles also showed some distinct preferences for mediator behaviors and qualifications.[167]

One might expect individuals who prefer to avoid conflict to be less inclined to participate in mediation that uses a highly elicitive style, as it is likely to involve a good deal of direct contact and discussion with one's opponent, and to be somewhat uncomfortable for those preferring to avoid conflict. Thus, the tendency to avoid conflict might be expected to lead to a

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[162] *See supra* Table 4.

[163] *See supra* Table 2.

[164] *See* Shell, *supra* note 56, at 168–69.

[165] *See supra* Table 4.

[166] *See supra* note 105.

[167] *See supra* Table 4.

preference for a mediator who tends to act more as a go-between, brokering a deal between the parties. Although the relationship did not reach traditional levels of statistical significance, we did find an inverse correlation between the tendency to avoid conflict and a preference for elicitive mediator behaviors.[168]

Consistent with the notion of someone with a competitive conflict resolution style as highly assertive and lower in empathy, we found that those preferring to handle conflict in a competitive manner had stronger preferences for directive mediator behaviors and mediators who give their own opinions about the case. In addition, these competitors were less predisposed toward creative mediators, mediators with more training and experience, and joint sessions.[169] To the extent that those who handle conflict in a competitive manner are more focused on rights, winning and losing, and concrete outcomes,[170] it is not surprising that highly competitive individuals would prefer a mediator who is less likely to focus on the participation of the parties, but who focuses on legal and economic issues in order to allow strategic bargaining and advocacy to have a central role in the mediation.

Finally, a preference for accommodation implies a high degree of concern for the relationship underlying a dispute combined with a low degree of assertiveness.[171] Thus, we might expect an accommodating individual to favor an elicitive style mediator to the extent that this allows increased attention to the needs and concerns underlying the clients' positions, more time for direct participation of the clients, and the greatest opportunity for them to understand each other and reconcile. The positive correlation between an accommodating conflict handling style and a preference for elicitive mediator behaviors—and an inverse correlation between empathy and directive mediator behaviors more generally[172]—is consistent with these expected tendencies. As with collaborators, it is likely that accommodators see elicitive mediation as more effective in promoting a good relationship and cooperative efforts between disputants. The correlation between a strong disposition toward accommodation and creativity in mediation[173] might also

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[168] *See supra* Table 4.

[169] *Id.*

[170] *See* TKI, *supra* note 57; Shell, *supra* note 56, at 169 (noting that "competitive negotiators instinctively focus on the issues that are easiest to count in terms of winning and losing—like money. They may overlook nonquantitative issues that can yield substantial value.").

[171] TKI, *supra* note 57.

[172] *See supra* Table 4.

[173] *Id.*

suggest a willingness by accommodators to cede some control over the process in the hopes of achieving a mutually satisfactory agreement, if not a reconciliation of the disputants.

C. *Lawyers Selecting Mediators*

Where lawyers have primary responsibility for selecting mediators—particularly in court-connected mediation in the civil litigation context—our results have implications for the evolution of the field of mediation. Some have argued that lawyers may exhibit a distinct preference for certain types of mediation—e.g., evaluative or directive—and that those preferences will drive the range of approaches to mediation that is available.[174] However, our data suggest that this narrowing of the field is unlikely.

1. *Lawyer Preferences*

Professor Riskin has articulated what he has labeled the lawyer's "standard philosophical map."[175] He concludes that lawyers, as a result of some combination of personality and training, are inclined to "put people and events into categories that are legally meaningful," to "think in terms of rights and duties established by rules," to "focus on acts more than persons," and to suffer from an "under-cultivation of emotional faculties."[176] To this conception of the lawyer's standard philosophical map, Professor James Coben has suggested that the map also includes:

> [T]he notion of law as the exclusive measure of fairness and equity, the assumption that justice is done within the adversarial system when the zealous advocate vigorously represents her clients' interests without regard to other's interests, and the idea that a duty exists to zealously exploit rules and processes to aid the client.[177]

Similarly, Professor Susan Daicoff, in reviewing studies of lawyers' personalities, concludes that lawyers are distinguished by a marked drive to achieve; a preference for an impersonal, logical approach to problem solving; a masculine orientation favoring competitiveness; an emphasis on rights and

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[174] *See generally* Lande, *supra* note 18, at 882.

[175] Riskin, *Mediation and Lawyers*, *supra* note 6, at 43–44.

[176] *Id.* at 45.

[177] James R. Coben, *Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophical Map*, 50 U. FLA. L. REV. 735, 737 (1998).

obligations over emotions and interpersonal relations; and high levels of psychological distress among those in the profession.[178] Beginning even before law school, lawyers tend to be more analytical, achievement oriented, dominant, and introverted—"uniformly less interested in people, in emotions, and interpersonal concerns"—than the general population.[179]

One measure, the Myers-Briggs Type Indicator (MBTI), has been used to explore several aspects of lawyers' personalities that have particular relevance to the present discussion.[180] In particular, the MBTI measures both whether one has a preference for "Thinking" or "Feeling" and whether one is "Introverted" or "Extroverted."[181]

Persons who favor Thinking on the MBTI tend to value logical analysis, objectivity, order, decisiveness, and a focus on discovering truth and achieving justice. Those favoring Feeling tend to be more interested in people and to value relationships; they are concerned with maintaining harmony and seek to make decisions that accord with personal beliefs and values.[182] Studies have consistently found that lawyers (and law students) are more likely to have a Thinking orientation (and are less inclined to have a

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[178] SUSAN SWAIM DAICOFF, LAWYER KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES 25–42 (Bruce D. Sales ed., American Psychological Association 2004) [hereinafter DAICOFF, LAWYER KNOW THYSELF]; Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997) [hereinafter Daicoff, *Attributes*]; Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547 (1998); Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 811 (1999).

[179] Daicoff, *Attributes*, *supra* note 178, at 1403–05.

[180] *See, e.g.*, DAICOFF, LAWYER KNOW THYSELF, *supra* note 178, at 32–26; Larry Richard, *How Your Personality Affects Your Practice*, 79 A.B.A. J. July 1993, 74–78.

[181] For more general discussions of psychological type theory and the law, see Don Peters, *Forever Jung: Psychological Type Theory, The Myers-Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1 (1993) (exploring the use of the MBTI in negotiation theory and pedagogy); R. Lisle Baker, *Using Insights About Perception and Judgment from the Myers-Briggs Type Indicator Instrument as an Aid to Mediation*, 9 HARV. NEGOT. L. REV. 115 (2004) (explaining how psychological type theory can inform the analysis of disputes and disputants in mediation); Raymond B. Marcin, *Psychological Type Theory in the Legal Profession*, 24 U. TOL. L. REV. 103 (1992) (exploring the relevance of psychological type theory for the legal profession).

[182] Daicoff, *Attributes*, *supra* note 178, at 1366.

Feeling orientation) than are others in the general population.[183] Consistent with the lawyers' philosophical map, lawyers with a Thinking orientation are inclined to be more analytical and to rely less on empathy and interpersonal skills in problem solving.[184] Thus, Thinkers tend to have a narrower approach to problem solving and will tend to focus on more objective indicators of appropriate resolution, such as legal norms and expected financial value.[185]

In addition, studies have found that lawyers are more likely than others in the general population to score as Introverts, rather than Extroverts, on the MBTI.[186] Introverts prefer to avoid actively engaging in conflicts as a strategy to resolve them.[187] Persons with a preference for introversion tend to be oriented inward, taking in information and thinking it through before responding, and are generally reticent and inclined to hold their cards close in a negotiation.[188] This strategic use of caution is thought to be well-suited to an adversarial negotiation style,[189] but may also facilitate a cooperative approach by avoiding unhelpful initial reactions to an opponent's statements or behaviors. Extroverts, in contrast, prefer to focus outward: initiating verbal interactions, asking numerous questions, inviting input from others, and comfortably expressing their needs and interests during conflict.[190]

A preference for Thinking is thought to be compatible with adversarial

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[183] *See* Richard, *supra* note 180, at 74–78 (finding that 81% of male lawyers prefer thinking compared to 60% of all men in the U.S., while 66% of female lawyers prefer thinking compared to only 35% of women in the general population, and concluding that "the law is a thinker's profession"). DAICOFF, LAWYER KNOW THYSELF *supra* note 178, at 34, Table 2.1. *See also* Baker, supra note 181, at 136 (comparing studies of the general population, lawyers, judges, and mediators); Peters, *supra* note 181, at 17 (80% of law student sample were thinkers); Vernellia R. Randall, *The Meyers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 91 (1995) (finding 77.9% of first year law students at the University of Dayton were "thinkers," as opposed to "feelers," on the MBTI); Paul Van R. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460, 465 (1967) (72% of law students were thinkers v. 54% of liberal arts students).

[184] *See* Baker, *supra* note 181; Peters, *supra* note 181; Randall, *supra* note 183.

[185] *See* Korobkin & Guthrie, *supra* note 39.

[186] *See, e.g.*, Richard, *supra* note 183 (finding that 57% of lawyers prefer introversion to extroversion).

[187] Percival et al., *supra* note 82, at 15 (characterizing this conclusion as "well established" in the research literature).

[188] Peters, *supra* note 181, at 92–93.

[189] *Id.* at 92–97.

[190] *Id.* at 84–91.

strategies,[191] and studies have found that Thinkers prefer competing more than do Feelers.[192] However, researchers have also found that most MBTI Thinkers prefer compromising to competing,[193] and Introverted Thinkers, in particular, have a tendency to rate compromise and avoidance as their most preferred conflict handling approaches.[194] Thus, compromising may be the "thinking person's way of cooperating."[195] In contrast, it is those who prefer Feeling and are Extroverted who are more likely to rate collaboration as their most preferred strategy.[196] Our finding that participants demonstrated a preference for the compromise strategy and a relative lack of preference for collaboration is consistent with the tendency of lawyers to prefer Thinking and to be Introverted. Moreover, the comparatively strong preference for avoiding conflict in our sample is consistent with the relatively high prevalence of introversion among lawyers.[197]

2. *Influence on Mediation*

To the extent that lawyers exhibit distinct preferences for particular styles of resolving conflict, some have argued that those preferences are likely to drive the selection of mediators for particular disputes and will ultimately determine the direction of the field.[198] This is because in a market for mediation services in which attorneys select mediators, they will attempt

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[191] *Id.* at 92–97.

[192] *See* Johnson, *supra* note 63, at 30–31.

[193] Percival et al., *supra* note 82, at 15.

[194] Percival et al., *supra* note 82, at 12; Johnson, *supra* note 63, at 36.

[195] Percival et al., *supra* note 82, at 15.

[196] Percival et al., *supra* note 82, at 12, 14; *see also* Johnson, *supra* note 63, at 31 (finding correlation between preference for extroversion and preference for collaboration). For additional analysis of the general relationship between personality and conflict style see, e.g., David Antonioni, *Relationship Between the Big Five Personality Factors and Conflict Management Styles*, 9 INT'L J. CONFLICT MGMT. 336 (1998); Philip J. Moberg, *Predicting Conflict Strategy with Personality Traits: Incremental Validity and the Five Factor Model*, 9 INT'L J. CONFLICT MGMT. 258 (1998); Ritch L. Sorenson et al., *A Test of the Motivations Underlying Choice of Conflict Strategies in the Dual-Concerns Model*, 10 INT'L J. CONFLICT MGMT. 25 (1999).

[197] *See supra* notes 186–189 and accompanying text.

[198] *See* Lande, *Transform*, *supra* note 18, at 888–90. *Compare* Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOC'Y REV. 27 (1995) (arguing that American litigators have shaped the practice of international commercial arbitration).

to select mediators who they believe will complement their preferred conflict resolution strategies.[199] Moreover, mediators concerned about sustaining a successful practice may respond to these attorney preferences by consciously or unconsciously adopting a style that conforms to those attorney preferences.[200]

As attorneys have become regular players in court-annexed mediations, mediators may seek to define themselves in terms of mediation style as a response to market pressures resulting from attorneys' influence over the selection of mediators:

> Mediators will feel pressure to develop distinctive professional identities with identifiable characteristics of their mediation practices to maintain and grow their mediation businesses. Mediators will need to manage relationships with lawyers as repeat buyers of their services and professional colleagues who serve the same principals. Regular participation of lawyers in mediation is likely to result in ongoing relationships between mediators and lawyers that may overshadow their respective relationships with the principals and dramatically affect the mediation process.[201]

The ultimate concern is that this may lead to a narrowing of the range of styles used by mediators.[202] In this vein, Professor Lande suggests that the debate over mediation styles marks the tensions in a larger "ideological contest" over the establishment of de facto norms and operative theories of mediation practice.[203] Whatever conception of mediation emerges as the accepted model, then, can be expected to predominate and greatly influence the dispute resolution options available to litigants and others disputants. If

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[199] *See* Lande, *supra* note 18, at 849 ("Mediation buyers will often want to distinguish the working styles of the mediators and match them to the perceived needs in particular cases or to the buyers' own general preferences about the mediator styles and goals.").

[200] *See, e.g.*, McAdoo & Hinshaw, *supra* note 95, at 527–28 (assuming that mediators use evaluative techniques because attorneys want them to do so and arguing that mediators "focus almost exclusively on the lawyers, in part because mediators feel they need to keep attorneys happy to sustain a mediation practice"); Lande, *Transform*, *supra* note 18, at 882 (suggesting that mediators may come to "see lawyers as their (mediators') clients rather than the principals with whom the mediators are much less likely to have repeat business").

[201] Lande, *Transform*, *supra* note 18, at 891.

[202] *See, e.g.*, Lande, *Transform*, *supra* note 18; Lande, *Getting the Faith*, *supra* note 29, at 225–27.

[203] *See* Lande, *Transform*, *supra* note 18, at 854–55.

one view of mediation were to become the dominant orientation, the institutionalization of this dispute resolution technique could fail systematically to maximize the utility of individual disputants, who presumably will have varying needs and interests.[204] Attorneys, given their prominent role in mediation and in selecting mediators, are likely to play a significant role in influencing the model of mediation that emerges as dominant in the marketplace for mediation services.

There is evidence that lawyers have a tendency to gravitate toward evaluative or directive techniques in mediation—both as mediators[205] and as advocates.[206] With regard to attorneys acting as mediators, Professor Guthrie argues that attorneys' inclination toward analytical thinking, "emotional distance," and "comfort with a rule-based regime," while valuable for some aspects of the mediator's role, will prevent attorneys from engaging in mediation "in a purely facilitative, non-evaluative way," and that many will not be particularly skilled at the facilitative tasks of "exercis[ing] the flexibility, creativity, and imagination . . . actively listening to parties, attending to their verbal and non-verbal cues, picking up on subtle displays of emotion, and 're-orienting' the parties toward one another," or mediating "outside 'the shadow of the law' and the legal system."[207] As advocates, attorneys as a group have been found to appreciate mediators who can value cases, have background in law and the substantive area of the dispute, and who know how to help the parties clarify the issues.[208]

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[204] *See* Carrie Menkel-Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995); Sternlight, *supra* note 37.

[205] *See* Guthrie, *supra* note 13, at 164–65 (arguing that the lawyers' standard philosophical maps makes lawyers "inclined to behave in an evaluative fashion" when acting as mediators).

[206] *See, e.g.*, McAdoo & Hinshaw, *supra* note 95; ROSELLE L. WISSLER, AN EVALUATION OF THE COMMON PLEAS CIVIL PILOT MEDIATION PROJECT, at ix (Feb. 2000).

[207] Guthrie, *supra* note 13, at 163–64.

[208] *See, e.g.*, McAdoo & Hinshaw, *supra* note 95, at 524 (finding that more than half of the attorneys surveyed found each of these mediator qualifications to be important); Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 145 (1997) (finding that 67.5% of the attorneys surveyed thought that mediators should give opinions about the merits of medical malpractice cases); WISSLER, *supra* note 206 ("Attorneys had more favorable assessments of the process and mediator and reported mediation was more helpful in achieving case objectives if the mediator evaluated the merits of the case and suggested settlement options."); *see also* Guthrie, *supra* note 13, at 181 ("The lawyer's standard philosophical map—which advances an analytical, non-emotional, adversarial orientation to law practice—reflects an evaluative approach to lawyering."); McAdoo and Welsh, *supra*

A preference for compromise and a relative lack of preference for collaboration, shown both by our data and by studies of attorney personality, are consistent with these desires for evaluation. As noted above in our study, individuals with a strong preference for compromise have a stronger draw toward mediators with training and experience and a reputation for settling cases than do those less inclined to compromise.[209] In addition, compromisers show a disinclination toward mediators who are highly creative.[210] Moreover, those who are reluctant to collaborate are more strongly inclined toward directive mediator behaviors and less inclined toward elicitive techniques.[211]

To the extent that these attorney preferences diverge from those of their clients, we might expect to see a disconnect in the preferences of attorneys and clients. In fact, Professors Russell Korobkin and Chris Guthrie have conducted experiments that suggest that attorneys and clients systematically evaluate litigation options differently.[212] Specifically, they found that attorneys are more likely to employ an expected financial value analysis, and to avoid certain cognitive biases that clients tend to experience and that can lead to less than optimal financial outcomes in litigation.[213] In general, clients who share this focus on wealth maximization will tend to be well served by these tendencies of attorneys; however, for clients who favor other nonmonetary goals, the attorney's influence may lead to a less than optimal outcome from the client's perspective.[214] In the latter case, to the extent that these attorney dispositions are likely to influence the selection of a mediator such that a mediator whose style is consistent with the attorney's predispositions toward conflict is chosen, this divergence may be reinforced.

Our data, however, suggest some factors that may militate against a

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note 27, at 392 ("If these potential benefits [client satisfaction, client control, and the relationship of the parties] do not find their places on the lawyers' philosophical map, it is likely that the mediation model will continue to adapt to fit within the traditional legal culture and will look more and more like the traditional settlement conference mode.").

[209] *See supra* Table 4.

[210] *See supra* Table 4.

[211] *See supra* Table 4.

[212] *See* Korobkin & Guthrie, *supra* note 39, at 121–22, passim.

[213] *Id.*

[214] *Id.* at 131–32. Jean Sternlight has elucidated more precisely the factors that may cause attorneys to urge their clients to settle when they should not, or prevent clients from settling when they should. Sternlight, *supra* note 37. Specifically, she describes how a multitude of diverging monetary incentives, diverging non-monetary incentives, and the different psychological needs and characteristics of attorneys and clients can lead to sub-optimal client outcomes. *Id.* at 320–31.

narrowing of the field in the direction of evaluation and directive mediation. First, our data show an overall preference for creative and elicitive techniques in mediation. Across participants and conflict styles, creative mediator behaviors were rated as the most highly preferred or important; elicitive behaviors were the next most highly valued. Directive behaviors, though still valued moderately highly, were rated as least desirable.[215] Second, our participants comprised a wide range of preferred conflict handling styles. Each of the five conflict resolution modes, including collaboration, was the preferred style of at least 17% of the participants.[216] This is, perhaps, not surprising. Although Thinkers and Introverts are predominant in the ranks of the legal profession, significant minorities of lawyers and law students are oriented toward Feeling and toward Extroversion.[217]

Accordingly, our findings and the findings of existing research are more consistent with the notion that an eclectic or pluralist assortment of styles will emerge as accepted forms of mediation.[218] Certainly, processes that have been referred to as mediation include a variety of behaviors thought to be directive and others thought to be elicitive.[219] Attorneys report that mediators use a variety of techniques, often incorporating both elicitive and directive behaviors.[220] Indeed, many mediators use a mix of directive and elicitive techniques within a single mediation,[221] and some mediators may

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[215] *See supra* note 105.

[216] *See supra* Table 3.

[217] *See* Richard, *supra* note 183, at 75–76 (finding that 43% of attorneys prefer Extraversion and that 22% of attorneys prefer Feeling); DAICOFF, LAWYER KNOW THYSELF, *supra* note 178, at 34, tbl. 2.1 (reporting that 41–44% of attorneys prefer extroversion; 24–35% of attorneys prefer Feeling).

[218] *See* Stempel, *Inevitability of the Eclectic*, *supra* note 146; Stempel, *Beyond Formalism*, *supra* note 148; Lande, *Transform*, *supra* note 18; Riskin, *New New Grid*, *supra* note 5; Guthrie, *supra* note 13, at 180 (stating that "mediation should be an eclectic process in which different types of mediators are available to suit different disputants").

[219] *See* Riskin, *New New Grid*, *supra* note 5, at 18–20 (describing examples of common mediator behaviors that can be seen as directive or elicitive); *see also* Guthrie, *supra* note 13, at 146–47 (noting that "most in the mediation community accept Riskin's *positive* assertion that mediation as currently practiced includes both facilitation and evaluation").

[220] *See, e.g.*, MCADOO, *supra* note 95, at 39; McAdoo & Hinshaw, *supra* note 95, at 523; *see also* Riskin *New New Grid*, *supra* note 5, at 14 (asserting that "It is quite clear, however, that many—probably most—mediators engage in behaviors that fit into both categories. They evaluate *and* facilitate").

[221] *See, e.g.*, Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41 (videotape

"deliberately try to avoid attachment to a particular orientation."[222] Moreover, a range of different orientations to mediation, differing norms and traditions in certain substantive areas, and differences in practice across geographic areas may all contribute to the existence of a variety of mediation cultures that will diverge from more broadly established models.[223] Thus, it may be quite difficult for one particular form of mediation to completely capture the field.

Given this likely pluralistic range of orientations to mediation, attorneys might consider discussing mediator orientation and selection with clients. Indeed, Professor Jacqueline Nolan-Haley argues that clients and lawyers together ought to determine which orientation toward mediation is best for the client and who the appropriate mediator might be.[224] In the context of this dialogue, attorneys might also find it useful to disclose to clients their own conflict-handling preferences and preferences about orientations to mediation.[225] At a minimum, our findings about the connections between

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study); Riskin, *Mediator Orientations*, *supra* note 8, at 36 (observing that some mediators "deviate from their presumptive orientation in response to circumstances arising in the course of a mediation). *See also* Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309 (arguing that all mediation is necessarily both evaluative and facilitative).

[222] Riskin, *Mediator Orientations*, *supra* note 8, at 36. Professor Riskin has noted a Wisconsin poll in which the same individual was selected as the best facilitative mediator *and* the second best evaluative mediator. Riskin, *New New Grid*, *supra* note 5, at 17 (citing Jane Pribek, *McDevitt: Master of Mediation*, WIS. L.J., Mar. 27, 2002, at 4).

[223] For discussion of mediation cultures see, e.g., Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241.

[224] Nolan-Haley, *supra* note 37, at 1388–89. Many jurisdictions require lawyers to counsel clients about methods of dispute resolution more generally. *See, e.g.*, Ga. Code Prof'l Resp., EC7-5 ("A lawyer as advisor has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation."); Minn. Gen. Prac. Rule 114.03(b) (requiring attorneys to "provide clients with ADR information"); Mo. Sup. Ct. Rule 17.02(b) (requiring that lawyers "shall advise their clients of the availability of alternative dispute resolution programs"); N.D. Rules of Court 8.8(a) (requiring "that the parties have discussed ADR participation with each other and that the parties' lawyers have discussed ADR with their clients").

[225] We are grateful to Chris Guthrie for suggesting this implication. For a discussion of how lawyers and clients might consult about their respective roles in mediation, see Sternlight, *supra* note 37. For general discussion of client-centered counseling see DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS 287–308 (West Group 1991). For a broader look at the factors that sometimes impede attorneys in their discussions about mediation

conflict-handling preferences and mediator preferences suggest that attorneys should endeavor to assess their personal and professional predispositions about conflict and mediation styles. Armed with an awareness of their tendencies in this regard, attorneys may be better positioned to respond effectively to the needs of particular clients and particular disputes. It is even possible that this self-evaluation process itself may create demand for a broader menu of mediation styles and processes, leading to an even more eclectic market for mediation.

V. CONCLUSION

The findings reported here shed light both on notions of orientations to mediation generally and the role of attorneys in selecting mediators for their clients' disputes more specifically. Importantly, we find that conflict styles influence preferences for how mediation is conducted in predictable ways.

Nevertheless, we are skeptical that this will result in a movement of the field to embrace a directive style of mediation to the exclusion of a more elicitive style. While preferences for a more directive orientation toward mediation are surely likely to result from the lawyer's standard philosophical map and are reflected in participants' inclination toward compromise, participants also demonstrated a relative preference for creativity and elicitive behaviors in mediation.[226] Moreover, a broad range of conflict styles were preferred across the range of participants in the sample, and this is likely to result in preferences for a variety of orientations toward mediation.[227] Finally, we provide evidence that mediator orientation is not a dichotomy or even a single continuum along which one must select a mediator.[228] Rather, elicitive and directive mediator behaviors are conceptually distinct, potentially compatible, sets of behaviors.[229] This, too, provides room for the development of a wide range of orientations to mediation—each blending these elements in different combinations.

We are mindful that the results obtained here with law students must necessarily be viewed with appropriate caution. Our participants, who will practice law and select mediators in the coming years, differ from the currently practicing bar in a number of ways, including legal experience, age,

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and other forms of ADR with clients, and the likely effectiveness of requiring such discussions, see Wissler, *Barriers*, supra note 29.

[226] *See supra* note 105.

[227] *See supra* Table 3 and notes 192–99.

[228] *See supra* notes 97, 137–38.

[229] *Id.*

gender, and academic exposure to theories of dispute resolution.[230] While previous studies have not usually revealed large gaps between the behaviors and personality characteristics of law students and those of lawyers,[231] it will be important to confirm our results with similar studies of practicing attorneys. We are hopeful that this initial study into the relationship between lawyer conflict styles and preferences for particular orientations in mediation will open a promising avenue of future inquiry into the question of how and why mediators are chosen and the implications of these choices for the practice of mediation.

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[230] One recent survey of 664 practicing attorneys from the Chicago and Milwaukee areas found that the "vast majority" of respondents had not been "greatly exposed" to ADR nor had taken negotiation courses. Schneider, *supra* note 57, at 191–92. In contrast, 78% of our participants had taken or were taking at least one course in the dispute resolution area (including a survey of ADR, negotiation, conflict theory, mediation, and other courses). This difference is consistent with trends in legal education. Between 1992 and 2002, seventy-nine law schools increased the number of ADR courses that they offer and most U.S. law schools now offer courses in ADR (138 law schools) and/or negotiation (122 law schools), in addition to many that offer more specialized courses in mediation (118 law schools), arbitration (79 law schools), and others. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION, A SURVEY OF LAW SCHOOL CURRICULA: 1992–2002 (2004).

[231] *See, e.g.*, Nelken, *supra* note 62, at 12 (finding that "lawyers' [TKI] results, like the law students', showed a substantial preference for compromising over all other negotiations styles."); *see generally* Daicoff, *Attributes*, *supra* note 178, at 1409 (characterizing the amount of empirical research on practicing attorneys "fairly sparse," but concluding that "it is almost entirely consistent with the research on law students (and even pre-law students)").