

Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model

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I. INTRODUCTION

Quality assurance regarding mediators' services is one of the thorniest policy issues facing the contemporary mediation field. The call for quality assurance measures is motivated by such varied concerns as ensuring consumer protection,¹ enhancing the credibility of the field,² providing

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¹ See generally Barbara Landau, *Qualifications of Family Mediators: Listening to the Feminist Critique*, in QUALIFICATIONS FOR DISPUTE RESOLUTION: PERSPECTIVES ON THE DEBATE 27, 43 (Catherine Morris & Andrew Pirie eds., 1994) [hereinafter QUALIFICATIONS FOR DISPUTE RESOLUTION]; Catherine Morris, *Where Peace and Justice Meet: Will Standards for Dispute Resolution Get Us There?*, in QUALIFICATIONS FOR DISPUTE RESOLUTION, *supra*, at 3, 12; Lisa Schirch-Elias, *Public Dispute Intervenor Standards and Qualifications: Some Critical Questions*, in QUALIFICATIONS FOR DISPUTE RESOLUTION, *supra*, at 79, 79. Concerns with consumer protection are also expressed as a motivating force behind current quality assurance initiatives sponsored by the Association for Conflict Resolution (ACR). See generally Letter from Nancy E. Peace to members of ACR, ACR's Four Quality Assurance Initiatives (July 23, 2003), available at <http://www.acresolution.org/research.nsf/key/QualAssur> (last visited Oct. 16, 2003); Memorandum from the Advanced Practitioner Membership Work Group to ACR Members, Advanced Practitioner Workgroup Report (July 21, 2003), available at <http://www.acresolution.org/research> (last visited Oct. 16, 2003); ACR TASK FORCE ON MEDIATOR CERTIFICATION: INITIAL REPORT (July 21, 2003) [hereinafter ACR TASK FORCE].

² See Landau, *supra* note 1, at 43; Morris, *supra* note 1, at 11; Schirch-Elias, *supra* note 1, at 79.

marketing advantages to individual practitioners,³ and increasing public demand for mediation services.⁴ Yet at the same time, the prospect of quality assurance procedures often stirs heartfelt debate about the professionalization of the field,⁵ premature institutionalization,⁶ reduced access to the field,⁷ standardization,⁸ and hegemony.⁹ While the motivations to provide quality assurance measures are creditable, the sources of resistance highlight significant concerns about the potential impact of such measures on a still-developing field of endeavor and those whom that field serves.

Despite the debate, a wide variety of quality assurance processes have evolved. Professors Sarah Cole, Nancy Rogers, and Craig McEwen catalog a patchwork of processes in place in various jurisdictions throughout the country. These processes include entry-level qualifications based on educational degrees, training, or experience; performance-based standards; mediator liability and immunity schemes; certification and decertification schemes; codes of ethics; and regulatory approaches.¹⁰ Of these, only performance-based assessment directly addresses the *practice* competence of mediators—the ability to perform the role of mediator competently in the course of the unfolding interaction of a mediation session. Nonetheless, it is

³ This motivation typically underlies quality assurance efforts by professional organizations. See, e.g., Letter from Nancy E. Peace, *supra* note 1; Memorandum from the Advanced Practitioner Membership Workgroup Report, *supra* note 1; ACR TASK FORCE, *supra* note 1.

⁴ See Morris, *supra* note 1, at 12.

⁵ See *id.* at 16–17.

⁶ See *id.* at 19.

⁷ Michelle LeBaron Duryea, *The Quest for Qualifications: A Quick Trip Without a Good Map*, in QUALIFICATIONS FOR DISPUTE RESOLUTION, *supra* note 1, at 109–10 (expressing concern that the push for qualifications and standards in the mediation field will lead to “replication of the status quo where processing of disputes is carried out primarily by dominant culture professionals according to dominant culture, middle class values”); Eric B. Gilman & David L. Gustafson, *Of VORPs, VOMPs, CDRPs and KSAOs: A Case for Competency-Based Qualifications in Victim Offender Mediation*, in QUALIFICATIONS FOR DISPUTE RESOLUTION, *supra* note 1, at 89, 93–94 (arguing that the process of establishing mediator qualifications is extending the hegemony of the legal system, and the “white male lawyers” who have become legislators and judges).

⁸ See Morris, *supra* note 1, at 7.

⁹ See Duryea, *supra* note 7, at 110; Gilman & Gustafson, *supra* note 7, at 94; Morris, *supra* note 1, at 6.

¹⁰ SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY AND PRACTICE* §§ 11.2–11.6 (2d ed. 2001).

safe to say that performance-based assessment methods remain the least developed in the field¹¹ and possibly the most criticized as well.¹²

In this Article, we describe and explain a quality assurance model for mediators called the Interactive Rating Scale Assessment—an interactive, performance-based approach that is directed toward the summative assessment¹³ of practice competence in mediators who follow the transformative framework.¹⁴ We begin with the historical and conceptual background of this project in Part II. From our review of the history of performance-based assessment initiatives in the mediation field, we identify three key deficiencies in the early attempts at establishing performance-based assessment methods that we believe generated valid criticism: inadequate theoretical grounding, inadequate empirical grounding, and inadequate methodological grounding. In Part III, we lay the groundwork for our process by articulating our own theoretical, empirical, and methodological

¹¹ According to Cole et al., “the widespread adoption of performance-based standards appears uncertain and distant.” *Id.* §11.2.

¹² Many of these criticisms were expressed in *Who Really is a Mediator? A Special Section on the Interim Guidelines*, 9 NEGOT. J. 293 (1993). See generally Robert A. Baruch Bush, *Mixed Messages in the Interim Guidelines*, 9 NEGOT. J. 341, 342 (1993); Robert Dingwall, *Does Caveat Emptor Alone Help Potential Users of Mediation?*, 9 NEGOT. J. 331, 334 (1993); Deborah M. Kolb & Jonathan E. Kolb, *All the Mediators in the Garden*, 9 NEGOT. J. 335 (1993); David E. Matz, *Some Advice for Mediator Evaluators*, 9 NEGOT. J. 327, 327–30 (1993); Craig A. McEwen, *Competence and Quality*, 9 NEGOT. J. 317, 318 (1993); Carrie Menkel-Meadow, *Measuring Both the Art and Science of Mediation*, 9 NEGOT. J. 321, 321 (1993); Richard A. Salem, *The Interim Guidelines Need a Broader Perspective*, 9 NEGOT. J. 309 (1993); Susan S. Silbey, *Mediation Mythology*, 9 NEGOT. J. 349 (1993); see also, Duryea, *supra* note 7, at 109–29; Morris, *supra* note 1, at 3–24; Cheryl A. Picard, *The Emergence of Mediation as a Profession*, in QUALIFICATIONS FOR DISPUTE RESOLUTION, *supra* note 1, at 141–63; Andrew Pirie, *Manufacturing Mediation: The Professionalization of Informalism*, in QUALIFICATIONS FOR DISPUTE RESOLUTION, *supra* note 1, at 165–91.

¹³ “Summative assessment” refers to assessment performed at the conclusion of a course of instruction in order to determine whether the goals of instruction were met. See D. Royce Sadler, *Formative Assessment and the Design of Instructional Systems*, 18 INSTRUCTIONAL SCIENCE 119, 120 (1989); see also Northern Illinois University, Assessment Services “Assessment Term Glossary,” at http://www.niu.edu/assessment/_resourc/gloss.shtml (last visited Feb. 9, 2004); David R. Carless, *Unleashing the Potential of Assessment for Learning*, Paper presented at the Symposium, “Learning from the Past, Informing the Future: Education, Then, Now and Tomorrow,” supported by the Council of the Lord Wilson Heritage Trust, held at Hong Kong Baptist University, May 13–14, 2002.

¹⁴ The transformative approach was articulated by Robert A. Baruch Bush and Joseph P. Folger. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 12, 102–04 (1994).

foundations. In Part IV, we discuss the discourse patterns that characterize competent transformative mediation practice. We then describe the Interactive Rating Scale Assessment in Part V, including how it is best used and the evidence for its validity and reliability. We conclude, in Part VI, with a discussion of the implications of this model for the future of performance-based assessment initiatives in the mediation field generally.

II. HISTORICAL AND CONCEPTUAL BACKGROUND

A. *The ISCT Project*

The Interactive Rating Scale Assessment we present here is one product of a larger endeavor by the Institute for the Study of Conflict Transformation (ISCT)¹⁵ to develop approaches for supporting and assessing mediator competence in the transformative framework. This work began as part of the Practice Enrichment Initiative (PEI), a multi-pronged theory-to-practice project led by Professors Robert A. Baruch Bush and Joseph P. Folger, which was jointly funded by the Hewlett Foundation and the Surdna Foundation.¹⁶ The PEI, which began in 1998 and ended in 2000, encompassed three work groups: one that focused on developing “pictures of practice” through close analysis of transformative mediation practice using videotapes and transcripts of mediation sessions; another that studied approaches to mediator development and assessment; and a third that analyzed policy materials in the mediation field to assess their impact on the opportunity to engage in transformative practice and to develop appropriate alternatives where necessary.¹⁷ Among the many products of the PEI were: (1) the recognition of the profound impact of policy materials, such as assessment standards and procedures, on practice; (2) a crystallization of images of competent transformative practice; and (3) thoughtful approaches and materials for *formative assessment*—a supportive, developmental approach to *building* mediator competence in the transformative model.¹⁸

¹⁵ The Institute for the Study of Conflict Transformation is a think tank, affiliated with the Hofstra University School of Law that is dedicated to developing and disseminating resources on the transformative framework to practitioners, policymakers, and others interested in the mediation field.

¹⁶ Robert A. Baruch Bush & Joseph P. Folger, *The Practice Enrichment Initiative 1998–2000 Final Report* (2001).

¹⁷ *Id.*

¹⁸ See generally James R. Antes & Judith A. Saul, *Evaluating Mediation Practice from a Transformative Perspective*, 18 *MEDIATION Q.* 313 (2001) [hereinafter, Antes & Saul, *Evaluating*]; James R. Antes & Judith A. Saul, *Staying on Track with*

During this same time period, members of the ISCT were actively engaged in the education and training of mediators—as they are today. A significant component of these training programs involved ongoing assessment of the practices of mediators during the training process in order to determine those areas where adequate learning was demonstrated, as well as those areas where additional instruction was needed. This assessment was conducted through close analysis of the mediators' interactions in mediation simulations. Eventually, to meet the demand for training beyond the introductory level, members of the ISCT developed an advanced tutorial training (also known as a coaching process) that utilized close analysis with mediators of videotaped interactions of those mediators in mediation simulations. This training process was developed in tandem with the work of Professor James R. Antes and Judith A. Saul on formative assessment.¹⁹

Upon the conclusion of the PEI, we turned our attention toward *summative assessment*, that is, a summary evaluation at a specific point in time of a mediator's competence in transformative practice.²⁰ Because our

Transformative Practice: How Do We Know if Mediators Have Internalized the Framework?, Presentation at the Hamline University 1999 Symposium on Advanced Issues in Conflict Resolution (Oct. 16–18, 1999), *available at* <http://www.transformativemediation.org/initiatives.htm> (last visited Feb. 7, 2004) [hereinafter Antes & Saul, *Staying*].

¹⁹ See generally Antes & Saul, *Evaluating*, *supra* note 18; Antes & Saul, *Staying*, *supra* note 18.

²⁰ The summative assessment work of the ISCT was and is motivated by a variety of concerns. First, there is a desire to be responsive to and support the many program administrators who have consistently voiced a need for summative assessment approaches to support their own local quality control efforts. Second, there is a need to protect the integrity of the transformative model and minimize the potential for confusion among various models by providing a means for assessing whether practitioners and programs going by the name “transformative” are truly engaged in transformative practice. The third concern is related to the second: providing a way to assess whether mediators are actually engaged in transformative practice supports the possibility of valid and reliable research into the effects of transformative mediation. Fourth, there is a desire to protect the ability of mediators to use the transformative model by offering an assessment alternative for those programs that are currently using assessment processes based solely on the problem-solving model. While the developers and administrators of such programs may not intend to exclude transformative mediators from their ranks, they sometimes exclude transformative mediators nonetheless because they adopt assessment processes that capture only problem-solving competencies. Finally, the ISCT has been approached by organizations that seek access to a roster of mediators who are competent in the transformative approach. It is within the ISCT mission of supporting the field, and the mission of mediators who wish to engage in transformative practice, to develop such rosters. This requires a thoughtful process for determining practice competence.

interest was in practice competence, we explored performance-based assessment methods. We looked critically at what had already been attempted in the field, considered the concerns voiced by various scholars and practitioners, and sought to develop a process that addressed those concerns. In the process, we brought together the insights from the PEI project, our experiences with training and coaching, and new insights from empirical research on the discourse of competent transformative mediators.²¹

At the 2002 Symposium of the Institute for the Study of Conflict Transformation, entitled *Assuring Mediator Quality: What are the Alternatives?* at the University of Maryland School of Law in Baltimore, we presented a Provisional Summative Assessment Process²² and invited public comment. Participants at the Symposium were generous with their comments, insights, and suggestions.²³ Following the Symposium, we made a number of revisions to the model and tested it for reliability. In the spring of 2003, the ISCT launched a performance-based mediator certification program utilizing the Interactive Rating Scale Assessment.²⁴ With the historical background of this project articulated, in the next section we present the conceptual background, by reviewing the history of performance-based assessment in the mediation field.

B. Performance-Based Assessment in the Mediation Field

The basic premise of performance-based assessment is rather simple: identify what competent mediators do, and then observe mediators in action to determine whether they demonstrate competence by doing it. The earliest attempt to identify what competent mediators do for the purpose of developing a method of assessment is generally traced to Christopher Honeyman.²⁵

²¹ See generally DOROTHY J. DELLA NOCE, *IDEOLOGICALLY BASED PATTERNS IN THE DISCOURSE OF MEDIATORS: A COMPARISON OF PROBLEM SOLVING AND TRANSFORMATIVE PRACTICE* (2002).

²² See Dorothy J. Della Noce et al., *Identifying Competence in Transformative Mediators: A Provisional Summative Assessment Process*, Presentation for the 2002 Symposium of The Institute for the Study of Conflict Transformation (Dec. 8–9, 2002).

²³ We thank all who have contributed to the development of this project, including our colleagues at the ISCT and the participants at the Symposium.

²⁴ Information on the ISCT Certification Program can be found at <http://www.transformativemediation.org> (last visited Feb. 7, 2004).

²⁵ See Christopher Honeyman, *Five Elements of Mediation*, 4 *NEGOT. J.* 149, 149 (1988).

TRANSFORMATIVE MEDIATOR COMPETENCE

While conducting on-the-job training of mediators within the Wisconsin Employment Relations Commission (WERC), Honeyman observed that trainees were likely to encounter vast differences in the working styles of various mediators, which caused certain practical difficulties. To address these difficulties, in 1985–86 he undertook a study designed to find out if there was a common matrix of basic skills that could be used to explain mediator practice generally and to inform mediation training programs in particular. First, he identified five mediators who met two criteria: “demonstrated consistency of results, and the maximum possible variation of character and known style of mediation.”²⁶ Honeyman then observed a total of sixteen mediation sessions conducted by members of this group of mediators. He interviewed the mediators before and after the mediation sessions and made notes of his observations during the sessions. He concluded that all mediators studied engaged in five generic types of activities: investigation, empathy, persuasion, invention, and distraction. The results of this study were then used to develop training materials to teach toward each of the five dimensions as well as to create assessment scales for evaluating the performance of mediator candidates in a mediation role-play simulation.

In 1987, concerns with quality control in the mediation field led the Society of Professionals in Dispute Resolution (SPIDR) to establish a Commission on Qualifications. In its 1989 Report, the Commission concluded that quality control standards for mediators should be “performance-based,” that is, built on understanding what mediators actually do in the course of mediation practice and how they do it, rather than identified with any particular degree or educational background.²⁷ In its Report, the Commission cited Honeyman’s effort at identifying “performance-based” criteria for the selection and training of mediators as an example of the type of criteria it endorsed.²⁸ With this endorsement, the study Honeyman conducted in 1985–86 inspired more than a decade of follow-up work.²⁹

²⁶ *Id.* at 152.

²⁷ See COMMISSION ON QUALIFICATIONS, SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES 3 (1989).

²⁸ See *id.* at 15–16.

²⁹ See, e.g., TEST DESIGN PROJECT, INTERIM GUIDELINES FOR SELECTING MEDIATORS 2 (1993) [hereinafter TEST DESIGN PROJECT, INTERIM GUIDELINES]; TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY FOR USE IN SELECTING, TRAINING, AND EVALUATING MEDIATORS 2 (1995) [hereinafter, TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT]; Christopher Honeyman, *The Common Core of Mediation*, 8 MEDIATION Q. 73, 73 (1990); Christopher Honeyman, *On Evaluating*

Most of the follow-up work on Honeyman's project took place under the auspices of the Test Design Project, a grant-funded initiative with the goal of describing the essential elements of mediation practice in order to create standardized rating scales for evaluating mediators. To develop measurement scales for core mediator competencies in a rapid and economical way, the Test Design Project team built upon the original scales developed by Honeyman, but modified them using a "consensus" process. First, the group compiled a list of tasks expected of mediators by studying training manuals and job descriptions. Then, the group discussed and amended what it had compiled, reaching an agreed list of knowledge, skills, abilities, and other attributes necessary for competent mediation practice. In 1993, the Test Design Project released the *Interim Guidelines for Selecting Mediators* (hereinafter *Interim Guidelines*).³⁰

A special issue of *Negotiation Journal* dedicated to commentary on the *Interim Guidelines* followed.³¹ While some of the commentary lauded the guidelines as a service to the field and the public,³² criticism of the assumptions, methods, and consequences of the *Interim Guidelines* abounded. Notably, the overwhelming weight of critique directed toward the work of the Test Design Project was that it did not account for the diversity of practice in the field.³³

In 1995, the Test Design Project issued its final report, *Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators*,³⁴ which replaced the *Interim Guidelines*. In this report, the Test Design Project team directly addressed the issue of the diversity of practice in the mediation field. The team acknowledged the challenge of resolving the different approaches to mediation on one set of competency scales, and reframed the goal from providing universal, standardized scales to providing a "methodology" for assessment. The Test Design Project team claimed in its final report that it presented at best a methodology—not fixed substantive standards for competency. The team recommended that each mediation program identify the skills it deemed essential to competence and modify the scales proposed by the Project team

Mediators, 6 NEGOT. J. 23, 24 (1990); Brad Honoroff et al., *Putting Mediation Skills to the Test*, 6 NEGOT. J. 37, 37 (1990).

³⁰ TEST DESIGN PROJECT, INTERIM GUIDELINES, *supra* note 29.

³¹ See *supra* note 12.

³² See generally Dingwall, *supra* note 12; Menkel-Meadow, *supra* note 12.

³³ See, e.g., Bush, *supra* note 12, at 343–44; Duryea, *supra* note 7, at 116–20; Kolb & Kolb, *supra* note 12, at 335–36; McEwen, *supra* note 12, at 317–19; Morris, *supra* note 1, at 5–6.

³⁴ TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT, *supra* note 29.

accordingly to customize a set of scales consistent with its own values and priorities. Hence, the Project team's final product was not a valid and reliable test of mediator practice competence. Validity was in question because of the lack of evidence that what the test claimed to be measuring—competent mediation practice—was what it actually measured. On one hand, the multiple variant scales offered by the Test Design Project, and the recommendation that mediation programs customize their own scales, threatened validity by suggesting that competent mediation practice could not be precisely defined and measured. On the other hand, validity was threatened by the lack of empirical evidence to support the scales. Reliability, defined as “consistency of observation, labeling, or interpretation,”³⁵ was likewise threatened by the recommendation of customization, which suggested that if different practitioners could define mediation differently, then different assessors could as well. Hence, quality of mediation practice was in the eyes of each individual assessor and consistency of judgment within the community of assessors was doubtful.

A number of performance-based tests that have followed the Test Design Project—what Professor Bush calls the “progeny of the TDP test”—are “similar in character and purpose.”³⁶ A thorough review of each of these tests is beyond the scope of this Article.³⁷ However, because these tests are based upon essentially the same fundamental assumptions and approach as the Test Design Project test,³⁸ they suffer from the same questionable validity and reliability. For purposes of this Article, we will closely analyze only the case of the Test Design Project, and use it as an exemplar of problems faced by efforts to develop performance-based testing in the mediation field generally.

We suggest that the problem faced by the Test Design Project was not the concept of performance-based assessment per se,³⁹ but rather how that concept was executed. Specifically, we suggest that the foregoing efforts to develop a performance-based assessment process were hampered by: (1) inadequate theoretical grounding, (2) inadequate empirical grounding, and

³⁵ See RICHARD E. BOYATZIS, *TRANSFORMING QUALITATIVE INFORMATION: THEMATIC ANALYSIS AND CODE DEVELOPMENT* 144 (1998).

³⁶ Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 974–81 (2004).

³⁷ *Id.* (reviewing and analyzing these tests).

³⁸ *Id.*

³⁹ Note that the ACR Task Force on Certification reached a contrary conclusion. In its report to the ACR Board of Directors, the Task Force on Certification discouraged the use of performance-based testing because of the “cost . . . and possible unreliability.” See ACR Task Force on Mediator Certification, Initial Report, *supra* note 1.

(3) inadequate methodological grounding. We elaborate each of these dimensions in the paragraphs that follow.

First, the above efforts to develop performance-based assessment methods were hampered by a lack of theoretical grounding. From Honeyman's earliest work to the Final Report of the Test Design Project, there is an absence of any articulated theoretical framework for mediation practice; that is, a coherent explanation of "the when and why" of mediator intervention.⁴⁰ An articulated theoretical framework is essential to the construction of performance-based competency tests for mediators. Theory shapes practice, in the sense that the theoretical framework establishes the definition of success for the mediator, which in turn shapes the mediator's ideas of good practice and bad practice.⁴¹ Because definitions of success vary widely according to the theoretical model followed,⁴² a single rating scale cannot be designed that captures competent practice at a meaningful behavioral level for all mediators, across diverse theoretical frameworks.⁴³ In fact, there is empirical evidence that the very actions that are defined as "good practice" for mediators oriented to one framework are considered "bad practice" for mediators oriented to a different framework.⁴⁴ In other words, practice competence is theory-specific.⁴⁵ Even when there is no articulated theoretical framework, theoretical assumptions about the nature of "good practice" and "good outcomes" still emerge through the language of the assessment standards themselves.⁴⁶ Thus, even in the absence of a clearly

⁴⁰ Joseph A. Scimecca, *Theory and Alternative Dispute Resolution: A Contradiction in Terms?*, in CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 211, 217 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993). See Della Noce, *supra* note 21, at 321–26; Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 41–51 (2002) (discussing the importance of theoretical frameworks for mediation).

⁴¹ Descriptions of three different theoretical frameworks that shape mediation practice in profoundly different ways are offered by BUSH & FOLGER, *supra* note 14, at 59–63, 191–208, 239–41, namely the transformative framework, the problem-solving framework, and the harmony framework. See also Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 263–76 (1996).

⁴² BUSH & FOLGER, *supra* note 14, at 94–95.

⁴³ Bush, *supra* note 36, at 984–1000; DELLA NOCE, *supra* note 21, at 335–36.

⁴⁴ DELLA NOCE, *supra* note 21, at 198–304.

⁴⁵ *Id.* at 333–36.

⁴⁶ See Bush, *supra* note 36, at 968–1000 (analyzing the theoretical models that informed earlier attempts at setting standards for performance-based quality assurance measures); Duryea, *supra* note 7, at 113–18 (analyzing the theoretical model underlying

articulated theoretical framework, performance-based assessment initiatives will have, to the extent that they are applied broadly, the consequence of imposing one model on the field.⁴⁷ For those who understand that there are different forms of mediation practice, such attempts at standardization are seen as hegemonic.⁴⁸

Second, the foregoing efforts to develop performance-based assessment methods were hampered by a lack of empirical grounding—that is, a lack of empirical evidence of what competent mediators actually do in a mediation session. Honeyman’s original study was the foundation for the final rating scales produced in the *Interim Guidelines* and eventually the *Final Report*. This study was problematic in itself, because differences between mediators were not sufficiently conceptualized or operationalized to justify a claim that those differences were indeed transcended by a common core of practice.⁴⁹ Equally problematic was the use of a consensus process to modify the original scales.⁵⁰ Consensus is a process for reaching agreement, not a

the work of the Test Design Project). See generally Della Noce et al., *supra* note 40, at 53–56 (analyzing the role of theoretical clarity in mediation practice and policymaking).

⁴⁷ See Bush, *supra* note 36, at 968–1000.

⁴⁸ See *supra* note 9 and accompanying text.

⁴⁹ Honeyman’s primary claim in this study was that he discovered a “common core” of activities shared by his subjects despite selecting mediators who exhibited “the maximum possible variation of character and known style of mediation.” Hence, the nature and extent of variation in the mediators’ practices bears scrutiny. “Style” variation was demonstrated through Honeyman’s characterization of each mediator (approaching caricature, e.g., the Stoic, the Family Doctor), based on his own observations of and acquaintance with the mediators. One could argue, however, that Honeyman’s mediators were more alike than not with respect to their practices. All five were labor mediators. They shared the same organizational culture and programmatic goals. Most significantly, Honeyman classified all, in an aside, as “deal-makers.” Deborah M. Kolb devised the categories of “deal-maker” and “orchestrator” in an empirical study of labor mediators to refer to two different groups of mediators who could be distinguished by the specific constellations of attitudes and behaviors they shared. See DEBORAH M. KOLB, *THE MEDIATORS* 25 (1983). It is notable that despite Honeyman’s claims of maximum possible variation, he does not identify any of his subjects as “orchestrators.” In light of these observations, Honeyman’s finding that, “to a surprising extent,” a common core of activities could be discerned among the five mediators he observed appears less than surprising. In fact, it is exactly what Kolb’s study would predict. At best, Honeyman identified a common core of behaviors among “deal-making” mediators who worked in the same setting and shared the same culture and the same goals, but were observed by him to exhibit different personalities. Nonetheless, the results of study of this homogenous sample were generalized to the heterogeneous population of mediators.

⁵⁰ See generally Dorothy J. Della Noce, *The Beaten Path to Mediator Quality Assurance: The Emerging Narrative of Consensus and Its Institutional Functions*, 19

research method.⁵¹ Moreover, the consensus process was oriented to capture what mediators (and others) *say* they do,⁵² despite a substantial body of communication research that had accumulated by that time, which suggested that what mediators actually *do* is not always the same as what they *think* they do or what they *say* they do.⁵³ Basing competency tests on what mediators *say* they do, rather than empirical evidence of what competent mediators actually do, mythologizes the practice of mediation.⁵⁴ As a basis

OHIO ST. J. ON DISP. RESOL. 937 (2004) (analyzing and critiquing the use of consensus processes in the mediation field to establish mediator quality control standards).

⁵¹ *Id.* at 939–47.

⁵² *See id.* at 947–57, 962–63. For example, by referring to training manuals and job descriptions, members of the Test Design Project team captured what trainers and employers *said* mediators should do. By further amending their findings with their own notions of good practice, team members added what *they thought* mediators did or should do.

⁵³ *See generally* James J. Alfini, *Trashing, Bashing, and Hashing It out: Is This the End of “Good Mediation”?* 19 FLA. ST. U. L. REV. 47 (1991); Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 MEDIATION Q. 61 (1984); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35 (1991); Robert Dingwall, *Empowerment or Enforcement? Some Questions About Power and Control in Divorce Mediation*, in DIVORCE MEDIATION AND THE LEGAL PROCESS 150 (Robert Dingwall & John Eekelaar eds., 1988); Joseph P. Folger & Sydney E. Bernard, *Divorce Mediation: When Mediators Challenge the Divorcing Parties*, 10 MEDIATION Q. 5 (1985); Angela Garcia, *Dispute Resolution Without Disputing: How the Interactional Organization of Mediation Hearings Minimizes Argument*, 56 AM. SOC. REV. 818 (1991); David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC’Y REV. 613 (1989); David Greatbatch & Robert Dingwall, *The Interactive Construction of Interventions by Divorce Mediators*, in NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 84 (Joseph P. Folger & Tricia S. Jones eds., 1994); DEBORAH M. KOLB ET AL., *WHEN TALK WORKS: PROFILES OF MEDIATORS* (1994); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL’Y 7 (1986); Karen Tracy & Anna Spradlin, *Talking Like a Mediator: Conversational Moves of Experienced Divorce Mediators*, in NEW DIRECTIONS IN MEDIATION, *supra*, at 110; Frans H. van Eemeren et al., *RECONSTRUCTING ARGUMENTATIVE DISCOURSE* (1993). Empirical data on this point has continued to mount. *See generally* Sara Cobb, *The Domestication of Violence in Mediation*, 31 LAW & SOC’Y REV. 397 (1997); Angela Garcia, *The Problematics of Representation in Community Mediation: Implications for Mediation Practice*, 22 J. SOC. & SOCIAL WELFARE 23 (1995); Angela Garcia, *Negotiating Negotiation: The Collaborative Production of Resolution in Small Claims Mediation Hearings*, 11 DISCOURSE & SOC’Y. 315 (2000); B. Phillips, *Reformulating Dispute Narratives through Active Listening*, 17 MEDIATION Q. 161 (1999).

⁵⁴ KOLB ET AL., *supra* note 53, at 459–492, 490 (describing the myths surrounding mediation practice and how they are perpetuated under mediator selection and training

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for performance-based assessment rating scales, it is easily challenged by those with evidence of alternative practices.⁵⁵

Finally, the efforts cited above lacked methodological grounding. Here we refer not to Honeyman's original study, but to the "methodology" for assessing mediator practice that is described in the Test Design Project's Final Report. Performance-based testing of mediator competency entails the assessment of oral communication. Criteria for the credible assessment of oral communication include not only observed performance and a set of assessment scales, but also evidence of validity and reliability.⁵⁶ As we noted earlier, to be valid, it should be apparent that an instrument or process measures what it claims to be measuring. Several factors absent from the Test Design Project would arguably enhance the validity of performance-based testing. First, a coherent perspective on the phenomenon of human communication that accounts for the "interactive and social nature of communication"⁵⁷ would support the validity of the test process, by capturing the contextualized nature of mediator communication, that is, whether the mediator's conversational moves in the interaction are responsive to the parties' moves. Second, validity would be enhanced by taking into account the mediator's own interpretations of the nature, purpose, and effect of his or her moves with respect to the unfolding interaction. Third, validity would be enhanced by a methodologically sound approach to collecting, coding, and analyzing communication data. Reliability, defined earlier as "consistency of observation, labeling, or interpretation,"⁵⁸ would likewise be enhanced by a methodologically sound approach to collecting, coding, and analyzing communication data.

In conclusion, we suggest that efforts to develop valid and reliable performance-based assessment methods have been hampered by inattention to theory, empirical research, and assessment methodology. Clarifying these obstacles points the way to the development of a valid and reliable process: theoretical, empirical, and methodological grounding. In the next section, we articulate just such an approach.

schemes); Silbey, *supra* note 12, at 349–53 (describing how performance-based competency testing may perpetuate mediation mythology).

⁵⁵ Silbey, *supra* note 12, at 352.

⁵⁶ See National Communication Association, *Criteria for Assessment of Oral Communication*, available at <http://www.natcom.org/Instruction/assessment/Assessment/CriteriaAssessment.htm> (last visited Feb. 7, 2004) (describing criteria for the assessment of oral communication in K–18 education programs).

⁵⁷ *Id.*

⁵⁸ See BOYATZIS, *supra* note 35, at 144.

III. THE FOUNDATIONS OF THE INTERACTIVE RATING SCALE ASSESSMENT

A. *Theoretical Foundation*

The Interactive Rating Scale Assessment we present here is specifically grounded in the transformative framework.⁵⁹ Because our theoretical foundation is transformative mediation, we make no claim that the performance-based assessment standards we set forth can or should be generalized to all mediators. By making our approach theory-specific we recognize the diversity of the mediation field, and free our approach of the universalizing and potentially hegemonic impact of prior models.

Moreover, by making our approach theory-specific, we enhance its validity, by tying competent mediator practices at the behavioral level with a specific definition of mediator success. In the transformative framework, mediation is a process in which a neutral third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, by supporting party efforts at empowerment and recognition.⁶⁰ In this approach, “success” in mediation is expressed as “shifts” in the quality of the human conflict interaction in the room, rather than the achievement of an agreement per se or any particular terms of agreement.⁶¹ This vision of success shapes mediation practice in ways that are unique to the transformative framework.⁶² A competent transformative mediator practices with a *microfocus*, identifying opportunities for empowerment and recognition as those opportunities appear in the parties’ own conversations, and responding in ways that provide an opening for parties to choose what, if anything, to do with them.⁶³ Competent transformative practice also has *transformative effects*—visible shifts in each party’s personal clarity, decisionmaking capacity, and responsiveness to the other—that are apparent in the unfolding conversation. Therefore, competence in transformative mediation—the

⁵⁹ BUSH & FOLGER, *supra* note 14, at 191–208.

⁶⁰ See BUSH & FOLGER, *supra* note 14, at 84–89; Folger & Bush, *supra* note 41, at 266–67; see also Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 86–95 (2002).

⁶¹ See BUSH & FOLGER, *supra* note 14, at 84; Folger & Bush, *supra* note 41, at 266–67; see also Bush & Pope, *supra* note 60, at 77–85; DELLA NOCE, *supra* note 21, at 172–97.

⁶² DELLA NOCE, *supra* note 21, at 172–97, 251–304.

⁶³ BUSH & FOLGER, *supra* note 14, at 84.

ability to act consistently and reflectively in a way that supports the parties' efforts at conflict transformation—is a function of the mediator's understanding of the theoretical foundations of the process, and his or her ability to enact that understanding in context of unfolding conflict interaction.⁶⁴

B. *Empirical Foundation*

With our theoretical framework defined, we can now address the question of defining competent practice. As we noted earlier, competence is theory-specific. Because it is impossible to specify competent practice at the behavioral level that is valid for the diversity of theoretical frameworks that occupy the mediation field,⁶⁵ our primary concern in this project was with empirical evidence of competent practice in the transformative model.

We developed this model using two types of empirical evidence of what competent transformative mediators *actually do (and don't do)* in mediation. First, we drew upon what might be called the “participatory action research”⁶⁶ conducted by members of the ISCT since the time of the PEI—the analysis of videotapes and transcripts of mediation sessions, as well as close coaching work with mediators on the nature and effects of their discourse moves at a micro-level. Second, we drew upon discourse analytic research conducted by Della Noce, who compared the practices of competent problem-solving mediators with the practices of competent transformative mediators, and thereby isolated essential and unique discursive practices of transformative mediators.⁶⁷ Specifically, Della Noce identified five “discourse strategies” used by the transformative mediators in her study that were not used by the problem-solving mediators, as well as various micro-level mediator moves that made up those strategies.⁶⁸ We continued to refine and build on the findings of this research by analyzing additional videotapes of mediations representative of each framework and comparing the patterns

⁶⁴ See Antes & Saul, *Evaluating*, *supra* note 18, at 315–23.

⁶⁵ Bush, *supra* note 36, at 984–1000; Della Noce, *supra* note 21, at 333–36.

⁶⁶ See Stephen Kemmis & Robin McTaggart, *Participatory Action Research*, in *HANDBOOK OF QUALITATIVE RESEARCH* (2d ed.) 567, 593, 595–98 (Norman K. Denzin & Yvonna S. Lincoln eds., 2000) (describing participatory action research as a collaborative, recursive, critical, and practical social process through which participants in any form of social practice aim to transform both theory and practice by examining what the nature of social practice is, how social practice is shaped, and how social practice can be transformed through collective action).

⁶⁷ DELLA NOCE, *supra* note 21, at 198–304.

⁶⁸ *Id.* at 251–304.

of practice we found with those identified in the original research. We define the discursive practice patterns of competent transformative mediators in a later section; but first, we address the methodological foundations of our approach.

C. Methodological Foundation

Because any attempt to assess mediator practice is the assessment of communication, with potentially serious consequences for the assessee, methodological grounding is essential. Competence cannot be merely in the eye of the beholder. As we noted earlier, the validity and reliability of performance-based testing is enhanced when the process is based on (1) building on a coherent perspective on the phenomenon of human communication that accounts for the “interactive and social nature of communication”⁶⁹ by capturing the contextualized nature of mediator communication; (2) taking into account the mediator’s own interpretations of the nature, purpose, and effect of his or her moves on the ongoing interaction; and (3) using a methodologically sound approach to collecting, coding, and analyzing communication data. We address each of these factors in the paragraphs that follow.

Our work is based on *the discourse analytic perspective*.⁷⁰ By way of the briefest summary, the discourse analytic perspective treats human communication as a complex social interaction: multi-functional, goal-directed, context-sensitive, tentative, patterned, interpretive, and socially constructed, with important and far-reaching social consequences. The importance of this perspective will become clearer as we discuss the structure of the assessment process below. For now, however, it should be apparent that this perspective takes context seriously and does not support the assumption that an observer can simply “read off” a single meaning, purpose, or function from a sample of mediator discourse.

Because our perspective emphasizes the contextualized and interpretive nature of meaning in communication, we have taken care to temper the assessor’s interpretation of practice competence with the interpretations of the mediator. By bringing the mediator’s voice into the assessment process, we tap into the situated knowledge and values of the mediator, as well as

⁶⁹ National Communication Association, *supra* note 56.

⁷⁰ This perspective has a rich and complex history that is beyond the scope of this presentation. See DELLA NOCE, *supra* note 21, at 76–87 (elaborating on this perspective and providing a concise review of the key literature).

how the mediator reads the unfolding context of the session, in order to build a nuanced interpretation of competence and thereby enhance validity.

Finally, we have also taken care to articulate precise methods for collecting, coding, and analyzing the discourse of the mediation session, in order to enhance both the reliability and the validity of this process. The units of coding and units of analysis are the subject of the next section.

IV. DISCOURSE PATTERNS OF COMPETENT TRANSFORMATIVE MEDIATORS

Given our concern with mediator *practice* competency, we discuss markers of transformative practice here with a focus on *mediator discourse*.⁷¹ The focus on discourse allows us to solidify fundamental but abstract theoretical concepts (such as empowerment and recognition), so they can be coded and analyzed by assessors, and just as importantly, taught to assessors.

We introduce here three levels of mediator discourse at ascending levels of complexity: means, moves, and strategies. Each has an important role, but each provides different insights on the competence of the mediator. The role of each of these levels in assessment will become more apparent when we discuss the assessment process itself in a later section.

A. Means

In mediator discourse, the “means” are the linguistic “forms” a mediator intervention takes, such as reflection, summary, or question. Mastery of certain basic linguistic forms contributes a certain degree of fluency to mediator discourse. However, because this basic level of discourse has no inherent meaning or function, assessment at this level alone provides little insight on competence in transformative practice. For example, a summary could be used to open up a party-to-party conversation (transformative practice) or to shut it down by changing the topic or the speaker turn (contrary to transformative practice); a question can be used to follow the parties’ conversation for elaboration (transformative practice) or to change the topic of their conversation (contrary to transformative practice). Therefore, the “means” of mediator intervention, while important, are less informative regarding practice competence than *how* he or she uses them in context. Assessment of competency requires that we look at a more complex level of discourse.

⁷¹ “Discourse” refers to communicative behavior in a social setting. See TEUN A. VAN DIJK, *IDEOLOGY: A MULTIDISCIPLINARY APPROACH* 194 (1998).

B. *Moves*

The next level of complexity is discourse “moves.” A useful way to think of discourse “moves” is as “meaning-making units,” or to borrow a term from Boyatzis, “codable moments.”⁷² A single turn at talk is often made up of multiple moves. “Moves” provide insight on *how* a mediator structures his or her turn in the interaction in response to preceding interactions—taking into account the means of intervention as well as specific linguistic features, such as noun and pronoun use, that demonstrate how the mediator is orienting to the prior turns at talk. Because mediator moves key into “local” context (prior turns), they provide valuable insight on competence (especially with respect to whether the mediator is “following” the parties).⁷³ However, moves still focus primarily on the mediator’s behavior turn-by-turn, and provide relatively little insight into the purpose of that behavior, its consistency or inconsistency over time, its effects on the ongoing interaction, or the overall character of the interaction being shaped.

C. *Strategies*

Finally, a further level of complexity is discourse “strategies,”⁷⁴ recurrent patterns of moves that braid together over time. Because strategies, in the communication sense, refer to patterns over time, they are viewed and understood *retrospectively*.⁷⁵ Of the three levels of discourse outlined here, strategies provide the greatest insight on competence because they reveal the coherent function of mediator moves over time in terms of how the mediator uses and combines various moves to consistently support party efforts at empowerment and recognition—revealing the purpose of the mediator’s interventions, the effects of those responses on the continuing interaction,

⁷² BOYATZIS, *supra* note 35, at 65.

⁷³ Compare the context sensitivity of this approach with Duryea’s criticism that the approach taken by the Test Design Project failed to take the parties into account. Duryea, *supra* note 7, at 115.

⁷⁴ We want to emphasize here that we are using the term “strategy” in a discursive, rather than psychological, sense. That is, we are not talking about psychological strategizing that puts the mediator out “ahead of the parties.” KOLB ET AL., *supra* note 53, at 472. Rather, we are referring to a “strategy” as a discursive intervention that gains—and reveals—its function in context, based on the fundamental assumption of discourse analysis that all discourse is goal-directed.

⁷⁵ See Rom Harré & Luk Van Langenhove, *The Dynamics of Social Episodes*, in POSITIONING THEORY: MORAL CONTEXT OF INTENTIONAL ACTION 1 (Rom Harré & Luk Van Langenhove eds., 1999).

and the overall character of the interaction being shaped through the discourse.⁷⁶ Said another way, strategies provide a way of analyzing and describing collections of mediator moves (made by using such means as summaries, reflections, questions, and statements), as they appear in context, in terms of their responsiveness to the parties' interactions and their effects on ongoing interaction.

In the Interactive Rating Scale Assessment, "moves" are the *units of coding* or the "codable moment,"⁷⁷ and "strategies" are the *units of analysis* on which decisions about mediator competency are based. We will return to this distinction later in this Article. But first, it is important to illustrate what we mean by moves and strategies in the discourse of competent transformative mediation practice. In the subsections that follow, we discuss five essential discourse strategies of competent transformative practice, as well as typical mediator moves that make up each of those strategies. We begin each subsection with a description of the strategy and its importance to transformative practice. We describe mediator moves that support each strategy,⁷⁸ and provide examples from actual mediator interventions.⁷⁹ We also describe mediator moves that would not be supportive of each strategy (i.e., that would be contrary to competent transformative practice).

1. *Strategy 1: Orienting the Parties to a Constructive Conversation*

"Constructive conversation" is an important root metaphor⁸⁰ for mediators working in the transformative framework.⁸¹ This metaphor is significant for transformative practice at a number of levels. First, it is a distinctly Relational metaphor, embracing the joint participation of all

⁷⁶ DELLA NOCE, *supra* note 21, at 122–30.

⁷⁷ BOYATZIS, *supra* note 35, at 62–65.

⁷⁸ We should emphasize here that the same move might appear as supportive of one or more strategies. Recall from the earlier discussion in this Article about the discourse analytic perspective on human communication that discourse is *multifunctional*. Therefore, it is conceivable (and even likely) that a single mediator move may actually support more than one functional strategy. Likewise, a single mediator move may have elements that support one strategy but interfere with another.

⁷⁹ See DELLA NOCE, *supra* note 21, at 251–304 (providing examples used throughout this Article).

⁸⁰ See generally Ruth C. Smith & Eric M. Eisenberg, *Conflict at Disneyland: A Root-Metaphor Analysis*, 54 COMM. MONOGRAPHS 367, 368 (1987) (noting that root metaphors "play a crucial role in the production, understanding, and communication of human thought and action").

⁸¹ See DELLA NOCE, *supra* note 21, at 172–86.

concerned parties in a constructive dialogue.⁸² Second, because of its Relational roots, the conversation metaphor embraces the two signature dimensions of transformative practice: empowerment and recognition.⁸³ It is an inherently empowering metaphor, as its introduction conveys the message that mediation is simply the familiar process of conversation in which participants are presumed competent. At the same time, introduction of this metaphor orients the parties to the possibility of interpersonal recognition built through dialogue.⁸⁴ Third, by focusing the mediator on the importance of party-to-party conversation, the metaphor supports mediator efforts to engage in a microfocus on the parties' interaction.⁸⁵ Finally, the conversation metaphor allows for a definition of success that goes beyond agreement alone, as a successful conversation can result in greater understanding of the other, of choices to be made, and of potential consequences, whether agreement is reached or not.⁸⁶

Competent transformative mediators often introduce the conversation metaphor early in the session, as they describe the mediation process and the mediator's role in their opening comments. The conversation metaphor also can be a useful touchstone for mediators throughout the process. When mediators feel pulled toward narrowing, directive, or solution-focused behaviors that would place their agenda above the agenda of the parties, the conversation metaphor reminds the mediators of the purpose of mediation and that the focus should be on the parties' interaction and their choices about whether and how to have their conversation.

a. *Supportive Moves*

Certain mediator moves demonstrate that the mediator is orienting the parties to a constructive conversation. Two that are quite typical are:

1. Using a metaphor of conversation to describe mediation or the mediator's role (including such words as "discussion," "chat," "talk," etc.); and

⁸² See, e.g., MARGARET J. WHEATLEY, TURNING TO ONE ANOTHER: SIMPLE CONVERSATION TO RESTORE HOPE TO THE FUTURE 24–33 (2002) (discussing the power of conversation to build interpersonal understanding).

⁸³ See BUSH & FOLGER, *supra* note 14, at 84.

⁸⁴ See, e.g., WHEATLEY, *supra* note 82, at 24–33.

⁸⁵ See DELLA NOCE, *supra* note 21, at 184–86.

⁸⁶ See DELLA NOCE, *supra* note 21, at 308–10.

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2. Identifying inherent constructive possibilities in having a conversation, such as talking over differences, increasing clarity and interpersonal understanding, seeing choices, and making decisions.

Consider this example, taken from a mediator's opening comments, where the italicized text illustrates the mediator using the conversation metaphor and pointing to inherent constructive possibilities:

Example 1: "I see my role as a mediator to assist you *in conversation and discussion*. So that, I'm not going to be making any judgments about what I think is best for you. That, I think you are the two people who are in the best position to make those judgments. And, if you're having some differences about what's best for you and your children, then *this is a place for you to talk, talk over the differences*, um, and I see my role as helping to clarify your thinking about them, helping you to *clarify your thinking*, in the sense of *understanding your own goals, your own needs, and understanding the other person's.*"

b. *Non-Supportive Moves*

At the same time, it should be noted that certain mediator moves do not support an overall strategy of orienting parties to a constructive conversation, including:

1. Using metaphors that disempower the parties by positioning the mediator as an authority figure or expert: such as, referring to mediation as a "hearing" and using related legal terms; referring to the legal, therapeutic, or substantive expertise of the mediator; assuming an analytical stance "above" the parties;
2. Using metaphors that suggest that the outcome is more important than the conversation itself: for example, negotiation, settlement, problem-solving, problem, and solution; and
3. A focus on agreement as the definition of success.

Because these moves are contrary to competent transformative practice, the mediator with a transformative orientation should avoid them.

2. *Strategy 2: Orienting the Parties to Their Own Agency*

Party agency is another important concept for transformative practice.⁸⁷ "Agency" is "a person or thing through which power is exerted or an end is

⁸⁷ *Id.* at 172–86.

achieved.”⁸⁸ In the transformative framework, mediators orient the *parties* to their *own* agency—that is, their own potential ability to exert power or achieve certain goals in the mediation session.

Orienting parties to their own agency is a strategy directly tied to empowerment. It means using language that signals the *parties'* ability to act and to decide, if they so choose, as well as language that signals the *parties'* central role in the mediation. This is in contrast to language that signals that the mediator has the central role in the process. In general, a mediator is utilizing this strategy when he or she conveys to the parties that “this is all about you,” rather than “this is all about me.” This is often as easy to identify as what pronouns the mediator generally uses (i.e., more “you” talk than “I” talk). Another way to identify this strategy is through moves that show the mediator “getting out of their way,” as opposed to “getting in their way.”

a. *Supportive moves*

Certain mediator moves demonstrate that the mediator is orienting the parties to their own agency. Some that are quite typical are:

1. Using the second person subject, singular and plural (“you”), in questions, summaries, and reflections;
2. Using second person possessive adjectives (“your”), in questions, summaries and reflections;
3. Using parties’ names in the subject position of a sentence, thereby “constructing” them as people capable of action;
4. Downgrading mediator agency (e.g., emphasizing mediator role as “assisting” or “helping,” or otherwise disclaiming mediator power or authority);
5. Using reflections that “follow” a party’s own comments;
6. “Getting out of the parties’ way” (e.g., allowing the mediator to be interrupted or corrected); and
7. Offering reflections of a party’s comments in a tentative manner, especially by using “check-ins” or ending with an open, questioning tone (e.g., “is that what you were trying to say?”).

Consider again the text of Example 1, above, from a mediator’s opening comments, this time noting how the (different) italicized words and phrases orient the parties to their own agency and simultaneously downgrade mediator agency:

⁸⁸ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 22 (10th ed. 1993).

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Example 2: “I see my role as a mediator to *assist you* in conversation and discussion. So that, *I’m not going to be making any judgments* about what I think is best for *you*. That, I think *you* are the two people who are in the best position to make those judgments. And, if *you’re* having some differences about what’s best for *you* and *your* children, then this is a place for *you* to talk, talk over the differences, um, and I see my role as *helping* to clarify *your* thinking about them, *helping you* to clarify *your* thinking, in the sense of understanding *your* own goals, *your* own needs, and understanding the other person’s.”

An important point to notice in comparing Example 1 with Example 2 is that, in the same “piece” of discourse where the mediator oriented the parties to constructive conversation, she also oriented them to their own agency. This is what was meant earlier by discourse being *multifunctional*. The mediator accomplished multiple discursive goals within a single turn at talk by braiding together a pattern of multiple moves in context.

This second example of the strategy of orienting the parties to their own agency is a series of reflections directed to each party. This series of reflections followed an interchange between the parties about one party’s proposal that took approximately twenty turns at talk between them, and is notable for how it orients each of the parties to their own agency through the italicized segments:

Example 3: (Mediator) So, *you* have some details *you want* to talk about here I think, as far as . . . but I just wanted to, not let drop, the, uh, comments *you* were making about the philosophy *you* were bringing to *your thinking* in developing this, and *your* reactions to it, *Bill*. And it sounded as though *you* were saying, *Anne*, that *you, you wanted* to, be able to maintain *yourself*, and the kids when they’re with *you*, in a standard where *you feel you’re* not being short-changed. That, *you’re* not living at a poverty level, and that that’s gonna take help from Bill. A lot of . . .

(Anne) I have no income. I’m in school.

(Mediator) And, and *Bill, you were saying* that, *you’re, you* really essentially do want that, to the extent . . . but *you’re* not sure that *you* have income available, to provide everything as *you* see it on the list now. But . . .

b. *Non-Supportive Moves*

As was true with regard to the prior strategy, it is worth noting that certain mediator moves do not support the strategy of orienting the parties to their own agency, including:

1. Using terms that orient the parties to the agency of the mediator, especially frequent use of the first person by the mediator (“I,” “me,” “my,” or “we”);
2. Acting in ways that assert mediator authority (e.g., interrupting the parties or setting ground rules for the parties); and
3. “Normalizing”⁸⁹: advancing the mediator’s interpretation of the party’s situation over the party’s own interpretation, by “convinc[ing] them that theirs is a normal, resolvable problem” and “undermin[ing] the uniqueness of each problem definition by normalizing the situation.”⁹⁰

Because these moves are contrary to transformative practice, the mediator with a transformative orientation should avoid them.

3. *Strategy 3: Orienting the Parties to Each Other*

Mediators who practice in the transformative framework also orient each of the parties to the presence of the other party (or parties) in the session—or, said another way, to the participation and connection of both (or all) concerned parties.⁹¹ Orienting the parties to each other is a strategy directly related to supporting inter-party recognition—to supporting opportunities for the parties to build interpersonal understanding should they choose to do so.

A foundation for the possibility of recognition is laid when the mediator uses simple language that orients the parties to the participation and connection of all involved, such as “both of you,” or “all of you,” or “together.” Likewise, allowing party-to-party talk, when the parties choose to engage in it, also provides a foundation for the possibility of recognition as interpersonal understanding is built through direct dialogue.

An important caveat attaches to this strategy, however. As Bush and Folger⁹² have noted, recognition is *always* subject to empowerment. It is a matter of party choice, and thus, although the mediator can lay the foundation through this strategy, the mediator should not force recognition. While the possibility of recognition begins with an awareness of the other—which mediators can foster—empowerment requires that mediators leave it to the parties to choose what to do with that awareness.

⁸⁹ JOHN M. HAYNES, *THE FUNDAMENTALS OF FAMILY MEDIATION* 9–11 (1994).

⁹⁰ *See id.* at 9.

⁹¹ DELLA NOCE, *supra* note 21, at 263–65, 283–90.

⁹² *See* BUSH & FOLGER, *supra* note 14, at 84–85.

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a. *Supportive Moves*

Certain mediator moves demonstrate that the mediator is orienting the parties to each other. Some that are quite typical are:

1. Using the conversation metaphor (it takes two!);
2. Using the second person *plural* subject;
3. Making explicit references to “the other” (by name, or terms such as “both of you,” or “each of you,” or “together”);
4. Allowing parties to speak of and for each other (that is, to step into the other’s shoes);
5. “Checking in” with a party who has not been “in” the conversation for a period of time, to orient the speaking party to the other party’s presence, and to “make space” if that party chooses to talk;
6. Allowing significant segments of uninterrupted party-to-party talk (sometimes understood as a move of “intentional silence”); and
7. “Following” party-to-party discussions thorough *inclusive* summaries—summaries that include important topics or themes that each party has raised and make extensive use of the second person (“you”) as well as the parties’ names.

Consider the following example from an opening discussion between a mediator and the parties, and how the italicized portions emphasize that mediation is something the parties engage in *together*:

Example 4: “Um, what about your, um, your guidelines for discussion, in terms of what *you* think will make a most productive meeting for the *two of you*. Are there any requests *you* would make of *each other* about the *communication process*? Any suggestions that *you* would have, based on, you know, kind of understanding that you’ve worked with a mediator, and have had *conversations* with *each other*? Any suggestions *you* would make?”

b. *Non-Supportive Moves*

Again, it is important to note that certain mediator moves do not support the strategy of orienting the parties to each other, including:

1. Focusing party attention on the mediator and away from each other;
2. Focusing party attention on “the problem” and away from each other;

3. Discouraging party-to-party talk through:
 - (a) Ground rules;
 - (b) Use of caucus;
 - (c) Ignoring a party who is trying to engage; or
 - (d) Non-verbal behaviors that “cut off” a party; and
4. Stopping party-to-party talk when it happens, through
 - (a) “Turn shifts” (changing who may speak next);
 - (b) “Topic shifts” (changing the subject);
 - (c) Interruptions;
 - (d) Use of caucus; or
 - (e) Specific “sanctions” (e.g., “speak for yourself” or “speak to me”).

Because these moves are contrary to transformative practice, the mediator with a transformative orientation should avoid them.

4. *Strategy 4: Supporting the Parties’ “Conflict Talk”*

Supporting the parties’ “conflict talk” is an essential strategy for a transformative mediator, and a key difference between the discourse of transformative and the discourse of problem-solving mediators.⁹³ For transformative mediators, it is critical that the parties at least have the opportunity to talk with and hear each other, no matter what the ultimate outcome. The underlying premise is that, for decisionmaking (empowerment) and interpersonal understanding (recognition) capacities to develop through conversation, conversation must be allowed to happen. Hence, the mediator must be comfortable in the presence of “conflict talk,” and orient toward supporting rather than containing it.

We use the term “conflict talk” to refer to interactions in which the parties “oppose the utterances, actions, or selves of one another in successive turns at talk,” as well as those in which one party constructs an opposition between himself or herself and the other party in a single turn at talk.⁹⁴ The

⁹³ DELLA NOCE, *supra* note 21, at 308–14.

⁹⁴ The term “conflict talk” is taken from a book entitled CONFLICT TALK: SOCIOLINGUISTIC INVESTIGATIONS OF ARGUMENTS IN CONVERSATIONS (Allen D. Grimshaw ed., 1990). We use it here to refer to the speech activity of verbal conflict in which the parties “oppose the utterances, actions, or selves of one another,” either through direct engagement between the parties, or through one party’s construction of an opposition with the other in a single turn at talk. See DELLA NOCE, *supra* note 21, at 207–8 (extending the definition provided by Samuel Vuchinich, *The Sequential Organization of Closing in Verbal Family Conflict*, in CONFLICT TALK, *supra* at 118). See also Christina Kakava, *Discourse and Conflict*, in THE HANDBOOK OF DISCOURSE ANALYSIS

key feature is its oppositional nature. The transformative mediator works to support this talk between the parties because conflict talk is functional. Studies of the discourse of conflict demonstrate that people conduct important social acts in the midst of conflict interactions.⁹⁵ For the transformative mediator, it is as the conflict unfolds from moment to moment that the parties can learn new information, present themselves in new ways, create new understandings, and make informed decisions. To support these possibilities, the mediator follows that unfolding conversation, listening for places of difference, contention, or heat, where choices can be highlighted or possibilities for building greater interpersonal understanding emerge. Said another way, both empowerment and recognition opportunities emerge—and shifts happen—in the midst of “conflict talk.”

a. *Supportive Moves*

Certain mediator moves demonstrate that the mediator is oriented to supporting the parties’ conflict talk. Some that are quite typical are:

1. Using minimal encouragers at party pauses to encourage a party to continue speaking (“Mm-hmm,” “Go on,” “Okay”);⁹⁶
2. Using key word encouragers, that is, keying in to a term a party uses that seems to carry heat (“Support, as in . . . ?”);⁹⁷
3. Using open reflections (reflections that “follow” the content and emotional tone of party “conflict talk,” and “check in” with that party on the accuracy of the reflection);
4. Using reflections and summaries to mark points of disagreement (not just agreement or common ground);
5. Using reflections, summaries, and questions that “follow” conflict storylines;
6. Asking questions that invite elaboration of “conflict talk;” and

651, 651 (Deborah Schiffrin et al. eds., 2001) (defining conflict as “any type of verbal or nonverbal opposition ranging from disagreement to disputes, mostly in social interaction”).

⁹⁵ See generally Grimshaw, *supra* note 94; Kakava, *supra* note 94 (reviewing research conducted on language and conflict).

⁹⁶ Erling O. Jorgensen et al., *The What and How of Transformative Opportunities*, in *DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK* 133, 139 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001).

⁹⁷ *Id.*

7. Allowing multiple themes or storylines to develop in the course of conversation (including conflict-related themes and not just themes or storylines that seem tangible or solvable).

Consider the following example, noting how the mediator keys in on the word that marks a point of disagreement, and how she ends with a questioning, open tone that invites the party to say more.

Example 5: (Party) Um, the main issue that I think we're both very stressed and scared about is money, the financial aspect. And then I think, time is also an issue for him, because of Coleen. That's not an issue for me.

(Mediator) "*Time. . . time in the sense . . . ?*"

b. *Non-Supportive Moves*

Again, it is important to note that certain mediator moves do not support the strategy of supporting the parties' conflict talk, including:

1. Preventing the possibility of conflict talk in advance ("preemptive containment")⁹⁸ through ground rules that limit:
 - (a) How long a party may talk;
 - (b) How parties may talk; and
 - (c) What they may talk about;
2. Terminating conflict talk when it occurs ("reactive containment")⁹⁹ through:
 - (a) Turn shifts (changing the speaker);
 - (b) Topic shifts (changing the subject);
 - (c) Interruptions;
 - (d) Use of caucus; and
 - (e) Specific sanctions;
3. Failing to respond to conflict talk and its accompanying emotional tone;
4. "Normalizing" (see above);
5. "Mutualizing"—changing a party's interpretation of a situation from one which places blame or responsibility on the other by framing the problem using a mutually acceptable definition;¹⁰⁰

⁹⁸ See DELLA NOCE, *supra* note 21, at 208–09 (describing preemptive containment).

⁹⁹ *Id.* at 209–11 (describing reactive containment).

¹⁰⁰ See, e.g., HAYNES, *supra* note 89, at 11; CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 236 (3d ed. 2003).

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6. “Future focus”—stopping or discouraging “conflict talk” about the past by shifting the parties’ conversation to talk about the future;¹⁰¹
7. Reframing—changing a party’s definition of a situation so that the conflict is laundered out and the situation is redefined as a solvable problem, changing a party’s statement of a position into a statement of an interest, or changing a party’s statement of a value that is in conflict to a statement of an interest; and¹⁰²
8. “Softening” a party’s “conflict talk.”

Because these moves are contrary to transformative practice, the mediator with a transformative orientation should avoid them.

5. *Strategy 5: Supporting the Parties’ Decisionmaking Process*

For the transformative mediator, the emphasis on party empowerment requires that the mediator highlight *all possible decision-points* and offer them to the parties. Moreover, the mediator makes no distinction between so-called “process” and “content” decisions.¹⁰³ Mediation is viewed as an ongoing process of decisionmaking by the parties—whether to stay, who should talk when, what to say, what not to say, whether to listen, how to listen, how to talk, what to do, etc. In terms of practice, this means (1) the mediator should avoid making any decision that could be made by the parties, and (2) the mediator should note the possible decision-points and offer them to the parties, but the mediator should not force decisions upon the parties.

a. *Supportive Moves*

Certain mediator moves demonstrate that the mediator is oriented to supporting the parties’ decisionmaking process. Some that are quite typical are:

1. Using reflections or summaries to highlight available decision-points and call them to the attention of the parties (making no distinction between process and content decisions);

¹⁰¹ See, e.g., HAYNES, *supra* note 89, at 12–13.

¹⁰² See, e.g., MOORE, *supra* note 100, at 236–44.

¹⁰³ See Joseph P. Folger, *Who Owns What in Mediation?: Seeing the Link Between Process and Content*, in *DESIGNING MEDIATION*, *supra* note 96, at 55 (discussing the fallacy of separating process and content).

2. Using reflections, summaries, or questions to offer decision-points to the parties;
3. "Checking in" with the parties through questions when decision-points are noted;
4. Pairing any mediator suggestions with "tentatives" that downgrade mediator decisionmaking authority (e.g., "I just," "it might," and "I don't know"); and
5. Offering any mediator suggestions with a number of alternatives to emphasize the possibility of party choice.

Consider the following example from the early moments of a mediation, noting how the mediator emphasizes opportunities for party decisionmaking in the italicized segments:

Example 6: (Mediator): Okay. So *is this a list of agenda items, is this where you want to start . . . ?*

(Party): It's a list of what we need to split up . . .

(Mediator): Okay . . .

(Party): uh, what we need to do with the kids . . .

(Mediator): Mmm-hmm.

(Party): um, I don't know what you want to do, I mean, we . . .

(Mediator): Okay.

(Party): see, we don't have that many things, like house and, stuff . . . Um, I don't know what you want to do first.

(Mediator): I certainly want to do *what you want to do*. But you have in that packet of information I gave to you an outline of the two major areas that normally need to be talked about, and that's children, of course, and the division of . . .

(Party): property . . .

(Mediator): your assets.

(Other party): Um-hum.

(Party): Yep.

(Mediator): So *wherever you might want to start*. It *might* be good to, um, *you know*, start with what you feel might be either more urgent, *or* important to you, *or* you feel you need to get a little more clarity, *or* more information first before we can go further. *I don't know . . .*

b. *Non-Supportive Moves*

Again, it is important to note that certain mediator moves do not support the strategy of supporting the parties' decisionmaking, including:

1. Making choices for the parties;
2. Taking choices away from the parties;
3. Narrowing discussion in a way that limits party choices;
4. Favoring certain choices over others;
5. Orchestrating or managing the parties' interactions through so-called "process" choices; and
6. "Closing" (disregarding unresolved topics that arose in the conversation as agreement begins to appear).

Because these moves are contrary to transformative practice, the mediator with a transformative orientation should avoid them.

In summary, a number of important points should be highlighted regarding mediator moves and strategies, in light of the goal of using these discourse markers to assess mediator competence. Given the multi-functional nature of discourse noted earlier in this Article, it should be apparent that some mediator moves can support more than one strategy, depending on how the moves are used in context. Moreover, not every move in a given strategy must be employed by the mediator in order for the mediator to be competent in that strategy. This is where the personal "style" of the mediator may be taken into account. For example, some mediators may show a preference for orienting the parties to each other by "intentional silence," while others may make ample use of summaries, yet all may be working competently within the transformative framework. Said another way, no mediator should feel compelled to use every move identified here in any given mediation, and it would not be helpful to mediators to create an assessment process that suggests that they should focus on using every available move in order to demonstrate their competence, no matter what the context.

We should also note that there are more than thirty different mediator moves identified here that characterize competent practice in the transformative framework, and more than thirty different moves identified that would be contrary to competent practice. A checklist that attempted to capture mediator competencies at the level of discursive moves would be unwieldy for an assessor.¹⁰⁴ At the same time, a checklist tends to ignore the

¹⁰⁴ See, e.g., PATRICIA CRANTON, *PLANNING INSTRUCTION FOR ADULT LEARNERS* 200 (2d ed. 2000) (suggesting that a checklist contain no more than 15 items).

context in which moves are enacted, as well as the interactive effect of the move employed. These observations support our conclusion that a rating scale that can capture competence at the strategy level is both a more appropriate and user-friendly approach to assessing mediator discourse.

For all of these reasons, we have chosen “strategies” as the unit on which to base our assessment process and our rating scale. That is, “strategies” are the *unit of analysis* on which decisions about mediator competency will be based, while “moves” are the *unit of coding* or the “codable moment.”¹⁰⁵ The importance of this distinction will become clearer in the next section.

V. AN OVERVIEW OF THE INTERACTIVE RATING SCALE APPROACH TO SUMMATIVE ASSESSMENT

In terms of transformative mediation, the goal of a summative assessment process is to provide evidence of how well the mediator has learned and internalized the approach, to the end that he or she can apply it to specific situations, and ultimately, demonstrate appropriate moves and strategies in practice.¹⁰⁶ Ability to perform is best assessed through actual observation of performance, supported by rating scales or checklists¹⁰⁷ that focus the observer on the key aspects of a desired performance.¹⁰⁸ At the same time, although observation of performance does not directly test mastery of a given body of knowledge, rating scales or checklists can be developed in such a way as to permit reasonable inferences about a candidate’s knowledge and ability to apply it.¹⁰⁹ In the alternative, an approach to evaluation can combine the use of rating scales or checklists that are oriented to the evaluation of performance with additional components

¹⁰⁵ See BOYATZIS, *supra* note 35, at 62–65.

¹⁰⁶ See Antes & Saul, *Evaluating*, *supra* note 18, at 319; Antes & Saul, *Staying*, *supra* note 18, at 5.

¹⁰⁷ A clarification of the differences between checklists and rating scales is in order. A checklist is used to record whether certain discrete behaviors have occurred and if so, with what frequency. See CRANTON, *supra* note 104, at 199. It is structured as a simple list of behaviors that are checked off—in yes/no fashion—as they occur. *Id.* at 199–200. Checklists generally do not allow for any judgments to be made as to variations in quality. *Id.* at 199. Rating scales, on the other hand, are generally more oriented to capturing quality of performance, often using a graduated scale to capture qualitative variations. *Id.* at 200–02. Rating scales call for more subjective judgment and interpretation by the rater than do checklists. *Id.* at 178–82, 200–02.

¹⁰⁸ *Id.* at 178–82.

¹⁰⁹ *Id.* at 178–81.

that provide insight on the mediator's understanding of the model and ability to apply it in specific situations.

The Interactive Rating Scale Assessment is organized in two parts. In Part 1, the assessor observes the performance of a mediator in session and uses a rating scale to analyze the quality of the mediator's performance of each essential discourse strategy. In Part 2, the assessor evaluates the mediator's understanding of the transformative framework and ability to apply it by analyzing the mediator's own descriptions and explanations of his or her practice. Here, the mediator's own voice is introduced into the assessment process through a Self-Assessment provided by the mediator¹¹⁰ and an interview between the assessor and the mediator.

We discuss each of these aspects of the assessment process separately, but note that we consider both essential to thorough assessment of the competencies we set forth earlier in this Article. Likewise, the mediator must pass both Parts 1 and 2 in order to be deemed competent in the transformative framework.

A. *The Performance Assessment*

For this part of the assessment, the assessor must be able to observe the mediator performing as a mediator. We require that the mediator submit a sample mediation session to the assessor on videotape.¹¹¹ The use of videotape supports close analysis of discourse in a way that cannot be duplicated in viewing live interactions because it allows the assessor to replay the tape to study specific interactions and their effects more closely,

¹¹⁰ The Self-Assessment consists of two brief essays by the mediator. The mediator selects two segments of the videotape to analyze according to directions provided in the *Applicant's Guide to Preparing a Self-Assessment* (see Appendix D): one segment that demonstrates the mediator intervening in a way that is consistent with transformative practice and one that demonstrates the mediator intervening in a way that is not consistent with transformative practice. The *Applicant's Guide to Preparing a Self-Assessment* provides the guidelines for the mediator's written analysis of each segment. This written analysis is submitted to the assessor with the videotape.

¹¹¹ We require a videotape for the Interactive Rating Scale Assessment because the unit of analysis is the "strategy," which can be observed and properly assessed only retrospectively. At the same time, we wish to acknowledge that we have recently developed a method for assessing live-action mediation that draws on the same foundations articulated in this Article. However, there we employ the concepts of "Signposts" to capture the context of party talk and "Crossroads" to capture the responsiveness or non-responsiveness of mediator interventions at the level of specific discursive moves. This method is still in the testing phase, where it is showing promising results, and will be the subject of a later publication.

and even to review segments with colleagues if necessary.¹¹² It also provides the vehicle for mediator Self-Assessment and for sharing the basis of that assessment with the assessor. Similarly, it provides the vehicle for the assessor and the mediator to converse, in the interview, about the rationale for particular moves and strategies in order to probe the mediator's understanding of the premises-purpose-practice link. Finally, it provides a record that supports review of the assessor's interpretations, if necessary.

The videotape may involve an actual mediation session (if submitted with the appropriate consent forms from the clients), or it may be an unscripted mediation simulation or "role play."¹¹³ In either case, the most important factor is that the assessor has an opportunity to observe the performance of the mediator in the course of real-time interaction. Therefore, the session should be uncut, unscripted, and unrehearsed. We recommend that the session be at least one-half hour in length,¹¹⁴ and that it include the mediator's opening of the mediation session.¹¹⁵ Good sound quality is

¹¹² See BOYATZIS, *supra* note 35, at 147.

¹¹³ We approve the use of unscripted, unrehearsed role-plays or simulations, given the assumptions about the nature of communication we articulated earlier. Even in a role-play or simulation, each participant can still be assumed to be constructing his or her discourse in a tentative, strategic, on-line fashion, toward the accomplishment of specific goals, in the context of the unfolding interactions among every participant.

¹¹⁴ We recommend one-half hour of viewing time, even if that time does not represent an "entire" mediation. There are several reasons for this. First, research on which this process is based, in part, demonstrated that the patterns of strategies typical of a mediator's practice were repeated over and over again in the mediation process, from beginning to end. See DELLA NOCE, *supra* note 21, at 198-319. Second, because the mediator is not being judged on "outcome," but on the quality of ongoing interaction, it is not necessary for the assessor to see how the mediation "turned out." Third, because the transformative model is not based on a linear progression of "stages," the assessor need not view an entire mediation with the goal of seeing "every stage." See Antes, *supra* note 85, at 288; BUSH & FOLGER, *supra* note 14, at 192-201; Dorothy J. Della Noce, *Mediation as a Transformative Process: Insights on Structure and Movement*, in DESIGNING MEDIATION, *supra* note 96, at 71. Finally, a "fatigue factor" for the assessors was noted during the development and testing phase of this process that suggests that one-half hour of coding is optimal.

¹¹⁵ The opening of a mediation is very revealing with respect to the practice orientation of the mediator. Almost every key strategy of transformative practice can be identified in the opening moments, and this often establishes relatively stable interaction patterns for the remainder of the mediation. See DELLA NOCE, *supra* note 21, at 251-80; see also Folger & Bush, *supra* note 40, at 266 (noting that "[t]he opening statement says it all"); Sally Ganong Pope, *Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition*, 13 MEDIATION Q. 287, 290-91 (1996).

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essential to the assessment process, and therefore we encourage mediators to use table microphones during the taping process.

In preparation for the assessment process, the assessor¹¹⁶ gathers the following materials:

1. A pad of paper for taking down notes on mediator moves while viewing the videotape, and a pen or pencil;
2. The *Assessor's Guide to Mediator Moves and Strategies* (Appendix A);
3. The *Assessor's Coding Form* (Appendix B); and
4. The *Summative Assessment Feedback Form* (Appendix C).

1. *Observation Phase*

The assessor watches and listens carefully to one-half hour of the unfolding mediation session, starting from the beginning of the tape. The assessor's attention is on the moment-by-moment interaction unfolding in the course of the mediation session. With respect to mediator interventions, the assessor takes down the mediator's language (verbal and nonverbal) as accurately as possible.¹¹⁷ Because mediator interventions cannot and should not be separated from the context in which they occur, the assessor also strives to capture the "flow" of the unfolding interaction in his or her notes, by noting observations about the party moves that preceded a mediator intervention, the intervention itself, the timing of an intervention, and the effect of the intervention on the parties' continuing interaction. For example, the assessor might note that the mediator offered a reflection after a party spoke, but that the reflection softened or laundered out the emotional content of what the party said. Skilled assessors should also be able to follow and read the unfolding context sufficiently well that they might note the absence

¹¹⁶ The process as described in the remainder of this Article presumes a well-trained assessor, who would have (and should have) undergone thorough education in the foundations of this process and how to recognize markers of competent transformative practice in the ongoing interaction of a mediation session.

¹¹⁷ We have found that the simplest and most effective approach is to make notes about party "talk" on the left side of the sheet of paper and notes regarding the mediator's interventions on the right side of the sheet of paper. For the party "talk," the assessor usually captures notable moments in terms of the opportunities presented for empowerment and/or recognition. For the mediator's interventions, the assessor notes each "sentence-like" segment of intervention on a separate line of the assessor's notepad. Occasionally, it may be necessary for the assessor to rewind the tape and play back portions in order to accurately capture the mediator's language, especially in the opening of the session and during lengthy summaries.

of a particular intervention where they believe a supportive intervention was warranted—recognizing that a choice not to act is also an intentional “move” in an unfolding discourse.

Obviously, this observation period requires close attention by the assessor, not only to each mediator intervention, but also to the party discourse that precedes and follows it. At the end of the observation period, the assessor typically has several pages of notes showing actual examples of the mediator’s discourse in context.

2. Coding Phase

The next step is for the assessor to study the examples of mediator discourse that he or she has noted and to code them. The unit of coding is the “move.” Therefore, the assessor’s task is to study the mediator’s discourse and identify specific moves within that discourse.

First, the assessor numbers each segment of mediator intervention that he or she took down during the observation period. Second, the assessor identifies the moves, or “codable moments”, within each segment of intervention. For example, the assessor might identify, within a single segment, the use of the conversation metaphor, the use of the second person, and the use of a question that highlighted an opportunity for party choice. Each of these is a codable moment within that segment. Third, the assessor considers whether and how each identified move supported (or did not support) each of the five essential discourse strategies. Then, on the *Assessor’s Coding Form* (Appendix B), the assessor places the number of *each* mediator move that the assessor noted in the proper cell(s)—the intersection of the horizontal row for each strategy and the vertical column for whether the move was supportive of that strategy or contrary to supporting it.¹¹⁹ At the end of this process, the assessor has a completed *Assessor’s Coding Form* with a list of numbers in each cell representing those moves that supported, or did not support, the strategy represented by that cell.

¹¹⁹ Note that the “number” assigned to any one intervention could appear on the *Assessor’s Coding Form* as many as five times as a supportive move, or as many as five times as a non-supportive move, or could also appear as a move that supports certain strategies yet interferes with others.

3. *Analysis Phase*

The next task of the assessor is to analyze the pattern of moves identified in the mediator's discourse in terms of competence in each of the five essential discourse strategies. To accomplish this task, the assessor now completes the *Summative Assessment Feedback Form* (Appendix C). By reviewing the moves within each cell, the assessor should be able to rate the mediator in terms of his or her competence within each of the five essential strategy areas. We recommend that the assessor first prepare a brief narrative for each strategy, noting first what the mediator did well, and then any improvements the mediator may need to make. Based upon this narrative summary, the assessor then assigns one of the following ratings to the mediator's competence on each strategy:

- Satisfactory = Overall, on the strategy in question, the preponderance of mediator moves fell within the "supportive" cell. This would suggest that the mediator exhibited an adequate range of moves in this strategy; the mediator was responsive to opportunities for empowerment and recognition that appeared in the party talk; and the mediator's sense of timing was adequate to the task of following the parties (rather than directing them, over-structuring the session, or being overly passive).
- Needs Improvement = Overall, on the strategy in question, the preponderance of mediator moves fell within the "non-supportive" cell. This would suggest that the mediator exhibited only a narrow range of moves in this strategy, if any; the mediator missed important opportunities to respond supportively to parties with moves in this strategy, and/or acted in ways that interfered with party efforts at empowerment and recognition; and the mediator directed party interactions, over-structured the session, and/or was overly passive.

Next, the assessor reviews the ratings assigned to each strategy in order to make a determination of whether the mediator should be "Deferred" or preliminarily "Approved." If any strategy is rated as "Needs Improvement," the mediator is Deferred. In addition, the assessor notes for the mediator, in the space provided, the two areas in which the assessor believes the mediator would most benefit from further development or practice. The completed *Summative Assessment Feedback Form* now establishes the basis for Part 2 of the assessment process, the Interactive Component.

B. *The Interactive Component*

The purpose of the Interactive Component is to provide the assessor with insight on the mediator's understanding of the theoretical foundations of the transformative model and ability to apply that understanding to specific situations. It is important to say a few words about the rationale for this part of the Assessment Process. While an interactive component is an essential part of the formative assessment process for developmental purposes in order to foster the mediator's understanding of the premises-purpose-practice link,¹²⁰ an interactive component is also important to the summative assessment process for *both* evaluative and developmental purposes.

For evaluative purposes, the interactive component allows the assessor and the mediator to go beyond the assessor's inferences concerning the mediator's understanding of the theoretical framework and ability to apply it, which was based solely on the mediator's in-session competencies. The interactive component enriches the evaluation by involving the mediator's interpretations in the process. As we noted earlier, it is the nature of communication that people are constantly reading the developing context, and that participation in any interaction is on-line, tentative, and subject to ongoing refinement as the communication interaction continues to unfold. It follows then, that a mediator could have made a "mistake" in a mediation, yet demonstrate an understanding of the model by being fully capable of identifying the mistake, explaining why it was a mistake and how it happened, and offering alternative moves and strategies that would have been more appropriate.¹²¹ At the same time, it is equally likely that what might appear to an observer as a sound move in the course of an interaction could have been blind luck, or even be perceived by the mediator as a mistake.¹²² Discussion will draw this out. At the same time, it is useful to remember that every evaluation is "a re-diagnosis of learning needs."¹²³ The developmental purposes of this interactive component remain relevant at the evaluative stage no matter how the assessment turns out.

The first task of the assessor in this phase is to review the Self-Assessment submitted by the mediator, in order to get a sense of the mediator's own interpretations of his or her practice competencies. The assessor views the two segments of the videotape to which the mediator

¹²⁰ See Antes & Saul, *Evaluating*, *supra* note 18, at 319.

¹²¹ See DELLA NOCE, *supra* note 21, at 311.

¹²² *Id.*

¹²³ CRANTON, *supra* note 104, at 13.

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directed the assessor's attention, and carefully considers the substance of the mediator's essay with respect to:

1. Whether it contains an accurate representation of the transformative model of practice (e.g., key vocabulary and concepts, such as empowerment, recognition, and micro-focus, are properly used); and
2. Whether it contains an accurate self-evaluation (e.g., descriptions and explanations that reveal an understanding of the model, and the ability to apply key theoretical concepts of the model to an analysis of the interaction as it unfolds in the session).

The assessor makes notes about any insights he or she gains, and also notes any areas of concern that he or she would like to explore in a later conversation with the mediator.

The next step of the Interactive Component will vary slightly, depending on whether the mediator was Approved or Deferred as a result of the Performance Assessment. As we noted earlier, a mediator must pass both Part 1 and Part 2 of the assessment process in order to be deemed a competent transformative mediator.

A decision that the mediator should be Deferred, based on the Performance Assessment, suggests that the mediator is in need of developmental coaching. Therefore, the assessor calls the mediator to inform him or her of the decision, and to offer to return the tape to the mediator and schedule a telephone call for the purpose of developmental coaching. The assessor urges the mediator to review the tape and the completed *Summative Assessment Feedback Form* prior to the coaching call, and to use this call as an opportunity to understand the basis for the assessor's decision and the assessor's suggestions for improvements to the mediator's practice. During the call, the assessor reviews specific segments of the tape with the mediator, and also reviews his or her impressions of the mediator's understanding of the model gained from the assessor's analysis of the mediator's Self-Assessment.

If the mediator was preliminarily Approved, the goal of this portion of the Interactive Component is to analyze separately the mediator's understanding of the theoretical foundations of the model and the ability to apply that understanding in practice. This is a key component of assessment that must be passed independently of the Performance Assessment because it indicates whether a mediator will be able to engage *consistently* in transformative practice—part of the definition of competence in the transformative model that we stated earlier in this Article.

In either case, we suggest the following procedure for the interactive component. The mediator and the assessor talk together¹²⁵ about portions of the videotape selected by the assessor. The assessor directs the mediator's attention to certain segments of the videotape, and at each segment engages the mediator in a discussion of these key questions:¹²⁶

1. What *opportunities* did you see or hear in the interaction (i.e., for party empowerment or inter-party recognition) that you were responding to?;
2. What was the *purpose* of your intervention in that segment? (i.e., what were you trying to do?);
3. What *effect* did your intervention have on the continuing interaction? (i.e., can party "shifts" in the dimensions of empowerment and recognition be identified);
4. How did your intervention support, or interfere with, the *principles and premises* of the transformative model?¹²⁷; and
5. *What else* might you have done at this point?

Three or four segments of discussion following this general pattern are usually sufficient to allow the assessor to gain insight on the mediator's understanding of the model. At the conclusion of this process, the assessor discusses his or her impressions with the mediator, and in particular impressions related to areas of strength and areas in need of further development. The assessor then prepares the "Narrative Regarding Theoretical Understanding and Application to Practice" where indicated on the *Summative Assessment Feedback Form*. Finally, the assessor notes his or her overall assessment of the mediator's understanding of the model and ability to apply it as Satisfactory or Unsatisfactory. An Unsatisfactory rating requires the assessor to change the preliminary Approved decision to a Deferred decision. A Satisfactory rating on the Interactive Component, coupled with a preliminarily Approved decision on the Performance Assessment, indicates that the mediator is Approved as a competent transformative mediator.

¹²⁵ This discussion can take place in person or by telephone. If by telephone, we suggest that the mediator keep one copy of the videotape he or she sends to the assessor for reference during the telephone interview.

¹²⁶ See Antes & Saul, *Staying*, *supra* note 18, at 6-7; Antes & Saul, *Evaluating*, *supra* note 18, at 319-20.

¹²⁷ For this portion of the discussion, a useful reference point is the "Principles-Premises" diagram developed by Antes & Saul. See Antes & Saul, *Evaluating*, *supra* note 18, at 321.

C. *Validity and Reliability*

To be useful to the field and to the ISCT, the process set forth here must be both reliable and valid. Our development process and subsequent testing indicate that the Interactive Rating Scale Model is both a reliable and valid approach to quality assurance for transformative mediators.

Validity represents a concern that what the scale claims to be measuring—transformative practice—is actually what is being measured. We suggest that this process, and the rating scale in particular, are valid for two important reasons. First, the empirical foundation of the Rating Scale supports the validity of the scale. In Della Noce's research, the mediators whose discourse was studied and compared identified with two different frameworks, and her findings regarding the key strategies of transformative mediators emerged from analysis of the discourse of self-described transformative mediators.¹²⁹ Moreover, as part of that study, those transformative mediators analyzed and explained their strategies to the researcher in terms of their preferred framework of practice. Second, we tested the scale using tapes of mediators with known practice orientations in order to determine if the scale discriminated adequately between mediators who were competent transformative mediators and mediators who were working from a different orientation. Using videotapes of mediators who we know to be highly competent transformative mediators through their reputations, experience, trainings, and scholarship, we found that these mediators consistently scored Satisfactory on each strategy. On the other hand, using videotapes of mediators whom we knew to be working from different orientations through their own claims, reputations, trainings, and scholarship, we found that these mediators consistently scored Needs Improvement on each strategy. For each of these reasons, we are confident that the Interactive Rating Scale Model measures what it claims to be measuring.

Reliability is "consistency of observation, labeling, or interpretation."¹³⁰ Reliability is important in qualitative research projects because it "protects against or lessens the contamination of projection."¹³¹ We have tested this approach for "interrater reliability," that is, whether consistency of judgment is achieved when different people observe the same information.¹³² It bears emphasis that interrater reliability is as much a factor of the training and

¹²⁹ See DELLA NOCE, *supra* note 21, at 99–107.

¹³⁰ See BOYATZIS, *supra* note 35, at 144.

¹³¹ *Id.* at 146.

¹³² *Id.* at 147.

experience of the raters as it is related to any innate feature of the scale used.¹³³ Therefore, to establish reliability, we began by slowly working together with short segments of videotaped mediations in practice sessions. We watched these segments together, coded independently, and then compared our impressions and interpretations of the various “codable moments” we identified. After several practice sessions using this format, we felt we had achieved sufficient “consistency of observation, labeling, or interpretation” that we could move forward into a period of reliability testing.

To conduct reliability testing, we obtained videotapes of mediators conducting simulations in a community mediation center. None of us had viewed these videotapes in advance of the testing session. We viewed each tape for the one-half hour period recommended in this Article, and independently noted the “codable moments,” coded moves as discussed earlier in this Article, rated strategies, and determined whether the mediators were Approved or Deferred. We then compared our ratings and decisions. Because our unit of analysis was the strategy, we focused first on whether we achieved interrater reliability with respect to our independent ratings of mediator’s strategies. In addition, because the decision to Approve or Defer was most consequential for the mediators, we also examined whether we achieved interrater reliability with respect to our independent assessments on this dimension. We used a “percentage agreement” approach.¹³⁴ Scores of 70% or better are considered necessary for this measure of reliability.¹³⁵ With respect to our independent ratings of mediator strategies, we achieved an average percentage agreement of 80%. In addition, we found that we achieved an average percentage agreement of 80% on the decision to Approve or Defer. Finally, we found that we achieved an average percentage agreement of 100% with respect to the two comments we each listed for the mediator on the section of the *Summative Assessment Feedback Form* entitled “Summary Suggestions for Future Growth.” Each of these scores exceeds the necessary level for reliability.

VI. IMPLICATIONS

We began this Article by noting the challenge mediator quality assurance initiatives present to the field. Despite creditable motivations for pursuing quality assurance initiatives, many respond to such initiatives with suspicion

¹³³ It is for this reason that we urge that the scale be used only by those who are both thoroughly trained in doing so and understand its foundations.

¹³⁴ See BOYATZIS, *supra* note 35, at 153–57.

¹³⁵ *Id.* at 156.

and mistrust, noting their potential to close the field, standardize it, or impose hegemony upon it. Our analysis, however, suggests that these fears and other objections to performance-based testing do not reflect a flaw in the concept of performance-based testing as much as they do a flaw in the way that concept has been executed in the mediation field to date. What we have presented here is a model for a performance-based assessment process that is theoretically, empirically, and methodologically grounded, and therefore both reliable and valid. As a result, it avoids the practical pitfalls of earlier attempts as well as the universalizing assumptions underlying those attempts, which raised valid concerns with standardization and hegemony.

We suggest that this model, while directly applicable only to transformative mediation, is instructive for the field as a whole. It provides a roadmap for scholars and practitioners of other frameworks to develop theory-specific approaches to performance-based assessment methods that are grounded in research on the actual practices of mediators in that particular framework and are methodologically sound. At the same time, this roadmap presents a challenge to the field. Our work suggests the fundamental importance of theoretical, empirical, and methodological grounding for future efforts to create performance-based assessment tests. Each of these dimensions may prove problematic for the field. First, a recurrent criticism of the mediation field is its lack of theoretical grounding.¹³⁶ Yet, before scholars and practitioners can create a valid and reliable performance-based assessment method, they must be able to articulate the theoretical framework they are using, and the definition of mediator success in that framework. In the current climate of the mediation field, with its marked tendency to present the field as a monolithic entity and practice as generic and neutral in terms of theoretical frameworks, articulation of theoretical frameworks presents a serious challenge to the status quo.¹³⁷ Second, the field as a whole, and policymakers in particular, have shown reluctance to draw upon insights from empirical research to enlighten practice and policy. This may be because insights from empirical research have tended to challenge the prevailing mythologies of mediation practice.¹³⁸ Nonetheless, our work highlights the importance of drawing upon empirical research about what mediators actually do in order to

¹³⁶ KOLB, *supra* note 49, at 4; Scimecca, *supra* note 40, at 211–14. *But see* Della Noce et al., *supra* note 40, at 40–42.

¹³⁷ *See* Bush, *supra* note 36. A vivid example of this tendency is provided by the ACR Task Force on Mediator Certification: Initial Report, which purports to aspire to a process that is “style neutral.” *See* ACR Task Force on Mediator Certification: Initial Report, *supra* note 1; *see also* Della Noce et al., *supra* note 40, at 40–42.

¹³⁸ *See supra* note 53 and accompanying text.

construct valid and reliable assessment processes. At the same time, empirical research in the mediation field deserves renewed attention as theoretical frameworks develop and comparative studies become more feasible.¹³⁹ Finally, the need for methodological grounding in mediator assessment initiatives suggests the importance of collaborations between practitioners, policymakers, and scholars who can construct and execute valid and reliable research. Unfortunately, the field has shown some antipathy towards scholars in the past.¹⁴⁰

Despite these considerable challenges, it is our hope that this example of the Interactive Rating Scale Assessment will stimulate greater theoretical, empirical, and methodological rigor in the field. The field as a whole can only benefit from greater clarity regarding the nature of good mediation practice and the sources of diverse views on what that means.

¹³⁹ See, e.g., DELLA NOCE, *supra* note 21.

¹⁴⁰ See, e.g., Linda C. Neilson & Peggy English, *The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience*, 18 MEDIATION Q. 221, 223 (2001) (arguing that scholars and academics who merely think about mediation practice would make no useful contribution to the development of assessment standards).

APPENDIX A

ASSESSOR'S GUIDE TO MOVES AND STRATEGIES

Strategy: Orienting the parties to constructive conversation	
Supportive mediator moves	Non-supportive mediator moves
<p>Using a <i>metaphor of conversation</i> to describe mediation, the mediator's role, or the party's role</p> <ul style="list-style-type: none"> • conversation <i>between the parties</i> • related terms: discussion, talk, chat, etc . . . <p>Identifying inherent constructive possibilities in having a conversation, such as:</p> <ul style="list-style-type: none"> • talking over differences • increasing clarity and understanding • hearing new information • being heard by the other • seeing choices making decisions 	<p>Using metaphors that disempower the parties by positioning the mediator as an authority figure or expert, such as:</p> <ul style="list-style-type: none"> • referring to mediation as a "hearing" • referring to parties as plaintiffs and defendants • using unnecessary legal terms • referring to the legal, therapeutic, or substantive expertise of the mediator • assuming an analytical stance "above" the parties <p>Using metaphors that suggest that the outcome is more important than the conversation itself, such as:</p> <ul style="list-style-type: none"> • negotiation • settlement • problem-solving • problem and solution <p>A focus on agreement as definition of success</p>

Strategy: Orienting the parties to their own agency	
Supportive mediator moves	Non-supportive mediator moves
<p>Using the second person subject, singular and plural (“you”)</p> <p>Using second person possessive adjectives (“your”)</p> <p>Using parties’ names in the subject position of a sentence, thereby “constructing” them as people capable of action</p> <p>Downgrading mediator agency, for example:</p> <ul style="list-style-type: none"> • emphasizing role as “helping” or “assisting” • disclaiming power to decide <p>Using reflections that “follow” the content and emotional tone of a party’s own comments</p> <p>“Getting out of the parties’ way,” for example:</p> <ul style="list-style-type: none"> • allowing self to be interrupted • allowing self to be corrected <p>Offering reflections in a tentative manner, especially by using “check ins” and/or ending with an opening, questioning tone</p>	<p>Using terms that orient the parties to the agency of the mediator, such as:</p> <ul style="list-style-type: none"> • frequent use of the first person (“I,” “me,” “my”) • use of “we” to include mediator as a party <p>Acting in ways that assert mediator authority, such as:</p> <ul style="list-style-type: none"> • interrupting the parties • making choices for the parties <p>“Normalizing” (advancing the mediator’s interpretation of the party’s situation over the party’s own interpretation, by “convinc[ing] them that theirs is a normal, resolvable problem” and “undermin[ing] the uniqueness of each problem definition by normalizing the situation”)*</p>

* JOHN M. HAYNES, THE FUNDAMENTALS OF FAMILY MEDIATION 9 (1994).

TRANSFORMATIVE MEDIATOR COMPETENCE

Strategy: Orienting the parties to each other	
Supportive mediator moves	Non-supportive mediator moves
<p>Using the conversation metaphor (it takes two!)</p> <p>Using the second person, especially plural subject</p> <p>Making explicit references to “the other”</p> <ul style="list-style-type: none"> • by name • “both of you,” “each of you,” or “together” <p>Allowing parties to speak of and for each other (that is, to step into the other’s shoes)</p> <p>Checking in with a party who has not been “in” the conversation for a period of time, to “make space” if the party chooses to speak</p> <p>Allowing significant segments of uninterrupted party-to-party talk (“intentional silence”)</p> <p>“Following” party-to-party discussions through <i>inclusive</i> summaries (summaries that include important topics raised by both/all parties in order to help parties hear each other)</p>	<p>Focusing party attention on the mediator and away from each other</p> <p>Focusing party attention on “the problem” and away from each other</p> <p>Discouraging party efforts at party-to-party talk through:</p> <ul style="list-style-type: none"> • ground rules • use of caucus • ignoring a party who is trying to engage • non-verbal behaviors that “cut off” a party <p>Stopping party-to-party talk when it happens, through:</p> <ul style="list-style-type: none"> • “turn shifts” (changing who may speak next) • “topic shifts” (changing the subject) • use of caucus • interruptions • specific “sanctions” (e.g., “speak for yourself” or “speak to me”)

Strategy: Supporting the parties' "conflict talk"	
Supportive mediator moves	Non-supportive mediator moves
<p>Using minimal encouragers at party pauses to encourage a party to continue speaking ("Mm-hmm," "Go on," "Okay")</p> <p>Using key word encouragers, that is, keying in to term a party used that seems to carry "heat" ("Support, as in . . . ?")</p> <p>Using open reflections (reflections that "follow" the content and emotional tone of party conflict talk and "check in" with party on accuracy of reflection)</p> <p>Using reflections and summaries to mark points of disagreement (not just agreement or common ground)</p> <p>Using reflections and summaries that "follow" conflict storylines</p> <p>Allowing multiple themes/storylines to develop in the course of conversation (not just themes that seem tangible, or solvable)</p> <p>Asking questions that invite elaboration</p> <p>Allowing conflict talk to continue uninterrupted</p>	<p>Preventing verbal conflict in advance through ground rules that limit:</p> <ul style="list-style-type: none"> • how long a party may talk • how parties may talk • what parties may talk about <p>Terminating verbal conflict through:</p> <ul style="list-style-type: none"> • turn shifts (changing the speaker) • topic shifts (changing the subject) • interruptions • use of caucus • sanctions <p>Failing to respond to conflict talk and strong emotion</p> <p>Normalizing</p> <p>Mutualizing</p> <p>Future focus</p> <p>Reframing</p>

TRANSFORMATIVE MEDIATOR COMPETENCE

Strategy: Supporting the parties' decisionmaking process	
Supportive mediator moves	Non-supportive mediator moves
<p>Summarizing and highlighting available decision-points (no distinction between process and content decisions)</p> <p>Offering decision-points to the parties</p> <p>Offering mediator suggestions only tentatively</p> <p>Offering mediator suggestions with alternatives, in order to emphasize opportunity for party choice</p>	<p>Making choices for the parties (e.g., "The mediator controls the process, and the parties control outcome")</p> <p>Taking choices away from the parties</p> <p>Limiting the choices/topics available for discussion</p> <p>Narrowing the topics for discussion</p> <p>Favoring certain choices over others</p> <p>"Closing" (disregarding unresolved topics as agreement begins to appear)</p> <p>Orchestrating or managing the parties' interactions</p>

**APPENDIX B
ASSESSOR'S CODING FORM**

STRATEGIES	SUPPORTIVE MOVES	NON-SUPPORTIVE MOVES
Orienting the parties to "constructive conversation"		
Orienting the parties to their own agency		
Orienting the parties to each other		
Supporting the parties' conflict talk		
Supporting the parties' decisionmaking process		

TRANSFORMATIVE MEDIATOR COMPETENCE

APPENDIX C SUMMATIVE ASSESSMENT FEEDBACK FORM

Applicant's Name: _____

Evaluator's Name: _____

Date: _____

Part 1: Performance Assessment Narrative and Rating:

Strategy: Orienting Parties to Constructive Conversation

___ Satisfactory ___ Needs Improvement

Comments:

Strategy: Orienting Parties to their own Agency

___ Satisfactory ___ Needs Improvement

Comments:

Strategy: Orienting Parties to Each Other

___ Satisfactory ___ Needs Improvement

Comments:

Strategy: Supporting the Parties' Conflict Talk

___ Satisfactory ___ Needs Improvement

Comments:

Strategy: Supporting the Parties' Decisionmaking

___ Satisfactory ___ Needs Improvement

Comments:

Part 2: Narrative Regarding Theoretical Understanding and Application to Practice

Summary Suggestions for Future Growth:

1.

2.

Decision:

Applicant is ___ Approved ___ Deferred for Certification as a Transformative Mediator by the Institute for the Study of Conflict Transformation.

APPENDIX D APPLICANT'S GUIDE TO PREPARING A SELF-ASSESSMENT

An important component of the Summative Assessment Process is to engage you, the mediator, in the process. There are several reasons for this:

1. Your “voice” should be a part of the process, that is, you should have an opportunity to share your own insights about the purpose of your work, how your interventions relate to the principles and premises of transformative practice, and your perceived effectiveness, in your own words.
2. The process of preparing your Self-Assessment has an educative function for you. It encourages you to review and critically evaluate your tape, according to the same criteria on which it will be judged, before you submit it. If you find, in that process, that you are not adequately satisfied with the way you represent your work on this tape, you then have the opportunity to learn and practice further, and prepare a different tape for submission.
3. The assessors are interested in more than simply a skills demonstration. An important component of transformative practice is the ability to link purpose to practice, that is, to understand and apply transformative conflict theory to concrete situations. This understanding is what sustains a mediator when presented with interactive challenges. Your self-assessment will provide the assessors with insights on your understanding of the purpose-practice link, in your own words.

In the Summative Assessment Process, the assessors bring your voice into the process at two different points. The first point is this Self-Assessment. We ask that you prepare a Self-Assessment, according to the directions below, and submit it with your tape. The assessors will review the sections of the tape you direct them to, and look at those sections in light of your own interpretations. The assessors will also have a conversation with most candidates at the end of the tape evaluation process, as is described in the more detailed Description of the Summative Assessment Process.

Your Self-Assessment consists of two short essays, as outlined below. Each essay should be structured as a series of short, concise answers to the questions provided. Your answers should be typewritten, double-spaced, in 12-point type size, with one-inch margins on all sides. Each of the two essays should be approximately one page in length.

Self-Assessment #1

Select a segment of the tape where you made an intervention that you believe is *consistent* with competent practice in the transformative framework.

1. Note the approximate number of minutes into the tape where the intervention occurs, so that the assessors can locate the intervention.
2. Describe what you did in the intervention.
3. Explain the context, what you were responding to (e.g., what opportunity for party empowerment or inter-party recognition drew your attention).
4. Describe your purpose in intervening at this point.
5. Describe the effect of your intervention on the unfolding interaction between the parties.
6. Relate your intervention to the principles and premises of transformative mediation.

Self-Assessment #2

Select a segment of the tape where you made an intervention that you would critique as *inconsistent* with competent practice in the transformative framework.

1. Note the approximate number of minutes into the tape where the intervention occurs, so that the assessors can locate the intervention.
2. Describe what you did in the intervention.
3. Explain the context, what you were responding to (e.g., what happened in the interaction that made you intervene as you did).
4. Describe your purpose in intervening at this point.
5. Describe the effect of your intervention on the unfolding interaction between the parties.
6. Describe how your intervention was inconsistent with the principles and premises of transformative mediation.
7. Describe an alternative intervention that is consistent with the principles and premises of transformative mediation.