

2000

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Recommended Citation

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SYMPOSIUM

The Inevitability of the Eclectic: Liberating ADR from Ideology

Jeffrey W. Stempel*

I. INTRODUCTION

In recent years, perhaps the most pronounced debate in alternative dispute resolution circles has been over the propriety and effectiveness of "evaluative" versus "facilitative" mediation.¹ I have argued that this categorization, although a useful organizational device for discussion and shorthand reference, creates a false dichotomy, erroneously suggesting that mediators must be in one "camp" or another.² Worse yet, the evaluative-facilitative debate can at times result in a one-sided and almost evangelical view that there is but one "true way" of practicing mediation.³

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1. See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1887 (1997) ("The current, most heated debate concerns the question whether mediation is facilitative or evaluative or both."); Symposium, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997). See, e.g., John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 70 (1996); Kimberlee K. Kovach, *What is Real Mediation, and Who Should Decide?*, DISP. RESOL. MAG. No. 2, 1996, at 5; Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31 (1996); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 100-02 (comments of Leonard Riskin) (stating permissible use of evaluative elements in mediation is "very controversial").

2. See Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997).

3. See Menkel-Meadow, *supra* note 1, at 1887 (emphasis added) ("[P]ure' mediation advocates suggest that mediation involves no more than a third-party neutral facilitating communication between parties, never evaluating or judging cases."). See, e.g., Kovach & Love, *supra* note 1; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 946 (1997) (adopting facilitative view of mediation and arguing that a uniform view of mediation is critical to the development of mediation as a distinct field of dispute resolution).

It should be noted that proponents of both evaluation and facilitation have observed the exaggeration of the division. See Riskin, *Grid*, *supra* note 1, at 23-24 (representing mediation essentially as an amalgamation of mix of evaluative and facilitative styles); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 995-96 (1997) (arguing that mediation should retain essentially facilitative character but also noting that stark division of evaluation and mediation is a false dichotomy); Symposium, *Standards of Professional Conduct*,

In this essay, I continue to argue against such rigid characterization of the mediation enterprise and in favor of what I term an "eclectic" approach to mediation. The eclectic style is one in which a mediator — while maintaining neutrality and impartiality at all times — attempts to both assist the disputants in finding acceptable solutions on their own and also remains free to provide necessary guidance as to the outcomes that might obtain in the legal regime that will govern their dispute should no agreement result from the mediation. In short, my view of good mediation practice is one where the mediator may employ both facilitative and evaluative techniques in order to assist the parties. Permissible mediation conduct should vary not according to some ironclad formula but should instead reflect the personal style of the mediator as well as the desires of the disputants and the context and nature of the dispute.⁴

Indeed, the two strands of mediation are interwoven to the degree that assisting the parties in resolution will, in many cases, necessarily require both that the parties think settlement is a good option and that the parties settle with at least rudimentary knowledge of what might occur should they take their dispute into the more adjudicative arenas of arbitration and litigation. In short, even in the most facilitative of mediations, disputants should ordinarily come to a resolution with at least a rudimentary knowledge of their options under the legal regime outside of mediation. At the very least, mediators should not be prevented from providing disputants with this knowledge.

The evaluative-facilitative distinction is not a dichotomy of ADR apples and oranges. Rather, evaluation and facilitation are two ends of a continuum or two regions of a circle.⁵ Different disputes will often be best resolved through the eclectic mediator's judicious employment of a distinct mix of the facilitative and evaluative. Some cases will require more evaluation. For example, if a recalcitrant party is making unreasonable demands, there can be a just mediation outcome only if the mediator throws some metaphorical cold water on the unreasonable demands and gives the party some insight into the default legal rules that govern the topic. In

supra note 1; *infra* notes 70-90 and accompanying text, (arguing that mediation is inherently an eclectic hybrid of facilitative and evaluative approaches);

4. I am not suggesting that I have discovered a new vein of precious ore. Viewing mediation as a flexible hybrid is consistent with the views expressed in Riskin, *Grid*, *supra* note 1, Menkel-Meadow, *supra* note 1, and John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 895 (1997), as well as in the writings of most who defend evaluative mediation. "Evaluators" do not generally advocate arbitral determinations by mediators but advocate mediation that is largely facilitative with elements of information dispensation and evaluative feedback as necessary or desired by the parties. See, e.g., Symposium, *Evaluative Versus Facilitative*, *supra* note 1, at 924. Lawrence Watson, a mediator generally known and self-identified as an evaluator or settlement broker, views it as improper for mediators to render an opinion on the merits and likely outcome of a particular dispute. *Id.* Many "facilitators" will concede the propriety of certain techniques that might strictly be considered evaluative. See, e.g., Stulberg, *supra* note 3, at 995-99 (mediator's introduction of substantive legal information is not impermissible evaluation).

I differ to some degree from these commentators in using the term eclectic to describe the real world of mediation, and I think that mediation is inherently eclectic nearly all the time. Pure facilitation is rare just as the mediator turned adjudicator is rare. In addition, I would under apt circumstances permit the mediator more discretion to evaluate than even the bulk of evaluative commentators. See *infra* notes 66-90 and accompanying text.

5. See Riskin *Grid*, *supra* note 1, at 20-30; Stempel, *supra* note 2.

more pronounced cases of this sort, the mediator may need to provide at least one party with an assessment of the strength of its claim on the facts or may need to recess or call off the mediation entirely.

Other cases will suggest little or no need for evaluation. The disputants may be genuinely uninterested in their default legal rights or likely outcomes and may instead have particular issues of concern that cannot be assessed according to the prevailing legal regime. In these cases, a more facilitative approach (or even a purely facilitative approach) is most apt, with the mediator seeking to draw from the parties an extralegal resolution of their own making in a situation where there is no public policy reason to prevent them from reaching this resolution.

In my view, the false dichotomy of the evaluative-facilitative debate springs from two primary causes. One cause is the simple cognitive error wrought by classification — the formalist view that the world (particularly the legal world) is composed of rigid categories and the corollary view that mediation, as a part of the world, must in some way be classified. Once mediation is defined as largely facilitative, all nonfacilitative mediation is classified as improper. The general labels "evaluative" and "facilitative" have significant explanatory power and are useful heuristic devices. But the utility of the labels for discussion should not drive mediators, lawyers, and policymakers to categorize mediation as either evaluative or facilitative. Much mediation — indeed, most mediation — has substantial elements of both schools of thought.⁶

The false dichotomy also results in significant part from the ideological orientation of many ADR advocates. Attracted to the ADR movement, and mediation in particular because it is not litigation, this segment of the ADR community at times appears to view facilitation as something of an orthodox ideology if not an orthodox theology. For these mediators, facilitation is the "one true way" of mediation because mediation draws its legitimacy from its purported nonevaluative character.⁷ In addition, a significant percentage of the facilitative mediation community is composed of nonlawyers, many of whom appear to have a

6. See Menkel-Meadow, *supra* note 1, at 1887-88. As one commentator summarized:

Even within the "pure" mediation camp, there are debates concerning whether it is appropriate to be a "settlement-seeking" problemsolver rather than one who "transforms" the parties to appreciate each other and themselves. Others argue that such a focus on the parties' underlying psychological needs is inappropriate "therapy" in the context of bargaining strategies used for settling disputes in the legal arena. In fact, mediators vary their techniques based on their own disciplinary backgrounds, the contexts in which they work, and the urgency of the problems with which they are dealing.

Id. See also *supra* notes 1-4 and accompanying text, and *infra* notes 78-110 and accompanying text (positing that evaluative mediation or hybrids of facilitative and evaluative mediation occur much of the time, probably most of the time, in actual practice). Accord, Barbara McAadoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376 (1997) (stating that attorneys view mediation in practice as a mix of evaluation and facilitation); Barbara A. Phillips, *Mediation: Did We Get It Wrong?*, 33 WILLAMETTE L. REV. 649, 684 n.154 (1997) (adopting facilitative approach and preferring that evaluation be done separately in other ADR devices but suggesting that presence of evaluation does not vitiate the value of mediation); Donald T. Weckstein, *In Praise of Party Empowerment - And of Mediator Activism*, 33 WILLAMETTE L. REV. 501 (1997) (defending hybrid approach and suggesting that most mediation in real world is hybrid).

7. See *infra* notes 14-21 and accompanying text.

generalized aversion to things legal or litigation like.⁸ This political orientation of a significant segment of the ADR community has led to excessive romanticism about facilitation and party empowerment coupled with undue suspicion of evaluative ADR, including even the use of the legal framework for dispute resolution.⁹

The problem with viewing facilitation as the only legitimate form of mediation, of course, is that it borders on tautology: mediation is nonevaluative, therefore any evaluation in mediation must be impermissible. Although this view remains strongly held in many quarters, it appears to be in retreat, both within the mediation community and in the legal community at large. Courts and commentators have shown increasing favor toward some evaluative or advising component of mediation.¹⁰

More important, the eclectic style appears to be what takes place in the metaphorical trenches of mediation practice (although sound empirical data is necessarily hard to obtain given the confidential nature of most mediation).¹¹ In addition, it may be that the mixture of facilitation and evaluation in mediation varies with the type of case under consideration as well as with the particular disputants and mediator involved. A secondary thesis of this essay is that one appropriately finds more facilitative mediation in certain types of cases and more evaluative mediation in other types of cases. For example, family law matters, particularly issues of child custody and visitation, appear to more closely track the facilitative model. Commercial matters such as contract damage claims are likely to see more evaluation. Similarly, one expects to find and appears to find more mediation in the resolution of tort disputes between strangers.¹²

8. See Love, *supra* note 3, at 941-42 (expressing concern that too much evaluation in mediation will drive away many nonlawyer mediators); Symposium, *Evaluative Versus Facilitative*, *supra* note 1, at 919 (significant representation of nonlawyers on panel).

9. See *infra* notes 120-26 and accompanying text.

10. See *In re* Amendments to the Florida Rules for Certified and Court-Appointed Mediators, 762 So. 2d 441 (Fla. 2000) (approving changes permitting more evaluative actions by mediators), discussed *infra* at text and notes 51-64. See, e.g., Symposium, *Evaluative Versus Facilitative*, *supra* note 1. On the issue of whether scholars favor evaluative or facilitative mediation (or at least the permissibility of both), there could be considerable disagreement as to where the academic community aligns. I have not attempted to rigorously classify and count the many articles that at least touch upon the topic. However, it is my impression that, at least in the legal literature, the purely facilitative position has lost ground and is now the minority view. Of course, it is possible that I am, consistent with the thesis of this essay, paying too much attention to law journal commentary by lawyers because I have been trained as a lawyer and approach the evaluative-facilitative question from the lawyer's perspective.

11. McAdoo & Welsh, *supra* note 6, at 388-90; Menkel-Meadow, *supra* note 1, at 1887

In actual practice, many mediators' functions vary from facilitating communication, to probing the parties' own thinking about the strengths and weaknesses of their cases, to neutral evaluation of the merits, to prediction of how courts will decide cases, to forms that include suggesting solutions (with or without the use of shuttle diplomacy) or approaching decision-like arbitration.

Id.; Barbara A. McAdoo, A Report To The Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota, 30-40 (Dec. 1997) (attorneys report that a substantial part of actual mediation is conducted in a manner not strictly facilitative) (on file with author), See *infra* notes 70-82 and accompanying text.

12. See *infra* notes 161-63 and accompanying text.

In a sense, mediation, like much of civil litigation, may exhibit a de facto specialization or "nontrans-substantivity"¹³ in that mediation style responds to the substance of the underlying disputes. There is no one uniform and generic way of mediating any more than there is one uniform and generic way of negotiating or litigating.

II. BACKGROUND: DICHOTOMIES, DEBATES, AND DEVELOPMENTS

A. *The Facilitative-Evaluative Dichotomy and Debate*

Facilitative mediation takes its name from the thesis that mediation's primary goal is to "facilitate" an acceptable outcome of a dispute, allowing the involved parties to reach an accommodation.¹⁴ The underlying notion is that mediation differs distinctly and resolutely from litigation and ADR formats such as arbitration, early neutral evaluation, or judge-brokered settlement negotiation.¹⁵

Proponents of facilitative mediation maintain that mediators should never provide the disputants with any assessment of the reasonableness or legal strength

13. The phrase "trans-substantive" and its counterpart, "nontrans-substantive" have their roots of course in Robert Cover's famous article. See Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 721-23 (1976). Cover suggested that the generic, "one set of procedural rules for all disputes" model of the 1938 Federal Rules of Civil Procedure may be disserving modern civil litigation due to poor fit between the open-ended rules and specific cases that might suggest a need for more tailored rules. In my view, Cover's choice of terminology (the unwieldy "trans-substantive" and "nontrans-substantive") was unfortunate; a better label for Cover's insight is that we may have generic procedure (which applies to all cases whatever the type) or substance-specific procedure that varies to some degree according to the type of case. For example, there may be greater or fewer limits on discovery in certain cases based on an assessment of whether the type of case needs more or less discovery on average.

Cover's notion received a good deal of academic attention but has never made significant headway with litigation rulemakers. See, e.g., Paul Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989) (defending trans-substantive ideal and suggesting that substance-specific procedure is structurally inefficient and politically unworkable); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss' "Tolstoy Problem,"* 46 FLA. L. REV. 57 (1994) (arguing for cautious experimentation with Subrin's approach where cross-section of profession has consensus as to substance-specific procedural standards); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994) (suggesting nontrans-substantivity, particularly as to discovery matters, as a viable means of improving civil litigation).

14. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 96-97 (1994); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985). Accord, JOHN W. COOLEY, *MEDIATION ADVOCACY* (1996); ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION* (1994); DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* (1996); E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, *ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS* (1996); NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY & PRACTICE* (2d ed. 1994).

15. See BUSH & FOLGER, *supra* note 14; DEBORAH M. KOLB ET AL., *WHEN TALK WORKS: PROFILES OF MEDIATORS* (1994); Richard Birke, *Mandating Mediation of Money: The Implications of Enlarging the Scope of Domestic Relations Mediation From Custody to Full Service*, 35 WILLAMETTE L. REV. 485, 497-500 (1999); Kenneth Kressel et al., *The Settlement Orientation vs. The Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67 (1994); Riskin, *Grid*, *supra* note 1.

of their positions in the dispute.¹⁶ Many in the facilitation camp go so far as to state that it is improper for a mediator to even inform the parties of the default rules of law that would govern their dispute if litigated.¹⁷

Evaluative mediation, by contrast, is the technique in which a mediator may candidly inform the disputants (either individually or collectively) of the mediator's evaluation of their dispute.¹⁸ Under a pure evaluative approach, for example, the mediator may tell the parties that both are making unreasonable demands and provide the parties with a range of likely court outcomes if the case is litigated. Under this most blunt example of an evaluative approach, the mediator may give the disputants an opinion of the likely bottom line of litigation and encourage the parties to either compromise toward that mean or to develop alternative means of resolution that avoid the likely court outcome or avoid the risk of loss in disputes that tend more to the zero-sum.¹⁹

I have previously defended the evaluative aspects of mediation and criticized the notion that "good" mediation must fit the facilitative model.²⁰ Primarily, however, I am not so much advocating evaluative mediation but endorsing flexible mediation that permits judicious use of evaluative techniques in the sound discretion of the mediator. Intellectual oversimplification occurs when the debate is cast in the wooden form of evaluation versus facilitation. Not only is this framing unwise and misleading, but it also may lead to government-sponsored unfairness where the mediation enterprise takes place under the auspices of court-compelled mediation.²¹

The framework for the debate over mediation styles and propriety continues to be the notion that mediation is or must be either "facilitative" (designed to allow parties to work out a consensual resolution of their disputes) or "evaluative" (designed to provide a neutral viewer's assessment of the relative merits of the issues in order to move the parties to a resolution).²² In my view, notwithstanding

16. See *supra* notes 2-4 and accompanying text.

17. See, e.g., Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 85-95 (1998); Love, *supra* note 3. For example, the Florida Mediator Qualifications Advisory Panel has rendered opinions stating that it is improper for a mediator to inform the parties as to the governing legal rule that would be applicable to their dispute in court. See Stempel, *supra* note 2, at 961-70.

See also James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation?"*, FLA. ST. U. L. REV. 47, 47-50, 73-74 (1991) (noting that many or even the bulk of mediation professionals define proper or "good" mediation as employing exclusively facilitative approaches but also observing that a substantial percentage of mediators use evaluative approaches that are well received by the parties).

18. See Birke, *supra* note 15, at 497-500; Kenneth Kressel et al., *supra* note 15; Riskin, *Grid*, *supra* note 1, at 13-14; Stempel, *supra* note 2, at 949-60.

19. See Menkel-Meadow, *supra* note 1, at 1872-88 (describing variety of mediation and other ADR models and styles that have both facilitative and evaluative components).

20. See Stempel, *supra* note 2, at 954-70.

21. See Trina Grillo, *The Mediation Alternative, Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553 (1995); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 62-75 (1996); Stempel, *supra* note 2, at 960-78.

22. The facilitative-evaluative dichotomy has been widely accepted, at least for purposes of framing discussion, by many ADR commentators. See, e.g., BUSH & FOLGER, *supra* note 14, at 11-12 (describing mediation movement at "crossroads" for choosing between "problem-solving" method of mediation, which makes use of evaluative techniques as a spur to settlement, and "transformative approach"

respected views to the contrary,²³ this notion is simply wrong.²⁴ Good mediators should be permitted to be both facilitative and evaluative in varying degrees.²⁵

Of course, there is some danger that I am painting a straw man ripe for attack. Many scholars identified with the facilitative perspective would not absolutely preclude mediators from taking actions that would in all likelihood lead to making

generally described as more facilitative in tone with an eye toward "fostering empowerment" of the parties); Craig A. McEwen, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV. 77 (1991) (describing variations of evaluative and facilitative approach); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or the Law of ADR*, 19 FLA. ST. U. L. REV. 1 (1991) (perceiving tension between facilitative, party-centered view of mediation and systemic goals of case resolution consistent with legal norms); Riskin, *Grid*, *supra* note 1, (reviewing variants of evaluative and facilitative approaches to mediation); Susan S. Silbey & Sally Merry, *Mediator Settlement Strategies*, 8 L. & POL'Y 7 (1986) (describing evaluative and facilitative techniques employed by mediators); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 340-342 (1996) (noting variation in mediation and other ADR methods according to whether device provides primarily adjudicatory decision (evaluative) or settlement brokering (facilitative in combination with evaluative) role); Leonard L. Riskin, *Two Concepts of Mediation in the FmHA's Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21 (1993) (noting presence of a primarily evaluative and a primarily facilitative approach in mediations conducted under auspices of federal farm lending program);

Although some degree of polarity can be a useful analytic device or means of organizing discussion, labels of this type inevitably tend to organize thought as well, sometimes constricting it and leading analysis astray. Menkel-Meadow, *supra* note 1, at 1913 (question of facilitation versus evaluation in mediation is complicated issue); *See infra* notes 92-95 and accompanying text

23. Professors Robert Bush and Lela Love, for example, are two prominent and respected commentators who can at least be interpreted as arguing that facilitative mediation is the one true way, and that any infusion of evaluative techniques essentially corrupts mediation and alchemizes it into something else and something less. For example, Professor Bush has argued that mediation be defined in a more or less singular fashion (and, implicitly, that his version of the facilitative approach — transformation and empowerment of the parties — be the standard).

[F]or every mediator to choose for himself, what conception to adopt -- which may be close to the present situation — does not seem a good idea at all. The result would be that different mediators would handle similar dilemmas in entirely different fashion. Not only would this be unfair to individuals, it would be damaging to the reputation of mediation as a whole. The lack of uniformity and common standards would undermine confidence in and respect for mediation.

Robert A. Baruch Bush, Symposium, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1 (quoted in John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997)). *See also* BUSH & FOLGER, *supra* note 14. *See generally* Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications* 1994 J. DISP. RESOL. 1 (National Institute for Dispute Resolution monograph 1992) (presenting revised and updated version of 1989 paper).

Professor Love makes a similar case for the benefits of facilitation and the need to define mediation as an essentially facilitative enterprise in her contribution to this Symposium. *See* Love, *supra* note 3, at 946 ("A uniform understanding of mediation is critical to the development of the field.")

24. As are most polar models if taken too rigidly. *See* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995) (arguing persuasively that litigation generally serves both dispute resolution and policy setting functions and that adjudication cannot be exclusively or even primarily defined by either model); *infra* notes 92-95 and accompanying text.

25. *Accord*, McAdoo & Welsh, *supra* note 6 (survey of Minnesota attorneys suggests mediation in practice mixes two styles); Lande, *supra* note 4, at 855 (arguing for hybridized approach to mediation); Weckstein, *supra* note 6 (suggesting that mixture of approaches is generally better for mediation).

assessments of the disputants' positions²⁶ and behavior — although they may be unwilling to consider such conduct mediation and would regard the ADR process as then becoming something different.²⁷ Similarly, those supporting evaluation are willing to impose some limits on the evaluative mediator in order to prevent mediation from becoming early neutral evaluation or (worse yet from the perspective of a facilitative mediator) arbitration or coerced settlement engineered by a nonjudicial officer.²⁸

B. The Case Against a Facilitative Orthodoxy

Unfortunately, too much discussion of mediation has appeared to take place under a seemingly rigid view of the relationship between evaluation and mediation. This leads to an uncomfortable air of tautology and self-fulfilling prophecy. For example, if as the first leg of a syllogism, one posits that "all mediation is nonevaluative and facilitative only," any situation of arguably evaluative or interventionist mediation becomes "nonmediation" or "improper mediation" when the syllogism is carried to conclusion. This results not only in an excessively narrow view of mediation, but also creates a regulatory regime that discourages flexible,

26. See Symposium, *Evaluative Versus Facilitative*, *supra* note 1, at 933 (comments of Professor Lela Love)(no objection to use of evaluation in ADR if this is clearly delineated and not commingled with mediation); *Id.* at 934 (comments of Professor Lela Love)(when confronted with party desire to enter into agreement barred by applicable law, mediators raise "concerns about the legality of the agreement and advise the parties to get legal counsel"); *Id.* at 928 (comments of Professor Cheryl McDonald) (to educate parties and attempt to correct misimpressions, mediator "might point them towards the library . . ." but should not offer his or her own assessment); *Id.* at 923 (comments of Professor Robert Moberly) (Fla. Rule for Court-Appointed Mediators 10.090(d) "doesn't prohibit all opinions, but it does prohibit a[[mediator's announced] opinion as to how the judge in that particular case will rule."). *But see id.* at 923 (comments of Professor Moberly)(suggesting distinction between permitted and prohibited types of evaluation and urging "great caution in utilizing this sort of opinion and evaluation"); *Id.* at 922 (comments of Professor McDonald)(rejecting mediator authority to state opinion on judge's decision-making reputation in landlord-tenant matters because "there are a lot more ways and more neutral ways in which both parties could be alerted to the possibility that judges, being human beings, might have particular biases that might have an impact on their case and that's something they should both be thinking about"); *Id.* at 925 (comments of Professor Moberly)(mediator is allowed to provide information although "line between information and advice may not always be so clear"); *Id.* at 929 (comments of Professor Moberly)("Florida Rules don't prohibit all or even most evaluations. They only prohibit those specifically mentioned The Rules specifically allow mediators to point out possible outcomes of the case.").

Accord, Symposium, *Standards of Professional Conduct*, *supra* note 1, at 103 (comments of Dean John D. Feerick)(defender of facilitative approach acknowledges that some proper mediation may touch upon elements of substantive law and evaluation); *Id.* at 105 (comments of Professor Moberly) (permissible for mediator in facilitative regime to inform parties as to applicable law).

27. See Love, *supra* note 3, at 948; Phillips, *supra* note 6, at 884, n.154; Stulberg, *supra* note 3, at 995-99.

28. See Symposium, *Evaluative Versus Facilitative*, *supra* note 1, at 928 (comments of Lawrence M. Watson, Jr.)(evaluation of party positions permissible and useful and "becomes dangerous only when you start taking the decision-making process away from the parties"); *Id.* at 922 (comments of Professor Jeffrey W. Stempel)(if mediator provides assessment of merits of issue or likely adjudication outcome too early in mediation process, it may warp process and preclude opportunity for mutual resolution by parties); *Id.* at 928 (comments of Donna Gebhart)(approving nonevaluative techniques of alerting parties and raising consciousness as required prelude to offering assessment of position, circumstances, or possible outcomes).

hybrid approaches to dispute resolution. At its extreme, the "mediation is nonevaluative" mantra becomes an end in itself and loses sight of the ultimate goal of mediation or any other ADR technique: the efficient and just resolution of controversy. When the end instead becomes the preservation of a particular model of mediation (rigidly nonevaluative), attainment of this goal may overwhelm the more germane objective of just dispute resolution.

In previous commentary, I offered a hypothetical situation that I continue to think illustrates the weakness of a rigidly nonevaluative model of mediation.²⁹ Working through this hypothetical led me to conclude that some feminist scholars are indeed correctly concerned that a mediation orthodoxy eschewing even minimalist evaluation can disserve women,³⁰ weaker parties, and less assertive entities. I also posited two other hypothetical mediation situations where some dose of evaluation may often be necessary if mediation is to be just: a landlord-tenant dispute and a personal injury tort action.³¹ In these three situations, some simple thought experiments led inexorably to the conclusion that mediators should not be so philosophically transfixed by the facilitative concept that they permit one party to a dispute to bully the other into submission or deceive them into a resolution that is clearly substandard under the default rules of the applicable law.³²

I continue to have these serious concerns that mediation, despite its informality, has an element of coercion in that it exerts hydraulic pressure on the disputants to reach resolution. Furthermore, the disputants (particularly less powerful or sophisticated disputants) will be drawn more strongly in the direction of settlement precisely because the presence of a third party creates the appearance of adjudicative formality even though the mediator steadfastly avoids evaluation. But where the mediator avoids evaluating, disputants of less sophistication or will may easily be led by opponents into disadvantageous settlements. To be sure, this can happen in "regular" negotiation as well, particularly where the judge is attempting to broker a settlement on the eve of trial.³³

29. See Stempel, *supra* note 2, at 957-70.

30. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) (suggesting that mediation's elimination or de-emphasis of legal rights in preference for pursuit of resolution disadvantages typical woman in domestic dispute due to imbalance of power); Trina Grillo, *supra* note 21 (contending that more informal processes of mediation may discourage women from asserting legal rights and encourage mediators to overlook such rights in seeking resolution of domestic matters).

31. See Stempel, *supra* note 2, at 955-70; Symposium, *Evaluative Versus Facilitative*, *supra* note 1, at 922-30 (comments of James J. Alfini).

32. See Stempel, *supra* note 2, at 955-70. For example, by simply "facilitating" without editorial comment the hypothetical divorce where husband takes wife to the cleaners, the mediator is giving tacit legitimacy to the husband's efforts to unfairly impoverish spouse and children in a manner no court would tolerate. At least I hope no court would tolerate a divorce settlement where the weaker or less sophisticated party receives so little that it imperils the children's well-being. Although courts defer to party judgments on settlement and appellate courts defer to trial courts, courts exercise some modest policing of agreements either because judicial approval is required or because the court may raise its metaphorical eyebrow in response to a suspicious settlement.

33. The dangers of judicial arm twisting are sufficiently well-recognized that there has emerged an entire literature critical of managerial judging and judicial overzealousness in seeking settlement. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424-31 (1982). There is also a lengthy literature defending judicially encouraged settlement. See, e.g., Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case*

Evaluation in mediation has been criticized as too fraught with the possibility of bad or misleading legal assessments.³⁴ This is a serious concern that deserves responsive monitoring by courts. But it is equally true that the mediator's tacit authority also acts to legitimize even unfair settlement proposals if the mediator steadfastly refuses to give them any sort of negative evaluation. In my view, even the commentators most associated with the facilitative and nonevaluative perspective³⁵ recognize this when applying their model of facilitative mediation to situations of unequal parties or strategic behavior.³⁶ Similarly, proponents of the evaluative mediation approach also realize that mediation becomes a charade if the first meeting of the parties results in an immediate decree by the mediator.³⁷ Consequently, the debate in the literature is more complex than can be captured by the "facilitative vs. evaluative" description.³⁸

C. An Example of Enlightenment: Florida's Move Toward a More Eclectic Approach

After several years of taking what could be termed an excessively purist view of mediation as facilitative, Florida recently amended its mediation rules to specifically provide that informing the disputants of the law, at their request, was not impermissible favoritism or excessive evaluation.³⁹ Florida adopted mandatory

Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution, 37 RUTGERS L. REV. 253 (1985); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); William W. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978); Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 89, 203 (1976) (seminar for new judges). See also E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 317 (1986).

34. As one commentator put it:

In mediation, there is little protection from the delivery of inadequately informed opinion on the part of the mediator. Whether the mediator is opining that one of the parties should buy a carpet to lessen the impact of sounds heard by a neighbor or that one of the parties does not have standing to bring a particular claim in court — these opinions carry enormous weight.

Love, *supra*, note 3, at 942-43.

35. See, e.g., BUSH & FOLGER, *supra* note 14; Kovach & Love, *supra* note 17, at 90-105.

36. For example, Bush and Folger, although stressing facilitation, also emphasize the need to empower the parties and to prompt the parties to recognize the concerns of one another. They also advise mediators to note and compensate for differential power relationships. See BUSH & FOLGER, *supra* note 14, at 209-26.

37. See, e.g., Symposium, *Evaluative Versus Facilitative*, *supra* note 1, at 922 (comments of Jeffrey W. Stempel); *Id.* at 925 (comments of Lawrence Watson).

38. See Menkel-Meadow, *supra* note 1, at 1875-90 (describing mediation in practice as eclectic). See, e.g., Symposium, *Evaluative Versus Facilitative*, *supra* note 1. Professor Lela Love, clearly a proponent of the facilitative approach and a critic of evaluation, deems it good facilitative mediation where "[m]ediators push disputing parties to question their assumptions, reconsider their positions, listen to each other's perspectives, stories and arguments, consider relevant law, weigh their own values, principles and priorities, and develop an outcome optimal to the particular parties. In so doing, mediators facilitate evaluation by the parties." See Love, *supra* note 3, at 939 (emphasis added). The activities Professor Love describes obviously have an evaluative dimension as well as a facilitative and empowering mission; these activities simply steer clear of heavy-handed evaluation that fundamentally alters the mediation enterprise.

39. See *In re Amendments*, 762 So. 2d at 444-46.

mediation for many disputes in 1987 and has been officially encouraging mediation and other forms of ADR since that time.⁴⁰

Florida's mediation statute ("Statute") defines mediation as "a process whereby a neutral third person called a mediator acts to encourage and *facilitate* the resolution of a dispute between two or more parties."⁴¹ The Florida Rules of Civil Procedure and the Family Law Rules of Civil Procedure speak to the logistical administration of the mediation, and even to such matters as compensation of the mediators, but say nothing regarding the appropriate mediation style beyond the general defining principal that mediation is facilitation of party-driven agreement.⁴²

The Florida Rules for Certified and Court-Appointed Mediators as initially drafted and in effect from 1986 to 2000 ("former Rules") are somewhat more specific but are largely patterned on the statutory language, thus containing a similar facilitative slant, although they do not textually foreclose some degree of helpful evaluation in the service of mediation. Arguably, the Statute and the former Rules could have been interpreted to permit a broad notion of facilitation that encompasses use of evaluative techniques in appropriate circumstances. Specifically, the former Rules defined "mediation" as:

a process whereby a neutral third party acts to encourage and *facilitate* the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process with the objective of helping the parties reach a mutually acceptable agreement.⁴³

* * *

40. Florida's Supreme Court established a Dispute Resolution Center in 1986. See Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997); Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029 (1993).

Florida's first institutional promotion of ADR appears to have been the establishment by the state during the 1970s of "citizen dispute settlement" ("CDS") centers and pilot divorce mediation programs operated by the state's trial courts in order to attempt to assist the settlement of cases thought likely to benefit from negotiation rather than litigation. The Florida Supreme Court's Office of the State Courts Administrator ("OSCA") developed these programs and produced training and organizational materials as well as lobbying for the enabling legislation, which was not enacted until 1985 even though the programs had been operating in some form since the 1970s. See Press, *Institutionalization*, *supra* at 905; Press, *View*, *supra* at 1031-33. See, e.g., JOSEPH P. STULBERG, SUPREME COURT OF FLORIDA INSTRUCTOR'S GUIDE FOR TRAINING MEDIATORS FOR SERVICE IN CITIZEN DISPUTES SETTLEMENT PROGRAMS (1981) (training manual).

As scholars from Toynbee to Holmes have observed, history explains a lot. Florida's historic preference for the facilitative end of the continuum probably results from the dominance of the facilitative ethos in the community mediation sphere. See Weckstein, *supra* note 6, at 510-15. It is probably more than coincidental that Florida's initial reference materials on proper mediation were authored by Joseph Stulberg, one of the country's most prominent exponents of the facilitative model. See Stulberg, *supra* note 3, at 991-98.

41. See FLA. STAT. ch. 44.1011(2) (1999) (emphasis added).

42. See FLA. R. CIV. P. 1.700, 1.710, 1.730; FLA. R. FAM. CT. 12.740, 12.741.

43. See FLA. R. CERT. & CT-APPOINTED MEDS. R. 10.020(b) (Preamble) (Oct. 1995) (emphasis added) (rules subsequently amended) [hereinafter FLA. MEDS. R.]. See *In re Amendments*, 762 So. 2d 441. See also FLA. STAT. ch. 44.1011(1).

General Principles. Mediation is based on principles of communication, negotiation, *facilitation*, and problem-solving that emphasize:

- (1) the needs and interests of the participants;
- (2) fairness;
- (3) procedural flexibility;
- (4) privacy and confidentiality;
- (5) full disclosure; and
- (6) self determination.⁴⁴

In addition to noting fairness as an essential principle of mediation, the former Rules also contained other language suggesting that the facilitative notion of mediation need not exclude an evaluative component. For example, the role of the mediator as defined in the former Rules "includes but is not limited to" the generally facilitative techniques of assisting the parties to identify issues, improve communication, explore alternative resolutions, and assist the parties to reach "voluntary" agreements.⁴⁵

The text of the former Rules themselves suggested a role for evaluation, or at least legal information provision in the mediation process.⁴⁶ However,

44. FLA. MEDS. R. 10.020(d) (emphasis added).

45. See FLA. MEDS. R. 10.020(c).

46. Various provisions in the Florida Statutes and former Rules buttress this assessment. For example, mediators "shall promote mutual respect among the parties throughout the mediation process." See FLA. MEDS. R. 10.060(f)(Self-Determination article of former Rules provides that mediator "shall promote mutual respect among the parties through the mediation process"). In addition, the mediators "shall not unnecessarily or inappropriately prolong a mediation session if it becomes apparent that the case is unsuitable for mediation or if one or more of the parties is unwilling or unable to participate in the mediation process in a meaningful manner." See FLA. MEDS. R. Rule 10.050(b) (also providing that "mediator shall assist the parties in evaluating the benefits, risks, and costs of mediation and alternative methods of problem solving available to them"). The mixed message of mediation philosophy is to some extent encapsulated in the Committee Note to Rule 10.060 (Self-Determination), which provides:

While a mediator has no duty to specifically advise a party as to the legal ramifications or consequences of a proposed agreement, there is a duty for the mediator to advise the parties of the importance of understanding such matters and giving them the opportunity to seek such advice if they desire.

FLA. MEDS. R., Committee Note to Rule 10.060. In other words, the mediator must give the parties something of a "heads up" advisory regarding the gravity of settling a dispute that would otherwise ultimately be subject to litigation (because court-ordered mediation in Florida is nonbinding) and the tacit advisability of obtaining appropriate legal advice. But the mediator is not required to give the parties a similar heads up regarding even a one-sided settlement on which they appear to be embarking. Although the Committee Note expresses a useful sentiment and certainly does not foreclose the mediator from registering evaluative sentiments in the interests of avoiding unfairness, the Note continues in the Florida mediation vein of largely encouraging the facilitative model.

For example, a mediator is unlikely to ever be censured for standing idly by while the wife in the divorce hypothetical sells her future and that of her children down the river so long as the mediator has given at least a boilerplate disclaimer at the start of the mediation (for example, "[s]ettlement of a legal dispute is an important event and becomes no less important because the settlement results from a mediated agreement. Any settlement you make as a result of this mediation will be legally binding and will conclude the matter at issue. You may take time to consult with a lawyer or other professionals prior to agreeing to any settlement that comes up during your mediation efforts.").

The most express recognition of fairness dangers in mediation is found in Florida Statute 44.102, which provides that a "court shall not refer any case to mediation if it finds there has been a significant history of domestic abuse which would compromise the mediation process." FLA. STAT. ch. 44.102(2)(b)

interpretations of the Statute and former Rules regularly took an extremist approach, embracing the purely facilitative model and resisting even modest mediator attempts to provide disputants with information regarding the legal framework within which the dispute was taking place. Although the language of the Statute and former Rules is susceptible to permitting a wide range of mediation styles, it had been interpreted to require that mediators refrain from saying or doing anything that could be construed as evaluative.⁴⁷ Florida's Mediator Qualifications Advisory Panel ("Advisory Panel") is occasionally asked to respond to questions posed by certified mediators. Opinions of the Advisory Panel during 1995 and 1996 reveal a highly restrictive view of mediation, one that appears to permit not even isolated, minor, and useful evaluative action by mediators. Examples involving debtor-creditor

(1999). Presumably, all such instances would be found to undermine mediation and courts will therefore not refer domestic relations matters to mediation where there has been spouse or child abuse. However, "abuse" per se hardly exhausts the lists of power, attitude, and fairness concerns that attend mediation.

47. See Stempel, *supra* note 2, at 960-70.

law,⁴⁸ marital dissolution,⁴⁹ and tort⁵⁰ all serve to illustrate the extreme orientation

48. For example, in Advisory Panel Opinion 95-002, the hypothetical considered involved a creditor's collection action against a debtor for \$1,250. The debtor admits owing this amount, but she wishes to arrange a graduated repayment schedule, offering to pay \$110 per month, an amount the creditor is readily willing to accept without pursuing the matter to judgment. However, the note signed by the debtor provides for an effective interest rate of 29.5% per year while the prevailing post-judgment interest rate is 8% per year. The creditor has, of course, been through these sorts of disputes before. The debtor is generally naive about the law. In the hallway prior to the mediation session, the mediator overheard the creditor suggesting to the debtor that she should avoid a judgment "because it would hurt her credit." The Mediation Qualifications Advisory Panel ("Advisory Panel") Question 95-002 and Opinion is set forth in FLORIDA DISPUTE RESOLUTION CENTER, THE RESOLUTION REPORT at 2-5 (Oct. 1995) (hereinafter RESOLUTION REPORT).

The panel then considered whether the mediator could ask the debtor: (Question 95-002A in the Panel's classification system) "Are you aware that the monthly payments do not cover the interest as it is accruing and you will be paying on this loan forever?" and (Question 95-002B) "[A]re you aware that if a judgment was entered against you, the interest would be reduced from 29.5% to 8%?" The Advisory Panel declined to give an opinion (Question 95-002C) as to whether making the interest rate comparison would be "interfering with a contractual relationship," finding this a legal determination outside the scope of the Advisory Panel's authority. *Id.* at 3. In addition, the Advisory Panel considered whether a mediator's potential "question [can] be asked even if the framing of the question tends to advise or inform one or both of the parties involved?" *Id.* at 3.

The Advisory Panel essentially ruled that all such activity by the mediator violated Florida's prohibition against mediators providing legal advice. In particular, the Advisory Panel even found Mediator Action A to be unethical in that the "you'll be paying forever" statement was a misrepresentation, and that simply advising the naive debtor (Mediator Action B) of the prevailing interest rate on judgments "violated the prohibition relating to the provision of legal advice," and that (in response to Question D) "it is improper for a mediator to provide legal advice by any method during the mediation," even the innocuous act of questioning a party to determine whether the party is taking even foolish action with a minimal understanding of the law and the legal ramifications of the action. *See id.* at 5 (Summary of Advisory Panel Opinion). In particular, the Advisory Panel found that a mediator question "designed to advise the party about her legal options, a role that is appropriate for an attorney, [is] inappropriate for a mediator" *Id.* at 4 (Opinion 95-002B). Also, that "[i]t is improper for a mediator to provide legal advice by any method within the scope of a mediation, whether such advice be by statement, question or any other form of communication." *Id.* at 5 (Opinion 95-002D). The Advisory Panel did provide something of an escape valve for the pressure felt by the mediator in this hypothetical situation:

The mediator may, however, often obtain the desired information if the question is framed more generally [The mediator may inquire] by asking the following: "Is interest levied on a judgment? Do either of you know?" These two questions set the stage for the parties to provide information to the mediator and to each other without placing the mediator in the position of providing that information. In so doing, the mediator assists in maximizing the exploration of alternatives, and adheres to the principles of fairness, full disclosure, self determination, and the needs and interests of the participants [Rule 10.02(d)(1),(2) and (5)], while honoring the commitment to all parties to move toward an agreement [Rule 10.070(a)].

Id. Although the issues of interpreting the law and former Rules are reasonably close, I believe the Advisory Panel Opinion was in error and took an excessively restrictive view of mediator discretion under Florida law. The Statute prohibits a mediator's giving of legal "advice," an admittedly malleable term, but hardly one that requires the expansive definition placed upon it by the Advisory Panel.

49. In Question 95-005A, the Advisory Panel was asked, "[w]hat is the duty of a mediator who is informed during a caucus of a family (dissolution of marriage) mediation that one spouse possesses an asset of which the other spouse has no knowledge?" Advisory Panel Question and Opinion 95-005A, reported in RESOLUTION REPORT, at 14-15. The Panel stated that the mediator "should withdraw from the mediation unless the party discloses the asset" but suggested the mediator has no authority to hint to the other party that further investigation might be in order. Although withdrawal of the mediator is obviously superior to presiding over settlement tainted by fraud, the Advisory Panel Opinion turns a blind eye to the likely second round of the dispute. There, a second mediator will preside over

toward a purely facilitative model in Florida during the 1990s.

In February 2000, the Florida Supreme Court approved new rules for mediators ("new Rules"). As part of its overall ADR program, the Florida Supreme Court in 1989 established a Standing Committee on Mediation and Arbitration Rules ("Committee"). In 1999, after two years of public hearings and drafting sessions, the Committee proposed amendments to the state's Mediator Standards of Professional Conduct as well as other changes.⁵¹ Despite some significant changes in the former Rules, the new Rules retain the facilitative approach.⁵² However, the new Rules were challenged before the court by one private mediator who asserted that they encouraged excessive evaluation.⁵³

negotiation and probable settlement. This time the spouse hiding an asset will be cagey enough not to alert the mediator and the case will likely settle favorably for the deceptive spouse. At this point, one wonders why mediation communications must be so privileged. If a judge found out about incipient fraud, would the only remedy be withdrawal rather than disclosing the hidden asset on grounds similar to the crime-fraud exception to the confidentiality of attorney-client communications? Although this issue is complex and beyond the scope of this essay, Opinion 95-005A remains unsatisfying in large part because it envisions a nonactivist role for the mediator.

50. Advisory Panel Opinion 95-005C is more unsatisfying still. There, the question was: "If a mediator who becomes aware that a plaintiff in a wrongful death action is making no claim for loss of consortium, which claim would appear to the mediator to be appropriate under the circumstances, [is mediator] bound to inform that party of this matter?" See Advisory Panel Question and Opinion 95-005C, reported in RESOLUTION REPORT at 14-16. The Advisory Panel's response: "It is an ethical violation for a mediator to give legal advice to a party." Continuing, the Advisory Panel stated: it is inappropriate for a mediator to give legal advice even if a party to the mediation is not represented by counsel. If the party is represented by counsel, which appears to be the case in your scenario, it would be clearly inappropriate to provide such legal advice. See Rules 10.070(a)(1); 10.090(a)&(b).

Id. at 16. Again, the Advisory Panel embraces a narrow view of mediation and an excessively broad notion of legal advice. Particularly, where a party has counsel, it hardly seems obstructionist if the mediator simply asks: "Counsel, did you decide not to make a consortium claim or is it considered covered by the settlement?" Where the plaintiff is pro se (almost a per se problem with something as serious as a wrongful death action), the mediator will need to first provide some legal background but the same question would seem equally apt to ensure that the parties settle with relatively complete knowledge of their options and the consequences of the settlement. Of course this alerts the lawyer or party. But this dollup of "legal advice" is but a small impurity in the facilitative model. In return, the legal system by this modest mediator intervention acts to minimize unfairness, or mistake.

51. See *In re Amendments*, 762 So. 2d at 441.

The proposed changes to the ethical rules amount to a complete rewrite of the existing rules. In addition to revising the text of individual ethical rules, the Committee has reorganized the grouping and order of the rules, moved ethical concepts between rules, renumbered the rules, and created several new rules.

Id. at 441.

52. *Id.* at 442 (discussing new Rule 10.210) (defining mediation as process to "facilitate" dispute resolution "without prescribing" result in "non-adversarial" process so that parties may "reach a mutually acceptable agreement"); *Id.* (discussing New Rule 10.220) (emphasizing that "all decision-making authority rests with the parties").

53. *Id.* at 443.

Dr. Firestone [the mediator who challenged the new Rules] maintains that the committee note to rule 10.310, which recognizes that a mediator may be asked to serve as a decision-maker, increases the lack of clarity between mediation and non-binding arbitration. He fears that the committee note will encourage mediators to serve as arbitrators without offering clear guidelines for the 'mediator/arbitrator' role.

Id. (footnotes omitted).

The plaintiff argued that new Rule 10.370 (Professional Advice or Opinions) "further blurs the distinction between arbitration and mediation by allowing the mediator to point out possible outcomes and discuss the merits of the case," a fear raised particularly with regard to family and dependency mediations.⁵⁴ The Committee response, with which the court concurred, was to acknowledge the support for both evaluative and facilitative techniques in the mediation community⁵⁵ and to maintain that a mediator may, at the request of the parties, provide information so long as this is "consistent with the basic mediation principles of impartiality and party determination" but that new Rule 10.370 "does not authorize the mediator to decide the case or act as an arbitrator."⁵⁶

Under the new Rules, then, providing legal information and insight is permitted, but only at the request of the parties. Although a mediator can lead parties to make this request, this is still a strong limitation. For example, in some of the hypothetical bullying situations I have posited (*e.g.*, abusive husband, cowed wife; slick lender, guileless debtor),⁵⁷ significant evaluative mediation would seem to be precluded as a practical matter because the bullying party is unlikely to agree to let the mediator cast any "shadow of the law" on the dispute. For example, under the new Rules "the mediator is specifically prohibited from offering personal or professional opinion intended to decide the dispute or direct a resolution of any issue and from offering an opinion as to how the court will resolve the dispute."⁵⁸ The bulk of new Rule 10.370 in fact concentrates on telling the mediator that she must be very careful not to do anything that undermines party decision-making and suggests a continued strong allegiance to the facilitative model.⁵⁹

New Rule 10.060 emphasizes that a mediator should not coerce settlement and the mediation should be a "balanced" process of "deliberations" rather than judgment making.⁶⁰ Although the mediator may raise questions as to the "reality, fairness, equity, and feasibility of proposed options for settlement,"⁶¹ and may "point out possible outcomes of the case,"⁶² the mediator is barred from giving a personal opinion or legal advice.⁶³ Where the mediator believes a pro se disputant is having its pocket picked, the mediator's recourse is to "advise the participants to seek independent legal counsel."⁶⁴

Although Florida's new Rules should eliminate the ridiculously pure facilitative formalism of some Advisory Panel opinions of the 1990s, they hardly open the floodgates to torrents of evaluation. However, the new Rules are a distinct improvement in that they better capture the pluralistic eclecticism that should attend

54. *Id.* at 444.

55. *Id.* at 445 (citing Riskin, *Grid*, *supra* note 1; Stulberg, *supra* note 3; and Stempel, *supra* note 2).

56. *In re Amendments*, 762 So. 2d at 445.

57. *See supra* notes 46-51 and accompanying text; *see also* Stempel, *supra* note 2, at 954-60.

58. *In re Amendments*, 762 So. 2d 445.

59. *Id.* at 444.

60. *See* FLA. MEDS. R. 10.060(c) & (d).

61. *See* FLA. MEDS. R. 10.070(a)(1).

62. *See* FLA. MEDS. R. 10.090(d).

63. *See* FLA. MEDS. R. 10.090(d) ("While a mediator may point out possible outcomes of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.").

64. *See* FLA. MEDS. R. 10.090(b).

mediation. The broad definition of "legal advice" by a mediator that the Advisory Panel adopted during the 1990s is defensible but extreme. It can be fitted with the text of the mediation statute but not its purpose. The purpose of the prohibition on legal advice, of course, is to prevent the mediator from choosing sides, playing favorites, interfering with party-lawyer relations,⁶⁵ or impeding voluntary resolution through needless, legalistic Monday-morning quarterbacking.

So long as the mediator is not frustrating the purpose of the Statute through these or similar tactics, the Advisory Panel (and the Florida dispute resolution establishment) should accord the statutory limit on "legal advice" the sort of constrained, common sense view that we as lawyers would ourselves employ when determining whether our communications rise to the level of providing representation or services. Alerting disputants to potential pitfalls and fairness concerns, even if done through questions or information discussion rather than editorial comment, should not be roundly forbidden as impermissible legal advice. An overly restrictive view of mediator discretion to inform as to the law is not only erroneous as a matter of characterizing mediation but makes for detrimental public policy.

Fortunately, Florida's new Rules of mediation now accord more with such sound public policy and the operation of good mediation in practice. The new Rules are hardly a complete victory for evaluators. For example, I would permit mediators under appropriate circumstances to offer something closer to a prediction of what will likely happen if the instant case is litigated, even without the parties requesting it. But, as the traditional aphorism goes, if the rule makes both facilitation and evaluation zealots unhappy, it probably is a centrist, balanced rule.

III. THE CASE FOR THE ECLECTIC APPROACH

A. Greater Substantive Rationality in the Eclectic Approach

Speaking of facilitation and evaluation as polar opposites, or completely separate, parallel tracks of dispute resolution, oversimplifies both the world and the analytic model. There really are no purely "facilitative" actions and purely "evaluative" actions by mediators. Rather, the effective mediator engages in a range of behaviors that span the facilitative-evaluative continuum. Some actions (remarking that a settlement offer falls below the minimum legal standard) are clearly more evaluative. Other actions (asking a divorcing wife to detail her future goals for the children and estimating the financial resources required) are more

65. Despite their professed commitment to the moral high ground of non-interference, facilitative mediators are vulnerable on this score. For example, many mediators have taken to referring to the disputing parties as the mediator's "clients" or "principals" rather than merely the disputants who have retained the mediator. Although this characterization is touching in its connotative closeness, it misperceives the relationship. A disputant does not use a mediator as an "agent" in the way in which clients or other principals use lawyers or representatives as agents. In addition, of course, the party has no particular claim to the mediator's zealous advocacy or fiduciary duty (far from it). Rather, the mediator has a duty to serve the parties and the situation in the aggregate rather than to represent either party as such.

facilitative but have a clear evaluative agenda. Other actions (suggesting a visit to a marriage counselor) fit quite snugly within the realm of facilitation.

One's natural impulse is to speak of the range of mediator activities as falling along various points of a continuum marked at the poles by purely evaluative actions ("Mr. Widget-maker, your breach of contract settlement offer is ludicrously low. You concede that more than half the widgets didn't work and you were paid in full. You must want to litigate this matter rather than settle it.") and nearly purely facilitative techniques ("Mr. Husband and Mrs. Wife, what are your goals for the children?").⁶⁶ But the continuum metaphor, although common and thus comfortable, is not really accurate either. Describing mediator conduct as a continuum yields too greatly to the false dichotomy. Many mediation actions are not compromises between the evaluative and facilitative poles of the dichotomy but are instead actions not fully susceptible of categorization within either school of thought. The same or similar actions may be either essentially facilitative or primarily evaluative depending on the context of the dispute.

In practice, however, it appears that the most highly sought mediators are those who provide exactly this sort of evaluative feedback to the parties and use some measure of evaluation as part of their facilitation of reasonable party dialogue leading to settlement.⁶⁷ Each day in the field, many mediators do engage in what might be termed evaluative behavior,⁶⁸ and evaluative-style mediators, particularly former judges, appear in strong demand as mediators.⁶⁹ To an extent, then, the

66. Of course, efforts to encourage the parties to discuss their feelings do not inevitably provide positive catharsis. For example, if a marriage is fraught with conflict and anger, airing those feelings may only make the parties more confrontational, impeding further mediation and settlement. Sending husband and wife to a marriage counselor may be a facilitative strategy but may not lead to cooperation if during the course of venting their frustrations, husband and wife lose whatever remaining reservoir of goodwill they possessed when first entering mediation.

67. See, e.g., Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 468-85 (1994) (The profiles of successful mediators in Kolb's book revealed a good deal of evaluative style activity by mediators); Lawrence Susskind, *Mediating Public Disputes: A Response to the Skeptics*, 1 *NEGOT. J.* 117 (1985) (mediation may need evaluative component to produce results); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 *VT. L. REV.* 1 (1981) (suggesting that evaluation is common component to environmental mediation); Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 *U.S.F.L. REV.* 723, 729-43 (1996); Weckstein, *supra* note 6, at 518-25 (suggesting, based on experience and review of literature, that many popular mediators evaluate to a degree). But see Joseph B. Stulberg, *The Theory and Practice of Mediation, A Reply to Professor Susskind*, 6 *VT. L. REV.* 85 (1981).

68. See Alfini, *supra* note 17, at 66-73 (identifying at least one popular tactic, "trashing," that is highly evaluative and another, "bashing," that strongly incorporates evaluation while a third identified tactic, "hashing," it out most resembles a facilitative model of mediation); McAdoo, *supra* note 11 (lawyers and participants report mix of facilitative and evaluative elements in their mediation); Menkel-Meadow, *supra* note 1, at 1887 ("In actual practice, many mediators' functions vary . . ."); sources cited *supra* note 67.

69. See Margaret A. Jacobs, *Retired Judges Seize Rising Role in Settling Disputes in California*, *WALL ST. J.*, July 26, 1996, at A1; Lande, *supra* note 4, at 845-47; Menkel-Meadow, *supra* note 1, at 1887, n.88 (in actual practice in commercial or high-stakes mediation "mediators are often chosen precisely because of their substantive expertise"; here and in court-sponsored programs, evaluative feedback of mediator is desired by the disputants). *Accord*, JAMES FREUND, *THE NEUTRAL NEGOTIATOR: WHY AND HOW MEDIATION CAN WORK TO RESOLVE DOLLAR DISPUTES* (1994).

modern market for ADR exhibits strong attraction to at least some of the evaluative tactics displayed by judges over the years.⁷⁰

Rather than viewing the situation from the theoretical perspective of ex-ante definition, it might be more accurate to define mediation ex post. If, in actual use of what is generally considered mediation, participants frequently prefer mediators who bring evaluative techniques to the process, it is needlessly bucking reality to insist that "real" mediation must be devoid of any evaluative component.

1. Eclecticism as an Antidote to Distributional Concerns

Related to the problem of differential resources is the obvious fact that both adjudication and settlement normally result in a transfer of wealth. Usually, both trial and settlement require at least one disputant to give up something to another disputant. Although creative mediation or negotiation can make for "win-win" outcomes of the dispute, even these outcomes usually require one party to give up something in return for something surrendered by the opponent. When the system works well, litigation, ADR, and private settlement outcomes should largely result in at least corrective justice and perhaps even wealth creation.⁷¹ In this regard, ADR and mediation in particular may have advantages over adjudication, which is unlikely to result in distributive justice, as courts exist primarily to enforce existing legal rights; most legal rights possessed by Americans are based on the status quo rather than any entitlement to distributive just deserts.

Thus, properly performed adjudication gives the parties what they would have had or should have had in the absence of the dispute. Whatever inequalities preceded the litigation remain after the litigation — but the litigation at least usually does not enhance inequality. However, favorable settlements extracted by parties with superior leverage may accentuate distributional inequity. Such settlements reached through court-ordered mediation that would otherwise have proceeded through adjudication arguably result in a government-sponsored program (mediation) that operates in some cases to enhance inequitable distribution of wealth rather than to maintain the existing assignment of wealth in society. Put another way, court-ordered mediation that allows one party to reach advantageous settlements that it could otherwise not obtain serves to put the state in the position of enhancing distributional inequities rather than holding them steady or reducing

70. This is a view most strongly expressed by mediator John Bickerman in *Evaluative Mediator Responds*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 70 (1996). However, Len Riskin, in a humorous verse summarizing the evaluative-facilitative debate, describes Bickerman as "smitten" with the market. See Leonard L. Riskin, *Mediation Quandries*, 24 FLA. ST. U. L. REV. 1007, 1008, n.4 (1997). When speaking in prose rather than poetry, Riskin takes a similar view that mediation is to some degree what takes place in the market of actual mediation practice. See Riskin, *Grid*, *supra* note 1, at 720-30; Symposium, *Standards of Professional Conduct*, *supra* note 1, at 111 (comments of Leonard Riskin).

71. The classic illustration of this, in my view, is found in ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 59 (1981). They describe two hypothetical disputants each seeking possession of an orange. However, one wants the orange pulp to eat and the other wants the orange rind for baking. If the two disputants avoid positional bargaining (which would suggest that the optimal solution is cutting the orange in half), a settlement can occur that leaves each party better off and society with more (a satisfied orange-eater and a completely flavored pie).

them, the latter being the normally accepted roles of the modern industrialized nation-state.

As a practical matter, some disputants are almost always better situated to extract favorable settlements from their opponents. Family law mediators report that half of the disputants before them are not even represented by counsel,⁷² which may accentuate inequality between the parties. Ironically, then, the problem of party inequality may occur most often in the sorts of "smaller" cases more likely to be ordered into mediation and where the facilitative model is most entrenched.⁷³ In larger cases, the parties are more likely to have equal financial strength and legal sophistication, or at least will employ legal counsel even in ADR. Even when one or more of the parties lacks requisite sophistication, the sheer magnitude or importance of the dispute usually ensures that lawyers will be involved in the matter, thus tending to level the playing field of legal sophistication.⁷⁴

When mismatched parties, whether represented or pro se, are thrown together, any resulting settlement is more likely to favor the party with superior resources. Mediation should at least not accentuate this tendency. Although disputants usually settle rather than litigate to final judgment, they bargain in the shadow of the substantive law as regulated by the procedural rules of the jurisdictions.⁷⁵ My discussion of course proceeds with a tacit suggestion that in mediation there is considerable danger that the "haves" tend to do better than the "have-nots," although this danger certainly exists in litigation as well.⁷⁶ Although this may be unfortunate in litigation, it would be more unfortunate if mediation created greater inequalities than result from traditional adjudication and settlement.

2. Adding More Value to Mediation Through Eclecticism

Recent scholarship has suggested that mediation adds value to the disputing transaction by providing the parties with information and structured evaluation that parties themselves cannot provide.⁷⁷ This view, although more self-consciously based on economic analysis, fits comfortably with the sociological and psychological scholarship that suggests parties benefit significantly from being accorded a relatively timely, reasonably formal opportunity to present their case to a neutral

72. See Weckstein, *supra* note 6, at 539 n.179.

73. See *supra* notes 46-51 and accompanying text.

74. See Craig McEwen et al., *Bring In the Lawyers: Challenging the Dominant Approach to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995) (suggesting that lawyer involvement makes mediation outcomes fairer, more rational, and more in general conformity with prevailing law and policy). There is a glitch in this reasoning, of course: not all lawyers are equally effective, and richer, more sophisticated disputants generally retain more effective lawyers. But despite the reality of differing legal talent, time, and logistical support, the presence of counsel normally has a leavening effect.

75. See Robert A. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

76. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (suggesting that experienced litigants as well as those with greater resources will generally have an advantage over episodic or poorer opponents).

77. See, e.g., Jennifer Gerarda Brown, *The Role of Hope in Negotiation*, 44 UCLA L. REV. 1661 (1997); Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323 (1994).

third party and to receive a fair and reflective hearing of the matter.⁷⁸ Depending upon the orientation of the parties, the case might ultimately be better resolved by varying degrees of neutral facilitation or neutral evaluation. However, both economic and sociological analysis tends to suggest that more value is added to the process when the mediator not only gives the parties a forum and assists them in new ways of assessing the dispute, but also provides some yardstick for assessing the options and some information about the range of default options if the matter is adjudicated rather than settled.⁷⁹

B. Disputant Demand for Eclectic Mediation

Obviously, there is no objectively verifiable database from which one can accurately gauge the proportion of evaluative and facilitative activity currently occurring under the rubric of mediation. But the anecdotal evidence provided by participants in the system is strongly suggestive. Popular mediators appear to be in demand (at least for parties with cases and resources large enough to afford their fees) not only for their interpersonal facilitative skills but also for their ability to evaluate party positions and to encourage disputants to argue over the range of the reasonable.⁸⁰ These sorts of mediators, at least by reputation, do not assiduously refrain from providing information or editorial comment but use it selectively and fairly.⁸¹

Even advocates of the facilitative approach readily acknowledge that it is not the exclusive approach to mediation as practiced today. For example, Professor Robert Bush, who champions a model of transformative and empowering mediation clearly within the facilitative school, also identifies several other mediation styles that are substantially or primarily evaluative: settlers, "fixers" or problem-solvers, protectors, and reconcilers.⁸² Although one can quibble about whether all of these approaches

78. See E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 101-06 (1988) (suggesting that disputants have greater satisfaction with the process when able to be heard before third party seen as neutral); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 *LAW & SOC'Y REV.* 953, 980-83 (1990); McEwen et al., *supra* note 74, at 1378-84.

79. See Ayres & Brown, *supra* note 77, at 373-85, 395 (informational feedback conveyed by mediator, even if shared only with one disputant, may add value to process by enabling more informed, creative, or realistic decision); McEwen et al., *supra* note 74, at 1378-84.

80. See McAadoo, *supra* note 11, at 30-42; Menkel-Meadow, *supra* note 1, at 1880-82, 1887-88, 1898-1900; Stempel, *supra* note 2, at 974; *supra* notes 67-70 and accompanying text.

81. See DEBORAH KOLB ET AL., *supra* note 15 (of 12 prominent mediators studied, most displayed some evaluative components in their mediation); Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 *OHIO ST. J. ON DISP. RESOL.* 105, 147 (1996) (mediators appear to use a variety of techniques to seek settlement); McAadoo, *supra* note 10, at 30-42 (lawyer survey responses suggest much actual mediation in Minnesota is hybrid); McAadoo & Welsh, *supra* note 6, at 389 (attorneys for disputants prefer mediators that are not strictly facilitative); Nina R. Meierding, *Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements*, 11 *MED. Q.* 157 (1993) (even in primarily facilitative divorce mediations participants report a substantial and valuable element of "testing reality with respect to legal alternatives" and suggest evaluative dimension to process); Weckstein, *supra* note 6, at 515-17.

82. See BUSH & FOLGER, *supra* note 14, at 208-24; Bush, *supra* note 23 (observing different styles but favoring standard where mediator does not make legal observations). See also Menkel-Meadow, *supra* note 1, at 1881-83, 1888-90 (making this observation about even those who favor facilitative

are really mediation, it may be more productive to accept all as legitimate forms of mediation that vary in appropriateness according to the context of the particular case⁸³.

A common term one hears regarding mediation is that it provides a useful "reality check" for disputants.⁸⁴ In one survey of attorneys who had participated in court-prompted but voluntary mediation, half of the respondents stated that they were motivated to elect mediation because it provided a "needed reality check for opposing counsel" or the other disputant, or that it provided a "reality check for my client."⁸⁵ The notion of a reality check implies that the mediator and the mediation process in some way provide a degree of evaluative feedback to the participants. Other aspects of this extensive survey of Minnesota lawyers found similar substantial evidence that much mediation is evaluative and that the parties like this component of the process.⁸⁶

The Minnesota survey data is quite consistent with the anecdotal information collected by and experienced by others in the mediation community.⁸⁷ As one successful and in-demand mediator told me privately: "Of course I evaluate."⁸⁸ He hastened to add that he never begins the process with evaluation and that he believes he is indifferent to the relative benefits that either party may receive at the end of the mediation day.⁸⁹ At some point in the dispute, however, he expects that he will usually find it useful to inform the parties of applicable legal considerations, indicate

model of mediation).

83. See Menkel-Meadow, *supra* note 1, at 1880-83, 1887-90:

[E]thical and practical concerns about what is or is not appropriate to say or do in a separate caucus session will matter greatly depending on what one's orientation is to the appropriateness of evaluative behavior in mediation. Denying that it exists of defining it away will not likely be successful in the long run.

Id. at 1887 n.88. *Accord*, Riskin, *Grid*, *supra* note 1; Frank E.A. Sander, *Introduction to Symposium*, 13 OHIO ST. J. ON DISP. RESOL. 791 (1998) (supporting mediator freedom to voice opinions and noting this position of other commentators).

84. See, e.g., McAdoo & Welsh, *supra* note 6; Meierding, *supra* note 81.

85. See McAdoo, *supra* note 11, at 31. The McAdoo study was done at the behest of the ADR Task Force of the Minnesota Supreme Court. In 1994, Minnesota General Rule of Civil Procedure 114 became effective. The Rule requires lawyers to consider ADR in all civil disputes. The McAdoo study surveyed counsel to determine their experience with the Rule, which included a survey of their experiences choosing and using various ADR options, including mediation.

86. See McAdoo, *supra* note 11, at 38 (vast majority of lawyers (84.2%) believe that a "[m]ediator should have substantive experience in field of law related to case" while 63.6% prefer lawyer mediators). A table of "What Do Mediators Generally Do In Mediation?" shows that a third of mediators appear to "frequently" predict court outcomes of the dispute. *Id.* at 39. This data indicates a significant and accepted component of evaluation in mediation. *Accord*, McAdoo & Welsh, *supra* note 6 (further discussion of McAdoo study data).

87. See Menkel-Meadow, *supra* note 1, at 1880-92; Symposium, *Evaluative Versus Facilitative*, *supra* note 1, at 920-30 (much evaluation takes place in mediation and more evaluative mediators are frequently sought).

88. Conversation with mediator who operates mediation office in Northeast (name withheld). Persons familiar with the anonymous mediator's practice confirmed that he is sought-after, commands substantial fees, and is well-regarded by clients and the local legal community.

89. *Id.*

if a disputant's position is distinctly at odds with the controlling legal regime, and even to provide a range of likely outcomes if the dispute is processed by litigation.⁹⁰

If the experiential, anecdotal and limited survey evidence is correct, the market comprised of disputants is sending a powerful message in favor of hybrid mediation that permits some use of evaluative technique. If disputants do not want a purely nonevaluative mediator, there is no reason for government regulation of mediation or the orthodoxy of one segment of the ADR community to force a purely facilitative mediation upon the disputants.

IV. EXPLAINING THE PERSISTENCE OF THE FALSE DICHOTOMY

In light of the detriments of evaluative-facilitative formalism, one is prompted to wonder why this false dichotomy not only continues to persist but continues to be a dominant issue regarding mediation and ADR. The issue continues to engender debate so vigorous it borders on the emotional or strident. As discussed above, the debate may to some degree be a bit irrelevant in view of the de facto eclecticism that actually seems frequently (perhaps even usually) to take place in the real world of mediation.

The evaluative-facilitative debate is in my view excessive because of both (1) the heuristic errors of formalist thinking; and (2) the ideological makeup of much of the ADR community.

A. The Perils of Categorization

The continued vitality of the evaluative-facilitative debate and its false dichotomy results not merely because it is false but in large part because it is a dichotomy. Simply categorizing mediation styles, like any type of categorization, has an inherently polarizing effect. To perhaps state a truism, simply dividing the world into categories creates divisions. Of course, categorizations and divisions are a necessary evil if we are to organize a complex world in any sort of manageable fashion. We categorize, even at the risk of oversimplification, because at some level it is essential.

To avoid an overly reductionist view of the world, humans ordinarily categorize only to the extent that the organizational benefits of categorization outweigh the drawbacks of oversimplification and creation of divisions. When the costs of divisiveness or reductionism begin to outweigh the benefits of labeling and organization, prudent human beings stop categorizing, or at least stop categorizing rigidly. At the very least, categorization at the point of diminishing returns becomes merely presumptive categorization that may be overcome by countervailing considerations. Frequently, the answer to the cost-benefit dilemma posed by categorization is leavened with discretion.

This solution to the dilemma of categorization is particularly common in law. For example, there is a rule of evidence that makes anything admissible if it has any

90. *Id.* I should add at the risk of pointing out the obvious, that this mediator has a J.D. and substantial pre-mediation experience as a practicing lawyer.

tendency to prove or disprove a fact at issue in litigation.⁹¹ All such material is categorized as "relevant" evidence while matter not having this quality is deemed "irrelevant" and inadmissible evidence.⁹² But because the category of relevant evidence is so broadly defined, there is significant potential for mischief. Barely relevant matter may be so emotionally charged as to cloud the impartiality of the factfinder. Law's traditional solution to this dilemma has been to give judges discretion to exclude even relevant evidence where the court finds that its relevance is outweighed by the risk of unfair prejudice or is otherwise distracting or cumulative.⁹³

The prevalence of this interplay between rules and discretion has been a major theme of an entire subschool of legal theory, the Critical Legal Studies ("CLS") movement.⁹⁴ A pillar of much CLS thought has been the notion of a "fundamental contradiction" between rules and the frequent tension between rules and discretion.⁹⁵ I see this tension not so much as a contradiction but as an inevitability. Few (perhaps no) rules or categories can be so perfectly defined as to foreclose exceptions. As a result, virtually all rules in human society, legal and otherwise, have at least a few delineated exceptions or a generalized exception that can be exercised in the discretion of an appropriate decisionmaker.

Even the most sacrosanct rules have exceptions. Murder is illegal, perhaps the most heinous crime in our society, with Biblical roots ("Thou shalt not kill"), but we permit an exception to murder's illegality in cases of self-defense. We also provide for gradations of fault in killing (involuntary manslaughter to first-degree murder) and for acquittal by reason of insanity. Even our most hallowed of absolutes is not absolute.

Clinging to a categorical division too tightly invariably leads to error of analysis. Almost by definition, categories were made to be blurred. Becoming too fundamentalist about an absolute frequently leads to an impoverished view of reality and a tendency to substitute dogma for analysis. So it is with the evaluative-facilitative dichotomy. On the one hand, a rabid evaluator may easily lose cite of the neutrality, fairness, and cultivated trust of the disputants that is essential for good mediation. On the other hand, absolutist facilitators may be stuck spinning wheels when what the situation requires is some appraisal of the legal framework that will govern the dispute if mediation fails. Worse yet, the absolutist facilitator may stand idly by while one disputant takes unconscionable advantage over another under guise

91. See FED. R. EVID. 401.

92. *Id.*

93. See FED. R. EVID. 403.

94. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1988); Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599 (1989). See also BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 174-76 (1994) (observing tension of rules-vs-discretion in the law and as foundational point in CLS scholarship); Kathleen Sullivan, *The Supreme Court 1991 Term - Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (characterizing Supreme Court Justices and decisions according to whether they treat constitutional provisions as rigid rules or more flexible standards permitting greater exercise of interpretative discretion).

95. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

of a process that legitimizes the outcomes in a way not found in mere private negotiation.

Then there is the divisiveness. Once categorical lines are brightly drawn, distinctions in methodology are accentuated and differences within the community are exaggerated. So it is with the false dichotomy of evaluation versus facilitation. The continued cleavage to this organizing or explanatory principle makes the methodology of mediators seem more disparate than it may really be in practice. Further, scholars and practitioners in different "camps" are needlessly cantankerous toward one another and may overlook common ground for establishing principles or administering an ADR system. At a minimum, discussion of the issue is forced unnecessarily into an either-or framework, with some impetus to take sides. This commentary, of course, is similarly affected by the pervasiveness of the nomenclature that has dominated the issue.

B. The Historical and Sociological Roots of Mediation

In addition to what might be termed the "generic" perils of categorization, the history of mediation and the sociology and ideology of much of the mediation community has contributed to both the perpetuation of the false dichotomy and the absolutism of some facilitative advocates.

ADR rose in response to litigation. As the name implies, it is "alternative" to litigation.⁹⁶ As a result, many proponents of ADR come from what might even be termed an anti-lawyer or anti-evaluation school. One scholar has described mediation as having gone through four phases: (1) an initial period in which mediation existed but was not generally used in legal disputes; (2) a stage when mediation entered the legal arena but bench and bar activity fought mediation; (3) a period (largely the past fifteen to twenty years) in which mediation attained legitimacy and popularity; and (4) a current period of expansion, evolving maturity, and "a robust and vigorous acceptance of ADR."⁹⁷

Although one can quibble with aspects of this historical characterization, there is no question that mediation and other forms of ADR in significant degree fought for recognition and respect, with the organized bar providing a great deal of

96. Many in the dispute resolution community have tried to eliminate the "A" from ADR and will refer only to "dispute resolution" or "DR." See, e.g., Roger Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U. L. REV. 591 (1988); Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267 (1996); Symposium, *Dispute Resolution in the Law School Curriculum*, 1998 FLA. L. REV. 583. See also Stempel, *supra* note 22 at 340 (1996) (arguing to continue to refer to "alternative" dispute resolution because default reference point is litigation). I have no fundamental disagreement with this effort to use nomenclature to raise the status of mediation, arbitration, and other activity to the same status level as litigation. But the effort is a bit strained. Modern arbitration and mediation is a response to litigation and was launched as an alternative to litigation. It is historically inaccurate to pretend otherwise. Further, absent special legislation or contractual agreement, litigation is the default means of dispute resolution in society. Consequently, other forms of dispute resolution are "alternative" and are most accurately described as such.

97. See Birke, *supra* note 15, at 516. *Accord*, Phillips, *supra* note 6, at 651-653 (describing mediation as increasing in late Twentieth Century in correlation with social changes and dissatisfaction with adjudication; also attributing rise in mediation to interest of liability insurers who control defense of many tort claims and pay many tort judgments and settlements).

resistance. Even arbitration, the most litigation-like form of ADR, fought an uphill battle, with courts for decades refusing to specifically enforce predispute arbitration agreements.⁹⁸ Eventually, the desires of the business community and efforts of commercial lawyers prompted passage of the Federal Arbitration Act ("FAA") in 1926 and a Uniform Act passed in most states.⁹⁹ Courts to some degree continued a rear guard action against arbitration¹⁰⁰ until the avalanche of pro-arbitration jurisprudence (some would say overly pro-arbitration) of the 1980s and 1990s.¹⁰¹

Mediation traveled an even tougher road. Mediation statutes, codes, and acceptance are largely a product of only the past twenty years.¹⁰² Mediation achieved respectability nearly fifty years after arbitration,¹⁰³ and much of the bar was

98. See Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1380-81 (1991)[hereinafter Stempel, *A Better Approach to Arbitrability*].

99. See *id.* (reviewing history of passage of Arbitration Act and prior hostility toward arbitration at common law); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990) [hereinafter Stempel, *Pitfalls of Public Policy*] (outlining pre-Act judicial attitudes against specific enforcement of arbitration agreements and successful effort to achieve statutory change in the Federal Arbitration Act).

100. See Stempel, *Pitfalls of Public Policy*, *supra* note 99 (providing examples of decisions reflecting considerable hostility to the enforcement of arbitration agreements).

101. See Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gommorah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996) [hereinafter Stempel, *Bootstrapping and Slouching Toward Gommorah*] (describing pro-arbitration jurisprudence since 1983 and finding much of it excessively sanguine about the benefits of arbitration and insufficiently sensitive to issues of party autonomy and context of transactions); Stempel, *A Better Approach to Arbitrability*, *supra* note 98 (reviewing interpretation of Arbitration Act and identifying modern legitimate defenses to enforcement of written arbitration clauses).

102. See ROGERS & MCEWEN, *supra* note 14 at 5:1-5:19 (2d ed. 1994 & Supp. 1999) (describing history of mediation); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 832 (1998) ("[O]nly twenty years ago, mediation was rarely employed in this country outside the collective bargaining context."). For example, the American Bar Association Section on Dispute Resolution did not exist until 1993, but today it numbers approximately 6,300 members. The primary scholarly journals discussing mediation and dispute resolution (*e.g.*, Missouri's *Journal of Dispute Resolution*, the *Ohio State Journal on Dispute Resolution*, and the *Harvard Negotiation Law Review*) began during the 1980s or later, as did many of the leading law school programs focusing on dispute resolution (*e.g.*, Missouri, Harvard, Pepperdine, and Willamette).

Codes of Conduct for mediators did not appear until the 1980s, with the most significant being the 1987 Code compiled by the Society of Professionals in Dispute Resolution ("SPIDR"). In 1994, a revised set of Standards of Conduct for Mediators was approved by SPIDR, the American Arbitration Association, and the American Bar Association Section on Dispute Resolution. See Symposium, *Standards of Professional Conduct*, *supra* note 1, at 122 (noting enactment and reproducing standards of conduct for mediators).

103. Although to some extent, the modern success of all forms of ADR is tied together as part of a larger pro-ADR or anti-litigation movement, mediation achieved its status later than arbitration. As discussed in the previous note, many of the indicia of ADR success, such as scholarly journals and curricular programs, involve both mediation and arbitration and began only during the past 20 years. But the Arbitration Act was passed nearly 75 years ago and the American Arbitration Association was founded in 1926. Labor arbitration has been common since passage of the National Labor Relations Act and related legislation in the 1940s and 1950s and was given favored judicial status 20 years prior to the Supreme Court's support of commercial arbitration. See *United Steelworkers Union v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers Union v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers Union v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (popularly known as the "*Steelworkers Trilogy*" as all three cases arose out of labor disputes involving the Steelworkers Union and manufacturers).

an impediment along the way.¹⁰⁴ Also, where lawyers have supported ADR they have frequently sought to ensure that ADR is conducted by attorneys rather than nonlawyers.¹⁰⁵ In view of this history, one can hardly be surprised that many mediation advocates, especially the nonlawyer mediators, demonstrate an aversion to lawyers and the legalistic.

In addition, unlike arbitration, a significant amount, perhaps even the bulk, of the foundation of mediation was built by nonlawyers. Although the business community spearheaded arbitration, lawyers were also in the forefront and were a fixture of the medium and high stakes arbitrations conducted by the American Arbitration Association ("AAA") and others.¹⁰⁶ With this history, the mediation culture was bound to have less affinity for the classic means of settlement brokering practiced by judges and lawyers in which offers and counteroffers are made, positions are staked out, and assessments are frequently given as part of the bargaining and bluffing process.

In addition, of course, mediation is by definition designed to have a less adversarial or adjudicative focus.¹⁰⁷ Even if all mediators were lawyers, the seeds of the evaluative-facilitative debate would exist.¹⁰⁸ But the high proportion of nonlawyers in mediation and their predominance in areas such as family law, widened the perceived gulf between evaluation and facilitation.

The evolution of mediation differs from arbitration in terms of its participants as well as its political support. Arbitration was a favorite of the commercial community, which enlisted with commercial lawyers in lobbying for the FAA and state counterparts.¹⁰⁹ AAA was initiated by the business community and business lawyers. Although largely a business-backed enterprise, lawyers are significantly involved and the upscale commercial legal community has historically been a significant backer of AAA, and of commercial and construction arbitration in general. In many ways, commercial arbitration has been a "Wall Street Act." New York-centered businesses and lawyers have been major proponents of commercial

104. To point out what is perhaps obvious, lawyers for parties resisting enforcement of arbitration agreements or other methods of ADR created the anti-ADR, pro-litigation arguments used in courts. Lawyers acting as judges were part of the resistance to ADR that predated 1980 (although the bench in some ways has been a cheerleader for ADR since then). Bar associations or subgroups of attorneys have often been the most vocal opponents of court-annexed arbitration or mediation.

105. See Stempel, *A Better Approach to Arbitrability*, *supra* note 98, at 1380; Stempel, *Pitfalls of Public Policy*, *supra* note 99, at 275-77.

106. See sources cited *supra* note 105.

107. See JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK*, ch. 1 (2000); GOLANN, *supra* note 14, ch. 1; Symposium, *Evaluative Versus Facilitative*, *supra* note 1.

108. For example, prominent ADR writings have frequently used as a starting point the rejection of "positional bargaining" that is common in many traditional legal negotiations. See BUSH & FOLGER, *supra* note 1; Fisher & Ury, *supra* note 71. As an example of the degree to which this view has been embraced by the mainstream legal establishment, see, for example, Judith S. Kaye, *Business Dispute Resolution - ADR & Beyond: An Opening Statement*, 59 ALB. L. REV. 835, 839 (1996) (Chief Judge of New York's highest court cites Fisher and Ury with favor, particularly their illustration of the two disputants who each wanted an orange, one for the rind and one for the fruit where point of story is that non-positional bargaining can bring better results).

109. See *supra* notes 100-06 and accompanying text.

arbitration throughout the Twentieth Century.¹¹⁰ There exists a significant body of case law on the issue of arbitrability, which of course is the product of litigation by lawyers.¹¹¹

Labor arbitration had a similar but less lawyered history. Although arbitration was informally practiced in workplace disputes and favored by unions, it had mixed success in becoming established until federal legislation backed by the unions was enacted.¹¹² These New Deal era statutes were primarily the work of unions and political allies in the FDR administration, but much of the political jockeying was done by lawyers either favoring or opposing the legislation.¹¹³ In the aftermath of the legislation, there were significant court battles over its reach, meaning, and application.¹¹⁴

Labor arbitration differs significantly from commercial arbitration on a number of fronts, but one commonality is the frequent presence of lawyers as arbitrators and as advocates. In commercial and construction arbitration, there is almost always a lawyer-arbitrator on any panel and lawyers are the most common type of single arbitrator. Parties to these arbitrations are seldom unrepresented and when represented, have a lawyer as counsel. Labor arbitration finds this less often but lawyer-advocates frequently appear in this arena as well, especially in larger matters.

By contrast, mediation has a less law-oriented history to which lawyers are less central. Mediation was not established through years of legislative lawmaking and case-by-case adjudication as was arbitration. Rather, the growth and popularity of mediation has been more organic.¹¹⁵ Mediation has become prevalent during the past two decades through either voluntary decisions to mediate or court-prompted mandatory or suggested mediation.¹¹⁶ In a sense, mediation has grown in a less litigation-driven manner both because it is different than arbitration and because it has benefitted from riding in the wake of ADR acceptance established by arbitration proponents.

Structurally, of course, mediation and arbitration are quite different. Arbitration resembles less formalized litigation. In arbitration, there is the advocacy, argument and decision or litigation, but relaxed rules of evidence, procedure, and appeal.¹¹⁷ Mediation, by design, seeks less argument and more reconciliation than decision. As a result, segments of the ADR community trained in arbitration but moving into mediation are likely to have greater tolerance for evaluation, perhaps even a

110. See IAN MACNEIL ET AL., *ARBITRATION* (1994); Stempel, *A Better Approach to Arbitrability*, *supra* note 98, at 1380-85; Stempel, *Pitfalls of Public Policy*, *supra* note 99, at 275, n.59.

111. See Stempel, *Bootstrapping and Slouching Toward Gommorah*, *supra* note 101, at 1392-93, nn. 29 & 30; Stempel, *A Better Approach to Arbitrability*, *supra* note 98, at 1383 (describing case law on enforcement of arbitration agreements).

112. See ROBERT A. GORMAN, *LABOR LAW*, ch. 1 (2d ed. 1994); Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 450 (1999).

113. See LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE*, 2-9 (2000).

114. See *Id.*, at 29; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

115. See Weckstein, *supra* note 6, at 520-25 (seeing roots of mediation's overall popularity today in the community mediation movement of the 1960s and 1970s).

116. See BUSH & FOLGER, *THE PROMISE OF MEDIATION*, *supra* note 14, *introduction* and ch. 1; COOLEY, *supra* note 107, ch. 1.

117. See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 216-219 (student abr. ed. 1998); Stempel, *A Better Approach to Arbitrability*, *supra* note 98, at 1381-1383.

preference for it. The segment of the mediation community that did not travel through the lawyering or arbitration processes lacks this legal background and kinship with adjudication. One explanation of the evaluative-facilitative divide is that the chasm is one separating those with greater ties to litigation and arbitration (the lawyer segment of ADR) from those without such ties (the nonlawyer segment of ADR).

In addition, many proponents of ADR with a legal background may have specifically moved into mediation out of dissatisfaction with the contentiousness of law and its adjudicative imperative. Thus, many of the lawyer mediators will resist evaluation in mediation not only because of a view as to what constitutes the essence of mediation but also because they have found evaluation wanting in litigation or arbitration.¹¹⁸

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

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

Primary values of the lawyer's education and training are client loyalty and zealous advocacy,¹¹⁹ which presuppose that one is working zealously and loyally for a client in order to achieve favorable adjudication or a better negotiated resolution. More enlightened thinking about negotiation may dilute this tendency, but the

118. Professor Weckstein attributes a good deal of this to history as well, observing that:

[A]ctivist intervention generally has been unwelcome in traditional community mediation or neighborhood justice centers. These agencies have widely adopted the "classical" facilitative or norm-generating, mediation model. As Kressel indicated, early generations of community mediators were concerned with maintaining an appearance of impartiality and avoiding strong-arming. These agencies reflected an ideology of empowering neighbors to resolve their own disputes and to train communities in self-governance. However, as the nature of the case load of the community centers changes from "barking dog" cases among close neighbors to more sophisticated disputes, often among strangers, pressures mount on volunteer mediators, even though trained in the facilitative mediation model, to stray toward norm-educating or evaluative styles of mediation.

See Weckstein, *supra* note 6, at 523-24 (footnotes omitted).

119. See, *e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999) (requiring preservation of confidentiality), Rule 1.7 (forbidding concurrent conflicts of interest), Rule 1.9 (forbidding consecutive conflicts of interest), Rule 3.1 (requiring advocacy for client in litigation).

overall thrust of legal training and lawyering is designed to obtain the optimal result for clients in an adversary system. This leads almost inexorably to an evaluative orientation in lawyers, including the lawyer mediator (except to the extent that the lawyer mediator is a renegade who mediates because he or she has rejected these professional values of the lawyer).

Nonlawyer mediators also bring a different agenda to the debate, one of seeking greater legitimacy and professional status. Lawyer mediators to some extent arrive on the scene with a received professional status and orientation that comes from being a lawyer. The lawyer mediator is by definition a member of a profession, has been inculcated in those professional values, and more likely than not wants to preserve the profession's autonomy and status as well as its values. Although many nonlawyer mediators come from fields frequently described as professions (psychology, sociology, engineering, and architecture), they do not have the same established infrastructure and prestige that attends society's traditional professions such as law and medicine.¹²⁰

Nonlawyer mediators also have a more self-interested reason to favor facilitation over evaluation. With this motivation comes another part of the nonlawyer ADR agenda: giving nonlawyers in ADR status equal to that enjoyed by members of the legal profession. Nonlawyer mediators, like most workers, desire greater prestige, autonomy, and income rather than reduced prestige, autonomy or income.¹²¹ Nonlawyer mediators, like many workers, are attracted to the rewards of professional status.¹²² To the extent that mediation is differentiated from lawyering, nonlawyer mediators are more likely to gain greater status and autonomy. If they succeed in delegitimizing lawyerlike "evaluative" behavior in mediation, they also succeed in

120. See ELIOT FRIEDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* (1986); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM* (1977); Andrew Abbott, *Status and Strain in the Professions*, 86 AM. J. SOC. 819 (1981); *infra* notes 122-53 and accompanying text.

121. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Model*, 18 J.L. & ECON. 875 (1975) (arguing that lawyers and judges, like other members of an occupational, social, or political group are rational actors who seek through vocational activity to enjoy greater psychic and monetary rewards); Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 66-82 (1999) [hereinafter Stempel, *Embracing Descent*] (reviewing literature of occupational motivation, traits of professional culture, and rewards conferred to occupational group by professional self-regulation). See also sources cited *supra* note 120.

122. See PETER M. BLAU, *THE DYNAMIC OF BUREAUCRACY: A STUDY OF INTERPERSONAL RELATIONS IN TWO GOVERNMENT AGENCIES* (1955); B.J. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE HIGHER EDUCATION IN AMERICA* (1976); EMILE DURKHEIM, *PRAGMATISM AND SOCIOLOGY* (John B. Allock ed., J.C. Whitehouse trans. 1983); EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* (Cornelia Brookfield trans. 1957); ELIOT FRIEDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* (2d ed. 1986); ELIOT FRIEDSON, *DOCTORING TOGETHER: A STUDY OF PROFESSIONAL SOCIAL CONTROL* (1975); ELIOT FRIEDSON, *PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE* (1970); ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (rev. ed. 1968); TALCOTT PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* (1954); TALCOTT PARSONS, *THE PROFESSIONS AND SOCIAL STRUCTURE* (1939); TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1951); HARRISON M. TRICE, *OCCUPATIONAL SUBCULTURES IN THE WORKPLACE* (1993); R. Bucher & J. Stelling, *Characteristics of Professional Organizations*, 10 J. HEALTH & SOC. BEHAV. 3 (1969); Landes & Posner, *supra* note 121, at 885-95; Stempel, *Embracing Descent*, *supra* note 121, at 66-82. See also JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (rev. ed. 1994).

reducing the power of lawyers over the ever-growing mediation sphere of dispute resolution.

In short, the mediation community — particularly the nonlawyers — has some attributes of an interest group and significant incentive to behave like other interest groups in pursuit of greater occupational gains. These gains may be achieved by the market (e.g., disputants may "vote with their feet" for facilitative mediation rather than more evaluative forms of mediation or other types of dispute resolution), or these gains may be sought through the more overtly political arena (e.g., through legislation forbidding or discouraging evaluation in mediation or favoring the more facilitative brand of mediation). In this regard, the facilitative wing of the mediation community has in fact been quite successful. Most state statutes providing for mediation define it specifically as a "facilitative" process rather than one of evaluation.¹²³

Similarly, professional gains for nonlawyer mediators may be sought through the judicial arena via court rulemaking or oversight of the mediation process. Recall that in Florida, the supreme court-promulgated new Rules define mediation as a process that encourages "facilitation" of disputes.¹²⁴ In addition, until the recent amendment of the new Rules, evaluation was considered a complete anathema to mediation, even to the point where the Advisory Panel deemed it improper for a mediator to even inform the parties of the legal rules that governed the dispute.¹²⁵

In this arena as well as the legislative process, facilitative mediators have been successful in defining "good" mediation as facilitative rather than evaluative.¹²⁶ It is in the arena of the market, however, that the facilitative camp appears to have had the least success. It appears that many disputants themselves want a dose of evaluation as an aid to resolving their disputes.¹²⁷ There is significant demand for mediators who are willing to inform the parties of legal options and possible outcomes and to provide some "reality check" on the positions of disputing parties.¹²⁸ As previously discussed above and discussed further below, mediators who evaluate (at least a little) seem particularly sought for commercial disputes.¹²⁹

The success of the facilitative mediators in defining the field means that mediation statutes, rules, and codes frequently stress the facilitative and minimize or even seem to banish the evaluative aspects of mediation.¹³⁰ Even where states

123. See ROGERS & MCEWEN, *supra* note 14, 5.03 at 13-15; Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 934-35 (1998) (most state statutes and rules define mediation as essentially facilitative); See, e.g., FLA. STAT. ch. 489.105, 489.505(2); 44.1011; FLA. MEDS. R. Rule 10.210; *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1130-40 (N.D. Cal. 1999) (reversible error to bar mediator from testifying in post-mediation litigation due to mediator's status since mediator does not adjudicate and hence can discuss nonconfidential matters observed).

124. See *In re Amendments*, So. 2d at 441-42.

125. See *supra* notes 41-62 and accompanying text.

126. See Alfini, *supra* note 17 (observing that nonevaluation is officially deemed the proper approach to mediation but that in practice a good deal of evaluative mediation takes place); *supra* notes 62-67 and accompanying text.

127. See *supra* notes 62-67 and accompanying text.

128. See McAadoo, *supra* note 11 (on file with author) (in survey, one half of disputants choosing mediation stated that they chose mediation because it provided a "reality check" for opponents or clients); McAadoo & Welsh, *supra* note 6; Riskin, *Grid*, *supra* note 1; Weckstein, *supra* note 6.

129. See *supra* notes 66-90 and accompanying text.

130. See, e.g., FLA. MEDS. R. Rule 10.210 (defining mediation as facilitative).

move away from a highly doctrinaire facilitative approach as recently happened in Florida, the general framework of the process stresses mediation as facilitative and not adjudicative or evaluative. Only by request of the parties can the mediator truly evaluate. Although the mediator (at least in Florida and in most states) can give the disputants information, great caution is urged lest the giving of information morph into something too closely resembling evaluation.¹³¹

In light of human and professional nature, we should not be surprised that facilitative mediators have pressed their agenda. Nor should we be surprised at the success of that agenda. We should, however, keep the respective professional orientation and self-interest of mediators in mind in evaluating and making mediation policy. Just as war is too important to be left completely to the generals; the definition, practice, and regulation of mediation should not be rigidly circumscribed according to the orthodoxy of a particular group of mediators.

A significant percentage of the facilitative mediation community is composed of nonlawyers who stand to gain a good deal professionally to the extent that mediation is defined as disparately from adjudication and negotiation as possible. This assessment is not intended to be highly critical of nonlawyer mediators. Indeed, it is meant to be explanatory rather than critical. Mediators (both lawyer and nonlawyer) are simply behaving in a rational manner. Similarly, lawyers have shown this rational self-interest for at least 150 years in the United States (longer in England)¹³² in pursuing professional status and attempting to hold onto it in the face of changing social conditions and increased economic competition.¹³³

The drive of practitioners toward professional status and autonomy is widely viewed as a mixed blessing. One positive aspect is a commitment to quality. Members of the traditional professions like law and medicine are required to demonstrate competence in the eyes of other accomplished professionals as a prerequisite to earning a living in the field. Where such competence is lacking (at

131. See *In re Amendments*, 762 So. 2d at 442-443.

132. In America, lawyers' drive for professional stature is seen as becoming most concrete during what may be broadly defined as the mid-1800s. During this time, the first full-time law school (Harvard in 1821) was founded, states promulgated codes of ethics that lawyers were required to observe (Alabama was the first in 1868), and scholarly tracts on professionalism appeared. See e.g., DAVID HOFFMAN, FIFTY RESOLUTIONS IN REGARD TO PROFESSIONAL DEPARTMENT (1836); GEORGE SHARSWOOD, ESSAY ON PROFESSIONAL ETHICS (1854).

During this period, bar associations emerged as strong forces and more formal criteria for admission to the bar emerged in the form of bar examinations and requirements that the applicant have graduated from a program of legal study. Prior to this time period, one could become a lawyer by "reading law" and engage in practice merely by hanging out a shingle and representing oneself as a lawyer. See generally CHARLES WOLFRAM, MODERN LEGAL ETHICS ch. 1 (1986); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992); Jeffrey W. Stempel, *All Stressed Up But Not Sure Where to Go: Pondering the Meaning of Adversarialism in Law*, 55 BROOK. L. REV. 165 (1989).

133. See Stempel, *Embracing Descent*, *supra* note 121, at 28-35 (noting history of protectionism in law but defending professional status for lawyers); Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-as-Business Paradigm*, 27 FLA. ST. U. L. REV. 9 (1999) (foreseeing inevitable trend toward treating lawyers more like other business persons and less like professionals); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) (arguing that no persuasive rationale exists for continuing to treat lawyers as professionals and to convey upon them prerequisites of professional status).

least woefully lacking), there are several "weeding out" points such as professional school grades and the bar examination. After admission, good standing in the profession requires adherence to certain norms. Deviance may result in suspension, removal, or other punishment. In addition, clients asserting injury because of professional negligence generally have a right of action for damages.

The negative side of the professionalism coin is protectionism and a suboptimally competitive environment. Rigid criteria on education, admission, and retention in good standing may act to limit membership in the profession with no corresponding increase in the quality of professionals (or at least not enough increase in quality for consumers to outweigh the decrease in supply that arguably hurts consumers). Rules restricting practice of the profession may make professionals less responsive to consumer demand or less willing to compete aggressively for available business.

Law provides a good example of this tension. In some states, only two-thirds of the applicants pass the bar but almost all are graduates of accredited law schools (accreditation of educational institutions being another hallmark of a profession).¹³⁴ Under these circumstances, one can seriously wonder whether the exam is guaranteeing minimum quality or merely restricting the entry of new lawyers that might provide competition for established lawyers. Similarly, state bar associations banned advertising by lawyers for three-fourths of the Twentieth Century.¹³⁵ Although modern legal advertising (some of it pretty tacky) has its critics, there is broad consensus that this rule was more for the benefit of established lawyers than consumers.¹³⁶

But law is not alone in providing examples of the fine line between legitimate professional regulation and anti-competitive conduct. Medicine has historically been criticized for resisting the establishment of new medical schools or unduly restricting the practices of osteopaths and chiropractors. Even "semi-professions" such as trade unions present this dichotomy. Getting a union plumber or electrician may provide some greater guarantee of quality but it also provides a guarantee that the price will be higher.

Mediation has followed a pattern similar to law in many ways even though it lacks the full indicia of professionalism found in law. Until modern times, anyone could be a mediator by claiming to be a mediator. Organizations such as the Society of Professionals in Dispute Resolution ("SPIDR") developed during the 1980s and brought mediation closer to a profession with standards, scholarly journals, and self-conscious focus on mediation as a professional-esque activity. Most states require at least some mediators to obtain certification to practice certain types of mediation,

134. See *BAR/BRI website* (visited July 31, 2000) <<http://www.barbri.com/exam>> (reviewing bar passage ratios by state).

135. The fall of the total ban on advertising came not because of reforms within the bar but because the United States Supreme Court struck down such bans as unconstitutional under the First Amendment. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Since *Bates*, states continue to have broad authority to regulate advertising in the interest of consumer protection and the Court has upheld some restrictions though anti-consumer. See *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618 (1995) (upholding 30-day ban on solicitation of accident victims or family although there is no corresponding restriction on insurance adjuster contact with victims or family).

136. See STEVEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS*, 909-10 (4th ed. 1995).

typically in court-ordered plans.¹³⁷ There are also mediation review boards and mediation standards boards that rule on acceptable mediation practice and in some cases even have sanctioning power over a mediator thought to have breached acceptable standards of good practice.¹³⁸ Mediation advocates have also urged expansion of the types of disputes committed to mandatory mediation under state law.¹³⁹

Mediators as a group have also pressed for immunity from private actions by disgruntled disputants, citing the semi-judicial role of the mediator as a neutral.¹⁴⁰ This type of activity is something of a hybrid of professionalism concepts, perhaps even a contradiction. Immunity elevates mediators to a judge-like status but judges have immunity because they make evaluations and society has determined that judges should not be chilled in making those evaluations by the possibility of litigation and personal liability.¹⁴¹ In addition, barring malpractice suits against mediators is at odds to some degree with an effort to make mediators equivalent to lawyers, professionals who are subject to malpractice liability.¹⁴²

For lawyers who mediate, there is also a professional status concern lurking in the evaluative-facilitative debate, although it is far less obvious and perhaps less important. The lawyer who mediates is already a member of an established profession and enjoys all the general benefits of membership in the profession. But to the extent that the lawyer's practice consists substantially of mediation, the lawyer's work runs counter to the traditional professional archetype that has (rightly or wrongly) dominated the legal profession.

The archetypal good lawyer is one with vast or deep substantive knowledge (or, ideally, both) who represents clients aggressively and successfully. The

137. See Edward F. Sherman, *Introduction to Symposium on Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 96-102. See, e.g., *In re Amendments*, 762 So. 2d at 446-48 (reviewing Florida certification).

138. See Stempel, *supra* note 2, at 96-70 (discussing Florida panel).

139. See Birke, *supra* note 15.

140. See Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 RUTGERS L.J. 131 (1999) (reviewing history and incidence of mediator immunity but arguing against absolute immunity, in part on grounds that mediators are not adjudicators).

141. See *Stump v. Sparkman*, 435 U.S. 349 (1978) (upholding absolute judicial immunity on grounds of protecting independent decision-making by judges under very difficult facts of judge allegedly forcing an erroneous and irreversible sterilization of complainant). See also Esquibel, *supra* note 140, at 136-64.

142. Of course, many mediators would be reluctant to describe the disputants as "clients" or "patients," the persons who have standing to sue lawyers and doctors over alleged acts of malpractice. Mediators on the whole appear to regard themselves as representatives for what Louis Brandeis called "the situation" in describing the role of a lawyer working with two parties to achieve a business objective.

Brandeis, during the time of his Senate confirmation to the United States Supreme Court, was accused of acting unethically in brokering such arrangements between commercial entities with arguably conflicting interests and successfully defended himself by articulating the "lawyer for the situation" concept. See GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* (1976). The concept was subsequently codified in large part in MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2, a product of the ABA Committee of which Professor Hazard was the Reporter.

The lawyer for the situation concept has remained of more interest to academics than courts, however. There are few reported cases addressing alleged lawyer violations or vindications pursuant to Rule 2.2. However, anecdotal evidence from practice suggests that lawyers do with some frequency act as representative of a multi-party goal rather than as advocates for a specific party if they can do so without violating the conflict of interest rules (Rules 1.7, 1.8, 1.9).

historical model of the good lawyer is a smart, aggressive agent who gave his or her client good analysis and advice regarding legal problems. Where necessary, this model lawyer would negotiate or litigate to obtain optimal results for clients, documenting deals and settlements in the manner most advantageous for clients. This model lawyer was also supposed to act ethically (e.g., no furthering of criminal activity), wisely (e.g., convincing clients to spurn the permissible but wasteful fight)¹⁴³ and with dignity (e.g., altering evidence or jury tampering is forbidden)¹⁴⁴ as well.

But in the main, the archetypical lawyer was an advisor and advocate for his or her own clients, pursuing success on behalf of the client, often at the expense of others. This advocacy role of the lawyer is the source of considerable prestige for the lawyer (clients pay top dollar in order to have a loyal champion and in anticipation of beneficial results) but considerable controversy as well. Lawyers are routinely labeled amoral hired guns and accused of needlessly increasing the cost of resolving disputes or accomplishing things. It is well beyond the scope of this essay to comment on whether this critique of the legal profession is well-taken. My point

143. The classic anecdote on this is the oft-repeated story that famed New York lawyer Elihu Root once stated that "about half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop." See STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 303 (Teacher's Manual 5th ed. 1999) (repeating Root anecdote through character in hypothetical exercise). Root was recently deemed one of the greatest lawyers of the Twentieth Century. See Morton Keller, *The First Wise Man*, *AM. LAWYER*, Dec. 1999, at 109.

Of course, as is so often the case in matters of law and policy, things are too complex to place in tight and rigid categories. Although I cite Root as an example of the lawyer as evaluator, Keller describes Root as having become "the embodiment of the lawyer-as-facilitator." *Id.* In context, however, I think Keller's characterization can be squared with my invocation of Root. Keller's mini-biography stated of Root:

Business clients besieged him, and his work evolved from litigation to counseling. Major clients including tractor magnate William Whitney and American Sugar Refining Company head Henry Havemeyer [sought his advice]. Root *served his clients* in a variety of ways, appearing before courts and legislative committees, handling litigation with other companies, and *advising* on corporate strategy. By the 1890s, he'd become the country's leading corporation lawyer, the embodiment of the lawyer-as-facilitator immortalized by Finley Peter Dunne's comic character Mr. Dooley: "What looks like a stone wall to the ordinary man is a triumphal arch to the lawyer."

Id. (emphasis added).

In other words, Root facilitated matters not to help disputants find empowerment but rather to gain optimal results for his clients, although this frequently involved resolution mutually acceptable to others. Root was not always adversarial, but he was most certainly evaluative as a counselor and negotiator. *Id.* (Root's "readiness to tell his boss [President Theodore Roosevelt] what was good for him made him perhaps Roosevelt's closest confidant.").

144. It is less clear whether lawyers are prohibited from presenting falsehoods or ignoring the falsehoods that assist the client. Certainly, a lawyer cannot make knowing misstatements to the court (Rule 3.3) and must advise the court of controlling legal authority of which the court is unaware (Rule 3.3). However, lawyers need not correct helpful misimpressions that do not result from the client or lawyer's activities and may leave courts in ignorance of noncontrolling adverse law from other jurisdictions. In the realm of negotiation away from court, the dividing line becomes murkier. See Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 *OHIO ST. L.J.* 1 (1987). See, e.g., Inquiry Concerning Judge No. 93-62, 645 So. 2d 398 (1995) (reversing ethical practices board order to remove judge for allegedly making misrepresentation to former law partner in bitter dispute over division of law firm profits; one dissenting judge would have found actual misrepresentation of status of pending cases and fees meriting removal from the bench).

is simply that the image of lawyer as evaluator is hard-wired into the professional training, rules, and norms of the legal profession.

Against this backdrop, the lawyer turned mediator is to some degree a renegade. Lawyers who arbitrate act consistently with the evaluative and adjudicative ethos of the profession. Lawyers who mediate in the evaluative style are also close to the traditional lawyer model of negotiating and advising clients. But lawyers who mediate facilitatively have departed from the traditional professional model. To the extent that the alternative professional model of mediation as facilitation takes hold, the facilitative lawyer mediator has increased professional legitimacy, both in mediation circles and in lawyering circles.

Additionally, the lawyer turned facilitative mediator may well have done so out of a view that the traditional model of lawyering is overly adversarial and insufficiently supple in responding to disputes. Having "left" law for mediation, these lawyer mediators may well be distressed at the prospect of mediation becoming too similar to old-fashioned offer-disparagement-counteroffer-dickering negotiation. They may also have heightened sensitivity to the risk that mediation with too great a dose of evaluation becomes arbitration or adjudication without the procedural safeguards that normally attend these processes.

Assessing the battle over evaluative and facilitative mediation in light of the history and theory of professionalism helps to explain the depth and longevity of the debate. Full-time mediators, most of whom are nonlawyers and entered the field from a facilitative perspective, have much to gain if facilitation becomes *the* professional standard for mediation. Indeed, these persons stand to gain to whatever extent mediation is treated as a separate profession with autonomy, distinctive standards, and separate status closer to that of lawyers. In a nonlawyer mediator's most ambitious dreams, mediation would be considered a profession on a par with law. For full-time mediators, the personal and occupational stakes of the evaluative-facilitative debate are quite high.

To my knowledge, no nonlawyer mediator has expressly admitted to having an agenda of professional group enhancement. Implicitly, however, mediators in general and nonlawyer mediators in particular have made this agenda quite clear. Mediators have become organized in groups such as SPIDR, the Center for Dispute Settlement, the mediation component of the AAA and private ADR groups such as JAMS-Endispute, and government entities such as the Federal Mediation and Conciliation Service. A primary purpose of some of these organizations is to establish mediation as a profession and to enhance the professional status of mediators.¹⁴⁵

Note that the very nomenclature is revealing: practitioners of ADR self-identify as professionals¹⁴⁶ even though being a mediator does not, without more, qualify as

145. See, e.g., Symposium, *Evaluative Versus Facilitative*, *supra* note 1, at 106 (comments of Lela P. Love) ("The mediator's role should not be mixed with that of another *profession*." (emphasis added)).

146. See Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalism*, 1997 BYU L. REV. 687; Rogers & McEwen, *Employing the Law to Increase Mediation*, *supra* note 102, at 855-57; Symposium, *Standards of Professional Conduct*, *supra* note 1 (mediators view themselves as professionals and are attempting greater professional self-regulation).

a profession under the historical criteria of society.¹⁴⁷ Historically, western society has recognized five professions: law, medicine, teaching, clergy, and military. These professions are distinguished not only by their historical pedigree but also by other factors: required education (at a minimum of college); examination or other testing required for entry; a particular course of study or body of knowledge as part of a professional canon; self-regulation of the profession with force of law, including the ability of the profession to discipline and even expel its members.¹⁴⁸

Without trying to be disparaging, I am compelled to note that mediation does not qualify as a profession according to the standard criteria. Although various states are imposing minimum requirements for certification as a mediator,¹⁴⁹ there is as yet no universal curriculum or entry examination. In many states, one need not be a college graduate to mediate.¹⁵⁰ Neither is there the sort of control over entry to the profession and remaining in the profession one finds with law or medicine. Although these professions can be criticized for perhaps not doing enough to remove "bad apples" from the bushel, there is no doubt that they have the power. Lawyers can be disbarred and doctors can lose their licenses. The same control of status is absent in mediation. However, lawyer mediators may be suspended or disbarred; whether this stops them from mediating depends on whether such activity is considered the "practice of law" in the governing jurisdiction. Psychologists or other mediators coming from professions such as architecture or engineering may also be subject to "professional" discipline, but this is not necessarily mediator professional discipline.

Although a mediator may run afoul of one of the organizations or fall out of favor with a local court, there is little other than incarceration to stop a mediator from continuing to mediate if he or she has business. On one hand, this situation creates something of a pro-consumer market with low barriers to entry for the would-be mediator. On the other hand, there may be problems of quality control and interest group-wide problems of status.

Many in the mediation community, particularly nonlawyers, appear to advocate more indicia of professionalism for mediators (although there is debate on the issue). Looking at the e-mails on the ADR listserv on any given day reveals many messages on the topic.¹⁵¹ Mediators on the listserv regularly discuss the issue of minimum qualifications for mediators and other criteria for determining a mediator's professionalism. Judging from the listserv commentary, the topic of proper

147. See Stempel, *Embracing Descent*, *supra* note 121, at 51 (surveying criteria that have historically been used to determine whether a given occupation qualifies as a profession).

148. See Jeffrey W. Stempel, *Embracing Descent* *supra* note 121 at 36-50. Some observers of professionalism would also require that the profession involve "esoteric knowledge or great complexity" that is generally beyond lay understanding. *Id.* at 37-40.

149. See *supra* note 137.

150. See, e.g., W. Lee Dobbins, *The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?*, 7 FLA. J. L. & PUB. POL'Y 95, 101 (1995) (requirement of bachelor's degree increasingly common but not universal); Harges, *supra* note 146, at 688 (some states require a college degree for mediator certification while others require only some training);

151. See generally, *Dispute Resolution Listserv*, Ethan Katsh, List Manager, katsh@legal.umass.edu (visited Nov. 22, 2000) (Dispute Resolution Listserv is sponsored by the University of Massachusetts Center for Information Technology and Dispute Resolution).

mediation and professional status is prominent in the minds of practicing mediators.¹⁵²

Whether this rational self-interest of occupational groups serves the public interest depends on the circumstances. For example, the legal profession's professional edifice may be protectionist but may also deliver to society other values such as client loyalty, independent judgment, and political independence on behalf of the disempowered.¹⁵³ Similarly, the mediation community's drive to make mediation more like a profession on a par with law or medicine has elements of both self-aggrandizement and social benefit. The trick is to adopt the public-regarding part of the mediator mission without permitting law and public policy to succumb to the private-regarding.

In the context of the evaluative-facilitative debate, hospitality to eclectic mediation seems the right balance. As a general presumption and default rule, mediators should emphasize the facilitative and attempt to work with disputants toward consensual resolution in a nonjudgmental atmosphere. But this presumption, like most general rules, should not be elevated to the level of dogma. Where the context of the dispute warrants, mediators should be able to provide information about legal options and outcomes and even provide a framework within which disputants can evaluate the merits of mediated settlement in contrast to possible adjudicative outcomes. Where a party's position is unreasonable or deceptive, the mediator should be permitted to "call" the party on such tactics, provided that the mediator's action is consistent with neutral and fair treatment to the disputants as a whole. Certainly, the mediator should be permitted to evaluate quite specifically if asked by the parties, even to the point of making a prediction about adjudicative outcomes.

If mediators are allowed to be aptly eclectic in the exercise of reasoned discretion, mediation standards are less likely to become interest group oriented and more likely to serve the interests of disputants and the public. A legal regime which

152. This assessment is based on my regular reading of all ADR listserv e-mail messages for the January 1 - May 31, 2000, period. The frequency and length of commentary by some mediators also suggests that some of them are not fully employed. Unless insomniac, these frequent contributors to the listserv discussion must have time on their hands. If so, this would further support the view that some mediators have an incentive to more narrowly define and "professionalize" mediation as facilitative only to reduce the number of mediators and perhaps gain business. Or, the frequency and length of these comments may simply indicate strong ideological commitment to the "facilitation-only" model (enough such that a fully employed person would find the time to write as many as a half-dozen long e-mail postings to the listserv in a day - there goeth either an underemployed mediator or a true believer), another factor that would tend to fuel the false dichotomy and energy of the evaluative-facilitative debate.

Regarding the possible distinctions between lawyer and nonlawyer mediators, I also note that the most frequent and active participants in the ADR listserv discussions are nonlawyers. To me, this suggests that lawyers on the list either are less concerned about issues of professional status and defining acceptable mediation styles or are too busy with paying matters to be heavily involved in the e-mail discussions. Either of these reasons for the relative imbalance of commentary is consistent with my thesis in this essay: too much of the extremism of the evaluation-facilitation debate has been fueled by ideology or the quest for improvements in occupational status.

153. See Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57 (1998) (arguing that greater adherence to traditional model of professionalism and client loyalty will reduce impermissible conflicts of interest); Stempel, *Embracing Descent*, *supra* note 121.

permits only certain types of mediation and forbids others looks uncomfortably like a licensing scheme or other barrier to entry that tends to lend a given occupational group an advantage not enjoyed in the market at large. Unless those resolutely opposed to evaluation in mediation can provide more persuasive reasons than have been the case thus far, society should not ban, nor even discourage evaluation in mediation (so long as the mediator maintains impartiality and so long as the parties are not opposed).¹⁵⁴

V. UNDERSTANDING THE VARIEGATION OF MEDIATION SETTINGS

Just as a page of history may be worth a volume of logic, a glimpse of actual practice activity may carry considerably more weight than theoretical or ideological argument about the "right" approaches to mediation. As noted above, there appears to be and always has been significant demand by disputants for mediation that is evaluative in at least some respects.¹⁵⁵ In the communities with which I am familiar, many of the most highly sought mediators are self-declared "evaluators" who are happy to provide the parties with information, legal options to assess, and even feedback as to the strengths and weaknesses of their respective positions.

I hasten to add that my understanding is that even these self-described evaluators begin in the facilitative mode and move to more evaluative behavior only when the expressed wishes of the parties or the context of the dispute suggest these evaluative movements. The in-demand mediator is not a "blood-and-guts," cram-down-the-bottom-line mediator. But neither is he or she so facilitative as to avoid any statements relating to the legal framework within which dispute resolution occurs or any expression of opinions regarding legal aspects of the case.

Equally important but overlooked is the possible variance of mediation styles according to the subject matter of the dispute. Although the available information is not comprehensive, existing scholarship, anecdote, and observation suggest that

154. A good deal of debate also attends whether impartiality and neutrality are synonyms. In its recent decision, the Florida Supreme Court regarded the terms as functionally equivalent. *See In re: Amendments*, 762 So. 2d at 441.

Others argue that there is a subtle difference between the terms: an impartial mediator has no favoritism for either party. But an impartial mediator need not be "neutral" to the point of refusing to inform the parties of governing law when she suspects that one party enjoys an information advantage over another.

Some in the mediation movement, particularly those I would call "hard-core" facilitators, suggest that giving such information betrays partiality. I disagree. If the mediator provides information to the parties whenever thought necessary to level the metaphorical playing field, irrespective of which party is at informational disadvantage, the mediator remains "impartial" and is also "neutral" to the extent that impartiality and neutrality are the same concept.

See also Weckstein, *supra* note 6, at 509-10 (treating neutrality and impartiality as synonyms but that this condition of the mediator:

is neither realistic in all cases nor an essential ingredient of the process The more realistic ethical standards for the practice of mediation do not mandate that a mediator be a neutral or impartial person but only require that the mediator act impartially. In addition, a mediator may not have a financial or personal interest in the outcome, personal bias toward one or more of the parties, or any other conflict of interest.).

155. *See supra* notes 62-67 and accompanying text.

more purely facilitative mediation takes place in the realm of family law disputes, particularly matters of child custody and parental visitation.¹⁵⁶ In the arena of commercial mediation, mediators appear to exhibit more evaluative behavior.¹⁵⁷

These distinctions should not be surprising in view of the differences that frequently mark these different types of disputes. In the real world of dispute resolution, it is likely that mediation styles vary not only according to the mediator and the context of a specific case but also according to the general type of case at issue.

Analysis of mediation style has proceeded without much reflection about the degree to which the type of dispute may drive the normally apt type of mediation. For example, in family law the facilitative approach may be particularly apt. When divorcing parents face issues of child custody and visitation, many indicia suggest the utility of facilitation. The parties have been and will continue to be in a relationship (at least until the children are grown). There may also be substantial affection and goodwill between the parties notwithstanding the dispute between them. The matters at stake are not monetary or easily reduced to a monetary amount. Although there is a certain zero-sum quality about the issues (*e.g.*, a child can only be in one place at a certain time), the issues are not strictly zero-sum. Custody on a birthday can be exchanged for custody on a holiday, and so on. Most important, the disputing, divorcing parents have a powerful incentive to make things work well and without acrimony because of affection for, and commitment to, a third party.¹⁵⁸

At the other end of the spectrum, mediation of a tort claim may in fact fare far better with a significant dose of evaluation. The disputants may often have no prior or subsequent relationship. The dispute is often about money or that which is easily reduced to money. Each party has an incentive not so much to get along with the other side but to strike the best arrangement possible. Getting along reasonably well with the adversary is helpful to furthering the goal of an optimal monetary compromise but it is not likely to be a prime goal in itself.

As noted, child custody and visitation provide a good example — and perhaps the strongest case for the facilitative approach. The parties (divorcing spouses) are by definition in a relationship, even if it is a crumbling relationship. There is a past history of connection and the relationship must continue in some form in the future because the divorcing spouses will need to work together to some degree if the offspring are to be well-raised. If one spouse wants only to exit all aspects of the marriage, including childcare, there is no dispute (at least no dispute about custody or visitation; there may be a dispute about child support).

156. See, *e.g.*, *Stempel*, *supra* note 2, at 949-50, 960-70 (requiring mediation in marital dissolution cases in Florida and facilitative method historically enforced). This view is frequently espoused in informal conversation by lawyers and negotiators. The prevalence of this view preempted scholarly writing by feminists questioning the fairness of mediation for women. See, *e.g.*, *Grillo*, *supra* note 21.

157. See Symposium, *Evaluative Versus Facilitative*, *supra* note 1, at 924 (comments of Lawrence Watson, Esq.). Private mediators with whom I have spoken over the years frequently have told me that the participants in commercial disputes want some feedback from the mediator.

158. See *Birke*, *supra* note 15. In addition, mediation is attractive in these sorts of disputes because it is private and generally less expensive than litigation. However, these attributes of mediation would seem to obtain whether the mediation is facilitative or evaluative.

Where the parties have an ongoing relationship, even one not entirely voluntary, dispute resolution based on facilitation and party-generated solutions would seem advantageous as compared to an evaluative approach. Over-evaluation may make the dispute more confrontational than necessary. Efforts of one spouse to assess blame may impede successful spousal cooperation in child-rearing. The mediator's competence to evaluate may be at a particularly low ebb. The mediator, even with extended sessions, cannot readily gain much sense of the respective parenting skills and relations with the children and other factors bearing on what might be the optimal resolution of a dispute. By contrast, even a harried family court trial will present and test more evidence bearing on these questions.

Under the typical circumstances of child custody and visitation issues, a facilitative approach is the optimal default rule for approaching mediation. Not surprisingly, most such mediations appear to be conducted in a facilitative style, as they should be, at least at the outset. But the presumption of facilitation cannot be so irrefutable that the mediator clings to it in the face of facts undermining a facilitative solution. For example, the father (a loutish Lothario who barely recognizes the kids and is given to binge drinking) may insist on sole custody or visitation on every holiday. Although the mediator may attempt facilitation for a time, the mother is unlikely to want to work within these parameters for long.

At this point, the mediator faces a choice. A significant segment of the mediation community appears to suggest that mediation be terminated, or formally converted to a more evaluative process that permits commentary, if one party stakes out such an unreasonable position as to preclude progress in resolving the dispute.¹⁵⁹ This resolution is fine so far as it goes. If Dad wants to go to the ramparts for an absurd stance, there is nothing wrong with making the case one of DR (litigation) rather than ADR (mediation).

But there is another approach to this imbroglio that should be considered acceptable mediation even in an area of law where the facilitative style is the presumptive norm. In the unreasonable, recalcitrant father hypothetical, for example, the mediator might inform the father that if the case is litigated he is almost certain not to get sole custody. Monopolization of visitation on the holidays is a similarly unlikely outcome in litigation. If the father (even our selfish, loutish father in the hypothetical) understands this, he may move from his unreasonably intransigent position toward one that permits facilitation to take place. The ideological orthodoxy of mediation should not be so intransigent as to permit this sort of evaluative "reality check," even in an area normally conducive to facilitative mediation. Not surprisingly, many disputants seem to welcome this sort of mediator activity in the apt case.¹⁶⁰

Thus, even in an area that would seem to be a stronghold of the facilitative model, one can see the benefits of eclecticism. But the prevalence of facilitation in child custody matters and the apparent popularity of evaluation in commercial

159. See, e.g., KIMBERLY K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 167 (2000); Love, *supra* note 3, at 948. See also GOLANN, *supra* note 14, ch. 10 (discussing use of evaluation short of terminology proceeding).

160. See *supra* notes 62-67 and accompanying text. See, e.g., KOLB ET AL., *supra* note 15; McAdoo, *supra* note 11, at 30-35.

disputes suggests some rough criteria for predicting whether eclectic mediation will be more evaluative or more facilitative in different types of disputes.

Where the parties have had a past relationship of significance, are involved in a current relationship, or will be interacting in the future, the facilitative prong of mediation will be most pronounced. It only stands to reason that parties who are or will be intertwined will want, if possible, to resolve disputes in a manner less likely to lead to debates over fault and the ensuing recriminations. Family law matters in general would appear to meet this criteria, not only child custody and visitation but also other terms and conditions of divorce, including alimony, child support, and property division.

By contrast, a contract dispute will often be a one-time transaction of two commercial actors who are unlikely to need or want to deal with one another in the future. When a dispute arises as to contract breach or performance, the parties will have relatively little interest in facilitation except as a means of reducing disputing costs (in which case they may be better off just negotiating rather than mediating) or achieving a compromise that is difficult or impossible to achieve according to legal doctrine.¹⁶¹ Sometimes (oftentimes), the dispute is a straightforward one over the amount owed on a contract. If the parties cannot resolve this through negotiation, mediation is likely to bring a resolution only after some reality check of at least partial evaluation or appraisal as to what a court might do. In short, commercial disputes will in theory have a preference for evaluative mediation and this seems to be what takes place in practice.

But, as we have seen, the linkage between relationship and facilitation is not perfect in the context of family law. Similarly, in the context of commercial law, there may be disputants with current and future relationships at stake. Indeed, it has been recognized for nearly a half-century that many business transactions are "relational" contracts that are part of an ongoing business relationship.¹⁶² In these sorts of disputes, one would expect to find strong facilitative overtones to mediation even though the subject matter of contract often sees more evaluation than does family law.

Using party relationships as a yardstick, one would perhaps expect more facilitation and less evaluation in matters such as franchise law (where the contracting parties are by definition quasi-partners in what they hope will be a long-term relational contract); licensing situations (for similar reasons); and intellectual property matters such as copyright, patent, or trademark where the disputants have a shared interest in a product or brand. Similarly, property or similar disputes

161. For example, the commercial disputants may wish to horse-trade by having Company A deliver widgets to another job site while Company B agrees not to compete with Company C, an affiliate of Company A. A court applying standard legal notions of breach and damages would be unlikely to ever reach this sort of apples-and-oranges resolution, both because it is a compromise and because it does not fit within the general measures of commercial damages, and also because the noncompetition arrangement could raise antitrust concerns. In the memorable words of one commentator, courts have "limited remedial imagination," which allows opportunity for mediation to provide dispute resolution benefits essentially foreclosed in the courts. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 789-94 (1984).

162. See, e.g., Stewart MacCaulay, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System*, 1965 WIS. L. REV. 483, 540.

between neighbors would seem suited for a more facilitative approach. Construction defect matters have a similar quality. Student-school disputes also appear appropriate for facilitation (even if the student is graduating, she may have younger siblings in the system). The link between relationships, future interaction, and apt dispute resolution helps to explain the relative resistance (proper in my view) to facilitative mediation of criminal matters.¹⁶³

By contrast, the one-shot commercial transaction seems most apt for evaluation. Similarly, tort or statutory claims among strangers would seem most apt for evaluation. For example, if Driver A runs over Pedestrian B in a cross walk, causing serious injury, B is probably not particularly interested in a resolution that maximizes the already strained relations of these strangers. B wants to be compensated first and foremost. To be sure, B may be better able to bear his injuries if he feels some empowerment and autonomy in resolving the dispute. B may want, as much as anything, an apology, which may be difficult in the context of litigation where it could be construed as an admission of liability. If facilitative mediation assists in this regard, it may well have advantages over evaluation, particularly if B is at fault for walking against the light. A full-blown trial over negligence, contributory negligence, or assumption of risk may not be in the interests of anyone. But neither is a purely facilitative mediation likely to be of much help if the parties are poles apart on money and A, or her insurer, is being unreasonably stingy regarding compensation.

Because tort claimants and defendants are often strangers, successful mediation of these disputes may frequently require some evaluative component. Similarly, when strangers raise claims under the civil rights laws, the antitrust laws, food and drug laws and the like, some evaluation would seem frequently in order. Here again, rigid classification is unlikely to be accurate classification. Civil rights disputants may be true strangers (e.g., the black motorist alleging bigotry by the white policeman who made an arrest for no reason) or may be members of the same community (e.g., the black residents of a neighborhood who want as much police protection as the city provides to white neighborhoods). Some statutory claims, like securities fraud, could involve either one-shot transactions or an ongoing relationship between a company and long-term shareholders.

Parties may also be more interested in a more facilitative mediation not only because of relationships between the disputants but also because the disputants have mutual interests in the welfare of a third party. Child custody is a classic example of this. Mom and Dad may now hate one another but they usually have considerable love for the children, which will mute any tendency to harm the children through competitive, evaluative, legal battles. Other areas of law that may find significant disputant concern for third parties include will contests (a contestant may feel wronged by a reduced inheritance but still have great affection for the other relatives

163. See, e.g., Albert W. Alschuler, *Mediation with a Mugging: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1809-11 (1986) (describing failed victim-offender mediation involving mugging victim Bernhard Goetz prior to Goetz's later, more publicized incident in which he shot four men on the subway for allegedly threatening him); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1273-81 (1994).

with a financial stake in the dispute). Intellectual property and statutory matters may have this component or may lack it entirely.

Then, of course, there are the hybrid matters in dispute. For example, marital dissolution frequently involves disputes over child custody (facilitative) and property division (something more akin to a contract or tort dispute that may need evaluation). In those cases, what are mediators to do? Richard Birke has recently raised concerns that mandatory mediation of property division will tend to make family law more litigation-like than has been the case for child custody and visitation mediation.¹⁶⁴ In particular, Birke argues that mandatory mediation of these "money" issues will invariably lead to more pressure for information about the law, advice, or evaluation of monetary claims, all of which will have deleterious impact by making the mediation less facilitative overall. This concerns Birke because he views facilitative mediation of child custody and visitation disputes as a success that should be continued without the potentially corrupting effect of the introduction of financial matters and the attendant pressure for evaluation.¹⁶⁵

Although not surprising, the differential relationship between mediation style and type of dispute has been largely ignored or overlooked by commentators. To date, the bulk of the evaluative-facilitative debate has assumed that the style one prefers is "the style" preferable in all circumstances.¹⁶⁶ Seldom do those debating evaluation versus facilitation even address the question of whether mediation style varies, or should vary, according to the type of dispute and case-specific factors such as the parties, the amount at stake, forward-or-backward orientation of the litigation, and other contextual factors.¹⁶⁷

Implicitly, the framework of modern mediation recognizes contextual factors. For example, mediators are cautioned or instructed to abandon the mediation effort where the disputants' attitudes are not conducive to a mediated resolution. Mediation statutes or rules also commonly instruct mediators to be sensitive to issues of domestic abuse and not to continue mediation under adverse circumstances of abuse or where there is potential danger in continuance.¹⁶⁸ Most obviously, mediation is not mandatory in many classes of cases that can be seen as classes of cases less conducive to mediation.

To a degree, this aspect of the evaluative-facilitative controversy is reminiscent of the continuing discussion in civil procedure circles as to whether rules of procedure should be universal or substance specific. Robert Cover raised this issue most prominently and gave the debate an awkward nomenclature.¹⁶⁹ The 1938 Federal Rules of Civil Procedure ("Civil Rules") are "transubstantive" in that they provide the same means for processing a dispute regardless of the subject matter of

164. See Birke, *supra* note 15, at 503-12.

165. Birke, *supra* note 15, at 505-20.

166. See generally, Symposium, *Standards of Professional Conduct*, *supra* note 1; Symposium, *Evaluative Versus Facilitative*, *supra* note 1 (where in both cases, participants write about or discuss the issue of facilitative versus evaluative mediation with no discussion of differentiation by subject matter of the case or of content of dispute).

167. See sources cited *supra* note 166.

168. See, e.g., Gary A. Weissman, *A Lawyer's View of the Family Law Amendments to Rule 114*, 18 *HAMLIN J. PUB. L. & POL'Y* 394, 400-402 (1996-97) (discussing history of Minnesota rule to that effect).

169. See Cover, *supra* note 13.

the dispute.¹⁷⁰ Cover questioned this operating premise, arguing that the processing of some cases may benefit from rules designed more specifically for such disputes. Cover urged the profession to at least examine with an open mind the utility of non-transubstantive procedural rules.¹⁷¹

Cover's thesis provoked more comment than actual Civil Rules reform,¹⁷² with most commentators defending the ideal of general procedural rules rather than substance-specific rules,¹⁷³ although there remains considerable interest in the topic.¹⁷⁴ The defenders of general procedural rules have argued with considerable force that a general set of rules is more likely to resist the influence of special interest groups: where one set of rules governs all cases, the array of interested disputants are more likely to cancel one another out so that procedural rulemaking does not become "captured" by any particular interest group.¹⁷⁵

In addition, one can also argue with considerable force that it is very difficult to craft sound substance-specific rules under the current regime in which federal rulemaking is done largely by generalist judges¹⁷⁶ who may have relatively little knowledge about specific fields of law and the operation of civil rules that govern pretrial matters that take place outside the court. Even those arguing for more

170. See Cover, *supra* note 13 at 732-33.

171. See Cover, *supra* note 13. at 735-45.

172. See Carrington, *supra* note 13 at 2068.

173. See Carrington, *supra* note 13, at 2068; Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237-38 (1989); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776-79 (1993).

174. Carrington, *supra* note 13 at 2068, n.4 (suggesting that even among academicians, the notion of specific procedural rules for specific areas of law has been waning). As examples of at least cautious support for substance-specific procedural rules, see, for example, Subrin, *supra* note 13; Stempel, *supra* note 13; Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 696-97 (1988); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547-48 (1986); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 985 (1987).

One commentator, noting the proliferation of local rules, standing orders, statutory changes affecting procedure, and the differing Delay-and-Expense reduction plans required by the 1990 Civil Justice Reform Act, has concluded that non-trans-substantivity has achieved considerable gain although generalist procedure remains tenuously the norm. See Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992).

175. See Carrington, *supra* note 13, at 2068-72.

176. Under the Rules Enabling Act of 1934, federal rulemaking revision is in the first instance undertaken by advisory committees appointed by the Chief Justice. These committees usually are dominated by judges. The advisory committee's work is then reviewed by the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, and the Supreme Court, which will promulgate amendments if it concurs in the work of the Judicial Conference and the committees. Congress has approximately seven months to act if it wishes to amend the Court's proposed rules or disapprove them and prevent them from going into effect. See 28 U.S.C. § 2072 (1994); Jeffrey W. Stempel, *Sociology and Politics in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. (forthcoming 2001) (explaining rulemaking process in more detail).

Except for the final phase of rulemaking when Congress has a chance to have the last word, the process is largely the province of the bench. By definition, trial and appellate judges and Supreme Court Justices have relatively little recent experience actually conducting pretrial litigation. Congresspersons have even less experience. For that reason, the rulemaking process seems better designed for crafting general rules than rules highly specific to the litigation of particular types of cases.

consideration of substance-specific rules have tended to suggest that these rules be crafted by special committees or task forces composed of lawyers experienced in the area and balanced in composition so that neither plaintiff nor defendant interests dominate.¹⁷⁷

Since 1938 and continuing to this day, a generalist framework has dominated the Civil Rules of litigation. One might therefore expect a similar generalist approach to obtain for mediation. If so, the confines of a rule or regime of mediation take on considerable importance. But bluntly, if the facilitativists carry the day, all mediation will be required to be conducted in a facilitative manner. If the evaluationists prevail, evaluative mediation becomes the general norm. Framed in this manner the debate is an important one that understandably generates strong feelings in view of the stakes.

However, even where universal Civil Rules govern the conduct of a mode of dispute resolution such as litigation, operation in the field is again more complex than the articulated doctrine or black letter law. Civil Rules of litigation are universal. They govern all disputes in the relevant court system. But the universal rules governing the federal system are broad and vest the presiding judge with considerable discretion.¹⁷⁸ In addition, each judicial district may formulate local rules of procedure that have greater specificity so long as they are not inconsistent with the Civil Rules.¹⁷⁹ Each judge is also permitted to enter a standing order governing procedural matters in cases before that judge. The "black letter" of the Civil Rules may thus be "one size fits all," but there is considerable opportunity for nuanced subject and case-specific application of the Civil Rules.

The "rules" of mediation would probably benefit from a similar regime. It may be too daunting, too expensive, too inefficient, and too fraught with potential error to craft mediation protocols for different types of disputes, even areas as different as child custody and auto accidents. However, if the general protocols of mediation are written with sufficient generality and allowed to be applied with a range of reasoned discretion, mediation can adapt nicely to virtually any sort of dispute. Undoubtedly, mediation will not successfully resolve every dispute. Mediation may need to be abandoned in the face of unreasonable parties or potential abuse. But mediation operating under a regime of eclecticism will serve society vastly better than will extreme versions of either the facilitative or evaluative approach.

VI. CONCLUSION

Mediation has grown almost exponentially in the past twenty years and is now well established. With success comes both infrastructure and the risk of orthodoxy. Although it is good to have values and standards, dogma is unlikely to enhance

177. See Stempel, *supra* note 13, at 89-102; Subrin, *supra* note 13, at 51-56.

178. See Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LIT. 273 (1991); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* 63 L. & CONTEMP. PROBS. (forthcoming 2001) (noting the general prevalence in Federal Rules for vesting considerable discretion in trial judge).

179. See FED. R. CIV. P. 81.

mediation. In the facilitative-evaluative debate, at least at the rhetorical level, extremism and ideology continue to have a prominent voice. In practice, mediation is more subtle and eclectic, properly varying in style with the subject matter of the controversy, its facts and circumstances, the disputants themselves, and the interests of third parties and society. Mediation is likely to accomplish even more if not distorted by continuing ideologically-driven debate divorced from the reality of dispute resolution in practice in the context of particular types of disputes.

