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# Variations in Mediation: How--and Why--Legal Mediators Change Styles in the Course of a Case

Dwight Golann \*

If the use of alternative dispute resolution is to grow, then dispute resolution techniques must continue to improve. This is true for several reasons: First, those who believe in these processes have a natural interest in their advancement. In addition, after a quarter century of publicity and discussion of ADR in American legal circles, many of those most receptive to these techniques are already using them. To convert the skeptics will require that ADR methods become more effective, or at least that their present effectiveness be more persuasively demonstrated. Lawyers also increasingly attempt to “spin” neutrals to adversarial ends,<sup>1</sup> requiring a more sophisticated response by mediators. Finally, if society increases its support for court-related ADR,<sup>2</sup> those who design and fund these processes, and especially jurisdictions that require litigants to use them,<sup>3</sup> have a natural stake in their being delivered effectively.

Curiously, although there has been debate over the appropriateness of various ADR techniques,<sup>4</sup> there has been relatively little inquiry--at least by legal scholars--into how these processes actually unfold<sup>5</sup> in the general field of American civil

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1. See, e.g. David Stern, *Mediation: An Old Dog With Some New Tricks*, 24 LITIG. 31 (1998) (analyzing how mediation can be used as part of a larger litigation strategy).

2. These issues arise, for example, under Professor Sander's concept of a comprehensive justice center. Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 5-6 (2000).

3. Professor Sander endorses the concept of requiring disputants at least to sample mediation. *Id.* at 7-8. Others have called attention to the special policy concerns that arise when the state requires disputants to engage in a specific form of ADR. 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, 953-54, 971 (1997).

4. For example, in STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 134-64 (1999), the authors present a story of a legal mediation interspersed with contrasting views of academics concerning the techniques proper to use in such a process.

5. Recent empirical studies of legal mediation have focused primarily on outcomes: settlement rates, cost savings and user satisfaction. See JAMES S. KAKALIK ET AL., *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT* (1996); Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOTIATION J. 259 (1996); Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 579 (1997). The leading compilation of research into what occurs during the mediation process is KENNETH KRESSEL ET AL., *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* (1989).

litigation.<sup>6</sup> In particular, there has been little examination of whether legal mediators change styles during a single case, or of when and why any such changes occur.<sup>7</sup> This article addresses the issue of style, using as its foundation an experiment in which several professional mediators were asked to resolve the same dispute while being filmed.

I will seek to show in this article that professional legal mediators in fact use a variety of styles, and that they change their approach constantly during a single mediation, even within a single meeting with a disputant.<sup>8</sup> I will argue that these stylistic changes are the norm rather than the exception in the mediation of civil legal disputes<sup>9</sup> and that the use of evaluative techniques<sup>10</sup> is also frequent, even among those mediators who favor a broad, facilitative approach. Finally, I will describe the contrasting styles that the filmed mediators used in the same dispute and argue that these variations were caused less by the inherent tendencies of the mediators than by differences in the tactics and personalities of the disputants with whom they interacted.

*The data base.* In 1998, I participated in an interesting project under the aegis of the Program on Negotiation at Harvard Law School. Our goal was twofold: We wanted to examine the phenomenon of mediator style in legal mediation, and also to produce new and realistic videotapes of the process.<sup>11</sup> We created two roleplays based on actual disputes, one involving a commercial warranty claim and the other an allegation of age discrimination in employment,<sup>12</sup> and invited seven professional

6. As I discuss later, see *infra* text accompanying note 23, legal disputes differ from other controversies such as community disputes in significant ways that have implications for the techniques appropriate to resolve them. By "professional" legal mediator, I mean a neutral who has established a successful private practice focused on civil legal disputes. Such mediators have, by definition, substantial experience and may share common stylistic traits.

7. An exception is Leonard Riskin, who in the article that provides the foundation for my inquiry commented that mediators tend to have a "presumptive or predominant style," but that many mediators change style, either from case to case or in perhaps the course of a single process. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 35-36 & nn.90-91 (1996).

8. Professor Riskin envisioned an "ideal mediator . . . sufficiently flexible to employ the most appropriate orientation, strategies and techniques as the participants' needs present themselves." *Id.* at 40-41.

9. By "civil legal dispute" I mean a dispute in which a legal claim has been or could be asserted and that is substantial enough to make it likely that lawyers will become involved as advocates. This definition excludes most small claims and neighborhood disputes, as well as controversies that have no potential legal implication. I also exclude marital disputes, because the special nature of that relationship, often involving serious emotional and psychological issues and the presence of unrepresented third parties, the children, may well affect the techniques that any mediator would use to resolve them.

10. I define "evaluative" to include assessments about issues other than the legal merits. See *infra* Figure 1.

11. The first of the resulting videotapes consists of excerpts from one of the mediations discussed in this article. Videotape: *Mediators at Work: Breach of Warranty?* (Program on Negotiation ("PON"), Harvard Law School 1999) (on file with the Case Clearinghouse of PON, Harvard Law School).

12. The instructions for the commercial warranty case discussed in this article are available from the Case Clearinghouse of PON. PON, Harvard Law School, "Waltham Construction Supply Co. vs. Foster Fuels, Inc." (2000) (on file with the Case Clearinghouse of PON, Harvard Law School). The employment discrimination problem is also available from the Clearinghouse. PON, Harvard Law School, "Termination Tempest" (1999) (on file with the Case Clearinghouse of PON, Harvard Law School).

mediators who practice in Boston, New York and Philadelphia to mediate one of the two cases. I should note in passing that although we looked initially for mediators who favored a particular style,<sup>13</sup> none of the neutrals we contacted would admit to doing so; rather, all said that they adopt a range of styles to fit the needs of each situation. Among its other aspects, the project allowed us to judge whether these self-assessments were accurate.

Each neutral was paired with lawyers and played by litigators and law professors from the Boston area.<sup>14</sup> There was no script, and none of the players had access to the confidential instructions of other participants.<sup>15</sup> The neutrals were simply asked to mediate the dispute as they would a real case, and the resulting interactions were filmed.<sup>16</sup> Each group worked with one of the two scenarios and under the same external constraints.<sup>17</sup> The sessions, however, evolved in varied ways and reached different results. This paper is based on two groups<sup>18</sup> that mediated the warranty dispute.<sup>19</sup> The mediators in the sessions I will discuss were each experienced neutrals with successful private practices who also teach mediation at well-known law schools. Prior to becoming a mediator, both had extensive experience as litigators in large law firms, and one of them currently carries on a mixed litigation and

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13. Leonard Riskin has observed, accurately I think, that even when mediators use multiple styles, they usually have a tendency to favor some approaches over others. Riskin, *supra* note 7, at 24-25.

14. Including the neutrals there were a total of 35 players, organized into seven groups of five. Most disputant roles were played by legal professionals, but a few non-lawyers took on the roles of lay parties. We considered having the same persons play the disputant roles in each iteration of a case so as to provide identical conditions for each mediator, but eventually rejected this option. Among other reasons, we doubted that amateur actors could re-enact their styles and tactics in successive sessions.

15. The mediators received only the general instructions for the problem, while the disputants received the general instructions plus confidential instructions specific to their part.

16. A videotape of each of the four sessions discussed in this article is on file with the author.

17. The sessions were limited to four hours apiece, primarily due to the cost of filming. Because of technical needs, this allowed approximately three and a half hours of actual mediation in each session. Apart from these time limitations, the role players had to behave naturally in the presence of outsiders and video equipment and to deal with occasional interruptions.

18. Two sessions, or even all seven conducted as part of this project, provide a slender basis for generalizations about mediator practice. Still, the results appeared very realistic to me and my co-director, and the participants also remarked that the experience felt identical to actual mediations in which they had been involved. Excerpts from the tapes have been shown to groups including law teachers and experienced litigators who have also commented on their realism. I believe that the results discussed in this article produce, at a minimum, interesting hypotheses, and hope that they will serve as a starting point for other experiments.

19. The case involved a dispute between a construction firm and a long-time supplier of fuel oil over the delivery of three barrels of commercial antifreeze which, the plaintiff alleged, was defective and caused serious damage to the cooling systems of 70 of its heavy trucks. According to the plaintiff, 21 trucks needed complete engine overhauls at a cost of nearly \$10,000 apiece, and the other 49 exposed trucks, which had not yet shown damage, suffered a decline in market value of \$5,000 apiece, for total damages of \$455,000. Statutory legal interest on that sum was an additional \$110,000.

In addition to suing the supplier of the antifreeze, the plaintiff brought a claim against the supplier's insurer, alleging that it had engaged in a bad-faith settlement practice by refusing to make any offer of compensation to the plaintiff. The plaintiff sought to recover treble damages (an additional \$910,000) plus attorneys fees (\$60,000) under state law, for a maximum potential recovery of \$1.535 million.

The defendants viewed the plaintiff's liability claim as unsubstantiated by expert evidence, its damage calculations as inflated, and its unfair settlement practice claim as frivolous. As of the time of the mediation, the defendants had not made any offer of settlement and the business relationship between the two companies had ended.

mediation practice. They both have experience mediating in community dispute programs, and each emphasizes broad/facilitative techniques in the courses they teach.

## I. THE ANALYTIC GRID

To describe mediator styles we need a scale. A few years ago Professor Leonard Riskin greatly advanced the discussion of mediator style by identifying two key attributes of neutrals: whether they take a "broad" or "narrow" view of the goals of the process, and whether they use a "facilitative" or "evaluative" approach in intervening.<sup>20</sup> Professor Riskin also developed a method to display these styles in a graphic format that I will call the "Riskin grid."<sup>21</sup> The Riskin grid has a property which has not yet been exploited: If mediators do change style as a mediation unfolds, the grid provides a vehicle to chart and compare their movements.

The Riskin grid must be modified, however, in order to serve as a useful template for analyzing legal mediation. Legal disputes differ from other controversies in several ways:

- First, the parties cannot easily walk away from a failed negotiation, since one or both can draw the other into binding adjudication.
- The fact that both parties' primary alternative to agreement is adjudication makes it easier to channel them into so-called "principled" bargaining,<sup>22</sup> the relevant principles being the ones that the adjudicator would apply. But it also means that disagreements about the value of the litigation alternative can assume exaggerated importance, and it encourages negotiators to treat non-legal issues as irrelevant.
- Legal disputes have a "scorpions in a bottle" quality, in that the process of legal discovery and motion practice empowers the parties to inflict significant costs and aggravation on each other, regardless of the ultimate outcome in adjudication.
- Legal mediation is distinctive, finally, in that it usually involves attorneys as negotiators or advisors to the parties. The presence of professional advocates is helpful when they use their objectivity and experience to move the process toward a sensible resolution, but it is a complicating factor if parties hand over a case to litigators and then ignore it, or if lawyers are influenced by interests that conflict with those of their clients.<sup>23</sup>

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20. The grid is set forth and its implications are explained in Riskin, *supra* note 7, at 17-35. Although we can display only two variables on a printed page, most mediators in fact work in several dimensions, a point recognized by Riskin, *see id.* at 26 nn.60, 49. A mediator must choose, for instance, not only whether to be narrow or broad and facilitative or evaluative, but also how actively to intervene, whether to talk primarily to clients or to lawyers, and so on. See DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES, EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 14-23 (1996). All of these choices are important, but only two of them can be shown on a single grid. The variables identified by Professor Riskin appear to be the most significant, and their use as classifying criteria therefore seems justified.

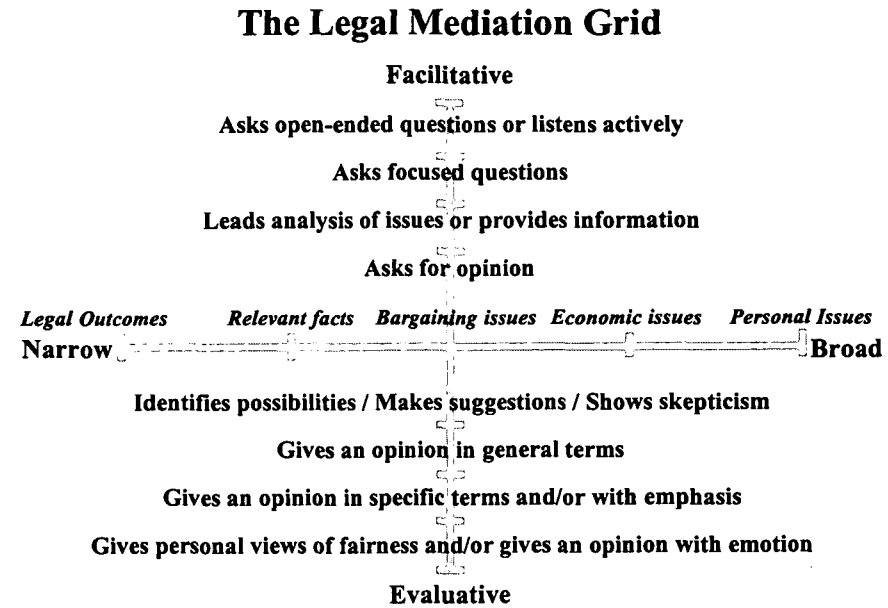
21. See Riskin, *supra* note 7, at 35.

22. The concept of principled negotiation was popularized in ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 81-94 (Bruce Patton ed., 1st ed. 1981).

23. For an interesting discussion of lawyer traits that can complicate the settlement process, see William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 375-90 (1999).

These attributes of legal disputes add an overlay to the usual issues that arise during mediation. As a result, the Riskin grid does not apply well to legal mediation. I have modified the grid in several respects, classifying facilitative interventions in terms of their openness and evaluative comments in terms of their intensity or specificity, that is, their “hardness.” I place the subject of an intervention—the legal merits, case facts, bargaining, economic issues and personal issues—on the horizontal, “narrow-broad” axis.<sup>24</sup> The resulting “legal grid” is shown in Figure 1.

Figure 1



24. For example, legal mediators spend a good deal of time privately assessing the strength of the parties’ legal arguments and underlying interests, proposing and advocating settlement options, and sometimes giving their opinions concerning the likely outcome in adjudication. See KRESSEL ET AL., *supra* note 5, at 394, 417-19 (“Despite a persistent ideology that mediators ought to refrain from pushing their own ideas, it is quite evident that they are often a primary source of settlement proposals and that they are not at all shy about playing such a role. . . . Ideology notwithstanding, the research . . . shows that most mediators regard pressure tactics as an essential ingredient of their kit bag.”); Marjorie Corman Aaron, *Evaluation in Mediation*, in *MEDIATING LEGAL DISPUTES*, *supra* note 20, at 267-305 (discussing situations in which it may be appropriate for a mediator to evaluate the legal merits). All these behaviors are classified by the Riskin model as evaluative. See Riskin, *supra* note 7, at 35. At the same time legal mediators are rarely called upon to focus on issues of social change, which Riskin includes in his definition of a “broad” orientation. *Id.* at 21-22.

There is also a problem of calibration on the Riskin grid. First, it is not clear how to chart broad versus narrow approaches if social change is eliminated as a topic. In addition, the model classifies levels of evaluation by the subject rather than by the intensity with which a mediator delivers a view. Thus, for example, a statement such as “You’re crazy to reject that offer” would be rated by the Riskin grid as less evaluative than “I don’t know, but a jury might have trouble understanding that theory of causation,” because the first opinion concerns the bargaining situation while the second deals with the trial outcome. If a grid is to be used to chart styles of legal mediators, then inability to measure the intensity of an intervention is a drawback.

Finally, it seems inappropriate to place facilitation at the bottom and evaluation at the top as in the Riskin grid; most mediators would agree that facilitation is preferable to evaluation, and the convention is to put positive values at the top of a graph.

## II. PATTERNS IN MEDIATOR BEHAVIOR

Do mediators in fact change style over the course of a mediation, or do they maintain a consistent approach throughout the process? To investigate this question, I will analyze two representative sessions that we filmed, denoted "Mediation A" and "Mediation B." Because the approaches used by all of the neutrals in their opening sessions were similar,<sup>25</sup> I begin with the first private caucus meeting held by each mediator. For purposes of charting styles, the participants are identified by letters: "M" for the mediator, "L" for the lawyer and "P" for the party representative.<sup>26</sup> The first person to speak in each exchange is shown in bold type. To identify interactions and show their progression, I have given later interactions higher subscript numbers: a conversation marked (M<sub>2</sub>, L<sub>2</sub>) for example, occurs after one marked (M<sub>1</sub>, L<sub>1</sub>, P<sub>1</sub>). In the course of each meeting there were usually too many stylistic variations to be charted legibly, and so I have shown only the more significant changes on the grid.<sup>27</sup> One final note: Because the charts in Figures 2 through 5 show lawyers and parties as well as neutrals, the calibrations of the grid, which are phrased in terms of what a mediator does, must be construed to fit the other participants in the discussion. For example, "Leads an analysis," as applied to a party representative, means that the person is discussing the bargaining situation with an open mind, whereas "Gives an opinion" means that the disputant is arguing that a certain proposal or assessment of the merits is correct and should be endorsed by the neutral.

### *A. First Caucus, First Meeting*

Figure 2 shows the key interactions during each mediator's first meeting with a party representative and his or her counsel.

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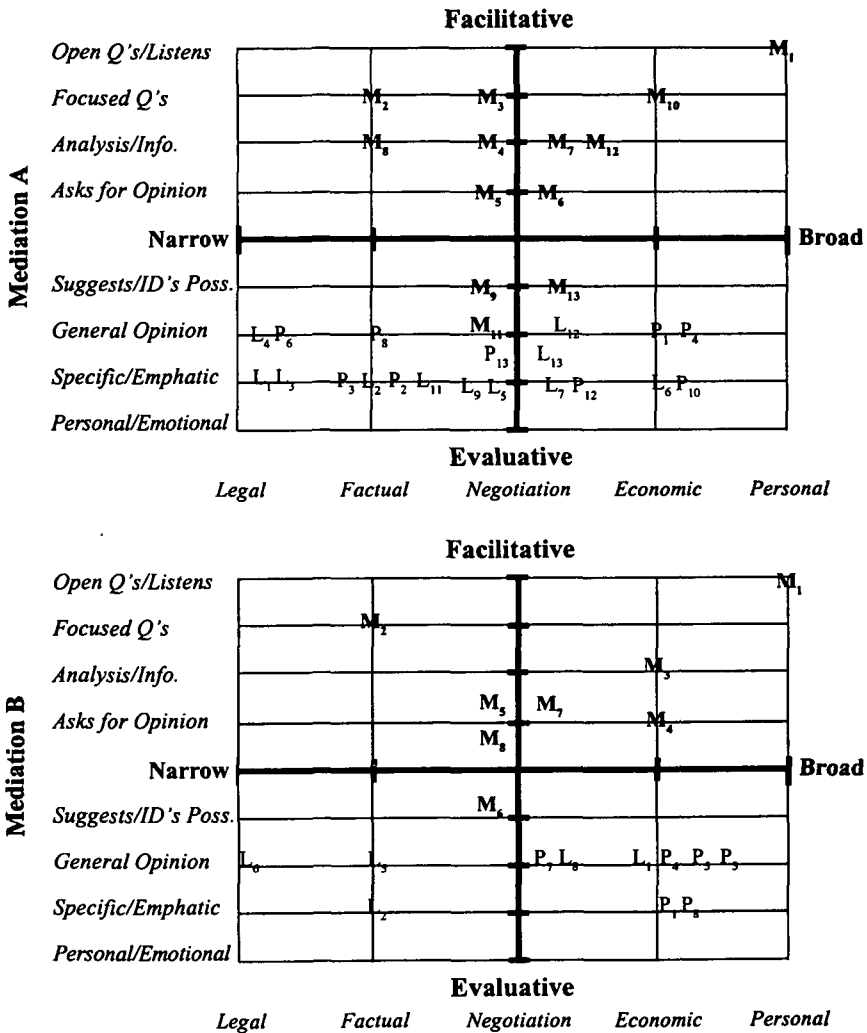
25. All the mediators in our experiment used the same general structure for the process: they began with a joint session, then worked almost exclusively in caucuses. In each opening session the neutral introduced him or herself and explained the process. The disputants, through their lawyer, made an opening statement. If a party representative did not add comments, then the mediator typically asked the representative whether he or she wished to add anything. The neutral then moderated a question-and-answer period, asked questions him or herself, and made a transition to private caucuses, where the disputants remained for almost all the rest of the process.

26. The plaintiff is represented in the roleplayed case by its vice president, a lay person, the defendant-supplier by its inside counsel, and the defendant-insurer by both defendants' outside litigator.

27. For legibility reasons, comments about bargaining issues are placed beside the vertical axis rather than superimposed on it, and multiple comments at a particular point on the grid are grouped next to each other but on different lines of type. The placement of one symbol slightly to the left or right or above or below another has no substantive significance.

Figure 2

**First Caucus-First Meetings**



These results are interesting in several respects. First, it is apparent that the two mediators do not maintain a single approach, either as to the subjects they discuss or the approaches that they use to discuss them. Rather, each neutral moves constantly between sectors of the grid. Mediator A shows more variation in approach, but this is probably because the first meeting in Session A was considerably longer than in Session B (forty-eight versus sixteen minutes).

Is there a pattern in what occurs? Each session begins with a phase in which the mediator probes for information while the disputants argue about legal, factual or business issues. Each discussion then moves into a phase in which bargaining



issues predominate. These two phases appear on Figure 2 as follows.

*Information Phase.* Each mediator begins in a broad/facilitative mode ( $M_1$ ). In mediation A, the litigator answers, arguing his client's legal case ( $L_1$ ). Narrow legal responses to broad questions are common in legal mediation and pose a practical problem for the neutral: If he or she continues to ask about broad issues, the mediator and the disputant will be focusing on different topics, making at the least for an awkward conversation. This is probably why mediator A moves to the narrow part of the spectrum, focusing on factual issues but without adopting the disputants' evaluative tone ( $M_2$ ). In caucus B, by contrast, the party representative responds to the mediator's initial question, and describes how the defendant's negligence has harmed his business ( $P_1$ ). Mediator B, after touching on legal matters ( $M_2$ ) focuses on business issues ( $M_{3,4}$ ), again in response to the disputants' lead.<sup>28</sup>

*Bargaining Phase.* After about the same amount of time (fourteen minutes into Session A and twelve minutes into Session B), each mediator shifts focus to the negotiation process, asking disputants what they are prepared to do to advance the bargaining (Session A,  $M_{3,6}$ ; Session B,  $M_5$ ). Thus in Mediation A the neutral, after summarizing the legal arguments he has heard, asks, "Given all that, why are you here?" and a few minutes later comments, "When I talk with the other side, they're going to ask if there's been a proposal . . . ." In each session the focus of the discussion moves to bargaining.

As the subject shifts, each mediator's manner also changes. Both neutrals have remained in a facilitative mode while talking about the legal merits, at most asking pointed questions about issues that the parties appeared to be glossing over. (For example, mediator A says to both disputants, "As [the lawyer] said, these things can often be a 50-50 proposition . . . . I guess what I'm wondering is . . . if the judge or the jury believes the other side's expert, doesn't that create at least the possibility that . . . ?"). Once the conversation turns to bargaining issues, however, each mediator begins to make mildly to moderately evaluative statements (Session A,  $M_{9,11,13}$ ; Session B,  $M_6$ ). Some of their comments take the form of observations about how the other side may be perceiving the bargaining situation, and what it may be expecting from a settlement. For example in mediation A:

- Lawyer A: They spent, according to them \$210,000 [on engine overhauls].
- Mediator A: And how much in legal fees?
- Lawyer: I don't see . . . frankly, those are sunk costs. We've had legal fees too and I don't think that they—
- Mediator: \$60,000 to date? I think is . . . [looking at his notes]
- Lawyer: Is that what they've said? Something like \$60,000.
- Mediator: I think something like that. So 210 plus 60 would get them, I mean in their eyes, back to zero. . . . I'm sorry, did I interrupt you?
- Lawyer: Well, that may be helpful, but I mean we've also spent \$60,000, and I think that their ability to recover that at

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28. In this case the defendant-supplier's economic interest is to re-establish a business relationship with the plaintiff and to protect its commercial reputation.

trial is frankly negligible — that is, the attorney’s fees.

The mediator here is intervening to give his assessment that the plaintiff probably sees the money it has spent on lawyers as “damages” that will have to be included in any settlement, regardless of whether it would be able to recover such fees at trial.

Each mediator also gives opinions about what is needed to advance the negotiation process (Session A, M<sub>11</sub>, Session B, M<sub>6</sub>). Here, for example, is Mediator A:

Mediator: Well, let me do this. I want to suggest two other possible approaches to settlement here because frankly, I think if I communicate your offer of \$38,500 plus a promise that they will keep all of this under wraps, they very well might say, “The mediation is over.” I’ve seen that happen and perhaps you have seen negotiations end because of that. With a demand of \$1.5 million, even if they feel that gives them a good deal of room to move, they could very possibly say to you, “That’s not a strong enough offer,” and they’re not going to counter. In which case you are going to be in a position where you are going to be asked to bid against yourselves, which most parties are very reluctant to do. So then we wind up in a bit of a stalemate. Whenever I am mediating, I feel like it’s part of my job to reason together with the side I am meeting with. I don’t know what their reaction might be. They may think \$38,500 is a good starting point. I have a gut-level hunch that they will view that as pretty light.

Lawyer: Given [the plaintiff vice president’s] rather wooden demeanor, I would say that you are probably right.

Mediator: [smiling] So we are sort of on the same wavelength in terms of the assessment of where they are. So that leaves me thinking a few things. Number one, might it be prudent to move your offer to a number that is more likely to motivate a response from the other side? That’s question number one. Question number two: Might it be sensible to include in your proposal, or as an alternative, something about possible business dealings?

After conferring privately, the defendants raise their offer to \$75,000.

In this phase of the meeting, both mediators appear to be acting according to implicit rules:

- A mediator should begin a first caucus meeting by asking broadly facilitative questions. Lawyers usually respond by arguing the legal merits, while parties may remain silent or discuss either legal or business issues. The disputants generally speak in an evaluative manner, arguing the strength or fairness of their positions.

- After spending some time gathering information about the case facts and legal issues in the dispute, as well as about non-legal interests if the disputants are willing to discuss them, a mediator should focus on bargaining and ask the disputants to make a proposal.
- A mediator should not at this stage evaluate the legal merits or the parties' non-legal interests.
- A neutral may, however, evaluate the bargaining: How the other side is seeing the situation and what stance toward them is likely to advance the negotiation.

In their first private meeting with a party, all four mediators who dealt with the warranty dispute used approaches similar to the one described above. Some showed more persistence in probing the parties' interests or greater skepticism about their factual assertions, but the pattern at this stage of the case was similar: The mediators spread their comments along the broad—narrow axis, remained facilitative, and if they evaluated at all, focused only on the bargaining situation. The disputants talked about a more limited range of subjects and were moderately to emphatically evaluative throughout. This may reflect a consensus, both among professional neutrals and among civil litigators, about how to conduct an initial caucus in a dispute of this type.<sup>29</sup>

### *B. Stylistic Variations Among Mediators*

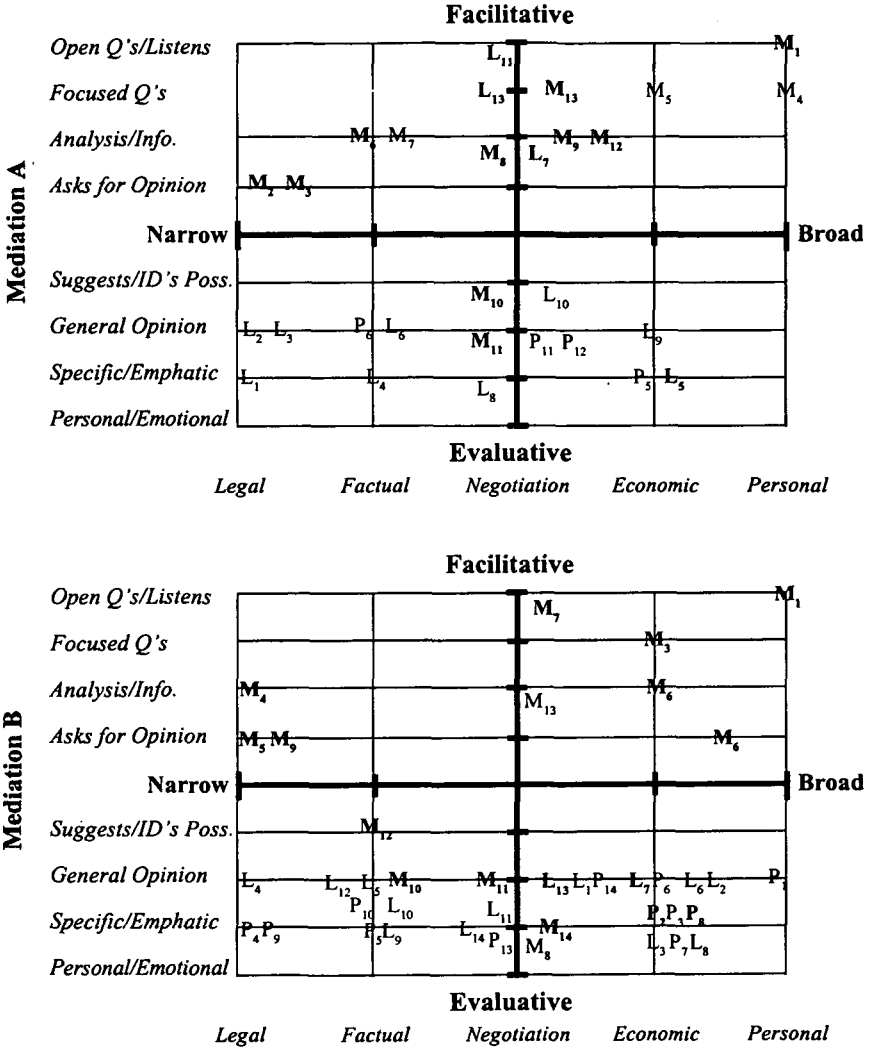
The styles used by mediators A and B diverged as they went on to meet with the other party in the dispute. These meetings are charted in Figure 3 on the following page.

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29. The same general approach is demonstrated in Videotape: Mediation in Action: Resolving a Complex Business Dispute (CPR Institute of Dispute Resolution 1994) (popularly known as "Prosando v. High Tech") (on file with the University of Missouri-Columbia Center for the Study of Dispute Resolution).

Figure 3

### First Caucus-Second Meetings



Both neutrals again begin in a broadly facilitative style (M<sub>1</sub>), but soon focus more narrowly on factual and legal issues (mediation A, M<sub>2,3,6,7</sub> mediation B, M<sub>4,5,9</sub>). During this phase, however, mediator B shows skepticism and gives opinions concerning the defendants' factual arguments (M<sub>10,12</sub>). Thus, for instance, mediator A, told by the plaintiff's vice president that to pursue the case through trial will cost only \$20,000, turns to the litigator and says in a "just checking" tone, "Is \$20,000? . . ." Counsel quickly responds: "It's probably a little light." (M<sub>6</sub>). Mediator B also asks about future litigation costs, but does so in an abrupt and skeptical manner: "How much is it going to cost to try this case?" (M<sub>12</sub>). Mediator B also shows more

emphatically his disagreement with the disputants' bargaining tactics (compare  $M_{10,11}$  in A with  $M_{8,11,14}$  in B). At one point, for example, mediator B says to defense counsel: "If I go back and I say 'They're willing to give you a discount, but *that's it*,' we've got a big problem, and we're going to have a short afternoon, *I think*. I could be wrong . . ."<sup>30</sup> ( $M_{11}$ ). Finally, a larger proportion of mediator B's interventions (two of A's and five of B's) are made in an evaluative manner.

What accounts for these differences? It is not the facts of the dispute, which by definition are identical. Is the variation due to their stylistic predispositions? It seems unlikely that mediator A is inherently facilitative and B consistently evaluative. Both neutrals have similar professional backgrounds, except that mediator A continues to litigate as well as mediate while B is a full-time neutral, and both emphasize facilitative skills in their teaching. Indeed, as Figure 2 shows, during the first caucus meetings B was if anything more consistently facilitative than A; their styles begin to diverge only during their meetings with the second party.

The differences that appear during the second meetings may stem in part from a tactical choice made by each neutral. In the warranty dispute, all of the mediators faced an initial problem: the plaintiff was making an aggressive claim for treble damages and demanding the highest amount that it could possibly recover in court, and the defendants had offered nothing in reply. In these circumstances, Mediator A elected to meet first with the defendants hoping, as he explained later,<sup>31</sup> to obtain an offer from them before he asked the plaintiff to compromise.

Mediator B elected to meet first with the plaintiff. He may have done so because during his opening session the plaintiff lawyer had accused the defense of unethical litigation conduct, provoking an angry exchange. Given this difficult beginning, Mediator B may have felt that the plaintiff side needed his attention first. In his first meeting, Mediator B persuaded the plaintiff's vice president to authorize him to tell the defendants that the plaintiff would be willing to show "significant flexibility" once the defense put a "number" on the table. The vice president adamantly refused, however, to bid against himself by reducing his demand by any specific amount; he said that he could not go back to the plaintiff's CEO, who was his father-in-law, "and report that I reduced my demand against no offer. I cannot do that. I *will not*." ( $P_8$ ). Mediator B thus went into his second meeting, with the defense representatives, without a specific concession to offer, which may have hardened their attitude.

Although these differences in the tactical situation probably had an impact on the styles used by the two mediators in their next meetings, a review of the videotapes suggests that the variation was due primarily to other factors. Mediator A met with a plaintiff team that, after arguing the merits and threatening to spread harmful comments about the defendant supplier's reputation, agreed to cut its demand in half from \$1.5 million to \$750,000 ( $P_{13}$ ). Mediator B, by contrast, encountered a defense counsel who used a two-pronged strategy: He first spoke about the desirability of finding a "marketplace resolution" of the dispute and on behalf of

30. The italics mark words on which the speaker placed particular emphasis.

31. These and other comments concerning a mediator's thoughts and intentions are based on the author's discussions with the neutrals after filming had been completed.

the defendant supplier offered a multi-year contract to supply the plaintiff with fuel at a discount price. However, he then said that the plaintiff's weak legal case and outrageous settlement demand made it impossible for the defendant's insurer to offer any money at all. "Paying them money to settle this law suit," he said, "is a holdup," which would expose both his insurer-client and himself to unacceptable demands from the same opposing lawyer in the future<sup>32</sup> (L<sub>8</sub>).

Counsel's stance put mediator B in a difficult position. He had already been told by the plaintiff's representative that a cash offer was a prerequisite to any monetary concession. In addition, half of the time allotted to the mediation had expired and neither side had yet offered a specific compromise on the money issue. The neutral listened for a few minutes to defense counsel explain why his "no cash, all coupon" proposal was the right solution and then commented in an evaluative tone: "I will tell you . . . that we are going to have an *extremely* hard time selling these folks on a no-cash settlement in *my judgment*. If *that's* what we've got to work with, well *OK* . . . but . . ." (M<sub>8</sub>). Mediator B said again that for both bargaining and psychological reasons the plaintiff needed to hear a cash offer. The defense continued to refuse to offer any money.

The mediator then directed the conversation to the merits, asking counsel in a facilitative tone to "put on your trial lawyer hat in my chair," and assess the litigation risks (M<sub>9</sub>). After the defense team argued strongly that the plaintiff had no expert to support its theory of causation, mediator B asked pointed questions such as: "How many cases have you been involved in, in which there was only an expert on one side, and the other side could not find *any expert* who would contradict him? How many?" (M<sub>10</sub>). The conversation returned to the bargaining and the mediator stressed what he called a "practical negotiation problem. I'm not going to get them to be realistic without some help from you . . . I'll do what you want me to do, but if I have to go back there and tell them, '*There ain't going to be no money today*' . . . it may be a short day . . ." (M<sub>11</sub>). Defense counsel responded, in a chiding, disappointed tone, "We need you to be more creative than that." The mediator listened to counsel explain how he should persuade the plaintiff's vice president to sell his father-in-law on the view that he was "a hero rather than a bum" because he had obtained a long-term fuel supply at an attractive price. The neutral then asked the brusque question mentioned above: "How much is it going to cost to try this case?" (M<sub>12</sub>). This query could have been posed in a facilitative way, but as delivered it implied strong disapproval of what the lawyer had been saying.

What caused mediator B to adopt a more evaluative style than mediator A? It may be that mediator B was inherently more willing to "go evaluative" than A, but

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32. The defense counsel in this case faced an ethical problem. One of his clients, the supplier of the allegedly defective product, had a strong business interest in reestablishing a relationship with the plaintiff, if only to prevent it from disparaging the defendant's products in the future. The insurer-client, however, was primarily interested in minimizing the amount of money it paid on the claim. In Session B, counsel added to his ethical problem by suggesting that he could not offer a monetary settlement on behalf of the supplier because of concern that it might hurt his bargaining stance on behalf of his insurer-client in future cases. In the four roleplays of the case, the mediators generally avoided grappling with this problem, apparently not wishing to alienate a person whose help they might need to bring about a settlement. The ethical issues posed by defense counsel's dual representation, both for counsel and perhaps also for the mediator, are interesting but beyond the scope of this article.

it is also true that he found himself in a more difficult situation than his counterpart. Mediator B later said that he had felt at the time that defense counsel was using what might be termed a “distributive tactic in integrative clothing,” i.e. making his “no cash-all coupon” proposal in part to delay for as long as possible offering cash, and that to facilitate this strategy would simply anger the plaintiff. This, combined with the time factor, led mediator B to communicate his skepticism about the defendants’ legal contentions and strongly challenge their bargaining strategy.

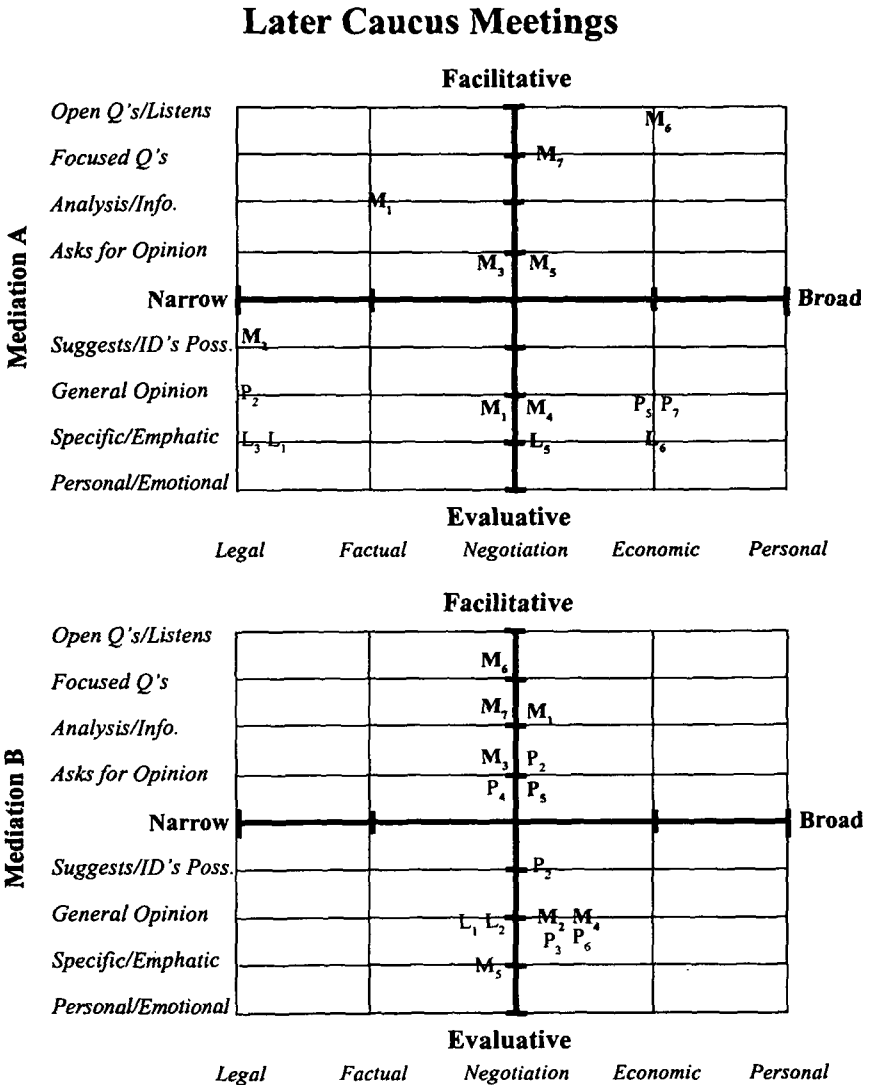
*Stylistic Progression.* We have seen that both the subjects that mediators pursue and the approaches they use can change repeatedly within a single caucus session. But is there any consistent pattern or evolution in neutrals’ styles over the course of a mediation? For example, are mediators likely to be found in particular areas of the grid during different phases of a case? Many publications describe mediators as emphasizing a broad-facilitative approach, helping disputants to focus on their underlying interests and then, on the assumption that this will be effective, working with them facilitatively to develop broad options for settlement.<sup>33</sup> The case that was being mediated, involving a disruption in a long-term commercial relationship, lent itself to such an approach. But did the mediation sessions actually follow this integrative model? For an answer, we need to look at later caucus meetings in the same two mediations.

*Later Caucuses.* We return to mediations A and B about three and one-half hours into each mediation, thirty minutes before the deadline for ending the process. Both mediators are meeting with the same parties as when they began caucusing, mediator A with the defendants and mediator B with the plaintiff. Both meetings are affected by events that precede them: Mediation A by the fact that the mediator is bringing back a lower demand from the plaintiff (reduced from \$750,000 to \$320,000) as well as confidential information that the plaintiff claims will weaken the defense case at trial, and mediation B by the fact that the defense counsel has shown for the first time a willingness to offer cash as part of a settlement. Figure 4 on the following page charts the two sessions.

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33. See, e.g., AMERICAN BAR ASSOCIATION, *WHAT EVERY LITIGATOR NEEDS TO KNOW ABOUT MEDIATION: STUDY GUIDE 2* (1993) (“In practice, mediation assists parties’ identification of their real interests . . . . The mediator assists the parties in rising above the complications of individuals’ personalities and emotions, and allows parties to reach a constructive, mutually acceptable solution . . . .”); CPR INSTITUTE OF DISPUTE RESOLUTION, *MEDIATOR’S DESKBOOK 2* (1999) (“The role of the mediator is multifaceted: Manages the mediation process for the parties; Opens communications between the parties; . . . Probes facts, positions and interests of parties; Actively keeps parties focused on problem solving; Assists the parties in creating and refining settlement options . . . .”);

Figure 4



*Session A.* We see that mediator A begins in a dual mode, combining evaluative comments about the plaintiff's new bargaining position with the new factual information; the grid thus shows two M<sub>1</sub>'s. Defense counsel responds by arguing both points. The mediator then emphasizes the risks of trial and offers an opinion on a legal issue (M<sub>2</sub>). Although the mediator uses evenhanded language ("Both sides have to reckon with a high degree of uncertainty. . . . The evidence seems to point in different directions"), his comments are probably interpreted as evaluative by the defendants, who have been arguing that they have much the stronger case. As in the first caucus, mediator A then moves to the less charged topic of bargaining.



He begins at a general level ( $M_3$ ), then points out again that from the plaintiff's perspective a "make whole" number would include attorneys' fees ( $M_4$ ).

At this point, the focus of the discussion changes to broader bargaining issues. The instigator, however, is the litigator rather than the neutral. The outside counsel suddenly says, "All right, tell you what we'll do . . . and it's only because the hour is late . . ." He offers to reimburse the plaintiff for the entire amount it claims to have spent on engine overhauls (\$206,000), if the plaintiff will agree to enter into a one-year contract to buy diesel fuel from the defendant at an attractive price ( $L_5$ ).<sup>34</sup> Regarding the other side's need for attorneys' fees, he replies, "They have to understand, they have emotion on their side, we have emotion on our side." He then describes for the first time an incident in which the plaintiff's sales manager humiliated the defendant supplier's marketing vice president while he was in the middle of a sales pitch by denigrating the defendant's products ( $L_6$ ). (The comment, as recounted by defense counsel, was "Still selling that crap antifreeze, are you?") The lawyer who presents these business-oriented terms and highlights an emotional issue is the same person who until now has deflected the mediator's questions about these topics. The neutral welcomes the initiative, clarifies its terms ( $M_7$ ), and goes to speak with the plaintiff.

*Session B.* At the start of this caucus, mediator B and the plaintiff's lawyer have just returned from a meeting with the defendant's outside counsel, a discussion that was held at defense counsel's request outside the presence of either of the party representatives.<sup>35</sup> In this caucus the focus of conversation is largely on bargaining, with the mediator helping the plaintiff's vice president to assess the situation and sort out tactical options. Mediator B alternates between evaluative comments about the other side's bargaining stance ("First thing [counsel] rattled a saber. . . . I'm finally seeing some breaks in the ice . . .") ( $M_1$ ,  $M_2$ ), questions intended to help the vice-president assess his needs ("What dollar range [is it] that the discount would equate to?") ( $M_3$ ), and an evaluation of the plaintiff's proposal ("You're . . . almost double the hard out-of-pocket [damages] . . . so I'm a little worried about that.") ( $M_4$ ). The vice-president is not offended by these evaluative comments; instead he asks both the mediator and his counsel to give him an assessment of the other side's intentions ( $P_4$ ):

- Party: "Can either of you gentlemen tell me your expectation of the best dollar I can get out of here today?"
- Mediator: "I honestly don't know yet."
- Party: "But I'm hearing from you . . . that you don't think that number is 750 [thousand dollars]."
- Mediator: "No, for sure and for certain not."

The plaintiff representative then agrees to put forth a lower demand which the

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34. Illustrating the subjectivity inherent in charting styles, or perhaps the limitations of the grid, defense counsel's comments could be placed either in the neutral category of bargaining, the moderately broad category of business issues, or the broadest category, emotional concerns.

35. The outside defense lawyer suggested that the litigators meet with the neutral alone after the supplier's inside counsel began to speak with increasing emotion, characterizing the mediation process as a "shakedown." After hesitating, the mediator agreed to convene a counsel-only meeting.

mediator takes to the other side.

To a degree, the caucuses in mediations A and B follow a similar pattern, which differs from the first meetings that each neutral held with the same party.

- These later caucuses are much shorter in duration, perhaps because the mediator has completed the process of gathering information and the participants are aware of the approaching deadline for concluding the process.<sup>36</sup>
- The conversation focuses more on the bargaining situation and less on factual information or legal arguments. Especially in Session B, this shows as a clustering of symbols at the “negotiation” or “zero” point of the horizontal axis.
- Each session deals with new issues, but in each instance the shift is initiated by defense counsel and not the mediator.
- Both mediators are more evaluative in the later caucuses, again focusing primarily on the bargaining situation.<sup>37</sup>

*The Final Stages.* Figure 5, on the following page, shows the interactions between mediator A and the parties at the end of the process. (Mediator B’s interactions are not charted because they showed less variation; the discussion in mediation B focused solely on bargaining issues, the mediator varying between facilitative and evaluative interventions.)

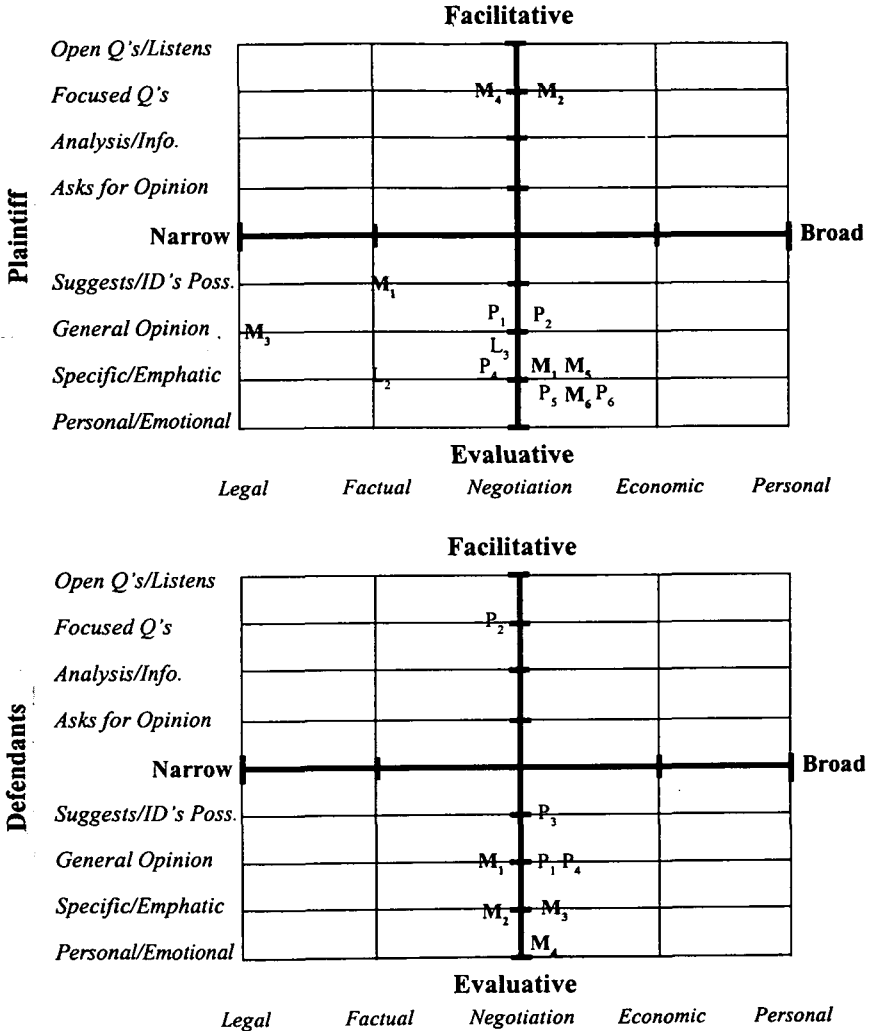
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36. Both neutrals joke about this phenomenon. Mediator A, for example, says that legal mediations are “like NBA basketball games - all the excitement happens in the last few minutes.”

37. Probably because mediator A has just brought back controversial evidence from the other side, he also comments on a specific legal issue, expressing doubt about defense counsel’s prediction that he will be able to keep the data from being admitted into evidence at trial.

Figure 5

### Final Meetings—Mediation A



Mediator A begins with the plaintiff team, presenting the previously-mentioned defense proposal for a cash payment of \$206,000 plus a one-year fuel contract. He stresses its advantages and also suggests that in light of the fact that “there is no concrete evidence of causation,” the liability issue “may be a very close question” at trial (see dual M<sub>1</sub>'s). The vice president reacts negatively to the contract aspect of the proposal. The mediator inquires about this (M<sub>2</sub>) and is told that the representative has bad feelings about “the whole history” of the case, as well as what he sees as the supplier’s “inferior product” (P<sub>2</sub>). Counsel adds that he thinks the defense “played games” with the test sample it produced during discovery.

The mediator then emphasizes the advantages of the offer, noting that it represents fifty percent of the plaintiff's "make whole" number ("If you say that's it is a 50-50 case . . . when you have the opportunity to settle a case that's . . . a horse race . . . at 50 cents on the dollar . . .") The mediator notes that they have made "tremendous progress" and stresses that "the case could settle." He later meets with the vice president alone, the litigator having gone to court,<sup>38</sup> and is told that based on a risk analysis, the plaintiff would be willing to settle in the middle \$200,000's. The mediator again inquires about including a fuel contract ( $M_4$ ), but is told by the plaintiff vice president that it is "not an option." At this point, he makes a mediator's proposal<sup>39</sup> to settle the case at \$220,000 in cash ( $M_5$ ) plus a confidentiality agreement, and the vice president agrees.

Mediator A then meets with the defendant's inside counsel (again the litigator has left). After explaining that the plaintiff will not agree to a renewed contract, he suggests that the case settle at slightly more than \$206,000 ( $M_1$ ); she counters that she was never at \$206,000 without a contract because of the value of a renewed relationship to her company. The mediator discusses the bargaining and then makes his \$220,000 proposal ( $M_2$ ). When the inside counsel hesitates, he rises from his chair and sketches the converging patterns of offers and demands on a flip chart, emphasizing that while the defense has come a long way in the negotiation, the plaintiff has come even farther ( $M_3$ ).<sup>40</sup> He also stresses how close his \$220,000 proposal is to \$206,000. Arguing that a difference of this magnitude is not enough to justify either side incurring the large cost of trying the case, he "strongly encourages" her to think about his proposal as one that makes sense for both sides ( $M_4$ ). She indicates that the mediator's proposal is "not unpalatable" but that she would like to talk with her father, the defendant's CEO. The mediator strongly encourages her to do so and the session ends.

The disputants in Sessions A and B both reach settlements, but on substantially different terms. While in A, both sides eventually accept a cash settlement at \$220,000 with confidentiality, in B the defendants had insisted from the beginning that any settlement would have to be based on a renewed supply contract, while the plaintiff had insisted that it would have to include money. The mediator worked within these structures, pushing each side to accept what the other required. Mediation B culminated in an agreement that the defendants would pay the plaintiff \$99,000 and the parties would enter into a five-year fuel supply contract at a

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38. In fact, both of the lawyers who played outside litigators in mediations A and B had to leave before the end of the session. The mediator was reluctant to proceed on a pro se basis, but did so for filming purposes and after inquiring of the party representatives whether they were comfortable going forward on this basis.

39. A mediator's proposal is one that is presented by the neutral to both sides under the ground rule that if both sides agree, there is a settlement, but that if either one refuses the proposal, it will not learn whether the other side accepted it. The primary advantage of the method is that a party can privately indicate its willingness to compromise without being concerned that its bargaining position will be compromised if there is no agreement. A disadvantage is that if the mediator expresses a view of the "right" solution and is unsuccessful, he or she may have difficulty advocating other options. For a further explanation of this technique, see GOLANN, *supra* note 20, at 57-59.

40. The plaintiff in mediation A began at \$1.535 million, dropped to \$750,000 and then to \$320,000 (just before the mediator made his proposal, the vice president had indicated privately that he would be willing to drop further, to about \$233,000). The defendants countered with offers of \$75,000, then \$100,000, and finally \$206,000 with a fuel contract.

discounted price.

The other iterations of the same case reached different results. The third session, Mediation C, was conducted by a mediator with a relatively narrow-facilitative style. The disputants in that session reached a settlement that included money plus a renewed business relationship. Again the turning point came when the defendants proposed adding a discounted-price fuel supply contract to what had until then been an entirely monetary negotiation. Mediation C settled at \$140,000 plus a five-year fuel contract. In a fourth iteration, Mediation D, the neutral pursued underlying interests with persistence, but also offered the most specifically evaluative comments about possible trial outcomes. The disputants in that session settled at \$140,000 in cash.

What accounts for these variations? Although there were differences in the stylistic tendencies of the neutrals, they do not correspond to the differences in the outcomes. Mediator A, for example, was perhaps the most facilitative and broadly oriented of the four, but he ultimately recommended a wholly distributive solution, while mediator C, despite a narrower orientation, obtained an integrative result. Again the causes appear to lie in the personalities and strategies of the persons playing the disputants. In all four sessions, defense representatives proposed a new business relationship; the key factor in whether an integrative deal emerged was the attitude of the plaintiff's vice president. In mediation A, the person playing this role was a young lawyer eager to show his toughness; he interpreted his instructions literally and ruled out any renewed relationship with the defendant supplier. In mediation C, by contrast, the plaintiff's vice president was played by an associate law dean who read the same instructions more flexibly, agreeing to entertain a proposal for a new contract. Their differing attitudes drove the outcome in each session.

The constraints of the experimental setting probably also affected how each mediator conducted the process. In a real case of this kind a private mediator would likely reserve a full day, but because of filming constraints each roleplayed session was limited to three and a half to four hours. Some neutrals later commented that the shortness of time discouraged them from probing as deeply as they would have wished into non-legal issues, an effect that has implications for ADR design.<sup>41</sup> In addition, several of the players seemed to feel a strong obligation to reach agreement. This may simply be a manifestation of the so-called "settlement effect,"<sup>42</sup> that is, the influence that a deadline can have on a negotiation. This said, however, the dynamics of the roleplayed sessions were remarkably similar to the feelings that the author has observed in actual mediations.

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41. This effect is also felt in a well-regarded court program in Cambridge, Massachusetts, known as the Middlesex Multi-Door Courthouse ("MMDC"). The MMDC is patterned on Professor Sander's proposal for a facility that would offer litigants multiple options for dispute resolution. See Sander, *supra* note 2, at 5-6. The MMDC, which employs a panel of trained and experienced mediators, focuses on civil claims exceeding \$25,000. Parties are typically asked to make a three to four hour commitment to mediation at a cost of \$350 to \$450 apiece. Nothing prevents the process from continuing after this initial commitment and often it does, but some MMDC panel members have acknowledged feeling the need to show progress within the presumptive time limit. This discourages them from pursuing the lengthy, sometimes wandering discussions that may be required to discover and flesh out an interest-based solution.

42. For an explanation of the "settlement effect," see GOLANN, *supra* note 20, at 154-62.

### III. CONCLUSIONS

The data from this project yield many intriguing possibilities and permit a few firm conclusions. Professional legal mediators do not in fact appear to maintain a consistent style throughout a case, but instead change their approach frequently within each meeting they hold with a party. Such mediators tend to begin in a broad-facilitative mode, but they are often forced by the advocates to focus on narrow legal and factual issues. Over the course of a mediation they inquire repeatedly about the participants' non-legal concerns, but often with little or no initial success.

The results do not support a conclusion that legal mediators are consistently either facilitative or evaluative, or that they readily evaluate litigation outcomes. The neutrals in our experiment did become increasingly evaluative over the course of the process, but their evaluative comments focused largely on the bargaining situation: What the other side was thinking and feeling, and which approach was most likely to move the process forward. As a mediation evolved, the mediator was likely to make comments or ask questions that suggested a view, or at least skepticism, about the strength of factual assertions or legal arguments made by the disputants, but almost all of these comments were framed in general terms. Only one mediator gave even a tentative opinion about who was likely to prevail in court, and no one placed a specific value on the case. The styles of the mediators over the course of the process did vary significantly, but the differences appeared to be driven much more by the personalities and approaches of the disputants than by tendencies of the neutrals.

The inquiry described in this article involved only four neutrals working with one dispute, and the results may at most describe the approaches of professional legal mediators in a particular type of case. To determine how other mediators, practicing in other settings and dealing with other kinds of disputes, approach their work requires additional investigation. At a minimum, however, the results of this inquiry suggest that the issue of mediator style is more complex and the styles themselves more variable than is often supposed. Understanding how and why legal mediators change their approaches and goals will help us to develop a more sophisticated theory of how mediation can support the negotiation process.

