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## Legislative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock

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# FLORIDA STATE UNIVERSITY LAW REVIEW



## FACILITATIVE VERSUS EVALUATIVE MEDIATOR ORIENTATIONS: PIERCING THE "GRID" LOCK

*Joseph B. Stulberg*

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# FACILITATIVE VERSUS EVALUATIVE MEDIATOR ORIENTATIONS: PIERCING THE “GRID” LOCK

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## I. INTRODUCTION

Professor Leonard Riskin introduced his “grid” of mediator orientations almost two years ago.<sup>1</sup> The vocabulary of “facilitative” and “evaluative” mediation derives from that article and his most recent, eloquent exposition.<sup>2</sup>

The distinction has become the focal point of constructive dialogue and controversy regarding the nature and scope of mediation. Riskin and others contend that the range of mediation practices and values, when properly described, encompasses a wide array of evaluative conduct by the mediator.<sup>3</sup> Some critics retort that “evaluative mediation” is an oxymoron and that “facilitative mediation” is a redundancy.<sup>4</sup> The decided benefit of the Riskin grid and its attendant analysis, then, is that it invites us to revisit traditional

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1. See Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 *ALTERNATIVES TO HIGH COST LITIG.* 111, 111 (1994).

2. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *HARV. NEGOTIATION L. REV.* 7, 23-24 (1996).

3. See *id.* at 44.

4. Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 *ALTERNATIVES TO HIGH COST LITIG.* 31, 31 (1996).

questions regarding the nature of the process, its users, and its practitioners, sharpened with increased insights regarding dispute resolution theory and the lessons of mediation's current widespread use.

If the debate were simply a terminological quibble about the use of a particular term, "mediation," then people would probably not be so agitated by the proffered distinction. However, considerably more is at stake. First, to embrace the grid as a descriptive account of mediation practice requires one to accept four implausible conclusions about mediation and mediation practice. Such a description requires us: (1) to deny our capacity to evaluate or criticize intervener performance as being capably or ineptly executed; (2) to accept a "marketplace driven" vision of the delivery of mediation services whose rationale is inconsistent with—and, hence, defeats—the very claim of customer preference it tries to advance; (3) to ignore how certain mediator orientations described by the grid, especially the evaluative approach, undermine a mediator's neutrality by potentially incorporating practices that skew or disadvantage parties on grounds of gender or race; and (4) to unnecessarily constrain the potential range of process use.

Second, although each of the criticisms noted above assumes, for argument purposes, that the definitions and descriptions contained in the grid are correct, I ultimately believe they are materially inaccurate. To accept the accuracy of the grid's portrayal of the key operative phrases "facilitative" and "evaluative" leads to an account of mediation that distorts the techniques, strategies, and theories that are distinctive of the mediator's role. The grid deprives, without theoretical justification, facilitative interveners from performing certain acts that are consistent with their theoretical conception of being a neutral intervener, while arrogating to evaluative interveners a philosophical framework that is inconsistent with their practitioner values. In short, I argue that any orientation that is "evaluative" as portrayed on the Riskin grid is conduct that is both conceptually different from, and operationally inconsistent with, the values and goals characteristically ascribed to the mediation process.

After reviewing in Part II the Riskin grid and the framework of the debate it has generated, I offer justification for my criticisms. In Part III, I identify and assess four implausible consequences about mediator practice that flow from the assumption that the grid's description of the broad range of behaviors it identifies as "mediator behaviors" is accurate.

In Part IV, however, I turn to examine directly the proffered distinction between facilitative and evaluative mediator orientations. I argue that the facilitative/evaluative dichotomy is a false one, but

not for reasons that will give comfort to those who have rushed to style themselves as either “evaluative” or “facilitative.”

## II. THE RISKIN GRID: AN OVERVIEW OF THE CONTROVERSY

Riskin attempts to clarify the confusion that he believes surrounds conversations about the nature of mediation. Specifically, Riskin suggests that gaining clarity on what the range of current mediation practices “is” will illuminate our answer to what mediation practices “ought” to be.<sup>5</sup> Hence, in his grid, he attempts to sort out the range of mediator orientations that have been observed in practice or reported across a broad spectrum of substantive contexts. He notes that two primary factors determine a mediator’s orientation: whether the mediator deploys “evaluative” or “facilitative” strategies and techniques to achieve the goal of helping parties address and resolve the problems at issue, and whether the mediator and parties focus the subject matter of the mediation narrowly or broadly.<sup>6</sup> With these two elements, the grid quickly takes shape.

Some commentators interpret Riskin’s grid to be both descriptive of current practices and, more disturbingly, to be prescriptive in nature.<sup>7</sup> Their concern, stated in the vernacular, is that “just because someone says that what she is doing is mediation does not make it mediation”; for Riskin to suggest, via the grid, that all orientations are indeed mediator behaviors fails to keep boundaries among otherwise sharply distinguishable dispute resolution processes. Riskin surely gives his critics language to justify such a reading. He writes:

I do not aim . . . to favor one type of mediation over another . . . . I try to include in my system most activities that are commonly called mediation and arguably fall within the broad definition of the term. I know that some mediators object to such inclusiveness, and fear that somehow it will legitimize activities that are inconsistent with the goals that they associate with mediation. Although I sympathize with this view, I also disagree with it. Usage determines meaning. It is too late for commentators or mediation organizations to tell practitioners who are widely recognized as mediators that they are not . . . .

. . . .  
The grid can help in selecting a mediator because it includes virtually all activities that are widely considered mediation.<sup>8</sup>

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5. Riskin, *supra* note 2, at 9.

6. See *id.*

7. See Videotape: Interview of Professor Robert A. Baruch Bush, Hofstra Law School (Professor Lela P. Love, Clinical Professor of Law, Cardozo Law School 1995) (on file with Professor Love).

8. Riskin, *supra* note 2, at 12-13, 40 (footnotes omitted).

While Riskin clearly notes that there are strengths and weaknesses for each of the respective orientations, he endorses each approach as being legitimate mediation practice<sup>9</sup> and affirmatively indicates that he is trying to “categorize the various approaches to mediation so that we can better understand and choose among them.”<sup>10</sup> He believes that the discussion should not be about whether a particular orientation is “really” mediation.<sup>11</sup> He would instead focus on clarifying for the potential user what orientation a mediator actually embraces, whether that orientation meets the preferences of the users, and whether the mediator’s training and experience reinforces and advances that orientation.<sup>12</sup> Some critics reject this approach.

Some argue that “evaluative mediation” (particularly, the “evaluative-narrow” orientation) is an oxymoron.<sup>13</sup> They maintain that evaluative activity by a mediator distorts the distinctive attributes of the mediation process and undermines the contribution a mediator makes when serving the disputing parties.<sup>14</sup> These critics urge that what is distinctive about mediation is its capacity to increase parties’ understanding of one another’s situation and, based upon such understandings, to develop concrete resolutions of their tangible concerns that are acceptable to all parties.<sup>15</sup> Concepts of empowerment, participation, and the freedom to develop or reject proposed solutions are prominently featured in the facilitative approach,<sup>16</sup> but are denigrated and undermined when the intervener becomes evaluative. Hence, critics argue that anyone engaging in activity that is in the northern, evaluative sphere of the grid is not doing “mediation.”<sup>17</sup>

That is not to say, the critics quickly note, that such persons might not be performing a valuable service or that the service might not be one that particular parties desire; critics insist, however, on urging that such conduct not be labeled “mediation.”<sup>18</sup> They urge us to clarify and to distinguish dispute resolution proceedings from one another—that is, to recognize the differences between the problem-

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9. See *id.* at 13.

10. *Id.*

11. See *id.* (preferring categorization over exclusion).

12. See *id.* at 40-41.

13. See Kovach & Love, *supra* note 4, at 31. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) (arguing that a problem-solving approach to mediation can lead to directives from the mediator that overshadow the goal of satisfying the parties’ needs).

14. See Kovach & Love, *supra* note 4, at 31.

15. See *id.*

16. See *id.*

17. See *id.*

18. See Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 948 (1997).

solving processes used in mediation and the evaluative processes used in adjudicatory processes—and the consequent skills and knowledge each intervener must bring to the respective enterprise.<sup>19</sup> Riskin's proposal to label such different activities with the same term does not, despite Riskin's assertion, make those activities the same (“[u]sage determines meaning”<sup>20</sup>); to characterize the critics' response in the Wittgensteinian terms that Riskin invites, the critics maintain that the processes described by the grid neither generate nor bear “family resemblances”<sup>21</sup> to one another. In short, they are not the “same” enterprise.

Another voice and perspective in this dialogue is frequently articulated by those very practitioners whose conduct scholarly commentators attempt to describe. The practitioner perspective suggests that the orientation of the effective mediator—with “effective” defined as someone who has an active, remunerative mediation practice—falls within several quadrants of the grid. “Sometimes I'm facilitative; sometimes I'm evaluative. Sometimes I focus narrowly; sometimes broadly. And, in fact, it could all happen within the same mediation!”<sup>22</sup> Riskin appears to allow for this type of response when he notes that some mediators can adopt whatever style the selecting parties or counsel announce at the outset that they want.<sup>23</sup> Additionally, Riskin notes that sometimes during the course of the mediation conference itself, a mediator might change her orientation based upon the circumstances.<sup>24</sup> While both of these dimensions seem to capture part of the spirit of the practitioner's insight, the practitioner still confronts the queasy feeling that something is missing in the explanation. I will argue below that the missing piece is the inability of the grid's analysis to assist the practitioner in knowing why she should move or is justified in moving from one orientation to another. The practitioner is left simply saying that “one knows what to do when the situation arises.” That response was inadequate in obscenity cases,<sup>25</sup> and it fails to provide the necessary criteria for determining appropriate mediator behavior as well.

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19. See *id.*

20. Riskin, *supra* note 2, at 13.

21. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* para. 67, at 32e (G.E.M. Anscombe trans., MacMillan Co. 3d ed. 1958) (1953).

22. This comment was made by several experienced civil trial mediators attending a master class for mediators conducted by the author and Lela P. Love in St. Augustine, Florida, from May 31 to June 2, 1995. For a statement of a similar position advocating flexibility, see ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION* 4 (1994).

23. See Riskin, *supra* note 2, at 40-41 (discussing criteria for selecting mediators).

24. See *id.* at 41 (asserting that flexible mediators who are able to change orientation as needed are available).

25. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (observing of obscenity that “I know it when I see it”).

So what is the debate on the grid about? All participants in the debate focus on what people do as mediators. The critics argue that every orientation carries with it a commitment to particular visions, values, and behaviors that the intervener is trying to promote, and that not all visions fit consistently in the category of mediation.<sup>26</sup> Further, they argue that the facilitative vision embraces one of party participation in problem-solving activities in a manner that features party choice.<sup>27</sup> Evaluative activity of any kind operates at cross-purposes with those goals.<sup>28</sup> To promote clarity of choice, then, they urge that the use of the term “mediation” (and its implementing program rules, training focus, etc.) should be reserved to the facilitative orientation, given that such values and approaches resonate most closely with the historical tradition and public policy associated with it.<sup>29</sup>

The response of Riskin and practitioners agrees with the general proposition that some orientations promote certain goals but not others.<sup>30</sup> However, Riskin maintains that: (1) the description of the broader range of mediator orientations portrays more accurately what is being done in the name of mediation; (2) clarity in mediator orientation facilitates informed party process choice; and (3) an individual mediator can operate consistently across various quadrants.<sup>31</sup> I believe that the practitioner is uneasy with the critics’ perspective because she believes that some of the evaluative behaviors described by the grid are ones she deploys and views as essential for effective mediation service. The facilitative approach, by contrast, seems oblivious to the energy, temperament, force, and edge that is often required for effective mediator interventions. I believe that the practitioner is equally uncomfortable with Riskin’s account because it seems to license behaviors that are both inconsistent with mediation being a consensual process and are arguably proscribed by state and professional codes of conduct under which they operate.<sup>32</sup> The debate at this level presumes that Riskin’s description of mediator orientations and strategies is accurate. In Part IV, I argue that this description is materially inaccurate; hence, the debate takes place on a foundation of quicksand. Before turning to that argument, however, I will analyze four unlikely conclusions about mediator practice that result from assuming the plausibility of Riskin’s description.

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26. See Kovach & Love, *supra* note 4, at 31.

27. See Love, *supra* note 18, at 939.

28. See Kovach & Love, *supra* note 4, at 32.

29. For a related discussion, see CHIEF JUDGE’S N.Y. STATE COURT ALTERNATIVE DISP. RESOL. PROJECT, COURT-REFERRED ADR IN N.Y. STATE 7 (1996).

30. See Riskin, *supra* note 2, at 41 (allowing that each approach has potential advantages and disadvantages).

31. See *id.* at 38-41.

32. See Love, *supra* note 18, at 940-41.



### III. CONSEQUENCES OF THE RISKIN GRID

If Riskin's overall account of mediator orientations and strategies is correct, four troublesome consequences result.

#### A. There Is No Criterion for Critiquing Mediator Performance (Whether Facilitative or Evaluative) Other than the Single Dimension of the Efficiency with Which Parties Reach (or Fail to Reach) the Stated Goal of the Mediator's Orientation

Consider the evaluative mediator. She is portrayed as someone who provides guidance to parties as to appropriate settlement terms in light of the legal, industry, or technology considerations with which the mediator is reasonably conversant.<sup>33</sup> In such circumstances, what counts as "good" or "bad" mediating? Presumably, the assessment turns completely on whether the mediator was successful in getting the parties to accept her assessment of the outcome and the settlement terms offered. However, that is simply to define good and bad in terms of efficiency in reaching a settlement. Whether the mediator listened to the parties or their counsel, captured their concerns, or crafted an agreement compatible with their values is irrelevant. The only test of success is whether the mediator convinced the parties to accept an outcome. To paraphrase H.L.A. Hart's wonderful example, mediating is simply the case of "the gunman writ large";<sup>34</sup> that is, if the mediator is articulate, adept with figures, or in any other manner dangerously persuasive, then, on the Riskin grid, such conduct is not subject to criticism if the parties reach agreement. We may observe that the mediator could have achieved the same results even if she had been less blustery, more subtle, less belligerent, or less authoritative, but such observations are simply comments about style. Nothing in principle is improper about the mediator bullying someone into an agreement as long as there is some operative notion that the parties "voluntarily" agreed to the outcome (for example, they had counsel, were not compelled under duress to accept the terms, etc.). There is no sense in which we can say of the mediator's performance, "You should not do that," where "should" appeals to some value other than whether (and how quickly) the parties accepted (the mediator's) proposed settlement terms.

Similar comments hold true for evaluating the performance of the facilitative mediator. The primary mission of the facilitative mediator,

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33. See Riskin, *supra* note 2, at 26.

34. H.L.A. HART, *THE CONCEPT OF LAW* 80 (1961).

according to Riskin, "is to clarify and to enhance communication between the parties in order to help them decide what to do."<sup>35</sup> If the mediator asked questions in carefully crafted and open-ended language, crystallized issues in neutral terms, thoughtfully designed a discussion agenda that enabled parties to reorient and enrich their understanding of one another, effectively but indirectly probed for possible options, or thoughtfully prompted parties to think about the consequences of not settling, and all of those efforts still failed to lead the parties to an enhanced understanding of their situation or improved communication (let alone a resolution), we cannot, according to the grid, say of that individual that she mediated well but was not successful. All we can say is that she was not effective in having the parties achieve the stated goal.

The general structure of this criticism, then, is that by letting a thousand flowers bloom in the name of mediation, the grid embraces whatever values a particular orientation espouses. Since all orientations are "mediation," no commanding, independent analytical framework for evaluating mediator performance emerges. By necessity, we are constrained to evaluating the conduct from the frame of reference of the quadrant within which one finds oneself. That evaluation reduces everything to a matter of efficiency, not propriety. Riskin, on pain of contradiction, must be wedded to this analytical consequence. For if he were to begin to offer some goals and values (for example, that mediation is consensual and participatory) as being distinctive of the mediation process, thus indicating standards against which one can evaluate mediator conduct, then the gate is opened to ask why those values, but not others, were included. Since the grid has no way in principle of foreclosing any values from being acceptable, it relinquishes all claims to establishing a noninstrumental foundation on which to critique mediator conduct.

#### B. The Marketplace Vision of the Delivery of Mediation Services Cannot Do What Its Advocates Propose

Some argue that the intervener should adopt the orientation that the parties desire.<sup>36</sup> If parties or their counsel want an evaluation, the mediator should provide it. If they want facilitation, the mediator should act accordingly. The mediator who can service the broadest client base is that individual who adapts her orientation to market demands.<sup>37</sup>

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35. Riskin, *supra* note 2, at 24.

36. See Riskin, *supra* note 2, at 39-41.

37. See *id.* at 40-41. This is not to say, of course, that the person who is most successful economically as a mediator or who services the largest clientele must be the most

However, this analysis collapses in an instructive way. Consider the situation in which Party A or her lawyer indicates that she prefers a mediator with an evaluative-narrow orientation, and Party B or her lawyer indicates that she prefers a mediator whose orientation is facilitative-broad. If one assumes that the parties are ordered to appear in mediation, how should the mediator proceed? The obvious answer is that the mediator must choose which orientation to adopt. That choice might be influenced by the mediator's convictions about the values of conversations and settlement discussions or her probabilistic assessments of which style will appeal to the largest segment of the financially paying mediation clients; the reasons, at this level, are irrelevant. The compelling insight is that the mediator must choose which orientation to adopt, not the parties. Thus, the market-demand analysis simply folds.

### C. Some Orientations May Incorporate Practices That Systematically Favor the Participation of One Party over Another

Assume that the grid accurately describes acceptable mediation practices. Do the orientations share a consistency of values in their process guidelines? I do not believe they do.

For example, recent communication literature suggests that conversational patterns among males and females are importantly different.<sup>38</sup> Some patterns appear to be characteristic of males—for example, argumentative comments designed to assert a certain dominance in the conversational relationship—whereas other styles that emphasize relational connections appear more congruent with female orientations.<sup>39</sup> Acknowledging that much of the analytical and empirical work in this area is quite tentative, I do believe that it is sufficiently rich to at least ask the following question: In a conference conducted pursuant to the evaluative-narrow orientation, would the structure of the conversation, with the advocates presenting the case, submitting facts, and proffering argumentative conclusions to the third-party intervener, operate to favor one gender over another? If any plausibility attaches to the claim that such an argumentative flavor might favor males over females, then certainly the mediator must revisit her claim that she is conducting a conversation that is without bias, for the game is skewed from the outset. From this admittedly

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adaptable, for it may be the case, as Riskin's analysis suggests, that most of the users of mediation services prefer only one type of orientation.

38. See generally DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990) (explaining gender influences on communication); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993) (proposing that women and men undergo different types of psychological development because of their differing perceptions of the world).

39. See TANNEN, *supra* note 38, at 149.

guarded perspective, the facilitative approach then appears to at least leave open the possibility of a more equitable conversational climate. In that important sense, the structure of the conversation can either support or undermine a viable notion of power balance and equality as being valued features of the problem-solving process.<sup>40</sup>

I recognize that the type of analysis, conversation, and conjecture noted immediately above is a tentative and awkward one at best. The hesitancy surfaces because the primary claims in communication theory seem so contestable and, perhaps more significantly, because we are trained to believe that one important method for “balancing inequalities” is to insist upon following a set of impartial procedures that prevent the most powerful, articulate, or domineering individual from overwhelming the other party, irrespective of the merits of the controversy.<sup>41</sup> Nevertheless, I believe that the grid’s analysis constructively compels us to pause in our skepticism of those matters. If the findings of communication theorists are in any way credible, then the decision to be “evaluative” rather than “facilitative” in one’s orientation has serious repercussions with respect to the fairness of the process and the justice of the ensuing results.

#### D. The Scope of Usefulness of the Mediation Process Is Unnecessarily Constrained

The image of mediation portrayed in the grid is governed by a conception of mediation as being an alternative to some other identifiable decisionmaking procedure. To play upon the well-worn phrase, the mediation captured by the grid is being conducted in the “shadow of a trial.”<sup>42</sup> If the parties do not resolve their differences in mediation, then some other dispute resolution forum—most likely an adjudicatory one (trial, arbitration, or administrative hearing)—will take place.

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40. For related comments and perspectives that analyze the difference in impact between a listener’s guiding a discussion and the speaker’s engaging in uninterrupted exposition, see the discussion in Freud’s autobiographical study of his change of methods from hypnosis to psychoanalysis in *THE FREUD READER* 13-19 (Peter Gay ed., 1989).

41. Indeed, this is the point of the criticism advanced by ADR critics. See Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1076 (1984) (arguing that inequality of resources between the parties can skew settlement proposals); see also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1550 (1991) (asserting that individuals who feel compelled to maintain a connection to another person are at a disadvantage in mediation). The argument I advance in the text suggests, contrary to these critics, that those very procedures, when used in an allegedly mediatory context, might serve to reinforce inequalities rather than balance them, thereby undermining the common aspiration of constructing a fair environment for dialogue.

42. The phrase, “bargaining in the shadow of the law,” gained widespread currency following the publication of Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

Mediation, however, has far more extensive uses than that—and when one envisions its applications, some mediator orientations are immediately deemed irrelevant. An evaluative-narrow orientation for a peer mediator in a high school converts the peer into a school guidance counselor. When the Department of Justice dispatches a team of mediators to service racial conflicts or the Federal Mediation and Conciliation Service assigns a mediator to help management and union bargaining teams resolve a private-sector collective-bargaining impasse, the last thing parties will embrace is someone who has come to tell them how to live their lives. In short, parties operating in important contexts in which mediation is used have no tolerance for the evaluative orientation. The response, “Well, for certain types of disputes, certain orientations would not be effective or well-suited,” is not sufficient. The mismatch in orientation stems from the fact that dissimilar values and goals make the intervention something different. That insight leads to the more fundamental flaw generated by the grid’s analysis, namely that the proffered distinction between evaluative and facilitative is not persuasive.

#### IV. THE EVALUATIVE/FACILITATIVE DICHOTOMY: A FALSE VISION

What does it mean to be evaluative or facilitative? Riskin’s initial account asserts:

The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement—based on law, industry practice or technology—and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.<sup>43</sup>

From these orientations, a mediator utilizes a range of strategies (plans) and techniques (particular moves or behaviors) to effectuate those strategies.<sup>44</sup> Again, the critical claims are made in Riskin’s descriptions of these choices:

A principal strategy of the evaluative-narrow approach is to help the parties understand the strengths and weaknesses of their positions and the likely outcome of litigation or whatever other process

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43. Riskin, *supra* note 2, at 24 (emphasis added) (footnote omitted).

44. See *id.* at 26.

they will use if they do not reach a resolution in mediation. But the evaluative-narrow mediator stresses her own education at least as much as that of the parties. Before the mediation starts, the evaluative-narrow mediator will study relevant documents, such as the pleadings, depositions, reports, and mediation briefs. At the outset of the mediation, such a mediator typically will ask the parties to present their cases, which normally means arguing their positions, in a joint session. Subsequently, most mediation activities take place in private caucuses in which the mediator will gather additional information and deploy evaluative techniques . . . .<sup>45</sup>

By contrast, Riskin characterizes the approach of the facilitative mediator in the following way:

The facilitative mediator believes it is inappropriate for the mediator to give his opinion, for at least two reasons. First, such opinions might impair the appearance of impartiality and thereby interfere with the mediator's ability to function. Second, the mediator might not know enough—about the details of the case or the relevant law, practices or technology—to give an informed opinion.<sup>46</sup>

The facilitative-narrow mediator . . . does not use his own assessments, predictions, or proposals. Nor does he apply pressure. He is less likely than the evaluative-narrow mediator to request or to study relevant documents.<sup>47</sup>

This picture of mediator orientations, however, is significantly distorted and supports mediator stereotypes that are not helpful. It ascribes attributes to facilitative mediators that render their service ineffective from the onset. As I argue below, this picture incorporates into the evaluative mediator's orientation a range of behaviors that lead quickly to transforming the mediator's role into an adjudicatory one.

#### A. The Substantive Knowledge Possessed by the Mediator

The grid and accompanying descriptions portray the evaluative mediator as one who is knowledgeable about the law, industry practices, or technology shaping the context of the dispute. By contrast, the facilitative mediator “might not know enough—about . . . the relevant law, practices or technology—to give an informed opinion.”<sup>48</sup> The picture created is that the facilitative mediator does not have to know about these matters to perform the mediator's role as she envisions it.<sup>49</sup> However, this is false for two reasons.

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45. *Id.* at 26-27 (emphasis added) (footnotes omitted).

46. Riskin, *supra* note 1, at 111 (emphasis added).

47. Riskin, *supra* note 2, at 28 (emphasis added) (footnote omitted).

48. Riskin, *supra* note 1, at 111.

49. See *id.* at 113. Riskin suggests that because the facilitative-broad mediator “emphasizes the participants' role in defining the problems and in developing and evaluating

First, knowing the relevant law, industry practice, or technology does not per se make one an “evaluative” mediator, for the issue is how the mediator uses that knowledge during the conversation. Surely a person unconditionally committed to assisting parties reach a resolution that they find acceptable can be as knowledgeable about relevant matters as the “evaluative” mediator, but yet refrain from predicting probable litigation outcomes and the like when trying to help parties reach agreement.

Second, according to the description, the facilitative mediator is one who “ask[s] questions . . . to help the participants understand . . . the strengths and weaknesses of each side’s case and the likely consequences of non-settlement, as well as the costs of litigation (including expense, delay, and inconvenience).”<sup>50</sup> Other techniques used include helping the parties develop their own proposals, helping the parties exchange proposals, and helping the parties evaluate proposals.<sup>51</sup> However, the image created by the first distinction suggests that all of these latter techniques are employed by the facilitative mediator in a knowledge vacuum—that is, that she asks questions or assesses proposed settlement offers without having any grounding in the relevant law, legal processes (trial tactics, etc.), industry practices, or technology. In short, the image of the facilitative mediator is that she is, by design, a “know-nothing” intervener who focuses exclusively on facilitating conversations between the contestants. This image is misleading because it suggests that one can formulate constructive or probing questions that help create movement towards settlement without the need to be informed about the relevant substantive and practice areas of the dispute. However, that proposition is false as a matter of epistemology. In any context—for example, persons mediating a case, college students participating in a classroom discussion, or friends engaging in a dialogue about matters relating to parenting practices—those persons who are most able to ask thoughtful, insightful questions about the topic under review are precisely those who are the most informed about the events, practices, and human behaviors that are the subject matter of conversation. The unprepared participant has the least to contribute to the discussion. If the grid’s account of the facilitative mediator is correct, however, then the mediator who is labeled “facilitative” is straddled with a knowledge-vacuum that makes it impossible for her to execute her role, even as the grid defines it for her. Furthermore, if the

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proposals, the facilitative-broad mediator does not need to fully understand the legal posture of the case.” *Id.*

50. Riskin, *supra* note 2, at 28 (emphasis added); see also *id.* at 51 n.68 (providing a more extensive, illustrative list of the types of questions that the facilitative-narrow mediator might ask).

51. See *id.* at 29.

facilitative mediator, conceptually speaking, is neither well-informed about the context within which the parties' concerns collide nor capable of asking questions that can probe, challenge, or illuminate the possibilities for movement, then the mediator-practitioner's skepticism about whether any party or her lawyer would ever hire such an individual is certainly well-grounded. Why should the "market" players spend time and money utilizing someone whose ability to facilitate problem-solving is severely handicapped from the outset? No reason exists to do so, and a person wanting to earn a living as a mediator would be committing economic suicide by presenting herself in this posture.

Intuitively, however, the facilitative mediator has a much better case to make for herself than the grid's analysis licenses. Although the case elaborated below speaks to a more prominent role in her helping parties to constructively confront the urgency and concreteness of their dispute, the facilitative mediator cannot make that case if strapped by the qualities attributed to her by the grid.

#### B. The Mediator's Preparation for and Conduct of the Mediation Conference

The grid portrays the evaluative mediator as someone who will study relevant documents, such as the pleadings, depositions, reports, and mediation briefs, before the first joint session and then begin the mediation by asking the parties to present their cases, "which normally means arguing their positions, in a joint session."<sup>52</sup> Again, the implied contrast is that the facilitative mediator, minimally, refrains from all pre-mediation review of relevant documents or orientation to the substantive controversy. The stronger implication is that the facilitative mediator would not look at these documents at any time during her service because they are not relevant to performing her role. As to the manner in which the mediation conference is conducted, the evaluative mediator begins by having the parties present their respective cases. Although Riskin and others do not state how the facilitative mediator would commence the conversation, the implication is that she would begin differently.

Again, it is important to assess the picture of the facilitative mediator that emerges from these descriptions and comparisons. The picture is that of a person who does not soil her hands by immersing herself in the documents that have helped shape the case; she does not allow parties or their representatives to present their concerns in a manner that resembles, at least initially, the format of an adversarial hearing or to allow for exchanges that exhibit contentious behavior

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52. *Id.* at 26-27.



among the parties. This picture of the ground rules that a facilitative mediator might establish reinforces the perception of her being a nice but ineffective person (a "Mr. Rogers," as one person derogatorily puts it<sup>53</sup>); she is ineffective because the ground rules undermine her capacity to influence party conversation. However, this image is also significantly misleading. I consider each element in turn.

### 1. Mediator Preparation

An important question for mediator practice is whether a mediator, prior to convening the first joint session, should review documents, memoranda, or other items (for example, a mediation brief) that set forth the background and focus of the controversy. Some might argue for the importance of having the mediator prepare herself for the conversation with as much information as is known and made available to her by each of the parties to the controversy. Indeed, parties can save time and money by having the mediator study such documents prior to the first joint session. A competing perspective is that the mediator's perception of the dispute is best developed by having all parties to the controversy give live presentations to the mediator while in one another's presence. In that way, the mediator will not impair her neutrality by prematurely developing beliefs or attitudes about what issues are in play or by artificially restricting the range of possible settlement options that might otherwise emerge from her pre-hearing review and assessment of written documents. I believe that mediator practices can legitimately vary on this matter across the dispute arena, so that what might be appropriate and reasonable in one context (for example, litigation-based cases in which formal documents and arguments are routinely prepared) is inapposite in another (for example, explosive community disputes).

Although the matter of the appropriate timing for reviewing such documents may arguably differ among contexts, it does not follow that a facilitative mediator should not review or analyze such documents at some point in time. Moreover, what is misleading about the image of the facilitative mediator created by the grid's descriptions is the suggestion that the facilitative orientation does not require the intervener to conduct informed, careful study of documents or to perform studies that may be relevant to an increased understanding of the operating environments of the parties. This posture is simply implausible. Consider the person serving as a mediator in discussions between a school district representative and a parent who is contesting the adequacy of the school's proffered individualized

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53. RICHARD H. RALSTON, DEFENSE RESEARCH INST., INC., ADR FOR THE DEFENSE SEMINAR: "EFFECTIVE ADVOCACY AND MEDIATION" 3 (1994).

education plan for the child who qualifies for such attention under federal and state disabilities laws. Should the mediator ignore the range of options licensed by the statutory provisions? Should the mediator dismiss as irrelevant any and all evidence as to how the school district has addressed such matters in other cases? Unless one wants to argue the value of communicating such data in oral form rather than in writing, it is difficult to imagine how an intervenor could be helpful to the parties by refusing to bring such information into the discussion. The image that one can “wing it” or focus primarily on process unjustifiably denigrates the skills required to help parties reach a resolution that they find acceptable.

## 2. Mediator Conduct

Conducting a constructive conversation is challenging under the best of circumstances. Conducting it when people are experiencing stress, apprehension, or tension, as is frequently the case with parties in a dispute, is even more challenging. How should a mediator proceed? The grid’s picture of the evaluative mediator is that of one who orchestrates the conversation, at least initially, in a way that resembles what we know to be a courtroom or adversary proceeding: parties state positions, counter the opposite’s argument, and otherwise behave in a distributive fashion.<sup>54</sup> The facilitative mediator, by contrast, tries to conduct the dialogue so that parties focus on being nonadversarial, look for win-win solutions, and otherwise engage in collaborative behaviors.

Again, mediator-practitioners, particularly those working with parties and counsel in matters of complex civil litigation, are the first to state vehemently that participants shape and approach the mediation session with a distributive mind-set; none of the parties to the mediation, or their counsel, have agreed in advance to “leave such attitudes at the door.” Surely this observation is plausible. In short, practitioners find the rhetoric of facilitative mediators implausible or naïve because it assumes, as a condition for participation, the very cooperation that most mediators perceive as being part of their job to try to create.

Most people analyze and verbalize their actions over a broad range of their interpersonal conduct through distributive language and lenses. That does not mean that they are correct in doing so, any more than does the observation that most Americans have too much fat in their normal diet lead to an endorsement of such eating habits as healthy or wise. Nor does it lock the mediator into accepting such

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54. For the original, and I believe the most instructive, explanation of the distributive/integrative distinction in bargaining theory, see RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* 11-183 (2d ed. 1991).

behaviors as the only eligible framework for dialogue. All it recognizes is that when people argue about or discuss things that matter to them, some aspects of those discussions are predictably contentious. If persons are justifiably outraged by the manner in which they have been treated, one should not expect them to describe such matters in a calm, sanitized, or stylized manner, nor to ignore their attitudes of righteous indignation in favor of feelings of collaboration and accommodation. Yet if the grid's image of the "facilitative mediator" is that of someone who requires disputing parties to behave collaboratively, then the mediator's imposition of those process or "orientation" values suggests an immediate disconnection between the process orientation and the reality with which parties experience their conflict. Again, if the market is the driving force for mediator selection, then disputing parties and their counsel will find the facilitative mediator clueless about critical features of their situations.

### 3. Implications of Preparation and Practice for the Grid

What is the consequence of the above analysis of mediator preparation and conduct? Relegating the "facilitative" mediator to such an implausibly ineffective orientation is disturbing. Why does it sting? The answer seems apparent and speaks to what the grid's critics have highlighted. The central values of the mediation process appear least congruent with the notion of the "evaluative" mediator as portrayed by the grid. In its rich, widespread history, mediation is not a process designed for having an expert apply some external criteria to assess the strengths and weaknesses of the parties' cases. Mediation is neither a process designed to marshal evidence leading to an advisory opinion by a third party, nor a rehearsal trial in front of judge or jury. Rather, mediation is a dialogue process designed to capture the parties' insights, imagination, and ideas that help them to participate in identifying and shaping their preferred outcomes. It is a process employed with an acute sensitivity, by all participants, to the context of the initial and continuing power relationship among the parties; it is a process in which multiple sources of criteria and reasons are tapped to help forge possibilities for progress. As Lon Fuller so eloquently put it, mediation is a process in which the central quality is the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."<sup>55</sup> Concepts of participation and empowerment are not idle pleasantries to be cited in Law Day speeches, but are central principles of a demo-

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55. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

cratic society and critical features of consensual decisionmaking processes, of which mediation is traditionally thought to be a prime example.<sup>56</sup> Aphorisms contain kernels of truth. Yitzhak Rabin's now-famous "You don't make peace with your friends, you make peace with your enemies"<sup>57</sup> observation signals an important difference about the central values of bargaining and settlement that distinguish it from an alternative process of victors, à la the Versailles Treaty, "imposing" peace terms on their enemy. Bargaining—negotiating—and mediated negotiations require conversation, dialogue, and interaction with perceived opponents. The processes require extending a fundamental respect to one's counterpart in order to create the possibility for striking a deal. Evaluative mediation distorts those values and behaviors and effectively denies their possibilities.

Nevertheless, the image of the facilitative mediator created by the grid gives one little pause for optimism. I believe that it is not the orientation that is wrong, but the picture or stereotype of what the facilitative mediator does or can do that is the source of mischief.

One way to frame the fundamental question is: Given that the overarching goals of the mediation process are to engage the disputing parties in a constructive conversation that enhances their understanding of the situation and supports their efforts to find acceptable settlement terms, is it inconsistent to attribute to a mediator such attributes as being assertive, firm, forceful, imaginative, creative, active, or focused? Are mediator characteristics of being knowledgeable about the matters in dispute or informed about the nature of the disputants incompatible with the mediator values of promoting effective party participation and the integrity of their right to exercise veto power over the outcome? I think most assuredly not. What is misleading about the grid's descriptions is that they require anyone possessing and displaying such characteristics to be placed in the grid's "evaluative" sphere and thereby behave and advance goals that are inconsistent with the central premises of mediation noted above.

The image of the placid intervener—that is, a mediator embracing the facilitative orientation—who can be helpful to the parties reaching realistic agreements about real problems but who, in the process, never makes a suggestion or offers an idea that might be responsive to party concerns, does not aggressively prod one or more parties to reconsider its proposed position, does not actively restructure the bargaining agenda based upon party presentations, or does

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56. For a related discussion of the relationship between negotiation processes and democratic theory, see Joseph B. Stulberg, *Cultural Diversity and Democratic Institutions: What Role for Negotiations?*, 10 *MEDIATION Q.* 249, 249 (1993).

57. Mr. Arafat's Entourage, *WASH. TIMES*, Oct. 2, 1996, at A20.

not challenge party proposals (perhaps in caucus) as unworkable or misleading based upon one's knowledge of the field and practices, is stunningly implausible. This image is unrealistic because it suggests that the intervener can be helpful to the parties without her having a perceptible impact or influence on the dynamics of party interaction. However, a mediator does not simply parrot the parties' statements; she is not a bump on a log in terms of suggesting ideas or possibilities for resolution. A mediator does influence dialogue and interaction—which is why mediation can be a practical contribution in resolving disputes. It is also true, however, that an intervener can manage that influence in a way that does not undermine party participation and their efforts at imaginative problem solving.

A related reason for rejecting the grid's image of the facilitative mediator is that the grid's account rests upon a constrained vision of how people develop ideas for settlement or otherwise engage in problem-solving dialogue. The grid's picture of the facilitative mediator assumes that settlement options or other constructive ideas come exclusively from dialogue between participants. The intervener cannot offer any suggestions or insights that might spur parties to think of other ideas or acceptable modifications of the mediator's ideas. The grid rules out the possibility that a mediator, without being evaluative, could suggest an idea for settlement that the parties find attractive or acceptable and, as a result, freely embrace it. Ideas and options, however, can have many parents. The grid imposes a pedigree test on ideas: if it comes from the parties, the mediator remains facilitative; if the mediator is the source of an idea, the mediator is evaluative. However, that means that persons are autonomous agents only if they entertain ideas for which they are the source. That vision renders incoherent the notion of personal autonomy and the role of voluntary decisionmaking that lies at the heart of the mediation enterprise.

## V. CONCLUSION

I believe that the mediation practitioners who were uncomfortably puzzled about their observation that they moved among the quadrants of the grid expressed that discomfort because they felt, presumed, and acted on the conviction that it was not inconsistent with party choice for them to be knowledgeable, resourceful, and active interveners in mediation dialogues. They reflectively acknowledge that in order for them to generate movement among parties, they routinely deploy such techniques as having the parties evaluate the strengths and weaknesses of their cases as well as those of their counterparts, assess the costs of not reaching resolution, forecast the impact of the dispute on the parties' relationship, and expose various

party interests that are advanced or undermined by the bargaining agenda and proffered solutions. They do that not to tell the parties how the mediator believes the controversy ought to be resolved, but rather as techniques for reorienting party perspectives. I believe there is nothing insidious about mediators doing this. Reorienting party perspectives is constructive. It is helpful. Moreover, it can be done in a manner that is consistent with the governing aspirations of having parties engage in the settlement-building process. A mediator can do this as a part of consensual decisionmaking processes.

The distinction between facilitative and evaluative behaviors is important to maintain for many reasons. One relates to appropriate expectations and behavior by advocates who represent parties in mediation conferences. Advocates who prepare for and participate in a “mediation conference” that is “evaluative” will do so as if they are preparing for a trial. However, the most experienced advocates who are also knowledgeable about the qualities of the mediation process recognize what a mistake that is. They encourage advocates to prepare for mediation as though it were a “trial-plus” procedure—to prepare for mediation as one would prepare for trial—but, in addition, to prepare to frame the dispute and orient clients so that everyone in the discussion is in a position to capitalize on the unique opportunities for problem-solving that the mediation forum offers.<sup>58</sup> Nevertheless, such advice is irrelevant if the dominant mediator orientation is evaluative.

Finally, even Riskin has a vision of the ideal mediator for any individual case. He writes:

The grid can help us envision an ideal mediator for any individual case. She would be sufficiently flexible to employ the most appropriate orientation, strategies, and techniques as the participants’ needs present themselves. This would require the ability (1) to both evaluate and facilitate, and (2) to see things both narrowly and broadly. She would have subject-matter expertise and she would be impartial.<sup>59</sup>

However, a significant drawback to even this ideal mediator orientation is that she has no home base on the grid itself. This ideal mediator emphatically is not someone who is simply all things to all people. The key insight above—and the grid’s ultimate Achilles’ heel—is set forth in the second sentence above: “She would be sufficiently flexible to employ the most appropriate orientation, strategies, and techniques as the participants’ needs present themselves.”<sup>60</sup> The par-

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58. See LAWRENCE M. WATSON, JR., *THE FLA. BAR, ALTERNATIVE DISPUTE RESOLUTION IN FLORIDA: EFFECTIVE LEGAL REPRESENTATION IN MEDIATION* 2-14 to -16 (1995).

59. Riskin, *supra* note 2, at 40-41 (footnote omitted).

60. *Id.* (emphasis added) (footnote omitted).

ties may exhibit their needs but not articulate them; the ideal mediator is authorized to capitalize on that distinction on her own initiative. So what Riskin allows his ideal mediator to do—namely, to act in certain ways even if one or more parties prefers otherwise—he denies to mediators who commit themselves to starting or operating only within one of the grid's quadrants. Justifying a governing conception of mediation is importantly different from simply asserting it. The grid embraces all "assertions" made in the name of mediation, but that is not sufficient. As set out above, I believe that only the mediator who adopts a suitably re-described facilitative orientation is in a position to ground an approach to problem-solving that anchors the behavior and principles of her performance in a manner consistent with consensual decisionmaking. The stability of that conception enables the parties, ultimately, to decide whether consensual decisionmaking is what they want. In that sense, the parties' choice to use or not use a mediator is informed by the integrity of the mediator's defined orientation. That vision of consensual decisionmaking, and the facilitative role required to support it, should inform the meaning of the term "mediation" in whatever statute, rule, or program it appears, and should constitute the standards by which we select and evaluate mediator performance. No persuasive reason exists to accept anything less.