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Mediation Quandaries

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MEDIATION QUANDARIES*

LEONARD L. RISKIN**

Transformation, there's a goal
that everyone should seek¹
But some poor souls, so I've been told,
often feel too meek

Bush and Folger say Empower!
I think that would be keen
But what of those, so awfully dour,
who might get downright mean?

Try recognition! they implore
'Tis better to give than receive it
But many whom we can't ignore,
simply can't perceive it.

So where to go from here? I think
the answer, it is hid
I hope somehow we'll find it
looking at a grid.²

But Lela and Kim take a view that's dim
and make a simple point:
Evaluation has to go,
or the grid they won't anoint.³

Kovach and Love say, Stars above,
I'm using an oxymoron!
Evaluative mediation?
It's nothing to bet the store on.⁴

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1. See ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1995).

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

3. See Lela Love and Kim Kovach, "Evaluative" Mediation Is an Oxymoron, 14 *ALTERNATIVES TO HIGH COST LITIG.* 31 (1996); Lela Love, The Top Ten Reasons Why Mediators Should Not Evaluate, 24 *FLA. ST. U. L. REV.* 937 (1997). But see Dwight Golann, Benefits and Dangers of Mediation Evaluation, 15 *ALTERNATIVES TO HIGH COST LITIG.* 35 (1997); James H. Stark, The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Questions from an Evaluative Lawyer-Mediator, 38 *S. TEX. L. REV.* (forthcoming 1997).

4. See generally Love & Kovach, *supra* note 3.

Jim Alfini says it seems unseemly

And then there's Josh, who says By gosh
 we must reject the grid.
 It's founded on faulty assumptions!
 At least put on a lid.⁵

Good mediators just don't do it
 Mediation's for hashing, not trashing or bashing
 If you give them the answer, you blew it.^a
 But see Bob Moberly, who writes quite soberly
 about the Florida scene.^b
 His viewpoint is reasonable (for an academic, is that treasonable?):
 Evaluation, sometimes, is clean.
 And see John Bickerman, who says it quicker than
 Anyone else who's written
 Give the parties a choice, he urges
 With the market, it appears, he's smitten.^c
 Marjorie Aaron, crisp as a clarion,
 Tells when and how to do it
 If you do it last, with strategic tact
 it will likely be a helpful act.^d
 Evaluative mediation is practicing law
 writes Carrie Menkel-Meadow^e
 And though the idea may harbor a flaw^f
 she seems quite unwilling to let go.^g
 For ethical problems so serious
 they've started a national commission^h
 These dilemmas just make me delirious
 For some clarification I'm wishin'.

a. See James J. Alfini, *Should Lawyer-Mediators Be Prohibited from Providing Legal Advice or Evaluations?*, *DISP. RESOL. MAG.*, Spring 1994, at 8; James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 *FLA. ST. U. L. REV.* 47 (1991).

b. See Robert Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 *S. TEX. L. REV.* (forthcoming 1997); Robert Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 *FLA. ST. U. L. REV.* 701 (1994).

c. See John Bickerman, *Evaluative Mediator Responds*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 70 (1996).

d. See Marjorie Corman Aaron, *A Mediator's Soliloquy*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 63 (1996); Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice*, *NEGOTIATION J.*, Apr. 1995, at 123.

e. See Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 57 (1996).

f. See Robert Benjamin, *What Is Mediation Anyway? Ethical Issues, Policy Issues and the Future of the Profession*, *NIDR NEWS*, July/Aug. 1996, at 9; Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 74 (1996).

g. See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers for the Adversary Conception of Lawyer's Responsibilities*, 38 *S. TEX. L. REV.* (forthcoming 1997).

h. In 1996, the CPR Institute for Dispute Resolution and the Georgetown University Law Center founded a Commission on Ethics and Standards in Dispute Resolution, which Professor Menkel-Meadow chairs. See *id.*

5. See Joseph B. Stulberg, *Evaluative Versus Facilitative Mediator Orientations: Piercing the "Grid" Lock*, 24 *FLA. ST. U. L. REV.* 985 (1997).

The grid describes what is,⁶ I think
while they describe what should be⁷
And here is the connecting link:
the dream of all that could be.

6. Actually, it is a lot more complicated than that, but this is a poem.

7. See supra note 6.