Informed Decision-making in Judicial Mediation and the Assessment of Litigation Risk

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I. INTRODUCTION

Mediation at any stage of a litigation process can help the parties escape the limiting and adversarial frame of litigation and explore potential areas of common ground. To accomplish this, a mediator may seek to keep the parties focused on their interests for as long as possible, pursuing the optimal benefits of lateral thinking: empathetic connection and a broadening of thought.[1] Sometimes, however, shared interests are simply not recognized by the parties. Litigating parties are bound in a process which reinforces anger and distrust, triggering perceptions that are ingrained in basic human responses to conflict. "Under such circumstances, all cognitions act to reinforce biases that both favor one's position and demonize the opponent."[2] Daniel Kahneman and other behavioral psychologists have verified that the judgment of litigants — and even of lawyers — are affected by overconfidence, easily anchored by values or positions in the pleadings and swayed by the sunk-cost fallacy.[3] In this way, cognitive biases operate quietly to encourage and prolong litigation:

> This psychological pathology will deepen as the litigation is prolonged in the name of obtaining more information. The more information a party has, the more accurate its syllogistic assessment of a court outcome will be or so the theory goes. Indeed, many parties actually delay their settlement efforts until a trial is near because that will be the point of maximum information. Unfortunately, it will also be the point of maximum cognitive contamination because of the acrimonious impact of

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[1] Lateral thinking is viewed as an essential ingredient in innovation and problem-solving. *See* EDWARD DE BONO, LATERAL THINKING: BE MORE CREATIVE AND PRODUCTIVE (1990); *and* Martha Emily Simmons, Increasing Innovation in Legal Process: The Contribution of Collaborative Law 207 (Mar. 25, 2015) (unpublished LLM Thesis, Osgoode Hall Law School of York University), http://digitalcommons.osgoode.yorku.ca/phd/11.

[2] GEORGE ADAMS, MEDIATING JUSTICE: LEGAL DISPUTE NEGOTIATIONS 148 (2003).

[3] DANIEL KAHNEMAN, THINKING FAST AND SLOW 253 (2011). *See also* JUDGEMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman,et al. eds., 1982); RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS 125 (2010); Derek Koehler et al., *The Calibration of Expert Judgment: Heuristics and Biases Beyond the Laboratory*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGEMENT 686 (Thomas Gilovich et al. eds., 2002); *and* Daniel Kahnman & Amos Tversky, *Choices, Values, and Frames in* JUDGEMENT AND DECISION-MAKING: AN INTERDISCIPLINARY READER 147 (Terry Connolly et al. eds., 2d ed. 2000).

> pre-trial procedures and, thus, the point of minimum problem-solving capacity.[4]

One of the most effective responses to biases, which polarize parties early in the process, is to reframe the discussion from positional, rights-based comparisons, to focus on their needs and (where they exist) deeper psychological or relationship interests.[5] Even then, the parties may still be hampered by unmitigated and incorrect instincts about what would happen if the matter proceeded to trial, and what it would take to get there (their "best alternative to a negotiated agreement" [BATNA]).[6] This can cloud the comparison of negotiated offers and projected court-based outcomes, and ultimately prevent or delay the construction of good, sustainable resolutions.

While much has been written about how mediators can guide parties through impasse, the popular literature is less attentive to the concept and method of litigation risk analysis and—in particular—how it might fit inside an interest-based mediation process. This can be a thorny issue when the mediation takes the form of a judicial settlement conference. In this arena, mediation approaches tend to vary significantly, affected by regional and jurisdictional differences, the demands of different types of legal cases, and the preferences of individual courts and judges. Opinions, here, can still be polarized about whether the mediating judge should ever adopt a purely evaluative role.[7] At the same time, lawyers often appear at judicial mediation

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[4] Adams, *supra* note 2, at 149. *See also* Andrew J. Wistirch & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL L. REV. 101, 104 (2013); *and* Kiser, *supra* note 3, at 25. "[T]he tendency to keep options open, like the tendency to seek additional information, can sometimes lead to nonoptimal decisions and can delay the process of psychologically adapting to a decision." JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING 233 (2012).

[5] Much can be said about the benefits of shifting to 'the right side of the brain' and engaging instincts for cooperation and empathy: Daniel Weitz, *The Brains Behind Mediation: Reflections on Neuroscience, Conflict Resolution and Decision-Making*, 12 CARDOZO J. OF CONFLICT RESOL. 471, 487 (2011).

[6] ROGER FISHER, ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 99 (3rd ed. 2011). For a discussion of the relationship between courts and law, and negotiation, see Heather Heavin & Michaela Keet, *Skating to Where the Puck Will Be: Exploring Settlement Counsel and Risk Analysis in the Negotiation of Business Disputes*, 76 SASK. L. REV. 191, 193 (2013). *See also* Adams, *supra* note 2, at 13. *and* ROBERT H. MNOOKIN et al., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 99 (2000).

[7] For general discussion about judicial mediation, see THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin & Archie Zariski eds., 2013); Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351, 352 (2006); Steven J. Miller,

expecting an evaluation of the case, and judges have relevant experience to share, when considering what may happen if the file continues on the litigation path. The result: a conceptual dilemma, at a time when judicial settlement conferencing is on the rise.

This article offers an alternative view, reframing the focus from the judge's or mediator's style, to the litigant's need to make informed decisions in any process. A litigation risk assessment can be adaptive, responsive to the environment created in judicial mediation. Within various mediation styles—even those which veer away from opinion-giving and evaluation—the judicial mediator can still help the parties develop realistic projections and measurements for comparison. Framing the conversation around a litigation risk assessment allows judicial mediators to reality-test while working to preserve judicial impartiality and party self-determination. The following discussion presents a practical framework for managing the risk assessment dialogue, and a spectrum of degrees of intervention, which allows judges and mediators to tailor the dialogue to fit their own mediation processes and styles.

II. THE BASICS OF LITIGATION RISK ASSESSMENT

Unfortunately, clients often do not receive the benefit of a full discussion about what litigation is likely to bring, or how those projections may operate as a touchstone for settlement dialogue.[8] This is true even when good litigation advocates are involved. Lawyers tend to use informal, *gestalt* approaches for assessing and communicating litigation risk, using qualitative terms (such as "a good chance" of succeeding)[9] and stopping short of quantifying the claim.[10]

Judicial Mediation: Two Judges' Philosophies, 38 LITIGATION 31, 31 (2012); Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 272 (2011); George W. Adams & Naomi L. Bussin, *Alternative Dispute Resolution and Canadian Courts: A Time for Change*, 17 ADVOC. Q. 133, 137 (1995); Edward J. Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J 232, 232 (2003); Hugh F. Landerkin & Andrew J. Pirie, *Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?*, 82 CAN. BAR. REV. 249, 262 (2003). In Canada, Quebec's Code of Civil Procedure embraces an interest-based process: "The purpose of a settlement conference is to facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions." Code of Civil Procedure, C.Q.L.R., c C-25 (Can.); Section IV Settlement Conference, s. 151.16.

[8] Heather Heavin & Michaela Keet, *The Path of Lawyers: Enhancing Predictive Ability through Risk Assessment Methods* 19-20, Paper Delivered at the CIAJ 2016 Annual Conference (Oct. 5-7, 2016).

[9] *Id.* at 18.

[10] *Id. See also* John Wade, *Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients to Make Better Decisions*, 13:2 BOND L. REV. 1, 1-2 (2002)

This kind of advice is open to interpretation by design, motivated by the desire to strike a middle ground—zealous advocacy without overstating the case. On the other end of the transaction, the client often receives the qualitative assessment as ambiguous, and the ambiguity allows pre-existing biases to continue. Anchored in expectations set early by the pleadings and reinforced by normal cognitive overconfidences, the client proceeds under the same unrealistic or imprecise measurements for 'success', especially when it comes to the distributive elements in a negotiation (the money). This cognitive trap impedes not only the client's commitment to settlement dialogue but also his capacity to make an informed choice. In the absence of a methodological and careful approach to assessing litigation risk, lawyers and their clients often make decision-making errors when assessing settlement offers.[11]

A realistic BATNA will go beyond the gestalt, built on a systematic and thorough assessment of risk for advancing with litigation. A litigation risk assessment breaks down the claim into elements that need to be proven, and will focus on the legal and factual uncertainties which will arise at a trial. Uncertainties are assigned a percentage probability of success. This way, the lawyer anticipates and evaluates the key turning points of a case, and then quantifies or weighs the risk. After creating an accurate projection for the outcome at trial (which considers both the liability tests and the claims for damages), the risk assessment moves on to fully consider the tangible and intangible costs of producing that outcome. There are multiple ways that a prepared lawyer could construct a risk analysis and several tools that could be used.[12] A simple, practical approach could follow the format below:

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[11] Important empirical studies have looked at the frequency and magnitude of decisionmaking errors by lawyers rejecting settlement offers and proceeding to trial. *See* Samuel Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 321 (1991); Samuel Gross & Ken Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44(1) UCLA L. REV. 1, 16 (1996); Jeffery Rachlinski, *Gains, Losses and the Psychology of Litigation*, 70 S. CAL L. REV. 113, 118 (1996); Randall L. Kiser, et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5(2) J. EMPIRICAL LEGAL STUD. 551, 553 (2008); and Kiser, *supra* note 3, at 1.

[12] Heavin & Keet, *supra* note 8, at 20-31 (exploring the method proposed in this paper in more detail).

A. *Stage One: Projection of Litigation Outcome*

1. *STEP ONE: UNDERSTAND AND CALCULATE RISKS ON LIABILITY*

The first stage of a risk analysis weighs the likelihood that a breach of law will be established. It breaks down the legal claim (and then defenses) into component parts and identifies areas of uncertainty in the applicable law, evidence or a combination of these elements. Thorough assessments involve numbers: Once the elements of the claim and risk factors (legal and evidentiary) are identified, a numerical probability of success is assigned to each uncertainty. Independent risks should be aggregated.[13] This will produce an overall assessment of the probable finding of liability.

2. *STEP TWO: CALCULATE DAMAGES*

This step focuses on an assessment of remedies: What remedies are available given the causes of action? What are the estimated damages, determined by reference to each itemized head of damages and the probability of proving each head of damage?[14] Graphical models can be especially helpful in working through projections. Likely outcomes under each head are added together, for an overall prediction on damages.

3. *STEP THREE: ASSESS—MULTIPLY STEPS ONE AND TWO*

The final step in Stage One of a risk assessment is to aggregate projections for liability and damages. Risks attached to proving liability and damages often exist independent of the other. The overall probability under liability and the overall projection of damages should now be multiplied, for a realistic reference point on expected legal outcome.

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[13] For a risk assessment to produce an economic measure, it should include the probability assessment, although lawyers may be uncomfortable working with probabilities. Probabilities on separate variables (each of which requires independent proof) need to be multiplied, to produce an overall prediction of the claim's strength. *Id.*

[14] Sometimes an assessment of what might be recovered could amount to a single figure, but more often than not it would require separate figures for each recoverable head of damage or loss. *See* SUSAN BLAKE, A PRACTICAL APPROACH TO EFFECTIVE LITIGATION, (7th ed. 2009).

B. *Stage Two: Projection of Litigation Costs*

1. *STEP FOUR: ASSESS AND COMPLETE COSTS OF ATTAINING THE LEGAL OUTCOME*

Now that a projection on outcome has been developed, the lawyer must assess the impact of 'getting there' viewed from the perspective of the client. For this calculation, lawyers tend to focus first on legal fees and expenses—the client's tangible out-of-pocket costs.[15] A multi-dimensional assessment of process costs includes much more. What client interests are engaged or put at risk in continued litigation and trial? How can the gains or losses, in terms of the client's process interests, be quantified? This requires anticipating the *impact* of the stages of the litigation leading to trial, in both monetary and non-monetary terms:

Internal Impacts Upon:
- human and organizational energy (time, emotional energy, psychological strain);
- internal environment of the family or organization;
- identity and reputation.

External Impacts Upon:
- relationships (family, business, community) and on larger individual or commercial networks;
- third parties, direct or indirect;
- opportunities: the advancement of life or organizational goals.

We know that while a legal problem remains unresolved people can experience "decreasing physical health, high levels of stress and emotional problems, and strains on relationships among family members".[16] It is difficult for clients to predict the impact of legal process (as distinct from legal outcomes) on their individual lives, but they can be guided through such a

[15] To be thorough, the estimate of legal fees and expenses ought to be broken down category-by-category and stage-by-stage.

[16] Trevor C.W. Farrow et al., *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* 12 (Osgoode Hall L. Sch. Legal Stud. Res. Paper Series, Res. Paper No. 57, 2016), http://ssrn.com/abstract=2795672. *See also* Noel Semple, *The Cost of Seeking Civil Justice in Canada*, 93(3) CAN. BAR REV. (2016) (summarizing a list of concerns and costs identified through interviews with litigants, including: temporal costs such as duration, workload and opportunity, as well as and psychological costs and direct legal costs).

reflective exercise with thoughtful questions. The impact of litigation, while litigants wait for a dispositive outcome, can be positive or negative. In the commercial context, of course, impact should also be translated into organizational terms.[17] Either way, clients should be encouraged to assign monetary values to drains on their psychological, emotional, social and financial resources.

2. *STEP FIVE: CALCULATE EXPECTED VALUE OF THE ACTION*

The final step is a simple subtraction of overall projected process costs from expected outcome. This produces an economic value which is not intended to be a prediction of what *will* occur through a trial,[18] but a mathematical construct and a more balanced reference point: the "risk-assessed value"[19] or the "expected monetary value (EMV)"[20] or even the "net present expected financial value (NPEFV)"[21]. It operates as a realistic point of comparison for the client who is trying to decide whether to proceed with litigation, accept or present a settlement offer, or abandon the action, *today*.

Well-prepared clients and lawyers will have done a detailed assessment along these lines. Because lawyers generally stop short of the economic valuation of the file, however, the systematic work and precise outcomes of a risk assessment, as described above, are often missing. This is problematic, in that it impedes informed decision-making on individual files and—viewed

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[17] Jeffrey M. Senger, *Analyzing Risk, in* THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 445 (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006); Martin Gramatikov, *A Framework for Measuring the Costs of Paths to Justice*, 2 J. JURISPRUDENCE 111 (2009), http://www.jurisprudence.com.au/juris2/gramatikov.pdf; *see also* MARTIN GRAMATIKOV ET AL, A HANDBOOK FOR MEASURING THE COSTS AND QUALITY OF ACCESS TO JUSTICE (2010).

[18] *See* Adams, *supra* note 2, at 128. *See also*, Doug deVries, *Mediation: Decision Analysis and Risk-Assessed Value* at 3-4, http://www.dkdresolution.com/articles/decision-analysis.pdf (offering an explanation for why the risk assessment result ought not to be viewed as a prediction of actual results, but operates still as an extremely useful "assessment of value").

[19] *See* deVries, *supra* note 18, at 3-4.

[20] John DeGroote, *Decision Tree Analysis in Litigation: The Basics*, SETTLEMENT PERSPECTIVES BLOG (Jan. 4, 2009), http://settlementperspectives.com/2009/01/decision-tree-analysis-in-litigation-the-basics/.

[21] Michael Palmer, *Which is Better? The Deal or the Ordeal?: An Examination of Some Challenges of Case Valuation*, 36 VTVT. B. J. 1, (2010).

from a social policy perspective—creates systemic reliance on the court process, in a climate laden with access to justice concerns.[22]

It does not necessarily follow that a settlement conferencing judge ought to lead the parties through such a calculation, where either or both lawyers have not. However, with some prodding, a judicial mediator can explore whether a party is reasonably informed and thoughtful about his or her BATNA. The question of *how* first warrants some critical reflection about the mediator's role.

III. SHOULD (JUDICIAL) MEDIATORS SEEK TO RAISE THE STANDARD FOR INFORMED DECISION-MAKING, AND ACTIVATE INCENTIVES FOR RESOLUTION?

Most mediators view reality-testing as a vehicle for ensuring that parties are making sound and informed decisions, as well as a strategy for overcoming intransigence.[23] Mediators in a recent Australia study used diverse ways to accomplish this:

> Reality testing of options was considered by all [mediators] an important tool to ensure informed decision making and procedural fairness. However, the extent, content, and form of reality testing differed significantly and were informed by the mediators' values... [S]ome participants would focus on

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[22] *See* ACTION COMMITTEE ON ACCESS TO JUSTICE IN CIVIL & FAMILY MATTERS, ACCESS TO CIVIL & FAMILY JUSTICE: A ROADMAP FOR CHANGE (Ottawa: Action Committee on Access to Justice, 2013) at 1 [hereinafter *Cromwell Report*], http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf. *See also* CANADIAN BAR ASSOCIATION, REACHING EQUAL JUSTICE REPORT: AN INVITATION TO ENVISION AND ACT (2013); David Luban, *Spring 2015 Reconsidering Access to Justice Symposium: Optimism, Skepticism, and Access to Justice,* 3 TEX. A&M L. REV. 495 (2016).

[23] ROBERT A. BURTON, ON BEING CERTAIN, BELIEVING YOU ARE RIGHT EVEN WHEN YOU'RE NOT 97-98 (2009) (acknowledging the strong hold of pre-conceived thought: "Once firmly established, a neural network that links a thought to a feeling of correctness is not easily undone. An idea known to be wrong continues to feel correct."); *See also* Weitz, *supra* note 5 at 471; Robbennolt & Sternlight, *supra* note 4, at 297, (discussing how mediators can help correct the impact of the sunk-cost fallacy and reactive devaluation, among other biases); Wistrich & Rachlinski, *supra* note 4, at 153 (pointing out the interesting statistic that lawyers who also have experience as mediators are less likely to be affected by decision-making biases, themselves, which suggests that the training and role of mediators might help improve clarity and integrity around settlement discussions and concluding that "lawyers seeking to reduce their error rates should consider seeking training by or advice from skilled and experienced mediators.").

> the costs of going to a hearing; others would focus on [the plaintiff's] legal rights; and a third group would focus on the discrepancy between expressed needs and interests with the settlement offer she is ready to accept.[24]

Prominent mediation texts in North America deliver a similar message. Consider the following quote from Boulle and Kelly's text, *Mediation: Principles, Process, Practice*:

> Mediators are often referred to as 'agents of reality' in so far as one of their functions is to encourage the parties to face the realities of their situations. The purpose of reality-testing is to make the relevant party reflect more systematically and practically on a position, behavior or attitude, and to think beyond the present situation to future consequences. Reality-testing can apply to subjective factors which are particular to the dispute, and to objective factors which are part of the wider picture . . . Mediation is about what is 'do-able' and if a party is holding out for something which is objectively unattainable then the mediator's function is to re-set, or bring about more realistic expectations.[25]

Moore's leading text on mediation recommends that mediators "respond to unrealistic or inflated expectations"[26], or "review the benefits of reaching an agreement and the potential costs of not doing so"[27] (as Adams puts it, to acknowledge the "symbiotic" relationship between settlement and adjudication[28]). Moore suggests that this form of assessment include:

> (1) the range of potential dispute resolution procedures, other than negotiation and mediation, that are available to the party to achieve his or her desired goals; . . .
> (3) potential substantive, procedural, or psychological/relational outcomes, and satisfaction of needs

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[24] Mary Anne Noone & Lola Akin Ojelabi, *Ethical Challenge for Mediators around the Globe: An Australian Perspective*, 45 J.L. & POL'Y. 145 (2014).

[25] LAURENCE BOULLE & KATHLEEN J. KELLY, MEDIATION: PRINCIPLES, PROCESS, PRACTICE (1999).

[26] CHRIS MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 423 (4th ed. 2014).

[27] *Id.* at 427.

[28] Adams, *supra* note 2, at 10.

> and interests, that might or might not result from the use of each of the procedures; . . .
> (5) what it may or will take in terms of energy, time, resources, and so forth to initiate and use any of the potential alternative procedures.[29]

The idea of mediators invoking litigation risk assessment and decision analysis frames is not new. In her 1995 article, Corman Aaron suggests that mediators use software tools and/or decision trees to walk the parties through a thorough risk assessment, arguing that it "can enhance the mediator's ability to unlock or redirect participants' emotional and professional investment in litigation and to remove personal and organizational incentives for entrenchment in adversarial and costly disputes."[30] Such tools can be viewed as helping the mediator level asymmetric information, dampen the impact of posturing and psychological bias,[31] and shift the parties' focus from the past to the future:

> Reasonable minds may disagree about the likelihood of each (outcome) . . . . Part of that dynamic is a function of the parties' assigned positions in the conflict and their lack of complete information. But notice what happens when parties agree on the basic structure of [a decision tree]. They are now arguing about the future and who decides it rather than the history that brought them to this point. Litigants are now making strategic business decisions within bracketed outcomes.[32]

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[29] Moore, *supra* note 26, at 429.

[30] Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice,* 11 NEGOT. J. (1995) (arguing that a mediator who uses decision-aiding software at any point in her mediation process ought to disclose that to the parties, stating "[a]ll parties should be given information regarding the main underlying assumptions of the system, the limitations and capabilities of the system, the confidentiality of the information used, and the role the computer and its results play in the dispute resolution." *See also* Linda M.V. Lisk, *Decision-Aiding Software and Alternative Dispute Resolution, in* SYSTEMATIC ANALYSIS IN DISPUTE RESOLUTION 195 (Stuart S. Nagel & Miriam K. Mills eds., 1991).

[31] *See* Aaron, *supra* note 30, at 121 – 128.

[32] Donald R. Philbin, Jr., *The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation*, 13 HARV. NEGOT. L. REV. 249, 273 (2008). Hoffer makes a similar argument; *See, e.g.*, David P. Hoffer, *Decision Analysis as a Mediator's Tool,* 1 HARV. NEGOT. L. REV. 113 (1996).

Many mediators choose not to reality-test through such a hands-on approach, especially if they wish to minimize the evaluative dimensions of their role.[33] Not all parties and their lawyers will be comfortable ceding control of a risk assessment conversation to the mediator, for multiple reasons.[34] It may be perceived as an evaluative move, which can be uncomfortable even to the parties, depending on how they view the mediator.[35] "Unless the parties have faith in the mediator's judgment and ability to guide them in the right direction, the process is likely to fail."[36] In the settlement conferencing setting, the parties are less likely to doubt the mediator's ability to guide a conversation about litigation risk. Because judicial mediators bring the influence of their office (and judicial mediation *feels* different than other forms of private or public mediation)[37], judges must be mindful about their role.[38] In this context, it can be argued that three principles take precedence: party self-determination and informed decision-making (which can sometimes

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[33] Kovach & Love argue strongly that mediators ought not to adopt evaluative frameworks. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 98-106 (1998). *See also* Kimberlee K. Kovach and Lela P. Love, *Evaluative Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST OF LITIG. 31 (1996); and Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U.L. REV. 937 (1997).

[34] Hoffer, *supra* note 32, at 130-132.

[35] *See* Kiser, *supra* note 3, at 359.

[36] Hoffer, *supra* note 32, at 133.

[37] Keet & Cotter, *infra* note 38, at 365. *See also* John D. Rooke, *Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in The Court of Queen's Bench of Alberta,* (Court of Queen's Bench of Alberta, Evaluation Report, 2009),http://cfcj-fcjc.org/sites/default/files/docs/hosted/22338-improving_excellence.pdf; John Arnold Epp, *The Role of the Judiciary in the Settlement of Civil Actions: A Survey of Vancouver Lawyers*, 15 WINDSOR YB ACCESS 82, 112 (1996) (noting a study of Vancouver lawyers in the early 90s indicated that lawyers viewed it as "effective" when the judge-mediator provided opinions or suggestions.); Jean-Francois Roberge, *Sense of Access to Justice as a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada)*, CARDOZO J. OF CONFLICT RESOL. 323 (2016). In the American context, see Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); and Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. DISP. RESOL. 1 (1987). There is an obvious link between the influence that lawyers believe judges carry into the mediator's role, and their inclination towards using judge-ed mediation. In one study, researchers found that lawyers were even more favorably inclined towards judicial participation in settlement (and wanted more intervention) than judges themselves. Dale E. Rude & James A. Wall Jr., *The Judge's Role in Settlement: Opinions from Missouri Judges and Attorneys*, J. DISP. RESOL. 163 (1988).

[38] Michaela Keet & Brent Cotter, *Settlement Conferences and Judicial Role: The Scaffolding for Expanded Thinking About Judicial Ethics*, 91 CAN. BAR REV. 363 (2013).

run in tension with each other, but are equally important), and mediator impartiality.[39]

Early resistance to judges as mediators came from the perceived incongruence of role and process: the judge adjudicating 'from the hip' inside a non-adjudicative (consensual) meeting, with few rules to protect the integrity of the process and information shared within.[40] It might help to conceptualize risk assessment as inviting a fundamentally different conversation. Although drawing on the judge's knowledge of procedural dynamics, it does not require evaluation: the exercise may not be one of assessing whose position is reasonable, and reacting—but simply encouraging each party to think differently about the risks and value on each side of the case:

> This is not to say that the merits of the parties' claims and defenses, and how the parties perceive them, are insignificant or unimportant, but rather that expressing a relatively objective valuation of the claims and defenses in monetary terms more efficiently advances the mediating parties' stated goal of trying to achieve settlement.[41]

A judicial mediator can help the parties anticipate where a litigation will lead, and this can be accomplished in a number of ways. On the extreme evaluative end of this spectrum, the conferencing judge would offer an opinion (usually qualified) about what she might decide at a trial. On the more facilitative end, the conferencing judge will nudge a participant toward his own reality-testing, using less interventionist approach which might include: *active listening* to facilitate the risk assessment conversation; probing the

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[39] *Id. See also* Canadian Judicial Council, *Ethical Principles for Judges* (1998), https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf; *and* see Georgina Jackson, *The Mystery of Judicial Ethics: Deciphering the 'Code'*, 68 SASK. L. REV. 1 (2005) (discussing party self-determination and its relation to the fairness of the outcome in mediation). *See also* Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281,336-37 (2012) (stating impartiality has never been viewed as a simple concept); *See e.g.* Hillary Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, 16:2 SOC. LEGAL STUD. 221 (2007); Ronit Zamir, *The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic*, 11 PEPP. DISP. RESOL. L. J. 467 (2011); Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L. J. 39 (2002).

[40] *See, e.g.,* James Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned To Them for trial*, 6 DISP. RESOL. MAG. 11 (1999). *See also* Landerkin & Pirie, *supra* note 7 at 261 (cautioning against "muscle mediation").

[41] de Vries, *supra* note 18.

parties' understanding of their choices within and outside of this process; and planting seeds of doubt where expectations are unfounded or uninformed.

Although reality-testing is acknowledged as an important and practical contribution of many mediators,[42] it can invoke old debates about where mediators do (and ought to) fall along a continuum of facilitative and evaluative approaches. When Leonard Riskin first introduced his grid distinguishing between types of mediation coalescing around the polar opposite behaviors of facilitating and evaluating, his work was both lauded and criticized.[43] In a revision published ten years later, Riskin clarified:

> [M]any—probably most—mediators engage in behaviors that fit into both categories. . . . [M]ediators often evaluate on some issues and facilitate on others, all within the same time block, and they typically decide on their moves at least partially in response to the personalities and conduct of the other participants.[44]

In this way, most mediators can be thought of as "roaming the grid" in responsive ways, even if they tend towards one particular orientation.[45] Riskin himself was sensitive to what may, at times, be a subtle difference:

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[42] Aaron, *supra* note 30, at 123; Hoffer, *supra* note 32 (stating the process in some models is designed to be an early neutral evaluation, where the third party's task is to provide a non-binding opinion). *See, e.g.*,. Laurence D. Connor, *How to Combine Facilitation with Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 15 (1996); Dwight Golann, *Benefits and Dangers of Mediation Evaluation*, 15 ALTERNATIVES TO HIGH COST LTIG. 35 (1997); *see* Dwight Golann, *Planning for Mediation Evaluation* 15 ALTERNATIVES TO HIGH COST LITIG. 49 (1997).

[43] Leonard Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed,* HARV. L. REV. 7 (1996); Leonard Riskin, *Decisionmaking in Mediation: The New Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1 (2003) [hereinafter Riskin, *Decisionmaking in Mediation*].

[44] Riskin, *Decisionmaking in Mediation*, *supra* note 43, at 14.

[45] Philbin, Jr., *supra* note 32. *See also* Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, J. DISP. RESOL. 309 (2000); and Jane Kidner, *The Limits of Mediator Labels: False Debate between Facilitative versus Evaluative Mediator Styles*, 30 WINDSOR REV. LEGAL SOC. ISSUES 167 (2011) (noting that Riskin's grid was never offered as a way to catalogue the various models and types of mediation, which include distinct styles such as, transformative). *See also* ROBERT A. BARUCH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (2004); BERNARD MAYER, STAYING WITH CONFLICT: A STRATEGIC APPROACH TO ONGOING DISPUTES 87-118 (2009); Cheryl A. Picard & Kenneth R. Melchin, *Insight Mediation: A Learning-Centered Mediation Model*, 23 NEGOT. J. 35 (2007).

> [I]t frequently may be difficult to characterize a particular intervention without knowing its actual impact, which may not accord with the mediator's intent. For instance, I have suggested that generally *a question* (e.g., about what is likely to happen in court or what effect a failure to settle may have on business or personal interests) is facilitative, whereas *a statement* about such matters is evaluative. But a question can have an evaluative impact. This can happen, of course, when a mediator phrases and delivers the question in such a way as to make it evaluative—for example, "How *in the world* do you expect to be able to prove *that?*" But it can also happen when the mediator asks the question out of genuine curiosity or to help the party think it through, but the party or lawyer *interprets* the question in a soft way, without any pressure or intent to incline the parties toward using that evaluation to frame their agreement–which makes it essentially facilitative. And of course, body language–deliberate or not–can have facilitative or evaluative effects.[46]

It is worth noting that Riskin's second grid drops the facilitative-evaluative continuum and replaces it with the elicitive-directive one.[47] Riskin himself warns against seeing these as mutually exclusive:

> [T]here is a complex, dynamic quality in the relationships between directive and elicitive mediator moves. They often travel in tandem, and a particular move can have both directive and elicitive motives and effects. . . . [D]irective and elicitive moves each contain the seeds of the other and yield to the other.[48]

This may coincide with a philosophy that mediators need to be adaptive, open at least in part to "a situational style".[49] For example, some argue that

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[46] Riskin, *Decisionmaking in Mediation*, *supra* note 43, at 16. *See also* Susan Oberman, *Mediation Theory vs. Practice: What are we Really Doing? Re-Solving a Professional Conundrum* 20(3) Ohio St. J. Disp. Resol. 775 (2005).

[47] DEBBIE DE GIROLAMO, THE FUGITIVE IDENTITY OF MEDIATION: NEGOTIATIONS, SHIFT CHANGES AND ALLUSIONARY ACTION 61 (2013) (asserting that although the new grid introduces more subtlety, it has not been taken up in the literature to the same extent as the old grid).

[48] Riskin, *Decisionmaking in Mediation*, *supra* note 43, at 33.

[49] Tanya M. Marcum, Charles R. Stoner & Sandra J. Perry, *Reframing the Mediation Lens: The Call for a Situational Style of Mediation,* 36 S Ill U.L.J 317 (2011-2012).

mediators should "read the situational context,"[50] and should be willing to adapt and flex their style of mediation according to that situational context."[51] A reminder: "[The] purpose of mediation is to allow the parties to settle their disputes on their own terms."[52] "Of course, this often requires the mediator to shift from personal style preferences and strategy to adopt an appropriate context-driven style of mediation . . . [E]ach mediator has the capacity to adapt and modify their preference based on the unique needs surfacing from their interaction with [the parties]."[53]

Although not commonly promoted as a mediation tool, Hersey and Blanchard's model of "situational leadership" in management captures this way of thinking, and may offer a useful way to visualize the spectrum of intervention that could be part of a risk assessment conversation.[54] While a judicial mediator may not view her process as fully determinable by the proclivities of the parties,[55] the idea of meeting the parties 'where they are at' for reality-testing and a discussion of litigation risk is appealing.[56] The diagram below therefore reflects a fusion of the "situational leadership grid",

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[50] *Id.* at 333.

[51] *Id.* at 334.

[52] Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 741 (1997).

[53] Marcum, *supra* note 49, at 334.

[54] Hersey & Blanchard's model is applied to lawyering processes in Leary Davis, *Competence as Situationally Appropriate Conduct: An Overarching Concept for Lawyering, Leadership, and Professionalism*, 52 SANTA CLARA L. REV. 725, 770-71 (2012). Davis credits Hersey & Blanchard's model for "helping lawyers and leaders appreciate the utility of modifying behavior to fit the situation" at 771. Originally developed for managers, it has become a popular model for teaching professionals in many disciplines; *see* Brighide Lynch, *Partnering for Performance in Situational Leadership: A Person-Centred Leadership Approach*, 5:5 INT'L PRAC. DEV. J. 1,2 (2015); and Gavriel Meirovich & Jian Gu, *Empirical and Theoretical Validity of Hersey-Blanchard's Contingency Model*, 20 J. APPLIED MGMT. & ENTREPRENEURSHIP 56 (2015).

[55] Villet's Ph.D dissertation explored the application of the situational leadership model to mediation, concluding that "for mediators to be effective, they must select the mediator style which 'matches' or 'fits' the assessed readiness level of disputants." Hylton James Villet, Situational Mediation: An Investigation of Disputant Influence on Mediator Style Selection and Disputant Assessment of Mediator Style Effectiveness, 38 (Aug.1998) (Ph.D. Dissertation, The Faculty of the College of Communication of Ohio University). However, the idea of adaptive responses has been raised in the context of judicial case management in family disputes: Nicholas Bala, Rachel Birnbaum & Justice Donna Martinson, *One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict*, 26 CAN. J. FAM. L. 395,399 (2010).

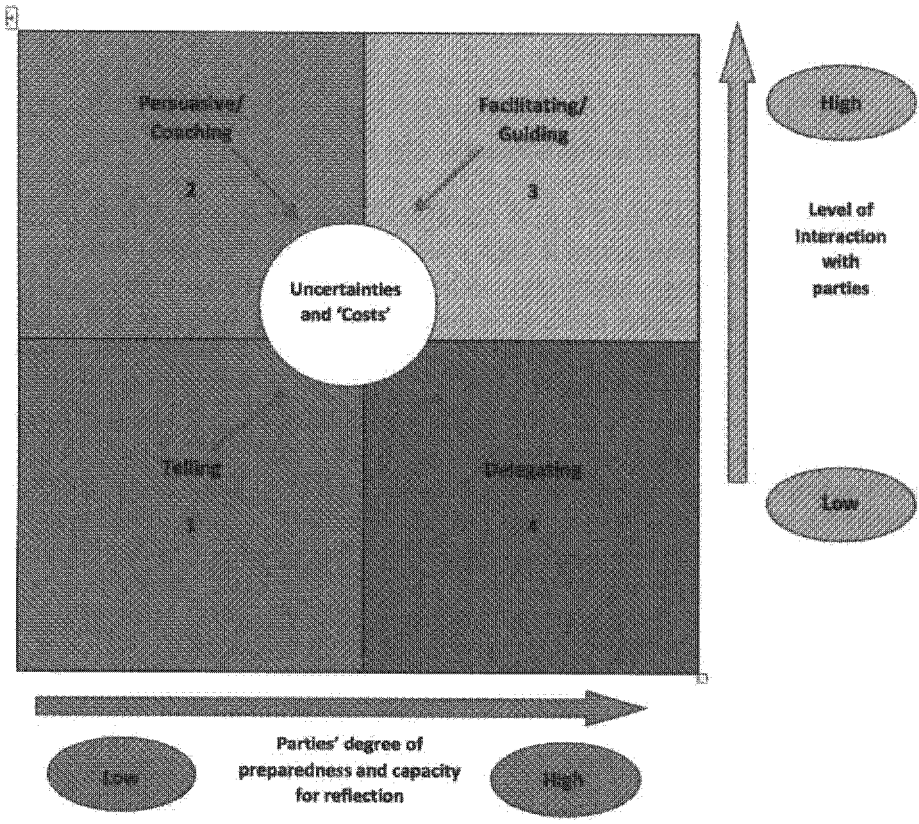
[56] On this point, Villet's general use of the situational leadership model does fit: "This model prescribes that, for a leader to be effective, he/she must attempt to 'match' his/her leadership style to the readiness levels of followers"; Villet, *supra* note 55, at 38.

and risk analysis considerations. It is offered as a starting point, to demonstrate a range of approaches that judges can use in helping the parties understand and equate litigation risks and costs, and develop realistic measurements for settlement.

IV. SITUATIONAL AND PROGRESSIVE INTERVENTIONS TO MANAGE A RISK ASSESSMENT CONVERSATION

Hersey and Blanchard's grid highlights four categories of behavioral interventions, describing how a leader might use authority while interacting with a person or group: telling, persuading/coaching, facilitating/guiding, and delegating. The idea they advance is that the manager or leader may increase her effectiveness by interpreting and responding to situational needs. Applying this basic conceptual model to judicial mediation, I suggest below that a judge's management of a risk assessment dialogue could vary according to the capacities and preparedness of the parties, as well as the judge's preference for engagement, taking into account the characteristics of the mediation so far. Of course, a judge or mediator can move from one quadrant and back again, as she explores the topics and help parties develop realistic measurements for settlement.

Guiding a Litigation Risk Assessment Using Situational Needs



Referring back to the stages of a litigation risk assessment (outlined above), the first area of risk to explore is the projected outcome. Uncertainties may exist around the substantive legal outcomes: a question of which legal test applies, or of whether the evidence proves breach and loss (vulnerabilities around documents, access to experts, witness evidence and credibility in particular). Pre-trial processes may still shape the case, for example, through applications to strike or modify pleadings which would alter or terminate a claim or defense. Most of the time, however, the projected outcome is simply a measure of how well the facts prove the elements of a claim – and, then, how well the facts prove the elements of loss and compensation.[57]

[57] As part of the *Path of Lawyers* study, we interviewed a mediator who had used the proposed risk assessment framework in the later stages of a mediation with parties who were engaged in a property dispute. She walked through the damages claim with the

Expected litigation outcomes can be tested and explored along a continuum of interventions, based on the situational resources available to the parties (emotional and psychological, as well as informational resources). For example, where the parties have a low degree of capacity and preparedness to engage in a dialogue about the strengths and weaknesses of the case, then the judicial mediator might take a "telling" approach (which requires a low degree of engagement) or a "coaching" approach (a higher degree of engagement). On the other hand, where there is a high degree of preparedness and readiness demonstrated by the parties, then the judicial mediator might take a "delegating" approach (inviting them to discuss this with each other) or a "guiding" approach — the latter placing the judge in a more interactive role in the conversation.[58] Consider the following examples:

A. *Examples of How to Explore Expected Outcomes, Along the Grid*

Telling

- A direction to the lawyers and/or the parties which identifies particular weaknesses in a claim or defense, from the judge's point of view (and which also acknowledges the limitations of an abbreviated process short of trial: 'the caveat')
  "If I were deciding this today, I would be persuaded that ..."

Persuading/Coaching

- Using arm's length suggestions about particular areas of concern in the construction or proof of a claim or defense:
  "In trial, many judges would have questions about ..."

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parties, in caucus. The increased structure that this added, highlighting the variables along different heads of damage, gave the parties more clarity on what information they needed to explore before the next meeting. As the mediation shifted to a conversation about reasonable ways to calculate loss, it opened up a pathway to resolution; Interview with Mediator #2. For a description of the study methodology, see Heavin & Keet, *supra* note 8, at 50.

[58] For example, a mediator we interviewed described her use of a risk assessment on the damage claim in this way: "I took a much stronger role in the content of organizing their argument. I pulled back from picking the numbers for them, but I gave them a lot more structure for how to have the conversation." Interview with Mediator #2. Note that such an approach can be taken without having expertise in a certain type of legal claim: "I may not know what all the elements are, but I know what questions to ask."

"Another judge may call upon you to explain ...."
"Plaintiffs with this kind of claim often struggle to establish ..."

Facilitating/Guiding

- Open questions about risks in establishing the claim or defense, directed to the lawyers and designed to:
    - Explore assessments on liability and remedy/damages to invite reflection on particular areas of strength and risk;
    - Invite lawyers to measure probabilities:
        "I'm sure you've thought about this and have discussed it with your clients: What are the strengths and risks that you each run, in proving the elements of the claim or defense at trial?"
        "There are several elements you need to establish for this claim (or defense) to succeed. Some will be strong (you are virtually 100% sure that this will be established), and others, much less so. On which elements do you see some risk – either in the way the law (or test) is interpreted, or in the strength of the evidence to support this point?"
    - Once particular issues are identified, *"What's your sense of the probability that this element will be established? What's your projection on this head of damage, taking into account the risks?"*
    - Press lawyers to consider risks or ranges, authentically – not as positional tools.

- Open questions about outcome risks of litigation, directed at the clients, to assess their level of understanding and consciousness about those probable outcomes;

- Some lawyers and clients will have more difficulty assigning probabilities in percentage terms. A variation is to ask each side to rank their issues by degree of uncertainty. For instance, both sides in an occupier's liability negligence claim could likely rank "duty of care" as the easiest element to establish (least uncertain, or in probabilistic terms, close to 100% likelihood of being proven), and the "breach of the standard of care" as the most difficult. This could be done in joint discussion, or separately,

with the rankings then compared (by the judge, mediator, by the parties themselves, or by both) to see where they correspond or diverge.

Delegating

- Create a break to trigger a focused discussion between lawyer and client.
  - To the litigant: *"During this caucus, I would like you, Mr. X, to gather some information from your lawyer about the uncertainties in proving (or defending) this claim in a trial (or, the strengths and weaknesses in your legal position)."*
  - Could be done during a break during the settlement conference (e.g. lunch), during a caucus, or in the interim between settlement meetings.

The impact and cost issues —the second stage of the risk assessment calculation — are equally important and often more relatable to the litigants. The potential impact of proceeding with litigation can be explored with the same range of nuance and intervention as that which can be employed in a discussion about liability and evidentiary uncertainties.[59] In fact, they may be best explored in a way that opens up dialogue about party interests and goals (even at a broad level: in John Wade's view, "life goals"[60]). Framing this stage of the discussion with hopes and concerns that the parties have already identified helps to keep the reality-testing phase congruent with an interest-based philosophy for the process, protecting party self-determination while encouraging informed decision-making. It also acknowledges the powerful operation of cognitive biases that tend to keep the parties caught up in the conflict and the litigation process.

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[59] It could be that guiding and facilitating roles are even more suitable when exploring projected impact and cost, because so much of that analysis flows from the litigant's goals and reference points. An analogy can be made with how a criminal court judge can "spark motivation" in a problem-solving setting – see Bruce J. Winick, *The Judge's Role in Encouraging Motivation for Change, in* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 181, 181 (Bruce J. Winick & David B. Wexler eds., 2003) where he invites problem-solving court judges to respect individual autonomy, avoid paternalism in favor of persuasion: "Judges should be aware of the psychological value of choice." at 182.

[60] Wade, *supra* note 10, at 21.

Again, judicial mediators can consider moving through the conversation with the above grid in mind. "Telling" parties and their lawyers about the direct and indirect impact of litigation may be appropriate in a subset of circumstances where the parties' capacity for self-reflection and engagement is very low, and the judge herself desires to minimize the level of interaction she has with them at this stage in the process. However, the downsides of such an approach are more obvious, as is the appeal of other kinds of reality-testing on the grid. "Coaching" might employ hunches shared with the litigants; "guiding" would be accomplished through open, elicitive questions and critical thinking; "delegating" might invite the parties to separately catalogue the cost and impact of prolonged litigation. As with a discussion about projected outcomes of a trial, a discussion about projected costs can be a sensitive area, and the gravitas of the judicial role easily felt by the parties. Gentle but targeted inquiries are possible, composed in different ways across the grid.

B. *Examples of How to Explore the Impact of Litigation, Along the Grid*

Telling

- A direction to the lawyers and/or the parties which identifies the judge's views on the probably direct costs and impact of this litigation, on those involved.

Persuading/Coaching

- Hunches directed to litigant (which allow lawyers to save face and 'draws them in as partners' in the problem-solving process), raising particular concerns
  "I imagine your lawyer has talked to you about how long this might take ...."

- Sharing reflections about common impact, using references to third parties:
  "When I see people late in the litigation process, I often hear them reflect that they are feeling XYZ . . . (that they have noticed XYZ impact, personally, and on their relationships . . .)"

Facilitating/Guiding

- Open questions directed to litigant rather than counsel
  "How has this litigation affected you?"
  "In the last year, how long have you gone without thinking about this matter?"[61]

- Using hypotheticals which invite critical thinking
  "What if . . . ?"
  "Imagine yourself . . . "
  "How would you feel if you arrived at trial two years from now and the judge said . . . ?"

- Clarifying and 'testing' questions which refer to interests the litigants have previously identified as important, perhaps exploring inconsistencies:
  "Earlier, you said that relationships were important to you . . . how might this affect XYZ, if you stay engaged in this conflict?"
  "How does investing time in this process (litigation, for example) fit with the other goals you identified?"

Delegating

- Encourage the parties—separately or together—to consider and even catalogue the indirect costs of litigation;

- Ask that homework be done on the question of direct costs (get quote from lawyer) or indirect costs and impacts (gather information or catalogue these items);

- Ask that direct or indirect costs be identified and considered during a break in the settlement conference (e.g. over lunch), during a caucus, or in the interim between settlement meetings.

V. PRACTICALITIES AND RISKS OF REALITY-TESTING

A full exploration of projected outcomes and projected costs, as outlined above, could take a long time. It could be the subject of a whole meeting, or

[61] This question is a favorite of Jay Watson, a prominent Saskatoon litigation lawyer; Panel discussion: Mediation Advocacy at the College of Law, University of Saskatchewan (Nov. 2015).

directed homework in between meetings. It may be that a risk assessment conversation can occur inside a case management process which is focused on early and focused information-sharing. Wistrich and Rachlinski offer the following advice to American judges:

> One step judges should take is to encourage parties to pursue the most diagnostic or important discovery first. This runs counter to the common practice of beginning with less important depositions and gradually building toward the most important ones. Although that practice may result in lawyers acquiring more familiarity with the case or even performing somewhat better by the time the most important depositions are taken, it also tends to lock in settlement, discouraging sunk costs before the most diagnostic information is obtained.[62]

On the other hand, risk assessment dialogue need not be long and exhaustive: A few well-placed questions can still set the stage effectively for informed decision-making. Each context will require some measurement of (1) where the parties are at and what kind of facilitation or direction they may need on this topic; (2) what the structural setting (and time limits) allow; and (3) the judge's own personal style.

An abbreviated agenda might look like this:

1. In proving the claim, or defense, what is your greatest risk at trial—the element on which there is the most uncertainty? And how would you assess the potential impact of that, on the outcome?
2. What will it cost to get there?
3. What will it cost YOU to get there? (personal impact and indirect costs)[63]

A judicial mediator can begin the conversation by being transparent about her own concerns and process goals or values. For example: "When people have been engaged in conflict, it can be hard to step back and measure 'where this is headed.' And yet, knowing how a resolution *here* compares to an outcome at trial is an important element of informed decision-making. It's important to me that people have those 'what if' discussions." Some judicial mediators prefer to create comfort and openness by caucusing, and others prefer to have transparent discussions in joint session. Either way,

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[62] Wistirch & Rachlinski, *supra* note 4, at 156.

[63] These three questions are the ones usually asked by Saskatoon civil mediator and Law instructor, Mark Baerg, even with short amounts of time to engage.

transparency about this part of the process helps protect the parties' right to self-determination in the process, and mitigate the risks of judicial influence.

It can indeed be argued that reality-testing activities by any mediator—judicial or not—must be done carefully and with overt attention to the values and goals of the process. Boulle and Kelly remind us that the risks of reality-testing must always be weighed:

> There are many ways in which mediators can serve as agents of reality: by providing information (for example about the costs of litigation), by advising . . . and by asking reflective, hypothetical or critical questions. It is again difficult to draw the line between legitimate and illegitimate reality-testing. The separate meetings allow the mediator more latitude in confronting the parties and disenchanting them with their unrealistic views. Some reality-testing is consistent with the process/content distinction in that the mediator asks generalized questions without implying any substantive knowledge, for example in querying whether a particular head of damage is viable in a personal injury claim. In the latter case reality-testing comes close to advising or evaluating, and it may be experienced as a pressure tactic by the relevant party. [64]

These questions are even more important when a judge is facilitating the settlement conversations, because of the sensitivity most parties have to what judges say and do, and because of the ethical principles surrounding the judge's work.[65] In the end, impartiality can be maintained, and the (sometimes competing) goals of informed decision-making and party self-determination met, even in a reality-testing conversation. Thinking of the process as one of risk-assessment — rather than bald evaluation — and using a range of tools guided by self-awareness and transparency, a judicial mediator can indeed help the parties develop realistic measurements of success in a settlement process.

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[64] Boulle & Kelly, *supra* note 25, at 150.

[65] Keet & Cotter, *supra* note 38, at 375. This paper also does not deal with the important question of reality-testing where imbalances of power, capacity and resources may be evident – and, in particular, the question of what form reality-testing can and should take in cases involving domestic violence; see Linda Nielson, *At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases*, 52(3) FAM. CT. REV. 529, 576 (2014).