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Oiling Rusty Wheels: A Small Claims Mediation Narrative

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I. INTRODUCTION

I needed a story. Stories help people learn.[1] They foster understanding of complicated interactions.[2] They help make sense of multi-layered

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1. *See, e.g.*, John Batt, *Law, Science, and Narrative: Reflections on Brain Science, Electronic Media, Story, and Law Learning*, 40 J. LEGAL EDUC. 19, 22-23 (1990); Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41, 59 (1994); Steven Lubet, *Lessons from Petticoat Lane*, 75 NEB. L. REV. 916, 919 (1996); Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 633 (1997).

2. *See* Lubet, *supra* note 1, at 919. Detailed analyses of specific behavioral choices helps readers understand "what is happening in these activities and how and why." Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9, 10 (1994). Stories may be particularly appropriate in clinical settings to introduce students to the worlds of actual others, mediators, lawyers, participants, and judges. *See* Cook, *supra* note 1, at 59. By continually

processes by showing how disparate elements come together creating integrated action sequences.[3] Narratives supply context and details that illuminate action choices made by participants.[4] They show consequences of decisions and permit examination of action theories—generalizations about behaviors that are likely to produce intended effects and why.[5] They can also illuminate when action deviates from theory.[6]

I needed a small claims mediation story to use in the intensive seminar

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attending to specific details and the feelings they invoke, clinical education uses an inherent narrative method. *See* Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65, 67 (1994).

3. *See* Lucie White, *"Democracy" in Development Practice: Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073, 1077 (1997) (recommending detailed descriptions of community development practice to "illuminate multi-layered processes"). Searching for meaning in stories cultivates vision, responsiveness and sympathy that helps us handle complex deliberative choices better. *See* Goldfarb, *supra* note 2, at 67. Stories have been used by clinical scholars to illuminate many integrated action sequences and complex processes. *See, e.g.*, C. Michael Abbott & Donald C. Peters, Fuentes v. Shevin: *A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955 (1972) (discussing case planning); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989) (discussing client interviewing and counseling); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WISC. L. REV. 699 (discussing how power is used to maintain subordination).

4. *See* Lubet, *supra* note 1, at 927. Evaluating mediation theory and practice requires sensitivity to context because the different environments in which mediation is practiced frame and shape how it is conceptualized and performed. *See* Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEG. J. 217, 218 (1995). Practice routines must be varied and altered depending on the context of the problem and the institution in which the dispute is situated, making evaluation by a single set of criteria difficult. *See id.* at 228.

5. Effective action requires knowing what to do to "yield intended consequences." CHRIS ARGYRIS & DONALD A. SCHÖN, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS 6 (1974). Action theories typically seek "to describe *parts* of the reality and to specify the *relationships* among those parts." Joseph D. Harbaugh, *Simulation and Gaming: A Teaching/Learning Strategy for Clinical Legal Education*, *in* CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS—ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 191, 194 (1980). These theories are sets of general propositions that predict and explain but remain "sufficiently abstract to be relevant to more than just particularized situations." Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 580 (1986).

6. Identifying when action deviates from theory often illuminates existing behavioral tendencies. *See* Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 924 (1996). Cognitive understanding of action theories does not necessarily produce consistent behaviors. *See* Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 295 (1981). Identifying instances when this occurs often strongly motivates actors to change their behaviors. *See* Peters, *supra*, at 924-25.

that begins our new Mediation Clinic.[7] This instructional unit provides forty hours of instruction in twenty classes spread over two weeks at the beginning of fall and spring terms.[8] Paralleling the twenty-hour course

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7. The Virgil Hawkins Mediation Clinic began in the fall term of 1997 after a proposal to add it to the Law Center's curriculum was unanimously approved by the Law Faculty on January 14, 1997. This clinical experience provides six academic credits, two graded traditionally while the remaining four are marked using our pass-fail system. It joined two existing in-house civil clinical operations, a family law litigation experience and a pro se family law advice program. A juvenile clinic started in the fall 1998 term. The in-house clinical programs at the University of Florida College of Law have been named by act of the Florida Legislature to honor Virgil Darnell Hawkins, a hero in the Florida civil rights struggle who was responsible for integrating the University of Florida by seeking admission to its law school. *See* 1989 General Laws, ch. 89-393, H.B. No. 450. The story of Mr. Hawkins' patient, persistent, and ultimately unsuccessful efforts to gain admission that included two United States Supreme Court decisions directing the University of Florida to admit him provides an inspirational context for clinical work at this law school. *See* Darryl Paulson & Paul Hawkes, *Desegregating The University of Florida Law School:* Virgil Hawkins v. The Florida Board of Control, 12 FLA. ST. U. L. REV. 59 (1984).

Establishing this mediation clinic joined a clinical trend toward ADR programs. A 1995 directory of law school clinics showed that 34 law schools offer mediation clinics and that thirteen more intended to start one. *See* James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 458 (1996). The Virgil Hawkins Mediation Clinic, however, is apparently only the third in Florida despite the state's extensive embrace of mandatory mediation. *See* Jim Hellegaard, *Resolving Disputes: New Institute for Dispute Resolution Helping to Keep Florida at ADR's Cutting Edge*, 35 FLA. LAW. 21, 23 (1998).

8. This rigorous classroom features four hours of class every day for the first two weeks of each term in which the Clinic is offered. These classes are scheduled at the first meeting each term to avoid conflict with other courses in which students are enrolled. Evening and Saturday morning classes are occasionally needed to accommodate existing course schedules. Although this approach creates long hours, a fast pace, and a barrage of reading assignments, it does engender familiarity with reflective, performance-based learning. It also helps students develop comfort with critical self-assessment. One student, for example, noted:

> I am usually not very good at critiquing myself but the class discussions and continual feedback help me better observe myself. At first, I was a little discouraged . . . because it had been so long since a professor gave individual feedback that I was taking it too personally. Once I got used to having feedback again, however, it really helped me improve as a mediator.

Student Comments from Papers Written by Students Taking Mediation Clinic and Mediation with Don Peters (1996-98) (Spring 1998) (on file with author) [hereinafter Student Comments].

The intensive approach also permits repetitive learning as students encounter concepts and action theories in assigned readings, demonstrations, and discussions, apply them in focused role plays and longer simulations, and then return to this material when observing and conducting actual mediations. Students frequently remark that this approach, while tiring, has value:

> Despite the fact that it has been tiring and somewhat overwhelming, I don't know if there is a better way to do it. We could talk about theory, action choices, and communication methods for weeks, but until we actually apply those skills and theories in simulated and real mediations, we won't be learning the real way we

required for county mediation certification in Florida,[9] this unit introduces concepts and theories of dispute resolution. It presents and explains action theories for critical mediation skills like questioning, listening, framing, and facilitating negotiation.[10] It then provides numerous opportunities to

> need to be learning. . . . [T]he intensive seminar is one of those grin and bear it situations where you pick up all you can, then jump right into mediations, then go back and review what you learned and pick up what you did not learn the first time. [T]he value . . . will become more evident as the semester progresses and we are forced to review our notes . . . to see what we learned and what we have forgotten.

Id. (Spring 1998).

9. *See* FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010(a)(1) (requiring completion of a minimum of 20 hours in a training program certified by the Supreme Court unless a candidate possesses circuit court or family certification). This course provides only the first step to Florida certification because candidates must also "observe a minimum of 4 county court mediation conferences conducted by a court-certified mediator and conduct 4 county court mediation conferences under the supervision and observation of a court-certified mediator." FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010(a)(2). The Supreme Court of Florida had certified approximately 4500 mediators by 1997. *See* Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 916 (1997). More than 1500 county court mediators have been certified. *See* 11 Res. Rpt. 7 (No. 2, July 1996). In 1996, an estimated 26,297 county cases were mediated in Florida. Telephone Interview with Kimberly Ann Kosch, Senior Court Program Specialist with the Florida Dispute Resolution Center, (May 12, 1998) (chart on file with author). Virtually all county court mediations are done on a volunteer basis without charge to the litigants. *See* Press, *supra*, at 908 n.21.

The Clinic's intensive seminar doubles the instruction mandated by the Supreme Court by providing 40 rather than 20 hours of classes. Forty hours is higher than many other states require. *See, e.g.*, John A. Goerdt, *How Mediation Is Working in Small Claims Courts*, 32 JUDGES J. 16, 45, 47 (1993) (Washington, D.C. requires 40 hours, Portland, Oregon requires 32, and Des Moines, Iowa requires 20). The intensive seminar also involves students in three, rather than one, complete simulated mediations and adds 15 short, focused role plays that are not found in the standard county training course offered by the Florida Dispute Resolution Center, the primary provider of certified county instructional programs. *See* Sharon B. Press, *County Civil Mediation, in* 2 ALTERNATIVE DISPUTE RESOLUTION IN FLORIDA 7-1, 7-5, 7-6 (1995) (stating that the Florida Dispute Resolution Center has "a packaged county court mediation program that is certified by the Supreme Court" which is offered free to individuals willing to serve as county court mediators); Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities–What We Learn From Mediation*, 56 MOD. L. REV. 361, 373 (1993) (UCLA's mediation clinic requires 45 hours and two videotaped simulations). Students taking the first Mediation Clinic in Fall 1997, had an opportunity to compare both courses because I had not yet qualified as a Primary Trainer under standards adopted by the Supreme Court of Florida. *See In re* Mediation Training Standards and Procedures, Fla. Admin. Order 2.04 (1) (D) (Dec. 1, 1995) (on file with Clerk, Fla. Sup. Ct., and author) [hereinafter Mediation Admin. Order] (requiring service in five distinct county mediation programs to qualify as a primary trainer). I qualified as a primary trainer later that term and the Mediation Clinic's Intensive Seminar was qualified as a certifying course by the Supreme Court on November 19, 1997. The gap in the fall was closed by requiring students to take a three-day, 20 hour course taught in early September by the Dispute Resolution Center in Gainesville.

10. This course, like the classroom components of other mediation clinics, seeks to help

students: (1) develop understandings of conflict and its dimensions; (2) improve fundamental information acquisition skills such as questioning and listening needed to mediate effectively; (3) acquire knowledge regarding the benefits and limitations of mediation; (4) enhance abilities to engage in critical, self-reflective lawyering, allowing students to learn better from their practice experiences; (5) discern effective ways to represent clients before and during mediations; and (6) provide quality mediation services to the litigants with whom they work. *See, e.g.*, Beryl Blaustone, *Training the Modern Lawyer: Incorporating the Study of Mediation into Required Law School Courses*, 21 SW. U. L. REV. 1317, 1325-29 (1992); Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995, 1997-2002 (1993); Stark, *supra* note 7, at 462-63; Janet Weinstein, *Teaching Mediation in Law Schools: Training Lawyers to Be Wise*, 35 N.Y.L. SCH. L. REV. 199, 203-04 (1990). This course must satisfy 69 specific learning objectives outlined by the Supreme Court of Florida. Mediation Admin. Order 3.01.

This course pursues the commonly accepted three-step learning model of "theory instruction, performance and critique." SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 254 (1992) (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) [hereinafter MACCRATE REPORT]. The text selected to promote theory development was written from the premise of coaching readers the week before they were to begin their first mediation. *See* KARL A. SLAIKEU, WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES (1996). Adopting a settlement orientation, it describes the mediation process and many of its essential tasks concisely and practically. Supplemental readings develop critical action theory frameworks for questioning, listening, framing, and facilitating negotiation in more detail to help students prepare, organize, and evaluate their classroom and field experiences. *See* Peters, *supra* note 6, at 880. Critical evaluations of demonstration videotapes, excerpted from movies, television shows, and simulated and actual mediations, complements theory development in this intensive seminar. These demonstrations help students visualize the action theories described in their readings and create mental images of effective and ineffective task performance. *See id.* at 882.

Students find this approach helpful, writing: "During the first week of the intensive seminar, I found that the video clips and role plays greatly help to supplement the reading." Student Comments (Spring 1998), *supra* note 8.

"The use of . . . movie clips helped to keep my attention to the learning process. I thought this helped us later to perceive situations sooner, and the possible conflicts that may arise without having to wait until the 'real deal' occurs." *Id.* (Fall 1997).

In addition, the intensive seminar includes two measuring tools, the Myers-Briggs Type Indicator [hereinafter MBTI] and the Thomas-Killman Management of Differences Exercise [hereinafter MODE], that students can use to generate and explore insights regarding their action habits and behaviors of others. The MBTI, designed to make Carl Jung's theory of psychological types based on similarities and differences found in common human behavioral patterns quickly functional, provides valuable insights about habitual patterns and is increasingly used in clinical courses. *See, e.g.*, J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 70-72 (1996); Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1, 103-112 (1993); Peters, *supra* note 6, at 925-26; Don Peters & Martha M. Peters, *Maybe That's Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 N.Y.L. SCH. L. REV. 169, 173-74 & n.20 (1990). The MBTI helps students identify their action tendencies that may be influenced by personality preferences and allows them to broaden their repertoires. *See* Menkel-Meadow, *supra* note 9, at 377; Peters, *supra*, at 98-112.

The MODE measures conflict resolution preferences or styles. *See* Steven Hartwell, *Understanding and Dealing with Deception in Legal Negotiation*, 6 OHIO ST. J. ON DISP. RESOL.

apply these theories in simulated mediations and shorter, focused role plays.[11] This intensive seminar also introduces differing models and

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171, 188 (1991); Peters, *supra* note 6, at 925. It has been used successfully in mediation clinics to deepen self-awareness and understanding of conflict dynamics in mediation. *See, e.g.*, Menkel-Meadow, *supra* note 9, at 377; Stark, *supra* note 7, at 493-94; Weinstein, *supra*, at 234-35.

Students have found these instruments helpful, writing:

> I found it [MBTI] and, in part, the MODE, to be the most valuable aspects of this class in that it [sic] enabled me to better learn the actual mediation theories. I was able to better learn the mediation theories because my self-evaluation as a mediator is grounded in large part to my type; I find that I temper both my self-criticism and praise by what I have found to be my type preferences. This approach is helpful in that I find I am able to better accept some of my mistakes without beating myself up as much as I am normally prone to do.

Student Comments (Fall 1997), *supra* note 8.

> Type theory was the most helpful as far as my life from now on. It is a great tool for understanding people and getting along with them. This is something we will use in all aspects of our life, not just legal practice. It has improved my married life and my tolerance for extroverted judgers (who I previously thought were just assholes).

Id. (Spring 1998).

> The most interesting and helpful aspect of the course was the MBTI and the MODE tests. It was helpful to know what our dominant type was so we could see where our strengths and weaknesses lie. I am an ESFJ, so it was nice to finally have a reason why I feel so out of place here in law school. This type indicator is a good tool to help us recognize and overcome our weak areas but I could also see it being used as a crutch. I found some of us, myself including, using our type to excuse poor action choices, For example, "I didn't mean to dominate the whole process, but I am an extrovert" or "I was perfectly happy to let you deal with him, it's the avoider in me."

Id. (Fall 1997).

11. Students perform three simulated mediations ranging in length from 20 to 60 minutes during the intensive seminar. These include a family dispute regarding a contested will that allows students to experience differences between mediation and adjudication; a conflict between neighbors that presents the type of continuing relationship possibilities students will occasionally encounter in their pro se docket cases; and three situations, of which each student mediates one, drawn from actual small claims mediations that replicate many of the issues and dynamics students will potentially encounter. Mediating in these simulations requires translating into action the essentially cognitive activities needed to assess situations strategically using the conceptual frameworks presented in readings, demonstrations, and discussions; selecting objectives realistically; and then developing action theories appropriately. *See* Peters, *supra* note 6, at 888-89. Portions of these performances are videotaped and then reviewed and discussed by the entire class. Following Supreme Court rules, the last simulation drawn from actual county cases is observed in its entirety by a certified mediator and followed immediately by a discussion where the observer

visions of mediation[12] and explores its ethical dimensions.[13]

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and the students playing party roles share feedback. In addition, students are asked to audiotape these simulations and, if they played a mediator role, to listen to their audiotapes and chart their action choices. Charting is done on a form that lists 22 tasks commonly required in mediation. A copy of this chart is attached as an Appendix to this Article.

Students have found these approaches valuable, writing:

> [T]he exercises we did to emphasize self-reflection and realize action choices were extremely helpful. Not only was I able to use those techniques to analyze my mediation experiences, I have used them in my personal life as well. I find myself analyzing my action choices in conversations and arguments I have with family and friends. This tool has also served to help me understand the choices my co-mediators make and to learn from their experience as well. It gives the whole clinic a basic way to communicate and understand why we make the choices we do.

Student Comments (Fall 1997), *supra* note 8.

> While the course was heavily front-loaded, the amount of training we did at the beginning was worth it. Before we ever had to mediate, we were well-versed in the theories and methods which were necessary for us to be effective mediators. I took careful notes and will keep my materials for future reference. Also, the number of mediation exercises we had at the beginning served us well later on in the actual mediations we did. It is one thing to learn the theories, but quite another to apply them. . . . I became much more at ease with the idea of applying what we had learned. Therefore, by the time we did have to do actual mediations I felt much more comfortable with my understanding of how to mediate than I would have without the practice.

Id.

> My first reaction to the mediation was how unprepared I felt as mediator. After 14 hours of lessons I still felt tongue-tied and insecure. As I listened to the audio tape of the session I could hear hesitation and meekness in my voice. In the opening statement I sounded more confident but as the parties began their stories and the tension between them grew more obvious, I became more uncomfortable with the situation.

Id.

12. Mediation literature describes at least nine different models including facilitative, evaluative, transformative, bureaucratic, open, closed, community, activist, and pragmatic. *See* Menkel-Meadow, *supra* note 4, at 219. Scholars display a tendency to analyze the mediation process using dichotomous models including directive-passive, broad-narrow, open-closed, and positional-interest-based. *See* Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 729 (1996). A debate rages in law reviews and dispute resolution literature about how mediators should behave, focused on whether only facilitative actions should be permitted or whether case evaluations may be made. *See generally* James J. Alfini, Moderator, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997) (discussing the debate over how mediators should behave and

I needed a small claims narrative to use near the beginning of this workshop to provide students with an overview. Although useful narratives of major litigation[14] and family disputes[15] existed, I questioned their value

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perform). An influential book also argues that mediation can be assessed usefully by analyzing four different visions for the process depicted in satisfaction, social justice, transformative, and oppression stories. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 15-32 (1994).

13. The Supreme Court of Florida has promulgated a code of ethical conduct and grievance procedures for mediators. *See* FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010-.100; *see also* Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701 (1994). An empirical study involving interviews with more than 80 Florida mediators showed extensive concern with fundamental value dilemmas concerning what their role is when different objectives of the mediation process clash. *See* Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RES. 1, 43. A central concern in this study, creating dilemmas reported more frequently than any other type, involved tensions between promoting party self-determination by remaining totally facilitative, and pursuing agreement by more directive interventions including providing information, suggesting solutions, giving advice, and making recommendations. *See id.* at 22-28. This clash reflects competing mediation visions, frequently labeled facilitative and evaluative. *E.g.*, Alfini, *supra* note 12, at 919; Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 951 (1997). *Compare* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997), *with* James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769 (1997).

The intensive seminar presents this crucial clash between mediation visions, values, and mediator roles and then immerses students in aspects of it in focused role plays. These issues then provide an overarching theme for many discussions that occur throughout the remainder of the term when students evaluate the mediations they observe and conduct.

The class continues after the intensive seminar, dropping to two meetings a week of two hours duration. One of these weekly sessions presents additional topics such as power issues, lawyering before and during mediation, collaboration, and valuing and managing differences. It also covers substantive law in areas students are most likely to encounter including landlord-tenant, consumer protection matters, and motor vehicle litigation. In addition, students participate in the weekly small claims docket of the County Court for Alachua, Florida, by first observing mediations I and other volunteers conduct until they have completed their mentoring requirement of four. Then students begin to co-mediate in pairs for the rest of the term. I observe many of these co-mediations and Alison Gerencser and other certified mediators supervise the rest. Students receive feedback as soon as possible after their co-mediations, usually later that same morning. In addition, students are asked to reflect on their theories, actions, and critiques by writing short papers after every mediation they observe or conduct. *See* Peters, *supra* note 6, at 890 n.30. Many of the quotations in this Article are taken from those papers with the written permission of these students.

14. *See, e.g.*, Lavinia E. Hall, *Finding Alternatives to Litigation in Business Disputes, in* WHEN TALK WORKS: PROFILES OF MEDIATORS 279 (Deborah M. Kolb et al. eds., 1994) (narrating the mediation of an employment dispute); SAM KAGEL & KATHY KELLY, THE ANATOMY OF MEDIATION: WHAT MAKES IT WORK 3-108 (1989) (narrating a labor-management dispute); FLETCHER KNEBEL & GERALD S. CLAY, BEFORE YOU SUE: HOW TO GET JUSTICE WITHOUT GOING TO COURT 108-33 (1987) (narrating a pre-suit mediation of an employment discharge situation).

15. *See, e.g.*, JOAN BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT 130-

in an intensive educational effort where every page of assigned reading has added importance. Florida's extensive embrace of court-annexed mediation[16] has generated an elaborate procedural mechanism for obtaining certification from the Supreme Court to mediate in these arenas. This certification permits participation in panels from which judicial appointments are made. It also creates obstacles preventing most law students from participating as mediators in family and civil litigation of claims more than $15,000. Obtaining certification to participate in major civil litigation, for example, requires five years of experience practicing law.[17] Similarly, family law certification, which incorporates dependency mediations, requires four years of experience practicing as either a lawyer, an accountant, or a mental health professional.[18] A mediation clinic in Florida using court-annexed mediations as the source of field experience necessarily must embrace county court work, the only venue which does not require experiential minimums to obtain certification.[19] Voluntary

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43 (1985) (case study in structured family mediation).

16. In 1987, the Florida Legislature enacted a comprehensive mediation statute giving trial judges broad discretion to order any civil case to this process subject to rules adopted by the Supreme Court of Florida. *See* Act effective Jan. 1, 1988, ch. 87-173, §§ 1-6, 1987 Fla. Laws 1202, 1202-05 (codified as amended in scattered sections of FLA. STAT. ch. 44 (1997)). By 1995, all twenty judicial circuits in Florida sent some portion of their caseloads to mediation. *See* Press, *supra* note 9, at 907. Data from only 12 of these circuits indicated that over 75,000 cases were mediated in 1995. *See id.* at 907 & n.18.

17. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010(c)(2) (requiring either Florida Bar membership in good standing with a least five years of Florida practice and one year of active membership in The Florida Bar within one year of applying for certification, or status as "a retired trial judge from any United States jurisdiction who was a member in good standing of the bar in the State in which the judge presided for at least 5 years immediately preceding the year certification is sought"). This provision has received substantial criticism, even prompting one prominent community mediator from another state to predict that it would cause "the end of good mediation." James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of Good Mediation?*, 19 FLA. ST. U. L. REV. 47 (1991) (quoting Albie Davis, Director of the Mediation Administration Office of the District Court of Massachusetts). A subsequent amendment allows parties to stipulate to a court-ordered mediation done by "a mediator who does not meet the certification requirements . . . but who, in the opinion of the parties and upon review by the presiding judge, is otherwise qualified to mediate all or some of the issues in the particular case." FLA. R. CIV. P. 1.720(f)(1)(B). Although possible, law students are not likely to be appointed to mediate these cases by party stipulation.

18. *See* FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010(b)(2). This provision, along with the circuit civil rule cited *supra* note 17, lessens chances for students to observe circuit civil and family mediations as part of their clinical experiences. Observations are usually limited to persons going through their mentorship requirements who watch only after parties consent. Two observations are required for certification in both arenas. *See* FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010(b)(3) (family); *id.* at (c)(3) (circuit civil). Many students, however, will have observed mediations in these areas as law clerks.

19. County court certification in Florida requires a minimum of 20 hours in a training program certified by the Supreme Court, four observations, and four co-mediations. *See* FLA. R.

mediations do not provide a reliable option.[20]

My search for a relevant small claims narrative coincided with actual mediations I was conducting to qualify under Supreme Court of Florida rules so that my intensive seminar could become the first step leading to student certification as county mediators.[21] While the literature on small claims mediation has grown significantly, I found no narratives that met my objectives.[22] This stimulated me to convert my fifth actual mediation

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CERT. & CT.-APPT. MEDIATORS 10.010(a)(1) and (2). Although no educational or experience requirements are imposed, a 1995 Florida Dispute Resolution Survey revealed that 87% of those who completed county mediation training had college or postgraduate degrees. *See* Press, *supra* note 9, at 7-8. This group was 94% white, 70% male, and over 55 years of age (55%). *See id.*

20. Generating voluntary mediations is not easy. People in conflict often hesitate to seek a third party's assistance because they fear weakening their negotiation chances for a maximized gain outcome. *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 82 (2d ed. 1996). Others refuse to participate pursuing a strategy of avoiding conflict. *See* SLAIKEU, *supra* note 10, at 4-9. Mediation programs that depend upon voluntary participation attract relatively few cases even when offered at low or no cost. *See* Rosselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILL. L. REV. 565, 570-71 (1997). For example, the Dade County community dispute resolution program, one of the pioneer projects in Florida, closed in 1995 in part to a disappointingly low caseload, particularly in comparison with court-connected mediation. *See* Press, *supra* note 9, at 906 n.11.

Local experiences also held no promise. A voluntary mediation program attached to the University's student services office, launched in 1996 with 12 graduate and law students whom I helped instruct, did only seven mediations that entire academic year on this campus of more than 40,000 students. Similarly, placing brochures in our University's Student Legal Services office in the fall of 1997 advertising the Virgil Hawkins Mediation Clinic's desire to provide free mediation services produced no voluntary mediations.

21. Although I obtained my entitlement to county mediation certification by completing family instruction and mentorship in 1993, my actual mediation experience was virtually nil. Class conflicts and the number of mediators on the family panel kept me from doing much family work in the intervening years. In addition, the Florida Dispute Resolution Center reports that more than 90% of the parties ordered to mediation stipulate to a mediator rather than having one appointed by the court. *See* John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 840 n.5 (1997).

22. The growing volume of small claims literature lacked a specific mediation narrative that I could find. *See, e.g.*, Arthur Best et al., *Peace, Wealth, Happiness, and Small Claims Courts: A Case Study*, 21 FORDHAM URB. L.J. 343 (1994); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11 (1984); Craig A. McEwen & Richard J. Maiman, *The Relative Significance of Disputing "Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC'Y REV. 439 (1986); Susan E. Raitt et al., *The Use of Mediation in Small Claims Courts*, 9 OHIO ST. J. DISP. RES. 55 (1993); Wissler, *supra* note 21; Note, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1990). Two narrative segments of landlord-tenant mediations interspersed with extensive analysis also lacked the complete picture that I sought. *See, e.g.*, BUSH & FOLGER, *supra* note 12, at 139-88, 191-208 (short segments of a voluntary mediation of dispute between a private individual landlord and his tenant interspersed with explanatory comments and analysis, followed by detailed evaluation of how the mediator used a transformational approach); Stark, *supra* note

into the following narrative.

II. A SMALL CLAIMS MEDIATION NARRATIVE

Dan Post[23] worried that he might not make it to the courthouse on time. He should have skipped that quick visit to his office at the law school, a stop that ran longer when he encountered a clinical student with "just a couple of questions." He took an alternate route to avoid University Avenue traffic. Fortunately he found a place on the second floor of the parking garage and Judge Arch was just entering the second floor courtroom when Dan arrived.

Dan didn't listen carefully to the Judge's introductory remarks because

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13, at 780-84 (scenes from a caucus in a court-ordered mediation of a suit seeking return of security deposit against a private landlord analyzed from evaluative-facilitative and ethical perspectives).

23. The names of all participants have been changed to protect their identity and honor the confidentiality that attaches by Florida statute to court-ordered mediation. *See* FLA. STAT. § 44.102(3) (1997) (providing that "[a]ll oral or written communications in a mediation proceeding, other than an executed settlement agreement . . . shall be confidential and inadmissible in any subsequent legal proceeding"). The outcome has also been modified. This narrative is based on short, fragmented, and incomplete notes taken during the session and my all too suspect memory. Although originally drafted shortly after this mediation which occurred in the summer of 1997, considerable editorial license has been taken with it since. Much of this narrative actually occurred although changes, embellishments, and elements taken from other mediations have been added to honor the confidentiality attendant to this session.

The difficulty of planning specifically for any particular mediation and taking accurate notes during rapidly paced sessions hampers traditional clinical approaches. *See* Stark, *supra* note 7, at 497-501. Students have commented on how difficult it is to keep track of their action theories, particularly when compared to simulated events which are video-taped or audio-taped, writing:

> I wish we could find some way to continue critiquing our individual mediations with the mediator's action choices chart and an audio tape. It is extremely helpful to me when I am able to see my past action choices, reflect upon the situation, and plan out future action choices to pursue if faced with a similar situation. After our actual mediations began, I was no longer able to effectively critique myself because my perception of performance is completely different than actual performance.

Student Comments (Spring 1998), *supra* note 8.

High quality post-performance feedback discussions supply the best solution to these problems. *See* Stark, *supra* note 7, at 499. Students typically value these critique sessions, noting:

> As a mediator in training I need that specific example based feedback to effectively analyze my performance. In addition, I found that when I mediated that I was unable to take notes effectively for my reflection papers. Because Don had charted us and taken extensive notes on our performance, I would often borrow his notes as a reference for my reflection papers.

Student Comments (Fall 1997), *supra* note 8.

he had heard them many times before.[24] His mind wandered to the

24. Small claims jurisdiction in Florida is exercised in county courts and extends to "all actions at law of a civil nature in the county courts in which the demand or value of property involved does not exceed $5,000 exclusive of costs, interest, and attorneys' fees." FLA. SM. CL. R. 7.010(b); *see* FLA. STAT. § 34.01(2) (1997) (giving county courts small claims jurisdiction generally). The Alachua County Court holds one small claims docket each week for pre-trial conferences. Florida law requires that plaintiffs and defendants shall appear at these conferences personally or by counsel, and these sessions are scheduled by the Clerk when the statement of claim is filed and a notice to appear is served along with the summons. *See* FLA. SM. CL. R. 7.090. These sessions are held on Tuesday mornings with cases involving attorneys scheduled at 9:00 a.m. and pro se matters not involving lawyers set at 10:00 a.m. Students enrolled in the Virgil Hawkins Mediation Clinic handle matters referred during each docket, giving them some variety in mediation dynamics. *See* Stark, *supra* note 7, at 471-72 (arguing the value of giving students different mediation experiences that call for different strategies and tap different innate skills and abilities).

Alachua County judges traditionally begin each small claims session with introductory remarks designed to explain basic pre-trial appearance conference procedures. These explanations typically indicate that: (1) when their case is called by the clerk everyone steps forward to the podium before the judge; (2) defendants then must either admit or deny the plaintiff's claim; (3) if the claim is admitted, defendants are usually given an opportunity to stipulate to a mutually acceptable payment plan (authorized by FLA. SM. CL. R. 7.210(a)); and (4) if the claim is denied in whole or in part, the parties are then ordered to mediate with one of the volunteer mediators in the courtroom. Trials are set by clerks only after unsuccessful mediations unless all parties are represented by counsel and all agree to waive the pretrial conference. FLA. SM. CL. R. 7.090(e) (requiring filing a short document indicating disputed fact and law issues, number of witnesses, and estimated time needed).

Judges also use this introductory opportunity to explain: (1) that parties without counsel are at a disadvantage at trial against represented parties; (2) that unrepresented parties must bring all witnesses and important evidence to trial; (3) how witnesses are subpoenaed; and (4) why documents alone, such as repair estimates, are not sufficient evidence. In addition, judges frequently add a few words supporting mediation, sounding themes that include: (1) trial will produce a winner and a loser with parties having little control over outcome while mediation lets parties control results; (2) mediation is their last and best chance to find a mutually beneficial resolution that may be broader than anything judges may order; and (3) judges have to follow the law which can sometimes seem very unfair. One Judge frequently embellishes this last theme by relating a case where a car repair shop did more than $5000 worth of work and yet did not recover a penny after failing to comply with the provisions of the Florida Motor Vehicle Repair Act. *See* Gonzalez v. Tremont Body & Towing, Inc., 483 So. 2d 503 (Fla. 3d DCA 1986) (repair shop not entitled to quantum meruit damages because it failed to conform with written repair estimates). I wonder whether this Judge has considered the irony of encouraging unrepresented defendants to mediate seriously by using one of the few examples in Florida law where consumers actually have the upper hand.

Unlike Dan Post's choice, clinic students are encouraged to listen carefully to these introductory remarks so that they can be referred to during the mediation. For example, judicial explanations of the procedures for subpoenaing witnesses and marshaling evidence can be referenced when exploring the option of trying the case. So can judicial disclaimers of the inferences that unrepresented litigants may hold that trial outcomes will be fair rather than in accord with legal standards.

Two of Alachua County's five county judges handle small claims cases which allows clinic students to observe different approaches to these opening remarks. The two judges in the fall 1997 term were an African-American woman and a white male from a rural outlying county. I frequently

appointments committee meeting scheduled for the afternoon, a session where he hoped to convince skeptical colleagues to allocate more resources to the clinical curriculum at the law school.[25] A veteran of more than twenty years on this law faculty, he helped the curriculum grow to a point where about 30% of the graduating class enjoyed an in-house clinical opportunity.[26] Dan passionately believed that more needed to be done,

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encourage students to reflect on how these differences might effect how justice gets dispensed if the matters they mediate go to trial. *See* JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 111 (1990); JOHN C. RUHNKA ET AL., NATIONAL CTR. FOR STATE COURTS, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION, ch. 2 (1978). These impressions are developed further by assigning students to observe small claims trials conducted during the two weeks of the term set aside for observing mediations.

25. Considerable evidence suggests that Dan's chances of succeeding with his proposal are not good. Many argue that "an imbalance in emphasis presently exists in legal education." MACCRATE REPORT, *supra* note 10, at 277. Instruction in mediating, along with interviewing, counseling, negotiating, and litigating, theories and skills and supervision of clinical field work, consumes only 9% of the total instructional time provided by law schools. *See* MACCRATE REPORT, *supra* note 10, at 239-41. The cost of this type of instruction actually dropped as a percentage of law school budgets from 4.5% in 1977 to 3.1% in 1987-88. *See id.* at 249-50. This important work at the University of Florida College of Law now involves only 3% of the full-time tenure track faculty (2 of 58). Most of this work at Florida is done by five persons who work with little job security and receive salaries that average less than half of those earned by full-time tenure track faculty. The College has added only one non-tenure track to teach these courses since the profession's call that "[l]aw schools should be encouraged to develop or expand instruction in such areas." *Id.* at 332 (Recommendation C-13). Three tenured professors who taught in these areas retired during this period and have not been replaced.

Some question exists whether significant reform in legal education will ever come from the voluntary efforts of law schools. *See* John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135 (1997). The dean of Dan's law school argues that scholarship provides the primary influence on academic reputation and that law schools increase their prestige by boosting the scholarly achievement of their faculties. *See* Richard A. Matasar, *The MacCrate Report from the Dean's Perspective*, 1 CLINICAL L. REV. 457, 476-77 (1994); *see also* Elson, *supra*, at 1138-39 (arguing that law professors' initial hiring, promotion, tenure, compensation, and ability to move to more prestigious jobs all depend on how their scholarship is rated by other tenured faculty). The bulk of this legal scholarship, written for and read primarily by legal academics, often lacks social utility. *See* Elson, *supra*, at 1139-41 (arguing that social benefit is usually irrelevant in the reward structures applied to most legal scholarship). Dan's dean also ignores or overlooks evidence, *see infra* notes 48, 64, and argues that clinical outputs are difficult to quantify and, when "quantified don't necessarily impress outsiders." Matasar, *supra*, at 478 n.49. The outsiders Dan's dean refers to are other academics and those who vote in the *U.S. News and World Report*'s annual survey ranking law schools. *See id.* at 469.

26. In-house clinics provide learning experiences where the supervision and review of student field activities are done by law school faculty rather than by practitioners outside the law school. *See Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 511 (1992). Florida's new Mediation Clinic qualifies as an in-house operation because virtually all of the observation and feedback of student co-mediations are done by law school faculty. The ratio of students to faculty recommended for in-house clinics involving actual client representation is no more than eight students to one faculty member. *See* MACCRATE REPORT, *supra* note 10, at 250

particularly to boost the number of slots available in non-litigation professional skills courses including the new mediation clinic.[27]

(stating national clinical average is eight to one). I initially hoped that the Mediation Clinic could expand that ratio to 10 or 12 to 1 because the non-representational nature of the service avoids continuous client responsibilities and case planning supervisory sessions. *See* Stark, *supra* note 7, at 457 (suggesting that mediation clinics avoid client telephone calls, case emergencies, and extensive strategic and tactical event planning conversations). Unfortunately, the constraints of local small claims practice demonstrated that eight students are the maximum that can be accommodated to meet Florida's requirement of four observed mediations and four co-mediations. *See* FLA. R. CERT. & CT.-APPT. MEDIATORS 10.010(a). Nevertheless, the addition of this clinic along with a new pro se family law advice and juvenile clinics let our College of Law meet the national average which affords in-house clinical learning opportunities to 30% of each class. *See* Marjorie A. McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 280-81 (1990). Externship placements with state attorney and public defender offices in Gainesville and nearby cities during the fall and spring terms, and around the state during summers, permit accommodating approximately half of the graduating class.

Students at Florida must elect between an in-house civil or externship criminal law representational clinic. Seniority measured by earned credit hours drives enrollment in all elective courses including clinics. Students may also take the Mediation Clinic but are placed second in priority to students who have not been able to take either of the client-representing clinics. As a result of strong student interest in clinical learning opportunities, virtually no students can take more than one. For example, 99 students applied for the Mediation Clinic in the spring term of 1998 and 64 applied for it in the fall term of 1998. *See* Memorandum of from Assistant Dean Patrick Shannon to the Faculty of the University of Florida College of Law (June 5, 1998) (on file with author).

27. Florida, like most schools, provides more learning opportunities in litigation theories and skills than in the important non-trial tasks of interviewing, counseling, negotiating, and problem solving. *See* Peters, *supra* note 6, at 928; MACCRATE REPORT, *supra* note 10, at 240. A majority of law students take either one (32%) or no (28%) professional skills courses if trial advocacy, moot court, first year and advanced research and writing, and first year introduction to lawyering courses are discounted. *See* MACCRATE REPORT, *supra* note 10, at 240. Florida offered only one section of its negotiation and interviewing and counseling courses in the 1995-96, 1996-97, and 1997-98 academic years. *See* Peters, *supra* note 6, at 928 n.116. Lack of teachers interested in teaching these courses rather than lack of student interest in these areas create this situation. "Although the [Florida] Law Faculty in 1993 recommended as part of a curriculum revision that non-trial skills courses provide 240 seats a year (serving approximately 60% of its senior class), this goal has not been achieved." *Id.* at 929 n.118.

In addition, few American law schools currently provide curricular sequencing where students take simulation-based courses and develop preliminary groundings in action theory and practice before applying their knowledge and skills in real situations. *See* Elson, *supra* note 25, at 1137 (arguing no law school "has done the comprehensive curriculum planning that a rational commitment to the goal of professional education requires"); Peters, *supra* note 6, at 929-30 & n.118 (indicating that the vast majority of students who enroll in Florida's in-house civil clinics do not have a chance to learn interviewing, counseling, and negotiating theories and skills in simulation-based courses offered before their clinical experiences). Mediation involves facilitating and enhancing negotiation. *See, e.g.*, KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 16 (1994); MOORE, *supra* note 20, at 8; SLAIKEU, *supra* note 10, at 3-4. Requiring mediation clinic students to take a simulation-based negotiation course as a prerequisite makes immense sense but cannot currently be done because of a lack of teachers interested in teaching

Dan tuned in to the courtroom proceedings as Judge Arch concluded her remarks and the first case was called. Dan was the first volunteer mediator on the list this morning and he didn't want to miss any of the judicial dialogue on his case.[28] Surprising to see Jim Maxwell, a prominent local litigator, here in small claims court, thought Dan, as Jim and another man approached the podium in the center of the courtroom. Dan litigated several difficult custody cases against Jim during the years he worked with the in-house family law clinic at the law school, and he recalled that Jim liked and used aggressive and abrasive behaviors when trying cases. Two nicely dressed women of different ages also approached the podium, probably a mother and daughter thought Dan.

"Do you admit or deny the claim?" intoned Judge Arch to the women as they got to the podium.

"We were told we could settle this for two months' rent," said the older woman, probably the mother. "Now these people say we can't."

"I'll send you to mediation to see if you can work this out," said Judge Arch, obviously eager to get moving on the morning's large docket.[29]

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negotiation. I am the only person who has taught our negotiation course in the last five years.

28. Watching the often very short exchange at the podium as the Judge explores whether the plaintiff's claim is admitted or denied affords the only case-specific data gathering possible before a mediation. *See* KOVACH, *supra* note 27, at 70.

29. County judges have broad discretion regarding whether to decide claims are disputed sufficiently to be ordered to mediation, and often differ in their willingness to do so. Some appear reluctant, occasionally asking parties whether they want to mediate. One student, after a frustrating session where a Judge passed up several obvious chances to order mediation, wrote:

> I witnessed at least three cases where the party should have gone to mediation to settle the claim. In one a lady admitted the amount she owed for medical bills but denied the interest payments because it had taken the hospital 16 months to send her the first bill. The judge said "I can't tell whether you admit or deny," but then she proceeded to say, "what you are saying is that you admit the amount owed and so then if you are not prepared to pay and not prepared to work out some sort of a payment plan and then the judgment will be entered against you." Now perhaps I am wrong . . . [h]owever, in my mind this case was one that should have been mediated.

Student Comments (Fall 1997), *supra* note 8.

Other county judges, like Arch in this story, are eager to refer cases to mediation in the hope that settlements will occur obviating trials and clearing their dockets. This reflects an instrumentalist vision of mediation, seeing it as "a perfunctory process which settles cases and clears dockets." Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 54 (1996). For example, Judge Aymer L. "Buck" Curtin who presided over small claims dockets during both of the first two terms of the Mediation Clinic's existence, called mediation "'the greatest thing that ever happened to the court system.'" Hellegaard, *supra* note 7, at 21. Judge Curtin then explained: "'You shouldn't be using a judge that's paid a huge sum of money and has 15 or 20 years of experience to sit there resolving disputes that don't always have a sound legal basis[.] Mediation has been marvelous. It's also enabled us to free up judges to work

Not much to go on there,[30] thought Dan, standing and then walking to the clerk's table. He picked up the court file and the mediator's packet containing the forms he was to complete regarding this mediation's outcome. Then he motioned for the women as well as Jim and the other

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on other cases.'" *Id.* Volunteer mediators in Alachua County mediated 719 cases in 1997, obtaining settlements in 504 matters. *See* Janet Hearn, Mediator Results-Small Claims (1998) (on file with author). National research also confirms that mediation reduces the amount of judicial time courts assign to small claims calendars by settling a substantial percentage of trial-ready cases. *See* Raitt et al., *supra* note 22, at 61.

30. These brief sessions often reveal helpful clues about substantive issues involved in the dispute that can be explored further during mediation. In addition, the amount of conflict and tension between disputants can often be discerned by careful observation of their words and behaviors during these short conversations at the podium because communication provides the medium through which most conflict occurs in courtrooms. *See* KOVACH, *supra* note 27, at 3. Verbal and nonverbal clues are often provided. *See* MOORE, *supra* note 10, at 154 (suggesting mediators assess the psychological readiness of participants including emotional level and negative behaviors that are likely to influence the negotiation); Stark, *supra* note 7, at 494 (suggesting that "90% or more of the emotional content of statements is nonverbal"). This can help student mediators make an individualized decision regarding the degree of structure in the form of communication ground rules that these parties might need to converse productively at the beginning of the mediation when presumably everyone sits together in the same room.

Scholars generally agree that mediators should consider the need for ground rules for communication, typically announcing or suggesting them during their opening statements. *See, e.g.*, KOVACH, *supra* note 27, at 85 (specific ground rules should be explained after mediator describes the process); MOORE, *supra* note 20, at 201-02 (behavioral guidelines should be considered as part of a mediator's opening statement); SLAIKEU, *supra* note 10, at 79 (providing example of how ground rules can be incorporated in mediator's opening statement); JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT 63 (1987) (mediators should establish an appropriate tone for the discussion . . . [with] appropriate expectations about what can and cannot be done).

Clinic students are encouraged toward a context-sensitive approach to choosing action theories and implementing behaviors. Whether and how to announce communication guidelines gives students a good example of adapting theory choice and action to specific participant contexts. Parties who are not in overt conflict may resent being told how to communicate while persons engaged in emotional conflict may value this same approach. *See, e.g.*, MOORE, *supra* note 20, at 202 (suggesting there is clearly no one way to establish behavioral guidelines because disputants in tense situations may need direction from mediators while parties in less polarized situations may be in total control). Students occasionally are kept from the relatively small courtroom on large docket days when all the seats are given to parties, and some have remarked on the consequences of this missed opportunity to observe context. One student, reacting to feedback from another certified mediator who supervised one day while my colleague was away, noted:

> [She] also suggested that we lay ground rules. I must say that I disagree with her as I don't think it is always necessary and feel that doing so to parties who don't need to hear it we may come across as condescending. However, in this case it would have been appropriate because there was a lot of animosity between the parties. We were unaware of this because we weren't in the courtroom to pick up on it.

Student Comments (Spring 1998), *supra* note 8.

man to follow him out of the courtroom.

"Nice to see you again, Dan," said Jim as they reached the hallway. "How are things at the law school?"

"Fine," said Dan. "Maybe we can chat a bit afterwards."

Then, concerned about the potential favoritism that this spontaneous conversation might display,[31] Dan turned to the women and said, "Folks, my name is Dan Post and I am the volunteer mediator who will work with you this morning. We have the jury room to Courtroom 3C, next floor up. Let's head up there and I can explain how this works. We can take the elevator over here," motioning in the correct direction. "Would that be okay?"

Dan led the way to the elevator as everyone expressed their verbal and non-verbal approval. Dan always found the trip to the assigned mediation rooms scattered around the courthouse awkward, never knowing exactly how to strike an appropriate balance between conducting ice-breaking conversation and avoiding communications that invite potentially confidential disclosures from inexperienced participants. "Are you from Gainesville?," Dan said to the women as the elevator door closed.

"No," replied the older woman, "we're from Frontenac Beach. We just drove up for the hearing. My daughter used to live here, going to the University of Florida. That's what this is about. . . ."

"We'll discuss that fully when we get to our assigned room," interrupted Dan.[32] Guessed wrong there, he thought. "Where is Frontenac

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31. The need to constantly monitor how interventions affect not one, but all parties, makes a mediator's role challenging and very different from representational lawyering. *See* Stark, *supra* note 7, at 477 (calling this the problem of two). Mediators must make challenging decisions helping parties state their cases, develop and understand their interests, and engage in productive negotiation communications focused on solving problems while simultaneously maintaining balance and equilibrium between all participants. *See id.*

32. Effective mediating, unlike interviewing and counseling, may require intentional interruptions like this one which was done to avoid potentially breaching confidentiality. Although interruptions should be avoided while interviewing and counseling clients, studies of legal interviews have shown that lawyers frequently interrupt. *See, e.g.*, Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 604-05 (1979); Don Peters, *You Can't Always Get What You Want: Organizing Matrimonial Interviews to Get What You Need*, 26 CAL. W. L. REV. 257, 277 (1989-90).

Interventions done to neutralize escalating conversations that might threaten a mediation when parties are together provide another example of when interruptions may be appropriate action choices for mediators. *See* MARK D. BENNETT & MICHELE S.G. HERMANN, THE ART OF MEDIATION 21 (1996) (suggesting that neutralizing by de-escalating polarizing behaviors is part of a mediator's job); KOVACH, *supra* note 27, at 36-37 (suggesting that mediators should not allow venting of feelings to become uncontrollable); MOORE, *supra* note 20, at 167-68 (suggesting that mediators may want to preempt unproductive venting). De-escalating interventions can be done without interrupting if mediators decide that waiting for the party to finish will not irreparably harm the session. *See* KOVACH, *supra* note 27, at 36 (suggesting that "[p]roviding a safe environment where

Beach?" he inquired, hoping to continue breaking ice while minimizing harm caused by his interruption.

"Down south, just between Delray and Boynton," replied the woman.

"Beautiful place," said Jim.

He's obviously trying to soften up these women for the impending negotiation, thought Dan.

"Here we are," said Dan, opening the door to courtroom 3C. "Our room is back here," leading them through the large, vacant, cold and dark courtroom to the door to the much smaller room used for jury deliberations. This room contained one rectangular wood table and ten not very comfortable wood chairs. Upon entering, Dan said: "You can sit on either side of the table you wish. I'll sit here on the end. I wish we had a round table so we didn't have to sit across from each other in such a formal way.[33] These rooms were originally designed for jury deliberations but I

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the parties feel comfortable venting their feelings is also part of the mediator's role). Making this decision is complicated by the fact that some escalation and ventilation in joint session can generate valuable information along with communicating intensity and commitment. *See* MOORE, *supra* note 20, at 168 (arguing that venting in joint session may have value educating about source or intensity of emotion and providing a productive psychological release as long as it does not damage willingness to negotiate). Students frequently find this a difficult judgment call to make in the spontaneous environment of mediations, writing:

> A more prime example of how one action choice works so well on some parties and totally backfires on others is . . . [our] action choice to allow the parties to speak to each other and not stopping what seemed to be an escalating conversation. In what seemed like a split second and I had already thought we needed to stop this in an attempt to move forward . . . the defendant got up and said, "She will not let me get a word in and I did not come here to argue with her so I am leaving." And [she] walked out the door.

Student Comments (Fall 1997), *supra* note 8.

33. Mediators frequently use round tables because they convey no physical representation of a boundary between parties. *See* SHARON C. LEVITON & JAMES L. GREENSTONE, ELEMENTS OF MEDIATION 18 (1997); MOORE, *supra* note 20, at 151. Research suggests "that adversaries tend to seat themselves opposite each other, and that this physical arrangement seems to produce more polarized and competitive behavior than side-by-side seating." MOORE, *supra* note 20, at 150. Sitting at round tables or on the corners of rectangular tables may be more conducive to side-by-side problem solving. *See* SLAIKEU, *supra* note 10, at 67.

The rooms used for small claims mediations in the Alachua County Courthouse do not contain round tables. All of these rooms contain rectangular tables and they include small conference rooms, described by one clinic student as "closets," jury rooms adjacent to courtrooms, and occasionally counsel tables in the cold, dark, and cavernous courtrooms. None of these spaces project comfort or informality, important physical attributes for enhancing effective communication during mediation. *See* BENNETT & HERMANN, *supra* note 32, at 147; STULBERG, *supra* note 30, at 61. I am grateful that we do not have to mediate in snack bars, Goerdt, *supra* note 9, at 49, or "crowded, noisy hallways." Nolan-Haley, *supra* note 29, at 100 n.260. One particularly busy morning, however, sent us to the Courthouse Law Library, an experience which one student

bet more mediations than jury discussions occur in them now." Bumping his knee on the table's apron as he was saying this, Dan also wished the table were designed to allow someone to sit at its end comfortably.

"This mediation is our opportunity to discuss your concerns and interests to see if you can reach an agreement that will save everyone the expense and delay that will result if this matter needs a trial," said Dan, using a favorite invocation of mutual interests as an opening frame.[34]

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appropriately critiqued, writing:

> I was very concerned with this arrangement because of the potential for inadvertent breach of confidentiality since the area was open to the public. In fact, one mediation was interrupted when an attorney came around the corner looking for a volume of the Florida Statutes Annotated. [The plaintiff's attorney] stopped to acknowledge the attorney and to tell him where he could find the current statutes. While I don't think this had a significant impact on that particular mediation, I believe the potential was there for one of the parties to be made to feel uncomfortable and to question the validity of our assurances (and ultimately our credibility) about confidentiality which we gave them in our opening statements. After all, how private can a public law library be?

Student Comments (Fall 1997), *supra* note 8.

We shared these concerns with the Program Director later and she stopped the practice of assigning mediations to the Law Library.

34. Dan begins by framing this mediation in a productive, problem-solving manner. *See* MOORE, *supra* note 20, at 218 (suggesting that mediators may frame issues positively before parties restrict themselves by taking particular and opposed positions); SLAIKEU, *supra* note 10, at 75-76 (noting that everything the mediator says and does at the beginning sets the tone for moving disputants toward collaboration). Frames influence how people perceive and interpret situations and make decisions. *See* BENNETT & HERMANN, *supra* note 32, at 87; MOORE, *supra* note 20, at 217-18; Linda L. Putnam & Majia Holmer, *Framing, Reframing, and Issue Development, in* COMMUNICATION AND NEGOTIATION 128, 129 (Linda L. Putnam & Michael E. Roloff eds., 1992).

Dan completes this initial effort to articulate a positive frame by mentioning the interests of avoiding the expense, delay, and uncertainty that will accompany a trial of this dispute, an obvious alternative to an agreement. *See* SLAIKEU, *supra* note 10, at 29 (listing avoiding time and money costs of litigation and putting matters to rest as standard interests found in many, if not most, mediations). Interests reflect needs, desires, concerns, and fears. These interests motivate people to act, and provide the heart of the matter in any dispute. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40-41 (2d ed. 1991); SLAIKEU, *supra* note 10, at 26. Sorting interests into categories of shared, independent, and conflict can often be useful when negotiating and mediating. *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING 481 (1991). Frequently parties share the interests that Dan mentioned.

Although Dan did not suggest that these interests were either shared or exclusive, Bush and Folger would say that his formulation promotes the satisfaction vision of mediation. *See* BUSH & FOLGER, *supra* note 12, at 16-18. Dan clearly suggests reframing "a contentious dispute as a mutual problem" in order to "facilitate collaborative, integrative problem solving rather than adversarial, distributive bargaining." *Id.* at 16. In addition, someone totally committed to a non-directive approach to mediating would criticize Dan for directing this framing rather than waiting to see

Realizing that people in dispute may not be listening carefully at the beginning, he often repeats it later.[35]

"Before I explain more about how this process works," continued Dan, "let me ask you to introduce yourselves to me and to each other.[36] I know Jim Maxwell as we have tried cases against each other in the past.[37] I do not know anyone else in this room."

"As Dan said, my name is Jim Maxwell," said Jim.

Just like a lawyer to seize the conversational agenda at the first opportunity,[38] thought Dan.

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whether parties might adopt this productive, problem-solving approach on their own. *See id.* at 276 (arguing that no evidence proves that disputing parties want a directive approach to guide them out of their conflicts more than opportunities to "handle their conflicts for themselves with dignity, self-respect, and consideration for others"); MOORE, *supra* note 20, at 218 (noting that mediators may become "merely interested observers" in situations "when negotiators frame issues in a productive, problem-solving manner").

35. Mediators should not anticipate that parties learn something just because it is said once. Repetition helps people learn. *See* GORDON H. BOWER & ERNEST R. HILGARD, THEORIES OF LEARNING 77-78 (5th ed. 1981). Subsequent references to these interests can occur through questions designed to determine whether each party has these concerns and statements as shared interests. *See* STULBERG, *supra* note 30, at 103 (emphasizing value of identifying joint or shared interests in helping parties reach agreement). These interests also can be invoked by reframing statements that seek to substitute a more positive approach for negative methods employed by the parties. *See* BENNETT & HERMANN, *supra* note 32, at 87 (suggesting reframing positions to interests).

36. Mediation scholars recommend a complete introduction of all parties as something that should be done very near the beginning of the mediator's opening statement. *See, e.g.*, KOVACH, *supra* note 27, at 84 (should be "the very first item"); MOORE, *supra* note 20, at 194 (listed as first item along with introduction of the mediator); SLAIKEU, *supra* note 10, at 77 (suggesting "introductions will have been made in the waiting room").

37. The Florida Standards of Professional Conduct for Mediators requires disclosure of: (1) "any current, past, or possible future representation or consulting relationship with any party or attorney involved in the mediation;" FLA. R. CERT. & CT.-APPT. MEDIATORS 10.070(b)(1); (2) "any pertinent pecuniary interest," *id.*; and (3) "any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this rule, which might reasonably raise a question as to the mediator's impartiality," *id.* at 10.070(b)(2). Dan's disclosure probably was not necessary under these provisions but could conceivably fall within the "other circumstance" dimension of 10.070(b)(2). *See id.* It reflected concern that out-of-towners, like the defendants, might suspect that Gainesville attorneys are a close knit and friendly group, and invoked a sensible "when in doubt disclose" approach. *See* Moberly, *supra* note 13, at 713 (suggesting that "disclosure of any possible bias is prudent"). Dan neglected, however, to indicate his belief that this prior relationship did not affect his ability to act impartially and then ascertain how the parties felt about his disclosure and belief. These steps are suggested by The Florida Rules for Mediators, *see* FLA. R. CERT. & CT.-APPT. MEDIATORS 10.070(b)(3) (placing the burden of disclosure on mediators as soon as practical after becoming aware of interest or relationship and allowing them to serve if parties so desire).

38. This mediation was ordered out of the 9:00 a.m. docket reserved for cases involving lawyers. Lawyers appear in small claims cases in Florida and elsewhere far more frequently than the inexpensive, simple, informal, and speedy justice rhetoric often used to describe these tribunals

"I represent Serenity Oaks, Inc., the plaintiff in this case," continued Jim. "Here with me is Joel Tanman, the CEO of Rental Management Ltd., the entity that actually manages the plaintiff's business. Rental Management handles lawsuits against former tenants like this one."

I wish he had said claims rather than lawsuits, thought Dan. Claiming somehow seems softer than suing, seldom inspires the same level of defensiveness, and reflects applicable procedure which requires statements of claim rather than complaints. It could have been worse, however, Dan mused, because it actually was a relatively non-aggressive introduction. Maybe Jim is mellowing, thought Dan, remembering how often lawyers alienate other mediation participants by the simple act of introducing themselves and their clients with excessively strong language.[39] Dan then

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might suggest. *See* Best et al., *supra* note 22, at 346 (indicating that "the Colorado small claims court was established in 1976, with the legislative intention of providing inexpensive, simple, and speedy justice to the average person"). A survey of the Iowa Small Claims Court showed that plaintiffs were represented by lawyers 35% of the time. *See* Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 489-90 (1990). A survey of four housing courts in the Boston area showed that lawyers represented landlords in possession actions from 58% to 75% of the time. *See* Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties From the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 61 n.30. Some states, however, preclude participation by lawyers in a representational capacity in small claims proceedings. *See* Best et al., *supra* note 22, at 354 & n.101.

39. Lawyers usually speak first whenever given the opportunity as Dan did here inviting introductions. Lawyers representing parties also tend to speak first when parties are invited to make their opening statements, a stage that typically follows the mediator's statement. These events frequently let student mediators see how action choices by lawyers at this stage can either facilitate or damage chances of finding a mutually acceptable settlement. *See* ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 75 (1994) (noting that opening statements by lawyers "can do tremendous good for your client . . . or you can do so much damage that you destroy any chance for a favorable resolution"). Scholars distinguish between mediation and trial advocacy and recommend communication action choices that avoid excessive adversarialness in mediation. *See, e.g.*, JOHN W. COOLEY, MEDIATION ADVOCACY 131 (1996) (aggressive manner and demeanor likely to be ineffective in mediation process); GALTON, *supra*, at 75-80 (arguing lawyers should avoid inflammatory words, threats, overstatements, and law talk in their opening statements). Despite this advice, actual practice varies and students have written: "[The plaintiff's attorney's opening statement] was very abrasive; I thought he was trying to force people back downstairs [to set trial]." Student Comments (Spring 1998), *supra* note 8.

> The claim [to be mediated] was by an insurance company against the owner of a vehicle for damage caused when a friend of the auto owner was driving. The attorney just flew up from Miami and he was, well, he was a jerk. There are better words to describe him though. . . . On the way to the elevator he asked loudly, "So where do we set the trial when we impasse this thing?" When we were introduced as law students he reacted, "Oh, Christ."

Id.

looked expectantly at the side of the table where the women were sitting.

"My name is Michelle Pandrau," said the older woman. French, thought Dan, noting her short hair, cut stylishly, and the accent gracing her speech. She was also expensively dressed, and wore a huge diamond on her left ring finger that implied both marriage and wealth. "And this is my daughter, Colette James."

"Thank you," said Dan, noting and wondering about the different last names. "Let me explain how mediation works." Looking at Michelle and Colette, he asked, "Have you participated in a mediation before?"

"No," said both of them, virtually in unison.

"Okay," replied Dan. "Please ask me any questions you have as I share this explanation because it's important that you understand how mediation differs from the trial which will happen if you don't reach an agreement."

"I've just been certified as a mediator," said Jim, interrupting. Figures, thought Dan, lawyers are increasingly taking mediation training courses to increase their abilities to represent their clients better. Dan also felt a slight tinge of annoyance at Jim's clumsy effort to get a negotiating advantage by asserting greater knowledge and expertise, something he already has by virtue of his legal training and experience.[40]

Co-mediating in clinics lets students see how lawyering choices affect negotiations and give them opportunities to assess how they want to behave when they represent clients during mediations. Students, for example, wrote: "I also feel privileged to have had the opportunity to see so many different lawyering styles, some of which I liked and some of which I didn't." *Id.* (Spring 1998).

> I have developed a thorough understand[ing] of the [mediation] process and I think I will be better able to prepare clients. I have also seen how effective the cooperative lawyers are. This is type of lawyer I want to be. Mediation helped make this clear.

Id.

40. Most lawyers possess legal knowledge, negotiating experience, if not ability, and familiarity with court procedures and judges which typically gives them more power in small claims mediations with inexperienced parties representing themselves. *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenant's Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 556-57 (1992); Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 92-93 (1996); Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-103 (1974); Kurtzberg & Henifoff, *supra* note 38, at 60-61; Beatrice A. Moulton, Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1662 (1969). This power imbalance raises many difficult ethical and practical questions centered on how mediators balance power while remaining neutral or impartial. *See* Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 17-28 (describing dilemmas attempting to ensure informed consent while remaining impartial); Kurtzberg & Henikoff, *supra* note 38, at 63 (noting that mediation critics claim that mediators typically do not do enough to empower less

"I know you are well-versed in mediation, Jim, and may I also assume that Joel is familiar with the process?" Dan winced inwardly as that came out because it risked sounding threatening to Michelle and Colette whom he had already identified as inexperienced. I must take more care with phrasing choices, Dan mused, and not automatically use this common opening.[41]

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powerful parties); Nolan-Haley, *supra* note 29, at 93-94 (describing variance in how mediators and commentators approach these difficult questions).

The Mediation Clinic's participation in both the 9:00 a.m. docket with lawyer-filed cases and the 10:00 a.m. docket with pro se cases insures that at least half of most students' experience will involve wrestling with the difficult ethical and role questions presented by this power imbalance. Students commented on this power imbalance, noting:

> [describing an observed mediation involving three defendant co-tenants where only one did not have a lawyer] I felt that the unrepresented subtenant got the short end of the stick. She ended up paying more than all parties involved. This was a direct effect of her not having an attorney. She was willing to negotiate up front while the attorneys held their position for a lengthy time. Later on the other parties gave in a little, but the numbers still tended to get added to her total to be paid.

Student Comments (Fall 1997), *supra* note 8.

> [describing an observed mediation where the plaintiff's attorney objected to the student co-mediators writing the agreement] It seemed like he was motivated to have the agreement written without the participation of the mediators. He even made some lame excuse that it would cost his client too much money for him to sit there while the mediators wrote the agreement when he could write it up much faster on his own. . . . I did not trust the attorney to write out the agreement himself and stick to the deal discussed without... [the co-mediators] around. For instance, he seemed very interested in charging interest during the time . . . [defendant] was making the payments. I'm afraid he could attempt to renegotiate that point or even slip it in. I think this is a real concern because [defendant] is not represented by an attorney and he has never been to court. Is there any oversight in these situations besides faith in the attorney and hope that the other party can stand up for himself?

Id. (Fall 1998).

41. Mediators can develop habits of always using the same action choices without assessing contextual factors to predict whether this will be effective behavior. *See* Peters, *supra* note 6, at 904 (arguing that "[n]ew actions often are learned by imitating others" which often results in ineffective behaviors). Dan's unthinking use of a variation of a "how many have mediated before?" approach suggests such a pattern. All it accomplished was highlighting and emphasizing the probable power imbalance between the plaintiff representatives and the defendants. Dan's non-purposeful action choice also exemplifies a criticism of small claims mediation practice that mediators tend to act in standardized, rigid ways to handle the large volume of cases. *See* Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work, in* WHEN TALK WORKS: PROFILES OF MEDIATORS 460 (Deborah M. Kolb & Assocs. eds., 1994) (suggesting that mediation volunteers in bureaucratic institutions tend to use routine and structured practices); Menkel-Meadow, *supra* note 4, at 229

"Yes," said Joel, rather smugly in Dan's estimation.[42]

"I would feel more comfortable if we could address each other by first names. This is an informal process, more like a conversation than anything else. Would that be okay with everyone?"[43] Dan threw this out rather

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(arguing that "greater rigidity, formalism, and replicability" are found in court-connected, bureaucratic mediations).

The approach Dan used probably stems from an efficiency concern of avoiding extended process explanations when participants already have this knowledge. Giving one opening statement to all defendants when one lawyer has several cases ordered to mediation on the same docket demonstrates another facet of this concern for time efficiency. Occasionally Clinic and other volunteer mediators present the opening to multiple defendants while the attorney negotiates stipulations outside the courtroom. One Clinic student commented on problems with taking efficiency this far, writing:

> I know that repeat players are more than happy to let us inform the other party about mediation, but I wonder if we are not setting up a less than neutral dynamic from the start by singling out the unrepresented defendant in this way. I do not know how the defendants feel about it, but I am afraid that in their mind, it turns us into an instrument of the opposing party. The unrepresented defendant, if they are new to the small claims process and especially if they are new to mediation, are already going to view us as an arm of the court system. When we do the opposing attorneys "the favor" of not making them sit through the opening, I am afraid that, in the mind of this unrepresented defendant, [it] may prejudice him or her and affect how they view the fairness of the process. Again, because of our "magic 45 minute" time limit, changing how we do the opening may present quite a challenge. Perhaps the mediators could explain the process to the uncounseled defendant and introduce themselves, but then could save some of the opening such as the description of the opening statement, and a comment on settlement authority, until the attorney arrives.

Student Comments (Fall 1997), *supra* note 8.

42. Non-lawyer company representatives often are skilled repeat players in small claims courts. *See* Galanter, *supra* note 40, at 97-101. They also frequently bring mediation experience and knowledge. *See* Goerdt, *supra* note 9, at 46 (experienced representative of a collection agency in Portland, Oregon, indicated that he "was usually much more knowledgeable about how to prepare a case and what types of questions a judge would ask than the individual defendants he litigated against"). Florida Small Claims Rules provide that "[a] corporation may be represented at any stage of the trial court proceedings by an officer of the corporation or any employee authorized by an officer of the corporation." FLA. SM. CL. R. 7.050(a)(2).

43. Mediators make choices when they make opening statements including a decision about whether to address parties by their first names or by titles such as Mr. and Ms. *See* STULBERG, *supra* note 30, at 66. Here Dan announces, somewhat directly, a protocol where first names are used after previously referring to the plaintiff's representative and lawyer by their first names. He made this choice and suggested this protocol to combat the formality created by meeting in a room adjacent to a courtroom shortly after parties had been summoned to the courthouse and then judicially ordered to mediate. Mediation scholars recommend that mediators strive to make opening statements that sound more like conversations than formal legal proceedings. *See* KOVACH, *supra* note 27, at 83. These decisions, like virtually all the choices that mediators make, depend heavily on context. *See id.* (suggesting that mediator's introductions should vary depending on context).

quickly, trying to move rapidly past his inadvertent emphasis of Michelle's and Colette's inexperience.

Everyone spoke or nodded their assent and Dan continued "I view

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For example, Dan probably assessed the following context factors here as he embarked on this action course: (1) the absence of verbal and non-verbal clues of high conflict levels both here and before in the courtroom, suggesting that formal titles are not needed to de-escalate emotions; (2) his prior familiarity with this lawyer suggests that using the title Mr. would be formal and might be taken by the defendants as impartially deferential; (3) using the plaintiff's representative's first name was probably acceptable because they are of the same gender and Dan was older; and (4) the cross-gender context might cause them to view Dan's uninvited use of their first names as inappropriately familiar without first establishing the proposed protocol.

Many mediators might constructively criticize Dan's choices for at least two reasons. First, he might want to explain his reasoning, the informal conversation ideal, before suggesting the first name protocol to increase chances that parties understand the proposal. In addition, his directive approach may make it difficult for persons without mediation experience to object. Michelle and Colette, for example, may be very reluctant to make their mediator uncomfortable by objecting to first names when they lack a complete understanding of the mediator's role. Consequently, many mediators might suggest as an option that Dan explain mediation's potential informality and then ask the parties whether they would like to use first names or Mr./Ms. titles before their last names.

This choice point presents a simple example of the recurring and perhaps unavoidable tension between a mediator's obligation to influence the process and the professed ideal of party autonomy. *See* Kolb & Kressel, *supra* note 41, at 487 (noting that mediation stress comes from "inherent contradictions and ambiguities" in the mediation role including "tensions between giving the parties autonomy and their own obligation to control the process"). Students struggle with this name issue and benefit from reflecting on their context-based choices, writing:

> When I asked everyone what they would like to be called, it surprised them. Last time I asked if first names would be OK and that also seemed uncomfortable so I have decided that I am going to skip this issue entirely and not refer to them by name or use the name that the other party calls them, unless a party tells me what to call them.

Student Comments (Spring 1998), *supra* note 8.

> The biggest surprise was getting scolded (by the attorney) in the hallway . . . for using first names. We introduced ourselves and said that we liked to use first names but how would you like to be addressed? The defendant said "[his first name] is great" and the attorney at first said his first name was Mr. Then he laughed and we used his first name. He was really pissed about this later saying we were in a courthouse and this was a very formal place and we are not friends. He said, "How would the judge like it if we called him, [by his first name]?" I, as politely as I could, apologized, and said that we did ask him how he would like to address us, and said it seemed to really help the defendants be less intimidated. He replied that this defendant should be really intimidated because he owes a lot of money. He also said that we put him on the spot by asking about the names instead of just being formal and that if he had used his full name the defendant would think he was a stuffy lawyer.

Id.

mediation as a conversation because it gives you a chance to talk about your concerns, interests, and ideas for reaching an agreement today that saves everyone the expense and uncertainty of trial. Here you can talk about anything and everything that you think is important. At trial you will be restricted to what your lawyers and the judge deem relevant. Mediation is a voluntary process where you seek a consensual agreement that everyone finds acceptable."

Dan tried to make his introduction sound interesting and coherent as he explained his role as a neutral facilitator, his lack of adjudicatory power to make decisions and order anyone to do anything, confidentiality, caucus procedures, how an agreement would be reduced to writing, and final hearing scheduling protocols if an agreement was not reached.[44] "Does anyone have questions?"

No one did. So Dan said: "Now I would like to hear from all of you about the issues here and what you would like to accomplish in this mediation. It doesn't matter who goes first because everyone should take as much time as they need. It's customary to ask the people who made the claim to go first so we have a clear understanding of it.[45] If that's okay, I'll

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44. Dan's opening statement covered all the topics that most mediation scholars recommend. *See, e.g.*, KOVACH, *supra* note 27, at 82-85; MOORE, *supra* note 20, at 154-60, 193-202; SLAIKEU, *supra* note 10, at 75-80; STULBERG, *supra* note 30, at 59-68. It did not, however, include the transformative vision objectives of: (1) opportunities for parties to achieve greater understanding of their options and each other; and (2) written summaries of accomplishments short of settlement including understandings reached, new information learned, and descriptions of new ways of communicating. *See* BUSH & FOLGER, *supra* note 12, at 264 (recommending that mediators' opening statements be changed to reflect these transformative objectives).

Mediation clinic students enjoy the opportunities to plan, prepare, and coordinate that opening statements allow. One noted: "If there is one thing that our class does better than anyone I have watched . . . is give an opening statement." Student Comments (Fall 1997), *supra* note 8.

Dan also made a context-based decision here not to propose any communication ground rules. *See supra* note 30. Analyzing the absence of conflict language and non-verbal communication both in the courtroom when the matter was ordered to mediation and during the introductory proceedings, Dan concluded that the value of ground rules was outweighed by the risk that the parties would find them offensive, condescending, and inconsistent with the notion of a consensual, autonomous process. Dan can suggest these ground rules later if needed, after the parties have experientially learned how they might be helpful in allowing them to communicate more effectively. *Cf.* STULBERG, *supra* note 30, at 66 (arguing that mediators undercut their credibility by proposing communication ground rules after the opening statement).

45. Opening statements from the parties follow mediator openings in virtually all recommended mediation formats. *See, e.g.*, KOVACH, *supra* note 27, at 85-86; MOORE, *supra* note 20, at 202; SLAIKEU, *supra* note 10, at 81; STULBERG, *supra* note 30, at 69. Dan followed the customary court-annexed mediation procedure of asking the claimant to present the first statement. *See* KOVACH, *supra* note 27, at 86. Although this framing choice seems appropriate in this context where one party has initiated a lawsuit against the other, it has the predictable effect of narrowing initial discourse to the substantive issues raised in the pleadings. *See id.* This frame also makes it more difficult to identify issues and options lying beyond this perspective. The primacy of the initial

ask Jim to summarize this claim and all of its components, and then invite Joel to add whatever he thinks is appropriate. Then I want Michelle and Colette to express their issues and concerns. Is that agreeable?"

Everyone nodded their assent and then Jim started to talk: "We just took over as the management company for Serenity Oaks so we don't have a long history on this. As Joel will verify, we base our claim on our records. They show that Ms. Pandreau, er Michelle, and her daughter signed a year's lease thirteen months ago. Both are liable under the law. Colette skipped out on the lease after four months. We attempted to mitigate and re-rent but were not successful. We are suing for the balance of the rent plus court costs and attorney's fees. The total we're demanding is . . . uh [looking down as he reviews his file] $2426."[46]

"So I understand that you claim Michelle and Colette owe your client money under a lease and you want that sum plus costs and fees," said Dan, using a content summary to model this type of reflective listening.[47] As he

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frame attaches to mediations done in other contexts. For example, narrative analysis shows that the first story told frames any resulting agreement in approximately 75% of community mediation cases. *See* Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEG. J. 245, 250 (1993).

46. Attorneys usually speak before their clients in non-divorce litigation-related mediations for reasons that include: (1) summarizing the legal claims in legal language, as Jim did here; and (2) justifying the fee that they charge for representing their clients during these sessions. Most lawyer-led opening statements in small claims cases resemble Jim's concise presentations of the basis of the claim and its amount. Florida procedure requires only a statement of claim that "in concise form" informs "the defendant of the basis and the amount of the claim." FLA. SM. CL. R. 7.050(a)(1). This provides an immediate focus on the substantive issues in the dispute as framed in terms of legal rights. It also reflects "[t]he most common, but not necessarily the most effective, way to open negotiations." MOORE, *supra* note 20, at 203.

Suits against residential lease guarantors are common in University communities such as Gainesville. They also frequently demonstrate how a legal principle, the stability of contract, can depart from lay perceptions of fairness. For example, the Mediation Clinic mediated a case where the mother who had guaranteed her son's lease was outraged to learn that the fact that her son left school and his lease to attend to his dying father, her ex-husband, did not, in the opinion of the landlord's lawyer, affect her legal liability. Landlords routinely win cases against parental guarantors where students leave leases early because they become ill or pregnant, lose their student loans, or possess some other totally understandable reason for leaving town. Interview with John Hayter, local attorney, in Gainesville, Florida (June 5, 1998). Parents who removed their daughters from school during the week in August of 1990, when a serial killer brutally murdered several young students in Gainesville, were successfully sued. *See id.*

47. Listening effectively may be the most important core mediation skill. *See* SLAIKEU, *supra* note 10, at 47-48 (observing that listening is the chief feature of what mediators offer and that whenever they are in doubt, they should "listen, and then listen again"); Weinstein, *supra* note 10, at 205 (arguing that listening skills are the key to mediation training because they help mediators learn both what the parties believe their dispute embodies and what it is really about). Clinical legal education literature helpfully categorizes listening skills as either passive or active. *E.g.*, DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH Ch.3 (1977). Passive listening requires "keeping silent to allow others to talk,

said this he thought that this opening wasn't as attacking as he had feared. Not much legalese was used and although he phrase "skipped out" was accusatory, it could have been worse. Dan also noted the possibility that somebody screwed up since the suit lists Serenity Oaks as the plaintiff as opposed to the management company that Jim actually represents.[48] Better file this away to use as a possible testing measure if I need it, thought

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maintaining attentive eye contact, and providing non-verbal encouragement to communicate." Peters, *supra* note 32, at 277. Mediation clinic students seldom find this particularly challenging.

Active listening requires "verbal responses that paraphrase or reflect" what speakers have said. *See id.* at 278. Active listening proves understanding what speakers have said about particular facts, issues, or feelings while passive listening can only imply that understanding has occurred. *See id.* at 278-79. Clinical literature also suggest that active listening can be used to reflect aspects of both content, the objective criteria that make up the events of situations and disputes, and feelings that are communicated. *See* Binder & Price, *supra*, at 21-22.

Dan here used an active listening statement that reflected the content of Jim's brief opening. He made this choice to invoke the "widely accepted assumption that being heard and understood makes speakers feel better both about the person with whom they are communicating and the process of talking with" that person. Peters, *supra* note 32, at 279. These positive feelings typically create "motivation for and a climate conducive to" further disclosure. *See id.* Content reflections also provide a useful way to confirm understanding as happened here. They model an effective approach to communication which emphasizes understanding each other. *See* BUSH & FOLGER, *supra* note 12, at 145-48 (content reflections used to highlight points where parties can provide recognition to each other in landlord-tenant mediation). They can facilitate mediation's potential "to reorient the parties toward each other . . . by helping them to achieve a new and shared perception of their relationship." Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

Learning how to be "other-centered" and to pay full attention to another challenges many mediation clinic students. *See* Weinstein, *supra* note 10, at 205-06 (describing how mediation clinic students become frustrated "upon discovering how poorly they listen"). Although Virgil Hawkins Mediation Clinic students are encouraged to use active listening statements after each parties' opening statement, many fail to do so, particularly at the beginning of the term. The distanced role of a mediator, however, seems to help many students realize the value of active listening and improve their skills in the area over the semester. The 20 students in the first two offerings of this Clinic, for example, indicated that their abilities to use active listening responses significantly increased, posting a 5.85 cumulative score on a 7 point scale. Composite of Final Mediation Questionnaires on file with author.

Research has shown that active listening skills can be learned in clinical courses. *See, e.g.*, John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505, 526-27 & nn.63-64 (1983) (students increased empathy scale measurements from a pretest mean of 2.46 to a 4.91 mean on the Truax Accurate Empathy Scale after four hours of instruction); Peters, *supra* note 32, at 279 n.69 (students increased average use of active listening in initial interviews from 7% to 15% of total responses after 10 hours of instruction).

48. Dan fails to clarify the facts regarding Rental Management, Ltd.'s relationship to Serenity Oaks, Inc., the named plaintiff here. If Serenity assigned the lease claim to Rental Management, Florida allows assignees to sue in small claims courts. Although an argument may exist regarding whether Serenity Oaks is the real party in interest, Florida procedure is permissive, permitting the suit to be filed in the name of the party holding the lease interest for the use of the real party in interest. FLA. R. CIV. P. 1.210(a).

Dan.[49] In addition, the fact that Jim and Joel are new to the case might allow them to back down more than usual without losing face. On the other hand, they may want to maximize collection success early in their relationship with this client. I will have to pay attention to these possibilities, thought Dan.

"That's right," said Jim.

"It might be helpful if you would list the components of your total claim and indicate how much you seek in each category," said Dan, thinking that specifying the categories allows focused bargaining and potential trading. For example, some lawyers will eliminate or reduce their fee claim as part of the negotiation process.[50] Dan also surmised that this

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49. The Florida Standards of Professional Conduct for Mediators permit mediators to raise "questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement." FLA. R. CERT. & CT.-APPT. MEDIATORS 10.070(a)(1). This comports with the view of many scholars that mediators may appropriately test participants regarding their estimates of the reality, fairness, equity, and feasibility of their options. *See, e.g.*, KOVACH, *supra* note 27, at 25-26, 166-68; MOORE, *supra* note 20, at 276-77; SLAIKEU, *supra* note 10, at 100-05; STULBERG, *supra* note 30, at 96-101. Mediators often start to listen for possible topics that can be used later to explore these dimensions. *See* SLAIKEU, *supra* note 10, at 102 (suggesting listening for opportunities to make subsequent interventions that will loosen tight grips on positions or open doors to moving to different perspectives).

Dan's thought process here demonstrates that type of listening even though his assumption that the plaintiff was incorrectly identified may be erroneous. *See supra* note 48. Asking Jim about this discrepancy later may still have value, however, because the better practice in Florida is to "sue only in the name of the real party in interest." HENRY P. TRAWICK, FLORIDA PRACTICE AND PROCEDURE 40 (1997). Consequently, Jim may want to amend his Statement of Claim either to add Rental Properties, Ltd., as a co-plaintiff or delete Serenity Oaks if he suspects that the defendants may retain a lawyer who will raise this issue or fears that failing to do this might damage his reputation with the presiding judge. Preparing and presenting such an amended pleading adds time, expense, and potential loss of face with the judge. The benefits of avoiding these consequences might encourage Jim to be more flexible in negotiating.

Dan's willingness to think in these directions this soon in the mediation clearly signals that he is adopting a settlement or satisfaction perspective toward this session. *See* KOLB & KRESSEL, *supra* note 41, at 471 (observing that mediators using a settlement frame demonstrate thinking that is preoccupied with identifying what it will take to get agreements); BUSH & FOLGER, *supra* note 12, at 61, 64-65 (arguing that the problem-solving mediators pursuing a satisfaction vision tend to seek most direct routes to agreements and make quick, early, diagnostic decisions).

50. Most small claims matters that involve lawyers representing plaintiffs are collection efforts. Virtually all collection cases are handled on a contingent fee basis with the plaintiffs' lawyers receiving a percentage of payments made by defendants. *See* ARTHUR WINSTON, CREDIT AND COLLECTION LAW 177-78 (1996). Collection contingencies generate interesting negotiation dynamics because they are measured at trial by the hours the attorney spent on the case as if the fee agreement were on an hourly basis. Res-based contingency fees like those used in tort suits, on the other hand, reduce the total amount awarded by the fee percentage. *See* 1 JAMES C. HAUSER, ATTORNEYS' FEES IN FLORIDA 19 (1997).

Contingency fees inject potential economic conflicts of interests between lawyers and clients. Lawyers who handle cases by volume or who feel that their case is weak are usually eager to settle in mediation to avoid running additional time and cost expenses of trying cases. *See* Menkel-

question might start the important but often difficult process of educating Michelle and Colette about the harsh realities of court costs and attorney's fee shifts in landlord-tenant lawsuits. If only they could have talked about this before the court costs were paid, thought Dan, but then small claims litigants seldom do.

"Sure," replied Jim. "The rent was $235 a month and they owe 7 months for a total of $1645. Court costs were $76.[51] Attorney's fees are now at $750."

Seven hundred fifty is a crock,[52] thought Dan, but I can explore that later. Then he turned to Joel and said, "What would you like to add, Joel?"[53]

Meadow, *supra* note 9, at 369-70 (arguing that contingency fee agreements encourage lawyers to monetize issues and inhibit efforts to use more creative, non-monetary solutions). Collection clients, however, may resist settlement knowing that their attorneys' fees may be added to their award at trial. *See* Lucian Arye Bebchuk & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEG. L. REV. 53, 54 (1996). Local attorneys doing volume collection work will often discount or waive their "accrued" fee as part of negotiation during mediation.

51. Court costs in Florida are currently awarded to the "party recovering judgement." FLA. STAT. § 57.041 (1997). They typically include filing and service charges. *See* Trawick, *supra* note 49, at 440.

52. Local attorneys typically charge no more than $150 an hour for small claims pre-trial work. In addition, most attorneys claim no more than two hours of time invested before the case is sent to mediation. The probable basis for the fee shift here will be either a contractual right based on a provision of the lease or the Florida Residential Landlord Tenant Act which authorizes a reasonable attorneys fee to the "party in whose favor a judgement or decree has been rendered" in "any civil action brought to enforce the provisions of the rental agreement." FLA. STAT. § 83.48 (1997).

Florida law also allows courts to apply a multiplier in contingency fee cases that adjusts the fee upward. *See* Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1151 (Fla. 1985) (allowing contingency fees to be computed by multiplying the number of hours reasonably spent times a reasonable hourly rate times a multiplier factor). A local lawyer, who files approximately 1100 small claims collection matters annually, told me that he routinely gets a 2.0 multiplier which means that his $150 an hour fee is doubled when it is shifted. Interview with John Hayter, local attorney, in Gainesville, Florida (June 5, 1998).

Most unrepresented litigants, including perhaps these defendants, are not aware of this potential liability until mediation. Dan missed an opportunity here to ask Jim to explain the basis for fee shifting and an estimate of what might be shifted, an approach which often provides a good way to start this educational process. Doing this has value because it allows defendants to learn that fee concessions may have significant value. *See supra* note 50. Dan's failure runs the risk that he will either have to explain it later, engaging in legal advice that may cross ethical lines, *see infra* note 58, or return to joint session and ask Jim to outline it then. I encourage mediation clinic students to inquire about the basis of the asserted fee shift so that defendants will realize that this is a potential risk of litigation and appreciate concessions if they come. Getting this information out early also lets students assess how likely a multiplier is under Florida law. Explaining multipliers, however, probably should be left to later stages of the mediation because experience suggests that lawyers seldom use this as direct leverage in collection mediations.

53. Dan appropriately invites participation from the non-lawyer client representative to insure

"Not much, I guess, Jim has pretty much covered our position in this situation. As he said, we've only had this client for the past two months so we don't know too much about what happened before Colette left."

"Well, I'm hoping that Colette and Michelle will share their concerns now," replied Dan. Dan sensed an openness and reasonableness from Joel, and a possibility that Joel might not let Jim make all the decisions,[54]

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that everyone has a chance to participate at the outset. *See* GALTON, *supra* note 39, at 15 (arguing that parties should participate fully because it is their dispute). Although a few lawyers might resent this invitation, mediation is so well established now in Florida that lawyers should expect mediator invitations to their clients to speak. *See* Watson, *supra* note 40, at 2-20 to 2-21 (recommending that mediation belongs more to clients than attorneys, and that lawyers should prepare and then involve their clients). In many mediation contexts, and particularly divorce, the clients play a more prominent role than their lawyers. *See* GALTON, *supra* note 39, at 115. In court-annexed mediation, however, lawyers tend to take the lead, particularly at the beginning. *See* DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 63 (1996) (arguing that lawyers may find it easier to give up control to their clients if they have a chance to play an initial role as advocates).

54. As Dan demonstrates here, mediators should be sensitive to the decision-making dynamics they observe between lawyers and clients with whom they are working. *See* GALTON, *supra* note 39, at 14 (noting that "[l]awyers are often co-decision makers, along with their clients"). Mediation typically generates new information that allows lawyers and clients to re-evaluate the strengths and weaknesses of their cases. *See id.* Questions exploring the reality and feasibility of identified options often have more effect on clients than their attorneys. This effect happens frequently when lawyers have failed to counsel their clients adequately about risks and downsides of positions, causing clients to hear this information for the first time during the mediation. Conversely, attorneys can often use reality-testing questions to confirm downside information that they have previously shared but which has not had much effect on the client's decision-making. *See id.* at 43 (noting that mediation often helps clients understand case weaknesses that their lawyers have already identified).

Attorneys and clients sometimes disagree in a mediator's presence, presenting challenging action choice opportunities for the mediators. It also presents valuable opportunities to observe whether lawyers adhere to a client-centered approach to counseling. Virgil Hawkins Mediation Clinic students discuss how the client-centered counseling approach taught in other clinic courses mirrors mediation's self-determination goal that "[d]ecisions are to be made voluntarily by the parties themselves." FLA. R. CERT. & CT.-APPT. MEDIATORS 10.060(a). Although few students have had the opportunity to study this theory in other clinic or simulation-based courses, *see supra* note 27, they often watch lawyers wrestling with these concepts when disagreements develop. The distanced perspective shows them conduct to emulate and avoid, and may help them improve their own counseling skills later. *See* Menkel-Meadow, *supra* note 9, at 378 (arguing that mediation clinic students can improve their negotiating skills by observing the destructive and inefficient action choices they observe). Students have noted:

> [My co-mediator] presented the offer and the defendant immediately said that he would take it and just as . . . [we] were expressing our delight the lawyer pipes up and tells his client that he did not think taking the offer was a good idea. The client said that he just wanted the thing to be over and the attorney tried to talk him out of it! The attorney said, "you know, I've told you that you can get the full amount if you go to trial. Then he tried to give his client a quick negotiation lesson by saying that this is the first offer and you should come back with something

particularly if Jim negotiated as aggressively as he litigated.

Michelle spoke first, signaling perhaps another tricky control of decision-making issue involving parent-child dynamics. "I have no intention of paying $2400. There's no way I can afford that." Then she paused, looking either angry or upset.

"I understand you are concerned," said Dan, trying to sound empathic but not sure whether he heard anger or fear in Michelle's statement, tone and non-verbal communication.[55] "That's their claim and we'd like to hear your ideas now." Dan stopped himself before he said that no one was saying she had to pay the full claim because obviously Jim just said that. Dan also noted that her apparent belief that she might have to pay what was sought signaled lack of context knowledge.[56] It also suggested an

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higher." In deference to the attorney, . . . [we] offered to leave them alone when the attorney seemed uncomfortable.

Student Comments (Fall 1997), *supra* note 8.

55. Scholars estimate that ninety percent or more of the emotional content of statements is communicated non-verbally. *See* DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 97 (1995). Mediators need listening skills that let them attend to verbal and nonverbal nuance and read and understand underlying emotions. *See* Stark, *supra* note 7, at 474. Listening accurately is not easy. Dan's choice of a weakly characterized feeling reflection was probably effective because it communicated an effort to listen and understand Michelle's statement on an emotional level. His decision to continue with a request for Michelle's ideas, however, may not have been effective. It undercut the rapport building value of his listening choice. A pause would have allowed Michelle to clarify what she was feeling and skillful listening requires empathic and nonjudgmental clarification. *See id.* Dan's response was more effective on the content level because it encouraged Michelle to reframe her focus from a positional statement to the potentially more productive direction of her ideas.

56. Although non-lawyer, first time participants have no reason to know this, mandatory small claims mediations present an initial context where defendants are expected to present facts justifying their denial of all or part of the plaintiff's claim in some potentially legally valid way. Florida law requires only that parties attend mandatory mediations, it does not attempt to force them to negotiate once they are there. *See* Avril v. Civilmar, 605 So. 2d 988, 990 (Fla. 4th DCA 1992) (noting mandatory mediation statutes do not require parties to settle cases because there is no requirement that a party even make an offer at mediation). Florida law also does not require filing answers and asserting defenses before the pretrial conferences which trigger mediations. *See* FLA. SM. CL. R. 7.090(c) (defensive pleadings ordinarily not necessary). Formal discovery before pretrial conferences, while possible, rarely occurs. *See id.* 7.020(b) (allowing discovery against unrepresented parties only with leave of court). Consequently, attorneys representing plaintiffs who decide to mediate seriously listen for new facts during defendants' opening statements that warrant movement from the amount claimed. *See* Goerdt, *supra* note 9, at 46 (describing collection agency representative who does not mediate unless some question exists about the facts as he initially understood them); *See* Menkel-Meadow, *supra* note 9, at 376 (noting that some lawyers refused to change fixed negotiation offers even after listening to new facts from the other side). This framing implies a form of presumptive validity to the plaintiff's claim. *See* Moulton, *supra* note 40, at 1667 (noting that routine approaches in small claims courts develop "a kind of de facto presumption that there is no defense to the ordinary contract claim"). It also puts defendants in negative discourse

absence of negotiation skill,[57] both common dimensions of small claims matters where one side has counsel and the other does not have representation.[58] Maybe this means an early caucus is an order, Dan

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positions that can impair their abilities to negotiate for themselves. *See* Fox, *supra* note 40, at 103 (negative discourse positions undermine the sense of legitimacy that people bring to negotiations).

Michelle's initial reaction that she could not afford the full amount of plaintiff's claim fails as a potentially valid defense because inability to pay does not constitute a defense to the breach of a lease. Local judges occasionally seek to screen non-legally viable defense claims from mediation by inquiring why defendants deny claims during the brief podium conversations in open court. Michelle's initial response in that context, without more, probably earns a judicial direction to negotiate a payment plan rather than an order to mediate.

Although potentially undercut by indicators of wealth such as her attire and diamond ring, Michelle's claim of financial inability to pay the full claim may suggest interests for productive exploration later. Dan's active listening response to Michelle's initial statement, converting it to hearing her concern, may have been sufficient to imply that this mediation would take a broader focus than legal relevance and include her interests underlying her current financial situation. Ignoring or rejecting such a claim, on the other hand, may send Michelle the message that her perceptions and perspectives are not important. *See* Fox, *supra* note 40, at 108-09 (arguing that official silence tells unrepresented individuals that compliance rather than assertion of their rights is the acceptable norm).

57. This negotiation, as most small claims mediations, begins with the plaintiff restating its demand that forms the basis of its lawsuit. That demand may be analyzed and understood in terms of legal negotiation theory, an esoteric topic about which non-lawyer, first-time participants like Michelle and Colette probably know little. *See* Peters, *supra* note 6, at 887 (arguing that a useful, broad theoretical map of negotiation "distinguishes between strategic orientations, described by bargaining objectives, and styles, described as narrow communication behaviors used pursuing strategies"). That demand reflects adversarial negotiation strategy because its objective is to maximize gain by seeking the maximum amount a court would order if this matter went to trial. *See id.* at 887-88.

Knowledgeable negotiators realize that first offers in adversarial strategy must be reduced for agreement to occur following a linear process described as "[c]oncessions on the [r]oad to [c]ompromise." Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 768 (1984). Michelle's apparent concern that she has to pay the entire claim signals that she may not either know or understand that adversarially strategic negotiation involves movement along this linear continuum. Virtually all mediations linked to lawsuits involve adversarially strategic bargaining, at least at the beginning. *See* GOLANN, *supra* note 53, at 162.

58. This common situation presents enormous challenges to small claims mediators forcing them to confront and resolve difficult questions about their role. These challenges center on tensions between their duty to be "impartial," FLA. R. CERT. & CT.-APPT. MEDIATORS 10.070(a), and their often strongly felt needs to inform less knowledgeable participants and empower less powerful parties. *See* Stark, *supra* note 13, at 795 (noting that mediation contains inherent and conflicting goals of "avoiding conduct that favors one side over the other, and fostering party empowerment through informed consent").

Florida small claims mediators have the duty to "assist the parties in reaching an informed . . . settlement." FLA. R. CERT. & CT.-APPT. MEDIATORS 10.060(a). Some commentators argue that self-determination provides the central value of mediation. *See, e.g.*, John Feerick, et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 117 ("[T]he primary purpose of mediation is to allow party self-determination . . . . Virtually all the mediator

ethical codes set forth self-determination as a major (often the major) principle and goal of mediation."); Lawrence M. Watson, Jr., *Advice and Opinions From Mediators: A Rational Analysis*, 13 RESOL. REP. 13, 14 (Jan. 1998) (noting self-determination of the parties supplies "heart and soul of mediation); Donald T. Weckstein, *In Praise of Party Empowerment—And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 502 (1997) ("free choice of disputants in determining how best to resolve their conflicts" embodies successful, effective mediations). Full information seems essential to exercising effective self-determination. *See, e.g.*, Nolan-Haley, *supra* note 29, at 87 (arguing that parties who decide without knowledge of their legal rights are simply engaging in a "feel-good" process); Stark, *supra* note 13, at 786 (arguing parties cannot make informed decisions if they do not know their legal rights); Weckstein, *supra*, at 502 (arguing that parties who are not aware of important information or available alternatives are prevented from exercising effective self-determination).

Dan and other Florida small claims mediators must traverse an ethical minefield in the middle of the facilitative-evaluative controversy as they pursue the daunting task of informing unrepresented, first-time participants like Michelle and Colette adequately. Many aspects of contemporary Florida mediation standards imply that mediators should employ narrow rather than expansive informing efforts. For example, Florida ethical standards prohibit mediators from providing the most relevant information unrepresented parties can get, predictions about how the assigned judge will rule on the issues at trial. *See* FLA. R. CERT. & CT.-APPT. MEDIATORS 10.090(d) ("[u]nder no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute"). Scholars encourage lawyers to predict how courts are likely to rule using statements of percentage and a range of predictions as a critically important part of helping them make informed decisions. *E.g.*, DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 294, 337-40 (1991). Jim presumably will predict this for Joel either before or during this mediation. Unless Michelle and Colette retain and consult with counsel during this mediation, an unlikely possibility for both practical and economic reasons, they cannot be as fully informed as Joel is. *See* Nolan-Haley, *supra* note 29, at 66 (arguing unrepresented parties typically are not "capable of making informed decisions about the tradeoffs involved in balancing legal and nonlegal interests").

Whether Dan can ethically provide information that informs Michelle and Colette adequately short of predicting a specific outcome remains uncertain. Current Florida ethical standards apparently permit mediators to provide any other information they wish as long as they are "qualified by training or experience." FLA. R. CERT. & CT.-APPT. MEDIATORS 10.090(a). The breadth of this grant of apparent ethical space, however, may be narrowed by two other considerations. First, the Florida ethical standards also require that mediators "shall advise participants to seek independent legal counsel" whenever they believe that they do "not understand . . . how an agreement may adversely affect legal rights or obligations." *Id.* 10.090(b). This provision implies that mediators cannot successfully discharge the task of informing unrepresented parties to the extent necessary to let them participate equally with counseled parties.

Second, one of the few decisions by the Florida Mediator Qualifications Advisory Panel discussing small claims practice may substantially discourage mediators who may want to inform unrepresented, first-time participants like Michelle and Colette. *See* Risette Posey, *Latest MQAP Advisory Opinions*, 10 RESOL. REP. 2, 3 (Oct. 1995). This opinion discusses a hypothetical situation involving a collection action under a contract calling for interest at the rate of 29.5% a year while interest on judgments accrued at the rate of 8% a year. *See id.* at 2. It posited an apparent agreement where the defendant would continue to pay at the higher interest rate requiring about 18 months to settle, and giving the plaintiff a total recovery far more than the outstanding debt. *See id.*; Stempel, *supra* note 13, at 964 n.46. No information was provided about the training or experience of the apparently non-lawyer mediator. The questions presented to the panel did not deal with the mediator using statements informing the debtor of the interest differential. *See* Posey, *supra*, at 2-3.

Rather they raised the issue of whether this information could be ethically communicated less directly by questions. *See id.*

The Panel ruled that the following question to the defendant, "are you aware that if a judgement were entered against you, the interest would be reduced from 29.5% to 8%," was improper. *See id.* at 3. It reasoned:

> While the mediator's inquiry is indeed in question form, it is designed to advise the party about her legal options, a role that is appropriate for an attorney, but inappropriate for a mediator. Providing such advice in the form of a question does not lessen the impropriety of the act; as such, the mediator violates rule 10.090(a) & (b) by providing information the mediator is not qualified by training to provide and by failing to advise the participant to seek independent legal counsel.

Id. at 4.

The Panel also ruled that it is improper for a mediator to ask a question "if the framing of the question tends to advise or inform one or both of the parties involved." *Id.* at 3. The Panel reasoned:

> It is improper for a mediator to provide legal advice by any method within the scope of a mediation, whether such advise by statement, question, or any other form of communication. The mediator, while fulfilling the role of reality tester, must be aware of, and consciously avoid crossing the line between partiality and impartiality, neutrality and non-neutrality.

Id. at 5.

This panel decision favors the value of impartiality over the value of informed decision-making after less than coherent and convincing analysis. Like many appellate decisions, this Panel opinion conveniently ignored difficult questions such as an analysis of a mediator's other duties which include obligations to: (1) assist "the parties in identifying issues," FLA. R. CERT. & CT.-APPT. MEDIATORS 10.020(c); (2) maximize "the exploration of alternatives," *id.*; (3) "assist the parties in reaching an informed and voluntary settlement," *id.* 10.060(a); and (4) raise "questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement." *Id.* 10.070(a)(1). Both questions and statements communicating the simple legal fact that the interest rates and pay-outs will differ under each option appropriately pursue all of these other ethical duties for mediators. Consequently, I agree with the criticism that this opinion is "an excessively restrictive view of mediat[ion] discretion" and "a disaster as a matter of public policy." Stempel, *supra* note 13, at 965-66.

The Panel's reasoning on the first question suggesting that the mediator should have advised the defendant to seek independent counsel gives credence to the view that mediators should not inform unrepresented parties extensively. The difficulty of drawing meaningful lines between permissible informing and impermissible advice-giving provides one justification for such a rule, a reason not articulated by the Panel which chose to rely on broad conclusions rather than careful analysis. Although ethical standards often adopt this distinction, making it in practice is not easy. *See* Nolan-Haley, *supra* note 29, at 94; Stark, *supra* note 13, at 785.

The Panel's narrow view of advice-giving may be restricted to non-lawyers. *See* Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669, 676 (1997) (noting that opinion "simply assumed that the mediator was not qualified by training to provide this information" without exploring the issue). If so, Dan's twenty-five years of law practice including representing debtors in collection actions probably exempts him from this restrictive vision. He probably could have ethically communicated the different interest rates to the hypothetical debtor by either a statement or a question. If disciplined for doing so, he faces only

thought, so that negotiation coaching of Michelle and Colette can begin.[59]

"Well, Colette can tell you what a nightmare she went through with

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loss of his privilege to continue serving as a volunteer. *See* FLA. R. CERT. & CT.-APPT. MEDIATORS 10.300(e) (stating reliance on panel opinion not a defense in any disciplinary proceeding but is evidence of good faith to be considered in determination of guilt or mitigation of punishment).

Disputants differ in the degree of explicit information they need to understand their legal positions. *See* Stark, *supra* note 13, at 786. The ethical appropriateness of continuing to respond to additional, interrelated questions that an unsophisticated debtor might ask remains uncertain. *See* Nolan-Haley, *supra* note 29, at 95 (suggesting that mediators should exercise extreme caution responding to questions about specific areas of the law because it may not be possible to do this without favoring one of the parties); Stark, *supra* note 13, at 786 (arguing that degree of explicitness of information is not a good standard for an ethical rule).

More guidance about these issues is needed. *See* Nolan-Haley, *supra* note 29, at 94. Some may be coming soon as Florida amends and reorganizes its code of conduct for mediators. *See* Sharon Press, *Rules Committee Proposes Amendments to the Mediator Code of Conduct*, 13 RESOL. REP. 1 (Jan. 1998).

In addition, giving specific information about particular facts risks practicing law. *Compare* Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 57, 61 (1996) (contending that applying legal principles to specific facts constitutes law practice regardless of whether a lawyer-client relationship exists) *with* Bruce Myerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 74 (1996) (arguing that having a client is essential to practicing law). Virgil Hawkins Mediation Clinic students need to take care to avoid unauthorized law practice because they are not certified under the student practice rules when they do not represent clients.

Any decision by Dan to seek to inform Michelle and Colette adequately, if ethical, must also wrestle with the facilitative-evaluative debate that rages in contemporary mediation. *See supra* note 12. Informing Michelle and Colette adequately will unquestionably require providing information whether that is done by statements or questions or a combination of the two. Many would label these efforts evaluative mediation. *See* Stark, *supra* note 13, at 784-88 (discussing and criticizing distinctions mediators draw between proper and improper evaluation). The Panel's opinion discussed earlier has been interpreted as prohibiting mediators from doing anything evaluative and elevating a "formalist 'facilitative' model of mediation above the practical needs of disputants and the fairness concerns that must animate decision-making in any government-sponsored proceeding." Stempel, *supra* note 13, at 963, 966.

Finally, Dan and other small claims mediators need to wrestle with the question of whether unrepresented, first time participants like Michelle and Colette can be meaningfully informed in the 45 to 60 minute time frame that has been applied to mediations involving lawyers locally. *See infra* note 139.

59. Effective negotiation requires information and an understanding of the negotiation process, components that first time, unrepresented small claims litigants often lack. *See* Fox, *supra* note 40, at 95. Some commentators stress the importance of negotiation coaching. *See, e.g.*, GOLANN, *supra* note 53, at 19 (mediators should attempt to move participants away from adversarial and toward problem-solving strategy); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. DISP. RESOL. 235, 248-49 (1993) (describing how mediators can help participants overcome various barriers to negotiation); SLAIKEU, *supra* note 10, at 48 (arguing that when disputants have poor negotiation skills, brief tutorials on how to negotiate can be critical factors in turning the case around). Doing this ethically in Florida can be challenging because coaching can easily cross the uncertain line becoming impermissible legal advice and opinion. *See supra* note 58.

Serenity Oaks. All I know is what she told me. Except I do know that when Colette decided that she couldn't take it anymore, I talked to the manager there who said that if we paid for two more months they would forget the whole thing. [Now speaking more rapidly and raising her tone of voice] I called Serenity when I got the legal papers and they wouldn't talk to me. I just don't understand."

"So you understood at some earlier time that Serenity Oaks would accept $470 in full settlement of this situation?," said Dan, hoping that this content summary would help Michelle relax a bit.[60] She probably controls the purse strings, thought Dan, and she sure doesn't present herself as someone lacking assets from which collection can be sought. I would have suggested that she take the huge diamond ring off her finger before this proceeding if I represented her.

"Yes," said Michelle, with a relieved tone, apparently happy to be understood.

"Colette," said Dan, "I think everyone agrees that you have the most direct personal knowledge of this situation. Would you tell us your concerns? We also welcome your ideas about how to solve this problem." As he said this, Dan hoped that the way he phrased this invitation would help keep the focus primarily on the present and the future.[61] While both

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60. Dan appropriately seeks to balance content reflections regarding each of the parties' substantive contentions. *See supra* notes 31, 47. Demonstrating understanding may be particularly important with unrepresented, first-time participants like Michelle because small claims litigants often complain that they were not understood. *See* RAITT ET AL., *supra* note 22, at 59 (describing small claims litigants complaints about their trial experiences). Validating perspectives by showing understanding may also help unrepresented, first-time participants become more comfortable negotiating on their own behalf. *See* Fox, *supra* note 40, at 94 (arguing that effective self-representation requires recognition that one's interests are legitimate and that it is legitimate to pursue one's interests).

61. Dan intentionally chose to frame the invitations to narrate as "concerns" and "ideas for solving the problems" to encourage Colette, and Michelle earlier, to focus on the present and future. Dan made this choice realizing that the litigation context of this mediation inevitably invites recitation of some of the past events that relate to the plaintiff's claim. *See* BENNETT & HERMANN, *supra* note 33, at 43-44 (suggesting that parties in small claims mediations need to tell what brought them to court). Dan's objective using this frame was to stimulate ultimate communication about the future and not the past. Mediation does not adjudicate by deciding what past perspectives are true facts leading to which legal principles govern present and future rights. *See* KOLB & KRESSEL, *supra* note 42, at 475 (quoting mediator Patrich Phear who tells parties "mediation is really hopeless at deciding past rights and past wrongs" but is "excellent at looking forward to designing things"). Dan also anticipates that he will encourage all parties to reframe their efforts by abandoning arguments about the past and looking to the present and future, a common mediation reframing approach. *See, e.g.*, BENNETT & HERMANN, *supra* note 32, at 88.

Dan's framing choice here demonstrates another example of his very directive approach to this mediation. It may be criticized as too narrow. *See* MOORE, *supra* note 20, at 208 (suggesting that parties be encouraged to include some historical background to their narrative description of the situation and their needs that they wish satisfied). It may also be criticized as subtly unbalanced in

Colette and Michelle probably want to air past frustrations, Dan hoped that most of this venting could occur in caucus. Discharging these frustrations might be necessary to help them feel better and most beyond their initial offer, something that predictably will be needed to reach agreement.[62] It also might produce information that Dan could share with Jim and Joel and facilitate the negotiation process.

"Yes, I would be happy to," said Colette eagerly. "It was a nightmare like Mom said. You see, we picked out this place with the understanding that I would have to share my bedroom with another girl. I was the first one to sign the lease. They called it a bedroom lease. They rented out the two bedrooms with each having two girls. One day after I moved in Jane came. She had rented the other half of my bedroom. A few months later Jane moved her boyfriend into our bedroom. I'm not totally naive even though I'm young. But having this guy in the same room every night, and having him walking around naked all the time, was not easy. And barging in on me when I was in the bathroom. It got to be a little much."

"I'm sure it did," said Dan, thinking that Colette certainly looks fairly naive, and that a judge trying this might easily form similar impressions.

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view of Dan's choice to invite the plaintiff to narrate about their "claim and its components." Finally, this choice further demonstrates Dan's embrace of a settlement or satisfaction orientation to this mediation. *See* BUSH & FOLGER, *supra* note 12, at 101 (suggesting that the problem-solving satisfaction model is necessarily future-oriented). A transformative vision of mediation recognizes that "past events can be as important as future choices in offering opportunities for recognition." *Id.*

62. People can easily become angry and hostile when talking about things that matter to them. *See* Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 1001 (1997). Ventilation through expressing anger and other emotions "is a part of the mediation process and should be encouraged." KOVACH, *supra* note 27, at 88; *see also* GOLANN, *supra* note 53, at 65 (Mediators should "take an informal approach, encouraging the free expression of views and feelings so that the session can be cathartic."). Venting in joint sessions, however, can veer into direct attacks on other participants and threaten the mediation. *See id.*; KOVACH, *supra* note 27, at 88. Mediators need to exercise control in these instances, often by moving quickly to caucus. *See id.* This can be a difficult decision to make, as demonstrated by the following comments from a student's reflection paper: "Do you talk over arguing parties or wait for a pause. We've been waiting for a pause, but this lets the situation go on. On the other hand, we aren't supposed to talk when someone else is talking." Student Comments (Spring 1998), *supra* note 8.

Participants often experience an emotional release when they vent which makes it easier for them to focus on solving the problem and finding a satisfactory agreement. *See* BUSH & FOLGER, *supra* note 12, at 62; Susan S. Silbey & Sally E. Merry, *Mediation Settlement Strategies*, 8 LAW & POL'Y 7, 9 (1986). One student noted this dynamic, writing: "Allowing [the defendants] to vent did have some therapeutic value and gave some participants the satisfaction in knowing the mediators do care about what they are saying and that we know the facts of their case." Student Comments (Fall 1997), *supra* note 8. Another student wrote: "When doing feeling reflections in role plays it seems phoney but they are truly effective talking to real people with real emotions. Most people are looking for validation for their feelings and acknowledging their feelings gives them some satisfaction." *Id.*

"Please continue."[63]

"Well, I complained to the manager several times. She always said that she would do something about it but she never did. Then Serena moved her boyfriend into the other bedroom. Now everyone but me was smoking, drinking, and partying. They all got along great, these two couples. I'm trying to study and pass my first-year courses and I'm living in party central. And I've got two naked men prowling around what I though would be a girls' room. These men didn't pay rent. They were slobs, didn't pick up anything. They ate my food. They made long distance calls on my phone and Jane and Serena wouldn't make them pay me. So I got really mad. They owe me more than a hundred dollars for calls they wouldn't admit making. I had to pay these bills to keep my credit with the phone company."

"Go on," said Dan, thinking that he wished she hadn't said that last bit about the phone bills. Jim will probably frame that as an interpersonal dispute having nothing to do with any landlord responsibility, and argue that it creates the primary justification for Colette's decision to break the lease.

"That's about it. I stuck it out for four months but it kept getting worse. The manager, she did at one point ask Jane whether a man was living with her. Jane and Serena got really mad at me then. It did not require a brain surgeon to figure out the answer to that question, everybody in the unit knew that these guys were living there. Men's clothes were everywhere.

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63. One of Dan's action choices here was ineffective while the other was arguably effective. His first active listening response was ineffectively non-neutral and judgmental from two perspectives. If it was an attempt to reflect content, it jeopardized his mediator neutrality by suggesting positive judgment about and potential agreement with Colette's view that her living situation at Serenity Oaks was intolerable. Mediators should avoid making content reflections that communicate positive or negative judgments about merits of the statements paraphrased. *See* STULBERG, *supra* note 30, at 66 (mediators must use neutral language). Dan's language choice was also an ineffective listening response if his goal was to reflect what may have been a vague expression of feeling by Colette. Non-judgmental statements provide effective feeling reflections. *See* BINDER ET AL., *supra* note 58, at 60-61. Feeling reflections phrased in ways that express positive judgment minimize the underlying emotion and imply a willingness to employ negative judgment later. *See* Peters, *supra* note 32, at 281 n.76.

Dan's second response, however, was an effective open question. It allowed Colette to continue telling her story with virtually no limiting suggestions from the mediator. *See id.* at 267 (arguing that open questions allow respondents to use their memory patterns and associational frames of reference to narrate information they think is important). Scholars recommend frequent use of open questions during initial joint mediation sessions to facilitate gaining complete data and avoid focusing directions too soon. *See, e.g.*, BENNETT & HERMANN, *supra* note 32, at 80-81; KOVACH, *supra* note 27, at 92; STULBERG, *supra* note 30, at 77. Research demonstrates that students increase their use of open questions after exposure to instructional units emphasizing their value. *See* Peters, *supra* note 32, at 284 n.84; Paula L. Stillman et al., *Use of Client Instructors to Teach Interviewing Skills to Law Students*, 32 J. LEGAL EDUC. 395, 401 (1982).

There was shaving cream and stuff in both bathrooms. I really had no place to study. I couldn't study at my apartment and I was afraid to walk home from the library alone late at night. I talked to my therapist during a visit back home and she said I was clinically depressed. She suggested that I check to see when was the latest I could withdraw from my classes without flunking them. I did and learned that I was almost at that point. So I packed my stuff and left."

"Where did you go?" inquired Dan, thinking that he wanted to encourage Colette to keep talking in joint session.[64]

"I came back home to Frontenac Beach. I was afraid I'd get really lousy grades and that would keep me from the upper level college I want, business."

"Was this your first semester at UF?" inquired Dan.

"Sort of. I started that summer, B term. I'm re-enrolled next month. But I will stay in a dorm next time. I won't have to deal with all of these problems there."

"It sounds like your were angry that Serenity Oaks did not respond to your concerns about your roommates' boyfriends," said Dan, hoping that this feeling reflection did not undermine his neutrality with Jim and Joel.[65]

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64. Dan's action choice here arguably is effective even though it results in an unbalanced situation where the defendants talk more than the plaintiffs initially. This choice deviates from the general suggestion that party openings be balanced in length. *See* BENNETT & HERMANN, *supra* note 32, at 44 (suggesting that 3 to 5 minutes is a reasonable estimate in pro se mediations because it can be hard for the second party speaking to wait and listen effectively much longer). It arguably reflects an effective adjustment to this individual context because the plaintiffs have previously indicated their lack of knowledge of the events regarding this lease and Colette's decision to leave the apartment and the University. This choice also reflects the common small claims situation where plaintiffs' base their opening on their claim and then are interested in learning what the defendants have to say. *See supra* note 56. This context also presents a typical situation where the plaintiff's attorney has little need to say much while defendants have a greater need to talk and be listened to. *See* Nolan-Haley, *supra* note 29, at 58 n.48 (noting that "some parties have a strong desire to tell their stories rather than to achieve specific outcomes").

65. Dan faced a common situation where his desire to demonstrate empathy to Colette by using a feeling reflection collided with his concern for remaining neutral in the eyes of Jim and Joel. *See* Michael Moffit, *Casting a Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 23 OHIO ST. J. ON DISP. RESOL. 1, 12-13 (1997); Stark, *supra* note 7, at 479. Dan effectively recognized the emotional dimension of Colette's narrative. Whether he should have chosen now to reflect it by making a listening response remains debatable. Making a feeling response demonstrates concern and respect for Colette, models empathetic perspective-taking and understanding for all participants, and helps all parties become better prepared for the rest of the mediation. *See* Moffitt, *supra*, at 11-12; Robert H. Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOTIATION J. 217, 219-20 (1996). On the other hand, demonstrating empathy to one party and not the other may undermine impartiality. *See* Stark, *supra* note 7, at 479 (arguing that "empathy in mediation must be practiced with some concern for diplomacy, given the presence of two parties").

The context here, where the plaintiffs are repeat players who were neither personally involved

"That's for sure," said Colette.

"What was the name of the assistant manager you dealt with?" inquired Dan. As he did, he mused that Colette would probably make a pretty persuasive witness. Intelligent and controlled, she convincingly presented herself as a young woman poorly served by the staff of Serenity Oaks.

"Dudley, Carolyn Dudley," replied Colette.

"Anything else we should know now?," inquired Dan, restraining himself from asking more about this potential estoppel defense for fear that the answers would show no independent proof and diminish potential testing value.[66]

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with nor knowledgeable about the events causing Colette's emotional responses, may indicate that a feeling response was appropriate. Assuming that it was, Dan's phrasing was arguably ineffective. His choice to paraphrase why Colette was angry, i.e., because of Serenity Oaks' failure to respond to her concerns about her roommates' boyfriends, may have colored the defendants' perceptions of his neutrality. They may easily be interpreted as positively judgmental and implying agreement with Colette's perspective. *See supra* note 63. Simply reflecting Colette's emotional experience provides a better, safer phrasing choice. *See* Moffitt, *supra*, at 12. Saying "you were angry" or "I imagine this angered you" implies no positive judgment or agreement with Colette's substantive views. *See id.* Nonjudgmental expressions of empathy require neither agreement with views nor compassion for circumstances. *See id.* at 10.

This common and difficult contextualized decision-making complicates the already challenging talk of helping law students learn the feeling reflecting dimension of active listening. *See* Stark, *supra* note 7, at 479. As students have noted:

> I wish I were able to utilize the "feeling reflection" with . . . confidence. I still found it [to] be a useful tool when given right. Coming from me, though, it sounded patronizing and condescending. Feeling reflections made me frustrated because I was unable to get a diversified vocabulary of feeling words. The reflection sort of loses its use when it does not specifically hit the feeling experienced by the parties. For example, all the parties are upset, frustrated, or angry. Stating the obvious seems like we are reading from a script rather than pinpointing the particular feelings of the parties.

Student Comments (Fall 1997), *supra* note 8.

66. In addition to preserving some testing options, Dan's choice also avoids focusing on specific facts too soon. KOVACH, *supra* note 27, at 92 (arguing that mediators should not narrow their focus too soon). Lawyers mediating can be powerfully drawn to cutting quickly to the chase and exploring legally salient facts specifically and prematurely.

In addition, effective mediation involves striking an effective balance between participant needs to tell their stories, often in a very fact specific way, and focusing on the big picture to discern issues, agendas, and interests. *See* Stark, *supra* note 7, at 497-501 (describing how unruly, nonlinear, unpredictable, and spontaneous mediations can be). Mediation clinic students often struggle with obtaining an appropriate big picture-specific detail focus in their initial experiences. One student wrote:

> It is important to focus on the big overlying issues, but without having clear notes on the minute details, one can get lost in the mediation. Also, by not having one's details straight, a mediator can lose a party's confidence. For instance, after details

"No, that's about it. I don't think I should have to pay anything but I guess my Mom agreed to pay two more months' rent. I'll have to repay her for that from the money I'm saving to return to UF. I've been working since I returned home."

"I understand," said Dan, thinking that the contribution issues between mother and daughter probably carried little persuasive weight with Jim and Joel.

"Often I like to encourage you to ask each other questions to clarify what you've said to each other but I think everyone has done a good job presenting the issues,"[67] continued Dan, thinking as he said this that there was no way he wanted to turn Jim loose to conduct a mini-deposition of Michelle and Colette.[68] Dan also decided to try a round of caucuses in search of significant movement.[69] Dan reasoned that the defendants have

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> had been listed for awhile, I asked one party for clarification as to some of the details. In response to this question the attorney for this party said they thought the mediators were responsible for taking notes and keeping up with details. I was embarrassed by my mistake. . . .

Student Comments (Fall 1997), *supra* note 8.

67. Dan effectively provides positive feedback to the parties for presenting useful opening statements that avoided counterproductive communication choices. Mediators must be sensitive to human motivation. KOVACH, *supra* note 27, at 37. Positive feedback motivates by providing recognition. *See* BINDER ET AL., *supra* note 58, at 43. Rewarding positive behaviors by making specific feedback statements about them can increase self-esteem, confidence, and the likelihood that these actions will continue. *See* Peters, *supra* note 6, at 920-21. Positive feedback may be particularly important when unrepresented, first-time participants like Michelle and Colette are involved. It provides another way to communicate that their perspectives are legitimate, increasing chances that they will negotiate effectively. *See* Fox, *supra* note 40, at 94-95, 108-09.

68. Inviting participants to ask each other questions of clarification after opening statements can be a useful approach in many mediation contexts. *E.g.*, KOVACH, *supra* note 27, at 91; SLAIKEU, *supra* note 10, at 81. Post-opening joint session conversations provide good opportunities for the parties to provide recognition to each other in the transformative vision of mediation. *See* BUSH & FOLGER, *supra* note 12, at 266 (recommending setting aside a time after opening statements when parties can dialogue about what they think the other participants do not understand about them). Here Dan, arguably appropriately, decides that this course is too risky because of a propensity for attorneys to take mini-depositions rather than seek genuine clarification when this opportunity is presented. *See* GALTON, *supra* note 39, at 31 (observing that a "[m]ediation should never be transformed into a deposition"). Dan has experienced situations where lawyers asked questions in joint sessions in competitively stylistic ways through aggressive language choices and excessive use of leading questions. These choices harm cooperative communication and negotiation. *See id.* (noting that invectives do not put people in the mood to negotiate constructively).

69. Dan's decision to caucus at this stage raises several questions that can be usefully analyzed. Commentators disagree regarding the appropriateness of early caucusing. *Compare* KOVACH, *supra* note 27, at 91 (suggesting that important information usually remains to be gathered after opening statements and that mediators should continue to gather more information rather than rushing to identify and deal with specific issues) *with* GALTON, *supra* note 39, at 31 (stating his preference for skipping joint discussions and moving directly to caucuses); SLAIKEU,

supra note 10, at 81 (suggesting proceeding to caucuses after parties ask clarifying questions following their openings). Whether to caucus or continue with joint session information gathering provides another context-based decision that carries no general rules or easy answers. *See* STULBERG, *supra* note 30, at 107-09 (arguing that timing of caucuses dictated by purpose mediator wants to promote).

Small claims matters occasionally involve parties in relationships that will continue after this dispute is resolved. *See* Nolan-Haley, *supra* note 29, at 58 n.48. These cases occur more frequently on the pro se docket and present situations suggesting that more joint session work may be appropriate. *See* KOVACH, *supra* note 27, at 127 (suggesting that solving problems jointly strengthens relationships). Early caucuses are probably not an effective choice in these cases unless communication breakdowns or refusals to negotiate make them necessary. *See id.*

If asked, Dan would probably explain that his decision to go to early caucuses reflects the following context factors: (1) no likelihood of an ongoing relationship exists between these plaintiffs and defendants; (2) no past relationship has existed because neither Joel nor Jim know anything about the events potentially justifying or excusing the apparent breach of their client's lease; (3) significant imbalances exist because Jim and Joel possess more legal knowledge, mediation experience, and negotiating skill than Michelle and Colette apparently have; and (4) a 45 minute time expectation which does not permit a lot of joint problem-solving exists. *See supra* notes 57-58. Maximizing the use of separate sessions to help unrepresented participants feel less intimidated has been recommended as a useful way to deal with uncounseled, inexperienced parties. *See* Nolan-Haley, *supra* note 29, at 92 n.218.

Dan's decision to use early caucuses further demonstrates his orientation to a settlement or satisfaction model for this mediation. *See, e.g.*, Alfini, *supra* note 17, at 66-67 (suggesting that mediators using a style he calls "trashers" work primarily in caucuses to afford freedom to test the merits of each side's case); BUSH & FOLGER, *supra* note 12, at 61 (describing extensive use of caucuses to pursue the most direct route to problem-solving allow satisfaction oriented mediators to keep "tight control" over interactions and move participants "steadily toward solutions that are mutually acceptable"). The choice to use early caucuses also enhances Dan's ability to influence the participants by sequencing, framing, and questioning choices. *See* Lande, *supra* note 21, at 864 (arguing that early and extensive caucusing gives mediators "tremendous power to influence the participants through careful characterization of the other side's positions"). Commentators also warn that Dan's decision increases the likelihood that he will engage in directive action choices. *See, e.g.*, BUSH & FOLGER, *supra* note 12, at 69 (arguing that mediators who focus on the objective of solving problems generally "use a strong, directive hand").

Dan also skipped an arguably important stage of mediation by his decision here to go to early caucuses. Many commentators suggest that identifying issues jointly with participants constitutes an important mediation stage that should be completed before caucuses begin. *See, e.g.*, KOVACH, *supra* note 27, at 107 (suggesting that this be done jointly unless overt hostility exists); MOORE, *supra* note 20, at 210 (noting that its helpful to do this early in the negotiations); STULBERG, *supra* note 30, at 82 (emphasizing the value of jointly identifying issues so that subsequent discussion can be restricted to them). Identifying issues jointly helps everyone either agree of what will be discussed or agree to disagree and prevents later misunderstandings on what the important topics are. *See* KOVACH, *supra* note 27, at 107. Getting everyone's input helps ensure that nothing is overlooked and that mediations do not prematurely focus on inappropriately narrow frames. *See id.* at 91-92 (observing that novice mediators often want to find immediate solutions before all the issues are articulated).

Here Dan apparently assumes that the issues are limited to those presented by the plaintiff's claim and the defendants' potential defenses and counterclaims. Mediators should not assume anything. *See* STULBERG, *supra* note 30, at 97 ("The mediator must check and challenge all assumptions . . . ."). His prematurely narrowed focus demonstrates the criticism that satisfaction-

essentially offered $470 and there's probably a security deposit that they are not contesting so money is on the table already. Dan also quickly decided to meet first with the plaintiff's representatives because he sensed that movement off $2426 was necessary to help Michelle learn that this would be a give and take negotiation process if agreement were possible. In addition, it was arguably the plaintiff's turn to concede because they demanded $2426 and defendants had effectively offered $470 plus, probably, the damage deposit.[70]

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settlement oriented mediators are prone to do this. *See* BUSH & FOLGER, *supra* note 12, at 67 (observing a tendency for mediators to ignore "certain types of issues and thus influence the way problems typically get defined"). Dan neglected to ask the parties to identify the issues they wanted to discuss. Dan's assumption probably captures the plaintiffs' issues but ignores the possibility that the defendants might have some topics that transcend the four corners of this lawsuit. Exploring this possibility affords a good route to avoiding the narrow focus that often occurs in court-ordered mediations. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7, 19 (1996) (suggesting that a narrow view is to settle the matter in dispute in a manner similar to how it would be settled in litigation).

Michelle and Colette, for example, might like an apology for the injuries and inconveniences they have suffered. Apologies may become issues in mediations, provide a standard solution, SLAIKEU, *supra* note 10, at 35, and often help resolve small claims mediations. *See* Nolan-Haley, *supra* note 29, at 58 n.48 (observing that apologies are often needed by small claims litigants and are not generally available through final judgments). Colette's anger which Dan reflected earlier suggests that this could be a possible issue. *See supra* text accompanying note 65. Surfacing this issue now gives Jim and Joel an opportunity to consider their responses while Dan caucuses with Michelle and Colette. If participants do not identify an apology as an issue initially, mediators may still want to use it later in negotiation as a possible solution. *See* GOLANN, *supra* note 54, at 194 (arguing that mediators can often bring adversaries together in constructive ways by arranging for apologies or regrets).

Although the Clinic did not handle any disputes involving lawyers where apologies were agreed to, this has been an important issue in some of their pro se mediations. One student noted:

> In my last co-mediation . . . , the parties settled, but maybe more importantly, the deeply hurt plaintiff felt better about the process when the defendant gave him a heart felt apology. Although the parties are not likely to go out to dinner soon; they were able to feel better about the process, better than they would through litigation.

Student Comments (Fall 1997), *supra* note 8.

70. Choosing who to caucus with first requires careful thought. *See* STULBERG, *supra* note 30, at 109. Dan's choice to meet with the plaintiffs first deviated from a general practice designed to provide process balance by caucusing first with the party who did not present the initial opening. Michelle and Colette did, however, speak longer than the plaintiffs. Dan also takes unnecessary risks by assuming that the $470 offer is still on the table without verifying this before going to caucus. Mediation clinic students are encouraged generally to see if negotiation can be started during joint session. Although some mediators suggest delaying talking about money until after the first round of caucuses, the limited time expectations attorneys apply to small claims mediations makes this a difficult strategy to pursue.

Dan's choice also deviated from a general practice of caucusing first with defendants who have

"Now I'd like to hold some of those individual meetings I mentioned earlier," continued Dan. "I'd like to start with Jim and Joel to learn more about their interests, would that be okay with everyone?"

As everyone assented, Dan stood and escorted Michelle and Colette out of the jury room and into the empty courtroom next door. He assured them that he would meet with them next for an approximately equal amount of time, and then returned to the jury room where Jim and Joel were talking quietly.

"How do these bed leases work?," asked Dan, as he sat down, thinking he would do some general fact gathering that might lead to some testing.[71]

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not asserted counterclaims to see if they are willing to negotiate by offering something to satisfy the claim. Defendants are not obligated to negotiate. *See supra* note 56. Plaintiff's lawyers generally expect to see some commitment to negotiate expressed either during joint session or in the first caucus before they will commit to mediating seriously. Dan's departure from this rule demonstrates his embrace of a settlement orientation and reflects his sense that any deal will fall considerably below the opening demand. *See* KOLB & KRESSEL, *supra* note 41, at 471 (describing how settlement oriented mediators will get a "sense of" or "fix" on how cases might settle). It also hints at a subtle bias in favor of the tenants, perhaps stemming from Dan's legal services background and experience, inasmuch as he chose not to try to meet with the defendants first which might have produced an initial offer from them above the range Dan was contemplating. *See* Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 MO. J. DISP. RESOL. 141, 142 (noting that bias can stem from past experiences).

Dan explains his reasoning for not honoring the normal expectation that defendants will get the first caucus. Deviating from this expectation without the contextual basis that Dan relies on usually is counterproductive, as this student learned from experience:

> As the plaintiff, . . . [the attorney] had technically made the first offer. For me to then ask him to make another offer amounted to asking him to bid against himself. [His] reaction to this was that he was there to negotiate in good faith but that he was not, nor does he ever, make a first offer [after stating hi[s] claim]. When we met with the defendants, they in turn did not want to make a first offer. In fact, I believe they took [the lawyer's] refusal to make an offer as a threat and an insult, thereby making them take the position that they did not owe, and would not pay, "a red cent, not one dollar."

Student Comments (Fall 1997), *supra* note 8.

71. Mediators undeniably influence mediations and their outcomes. *See, e.g.*, BUSH & FOLGER, *supra* note 12, at 63-64; KOLB & KRESSEL, *supra* note 41, at 491. Dan demonstrates one of the ways this occurs, by selecting what topics to emphasize. *See* Honeyman, *supra* note 70, at 141 (observing that mediators can choose "which possibilities will be emphasized and which downplayed"). The topic chosen seems appropriate because it involves an apparently new approach to commercial residential tenancy. Dan begins his exploration of this subject effectively by asking a topic-specific open question that invites any response within the focus provided. *See, e.g.*, KOVACH, *supra* note 27, at 93; Peters, *supra* note 32, at 267 n.32; STULBERG, *supra* note 30, at 78. The experience Jim and Joel have with mediation probably validates Dan's choice to not begin the caucus by explaining confidentiality. *See* SLAIKEU, *supra* note 10, at 92 (recommending beginning caucuses by reviewing confidentiality and then asking an open question). The predictable desire of

"I'm not very familiar with them," said Jim.

"As I understand it," replied Joel, "Serenity rents out bedrooms to two tenants on separate leases. Each gets a bed in the room. It is a new multiple lease system and I think some other apartment units are starting to use it. I hadn't seen it until we started managing this complex."

"Do you rent out a two bedroom to four tenants with each paying rent on an individual lease?," inquired Dan.[72]

"Yes. I guess so," said Joel.

"Separate beds?," asked Dan.

"I should think so," said Joel. "I suppose its possible to rent a bedroom this way to persons who want to share a bed but I don't think that's the normal marketing strategy."

"I should hope not," growled Jim, sparking hope in Dan that he might have been moved by Colette's narrative.

"Was it separate beds here for Colette and Jane?" asked Dan, following up.

"Yes, I definitely think so," replied Joel.

"Presumably single beds given the probable size of these bedrooms?," asked Dan, thinking out loud but setting up some later testing questions about the close quarters in which Colette had to spend bedroom time with Jane and her clothing-optional lover.[73]

"Yes, that would be right," responded Joel.

"Have you checked out Michelle's claim that Carolyn Dudley

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a plaintiffs' attorney on contingent fee to get right down to it also justifies Dan's choice to dispense with a couple of general background questions to build rapport. *See* GOLANN, *supra* note 53, at 75 (suggesting that mediators begin by asking simple questions that focus on facts to get the parties accustomed to speaking freely).

72. Dan follows his open question with a closed question. Mixing open and closed questions on the same topic this way demonstrates an important approach to inquiry that mediators can use effectively in caucus to acquire complete information. *See* GOLANN, *supra* note 53, at 75. This approach, called funnel questioning, begins a topical exploration with open questions and then funnels, or narrows, to closed questions that develop additional details about the subject. *See* Binder et al., *supra* note 58, at 171-79; Peters, *supra* note 32, at 297.

73. Dan's final question on this sequence was a leading question because it suggested the answer. *E.g.*, Binder et al., *supra* note 58, at 72; KOVACH, *supra* note 27, at 94. Leading questions probably have little impact on lawyers and repeat players like Jim and Joel when asked in caucus. *See* STULBERG, *supra* note 30, at 79; *see* Peters, *supra* note 32, at 271 nn. 45-46. Nevertheless, mediators should generally avoid phrasing questions in a leading form because they can create defensive responses and suggest bias. *See* GOLANN, *supra* note 53, at 75. They also tend to restrict or impede the flow of information. *See id.* at 79. Research suggests that lawyers often have difficulty avoiding leading questions when gathering information from clients in initial interviews. *E.g.*, Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROB. 599, 605 (1979) (25% of average lawyer's questions were leading in almost 50 observed legal aid interviews); Peters, *supra* note 32, at 271 n.45 (average of 21% of all questions asked in 30 taped and transcribed interviews at the University of Florida Law School's Virgil Hawkins Civil Clinic were leading).

authorized settling this for two more month's rent?," asked Dan, switching topics after deciding to save testing questions about the close quarters for later.[74]

"There's nothing about that in the file," replied Joel.

Hearing the evasion, Dan followed with, "Have you talked to Carolyn about this?"

"No," said Joel.

"Can you call her while I caucus with Michelle and Colette?," inquired Dan.[75]

"Not easily," replied Joel.

"Why?" said Dan.

"She doesn't work at Serenity Oaks anymore," replied Joel. "She stopped working there before we took over managing the property. I've never met her. I have no idea where she lives."

"Could the time and expense of locating her as a witness be significant if this goes to trial?," asked Dan, following up with his first question exploring settlement alternatives.[76]

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74. Dan's decision to switch topics before testing probably was effective because it is generally better to gather information before engaging in reality testing. *See* GOLANN, *supra* note 53, at 74 (recommending starting slowly and avoiding direct testing questions early in caucusing process). Mediators also should generally use a careful progression, asking simple questions focused on the facts before moving to "more complex, sensitive inquiries about tactics, goals, and settlement terms." *Id.* at 75. This moment in the mediation also demonstrates a mediator's power to set agendas, determining what topics will be discussed, in what order, and in how much depth. *See id.* at 26.

75. Dan's question demonstrates mediation's potential flexibility to respond to unexpected problems. Experienced mediators know that if information is needed, calling to get it is an obvious option. Similarly, if viewing a scene might help, everyone could drive to it and walk through it. This flexibility, however, typically exists more in large claim mediations where time expectations are different and typically expanded. Small claims continuances are often opposed by plaintiffs' attorneys who frequently suggest setting a trial and negotiating privately in the interim. I have occasionally encouraged parties to make calls seeking authority while I caucused with other participants. Florida law requires parties with full authority to attend county court mediations. *See* FLA. R. CIV. P. 1.750(e) (attorneys may appear for parties in small claims actions provided that they have "full authority to settle without further consultation"). Full authority is defined by local circuit court rule "as the authority to agree to pay any sum requested or to accept any sum offered without consultation with any other person." ADMINISTRATIVE ORDER NO. 3.1100(C)III(b)(3)(a) (8th Jud. Cir. Fla. Aug 19, 1997). Lawyers are supposed to know this rule but often do not, and the recommended remedy is to bring them back to the judge and indicate that the mediation cannot occur as ordered because the attorney lacks authority. Unrepresented parties have no realistic way of knowing about this requirement before the mediation. Occasionally authority problems can be solved by a simple phone call.

76. Asking questions about the costs of litigating provides a major tool that mediators use to explore alternatives to reaching an agreement. *See* GOLANN, *supra* note 53, at 76 (recommending that mediators ask participants about "both the explicit and hidden costs of litigation"); SLAIKEU, *supra* note 10, at 32 (advocating exploring what persons will do if they don't strike a deal). The value of options away from the negotiating table supplies a key factor in many negotiations. *See*

"I don't think so," chimed Jim. "We won't need her."

"Will defendants then win the point by testifying like what Michelle said today?" inquired Dan.[77]

"Nah, that's hearsay," said Jim, quickly.

"Does this fall under the admission exception covering employees who speak within the scope of their apparent authority?," inquired Dan.[78]

Apparently suspecting that he had lost the point, Jim growled, "We'll find her if we need to."

Shifting gears, Dan said: "I think we can reach an agreement today that will save you the time and expense of finding Carolyn.[79] Although I forgot to confirm this in joint session, I have a sense that their offer of $470 is

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GOLANN, *supra* note 53, at 4. This approach requires looking at each side's "Best Alternative to a Negotiated Agreement" or "BATNA". FISHER & URY, *supra* note 34, at 97. Small claims mediations present situations where one obvious alternative is to submit the dispute to the judge or jury at trial. *See* GOLANN, *supra* note 53, at 4.

77. Dan follows up effectively by asking another closed question. This question goes beyond the BATNA exploring dimension of the preceding inquiry and seeks to test reality by exploring weaknesses that might exist in substantive cases. *See* GOLANN, *supra* note 53, at 50. This approach supplies a key part of any mediation strategy. *See id.* Dan might be criticized for doing this prematurely. *See id.* (recommending that generally mediators should initially explore case strengths before weaknesses). On the other hand, small claims cases often do not consume the time needed to conduct multiple caucus rounds. *See infra* note 140. In addition, Jim might be criticized for failing to acknowledge that Carolyn's testimony might be needed to counter Michelle's estoppel defense by denying or reframing Michelle's version of this phone conversation. *See* Cooley, *supra* note 39, at 117 (recommending that lawyers acknowledge their case weaknesses to mediators to demonstrate preparedness, reasonableness, and diminish chances that these problems will be used to reduce their demands).

78. Dan's follow up closed question raised the likelihood that a judge will permit Michelle to testify about what Carolyn allegedly told her on the phone. Florida law includes as an exception to the hearsay rule statements offered against a party that is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship." FLA. STAT. § 90.803(18)(d) (1997). Dan may be skating on thin ice here by pressing and potentially embarrassing Jim in front of his client. *See* GALTON, *supra* note 39, at 37 (arguing that mediators must "*never* embarrass or humiliate an attorney in the presence of her client"). Doing this can cause stubborn and hostile reactions that harm chances of reaching agreement; GOLANN, *supra* note 53, at 51 (noting the "tension inherent in reality testing between being pointed enough to force the players to confront the problems with their legal options and not pushing them into stubbornness or hostility"). Pressing too hard can also lose their perception of impartiality, their "most powerful tool." *Id.* at 33-34.

79. Dan's expression of optimism reflects an important quality of and a usually effective action choice for mediators. *See, e.g.*, GOLANN, *supra* note 53, at 71 (urging mediators to promote a sense of optimism about the mediation process); MENKEL-MEADOW, *supra* note 4, at 226 (arguing that solving problems with an optimistic, creative mediator can be "proactive, creative, positive, synthetic and energizing"); STULBERG, *supra* note 30, at 41 (arguing that mediators should be "upbeat," give parties "confidence that they can resolve their concerns," and inspire them to believe in their own abilities).

good. Will that get it done?"[80]

"Not enough," said Joel.

"Why?" inquired Dan.[81]

"This is our first suit for Serenity," said Jim, "and we need to do better than that. We've got to get off to a good start with them."

"Will this good start include not spending a lot of their money preparing and trying a case that you could settle now for about the same money?," asked Dan, fearing the response.[82]

"We're certainly mindful of that,"growled Jim, "and we think that we could get a reasonable fee award if we have to go to trial. And from what've I've observed, I think Michelle is far from judgment proof."

Me too, thought Dan. Time to try another tack. "Joel, did Colette pay a damage deposit?"

Joel, after looking briefly at his records, replied, "Yes, she did. It was one month's rent, another $235."

"Do you still have that money?" inquired Dan.

"Yes," said Joel.

"I haven't heard any mention by them of getting this back so I'm guessing that they'd be willing to add it to their offer.[83] That brings them

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80. Dan here appropriately changes the topic and moves to exploring the state of the current negotiation. Mediators typically ask parties whether the other side's offer is acceptable as a prelude to the next negotiation move. *See* GOLANN, *supra* note 53, at 48 (suggesting that mediators are "dancemasters" leading parties "through a series of steps that cover the remaining ground to agreement").

81. Mediators typically find asking "why" very useful. This question often produces a respondent's rational response for rejecting the proposed solution. *See* STULBERG, *supra* note 30, at 79. These questions can also produce information about the interests which underlie the bargaining positions. *See* Fisher & Ury, *supra* note 34, at 44; STULBERG, *supra* note 30, at 79; WILLIAM URY, GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE 63 (1991).

82. Dan makes a significant mistake here by returning to a reality testing question. This action choice may reflect a desire to tangle with Jim, perhaps stemming from their prior litigation encounters. Dan needs to monitor this motivation carefully because it impairs effective action choice and could imperil the perception of him as impartial.

Asking follow up questions continuing to explore underlying interests would have been a much more effective direction for Dan. For one thing, Jim's response to Dan's why question did not simply articulate litigation-linked justifications such as "that's what we are entitled to" or "that's what the judge will give us." Instead it invoked an aspect of his relationship to his client, hinting at an underlying interest. Following that hint with an open question, such as "tell me more," might have been very effective. Moreover, the vague phrase "we need to do better than that" suggests that Jim may be willing to consider significantly discounting his original claim. Dan could have chosen to pursue that possibility by asking what percentage of return Jim felt he needed. Dan also could have used an active listening response, an action choice which often helps participants explore interests. *See* SLAIKEU, *supra* note 10, at 13. All of these choices would have been more effective than interrupting this topic by returning to reality testing inquiry.

83. Dan's surfacing of the unreturned damage deposit demonstrates a type of agenda expansion that can often help facilitate monetary negotiations. *See* J. Michael Keating, Jr.,

up to $705, getting close to half the unpaid rent. That's cash now, without any more hassle or time for you and fees for Serenity Oaks. How does this sound?"

"Still not enough," growled Jim.

"Any reasons other than those you mentioned already?," inquired Dan.

"No," responded Jim.

"I need a significant concession now," replied Dan. "You saw how quickly Michelle balked at paying the full demand. Give me something to work with and I think she can be coached to negotiate. If you don't give me a big concession, we might not get there. It's your turn since defendants probably have $705 on the table.[84] I wonder if a flip side of Michelle's

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Mediating in the Dance for Dollars, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 93, 103 (Sept. 1996) (urging mediators to look for ways to introduce integrative elements into distributive disputes); Menkel-Meadow, *supra* note 4, at 226 (noting that it is often more productive to expand, rather than narrow, negotiation focus). Dan's questions on this topic imply that plaintiffs already have this money and should view this sum as a way to increase their payoff at relatively little cost to the defendants. *See id.* Although Dan hasn't confirmed the defendants' willingness to relinquish their damage deposit, he knows that they do not possess a strong and clear legal path to secure its return. Florida law relieves landlords from their legal obligation to notify tenants of their intention to impose a claim on a damage deposit when tenants have vacated the premises before their lease term expired without first giving written notice at least seven days before leaving. FLA. STAT. § 83.49(5) (1997).

Dan's formulation of this possibility also demonstrates a common technique of proposing a hypothetical situation in caucus. *See* Cooley, *supra* note 38, at 144; GOLANN, *supra* note 53, at 57-58.

84. Dan shares his perspective on how this negotiation should proceed. Commenting on an unfolding process is often an effective way to influence it. *See* Peters, *supra* note 10, at 67. This insight helps mediators influence productive communications once they identify potentially destructive conflict-escalating behaviors. They can do this by making comments designed to keep communications on track and productive. *See* Stark, *supra* note 7, at 475 (arguing that mediators must assist "open and honest communication" and "squelch inappropriate threats and coercion"). This insight also underlies the negotiation action theory that provocative maneuvers should receive verbal responses that communicate recognition of the tactics because this often neutralizes them, particularly when these comments are accompanied by non-escalatory messages. *See, e.g.*, BASTRESS & HARBAUGH, *supra* note 34, at 464-65; Fisher & Ury, *supra* note 34, at 130-32; Peters, *supra* note 10, at 67.

Dan employs this action theory in an effort to stimulate a significant concession. Asking parties to make concessions is a common part of litigation-linked mediation. *See* GOLANN, *supra* note 53, at 48. Dan also effectively explains his decision to caucus first with the plaintiffs because the defendants have effectively offered almost half the unpaid rent. These process comments helpfully make the present state of the negotiation explicit. They may also counter concerns that Jim and Joel may have about bargaining with themselves because mediators should exercise care to try to make concessions seem reciprocal. *See id.* at 48-49.

Research suggests that making small concessions grudgingly tends to maximize gain if it does not generate impasse. *See* BASTRESS & HARBAUGH, *supra* note 34, at 520. Many lawyers "begin with piddling or insulting openings, discouraging the other party from serious bargaining and prolonging the negotiation process." Keating, *supra* note 83, at 103. Not having earlier experience with how Jim and Joel negotiate during small claims mediations, Dan apparently fears that they will

apparent ability to pay a judgment that you mentioned, Jim, might be a willingness to get a lawyer and fight this on the merits, maybe just for the principle of the thing."[85]

"It will cost her a lot of money," replied Jim.

"Maybe, maybe not," said Dan, using the most reasonable, non-attacking tone and manner he could muster in the hope that Jim would take the bait.[86]

"What do you mean?" said Jim, taking the bait.

"Do you think this multiple lease approach could be realistically challenged as unconscionable?," inquired Dan, again using a reasonable and non-attacking tone and manner.

"What do you mean?," said Jim.

"As you know, Jim, the residential landlord-tenant act gives courts the right to declare provisions of lease agreements invalid if they deem them unconscionable,"[87] replied Dan. "I wonder whether this new marketing approach which generates perhaps double the rent normally received for a 2 bedroom apartment could be vulnerable on this basis. Have you litigated this question?"[88]

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seek to maximize gain by beginning with a small rather than a significant concession. He uses effective action choices to respond to that concern.

85. Dan makes an ineffective sequencing choice here by returning to a question that has reality testing as its apparent goal. Dan diminished the power of his earlier process comments by going to more testing before allowing Jim and Joel a chance to respond. Doing this testing before seeking to stimulate a significant concession provides a more effective sequence. Asking Jim and Joel to explore their litigation option in light of Michelle's apparent wealth and her consequently greater access to lawyers, however, might be a useful direction if sequenced differently. Michelle's estoppel defense becomes more formidable if she consults a lawyer. This defense will force Jim to locate, confer with, and possibly summon Carolyn, spending time and money that might not be reimbursed if the case is lost. Dan also asks this question effectively, posing it indirectly by injecting the phrase "I wonder if." *See* Ury, *supra* note 81, at 63 (stressing the value of indirectly phrased questions in problem solving negotiation).

86. Mediators should not bait lawyers during mediations because this undercuts the mediation process. This also invites hostile, stubborn reactions as well as impasse. *See supra* text accompanying note 78. Mediators do, however, negotiate with lawyers during mediations and lawyers negotiate with them. *See* Cooley, *supra* note 39, at 114. In addition, Mediators should also be flexible and inventive. *See* GOLANN, *supra* note 53, at 31 (contrasting the mediators role with "judges and arbitrators, who are expected to be reserved and inaccessible"). Lawyers familiar with mediation probably expect mediators "to try one approach after another, cajoling, humoring, inventing, and sometimes hammering them about the dire consequences of a stalemate" while searching for "keys that will unlock a settlement." *Id.*

87. *See* FLA. STAT. § 83.45 (1997).

88. Dan continues his reality testing by raising the possibility that the format the plaintiffs sued under might be vulnerable to an unconscionability claim. This continues his effort to frame ways that the defendants opening statements might reflect weaknesses in the plaintiffs' substantive case. *See supra* note 56. Dan also tries to deflect some of the harsher aspects of this tactic by taking two additional action choices. First, he tests indirectly by using an "I wonder" phrasing.

"No," growled Jim, "I told you it was a new one for me."

"I wonder if the student legal services office here would want to litigate this question?," inquired Dan, as innocently as he could.

"She wouldn't qualify," said Jim quickly, "she's not a student."

"I wonder about that," replied Dan, "in view of the fact that she was a student when this started. She also has said that she's been reaccepted and will re-enroll this fall. I wonder if they would represent her on this basis."[89]

"You're not going to tell her about this possibility, are you?," said Jim, with a tinge of concern in his voice.

"She may already know," replied Dan, ducking the question.[90]

Second, he ends the point by asking a closed question regarding whether Jim has any litigation experience on this point.

89. Realizing that Michelle and Colette will never identify the unconscionability defense, Dan now tests regarding Colette's potential eligibility for the student legal services program at the University of Florida. Jim and Dan both know that this organization frequently represents student tenants in the Alachua County Court regardless of indigency, and that it occasionally pursues broader legal questions. Again Dan does this indirectly by using an "I wonder" formulation.

As it turns out, the student legal services program might represent a student in Colette's situation. This representation could be done under the organization's ability to represent non-students if the issue involved has potentially wide application to student concerns. Interview with Larry Givens, Director of the University of Florida Student Legal Services Program in Gainesville, Florida (June 9, 1998). Approval would be likely here because Colette was a student when the dispute started, having paid her fees that trigger the organization's representation, and the dispute has wide applicability to other student tenants. *See id.*

The defense of unconscionability that Dan formulated has not received broad development in Florida or elsewhere. *See* Lande, *supra* note 21, at 866 n.139. Bargains are not unconscionable simply because parties have unequal bargaining position and the weaker assumes more risks. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d. Proving unconscionability typically requires showing gross inequality of bargaining power and terms unreasonably favorable to the stronger party, suggesting that the weaker party had no real alternative. *See id.*

Michelle and Colette arguably had other choices here including staying in a dorm or sharing a two bedroom rental. Their choice of the least expensive rental option probably falls short of what it would take to persuade a court that this arrangement was unconscionable. The lawyer who introduced multiple leases to Gainesville indicated that no one has challenged them on this basis. Interview with John Hayter, local attorney, in Gainesville, Florida (June 5, 1998).

90. Mediators occasionally evade or ignore questions from parties as they pursue their settlement or transformative goals. *See* BUSH & FOLGER, *supra* note 12, at 163 (example of mediator pursuing transformative vision not responding to landlord's question). Settlement oriented mediators accept that their role involves negotiation with the parties in the process of seeking to facilitate and enhance negotiation. Evading or ignoring questions demonstrates an important negotiation tactic of blocking inquiry to avoid information disclosure. *See* BASTRESS & HARBAUGH, *supra* note 34, at 420. Although blocking occurs more frequently in adversarial strategy when negotiators seek to maximize gain, it also plays an important role in problem-solving strategy to avoid disclosing information that creates unfair leverage. *See* FISHER & URY, *supra* note 34, at 105 (suggesting that negotiators should not disclose information revealing that their best alternative to negotiation is worse than the other bargainer expects). For example, when one party asks a mediator in caucus whether the other party has shared their bottom line, a block is needed. Dan here uses the common block of answering a question with a response to another question. *See* BASTRESS &

"What if she doesn't know?," said Jim.

"As you know from your mediation training, Jim, I am ethically obliged to refer her to counsel if she asks me questions about her legal rights," replied Dan. "I also have to do this if I suspect that she may not know her rights. We haven't talked privately but I got the sense that neither Michelle nor Colette have conferred with a lawyer yet. I'm concerned that my responsibility to refer them to counsel may include telling Colette of possible eligibility for free assistance if she asks about that. What do you think?"[91]

"I don't think you have a responsibility to be a referral agency," said Jim, rather sharply.

"You may be right," replied Dan, "but what good are free legal services if prospective clients do not know about them? Maybe we can avoid this entire dilemma if you give me a meaningful concession to take to them."

"We need the court costs," said Joel.

A lengthy pause occurred during which Dan purposefully remained silent.[92] Finally, Jim said "I guess we could walk away with $1500."

Great, thought Dan, because I was thinking about a matching concession of $700 bringing them to about $1700.[93] It's also great, Dan mused, that no justification was given for this figure, giving me maximum freedom to frame it advantageously. It's even less than the total rent claim

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HARBAUGH, *supra* note 34, at 422-25; DONALD GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS 136 (1989).

91. Here Dan invokes his ethical responsibility to advise the participants "to seek independent legal counsel" when he "believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations." FLA. R. CERT.& CT.-APPT. MEDIATORS 10.090(b). He also effectively tries to soften the impact of his view that this responsibility includes informing Colette of the possible availability of free counsel by asking Jim for his opinion. Asking advocates what they think has been recommended as an effective approach to many issues. *See* GALTON, *supra* note 39, at 48, 110.

92. Silence often is an effective negotiation tactic. *See* Peters, *supra* note 10, at 92. It encourages other negotiators to talk, increasing the chances that they will disclose useful information. *See* CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 151-53 (3d ed. 1997); Peters, *supra* note 10, at 92. Remaining silent demonstrates the patience and refusal to rush that mediators should display. *See* GOLANN, *supra* note 53, at 34-35. Here Dan effectively displays patience, remains silent, and lets Jim ponder and then present his next negotiation move.

93. Dan's analysis demonstrates awareness that concessions are often matching in approximate size. *See* BASTRESS & HARBAUGH, *supra* note 34, at 520; GALTON, *supra* note 39, at 40-41. The linear, money-based dimension of most small claims negotiations begin, as this one did, with a first offer from plaintiffs consisting of the amount sought in their statement of claim plus costs and fees if a shift is permitted by contract or statute. *See supra* note 57. The next step typically requires a credible counter-move from defendants. Mediators usually perceive credible moves as those that encourage other parties to perceive that the negotiation is moving reasonably. *See* GALTON, *supra* note 39, at 41. Dan fashioned a predicted defensive countermove of approximately one-fourth of plaintiffs demand. The next linear question concerns how plaintiffs will respond as mediators seek to encourage useful reciprocal concessions. *See supra* note 85.

of $1645 which could be very helpful.[94]

"Okay, good," said Dan. "That gives me something I can work with. I assume that I can share this with Michelle and Colette?"

"Of course," said Jim.

"What else can I share?," inquired Dan.[95]

"That's all," said Jim. "Don't tell them we haven't talked to Dudley, or even that Dudley doesn't work there anymore. Also don't tell them about Colette's possible eligibility for student legal services."

"I will certainly keep the information about Dudley confidential, Jim," replied Dan. "I'm not sure I agree about the legal services eligibility point. How about this, I won't volunteer it. I'll mention the possibility only if asked about it specifically. I think that's consistent with my ethical responsibility to stay neutral yet make sure an unrepresented participant has an informed referral."[96]

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94. Articulating specific justifications for concessions supply an important component of adversarial negotiation strategy that seeks to maximize gain. *See* BASTRESS & HARBAUGH, *supra* note 34, at 509. These reasons imply commitment to revised positions and permit resisting further concessions until legitimate reasons for them are invoked. *See id.*; Peters, *supra* note 10, at 37-38. Jim neglects to do that here, perhaps because this concession is given in caucus out of the presence of the defendants and he has no assurance that Dan will relate his justification to them. Mediators typically present negotiation moves in ways that promote settlement. *See* GOLANN, *supra* note 53, at 71-72. They can omit or reframe justifications for concessions when sharing the new state of the negotiation unless they pledge to share it verbatim. Dan appears to be thinking this way when he notes that the concession is a sum lesser than the total rent claim. This is one subtle way that mediation influences a change from adversarial to problem-solving strategy. *See* BUSH & FOLGER, *supra* note 12, at 59 (arguing that settlement-oriented mediation is "assisted problem solving"). If, like this one, a mediation unfolds with a narrow frame looking only at the issues raised in the litigation, the solution that invariably results is a compromise. *See* GALTON, *supra* note 39, at 45 (arguing that all negotiations ultimately boil down "to what someone is willing to pay and what someone is willing to accept").

Jim arguably should have justified his concession notwithstanding the possibility that Dan might not share it. Effective mediation advocacy requires giving mediators several supporting reasons for concessions and rationales why they should be acceptable to other negotiators. *See* COOLEY, *supra* note 39, at 122. This method helps mediators explain that the move is rationally based and principled rather than a recognition of "the other side's more meritorious demands." *Id.*

Jim's concession to $1500 clearly gave Dan a credible move to take back to the defendants. *See* GALTON, *supra* note 39, at 41. It signals that the attorney's fee claim may have been dropped, *see supra* notes 50 & 52, because $1500 barely covers six months rent and court costs. It may also reflect a "cut to the chase, let's get it done quickly" negotiation approach that research suggests is relatively common. *See* Menkel-Meadow, *supra* note 9, at 369-70 (noting that research suggests that low intensity bargaining featuring small numbers of contacts and offers between parties is common).

95. Dan appropriately revisits the issue of confidentiality near the close of this caucus. *See* GOLANN, *supra* note 53, at 78. He selects a common option of clarifying what he is permitted to disclose and assuming that everything else is private. *See id.*

96. Dan may be jeopardizing whether Jim and Joel continue to view him as impartial by advancing the view that his ethical obligation to suggest counsel includes providing information

"I don't agree," said Jim.

"I know you don't," responded Dan, "but I hope you understand."

Dan, getting up, said "Now, if you'll step outside I'll get Michelle and Colette in here and see if we can keep the momentum going. Thanks." As he said that, he opened the door, walked out in front of Jim and Joel and over to where Colette and Michelle were sitting. Greeting them, and apologizing for the delay, he invited them back into the jury room.

After everyone sat down, Dan said: "I know this has been a hard situation for both of you."[97]

"Yes," they said, virtually in unison.

"I think we may be able to settle it today," said Dan, "and bring an end to the anger and frustration that this has generated."

"That would be great," said Michelle.

"Remember that everything you tell me in this private discussion is confidential," said Dan, finding it useful to repeat this with first time players in the mediation process. "I will not repeat anything you say unless you authorize me to."

"Good," said Michelle.

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about free or low cost legal services. Jim undoubtedly knows Dan's legal services background which adds to the possibility that he will attribute bias resulting from Dan's stance. Dan's view is probably correct because mediators "may refer the parties to appropriate resources if necessary." FLA. R. CERT. & CT.-APPT. MEDIATORS 10.090(c). Free legal services certainly qualifies as a potentially necessary and appropriate resource. In fact, one prominent Florida mediation trainer encourages county mediators to know the phone number of legal aid services in their communities and call them if necessary to schedule interviews for unrepresented participants. Interview with David Strawn in Orlando, Florida (June 15, 1998). Farm mediators in Iowa routinely advise borrowers that they may qualify for free legal assistance from a program offered by the Legal Services Corporation of Iowa. *See* Bethany Verhoef Brands et al., *The Iowa Mediation Service: An Empirical Study of Iowa Attorneys' Views on Mandatory Farm Mediation*, 79 IOWA L. REV. 653, 679 (1994).

The situation demonstrates a common dilemma mediators confront where either decision ends up potentially favoring one party at the expense of another. Dan's "don't tell unless asked" solution may remedy the potential harm to his role that advancing this perspective may generate and probably falls within the discretionary nature of the Florida ethical code. *See* FLA. R. CERT. & CT.-APPT. MEDIATORS 10.090(c).

97. Dan begins effectively by making a feeling response designed to demonstrate empathy. Parties often want to vent their feelings in caucus, often right away. *See* GALTON, *supra* note 39, at 35. Beginning a caucus this way with parties who displayed emotion during joint session helps ameliorate some of the damage caused by a purposeful decision to avoid alienating non-emotional participants by not reflecting feelings then or to do so with language choices that purposefully do not mirror the feeling's intensity. *See supra* text accompanying note 65. Feeling reflections also often produce new factual information. *See id.* (noting that venting usually generates information about needs "beyond the relief it affords" parties); Peters, *supra* note 32, at 279-80 n.71 (reporting that 67% of the feeling reflections in sample of 30 divorce interviews produced additional information).

"Have you talked to an attorney about this situation?" inquired Dan.[98]

"No," said Michelle, "I really can't afford to."

"Do you have any experiences giving you a sense of what it might cost to hire an attorney for a matter like this?"

"Well," replied Michelle, "we hired an attorney for a little boundary line dispute we had down in Frontenac last year. It just needed a short hearing and cost $1,100."

"That gives you a framework from which to think about negotiating this current claim," replied Dan, thinking that might have been a slightly heavy start.[99] "I get the sense that you are still willing to offer the two month's rent that Carolyn Dudley said would take care of this."

"Yes," replied Michelle, "I said that five months ago and I stand by that deal."

"Do you have any way to prove that conversation besides your testimony?," asked Dan?

"What do you mean," said Michelle.

"Do you have anything in writing that says Serenity agreed to settle this for two month's rent?," inquired Dan.[100]

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98. Dan starts gathering information with a closed question exploring whether the defendants have consulted counsel about this situation. His experience has shown him that this can be a useful foundational inquiry when parties present nonverbal indicators suggesting that they will not be offended by the question. If an attorney has been consulted, Dan may follow with questions exploring what, if anything, that attorney has said about case strengths and weaknesses. *See* GALTON, *supra* note 39, at 34 (recommending that mediators use initial caucuses to explore strengths and weaknesses). It also raises the possibility that the parties might call their lawyers during the mediation. *See supra* note 75. This approach is far from foolproof, however, because Dan has encountered situations where parties attribute incorrect views to "their lawyers" which may reflect lawyer errors, client misunderstandings, and exaggerations regarding the nature [or even existence] of an earlier consultation. If a party responds negatively to this question, Dan knows that he has to contend with all of the dilemmas posed by unrepresented participants. *See supra* note 58.

99. Dan's follow-up question shifted again from information gathering to exploring the potential consequences of litigating. Although appropriate, it again might have been premature. *See supra* note 82. Gathering information before testing usually provides a more effective sequence. *See* GOLANN, *supra* note 53, at 74-75 (suggesting that mediators start slowly remembering that leading people toward difficult goals requires beginning where they are in both substantive and psychological dimensions rather than where you want to take them).

100. Here Dan makes two errors Mediation Clinic students often make. Dan's major error was failing to ask an open question before posing specific, closed questions about an important topic, the potential estoppel defense. In other words, Dan failed to use a funnel sequence here. *See supra* note 72. Legal experience and education can incline lawyers and law students to focus too quickly on specifics. *See* Saul W. Baernstein, *Functional Relations Between Law and Psychiatry—A Study of Characteristics Inherent in Professional Interaction*, 23 J. LEGAL EDUC. 399, 408-09 (1971) (recognizing that law students tended to ask more specific questions when interviewing clients than medical residents did when interviewing patients). Students have wrestled with this tendency. One student noted: "I sometimes box myself into a particular line of questioning that I am drawn to. Instead, I should employ more open questions to be sure that I touch on all issues rather than getting

"No," replied Michelle, "it was a phone call."

There goes the possibility of witnesses, thought Dan. Staying on this topic, Dan asked "Why was this deal never finalized?"

"I don't know," said Michelle.

"Did they contact you again after that conversation and before this suit?," asked Dan, continuing to follow up.

"No," replied Michelle.

"Did you contact them?," inquired Dan.[101]

"No," said Michelle, "I figured no news was good news."

"One consequence of that non-finalized deal," said Dan, "is that it gives Serenity Oaks the chance to claim that they are not bound by what Carolyn said back then.[102] That's what Jim and Joel are now claiming. Do you

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specific on a few." Student Comments (Spring 1998), *supra* note 8.

Dan also defined this topic too narrowly by focusing on the specific dimension of proving estoppel before gathering information about the events potentially creating this defense. Mediators possess wide latitude to define topics. Dan should have asked an open question like "tell me about your conversation with Carolyn?" Although Dan's focus on proof betrays his legal training and experience, it can be a useful topic to explore when aspects of the litigation alternative are examined. *See supra* note 76 (discussing Dan's exploration with Jim of the time and expense involved in locating and subpoenaing Carolyn). Doing this with unrepresented first-time disputants is challenging, however, because they understandably have no idea how they will prove their contentions and often lack knowledge of what their contentions are. *See supra* note 58.

101. Dan uses an effective funnel sequence to explore the topic of how the phone call with Carolyn was apparently not followed up. *See supra* note 73. He uses an open "why" question followed by two closed questions. Unfortunately, Dan neglected to exhaust the prior topic, the conversation with Carolyn, before moving to this new topic. He should have explored Michelle's understanding of why Carolyn was willing to resolve this situation for two month's additional rent in order to continue to use the potential estoppel defense effectively in his next caucus with Jim and Joel. This fact also may be crucial to accurately evaluate the predictable success with this defense. For example, if Carolyn told Michelle that she was willing to resolve this for two months rent because of the roommates' boyfriends, Dan has information that Jim and Joel apparently do not know and are likely to find persuasive. Failing to exhaust important information gathering before switching topics generates incomplete knowledge, inappropriate assumptions, and subsequent misunderstandings. *See* Peters, *supra* note 32, at 301. Dan's failure to use a funnel sequence for the first topic contributed to his failure to exhaust it.

102. Dan makes a subtle but important decision not to explore case strengths before exploring case weaknesses. Dan's statement starts an exploration of the weaknesses of the defendants' potential estoppel defense without exploring its potential strengths. This choice demonstrates a common mediation approach. *See* Stark, *supra* note 13, at 772 (noting tendency of mediators to deal with weaknesses but not strengths of cases). It also reflects a subtle imbalance in treatment of the participants because Dan did explore with Jim a potential case strength by asking him what Carolyn said about the potential estoppel defense. Small claims mediators rarely explore strengths with plaintiff attorneys because most claims are liquidated and, absent a convincing defense, the plaintiff will win them obtaining a judgment plus costs and allowable fees. This reality tends to focus mediator exploration on any potential weaknesses suggested by possible defenses.

Dan probably makes this choice because he realizes that any exploration of case strengths with inexperienced, unrepresented parties like Michelle and Colette will necessarily require providing

understand that your ability to persuade the judge that Jim and Joel's claim is limited to the two month's rent under your agreement with Carolyn on the phone will require running the risks and additional expenses of taking this question to trial?"[103]

"Yes," said Michelle, rather hesitantly and demonstrating non-verbal clues of discomfort.

"How do you feel about coming back up to Gainesville for a trial?" inquired Dan.

"Not good," said Michelle.

"Why?," asked Dan, following up.

"It's really hard for me to take off from work," said Michelle.

"What work do you do?," asked Dan.

"I'm a flight attendant," replied Michelle, "with Northeastern. Actually I'm based out of Chicago. I fly primarily French-speaking routes; you know, to Montreal, Ottawa, the French Caribbean, and occasionally to Paris. It's hard to get home, and even harder to take one of my few days off to get here."

"I understand how difficult that can be," said Dan, hoping to convey empathy.[104] "I asked them whether they'd be willing to settle this for the $470 on the assumption that you would be still willing to pay that. They said no. As you heard, they are new to Serenity Oaks. They have just started there. They have an interest in doing well for their new client and they are defining that as getting more than two month's rent. They are not seeking the full amount of the claim today although they will at trial. I guess you are familiar with the give and take process that negotiation

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legal information and advice, forcing him to resolve the difficult dilemmas described earlier. *See supra* note 58.

103. Dan completes his emphasis on the weaknesses of the estoppel defense by asking a very closed question. His action choice here reflects the reality that mediator questions often are designed to communicate information more than gather it. *See* Kolb & Kressel, *supra* note 41, at 472-73 (noting that mediators often use questions to promote the achievement of specific ends). Here Dan uses this question to communicate that litigating the estoppel question will be risky and expensive without providing any specific information about the degree of risk or amount of expense. This choice resembles the "incomplete and potentially misleading advice-giving" that some contend undermine "the parties' self-determination through informed consent." Stark, *supra* note 13, at 772. Dan, of course, is ethically prohibited from communicating meaningful information about the degree of risk in litigating this defense because that approximates a prediction of how "the court in which the case has been filed will resolve the dispute." FLA. R. CERT. & CT.-APPT. MEDIATORS 10.090(d). His ability to comment meaningfully about the expense may also be constrained by ethical prohibitions. *See supra* note 58.

104. Dan completes an effective funnel sequence exploring the cost of returning to court to try this case, another important dimension of Michelle's BATNA that impacts her differentially because she lives out of town and does not earn her livelihood practicing law. *See supra* note 76. This funnel included two open questions and one closed inquiry.

involves."[105]

"Sure," said Michelle, "but I can't spend a lot of money just so that they can look good for their client."

"I understand that, and I think they do too," said Dan, wishing he had framed their interest a little more effectively.[106] What more can you offer above $470?"[107]

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105. Dan's choice to ask a leading question can be criticized. *See supra* note 74. It did, however, spare him from having to explain the give and take process of negotiation and avoid the potential ethical problems that this might present. *See supra* notes 57-58.

106. Dan's failure to gather information more effectively about the plaintiffs' interests supplied one of the reasons he was not able to frame them more effectively. Mediators usefully encourage participants to recognize and value the genuine interests of each other. *See* GOLANN, *supra* note 53, at 247 (noting that "[a] mediator's task is to therefore help the parties identify their interests and find ways to achieve them through settlement").

107. Dan's choice to move to stimulating a negotiation move at this point presents several points for analysis and criticism. For example, he could be criticized for moving to negotiation stimulation prematurely before gathering information on areas of potential strengths in the defendants' situation that he could use in his next caucus with the plaintiffs. He also has asked no questions of Colette seeking more detail about her unpleasant experiences. Doing this gives Colette a chance to vent which might make her, along with her mother, more receptive to continued negotiating. *See supra* note 47. Exploring these topics also involves Colette, while Dan's choices so far in this caucus have virtually ignored her. *See* GALTON, *supra* note 39, at 15 (arguing that all parties should participate fully because the dispute belongs to them).

In addition, although Dan apparently feels constrained by Florida ethical provisions from making statements about defendants' potential case strengths, *see supra* notes 58 & 102, his choice not to seek information about these topics enhances defendants' ignorance of their potential rights. Dan's failure to gather information about potential unconscionability, constructive eviction, and breach of quiet enjoyment defenses deprives the defendants of any inferences they might draw from these discussions that their case position has strength. For example, questions about pre-lease conversations or lease provisions regarding guests might send these signals. Dan instead chooses to seek a concession without sending any clues that the defendants might have a viable trial option.

Dan probably makes another mistake here by seeking a counter-offer before telling the defendants that the plaintiffs have offered to settle for $1500 including the damage deposit. Although Dan hinted earlier that the plaintiffs will accept less, he has not yet communicated this information specifically. Knowing that one side has made a significant concession often stimulates the other to respond. *See* GOLANN, *supra* note 53, at 155 (noting that negotiators know that mediators will seek "to ensure that their concessions are reciprocated"). Dan also runs a slight risk that asking this question before sharing the plaintiffs' concession will produce a response offering more than Jim's figure. If Michelle answers "sixteen hundred," Dan faces a troubling ethical dilemma of overlapping offers.

Finally, Dan chose a very directive approach to pursue his objective of encouraging a counter-concession. The very closed way he phrased this question sent a strong signal that Michelle should offer more. Inexperienced, unrepresented parties are often vulnerable to interpreting suggestions as commands. *See* Nolan-Haley, *supra* note 29, at 61 (noting that unrepresented litigants often perceive suggestions from authority figures as commands).

Whether Dan should have informed defendants of potential case strengths, either directly by statements or indirectly by questions, remains debatable and controversial. No debate exists, however, about Dan's inappropriate directiveness. He should have explained how negotiation works generally and then asked the defendants what they wanted to do. The question Dan asked supplies

"Not much," said Michelle.

"Why?," said Dan, trying hard not to make this simple question induce a defensive response in this context.[108]

"I've got a lot of expenses right now," said Michelle.

"Without meaning to pry, what are these expenses?," asked Dan, using a soft, encouraging voice tone, hoping to get something to share with Jim and Joel that they might find persuasive.[109]

"Well, I've got two other children besides Colette," said Michelle. "They both need to go to summer camp this summer, an aviation camp in New Mexico for Jeremy, and a space camp at the Cape for Jennifer. That's pretty expensive."

"I'm sure it is," replied Dan, thinking that this information will not persuade Jim and Joel. Dan caught himself wondering about Mr. Papadreu, but remembered that his curiosity should not drive his information gathering. Maybe Dad is not around, perhaps a strong possibility given the different last names. Even if Dad were around, he is not liable here since he's not on the lease. Collection efforts on assets jointly owned with Michelle, however, could hassle him. Maybe I'll develop this possibility when exploring collection later, Dan thought, if we need more caucus rounds.[110] "Are there other unexpected expenses?"[111]

"There's the therapy," replied Michelle. "I owe over $600 on Colette's therapy, all the result of this situation and her having to drop out of school. Can I get them to pay this?"

"I wish I could answer that question for you," replied Dan, "but my role as a neutral prohibits me from giving any legal advice to anybody. This is definitely the kind of question you should ask an attorney if you decide to

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a good follow up inquiry if defendants indicate that they want to make a counter-offer.

108. Asking why often uncovers underlying interests. *See supra* note 88. Using the word "why" in questions, however, may also connote disapproval or displeasure. It may suggest to persons receiving these questions that they have done something wrong. *See* THOMAS L. SHAFFER, LEGAL INTERVIEWING AND COUNSELING 124 (1976). Dan recognizes that this risk might be greater with inexperienced litigants than with lawyers. *See* Nolan-Haley, *supra* note 29, at 61. To mitigate this risk, Dan effectively attends to tone and pacing as he asks this question. *See* SHAFFER, *supra*, at 120.

109. Dan effectively asks an open question to explore whether Michelle might provide useful information for his next caucus. Mediators often use information generated by one side to help the other side continue negotiating. GOLANN, *supra* note 53, at 228 (noting how mediators "get each side's help in developing questions for the other").

110. Dan effectively resists letting his curiosity drive his information gathering choices. He also reasons correctly that collection may be a topic to be explored with defendants in a later caucus. Exploring it effectively, however, will put him in a difficult information giving situation. *See supra* note 58. Moreover, the 45-minute time expectation many lawyers apply to mandatory small claims mediations makes holding multiple caucus rounds difficult. *See infra* note 139.

111. Dan effectively asks a closed question completing the funnel sequence on this topic. *See supra* note 72.

consult one. In fact, my obligation is to encourage you to consult an attorney to make sure you understand your legal rights, and your question raises issues about your potential rights." It sure does, thought Dan, inasmuch as it forms the gist of an interesting counterclaim that could have a significant dollar value if there's an insurance co-pay on top of that $600.[112]

"That's not terribly helpful," replied Michelle.

"I know it isn't," replied Dan, "and I regret that. Do you think you will consult an attorney, if we can't settle this today, and schedule a trial?"[113]

"I guess I'll have to," said Michelle, reluctantly.

Jim and Joel might find that persuasive, thought Dan. "Is this $600 figure the total cost of Colette's therapy or has insurance paid for some of it?" Drat, another compound question, noted Dan. They just roll out automatically.[114]

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112. Here Dan gives the required "consult an attorney" response. *See* FLA. R. CERT. & CT.-APPT. MEDIATORS 10.090(b). Dan's landlord-tenant experience suggests that defendants might have counterclaims based on legal theories of constructive eviction and breach of quiet enjoyment. Florida law recognizes constructive eviction whenever landlords default in their duties rendering tenancies "unsafe, unfit, or unsuitable for occupancy in whole or in substantial part." Ralston, Inc. v. Miller, 357 So. 2d 1066, 1070 (Fla. 3d DCA 1978). No reported Florida cases have discussed whether failing to enforce guest rules could qualify.

Dan failed to explore facts regarding this possible constructive eviction defense by not asking questions about whether Colette ever gave written notice to her landlord about this situation. This notice, to be effective, must also specify the noncompliance and indicate the tenant's intent to terminate the rental agreement. *See* FLA. STAT. § 83.56(1) (1997). In addition, Colette's perhaps heroic decision to stay in this environment for several weeks probably weakens her argument that the premises were unfit and unsafe.

No Florida decision has discussed a tenant's right to quiet enjoyment in the factual context presented by Colette's situation. In *Barton v. Mitchell Co.*, 507 So. 2d 148, 149 (Fla. 4th DCA 1987), the court found a breach of quiet enjoyment when a commercial tenant suffered vibrating walls and paint falling off due to the landlord's renting of adjacent premises to an exercise studio. Colette's claim for breach of quiet enjoyment seems weak because noisy parties probably do not rise to this level and are common events in student apartments.

113. This may be a key question in view of Jim's apparent concern that Dan might inform Colette of her potential eligibility for free legal services. *See supra* notes 87, 88 & 96. Michelle's answer may also moot this issue.

114. Compound questions combine more than one inquiry in the same interrogative statement. *See* KOVACH, *supra* note 27, at 94. They include combinations of open and closed inquiry, using conjunctive phrasings, and other situations where questioners verbalize their thinking without putting it into an effective interrogative form. *See* Peters, *supra* note 32, at 272 n.46. Although seldom directly harmful, they can be confusing. Mediators should avoid using compound formulations. KOVACH, *supra* note 27, at 94. Research suggests that they are common. *See, e.g.*, Peters, *supra* note 32, at 272 n.46 (clinical students averaged 22% compound questions in the 30 divorce interviews analyzed). Questioners often need to inject a moment or two of silence between thought and word, using this time to organize the question and choose a form that would be most effective for a particular context. *See* Peters, *supra* note 32, at 272 n.46. Had Dan done that, he probably would have chosen to ask these closed questions sequentially, starting with the first one.

"Oh golly no," said Michelle, "the $600 is our half. Our insurance has paid the other half."

Bingo, thought Dan, a nice useful piece of information there that Jim can use to cover his decision with Serenity Oaks. "I'd like you to think about how much you can offer above the $470 you've already agreed to pay. Let me tell you two things as you think about this. One is that Serenity Oaks already has $235 of your money for the damage deposit you paid when Colette moved in. I haven't heard you mention getting that back. If you do not seek its return, we can consider this an addition to your offer."

"Sure," replied Michelle, quickly. "I never figured to see that money again."

"The other thing to think about," continued Dan, "is how much you are willing to spend now to save you the cost of hiring an attorney to represent you in case that can't be worked out today. You mentioned a figure of $1,100 earlier. That gives a benchmark to use for decision-making," continued Dan, noting that it seemed a bit high for local practice.[115] "A settlement will also save you the need of returning and that may have some dollar value that you might want to consider."[116]

Phrasing effective questions spontaneously is surprisingly difficult and affords a subtle, base-line measure of one aspect of mediation skill. *See* Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 609 (1994) (suggesting that the art of question framing is a foundational lawyering skill). Clinic students experience this difficulty. One noted:

> I am still having a problem with asking compound . . . questions. I believe the reason is because of habits I've developed in casual conversation. When I become anxious in mediation, I stop thinking about the way I should ask questions. It becomes more instinctual. As a result, I slip into my conversational mode of questioning which can be very non-deliberate.

Student Comments (Fall 1997), *supra* note 8. Mediation clinic students report that their question-framing skills improve as a result of their clinical instruction and experience, voting 5.6 on a 7 point scale with 7 indicating the highest increase.

115. Dan knew that local attorneys typically charged between $500 to $750 to represent someone in a simple small claims matter. Dan also probably worried about whether his duty of candor required telling Michelle this. Mediators may not lie, misrepresent, or mislead participants. *See* GOLANN, *supra* note 53, at 164. On the other hand, Dan reasoned that Michelle's estimate represents six hours of work locally and preparing her case might take that long because it pushes legal frontiers on the possible defenses and potential counterclaims based on unconscionability, constructive eviction, and breach of quiet enjoyment rights. Locating and interviewing or deposing Carolyn may also be important to prepare the estoppel defense. Michelle may also want to retain counsel where she lives and her estimate might be low if she chooses that route.

116. Here Dan effectively and appropriately invokes a hidden cost of litigating as a reason Michelle might want to make a counter-offer. *See* GOLANN, *supra* note 53, at 231 (listing as hidden costs of litigating the monetary and emotional expenses of "taking parties and witnesses away from their normal occupations, as well as the disruption of family lives and corporate organizations that

As Dan said this, he noticed how queasy he felt influencing this woman to consider paying more. He had spent his entire career representing tenants in disputes with landlords, and he suspected that Colette got a raw deal. She could possibly avoid any liability on an unconscionability or constructive eviction theory in front of this particular county judge. She might even walk away with a positive judgment for damages on a counterclaim although Dan's experience suggests that small claims judges like to decide claims and counterclaims so that neither pays the other.[117] Dan also made a mental note to include constructive eviction as another potential testing direction to pursue with Jim if necessary.

"I don't think I could pay much more now," said Michelle, "in view of those expenses I mentioned earlier."

"They might consider taking some money now and some in installments. I can ask them, although paying over time often produces a larger total payment.[118] They have reduced their claim to $1500," said Dan,

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occurs when people focus on litigation"). Exploring the alternatives to settlement by asking questions provides an important mediation technique that helps participants reevaluate and revise their settlement positions.

117. Mediators frequently develop opinions about who has the stronger or more meritorious case. *See* GOLANN, *supra* note 53, at 80. Nevertheless, a mediator's neutral role does not include "bring[ing] about any particular outcome." *Id.* at 25. Mediators also should not manipulate the process to produce "fairer results." *Id.* As Dan experiences, maintaining this neutrality can be challenging when mediating issues that touch professional experiences or impact personal values. Clinic students have also struggled with this. One wrote:

> It seems to me that we should base our mediation more on what is fair in the practical everyday situation as compared to what will happen legally. I think that while the party should think about what will happen in court, it shouldn't be stressed as much as we have been doing because mediation is the last place where a fair, not legal, solution can be worked out.

Student Comments (Spring 1998), *supra* note 8.

> The mechanic was equally stubborn, but much more justified. After awhile, I felt guilty testing him on the quality of his work. After over an hour of discussion in a number of caucuses, we impassed. I have absolutely no problem with this outcome because when it goes to court . . . [the Judge] will probably let the mechanic off completely. Had [my co-mediator] and I been able to negotiate an agreement, I believe it would have worked an injustice on the mechanic.

Student Comments (Fall 1998), *supra* note 8.

118. Dan suggests the option of an installment payment, providing a logical response after Michelle mentioned her problem paying very much now. Suggesting solutions, options, and alternatives falls within a settlement-oriented mediation approach. *See* SLAIKEU, *supra* note 10, at 49 (arguing that mediators often need to help create alternatives that parties do not see); FLA. R. CERT. & CT.-APPT. MEDIATORS 10.020(c) (mediator's role includes "maximizing the exploration of alternatives"). Scholars disagree about whether suggesting solutions like Dan did constitutes

"and I think you could consider that as some acknowledgment of the hassles and frustrations you and your daughter have endured."[119]

"Can they get that much at trial?," asked Michelle, with a worried tone.

"I can't predict trial outcomes," said Dan. "That's not my role. That's the job of an attorney and I need to remind you that you can consult an attorney and ask her just that question."[120]

"Here's the best I can do," said Michelle. "I can pay $600 now. I could pay the rest over time."

"Should we consider this an offer of $600 cash now," said Dan, clarifying, "plus the $235 security deposit, making a total offer now of $835?"

"Yes, that's okay," replied Michelle.

"That leaves you $665 short of their current claim," said Dan.

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evaluative mediation. *See* Weckstein, *supra* note 58, at 546 (observing that facilitative mediators object to mediators making substantive suggestions); Stulberg, *supra* note 62, at 1003 (arguing that mediators can "suggest an idea for settlement that parties find attractive or acceptable" without engaging in evaluative mediation).

Dan continues his very directive approach by this action choice. He did not follow the suggestion that mediators should first encourage parties to suggest their own options. *See* KOVACH, *supra* note 27, at 133. This increases the likelihood that parties will feel non-coerced. Parties tend to feel more satisfied with solutions they have devised than with options that they feel are imposed on them. *See* GOLANN, *supra* note 53, at 35. If Dan had stated that Jim and Joel might want more than what she can pay now and asked whether Michelle had any ideas for dealing with that possibility, she might have suggested an installment approach saving Dan from having to suggest it.

Dan's action choice may also be criticized because he suggested only one solution to an unrepresented party, creating a context which often creates a sense of command. *See* KOVACH, *supra* note 27, at 133 (arguing that unrepresented participants who receive one suggested solution from a mediator tend to see it as "the answer"); Nolan-Haley, *supra* note 29, at 61 (noting that unrepresented litigants receiving suggestions from authority-figures like mediators often perceive them as commands). Unrepresented participants often think that mediators should know what to do, particularly if they are attorneys. *See* Alfini, *supra* note 12, at 932 (comments of Kathy Reuter).

Finally, Dan continues to frame the issues narrowly, looking only at the distributive dimension of compromising the claim in a mutually acceptable way. Asking an open question at any stage of this process, such as "how do we solve this problem?," allows the defendants to expand the agenda to include solutions like apologies. *See supra* note 69.

119. Dan reframes the plaintiffs' offer positively, demonstrating a common mediation technique. *See* GOLANN, *supra* note 53, at 71 (observing that reframing participants' views is an important caucus goal for mediators). Mediators can take the sting out of proposals. *See* GALTON, *supra* note 39, at 14.

120. Dan chooses a safe course, broadly interpreting the relevant Florida professional standard. *See* FLA. R. CERT. & CT.-APP'T. MEDIATORS 10.090(d). Dan may have played it too safe because the standard allows mediators to "point out possible outcomes." *Id.* The plaintiff's getting a judgment for $1500 at trial certainly qualifies as a possible trial outcome. Ironically, Dan's decision to play this safe, while possibly made to avoid pressuring Michelle further, deprives her of useful information that unrepresented, inexperienced litigators need to make informed decisions. *See supra* note 58.

Neither Michelle nor Colette made a rapid response.

"You need to decide how much in total that you will offer now," continued Dan, after a few seconds of silence. "You also need a proposal suggesting how the installments should be structured.[121] Taking these one at a time in reverse order, can you pay the difference between $835 and whatever you decide to offer above that in $100 a month?"[122]

"Yes, I can pay $100 a month," said Michelle, "but Colette will have to pay me back. What do you think my total offer should be?"

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121. Dan here chose to seek a higher offer from Michelle rather than take her increased offer of $600 now plus the $235 deposit back to the plaintiffs for their response. If asked, Dan might explain that he made this decision because: (1) Michelle used the word "now" in connection with her statement that $600 was all she could pay, implying that she could make a larger offer if some of it were paid over time; (2) he believed that a larger concession might get an agreement quicker and he was concerned about Jim and the 45 minute expectation many lawyers bring to small claims mediations, *see infra* note 139; and, (3) he usually keeps asking for more until a participant communicates a concession firmly. Dan's decision and probable reasoning demonstrate the power that mediators possess to make decisions that influence outcomes. *See supra* note 71. Dan's reasoning also demonstrates how an inexperienced, unrepresented person's negotiation deficiencies can lessen favorable mediation outcomes. *See supra* notes 56-58.

Dan could have explained going back with just $835 or this sum plus an installment plan as separate options and asked Michelle what she wanted to do at this point. He also could have shared some of the consequences he foresaw flowing from each option before he asked what she wanted to do. Dan could have mentioned the advantages of making a larger total offer now in view of the common tendency to seek more money if paid over time that he appropriately shared with Michelle earlier.

Finally, Dan again chose very directive language to express his action choices. By phrasing his remarks as telling Michelle what she "needs to do," he risked having her perceive his statement as a command. *See* Nolan-Haley, *supra* note 29, at 61. His directive language also probably helps convince Michelle that she "needs" to offer more. This conversation might not have been necessary now if Dan had identified the option of taking only a cash offer back now. Dan's points also could have been phrased much less directively when this conversation needed to occur. For example, Dan could have explained how mixed cash, installment offers are typically framed in mediations and then asked Michelle how she wanted to proceed.

Mediators cannot change many of the power dimensions in a negotiation. *See* SLAIKEU, *supra* note 10, at 46. They can, however, influence an atmosphere that "enhances and maximizes each party's perceptions of having equal status within the negotiations." LEVITON & GREENSTONE, *supra* note 33, at 39. Dan failed to do that adequately here.

122. Here Dan uses, perhaps inadvertently, a negotiation technique that assumes Michelle will commit to a course of action before asking her whether she wants to offer anything more than her currently phrased cash limit. This "not what but which" technique in sales leads to approaches like dealers asking customers "which convertible will you buy?" rather than "do you want to buy a convertible?" A less devious approach would first explore her willingness to offer more before exploring how the installments could be constructed. *See supra* note 121. Dan also directively suggests an amount for installments rather than asking Michelle what figure she wants to pay. *See id.* The amount Dan suggested, $100, falls at the high end of local small claims practice for installment payments and makes an agreement more likely. Perhaps Dan did this because of his assumptions, mentioned earlier in this narrative assessment, that Michelle could probably afford it.

"That's up to you," replied Dan. "Splitting the difference can be one way to resolve logjams like this.[123] One way to think about this is that you're at 835, which is 600 cash today plus the damage deposit. They are offering 1500, which leaves a difference of $665. If you split that approximately in half, you could offer another $330 paid over time. Using round numbers, you could offer to pay a total of $1150. If you made this offer, you'd pay them $600 today, get credit for your $235 damage deposit, and still owe them three monthly payments to pay the remaining $315. You could offer to pay $100 for the next two months and $115 for the last month. Does that sound acceptable?"[124]

"Yes, I could do that,"[125] said Michelle, "but Colette will have to pay me back."

"I can do that Mom," said Colette.

"Okay," replied Dan, "we're making good progress. When would you like your monthly payments to be due?"

"How about the first of the month, starting next month," replied Michelle.

"Okay," said Dan. "With your permission then, I'll make that offer we just summarized to them. Do you have any questions about it?"

"No," replied Michelle.

"You need to know that the agreement form the court supplies has a provision that if payments are not made, the plaintiff can get a judgment without a trial for the full amount of its claim less what has already been paid,"[126] continued Dan. "Jim would probably ask for this if it was not on

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123. Splitting the difference is a common negotiating technique used to generate movement in linear bargaining like Dan is orchestrating here. *See* CRAVER, *supra* note 92, at 221-22. Dan may have used it prematurely, however, because most mediators save it for the end of the process. *See* GALTON, *supra* note 39, at 168-69. Dan may have difficulty repeating the technique in a later caucus if the parties are close together.

124. Here Dan suggests a specific counteroffer completing his excessively directive orchestration of Michelle's next negotiation move. *See supra* notes 118, 121 & 122. He fails to ask her for an offer that she deems acceptable or likely to satisfy Jim and Joel. He also uses a closed rather than an open question to explore the acceptability of his suggestion.

Some scholars argue that providing alternatives supplies an essential part of a mediator's job, helping parties develop enough options to keep them talking until they generate an acceptable solution. *See* David V. Strawn, *Profile of a Mediator*, 2 ALTERNATIVE DISP. RESOL. OF FLA. 3-6 to 3-7. When doing this, however, mediators should ensure that their suggestions are heard as possibilities rather than judgments regarding proper things to do. *See id.* at 3-9. Dan's language choices probably fail that test.

125. Dan should note that Michelle has not objected to any suggestions that he has made. This suggests that she may indeed be hearing his suggestions as commands. *See supra* notes 118, 121 & 124.

126. *See* Results of Mediation Form, paragraph (3) (on file with author). Volunteer mediators receive these forms in the packets distributed by the clerk when they are assigned a case to mediate. The form complies with FLA. SM. CL. R. 7.130(b) which provides: "Upon failure of a party to

the form. Do you understand how this works?"

"I guess so," said Michelle.

"All they have to do if you miss one of these payments is file an affidavit with the court clerk. Then a judgment is entered for the full amount of the claim minus the amount you have already paid," explained Dan.[127]

"I won't miss any payments," replied Michelle.

"I'd also like your permission to share the information about the therapy expenses and your probable intention to hire an attorney if a trial is scheduled," continued Dan. "Is that okay?"[128]

"Sure," replied Michelle.

"Good," replied Dan. "I think we've made great progress. Let me ask you to return to that less than inviting vacant courtroom while I speak with Jim and Joel. Hopefully, it won't be long, and, if they accept your offer, I won't need another private meeting with you." Dan then led Michelle and Colette back to the courtroom and motioned Jim and Joel to come back in to the jury room.

"I think we're making progress and could get an agreement soon," started Dan. "I learned a couple of things during my caucus with Michelle and Colette that might help your decision making. First, I've been authorized to share that Colette has incurred $1200 worth of therapy expenses for counseling services regarding depression generated by having to interrupt her college career. I wonder if you have any exposure here on

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perform the terms of any stipulation or agreement for settlement of the claim before judgment, the court may enter appropriate judgment without notice upon the creditor's filing of an affidavit of the amount due."

Other states use this approach. *See* Goerdt, *supra* note 9, at 46 (indicating that the same procedure is followed in the small claims court in Portland, Oregon). This approach certainly promotes efficiency in clearing court dockets. *See supra* note 29.

127. Dan appropriately checks twice to make sure Michelle understands these important procedures accompanying any small claims mediation agreements. Mediated agreements are not converted to judgments but remain stipulations. *See* FLA. SM. CL. R. 7.130(b). Mediators give agreements to a clerk and the files are either dismissed or continued pending payments. Cases that are continued pending payments go on inactive status. *See id.* If an installment agreement has been satisfied, the case is ultimately dismissed as the result of periodic checks of inactive files done by the clerk's office or dismissal notices filed by plaintiffs. If an installment agreement is not followed, plaintiffs can get a judgment for the full amount less payments simply by filing an affidavit. No other notice is provided. *See id.* A Gainesville lawyer who handles an estimated 1100 small claims cases a year believes that approximately 40% of his mediated installment agreements result in default. Interview with John Hayter, local attorney, Gainesville, Florida (June 5, 1998).

128. Dan here summarizes what he wants to share in the next caucus, another common way of confirming confidentiality at the end of an individual session. *See* GOLANN, *supra* note 53, at 78. Dan used a different approach with Jim and Joel, asking them to identify information that they did not want disclosed. Dan demonstrates an effective contextual modification here because Jim and Joel's greater knowledge and experience justifies this different treatment.

a theory that this interruption was caused by Serenity's failure to provide suitable premises under its multiple lease marketing approach. . . ."[129]

"That'll never fly," argued Jim, interrupting.

"Does the lease say anything about how guests will be treated?," inquired Dan.

"Yeah, I think so," replied Joel. "It says something about guests staying more than a week have to notify management, or something like that."

"Would you file a counterclaim alleging this if you represented Michelle and Colette, and heard what Colette shared?," inquired Dan, using a non-threatening tone.[130]

"What else do you want to tell us?," growled Jim, ignoring Dan's question.

"I confirmed my guess that Michelle would retain counsel," responded Dan. "She indicated that she would hire a lawyer if we didn't reach a deal today and had to go to trial. Do you think that increases the chances that you could be looking at a counterclaim?"[131]

"It would be barred by failure to assert it five days before the preliminary appearance, under the rules," asserted Jim.[132]

"Could a subsequently retained attorney successfully move for leave to

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129. Dan demonstrates a common mediator decision in shuttle caucusing by starting with something other than the negotiation move he will ultimately share. This approach sustains the mediators ability to influence the negotiation and keeps him or her from being simply a messenger. *See* GOLANN, *supra* note 53, at 77 (suggesting that mediators should not simply pass along offers like efficient messengers but rather present them in ways that have maximum effects). Other mediators suggest that you should always start with the offer and then discuss what the participants want to do in light of it. Interview with David Strawn (June 15, 1998). Dan continues to convert information learned from unrepresented participants into legal theories that can be used to explore assumptions about case strengths and weaknesses, something he did frequently in his first caucus with Jim and Joel. *See supra* notes 77, 78 & 88. Dan also continues to use the relatively indirect phrasing of "I wonder." *See supra* note 88.

130. Dan uses a variation on the role reversal technique here. Asking participants to reverse roles and think about the situation from the perspective of the other can often generate insight, understanding, and willingness to revise positions. *See* GOLANN, *supra* note 53, at 208 (noting that playing out an adversary's role sometimes allows disputants "to move out of their psychologically rigid framework and see their situation in a more objective way"). Rather than asking Jim to think about it from the other participants' perspective, Dan invites Jim to adopt the role of a lawyer representing them. This can be an effective variation to use when mediating cases involving unrepresented participants. Lawyers are trained to see both sides of an issue. It may be easier for them to adopt the other advocate's perspective than that of the opposing clients.

131. Dan here shares the other fact that he learned in his earlier caucus that he predicts Jim and Joel might find persuasive. He then returns to his case strength and weakness exploration by asking a closed question. This technique demonstrates an effective sequencing choice.

132. Florida requires compulsory and permissive counterclaims to be filed "not less than 5 days prior to the appearance date or within such time as the court designates." FLA. SM. CL. R. 7.100(a)(b). Unrepresented participants are not likely to understand this requirement even though it is printed in the notice to appear served on them.

file it late?" inquired Dan, softly.[133]

"Sure," growled Jim.

"Joel, did Jane live out her lease on the bedroom that Colette left?," inquired Dan.

After checking his records, Joel said, "Yeah, I guess so."

"Did Serena also stay the full lease term?" asked Dan, following up.

"Yes," replied Joel.

"What's a normal rent now for a two-bedroom at Serenity Oaks?"

"Six hundred dollars," replied Joel.

"So am I correct in understanding that this unit brought in $470 a month for the months in question?," asked Dan.[134]

"I guess so," replied Joel.

"Do your records indicate whether any rent was collected from Jane's or Serena's boyfriends?," asked Dan.

"No, there's no indication that more rent was collected," said Joel.

"I pushed Michelle pretty hard," said Dan, changing topics and hoping that this harsh formulation would appeal to Jim's need to win.[135] "Here's what I was able to get," [and Dan went on to explain the offer in detail].

"That's not enough," said Jim, quickly.

"Why?," responded Dan.

"She can pay more," growled Jim. "And what about the old man, he's probably loaded. Frontenac Beach is pretty high end."

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133. Florida small claims procedure permits amending pleadings by incorporating the relevant civil procedure rule allowing this. *See* FLA. SM. CL. R. 7.020(a) (incorporating RCP 1.190(e)). Rule 1.190(e) gives courts broad discretion in allowing amendments whenever doing so would be "just." It seems extremely unlikely that a county judge would deny an amended counterclaim filed by a lawyer hired after the pretrial because it has the power to allow amendments to be filed "within such time as the court designates." FLA. SM. CL. R. 7.100(a). Filing a motion to amend would be prudent even though it may not be heard until the trial date.

Explaining these procedures provides another dilemma for mediators dealing with unrepresented, inexperienced participants. The Clinic has done several mediations where persons assert their intention to file a counterclaim if they can not reach an acceptable agreement. How much of this procedure non-lawyer mediators, which may include law students, may permissibly explain to these participants remains unclear. *See supra* note 58.

134. Although Dan's probable intent here was to reflect content, it sounds awfully close to a leading question. He summarizes content that has not been directly stated. He also uses a phrasing choice that is consistent with cross examination, following a sequence of closed questions. This could make Joel defensive.

135. Negotiators using an adversarial strategy like to win. *See* Peters, *supra* note 10, at 7-8, 55. Suggesting that the other side also feels frustrated and exploited can also help some negotiators continue to bargain. *See* GOLANN, *supra* note 53, at 166. Dan chose this phrasing to invoke both of these dynamics which he anticipates will appeal to Jim, based on his prior experience trying lawsuits with him. Dan's choice, however, overlooks the possibility that Jim's mediation training and experience have taught him the value of less adversarial behavior when mediating. *See infra* note 140.

"What theory of liability binds Colette's father?," inquired Dan.[136]

"How did they justify the $1,150 figure?" asked Joel.

"One way to frame it," replied Dan, evading the question, "is this. Seven times the difference between a normal two-bedroom rental and what you got from Jane and Serena is about $910. Reimbursing your court costs brings it to $976. The balance can be applied to Jim's fees."

"That's not even close to the actual fees and you know it," growled Jim.

"I understand," replied Dan.[137] "Another way to look at it is that you've got a claim for about $2,100 because I suspect that there was some room in that first fee figure you gave, Jim. They've got a potential counterclaim for $1,200. Subtract that claim from your claim and that's about what you're getting." As he said this, Dan realized that he was running out of ideas, but he hoped these framing possibilities were helping Joel, or Jim, or both of them, come up with ideas they can use to explain the ultimate deal to whomever at Serenity they might need to report.[138]

"I'll do it," said Joel.

"Are you sure?," asked Jim. "I think we can get more."

"Maybe, maybe not," replied Joel. "But fifty percent is good enough in view of the risks."

"Congratulations," said Dan. "I think you're making a good business decision here. Let me get everyone together and I'll write the agreement."

Dan brought everyone back to the jury room and congratulated them for finding an agreement that solved the problem, met everyone's needs, and saved everyone the time, expense, and aggravation of going to trial. Even Jim, who ordinarily loves a good trial, did not seem sad at the prospect of avoiding this one. Everyone shook hands, and acted graciously toward each other. Dan even thought he detected a slight smile from Michelle at one point. He then checked his watch, noting that the mediation took fifty minutes.[139]

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136. Colette's father is neither a guarantor on the lease nor a named defendant. Dan tests Jim's assumption by asking a closed question. Left unexplored, however, are questions regarding possible liability by virtue of Colette's minority or an obligation stemming from a divorce agreement or judgment.

137. Dan also understands that if Jim has a contingent fee arrangement, the hours he is now claiming are not relevant until he gets before a court. He will collect his percentage of whatever is paid now and in installments. *See supra* notes 50 & 52.

138. Suggesting frames, or ways that participants might evaluate negotiation proposals, plays an important role in mediating legal disputes. *See* GOLANN, *supra* note 53, at 71, 171 (arguing that later caucuses should be used to help the negotiators change their views about the dispute, each other, and the negotiation process). Dan does this effectively here.

139. Providing positive feedback to participants who reach agreement, as Dan does here, plays an important role in closing a successful session. Reinforcing cooperative behavior is important throughout the mediation process. *See* SLAIKEU, *supra* note 10, at 92. The ritual handshake done here is our culture's most common way of symbolizing the end of conflict. *See* KOVACH, *supra* note

Dan reflected on this mediation as he drove back to the law school. He felt unsettled about Michelle and Colette paying so much when they had a chance of prevailing at trial. He was troubled that they made this decision without any apparent knowledge of their potential legal rights. But he wondered what he could have done differently and still complied with Florida's ethical rules. He also sensed that he had rushed through the mediation, yet still exceeded the forty-five minute expectation regarding the appropriate length for small claims mediations that most local attorneys share. Dan then tried to reassure himself by thinking that his cursory factual understanding of the case could easily be proven wrong once good advocates went to work, and Jim is a talented lawyer. Dan also recalled that other factors might have contributed to Colette's depression and her decision to leave the lease. Litigating has collateral costs, besides money and time, that would predictably affect Colette and Michelle much more than they would bother Jim and Joel. Dan's final thoughts about the session focused on Jim, and how effective and non-adversarial he was at many key moments. Could it be that Jim's mediation course and experiences had changed how he views lawyering?[140]

27, at 185; MOORE, *supra* note 20, at 316.

Dan's mediation ran five minutes longer than the 45 minute expectation many lawyers apply to small claims sessions. This expectation was announced by the first Coordinator of the Program. Interview with Jean Sperbeck, in Gainesville, Florida (October 9, 1997). Although this expectation has no legal basis, it has been widely accepted. Most local attorneys are working on contingent fee arrangements and many will get very frustrated if significant progress is not made toward settlement in this amount of time. For example, a local attorney who files approximately 1100 small claims cases a year believes that 45 minutes "is not unreasonable" but generally "likes to get them done quicker, in 20 to 30 minutes." Interview with John Hayter, local attorney, in Gainesville, Florida (June 5, 1998). Local attorneys seldom object to spending 60-75 minutes on difficult cases that are making progress but expect mediators not to waste their time if settlement does not appear likely. All county mediators work within this expectation. Clinic students often take longer, up to three hours, to help pro se litigants mediate their disputes.

Research on settlement rates suggest a correlation exists between the time spent on a case and its likelihood of settlement. *See* Raitt et al., *supra* note 22, at 80. Small claims cases mediated for an average of 30 minutes settled 25% of these matters while mediations in another court averaged two to three hours and produced a 95% settlement rate. *See id.* Forty-five minutes falls slightly under other national averages. *See* Goerdt, *supra* note 9, at 16 (cases mediated in Washington, D.C., average 60 minutes); *id.* at 46 (cases mediated in Portland, Oregon, average 65-75 minutes). Forty-five minutes also typically does not allow time for expanding agendas, creative problem-solving approaches, and multiple caucus rounds. *See* GOLANN, *supra* note 53, at 44 (arguing that 45 minutes is too short a time period to apply many of the techniques he describes and recommends). Non-small claims civil matters typically take much longer to mediate. *See, e.g.*, GALTON, *supra* note 39, at 19 (most cases require four to eight hours to mediate).

140. If this has happened to Jim, it does not appear to be a discernible trend. A survey of 515 lawyers and 55 judges in New Jersey showed that respondents estimated that about seventy percent of their cases were settled using positional methods, even though about sixty percent of the respondents said that problem-solving methods should be used more often. *See* Milton Heumann

III. CONCLUSION

That's my, or Dan's, story. It contains the commonly encountered elements of local small claims mediation practice except for conflict management, unnecessary because the participants refrained from attacking verbal and nonverbal behaviors. Dan, like most mediators, faced an indeterminate, uncertain, and potentially conflict-laden situation as he facilitated and participated in the negotiation conversations this story narrates.[141] He made many quick tactical and strategic decisions that touched three important dimensions of mediation: (1) core action theories and skills; (2) mediation goals; and (3) ethical issues. This story captures all three dimensions, introducing the complex, multiple layers involved in mediating even small claims. Dan's story provides many avenues for learning and teaching. From the perspective of developing professional competence, an important lens for clinic students reading this story three weeks before their first actual mediation, this story shows the numerous acts of perception, judgment, and activity designed to accomplish desired objectives that comprise skill.[142] It demonstrates that mediation requires integrating knowledge and activity from all three dimensions in flexible and spontaneous ways as it describes Dan's perceptions, judgments, and actions.

Some of Dan's perceptions, judgments, and actions were effective.[143] Some were not.[144] Discussing which were which, why, and what theories

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& Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997). Interviews with Hennepin County, Minnesota, lawyers suggest that problem-solving methods were not in wide use because "settlements in mediation were not more 'creative' than before mediation became institutionalized." *See* Lande, *supra* note 21, at 888-89 n.228.

141. Mediation continually demonstrates what Donald Schön, a leading theorist of professional education, calls "indeterminate zones of practice" that professionals must frame and then solve. *See* DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS 6 (1987). Schön's theories have been adapted by many clinicians to explain relationships between theory and practice and to frame teaching goals, methods, and supervisory approaches. *See, e.g.*, Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 232 n.22 (1981); Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 250-60 (1992); Peters, *supra* note 6, at 878-90.

142. Skills demonstrate behavior that accomplish specific tasks successfully producing intended effects. *See* Peters, *supra* note 6, at 878. Schön defines professional artistry as "a high-powered, esoteric variant of the more familiar sorts of competence all of us exhibit every day in countless acts of recognition, judgment, and skillful performance." SCHÖN, *supra* note 141, at 22.

143. *See supra* notes 33, 35, 38, 44, 45, 48, 54, 61, 62, 64-68, 71, 73, 75, 78-82, 84, 85, 91-94, 96, 98, 99, 102, 105, 109-112, 117, 120, 128, 129, 131, 137, 139 & 140.

144. *See supra* notes 42, 49, 64, 70, 74, 83, 86, 101, 108, 115, 118, 119, 122-125 & 135.

and actions will work better, provides valuable learning and teaching opportunities. For example, except for a few errors,[145] Dan demonstrated effective judgment and action choices regarding the core mediation skills of questioning,[146] listening,[147] and framing.[148] His judgments and actions facilitating the negotiation process with the defendants, however, were less effective.[149]

Dan's story supplies important context for exploring mediation process goals and models. It demonstrates the power of a mediator's goal orientation. Dan displayed a settlement orientation that made helping these litigants negotiate an agreement his primary goal.[150] This orientation influenced many of Dan's perceptions, judgments, and actions.[151] For example, it influenced his narrow approach to framing issues in this situation and may have contributed to his inappropriate directiveness in his caucus conversations with the defendants.[152]

Dan's goal orientation also may have influenced his perceiving, judging, and implementing choices about important context factors in this narrative. For example, these participants do not possess an ongoing and will not have a future relationship, important context factors which, when present, often leave little to transform.[153] Dan assessed this context factor

145. *See supra* notes 64, 74, 101, 115 & 135.

146. *See supra* notes 64, 73, 78, 79, 99, 102, 105, 109, 110, 112 & 137.

147. *See supra* notes 48, 61, 66 & 98.

148. *See supra* notes 35, 62, 120 & 139.

149. *See supra* notes 118, 119, 122, 123 & 125.

150. Dan's settlement orientation was demonstrated by his narrow framing, *see supra* notes 34, 45, 61 & 69; his failure to expand the agenda beyond the contours of the litigation, *see supra* note 69; and his pushing of all participants to get an agreement quickly, *see supra* notes 84, 107, 118, 121, 123 & 124. Bush and Folger identify three troublesome patterns of action choices that characterize settlement-oriented mediators: (1) premature judgment framing disputes in manageable problem-solving ways; (2) directive interventions influencing settlement terms; and (3) tendencies to ignore issues that cannot be handled in problem-solving ways. *See* BUSH & FOLGER, *supra* note 12, at 64. Dan manifested all of these tendencies in this mediation.

151. *See* BUSH & FOLGER, *supra* note 12, at 55-56, 64 (arguing that settlement-oriented mediators adopt a problem-solving orientation to conflict that frequently causes them to "influence settlement terms in surprisingly directive ways"); Riskin, *supra* note 69, at 24-25 (observing that "most mediators operate from a predominant, presumptive or default orientation" although many adapt to fit context). A negotiator's orientation to either adversarial or problem solving strategy influences their action choices. *See* Menkel-Meadow, *supra* note 57, at 759.

152. *See* BUSH & FOLGER, *supra* note 12, at 64 (arguing that mediators tend to mold situations quickly into potential outcomes and possible solutions); *id.* at 65-66 (arguing that mediators tend to use specific moves to shape arguments and frame proposals that are directed toward creating acceptable settlement terms).

153. *See* Nolan-Haley, *supra* note 29, at 58 n.48 (observing that parties often leave court on speaking terms with each other after mediating small claims cases involving relationships that will continue even if they do not settle); *id.* at 61 n.61 (arguing that most small claims cases "are not easily processed through the integrative bargaining approach of problem-solving negotiation").

effectively, yet he neglected to suggest broadening this mediation's scope to include an apology, overlooking an obvious transformative possibility in his rush to settle the case.

Dan's story also demonstrates values and limits of academic debates about theoretical models when they are applied to messy, indeterminate, and uncertain mediation settings. For example, diagnosing whether Dan was primarily facilitative or evaluative in this mediation shows these values and limits and also provides another way to emphasize the importance of precise attention to contextual nuances in all their complexity when developing professional competence. Although Dan chose few actions designed to clarify and enhance communication, primary hallmarks of the facilitative approach,[154] his decisions to encourage problem-solving negotiation and reframe communications demonstrate facilitative techniques.[155] He provided virtually no information to either party about substantive issues, another facilitative maneuver that protects mediators from appearing partial or seeming to favor one side over another.[156] He also used questions rather than statements to explore case weaknesses and settlement alternatives, another facilitative mediation approach.[157] Finally, Dan did not offer opinions about case elements or valuations and refrained from giving substantive and procedural advice, common components of evaluative mediation that can impair autonomous decision-making by participants.[158]

On the other hand, Dan focused exclusively on legal issues, a common

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Clinic students have commented on this experience, noting: "The transformative theory may not be adaptable on the Tuesday morning docket because, for the most part, the parties do not want to deal with each other in the future." Student Comments (Fall 1997), *supra* note 8. "County court does not always lend itself well to creative solutions again because of the collection issue. Most plaintiffs want their money as soon as possible and are not interested in alternatives." *Id.* (Spring 1998).

154. *See* Riskin, *supra* note 69, at 24.

155. *See* Love, *supra* note 13, at 939.

156. *See* Stark, *supra* note 13, at 777. Information often helps one party and not the other, putting an arrow in the quiver of the party helped, and rendering mediators less neutral and less impartial. *See* Alfini, *supra* note 12, at 927 (comments of James Alfini).

157. *See* GOLANN, *supra* note 53, at 22; Love, *supra* note 13, at 939. Questions are less likely than statements to cause resistance from participants. *See* Kolb & Kressel, *supra* note 41, at 472. They can be persuasive because answering them allows participants to criticize themselves rather than listening to mediators attacking their positions and case weaknesses. *See* Strawn, *supra* note 124, at 3-9. They send indirect hints if phrased skillfully and tactfully, *see* Stark, *supra* note 13, at 787, allowing teaching without lecturing. *See* Kolb & Kressel, *supra* note 41, at 473. Questions can, however, be phrased in tactless ways that make them non-facilitative. *See* Hall, *supra* note 14, at 299 (describing mediator asking a plaintiff in an employment termination case who is refusing to move off a demand, "[h]ow greedy can you get?"); Stark, *supra* note 13, at 788 (arguing that "questioning is little more than evaluation by Socratic dialogue" in many mediation contexts).

158. *See* GOLANN, *supra* note 53, at 22; Love, *supra* note 13, at 938; Riskin, *supra* note 69, at 35.

attribute of evaluative mediation.[159] He did not expand issues, explore creative solutions, and develop participant interests fully, action choices that are consistent with evaluative mediation.[160] Dan also suggested an offer that created the final settlement, employing, perhaps inadvertently, one of the most directive evaluative techniques.[161]

This analysis demonstrates how the facilitative-evaluative dichotomy, while useful for framing and examining specific action theories and choices, offers little value as a guiding model for mediation behavior. Dan combined facilitative and evaluative choices, complicating an accurate identification of his predominant approach. Counting and comparing the number of Dan's facilitative and evaluative choices suggests that he was primarily facilitative. Assigning values to his choices, however, typically produces a conclusion that Dan was primarily evaluative because his directiveness with the defendants outweighs his facilitative choices.[162] All mediators evaluate some things to some degree,[163] suggesting that a precise contextual analysis of specific action choices provides a more useful inquiry about facilitation and evaluation than an either/or perspective does.[164] Effective mediation probably proceeds from facilitative to

159. *See* GOLANN, *supra* note 53, at 22. Riskin suggests that a mediator's focus in terms of the scope of problems sought to be solved should be distinguished from a mediator's activities, and that a facilitative/evaluative analysis should be applied only to activities. *See* Riskin, *supra* note 69, at 17. He contends that this conceptualization enables clear communication about "what can, does, and should happen in a mediation." *Id.* at 38.

160. *See* John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 123; Love, *supra* note 13, at 939.

161. Proposing a settlement has been identified as the most directive evaluative activity that a mediator can choose. *See* Stark, *supra* note 13, at 774 n.7.

162. Many clinic students reach this conclusion after reading this narrative.

163. *See* L. Randolph Lowry, *To Evaluate or Not–That Is Not the Question!*, 2 PEPPERDINE RESOLUTIONS 2 (Winter 1997). All mediators engage in internal evaluations to the extent that they must make judgments about process and people. *See id.* Facilitative mediators exercise internal judgments when deciding which topics to explore, how to reframe issues, and what process sequencing choices will be most helpful. *See id.* All mediators typically explore the consequences of all readily available options and this necessarily involves evaluative judgment about what they are. *See* Alfini, *supra* note 12, at 924 (comments of Lawrence Watson).

The current ideological tug of war treats facilitation and evaluation as separate models of mediating. *See* Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 705 (1997). Facilitation is defined as proper or good mediation. *See* Alfini, *supra* note 17, at 47-50, 73-74. Evaluative mediators are negatively described as "muscle" and "Rambo" mediators. *See* John Lande, *Stop Bickering! A Call for Collaboration*, 16 ALTERNATIVES TO HIGH COST LITIG. 1, 11 (Jan. 1998). This rhetoric obscures the fact that most mediators, like Dan, routinely make choices that fall into both categories when mediating.

164. *See, e.g.*, Lowry, *supra* note 163, at 2 (arguing that the debate should be about how rather than whether evaluations should be expressed); Menkel-Meadow, *supra* note 4, at 232-33 (criticizing "simplistic taxonomies that academic critics . . . love to create that simply do not ring

evaluative action choices although debates rage about the appropriateness of many evaluative behaviors. Using this inquiry to examine Dan's action choices requires exploring whether his evaluative decisions targeted appropriate topics at useful times in effective ways.

For example, Dan's error regarding the failure to explore an apology began with his choice not to ask defendants in caucus what other issues, options, and solutions they wished to explore.[165] Dan's choices to frame this mediation narrowly and use directive closed questions were not effective because mediators should begin explorations of these topics facilitatively by using open inquiry, along with effective listening, to encourage full participant participation.[166] If Dan had used open inquiry and the defendants did not mention an apology, however, he then faced a decision of whether to use an evaluative approach of suggesting this option, probably by asking a question. Although asking such a question in this context effectively pursues facilitative objectives of expanding agendas, identifying party interests, and pursuing creative solutions, it requires using a technique that many call evaluative.[167]

This story, like many narratives, stimulates examination of larger stories that raise important value, policy, and ethical issues.[168] Dan made several ethical decisions confronting inherent tensions in a mediator's role between remaining impartial and dealing with participants possessing unequal knowledge and skill. His cautious approach to these issues complied with Florida ethical requirements and interpretations[169] but left

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true for many practitioner"); Stempel, *supra* note 13, at 952 (arguing that "good mediators should be both facilitative and evaluative in varying degrees"). The either-or perspective also ignores the prevalence of and frequent market preference for skillful use of evaluative techniques that do not take decision-making from participants. *See, e.g.*, Alfini, *supra* note 12, at 930 (comments of Robert Moberly) (arguing that presence of attorneys on both sides makes it difficult to conclude that self-determination is violated); Stark, *supra* note 13, at 770 (noting that the market supports evaluation).

165. *See supra* note 69.

166. *See supra* notes 69 & 118.

167. Defining conduct as either facilitative or evaluative necessarily involves dealing with a behavioral continuum rather than clearly differentiated action categories. *See* Riskin, *supra* note 69, at 17 (suggesting that one end of the continuum contains actions that facilitate participant negotiation while behaviors intended to evaluate mediation matters lie at the other). The difficulty of drawing these lines brightly may be seen in an argument by a proponent of facilitative mediation advocating that facilitative mediators push participants to "question their assumptions, reconsider their positions, and listen to each other's perspectives, stories, and arguments." Love, *supra* note 13, at 939. "Pushing" sounds evaluative. *See* Stempel, *supra* note 13, at 960.

168. *See* John Winslade et al., *A Narrative Approach to the Practice of Mediation*, 14 NEGOTIATION J. 21, 24 (1998) (suggesting that narratives "embody the thematic influences of the cultural contexts from which they arise"). Mediation allows people to tell their stories. *See* Nolan-Haley, *supra* note 29, at 56 n.43. It does not silence people in ways that litigation, with rules of evidence, procedure, and trial strategy, does. *See id.* at 56.

169. *See supra* note 58.

the less knowledgeable defendants ignorant of their legal rights.[170] Dan's decisions also encouraged them to make an autonomous but uninformed decision that might have produced an unfair outcome.[171] Analyzing these decisions and their consequences in this narrative raises broader value and policy questions about appropriate treatment of unrepresented participants in mandatory, court-annexed mediations.[172]

This narrative also reinforces the need to remain humble and self-critical when learning to mediate effectively. Learning professional competence requires continually modifying ineffective actions through reflection which, when mastery comes, happens spontaneously within activity.[173] Dan displays some spontaneous reflection[174] and many footnotes carry his reflection further through self-critical, post-performance

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170. *See supra* notes 102, 107, 118 & 120.

171. Dan encouraged defendants to settle this case without knowing about unconscionability and constructive eviction legal theories that may have let them avoid liability and possibly receive a counterclaim judgment against the plaintiff. *See supra* notes 89 & 112. Perhaps fairness rather than autonomy, self-determination, satisfaction, and docket-clearing should govern court-annexed, mandatory mediation. *See* Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646 (1985) (arguing that "fairness is the fundamental concept that guides our thinking about substantive and procedural law"); Nolan-Haley, *supra* note 29, at 90 (arguing that court mediation should produce just results that are voluntarily and knowledgeably chosen). Staying on the information periphery when participants lack knowledge and counsel increases the chances that the stronger will prevail. *See* Alfini, *supra* note 12, at 932 (comments of Jeffrey Stempel). This approach may bring mediation close to an oppression story where the process has become "a dangerous instrument for increasing the power of the strong to take advantage of the weak." BUSH & FOLGER, *supra* note 12, at 22.

172. Students are encouraged to discuss ways to solve these problems. Several ideas have been proposed. For example, brochures in simple, clear language that explain the mediation process and the common legal principles and areas will help. *See* Jonathan D. Asher, *Focus on Fairness: When Low-Income Consumers Face Court-Mandated ADR*, 14 ALTERNATIVES TO HIGH COST LITIG. 119, 119 (Nov. 1996); Raitt et al., *supra* note 22, at 83. Providing pro bono advocates, self help clinics, and counsel will help even more. *See* Asher, *supra*, at 119 (advocating pro bono advocates and self-help clinics); Moulton, *supra* note 40, at 1680-84 (advocating right to "some kind of legal representation" by lawyers or lay advocates). None of these options are currently in use in Alachua County. In addition, Alachua County's Legal Services program typically does not represent clients in small claims matters. A law school clinical program doing this work might be restricted by the Florida student practice rule to representing only defendants who qualify as indigents. *See* RULES REGULATING THE FLORIDA BAR 11-1.1 (limiting student law practice in court or administrative proceedings to indigent persons). Developing such a program will also have to deal with a resource allocation dilemma. *See supra* notes 25-27.

173. *See* SCHÖN, *supra* note 141, at 25-31. Schön argues that the ultimate in professional artistry lies in the ability to reflect-in-action, having a conscious "reflective conversation" with events as they unfold. *See id.* at 268. Usually generated by surprising, unexpected, or non-routine events, this inner monologue requires reflection in the midst of action without interrupting it. *See id.* at 26.

174. *See supra* notes 65, 68, 69 & 114.

analysis.[175]

As shown by this story, contemporaneous and later reflections on mediation experiences often generate different insights that can be explored individually and in larger groups.[176] Dan's inappropriate directiveness with the defendants, for example, suggests that he needs to explore his action theories.[177] If his theories were appropriate, Dan should consider why he did not act consistently with them.[178] These action errors also raise several topics that a larger group, such as a clinic class, might valuably discuss. For example, Dan's errors reflect a commonly held action theory discovered in many professions that tasks ordinarily should

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175. Clinicians typically emphasize reflection as a key component of learning from experience. *See, e.g.*, Paul Bergman et al., *Learning from Experience: Nonlegally-Specific Role Plays*, 37 J. LEGAL EDUC. 535, 537 (1987) (arguing that students must reflect on their experience to learn from it fully); George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 192-93 (1974) (arguing that clinical legal education's aim is to create skills of professional self-examination); Kreiling, *supra* note 6, at 285 (observing that clinical legal education focuses primarily on learning through acting or watching others act and then analyzing the effects of those action choices).

176. *See* Stacy Caplow, *A Year in Practice: The Journal of a Reflective Clinician*, 3 CLINICAL L. REV. 1, 52 (1996). Reflecting contemporaneously in feedback discussions shortly after mediation performances delivers greater accuracy and more details, but does not permit significant perspective, allow much basis for comparison, or benefit from substantial introspection. *See id.* All three of these benefits can be achieved by later reflection through writing papers a day or two after the experience and looking back on it at the end of the term. *See id.* Clinic students practice both forms of reflection. *See supra* note 13.

177. The listing of Dan's probable action theories in note 121 suggests that exploration and revision will be valuable. For example, Dan's action theory that mediators should usually ask for more until participants say no may need modification when dealing with unrepresented participants who appear to lack negotiation knowledge and skill. Perhaps an action theory requiring full process explanations, numerous autonomy reminders, and frequent disclaimers that suggestions are not commands before responding to a significant but unjustified negotiation move fits this context better. It more fully informs unrepresented parties and also minimizes the directive, potentially coercive nature of Dan's earlier action theories.

Examining action theories before criticizing actions makes critical reflection more accurate and helpful. *See* Peters, *supra* note 6, at 901-03. Dan acted consistently with his action theory so that precisely identifying the ineffective step helps both Dan, observers, and listeners to his subsequent narrative learn. *See id.*

178. Actions often are not congruent with intentions and this often explains ineffective behaviors. *See* Peters, *supra* note 6, at 923. Cognitive understanding of action theories, however, does not automatically produce consistent behaviors. *See* Argyris & Schön, *supra* note 5, at 12; *supra* note 6. Identifying when students did not act consistently with their theories challenges them to explore what motivated their inconsistent actions. *See* Peters, *supra* note 6, at 924-25. The MBTI and MODE help this exploration. *See id.* at 925-26; *supra* note 10. For example, Dan's psychological type, INTJ, extraverts tendencies to make impersonal, objective decisions, often values efficiency higher than subjective concerns, and naturally prefers to reach closure rather than continue gathering information. *See* Peters, *supra* note 10, at 52-56, 69-77. These behavioral tendencies may help Dan understand why he made these errors and why correcting them will be challenging despite his cognitive embrace of different action theories. *See id.* at 100-12.

be defined unilaterally with important information often withheld.[179] Research suggesting that men often adopt directive approaches when communicating with women allows discussion of the gender implications of Dan's choices.[180] Ways of facilitating negotiation more effectively with inexperienced, unrepresented participants, such as using more process explanations and reminders that suggestions are not commands, can also be developed and explored in a larger group.[181]

All of the learning and teaching dimensions of this story model the value of sharing mediation narratives. Students will soon create written and oral narratives to share during their clinic experience, and reading and analyzing this story's description of the choices made by their firm's senior mediator may help them appreciate the importance and complexity of self-reflective learning.[182] Reading Dan's effective choices, for example, may

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179. Scholars investigating professional competence have identified common interpersonal behavioral tendencies in difficult or stressful situations that are demonstrated by professionals in many disciplines including law, architecture, educational administration, social work and city planning. These tendencies influence behavior regardless of what these professionals espouse or intend as action theories. One major tendency is to design and achieve interpersonal objectives unilaterally. *See* Argyris & Schön, *supra* note 5, at 67-70; SCHÖN, *supra* note 141, at 256. Seminar participants rarely tried to develop mutual goals but rather tended to plan actions internally and then persuade others to agree with them. These strategies influence limited and selective information sharing. *See id.* Dan's inappropriate directiveness with defendants reflects this tendency and demonstrates the difficulties and challenges of learning to avoid persuasive behaviors and promote mutual explorations. *See* Condlin, *supra* note 141, at 228-33 (arguing that persuasion through asserting critiquer's interpretation of student behavior rather than collaborating with performers to explore their meanings is pervasive in clinical teaching); Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 531 n.87 (1995) (arguing that persuasion dominates traditional law teaching as well as trial practice, negotiation, and other clinical courses).

180. Patterns of male dominance, fostered by conversational styles and goals, have been identified in attorney client relationships. *See generally* Byrna Bogoch, *Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction*, 31 LAW & SOC'Y REV. 677 (1997); Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991). An ability to determine and initiate topics has been identified as a powerful tool of dominance. *See* Bogoch, *supra*, at 689. The facilitative-evaluative framework may reflect gender influences with the former honoring feminine forms of discourse while evaluative communication may be more comfortable for males. *See* Stulberg, *supra* note 63, at 993-94.

Mediation critics often argue that women who are not represented at mediations often do poorly and feel coerced. GALTON, *supra* note 39, at 114.

181. *See supra* notes 118, 121, 124 & 170.

182. Stories open, broaden, and deepen learning, moving beyond the fixed facts of appellate cases to "the more realistic human dynamics of fluid and differentially experienced" dimensions. Menkel-Meadow, *supra* note 10, at 1996. Reading narratives finely hones attention to particulars and actively engages feelings as well as intellect. *See* Goldfarb, *supra* note 2, at 67. Clinical education operates by "an inherent narrative method" because clinicians and students receive and interpret others stories and engage with these storytellers helping them choose and act further. *See*

demonstrate the value of identifying what was done well and why because positive feedback better facilitates learning than constructive criticism does.[183] Reading their firm's senior mediator's errors may also make students less fearful of owning their mediation mistakes when they create and share their narratives.[184] It may also make them more receptive to the self-critical perspective that reflective learning demands.[185]

So that's my story. And, as they say on *Saturday Night Live*, "I'm sticking to it."

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id. As one mediation clinic student wrote: "Stories seem to stick with me longer than theoretical discourses. The stories slipped their messages into the consciousness without being didactic. They are descriptive and not proscriptive. It is the same kind of information transfer that the video vignettes provide–only portable. I'm all for them." Student Comments (Summer 1997), *supra* note 8.

183. *See* Peters, *supra* note 6, at 920-21. "Recognizing effective action theory and behaviors facilitates learning because it identifies what should be repeated in identical and similar contexts." *Id.* at 921. It also helps build confidence in students by letting them know some of the challenges they will face in their future experiences and effective responses. *See id.*

Students also observe their instructors during the weeks they watch four mediations to complete their mentoring obligation. *See supra* note 9. This modeling builds on Dan's story and can be a very valuable learning experience for many students. *See* Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185, 199-202 (1989) (arguing that learning theory suggests that modeling can help many students build an important bridge to the acquisition of skills); Peters, *supra* note 6, at 904 (arguing that new lawyers probably learn skills more by imitating others than any other method). Observing actual mediations provide a sense of relevancy and immediacy, affording a chance to be analytical and critical without concern for classmates that simulations typically generate. *See* Robert A. Baruch Bush, *Using Process Observation to Teach Alternative Dispute Resolution: Alternatives to Simulation*, 37 J. LEGAL EDUC. 46, 48 (1987). As one student commented: "I finally watched Don in action. I have to admit I was surprised to see him exercise most of the guidelines presented in class. I guess I thought all that stuff was just show." Student Comments (Fall 1997), *supra* note 8.

184. Dan's story demonstrates that practice requires constant and virtually simultaneous decision-making. *See supra* notes 142-44. Professionals increase competence by realizing that perfection is not attainable and that less effective action choices will inevitably occur. *See* SCHÖN, *supra* note 141, at 272. Reflective learning requires correcting ineffective action choices after thinking about them, either during the same event if possible or in the future when a similar challenge is confronted. *See id.* Owning responsibility for ineffective choices facilitates learning how to improve these behaviors. *See* Condlin, *supra* note 141, at 235-37. It supplies an essential step in feedback, the process of generating accurate information about events. *See* Peters, *supra* note 6, at 919. Narrating mediation experiences, as Dan did here and students will do throughout their clinical experience, requires generating self-feedback.

185. Generating self-critique by writing and sharing narratives of mediation experiences lets students acknowledge errors and explore why choices were not effective. *See* Peters, *supra* note 6, at 920-23. Everyone experiences instances when action choices do not work well and they initially do not know why. As Dan's story demonstrates, problems can lie with both action theories and implementing behaviors. *See supra* notes 121 & 170. Reading and analyzing this story often helps students appreciate the challenges and complexities of analyzing both dimensions carefully in pursuit of increased professional competence.

APPENDIX

MEDIATOR'S ACTION CHOICES CHART

(Please complete by using a slash mark counting system.)

Listening

1. Interruptions:

2. Active listening reflections of content:
   a. Short paraphrasing statements:
   b. Longer content summaries:

3. Active listening reflections of feelings:

4. Missed opportunities to reflect feelings:

5. Other listening errors [i.e., questions/statements suggesting failure to hear earlier remarks, etc.]:

Questioning

6. Open questions [both general and topic specific]:

7. Closed questions:

8. Leading questions:

9. Compound questions:

10. Funnel sequences:

Effective Comments and Interventions

11. Process comments:
    a. Explanations:
    b. De-escalating, neutralizing, and power balancing interventions:
    c. Agenda-setting comments:
    d. Expressions of optimism:

12. Positive feedback statements:

13. Interest-linked interventions:
    a. Questions exploring interests:
    b. Mutualizing comments regarding shared interests:
    c. Attacking, threatening, blaming to problem focus:

15. Testing:
    a. Questions:
    b. BATNA explorations:
    c. Statements:

16. Options/Solutions
    a. Questions:
    b. Hypotheticals:
    c. Statements:

Errors

17. Questions, statements, and actions undercutting neutrality:
    a. Ineffective testing statements:
    b. Over-zealous advocacy:

18. Questions or comments breaching or undermining confidentiality:

19. Prematurely exploring topics:

20. Questions and statements suggesting premature judgment:

21. Negotiation errors:

22. Other errors: