The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion

MURRAY S. LEVIN*

I. INTRODUCTION

A decade ago most attorneys were unable to differentiate between mediation and arbitration. Today because of increased publicity about alternative dispute resolution (ADR), including many continuing legal education offerings on the subject, attorneys are overwhelmingly able to understand this difference. The present problem, however, is the inability of attorneys to appreciate distinctions among a broader range of ADR procedures that may in practice be loosely referred to as "mediation."

In fact, there is no single limiting definition of mediation, in part because mediators function in accordance with different philosophies and in stylistically different ways. One aspect of these differences is the extent to which mediation practitioners engage in evaluative mediation. At one extreme a mediator may be explicitly evaluative. At the other extreme a mediator may avoid any suggestion of evaluative opinion. And then there are intermediate possibilities, in which a mediator may use suggestions—ranging from overt to subtle—predictive of a likely outcome. The propriety of evaluative mediation has been heavily debated over the last few years.[1] This

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* Associate Professor of Business Law, University of Kansas School of Business. The University of Kansas General Research Fund allocation # 2301231–003 supported the research for this article.

[1] *E.g.*, John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996); Scott H. Hughes, *Facilitative or Evaluative Mediation: May Your Choice Be a Wise One*, 59 ALA. LAW. 246 (1998); Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation Is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 849–56 (1997); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669 (1997); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23–24 (1996); 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); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997); Ellen A. Waldman, *The Evaluative-Facilitative Debate in*

article transcends that theoretical debate by analyzing the propriety of evaluative mediation in terms of pertinent laws and by relating empirical research regarding the prediction of case outcomes to the phenomenon of case evaluation by mediators.

II. A PHILOSOPHICAL AND STYLISTIC DIFFERENCE: FACILITATIVE VERSUS EVALUATIVE MEDIATION

Early in the ADR movement, mediation was being taught and largely practiced in a form typically labeled "facilitative mediation." This approach to mediation is based on the fundamental belief that disputants can work together constructively if placed in a neutral, safe, and supportive environment. Accordingly, the mediator's role is to facilitate such an opportunity. Proponents of facilitative mediation believe that disputants, with the aid of their own legal counsel, are capable of understanding their situations better than third parties and therefore "can develop better solutions than any the mediator might create."[2] Consequently, facilitative mediation emphasizes assisting the disputants in evaluating their own situations rather than evaluating the disputes for them. Thus, the facilitative mediator does not give advice and does not provide opinions on the merits of arguments and the relative value of the case. Nor does the facilitative mediator make predictions about how a suit would likely be decided. Instead, the facilitative mediator assists the parties in reaching a mutually agreeable resolution by enhancing and clarifying communication, by reorienting efforts away from fighting in support of positions and toward identification of true interests, and by helping the disputants to identify and analyze their options.[3] Moreover, facilitative mediation offers a therapeutic approach to dispute resolution because the outcome of facilitative mediation is an agreement based on information and understanding rather than mediator influence or coercion. A productive facilitative mediator will likely have considerable process expertise. Substantive expertise can also be a valuable attribute for a facilitative mediator, though it may be considered less critical.[4]

Mediation: Applying the Lens of Therapeutic Jurisprudence, 82 MARQUETTE L. REV. 155 (1998).

[2] *See* Stulberg, *supra* note 1, at 995 (summarizing an assertion made by Riskin, *supra* note 1, at 24).

[3] This facilitative approach to mediation is closely aligned with the process of principled negotiation popularized by Roger Fisher and William Ury of the Harvard Negotiation Project. *E.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES (Bruce Patton ed., 2d ed. 1991); ROGER FISHER & WILLIAM URY, INTERNATIONAL MEDIATION: A WORKING GUIDE (1978).

[4] Another distinguishable form of facilitative mediation is what is known as "transformative mediation." This non-evaluative approach has roots in the 1970s related

During the 1990s, there was an enormous growth in the use of mediation. Much of this growth was the product of court referrals and orders. In this adversarial setting, there arose a practice of "evaluative mediation" modeled somewhat after judicial settlement conferences. The evaluative mediator is more concerned with the parties' legal rights than with satisfying their interests. Evaluative mediation is based on the fundamental belief that disputants can benefit when a knowledgeable and objective third party provides guidance about substantive issues and the merits of their positions.[5] The evaluative mediator gives advice, makes assessments, renders opinions on issues, and predicts outcomes—including expressing an opinion about how a judge or jury would likely decide the case. As a part of this process, the evaluative mediator usually devotes considerable time to impressing upon the parties the weaknesses of their case and the cost of pursuing a litigated resolution. The process is often adversarial throughout, with the mediator pressing the disputants to make new demands and offers more in line with the mediator's evaluations. Given this legal rights focus, it is common for evaluative mediators to be lawyers or retired judges with considerable substantive legal expertise.

In practice, however, many mediators combine aspects of facilitative and evaluative mediation; thus, the philosophical and stylistic differences between the two approaches is less distinct and instead represents more of a continuum.[6] In the plainest sense, all mediators are facilitators in that all are assisting disputants in reaching settlements. In addition, evaluative mediators often engage in practices normally associated with facilitative mediation. Furthermore, even the staunchest facilitative mediator may utilize tools that are somewhat evaluative or, at least, may be perceived as evaluative. For example, while exploring attributes of the dispute the facilitative mediator may create the perception that she has evaluated the merits of the case in a

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to social concerns for empowerment of weaker parties. It has been brought to the forefront in the 1990s through the book *The Promise of Mediation*. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION (Jossey-Bass 1994). Transformative mediation does not center on solving the immediate problem. Instead, the focus is on personal development, interpersonal understanding, and transforming the relationship of the disputing parties. The transformative mediator works to foster empowerment and help each of the parties appreciate the other's needs, interests, values, and points of view. Moreover, the foremost goal of transformative mediation is not the generation of a mutually acceptable settlement of the immediate dispute. It is to enable the parties to constructively approach their current and future problems in an enabled and open-minded manner.

[5] Stulberg, *supra* note 1, at 995 (summarizing an assertion made by Riskin, *supra* note 1, at 24).

[6] Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 706 (1997) (reporting mediator survey results).

particular way because of the manner in which she asks the disputant probing questions in such a manner as to create a perception on the part of a disputant that the mediator has evaluated the merits of the case in a particular way.[7]

The evaluative mediator tends not to be critical of facilitative mediation, other than to suggest that some mediations are settled more easily when the disputants are provided an evaluation; thus, without an evaluation, settlement can be delayed or an opportunity can be lost altogether. In the main, however, criticism runs in the other direction, with the facilitative mediator rejecting a role for evaluation in mediation. Thus, the debate centers on the propriety of mediator involvement in evaluation.

Proponents of evaluative mediation assert that disputants help in understanding the law and how their case is affected by the law, and that lawyers want mediators to provide direction regarding appropriate settlement figures.[8] Additionally, proponents claim that because settlement negotiation takes place in the context of the alternative of litigation, the alternative outcome is highly relevant and therefore evaluation should be considered a valuable and proper component of mediation.[9] Included within this group of proponents are commentators who do not advocate evaluative mediation, per se, but believe it should be available when chosen by the disputants.[10]

Opponents of evaluative mediation counter that the tenor of the mediation process changes dramatically when the mediator assumes an evaluative role,[11] because evaluation reduces mediator impartiality and disputant self-determination.[12] When the mediator interjects an opinion, the disputant's ability to fashion a resolution based on their own needs is compromised. Understanding that the mediator will be evaluative, the disputant will not be as forthright with the mediator. A foremost goal will be a favorable mediator evaluation, and a disputant will not be willing to share information that could have an adverse effect on that evaluation. Under these circumstances it is more likely that the mediator will not learn about

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[7] Hughes, *supra* note 1, at 248.

[8] *E.g.*, James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 487 (1996). On a related note, sometimes attorneys welcome mediator evaluations as an aid in addressing what may be referred to as a "client control problem." The attorney anticipates that the mediator's evaluation will confirm the attorney's own assessment of the case, and this will encourage an unrealistic client to adjust expectations.

[9] Bickerman, *supra* note 1, at 70.

[10] John Lande, *Stop Bickering! A Call For Collaboration,* 16 ALTERNATIVES TO HIGH COST LITIG. 1 (1998); Moberly, *supra* note 1, at 672–73, 678; Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 101, 103 (1995) (comments by Professor Riskin).

[11] *E.g.*, Kovach & Love, *supra* note 1, at 31.

[12] Love, *supra* note 1, at 939.

important information that could be relevant to assisting the disputants and should be relevant to forming a valid evaluation.[13] This is especially likely if the mediation occurs at an early point in time prior to discovery. Evaluation turns the process away from problem solving toward an adversarial contest—sharing turns to posturing.[14] Facilitative mediators view the potential for sharing of information through mediation as a chief means to assist the parties in recognizing opportunities to create new value and find win-win solutions. Moreover, too much emphasis on a likely legal outcome overlooks the possibility that the legal solution is not necessarily the best solution. Critics also express concern about the directive and coercive nature of the process when evaluation occurs. Some have gone so far as to characterize evaluative mediators as "Rambo mediators" who are out to "knock some sense" into the disputants by "banging their heads together" or "twisting their arms."[15] Even if the evaluative mediator does not pressure, but merely opines, it is hard to deny a preferential effect, for there is a natural tendency to rely on the ideas, opinions, and predictions of the mediator.[16] Undeniably, any opinion or evaluation will favor one side and disfavor the other. One may then ponder whether this influence is justified—whether the evaluative mediator's evaluation is valid and proper.

III. THE LAW REGARDING MEDIATOR EVALUATIVE OPINIONS

All states have some statutory law regarding mediation. Often states govern mediation by a lot of piecemeal legislation directed at a variety of contexts—such as labor, family, school, farm, and public utility disputes. Some states have a mediation statute that generally addresses mediation, or certain aspects of mediation.[17] However, a growing number of states address mediation as part of a comprehensive alternative dispute resolution law.[18] On the other hand, some states only have arbitration statutes that include

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[13] *Id.* at 940.

[14] *See* David B. Keller, *Negotiatory Alchemy: The Court Special Master as Scientist and Mediator*, 13 NEGOTIATION J. 389, 395 (1997) (describing "the more evaluative and narrow I became, the more receptive were the attorneys, since this played more to a position-based distributive bargaining theme common to settlement conferences with judges").

[15] Lande, *supra* note 10, at 1.

[16] Hughes, *supra* note 1, at 247.

[17] *E.g.*, MASS. GEN. LAWS ANN. ch. 233, § 23C (West 2000); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); WIS. STAT. ANN. § 904.085 (West 2000).

[18] *E.g.*, ARK. CODE ANN. §§ 16–7–101 to -207 (Michie 1999); OHIO REV. CODE ANN. §§ 179.01–.04 (Anderson 1999); OR. REV. STAT. §§ 36.100–.558 (Supp. 1998); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001–.073 (Vernon 2000).

occasional provisions regarding mediation.[19] Finally, some states delegate the legislation of rules for mediation to local courts.[20] Many of these laws include definitions of mediation, but none are so restrictive as to rule out the possibility of some evaluative function by the mediator. For example, the Texas Alternative Dispute Resolution Procedures Act defines mediation as "a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them."[21] Subsection b of this same statute adds, "A mediator may not impose his own judgment on the issues for that of the parties."[22] If "impose" means to force, then this would not seem to preclude the mere expression of an evaluative opinion.

There is an effort underway to promote adoption of a uniform mediation statute. The latest draft of the proposed Uniform Mediation Act defines mediation as follows: "'Mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[23] Although the proposed Uniform Mediation Act makes no reference to evaluative mediation, in several places the accompanying notes acknowledge different styles of mediation, including evaluative mediation. For example, addressing the application and construction of the act, the notes discuss that the disputants "can agree with the mediator on the general approach to mediation, including whether the mediator will be evaluative or facilitative."[24] Regarding the definition of mediation, the reporter comments that "[t]he emphasis on negotiation in this definition is designed to exclude adjudicative processes, not to distinguish among styles or approaches to

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[19] *E.g.*, MO. ANN. STAT. § 435.014 (West 1992) (addressing the ability to subpoena arbitrators).

[20] *E.g.*, OHIO REV. CODE ANN. §§ 1907.262, 2303.202 (Anderson 1998 & Supp. 1999) (authorizing the court to collect reasonable fees for dispute resolution procedures).

[21] TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (Vernon 2000).

[22] *Id.* § 154.023(b).

[23] UNIFORM MEDIATION ACT § 3(3) (Tentative Draft Feb. 2001), *at* http://www.law.upenn.edu/bll/ulc/mediat/med0220.htm. The February 2001 meeting was the final meeting following four years of research and drafting. A final draft is expected in May 2001. If approved by the conference in August 2001, it should be forwarded to the ABA House of delegates for action in February 2002. E-mail from Nancy Rogers, National Conference Reporter, Uniform Mediation Act, to Sherry Mowry, Managing Editor, The Ohio State Journal on Dispute Resolution (March 19, 2001, 13:18:00 CST) (on file with the Ohio State Journal on Dispute Resolution).

[24] UNIFORM MEDIATION ACT § 2 reporter's working notes (Proposed Draft Nov. 2000) *at* http://www.law.upenn.edu/bll/ulc/mediat/med1100.htm. In referring to the reporter's working notes, the proposed November 2000 draft will be cited because the current February 2001 draft does not include the reporter's working notes.

mediation."[25] And there is further comment that "[t]he use of the word 'facilitation' is not intended to express a preference with regard to approaches of mediation. The Drafters recognize approaches to mediation will vary widely."[26] Section 8 on "Disclosure by Mediator" states: "A mediator shall disclose the mediator's qualifications to mediate a dispute, if requested to do so by a party."[27] The notes accompanying this section state:

> The disclosure, upon request, of qualifications is a relatively novel requirement. In some situations, the parties may make clear that they care about the mediator's qualifications to conduct a particular approach to mediation and would want to know whether the mediator in the past has used a purely facilitative or instead an evaluative approach.[28]

Also, the comments to the Prefatory Note describe the diversity of the membership of the drafting committees, noting among other things, they include "strong proponents of both the evaluative and facilitative models of mediation."[29] Moreover, it seems that the proposed Uniform Mediation Act anticipates that mediation may proceed in an evaluative mode.

Some states have laws in the form of court or bar rules governing the conduct of mediators that relate to the issue of the propriety of evaluative mediation.[30] These rules, standards, or codes of ethics, which are typically promulgated by state dispute resolution commissions, describe the process of mediation and the function and role of the mediator. While there is no uniform set of rules among the states, there is considerable similarity in the language of some of these standards. The similarity exists largely because the drafters of these rules have been influenced by the Model Standards of Conduct for Mediators ("Model Standards") which was prepared by a joint committee of the American Bar Association, the American Arbitration

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[25] *Id.* § 3(3) reporter's working notes.

[26] *Id.*

[27] UNIFORM MEDIATION ACT § 8(f) (Tentative Draft Feb. 2001), *at* http://www.law.upenn.edu/bll/ulc/mediat/med0220.htm. "Bracketed language in the text refers to language that has been offered for discussion purposes only, and has not been accepted into the Draft by the Drafting Committees." *Id.*

[28] UNIFORM MEDIATION ACT § 9(b) reporter's working notes (Proposed Draft Nov. 2000) *at* http://www.law.upenn.edu/bll/ulc/mediat/med1100.htm.

[29] *Id.* at comments to Prefatory Note.

[30] *E.g.*, IOWA R. OF CT., GOV. STANDARDS. OF PRAC. FOR LAWYER MEDIATORS IN FAMILY DISPUTES R. 1–7. In some states, the elaboration of standards of conduct consists simply of codes of associations. *See* Harry M. Webne-Behrman, *The Emergence of Ethical Codes and Standards of Practice in Mediation: The Current State of Affairs*, 1998 WIS. L. REV. 1289 (focusing on guidelines of the Wisconsin Association of Mediators as well as the evolution of mediation in Wisconsin).

Association, the Society of Professionals in Dispute Resolution, and by the early efforts of organizations such as the Center for Dispute Resolution (CDR)[31] and states such as Hawaii and Florida.[32]

These rules address matters such as the importance of self-determination, mediator impartiality, and the role of professional advice—all of which have relevance to the issue of the propriety of evaluative mediation. In the main, however, these rules do not explicitly address this issue, and their effect on evaluative mediation is therefore not entirely clear.

A. *Self-Determination*

Nearly all of these mediator rules place considerable emphasis on self-determination in mediation. The Model Standards present self-determination as the first standard:

> **Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-determination by the Parties.**
>
> Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, un-coerced agreement. Any party may withdraw from mediation at any time.[33]

The Model Standards amplify each of the individual standards with explanatory comments.[34] Often state standards incorporate points addressed in this commentary into their official rule.[35]

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[31] The CDR Code of Professional Conduct for Mediators was adopted by the Colorado Council of Mediators in 1982. *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 299 (1986).

[32] For a historical overview, see generally KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 190–93 (1994).

[33] MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (American Arbitration Ass'n et al. 1994).

[34] Standard I is accompanied by the following comments:

> The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.
>
> A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

Id. Standard I cmt.

The standards accompanying Tennessee Supreme Court Rule 31 provide a more detailed example. The Tennessee standard on "Self Determination" reads as follows:

> (a) *Parties' Right to Decide.* A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties themselves.
>
> (b) *Prohibition of Mediator Coercion.* A mediator shall not coerce or unfairly influence a party into a settlement and shall not make substantive decisions for any party to a mediation process.
>
> (c) *Prohibition of Misrepresentation.* A mediator shall not intentionally nor knowingly misrepresent material facts or circumstances in the course of conducting a mediation.
>
> (d) *A Balanced Process.* A mediator shall promote a balanced process and shall encourage the parties to conduct the mediation deliberations in a non-adversarial manner.
>
> (e) *Mutual Respect.* A mediators shall promote mutual respect among the parties throughout the mediation process.[36]

One may question whether the practice of evaluative mediation is consistent with these self-determination standards. There is a fine line between facilitative influence and coercion.[37] In promoting mediation, it is common for mediation service providers to emphasize high settlement rates. In this environment, mediators are under considerable pressure to produce settlements. Giving an evaluative opinion can easily become part of a coercive effort to settle.

B. *Impartiality*

The second of the Model Standards addresses impartiality:

> **Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.**

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[35] *E.g.*, KAN. RULES RELATING TO MEDIATION 903(a); MINN. GEN. RULES OF PRAC. FOR THE DIST. CTS. 114 app. Code of Ethics; N.C. STANDARDS OF PROF'L CONDUCT FOR MEDIATORS Standard V (West 2000).

[36] TENN. SUP. CT. R. 31 app. A(5).

[37] *Compare* GA. ALTERNATIVE DISP. RESOL. RULES app. C § A(I)(D) ("The mediator must guard against any coercion of parties in obtaining a settlement.") *with id.* app. C § A(I)(E) commentary recommendation ("The line between information and advice can be very difficult to find. However, failure to honor the maxim that a mediator never offers professional advice can lead to an invasion of the parties' right to self-determination and a real or perceived breach of neutrality.")

> The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.[38]

Consider the Tennessee Standards again as an illustration of an actual state rule.[39] The standard on "Impartiality" provides the following:

> (a) *Impartiality.* A mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to an individual party, in moving toward an agreement.
>
> (1) A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.
>
> (2)A mediator shall withdraw from mediation if the mediator believes the he or she can no longer be impartial.
>
> (3) A mediator shall not give or accept a gift, request, favor, loan, or any other item of value to or from a party, attorney, or any other person involved in and arising from any mediation process.[40]

Florida has recently completed a major revision of its Mediator Standards. The following is the core provision of the new Florida rule on "Impartiality":[41]

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[38] MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II (American Arbitration Ass'n et al. 1994).

[39] For examples of other state rules pertaining to mediator impartiality, see ALA. CODE OF ETHICS FOR MEDIATORS § III Standard 5; KAN. RULES RELATING TO MEDIATION 903(b); N.J. DIST. CT. CIV. R. 301.1(g)(1). Some of these state rules do little more than express that the mediator has a duty to be impartial. *E.g.*, GA. ALTERNATIVE DISP. RESOL. RULES app. C § A(III) ("A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality.");
IDAHO R. CIV. P. 16(K)(9); N.C. STANDARDS OF PROF. CONDUCT Standard II (West 2000); OKLA. STAT. ANN. tit. 12, ch. 37 app. A § B(2)(c) (West 1993).

[40] TENN. SUP. CT. R. 31 app. A(6). This subsection also includes a paragraph (b) addressing the topics of conflicts of interest, other entangling relationships, required disclosures, and prohibitions regarding soliciting or providing counseling, therapy, legal, or other professional services. *Id.* R. 31 app. A(6)(b). Conflict of interest is addressed in Standard III of the Model Standards. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard III (American Arbitration Ass'n et al. 1994).

[41] Similar to Tennessee, the Florida rule on impartiality also addresses mediator withdrawal for failure to be impartial and a prohibition regarding the receipt of gifts and

> (a) **Generally.** A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual.[42]

The accompanying comment states: "During the mediation, a mediator shall maintain impartiality even while raising questions regarding the reality, fairness, equity, durability and feasibility of proposed options for settlement."[43]

Again, one may ponder the propriety of the practice of evaluative mediation in regard to an impartiality standard. A mediator may come to the mediation as an impartial third party, may proceed with an honest belief in his or her ability to serve impartially, and may, operating in this impartial mode, formulate a judgement about the merits of the case. The question then becomes, can the mediator maintain impartiality if the mediator discloses his or her evaluative assessment? Rendering an evaluative opinion may display a lack of evenhandedness. It can be viewed as a display of favoritism both in appearance and act. When a mediator formulates an opinion and then shares that information with the disputing parties, this necessarily favors one party over another, unless the mediator's evaluation lies precisely in the middle of the parties' positions of impasse. And while an arbitrator or a neutral evaluator can function impartially and render a decision or evaluative opinion, the same is not true of mediation.

C. *Giving Advice or Opinions*

There is no standard within the Model Standards specifically directed to the matter of giving advice or opinions. The comments to Standard VI do, however, speak to this matter. Standard VI reads as follows:

> **Quality of the Process: A Mediator shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.**
>
> A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the

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the solicitation of future services. FLA. RULES OF CT. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.330(b), (c).

[42] *Id.* R. 10.330(a).

[43] *Id.* R. 10.330(a) committee notes.

> discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.[44]

The Comments to this standard include the following statement:

> The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions. [45]

This comment implores the mediator to refrain from providing professional advice. Some of the states have specifically incorporated such language in their standards (not just accompanying comments).[46] But what exactly does "professional advice" include? Does it mean a psychologist-mediator should not provide psychological counseling, and a lawyer-mediator should not provide legal advice? Is it possible for a lawyer-mediator to provide an evaluative opinion without providing legal advice? If this means that lawyer-mediators are prohibited from providing legal advice, then the lawyer-mediator must refrain from providing an evaluative opinion when the opinion is based on the mediator's assessment of the law—as it would be in most cases. This is further supported by the statement encouraging the mediator to recommend outside professional advice, including arbitration and neutral evaluation. Nonetheless, the final sentence of this comment certainly contemplates that a mediator may undertake an additional role at the request of the parties. Although, the above discussion points to the impropriety of evaluative mediation, this is not a widely acknowledged interpretation of the

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[44] MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI (American Arbitration Ass'n et al. 1994).

[45] *Id.* Standard VI cmt.; *see also* S.C. ALTERNATIVE DISP. RESOL. app. B Standard VI (including the identical language of both the Model Standard and the accompanying comment).

[46] *E.g.*, GA. ALTERNATIVE DISP. RESOL. RULES app. C § A(I)(E); OKLA. STAT. ANN. tit. 12, ch. 37 app. A § B(2)(d)(1) (West 1993); *see also* KAN. RULES RELATING TO MEDIATION app. § V(C) ("The mediator may define the legal issues, but shall not direct the decision of the mediation participants based upon the mediator's interpretation of the law as applied to the facts of the situation.").

Model Standards. The drafting committee likely discussed the issue, but chose not to take a clear stand on it.

Some states have addressed the matters of advice or opinions more directly, especially the state of Florida. Florida first addressed the matter with the 1992 adoption of the Florida Rules for Certified and Court-Appointed Mediators. Old Rule 10.090(d) stated, "While a mediator may point out possible outcomes of the case, under 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."[47] This rule seemed to allow for providing information about an array of possible outcomes, but not for an opinion about a most likely outcome. Additionally, it transcended the more common prohibition of professional advice by prohibiting a *personal* opinion. Professor Robert Moberly has written, however, that this language did not prohibit evaluation, pointing to the fact that "there was no discussion to that effect when the code was drafted."[48] Moberly rationalized the rule as being adopted to "prohibit tactics that imply some special knowledge of how a particular judge will rule."[49] Though possibly true to the intention of the drafters, this seems an extraordinarily narrow reading contrary to the plain meaning of this language.

Mediator evaluation has been the subject of one Florida Advisory Ethics opinion.[50] The matter, however, did not involve a challenge to a mediator who engaged in case evaluation; instead, it involved an advertisement promoting mediator evaluation. The advertisement included the following statement: "When the survival of your client's case requires a dispassionate evaluation by a neutral, consider the benefits of an early mediation."[51] The ethics panel concluded that the description of mediation as a dispassionate evaluation constituted a violation of the advertising rule because the rule required mediators represent their services honestly and make only accurate statements about mediation.[52] The panel noted that mediation is different from early neutral evaluation, and it "is misleading for mediators to advertise that they are providing evaluation services under the guise of mediation services." [53] Here, too, Moberly has provided a narrow interpretation of events. He has asserted that although this opinion establishes that Florida

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[47] FLA. RULES OF CT. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.090(d) (West 1992) (repealed 2000).

[48] Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 715 (1994).

[49] *Id.*

[50] Florida Mediator Qualifications Advisory Board, Ethics Op. 95-007 (1995).

[51] *Id.*

[52] FLA. RULES OF CT. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.130.

[53] Ethics Op. 95-007, *supra* note 50.

mediators cannot call evaluation "mediation," and cannot advertise that they provide evaluation in mediation, this does not mean that they are prohibited from evaluating.[54] In Moberly's view, mediator evaluation should be permitted so long as it is not "coercive or harmful," in which case "the protections against violating principles of self-determination and impartiality are sufficient to protect the parties."[55]

After considerable debate and discussion, the Florida rule was revised last year with the adoption of the new Rule 10.370. This rule, entitled "Professional Advice Or Opinions," reads in its entirety as follows:

> (a) **Providing Information.** Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.
>
> (b) **Independent Legal Advice.** When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.
>
> (c) **Personal or Professional Opinion.** A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.[56]

Subsection (a) of Rule 10.370 allows a mediator to provide expert information, which would seem to include legal advice, provided the mediator advises of the right to independent legal counsel as required by subsection (b). Subsection (c) of Rule 10.370 provides a bit more direction than the old Rule 10.090(d), which it replaces. The new first sentence prohibits offering opinions that are "intended to coerce the parties, decide the dispute, or direct a resolution of any issue."[57] One can infer that opinions offered without such an intent would be appropriate. One must wonder, however, how this intent can be discerned. The second sentence of § 10.370(c) amplifies the former statement that a mediator "may point out possible outcomes of the case" by indicating this is "consistent with standards of impartiality and preserving party self-determination," and that a

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[54] Moberly, *supra* note 1, at 673.

[55] *Id.* at 675, 678.

[56] FLA. RULES OF CT. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.370(c).

[57] *Id.*

mediator may also "discuss the merits of a claim or defense."[58] The final sentence continues to include the prohibition on offering a personal or professional opinion about how the court in which the case has been filed will resolve the dispute.

The Florida Supreme Court offered some comments in connection with its adoption of new Rule 10.370. The court explained:

> Under subdivisions (a) and (c), if impartiality is maintained and the parties' rights to self-determination are preserved, a mediator may provide information that the mediator is qualified to give, point out possible outcomes and discuss the merits of a claim or defense. With the basic tenets of the rule in mind, personal opinions intended to coerce the parties, decide the dispute, or direct a resolution are prohibited.[59]

Professor Gregory Firestone urged the court not to adopt this rule, expressing concern that the rule blurs the distinction between arbitration and mediation; specifically, the rule would cause family and dependency mediation to become too adversarial. Noting the "substantial controversy" and two year history of hearings and debate concerning the propriety of evaluative mediation, the court dismissed Firestone's objection by deferring to the expertise of the committee in charge of drafting the rules.[60] The court did, however, acquiesce to another of Firestone's critical comments. Firestone objected to the reference to the mediator as an "*impartial* third person" in the new definitional rule 10.210, rather than a "*neutral* third person" as used in the Florida statutes.[61] To avoid confusion that could be caused by the use of the differing terminology, the court modified rule 10.210 to refer to a "neutral and impartial third person." The court explained that by using the term impartial the intent was to curtail a mediator's tendency to interject his or her beliefs about how the subject of the mediation should be resolved, thereby protecting the parties' right of self-determination. The court explained, according to the Committee, the rules were in fact intended to promote exactly what Firestone urged they should—a "neutral role with regard to the outcome of a dispute." [62]

The Florida court's opinion regarding the amendments to the Rules for Certified and Court Appointed Mediators is confounding. The court stressed

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[58] *Id.*

[59] *In re* Amendments to the Fla. Rules for Certified & Court-Appointed Mediators, 762 So. 2d 441, 444 (Fla. 2000).

[60] *Id.* at 445 ("We decline to second guess the Committee's decision that this mediation technique should be recognized in the rules.").

[61] FLA. STAT. ANN. § 44.1011(2) (West 1999) (emphasis added).

[62] *In re* Amendments, 762 So. 2d at 442.

that personal opinions that are "intended to coerce" are prohibited, conveying the notion that, otherwise, opinions are acceptable. And the court curtly dismissed Firestone's objection that the amendments permitted a more adjudicative role for mediators. Yet the court acknowledged the need for mediator impartiality and, thus, the need "to curtail a mediator's tendency to interject his or her beliefs about how the subject of the mediation should be resolved, thereby protecting the parties' right of self-determination—the guiding principle of mediation."[63] This latter quote points to a total prohibition of the rendering of opinions by mediators.

While the elaboration of new Rule 10.370(c) may suggest a greater receptiveness to evaluative opinions than previously, the Florida rule still seems susceptible to multiple interpretations. A conservative read would suggest that a mediator should do no more than identify an array of possible outcomes and discuss the merits of the case in a non-evaluative way. In contrast, a more liberal interpretation[64] would permit all evaluative feedback short of enunciating a specific prediction about how the court will resolve the matter, so long as it was offered without coercive intent.

A few other states have also addressed the topic of the rendering of opinions by mediators. Section 8 of the standards accompanying Tennessee Supreme Court Rule 31, which is entitled "Professional Advice," is very similar to Florida Rule 10.370. Tennessee's section 8(a) states: "A mediator shall not provide information the mediator is not qualified by training or experience to provide."[65] The Florida rule expressed the same thought in the form of a permissive statement.[66] Tennessee's section 8(b) on "Independent Legal Advice" directs the mediator to "advise the participants to seek independent legal counsel";[67] in Florida the mediator is to advise "of the right to seek independent legal counsel."[68] And, most on point, section 8(d) entitled "Personal Opinion" states: "While a mediator may point out possible outcomes of the case, a mediator *should not* offer a *firm opinion* as to how the court in which the case has been filed will resolve the dispute."[69] The Tennessee standard substitutes "should not" for the Florida "shall not" and "firm opinion" for "personal or professional opinion."[70] Giving regard to

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[63] *Id.*

[64] *See supra* itext accompanying note 55.

[65] TENN. S. CT. R. 31 app. A(8)(a).

[66] FLA. RULES OF CT. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.370(a) ("[A] mediator may provide information that the mediator is qualified by training or experience to provide.").

[67] TENN. S. CT. R. 31 app. A(8)(b).

[68] FLA. RULES OF CT. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.370(b).

[69] TENN. S. CT. R. 31 app. A(8)(d) (emphasis added).

[70] FLA. RULES OF CT. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.370(b).

these subtle differences in wording, it appears that the Tennessee standard expresses a less emphatic and narrower prohibition. One can surmise that the "firm opinion" reference signifies a confident prediction of a very specific outcome. If this is so, then a mediator could safely opine a range of outcomes, perhaps even a fairly narrow range, or perhaps predict a specific outcome, qualified with some degree of uncertainty.

The North Carolina Standards of Professional Conduct for Mediators includes specific language regarding giving opinions or advice. Standard VI, entitled "Separation of Mediation from Legal and Other Professional Advice," directs that a mediator "limit himself solely to the role of mediator" and "not provide legal or other professional advice whether in response to statements or questions by the parties or otherwise."[71] The standard on "Consent" states, among other things, "[a] mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement...."[72] The North Carolina standard on "Self Determination" begins with the statement "[a] mediator shall respect and encourage self-determination by the parties... and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement."[73] This standard further states that a mediator "shall not impose his judgment for that of the parties concerning any aspect of the mediation,"[74] and shall not "express an opinion about or advise for or against any proposal under consideration."[75] Based on the collective language of these provisions, one could infer that it would be improper for a mediator to render an evaluative opinion, especially once any settlement offer or demand has been made. Although the North Carolina Standards do not expressly address the propriety of the evaluative style of mediation, it clearly portrays the mediator as a questioner and maker of suggestions, and not an adviser and opinion giver. The North Carolina Standards clearly treat mediation as a non-judgmental, facilitative process. This is further reflected in Standard I regarding "Competency." This standard describes mediator qualifications in a manner recognizing that many mediators will not be qualified to serve as case evaluators and identifies the mediator's most important qualification as "competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute."[76]

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[71] N.C. STANDARDS OF PROF. CONDUCT FOR MEDIATORS Standard VI (second bold emphasis omitted).

[72] *Id.* Standard IV(B).

[73] *Id.* Standard V introductory cmt. (bold emphasis omitted).

[74] *Id.* Standard V(A).

[75] *Id.* Standard V(B).

[76] *Id.* Standard I(A).

The Minnesota ADR Code of Ethics does not specifically address mediator evaluative opinions, but the evolution of the language of the official comment to the one rule specifically written for mediators suggests a lack of enthusiasm for the practice. The Minnesota code, which is directed generally to alternative dispute resolution practitioners, includes one separate rule for mediators regarding "Self-Determination."[77] This rule, which is very similar to the Model Standard, is accompanied by the following comment:

> The mediator may provide information about the process, raise issues, offer opinions about the strengths and weaknesses of a case, draft proposals, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties should be given the opportunity to consider all proposed options. It is acceptable for the mediator to suggest options in response to parties' requests, but not to coerce the parties to accept any particular option.[78]

An earlier Advisory Task Force draft version of the comment to this same rule included the following final sentence: "It is acceptable for the mediator to suggest options or to offer opinions about the case, in response to parties' requests for such options or opinions."[79] Because of the difference in wording in the final sentence, the current version, unlike the earlier draft, does not convey a message of approval for mediator opinions.

In a small number of states there is some positive authority for evaluative opinions. The Alabama Code of Ethics for Mediators endorses, under limited circumstances, practices that would be associated with evaluative mediation. The Alabama standard on "Professional Advice" prohibits a mediator from offering "a personal or professional opinion regarding the likelihood of any specific outcome except in the presence of the attorney for the party to whom the opinion is given."[80] Thus, evaluative mediation is appropriate if the

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[77] MINN. GEN. RULES OF PRAC. FOR THE DIST. CTS. 114 app. Code of Ethics R. 1 (West 2001). This rule reads as follows:

> A mediator shall recognize that mediation is based on the principle of self-determination by the parties. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. The primary responsibility for the resolution of a dispute and the shaping of a settlement agreement rests with the parties. A mediator shall not require a party to stay in the mediation against the party's will.

Id.

[78] *Id.* R. 114 app. Code of Ethics R. 1 advisory task force comment n.1.

[79] Minnesota Supreme Court ADR Review Board, *Draft Rule 114 Code of Ethics*, http://www.finance-commerce.com/COURT/opinions/062196/81-1206a.htm (June 5, 1996).

[80] ALA. CODE OF ETHICS FOR MEDIATORS § III Standard 7(d).

parties have legal counsel present; otherwise it is not. Although California does not have a law establishing statewide standards of conduct for mediators, the California Dispute Resolution Council, an organization of mediators, arbitrators, and other neutral dispute resolvers, has promulgated a set of Standards of Practice for California Mediators. This document includes the following statement: "A Mediator may generally discuss a party's options including a range of possible outcomes in an adjudicative process. At the parties' request, a Mediator may offer a personal evaluation or opinion of a set of facts as presented, which should be clearly identified as such."[81]

The Virginia Standards of Ethics and Professional Responsibility for Certified Mediators contemplates different styles of mediation and calls for a preliminary agreement about the mediation style to be used. Like many other mediation standards, the Virginia Standards direct the mediator to describe the mediation process to the parties at the outset. It, however, specifically calls upon the mediator to "describe his style and approach to mediation."[82] The parties are to be given an opportunity to express their expectations regarding the conduct of the mediation process, and then the parties and the mediator are to include a general statement regarding the mediator's style and approach to mediation to which the parties have stipulated in their agreement to mediate. This is a curious allusion to mediation style, however, in that there is no further delineation of what is meant by this reference, and other provisions of the Virginia Standards include language regarding self-determination and impartiality—language that is common to other mediator standards and is strongly suggestive that mediators should not render evaluative opinions. The only specific reference to advice by the mediator is a required written notice that "[t]he mediator does not provide legal advice."[83] The mediator is to encourage the participants to "obtain independent expert information and/or advice . . . ."[84] Furthermore, a standard entitled "Professional Information" allows for the giving of information "only in those areas where qualified by training or experience."[85] And the mediator is to provide the information "in a manner that will neither affect the parties' perception of the mediator's impartiality, nor the parties' self-determination."[86] Moreover, as with other states' rules on mediation practices, the Virginia Standards convey a mixed message.

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[81] CDRC STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS 3 (1999).

[82] VA. STANDARDS OF ETHICS & PROF'L RESPONSIBILITIES FOR CERTIFIED MEDIATORS D(1)(c) (1997).

[83] *Id.* D(2)(a)(1).

[84] *Id.* F(1).

[85] *Id.* F(2).

[86] *Id.* F(3).

The effect of failing to comply with mediator standards of conduct is quite limited. Most of the existing rules and standards are either silent on the matter of non-compliance or generally indicate that the standards are intended simply to guide the conduct of mediators.[87] The Alabama Code of Ethics for Mediators explicitly indicates that violation of a standard neither gives rise to a cause of action against the mediator nor signifies a breach of a substantive duty by the mediator.[88] The Alabama Code does provide that failure to comply may serve as the basis for removal from the roster of mediators.[89] The Florida rule establishes a detailed hearing process for the handling of charges of non-compliance, and it provides for sanctions such as oral admonishment, written reprimand, additional training, suspension from the practice of mediation or decertification.[90] Furthermore, the court rules establishing standards of conduct for mediators would ordinarily apply only to court-annexed mediation.[91]

The majority of states have no law relating to the issue of the propriety of evaluative mediation. In the small number of states that have mediator rules and standards regarding self-determination, impartiality, and the giving of advice and opinions, the language of these provisions and the associated explanatory comments seem to put in question the propriety of evaluative mediation. This is all quite speculative, however, as no rule explicitly prohibits evaluative mediation, and there is no decisional authority to that effect. Some rules, such as those in North Carolina, seem to overwhelmingly oppose evaluative functions. Others, such as Alabama, are accepting of evaluation in limited circumstances. For the most part, the incipient law regarding mediator practices displays considerable ambivalence, neither definitively approving nor disapproving of the practice.

IV. THE QUALITY OF EVALUATIVE MEDIATION: PREDICTING CASE OUTCOMES

Evaluation by disputing parties and their advisors occurs throughout the dispute process. It is an integral part of dispute resolution. If mediators are to engage in an evaluative function, a fundamental question concerns the ability of mediators to meaningfully predict case outcomes. The predictability of a

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[87] *E.g.*, KAN. RULES RELATING TO MEDIATION 903 (indicating rules are "guide to conduct"); TENN. SUP. CT. R. 31 app. A(1)(a) (indicating that rules are guide to conduct); VA. STANDARDS OF ETHICS AND PROF'L RESP. FOR CERTIFIED MEDIATORS A (1997).

[88] ALA. CODE OF ETHICS FOR MEDIATORS § I.

[89] *Id.*

[90] FLA. RULES OF CT. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.820, 10.83.

[91] *See, e.g.*, TENN. SUP. CT. R. 31 app. A(1)(a).

case outcome is a function of many factors, and predictability varies under different circumstances and on a case-by-case basis. The limited nature of the mediators' involvement and the highly unpredictable nature of many cases that are submitted to mediation give cause for concern about the validity of evaluation by mediators.

First, one may question evaluative validity on grounds of insufficient mediator familiarity and understanding. Disputing is a complicated phenomenon, and disputes that are submitted to mediation are apt to be among the more complex. The problem is that for many mediations mediator involvement can be extremely limited. Sometimes mediators come to a mediation in almost complete ignorance, having been presented with no advance information about the dispute other than the identity of the parties. Some mediators actually seem to prefer this approach. A great many mediations consist of a one time meeting that may last just a few hours. This is probably the norm for settlement conference type mediations. Thus it is common for mediators to have a relatively superficial understanding of the case. Moreover, in many cases, although the disputing parties may think of the mediator as some sort of expert evaluator, in actuality, the mediator may be poorly positioned to render an evaluation.[92]

Second, one may question evaluative validity because of the highly unpredictable nature of the dispute. Some case outcomes are fairly easy to predict; others are much more difficult. One can surmise that the more difficult cases tend to be the ones that make their way to mediation. Normally, efforts at outcome prediction will come well in advance of mediation. In the first instance, the parties, at a minimum, sense that they have a potential meritorious claim. Next, the attorneys for the respective disputing parties will each commence to evaluate the case. For example, in considering representation, the plaintiff's attorney will evaluate the opportunities for success. If the attorney feels the case lacks merit, or at best is a very weak one, the attorney may decline representation and advise the party against pursuing the matter. The attorney may find it necessary to gather additional information and perform preliminary research to assist in making this initial determination. Once a formal engagement has occurred, the opportunities for learning the facts of the case and understanding the relevant law will improve, and the attorney will continually evaluate the prospects for success and counsel the client accordingly. The attorney may seek evaluative input from associates and various experts, and if the adversarial posturing suggests widely divergent views, the attorney may even

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[92] Hughes, *supra* note 1, at 247 ("[Disputants] have lived with the dispute for months, if not years, have slept on it, sweated over it, and cried about it. The mediator has, at most, a few hours of exposure to the dispute and cannot be expected to know more than the parties.").

retain independent counsel to provide an evaluative opinion. Cases that are more susceptible to accurate outcome predictions will result in more consistent attorney evaluations. These relatively straight forward cases will be able to settle without the aid of a mediator.[93] On the other hand, cases involving more uncertain outcomes are more likely to produce differing views of worth among the partisan evaluators and will likely travel further down the path toward an adjudicated decision. It is these harder to predict cases that comprise a high percentage of the cases that are submitted to mediation. It is under these circumstances of greater uncertainty, that the mediator's case evaluation is of more questionable validity. In other words, the highly contested case by its nature is not susceptible of a high probability assessment of outcome.[94] Remarkably, I was unable to identify any research that specifically addressed the ability of evaluative mediators to accurately predict case outcomes. Data is available, however, that displays the difficulty of predicting litigation outcomes—giving cause for concern about the quality of evaluative opinions by mediators.

Consider Professor Gerald Williams' studies of lawyer negotiating skills.[95] In one project, Williams conducted an experiment involving forty practicing lawyers in Des Moines, Iowa. Williams posed the question: "[I]f a number of experienced lawyers were paired against each other and assigned to undertake settlement negotiations on identical cases, would the resulting

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[93] This is true unless the parties are in search of a creative or "healing" solution. For example, mediation is often the ADR procedure of choice when the disputants will have some future relationship. A facilitative or transformative mediator may appropriately aid in this pursuit. Under these circumstances, there is little reason to involve a mediator in case evaluation.

[94] That is not to say that there is no place for evaluation under conditions of considerable uncertainty. To the contrary, quantitative decision making analysis involving an expected value determination can be meaningful. *See* Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 NEGOTIATION J. 123 (1995); Samuel Bodily, *When Should You Go to Court?*, HARV. BUS. REV., May–June 1981, at 103; George J. Siedel, *The Decision Tree: A Method to Figure Litigation Risks*, B. LEADER, Jan.–Feb. 1986, at 18; Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*, 40 BUS. LAW. 617 (1985). This approach is most relevant, however, for repeat players (*i.e.*, those who are frequently prosecuting or defending lawsuits) or those who, at least, have a broader perspective than just the dispute at hand. By using decision tree analysis and proceeding to settlement on the basis of an expected value calculation one can theoretically optimize decision making over the long term. It would seem that evaluation under conditions of considerable uncertainty might, therefore, make sense if the mediator is a decision science practitioner and the party understands the utility of decision science analysis. With the present state of affairs, neither of these conditions pertain for most mediations.

[95] GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 5–7, 110–14 (1983).

settlements be substantially identical, or would there be considerable variations in the dollar value of the outcomes?"[96] Williams divided the lawyers into twenty pairs for negotiation of the same personal injury case (half representing plaintiffs and half representing defendants).[97] The lawyers were presented with identical case files and historical data on jury verdicts from the court in which the case would be tried, and were given two weeks lead time to prepare for their settlement negotiation.[98] As an incentive for serious involvement, participating lawyers were told that the results of the negotiations would be published with the attorneys' names included (thereby putting their professional reputations at stake).[99] At the conclusion of these settlement negotiations, information was assembled regarding opening offers or demands and final outcomes.[100] In the end, only fourteen of the twenty pairs willingly submitted their results.[101] Williams describes the results as "sobering."[102] The settlement outcomes ranged from a high of $95,000 to a low of $15,000, with the remainder of the outcomes scattered almost randomly between the two extremes.[103] Williams reports, "It is apparent that there were dramatic differences not only in the perceptions these lawyers had about the 'value' of the case, but in the persuasiveness or skill with which they pursued their objectives."[104] Williams further recounts how after he announced the results at a meeting of the participants the participants all argued that they had accurately valued the case and that it was the others were mistaken.[105] Although Williams was attempting to draw conclusions about lawyer negotiation skills, his experiment provides a provocative database suggesting the difficulty of case evaluation.

Another study displaying the difficulty that lawyers have in assessing case values is that of Douglas Rosenthal.[106] This researcher picked sixty-one personal injury cases that had been settled in New York.[107] He then selected

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[96] *Id.* at 5.

[97] *Id.* at 6.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 6–7.

[101] *Id.* at 6.

[102] *Id.* at 6.

[103] *Id.*

[104] *Id.*

[105] Videotape: Competitive & Cooperative Modes of Negotiating (Harvard Law School Program on Negotiation 1986) (on file with the Harvard Law School Library).

[106] DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (Russell Sage Foundation 1974).

[107] *Id.* at 29.

five experts to independently review the actual case files.[108] Two of the evaluators were experienced plaintiffs' personal injury lawyers, one other had twenty-five years experience as a plaintiffs' lawyer and had recently begun doing insurance defense work, another was an experienced insurance defense lawyer, and the last was an experienced insurance claims adjuster.[109] For each case, Rosenthal reported six case values (the five evaluative opinions and the actual settlement value), the evaluative mean, and a coefficient of variability.[110] The variations among the case values for a case were dramatic. For example, case number 53, which settled for $25,000, generated an evaluation mean of $10,000; individual evaluations of $2,500, $3,000, $7,500, $12,000, and $25,000; and a coefficient of variability of 0.9226. Another typical example was case number 2, which settled for $3,500, and generated an evaluation mean of $21,500; individual evaluations of $7,500, $17,500, $20,000, $22,500, and $40,000; and a coefficient of variability of 0.5490.[111]

Jury Verdict Research, Inc. (JVR) has compiled considerable data regarding offers, demands, and jury verdicts. Phillip Hermann has analyzed sets of this data considering the question: "[h]ow good are lawyers and insurance companies at predicting verdicts?"[112] Hermann posits that final offers and demands are the best measurement of how well the bargaining representatives predict verdict outcomes.[113] As one would expect, most of the final demands (in one study 61%) exceeded the actual verdicts, and most of the final offers (70%) were lower than the verdicts.[114] Yet Hermann found that overwhelmingly these demands and offers were not close to the ultimate verdicts.[115] Only 18.43% of the demands and only 16.67% of the final offers fell within a range 25% above or below the ultimate verdict.[116] For this data set, the median demand was $50,000, the median offer was $15,000, and the median verdict was $35,000.[117] Hermann had similar findings in another study regarding back and neck injury claims—only one in six final demands

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[108] *Id.* at 37.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 204–05. The individual evaluator scores are listed here by order of dollar magnitude, not by evaluator.

[112] 1 PHILIP J. HERMANN, BETTER, EARLIER SETTLEMENTS THROUGH ECONOMIC LEVERAGE § 2.02 (1989).

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

and final offers fell within 25% of the ultimate verdicts.[118] Hermann observed that the disparity between these demands and offers was particularly striking because back and neck injury claims are among those most frequently seen by attorneys and adjusters, and the verdicts should therefore be relatively easy to predict.[119] From these studies, Hermann has concluded that most tort trial attorneys and claims adjusters are not very good at predicting jury verdicts.[120] Hermann has also explained how one can be a better predictor by systematically analyzing verdict statistics available from JVR.[121] Hermann referred to research comparisons of verdict expectancy figures and actual verdicts that show the validity of this valuation method.[122] He also appropriately emphasized that verdict analysis is based on probabilities and "[n]o one can say exactly what a specific jury will do"; researchers can only "estimate the probable outcome of a case based on specific case facts and the observed effect of those facts on past cases."[123]

Data from studies using multiple mock juries also provide reason to question the ability of a mediator to meaningfully evaluate a case. For example, Professors Liebman, Bennett and Fetter utilized a large number of mock jury panels in their study of the effect of jury instructions regarding

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[118] *Id.*

[119] One would expect predictions to be even wider ranging in more complex cases. *Cf.* Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 393 (1991) (explaining why simple tort cases are not an adequate paradigm for litigation).

[120] Observe that Hermann's study included only cases that did not settle. If the opposing representatives had reached similar evaluative conclusions about a case, the case would have settled and would not have been included in this database. Because of this, one may question Hermann's conclusion to the extent that it is intended to suggest that lawyers and adjusters, in general, are not very accomplished at evaluating cases. Nevertheless, Hermann's analysis is suggestive of the difficulty of case valuation for cases that do not settle. And cases that are submitted to mediation are more likely to consist of these tougher, non-settled cases. *See supra* text accompanying notes 93–94.

Also, there are other possible explanations for the seemingly poor predictive evaluations represented by the offers and demands. For example, it is also possible that a party may have accurately evaluated the case, but due to other factors, may have decided not to reveal this in the final offer. One side may have viewed a totally unrealistic demand from the adversary as not worthy of a response reflective of a sound evaluation of the case. *See* HERMANN, *supra* note 112, §§ 2.03–.04 (discussing, among other things, how negotiators get caught up in the negotiation ritual). Although, it would seem advisable to share a well grounded assessment of the value of the case with one's adversary. Indeed mediators often encourage disputants to do just that.

[121] HERMANN, *supra* note 112, § 3.00.

[122] *Id.* §§ 3.02.01, 3.03; *see also* Phillip J. Hermann, *Predicting Personal Injury Verdicts and Damages*, *in* 6 AM. JUR. TRIALS 963, 963–89 (1967).

[123] HERMANN, *supra* note 112, § 3.04.

comparative fault laws.[124] They presented the mock juries with a trial simulation case based on a real trial. An accident victim sues a truck driver (allegedly negligent operation of the vehicle) and the state (allegedly negligent signage or intersection design). The defendants deny their own negligence, argue negligence on the part of the plaintiff, and dispute the amount of the claimed damage. The simulations involved the use of an approximately four hour long video presentation of the case.[125] The researchers presented different mock jury panels with different jury instructions, and then looked for differences in the final outcome based on the different instructions. One set of jury panels was not informed of the legal consequences of the percentage bar to plaintiff's recovery under a modified comparative fault rule (the "blindfold" approach).[126] The other set of jury panels was informed (the "sunshine" approach).[127] In the main, these researchers did not find a statistically significant effect on the ultimate damage awards. While it was not a matter under study, the data generated from these many mock jury panels reveals widely varying verdicts from different mock jury panels deliberating with respect to the exact same case presentation.[128] The researchers report thirty-nine separate mock jury verdicts rendered under the blindfold instruction scenario.[129] Prior to adjusting for the modified comparative fault rule, these verdicts range from a high of $6,030,000 to a low of zero.[130] In all, three mock juries rendered defendants' verdicts, awarding nothing to the plaintiff.[131] The mean and median awards for plaintiff were $1,414,629 and $740,000, respectively; and the standard deviation was $1,456,807.[132] Then these verdicts were adjusted, taking into account the modified comparative fault rule.[133] Thus, all verdicts for cases in which the jury determined that the plaintiff was more than fifty percent at fault were changed to defendants' verdicts. This produced twenty-four new defendants' verdicts (in addition to the three that still stood).[134] After taking into account the modified comparative fault rule, the thirty-nine

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[124] *See generally* Jordan H. Leibman et al., *The Effect of Lifting the Blindfold from Civil Juries Charged with Apportioning Damages in Modified Comparative Fault Cases: An Empirical Study of the Alternatives*, 35 AM. BUS. L. J. 349 (1998).

[125] *Id.* at 381.

[126] *Id.* at 375, 381.

[127] *Id.*

[128] *Id.* at 386–88 tbls.1–3.

[129] *Id.* at 386–87 tbls.1–2.

[130] *Id.* at 386 tbl.1, col.11.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 387 tbl.2.

[134] *Id.* at 387 tbl.2, col.11.

verdicts ranged from a high $6,030,000 to a low of zero, with a mean verdict amount of $973,622, a median amount of zero, and a standard deviation of $1,619,631.[135] The researchers report forty-five separate mock jury verdicts rendered under the sunshine instruction scenario.[136] These verdicts range from a high of $7,000,000 to a low of zero.[137] In all, there were twenty-six defendants' verdicts and two hung juries.[138] The mean and median awards for plaintiff were $1,029,186 and zero, respectively; and the standard deviation was $1,774,573.[139] How can a mediator meaningfully predict the outcome of such a case other than to express the potential for a wide range of outcomes? If the mediator chooses to do otherwise, the prediction is fallacious.

I have also conducted experiments with multiple mock juries that have rendered similarly widely divergent verdicts. An earlier publication detailed the treatment of an identical case by seventy-five different jury panels.[140] This trial simulation involved a suit by customers (three brothers) against a business for false imprisonment, assault, and infliction of emotional distress. The customers claimed they had been wrongfully detained for suspected theft. The defendant denied the impropriety of the detention and disputed the amount of claimed damages. The seventy-five jury verdicts range from a high of $2,930,000 to a low of zero, with a mean verdict amount of $71,980, a median of $20,000, and a standard deviation of $345,422. This data set did include two outlying verdicts, the high of $2,930,000 and a second verdict of $750,000. At the other extreme, there was one hung jury, one defendant's verdict and one verdict for only $1.00. Nevertheless, the remaining seventy verdicts are fairly evenly spread across a range from roughly $2,000 up to $100,000.[141] Again, with such results, one must question the validity of any attempt to opine on the specific value of the case.

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[135] *Id.*

[136] *Id.* at 388 tbl.3.

[137] *Id.* at 388 tbl.3, col.11.

[138] *Id.*

[139] *Id.*

[140] Murray S. Levin, *Learning About the Unpredictability of Litigation Through a Mock Jury Exercise*, 16 J. LEGAL STUD. EDUC. 271 (1998).

[141] *Id.* at 295–96 tbl.2. This case was complicated by a claim for punitive damages. Yet, if one simply focuses on the compensatory damages portion of the verdicts, the results remain quite dispersed. The mean award was $3,601; the median $300; and the standard deviation was $7,051.

V. CONCLUSION

There is a degree of confusion about the meaning of the term "mediation."[142] Mediators adhere to a variety of styles of mediation, and in the last few years some commentators and practitioners have questioned the propriety of a form of mediation that includes an evaluative role for the mediator.

This Article has explored the developing body of law, largely in the form of court rules governing mediator practices, stressing the importance of self-determination by the disputing parties and impartiality by the mediator. Some of these rules also direct mediators not to give certain advice or opinions. While this body of law expresses no clear position on the issue of the propriety of the evaluative style of mediation, the variously worded rules provide ample reason to question the practice. There is a complex interplay between the matters of self-determination, impartiality, and the giving of advice or opinions. When a mediator renders an evaluative opinion, this will likely serve to influence the disputing parties. This is relevant to both self-determination and impartiality. The self-determination rules, among other things, stress that mediators must not act coercively. Mediators are under pressure to settle a high percentage of matters presented to them for mediation. In this environment it can be very difficult to separate acceptable judgmental influence from improper coercion. Though a mediator may be impartial in the sense that the mediator has no bias or prejudice for a particular party, rendering an evaluative opinion as part of a mediation represents a showing of favor. This may well serve to adversely affect the continuing evenhandedness expected of mediators. Mediation must be conducted in an impartial manner, and the mediator should display impartiality throughout the process. It is difficult enough for mediators to maintain the appearance of impartiality when engaging in common mediator practices such as asking probing questions, playing the role of devil's advocate, encouraging objectivity, defusing unrealistic expectations, or stimulating creative or empathetic thinking. When a mediator actually expresses an opinion regarding the merits of an issue or the entire case, the appearance of impartiality is severely challenged. It is widely accepted that mediators should not provide professional advice to parties to a mediation. For lawyer-mediators this means no advice about the law. The disputing parties should look to their own legal representatives for this information. While some disputes are strictly factual in nature, a great many disputes

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[142] *See* Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed Into Mediation: Standards of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 846 (1998) (advocating a change in the standards of professional conduct for mediators to reflect the proliferation of many different forms of mediation).

involve issues of both fact and law. For these disputes, when a lawyer-mediator renders an evaluative opinion, it is based on a professional opinion about the law. This is tantamount to giving professional advice.

This Article has also questioned the quality and validity of mediator evaluations. Valuing a case is far from an exact science. In many mediations, the mediator has rather limited exposure to the disputed case. Also, a high percentage of the cases that are submitted to mediation are likely to be cases for which the prediction of an outcome will be relatively difficult. There is no empirical research testing the validity of mediator evaluative opinions.[143] Data from studies regarding lawyer negotiating skills, lawyer and claims adjuster case evaluation, and mock jury experiments displays the difficulty of predicting litigation outcomes, and thus raises serious concern about the validity of evaluative opinions by mediators. If some mediators are going to practice evaluative mediation, they should have special skills promoting the capable performance of this function,[144] and they should be required to provide extensive information about their qualifications to the disputants.[145]

Regardless of one's conviction regarding styles or types of mediation, one undeniable criticism about the present state of affairs is the confusion stemming from what to expect from mediation. When a disputant agrees to participate in mediation, that party should not unwittingly agree to an unexpected process, including, for example, one that involves the rendering of an advisory evaluative opinion. It is imperative that there be a clear, advance understanding of the procedure.[146] Disputants and their legal representatives need to be educated about the nature of different procedures that are associated with the label "mediation." The parties should engage in preliminary discussion about the nature of the contemplated and desired

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[143] Nor is there any research attempting to assess disputant satisfaction with evaluative mediation in comparison to facilitative mediation. *Cf.* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute,* 13 OHIO ST. J. ON DISP. RESOL. 885, 887–88 n.7 (1998) (citing numerous articles reporting higher levels of satisfaction through mediation compared to litigation).

[144] *See, e.g.*, GA. ALTERNATIVE DISP. RESOL. RULES app. B § I(C) (requiring, among other things, that case evaluators or early neutral evaluators be "lawyers with extensive subject matter expertise in the area of the litigation in question."); *see also*, Aaron, *supra* note 94 (lauding the use of quantitative decision analysis in mediation).

[145] Observe, the proposed Uniform Mediation Act calls upon a mediator to disclose his or her qualifications to mediate only if asked by a disputant. *See supra* text accompanying notes 27–28.

[146] *See* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making*, 74 NOTRE DAME L. REV. 775 (1999) (recommending requirements to help ensure that parties make knowledgeable choices using mediation).

process.[147] It is inefficient and perhaps counterproductive to leave this important discussion to when the parties are at the mediation table and have already committed, at least in schedule and mind, to a mediation session before a particular mediator. The decision about process should be made before the mediator is selected. Then, in selecting the mediator, the parties will require information about the qualifications, experience, and style of available mediators.

Refinement and uniformity of the nomenclature for the various alternative dispute resolution processes would contribute to a much improved environment. Presently, the official definitions and understanding of the meaning of the term "mediation" varies across jurisdictions and within contexts. The adoption of the proposed Uniform Mediation Act would not fundamentally alter these varying understandings of the process. While this proposed uniform law provides a much needed common standard for confidentiality,[148] it provides one general definition of mediation that can encompass a number of varied processes.[149] Some jurisdictions have separately defined related processes such as neutral evaluation,[150] mini-trial,[151] med-arb,[152] or moderated settlement conference.[153] In many communities these similar processes, all of which involve an evaluative opinion, are collectively classified or thought of as mediation. It is desirable to work with uniform practice definitions, and it would be sensible to distinguish one more process–evaluative mediation.

One might conclude from this article that mediators should not render evaluative opinions. It seems preferable, however, to allow parties who truly desire such a process to have access to it. Much of the debate over evaluative mediation has centered around promoting settlement (pro-evaluation) versus diminishing interest focused analysis (anti-evaluation). This article has looked beyond that theoretical debate, exploring fundamental legal principles, questioning the quality and validity of case evaluation by mediators, and emphasizing the importance of participant understanding and informed choice of process.

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147 *Cf.* Lande, *supra* note 10, at 1 (advocating a pluralistic conception of mediation and proper advance disclosures of style).

148 UNIFORM MEDIATION ACT §§ 5–8 (Proposed Draft February 2001).

149 *See supra* text accompanying note 23.

150 *E.g.*, GA. ALTERNATIVE DISP. RESOL. RULES app. B § I(C) (West 2001); N.D. Cal. ADR L.R. 5–1.

151 *E.g.*, S.D. Cal. Civ L.R. 16.3(f); TEX. CIV. PRAC. & REM. CODE ANN. § 154.024 (West 1999); WIS. STAT. ANN. § 802.12 (West 1998).

152 *E.g.*, MINN. GEN. RULES OF PRAC. FOR THE DIST. CTS. 114.02(a)(9).

153 *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.025 (West 1999).