ARTICLE: Should Mediators Evaluate?: A Debate n1 Between Lela P. Love and James B. Boskey

NAME: Benjamin N. Cardozo, School of Law

LEXISNEXIS SUMMARY:
... In the field of ADR, where the expectation was that an increased acceptance of mediation by the courts and the legal profession would simply decrease the adversarial nature of legal disputes, it appears that it may have also unintentionally increased the legalistic and adversarial nature of the mediation process. ... Lela Love is a mediator, trainer and law professor at Cardozo School of Law and Director of the Mediation Clinic and the Kukin Program for Conflict Resolution. ... There is a variety of processes in which neutrals help people negotiate by giving them evaluations, including non-binding arbitration, neutral expert opinions, settlement conferencing and so forth. ... I was trained in the first AAA divorce mediation training programs in 1977 or 1978 by, among others, Josh Stulberg, who is Lela’s colleague in many of her mediation trainings. ... Mediators do have to possess knowledge and expertise, including some substantive expertise about the area in which they are mediating, to be intelligent enough to frame the issues, know what questions to ask, and when information is necessary. ... PROFESSOR BOSKEY: I think, probably, the definition we agree on is that evaluation is stating a firm opinion as to the correctness of either the total case or a major element of the case being presented by one of the parties. ... In other words, is this debate merely a matter of personal preference on the part of the mediators, or is there truly an importance in this debate that impacts on the people that we serve? ... So, I believe that, if leaders in the mediation field do not clearly define standards and best practices, then the evolving process will be the so-called "evaluative" mediation, where mediators give their opinions on likely court outcomes and assist the lawyers' jousting.

HIGHLIGHT: December 10, 1997

TEXT:
MODERATOR: I am Les Lopes, the chair of the Metropolitan Board of the Society of Professionals in Dispute Resolution ("SPIDR"). Tonight's program is presented by the Metropolitan Chapter of SPIDR, Cardozo School of Law, and the Kukin Program for Conflict Resolution. I would like to thank Dan Weitz, n2 a board member and our program chair, for putting this all together.

The theme for tonight's program is the current debate in the field of Alternative Dispute Resolution ("ADR") between evaluative and facilitative mediation. The distinction between these two processes is that the evaluative mediator will express an opinion concerning the legal strengths of each party's case and the possible outcome if they were to pursue the case in court. A facilitative mediator assists the disputants in making their own evaluations based on both parties'
present information, their counsels' theory of the case and other evidence and information presented. The facilitative mediator also helps parties evaluate underlying needs and interests. In facilitative mediation, if the disputant requests or needs to have a third party evaluation, the mediator will recommend that the party seek out a lawyer or another expert.

There are people in the field, myself included, who suspect that the current intensity with which the debate is being pursued is affected by the increased use of mediation by the courts and the increased participation of lawyers in the process. As the marketplace of legal conflict opens up to mediation as an alternative to litigation and as the people who have traditionally controlled that marketplace get involved, it is inevitable that a conflict of values will arise.

In the field of ADR, where the expectation was that an increased acceptance of mediation by the courts and the legal profession would simply decrease the adversarial nature of legal disputes, it appears that it may have also unintentionally increased the legalistic and adversarial nature of the mediation process. Of course, this assumes that evaluation is new to mediation and that it automatically leads to an adversarial climate.

While I was in Florida for the recent SPIDR conference, I found myself in the not so uncommon position of being the only non-lawyer at a dinner table with eight fellow mediators. The woman sitting next to me, a successful and highly respected mediator in Florida, began to describe the recent research project she had completed with a group of colleagues. They had surveyed a large number of customers and asked them what they expected from their mediators. The large majority of those surveyed replied that they wanted the mediator to give them an evaluation of their case. When I asked who these customers were, she replied, "Lawyers, of course."

Her answer made perfect sense. In the marketplace, the customer is not only the one who makes a choice, but also the one most likely to make the same choice again. Thus, the disputants who come and go are not the customer, but rather the lawyers who continually frolic in the murky waters of conflict, thus changing our very focus of who it is we serve as mediators. In this case, progress created the opposite of its intended purpose.

Behind this sociological description of what is occurring in the field is a very real philosophical concern as to what mediation is, how it relates to other processes in the field and what we want mediation to become. For that reason, I am pleased to introduce our two distinguished panelists, despite the fact that they are lawyers, who will present their diverse views on the topic.

Lela Love is a mediator, trainer and law professor at Cardozo School of Law and Director of the Mediation Clinic and the Kukin Program for Conflict Resolution. She has a B.A. from Harvard, a Masters of Education from the Virginia Commonwealth University, and a J.D. from Georgetown University. She is the author of a number of articles, including Evaluative Mediation is an Oxymoron, n3 and The Ten Top Reasons Why Mediators Should Not Evaluate. n4 She will be speaking for the facilitative mediation process.

Jim Boskey is a mediator, law professor at Seton Hall Law School, and editor of The Alternative Newsletter, n5 which includes book reviews, short articles on different issues in the field, as well as a list of trainings and current articles. Jim teaches dispute resolution and family law, and is active in many organizations in the dispute resolution field. He has an B.A. from Princeton, a J.D. from the University of Michigan, and an L.L.M. from the London School of Economics. He is also the author of numerous articles and book reviews, including The Place of Evaluative Mediation. n6 He will be speaking in defense of a broader definition of mediation that allows for evaluative techniques.

The format of today's discussion will be as follows: Lela will go first and Jim will go second. Both of them will give a ten minute opening statement, sharing their views on this particular issue, and then we will open up the floor to questions and answers, as well as a general discussion. At the end, Lela and Jim will each give a short closing statement. So, without further ado, I would like to welcome the first of our two panelists. Lela, it's all yours.

PROFESSOR LOVE: Thank you, Les and Dan, for organizing this. I would like to begin with a few personal comments. It is wonderful to be here. I feel at home in five ways: being here at Cardozo, my professional home; having SPIDR as a sponsor of the event, an organizational home; being with all the dear friends in this audience; debating my
esteemed colleague, Jim Boskey; and last, but perhaps not least, focusing on tonight's topic - whether mediators should evaluate. This topic has become close to my heart.

Two other personal comments: One, it is with great humility that I take on a discussion or debate with Jim Boskey. Jim Boskey is certainly one of the most profound repositories of information about the ADR field. He is incredibly well read. I do not know how anybody alive reads as much as Jim Boskey. Furthermore, he is able to summarize much of what he reads in *The Alternative Newsletter*, n7 which is among the greatest disseminators of information about the mediation field. One of the reasons I raise that here is to publicly thank him for this contribution to the field.

So, I am humble about debating him, but Jim, you know, everybody can be wrong on occasion.

PROFESSOR BOSKEY: True.

PROFESSOR LOVE: My last personal comment is the following. The issue we are discussing tonight has been hot since, approximately, 1994 when Len Riskin published an article in which he graphically, on a grid, depicted roughly half the mediation world as evaluativethat is, "evaluative" mediators having an orientation towards evaluation or an evaluative role. n8

Riskin's grid amazed me. It just did not fit for me that this could be a correct picture of the mediation world a grid that encompassed, as I viewed it, mediation, neutral evaluation and arbitration. I was talking with another colleague in the field, Cheryl McDonald, who teaches at Pepperdine, and Cheryl was discussing an unrelated matter when she said, "Well, everybody chooses what hill they die on. What hill do you stand and fight on?" For a complex number of reasons, this issue became a hill to stand and fight on for me. I hope I do not die on this hill professionally, but I wanted to explain that I believe it is a profoundly important issue.

I believe many people who care deeply about mediation do so because it is a unique and different paradigm. Teaching in a law school, I often reflect that you are teaching a vision that is different than the adversarial vision. n9 The mediation paradigm is quite different from the adversarial paradigm. For me, this contrast arises from several features of the mediation process. One of these features is that mediation is a process in which the neutral does not decide the outcome. It is a process where parties are encouraged to craft resolutions that are consonant with their values, priorities, preferences, visions, judgments, as well as the information they have about a variety of other options available. All of these factors make mediation unique. In the adversarial paradigm, of course, the outcome is determined by rules that are applied to so-called "facts" in a particular case. The neutral's evaluation either determines the outcome or drives the parties towards the neutral's assessment.

Mediation, on the other hand, is appealing and unique because it is a democratic process where the parties work together to craft the outcome. Decisions come from below in contrast to processes where decisions come from above, namely from experts, including judges, professionals, and frequently, lawyers representing and advising parties.

This paradigm that mediation represents offers an entirely different approach to dispute settlement than all of the processes that focus on evaluation. I am not just talking about litigation and arbitration here. There is a variety of processes in which neutrals help people negotiate by giving them evaluations, including non-binding arbitration, neutral expert opinions, settlement conferencing and so forth. These processes provide negotiation-assistance. The magic is that a neutral comes in with an evaluation to help jump start the negotiation process and make everybody more realistic and flexible.

I believe that if evaluative mediation is accepted, mediation will become indistinguishable from these other processes--case settlement, early neutral evaluation, and non-binding arbitration. If mediation, this unique paradigm, is swallowed up by an adversarial paradigm, the result will be that the work, and the inspiration of the last two decades of effort, with so many in this field trying to figure out ways in which to help people come to their own resolutions, will be lost. In sum, the debate is important.
I would like to jump to a few concrete reasons why I think mediators should not evaluate. First, evaluation can stop negotiation, the process that mediators are charged with furthering. What is the basis of that claim? First of all, mediators offer parties their neutrality. This neutrality is jeopardized when they offer an opinion favoring or disfavoring a party. I do not think it is contestable that when somebody makes a judgment or an evaluation, they favor one side over the other. Frequently, the disfavored party takes it personally and wants to leave the process. n10 It is also obvious that sometimes an evaluation can make parties more flexible. If you get an evaluation that says your case is not as strong as you thought it was, some people become more flexible, but others leave the process. I remember when I was trained to be an arbitrator for the New York City Small Claims Court. The only training they gave us was the advice: "Never tell people what your opinion is because we do not have the resources to protect you here in court." People are frequently passionate about their cases, and unfavorable opinions can make them angry or distrustful. n11 Furthermore, an opinion, while it may make one of the parties more flexible, is going to lock in or freeze the favored party, assuming that the mediator tells both parties the same thing. I think the mediator is ethically charged with telling parties the same thing and not giving different evaluations to the parties. So that is point one--evaluation can stop negotiation. n12

Second, evaluation can create an adversarial climate. When parties know that part of your task is to render a judgment that is going to be important to them, they are going to engage in adversarial conduct. They will present their own case in the best possible light and describe the other side's position and case in the very worst possible light. This sort of behavior is not conducive to what the mediator is trying to do, which is to shift the dialogue from confrontation to collaboration and to address whatever problems the parties face. This notion that the mediator is going to evaluate, to me, is at odds with the political goals of the mediator. n13

Third, I believe mediators are not well positioned to evaluate. Maybe this is academic, but the notion of "going for the gold" or "doing what people do best" strongly suggests that mediators should focus on facilitation. Judges and arbitrators have a particular calling, which is to evaluate. Judges are chosen by appointment or by vote to evaluate. There are immense numbers of protections put around judges: their decisions are appealable; they wear a black robe; there is legitimacy and credibility to their evaluations; you can only present evidence in a certain format; there is no ex parte communication which you have with a mediator; and so on. With arbitrators, the evaluation is bolstered by the fact that parties agree in writing to submit themselves to the arbitrator's determination. In other processes where the neutral evaluates, the parties have openly agreed to the evaluation. In the mediation process, it is not clear whether the parties have requested an evaluation. There is also a problem with the standard of care of mediators. Must the mediator be a lawyer to give an opinion on likely court outcome? Probably yes. Must the mediator be an expert in the substantive area of the law? Maybe. Must the mediator use the same diligence as a lawyer giving an opinion? Arguably. I simply think that mediators are not the best people to evaluate. They are in private sessions, there is no public scrutiny, and certainly evaluations will impact the parties. We want, as a society, to have top level evaluations.

Fourth, on Wall Street, they say, "The Street likes a pure play." The point is that endeavors that have a clear, single focus are more likely to succeed. n14 Dan Weitz and I just completed a mediation training program, and I recall a segment we taught on listening. Those of you who do mediation training programs know that, while people are capable of listening to two different things at the same time, we train mediators to give a 100% focus to whomever they are listening. Maybe we are capable of both facilitating and evaluating. However, the truth is, if you start doing two different things at the same time, sooner or later, one of the activities is going to become dominant and you will neglect the other one. It is hard to do two different things at the same time. A pure play is more likely to succeed.

Evaluation and facilitation are radically different activities. Let me list a few examples of the differences: a facilitator elicits information, interests, stories, issues, perspectives, values, feelings, assumptions, standards, and yes, even hearsay, because it is relevant and important to people. A facilitator guides and enhances communication. A facilitator stimulates "out of the box" thinking. A facilitator generates and supports collaboration and problem solving. A facilitator encourages more optimal outcomes that maximize the benefit to both parties. A facilitator captures and clarifies agreements. Each of those tasks is difficult and challenging.
What do evaluators do? They receive evidence; they are not charged with ferreting out evidence. They weigh evidence, and they are trained to weigh it according to certain standards, applying appropriate burdens of proof. They assess credibility. In a training program for arbitrators, arbitrators are warned not to be swayed because one party spoke first and the other spoke second. Also, arbitrators are not to be swayed by the quantity of information presented, but rather to assess quality. There are different lessons and tasks for evaluators and facilitators. The essence of the evaluator's job is to apply laws and rules to the facts they find in order to render a judgment or opinion. This is very different from the facilitator's central role. n15 These two worlds of activity are so far apart in my mind that marrying them weakens them both.

Now, I am going to take that statement back later because there are many situations in which mixed processes are good. I am not arguing against mixed processes. I think sometimes Med-Arb or Arb-Med or mediators agreeing to give a neutral expert opinion is fine as long as the mediator consciously takes on that task and, hence, commits himself to responsibly executing all the tasks of an evaluator as I described. Furthermore, they must be qualified to do the evaluation they are purporting to do.

My fifth point is that you can have your cake and eat it too. You can agree with me that mediators should not evaluate, and yet mediators can still change hats and evaluate as long as they are honest and up front about what they are doing, the parties agree to it, and they follow the appropriate ethical guidelines, meet the requisite standard of care, understand the task and have the necessary training. The Kaye Commission Report in New York n16 recommends training for both arbitrators and mediators. I strongly believe that just because you are a mediator does not mean you know about arbitration and vice versa.

So, I will end this by saying I think there is an integrative result possible for mediators. If they and the parties want, they can evaluate, but it has to be structured so that they are calling themselves by the appropriate professional name when they are acting in that other capacity, and the parties take them on as such, and make their presentations accordingly. Thank you.

PROFESSOR BOSKEY: Thank you. I would like to start by thanking Les and Dan Weitz for putting this debate together and getting Lela and me on the same panel. There is nobody with whom I would rather have this kind of a debate. Lela brings an intellectual quality and a theoretical understanding of mediation to the process that very few are able to contribute.

I agree, SPIDR is home. Cardozo I cannot claim as home. This is the first time I have been in this building, but I can very easily see it as becoming a home.

The last time Lela and I debated this issue was over the almost oxymoronic concept of a good dinner in Orlando, sitting at a long table, attending a SPIDR meeting. Several of our colleagues looked on in some degree of horror, as we went back and forth, probably asking themselves, "Are these people mediators?"

There is both more and less difference between Lela's position and mine than there appears to be on its face. Part of the problem is that we come to mediation from very different routes. Lela, in all fairness, comes to mediation from public policy and community perspectives. The cases that she started on, that she cut her teeth on, were cases where it is almost impossible for a mediator to have any substantial expertise beyond what the parties bring to the table. In the public policy setting, a good mediator is always running scared because the good mediator knows and understands less about the substance of the issue than anyone else at the table. Therefore, for the mediator to be involved in an evaluative process would be not only foolhardy, but would make the mediator often come out looking like a fool.

In the community mediation setting, similar problems arise because the real issue in most community mediation is not the formal legal issue. We can go back to the days of what are some of the earliest community mediation, the Ohio Night Prosecutors Program n17 in Columbus, Ohio, and some of the work done in San Francisco at the Community Board. n18 While the cases often present themselves as legal cases over a fence and over noise, almost invariably, the
disputes do not turn on that, but rather on the long history of relationships between the parties. The resolution, if there
was to be one, rested not on resolving the immediate concern, but on resolving the underlying relationship of the parties
in a way that usually, or at least frequently, would simply allow them not to tread on each other's toes along the way.

I came to mediation from a different angle. My initial training in mediation was as a divorce mediator, and it was
actually very mediocre training in mediation. I was trained in the first AAA divorce mediation training programs in
1977 or 1978 by, among others, Josh Stulberg, who is Lela's colleague in many of her mediation trainings. The trainers
were a group of people, none of whom had ever mediated a divorce case, and most of whom had never dealt with a
divorce except possibly, in a couple of cases, their own. They were people from the labor movement and people from
the Federal Mediation and Conciliation Service ("FMCS") community movement who had made a stop in Georgia to
meet with Jim Coogler to find out what he thought about mediation. They essentially realized that what he thought
about mediation had nothing to do with what anybody else thought about the process. Mr. Coogler came up and said to
us, "You folks ought to try this. There's something here, why don't you figure out what it is?"

Coming to the mediation process from the perspective of divorce cases raises very different questions as to the way you
approach the mediation process. Robert H. Mnookin and Lewis Kornhauser, in a Yale Law Journal article from the late
seventies, taught us a basic lesson about the process of divorcing and the relationship between parties in the divorcing
process. The title of their article was Bargaining in the Shadow of the Law, the Case of Divorce. The point they
made and the point that remains valid is that parties in a divorce situation in particular, although it applies to other
situations as well, are concerned about framing their solution in a way that they consider acceptable, not only to
themselves, but also to the surrounding community, including the courts. They are worried about doing something that
is beyond the scope of what is reasonable.

Does that mean that all outcomes must be reasonable from an objective or court perspective? No. I have mediated a fair
number of divorce cases in my years and I have come up with solutions that no court would dream of implementing,
including nesting custody cases, rotating custody cases, money situations that are weird, to put it mildly, and one case
where we spent four hours over the question of who got custody of the wagon wheel. We finally resolved it by my
offering to buy the wagon wheel from the parties. It was a $25 item that they bought at a country auction, but it had
become a key issue.

What does this mean in terms of evaluative versus facilitative mediation? Let me step back for a moment and talk about
some of the definitions we addressed and some of the definitional points made by Lela.

I agree with Lela that the basic approach to mediation is facilitating. I do not think that a purely evaluative situation is
mediation. To write a review for the Newsletter, I read a book written by a very nice, well meaning attorney in
Mississippi who describes a purely evaluative mediation process. My reaction is, functionally, in my review, to pat him
on the head and say, "Nice boy, go out and learn something." But that does not mean that there is no place for
evaluation in the mediation process. I think the point at which we differ is on the amount of substance that the mediator
brings into the mediation process.

The purely facilitative viewpoint, perhaps best represented by Baruch Bush and Joe Folger, but also reflected to a
large extent in Lela's writing, takes the position that the mediator is purely a process person and does not contribute
substantive information to the process other than agenda structuring. The problem in a divorce context is that this does
not work. The parties, themselves, rarely have sufficient substantive information and cannot acquire sufficient
substantive information from interaction with his or her attorneys, unless the party is extremely sophisticated, in order
to assure themselves that their issues are being dealt with.

What do I mean by evaluation? I very rarely will actually come out and say, "Your case is worthless," or, "your case is
valuable," or something to that effect. I can only remember one divorce case where I have done that, and it was after
severe irritation. A husband, after nearly four hours, firmly maintained the position that his wife had to reimburse him
for one half of the rent and mortgage payments they made during the twenty years of their marriage. This was a basic
condition before anything else could be dealt with in the situation. I finally got so upset with him that I turned and said, "Your position is not only unrelated to the law, it makes absolutely no sense," and I got lucky. The wife then turned on me and said, "How dare you accuse my husband of such things," and half an hour later, we had an agreement. It is not a risk I would recommend taking.

I can find, however, many interim evaluative elements in the mediation process. For example, the mediator often sets the discussion agenda. What issues I, as mediator, elect to treat first is an evaluative process because what I am doing is very clearly saying to the parties, "These are the things that are most important for you to resolve." I may provide them guidance as to what key questions they must address. Let us imagine a hotly contested custody case where the parties have settled on the following custody arrangement: four days one week and three days the next week for each parent, and the child was to move back and forth between the homes. Certainly before I will allow that resolution, I want the parties to have thought through the probable consequences for their children. I could suggest in some cases that the issue go to an outside third party - a professional psychologist or custody person - to provide that kind of evaluation. But in many divorce cases, I cannot do that. The parties do not have the money, or will not tolerate that kind of third party intervention. I have to play that role and bring that information into the picture.

The easiest example is in a tax area where the parties come in and the parties can work out an absolutely marvelous agreement, and this happens all the time, that will cost them immense amounts of money. Now, the answer that the purely facilitative mediator gives is, "Well, I send them out to an accountant and the accountant will straighten them out." The problem is that, by the time the accountant has straightened them out, the agreement has fallen apart because the accountant is not a mediator. The accountant is telling them, "You cannot do this, you cannot do that, you must do this, you must do that," and the information will not come through in a way that the parties are able to mold into forming an agreement. I will bring that information, as a process matter, to the table. I will not be the determiner; rather, I will send them back to their lawyer or accountant to make sure that I got it right. I am not a tax expert, but I have some expertise in this regard.

So what I mean by evaluation is bringing in expertise and utilizing that expertise as a part of the process.

The same thing applies in other areas of mediation as well. I use the divorce area because that is my primary arena. But I will give similar types of evaluations in a commercial mediation and, sometimes, in a community mediation as well. The trick is knowing what you can and cannot evaluate, and knowing what topics are appropriate.

Lela is absolutely right that evaluation can stop the negotiation process and create an adversarial climate. In some cases, however, evaluation can enhance the negotiation process. It can alleviate the adversarial climate by showing the parties that the issues that concern them are not real, explain to them why they are not real issues, and why they can avoid being trapped by things that appear to be of great importance to them. The example that I gave earlier, regarding the couple who were unable to resolve which of them would be primary residential custodian of the child, is illustrative. Someone needs to tell the parties that "custody" does not necessarily mean anything, explain to them why it does not, and that their debate may not be necessary.

Mediators, Lela points out, are not well positioned to evaluate. That may or may not be true. It depends on the mediator, the type of case, the parties, and the circumstances. In many situations, mediators are not well positioned to evaluate and they should not. My fundamental approach to this, however, is that I would want to trust the mediator to use whatever tool is necessary to assist the parties in reaching an appropriate agreement. I am not willing to throw out what I consider to be an important tool simply for the sake of purity of the process.

I think the evaluation tool is a valid one when used carefully and appropriately. I think the mediator has to be cautious. The problem that we face is that too many, particularly lawyer mediators, but not only lawyer mediators, get the idea that, "Hey, I can evaluate, that's all I have to do."

One of the most horrendous mediation situations that I have dealt with was in the New Jersey Small Claims Court. I
used to send several of my students in my ADR course to do research in the mediation processes in the small claims courts. They would come back and describe what happened. You have to understand the training that the mediators received—it is not their fault. These are law clerks who have just graduated from law school and are working for judges. The court, in all good faith and with good motives, decided that every law clerk should be trained as a mediator and go out and mediate small claims cases. So, they gave them mediation training. They gave them a full four hours of mediation training, and then sent them over to the small claims court and said, "Go, ye, and do justice." And notice, those words are carefully selected. They did not say, "Go, ye, and mediate," rather "Go, ye, and do justice."

So what happens? The defendant comes out and meets with the mediator. The mediator takes them to a corner of the courthouse and says, "Let me tell you what the judge is going to do in this case." And you know what? Thirty percent of the time the case settles because that is all you need to settle it, and everyone feels great. Seventy percent of the time, the parties say, "Huh?" and go away. The mediator says, "I knew there was something wrong with this process." That is a very real problem. If the mediators focus on evaluation as being the mediation process, Lela's absolutely right.

One of the things I am very uncomfortable with on my side of the debate concerns a lot of what we heard in Florida. Too many of the Florida mediators are really evaluators in disguise. These mediators are not using evaluation as a tool to assist in a facilitative mediation process. They are using evaluation as a substitute for the real process. I suspect that almost every mediator evaluates at various points in the process. They do not, however, let that be the single tool along the way.

One final thought, and the reason that I initially got involved in this debate, relates almost somewhat tangentially to evaluation. Most of you, I suspect, are familiar with the Bush-Folger book? The thing that really blew my mind was their example of a community mediation concerning a man walking through a certain neighborhood. The case was resolved by the man agreeing not to walk through that neighborhood any more, not to go into territory where others claimed he had no right to be. This was considered a happy resolution. That scared me because one of the things that should not happen in mediation, and one of the lessons that Trina Grillo taught us before her death, and others have taught us too, is that the mediator is responsible for making sure, at some level, that neither party to the mediation is oppressed by the process. One of the risks of being purely facilitative is that you may accept solutions which are oppressive and may say, "This is what the parties want, let them have what they want."

That scares me. That scares me particularly as a divorce mediator because I deal with too many battered spouses, even if not physically, but emotionally battered spouses, who are all too ready to give up and accept any agreement, believing they have gotten what they want. That scares me, but that is another worry.

MODERATOR: Thank you. We are going to open it up for questions.

QUESTION # 1: When is it appropriate for mediators to be evaluative, as opposed to facilitative or non-judgmental? Isn't there a facilitative-evaluative continuum, rather than it being an either-or issue?

PROFESSOR BOSKEY: I clearly agree with that point. Lela, take the lead on that.

PROFESSOR LOVE: Okay. One problem with this whole debate in my view is defining "evaluation." You mention a continuum. Some of the remarks that Jim just made would reduce the facilitative mediator to some California image of an easy going, laid back presence, who cheerfully reiterates, "Whatever everybody agrees to here is just fine." Jim mentioned Josh Stulberg earlier. The acronym for the mediation process Josh uses is the word BADGER, which represents an active, energetic, persistent mediator. In keeping with that image, the mediator presses parties to look at all their options and get the necessary information. The mediator provides frameworks for parties that do not have legal information, sometimes steers them to sources of relevant law, and presses parties to search for optimal outcomes, not just the first acceptable proposals put on the table.

I think one of the problems that your question raises is the notion that everything people do is evaluative. I do not debate that. If you raise your eyebrows, it is evaluative. You decide when to speak and you have just made a judgment.
And that is a given. I believe the mediator should be offering opinions with respect to process matters, including proposing a discussion agenda or urging parties to get necessary information and advice. These moves clearly involve making judgments. Mediators do have to possess knowledge and expertise, including some substantive expertise about the area in which they are mediating, to be intelligent enough to frame the issues, know what questions to ask, and when information is necessary. However, with respect to judging the parties and their positions, particularly given the natural human tendency to evaluate, it is important that the neutral understand the essentially non-evaluative role.

So, when is it appropriate to shift to the role of arbiter and give your opinion on a likely court outcome, or a fair resolution, or an appropriate range? From my point of view, the only appropriate time is after several things have happened. First, the mediator must be asked by both or all parties for an opinion, and the mediator must believe it is an informed request. Second, the mediator must be expert in the area in order to be a credible evaluator. Third, it is important that the parties have looked at your resume for that kind of relevant expertise and, consequently, can assess the value of your opinion. Finally, the mediator must take on the job with the same standard of care as that of an attorney or a neutral expert, giving the same attention they would provide to the matter. That is when I would evaluate. I agree with you. There is a facilitative-evaluative continuum. The psychologists and the social science researchers will say that we are evaluating all the time. However, there are some evaluative moves that a so-called facilitator should not make, nor should a mediator have, as their basic orientation—an evaluative role.

PROFESSOR BOSKEY: We will add another circumstance I think you will accept and that is where there appears to be oppression, i.e., power imbalance going on in the process, and we have to use evaluation as a way to level the playing field.

PROFESSOR LOVE: Again, this debate is plagued by a lack of definition of terms. If there is imbalance or injustice going on in the process, you could use many means to level the playing field other than evaluating the merits of parties' positions. You could caucus with the parties. You could press them to be sure they were articulating their interests, that they had the necessary information, had whatever support they needed, and were comfortable in the process. There are all sorts of things you could do short of saying, "You will win," or, "You will lose this thing in a court of law," or "You have these rights."

I have a profound distrust of evaluators in general. You give the same case to five judges and you may get five different outcomes. You give the same tax information to five IRS agents, or five accountants, and you will get different accounts of the tax liability involved. An evaluator's credibility or integrity rests on the nature of his appointment to the job and his expertise. Mediators, in general, are not positioned to be evaluators unless the parties, in effect, elect them to that job and they are well qualified. If Jim Boskey was my mediator in a divorce matter, the truth is, I would probably want his opinion on some things because he is an expert. He has spent a lot of his life studying family law, and I would have confidence in what he said. But I might not share with him some of the information I would share with a facilitative mediator if I were asking him for his opinion on the matter. So, I would want to know ahead of time that he would be giving an opinion. But, might I use his evaluative services? Yes, indeed.

PROFESSOR BOSKEY: One very brief point on that. I agree that I distrust evaluators in many contexts. I did a training for auto arbitration specialists. Each had seven years of experience with at least seventy-five percent of their practice in personal injury, litigation and so forth. These are highly trained, highly skilled lawyers. I gave them a very simple personal injury simulation, involving a broken arm, a swollen eye and back. I got evaluations out of 25 people ranging from $3,500 to $74,000 as the likely outcome of the case, not a bell curve but an absolutely flat distribution across. And this goes to the point.

I believe it is very rare that a mediator would evaluate the entire case. You simply give an evaluation of a particular point. You focus on a particular issue where clarity is needed, and it is a means of increasing that clarity.

MODERATOR: Okay. Another question.
QUESTION # 2: What sort of information about likely court outcome might a mediator provide?

PROFESSOR BOSKEY: In the equitable distribution area, n33 for example, there is some understanding of what a court would do. The parties are not necessarily going to do the same thing that a court would do. In fact, once you have given them the relevant law, they may decide to go in a totally different direction. The parties, for their own sense of the legitimacy of their approach, need to know what factors a court would consider.

For example, if one of them got a degree during the marriage, how a court would consider this issue depends on whether you are in New York or New Jersey. n34 The parties are going to want to know what a court would do. The mediator may point out to the parties that they can use the information without necessarily duplicating what a court would do. That is in my mind an evaluation. The mediator explained the governing court rules to the parties. Another example is when the parties have been living off one party's inheritance during their married life. If there has been no formal transmutation that would suffice to mark the property for "equitable distribution," the party who inherited the money needs to know that the inheritance is in some way protected. They may end up not protecting it, but there is a problem unless they have that information. In my point of view, that is an evaluative process.

Let us say that they did not have that information. Then, they cannot make a reasoned judgment, and their negotiations are going to go in circles.

PROFESSOR LOVE: Like Jim, I would prefer that parties bargain with access to the sort of legal information he describes. I would help the parties strategize about how to get critical information. In some cases, I might supply some legal information. But, I believe a mediator assumes a different role when she applies the law or rules to a particular case and suggests the likely court outcome. That is one of the places I would draw a line.

QUESTION # 3: The problem that I have with this debate is that you are trying to reduce mediation to one approach. Many mediators use evaluation effectively. Parties often have unrealistic expectations and can benefit from getting an opinion as to how their case would turn out if they went to court. This information can also help them reach a better and more realistic agreement. This being the case, is it not dangerous to say a mediator should never use evaluation when helping parties reach an agreement?

MODERATOR: Well, I am going to let Lela answer this question.

PROFESSOR LOVE: Well, we are sitting in a law school, and law school teaches us that there is nothing black and white in the world. But we strive for clarity and definition. On a public policy level, we need targets for training mediators, creating ethical guidelines and standards of conduct, and developing program guidelines. It strikes me that if you license mediators to give opinions on fair outcomes or likely court outcomes, there is such a strong pull from the prevailing paradigm that mediators are going to be pulled into an evaluative role. Jim made a distinction between community mediation and other arenas. But community mediators can be very evaluative too because evaluation is the norm. Evaluation comes more naturally in our culture than facilitation. Several years ago, as part of a project to design a mandatory mediation program for workers' compensation cases in Louisiana, I observed workers' compensation mediations all over that state. I expected that the role of the mediator might shift in cases dominated by lawyers and insurance adjusters, in addition to the injured worker, particularly where the mediators were experts in workers' compensation. However, I concluded that, on the contrary, the same facilitative orientation was effective and appropriate. Remember that facilitative mediators energetically urge the parties to share their perspectives and legal positions, and mediators "reality test" positions and proposals. In other words, the mediator supports disciplined evaluation by the parties. Evaluation does not drop out of the process.

I believe that Jim and I might have a hard time drawing the distinction between "reality testing" and mediator evaluation. As a reality tester, you have to know a lot in order to ask the right questions and make people look at the likely outcomes for themselves. As an evaluator, you present the likely outcome. In practice, however, the distinction will depend on how a party experiences the mediator's moveas a motivator for reflection or as an imposition of an
opinion.

PROFESSOR BOSKEY: One further point. Neither Lela nor I is an absolutist. I have a different perspective on what is good. I am the one who the AAA and the Better Business Bureau panel administrators hate because I do exactly what they taught you not to do in arbitration. I give the parties in an arbitration my opinion and I say, "Look, this is the way you are going folks. Do you not want to go out and talk about settling this?"

I do not draw strong lines between processes. I see it all as a process of settlement. Lela is more of a theoretician. She breaks it up and categorizes it. There is nothing wrong with that. There are different views of the world, if you will. But neither one of us is an absolutist, and Lela, herself, said that there are certain instances in a case where she sees evaluation as appropriate.

PROFESSOR LOVE: But, I might not call the evaluative activity mediation. That is the difference.

QUESTION # 4: I am not clear on exactly how you would define evaluative mediation. When does the mediator cross the line from facilitation to evaluation?

PROFESSOR BOSKEY: I think, probably, the definition we agree on is that evaluation is stating a firm opinion as to the correctness of either the total case or a major element of the case being presented by one of the parties. I am using the term "presenting a case" deliberately because, in that context, it is seen as a relatively adversarial part of the mediation process. Often, it happens early in the process before people really start talking. Also, it may happen late, as people move toward a solution, but either do not want to invest the time or cannot be bothered with some of the subsidiary issues.

PROFESSOR LOVE: I would broaden that a little. I do not think it is just pronouncements about likely court outcomes. If a mediator gives an opinion that somebody is being unreasonable in their perception of something, that is a judgment, an overt judgment. It could be an evaluation where they analyze who is right or wrong, or the merits of a matter. In contrast, the evaluation involved in setting a discussion agenda or reality testing has a different rationale than trying to impose your opinion on someone to move them. In setting an agenda, the mediator is trying to shift the tone of the discussion, perhaps by choosing an easy issue first. The mediator wants to help the parties to look at their situation in a different way by allowing them to experience movement with each other. That is the rationale for doing it. It is not that you are trying to impose your opinion. It is the same thing with reality testing. It has a different rationale than evaluation. You are trying to get the parties, pressing them hard sometimes, to evaluate or reevaluate the matter themselves. Once you step up with the opinion, "You lose, pal, this is a weak case," you take away the evaluative function from the parties. On the other hand, the evaluative features involved in seating arrangement, agenda setting, and reality testing are a necessary part of facilitation.

QUESTION # 5: Is this facilitative-evaluative debate equally relevant to therapists serving as mediators as it is to attorneys?

PROFESSOR BOSKEY: Let me just say that the theory that therapists are not evaluative is one that is highly suspect. In the divorce area, they tend not to be evaluative on money issues. However, let loose a therapist on a good custody case, and you do not want to know what kind of evaluation you will often see. They come in and lecture on child growth and development, many of them till the cows come home. So you have to be really careful in assuming that therapists are not as evaluative as attorney-mediators. Generally, it is easier for therapists not to define the bottom line, but it is not always true.

QUESTION # 6: Does avoiding evaluation promote the transformative potential of mediation rather than its settlement potential?

PROFESSOR LOVE: I would like to respond to that. Jim has aligned me with Baruch Bush and Joe Folger in
However, my perspective is different from the transformative approach in, at least, one important respect. I care a lot about resolving cases, and I am very excited about mediation's potential for solving problems in a way that no adjudicative process can. It brings people together to create outcomes. As a mediator, I push hard for people to solve the problems and issues they bring into mediation. So, I do not see myself at the left end of the continuum on transformative versus settlement orientations, nor do I think that valuing resolution means that the mediator should move resolution along by providing evaluations.

PROFESSOR BOSKEY: I think that is good. One of the things to remember about mediation, about the mediation process and whether you get settlement, is that there are many circumstances where transformation or reconstruction is not that important. What is much more important to people is getting it resolved. Now, that is not true in your typical community case. For example, I have done a number of mediations in the insurance industry over questions of reinsurance treaties. The most important thing to those parties is not doing justice, but moving the case along. In that circumstance, what the mediation process does is give resolution. Emotional satisfaction may be unimportant.

QUESTION # 7: Do you become an arbitrator when you evaluate?

PROFESSOR BOSKEY: No. I think you will find that you are granting me a more power than I believe I have in swaying the final result. Anybody who tries to convince me, or spends their time convincing me, is moving away from the agreement. I am not going to let them waste their time doing that. I do not want a party treating me as an arbitrator. I will not allow a party to accept my evaluation as a gospel solution, except on an issue where both parties agree. The wagon wheel is an example. In that case, I did not actually say "Look, I will flip a coin on the wagon wheel and then we will take it off the table." The parties agreed to my proposal. I do not allow my evaluation to be the final determination. What it does is inject reality and alert the parties that, under certain circumstances, reality bites.

MODERATOR: I am going to take two more questions.

QUESTION # 8: Can you avoid the dangers of evaluation that have been addressed here by simply giving the evaluation in a caucus?

PROFESSOR BOSKEY: I take exactly the opposite view. I will almost never give an evaluation in a caucus unless, occasionally, somebody specifically asks that question. Then, I might respond. The problem is if I give an opinion in a caucus, it might work to lock the party into that position. I can prevent them from locking in more easily if I do it in a joint session than in a caucus. That way, both parties know what the other is hearing and can assess the balance. Otherwise, the result of doing it in the caucus is that they think, "Hey, I have won the mediator." When I give them an opinion in a joint session, they do not feel they have won the mediation. They feel they have got an issue that is moving in a direction.

QUESTION # 9: This question is for Professor Love. When would you give an evaluation, if ever?

PROFESSOR LOVE: I would agree to shift my role and give an evaluation if the parties request it because they trust my objectivity and judgment, and, for efficiency, they do not want to have to educate another neutral. But there are counter-reasons, too, why a mediator should refrain from taking on an additional role: mediators have private information from caucus sessions; they have not heard rebuttal of that information; and there has been no right to cross-examine. In short, they might not be as good a decision-maker as a "pure" arbitrator. So, before I would agree to become an evaluator, I would want the parties' fully informed consent to that change in roles. I would want them to understand why I might not be as good of an evaluator as a neutral retained for that service alone. In changing hats, I would warn the parties, "What you are asking for now is different than the services I have been rendering thus far. If you would like me to give an opinion, I am willing to do so, but you should understand that it might undercut my ability to be an effective mediator for you after I give an opinion." At the end of the case, maybe it does not matter that the mediator might be less effective as a mediator after giving an evaluation. However, I think, at the point I agree to be something else, I would call it something else. Other standards kick in. If I am operating in a state court-annexed
program in New York State and giving a neutral opinion, I should have had the training program for neutral experts. I should know what there is to be taught to neutral experts. I should not rely on the fact that I have had a mediation training to make me think that I am capable of another role.

Additionally, if you are going to give an opinion, you should be an expert, who should have an opinion worth giving. If the parties want Lela Love's opinion on a product liability case, I would not give it because my opinion is not worth much. That is not an area of expertise for me, and I would inform the parties of this. If the question is an area in which I am confident of my substantive expertise, and the parties request an evaluation, understanding the downside that I might not be as effective as a mediator, I would be willing to evaluate. I serve as an arbitrator. I like arbitration. Yes, I would mix the processes under the right circumstances.

MODERATOR: Okay. I am going to have the two panelists give their closing statements. I am going to start with Jim because Lela went first. Before the panelists give their closing statements, I would like to throw in a little monkey wrench of my own. As the moderator, I have the right to do that. The United States Department of Justice came out with a report recently where they acknowledge that, throughout the community mediation programs in the United States, there is a wide range of different approaches being used, from evaluative to facilitative. The report makes the claim that research has shown there is no substantial difference in terms of outcome or in terms of perception of the disputants about the mediation process based on the technique used. One of the things I would like you both to respond to in your closing statement is whether this debate is actually more important to us than the parties we serve. In other words, is this debate merely a matter of personal preference on the part of the mediators, or is there truly an importance in this debate that impacts on the people that we serve?

PROFESSOR BOSKEY: The answer is that there is a real consequence for the parties. I think the problem that we are faced with in mediation research is that we do not have a true way of evaluating consequences. Satisfaction is not enough. Satisfaction, in many cases, is simply a placebo effect. The mere fact that there is activity, that somebody listens, is sufficient to give satisfaction.

Mediation done well can yield pareto optimal solutions, as Lela said before. Good mediation moves parties closer to reaching those pareto optimal solutions. While I think that there is a real consequence, I do not think we know how to measure that consequence.

The problem with much of the research that you see, even some very good research by very responsible researchers, is that it misses that point. It treats satisfaction or it treats numbers of cases resolved as a proxy for the quality of the outcome. I do not think there is an answer.

There has been a debate recently, a dispute rather, over the question of whether mandatory mediation was an oxymoron, following on Lela's article. A number of people are saying mediation is pure, true and holy, and anything that forces people to come to the table even to think about mediation is a violation of the underlying principle of party self-determination. Well, I believe in party self-determination. I believe in party self-determination particularly in the mediation context. Sometimes, however, it is equally important to get parties' attention in order to get them to determine their own results. It is the old story of how you train a mule. First, you get a two by four, raise it over your head, and bring it down as hard as you can on the head of the mule. Then, you have the mule's attention. Then, you can start training the mule. The same thing applies here.

There is a risk with being too pure in our definition. In Sally Engle Merry's marvelous book, The Possibility of Popular Justice: A Case Study of Community Mediation in the United States, Merry discusses the early days of the San Francisco Community Boards Program. Ray Shonholtz, the founder of Community Boards, had a very purist view. He did not want to be associated with the police because that would not make him a community activist. He did not want referrals from the courts because that would not be a community activity. He had a very sixties approach in not wanting government imposition in his program. He was a marvelous mediator with a great attitude. Unfortunately, he did not get any cases to resolve. However, they did have great parties and meetings. They used to meet near the corner of...
Haight-Ashbury and have great times, but they did not resolve cases. My concern is not to be so pure in your definition as to prevent ourselves from doing what we need to do.

We do not like to think of ourselves as an industry. But, if we are going to be successful, we have to be a service industry. My concern is to make sure that we keep ourselves open to meeting the needs of our clients with the requisite techniques. We should not let ourselves get so hung up on terminology that we are unable to do what our clients need.

PROFESSOR. LOVE: Are there real consequences when mediators evaluate? Look, I was talking about hills to die on. Obviously, I believe there is a real consequence in terms of whether mediators evaluate. I believe the process of mediation, as we have been teaching and practicing it, will die, if lawyers, operating from an adversarial paradigm, take over mediation. To some extent, this is happening now with more and more court-annexed mediation programs. So, I believe that, if leaders in the mediation field do not clearly define standards and best practices, then the evolving process will be the so-called "evaluative" mediation, where mediators give their opinions on likely court outcomes and assist the lawyers' jousting. Maybe this Justice Department research n41 did not capture it, but all of us here, tonight, who are mediators, know that mediation is an extremely powerful process. It can result in tremendously exciting outcomes for individuals, businesses, communities and nations. Those exciting outcomes are not possible in an adversarial rights-based process. So, it is important.

Jim is concerned that, if we are too pure, we are going to work ourselves out of business. I do not like being called a purist. On the other hand, I believe you have to stand for something and define what you do so that it can be distinguished from other things.

In 1976, at the Pound Conference, n42 Frank Sander n43 introduced the concept of a multi-door courthouse. The notion was that people would come in with disputes, and there would be different doors, different places to go, different processes to use. I believe if evaluative mediation becomes a norm, it will blend together so many processes that ADR will become an amorphous blob. We will have nothing other than litigation and this ill-defined other process.

Interestingly, the Kaye Commission report, n44 which came out after two years of study and meetings all over the state, emphasized that the blurring of distinctions between mediation, arbitration and neutral evaluation is not helpful, and there should be clear standards. Jim talks about letting a hundred flowers bloom, and I like a hundred flowers. I think the idea of the multi-door courthouse is similar to the hundred flowers idea. But, I think you need to name the flowers, cultivate them differently, and care for them in ways that their unique natures demand. In that way, you will have a hundred flowers. Else we will have just one big weed.

I will end with a quote from former Harvard President, Derek Bok, a couple of years after the Pound Conference. It was made in response to the excitement of the blossoming ADR movement. He said, "Over the next generation I predict society's opportunities will lie in tapping the human inclinations toward collaboration and compromise, rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.” n45 It strikes me that lawyers now, to the extent mediation is being pulled towards the evaluative mediation model, are engaged in squashing one of the most exciting social experiments of our time. I do not want that to happen.

MODERATOR: I want to thank both of you for a very stimulating debate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsFamily LawAlternative Dispute ResolutionArbitrationFamily LawAlternative Dispute ResolutionMediation

FOOTNOTES:
n1 Special thanks to Professor Adam Berner for serving as a proxy editor for Professor James Boskey. Professor Berner teaches Divorce Mediation at Benjamin N. Cardozo School of Law and is a trainer and practicing mediator.

n2 Dan Weitz is currently the Coordinator of Alternative Dispute Resolution ("ADR") Programs for the Unified Court System for the State of New York.


n5 James B. Boskey's The Alternative Newsletter: A Resource Newsletter on Dispute Resolution. For more information and back issues see http://www.mediate.com/tan.

n6 James B. Boskey, The Place of Evaluative Mediation (unpublished essay)(stating that mediators should not give evaluations absent substantially greater expertise than any of the party participants or advocates).

n7 Boskey, supra note 5.


n9 See Symposium, Teaching a New Paradigm: Must Knights Shed Their Swords and Armor to Enter Certain ADR Arenas? (forthcoming Spring 2000).

n10 See Love, supra note 4, at 939-41. See also Kovach & Love, supra note 3, at 31; Robert A. Baruch Bush, Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standard in Mediation, 41 FLA. L. REV. 253, 265 (1989) (describing the importance of complete mediator impartiality).

n11 See Marjorie Corman Aaron, ADR Toolbox: The High-Wire Act of Evaluation, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 62 (1996) (noting that the primary risk of evaluation is the mediator's potential loss of perceived neutrality because the "loser" in the evaluation may view the mediator as an adversary; nonetheless, situations do exist in which the careful and thoughtful use of mediator evaluation can serve the parties).

n12 See Kovach & Love, supra note 3, at 31 (stating that "evaluative mediation jeopardizes neutrality because a mediator's assessment invariably favors one side over the other"). See also Love, supra note 4.

n13 See Love, supra note 4, at 940 (stating that a mediator's goal is to foster understanding between parties and encourage them to create solutions that meet both sides' underlying interests). See also Kovach & Love,
supra note 3.

n14 See Love, supra note 4, at 939-940. See also Kovach & Love, supra note 3, at 32.

n15 See Love, supra note 4, at 940-41.

n16 Judith S. Kaye, New York State Court Alternative Dispute Resolution Project, State of New York Unified Court System, Court Referred ADR in NY State, Final Report of the Chief Judge's New York State Court Alternative Dispute Resolution Project 51-53 (May 1, 1996) (recommending for mediators: 1) a minimum of 25 hours of approved mediation training; 2) a minimum of 15 hours of additional training in the law, rules and court procedures pertaining to the subject area of the cases referred; 3) participation in the mediation of a minimum of three cases under the apprenticeship of an experienced mediator with the recognition that participation in more cases under apprenticeship of an experienced mediator is advisable; and 4) attendance at continuing education classes of a minimum of 8 hours every 2 years, and recommending for arbitrators: 1) a minimum of 8 hours training in the substantive and procedural matters related to arbitration of cases in the specific subject area of the case that will be referred to them; and 2) attendance at continuing education classes of a minimum of 8 hours every 2 years).

n17 See Dan McGillis, Recent Developments in Minor Dispute Processing, Winter 1980 A.B.A. SEC. DISP. RESOL. 12 (stating that the Columbus, Ohio Night Prosecutor's Program is considered to be among the first criminal justice dispute resolution programs in the country, providing mediation for minor disputes since the early seventies).


n19 See The American Arbitration Association, A Brief Overview of the American Arbitration Association, (last modified Nov. 11, 1998). The American Arbitration Association is a non-profit public service organization that is dedicated to the promotion of alternative dispute resolution. The organization provides forums for hearing disputes as well as impartial experts to hear and resolve cases. The address and phone number of the AAA is 1633 Broadway, NY, NY 10019, (212) 489-9695.

n20 See O.J. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT (1978) (indicating that in a divorce context, formal mediation processes were first utilized in the 1970s. Angered at the adversarial quality of his own divorce, Coogler founded the Family Mediation Association, and introduced the concept and practice of "structured mediation" as a participatory, non-hostile approach to settling divorce cases). Mr. Coogler is a prominent Georgia mediator.


n22 See Boskey, supra note 5.


n25 BUSH & FOLGER, supra note 23.

n26 Id.

n27 Id.


n29 See Richard Delago, Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina Grillo, 81 MINN. L. REV. 1391 (1997) (presenting the idea that conflict is the ordinary and natural state of affairs, mediation's effort to smooth over conflict and to treat it as unhealthy runs the risk of taking away the parties' indignation, which might otherwise fuel reform). See also Carrie Menkel-Meadow, What Trina Taught Me: Reflections on Mediation, Inequality, Teaching, and Life, 81 MINN. L. REV. 1413 (1997) (reflecting on Grillo's critique that the past cannot be erased and proposing that mediation ideology and practice must adapt and make room for acknowledgment of the past if it is to be of use in achieving racial justice).

n30 See Penelope Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 BUFF. L. REV. 441 (1992) (recognizing that mediation does not protect the less powerful wife from disadvantageous outcomes and concluding that lawyer negotiation produces more advantageous agreements for divorcing women than mediation). See also Martha Fineman, Dominant Discourse, Professional Language and Legal Change in Child Custody Decision Making, 101 HARV. L. REV. 727 (1988); Laura Nader, Disputing Without the Force of Law, 88 YALE L.J. 998 (1979).

n31 Due to the failure of the microphone to pick up the actual words of the audience questions, questions # 1-9 have been recreated here with the help of Lela Love and Les Lopes, to the best of their recollection.

n32 See JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT (1987) (listing six components of the mediator's role: (1) Begin the discussion; (2) Accumulate information; (3) Develop the agenda and discussion strategies; (4) Generate movement; (5) Escape to separate sessions; and (6) Resolve the dispute, and referring to these collective components with the mnemonic, BADGER).

n33 See N.Y. DOM. REL. LAW § 236 (Consol. 1990).
n34 Id. See Fraley v. Fraley, 652 N.Y.S.2d 889 (Sup. Ct. 1997) (ordering equitable distribution of marital property and awarding the wife duration maintenance, reasoning that the wife’s employment assisted the husband in earning his degree during the marriage). Compare, e.g., N.J. STAT. ANN. § 2A: 34-23 (West 1987); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (Sup. Ct. 1982) (holding that a professional degree is not property subject to partition in the dissolution of marriage, but a spouse can get reimbursement alimony for supporting the marital partner who was pursuing the degree during marriage, provided that the spouse seeking recovery can prove that both parties expected increased income and marital benefits to flow from the degree).

n35 See BUSH & FOLGER, supra note 23 (stating that the most important capacity of the mediation process is its potential for empowerment and recognition) Robert A. Baruch Bush, Efficiency and Protection or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation, 41 FLA. L. REV. 253, 265 (1989).


n37 Id.

n38 See, e.g., Paul Resenberger, Laissez - “Fair”: An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators, 13 OHIO ST. J. ON DISP. RESOL. 611, 625 (1998) (stating the pareto efficient point is defined as the point of allocation of resources where one person cannot make himself better off without making the other person worse off).


n40 See MERRY, supra note 18.

n41 See McGILLIS, supra note 36.


n43 Professor Frank E.A. Sander is Director of the Harvard Law School Program on Dispute Resolution. He was invited by Chief Justice Burger to deliver a paper on alternative dispute resolution at the Pound Conference in 1976. He has served for 14 years on the ABA Standing Committee on Dispute Resolution, including 3 years as Chair.

n44 See Kaye, supra note 16.