The Effect that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation

Susan Nauss Exon
The Effect that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation

By

Susan Nauss Exon*
Professor of Law
University of La Verne College of Law
320 East D Street
Ontario, CA  91764
exons@ulv.edu
909-460-2043
fax: 909-460-2081

August 24, 2007 Draft

*Copyright 2007, Susan Nauss Exon, Professor of Law, University of La Verne College of Law; J.D., University of Wyoming; LL.M. in Dispute Resolution, Pepperdine University. I am grateful to the University of La Verne College of Law which provided a research grant to help fund the preparation of this article. I am also indebted to the outstanding research assistance of David Nielsen who updated the research regarding mediation standards of conduct available in all of the fifty United States.
THE EFFECT THAT MEDIATOR STYLES IMPOSE ON NEUTRALITY AND IMPARTIALITY REQUIREMENTS OF MEDIATION

ABSTRACT

As the mediation field began to flourish in the United States, definitions of mediation were enacted. These early definitions included key components such as a neutral and impartial third-party mediator and party self-determination. As the field developed, scholars began to classify mediators based on style and conduct. Despite the variety of names used to describe mediator style or a mediation model, most can be classified as either facilitative or evaluative.

Then, in the 1990s states and professional organizations began to develop mediation ethical standards of conduct. Interestingly, every set of standards mandates mediator impartiality although the impartiality provisions are not uniform. In practice, mediators began to feel the tension that impartiality requirements imposed on various mediator styles or mediation models.

The tension has created a mediator’s dilemma: how can a mediator exhibit any style while concurrently remaining impartial? To maintain the integrity and credibility of mediation, it is time resolve the mediator’s dilemma: This article proposes four alternatives:

1. Take no action, limited to states which have not yet developed ethical Standards. These states should wait to develop Standards, including impartiality provisions, until they thoroughly recognize and analyze all mediator styles.
2. Redefine mediation to delete the requirement of mediator impartiality.
3. Redefine mediation to suit mediator styles – the contract approach. This alternative classifies a facilitative mediation as a traditional mediation and an evaluative mediation as a mediated settlement conference.
4. Create a hierarchy of values within a set of ethical Standards to emphasize the most important value while allowing mediator flexibility regarding other values.

Each alternative allows ethical Standards to stand side-by-side with traditional mediation styles and models. It is now time to begin a dialogue and choose the most appropriate alternative or use these alternatives to generate new and more creative solutions to the mediator’s dilemma.
THE EFFECT THAT MEDIATOR STYLES IMPOSE ON NEUTRALITY AND IMPARTIALITY REQUIREMENTS OF MEDIATION

By

Susan Nauss Exon

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>5</td>
</tr>
<tr>
<td>II. THE DEFINING NATURE OF MEDIATION</td>
<td>6</td>
</tr>
<tr>
<td>A. The Definition of “Mediation”</td>
<td>7</td>
</tr>
<tr>
<td>B. Key Provisions</td>
<td>9</td>
</tr>
<tr>
<td>1. The Significance of Mediation Neutrality</td>
<td>9</td>
</tr>
<tr>
<td>2. The Significance of Mediator Impartiality</td>
<td>9</td>
</tr>
<tr>
<td>3. The Requirement of Party Self-Determination</td>
<td>10</td>
</tr>
<tr>
<td>III. IMPARTIALITY REQUIREMENTS IN ETHICAL STANDARDS OF CONDUCT</td>
<td>11</td>
</tr>
<tr>
<td>A. The Model Standards of Conduct</td>
<td>12</td>
</tr>
<tr>
<td>B. The Uniform Mediation Act</td>
<td>12</td>
</tr>
<tr>
<td>C. Various State Standards</td>
<td>14</td>
</tr>
<tr>
<td>IV. MEDIATOR STYLES AND MEDIATION MODELS</td>
<td>18</td>
</tr>
<tr>
<td>A. Facilitative Mediator</td>
<td>20</td>
</tr>
<tr>
<td>B. Evaluative Mediator</td>
<td>22</td>
</tr>
<tr>
<td>C. Transformative Mediator</td>
<td>23</td>
</tr>
<tr>
<td>D. Additional Mediation Styles and Models</td>
<td>25</td>
</tr>
<tr>
<td>1. “Trickster,” “Magician” and “Prime Negotiator”</td>
<td>25</td>
</tr>
<tr>
<td>2. Dictates of Commercial Needs</td>
<td>26</td>
</tr>
<tr>
<td>3. “Michigan Mediation”</td>
<td>28</td>
</tr>
<tr>
<td>4. The Effect of Social Norms on Mediation</td>
<td>29</td>
</tr>
<tr>
<td>V. ANALYSIS OF THE TENSION BETWEEN MEDIATOR STYLES AND IMPARTIALITY</td>
<td>31</td>
</tr>
<tr>
<td>AND IMPARTIALITY REQUIREMENTS</td>
<td>31</td>
</tr>
<tr>
<td>A. Summary of the Problem Posed by the Research</td>
<td>31</td>
</tr>
<tr>
<td>B. The Effect that Styles and Models Have on a Mediator’s Neutrality</td>
<td>33</td>
</tr>
<tr>
<td>1. Mediator Styles</td>
<td>33</td>
</tr>
</tbody>
</table>
a. Facilitative Style ........................................ 33
b. Evaluative Style .......................................... 35
   1) General Criticisms of the Evaluative Style…. 35
   2) Effects of Related Evaluative Styles.......... 36
   3) Effects of Attempts to Balance Power ........ 37
   4) Informed Decision-making and a Final Outcome ........................................ 38
   5) The Overly Zealous Evaluator……………… 40
   6) Methods to Ease the Evaluative Mediator’s Dilemma .................................. 41
c. Transformative Style .................................... 45
2. Mediation Models......................................... 45

VI. RECOMMENDATIONS TO ALLEVIATE THE TENSION BETWEEN MEDIATOR STYLES AND IMPARTIALITY REQUIREMENTS ......... 46
A. Alternative 1: The No Action Approach to Developing Impartiality Requirements ........................................ 47
B. Alternative 2: Redefine Mediation to Delete the Requirement of Mediator Impartiality ................................. 48
C. Alternative 3: Redefine Mediation to Suit Mediator Styles – the Contract Approach ........................................ 52
   1. The Role of a Facilitative Mediator in a Mediation ....... 54
   2. The Role of an Evaluative Mediator in a Mediated Settlement Conference ........................................ 54
D. Alternative 4: Create a Hierarchy of Values Within a Set of Mediation Standards ........................................ 55

VII. CONCLUSION ............................................. 56
I. INTRODUCTION

Mediator styles – sometimes referred to as mediation models – are terms used to describe a neutral’s approach or conduct during mediation. Many scholars have categorized mediator styles using a variety of terms and concepts. Few have examined mediator styles in conjunction with impartiality provisions of newly developing ethical standards of conduct. Tension has developed because mediators are guided by written definitions and ethical standards, yet their actual roles may be dictated by their own personal style, values, and commercial needs in conjunction with the participants’ particular needs.

This article examines current laws, policies, and procedures that define and attempt to regulate the mediation practice. Specifically, this article concentrates on three inter-related aspects of mediation: 1) definitions of the term “mediation” to highlight the prominent role that mediator impartiality plays in the mediation process; 2) impartiality requirements found in ethical standards of conduct; and 3) mediator styles and mediation models (hereafter referred to collectively as mediator styles, unless otherwise specified). The objective is to illustrate the tension created by requirements of mediator neutrality and impartiality when applied to various mediator styles, and to propose possible solutions to alleviate the tension.

As a side note, this author acknowledges that scholars and practitioners have been debating the appropriateness of evaluative and facilitative mediator styles for more than a decade. This article does not seek to participate in such a debate. Rather, it simply describes the various styles employed by mediators and summarizes some of the criticisms to the extent they relate to mediator neutrality and impartiality.

This article is divided into several main sections. Section II examines definitions of “mediation.” Although no universally accepted definition exists, most definitions include key
terms and provisions such as a neutral third party, mediator impartiality, and party self-determination. Section III summarizes some of the impartiality provisions found in ethical standards of conduct designed to regulate the mediation practice with respect to civil disputes.\footnote{This article is limited to a discussion of general civil standards of conduct and does not address specific subject areas such as the regulation of family law and divorce mediation which are often regulated by separate rules and procedures.} Interestingly, every set of standards requires mediator impartiality although the intent behind such provisions varies. Section IV examines mediator styles and mediation models. Section V provides an in-depth analysis of the mediator’s dilemma: how can a mediator be neutral and impartial when engaged in certain mediation styles.

This author concludes that mediator styles can and do affect the mediator’s ability to remain neutral and impartial. Section VI, therefore, poses recommendations to help alleviate the tension between mediator styles and impartiality requirements. In turn, these recommendations can be used to initiate a dialogue about the regulation of the mediation process, including the appropriateness of mediation definitions. The conclusion is set forth in Section VII.

II. THE DEFINING NATURE OF MEDIATION

From the earliest development of mediation, scholars, practicing mediators, regulators, and legislators have attempted to define the term, “mediation.” Most agree that mediation involves a neutral and impartial third-party who assists others in resolving a dispute. Simplistically, mediation is facilitated negotiation because the mediator has no decision-making authority. The various definitions include other key terms and many acknowledge varying styles, techniques, and orientations of mediation. The conventional definitions and styles are significant as ethical standards develop and evolve, and indeed begin to clash with one another. As Professor Joseph Stulberg wrote over two decades ago: “paradoxically, while the use of
mediation has expanded, a common understanding as to what constitutes mediation has weakened . . . . It is important . . . to identify and clarify the principles and dynamics which together constitute mediation as a dispute settlement procedure.”\textsuperscript{2} The natural starting point is to examine and recognize definitions of mediation before addressing other aspects of this article.

A. \textit{The Definition of “Mediation”}

The term, “mediation,” does not have one established definition, although it includes many universally-accepted components. Among representative examples, mediation has been defined as:

- “[F]acilitated negotiation.”\textsuperscript{3}
- “[A]n informal process in which a neutral third party with no power to impose a resolution helps the disputing parties to try to reach a mutually acceptable settlement.”\textsuperscript{4}
- “Third party dispute settlement technique integrally related to the negotiation process whereby a skilled, disinterested neutral assists parties in changing their minds over conflicting needs mainly through the noncompulsory applicants of various forms of persuasion in order to reach a viable agreement on terms at issue.”\textsuperscript{5}
- “[T]he intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist

\textsuperscript{3} \textit{STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION} 201 (2001).
\textsuperscript{5} \textit{DOUGLAS H. YARN, editor, DICTIONARY OF CONFLICT RESOLUTION} 275 (1999).
disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.”

- “[A] process involving a neutral third party in a purely facilitative, process-director’s role, who makes no substantive contribution to the parties’ struggle with the dispute.”

- “A process in which the disputing parties select a neutral third party to assist them in reaching a settlement of the dispute. The process is private, voluntary, informal and nonbinding. The mediator has no power to impose a settlement.”

- “[A]n impartial third party helps others negotiate to resolve a dispute or plan a transaction. Unlike a judge or arbitrator, the mediator lacks authority to impose a solution.”

- “A voluntary process in which an impartial mediator actively assists disputants in identifying and clarifying issues of concern and in designing and agreeing to solutions for those issues.”

Some of the foregoing definitions highlight the consensual and informal process inherent in mediations. Requirements of fairness and just result are noticeably absent from the definitions. Most definitions, however, include key provisions: the mediator’s ability to be neutral and impartial and the parties’ ability to negotiate a resolution of their own choosing – party self-determination. The following examines the meaning of “neutrality,” “impartiality”

---

6 Id. at 277.
7 DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS § 10 (1996) (MARJORIE CORMAN AARON, contributing author) (hereafter “GOLANN, MEDIATING LEGAL DISPUTES”) (offering a definition of mediation that essentially precludes mediator evaluation).
8 YARN, supra note 5, at 277. In a similar definition, Dwight Golann adds that the following definition does not preclude a mediator from providing some evaluation: “a process in which disputing parties are assisted by a neutral third party to negotiate a resolution of their dispute, where the neutral third party is not given the power to impose a resolution upon them.” GOLANN, MEDIATING LEGAL DISPUTES, supra note 7, § 10.
9 LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 313 (2d ed. 2003).
10 YARN, supra note 5, at 278.
and “party self-determination” as applied to mediations. Understanding these key terms is a prerequisite to the study of various mediator styles.

B. Key Provisions

1. The Significance of Mediation Neutrality

Neutrality means the refusal to ally with, support, or favor any side in a dispute; “belonging to neither side nor party.” A mediator’s neutrality is her ability to be objective while facilitating communication among negotiating parties. Neutrality can be both transparent and opaque: “transparent because it operates on the basis of widely held assumptions about power and conflict, and opaque because it is exceedingly difficult to raise questions about the nature and practice of neutrality from within this consensus.”

2. The Significance of Mediator Impartiality

“Impartiality means freedom from favoritism and bias in word, action and appearance.” The key to this requirement is the mediator’s ability to serve all participants concurrently. A mediator must not exhibit any partiality or bias based on any party’s background, personal characteristics, or performance during the mediation. The role of impartiality should apply to all aspects of the mediation, including communication (both the spoken and the unspoken), the way questions are asked and positions and interests are reframed, the use and arrangement of furniture, seating arrangements, and methods to greet the participants as they arrive for the

---

11 THE AMERICAN HERITAGE DICTIONARY 460 (1983 Dell Publishing Co., Inc.).
12 See JAMES J. ALFINI et al., MEDIATION THEORY AND PRACTICE 12 (2001).
14 PHYLLIS BERNARD & BRYANT GARTH, DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 68 (2002) (citing Hawaii Standards, III (l)).
15 Id.
16 Id.
mediation.\textsuperscript{17} Impartiality also has been applied to relational issues such as conflict of interest concerns between the mediator and any of the participants.

Based on the principle of “impartiality,” many scholars debate whether mediators should report to an appropriate authority regarding a participant’s “bad faith” behavior and whether such reports infringe on a mediator’s impartiality.\textsuperscript{18} Mediator reporting also may affect procedural fairness in a mediation and lower the parties’ sense of expectation and empowerment.\textsuperscript{19} A mediator must realize that not only her impartiality is at stake, but also the appearance of impartiality.

When mediation professionals compare the concepts of neutrality and impartiality, some equate neutrality to the mediation process, including its outcome. Others equate impartiality to the relationship between the mediator and participants. Still others refer to the two terms interchangeably.\textsuperscript{20} For purposes of this article, the terms are used interchangeably unless otherwise designated.

3. The Requirement of Party Self-Determination

A third general requirement of mediation is party self-determination, considered the “fundamental principle of mediation.”\textsuperscript{21} Party autonomy is evidenced not only by references to the word, self-determination, but also by a mediator’s responsibility to help parties reach a

\textsuperscript{17} See Karen A. Zerhusen, Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator, 81 KY. L.J. 1165, 1169-70 (1993) (noting that a mediator’s impartiality applies to all aspects of the mediation process, from the arrangement of furniture to the way the mediator poses positioning statements).

\textsuperscript{18} See Carol L. Izumi and Homer C. La Rue, Symposium: Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent, 2003 J. DISP. RESOL. 67 (2003) (discussing the pros and cons of a mediator’s authority to report “bad faith” behavior to outside sources such as courts and administrative agencies).

\textsuperscript{19} Id. at 74.

\textsuperscript{20} See id. at 83-87 (using the terms “neutrality” and “impartiality” interchangeably as the authors discuss the standard of conduct for mediator impartiality).

\textsuperscript{21} BERNARD & GARTH, supra note 14, at 73.
voluntary and informed decision.\textsuperscript{22} To achieve party autonomy, a mediator may provide information to the parties regarding the mediation process, raise issues, and help parties explore various options.\textsuperscript{23} The mediator must be careful not to jeopardize her neutrality and impartiality. Likewise, she must be careful in the extent to which she is directive because many ethical standards specifically preclude a mediator from coercing the parties to settle or otherwise exerting undue influence.\textsuperscript{24}

A question arises whether a mediator jeopardizes party self-determination by raising issues or suggesting options, especially when done after the parties have agreed to a settlement, albeit one that appears unfair or one-sided. These concerns also affect the mediator’s duty of neutrality and impartiality because a simple question or suggestion may appear to advance only one participant’s interests. It is easy to see that the principle of party self-determination is tied directly to, and affected by, the mediator’s duties of neutrality and impartiality. Even though this article focuses on the concepts of mediator neutrality and impartiality, discussions of party self-determination are included since all of these concepts intricately interface with one another.

### III. IMPARTIALITY REQUIREMENTS IN ETHICAL STANDARDS OF CONDUCT

During the last two decades, many governmental entities and professional organizations have begun to develop ethical standards of conduct for mediators (Standards). This author has conducted extensive research regarding Standards.\textsuperscript{25} As of June 1, 2007, this author has examined The Model Standards of Conduct for Mediators including its 2005 revision (Model Standards).

\begin{flushleft}
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 73-74.
\end{flushleft}
Standards), the Uniform Mediation Act (UMA), and state-wide Standards found in thirty-six states, including twenty-seven court-connected Standards and thirteen Standards promulgated by professional organizations.

Although the Standards are varied in form and content, they all require mediator impartiality. Nevertheless, the impartiality provisions are far from uniform in scope. Some Standards have extensive definitions of impartiality, some have virtually nothing other than a statement that a mediator shall maintain impartiality, and others are somewhere in between. Some impartiality standards speak to conflict of interest concerns between the mediator and participants rather than address mediator behavior. All of these aspects of impartiality standards are discussed in this Section III.

A. The Model Standards of Conduct

The Model Standards define impartiality as “freedom from favoritism, bias or prejudice,” avoiding even the appearance of partiality. Additional comments instruct a mediator to maintain impartiality in respect to the participants’ “personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.” The Model Standards provide fairly straightforward guidance, yet leave room for interpretation, thereby acknowledging the flexible nature of the mediation process.

B. The Uniform Mediation Act

---

26 The 2005 revision of the Model Standards of Conduct for Mediators can be found at http://www.abanet.org/dispute.
28 See Exon, Why Ethical Standards Create Chaos, supra note 25, at Appendix A. Note that some states have both court-connected standards and standards promulgated by a professional organization. As a result, this author examined forty sets of Standards for the thirty-six states.
31 Id. at Standard II.B.1.
Technically the UMA is not an ethical code of conduct like other Standards. It focuses primarily on confidentiality and privilege issues, leaving ethical Standards to the expertise of professional organizations such as the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution. One exception exists regarding mediator impartiality and that portion of the UMA is summarized in this Section III.B.

The Association for Conflict Resolution (ACR) intended that both the mediator and the process be neutral; therefore, it urged the drafters of the UMA to include mediator impartiality as part of the definition of “mediator.” The drafters of the UMA refused.

The principle of impartiality is addressed in Section 9 of the UMA as it relates to conflict of interest concerns. A mediator must disclose facts that might affect a mediator’s impartiality, including financial, personal interest in the outcome, and existing or past relationships. If any conflict of interest exists, the participants may waive it by agreeing to allow the mediator to proceed. Otherwise, Section 9 simply states that a “mediator must be impartial.”

Although not specifically referring to “impartiality,” Section 7 of the UMA aligns with the notion of mediator impartiality because it prohibits mediator reports to outside authorities such as courts and administrative agencies. The non-reporting principle is consistent with the

---

33 David A. Hoffman, supra note 32, at 65.
37 Id. at § 9(g).
38 Id.
separate confidentiality principle, and fosters public confidence in a neutral mediator and neutral process.40

C. Various State Standards

Some Standards provide helpful definitions of impartiality. Many Standards include definitions of impartiality similar to the Model Standards. For example, the Minnesota Code of Ethics for Neutrals and the Montana Mediation Association Standards of Practice Ethical Guidelines for Full Members both define impartiality as “freedom from favoritism or bias either by word or action, and a commitment to serve all parties as opposed to a single party.”41 Massachusetts simply defines “impartiality” as “freedom from favoritism and bias in conduct as well as appearance.”42 Twelve other states incorporate similar definitions into their Standards.43

39 Id. § 8.
40 Id. § 7, Comment 1.
42 ALM SUP. JUD. CT. RULE 1:18, § 9(b) (2007).
43 Alabama Code of Ethics for Mediators, Standard 5(a), available at http://alabammaadr.org/flashSite/Standards/al_code_ethics.html (Mar. 1, 1996) (defining impartiality as “freedom from favoritism or bias in work, action, and appearance, impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward agreement.”); Arkansas Alternative Dispute Resolution Commission Requirements for the Conduct of Mediation and Mediators, Standard 5.A, available at http://courts.state.ar.us/pdf/0516_conduct.pdf (April 13, 2001) (defining impartiality as “freedom from favoritism or bias in work, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward agreement.”); FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.330(a) (2006) (defining mediator impartiality as “freedom from favoritism or bias in word, action, or appearance” and instructing the mediator to assist all parties rather than any one person); Guidelines for Hawaii Mediators, Guideline III.1., attached to In the Matter of the Guidelines for Hawaii Mediators (July 11, 2002) (defining impartiality as “freedom from favoritism and bias in word, action, and appearance. Impartiality implies a commitment to aid all participants, as opposed to a single individual in reaching a mutually satisfactory agreement.”); Maryland Standards of Conduct for Mediators II.A & B (April 2006), available at http://www.courts.state.md.us/macro/rules_standards.html (defining impartiality as “freedom from favoritism, bias or prejudice”); Nebraska Office of Dispute Resolution, Manual of Standards and Ethics for Center Mediators, Directors and Staff III.A.1 (Rev. June, 2001) (“A mediator should strive to maintain impartiality towards all parties and be free of favoritism or bias in appearance, word, and action. A mediator is committed to aiding all parties, as opposed to a single party, in exploring the possibilities for resolution.”); New Mexico Mediation Ass’n Code of Ethical Conduct, #4.B (1995), available at http://cio.state.nm.us/content/guidelinesStd/archive/adr/NMMACodeofEthics.pdf (“Impartiality, in word or action means: i) freedom from bias or favoritism. ii) A commitment to aid all parties equally in reaching a mutually satisfactory agreement. iii) That a mediator will not play an adversarial role in the process of dispute resolution.”);
Some Standards caution mediators to avoid partiality, including the appearance of partiality, or require a mediator to “avoid any conduct that gives the appearance of either favoring or disfavoring any party.” Like the Model Standards, some state Standards warn mediators about prejudice or partiality based on “any party’s personal characteristics, background, or behavior during the mediation.

In conjunction with impartiality provisions, a mediator may raise questions to enable the parties to consider the “fairness, equity, and feasibility” of proposed settlement options, and may withdraw from the mediation if she believes she can no longer maintain impartiality.

N.C. PROF. CONDUCT MEDIATORS Rule II.A. (2007) (defining impartiality as the “absence of prejudice or bias in word and action. . . [and] a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.”); Tenn. Sup. Ct. Rule 31, App. A, § 6(a) (2006) (“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 conducting Rule 31 ADR processes.”); Texas Ethical Guidelines for Mediators, Comment to Guideline 9, available at http://www.texasadr.org/ethicalguidelines.html (last visited June 5, 2007) (“Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement.”); Tenn. Code of Ethics for ADR Providers, URCADR Rule 104, Canon III(a)(1) (2007) (defining impartial as “free from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual”); Virginia Standards of Ethics and Professional Responsibility for Certified Mediators G & H (May 1, 2005), available at http://www.courts.state.va.us/soe/soe.htm (defining impartiality as “freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties in moving toward an agreement.”).


mediator may withdraw either based on her personal opinion regarding impartiality or based on a party’s request.⁴⁸

Some Standards are rather oblique in defining the concept of impartiality by simply requiring a mediator to be “impartial and evenhanded.”⁴⁹ Some track language similar to the UMA. For example, Michigan’s impartiality standard states:

A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is possible to 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.⁵⁰

Some states have the vaguest standards of impartiality by merely requiring a mediator to maintain impartiality or conduct the mediation in an impartial manner.⁵¹ One example requires mediators to “approach the mediation process in an impartial manner. If at any time . . . [mediators] are unable to do so, . . . [they] withdraw from the mediation process.”⁵² Although

---

⁴⁹ Miss. Court-Annexed Mediation Rules for Civil Litigation XV.B, available at http://www.mssc.state.ms.us/rules/AllRulesText.asp?IDNum=37 (June 27, 2002). Utah also requires a mediator to conduct proceedings in an “evenhanded manner,” but is much more specific than Mississippi. Utah Code of Ethics for ADR Providers, Rule 104, Canon III(a) ADR Providers Should Conduct the Proceedings Fairly and Diligently (2007). Utah goes on to require a mediator to “treat all parties with equality and fairness at all stages of the proceedings,” id., and then specifically defines “impartial.” Id. at Canon III(a)(1).
⁵⁰ Mich. Sup. Ct. Standards of Conduct for Mediators, Standard 3, (Jan. 4, 2001), available at http://www.courts.michigan.gov/scao/dispute/odr.pdf; see S.C. Rules, Cir. Ct. ADR Appx. B, Standards of Conduct for Mediators, Standard II (2006) (“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.”).
these state Standards do not specifically define impartiality, most of them focus on conflict of interest concerns rather than mediator behavior.

Thus, Standards may prohibit situations in which the mediator is related to or employed by one of the parties, or may require the mediator to disclose dealings or relationships that may raise questions about impartiality. Some Standards are more specific because they require a mediator to disclose whether he or she provided prior services to any of the participants, or simply has had a personal or professional relationship with one of the parties. In some instances, a mediator may not have an interest in the outcome of the dispute, or specifically precludes a financial interest in the outcome other than a fee arrangement. Without defining “impartiality,” several Standards require mediators to disclose prior or existing affiliations with any party and preclude any financial or other interest in the outcome of the mediation.

Finally, some Standards take a more thorough approach and do not commingle the concepts of mediator impartiality with conflicts of interest. Instead, the Standards set forth separate provisions for impartiality and conflicts of interest.

---

56 Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, CAL. RULES OF COURT 3.855(b) (2007).
58 Idaho Mediation Ass’n Standards of Prac. for Idaho Mediators III.4, available at http://www.idahomediation.org/sop.pdf (last visited June 6, 2007); see Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, CAL. RULES OF COURT 3.855(b) (2007) (noting that a mediator must inform participants about matters that may raise questions of impartiality, including those of a “financial nature”).
60 See, e.g., Maryland Standards of Conduct for Mediators II & III (April 2006), available at http://www.courts.state.md.us/macro/rules_standards.html; MISS. COURT-ANNEXED MEDIATION RULES FOR CIVIL
As can be seen from this sampling of Standards, principles of impartiality are not standardized. Some definitions relate to mediator conduct while others relate more to conflict of interest concerns. Many of the definitions of impartiality are insignificant because they simply require a mediator to be impartial; thus defining themselves by using recurrent terminology. Such an approach may not be helpful to mediators because it is too easy for them to interpret the meaning of impartiality in very different ways based on personal custom and tradition. On the other hand, the lack of complete explanations may be deemed necessary to maintain mediation as a flexible, fluid process.

Nonetheless, the lack of clarity in many of the impartiality provisions will enhance mediator interpretations of impartiality within their respective states, which could undermine the integrity and credibility of the mediation practice.

IV. MEDIATOR STYLES AND MEDIATION MODELS

A mediator’s approach to mediation may dictate the style with which she uses. Style refers to inter-personal conduct. A mediator may adopt one or a combination of several styles of mediation, and in fact, most mediators mix their styles and techniques in individual mediations.

---

61 See John S. Murray, Understanding Competing Theories of Negotiation, 2 NEGOTIATION J. 179, 180 (1986).
Many scholars have used descriptive words and phrases to define mediator styles and mediation models. The two most common styles are known as evaluative and facilitative or interest-based. Professor Leonard L. Riskin pioneered these mediator styles as he classified strategies and techniques used by mediators.63

Professor Riskin developed a grid based on two continuums. The horizontal continuum, categorized as the Problem-Definition Continuum, recognizes the goals of the mediation. One end represents a narrow view of the parties’ goals, such as how much money to pay to a party. The other end relates to a broad view of the goals. The broad view recognizes the economics of paying money, but goes farther by assessing underlying interests and how the parties may use their interests creatively to transform the dispute.64 The vertical continuum relates to the mediator’s activities or her individual style; one end signifies an evaluative mediator while the other relates to a facilitative mediator.65

Professor Riskin’s work has had a tremendous impact on the mediation field. It has changed the way educators and trainers teach mediation skills. Practitioners have become more thoughtful in their approaches. Probably the most important impact has been the dialogue that Riskin’s work has engendered. Professor Riskin acknowledges inherent problems with his grid – problems that have created confusion and misunderstanding of what he wanted to accomplish. As a result, he has proposed changing the words “evaluative” and “facilitative” to “directive” and “elicitive,” respectively.66 Professor Riskin also has proposed new grids that emphasize

64 Riskin, Grid for the Perplexed, supra note 63, at 17.
65 Id.
66 Leonard L. Riskin, Decisionmaking in Mediation: The New Old Grid and the New New Grid System, 79 NOTRE DAME L. REV. 1 (2003-2004) (hereafter “Riskin, Decisionmaking in Mediation”). Professor Riskin believes that the new terminology more closely aligns with his goal for the role-of-the mediator continuum, which relates to the mediator’s effect on party self-determination. Furthermore, he believes that “directive” is more descriptive than
mediator influences as well as influences by participants. For purposes of this article, however, references will continue to be made to evaluative and facilitative styles since these terms are widely adopted and used throughout the mediation field.

Professor Riskin and others acknowledge that many dynamics may affect a mediator’s style, including personal beliefs (predispositions), timing, participant influences, and the subject matter of the mediation. Thus, a mediator may be more evaluative in an employment case and more facilitative in a neighborhood dispute. A mediator may begin a mediation using facilitative techniques and at the end of a long day, urge the participants toward settlement using evaluative techniques. A mediator may combine both styles by proposing several alternatives in an evaluative style and then fostering communication in a facilitative manner so that participants may discuss the proposal. Furthermore, mediator styles may relate to substantive issues as well as process issues.

Based on the interrelated continuums of Professor Riskin’s grid, a mediator may assume specific orientations within each facilitative and evaluative style. Rather than focus on a mediator’s ability to facilitate or evaluate a broad or narrow scope of the subject matter, the following subsections contain generalized descriptions of mediator styles.

A. Facilitative Mediator

A facilitative mediation style emphasizes party interests. Some refer to the facilitative style as interest-based mediation. The facilitative mediator is seen as a third-party educator or facilitator, exemplified best because she seeks to emphasize the parties’ own problem-solving,
creativity, and personal evaluations. The mediator encourages party attendance, facilitates communication, poses questions to uncover the parties’ underlying needs and interests, helps educate the parties by assisting them to understand the other’s needs and interests, and otherwise attempts to provide a comfortable forum in which the parties can develop their own creative solutions to a problem.

Facilitative mediation may seem therapeutic due to the nature of its outcome – an emphasis on information and understanding to reach an agreement rather than a mediator’s influence or coercion. This mediation style is much more “touchy feely” than evaluative mediation. Hence facilitative mediators may be referred to as “‘soft,’ ‘touchy-feely,’ ‘therapeutic,’ ‘potted plant,’ or ‘new age-y.’”

A “productive facilitative mediator” may have extensive process expertise; expertise regarding substantive issues is not as important although it may be another valuable asset. As a facilitative mediator approaches the narrow end of Riskin’s continuum, she may help the parties evaluate their proposals through her questioning. Sometimes, the mediator may encourage participants to brainstorm possible solutions.

The facilitative mediator’s goal is to avoid a directive approach while concentrating on party empowerment and self-determination. A facilitative mediator may act in a directive

---


71 Riskin, Grid for the Perplexed, supra note 63, at 29-30, 32-34; Lande, Sophisticated Mediation Theory, supra note 62, at 321, 322 (“Mediators using a facilitative style focus on eliciting the principals’ opinions and refrain from pressing their own opinions about preferable settlement options.”).


74 Levin, supra note 72, at 268.

75 Riskin, Grid for the Perplexed, supra note 63, at 29.

capacity to the extent the mediator decides which questions to pose, which solutions to emphasize, and how she engages the participants. Nevertheless, the facilitative mediator should be capable of maintaining neutrality and impartiality as long as she does not require participants to accept her suggestions.

B. Evaluative Mediator

Margaret Shaw provides an insightful assessment of evaluative mediators; they use a “continuum of behaviors” that include questioning regarding strengths and weaknesses of a case, providing information, offering advice whether procedural or substantive, predicting possible outcomes by a court adjudication, and suggesting ways to resolve a dispute.\textsuperscript{77} Despite Shaw’s assessment, some scholars interpret an evaluative style in diverse ways.

Some prefer that a mediator evaluate issue by issue.\textsuperscript{78} Others use “less intrusive techniques” by recommending a “range of fair outcomes.”\textsuperscript{79} Under the latter method, an evaluative mediator predicts how she thinks a fair and reasonable person might settle. Others prefer the Socratic method of questioning. By posing questions in a way to educate the parties, the mediator offers a reality check.\textsuperscript{80} An evaluative mediator may go so far as to advocate that the parties accept a particular settlement proposal. Irrespective of the various interpretations, an evaluative mediator becomes directive in her approach, no matter what aspect of the mediation she emphasizes.\textsuperscript{81}

\textsuperscript{78} Maureen E. Laflin, \textit{Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators}, 14 ND J. L. ETHICS & PUB POL’Y 479, 493 (2000).
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 493-94.
\textsuperscript{81} Riskin, \textit{Grid for the Perplexed}, supra note 63 at 26-28.
A mediator’s ability to evaluate appropriately and effectively depends on her area of expertise. Most of the debate regarding evaluative mediators focuses on the lawyer-mediator who provides legal advice or legal information. An evaluative mediator, however, may emphasize other types of rights. A psychologist-mediator may focus on psychological positions and issues and a social worker-mediator may focus on the issues of her profession. Other areas that lend themselves to evaluative mediations include social, environmental, and public policy issues.

Some scholars have referred to evaluative mediators as more directive in their approach, donning such names as “‘muscle mediators,’ ‘Rambo mediators,’ [and] ‘Attila the mediator(s).’” In many instances, a mediator engages in an evaluative style for court-connected cases and in cases in which the parties are represented by counsel. The mediator may attempt to influence the participants to adopt her opinion, which may compromise her neutrality and impartiality. Many view these types of mediations as akin to a settlement conference.

C. Transformative Mediator

Over a decade ago, Robert A. Baruch Bush and Joseph P. Folger pioneered the concept of a transformative mediator. They point out that most mediations focus on problem-solving outcomes; but, the transformative mediator offers a different approach. She helps the parties focus on their relationship through their conflict interactions. In doing so, the transformative

---

82 Lande, Lawyering and Mediation Transformation, supra note 73, at 850.
83 Lande, Sophisticated Mediation Theory, supra note 62, at 322-23.
84 Levin, supra note 72, at 269.
85 BUSH & FOLGER, supra note 4.
mediator helps the parties focus their communication on their conflict and how productive changes may affect the conflict.86

The shift is away from a problem-solving outcome and toward a more open communication style; parties achieve “moral growth” by emphasizing “empowerment and recognition.”87 In other words, “the emphasis is on shifts in parties’ interaction, shifts from relative weakness to greater strength (the empowerment dimension) and movement from self-absorption to openness (the recognition dimension).”88 Recognition applies to a person’s ability to empathize and begin to understand the other party’s perspectives and point of view, not receiving recognition from another.89

The transformative mediator encourages parties to define issues and decide the terms of settlement themselves by helping them understand the other party’s perspective. Through this style of mediation, the parties may grow, develop, and change their own perspectives to become better human beings.90 Ultimately, transformative mediation can transform the character of the individual disputants as well as society in general.91

Although transformative mediation does not accentuate problem-solving, parties may settle an underlying dispute as part of their relational transformation. Hence, the transformative mediation style is not mutually exclusive from the problem-solving approach seen in facilitative and evaluative mediations.92

---

87 BUSH & FOLGER, supra note 4, at 2-12. The authors define “empowerment” as “the restoration to individuals of a sense of their own value and strength and their own capacity to handle life’s problems.” Id. at 2. “Recognition” is “the evocation in individuals of acknowledgment and empathy for the situation and problems of others.” Id.
88 Folger, supra note 86, at 393.
89 BUSH & FOLGER, supra note 4, at 96.
90 BUSH & FOLGER, supra note 4, at 2-12.
91 Id. at 20.
92 Id. at 11-12.
D.  Additional Mediation Styles and Models

As the mediation practice develops, some scholars venture out to coin new terms to define a mediator’s style or a mediation model. Notwithstanding the varied terminology, most can be classified as either facilitative or evaluative.

1.  “Trickster,” “Magician” and “Prime Negotiator”

Robert D. Benjamin opines that a mediator is a “trickster” because she manages and survives conflict rather than trying to defeat or stop it.93 The “trickster-mediator” accomplishes this task by offering a “third perspective that shares traits of both sides of the dichotomy, thereby transforming a conflicted dyad into a more harmonious triad.”94 The purpose behind the “trickster mediator” seems appropriate because the mediator reframes the conflict into an impartial third perspective. Yet, the terminology itself – “trickster” – is offensive on its face when referring to a mediator and appears to conflict with a neutral third party’s goal to help others reach peace and resolve conflict.

Others have softened the “trickster” phraseology. Professor John W. Cooley refers to mediators as “magicians.”95 James C. Freund refers to mediators as the “prime negotiator” because he believes the mediator becomes an integral part of the negotiation that takes place during a mediation.96

In some sense, these scholars are correct because they refer to the creativity and ingenuity of mediators who can reframe issues, add an impartial third story, pose alternative solutions, and

---

93 Robert D. Benjamin, Bringing Peace into the Room: The Personal Qualities of a Mediator, Managing the Natural Energy of Conflict: Mediators, Tricksters and the Constructive Uses of Deception (2003) (noting that “personality traits that best serve mediators may not be the most obvious or commonly presented. They are as follows: (1) confused, (2) voyeuristic, (3) compulsive, and (4) marginal.”).
94 Id.
otherwise think outside the box. In some sense, the scholars may go too far to the extent that the mediator emphasizes a third perspective that takes on a shape of its own or at a minimum, the mediator’s personal orientation. Irrespective of the label given to the mediator’s style, the mediator’s directive approach may infringe on the parties’ rights of self-determination, which in turn may affect the mediator’s neutrality and impartiality.

2. Dictates of Commercial Needs

The commercial nature of the mediator’s role may influence her neutrality and impartiality, especially in light of who she considers to be her client. If a mediator considers attorney advocates to be her clients, she may assert a style that she thinks the attorneys desire. She may be directive in her approach to encourage (and at times even force) parties to reach a settlement. This style may be important to the mediator who sells her services based on her settlement record.

Business requirements also may be important to the party who is searching for the type of mediator who will provide the best service under the facts of a case. For example, in a highly specialized situation such as a construction defect case involving many participants, the parties and their attorneys may want an attorney-mediator or a retired judge who has the expertise to provide a highly evaluative mediation. Even when attorneys are not involved in the mediation, a mediator may continue to exhibit the directive or evaluative style, although she may be more amenable to a facilitative style by focusing on the parties’ underlying interests.

In each situation, the mediator may attempt to appease clients to obtain future referrals rather than focus on the process. If the mediator exhibits favoritism toward a participant, she may jeopardize her neutrality. The end result is that a client’s commercial needs may dictate the

---

97 During the 2004 Annual Conference of the Association for Conflict Resolution, a comment was made in one session that the mediator would do whatever was necessary for the money.
mediator’s behavior in spite of the scholarly approach set forth in ethical standards of conduct.98 Commercial mediators’ willingness to go beyond ethical standards is proof that the Standards, while well meant, are not always followed.

Professor Robert A. Baruch Bush views commercialism from a different perspective. He examines a mediator’s ability to sell her services and the corresponding need of the client to know what he or she is getting when searching for a mediator.99 Rather than differentiate between evaluative and facilitative mediators, Professor Baruch Bush emphasizes mediator goals and enumerates mediators as “‘settlers,’ ‘fixers,’ ‘protectors,’ ‘reconcilers’ and ‘empowerors.’”100

The settlor’s job is to settle as many mediations as quickly as possible. If this is the case, arguably a mediator will be directive in her approach and may even cross the line to coerce the parties, knowing the primary purpose is to settle the dispute.

The fixer mediator emphasizes problem solving through solutions. Her goal is to relieve the parties of their problem while finding a solution that is best for everyone.101 This type of mediator needs to be creative and knowledgeable; more than likely this mediator will use a facilitative approach. The fixer mediator should be able to maintain neutrality and impartiality as long as she does not adopt the alternatives that she proposes.

The remaining types of mediators are “variants of the general ‘fixer’ species.”102 Protectors strive to create a fair process, especially for the weaker of the parties. They attempt to ensure that no one is hurt or taken advantage of through the mediation process. Sometimes

---

98 See DEBORAH M. KOLB AND KENNETH KRESSEL, THE REALITIES OF MAKING TALK WORK, WHEN TALK WORKS: PROFILES OF MEDIATORS 461 (2001) (noting that mediators’ needs to sell themselves may result in them exerting “pressure tactics and arm twisting” which ultimately jeopardizes their neutrality).
99 Lande, Lawyering and Mediation Transformation, supra note 73, at 851 (citing to an unpublished manuscript written by Professor Robert A. Baruch Bush, Ethical Dilemmas in Mediation 17-18 (1989)).
100 Id.
101 Id. at 852.
102 Id.
protectors go so far as to ensure that the final outcome is fair. In an attempt to help the weaker of the parties and ensure substantive fairness of the outcome, observably the mediator steps out of her neutral and impartial role. For, as soon as a mediator begins to assist one party to the disadvantage of the other party, a mediator is no longer neutral and impartial.

Two final mediator types may conform to neutrality and impartiality values. The reconcilor helps the parties concentrate on understanding each other and focuses on the quality of the mediation rather than attempt a final settlement. Reconcilers are sometimes referred to as “therapeutic” or “sensitive.” Finally some mediators are empowerors because their goal is party self-determination. Empoweror mediators may generate options but remain detached from them so that the parties may settle voluntarily. Some refer to this type of mediator as a fixer who does not take a directive approach. Clearly, reconcilor and empoweror styles of mediator do not run afoul of neutrality and impartiality.

3. “Michigan Mediation”

The “Michigan” style of mediation resembles arbitration because a neutral third party renders a decision. In this type of mediation, court rules require a neutral evaluation. Normally the court selects three evaluators from a panel of attorneys. After reviewing written briefs and hearing some argument from counsel, the panel makes an “award.” Although the award is not binding, the rejecting party will be sanctioned if it fails to obtain a better result at trial.

In 2000, the Michigan Supreme Court revised its Court Rules regarding Alternative Dispute Resolution primarily to change terminology. What was known as the “Michigan Mediation”

103 Id.
104 Id. at 853.
105 Id.
107 Id.
Mediation” pursuant to Michigan Court Rule 2.403 changed because the term “mediation” was changed to “case evaluation.” A new court rule was added – Rule 2.411 – to describe mediation under generally recognized principles consistent with the definitions of mediation provided in Section II of this article.

Other variations of the traditional “Michigan Mediation” continue to exist. Florida has a statute that regulates Campus Master Plans and Campus Development Agreements. It requires that parties mediate disputes that arise while implementing executed campus development agreements. Pursuant to this mandate, each party selects a mediator and the two mediators in turn select a neutral third mediator. The panel of three mediators issues a recommendation to resolve the dispute.

Attorney Laurence D. Connor uses a hybrid evaluation-facilitation type of mediation similar to the “Michigan Mediation.” He refers to himself as a “special” mediator. First he evaluates the mediation similar to the Michigan Mediation, although he does not disclose his recommended award. Then he begins the second phase of the mediation, using a facilitative style. During the facilitative phase, Mr. Connor uses both joint sessions and private caucuses and relies extensively on party involvement. If the parties cannot settle the matter, Mr. Connor terminates the mediation and discloses his award, including the reasons for it. Often on the eve of trial the parties may rely on Mr. Connor’s recommended award to settle the matter between them.

4. The Effect of Social Norms on Mediation

---

110 FLA. STAT. ch. 240.155 (1998). Typically, however, Florida prohibits mediators of civil court cases from offering an opinion regarding a final court outcome.
111 Connor, supra note 106.
Societal roles may affect a mediator’s style. Professor Ellen Waldman theorizes that mediations can be classified into “three separate models.”  

First, the “norm-generating” model is seen as a traditional mediation model by including the typical stages of introduction, storytelling, exchange of party views, generation of options, selection of options, and agreement writing. The mediator reframes issues and helps the parties manage their conflict. The parties establish their own norms so to speak by creating solutions based on their personal needs rather than social norms.

The second model is coined the “norm-educating model.” It is basically the same as the norm-generating model except the mediator goes farther by referring to “relevant social and legal norms.” The parties maintain autonomy by deciding whether or not their final resolution conforms to the social or legal norms. This style of mediator looks like a broad facilitator under Riskin’s grid. For example, in a divorce mediation involving children, a mediator might refer to relevant psychological studies concerning children’s needs as well as legal standards for the division of property. The “norm-educating” mediator must be careful not to step over the line of neutrality and impartiality. One can visualize a mediator doing so when helping to educate the least powerful party. Thus, the mediator should carefully provide the same information to all parties in her attempt to maintain neutrality and impartiality.

The third model coined by Professor Waldman is the “norm-advocating” model. Using the same basic stages and techniques of the first two models, explains Professor Waldman, this mediator not only educates the parties about relevant legal and ethical norms, but also

---

113 *Id.* at 713-18.
114 *Id.* at 730.
115 *Id.*
116 *Id.* at 742.
mandates that these norms be incorporated into a final settlement.\textsuperscript{117} Realizing that the norm-advocating model contradicts the traditional vision of mediation, Professor Waldman cautions that the model should be limited to situations in which one party is not capable of waiving certain rights or where the dispute affects society in general.\textsuperscript{118} Although seldom used, the norm-advocating model is best suited for mediations involving bioethical, zoning, environmental, and some discrimination disputes.\textsuperscript{119} This mediator style can be classified as a narrow evaluator under Riskin’s grid. As long as the norm-advocating mediator reinforces norms without regard to particular needs of any one party, the mediator may be able to maintain her impartiality.

V. ANALYSIS OF THE TENSION BETWEEN MEDIATOR STYLES AND IMPARTIALITY REQUIREMENTS

A. Summary of the Problem Posed by the Research

This article seeks to establish that mediators are guided by written definitions and Standards, yet their actual roles may be dictated by their own personal style, values, and commercial needs in conjunction with the practical needs (or at least the perceived practical needs) of the participants. Furthermore, a mediator’s style, or the model she employs in mediation, can affect the outcome of the mediation.

The simple reference to a mediation outcome is vague and equivocal inasmuch as the term “outcome” does not connote what is being measured. Does the outcome relate to problem-solving, indicative of facilitative and evaluative mediations, or is it relational because it seeks to transform relationships?

\textsuperscript{117} Id. at 745.
\textsuperscript{118} Id. at 753-54.
\textsuperscript{119} Waldman, supra note 112, at 746.
Little empirical research exists to measure the outcome of a mediator’s style, although many scholars hypothesize about such theories. One research project measured the extent to which evaluative and facilitative mediators’ styles affected party satisfaction and the amount of money obtained by a mediated settlement. That research project was limited to a study of evaluative versus facilitative mediator styles in the context of the Equal Employment Opportunity Commission’s (EEOC) mediation program.\(^{120}\) Another, more generic, study focused on four neutrals who worked on one simulated dispute. The study illustrated that mediators employ various styles within a single mediation and that the final outcome of the mediation may be due in part to a mediator’s style combined with the disputants’ personalities and approaches.\(^{121}\) A third study concluded that a mediator’s style in community mediations did not affect the final outcome.\(^{122}\)

As illustrated in Section II, many definitions of mediation include a key provision that requires the mediator to serve as a neutral and impartial third party. More impressive is the fact that every set of Standards requires mediator impartiality. Nevertheless, mediator styles, mediation models, and the commercial needs of the participants (whether attorney advocates or disputing parties) actually can force a mediator out of her neutral and impartial role.

The resulting dilemma is whether mediator impartiality requirements can and should apply to all types of mediator styles and mediation models. Section V.B. examines how

\(^{120}\) E. Patrick McDermott & Ruth Obar, “What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit, 9 Harv. Negot. L. Rev. 75, 75 (2004). The authors’ study focused on 645 employment law cases that were mediated at the EEOC from March 1 to July 31, 2000. Id. at 75, 90. The study compared the results of mediations conducted by evaluative and facilitative mediators and found, among other findings, that the participants were most satisfied with a facilitated mediation and obtained more monetary relief in an evaluative mediation in which the claimant was represented by counsel. Id. at 95-105.

\(^{121}\) See Golann, Variations in Mediation, supra note 62, at 61.

mediator styles and mediation models can impact a mediator’s duties of impartiality and neutrality.

B. The Effect that Styles and Models Have on a Mediator’s Neutrality and Impartiality

The mediator’s involvement in the mediation readily can be seen when comparing different mediator styles and mediation models. Irrespective of the differences, mediators may interpret the same styles and models differently.

Some who say they are facilitative mediators actually may engage in evaluative techniques and vice versa. Some mediators may confuse style with conduct when referring to their approach. When describing a particular style such as facilitative or evaluative, the mediator should be cognizant of whether that style applies to the process, the substance or both. Some mediators who espouse an evaluative mediation style may overstep their bounds by interjecting their personal opinions and values to the same extent that a settlement judge exhibits during a mandatory settlement conference. These variances in interpretation need to be kept in mind as we begin to examine the effect that styles and models have on a mediator’s neutrality and impartiality. Furthermore, a mediator’s impartiality cannot exist in a vacuum; rather it affects other mediation values, most notably party self-determination.

1. Mediator Styles

As discussed in Section III.A and B, the two most common mediator styles are facilitative and evaluative. Most of the other coined terms appear to be variations of these two styles.

   a. Facilitative Style

\[123\] See supra Part III.
The facilitative category of mediators includes Riskin’s classification of a facilitative mediator as well as others classified as fixer,124 reconcilor,125 empoweror,126 norm-generating,127 and norm-educating.128 A facilitative mediator emphasizes the needs and interests of the parties and reinforces the concept of self-empowerment. The facilitative mediator should be able to perform this task while maintaining her neutrality and impartiality, especially when the mediator is seen as a “process person” who does not contribute substantive information,129 and the ultimate goal is problem-solving rather than settlement of issues.

Some scholars are concerned about the mediator’s involvement in the participants’ power balance.130 Professor Stempel is concerned that a facilitative mediator passively allows the stronger party to control the weaker party.131 Yet if the mediator attempts to balance the power between the participants, she will surely take on a partial role and violate impartiality requirements. If the facilitative mediator concentrates on a specific problem by empowering both participants rather than attempting to balance the power, she should be able to maintain a neutral and impartial demeanor.

On the other hand, failing to balance the power may violate some Standards that otherwise require the mediator to do so. It is easy to envision how the tension between mediator style and impartiality requirements pervade other mediation values and exacerbate the mediator’s dilemma regarding her style versus impartiality requirements.

124 See supra note 101 and corresponding text.
125 See supra note 104 and corresponding text.
126 See supra note 105 and corresponding text.
127 See supra note 113 and corresponding text.
128 See supra notes 114 - 115 and corresponding text.
129 See A Debate Between Lela P. Love and James B. Boskey, supra note 122, ¶ 41 (reflecting on James Boskey’s summarization of Lela Love’s writings that a mediator is “purely a process person and does not contribute substantive information to the process other than agenda structuring,” and noting his disagreement with Love’s position).
130 Lande, Sophisticated Mediation Theory, supra note 62, at 326.
131 Id.
b. Evaluative Style

1) General Criticisms of the Evaluator Style

An ongoing debate exists regarding evaluative mediators. Many scholars criticize the evaluative mediator for crossing the neutral/impartial threshold. Professors Kimberlee Kovach and Lela Love refer to evaluative mediation as an “oxymoron.”\(^{132}\) They advocate for mediator regulation rather than “unfettered evaluations and assessments” of a case.\(^{133}\) They argue that a mediator’s evaluative style jeopardizes her neutrality because any assessment will, in all likelihood, favor one party to the detriment of the other. Once neutrality is jeopardized, so is a party’s trust in the mediator. The disfavored party may withdraw from the mediation or actually feel as though the mediation environment has become antagonistic because the disfavored party becomes angry, hurt or alienated.\(^{134}\)

Some critics argue that evaluative mediators may engage in unethical conduct. Some argue that by evaluating the substance of the mediation, the mediator interferes with party self-determination. Others contend that the mediator’s evaluation actually enhances party self-determination.\(^{135}\) Some critics contend that an evaluative mediator engages in the unauthorized


\(^{134}\) Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71, 101 (1998) (advocating that mediators should not use an evaluative style); Love, *The Top Ten Reasons*, supra note 70, at 937, 940, 945 (contending that evaluative mediators promote “adversarial behaviors” such as positioning and polarization and can actually stop the negotiation process); contra Lande, *Lawyering and Mediation Transformation*, supra note 73, at 874-76 (1997) (explaining that an evaluative mediator does not necessarily impair his or her impartiality).

practice of law. Some contend that an adverse effect may occur in the way the mediator delivers an evaluation. For example, if it is given in a joint session, the party on the losing end may “resist” the evaluation and stop listening in an effort to save face.

Another criticism is that evaluative mediators may inhibit parties from engaging in their own problem-solving methods. The mediator may re-orient the dispute towards her preferences rather than the participants’ creativity. Opponents contend that rather than provide an evaluative assessment, the mediator should encourage the parties to understand each other, become creative, and seek to solve their own problems. Nevertheless even some proponents caution that a mediator’s evaluation should be used to assist the facilitative process rather than serve as the sole source of the mediation style.

Even Professor Riskin acknowledges that as a mediator becomes more directive in her approach, she may become biased and appear incapable of maintaining her neutrality. Proponents, however, argue that a mediator has to include some element of evaluation in her style. Although the debate ensues, some scholars believe that we must examine what really occurs during a mediation as opposed to what should occur.

2) Effects of Related Evaluative Styles

---

136 McDermott & Obar, supra note 120, at 77.
137 Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation, 14 ALTERNATIVES TO HIGH COST LITIG.* 62 (1996) (advocating that a mediator provide an evaluation in private sessions to maintain neutrality and help the losing party from losing face).
139 *Id.* at 103-04.
140 Kovach & Love, *Evaluative Mediation is an Oxymoron,* supra note 132, at 31.
141 See A Debate Between Lela P. Love and James B. Boskey, *supra* note 122, ¶ 51, (articulating his (James Boskey’s) feelings of discomfort at the idea that a mediator’s sole tool will be evaluative techniques).
142 Riskin, *Grid for the Perplexed,* supra note 63, at 47-48; *see* Aaron, *supra* note 54, at 62 (noting that when a mediator evaluates a case, the party on the losing side may perceive the mediator’s lack of neutrality and begin to view the mediator more as an adversary).
143 McDermott and Obar, *supra* note 120, at 77-78.
Often a mediator’s style affects her ability to maintain impartiality no matter how the style is coined. Whether termed evaluative, directive, trickster, magician, prime negotiator, settlor, protector or norm-advocating, these types of mediators easily can exceed their neutral and impartial responsibility.

In each case, these types of mediators may influence parties to adopt a position that the mediator thinks is rational or best for everyone involved in the mediation. At the very least, when a mediator evaluates, her opinion usually favors one party over the other, which arguably jeopardizes her impartiality. In some instances and most notably with the protector mediator, a mediator may attempt to ensure a fair result. To the extent that a mediator asserts herself into the dispute, she begins to advocate for the benefit of one party rather than for all parties. Once again, mediator impartiality is jeopardized.

3) Effects of Attempts to Balance Power

The late Professor James Boskey argued that a mediator might want to use evaluative techniques where oppression is apparent, as when a power imbalance exists in the process; offering evaluation will help “level the playing field.” He contended that the parties cannot enter into a “truly voluntary” agreement if one or both have some factual misunderstanding. He also acknowledged that a mediator can avoid the appearance of partiality if she offers an

---

144 See supra notes 93 – 94 and corresponding text.
145 See supra note 95 and corresponding text.
146 See supra note 96 and corresponding text.
147 See supra note 100 and corresponding text.
148 See supra notes 102 – 103 and corresponding text.
149 See supra notes 116 – 119 and corresponding text.
150 See A Debate Between Lela P. Love and James B. Boskey, supra note 122, ¶ 21 (noting Lela P. Love’s position that mediators should not evaluate because they jeopardize their neutrality).
151 Id. ¶ 60.
evaluation in a joint session rather than a caucus.\textsuperscript{153} Despite Boskey’s well-reasoned opinion, his scenario is a specific example of a mediator exceeding her neutral and impartial role by attempting to assist the weaker, or at least the perceived weaker, party.

Other scholars also are concerned about the mediator’s involvement in the participants’ power balance.\textsuperscript{154} As previously discussed, Professor Stempel is concerned that a facilitative mediator passively allows the stronger party to control the weaker party.\textsuperscript{155} Professor John Lande acknowledges Stempel’s fear, yet believes that a mediator can equally side with the stronger party, aggravating the distribution of power problems which are at the heart of Stempel’s apprehension.\textsuperscript{156} And so, the question persists. If the mediator attempts to equalize the parties’ power by creating a fair mediation, what happens to the mediator’s neutrality and impartiality?

4) Informed Decision-making and a Final Outcome

As an evaluative mediator becomes an “activist” – one who takes control of the mediation by advising parties how to proceed\textsuperscript{157} – it is easy to see how her impartiality begins to wane. Such a scenario does not bother Professor James Stark because he believes the mediator should ensure the parties are making an informed decision even if the disclosure of information

\textsuperscript{153} A Debate Between Lela P. Love and James B. Boskey, supra note 122, ¶ 92.
\textsuperscript{154} Lande, Sophisticated Mediation Theory, supra note 62, at 326.
\textsuperscript{155} See supra note 131, and accompanying text.
\textsuperscript{156} Lande, Sophisticated Mediation Theory, supra note 62, at 326.
\textsuperscript{157} See Laflin, supra note 78, at 491 (noting that the “[a]ctivist, evaluative ADR” takes control of the outcome of the mediation process and this should not be connoted as mediation because it is more “akin to neutral evaluation”).

38
shows the appearance of bias by the mediator.\textsuperscript{158} He does not believe that the mediator’s impartiality is at issue.\textsuperscript{159}

Professor Susskind, on the other hand, suggests that the “activist” mediator is not neutral, but remains “nonpartisan” as to the outcome. In other words, the activist mediator advocates for the best “‘possible outcome’” while remaining disinterested in the individual parties. By taking a personal interest only in the outcome of the mediation, the mediator guides and controls or otherwise trains the parties how to focus on alternative solutions to advance their respective interests. Professor Maureen Laflin has added her own criticisms to the mix:

Yet mediators who see their role as one of training the parties, no matter how impartial they may be, are paternalistic. And mediators who approach the process as “advocates of a good solution” are necessarily adopting an attitude of power and control over the outcome, an attitude which cannot but compromise the principles of self-determination and impartiality.\textsuperscript{160}

Both Professors Susskind and Laflin make credible arguments, yet both appear flawed. First by taking an interest in the outcome of the mediation, a mediator may affect party self-determination. The problem is not solved by simple semantics such as “guide,” “control” or “train” the parties to focus on their own interests in creating a workable solution. Any attempt to guide, control or train parties easily can lead the mediator to guide, control or train the parties to act pursuant to the mediator’s agenda. This first point presupposes that the scenario always will occur and this author is not contending so.

Second, Professor Laflin goes too far in her argument because she contends that a mediator’s ability to “advocate . . . a good solution” always compromises self-determination and

\textsuperscript{158} Stark, \textit{supra} note 77, at 796 (noting that the dilemma between party informed consent and the appearance of mediator bias is not the same thing as a conflict between competing values of informed consent and mediator impartiality).

\textsuperscript{159} Stark, \textit{supra} note 77, at 796-97 (advocating that the mediator provide enough information to the parties to be “reasonably informed,” not necessarily fully informed).

\textsuperscript{160} Laflin, \textit{supra} note 78, at 498.
impartiality. The mediator must remain neutral and impartial to both the parties’ interests and the outcome of the mediation. This author agrees with Professor Laflin’s assessment in most cases, but not all cases. If a mediator crafts her words carefully, she may offer solutions or advice to the parties without compromising the parties’ ability to reach their own solution or her own ability to maintain neutrality and impartiality.

A related criticism relates to an evaluative mediator’s substantive advice. Some scholars argue that the law dictates the standard of fairness in mediations. As a result, an evaluative mediator may seek to promote fairness by attempting to predict a legal outcome.161 Some scholars contend that an evaluative mediator’s emphasis on the legal outcome presupposes that a legal solution is the best outcome for the dispute.162 Professor Lande contends that “this presumes that the legal rules provide firm results, the rules are reasonably clear, judges and juries consistently follow the rules, and mediators can accurately assess the likely results.”163 Lande makes a sound argument that often cases go to mediation because the law is not clear and the ability to predict a likely litigation outcome is difficult. The evaluative mediator, therefore, may create a social injustice by providing an incorrect prediction.164

5) The Overly Zealous Evaluator

Mediation can reach an extreme level when the mediator strives for a mediated settlement agreement based on fear or pressure to the extent that it constitutes undue influence165 or

---

161 Lande, Sophisticated Mediation Theory, supra note 62, at 326.
162 See Levin, supra note 72, at 271 (“Evaluation turns the process away from problem solving toward an adversarial contest – sharing turns to posturing. . . . Moreover, too much emphasis on a likely legal outcome overlooks the possibility that the legal solution is not necessarily the best solution.”).
163 Lande, Sophisticated Mediation Theory, supra note 62, at 326.
164 Id.
165 “Undue influence” is defined as “unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.” Restatement (Second) of Contracts § 177(1) (2003).
Professors Nancy A. Welsh and Carrie Menkel-Meadow are wary about a mediator’s overly-zealous conduct.

One can visualize how a mediator might begin to assert undue influence by comparing the traditional judicial settlement conference with mediation. In the former, the parties are presented with a potential settlement arrangement and are given an opportunity to passively accept or reject it. With mediation, the concept of party self-determination means that the parties dominate the dispute resolution process by creating options and solutions, controlling the substantive discussions, and deciding on a final settlement. Even though mediation is based on party empowerment, it also requires active mediator participation in the process. As a mediator becomes more directive or aggressive, she may try to influence the parties, thus affecting party control.

Examples of coercive conduct include scenarios where the mediator forces the parties to remain in session well into the evening hours without adequate food, strong-arming the parties to continue mediating until a final settlement is reached, failing to provide sufficient time for the parties to reflect on the adequacy of a final agreement, or emphasizing the mediator’s opinion regarding the legal outcome if the case went to litigation.

6) Methods to Ease the Evaluative Mediator’s Dilemma

---

166 “Coercion” has been described as a higher form of pressure than “undue influence” because it “works on mental, moral, or emotional weakness . . . .” See Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 539 (Cal. Ct. App. 1966). The two terms also have been distinguished because “undue influence” is based on some type of “confidential relationship” whereas such a relationship is not necessary in a coercive situation. Id. at 540. See Note, Duress and Undue Influence – A Comparative Analysis, 22 BAYLOR L. REV. 572, 576-77 (1970).

167 See Welsh, supra note 133 at 7, 15 (referring to the “thinning vision of party self-determination in court-connected mediations and noting that the principle of party self-determination is different in mediation as opposed to a traditional judicial settlement conference); Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities, 38 S. TEX. L. REV. 407, 411 (1997) (“One of the most troubling of our ethical dilemmas in ADR [is determining] when is a solution suggested . . . by a third party neutral too coercive on the parties.”).

168 See Welsh, supra note 133, at 16-18.

169 See supra notes 161 – 164 and corresponding text.
Several solutions may help ease the tension created by the foregoing criticisms. The evaluative mediator can maintain neutrality and impartiality by providing the same assessment to all disputing parties. The mediator must act without coercion. A mediator can accomplish these goals by offering her assessment in a joint session, after the parties request the evaluation. Alternatively, if a mediator renders opinions in separate caucuses, she also can maintain neutrality and impartiality by simply providing an invited assessment without pushing any party to adopt a specific course of conduct. Arguably, a neutral and impartial mediator can evaluate a case by rendering a personal opinion based on her particular expertise but at the same time not force it on any party. Professor Leonard Riskin goes so far as to contend that if a lawyer mediator discusses legal ramifications with the parties in a neutral manner, access to legal evaluation may actually diffuse advocacy because parties may not feel the need to bring in their own lawyers. Another approach is for the mediator to distance herself from the parties when offering advice; she can do this by predicting what an individual lawyer, judge or jury might advise in a particular situation.

Scholars like Dwight Golann and Marjorie Corman Aaron have written extensively on the subject of how an evaluative mediator can remain neutral. They have created a laundry list of recommendations. First and foremost, they caution that a mediator should not comment on

170 See Lande, Lawyering and Mediation Transformation, supra note 73, at 874-76 (contending that a mediator does not affect her impartiality when she expresses an opinion about a likely court outcome or typical resolutions of similar disputes, especially when the opinion or evaluation is invited by the parties).
171 Leonard L. Riskin, Toward New Standards for the Neutral Lawyer in Mediation, 26 ARIZ. L. REV. 329, 335 (1984) (hereafter “Riskin, Toward New Standards”) (noting that a neutral lawyer who serves as a mediator may provide legal information in such a way that the parties will not feel the need to hire independent counsel who may influence the process, which results in the parties’ ability to reach their own agreement without relying on the lawyers’ perspectives).
172 Id. at 336; GOLANN, MEDIATING LEGAL DISPUTES, supra note 7, § 10.6.9 (noting that a mediator can predict what a judge or jury might find in terms of damages and liability rather than make a personal statement such as, “I think there should be a liability finding here . . . .”).
the substance of the mediation; she should remain passive. In addition to the foregoing discussion, they contend that a mediator can remain neutral using the following methods:

- A mediator may provide a neutral evaluation by actually leading the parties through a process to evaluate their own case. By leading the participants in such a way as to have them formulate an evaluation of the case, the mediator maintains her neutrality.

- To maintain a level of credibility – the trust and rapport that a mediator may engender during the mediation – she needs to be very careful when posing questions. The mediator should carefully select the phraseology when posing difficult questions so that she does not reveal her point of view. A good way to do this is to pose questions in a joint session and direct them to all parties equally.

- To maintain her credibility and rapport with the participants, the mediator may call in a “specialist” to render a formal evaluation. This method prevents any perceived association with one party, avoids antagonism by the perceived loser, and equalizes the playing field from the mediator’s perspective.

- A mediator may provide a neutral evaluation regarding the value and merits of a “no-agreement” alternative. The evaluation does not seek to resolve the dispute. Rather, it prevents the mediator from interfering with the participants’ creativity,
ability to generate options, and responsibility to formulate their own resolution of a dispute.177

- The timing of a mediator’s evaluation is important. A mediator has a better chance of maintaining neutrality if she waits longer to express her evaluation. As a result, she can: learn more about the parties, facts, and case; gain a better understanding of the attorneys’ positions; and build trust and rapport with the participants.178

- Some scholars advocate that to maintain neutrality, an evaluative mediator should provide her assessment of the case in a joint session so that all participants hear the same thing. Yet others disagree and believe the best way to evaluate a case is during private sessions. To communicate effectively, the mediator may need to present her evaluation in different ways depending on the participants’ personalities and corporate cultures. Sometimes if an evaluation is presented in a joint session, the losing party will lose face and focus on the evaluation without moving forward in the mediation process. In other words, the losing party may resist the evaluation and a certain amount of animosity may develop between the losing party and the mediator. As a result, the mediator’s neutrality may be jeopardized. The mediator can alleviate potential animosity by presenting her evaluation in private caucuses.179 Both positions – evaluating in private caucuses or in a joint session – are valid and it is easy to see how the timing and logistics of delivering an evaluation impact a mediator’s neutrality.

177 Id. § 10.4.
178 Id. § 10.5.
179 GOLANN, MEDIATING LEGAL DISPUTES, supra note 7, § 10.6.1.
c. Transformative Style

A transformative approach to mediation means that the mediator is less likely to be directive in terms of solving a problem because she does not influence the final outcome. Rather, the mediator may be directive in terms of communication as she enables the parties to control the decisions regarding their outcome. In this regard, a transformative mediator easily can remain impartial because she does not influence the outcome as so often happens in a problem-solving approach.\footnote{Bush & Folger, supra note 4, at 104-06.}

2. Mediation Models

Rather than refer to a mediator’s style, some scholars refer to the entire process as a mediation model. One such model is a community mediation program, in which attorneys are not present. Party empowerment is especially prevalent as the parties actively communicate and the mediator validates and encourages them throughout the process.\footnote{Welsh, supra note 133 at 18-19.}

The all-empowering format is not as true with court-connected mediations in which the adversarial nature of the court processes may be present.\footnote{Id. at 20.} Lawyers may continue their aggressive “win at all cost” advocacy of rights rather than engage in interest-based, creative negotiations. The ability to maintain party empowerment is further eroded when court programs mandate mediations; in many situations the parties and their attorneys do not want to participate or if they do, the attorney advocate controls the process and restrains the client from talking or participating in an attempt to prevent opposing counsel from discerning the party’s credibility. As a result, the principle of party self-determination is eroded, which in turn opens the door for a
mediator to step over the neutral and impartial threshold as she takes more control of the substance and process of the mediation.

The traditional Michigan Mediation\textsuperscript{183} model clearly obstructs party empowerment since a panel of three attorneys renders an opinion and the parties have to take it or leave it. Once the panel renders an opinion in favor of one participant, it compromises the principles of neutrality and impartiality by taking sides. Proponents may argue that the parties have the right to accept or reject the opinion; therefore, party self-determination is present. Nonetheless, the mediators’ issuance of an opinion curtails any creativity or problem-solving by the parties, interferes with party self-determination to the extent the parties may feel intimated by the mediators’ opinion, and may create feelings of animosity by the losing party. Such results have a profound effect on the overall credibility of the mediation process and the parties’ perceptions of the mediator, creating a sense of distrust and negative impressions of the mediator’s impartiality. In actuality, the traditional Michigan Mediation model does not look like mediation. It appears to be more like arbitration than mediation.

VI. RECOMMENDATIONS TO ALLEVIATE THE TENSION BETWEEN MEDIATOR STYLES AND IMPARTIALITY REQUIREMENTS

Section V analyzes mediator styles and mediation models. One fact is obvious. A transformative mediator can always remain impartial. As a result, the majority of the analysis and recommendations relate to facilitative and evaluative mediator styles. It is readily apparent that all types of mediators cannot conform to impartiality requirements in Standards. Conversely impartiality requirements found in Standards cannot apply uniformly to all mediator styles and mediation models.

\textsuperscript{183} See supra notes 106 – 110 and corresponding text for a description of the Michigan Mediation.
The current debate regarding suitable mediator conduct needs to continue, albeit with a new focus. Scholars, mediators, regulators, and legislators need to focus the current dilemma toward appropriate compliance with impartiality Standards and the simultaneous use of practical mediator styles and conduct. The following four alternatives address this mediator dilemma.

A. **Alternative 1: The No Action Approach to Developing Impartiality Requirements**

Currently, thirteen states do not have ethical Standards of conduct for mediators even though most of these jurisdictions recognize and embrace the benefits of mediation. The absence of Standards means that a jurisdiction may have no rules regarding impartiality.

While researching individual state Standards, this author communicated with individuals in a handful of states that do not appear to have any Standards. Common themes for not developing ethical Standards are that: 1) the mediation industry is prematurely developed in a particular state; and 2) the tension between mediation values and traditional mediator styles is too great to enable the development of a set of Standards with the clarity necessary to be instructive to the practicing mediator. The reasons for not adopting ethical Standards are beyond the scope of this article; and therefore, this author has not pursued this line of questioning with all thirteen jurisdictions that lack Standards.

Nevertheless, the dialogue needs to address the issue whether or not ethical Standards are being developed prematurely. A question exists whether or not mediation has developed sufficiently to define the parameters of appropriate mediator conduct. Appropriate mediator conduct should be assessed in the context of various mediator styles and models before reigning in that conduct pursuant to ethical Standards.

---

184 This author is unable to locate general civil Standards, whether court-connected or by a professional organization, for the states of Alaska, Arizona, Connecticut, Delaware, Kentucky, Louisiana, Maine, Missouri, Nevada, North Dakota, Ohio, Rhode Island, and South Dakota.

Consequently, the first alternative is the no action alternative, which means that ethical Standards should not be developed in those states that currently lack them. Notwithstanding the nonexistence of a set of Standards, Alternative 1 may be superfluous if a state statute or court rule defines mediation by incorporating impartiality requirements.

Even so, before enacting comprehensive Standards the states should thoroughly analyze the mediator’s dilemma – examining mediator styles and the ability to simultaneously maintain mediator impartiality. When the time is right to develop Standards, clarity must be used while recognizing different mediator styles. These states may want to consider Alternatives 2, 3 or 4 as they develop their own ethical Standards.

Alternative 1 should not apply to states that already have enacted Standards because they have spent years working on the best possible set of ethical guidelines. They would suffer an extreme disservice if they were told to cancel everything and start anew. States that already have Standards should consider Alternatives 2, 3 or 4.

B. Alternative 2: Redefine Mediation to Delete the Requirement of Mediator Impartiality

Several scholars have theorized that a mediator cannot be impartial. Robert D. Benjamin has theorized that rather than being objective and neutral, mediators should be “balanced” in their communications with parties to protect both parties rather than either one.186 Benjamin theorizes that a mediator cannot be neutral since she becomes part of the system,187 yet his proposition seems extreme.

Although Benjamin makes an interesting argument that the mediator becomes “part of the system,” conceivably the mediator can continue to be neutral as long as she does not offer

---

187 Id.
alternatives or advice that benefit only one party. For example, a mediator who, with the participants’ approval, offers an opinion regarding the merits of the case and a probable outcome, may not lose her impartiality as long as she does not urge the parties to adopt this position.\textsuperscript{188} Furthermore, Benjamin’s approach seems to apply to evaluative mediators, implying that facilitative mediators can be impartial.

Semantics aside, whether a mediator employs balancing or evaluative techniques, the dilemma persists. Can the mediator conduct the mediation pursuant to impartiality requirements and simultaneously maintain any mediator style?

Professor John Lande believes in the eclectic nature of mediation. He makes a sensible argument that existing principles of mediation, such as confidentiality and neutrality, may not be absolutely necessary.\textsuperscript{189}

Another problem deals with unconscious reality. Mediators may use an evaluative style whether they consciously think about it or not. An ethical rule that completely prohibits such techniques could create an “unfair ethical [trap] . . . for unwary parties and mediators.”\textsuperscript{190}

Despite the traditional definitions of mediation which rely on key principles such as party self-determination, confidentiality, and mediator impartiality, industry standards and commercial dictates appear to be driving the profession in a new direction. Ethical Standards illustrate a new trend toward a fair result and related fairness concepts such as ensuring informed decisions and balancing power – aspirational concepts that are not part of the traditional definitions of mediation.

\textsuperscript{188} Lande makes a similar observation. See e.g., Lande, \textit{Lawyering and Mediation Transformation}, supra note 73, at 876.

\textsuperscript{189} Lande, \textit{ Sophisticated Mediation Theory}, supra note 62, at 332-33 (acknowledging that many effective mediators have some ties to the disputing participants, such as mediators who are members of organizations, tribes and communities connected to the participants, Postal Service mediators involved in employment cases and ombuds who are employed by a participating organization).

mediation.\textsuperscript{191} Promoting fairness under any style or model of mediation creates tension with mediator impartiality.

The tendency to embrace fairness concepts means that the mediation field is changing. The definition of mediation should change accordingly. Other than potential conflicts of interest, why should a mediator remain neutral and impartial?

The result is that the definition of mediation can be broadened to refer to \textit{a conciliatory process of using a third party to assist disputants to reach a desired goal}. The new definition of mediation is generic enough to apply to many different mediator styles. The reference to “desired goal” is flexible enough to apply to issue deciding, problem solving, and relational objectives – goals indicative of evaluative, facilitative, and transformative mediators or any variation of these main mediator styles.

The new, simplified definition of mediation also deletes requirements of mediator impartiality other than conflict of interest concerns. Concurrently, ethical Standards of conduct would need to be modified to delete the requirements of mediator impartiality. By removing impartiality requirements from corresponding Standards, regulators enable any and all types of mediator styles and mediation models to comply simultaneously with the broader definition of mediation and the simplified Standards. All mediator styles, therefore, can stand side-by-side with ethical Standards that have deleted requirements of mediator impartiality.

Some scholars may contend that Alternative 2 is impracticable and severe because it appears to push the mediation field backward rather than allow it to progress forward. They may

\textsuperscript{191} Exon, \textit{Why Ethical Standards Create Chaos}, supra note 25, at 419.
argue that mediation is flexible enough to sustain existing definitions of mediation, or that ethical opinions can fill the chasms left open by the inadequacies or inconsistencies of Standards.\textsuperscript{192}

Professor Michael Moffitt might criticize the broadened definition of mediation, arguing it is not helpful if a descriptive definition lacks the dual components of structure and behavior. He previously addressed a descriptive definition similar to this author’s proposal. According to Professor Moffitt, defining mediators as “‘third parties, not otherwise involved in a controversy, who assist disputing parties in their negotiations,’” provides a structural component which identifies the mediator yet fails to limit the broad, sweeping nature of the description to the mediation field. Furthermore, he contends such a definition says “little.”\textsuperscript{193}

Professor Moffitt’s potential criticism fails to take into account that current definitions of “mediator” are qualified, such as “distributive mediator,” “facilitative mediator,” “community mediator,” “family law mediator,” and so forth. Each qualifying word enhances the behavioral component that may appear lacking in the simplified definition of mediation offered in Alternative 2.

Professor Moffitt also is concerned that a broadened definition of mediation arguably extends to anyone who attempts to resolve a controversy, whether or not part of the mediation field. Practically speaking, without a mandate for mediator licensing, anyone may fit the third party characterization of the simplified definition of mediation. Standards become a critical component to help qualify the special goals and principles of mediation. A definition, standing alone, cannot serve as the all-encompassing guide for the mediation practice. It can, however, serve as a flexible point of beginning that does not collide with impartiality Standards.

\textsuperscript{192} See Paula M. Young, Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators, 5 APPAL. J.L. 195, 197-98, 200 (2006) (acknowledging that the revised Model Standards provide guidance and serve as a foundational framework for states that do not yet have mediation standards and advocating reliance on advisory or ethics opinions for more detailed assistance).

Additionally, none of the potential criticisms takes into account that most jurisdictions lack enforcement mechanisms. A few states such as Florida, Georgia, and North Carolina have specific mechanisms in place to enforce ethical obligations of mediators and address consumer complaints about mediator conduct.¹⁹⁴ Until such time as standardized enforcement mechanisms are commonplace, ethical standards of conduct must be adequate to specifically address the mediator’s dilemma regarding mediator style and impartiality.

C. Alternative 3: Redefine Mediation to Suit Mediator Styles – the Contract Approach

Another approach is to differentiate between the two main mediator styles – evaluative and facilitative – and redefine them as separate and independent processes. Rather than broaden the definition of mediation to encompass all types of mediator styles, Alternative 3 proposes the creation of two distinct types of mediation, each with its own narrowed definition.

A facilitative mediation could remain as the conventional definition of mediation. It would include the traditional principles of party self-determination, confidentiality, and mediator impartiality.

Evaluative mediation could be redesignated as its own process called a “Mediated Settlement Conference.” The evaluative mediator would not need to behave in a neutral and impartial demeanor. She could engage in all types of evaluative techniques except for coercive conduct.

In conjunction with the modified definitions of mediation, the parties could be presented with a menu of mediator behaviors that they would embrace. This is where mediator styles come into play. Presented with a brief description of evaluative, directive, facilitative, elicitive, empoweror, fixer, norm-educating, etc. styles, compartmentalized within either definition, the

¹⁹⁴ See Young, supra note 192 at n.240.
parties can assert true control over the process by defining how they want *their* mediator to act and *their* process to be conducted.

Alternative 3 provides both clarity and uniformity in the mediation process because it will satisfy the parties’ needs and interests, the mediator’s personal values and commercial needs, and the guiding principles set forth in written definitions and Standards. Most important, by allowing the parties to handle such preliminary matters before the mediation session begins, they in essence enter into a contract to select the mediator style and the process.¹⁹⁵ In turn, the participants truly determine the outcome of the mediation from both a procedural and substantive perspective.

To allow participants an opportunity to select the process of their choice, it is necessary to educate the participants before they engage in the mediation process. The parties need to know what a mediator can and should do. The parties need to understand the concept of mediator styles¹⁹⁶ along with the corresponding processes of either mediation or mediated settlement conference.

Rather than allow the mediator to educate the parties as is most often done at the beginning of a mediation, someone who is not part of the specific mediation session could perform the task; possible people include court personnel in court-connected mediation programs, an administrator in a private or neighborhood mediation, or a written pamphlet

---

¹⁹⁵ This is not a new idea. Dwight Golann has devised a set of prescriptions to help evaluative mediators maintain neutrality. Foremost in his suggestions is to allow participants to enter into a contract before beginning the mediation whereby they authorize the mediator to employ a certain style. See GOLANN, MEDIATING LEGAL DISPUTES, supra note 7, § 10.1 (1996) (MARJORIE CORMAN AARON, contributing author).

¹⁹⁶ John Bickerman, an attorney mediator, advocates for this position. He contends that parties should have the independence to select the type of mediator who they think will provide the best mediation service for their kind of dispute, or at least allow the mediator to use a variety of styles as dictated by market forces. John Bickerman, Evaluative Mediator Responds, 14 ALTERNATIVES TO HIGH COSTS LITIG. 70 (1996). Mr. Bickerman also points out that a mediator does not exceed her role of neutrality when she provides “frank assessments” regarding a case. The parties can make intelligent decisions based on their positions of being fully informed. *Id.*
prepared by any of these people or a professional mediation organization. The mediation education would create party awareness of appropriate mediator behavior under either process.

1. The Role of a Facilitative Mediator in a Mediation

A facilitative mediator may continue to serve under the traditional notions of mediation; she should be able to maintain neutrality and impartiality since her main responsibility is to enhance participant communication by emphasizing their interests. Through efforts to foster participant creativity, problem-solving, and personal evaluation, a facilitative mediator should be able to maintain the objectivity necessary to remain impartial. The mediator cannot, however, seek to ensure a fair result, attempt to balance the participant’s power or promote informed decisionmaking. Consequently, Standards would need to be modified to fit within the new description of “mediation.”

2. The Role of an Evaluative Mediator in a Mediated Settlement Conference

If participants want a more directive mediator, they may choose the mediated settlement conference rather than a traditional mediation. In a mediated settlement conference, the participants could agree at the outset of the mediation to allow certain mediator behavior. The participants may authorize the mediator to offer evaluation and even go so far as to encourage the parties in one direction. Under this process, the mediator could be authorized to ensure a just and fair result, a balanced process, and advocacy on behalf of a weak party if performed in a non-intimidating environment. Such authorizations mean that the evaluative mediator in this setting need not necessarily maintain impartiality. Standards would need to be modified accordingly.
In a mediated settlement conference, the mediator is expected to express some sort of evaluation. If the definition does not require the mediator to be impartial, the mediator can approach the process as though she is facilitating and enhancing party communication as well as encouraging parties to resolve a dispute.

D. Alternative 4: Create a Hierarchy of Values Within Mediation Standards

Alternative 4 posits an organizational hierarchy or prioritization of mediation values within a single set of Standards. Standards would retain the typical values of party self-determination, neutral process, impartial third-party mediator, prohibition of conflicts of interest, etc. The only difference would be to prioritize the values. The single, most important value would essentially trump other values. Some lesser values could trump the least important values. Such an approach is analogous to the posture in the current ABA Model Rules of Professional Conduct wherein Rule 1.6, Confidentiality of Information, specifically trumps all but one designated rule.¹⁹⁷

The complexity of Alternative 4 is the process of determining the most important value. Party self-determination is touted as the fundamental principle of mediation, and therefore, arguably is the most important value of mediation. The notion of informed decisionmaking, balance of power, and balanced process are inherent parts of party autonomy because arguably a party cannot decide on a final resolution for a mediated dispute unless the party fully comprehends the consequences of that decision. In such a scenario, a mediator could sacrifice her impartiality to ensure that the parties are fully informed of the consequences of their decision.

¹⁹⁷ Language in the following ABA Model Rules of Professional Conduct illustrates that each of the rules is limited by ABA Model R. 1.6: Rules 1.8(f), 1.9(b), 1.10(b), 1.14(c), 2.3(c), 4.1(b), 8.1(b) and 8.3(c). ABA Model R. 3.3, Candor to the Tribunal, is the only rule that requires disclosure of information otherwise deemed confidential pursuant to R. 1.6. MODEL RULES OF PROF’L CONDUCT R. 1.8(f), 1.9(b), 1.10(b), 3.3(c), 1.14(c), 2.3(c), 4.1(b), 8.1(b) and 8.3(c) (2002).
and that no party takes advantage of any other party. This is just one example of how an
evaluative mediator could direct and guide the parties without the fear of violating the ethical
requirements of impartiality.

Alternative 4 would continue to promote the flexibility of various mediator styles and
mediation models while concurrently requiring mediators to conform to all Standards.
Mediation would continue as a flexible, fluid process during the evolution of ethical standards of
conduct and other guidelines necessary to regulate an industry.

Several scholars already have weighed in on this type of alternative. Professor Michael
Moffitt proffers the same basic approach with respect to the revised Model Standards, noting that
the revised Model Standards fail to create any “hierarchy of ethical concerns” by disregarding
ethical tensions such as those posed in this article. Professor Moffitt advocates for specific
guidance by designating one standard that trumps the others.

Professor Ellen Waldman acknowledges the internal inconsistencies of Standards. She
proposes a “fact specific, context specific balancing approach.” Professor Waldman explains
that any time a field or discipline creates internal inconsistencies while evolving, it must engage
in a fact specific balancing process to analyze the priorities of the various values.

VII. CONCLUSION

For years a dialogue has taken place regarding mediator styles and whether evaluative
techniques are appropriate. Although some people may want to continue the dialogue, the
simple fact is that mediators assert a variety of styles such as facilitative, evaluative,

198 Michael L. Moffitt, The Wrong Model, Again: Why the devil is not in the details of the New Model Standards of Conduct for Mediators, DISP. RESOL. MAG., Spring 2006, at 31-32.
199 Id.
200 Telephone Interview with Ellen Waldman, Professor of Law, Thomas Jefferson Sch. of Law (Aug. 9, 2007).
201 Id.
transformative or some derivative classification. Mediators have the flexibility to use a variety of styles for a number of reasons – most notably due to the participants’ unique and commercial needs. Despite choices regarding style, mediators are mandated to serve with impartiality. This article has demonstrated the tension between impartiality requirements and mediator styles most commonly associated with evaluative mediators.

The tension has resulted in the mediator’s dilemma. How can all mediator styles and mediation models conform to mediator impartiality requirements? It is time to address the mediator’s dilemma so that we may act progressively as mediation matures.

Several alternatives are proposed to ensure the integrity and credibility of the mediation field. First, for states which do not have Standards, wait and study the mediator’s dilemma before adopting Standards that conflict with impartiality requirements. Second, broaden the definition of mediation by deleting mediator impartiality requirements. Such approach would permit mediators to be flexible enough to conform to any and all mediator styles and mediation models. Third, narrow the definition of mediation so that different definitions with correspondingly different mediator duties apply to facilitative and evaluative mediators, the two most common mediator styles. Fourth, create a hierarchy of values within Standards that allow flexibility while maintaining the rigors of the most important ethical values. Now it is up to the scholars, practicing mediators, regulators, and legislators to begin the dialogue for change and choose the most beneficial alternative.