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BOND UNIVERSITY
Dispute Resolution Centre

BOND DISPUTE RESOLUTION NEWS

Volume 21 December 2005

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Recent Activities of Bond University Dispute Resolution Centre
Recent and Forthcoming Publications
Forthcoming Courses of Bond Dispute Resolution Centre
Thoughts & Themes
Bonding to Bond

Recent Activities of Bond University Dispute Resolution Centre

22-25 September

Advanced Mediation Course – held at the Sheraton Noosa Resort, presenters, Professors Laurence Boulle and John Wade. Evaluation of course:

http://www.bond.edu.au/law/centres/drc/feedback/NoosaSept2005.pdf

14-16 October

Basic Mediation Course – presenters, Professors Laurence Boulle, John Wade at the Leo Cussen Institute in Melbourne. Evaluation of course:

http://www.bond.edu.au/law/centres/drc/feedback/CussenOct2005.pdf

1-3 December

Basic Mediation Course – presenters, Professors Laurence Boulle, John Wade at the Marriott Resort, Surfers Paradise, Queensland, Australia.

LAURENCE BOULLE

25 August	Delivered Key-note address to Annual Conference of Equal Opportunity Officers and Complaints Handlers, on 'Individual Responsibility in a (Sort of) Global World, Melbourne.
30-31 August	Conducted two-day workshop on Conflict Competency for Ombudsman, HREOC and Privacy Section, Department of Immigration and Multicultural Affairs, Canberra.
6 September	Launch of *Mediation: Principles Process Practice* (2ed 2005, LexisNexis Butterworths) by Chief Justice Marilyn Warren AC at Conflict Management Centre, Collins Street, Melbourne, chaired by Jonathan Rothfield, and attended by about 50 local mediators.
30 September	Attended meeting of Law Council of Australia ADR Committee.
31 October – 3	Attended a Symposium on Multilateral Trade Treaties and Developing Economies,

November	held by the International Trade Centre, Geneva, Switzerland
	Undertook facilitation process for National Mediator Accreditation project – see box below.
16 November	Together with 12 other mediators Laurence Boulle received an award for having been a community mediator with the Dispute Resolution Centre in the Department of Justice and Attorney-General. The presentations were made by the Queensland Attorney-General, Ms Linda Lavarch, who undertook her mediation training with the Bond DRC some years ago.
23 November	Presented a 'Mediation Update' to 40 Law Society Accredited Mediators as part of their continuing professional development requirements for the Queensland Law Society, with Professsor Nadja Alexander, Director of ADR, Australian Centre for Peace and Conflict Studies, University of Queensland.
5-6 December	Attended Evaluation Workshop on Indigenous Facilitation and Mediation Project, Australian Institute of Aboriginal and Torres Strait Islander Studies, on behalf of National Native Title Tribunal.
7-14 December	Undertaking dispute system design project involving inter-governmental disputes for the Department of Provincial and Local Government, South African government, Cape Town, with Professor Nico Steytler, Director of the Community Law Centre, University of the Western Cape, Cape Town.

National System of Mediator Accreditation

In 2004 the Commonwealth Attorney-General's Department made funds available to the National Mediation Conference Pty Ltd (NMC) for the development of a proposal for a national system of Mediator Accreditation in Australia.

The NMC appointed a broadly-based committee to appoint a facilitator for this undertaking, to oversee the facilitation process, and to report back to the Attorney-General's Department.

The committee comprises Helen Marks, Mary Walker, Warwick Soden, Scott Petterson, Sandra Boyle, Robert Crick, Franca Petrone, Bill Field, Gordon Tippett, Salli Browning and Karen Dey. The committee appointed Laurence Boulle to undertake the facilitation and report back to it.

Neither the facilitator nor the committee has any decision-making authority in relation to any accreditation issues.

To date the following tasks have been undertaken by the facilitator: literature and resource search; liaison with committee, in face-to-face meeting and through email and telephonic contacts; consultation with experts on facilitating group consensus; investigation of software for capture and sorting of submissions; drafting of several versions of a proposal with feedback from committee members.

As regards future progress the following time-table will be followed:

Mid-November 2005: Dissemination of Draft Accreditation Proposal to all sectors of the Australian mediation community.

Mid-November 2005 to late January 2006: First Phase of Community Consultation Process during which responses to the Draft Proposal can be submitted via the website.

Early February 2006: Redrafting of Accreditation Proposal in light of responses received during first consultation phase.

Mid-to Late February 2006: Second Phase of Community Consultation Process involving Public Forums in major centres attended by facilitator for consideration and discussion of proposal.

March 2006: Meeting between Facilitator and Committee and Final Drafting of Accreditation Proposal.

Mid-March 2006: Approval of Accreditation Proposal by Committee and Submission to Attorney-General's Department.

May 2006: Consideration and Approval of Accreditation System at National Mediation Conference, Hobart. (3 to 5 May 2006, more information about the conference available from the conference website (www.mediationconference.com.au))

The first draft of the sub-committee provided for comment is able to be accessed at: http://www.mediationconference.com.au

JOHN WADE

20-26 August	Five day mediation course, SMU Dallas Texas. Click hyperlink for evaluations: http://www.bond.edu.au/law/centres/drc/feedback/texas.pdf
9 September	Negotiation training, Hunt and Hunt, Lawyers, Brisbane.
30 Sept – 1 Oct	Family Law Conference, Mooloolaba, Queensland.
3-5 November	Three day Family Arbitration workshop, Law Council of Australia, Canberra.
23 November	Mediation seminar, Law Society of WA. Perth.
24-25 November	Two day Negotiation workshop; Blake Dawson Waldron http://www.bond.edu.au/law/centres/drc/feedback/Perth.pdf

BEE CHEN GOH

2-11 September	Inaugurating the first Chinese Law elective to be taught in China, 'Law in the PRC' at the East China University of Law and Politics, Shanghai.
10-11 November	Attended 'Legal Education in Asia' Symposium organized by the Asian Law Institute at the National University of Singapore, Singapore.
November	Conducted recruitment interviews in Malaysia.

BOBETTE WOLSKI

9-10 September	Presentation of paper "Reforms of the Civil Justice System – A Decade Past" at the Commonwealth Law Educators Association Conference, London.
October	Facilitated Dispute Systems Design workshop, Chamber of Commerce, Hamburg, Germany.
October	Taught Dispute Systems Design 3 day-intensive course, University of Applied Sciences, Jena, Germany.
October	Taught International Dispute Settlement, 5 day-intensive course, Faculty of Law, Halle-Wittenberg University, Germany.
October	Taught Legal Skills 5-day intensive, Faculty of Law, University of Halle-Wittenberg Germany.

PAT CAVANAGH

10-16 September	Attended University of New Delhi and presented a mediation seminar for senior judges and the legal profession. Addressed law students at the University of New Delhi.
17 October	Presented one day seminar on Negotiation at Law Society of Western Australia, Perth.
19-22 October	Co-presented three day mediation course with Professor Nadja Alexander for the Queensland Law Society, Brisbane.
8-11 November	Presented a conciliation training program for Residential Tenancy Authority at the University of Queensland with Nadja Alexander.
27-30 November	Presentation of mediation course for Queensland Law Society, Cairns. Also one day negotiation course for the legal profession in Cairns.
1-3 December	Presented negotiation sessions at the Dispute Resolution Centre's Basic Mediation Course, Gold Coast.

Recent and Forthcoming Publications

Laurence Boulle

'On-line ADR' vol 25.2 (2005) *The Arbitrator and Mediator* 9-16.

'Educating Lawyers in ADR' vol 8.2 *The ADR Bulletin* 28-32.

Produced three issues of the *ADR Bulletin* published by Richmond Press, Sydney.

Contributed chapter on Mediation and Other ADR processes for the second edition of Vicki Waye (ed) *A Guide to Arbitration Practice in Australia*, due for publication in 2006.

John Wade

1. Duncan Bentley and John Wade, "Special Methods and Tools for Educating the Transnational Lawyer" (2006) *J of Legal Ed* (forthcoming)
2. John Wade, "Formal Legal Education: A Few Lessons from the Past, Useful for the Future" (2006) *Waikato Law J* (forthcoming).
3. John Wade, Four Chapters in *The Negotiator's Fieldbook* ABA, 2006.

The following is an article submitted by

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"CAN A SINGLE ETHICAL CODE RESPOND TO ALL MODELS OF MEDIATION?"

By Katherine A. Mills

Abstract

This analysis examines the tension between the need for a uniform ethical code for mediators, and the need for such code (or codes) to have the ability to address, and effectively respond to, the needs of a vast range of available models of mediation.

In Canada, the ADR Institute of Canada, Inc. has drafted and implemented a national Model Code of Conduct for Mediators that attempts to protect the integrity of the mediation process by establishing a model ethics code ("Code") for mediators who are members of that Institute.

The fluidity of the Code reflects its attempt to apply to all forms of mediation. However, it could be argued that the Code is too general; and therefore too vague and uncertain to be able to be 'all things to all people'. The author has illustrated how the Code may be inadequate to address the needs of the available range of different models of mediation, and makes suggestions on how the Code might be revised. The models of mediation chosen for illustrative purposes are: "Evaluative", "Therapeutic", and "Facilitative".

Despite suggestions for reform to the Code, the author has concluded that it may be difficult to impose one single ethical standard at this time since too much constraint could unnecessarily limit the evolution and growth of the industry and curb mediation's potential as a mainstream method to resolve conflict.

The author suggests that it might be appropriate to have different ethical codes for different models of mediation, unless or until one model of mediation is selected to set a uniform standard. Nevertheless, the writer believes that limiting recognition and acceptance of mediation to only one model would tragically restrain the latent potential of mediation as a useful tool.

Further, the author submits that society requires that different models of mediation be available to resolve conflict in order to mirror the many different types of conflicts, societal contexts, and community interests, and needs that arise today; and that addressing these ever-increasing range of conflicts, without resort to adjudicative methods, requires a diverse range of mediation dispute resolution mechanisms.

I. INTRODUCTION

The term "mediation" has been given a great number of different meanings throughout history depending on who is using it, the purpose for its use, and where it is used.[1] However, since mediation's inception,[2] the mediator has been assigned the

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[1] Many cultures have had various traditions of mediation: See Moore, C.W. The Mediation Process: Practical Strategies for Resolving Conflicts. San Francisco: Jossey-Bass, 1986 p. 22-42.

[2] It has been suggested that even from the days of Moses onward there was always a mediator for an Israelite to properly approach God to both hear the truth of God, as well as find forgiveness. (Deuteronomy 5: 27) "… Moses was the recognized mediator of revelation from God to Israel." <http://bibletools.org//index.cfm/fuseaction/Def.show/RTD/ISBE/ID/5898> (Date Accessed: June 10, 2005)

role of intermediary between parties in conflict for the purpose of assisting them in achieving peaceful resolution.[3].

Despite its historical foundations, the use of mediation as a deviation from adjudicative processes, has lead many to question the ability of various different models to address conflicts while preserving the integrity of the profession. The result has lead to significant controversy[4] regarding whether it is necessary to create a static definition of "mediation" to the exclusion or limitation of other methods, or variations of those methods[5] for the purpose of establishing ethical standards.

As a result of the diverse range of available mediation practices, imposing one ethical code on all forms of mediation is cumbersome. While the ethical code must be specific enough to address legitimate concerns, it must be flexible enough to accommodate the different varieties of practice. The flip side to attempting to draft one code of ethics that will be "all things to all people" is to limit the professional practice of mediation to one or possibly just a few, uniform methods, and to do away with other forms of mediation models including hybrids of popular forms resulting in a restriction of the evolution of mediation both as a process and as a profession.

It has been suggested that labeling some forms of mediation something other than "mediation" might serve to address problems in devising standard ethical guidelines. [6] However, the question then becomes, what forms of mediation will be permitted to call themselves "mediation"? Also, wouldn't those other categories of dispute resolution processes then also require ethical codes? Who then decides when the form of mediation fits within the applicable code? Forcing different codes of ethics on a variety of different processes will likely require some uniform determination of what each process is. Each sect of mediators will then also require governing bodies to best assess, govern, and establish guidelines and standards for each category because changing the name of a method would not eliminate the need for corresponding ethical guidelines for the newly named process.

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[3] "Mediation" in its broadest sense can be defined as the act of intervening between parties at variance for the purpose of reconciling them, or between parties not necessarily hostile for the purpose of leading them into an agreement or covenant. Theologically, it has reference to the method by which God and man are reconciled through the instrumentality of some intervening process, act or person, and especially through the atoning work of Jesus Christ. The term itself does not occur in Biblical literature.< http://bibletools.org//index.cfm/fuseaction/Def.show/RTD/ISBE/ID/5898> (Date Accessed: June 10, 2005) and <www.jewishencyclopedia.com> (Date Accessed: June 10, 2005)

[4] The resulting debate as to comparisons of different models of mediation process, and appropriateness and superiority of the processes is not surprising. As with most disciplines that grow and evolve from different sources, are shaped by different people, but for similar purposes, and only marginally different goals; there are many different types of mediation, and combinations of mediation process. It is not likely to be very different from asking a doctor as to how best to practice medicine, or a lawyer, how to best practice law. For example, you would find general accepted principles of practice to be similar, if not the same, but there would are likely as many different micro-methods, as there would be people you would ask.

[5] See Lela Love and Kim Kovach, "Evaluative" Mediation Is an Oxymoron", 14 Alternatives to High Cost Litig. 31 (1996) ("Love and Kovach") and Lela Love "The Top Ten Reasons Why Mediators Should Not Evaluate", 24 Fla. St. U.L. Rev. 937 (1997) ("Love") as an example of where arguments are made against accepting the "EM" model as an acceptable mediation method. Also see John Lande "Respecting Rival Mediation Philosophies", 1998 CPR Institute for Dispute Resolution <www.mediate.com> (Date Accessed: June 10, 2005) ("Lande") discussing the mediation theory and practice 'tug of war'. Also see Leonard L. Riskin, "Mediation Quandaries," 24 Fla. St. U. L. Rev. 1007 (1997) poem regarding debate about the appropriateness and superiority of various mediation methods. ("Riskin Poem").

[6] For example, Love and Kovach, supra, at n. 5 argue that "EM" should not be called mediation at all, but maybe something like "neutral evaluation" in order to identify it as something other than a mediation process.

In Canada, on June 14, 2005, the ADR Institute of Canada (the "Institute") finished substantial revisions to a new national Model Code of Ethics[7] (the "Code") intended to apply to all mediators practicing all forms of mediation, with the exception of family mediation which has its own governing organization[8] and code of ethics. 'Failure to comply with the Code', it is said, 'could lead to penalties against members including obligations for re-training, or revocation of membership'.[9]

In contrast with the previous version of the Code that contained ten general concepts and policy-like statements, and applied to both mediators and arbitrators, the new Code is more specific and attempts to be more comprehensive in ensuring the integrity of the mediation process.[10] However, despite the longer more thorough explanatory statements, this new Code will likely still have difficulties in addressing the concerns arising from the wide range of existing mediation processes. Like other ethical codes enacted before it, the Code is still unlikely to give clear guidance on expectations for compliance especially when its attempt is to apply to all mediation methods.[11]

Among the vast range of available mediation methods, the three that are most frequently examined for the purposes of comparison, and which have been chosen for this analysis, are: evaluative mediation which tends be more directive and position-based ("Evaluative"); therapeutic mediation sometimes referred to interchangeably by some as "transformative" in that it tends to aim to "fix" the parties, and transform their relationship ("Therapeutic"); and facilitative mediation which focuses on problem-solving and allowing the parties to address their "interests", rather than positions ("Facilitative"). Since goals, techniques, and mediator roles, can vary among these various models of mediation, it is the author's submission that the ethical codes to which mediators must comply, should be specific to the needs of the individual process, and be clear enough to determine compliance standards.

There are a number of different ways in which to address the problems that arise in application of ethical codes to mediation processes but none of them are without their difficulties. The most straight forward approach would be to ensure that each model of mediation has a code of ethics that corresponds with its independent needs. In the alternative, one could revise the existing Code to reflect the independent needs of the various models. However, both options would require static definitions of the various processes. Although some authors suggest that the term "mediation" should be re-defined, this could unnecessarily eliminate current effective models from mainstream access, resulting in a great loss to the public, and a tragic limitation on the potential of the mediation process due to the fact that mediation's very strength is its ability to respond flexibly to the various needs of the public and the various existing disputes.

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7 At the time of writing this paper, the 2005 version of the Code was not yet published, this paper is based on a draft provided by the ADR Institute of Canada ("Institute") on June 14, 2005 attached as App."A".

8 Family Mediation Canada, <www.fmc.ca> (Date Accessed: June 14, 2005).

9 On June 14, 2005, Judy Ballantyne, Administrator of the ADR Institute of Canada advised that a Disciplinary Code had been drafted, and was not yet finalized but would include punishment for a failure to meet the Code of Ethics ("Code") obligations including imposition of re-training requirements, and potential for revocation of membership.

10 There are significant differences, as compared with the previous version of the Institute's Code (See App. "B").

11 The ABA/AAA Model Standards of Conduct for Mediators < http://www.mediate.com/articles/spidrstds.cfm> (Date Accessed: June 10, 2005) is also intended to apply to many forms of mediation process, in fact the Introductory note states that "… the standards are intended to apply to all types of mediation". As a result, that document also is necessarily vague and standards for compliance will be difficult to determine.

Over time, as dependence and trust in mediation grows, and the differences in mediation models become well known, various mediation methods may splinter off and re-identify themselves. But the author submits that to do this now, while the various models of mediation are in their formative stages, could dispose of the ability of mediation to flexibly respond to different types of conflict, creating a type of "off the rack" scenario that could be ill-fitting to the meet the needs of the vast range of conflicts to which mediation, as a conflict resolution mechanism, might be applied.

II. MEDIATION METHODS

There is little consensus as to what form of mediation is most commonly used.[12] However, it is generally accepted that mediation, as a means of resolving disputes, is a valuable tool for the peaceful resolution of conflict.[13]

Mediators using "Evaluative", "Therapeutic", and "Facilitative"[14] mediations may use different techniques and skills to conduct the mediation. But despite the fact that there are numerous variations on these general themes,[15] the core concepts of all three are the same in that the mediator is neutral,[16] the process is intended to be confidential, and it is the parties, and not the mediator, who determines the outcome[17]. Depending on the method employed, the role of the mediator in the mediation, and the outcome (both intended and unintended), can be significantly different. [18]

Since the mediation processes are "models" of process, rather than inert practice rules, their fluidity and lack of preciseness may further complicate the drafting and imposition of an ethical code that could anticipate all means of utilizing a particular model. However, it is this lack of "purity" in each of the forms of mediation process that adds value to the mechanism by permitting mediators to develop a means of practice based on appropriateness to the scenario and the needs of the particular parties.

Different methods of mediation are believed to be more or less appropriate, or desirable, depending on the type of conflict, the parties involved, the parties relationship (both existing and desired), and the context of the dispute. As a result, assessment of the appropriate method will require comprehensive knowledge of these

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[12] People's Law Library of Maryland (1999) < www.peoples-law.org> (Date Accessed: May 31, 2005) ("Maryland").

[13] The intervention in a negotiation or a conflict by an agreed upon third party, who has limited or no authoritative decision-making power, and who has the requisite skill to assist parties involved to voluntarily reach a mutually acceptable settlement of issues in dispute; is not only an effective tool in addressing substantive issues, but may also be an effective tool in establishing or strengthening relationships of trust and respect between the parties -- or, at least terminate relationships in a manner that minimizes emotional costs and psychological harms: Moore, supra n.1 at p. 15.

[14] Maryland, supra n. 12.

[15] Variations on general themes include hybrids and cousins including narrative, restorative, humanistic, mindful, intentional, forgiveness, and transformative mediation: John Wade, "Representing Clients Effectively in Negotiation Conciliation and Mediation in Family Property Disputes" First Published by Bond Dispute Resolution News 8 Volume 17 June 2004: < http://www.mediate.com/articles/wadeJ1.cfm> (Date Accessed: May 30, 2005)

[16] "Neutral" meaning that the mediator does not take either parties' side of the dispute or conflict.

[17] Technically this is correct, though some would argue that directive and evaluative methods limit the control that the parties have over the process, despite the fact that but ultimately it will be the parties who decide whether or not to resolve the matter at the mediation and enter into a settlement on the terms agreed to at mediation.

[18] Maryland supra, n. 12.

factors, in addition to the parties' goals.[19] There is significant overlap in which subject matter and type of case is appropriate for which type of dispute; and although proponents of different methods will have differing opinions, the choice of which process to use will likely depend more on the parties involved, and how they are advised in selecting a form of mediation. However, despite the fact that parties have the freedom to choose the model of their preference, it is commonly believed that: 1) where the relationship is less important, and a quick prediction as to rights and positions is paramount, the parties are more likely to choose Evaluative mediation ("EM") processes;[20] 2) where the parties desire a problem-solving mechanism to resolve the dispute in a non-antagonistic manner, taking into account the independent interests of the parties, they are more likely to choose Facilitative mediation ("FM"); and 3) where there is strong incentive for the parties to repair the relationship, and address past grievances, they are more likely to choose Therapeutic mediation ("TM").[21].

The different skills, or micro-skills used by the mediator ("M") will also need to respond to the needs of the parties and the conflict. For example, disposing of emotional issues may, or may, not assist the parties through the mediation. In relationship matters, or other matters where injury to the relationship has caused or compounded the conflict, it may be necessary for the M to assist the parties in addressing these issues. In other situations the emotional elements may be derailing the process and preclude the parties from having the ability to *rationally* address the matters in dispute.

A. PARTIES' GOALS AND MEDIATOR'S ROLE AND QUALIFICATIONS

a. Goals:

The goals of the parties upon entering into mediation may be diverse, or mixed. For example, one of the parties may enter into mediation for the purposes of repairing a relationship and to learn skills for future interactions, where the other party may be looking to determine the potential outcome of a lawsuit. Or, a single party might be entering into mediation to address both of these goals, and be unclear on which is the

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[19] For example, the goal of a business transactional mediation may be to resolve a contract dispute to avoid litigation, or to repair a business relationship, and the goal of an international commercial mediation may be to assist in a contract negotiation where social policies are at issue and international relations might be involved, in those cases the parties might choose Facilitative mediation. Whereas, the goals of a court-annexed mediation may be to terminate litigation and resolve the matter, in that case that parties might choose Facilitative or EM. In contrast, where the parties are more concerned with protecting and repairing future relationships and avoidance of repeated conflicts, they might choose Therapeutic mediation.

[20] Different processes may be employed where the parties value their relationship less. For example, parties involved in a commercial mediation that anticipate and/or desire a termination to the relationship, and are mediating merely to negotiate interpretation of contract terms, resolution of risk assessment issues, may require the mediator to assist them with processes to help them communicate, negotiate, and make decisions to facilitate a resolution to either avoid or terminate resolve litigation; but such assistance might limit or even exclude communication, in order to put more emphasis on the means necessary to economically resolve the conflict. In fact the mediator's role might be limited to assessing and evaluating the strength of each side's position, and/or to offer a solution without much communication exchanged between the parties at all. In purely commercial type or dispute, and particularly with mediations designed to avoid or terminate litigation, the mediator might act to help the parties to define and refine their issues. Perhaps even limiting or removing the emotional elements from the dispute in order to assist the parties in reaching an amicable agreement.

[21] Facilitative techniques may also assist the parties in establishing and/or strengthening relationships of trust and/or respect between the parties, and in the even the relationship must terminate, the process might be designed in such a way as to minimize emotional costs and psychological harm: Moore, supra n. 1, at p. 15.

primary objective. In the best case scenario, these matters will be defined before choosing a mediator, either with the assistance of lawyers, counselors, or the mediator; and the mediation process chosen, though fluid, will be directed to towards the generally accepted goals of the particular process and the needs of the parties.

When the parties choose EM, the generally accepted goal of the parties is usually to settle a conflict quickly within a range of outcomes determined by measuring objective standards against the parties' relative positions.[22] The parties are looking for the EM M to suggest probable findings by the court both regarding law and evidence, and the parties will want to rely on the M's recommendations for settlement in order to negotiate a resolution.

In contrast, the goal of the parties in choosing TM tends to be focused on dealing with the underlying causes of the parties' problems, in order to improve their relationship as a basis for resolving a dispute, and possibly to change their communication with each other, and their behaviors for the future. [23]In contrast with EM, the primary goal is not necessarily to generate a mutually acceptable settlement of the immediate dispute, but rather, to enable the parties to constructively approach their current and future problems.[24] Unlike other forms of mediation, since the goal is to repair the relationship, if the relationship is restored or improved the parties might feel that the mediation was successful even if there is no settlement. The goal is to deal with the relationship impasse that created the conflict in order that it does not hamper the negotiation process. [25] The parties seek a real "resolution" to the problem rather than merely a "settlement" of the dispute. [26] While both FM and EM aim to help the parties resolve their dispute, TM is more concerned with helping the parties alter the way in which they relate to each other. While a settlement is one possible outcome of TM, it is not the only outcome, or even the most important one.

In addition to avoiding the delays often associated with adjudication, and expediting resolution of a dispute or controversy, the goal of the parties in FM is to assist them in resolving disputes by negotiating in terms of their underlying needs and interests rather than being restricted by their stance on legal positions and measurement of strict legal entitlement. [27] Like EM, the goal is task-orientated in that the objective is primarily to resolve the conflict between the parties. But unlike EM the goal is to achieve a settlement that is created and developed by the parties, not the M. Also like TM, the goal is to teach the parties how to effectively create workable solutions to conflict, but unlike TM, the focus is on the conflict, not the relationship, and unlike TM, the parties are less likely to feel that the mediation is a success if no resolution is reached. However, once having been taught skills to develop settlement options, the

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[22] The evaluation of the parties positions will be an assessment by the EM mediator according to legal rights, probable court outcomes, industry norms, and/or other industry objective social standards: Laurence Boulle, "Mediation – Skills and Techniques", Sydney, Australia: Butterworths 2001 ("Boulle") at p. 15 "Mediation: Principles, Process, Practice", Sydney, Australia: Butterworths, 1996 ("Boulle 1996").

[23] Boulle, Laurence and Kathleen J. Kelly, Mediation: Principles, Process, Practice (Canadian Edition). Toronto, Butterworths, 1998 ("Boulle & Kelly") as quoted by Doyle, Kelly "Transformative Mediation: Confessions of a Facilitative Mediator and Civil Litigator with Evaluative Tendencies" March, 2002 ("Doyle") p. 6.

[24]\ Murray S. Levin, "The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion"16 Ohio St. J. on Disp. Resol. 267 (2001) ("Levin") at p. 2.

[25] Erickson, Beth M. "Therapeutic Mediation: A Saner Way of Disputing" 14 J. Am. Acad. Matrim. Law. 233 ("Erickson") at p. 233

[26] Boulle & Kelly, supra n. 23 at p. 6.

[27] Boulle 1996, supra at n. 22.

parties may also have improved their relationship and be left will skills to resolve conflict in the future, even thought this may or may not necessarily be a goal of the mediation.

b. Mediator's Role and Qualifications:

Although there is no exact definition of the role or qualifications of the "perfect mediator" for any of the different models of mediation, there are stereotypical roles that mediators take, depending on the mediation process chosen; and there are preconceived ideal qualifications that correspond to the method desired by the parties and their goals in choosing mediation.

The conventional role of the EM M is to focus on the parties' positions, and evaluate the strength of each; therefore the EM M chosen will likely be someone with expertise in the subject matter of the case.[28] However, the EM M may not necessarily have highly developed mediation skills or knowledge of a vast range of mediation techniques. [29] The EM M's role will be directed more at providing additional information and advising and persuading the parties, bringing professional expertise to bear on the content of negotiations. [30] Being a more interventionist M than Ms in other models of mediation, the M has more responsibilities[31] in that the M suggests potential solutions to the conflict, and presents potential settlement arrangements. Some refer to this style of mediation being 'quasi-arbitral in style', [32] and the process looks more adjudicative than therapeutic as in the case of TM, or collaborative, as in the case of FM. Since the parties may have less input and/or control over developing solutions or outcomes, it is important that the parties have confidence in the EM M's qualifications and expertise in the area, and the M's ability to properly evaluate the case and predict probable outcomes. The parties confidence in the expertise of the mediation will likely be paramount in whether the parties are moved to settle the case based on the M's recommendations.

Traditionally, the TM M will focus on the people, therefore the TM M's main role will be to use professional therapeutic techniques before or during mediation, and to treat relationship issues through empowerment and recognition, [33] many believe that the M chosen for this process should have expertise in counseling, psychology or social work, with an understanding of psychological causes of conflict. [34] The TM M will assist the parties in mending their relationship in order that they can have workable ways to communicate and resolve conflict in the future. The TM M will not propose settlement terms, draft agreements or make decisions for their clients. The

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[28] For example an EM mediator with a legal education will likely be chosen where an understanding of relevant documents such as pleadings, depositions, reports and briefs is important. However, when the primary issue is with respect to standards in a particular industry, a mediator with significant expertise in that area might be chosen. For example, an EM mediator in matter in construction litigation matter may suggest probable findings by the court both regarding law and evidence regarding construction industry standards; and then suggest potential settlement arrangements based on the mediators expertise, experience, and assessment of the case of how the parties should resolve the issue.

[29] Boulle 1996, supra n. 22

[30] Boulle 1996, supra n. 22

[31] Boulle 1996, supra n. 22

[32] Boulle 1996, supra n. 22

[33] Boulle, 1996, supra at n. 22

[34] Id.

definition of the dispute in TM is in terms of behavioral, emotional, communication and relationship factors. [35] The M's role will include and/or be governed by sensitivity to, and understanding of psychological causes of conflict. This model is said to be a natural tool for Ms with expertise in counseling or social work. [36] TM may be attractive to Ms without industry expertise or legal training; however, in recent years it has even become popular with lawyers transitioning from litigation practice to more holistic ideologies.[37]

In contrast with EM, which focuses on the issues, and TM, which focuses on the people, the FM M focuses on the problem. The FM M usually has a lower intervention role; instead parties are encouraged to fashion creative outcomes around mutual interests [38] using collaborative techniques. Therefore, the FM M's role will be to conduct the process, maintain a constructive dialogue between the parties to brainstorm with the parties for potential solutions to the problem, and enhance negotiation process and encourage settlement. As a result the M chosen for a FM should have expertise in mediation process and techniques; not necessary knowledge of the subject matter of dispute. In contrast with EM, since it will be parties, and not the M that will devise potential solutions, it is enough that the parties understand the subject matter. [39] The M will educate the parties in how to come up with possible solutions through the facilitate process, but will not educate them on the subject matter of the dispute.[40] The FM M will facilitate the parties' creation of a process through which the parties will be able to generate their own solutions to the conflict. Techniques applied through FM giving the parties control over the resolution are employed to procure *both* parties satisfaction with the result.

B. PROCESS AND SKILLS

Skills in the various mediation processes range from narrow conflict-based approaches to broad interest-based approaches, and from highly directed models like EM to undirected modes like TM. Both FM and EM Ms are task-oriented in that their objective is to achieve a settlement or resolution to the conflict presented. In contrast, TM focuses less on the conflict and positions, and more on the people and their relationship. The TM M will not only deal with matters presently at issue, but also possibly look into the past interactions between the parties, and future needs of the relationship.

Where the EM M educates himself about the conflict and interests of the parties to come up with a resolution, and the FM educates the parties to explore their interests including their positions in conflict and teaches them how to arrive at a solution for their a dispute; the TM explores the relationship, and teaches the parties about their

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35 Boulle & Kelly, supra n. 23 as quoted by Doyle, supra n. 23 at p. 6.

36 Id.

37 See discussion regarding applicability of transformative mediation in commercial litigation: Pynchon, Victoria " Can Transformative Mediation Work in Commercial Litigation? A Conversation With Joseph P. Folger and Robert A. Baruch Bush", February, 2005 Southern California Mediation Association Newsletter and Doyle, supra n. 23

38 Boulle 1996, supra n. 22,

39 Id.

40 Id.

relationship and how to interact not only for the resolution of their current problem, but also in the future in order to prevent problems.

Ms choose the form of skills they use according to their comfort levels, the particular parties involved, and the situation. Skills employed will include establishing rapport, communicating through both verbal and non-verbal behavior, and conflict resolution. Further skills involve organizing the mediation according to the needs of the parties, and the method employed, especially with respect to matters such as seating and environment.

While TM might be the most emotionally healing of the options, with EM mediation at the opposite end of the spectrum being the least healing, at least from a psychological and interpersonal relationship perspective, and FM will be somewhere in between the two methods;[41] all methods have vast potential to provide future collateral benefits to the parties. For example, benefits could arise from TM or FM in the form of teaching the parties communication techniques and dispute resolution skills they might use to resolve conflict in the future, or in EM, in offering predictions of how a similar controversy might evaluated by a neutral evaluation in the future, or through an adjudicative process. Even without settlement of the main issue, in TM and FM, one or both of the parties might be better equipped emotionally to move forward with their lives. Further, without settlement in EM or FM in the future, the parties might avoid similar the patterns of behavior or business dealings that gave rise to the problem, or they might arrive upon a resolution outside the scope of the primary conflict, for example 'agreeing to disagree' overlooking past wrongs and entering into a new deal.

a. Intake and Preliminary Matters:

In EM, the conflict is defined in terms of the positions of the parties. It is the most adversarial of the processes and it focuses on the education of the M, therefore the parties will provide briefs, evidence, expert material and any other material necessary to enable the M to effectively evaluate the case, and the parties' positions. The EM M will study relevant documents before the mediation.[42]

In TM mediation, the conflict is defined in terms of the relationship, therefore it will not likely be necessary for the M to have any more than a simple understanding of the conflict between the parties before the mediation commences. Prior to the TM, the M might know very little about the central conflict, for example the M might be told this matter relates to a divorce, estate dispute, partnership conflict, and nothing more. The TM M is less interested in the substantive issues because in TM the focus is to assist the parties in educating each other about the relationship. Therefore, unlike EM, the M in TM will not receive position papers, briefs or other materials in advance of the mediation.

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[41] However, certainly the Facilitative process could work to teach the parties how to deal with one another in the future by virtue of the skills learned to examine interests and come up with solutions to meet the needs of all parties. Further, it is arguable that with the evaluation of positions offered by the EM mediator, the parties may be less likely to be uncertain about a similar type of conflict in the future, and with knowledge of the Evaluative prediction in the past, the parties may even have a starting point from which to embark on negotiations.

[42] Relevant documents could include documents, such as pleadings, depositions, reports, and mediation briefs: Riskin, Riskin, Leonard L. "Understanding Mediator's Orientations, Strategies, and Techniques: A Grid for the Perplexed", 1 Harvard Negotiation Law Review 7, (1996) at p. 26 and 30 ("Riskin's Grid").

In contrast with the interventionist approach of EM techniques and passive non-issue oriented passive TM techniques; in FM, in order to maintain a directed process, the M may begin the process by pre-screening the participants to determine their needs during the mediation.[43] The M may interview the parties separately prior to commencement, in order to best strategize how to conduct the mediation. The M will ensure that the appropriate persons will attend the FM and that all necessary documentation that the parties need to negotiate, will be available. The M will also attempt to determine why the case has not settled to date, and what the best and worst alternatives of each participant will be if they do not reach a negotiated settlement during the mediation.

b. Commencement:

At the commencement of the EM, the M will give a short opening statement, and then each side will present their case.[44] After the presentation, the M conducting the EM broadly may ask for individual parties (often their lawyers) to make comments in order to attempt to identify to determine underlying interests of the parties[45], depending on the situation this could be in joint session or private caucus.[46] In the narrow EM the M may focus on the M's own education of the case over that of the parties[47]. Whereas the broad EM M will focus on the M's education of the case *at least* as much as the education of the parties. [48]

As inferred by its name, the TM might be conducted in a manner that could look much like a therapy session. Parties will be given an opportunity to air grievances and 'feel that they have been understood', for sometimes, perceptually, unlimited time periods; with little or no interruption from the M. The M will encourage active listening by both sides, and clear communication and active involvement of the parties in order to assist them to understand their relationship and the communication problems that gave rise to the dispute. The M might use professional therapeutic techniques to diagnose and treat relationship problems, [49] and these problems will be resolved before the parties begin to address the conflict and negotiate a settlement. Therapy techniques may include assisting parties to establish and/or strengthen relationships of trust and/or respect between them by allowing them to explore the impact of their current and past communication mannerisms and how they hamper

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43 Fells, Ray "A Tactical Opportunity? Different Perspectives on the Role of Mediation in Industrial Relations" (5th National Mediation Conference, Australia, 2000) University of Western Australia ("Fells")

44 Parties will usually choose to have their lawyers present their case: Riskin's Grid, supra at n.41 at p. 26.

45: As a result of the need to determine the underlying interests of the parties, in contrast with the narrow EM where the M might be satisfied to have merely the person with authority, and/or lawyers present, the M conducting the EM broadly will usually require the 'real parties' to attend and participate in the mediation: Riskin's Grid, supra at n. 41 at p. 26 and 30. In this way, this form of EM is more like Facilitative and Therapeutic mediation, which both require the participation of the actual parties in order for effective mediation.

46 Private interviews with the 'real parties' could include asking questions directly and indirectly (perhaps about plans, person goals and policies situations, etc.) to determine underlying interests; or the mediator might speculate out loud about the parties' interests, seeking confirmation from the parties. The mediation will be seeking to uncover needs that might not be revealed in documents: Riskin's Grid, supra at n. 41 p. 26 and 30;

47 Riskin's Grid, supra n. 41 at p 30

48 Riskin's Grid, supra n. 41 at p. 26; See Feinberg, Kenneth "Mediation – A Preferred Method of Dispute Resolution" , 16 Pepp. L. Rev. S5, S12 S20 (1989).

49 Boulle & Kelly, supra n. 23 as quoted by Doyle, supra n. 23 at p. 6: The process has been criticized in that it may confuse counseling and mediation roles.

their understanding of one another in order that the parties are able to negotiate and make decisions that will survive future events. [50].

Unlike other forms of mediation, the TM M will not adhere to a rigid schedule for commencement and completion of the mediation process, and instead will listen to the parties ask questions, summarize (without changing meaning), in order to help the parties identify and understand the issues about which there is conflict, and identify and assess options for improved communication (including non-settlement options).

Since, TM is based on the belief that conflict tends to make parties feel frail and self-absorbed, the TM will be guided by an intent to encourage change in the parties' conflict interactions by helping them appreciate the other side's perspective. By t teaching communication methods designed to strengthening the parties' ability to handle conflict in a productive manner, the TM M hopes to encourage the parties to use these skills to resolve the present conflict, and future conflict, thereby avoiding the need for a "negotiated" settlement.[51]

The M in TM will only usually intervene in the conversation between the parties in order to call attention to moments of recognition and empowerment, [52] and ground rules for the mediation are set only if the parties set them. For example ground rules may be set to avoid feelings of abuse, or intimidation, or limits on use of foul language, or insults etc. [53]. The M will not direct the parties to topics or issues, but instead, will follow the parties' conversation and assist them to talk about what they think is important. [54]. In TM, the M does not offer an opinion on the strengths or weaknesses of the parties' cases, and does not suggest solutions. [55]. TM skills are focused on encouraging personal growth and development, and accommodative relationships between groups or individuals with competing interests.[56] The conflict situation is intended to be transformed from one in which groups are in competition with one another, to one in which groups recognize their mutual interests in arriving at workable solutions. This approach is designed to bring together all those individuals and groups affected by a conflict, including those with the power to make the decision. As much as possible, the participants will be provided the freedom to control the process, to establish the boundaries of the conflict, to establish rules about how the process should unfold, and what, if any, role does the M play.

In FM, the M will give an opening statement and then allow each party to present the conflict from their own perspective. The M then works with the parties to narrow issues and interests in dispute, possibly listing them in order of priority. After the list has been comprised, the M will brainstorm with the parties to encourage them to develop potential solutions to the issues or problems presented. It is possible that through this process the parties may devise a workable solution, that they agree will meet their needs. If they do not, the M will meet with each side separately in order to attempt to clarify the concerns of the parties, and attempt to uncover any underlying

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[50] John Wade "Mediation, Seven Fundamental Questions" Dispute Resolution Center Newsletter, Vol 7, January 2001, p. 1; and Moore, supra n. 1 at p. 15 - 21.

[51] Maryland, supra n. 12.

[52] Id.

[53] Maryland, supra n. 12.

[54] Id.

[55] Id.

[56] Doyle, supra n. 23

interests that might be preventing settlement and assist the parties with their negotiation.[57] Unlike EM where adversarial behaviors are helpful to the M in evaluating positions, and unlike TM where the parties may need to 'vent' their grievances in order to move forward; in FM certain behavior can run counter to M's efforts to move parties towards a different perception of the conflict, therefore the EM will control the process to try to diffuse animosity in order to have the parties work together on developing a resolution to the dispute.[58]

c. Negotiation:

Depending on the M chosen, both the EM and the FM process can be conducted either broadly or narrowly.[59] The mediation conducted narrowly would be confined to issues and positions of the parties, whereas the mediation conducted broadly includes consideration of the parties' individual interests.[60]

In EM the parties will meet in private caucus after the joint session in order to further educate the M on their positions (in narrow EM), and on their individual interests and needs (in broad EM). Communication between the parties is likely restricted[61] because of the focus on the education of the M in order that M can evaluate the case, and develop a proposal acceptable to both sides. Therefore, there will be more time spent on private caucus, and less time in joint session[62] than TM and FM where the focus is more on the education of the parties.

In contrast with FM which encourages understanding and problem solving, and TM which encourages an understanding between the parties of their relationship, the EM process, some say, perpetuates an adversarial climate[63] because the strength of each side's position is assessed. This means the parties will likely act differently than they would with in FM or TM, and their focus will be on making themselves look as good as possible and their opponent's to look as bad as possible in order to sway the M to their position. All models of mediation inherently may involve parties behaving, whether consciously, or sub-consciously, in ways intended to promote their believability in the presence of the mediator in order to convince the mediator that they are the most credible, and/or sometimes reasonable, person. However, in EM this posturing will likely be exaggerated, since the mindset of the participants in FM, or TM, is significantly different. In EM, participants will be less likely to be open to revealing "their hand" for fear that it will weaken the evaluator's perception of the strength of their case.[64] There is an inherent disincentive for the parties' candor[65]because they will be in a competitive mind-set seeking to capture the evaluator's favor and win the case. These adversarial postures will, themselves,

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[57] Boulle, supra n. 22 at p. 175, and throughout the text gives great detail as to the extent of techniques that can be employed to conduct facilitative mediation, and in particular break an impasse.

[58] Love, supra n. 5 at p. 940, n. 16 referring to Robert A. Baruch Bush and Joseph P. Folger, "The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition" (1994) ("Baruch & Folger").

[59] See Riskin's Grid, supra n. 41.

[60] Id. at p. 26.

[61] Id. at p. 30.

[62] Riskin's Grid, supra n. 41 at p. 26 and 30.

[63] Love, supra n. 5 at p. 940 and Kovach and Love, supra note 5 at p. 31.

[64] Id.

[65] Riskin's Grid, supra n. 41 at, note 8 at p. 45; Love, supra n. 5 at p. 940, n.15.

sometimes provide further evidence to the EM M in assessing the parties' credibility for making a determination.

After private caucus, once the M believes he or she has sufficient understanding of the parties' positions and interests (in the case of broad EM), the M will make an assessment or evaluation of the strengths and weaknesses of each parties' position, and opine or suggest possible outcomes within a range of likely court verdicts.[66] Using predetermined criteria to evaluate evidence and arguments presented by adverse parties,[67] the M will have made determinations including finding facts by weighing evidence, judging credibility and allocating the burden of proof, determining and apply relevant law, rule, or custom to the particular situation. [68]

Based on that assessment, the M will then make a proposal for settlement purposes. [69] The credibility of the M as a specialist, in the subject matter, is likely to be an important part of whether the parties will accept the M's opinion and proposal; and the M's conduct during the mediation is likely to be more authoritarian and directive, than with other models. The more dictatorial environment will often set a tone that permits the M to influence and push the parties towards settlement.[70]

In attempting to make the parties accept the proposed resolution, in EM the M usually devotes considerable time to impressing upon the parties the weaknesses of their case to undermine their confidence in their position[71] and the cost of pursuing a litigated resolution. The process is often adversarial throughout, with the M pressing the disputants to make new demands and offers more in line with the M's evaluations. To push the parties towards settlement, the M in narrow EM might tell a party that they should accept offer because it would be "fair" or "reasonable", and it would reduce risk of expense of litigation, or the M might engage in "head-banging".[72] Like the M in narrow EM, the M in broad EM will urge parties to accept the M's or a variation of that proposal with varying degrees of force or intended impact. [73] Similar to some of the methods employed in FM and TM, if the M in broad EM concludes that the goal of the mediation should include changing the people involved, M might take measures

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66 Boulle 1996, supra n. 22.

67 Love, supra n. 5 at p. 2

68 Id.

69 Riskin's Grid, supra n. 41 at, note 8 at p. 45; Love, supra n. 5 at p. 940, n.15.

70 For example, during an employment termination dispute, the mediator may give each side his opinion as to what the settlement value of the case should be. The mediator may then try to pressure employer to accept suggested settlement by telling employer that it was employer's responsibility to live up to certain obligations. In private caucus with employee, when employee resists suggested settlement, the mediator may respond by shaming the employee for wanting more money, implying that employee is "greedy": Love, supra n. 5 at p. 1, and n. 1. Love uses these two examples by Eric Green to illustrate the use of mediation with neutral evaluation: Lavinia Hall and Eric Green Hall, "Finding Alternatives to Litigation in Business Disputes, in When Talk Works: Profiles of Mediators 279, at 298-299 ("Hall & Green") Love's article argues that the EM model is a "mixed process". Or, in a divorce mediation, where the wife mentions her debilitating health problems, the mediator might suggest that she is "acting sick" to get what she wants or insinuate ulterior motives: Love, supra n. 5 at p. 1 and n. 4 referring to Trina Grillo, "The Mediation Alternative: Process Dangers for Women", 100 Yale L.J. 1545, 1586 (1991) ("Grillo"). In the first example, the mediator has evaluated the case by assessing a fair settlement value of the case and pressing the parties to accept that settlement value; and in the second example, the mediator evaluates by making and articulating a judgment that the party is acting sick as a ploy to advance her position: Love, supra at n. 5.

71 Maryland, supra n. 12.

72 Riskin's Grid, supra n. 41 at p. 26.

73 Id. at p. 30: If the M has clout (the ability to bring pressure to bear on one or more of the parties, she might warn them or threaten to use it).

to effectuate that goal, such as appealing to shared values, lecturing, or applying pressure. [74]

In TM, there will be no negotiation of the conflict between the parties until the relationship issues are resolved. At that point the parties will be equipped, on their own, to resolve the conflict between them.[75]

In FM, the conflict is defined in terms of parties' underlying interests and needs – substantive, procedural and psychological. [76] As with TM, and in contrast with EM mediation, the M will assist disputants in making their own decisions and evaluating their own situations, and will not evaluate their positions and make suggestions for resolution, or predict outcomes. [77] Instead M will meet with each side separately in order to attempt to clarify the concerns of the parties, and attempt to uncover any underlying interests that might be preventing settlement and assist the parties with their negotiation to effectively evaluating their own situations[78] by facilitating communications, promoting understanding, and focusing the parties on their own interests, directing the parties to seek creative problem solving strategies to address their own interests.[79]

Using techniques such as: 'challenging the assumption that there is only a 'fixed pie' over which to negotiate'; '[r]efocusing the parties' attention on interests and away from positions'; clarifying communications and understandings between the parties'; or '[c]onducting another brainstorming or other creative option exercise'; the M will work with the parties both separately and together to break the impasse.[80] In some circumstances, intangibles such as an apology or other personal statement might be procured by the M on behalf or one or both parties in order to 'clear the air' and move forward might be important. Also important will be tools used by the M to help the parties diffuse possible feelings of animosity in order to move forward.

In FM, the M will take an active role in controlling the process by setting the ground rules for how the problem will be solved, asking questions to identify the interests of the parties and the real issues in the disagreement, and helping the parties to explore

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[74] Riskin's Grid, supra n. 41 at p. 30; Some believe that EM blurs the mediation/arbitration distinction, in that it does not teach the parties skills for the future, therefore it may not be appropriate for matters where there is a continuing relationship between the parties because of the likelihood for a re-occurance: Boulle 1996, supra n. 22: Boulle comments that appropriate matters for mediation would be Commercial, personal injury, trade practices, anti-discrimination, and matrimonial property disputes. However, upon settlement of the conflict based upon the evaluation, the parties might have a better idea as to the likely outcome of a similar dispute.

[75] In TM, the conflict between the parties is defined in terms of behavioral, emotional and relationship causes: Boulle 1996, supra n. 22. Decision-making and resolution of the dispute will be postponed until the relationship issues have been addressed and dealt with, therefore, there is less focus on settlement outcomes. The central premise of TM is that it is that the relationship issues that block the communication in the dispute have up until now prevented a peaceful resolution, therefore they must be attended to in order to remove impediments to negotiations: Erickson, supra n. 25 at p. 233. TM is intended to ensure that the relationship impasse that created the conflict do not occur again and that the parties can successfully avoid, or resolve future conflict on their own. However, since settlement of the conflict is not an imminent priority, it is possible for this form of mediation to take many sessions over a long drawn out period of time, with no settlement of the conflict.

[76] Boulle 1996, supra n. 22.

[77] Id.

[78] Love, supra n. 5 p. 939

[79] Id. at p. 940

[80] Boulle, supra n. 22 at p. 175 and throughout the text gives great detail as to the extent of techniques that can be employed to conduct facilitative mediation, and in particular break an impasse.

solutions that benefit both parties.[81] The M will assert to the parties that "…the disputants are intelligent, able to work with their counterparts, and capable of understanding their situations better than the M and, perhaps, better than their lawyers. Accordingly, the disputants can develop better solutions than any M might create. Thus, the FM M assumes that his principal mission is to clarify and to enhance communication between the disputants in order to help them decide what to do".[82]

The M in narrow FM will attempt to educate the parties about the strengths and weaknesses of their claims and the likely consequences of failing to settle, by asking questions in joint session and private caucus depending on the circumstances, and the questions, and issues. [83] The intent of the questions will be to help the parties to understand both sides' legal positions and the consequences of non-settlement. The questions ordinarily would concern the very issues about which the narrow EM M makes statements – the strengths and weaknesses of each side's case and the likely consequences of non-settlement, as well as the costs of litigation (including expense, delay, and inconvenience.)[84] The M in broad FM M will try to assist the parties in defining the subject matter of the mediation in terms of underlying interests, and to help them to develop and choose their own solutions that respond to such interests.[85] Some broad FM M's will also help participants find opportunities to educate or change themselves, their institutions, or their communities[86], in this way the method could offer transformative results not unlike TM. The M will emphasize the need for the parties to educate themselves, and each other, more than the mediator. [87] Therefore, in contrast with the M in EM, the M in broad FM will be inclined to use joint sessions more than private caucuses.[88]

Questions by the M in FM could include asking the parties how much might be paid to resolve a dispute over damages, or such other questions that might encourage the parties to weight the costs and benefits of the proposal against the consequences of non-settlement. The M in FM narrow will help the parties to understand the scope of the problem, whereas the M in FM broad will also assist the parties in understanding the problem in the context of underlying interests.[89]

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[81] Maryland, supra n. 12.

[82] Shestowsky, Donna "Procedural Preferences in Alternative Dispute Resolution" (September 2004) 10 Psychol. Pub. Pol'y & L. 211 ("Shestowsky").

[83] Riskin's Grid, supra n. 41 at p. 28.

[84] Id.

[85] Id. at p. 32

[86] Id.

[87] Id.

[88] Id.

[89] Unlike EM, there is more opportunity for the parties to have resolved personal conflict between them due to the learned they engaged in developing a solution to the conflict. However, the FM process requires hard work and effort on the part of the participants and it is possible that settlement might not be reached. Further, if there is an underlying problem in the relationship, this is something that will not be addressed in FM, therefore conflict could arise again due to the same source.

III. CODE OF ETHICS

In Canada, as in the United States, mediation is an unregulated profession. M's are not licensed; therefore anyone can hold himself or herself out as a M[90]. There are however a number of programs and organizations that attempt to impose standards on M's by screening interviews, credential evaluation, education and training requirements. Further, in most organizations and programs, M's are subject to codes of ethics or standards of conduct established by the program or organization.

The ADR Institute of Canada formerly known as the Arbitration and Mediation Institute of Canada ("Institute") is a national non-profit organization representing both ADR practitioners, and users of ADR processes. The Institute works with its seven (7) provincial affiliates across Canada, to train, certify, and create practice standards for ADR neutrals relating to matters other than family mediations, "family mediators" have their own governing organization and corresponding standards and code of ethics[91].

The Institute drafted and developed a code of ethics over thirty years ago to apply to its neutral panel, and although it has been amended a number of times over the years it has changed little from its original form. The old code applied, and continues to apply, to both arbitrators and M's, however in June 2005, the Institute completed its draft of a new model code intended to apply only to M's. The new AMIC Code is intended to address the needs of all models of mediation.[92]

However, just as one cannot apply the ethical standards of one profession to another (e.g. practicing law to practicing medicine), some argue that one code of ethics cannot address all models of mediation. [93] If ethical codes of conduct are to be effective, they must reflect the conduct, performance, and skills applied in connection with the particular model of mediation utilized. This makes it difficult to apply a "one-size-fits-all" ethical code to all forms of mediation.

The new Code is divided into twelve (12) general sections: objectives, definitions, principles of self-determination, independence and impartiality, conflicts of interest, confidentiality, quality of process, advertising, fees, mediation agreement, termination or suspension of mediation, and other conduct obligations. Generally, the topics addressed in the code can divided into two categories: Practice Issues, and Substantive Issues.[94] Practice issues are "relatively objective and clearly definable dimensions of

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[90] Although no legislation is currently in place, the benefits of such legislation was recently addressed in Jerry M. McHale's paper: "Uniform Mediation Act Discussion Paper", Proceedings of Annual Meetings - 2000 Victoria, BC < http://www.ulcc.ca> (Date Accessed: June 14, 2005).

[91] Family mediators are certified and governed by Family Mediation Canada <www.fmc.ca> (Date Accessed: June 14, 2005). Family Mediation Canada directs its ethical code towards problems unique to family mediation practice

[92] The previous version of the Code entitled "AMIC Code of Ethics" which was entirely contained in little more than a paragraph listing ten general principles is no longer valid for mediators, and has been expanded and replaced with a Code that now resembles a model similar to the standards of mediation practice as they were jointly defined by the American Bar Association (ABA), Association for Conflict Resolution (ACR), and the American Arbitration Association (AAA).

[93] Kovach, Kimberlee K. "Ethics for Whom? The Recognition of Diversity in Lawyering Calls for plurality in Ethical Considerations and Rules of Representational Work", Dispute Resolution Ethics, A Comprehensive Guide, Washington, D.C., ABA 2002 p. 57 ("Kovach 2002"); Also see Kovach, Kimberlee K., "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation 28 Fordham U.L.J. 935 (2001) ("Kovach 2001").

[94] Hilary Astor and Christine Chinkin "Dispute Resolution in Australia" 2nd Edition, Sydney, Australia: Butterworths, 2002 at p. 224 ("Astor & Chinkin").

the mediation process,"[95] for example, the requirements of confidentiality, costs and fee disclosure, informing participants about the nature of mediation and the role of the M, conflicts of interest and independent advice and counsel. [96] Substantive Issues refer to the less tangible matters relating to codes of conduct regarding M behavior and go to key issues of mediation: neutrality, fairness and impartiality. [97]

A. OBJECTIVES AND DEFINITIONS:

One reason ethical codes have difficulty in responding to all forms of situations is that the application of an ethical standard will depend upon an individual's subjective interpretation of the guidelines, and their own value judgments. Sections I and II, of the Code, the "Objectives" and "Definitions", respectively, attempt to guide and clarify the meaning of the following provisions for use by M's attempting to adhere to requisite standards.

a. Objectives:

Objectives for the Code are stated to be to provide: guiding principles for M's conduct, a means of protection to the public, and promotion of confidence in the process. The problem with these principles is, that while they are flexible, they do little to give notice as to what the requisite compliance standard is. This is particularly troublesome in that penalties will be imposed against members for non-compliance. How will discipline be imposed with due process in the event there is an allegation that the M fell below the requisite standard of conduct? To every allegation of misconduct on ethical grounds, one could argue that the ethical provisions were designed to "guide" the parties, and due to the ambiguity of the provisions (as discussed below), they cannot be applied strictly; as a result is there any standard at all?

Generally speaking guiding principles in regulatory provisions, or codes of ethics tend to assist in the interpretation of provisions when conduct comes into question, however this assumes that standards of conduct are specific enough to define. As discussed below, many of the provisions under the Code are too unclear for this provision to assist in their interpretation, particularly in light of the application of the Code to a numerous variety of mediation processes. For example, it is arguable that each provision could be assessed as to its applicability in the context of the particular model of mediation to which it is applied. However, the number of mediation processes, if one includes hybrids, could potentially be infinite.

With respect to provisions addressing protection of the public and promoting public confidence in mediation, without a clear delineation of requisite standards it seems unlikely that these provisions could serve either of these objectives. As discussed below, the only way in which to make these provisions mean something would be to

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[95] Astor & Chinkin, supra n. 93 at p. 224 quoting Greg Walker, "Training Mediators: Teaching about Ethical Obligatonis" (1988) 19 Mediation Quarterly 33 ("Walker") at p. 35.

[96] Astor & Chinkin, supra n. 93 at p. 224.

[97] Astor & Chinkin, supra n. 93 at p. 224 quoting Walker, supra n. 98 at p. 35.

make the Code more specific, which also has its problems.[98] In particular, for example, although rewriting the "Objectives" to impose mandatory standards of conduct might provide more certainty, it would also require concrete identification of the mediation forms and other provisions (as mentioned below) in order that compliance and non-compliance standards can also be established, thereby reducing the ability of the mediation process to flexibly respond to the situation at hand.

b. Definitions:

The Definition section defines only three (3) terms: "Mediation" is defined as "the use of an impartial third Party to assist the parties to resolve a dispute…" not including arbitration;

"Mediator" is defined as the impartial person or persons, engaged to assist the parties to resolve a dispute…" not including an arbitrator unless arbitrator is acting as a M with the consent of the parties; and "impartial" is defined as being unbiased, and being seen as unbiased towards the parties, their interests, and the options presented for settlement.

It is very clear that, by virtue of the definitions, that the term "mediation" is intended to encompass any and every form of mediation with no limit. If one was to limit the application of the Code to one, or only a few forms of mediation practice, in order to clarify to the public what form of process these standards were expected to cover it would be helpful to state within the definition section discrete definitions of the particular forms of process included,[99]. and then further, to set forth definitions for the various forms of mediation process. This more comprehensive definition would clarify what methods of process the Code intended to cover. At this time, the way the definition is drafted; "mediation" can mean anything, which as stated below poses problems and inconsistencies with respect to some of the other ethical obligations. Potentially this Code would even apply to family mediations, which the Institute has specifically asserted are not within the scope of its administration.

The definition for "unbiased" is also problematic in that in includes not only actual bias but also perceived bias i.e. "seen as unbiased". As discussed below, this definition is particularly difficult in EM because a ruling and/or prediction of the fate of a case will likely be seen by one or both parties as the M leaning in a particular direction. This would mean that the M in EM would consistently breach the obligation to be unbiased.

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[98] As discussed herein, by forcing mediation processes into static categories it is likely that you will lose some of the benefits of the flexibility of mediation in attempting to force a "one size fits all" model on all forms of disputes. Ethical codes for mediation are implemented because it has been acknowledged that the practice of mediation is not without potential for harm. Both individuals and organizations can suffer if mediation is conducted badly, or fails to protect vulnerable parties, or neglects the interests of vulnerable third parties; however, the need for consistency should be counterbalanced with the need for diversity of standards to guide the many different contexts in which mediation is practiced: Astor & Chinkin, supra n. 93 at p. 205 referencing at n. 11: NADRAC, "Primary Dispute Resolution in Family Law: A Report to the Attorney General on Part 5 of the Family Law Regulations, 1997, NADRAC, Canberra "Astor & Chinkin") at p. 8: "The flexible nature of the mediation process, the privacy and confidentiality in which it is conducted, the fact that it frequently requires the participants to negotiate legal rights and entitlements and the lack of community knowledge about it means that there is a clear risk that consumers of mediation services may be harmed if mediators are not appropriately trained or the quality of the service does not meet certain standards."

[99] For example, "the definition of mediation includes, "Evaluative Mediation", "Therapeutic Mediation", and "Facilitative Mediation".

One could argue that adding a comment to the effect that the perception of bias must commensurate in accordance with the model of mediation used, might assist in clarifying this provision. However, perhaps this is implied by virtue of the existing flexible "Objectives" referred to above, as merely "guiding principles", thus requiring each event to be viewed in context. The problem with this view is that it is very subjective. Without specified guidelines, the M will have no idea as to what the standard is, and how to avoid the breach of the standard.

B. PRACTICE ISSUES

Practice issues such as Conflict of Interest (Section V), Confidentiality (VI, Other Conduct Obligations (Section XII), Quality of Process (Section VII), Advertising (Section VIII), Fees (Section IX), Agreement to Mediate (Section IX) are fairly clear and comparatively easy to apply in most cases, with the noted exceptions

a. Conflict of Interest:

The Conflict of Interest provision imposes an obligation on the M to disclose to the parties, as soon as possible, any personal interest, conflict of interest, bias, or circumstances likely to give rise to a reasonable apprehension or presumption of bias that are known, or become known to the M after the M's appointment. After the disclosure, the M is required to withdraw, unless the parties consent to retaining the M. The provision also states that the M must be committed to the parties, and not allow pressure our outside influences to compromise the M's independence.

For the most part, the conflict of interest provisions are sufficiently clear, absent issues common to most mediation forms.[100] The disclosure requirement of "any reasonable apprehension or presumption of bias" and corresponding requirement for consent, at least provides the parties with an informed consent as to their decision to participate in the mediation process. But what may be unclear will be whether the disclosure of bias might include, for example: 1) the tendency of a M to give certain kinds of advice in TM; 2) the inclination of a M in FM to insist on a particular schedule for collaboration between the parties, or mandating specific dispute resolution tools for use by the parties during the process; 3) the position of an EM M on a particular challenged, or controversial, industry standard or legal principle that could be determinative of a conflict; or 4) the preconceived ideologies relating to challenged theories of psychological make-up of persons according to sibling

[100] Conflict of Interest issues common to most forms of mediation would include problems arising from situations where mediators are appointed to a administrative agency in scenarios where the M might see the same parties repeatedly; and small communities which have intimate professional communities because the chances of relationship between parties and the mediator may be high and choices of mediators may be limited. Further where the mediator is court-appointed or part of an organized mediation program within or in relationship to an institution, mandatory mediation, there will likely be a regular core of claimants or defendants who will become well-known to the mediators: Astor & Chinkin, supra 97. Also see illustration of the problem at p. 226 where problem has arisen in relation to farm debt mediation in New South Wales where there is a requirement of mediation between farmers and banks after default in payment of a mortgage and before enforcement by the bank. There were allegations that the mediator and the bank combined together to overbear the farmer and the farmer's non-legal representative. There were also suggestions that mediations are used by banks to get favorable consent judgments unfavorable to farmers. If such allegations are true, mediators are behaving improperly, if they are untrue, it will be difficult for mediators to prove allegations are unfounded because communications are confidential. This type of allegation if not addressed, could seriously undermine the development of mediation practice.

placement, gender, or race in TM. The current definition is amorphous and open to interpretation, and one could argue that a requirement that a M be completely from all bias would lead to no M being eligible. The question then becomes what is the extent of disclosure necessary to allow the parties to make an informed consent consistent with principles of self-determination (see discussion below).

b. Confidentiality:

The Confidentiality provision includes an obligation on the M to inform the parties of the confidential nature of the process, not to not disclose to anyone outside the process any information or documents exchanged without the parties' written consent or requirement by law; unless the information/documentation discloses an actual or potential threat to human life; is a report or summary that is required to be prepared by the M; or where the data about the mediation is for research and education purposes and the parties are not, or reasonably anticipated to be identified by such disclosure. Inherent in the mediation process is the disclosure of confidential information in caucus. Caucusing with each party during the course of the mediation is a tool commonly used by mediators to assist them in facilitating negotiation between the parties. The purpose of the caucus is to give the mediator access to vital information that the parties cannot reveal in unassisted negotiations for tactical reasons.[101] Although not all Ms use caucusing during the mediation process, many do, and caucusing is seen as a highly valuable tool in mediation. With respect to caucusing, the provision states that the M will discuss the nature of the private sessions with all parties prior to commencing the sessions, and advise the parties of any limits to confidentiality applicable to information disclosed during private sessions. Such direction would likely include a statement that confidential matters disclosed in caucus will not be revealed to the other side without permission. However, since sensitive information may be revealed during the caucus, despite the benefits that might occur through such disclosure by the M's use of this information, there are risks if the information is used inappropriately. For example, if one party were to learn of another's 'bottom line", all future negotiations could effectively be over because the compromised party would have no bargaining leverage[102]. This risk of leakage is inherent in confidential disclosures revealed during caucusing. Parties may come to the mediation expecting a certain amount of leakage, or use by the M of the confidential information; however, it might also appear to a party that the M is acting in a type of quasi-fiduciary role. The question then becomes, how much disclosure breaches the confidentiality obligation, and what is the extent of the M's duty in protecting confidential information?

The M is also required to maintain confidentiality in the storage and disposal of mediation notes, records and files. Although it is clear that the M must deal with these documents by maintaining their confidentiality, but there is little guidance for how for how long these records should be kept or whether the M must keep records at all.

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[101] "Planning Mediation Programs: Deskbook for common Peas Judges" , Ohio State University College of Law, 2000; Supreme court of Ohio Office of Dispute Resolution, citing: National Standards for Court Connected Mediation Programs, § 9.1 (Center for Dispute Settlement and Institute of Judicial Administration, 1992). ("The assusrance of confidentiality encourages parties to be candid and to participate fully in the process. A mediator's ability to draw out of the parties' underlying interests and concerns may require discussion – and sometimes admissions – of facts that disputants would not otherwise concede.")"

[102] Id.

c. Other Conduct Obligations:

One problem clearly apparent in this provision is the collateral obligations some Ms might face in responding to the ethical codes of their other professional memberships. Certain professions are under ethical obligations to disclose certain matters in accordance with their professional undertakings. The section entitled "Other Conduct Obligations", imposes additional ethical obligations on M's who members of other professions stating that by virtue of the M's professional calling, those provisions also apply, including those that have stricter standards, and where there is a conflict the stricter provision applies.

Obligations that some professionals owe under other professional ethics codes can conflict with provisions under the Code, or at least create an ambiguous state. For example, would an obligation to disclose fraud or misconduct under another professional code release the M from obligations under the M's Code. This type of inconsistency would put the M in jeopardy of breaching at least one code of ethics. An amendment subordinating the professional ethical obligation when the M is acting as an M, and not acting in his alternate professional capacity, would resolve this problem. However, the problem is how to deal with this in EM where the lines will be blurred as to that M's representative capacity. Although the M might insist he was acting in the capacity of M at the time in question, in choosing the particular M, one or both parties might have relied on his professional calling. In any event, this might be something that could be addressed through the contract between the parties, or some form of education (see Quality of Process). Further, the reason certain M's are chosen is because of their alternate professional affiliations, and their increased credibility to their membership in, and compliance with particular organizations, for example bar memberships.

d. Quality of Process:

The quality of the process section requires the M to make "reasonable efforts" to ensure that the parties understand the process before the mediation commences, to ensure that the M conducts a process that provides the parties with the opportunity to participate in the mediation, and which encourages respect among the parties. The provision also requires Ms to acquire and maintain the professional skills and abilities required to uphold the quality of the mediation process, and to conduct themselves professionally at all times and not engage in behavior that will bring disrepute on themselves or the Institute.

One might assume that the types of unprofessional conduct and things that a M would do to bring disrepute upon the M under the requirements set by the Institute would likely be similar to requirements under other ethical codes. However, with respect to the quality of process and requisite skills and abilities, requirements are less certain. Methods of mediation process are not referred to under this section or elsewhere in the Code. Absent is any reference to an M in EM being specifically skilled in the area for which he will give an evaluative opinion or being qualified in giving an evaluation, or the M in TM having the requisite therapist training that the parties might expect, or the M in FM being specifically skilled in problem-solving techniques.

One way to deal with defining "reasonable efforts" might include an obligation to inform parties of the specific methodology to be employed during the selected mediation process, This information could be provided before the mediation starts – perhaps even disclosed at the time the parties are selecting the M. Or during a preliminary interview even before the mediation date is set. . In fact it is hopeful that the M's contract with the parties would specify the method, and that the parties specifically chose the model based on their requirements. However, without a definition of "reasonable efforts", it would be impossible to determine what threshold standard is specifically required. Arguably in order to offer members appropriate due process rights, this provision should be more specific in order that they are aware of what standard they need to meet. Although requiring that a specific formula be contained within the contract between the parties before the start of the mediation could prohibit the M from responding flexibly to events that occur during the mediation, thus prohibiting the process.

Also, since levels of participation of the parties are substantially different depending on the mediation model chosen, there could be problems in requiring the M to ensure parties all have opportunities to participate to the extent they might want. For example, in the EM model, the opportunity of the parties to participate arguably is more limited than in the FM or TM. For example including a reference that the right of the parties to participate in accordance with the model of mediation chosen could clarify the obligation. But even then, would adequate notice be given to M's in order to comply with the requirement? Such a requirement would require uniform standards for each model of mediation. Likely the requisite level of participation for each model would be voraciously argued because M's often make decisions on these matters due in accordance with the scenario presented.

Of particular concern with the "right of participation", is the analysis of that right in the context of "EM" where a party's position in the negotiation could potentially be seriously damaged by a less than favorable evaluation, and where M's are could significantly limit dialogue and exchanges between the parties. Further, in connection with EM, the element of "subject-matter expertise" is paramount, in contrast with the skills of expertise in mediation process. There is no mention of ether of these in this section.

The level of "subject-matter expertise" required, meaning substantial understanding of the legal and administrative procedures, customary practices, or technology associated with the dispute, will necessarily increase in direct proportion to the parties need for M's evaluations.[103] The kind of subject-matter expertise needed depends on the kind of evaluation or direction the parties seek. If they want a prediction about what could happen in court they might prefer an M who practices EM with a strong background in related litigation. If they want ideas about how to structure future business relations, perhaps the mediator should understand the relevant industries. If they want suggestions about how to allocate costs, they may need a mediator who understands the relevant technology. If they need help sorting out interpersonal-relations problems, they would benefit from a mediator oriented towards those issues, rather than one inclined to avoid them. If they want to propose a new government regulation, they might with to retain a mediator who understands administrative law and

[103] Riskin's Grid, supra n. 41 at p. 46

procedure. [104] In contrast, to the extent the parties feel capable of understanding their circumstances and developing potential solutions, jointly or otherwise, jointly, or otherwise, they might prefer a mediator with great skill in the mediation process, even if he or she lacked subject-matter expertise. [105].

Without appropriate safeguards as to quality, potential participants to the mediation process could be significantly dissuaded from pursuing this avenue of dispute resolution. With respect to requisite skills to mediate, there are those who believe that an EM mediator by virtue of the M's ability to give opinions of likely court outcomes, or legal merit, would by necessity require that the M to be a lawyer or substantive expert, thus eliminating non-lawyers from mediation[106]. Further, under XII, the Quality of Process section, the M may also subject to professional obligations in addition to obligations as a M which could theoretically conflict with duties as a M.[107] Another problem with a M in EM is the legitimacy and quality of his decisions. The decisions of Judges' have legitimacy because of their stature as elected or appointed officials and because their decisions are subject to appeal. Judges are obligated to obey rules of procedure in place to guarantee the presentation of relevant and credible evidence and arguments while excluding unreliable information. Ms in EM do not have the legal expertise of a judge and are not subject to the scrutiny of appellate review. Since, even lawyer-mediators might not have sufficient decision-maker training, in EM, where the M will give his opinion on the likely court outcome or analyze the merits of claims or defenses, such activities raise questions about the liability of a M for defective conclusions.

In the current provisions, the concept of liability has remained unaddressed. There is no reference providing for exclusion of liability, and the parties may be free to enter into contracts that would waive all liability, including liability for negligence. However, this sorely reduces the checks and balances necessary to ensure the integrity of the process. On the other hand, failing to protect Ms from certain forms of liability would hamper their ability to work effectively with the parties. More than likely guidelines as to acceptable waivers should be set forth by the Institute either within the Code or in other regulatory provisions. In order to ensure the quality of the process as required under this section, it would likely be necessary to clearly define acceptable methods of mediation in order to develop understandable obligations on the part of the M in all contexts. Any liability waivers would need to reflect the different forms of mediation models available, and temper the notion of checks and balances to protect the public with protection to the M against liability for conduct within generally accepted methods of practice. Of course that does beg the question, what are the generally accepted methods of practice?

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[104] Id.

[105] Id: Depending on the process; to the extent that participants have expertise in the subject area, the need for the mediator to have it could diminish, in fact too much subject-matter expertise could incline some mediators toward a more evaluative role, thereby interfering with the development of creative solutions.

[106] Love, supra n. 5 at p. 942, and n. 23: "See Riskin's Grid, supra n. 41 at p. 46 (noting that the need for subject-matter expertise typically increases in direct proportion to the parties' need for mediator evaluation); Carrie Menkel-Meadow "Is Mediation the Practice of Law?" 14 Alternatives to High Cost of Litig. 57, 61 (1996) (asserting that giving legal predictions and evaluations is the practice of law and cautioning non lawyer-mediators to be wary of EM).

[107] Model Standards of Conduct for Mediators Standard VI cmt. (1995): The comments to the Model Standards state that a mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other processes.

e. Advertising:

Many professions have restrictions on modes of solicitation and advertising. Under the Code, the M is required to refrain from guaranteeing settlement or promising specific results, and to provide accurate information about the M's education, background, Mediation training and experience, in any representation, biographical or promotional material and in any oral explanation of same. This provision poses few problems with the exception that that accurate information regarding the qualifications of the M should likely include the methods of mediation practiced, and specific experience and education corresponding to the method. Since the various methods of mediation require different skills it could be difficult for the public to assess the experience of a particular M without this information. Since many mediators now advertise on websites, guidelines on acceptable advertising, and publication, would protect the public by ensuring competent information and assist the public in choosing a qualified M for their purpose, while still permitting the use of such tools for Ms to market their services. Unfortunately, though, with the use of the worldwide web the M must ensure that his solicitations and advertising comply with legal requirements of the jurisdictions to which he makes his services available. Many professional service organizations advertising services do this with a disclaimer.

f. Fees and Agreement to Mediate:

Neither the provision relating to Fees, nor the one dealing with the Agreement to Mediate raise much concern in the context of their application to a diverse range of mediation methods. However, one could include an obligation for the Mediation Agreement to contain a reference to the mediation method chosen by the parties to ensure that all participants are ad item on the method agreed to. However, once again this will be problematic in the event the parties want to leave open the possibility of the M being able to respond flexibly to the needs of the parties, employing perhaps several different methods during the mediation, that neither the parties, nor the M anticipated prior to commencement.

C. SUBSTANTIVE ISSUES

Substantive Issues of Self-Determination (Sections III) and Independence and Impartiality (Section IV) pose more significant problems.

a. Self-Determination:

Under the self-determination provision, the principle is recognized as the right of the parties to make their own "voluntary and non-coerced" decisions regarding a possible resolution, and self-determination is stated to be a fundamental principle that every M "shall respect and encourage". The M is required, before the mediation commences, to provide information as to the M's role in the mediation, including advising the parties that the authority for decision-making rests with them, not the M. The M is also prohibited from providing legal or professional advice to the parties, and is charged with the responsibility of advising unrepresented parties to obtain independent legal

advice, "where appropriate", and to advise them of the need to consult with other professionals to help parties make informed decisions.

Some models of mediation will cause greater problems for the self-determination provision than others. With respect to TM and FM, there is less of a problem because it is the parties and not the M that will devise the solution to the conflict. However, the provision seems less applicable to the TM in that, that process is intended to deal with the relationship of the parties, and not to deal with the legal issue. Therefore, one could imagine a situation that would give rise to legal issues between the parties during the course of the TM, but that addressing the legal issue would be contrary to the needs of the parties in the TM process because the intent is to focus on the relationship. In contrast, in FM the parties have significant input into the process for the purposes of resolving the dispute, therefore this provision is a more comfortable fit.

In EM, the atmosphere of the mediation changes vividly[108] reducing the ability of the parties to self-determine[109] because of the nature of the process.[110] In EM, the principle of self-determination is severely strained because the M assumes an evaluative role[111], sitting in judgment of the parties, crafting a proposed resolution to their conflict, and then encouraging the parties to compromise on their positions and accept M's proposal (or a variable thereof); [112] this significantly reduces M impartiality and therefore, disputant self-determination.[113]

This departure from traditional principles of self-determination in mediation is somewhat unique to EM. The dilution of self-determination in EM can lead to serious undesired and perhaps unanticipated collateral adjustment or alterations in the respective bargaining positions of the parties. For example, a determination by an EM that favors one party will strengthen the position of that party while the party whose position is discredited or disfavored will be weakened after significant investment of both time and money. However, while these results might appear unfavorable, they also could be the desired goals of the parties. EM is a useful tool for parties who desire an evaluative outcome and a decision on the principles at issue, and it plays an important role in the collection of mediation methods available to parties. Therefore, one way to address this dilemma would be to analyze the requirement for self-determination in the context of the EM and to create workable guiding principles of self-determination that would reflect the needs of the EM process. As discussed above, though problematic, this could be specifically delineated under the Code. Of course such a solution would provide self-determination in EM that would look very different from self-determination in other models of mediation, but the parties would

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[108] Levin, supra n. 24 at p. 2 and Love and Kovach, supra n. 5.

[109] Levin, supra n. 24, at p. 2 referring to Love, supra n. 5 at p. 939.

[110] Folberg and Taylor, 1984: Mediation is intended to be a self-empowering process, with decision-making resting with the participants rather than the mediator.

[111] Levin, supra n. 24 at p. 2 referring to Kovach and Love, supra n. 5.

[112] In fact the committee that drafted the AAA/ABA model Standards of Conduct for Mediators even rejected the EM model due to its failure to fit within self-determination principles. The comments to the Model Standard state that "[a] mediator should … refrain from providing professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes." Love, supra n. 5 at p. 940 , n. 19 Love comments "John Feerick, chairman of the committee that drafted the Model Standards, noted that '[w]e as a group did not buy (very vague terminology – why? Committee too scared? Politically wise to side step hot potato?) into mediation as an evaluative process …" Feerick et. al., supra at note…; Model Standards of Conduct of Mediators Standard VI cmt. (1995)

[113] Levin, supra n. 24 at p. 2 referring to Love, supra n. 5 at 939.

be informed of this very significant difference before selecting EM as their dispute resolution vehicle.

b. Independence and Impartiality

As referred to above, the definition of "impartial" under the definition section requires there to be no perception bias towards parties and interests, and options for settlement. This is consistent with the commonly held belief that a M should be an advocate "for a fair process, not for a particular settlement."[114]

Although there is no prescribed definition of "independence" in the Code, the term is literally defined as measured by the degree of relationship between the neutral and one of the parties, whether financial or otherwise. Independence requires a party to be self-governing, and free from influence, guidance, or control of another or others, self-reliant, and of an independent mind – not influenced by someone or something else; not contingent: a decision independent of the outcome.[115]

Since "Independence" is a main substantive requirement for the M under the Code, this term should be defined. The fact that "impartiality" is defined, and "independence" is not, could lead some to question its importance and interpretation under the framework of the Code, thereby leading to insufficient direction to Ms as to the requirement for compliance.

Under the Code, with respect to independence and impartiality, the M is required, unless the parties agree otherwise, to remain, independent at all times, wholly impartial, to not act as an advocate to any party or establish a relationship with and of the parties or in relation to the subject matter of the mediation in any capacity, unless all parties consent after full disclosure. This can be problematic in perhaps all of the methods of mediation where there are unrepresented parties, or insufficient legal representation. The M, in order to attempt to preserve fairness in the process, may depart from strict neutrality, becoming more flexible by trying to counterbalance unequal power.[116]

The M is required to disclose to the parties that M cannot act if M becomes aware of a lack, or perceived lack, of impartiality. As mentioned above, it may be impossible for any M to be entirely neutral because for someone go into mediation without any experiences or opinions which will affect her or his view of the dispute and disputants.[117] M's will have different perceptions of what is neutral or impartial behavior based upon their own cultural backgrounds, their value systems and their view of the context of the dispute. [118] As well, Ms may have differing views on their role as mediator in ensuring "fairness" or "equality" in the process.

In the context of EM, the obligation for the M to be independent and impartial is particularly problematic. As discussed above, the terms "independence" and "impartiality" are in common parlance, generally understood to mean "free from favoritism". Towards that end, some ethical codes that encourage independence and

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[114] Moore, at n. 1, p. 16

[115] Dictionary.com (Date Accessed: October 27, 2005)

[116] Nance, Cynthia E. "Unrepresented Parties in Mediation", 48 Practical Lawyer May 2004, American Law Institute, www.ali-aba.org (Date Accessed: October 27, 2005)

[117] Astor & Chinkin, supra n. 97 at p. 228

[118] Id.

impartiality encourage neutrals not to participate in settlement discussions unless requested to do so by all parties.[119] However, since all discussions are about how to settle a matter, artificial imposition of having the M caucus with the parties separately with the M then instructing the party to present the offer, or strongly suggesting that the party present the EM M's suggested offer, fail to ensure sanctity from bias. However, perceptually there could be some benefit arising from one party hearing the offer from the other party's mouth, as opposed to through the intermediary M. In any case, where an EM M has been retained to give an opinion on the likely court outcome of a particular claim or fair resolution of a particular matter, the obligations under this section are infringed due the likelihood that the EM M will side with one party's arguments over the other party.

As a result, in EM, the perception of the parties in listening to the M's opinion may be that the M is not impartial, and in fact the M could actually have "sided" with one of the party's positions in giving his or her opinion, especially if one of the sides had an unrealistic view of their case.[120] In such a situation, where the FM M might encourage a re-evaluation by the parties, or professional advice; and TM M might explore underlying causes for the needs of the party to believe the unrealistic opinion; the EM will is assessing the strength and weaknesses of the parties positions could come down on one side of the case, perhaps, perceptually, ruling against the other side. Such a scenario, in varying degrees, would not be uncommon; and will compromise the M's neutrality – both in actuality and in the eyes of the parties because the M will appear to be favoring one side in his or her judgment.[121] The "loser" in the EM may even view the M as an adversary."[122]

Therefore, in EM the M will have inherent problems in meeting obligations under the Code, unless the obligation for neutrality is taken in the context of the style of mediation. Therefore, as discussed above under the other sections, it could be helpful to refer to a level of neutrality that would be dependent on the style of mediation employed. For example, in this provision a statement that "…the obligations for independence and impartiality under section IV will not be breached by a M conducting an Evaluative Mediation as defined herein." As discussed above, for the sake of clarity, a definition of "evaluative mediation" would be required because there could be a number of ways in which EM could be conducted. However, once again this raises the issue of permissible forms of mediation and the restraint imposed on the flexibility of the process in imposing strict formulas. This would be particularly problematic in a situation such as this because certainly the obligation under this section could be avoided by arguing the mediation form employed was a hybrid of mediation methods. Therefore, unless there was a static formula for acceptable methods of mediation, with the exclusion of all others, and all hybrids, including a provision such as this would not satisfy the needs of Ms or the parties.

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[119] Love, supra n. 5 at p. 940, n. 21: "See Code of Ethics for Arbitrators in Commercial Disputes Canon IV.H (1977) (approved by the AAA and ABA). "[A]n arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle." Id.

[120] Love, supra n. 5 at p. 942

[121] Love, supra n. 5 at p. 939; Also, Love and Kovach, supra n. 5 and Baruch, Bush, Robert A. "Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation", 41 Fla. L. Rev. 253, 265 (1989) (describes the importance of complete mediator impartiality.

[122] Aaron, Marjorie Corman "ADR Toolbox: The Highwire Act of Evaluation", 14 Alternatives to High Cost of Litig. 62, 62 (1996).

IV. CONCLUSION

Many believe that a uniform understanding of mediation, and definition of process, is critical to the development of the profession and its acceptance by the public.[123] There are ongoing academic contests in examining the methods, roles, goals, and results of various mediations processes, and each of the various methods of mediation have been argued to be more effective, or less effective depending on the circumstances, forum, parties involved, and nature of interests (public versus private). [124] However, conclusions as to the preference for one single method of mediation, and the dominance for one single method for all scenarios has not been conclusively established.[125] In fact, different sects of Ms continue to personalize their own versions of existing models of mediation, and to argue for support of unique models of mediation, and for the supremacy of their own version, or combinations of pre-existing models. While some programs and/or institutions require one approach to the exclusion of all others.[126] Further, Ms outside the administration of these regulatory bodies appear to be able to use one approach exclusively, or as many different approaches, or combinations thereof, because they are strategically versatile and multi-skilled and can adapt mediation methods fluidly to adapt to particular parties and different situations as may arise and become required, and/or appropriate in the circumstances. This freedom to create a mediation model that suits the parties and situation at hand is available to Ms with these skills, partially because of the non-regulation of the industry[127].

Current ethical standards for Ms fall short of addressing the needs of both the public, and practicing Ms. To suggest that one ethical code could apply to all forms of mediation, such as the Code discussed here, requires that the standards imposed be broad and general enough to apply to all methods. However, as discussed above, definitions and enforcement of the various provisions could be difficult if not impossible unless the applicable model is defined. Another way to address this deficiency would be to create a number of different provisions in the Code addressing all forms of mediation, with corresponding definitions. But this could be a taxing

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[123] Love, supra n. 5 at p. 945, n. 52 "See Love and Kovach, supra n. 5 at 32 (discussing the importance of well-define uniform processes). Love comments that "A recently completed two-year-long study and report on court-referred ADR in New York State, commissioned by New York Court of Appeals Chief Judge Judith S. Kaye, concluded that a critical need exists for uniformity of standards and definitions for alternative dispute resolution processes [n. 53 See Chief Judges N.Y. State Court Alterntive Disp. Resol. Project, Court-Referred ADR in N.Y. State 7 (1996).] The report noted that "mediation" is a term used in an "extraordinary variety of ways." To address this problem the report recommends the promulgation of statewide standards and the subscription of neutrals to a specific code of ethics. In discussing the confusion of terms and labels, the report notes that "[b]luring the lines between mediation, neutral evaluation and even arbitration can have deleterious consequences." The consequences include parties who do not know what to expect and neutrals who do not understand what constitutes good practice Increasingly, the body of the report includes a discussion of training standards that state: "mediators do not advise litigants on the law or likely court outcomes…" [At 54 although the mediator does not advise the parties on the law and likely court outcomes, the report states that mediators "should be familiar with the law, court rules and procedures pertaining to the subject area of the case they are mediating".]

[124] Shestowsky, supra n. 82

[125] Shestowsky, supra n. 82

[126] Maryland, supra n. 12.

[127] Id. (Of course the model of mediation chosen must conform to the contract between the parties and the mediator, where no reference is made, the choice of techniques and process, is left entirely to the mediator's discretion.)

project, and perhaps impossible if the numerous hybrids of mediation models are retained within the definitions. A third way would be to have different labels for different types of mediation and different corresponding ethical codes addressing and meeting the needs of those various different processes. Ms could be divided into different groups, and be self-governed and administered. Those governing bodies could establish ethical standards appropriate to the particular type of mediation. However, the variations on methods could become so diverse and numerous that the public would be ill-equipped to determine which method to choose. Since protection of the public, and confidence in the process, is paramount, allowing each group to run their own models of mediation practice could lead to chaos.

When attorneys advise clients about the advantages and disadvantages of mediation, and when courts and institutes create mediation programs and panels of Ms, or consumers go to the yellow pages to find a M, they need to know what they are getting, and have a clear idea of the process and the tasks the M will perform. [128] Public awareness of the variety of different methods of mediation could lead to parties being able to choose the mediation method that they are comfortable with, under a belief or value system that is consistent with their own. Just as people choose between traditional physicians and alternative healthcare, or between legal specialists and generalists, depending on the problem they face, mediation services could be offered in a variety of different ways, to give parties the widest range of choice in how they will deal with their particular conflict.

In contrast, the hazard of having one ethical code, that corresponds to only one static form of mediation is that it fails to take advantage of the powerful possibilities of the mediation process, which relies on flexibility of the process; one format type of mediation process will likely be unable to effectively address all scenarios.

The 'disputing world' needs alternative options, a dispute resolution process appropriate to the particular dispute. Litigation and arbitration are available when necessary, but the potential of giving the parties control over their own process by virtue of creating options to facilitate settlement is a welcome addition the adjudicative processes. Whether they are Ms who offer the parties opinions as to the potential results of litigation or arbitration, Ms who educate the parties on how to resolve the problem, or Ms who help the parties to learn to communicate to avoid conflict; all models assist the parties in having some measure of control in resolving their dispute outside the adjudicative process.

There has been much debate over how to best protect the public from unskilled or incompetent Ms. Leaving aside the issue that the market likely will correct a surplus of too many of these types of persons; like other professions before it, education of both Ms and the public in the available mediation methods, is likely how the profession will most effectively and efficiently evolve in the future.

The Institute has made a significant start to the process by having mediation competence standards for certification. This certification hopefully will evolve into specialization certification. For example, a M certified in one model of mediation could practice that one form of mediation, a M certified in two methods, could practice two forms (or a combination of both), and so on.

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[128] Love, supra n. 5 at p. 947, n. 60 "See Kovach and Love, supra n. 5 (stating the term "mediation" should have a uniform meaning from state to state and from one court to another).

By including legislative references to mediation in family law legislation, Canada appears to have already recognized that family mediation, may require different, or additional, skills than other forms of mediation[129], although possibly the distinction between family mediation and other forms of mediation could be politically motivated, it would not seem too far a stretch to conceive of other mediation specializations that could be carved out as a result of industry pressure. For example construction industry mediation, international mediations arising out of treaty negotiations or other trade disputes between countries or international business, specializations relating to intellectual property issues, and the governing treaties. The various certification processes could include education and standards based on the type of mediation a party wishes to practice. For example, including psychological or therapist type training or qualifications might be required for those who seek to practice TM. In EM, standards and education might be imposed with respect to professional expertise and accreditation in a given area, and training on how to fairly, and in an unbiased manner, evaluate cases, and provide the parties with a uniform assessment of the strengths and weaknesses of the parties positions. In FM, the education and standards would focus on how to teach the parties problem-solving techniques, and how to educate and guide the parties towards devising a resolution to their conflict. Ms might be certified in a large range of areas, not only through training, but also through grandfathering those Ms who have practiced in a particular area for a length of time.

This certification of specialized areas could evolve and give way to the concrete standards that many believe are missing from the profession. Offering these accreditation opportunities would allow the market to limit the ability of unqualified Ms from hanging out a shingle and practicing without qualifications. In extreme, highly sensitive areas, imposition of legislation for mediation practice could also improve concerns about unqualified Ms misleading the public if such legislation imposes sanctions, and penalties for practice with false credentials.

But this evolution will take time, and unnecessarily limiting the growth of mediation by restricting practice too early could do more damage than good. The public should have the right to choose the process that is right for them. Although, as demonstrated above, one ethical code for all processes will be cumbersome; as mediation evolves, and educational programs and certification programs become available and in-house programs becoming increasingly more popular as industries recognize the value of mediation within their industry, and workplaces, public awareness of available processes will occur and will foster increased trust in the process. Certainly even without these standards, for all these years, mediation has been well received by the public.

The problem with imposing one ethical code, to cover all forms of mediation, just like the frequently discussed concerns regarding accreditation, qualifications, are just another part of the growing pains the mediation faces in increasing its market share in the dispute resolution industry. Although the problems could be easily addressed by allowing merely one form of mediation model to exist, and thus creating a clear standard for measurement of ethics including competence and all other variables,

[129] For example, identification of "high conflict" relationships, domestic violence issues, child support and family maintenance enforcement, and matters relating to the "best interests of the child", are all interpersonal relationship issues that will distinguish family mediation from other forms of mediation.

arguing for the superiority of one method of mediation over another is limiting, and is averse to the very purpose for which mediation was established.

Much better is the acceptance that the diverse range of available methods exposes opportunities for growth not only of the "appropriate dispute resolution" industry, but also of acceptance of mediation by the public. Off the rack dispute resolution processes, one fit for every type of dispute, will be available, and should be encouraged, it's only a matter of time; and requires the dedication of the pioneers embarking on this industry to make sure that fears for concerns like ethical standards, don't hamper the growth of the professional mediation industry. Letting 'thousands of flowers bloom in the name of mediation'[130] is not a bad thing. We just need to identify the species and have appropriate instructions for growing and care.

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[130] Stulberg, Joseph B. "Facilitative Versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock" 24, Florida State University Law Review (1997) 985 at p. 992. Stulberg uses this term in referring to the range of mediation models on "Riskin's Grid", supra n. 41.

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APPENDIX "A"

ADR Institute of Canada, Inc. "Code of Ethics", June 2005

MODEL CODE OF CONDUCT FOR MEDIATORS

The Model Code of Conduct for Mediators ("the Code") applies in its entirety to every Mediator who is a member of the ADR Institute of Canada, Inc. ("the

Institute"), or who accepts appointments from the Institute. While Mediators come from varied professional backgrounds and disciplines, every Mediator must adhere to the Code as a minimum. Being appointed as a Mediator confers no permanent rights to the individual, but is a conditional privilege that may be revoked for breaches of the Code.

The Institute, or any of its Regional Affiliates, is empowered to investigate alleged breaches, including temporarily suspending any Mediator from any of its rosters or membership in the Institute, pending the outcome of an investigation. The Institute is empowered to cancel membership in the Institute or remove any Mediator from its rosters if the Mediator is determined by the Institute either on its own behalf or upon the recommendation of any of its Regional Affiliates to be in breach of the Code. It will be the objective to ensure that complaints are investigated fairly, and that no Mediator is arbitrarily suspended or removed.

I. OBJECTIVES FOR MODEL CODE OF CONDUCT FOR MEDIATORS

The main objectives of the Code for Mediators are as follows:

(a) to provide guiding principles for the Mediator's conduct;

(b) to provide a means of protection for the public; and

(c) to promote confidence in Mediation as a process for resolving disputes.

II. DEFINITIONS

In the Code:

"Mediation" means the use of an impartial third Party to assist the parties to resolve a dispute, but does not include an arbitration.

"Mediator" means the impartial person or persons, engaged to assist the parties to resolve a dispute, but does not include an arbitrator unless the arbitrator is acting as a mediator by consent of the parties.

"impartial" means being and being seen as unbiased toward parties to a dispute, toward their interests and toward the options they present for settlement.

III. PRINCIPLE OF SELF-DETERMINATION

1. Self-determination is the right of parties in a Mediation to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute. It is a fundamental principle of Mediation which every Mediator shall respect and encourage.

2. The Mediator shall provide information about his or her role in the Mediation before Mediation commences, including the fact that authority for decision-making rests with the parties, not the Mediator.

3. The Mediator shall not provide legal or professional advice to the parties.

4. The Mediator has the responsibility to advise unrepresented parties to obtain independent legal advice, where appropriate. The Mediator also has the responsibility

where appropriate to advise parties of the need to consult other professionals to help parties make informed decisions.

IV. INDEPENDENCE AND IMPARTIALITY

1. Unless otherwise agreed by the parties, a Mediator shall be and remain, at all times, wholly independent.

2. The Mediator shall be and remain wholly impartial and shall not act as an advocate to any party to the Mediation.

3. The Mediator shall not establish a professional relationship with or act for any of the parties individually in relation to the particular dispute that is the subject matter of the Mediation in any capacity, unless all parties consent after full disclosure.

4. If the Mediator becomes aware of his or her lack of impartiality, he or she shall immediately disclose to the parties that he or she can no longer remain impartial and shall withdraw from the Mediation.

V. CONFLICT OF INTEREST

1. The Mediator has a responsibility to disclose as soon as possible to the parties in dispute any personal interest, conflict of interest, bias, or circumstances likely to give rise to a reasonable apprehension or presumption of bias that are known to the Mediator, or which becomes known after his or her appointment.

2. Any Mediator who has made a disclosure pursuant to V.1 shall withdraw as Mediator, unless the parties consent to retain the Mediator.

3. The Mediator's commitment is to the parties and the process and he or she shall not allow pressure or influence from third parties (including, without limitation, persons, service providers, Mediation facilities, organizations, or agencies) to compromise the independence of the Mediator.

VI. CONFIDENTIALITY

1. The Mediator shall inform the parties of the confidential nature of Mediation.

2. The Mediator shall not disclose to anyone who is not a party to the Mediation any information or documents that are exchanged for or during the Mediation process except:

(a) with the mediating parties' written consent;

(b) when ordered to do so by a court or otherwise required to do so by law;

(c) when the information/documentation discloses an actual or potential threat to human life;

(d) any report or summary that is required to be prepared by the Mediator; or

(e) where the data about the Mediation is for research and education purposes, and where the parties and the dispute are not, nor may reasonably be anticipated to be, identified by such disclosure.

3. If the Mediator holds private sessions (breakout meetings, caucuses) with a party, he or she shall discuss the nature of such sessions with all parties prior to commencing such sessions. In particular, the Mediator shall inform parties of any limits to confidentiality applicable to information disclosed during private sessions.

4. The Mediator shall maintain confidentiality in the storage and disposal of Mediation notes, records and files.

VII. QUALITY OF THE PROCESS

1. The Mediator shall make reasonable efforts to ensure the parties understand the Mediation process before Mediation commences.

2. The Mediator has a duty to ensure that he or she conducts a process which provides parties with the opportunity to participate in the Mediation and which encourages respect among the parties.

3. All Mediators have an obligation to acquire and maintain professional skills and abilities required to uphold the quality of the Mediation process.

4. The Mediator shall conduct himself or herself professionally at all times, and shall not engage in behaviour that will brings disrepute on themselves or the Institute.

VIII. ADVERTISING

In advertising or offering services to clients or potential clients:

1. The Mediator shall refrain from guaranteeing settlement or promising specific results.

2. The Mediator shall provide accurate information about his or her education, background, Mediation training and experience, in any representation, biographical or promotional material and in any oral explanation of same.

IX. FEES

1. The Mediator shall provide parties with the fee structure, likely expenses and any payment retainer requirements before Mediation commences.

2. The Mediator shall not base his or her fees on the outcome of Mediation, whether there is a settlement, what the settlement is, or the amount of the settlement.

3. The Mediator may charge a cancellation or a late/delay fee within the Mediator's discretion, provided the Mediator advises the parties in advance of this practice and the amount of the fee.

X. AGREEMENT TO MEDIATE

The Mediator, together with the parties, shall prepare and execute a Mediation Agreement setting out:

(a) the terms and conditions under which the parties are engaging the Mediator;

(b) any of the National Mediation Rules of the Institute which the parties agree shall not apply to the Mediation; and

(c) any additional rules which the parties agree shall apply to the Mediation. Should the parties be unable to agree on a Mediation Agreement, the Institute's Standard Form Agreement to Mediate shall be used.

XI. TERMINATION OR SUSPENSION OF MEDIATION

1. The Mediator shall withdraw from the Mediation for the reason referred to in paragraph IV.3.

2. The Mediator may suspend or terminate the Mediation if requested, in writing, by one or more of the parties.

3. The Mediator may suspend or terminate the Mediation with a written declaration by the Mediator that further efforts at mediation would not be useful.

XII. OTHER CONDUCT OBLIGATIONS

Nothing in the Code replaces or supersedes ethical standards and codes which may be additionally imposed upon any Mediator by virtue of the Mediator's professional calling. Where there are conflicting codes of conduct, the Mediator shall be bound by the stricter of the codes.

APPENDIX "B"

ADR Institute of Canada, Inc. (former version)

This Code is applicable to all members of the Institute in their capacity as arbitrators and mediators generally and in their undertaking of an arbitration or mediation appointment specifically.

1. A Member shall uphold and abide by the Rules of Conduct, regulations and other professional requirements adopted by the institute.
2. A Member shall not carry on any activity or conduct which could reasonably be considered as conduct unbecoming a member of the institute.
3. A Member shall uphold the integrity and fairness of the arbitration and mediation process.
4. A Member shall ensure that the parties involved in an arbitration or mediation are fairly informed and have an adequate understanding of the procedural aspects of the process and of their obligation to pay for services rendered.
5. A Member shall satisfy him/herself that he/she is qualified to undertake and complete an appointment in a professional manner.
6. A Member shall disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.
7. A Member, in communicating with the parties, shall avoid impropriety, exhibiting independence and impartiality.
8. A Member shall be faithful to the relationship of trust and confidentiality inherent in the office of arbitrator or mediator.
9. A Member shall conduct all proceedings related to the resolution of a dispute in accordance with applicable law.

Forthcoming Courses of the Dispute Resolution Centre

Bond University Short Courses				
30 March-2 April 2006	Melbourne	Short course – 4 days	Advanced Mediation Course, in conjunction with Leo Cussen Institute. Phone 03 96023111 email: lpd@leocussen.vic.edu.au	Boulle, Wade
6-9 April 2006	Gold Coast	Short course – 4 days	Basic Mediation Course *	Boulle, Wade
27-30 July 2006	Marriott Surfers Paradise	Short course – 4 days	Basic Mediation Course *	Boulle, Wade
21-24 September 2006	Sheraton, Noosa	Short course – 4 days	Advanced Mediation Course	Boulle, Wade
12-15 October 2006	Melbourne	Short course – 4 days	Basic Mediation Course, in conjunction with Leo Cussen Institute. Phone 03 96023111 email: lpd@leocussen.vic.edu.au	Boulle, Wade
30 November - 3 December 2006	Gold Coast	Short course – 4 days	Basic Mediation Course*	Boulle, Wade
* This course also has a Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators)				

John Wade will be presenting:

- 9-13 January, 2006 – Five day mediation course, SMU, Dallas Texas, USA.
- 12 January, 2006 – Workshop on "How to be a Successful Hard Bargainer" for South Western Texas Mediation Association, USA.

IN-HOUSE NEGOTIATION TRAINING
For details of popular individual course outlines on Negotiation see http://www.bond.edu.au/law/centres/drc/courses/index.htm

Thoughts and Themes

STRATEGIC LANGUAGE USED BY MEDIATORS (AND NEGOTIATORS)[1]

by John Wade[2]

Summary

This paper summarises 'types' or categories of linguistic interventions used by mediators (and negotiators). Then a chart of illustrations of these types of interventions is set out, from which mediators and negotiators can select for their toolboxes. Finally, empty charts are set out with a challenge to watch a mediation or negotiation and indicate which types of interventions are used.

Three Categories of Mediator Intervention – Directive, Reflexive and Non-Directive

"Most studies of mediator behavior have sought to identify the strategies and tactics used by mediators (Kressel, 1972; Sheppard, 1983; Wall, 1981). Kressel (1972) developed a useful way in which mediator activities may be categorized. He proposed that mediators can adopt three broad strategies: *directive, reflexive, and nondirective.*

Directive tactics involve "strategies by which the mediator actively promotes a specific solution or attempts to pressure or manipulate the parties directly into ending the dispute" (Kressel, 1972, p. 13). Reflexive tactics involve "behaviors by which the mediator attempts to orient himself to the dispute and to establish the groundwork upon which his later activities will be built" (Kressel, 1972, p. 13). Nondirective tactics involve "attempts at increasing the probability that the parties themselves, with a minimum of manipulation or suggestion from the mediator, will hit upon a mutually acceptable solution to the dispute" (Kressel, 1972, p. 13). Kressel presents these categories not as exclusive sets but rather as a convenient means of summarizing a large number of mediation tactics. It should be noted that a tactic may serve more than one strategy – e.g., caucusing may be used to pressure one party into agreement, to establish rapport with a party, or to educate a party to the impasse procedures (Kressel, 1972).

Mediation tactics that exemplify these three strategies have been frequently observed. As to directive strategies, it has been noted that mediators make compromise suggestions (Kerr, 1954), press the parties to make concessions (Stevens, 1963), suggest particular settlements (Perez, 1959), argue one party's case to the other (Perez, 1959), mention the costs of disagreement (Stevens, 1963), discuss other settlements in comparable cases (Simkin, 1971), try to change the parties' expectations (Douglas, 1962), make proposals (Pruitt, 1971), express pleasure or displeasure at negotiator progress (Douglas, 1962), and threaten to withdraw from the negotiation (Pruitt, 1981). As to reflexive tactics, it has been

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[1] A version of this paper first appeared in (1994) 6 *Australia DRJ* 56).

[2] Professor John Wade, Director Dispute Resolution Centre, Bond University, Gold Coast Queensland Australia, john_wade@bond.edu.au.

observed that mediators seek to gain the trust and confidence of the parties (Kressel, 1972), use humor to lighten the atmosphere (Karim & Pegnetter, 1983), deal with constituent problems (Kerr, 1954), take responsibility for concessions (Maggiolo, 1971), and assure each party of the other's honesty (Eiseman, 1977). As to nondirective tactics – in Kressel's terms those intended to "assist in the birth of a settlement" – it has been observed that mediators control bargaining structure and timing (Young, 1972), organize the agenda of issues (Douglas, 1962), control hostility (Douglas, 1962), educate the parties about the impasse procedures (Pruitt, 1971), and help the parties save face (Pruitt, 1971)."[3]

"Successful" Types of Mediator Intervention?

A mediator's function is to "facilitate" negotiation – to oil the process of discussion between individuals in conflict. There are a number of interventions which may assist the conversations. These interventions may be reflexive or practised during intake sessions. Predictably, the more experienced a mediator is, the more likely that (s)he will develop a repertoire of readily available interventions.

One definition of communication competence is "the knowledge of appropriate communication patterns in a given situation and the ability to use the knowledge".[4] There are accumulating empirical studies on utterances, words, sounds and body movement of mediators.[5]

Donoghue and Weider-Hatfield used the following questions to:

> "...reveal the extent to which successful and unsuccessful mediators differ in their use of control, involvement, and consistency strategies. With respect to *control*, three questions are relevant.
>
> 1. Will successful mediators (those fostering an agreement) talk more than unsuccessful mediators as a means of sustaining control?
> 2. Will successful mediators prevent a disputant from talking over them more than unsuccessful mediators?
> 3. Are successful mediators more capable of controlling the level of language intensity than unsuccessful mediators?
>
> Regarding the *involvement* strategy, two questions may be addressed.
>
> 1. Will successful mediators use shorter utterances than unsuccessful mediators as a means of providing the disputants with opportunities to present their views?
> 2. Will the disputing parties talk more to each other than to the mediator in the successfully mediated disputes?
>
> Finally, with respect to the *consistency* strategies, the following research questions will be tested.

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[3] P.J.D. Carnevale and R. Pegnetter, "The Selection of Mediation Tactics in Public Sector Disputes: A Contingency Analysis" (1985) 41 Journal of Social Issues 65 at 67-68.

[4] W.A. Donoghue and D Weider-Hatfield "Communication Strategies" in *Divorce Mediation in Theory and Practice* ed. J Folberg and A Milne (New York: Guilford, 1988) at 298.

[5] *Id* Donoghue.

1. Will the successful mediators interrupt disputing parties on a more equal basis than unsuccessful mediators?
2. Will successful mediators manage the level of language intensity more equally between disputants than unsuccessful mediators?"[6]

Their study concluded:

"[m]ediators who successfully fostered an agreement between disputants

1. were better able to control the allocation of floor time among the disputants and the disputants' level of language intensity
2. used shorter utterances in communicating with disputants in an attempt to increase disputants' involvement and increase the information base
3. were significantly more consistent in interrupting disputants and in the kinds of language intensity selected by the mediator."[7]

Set out below is a list of common interventions or "moves" with an example opposite each type of intervention or move.

[6] Ibid p.308.

[7] Ibid p.308.

MEDIATOR INTERVENTIONS OR MOVES[8]	
1. Mini lecture on conflict.	"You have only been separated for three months and it is quite normal for both of you to still be angry..."
2. Mini lecture on the negotiation process.	"In negotiations about several linked issues, it is often helpful to make an "if ... then" offer. For example "If you are prepared to consider a higher valuation, I would be prepared to consider a lower percentage."
3. Develop rapport.	Particularly during private intake sessions listening, reframing, summarising concerns.
4. Suggest compromise solutions.	"You both want the children for all of Christmas Day. Is there some way of dividing Christmas Day and Christmas Eve so that you both have a special time with the children?"
5. Suggest a particular solution.	"Of the possibilities you have suggested, the only realistic one appears to be alternate weeks in each holiday, with the children phoning the absent parent regularly – perhaps every second night".
6. Let parties blow off steam.	.....!!!..... "So you're both saying that what started as a good and loving relationship deteriorated into patterns of sniping. You each are bringing out the worst in the other?"
7. Require parties to face the mediator while speaking.	"Now Jane it's your turn. I'd like you to tell me, not Bill, but me, what possibilities you think might be suitable in relation to the occupation of the house."

[8] These mediator moves have been adapted and expanded from PJD Carnevale and R Pegnetter, "The Selection of Mediation Tactics in Public Sector Disputes: A Contingency Analysis" (1985) 41 *Journal of Social Issues* 65.

8.	Repeat areas of agreement.	"Having listened to you both it seems to me that you have already agreed on 3 things. Firstly, you are both good parents; secondly the children enjoy spending time with each of you; and thirdly, the house must be sold at some time - is that correct? Joe? Michelle?
9.	Focus on a particular issue.	"You lost me. I thought we were talking about question number 2 on the board. How are you going to organise the children's week?"
10.	Argue case for each side.	There are predictable arguments both for and against the sale of the business. The arguments for are..... The arguments against are.....I'm sure your lawyers can verify those standard arguments each way. So, what would a wise umpire do? Bill? Barb?"
11.	Clarify needs for each side.	"So let me see if I understand you correctly David - you need 6 months to finish this building job; and you also need cheap and peaceful accommodation for that 6 month period?"
12.	Frequent private meetings.	"The reason we are having these regular private meetings is that I find that privacy gives us all an opportunity to think clearly and to discuss concrete proposals."
13.	Mini lecture on dynamics and outcomes of similar disputes.	"It is normal for you each to go through a grieving process for any loss - including the loss of your marriage. The difficulty for all negotiations is that you may well be at different stages of grieving - one still very angry, the other further down the track". **OR** "Don't worry. Over 90% of these disputes settle by agreement. It is a question of whether you are ready to settle tonight, or in a few months time, closer to the door of the court."

14. Costs of disagreement.	"Obviously there are costs to disagreeing - costs in time, stress, loss of concentration, income foregone and money paid out. Do you each have a clear written estimate of the lowest and highest that your legal costs would be if you settled at the door of the court?"
15. What do you understand by "going to court"?	"One option, as you mentioned David, is 'going to court'. I'd like to explore with each of you later what you understand by that phrase." **OR** Can you each tell me now what the option of "going to court" involves - for example time span, documentation, time lost, meetings, expense, chances of getting an umpire's decision? **OR** "It seems clear to me that before either of you choose that option of "going to court" you both need clear answers to these more particular questions. Do you each think you can get those answers?"
16. Mini lecture on loss of control.	"Don't worry, only about 10% of these disputes get to an umpire's decision. The question for each of you tonight is basically whether to settle tonight or to settle later." **OR** "One of the benefits of mediation now is that you have control. As a dispute is processed towards the door of the court, you each progressively lose control as costs, attrition and time deadlines take over. At the door of the court, you will each be under intense pressure to agree in cramped quarters in a 45 minute shuttle negotiation between lawyers. So the question is again basically whether to settle now with control or later with less control."

17. Simple issues first.	"I'd like you to start by suggesting possible methods for Marg getting to and from work each day, now that the Ford Falcon is unregistered."
18. Restate progress.	"John, you are concerned that we are going over old territory. Well, correct me if I'm mistaken but it seems to me that tonight you have already identified 3 areas of agreement (up on the board) and 4 possible ways of valuing the business. Is that correct?" "If you've been disagreeing now for ...18 years - you will almost certainly take more than 2 hours to build some agreements".
19. Express pleasure at progress.	"May I say that you're to be congratulated on your negotiation skills. You have both shown restraint, despite the hurts of the past; and, you have both come up with several very constructive suggestions on how the children will move back and forth from Mum's house to Dad's house."
20. Say they are being unrealistic.	"How realistic is it to expect a teenage boy to want to leave his neighbourhood friends every weekend?" **OR** "In my experience you can agree that teenagers will move from house to house every weekend, but the reality is they will buck the system, sleep in, want to go to local parties? How will you respond to that real likelihood?"
21. Strongly hold parties to the process.	"In mediation, the mediator is in control of the **process**; the parties are in control of the outcome. So it is essential that you discuss issues one at a time; not all jumbled up together. Now, Bill we already have 2 possibilities in relation to issue 1 on the board. Any others.....?"

22. Bring in another mediator.	"As our next meeting will involve 3 grandparents, 2 teenagers and an aunt it would be helpful to have another mediator present. I have worked with ..... before and would like her to be included. Do you have any objections to another facilitator?"
23. Suggest trade offs (what if).	(In private meeting). "Would you be prepared to make an offer in the following terms? "What if the sale of the house is delayed for ... months and I pay the outgoings during that time, would you be prepared to divide proceeds closer to my preferred percentages etc?"
24. Speak parties' language.	"I suppose you have many friends who are farmers who are being forced to sell up because of the recession. You seem to be in the same difficult situation."
25. Increase number of issues on the table.	"O.K., we seem to be stuck discussing the payment of the Bankcard debt in isolation. Let's look at questions 2 and 3 on the board and see what possibilities you can suggest in relation to each of these."
26. Reduce number of issues for discussion.	"You have identified 14 issues for discussion. Obviously in the time available tonight we can only discuss say 4. I am going to ask each of you which 2 you would like to discuss tonight."
27. Prioritise issues.	Ditto.
28. Use late hours	"You have invested a lot of time and effort to get this far tonight. It is going to be difficult to get everyone together again. Do you want to keep going after a break for coffee?"

29. Keep parties at the table.	"Mark, you do have the option of leaving now. But my advice to you would be to consider all the other options before you choose the walk out option. There are certainly a number of other possibilities yet to be unearthed." **OR** "Mark, if you take the walk out option now, what do you think Joanne's lawyers and relatives will say? 'There I told you so, Mark isn't willing to negotiate.' In my experience, it is wise to avoid that inevitable label." "Everyone has made considerable effort to get here tonight. It is going to be very difficult to assemble everyone again once the litigation engine starts. In my opinion you should **both** exhaust every negotiation possibility tonight before calling it quits. Let me summarise where we are ....."
30. Coach how to negotiate.	"In negotiations, you can pluck a number from out of the air. But it is often more helpful if the method for calculating the number is explicable." **OR** "In negotiations, it is important that neither party feels like (s)he is giving everything, and getting little in exchange. Bill has made a concession in relation to frequency of visits - can you suggest any methods of increasing frequency of phone calls in return?"
31. Change the parties at the table.	"I'd like to meet now with Joe, Jane, Mark and Mary in the next room." ..... "If you reach any agreements here, I need your commitment to sell that agreement hard back in the other room."

32. Adjourn to get more facts.	"You **both** have 3 pieces of homework. Please write these down. Firstly, the range of legal costs from highest to lowest if you proceed to a 3 day trial. Secondly, your lawyer's advice on property percentages - highest to lowest with at least a 15% margin between. Thirdly, you both read this article on teenagers' responses to parental separation."
33. Private meetings with different groupings.	See (29).
34. Affirm mediator neutrality	"My job is to be absolutely impartial. If either of you think in any way that I am favouring one of you over the other, please tell me - either openly or in private whichever you feel more comfortable about. It is essential to help your negotiations that I am and am perceived to be impartial."
35. Use silence.	..... (Someone will eventually fill the silence).
36. Threaten termination.	"We have been here for a considerable time. Issues 3 and 4 are still to be resolved. I need to be out of here by 10.30 pm. Can we make another time to reconvene?"
37. Work on saving face.	"I also have difficulty understanding the 3 different methods of valuing businesses, David - could you help me understand?" **OR** "If you negotiate by making extreme claims and creeping towards some middle position, there is a risk that one or both parties will lose patience. We need to increase the issues on the table so that there is more to give and take." **OR** "If you feel like the negotiations will trigger your response of tears or yelling, at any time give me the signal and I will declare a break."

38. Control hostility.	"Jack, I'd like to interrupt there. The last interchange represented a series of accusations about past behaviour. Mediation is about you making decisions about the future. I'd like you **both** to concentrate on possible solutions for the future on issue number two." (Plus various other strategies).
39. Take blame/responsibility for concessions/misunderstandings.	"Jane, could you please repeat that for my sake; I didn't pick up the essence of your comment." OR "I'll have to change my question. The way I expressed it has obviously been misleading." OR "Can you help me, I still don't understand why it is so important to you - as it clearly is - to have the children stay with you every holiday period."
40. Reframed/summarise regularly.	"I'd just like to pause again and summarise where we have progressed so far tonight. First, you each listened to one another express his and her concerns; I attempted to summarise these as follows ....."
41. Confirmed trustworthiness/sincerity of both parties.	"You have raised a question whether Peter is really interested in settling tonight. I cannot breach confidentiality in relation to the substance of any private conversations I have had with each of you. But I can assure you, that in my judgment, there is no evidence of lack of sincerity or lack of interest in settlement. From my observation both of you want to explore every possibility of settlement now."

42.	Attempted to provide insights into the dynamics of parties' behaviour.	"You have both indicated that you have certain unhelpful and entrenched patterns of communication which you have been practising for 19 years. You are both concerned that that pattern will prevent a constructive discussion. " "Part of my job is to pull you out of that unhelpful pattern which you feel trapped in. I will interrupt if it recurs too often." **OR** (In private session) "It is clear to me that Jan feels very threatened when you open the topic of her job retraining. How can you avoid backing her into a corner? How can you avoid her closing down on **all** negotiation, because of her feeling so insecure about retraining." **OR** (In private session) "I want you to practise making that offer to me Margaret. Yes, right now. We can write it out if necessary. In negotiations, the form of words is very important. Some loose words can cause unintentional offence and the substance of the offer is lost. Alright, can you make that offer to me now?."
43.	Use humour.	"You get no lunch until we settle."
44.	Mini lectures on solving small parts of the complex dispute.	"Most negotiators want to 'get to the bottom line' quickly. But mediation is not like that - we have a saying that 'slow is fast'. We will address possible solutions to small parts of your dispute - and then fit together pieces in the jigsaw. Please be patient even when we seem to be moving slowly."

45. Casting doubt by questions to over-confident positional "experts".	"If I understand it correctly, one or both of the (lawyers; engineers; accountants) is currently wrong – dramatically wrong?" OR "So one or both of the (lawyers; engineers accountants) will at some time in the future be apologizing to his/her client – I got it badly wrong?" OR "Can we delay the debates for a moment? Can we first define precisely how you are currently apart on the facts and on the law?" OR "It may be that the current inaccurate legal advice is based on garbage in-garbage out. Why are you currently giving such different advice?" OR Add to 4, "I'd like to take a break and ask lawyers X and Y to meet (with me) to define exactly the major current differences on facts, evidence and law; or on these 3 issues."

SELF EVALUATION (or OBSERVER) EXERCISE

MEDIATOR INTERVENTIONS ***OR MOVES***	***Frequency of Use*** 0 - Never 1 - Occasionally 2 - Regularly 3 - Frequently 4 - Always				
	0	1	2	3	4
1. Mini lecture on conflict					
2. Mini lecture on negotiation process					
3. Develop rapport					
4. Suggest compromise solutions					
5. Suggest a particular solution					
6. Let parties blow off steam					
7. Require parties to face mediator while speaking					
8. Repeat areas of agreement					
9. Focus on a particular issue					
10. Argue case for each side					
11. Clarify needs for each side					
12. Frequent caucuses					
13. Mini lecture on dynamics and outcomes of similar disputes					
14. "Tell me about…costs of disagreement"					
15. What do you understand by "going to court"?					
16. Mini lecture on loss of control					
17. Simple issues first					
18. Congratulate/restate progress					
19. Express pleasure at progress					
20. Say they are unrealistic					
21. Strongly hold parties to process					
22. Bring in another mediator					
23. Suggest trade offs (what if...)					
24. Speak parties' language					
25. Increase number of issues on table					
26. Reduce number of issues for discussion					

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31. Change the parties at the table					
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40. Reframe/summarise regularly					
41. Confirm trustworthiness/sincerity of both parties					
42. Attempt to provide insights into dynamics of parties' behaviours					
43. Use humour					
44. Mini-lectures on solving small parts of the complex dispute					
45. Casting doubt by questions to overconfident positional "experts".					

OTHER MEDIATOR INTERVENTIONS USED	***Frequency of Use*** 0 - Never 1 - Occasionally 2 - Regularly 3 - Frequently 4 - Always				
	0	1	2	3	4

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If you have any suggestions about this newsletter; *OR* if you or your colleagues would like to be included on, or excluded from receiving this occasional newsletter, **please send us a message** with your e.mail address to:

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