

## THE TOP TEN REASONS WHY MEDIATORS SHOULD NOT EVALUATE

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The debate over whether mediators should “evaluate” revolves around the confusion over what constitutes evaluation and an “evaluative” mediator. The following examples describe two situations in which the mediators operate in an evaluative capacity.

During the course of an employment termination dispute, Eric Green<sup>1</sup> “tells both sides privately that, in his opinion, \$600,000 . . . is the settlement value of the case.”<sup>2</sup> Green pushes the employer towards settlement by saying, “It was your corporation’s responsibility

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1. Eric Green founded Endispute, a dispute resolution consulting firm. He is a professor at Boston University Law School and the co-author of STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* (1985), the first dispute resolution textbook for law students. The use of this example is not to criticize Professor Green’s performance; he is a highly successful and respected neutral intervener. Rather, this Article argues that in this example, Professor Green is combining mediation with neutral evaluation to create a “mixed process.”

2. Lavinia Hall, Eric Green: Finding Alternatives to Litigation in Business Disputes, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 279, 295 (Deborah M. Kolb et al. eds., 1994).

to live up to its moral obligations.”<sup>3</sup> When the former employee resists the \$600,000 figure, Green’s responds, “How greedy can you get?”<sup>4</sup> In the second example, during a divorce mediation, the husband appears friendly and gregarious while the wife is calm and poised, but somewhat cool.<sup>5</sup> The mediator repeatedly favors the husband in a manner indicating that she enforces the groundrules.<sup>6</sup> When the wife mentions her debilitating health problems, the mediator laughs and says, “You don’t have to act sick to get what you want.”<sup>7</sup>

In the first example, Green evaluates by assessing a fair settlement value of the case and pressing the parties to accept that settlement value. 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.

An “evaluative” mediator gives advice, makes assessments, states opinions—including opinions on the likely court outcome, proposes a fair or workable resolution to an issue or the dispute, or presses the parties to accept a particular resolution.<sup>8</sup> The ten reasons that follow demonstrate that those activities are inconsistent with the role of a mediator.

#### I. THE ROLES AND RELATED TASKS OF EVALUATORS AND FACILITATORS ARE AT ODDS

Evaluating, assessing, and deciding for others is radically different than helping others evaluate, assess, and decide for themselves. Judges, arbitrators, neutral experts, and advisors are evaluators. Their role is to make decisions and give opinions. To do so, they use predetermined criteria to evaluate evidence and arguments presented by adverse parties. The tasks of evaluators include: finding “the facts” by properly weighing evidence; judging credibility and allocating the burden of proof; determining and applying the relevant law, rule, or custom to the particular situation; and making an award or rendering an opinion. The adverse parties have expressly asked the evaluator—judge, arbitrator, or expert—to decide the issue or resolve the conflict.

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3. *Id.* at 298-99.

4. *Id.* at 299.

5. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1586 (1991).

6. See *id.*

7. *Id.*

8. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *HARV. NEGOTIATION L. REV.* 7, 27-28 (1996) (describing the mediator techniques associated with evaluative mediation as proposing a settlement, pushing parties to accept a settlement, predicting court or other outcomes, and assessing the strengths and weaknesses of each side’s case).

In contrast, the role of mediators is to assist disputing parties in making their own decisions and evaluating their own situations. A mediator “facilitate[s] communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement.”<sup>9</sup> Mediators push disputing parties to question their assumptions, reconsider their positions, and listen to each other’s perspectives, stories, and arguments. They urge the parties to consider relevant law, weigh their own values, principles, and priorities, and develop an optimal outcome. In so doing, mediators facilitate evaluation by the parties.

These differences between evaluators and facilitators mean that each uses different skills and techniques, and each requires different competencies, training norms, and ethical guidelines to perform their respective functions. Further, the evaluative tasks of determining facts, applying law or custom, and delivering an opinion not only divert the mediator away from facilitation, but also can compromise the mediator’s neutrality—both in actuality and in the eyes of the parties—because the mediator will be favoring one side in his or her judgment.<sup>10</sup>

Endeavors are more likely to succeed when the goal is clear and simple and not at war with other objectives.<sup>11</sup> Any task, whether it is the performance of an Olympic athlete, the advocacy of an attorney, or the negotiation assistance provided by a mediator, requires a clear and bright focus and the development of appropriate strategies, skills, and power. In most cases, should the athlete or the attorney or the mediator divert their focus to another task, it will diminish their capacity to achieve their primary goal. “No one can serve two masters.”<sup>12</sup> Mediators cannot effectively facilitate when they are evaluating.<sup>13</sup>

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9. John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95 app. at 123.

10. See Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 *ALTERNATIVES TO HIGH COST LITIG.* 31, 31 (1996); see also Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation*, 41 *FLA. L. REV.* 253, 265 (1989) (describing the importance of complete mediator impartiality). But see Marjorie Corman Aaron, *ADR Toolbox: The Highwire Act of Evaluation*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 62, 62 (1996) (noting that while the primary risk of evaluation is the mediator’s potential loss of perceived neutrality because the “loser” in the evaluation may view the mediator as an adversary, nonetheless, situations do exist in which the careful and thoughtful use of mediator evaluation can serve the parties).

11. See Kovach & Love, *supra* note 10, at 32.

12. Matthew 6:24.

13. As seen in Professor Green’s performance, there are examples in the mediation literature of “mediators” who evaluate. See *supra* text accompanying notes 1-4. When mediators evaluate, they assume additional roles and potentially jeopardize their effectiveness as a mediator. However, “mixed processes,” in which the mediator assumes different roles, can be useful. See discussion *infra* Part X.

## II. EVALUATION PROMOTES POSITIONING AND POLARIZATION, WHICH ARE ANTITHETICAL TO THE GOALS OF MEDIATION<sup>14</sup>

When disputing parties are in the presence of an evaluator—a judge, an arbitrator, or a neutral expert—they act (or should act) differently than they would in the presence of a mediator. With an evaluator, disputants make themselves look as good as possible and their opponent as bad as possible. They do not make offers of compromise or reveal their hand for fear that it weakens the evaluator's perception of the strength of their case.<sup>15</sup> They are in a competitive mind-set seeking to capture the evaluator's favor and win the case.

While adversarial confrontations between parties are helpful to a neutral who must judge credibility and clarify the choices he or she must make, such confrontations are not helpful to collaboration. Adversarial behaviors run counter to the mediator's efforts to move parties towards a different perception of their own situation and of each other.<sup>16</sup> While parties typically enter the mediation process in a hostile and adversarial stance, the mediator seeks to shift them towards a collaborative posture in which they jointly construct a win-win solution. An atmosphere of respectful collaboration is a necessary foundation for creative problem-solving.<sup>17</sup>

## III. ETHICAL CODES CAUTION MEDIATORS—AND OTHER NEUTRALS—AGAINST ASSUMING ADDITIONAL ROLES

The ethical codes explicitly include a preference to keep processes "pure." The Model Standards of Conduct for Mediators highlight party self-determination as being the fundamental principle of mediation.<sup>18</sup> The committee that created the Model Standards rejected

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14. See Kovach & Love, *supra* note 10, at 31 (noting that evaluation tends to perpetuate or create an adversarial climate and discourage understanding and problem-solving).

15. See Riskin, *supra* note 8, at 45 (noting that mediator evaluation can be a disincentive for the parties' candor). Federal Rule of Evidence 408 renders evidence of conduct or statements made in compromise negotiations inadmissible at trial to prove liability for or validity of a claim. See FED. R. EVID. 408. This rule encourages free participation in settlement discussions and highlights the assumption that negotiators will not speak openly and candidly if their remarks are or will be heard by someone who will subsequently evaluate their case. See FED. R. EVID. 408 advisory committee's note.

16. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) (articulating and expounding the mediator goal of supporting parties' efforts to move towards empowerment and recognition).

17. The technique of "brainstorming," designed to maximize the development of creative options, precludes evaluation of ideas during the idea-generating process as detrimental to creativity. Parties should separate the processes of inventing solutions and deciding outcomes. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 62-67 (1981).

18. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (Am. Arb. Ass'n et al. 1995) ("A Mediator shall Recognize that Mediation is Based on the Principle of Self-

mediation as an evaluative process.<sup>19</sup> The comments to the Model Standards state that “[a] mediator should . . . refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes.”<sup>20</sup>

Similarly, ethical codes for arbitrators encourage those neutrals not to participate in settlement discussions unless requested to do so by all parties.<sup>21</sup> Important rationales for this rule are: the arbitrator may be improperly influenced by the settlement discussions; the arbitrator may impede the discussions by his or her presence; and the arbitrator’s questions and suggestions while acting as a mediator can create improper pressure to settle.

Consequently, a mediator undertaking to give an opinion on the likely court outcome of a particular claim or a fair resolution of a particular matter should give an accurate label of the new role he or she is assuming<sup>22</sup> and obtain the disputants’ informed consent for undertaking the new role. Also, the mediator should be sure that the disputants understand that taking on an additional role might adversely impact the ability to facilitate discussions. When processes become “mixed,” such as when an arbitrator mediates or a mediator evaluates, it should be at the request and with the informed consent of the parties.

#### IV. IF MEDIATORS EVALUATE LEGAL CLAIMS AND DEFENSES, THEY MUST BE LAWYERS; ELIMINATING NONLAWYERS WILL WEAKEN THE FIELD

If it is acceptable or customary for mediators to give opinions on likely court outcomes or the merits of particular legal claims or defenses, then only lawyers and substantive experts will be competent to mediate.<sup>23</sup> The comments to the Model Standards state that a

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Determination by the Parties.”) The Model Standards were approved by the American Arbitration Association (AAA), the American Bar Association (ABA), and the Society of Professionals in Dispute Resolution.

19. John Feerick, chairman of the committee that drafted the Model Standards noted that “[w]e as a group did not buy into mediation as an evaluative process . . . .” Feerick et al., *supra* note 9, at 103.

20. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI cmt. (1995).

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.*

22. See Kovach & Love, *supra* note 10, at 31 (stating that the Model Standards require a mediator who engages in other processes to inform the parties).

23. See Riskin, *supra* note 8, at 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

“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.”<sup>24</sup>

While this result may be good news for lawyers, the mediator pool would be substantially weakened by the loss of the talents and perspectives of nonlawyers.<sup>25</sup> Furthermore, if the field is theirs, lawyer-mediators will likely pull mediation into an adversarial paradigm.<sup>26</sup> One noted authority in the mediation field, reacting to a Florida rule requiring mediators of certain cases to be either experienced lawyers or retired judges, proclaimed this requirement to be “the end of good mediation.”<sup>27</sup>

#### V. THERE ARE INSUFFICIENT PROTECTIONS AGAINST INCORRECT MEDIATOR EVALUATIONS

Even assuming that mediators could be governed by and held to appropriate standards when they evaluate, growing concerns about the quality of justice that disputants receive when they are diverted from courts into private alternative dispute resolution (ADR) processes<sup>28</sup> argue for leaving evaluation to adversarial processes where due process protections are in place. In the courts, disputants can appeal decisions they feel are wrong. In arbitration, disputants pick arbitrators based on the arbitrator’s substantive expertise or wisdom and consciously waive the right to appeal.

In mediation, little protection exists from a mediator’s inadequately informed opinion. Confidentiality statutes, rules, and agreements keep sessions private.<sup>29</sup> Quasi-judicial immunity in some

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COST LITIG. 57, 61 (1996) (asserting that giving legal predictions and evaluations is the practice of law and cautioning nonlawyer-mediators to be wary of evaluative mediation).

24. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI cmt. (1995).

25. See Paul J. Spiegelman, *Certifying Mediators: Using Selection Criteria to Include the Qualified—Lessons from the San Diego Experience*, 30 U.S.F. L. REV. 677, 693-97 (1996) (describing the critical role that nonlawyers and nonadversarial thinking have played in the development of mediation).

26. See James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 50 (1991) (raising concerns regarding the transformation of mediation from a consensual to a coercive process); Kovach & Love, *supra* note 10, at 31-32 (discussing a variety of ways in which courts and lawyers tend to pull mediation towards an adversarial framework).

27. Alfini, *supra* note 26, at 47 (quoting Albie Davis’s comment that increasing the use of evaluative mediation approaches portends the end of “good mediation”).

28. See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 82-83 (1996) (raising concerns about the quality of justice unrepresented litigants receive when they come to court but are diverted into mediation).

29. See Confidentiality in Court-ADR Programs, 10 ALTERNATIVES TO HIGH COST LITIG. 173, 175 (1992) (discussing the various protections afforded the mediation process). But see Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising*

cases can shield mediators from liability for careless opinions.<sup>30</sup> The mediator's opinion that one of the parties should buy a carpet to lessen the impact of sounds heard by a neighbor or that one of the parties does not have standing to bring a particular claim in court carries enormous weight.<sup>31</sup> Mediators are not in the best position to make those sorts of evaluations because, if they are doing their facilitative job, they have not completed the necessary preliminary tasks of an evaluator. Additionally, unless a mediator has separate training as a judge, arbitrator, or neutral evaluator, he or she may not be competent to serve as an evaluator. Service as a mediator does not qualify a mediator to be a judge any more than service as a judge qualifies a judge to mediate.

#### VI. EVALUATION ABOUNDS: THE DISPUTING WORLD NEEDS ALTERNATIVE PARADIGMS

The processes of litigation, "rent-a-judge,"<sup>32</sup> arbitration,<sup>33</sup> early neutral evaluation,<sup>34</sup> and summary jury trial<sup>35</sup> are all available for parties who want opinions or decisions. Evaluative models and service providers abound. We need a genuine alternative to the adversarial paradigm of disputants who fight and a neutral who assesses.

The collaborative paradigm of mediation, in which mediator evaluation does not play a part, offers a dispute resolution process

from the Texas Experience, 38 S. TEX. L. REV. (forthcoming 1997) (arguing that even a strict confidentiality statute should not preclude parties' ability to obtain information relevant to mediator malpractice).

30. See *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994) (extending quasi-judicial immunity to case evaluators in the mediation program of the District of Columbia Superior Court).

31. See *Menkel-Meadow*, supra note 23, at 61 (noting that parties may rely on what mediators tell them).

32. "Rent-a-judge" or private judging is a dispute resolution process in which adversarial presentations are made to a party-selected neutral decisionmaker who renders a decision that is typically binding and subject to the usual appeals process through the courts. See *GOLDBERG ET AL.*, supra note 1, at 280-81.

33. Arbitration is a private, voluntary dispute resolution process in which the parties to a dispute agree in writing to submit the dispute for resolution to a third-party neutral, chosen pursuant to the agreement of the parties. See Michele L. Giovagnoli, *To Be or Not to Be?: Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena*, 64 *UMKC L. REV.* 547, 554-55 (1996). The parties make adversarial presentations to the third-party neutral, and the neutral determines the facts and makes an award. See *id.* at 555. The arbitrator's award is usually binding and not subject to appeal, but may be advisory, depending on the parties' agreement. See *id.*

34. Early neutral evaluation is a private dispute resolution process in which a neutral with subject-matter expertise provides the parties with a nonbinding, reasoned evaluation of their cases to assist settlement. See J. Daniel Breen, *Mediation and the Magistrate Judge*, 26 *U. MEM. L. REV.* 1007, 1019-20 (1996).

35. A summary jury trial is a court-ordered dispute resolution process in which attorneys give brief presentations of their cases to a jury whose nonbinding verdict assists the parties in settling the case. See Frank Evans & Shadow Sloane, *Resolving Employment Disputes Through ADR Process*, 37 *S. TEX. L. REV.* 745, 762-63 (1996).

through which parties are taught how to resolve their own disputes, listen to each other differently, broaden their own capacities for understanding and collaboration, and create resolutions that build relationships, generate more harmony, and are “win-win.”<sup>36</sup> The lesson, “Give a man a fish and you feed him for a day, teach him to fish and you feed him for a lifetime,” highlights the importance of teaching people how to solve their own dilemmas.

In the corporate world, phalanges of consultants assist in promoting creative problem-solving and building teams capable of successful collaboration. Similarly, the legal community needs a model from among the array of dispute resolution processes that will assist parties to evolve in their understandings, relationships, and arrangements, using the opportunity represented by conflict situations.

Mediation has the potential of being shifted towards an adversarial framework in which mediators “trash and bash”<sup>37</sup> to get parties to settle. They “trash” the parties’ cases, predicting loss and risk if litigation is pursued.<sup>38</sup> They “bash” settlement proposals that the other side will not accept.<sup>39</sup> We lose a great deal if mediation becomes a mere adjunct of the adversarial norm. Having mediators use evaluation as a technique to get movement takes us in that direction.

#### VII. MEDIATOR EVALUATION DETRACTS FROM THE FOCUS ON PARTY RESPONSIBILITY FOR CRITICAL EVALUATION, RE-EVALUATION AND CREATIVE PROBLEM-SOLVING

If Einstein’s insight is true that “[t]he significant problems we face today cannot be solved at the same level of thinking we were at when we created them,”<sup>40</sup> then we, as a society, are called on to nurture ways to achieve higher levels of thinking and creativity. Mediation is the one dispute resolution process in which the neutral’s role

36. See Kovach & Love, *supra* note 10, at 32 (discussing mediation’s distinctive role); Bush, *supra* note 10, at 267-70 (highlighting mediation’s unique capacity for empowerment and recognition).

37. Alfini, *supra* note 26, at 66-73. Professor Alfini characterizes Florida circuit court mediation, which is conducted by legal professionals, as “trashing,” “bashing,” and “hashing it out.” *Id.* at 66. “Trashers” tell parties how bad their case is to get each side to be more realistic. Effective trashers have litigation experience that lends to their “trashing” credibility. See *id.* at 66-68. “Bashers” focus on settlement offers and bash away at the offers, trying to get a midrange number. Most bashers are retired judges who use their prestige to “hammer sense” into parties. See *id.* at 68-71. “Hashers” are similar to facilitative mediators. See *id.* at 71-73.

38. See *id.* at 66.

39. See *id.* at 69.

40. Marc S. Klein, *Reframing the ‘Tort Reform’ Debate (and Our Participation in It)*, N.J. LAW., Jan. 1995, at 39 (quoting Albert Einstein).

is to assist the parties to collaborate creatively and resolve the issues they face.<sup>41</sup>

Frequently, for the individuals, communities, or institutions involved, conflicts represent true crises, holding the potential for doing extreme harm and, at the same time, holding the potential for creative change and restructuring. The mediator's task of elevating the dialogue from recriminations and blame to the generation of possibilities and breakthrough ideas is a task we are just beginning to understand. If we allow mediation and mediators to slip into the comfortable (because it is the norm) adversarial mind-set of evaluation, we kill the turbo-thrust of the jet engine of idea generation.<sup>42</sup> So-called "evaluative mediation" pulls mediation away from creativity and into the adversarial frame.<sup>43</sup> If we are to continue to survive and evolve as a species, we need to nurture the processes that tap our affinity to create and imagine.<sup>44</sup>

### VIII. EVALUATION CAN STOP NEGOTIATION

When mediators provide opinions, the opinions have consequences. An unfavorable opinion can seriously disadvantage one of the parties. When a party disagrees with the unfavorable opinion, the party is likely to withdraw from the mediation, believing that the mediator has "sided" with the other party. On the other hand, a party advantaged by a favorable opinion may get locked into an unacceptable claim or position and negotiations may stop altogether.<sup>45</sup> Because mediators are charged with furthering negotiation, this result is undesirable.

The following incident illustrates this problem. The general counsel of a large shipping company was called to a mediation session in Florida.<sup>46</sup> The mediation involved a multi-million dollar dispute with

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41. I am arguing for a clear articulation of the mediator's role. See Bush, *supra* note 10, at 256 (stressing the importance of a governing conception of the mediator's role that articulates mediator qualifications and standards for practice). However, many different visions of the mediator's role exist. See, e.g., Alfini, *supra* note 26, at 73-74 (summarizing a variety of mediation styles and concluding that a lack of consensus exists as to what constitutes "good mediation"); Bush, *supra* note 10, at 258 (describing three different conceptions of the mediator's role: efficiency, protection-of-rights, and "empowerment-and-recognition"); Riskin, *supra* note 8, at 23-34 (describing different mediator orientations based on evaluative-facilitative and narrow-issue-definition/broad-issue-definition continuums).

42. See Kovach & Love, *supra* note 10, at 32 (stating that "evaluative mediation" shifts mediation into the framework of the adversarial norm and thereby stifles parties' creative capacity to resolve their own disputes).

43. See *id.*

44. See JOHN LENNON, *Imagine*, on *IMAGINE* (Apple Records 1971) (suggesting the possibilities available).

45. See Riskin, *supra* note 8, at 28 n.67 (noting that assessments can impair a party's faith in the mediator's neutrality or restrict a party's flexibility).

46. See Kovach & Love, *supra* note 10, at 31 (describing this incident in more detail).

a union, and the general counsel went to Florida wanting to settle the matter.<sup>47</sup> During the mediation, in a joint session, the mediator urged the company to be more flexible because the business did not have a chance of winning on appeal.<sup>48</sup> That evaluation shut down the negotiations by freezing the union representatives into their position.<sup>49</sup> Several years and hundreds of thousands of dollars later, the company won a complete victory in court that was affirmed on appeal.<sup>50</sup> Mediator behavior should not cause such pyrrhic (lose-lose) victories.

Of course, when one side has an unrealistic assessment of its case, a different impediment to negotiation is present. In such cases, mediators should encourage re-evaluation by enabling each side to present its best case and strongest arguments to the other side, encouraging the parties to get professional advice, questioning conclusions of the parties, and urging a neutral evaluation to break a stalemate.<sup>51</sup>

#### IX. A UNIFORM UNDERSTANDING OF MEDIATION IS CRITICAL TO THE DEVELOPMENT OF THE FIELD<sup>52</sup>

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.<sup>53</sup> The report specifically noted that "mediation" is a term used in an "extraordinary variety of ways."<sup>54</sup> To address this problem, the report recommends the promulgation of

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47. See *id.*

48. See *id.*

49. See *id.*

50. See *id.*

51. Some argue that the mediator should provide the neutral evaluation as a "last step" when the evaluation represents the "sole opportunity for settlement." Aaron, *supra* note 10, at 62. Others who find evaluation consistent with the mediator's role say evaluations should be made only if parties are sufficiently sophisticated not to be unduly swayed by the mediator's opinion. See James J. Alfini, Moderator, Evaluative Versus Facilitative Mediation: A Discussion, 24 FLA. ST. U. L. REV. 919, 928 (1997) (quoting Florida lawyer-mediator Lawrence M. Watson, Jr.). While a neutral evaluation can be critical in generating a settlement by expanding parties' information bases and deflating unrealistic positions, the potential harms of a mediator evaluating outweigh the potential benefits. The same result can be achieved by the mediator giving a party-requested evaluation only after notifying the parties that he or she is acting in a capacity other than that of a mediator. See discussion *infra* Part X.

52. See Kovach & Love, *supra* note 10, at 32 (discussing the importance of well-defined and uniform processes).

53. See CHIEF JUDGE'S N.Y. STATE COURT ALTERNATIVE DISP. RESOL. PROJECT, COURT-REFERRED ADR IN N.Y. STATE 7 (1996).

54. *Id.* at 7.

statewide standards<sup>55</sup> and the subscription of neutrals to a specific code of ethics.<sup>56</sup> In discussing the confusion of terms and labels, the report notes that “[b]lurring the lines between mediation, neutral evaluation and even arbitration can have deleterious consequences.”<sup>57</sup> The consequences include parties who do not know what to expect and neutrals who do not understand what constitutes good practice.<sup>58</sup> Interestingly, the body of the report includes a discussion of training standards that states: “mediators do not advise litigants on the law or likely court outcomes . . . .”<sup>59</sup>

When attorneys advise clients about the advantages and disadvantages of mediation, when courts and institutions create mediation programs and panels of mediators, when consumers go to the Yellow Pages to find a mediator, they should know what they are getting. They should have a clear understanding of the goals of the process and the tasks the neutral will perform.<sup>60</sup>

In an article criticizing ADR, Noreen Connell, former president of the New York State chapter of the National Organization for Women, describes a case in which a married couple elects to mediate their divorce to avoid dissipating marital assets in litigation:

At the sessions, the mediator, who is a woman, echoes the husband’s complaints that the wife is “too angry and too suspicious” when he claims that he no longer has a pension and that he has lost the credit card records. The wife is told her complaintss [sic] about not getting enough money to pay the mortgage since her husband moved out of the house are emotionally damaging to their son and that responsible parents choose joint custody.<sup>61</sup>

Ms. Connell’s conclusion about mediation is contained in the article’s title, “Beware of Alternative Dispute Resolution.” Another conclusion based on the same story is that the mediator was so busy evaluating who was right and wrong and what the outcome should be that the mediator did not mediate at all. The mediation community must make the meaning of mediation so clear that, in her next article, Ms. Connell will criticize the mediator involved in this case, not the mediation process itself.

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55. See *id.* at 8.

56. See *id.* at 9.

57. *Id.* at 37.

58. See *id.*

59. *Id.* at 54 (emphasis added). Although the mediator does not advise 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.” *Id.*

60. See Kovach & Love, *supra* note 10, at 32 (stating that the term “mediation” should have uniform meaning from state to state and from one court to another).

61. Noreen Connell, *Beware of Alternative Dispute Resolution: The “Touchy-Feely Trap”*, NOW-NYS ACTION REP., Summer 1996, at 7, 7.

## X. MIXED PROCESSES CAN BE USEFUL, BUT CALL THEM WHAT THEY ARE!

Parties sometimes request that neutrals assume a variety of roles. "Mixed processes" abound: med-arb, arb-med,<sup>62</sup> mini-trials,<sup>63</sup> summary jury trials, and mediation and neutral evaluation.<sup>64</sup> These mixed processes can address particular needs of a situation and can be very helpful.

Mediators are not foreclosed from engaging in some other process or helping parties design a mixed process. Whatever the service being provided, however, it should be requested by the parties and accurately labeled. When a process is "mixed" and the neutral has multiple roles, he or she is bound by more than one code of ethics and is charged with separate goals and tasks. A properly labeled process—or, conversely, a label that has a clear meaning—promotes integrity, disputant satisfaction, and uniform practice.

Mediators who regularly give case assessments and expert opinions should continue those practices only if they are requested by the parties, properly advertised, and accurately labeled.

Driving out of Manhattan on the Henry Hudson Parkway, a major route to New Jersey, a large billboard pictures David Letterman proclaiming: "Attention motorists: NJ is closed." I can imagine David Letterman with his huge smile announcing "Attention disputants: YOUR MEDIATOR MAY EVALUATE." It should seem equally absurd.

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62. See Laurence Connor, *How to Combine Facilitation with Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 15, 15 (1996). Connor describes a two-phase process in which, in the first phase, the neutral evaluates, makes an award, and seals the award. See *id.* If the facilitation that follows does not result in settlement, the advisory award is shown to the parties as a "reality check." *Id.* Since the sealed award cannot be changed after facilitation begins, the parties can reveal sensitive matters and possible weaknesses to the neutral without fearing the award will be affected. See *id.*

63. A mini-trial is a private dispute resolution process in which attorneys for each party present their cases to the other side in an abbreviated format in a session chaired by a neutral advisor. See Evans & Sloane, *supra* note 35, at 761. After the case presentations, the parties attempt to negotiate a settlement, usually with the assistance of a neutral advisor who facilitates the discussion or renders a nonbinding opinion. See *id.*

64. In the context of employment disputes, mediation and neutral fact-finding have been successfully combined. See, e.g., Carol Wittenberg et al., *Why Employment Disputes Mediation Is on the Rise*, LITIG. & TECH. MGMT. REP., Feb. 1996, at 8, 8.