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An Investigation into the "facilitative-evaluative" debate regarding mediator styles

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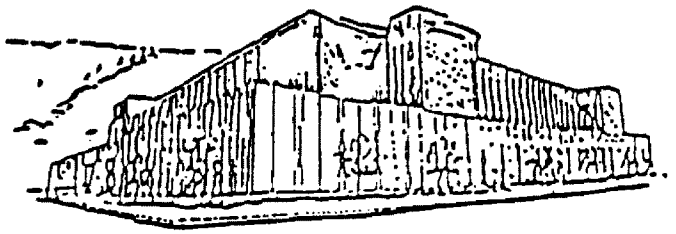

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An Investigation into the "Facilitative – Evaluative"
Debate Regarding Mediator Styles

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An Investigation into the "Facilitative – Evaluative" Debate Regarding Mediator Styles

Director: Dr. William Wilmot

ABSTRACT

Presently, mediation is being used in a wide variety of arenas, such as business, family, environmental, civil, international, school, and interpersonal disputes. Due to this expansion of the field, which initially began as an alternative method to resolve labor disputes, there are many more mediators working in a broad range of contexts. Each mediation contains its own intricacies and circumstances, thus requiring mediators to continually adapt to the uniqueness of each situation. These mediators utilize an array of skills and techniques, in sum their own personal style and orientation, while conducting mediation sessions. This study investigates the plethora of styles being used in the field today.

Theorists and practitioners alike are recognizing that the proliferation of contexts and mediators working in these diverse contexts is currently stretching the boundaries of what is actually considered proper mediation. Many mediators are operating from evaluative stances that are seen as contradictory to the original goal of mediation: to let disputants resolve their own conflicts. The mediator's job was initially seen as simply facilitating the communication in the negotiations, not offering solutions or evaluations of the content of the mediation. This study assesses the individual styles of mediators working in one particular mediation community, The Community Dispute Resolution Center of Missoula County (CDRC). The goal is to see what orientation these mediators work out of: facilitative or evaluative. Recommendations are then offered for the CDRC and its mediators.

ACKNOWLEDGEMENTS

I would like to thank Bill Wilmot for his guidance and support. His personal mediation style is an inspiration to me. I would also like to thank Art Lusse and the Community Dispute Resolution Center of Missoula County for their continuing support of mediation and mediators in Missoula, MT. Art provided me with sage advice throughout this entire process. And last, but not least, I would like to send my deepest appreciation to my personal editor during the past two years—Jolane Flanigan. Jolane has improved my writing and kept me company during some of graduate schools' bleakest moments. Thank you my friend.

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– Joseph Stulberg

Rationale

At the present time, there is much confusion as to what constitutes the field of mediation. In the past thirty years, mediation has grown from a fledging dispute resolution method to one that is now widely recognized and frequently used in the United States. Even though, as indicated in the above quotations, ambiguity about what "is" mediation is widespread today, Moore (1996) offers an agreeable definition:

> Mediation is generally defined as the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in the dispute. (p.15)

However, this may be where the agreement ends. As mediation is applied to a wider variety of contexts and disputes, it must adapt itself in order to meet the needs of each situation. Due to the increasing role mediation plays in the dispute resolution landscape, people with vastly different backgrounds, training, education, and experience are serving as mediators. These mediators utilize an array of different methods and techniques to assist disputants in the resolution of their conflicts. The confusion in *how* to properly mediate stems largely from this disparity in mediator styles and orientations.

I have been mediating for the past two years. The majority of this work has been conducted through a court-affiliated program in Missoula, Montana. During this time, I

have had the opportunity to work with and observe many other mediators. I have also had the privilege of being trained by and to study under several talented and experienced professional mediators. This exposure has influenced on my overall outlook on what constitutes mediation. From many of these mediators, I have acquired certain skills and techniques and have incorporated them into my personal mediation style. However, I have also witnessed other mediators whose skills and behaviors make me question how they conduct mediations and interact with disputants. How can one group of mediators operate in such different ways? Because I am continually amazed at the stylistic differences in the mediation community I am a part of, I have been inspired to explore this phenomenon—mediator style—in greater depth.

What are the driving forces behind our different strategies and outlooks—our mediation styles? Is one more appropriate than another? How can such wide arrays of techniques all fall under the same terminological "umbrella" of mediation? Is there one particular/proper "way" to mediate? And finally, who defines these parameters and ensures that the mediation community adheres to and works within the established mediation boundaries? For if a framework is established as to what mediation *is* and how mediators must *operate*, then individual mediators must work with their own interpretations of what really is considered mediation, as opposed to another alternative form of dispute resolution.

In this professional paper I will analyze the styles of a group of mediators who all work for the same group—the Community Dispute Resolution Center of Missoula County. I will use a quantitative instrument—a standardized questionnaire known as the Mediator Classification Index—to assess the individual stylistic tendencies of each

mediator. Combining these data with a review of relevant mediation literature, I hope to not only better understand this phenomenon, but also provide my local mediation community with some greater insight as to the "ambiguity" which is so prevalent in mediation these days. I will begin this paper by first reviewing the literature. I will follow with a description of the questionnaire and my findings, and will conclude with a broader discussion of the phenomenon of interest—mediator styles.

Literature Review

The Current Conversation

Mediation literature has been flooded in the past five to ten years with thoughts regarding different styles of mediation (Bush & Folger, 1994; Kolb, 1994; Kovach and Love, 1998; Kressel, 1993; Menkel-Meadow, 1995; Riskin, 1996; Silbey and Merry, 1986; Umbreit, 1994). Since each mediator carries his or her own personal experiences, beliefs, and biases into a conflict, then naturally each mediator will work in slightly different ways. Some mediators strive for resolution, while other mediators are primarily concerned with the disputants' relational issues. These different styles of mediation mentioned above have been well described along various continua: "settlement-oriented – problem-solving oriented" (Kressel, 1993, p. 2), "settlement frame – communication frame" (Kolb, 1995, p. 468), "adversarial – problem-solving" (Menkel-Meadow, 1984), "mini-trial – matchmaker" (Hyman et al., 1995), "bargaining type – therapeutic type" (Sibley & Merry, 1986, p. 25), "controlling – empowering" (Umbreit, 1997, p. 210), "problem-solving – transformative" (Bush and Folger, 1994, p. 81), and "facilitative – evaluative" (Riskin, 1996, p. 7).

All of these systems were developed by scholar/practitioners who have extensive experience in the field of mediation. As indicated by the numerous continua listed above, many scholar/practitioners notice a prevalent dichotomy in the field of mediation. This dichotomy is not a negative one. Rather, these mediators see the continua as accurately representing the plethora of styles presently being used in the mediation field. As they have seen the field grow in the past twenty years, they have also witnessed a myriad of changes as to what actually fits under the "umbrella" of mediation. What began as a distinct alternative to the litigation system so prevalent in the United States has now evolved into a field that is extremely diverse in its practices and practitioners (Kolb, 1994; Menkel-Meadow, 1995).

A driving force behind the development of the continua is that many mediators are considered to be overly directive in their task. This directive approach contradicts the "neutral/facilitative" stance touted by mediators when they begin a session (Alfini, 1997; Imperati, 1997; Kolb, 1995; Kolb, 1983; Kovach and Love, 1998; Love, 1997; Phillips, 1997; Sibley & Merry, 1986; Stulberg, 1997). These mediators involve themselves in the content of cases, as opposed to strictly facilitating the negotiations for the parties. They offer solutions, guidance, and evaluations. Furthermore, it is the belief of many mediators that the entire process of mediation is losing sight of what it initially set out to do: to offer disputants a safe forum to solve their own conflicts. Thus, if a mediator sizes up the situation, hypothesizes possible outcomes in court, decides on the best alternative for the parties, and then subtly pushes the parties in that direction, what makes the mediator any different from an arbitrator, lawyer or judge?

The recent trend in mediation literature— the abundant discussion of mediator style and orientation—demonstrates the importance of the topic to the field. As the use of mediation slowly grows and spreads to new areas, practitioners and researchers have become increasingly concerned with the reputation and integrity of the mediation process. All of the above mentioned dichotomies/continua (schemata) are attempts to assist mediators to better understand the complexities of the profession, while simultaneously giving definition to the multiple choices and decisions made by a mediator while helping to resolve a dispute (Kolb, 1994; Kressel, 1994). Like similar schemata in other domains, these continua serve to provide frameworks in which systematic organization of thoughts and observations can occur.

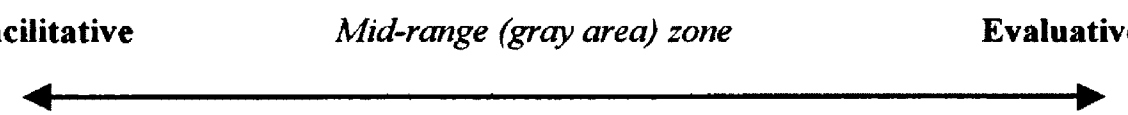
For the purpose of simplicity, for the rest of this paper I will use the terms "facilitative" and "evaluative" to represent the various continua. I choose these terms because, 1) presently, they are the most widely recognized and utilized terms regarding the phenomenon of mediator styles and 2) they are the terms utilized in the questionnaire I used for this professional paper.

How "facilitative" and "evaluative" differ from one another

As described above, it is apparent that mediators possess different styles. However, the problem is that the exact nature of these styles and their consequences are not very well understood (Kressel, 1994). Prior to the acknowledgement that mediators were going about their task in varying ways, it was simply assumed that once a mediator has learned the procedural aspects of mediation, then they will naturally be good mediators (Glavovic, Dukes, & Lynott, 1996). Training sessions and manuals focus primarily on (and they still do) the step-by-step format of the process. They do not

discuss stylistic options for mediators. Therefore, provided only with a skeletal outline of how to conduct the session itself, and lacking any clear standards or rules, mediators inevitably perform their task in a myriad of ways.

Beginning in 1986, with Sibley and Merry's essay *Mediator Settlement Strategies*, these different styles were first categorized and described, in hopes that they could be better understood. Sibley and Merry categorize the different styles along a continuum with these parameters: "bargaining type – therapeutic type." Today, we are presented with a great number of style-types, as indicated by the list of continua found toward the beginning of this paper. In general, the mediator style continua can be easily defined and understood by examining one in particular—"facilitative – evaluative." Following is a graphic showing this particular continuum:



I will now describe the two ends of this style continuum in order to better illuminate what is being discussed in literature and also to better describe how mediators are actually enacting these styles when they work.

A mediator who employs a facilitative style is described as helping disputants make their own decisions and assess their own situations. John Feerick (1995; in Love, 1997) elaborates on this description, "[A 'facilitative' mediator] facilitates communications, promotes understanding, focuses the parties on their interests, and seeks

creative problem solving to enable the parties to reach their own agreement" (p.123).

Love (1997) describes the role of the facilitative mediator in more depth,

> [Facilitative] 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 doing so, mediators facilitate evaluation by the parties. (p.939)[i]

Mediators utilizing the facilitative approach ensure that all decisions are generated by and agreed upon by the disputants themselves. Mediators working from this perspective strive to facilitate communications rather than enter into the actual content of the dispute.

In order to contrast the facilitative style with the evaluative style found at the opposite end of the mediator continuum, I will be consistent and use Love's (1997) description of an evaluative style. She states:

> Their (evaluators') 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 to decide the issue or resolve the conflict. (p.938)

According to Love's criteria, mediators who employ evaluative techniques will actively involve themselves in the content of the conflict by offering opinions, assessing the facts, and ultimately helping to make decisions. As a reference, this is the model which judges typically follow in court hearings.

Each mediator typically operates from one predominate style (Kolb, 1994; Kressel, 1994; Riskin, 1996). Even though every mediation is unique and certain situations will require different "moves," mediators tend to be either evaluative or facilitative in nature. After conducting a certain number of mediations, a mediator will find the communicative style and "quiver" of techniques, which best suits him or her.

They will conduct their mediations from this reference point and slide along the continuum utilizing different tactics (either evaluative or facilitative) accordingly (Kressel, 1994; Riskin, 1996). Below is a list of typical mediation techniques used at both ends of the continuum:

Facilitative Techniques	EvaluativeTechniques
• **Help parties understand interests**	**Assess strengths and weaknesses of of parties' cases**
• **Elicit information, issues, perspectives, feelings, assumptions**	**Determine facts and circumstances from parties' perspectives**
• **Guide/Facilitate communication between parties to enhance understanding**	**Speculate/Predict outcomes of court**
	Urge parties to settle
• **Help parties generate and propose collaborative options for settlement**	**Offer proposals and suggestions for settlement**
• **Help parties evaluate proposals**	

As can be seen in the above "facilitative" and "evaluative" descriptions, the two styles are fundamentally different. Undoubtedly, both styles are widely used in contemporary mediations. Because of this, there are now a broad array of activities and techniques that fall under the generally understood definition of mediation (Imperati, 1997; Kolb, 1994; Phillips, 1997; Riskin, 1996). As Riskin (1996) notes, "Almost every conversation about mediation suffers from ambiguity, a confusion of the 'is' and the 'ought'. This creates great difficulties when people try to determine whether and how to participate in mediation" (p.9). Due to the loose construction as to what exactly constitutes mediation, there is vast room for personal interpretation (Phillips, 1997). Consequently, when a mediator witnesses a fellow mediator conducting a session in a completely different way, the ambiguity becomes glaringly apparent. Many times

mediators will see their style of mediation as being consistent with what mediation really is, while simultaneously ignoring or discounting a slightly alternative version (Kolb, 1994; Merry, 1993). There is no "right" way, but as Riskin (1996) avers, everyone has their own version of how things should be done. And since there is little consensus as to what is the correct way to mediate, it is inevitable that these opposing perspectives are going to clash.

The "gray area" between mediation styles found along the "facilitative – evaluative" continuum is often difficult to distinguish. From the evaluative perspective the mediator evaluates issues, potential outcomes, and offers suggestions for solutions. From the facilitative perspective the mediator helps the parties evaluate issues, consider possible outcomes, and generate consensual decisions. Stulberg (1997) describes this hazy distinction from a facilitative mediator's perspective:

> In order for them [mediator] to generate movement among parties, they routinely deploy such techniques as having the parties evaluate the strengths and weaknesses of their cases as well as those of their counterparts, asses the cost of not reaching resolution, forecast the impact of the dispute on the parties' relationship, and expose the various party interests that are advanced or undermined by the bargaining agenda and proffered solutions. They do that not to tell the parties how the mediator believes the controversy ought to be resolved, but rather as techniques for reorienting party perspectives. I believe there is nothing insidious about mediators doing this. Reorienting party perspectives is constructive. Moreover, it can be done in a manner that is consistent with the governing aspirations of having the parties engage in the settlement-building process. (p1003-1004)

As indicated in the above excerpt, the facilitative mediator can help the *parties* evaluate; it is not considered an evaluative style, unless they are doing the evaluating. Therefore, if the parties are stalled, it is acceptable, and oftentimes necessary, for the mediator to help the parties reorient themselves in order to get back on the consensual decision-making track.

Contributing Factors to Different Styles

There are several factors, outside of a mediator's personal preference, which contribute to this application of varied styles to the mediation process. First among them is the lack of national standards or accreditation programs (Bush, 1994; Henning, 1999; Kovach & Love, 1998; Menkel-Meadow, 1997; Riskin, 1996; Stulberg & Montgomery, 1987). Disparate state and national regulations have caused much confusion regarding the field of mediation and what is actually considered "competent" mediation (Kovach & Love, 1998). Because no regulatory process is established, mediators are able to operate under a wide array of guises, as indicated by the ongoing controversy regarding mediator style/orientation. No national test or evaluation system exists to monitor the activities or actions of those individuals who call themselves mediators. As a result, mediators are given a wide berth in which to perform their craft.

Second, the institutionalization or establishment of mediation by individuals or groups who have contradictory objectives has promoted the widespread use of opposing styles (Kolb, 1994; Menkel-Meadow, 1997). For example, a lone professional mediator, a mediation firm, and a court-affiliated program, all located in the same city may conduct their mediations under contrasting guiding principles. This sends conflicting messages to clients and to the community, thus propagating the divisions in the mediation community.

A third contributing factor is the co-opting of mediation by lawyers who are working out a "win-lose" paradigm (Imperati, 1997; Menkel-Meadow, 1997; Phillips, 1997; Riskin, 1996; Stark, 1997). This win-lose mentality is contradictory to the collaborative aspirations of mediation. Lawyers who mediate use primarily evaluative skills, contributing to a continual widening of the "facilitative – evaluative" continuum. As court dockets become increasingly more crowded and as lawyers' case loads continue

to bulge, there has been a call for quicker and cheaper methods of dispute resolution. Many lawyers are mediating their cases or participating in mediations that their clients are involved in. Because lawyers emerge from the adversarial background, they inevitably bring an evaluative mindset into a mediation. They tend to evaluate the issues, weigh likely court outcomes, and press for settlements, regardless if they are generated by the parties or not. This blending of two different dispute resolution frameworks—litigation and mediation—is adding to the already cloudy realm that is present-day mediation.

A final contributing factor to the proliferation of different styles is that mediation is now being used in a wide array of disputes—business, family, court-ordered programs, international, and schools among many others. Each of these arenas, and each particular case, poses a different set of challenges to the individual mediators. Because of this, mediators will operate slightly differently from one another, utilizing all skills found along the "facilitative – evaluative" continuum. As mediation continues to spread to other contexts, it is logical to assume that the methods used by mediators will expand correspondingly.

As shown in this review of literature, what began as one common vision—to provide an opportunity for disputants to collaborate and solve their own conflicts—has now swelled into a vision that is muddied by the large number of practitioners, each using their own style, who have their own opinion as to what mediation should truly be. As a result, the field is currently in a state of flux and the only the continuing efforts of theorists and practitioners alike will reunite the communal efforts and vision of those who work in the field.

Mediation Community to be Studied

As I mentioned earlier, I have spent the past two years working for a mediation program known as The Community Dispute Resolution Center of Missoula County (CDRC). It is a court-affiliated program handling primarily small claims and civil cases. The majority of cases are landlord/tenant, employer/employee, consumer/merchant, or neighborhood disputes. The disputants are referred to mediation by the judges who hear their "preliminary remarks to sue." If the judge feels that the case has the potential to be resolved through mediation then s/he will notify the CDRC to arrange a session, usually two to three weeks away. Court clerks then inform the disputants of the date the mediation will be held. The sessions are mandatory and the court informs disputants that a judgment may be ruled against them if they fail to appear on the scheduled day.

Incorporated in September 1995, CDRC has been conducting mediations for the past five years. It is a non-profit organization consisting of approximately 50 trained volunteers. A local mediation group, Montana Mediators, has trained the majority of CDRC volunteers; those not trained in Missoula have received a comparable level of training elsewhere. In order to be able to mediate, volunteers must have acquired the adequate training (usually a three day seminar covering the fundamentals of mediation mixed with many role plays), observed no less than four mediations, and co-mediated with an experienced volunteer for another four sessions. Emphasis is placed on those mediators familiar with the system assisting up-and-coming mediators to better understand the intricacies of the process and their own personal communication techniques. Debriefing sessions between co-mediators occur after most mediations.

Through sharing constructive criticisms and observations of one another, it is hoped that mediators will build upon their strengths and improve those aspects of their mediation techniques that are not as effective.

CDRC volunteers consist of working adults (almost all mediators are older than 40 years of age) who volunteer to mediate approximately two times a month—a two-week rotation is the typical schedule pending cases are consistently being referred to CDRC by the court. In addition to providing an opportunity for its volunteers to mediate, CDRC provides continuing guidance and education for its 50 volunteers. All volunteer mediators must complete six hours of continuing education every year. Some examples of continuing education include victim-offender trainings, parent-teen mediation trainings, and internal evaluations of the CDRC and its guiding principles.

Mediation sessions are held in the Missoula County Courthouse and typically last one to two hours. Mediators use a structured framework (oftentimes followed off of a cue card) to guide the sessions. Ground rules, roles of disputants and mediators, and speaking time for participants all follow a regular pattern observable from session to session. The process is intended to diagnose/uncover any underlying issues that are fueling the conflict. The rationale behind this process is that if any hidden interests, relational matters, or misconstrued perceptions are perpetuating the conflict then they can be brought into open discussion where they can be negotiated and better understood. Oftentimes disputants are unaware that their individual views of the conflict are vastly different from their fellow disputant.

Upon entering court on the scheduled day of mediation, disputants are provided with an informational sheet which assists them in better understanding what mediation is,

before they enter into the session (see Appendix A). This sheet provides participants with, among other things, information about mediation and describes what the mediators role will be in the session:

> Mediation is a conflict resolution process in which a trained third party assists the participants to negotiate a mutually acceptable and informed agreement, if they so choose. If participants are unable to reach agreement during mediation, they retain their full right to utilize the legal system. In mediation, decision-making authority rests solely with the participants. The role of the mediator is to facilitate communication, promote understanding, focus the parties on their interests, and support creative problem-solving that enables the parties to reach to reach their own agreement.[ii]

The description of the role of mediators is fairly clear. It is emphasized that decision-making is the responsibility of the parties. CDRC mediators are seen as facilitators who promote communication, problem solving, and understanding between the parties. This is a facilitative approach to mediation.

Each mediation begins with the mediators opening statement. Mediators welcome parties, thank them for coming, and then introduce what is going to happen in the mediation. In its *Guide for Participation for Center Activities* (see Appendix A), CDRC informs its mediators that their opening statements may vary stylistically, but that they must contain the following information: (a) Do the parties have the authority to reach agreement (financial and otherwise)? (b) The process is confidential unless there is a threat of harm to one's self or to another person (c) The mediator is both impartial and neutral (d) The mediator has no decision-making power; all decisions will be made by the parties (e) The parties give up no legal rights by participating in mediation (f) Length of the conference (g) Parties' responsibility to dedicate uninterrupted time to the conference (h) Procedural ground rules.[iii] Mediators, upon completion of their opening statement, then turn the floor over to the parties for their uninterrupted time to give their perspective of the situation. The mediation then continues through the typical stage pattern of

opening statement, uninterrupted time, open discussion, caucus (if necessary), agreement and document preparing, and the filling out of evaluations. Besides the statements that mediators should be neutral/impartial and that they should refrain from decision-making, no other mention is made of how they should behave in the mediation.

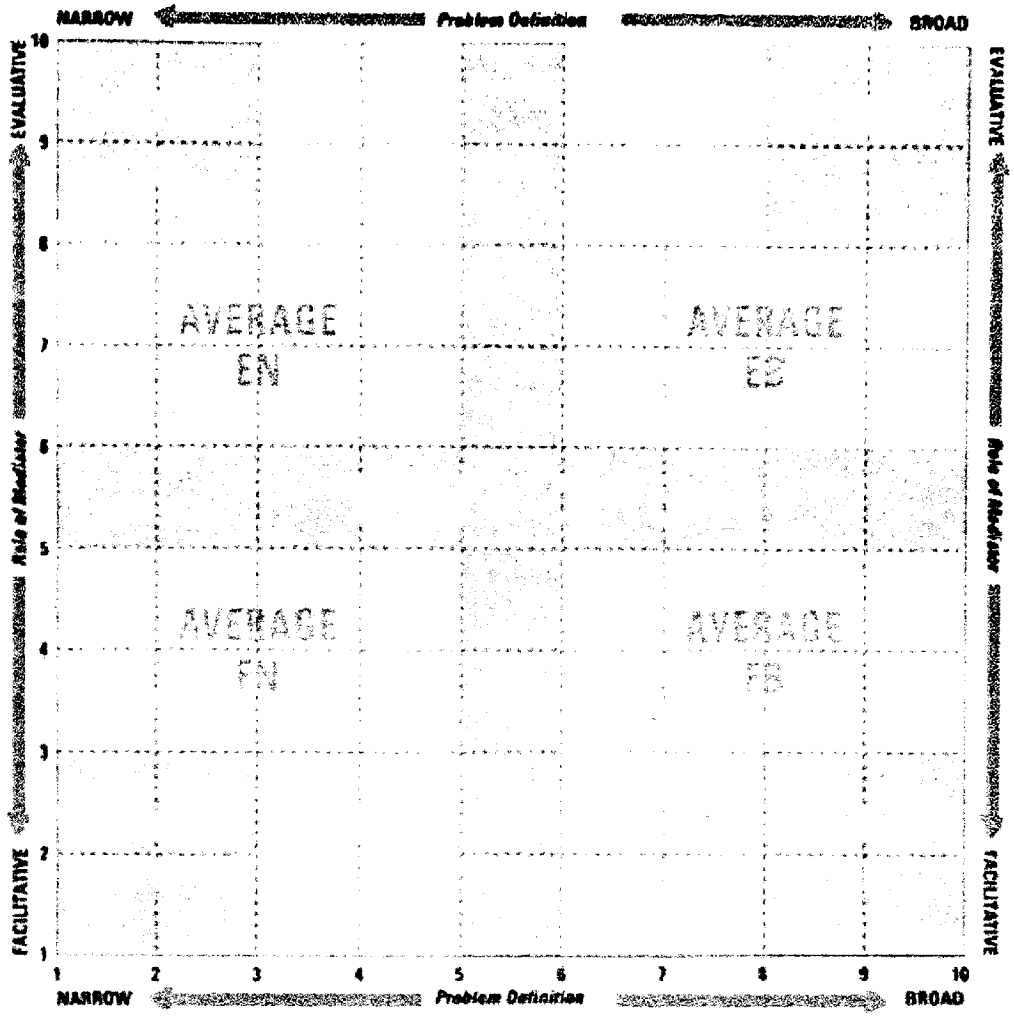
The Questionnaire: A Mediator Classification Index based upon Riskin's Grid

While working with CDRC for the past two years, I have had the opportunity to work with a number of different partners (we co-mediate in teams). In general I have no qualms or major complaints regarding my co-mediators' techniques or tactics, however there have been innumerable instances in which I disagreed with a "move" made by my partner. For instance, during many mediations my partner will warn one party against going to court, emphasizing such points as the large amounts of money they stand to lose or how their case is weaker than that of the other party. Another evaluative move which often occurs is that of mediators generating solutions for the parties. At the other end of the continuum, I often feel as if my partner is being too passive, or "hyper facilitative," in that they allow the parties to dominate the process, which usually leads to unproductive or hostile negotiations. When these instances arise, I find myself in a difficult position. I never want to disconfirm my partner, nor do I want to cast doubt on our allegiance and commitment to the disputants, which is our penultimate reason for mediating in the first place. These predicaments, in which I disagree with a stylistic approach taken by my fellow mediator, made me ponder what it was that determined our differences as mediators.

Furthermore, reflecting upon those mediations when my personal mediation style coincided with and reflected my partners' style, I recall a sense of ease and comfort with the entire proceedings. Regardless if the case settled or not I always left the session with a sense of accomplishment, knowing that we had tried our best to assist the parties in further understanding their conflict. I realize that this "comfortable feeling" within me was generated for many reasons: (a) my personal style had been validated, (b) I did not disagree with my partners' decisions, and (c) I felt we had, to the best of our abilities, assisted the disputants in mediating their conflict. Yet, even in those mediations in which I questioned my co-mediator's style I did not fully condemn or disregard their moves. I just saw the moves as different than ones I would make. In fact, many of these moves helped the case reach a settlement, with both parties appearing pleased with the overall agreement drafted.

An explanation of Riskin's Grid

In order to explore the stylistic tendencies of a mediation community (the CDRC of Missoula County) I turned to the one tool presently available to asses an individual mediator's style—the Riskin Grid. Developed in 1996 by Professor Leonard Riskin of the University of Missouri-Columbia School of Law, the Grid aims to assess how mediators, 1) view their own role in the mediation—as either evaluative or facilitative—and 2) define the problem or conflict—as either narrow or broad. The result is a four-quadrant grid considering these two factors and correspondingly categorizing mediators into one of quadrants: Evaluative Narrow, Evaluative Broad, Facilitative Narrow, and Facilitative Broad. Below is a reproduction of the Grid, showing the four quadrants:



In creating the Grid Riskin wanted to explore the wide spectrum of styles he was witnessing during mediations. Riskin (1996) opines,

> Nearly everyone would agree that mediation is a process in which an impartial third party helps others resolve a dispute or plan a transaction. Yet in real mediations, goals and methods vary so greatly that generalization becomes misleading. This is not simply because mediators practice differently according to the type of dispute or transaction; even within a particular field, one finds a wide range of practices. (p.11)

Riskin does not contend that mediation as a whole is a misunderstood process, however he does acknowledge that each mediation is inherently different and that because of these inherent differences, mediators inevitably use a wide range of styles to match the situation accordingly. Riskin recognizes that certain styles (for example, more evaluative) are appropriate for certain cases/situations and mediators, while a different

style (for example, more facilitative) may be more tailored for another mediator's natural tendencies. Near the end of his article Riskin continues,

> One cause of this situation (the large number of activities which mediation seems to encompass) is the absence of any widely-shared comprehensive method for describing the various approaches to mediation practice. In writing this Article, I mean to provide such a method. My goal is to facilitate clear thinking about processes that are commonly called mediation and fall, at least arguably, within the usual understanding of mediation as negotiation facilitated by an impartial third party. The system can help people understand mediation and make sound decisions about what kind of process they want and about selecting, training, and evaluating mediators. In addition, I hope that individual mediators will use it to reflect on their own work. I believe the framework also could help researchers in seeking to understand how various approaches to mediation correlate with different mediation experiences and outcomes. (p. 48-49)

Riskin believes his Grid has the ability to assist everyone involved in the mediation field: 1) It helps clients to better understand the process and the particular type of mediation they want to enter into, 2) It helps mediation trainers to effectively educate and assess neophyte mediators, 3) It helps mediators to better understand their own work, and 4) It helps researchers to understand how differing styles of mediation correlate with certain cases and conclusions. Riskin concludes his article by stating that he does not see his Grid as the final word on better understanding how mediators operate. He hopes that fellow scholars in the field will pick up the conversation he has begun so that the system can be improved.

Development of the Mediator Classification Index

Three years after Riskin first proposed the idea of his Grid, Jeffrey Krivis and Barbara MacAdoo developed an actual assessment instrument (based on Riskin's Grid) to determine what general style a mediator tends to employ. Krivis and MacAdoo's (1997) instrument is known as the Mediator Classification Index (MCI) (see Appendix B). The MCI consists of 26 Likert questions—13 questions measure the scope of the problem that the mediation seeks to address while the other 13 questions focus on the mediator's own

activities and techniques utilized in addressing the content of the mediation. Krivis and MacAdoo (1997) did a thorough job in creating and later refining the items on the MCI.[iv] Krivis and MacAdoo summarize the intent of the MCI:

> It is designed to assist mediators in understanding the particular approach or style they tend to use during the mediation process. Understanding style is a crucial to improving mediator performance. It allows the mediator to select from a spectrum of techniques that might be available depending on the nature of the issues presented. It also makes it simple for the mediator to explain to the disputants why a particular approach might be used in resolving the dispute (p. 1)

They stress that the intent of the instrument is not to restrict anyone to one particular style (quadrant) but rather it is intended to provide mediators with a "snapshot" of what their natural tendencies are.

The ensuing debate

Since the creation Riskin's Grid six years ago and the subsequent development of the MCI instrument, much debate has arisen regarding whether the Grid is even an appropriate tool for assessing a mediator's personal style. Many authors argue that using the term "Evaluative" makes the tool inherently incongruent with the guiding principles of mediation itself (Alfini, 1997; Kovach & Love, 1998; Kovach & Love, 1997; Lande, 1997; Love, 1997; Stulberg, 1997). These scholars stress that a mediator should take on a strictly facilitative role, for this is the approach that mediation initially embraced as a true alternative to litigation and arbitration. The inclusion of evaluative orientations into mediation practice, according to these authors, is incorrect and potentially threatening to the health and future success of the field.

Even though these authors ultimately condemn the Grid, they do acknowledge that the Grid portrays an accurate statement as to what is the present state of the mediation field. However, they feel that if the Grid really is an accurate representation of

the present day mediation field and if it does correctly identify the parameters within which mediators are operating—either taking an evaluative or facilitative role—then, unfortunately, mediation has strayed too far from its roots. Kovach and Love (1998) state,

> The Grid has made a substantial contribution both by clarifying the state of mediation practice today and by sparking vigorous debate about the direction the practice should take in the future. Since its introduction, the Grid has tended to legitimize evaluative activities conducted under the banner of mediation. Trainers and teachers discuss and explore the evaluative aspect of mediation, and some focus on how better to evaluate. A self-assessment tool (MCI) has been developed for mediators to aid them in determining where their orientation fits on the Grid. Neutrals who essentially perform the case evaluation feel comfortable calling themselves "mediators." This trend should stop. (p. 72-73)

Kovach and Love feel the Grid has promoted the use of improper, evaluative techniques not consistent with what mediation should offer its participants—the ability to make their own decisions. (Note the mention of the MCI assessment tool that I use in this paper). Calling for a halt to the trend of mediators seeing themselves (or being labeled) as evaluative, Kovach and Love caution, "let us use Riskin's Grid as a warning descriptor of where the mediation field is today, and create an alternative map of the mediation terrain—a map that keeps the promise of ADR" (p.110).

Similarly, Stulberg (1997) struggles with Riskin's Grid, yet finds some merits in how it has spurned an active discussion regarding how mediators should conduct themselves in a session. He notes,

> The decided benefit of the Riskin Grid and its attendant analysis, then, is that it invites us to revisit traditional questions regarding the nature of the process, its users, and its practitioners, sharpened with increased insights regarding the dispute resolution theory and the lessons of mediation's current widespread use. (p.985-986)

Stulberg appreciates how the arrival of Riskin's Grid (similar to the arrival of *The Promise of Mediation,* Bush & Folger, 1994) has generated discussion regarding the

present state of mediation. It has provided a springboard for reconsidering what mediation initially set out to do and where it is a few decades later.

Stulberg continues his article *Mediator Orientations* by debunking Riskin's Grid as an effective tool in assisting mediators to improve their skills. He argues against the evaluative portion of the Grid, stating that techniques incorporated into this style are poor representations of proper mediation:

> In short, I argue that any orientation that is 'evaluative' as *portrayed* on the Riskin grid is conduct that is both conceptually different from, and operationally inconsistent with, the values and goals characteristically ascribed to the mediation process. (p.986, italics in original)

Furthermore, Stulberg argues that the Grid does not actually assist practitioners in knowing why or when to switch their orientations and utilize skills from another quadrant of the Grid. Because of this confusion as to what orientation should be taken, many mediators may fall in to the trap of choosing a faulty strategy or one they may not be skilled in using. This potential pitfall can permanently damage the process for everyone involved. In concluding his article he describes what he sees as the route mediation should follow into the future:

> I believe that only the mediator who adopts a suitably re-described facilitative orientation is in a position to ground an approach to problem-solving that anchors the behaviors and principles of her performance in a manner consistent with consensual decisionmaking. The stability of that conception enables the parties, ultimately, to decide whether consensual decisionmaking is what they want. In that sense, the parties' choice to use a mediator is informed by the integrity of the mediator's defined orientation. That vision of consensual decisionmaking, and the facilitative role required to support it, should inform the term "mediation" in whatever statute, rule, or program it appears, and should constitute the standards by which we select and evaluate mediator performance. No persuasive reason exists to accept anything else. (p.1005)

Stulberg's final thoughts echo those of Kovach and Love (1996). The view from this camp is that mediation should embrace the consensual decisionmaking abilities of the parties themselves. And only a mediator who takes a completely facilitative approach

can assist the parties in proper mediation, because once evaluative techniques are employed the mediator wrestles some of the decisionmaking away from the parties and places it on her shoulders. Once this happens, mediation has stepped away from its origins and closer to the realms of arbitration and litigation. Thus, by rejecting the "northern" half, or evaluative portion, of the Grid, and saying that evaluative techniques are inconsistent with what mediation truly entails, Riskin's critics denounce his Grid on the grounds of misrepresentation.

The amount of debate regarding Riskin's Grid demonstrates what an important issue the evaluative versus facilitative roles are in contemporary mediation. At a time when mediation is grappling with its place in the dispute resolution landscape, it is confounding as to why so many practitioners and scholars are struggling over the *proper* way to mediate. I agree with the distinctions made from both camps and also see the style spectrum of mediators growing wider and wider. However, I concur with Riskin when he states that his Grid represents the activities encompassed in contemporary mediation. In response to his critics, Riskin (1997) composed a poem which reads:

Transformation, there's a goal
That everyone should seek
But some poor souls, so I've been told
often feel too meek

Bush and Folger say Empower!
I think that would be keen
But what of those, so awfully dour,
Who might get downright mean?

Try recognition! They implore
'Tis better to give than receive it
But many whom we can't ignore,
Simply can't perceive it.

So where to go from here? I think
The answer, it is hid
I hope somehow we'll find it

Looking at a grid.

But Lela (Love) and Kim (Kovach) take a view that's dim
And make a simple point:
Evaluation has to go,
Or the grid they won't anoint.

Kovach and Love say, Stars above,
I'm using an oxymoron!
Evaluative mediation?
It's nothing to bet the store on.

And then there's Josh (Stulberg), who says By gosh
We must reject the grid.
It's founded on faulty assumptions
At least put on a lid.

The grid describes what is, I think
While they describe what should be
And here is the connecting link:
The dream of all that could be.

In this ode to his critics, I sense some animosity emanating from Riskin. He seems to feel that his critics are somewhat idealistic and are not acknowledging how mediators are performing these days. He refers to Bush and Folger (and their book *The Promise of Mediation*) and notes that the goals of party empowerment and recognition are sometimes unattainable due to a lack of willingness and perception upon the disputants' behalf. He does not say that he is promoting evaluation by mediators and he does not fully discount his critics' ideals either. However, when Riskin first published his Grid, he said that he knew that it was not the finished tool for assessing mediator style. He hoped it would promote a conversation, one which would lead to a sharing of ideas and improving of the Grid itself. His poem has a defensive tone, one that subtly attacks his critics and their articles that refute his Grid.

Understanding that there is this conflict in the field regarding Riskin's Grid, I maintained that it would still be beneficial to administer the MCI to an established group

of mediators in order to assess where this particular mediation community stood with regards to these "facilitative – evaluative" issues. I chose to use the MCI for three reasons: 1) I see, as Riskin and the others do, that it does accurately capture and measure what is truly occurring, stylistically, in the field today, 2) It is the only assessment tool available today, and 3) I feel it is important to use and test these tools to see if they actually provide accurate and useful assessments for participants. To the probable chagrin of its critics, the MCI is presently posted on the web-site www.mediate.com where web browsers can fill out the questionnaire and assess their own style classification. After pondering the usefulness of the Grid for considerable time, I was curious to see what the results would be when I sent out the questionnaire to my fellow mediators at the CDRC.

The Questionnaire Process

When I initially obtained the Mediator Classification Index I filled it out to see what the commotion was all about. I found the questions to be straightforward and fairly accurate with regards to what occurred during mediation sessions. I then sent this questionnaire, along with cover letter and instructions (see Appendix B), to the 50 volunteers presently associated with the CDRC.

I provided participants with detailed instructions and a self-addressed, stamped envelope in which to return to questionnaire to me. After an initial wave of questionnaires returned within the first week, responses began to taper off dramatically. Two weeks after I sent out the mailing, I telephoned the participants who had not yet responded and reminded them of the questionnaire and also asked if they had any questions. After this follow-up phone call I received another surge of responses. Then,

approximately five weeks after I had initially sent the questionnaires out, responses were no longer arriving so I proceeded to analyze the results. I must mention that I received two more completed questionnaires (two and a half months after I sent out the mailing) following analysis of the data.

I received a 66% response rate for the questionnaire. 33 mediators completed the questionnaire and mailed it back to me, while I did not receive responses from the other 17. I computed each respondent's personal Mediator Classification Index and marked which quadrant they were located in on the Grid. I then sent out a second set of mailings to those CDRC mediators who responded the first time around. The second mailing (see Appendix C) consisted of a cover letter, a copy of the Grid (with their place marked on it), and an explanation of what activities, strategies, or tactics corresponded with each quadrant. The criteria of mediator behaviors for each quadrant were taken from Riskin's (1996) article *Mediator Orientations, Strategies, and Techniques*. Following is a description of each quadrant:

- The upper-left quadrant is **Evaluative Narrow**. According to Leonard Riskin, who first developed the grid, "the principal strategy of the 'Evaluative-Narrow' mediator is to help the parties understand the strengths and weaknesses of their positions and the likely outcome at trial. Before the mediation starts, the 'Evaluative-Narrow' mediator will study relevant documents, such as pleadings, depositions, reports, and mediation briefs. At the outset of the mediation, such a mediator will ask the parties to present their cases in a joint session. Subsequently, most mediation activities take place in private caucuses in which the mediator will gather additional information and deploy evaluative techniques—i.e. *assess strengths and weaknesses of each side's case, urging the parties to settle, or predicting outcomes of court.*"

- The upper-right quadrant is **Evaluative Broad**. "The 'Evaluative Broad' mediator's principal strategy is to learn about the circumstances and underlying interests of the parties and other affected individuals or groups, and then to direct the parties toward an outcome that responds to such interests. The 'Evaluative Broad' mediator will emphasize options that address underlying interests rather than those that propose only compromise on narrow issues. She may appeal to shared values, lecture, or apply pressure. She may use techniques such as—*educating herself about underlying*

interests, predicting the impacts (on interests) of not settling, offering broad proposals of settlement, and urging parties to accept the mediator's or another proposal."

- The lower-left quadrant is **Facilitative Narrow**. "The 'Facilitative Narrow' mediator shares the 'Evaluative Narrow' mediator's general strategy—to educate the parties about the strengths and weaknesses of their claims and the likely consequences of failing to settle. However, she does not use her own assessments, predictions, or proposals. Nor does she apply pressure. She is less likely than the 'Evaluative Narrow' mediator to study relevant documents. Instead, believing the burden of decision-making should rest with the parties, the 'Facilitative Narrow' mediator may use techniques such as—*asking questions, helping parties to develop their own narrow proposals, helping the parties exchange proposals, helping the parties evaluate proposals.*"

- The lower-right quadrant is **Facilitative Broad**. "The 'Facilitative Broad' mediator's principal strategy is to help the parties define the subject matter of the mediation in terms of underlying interests and to help them develop and choose their own solutions that respond to such interests. In addition, many 'Facilitative Broad' mediators will help participants find opportunities to educate or change themselves, their institutions, or their communities. To carry out such strategies the 'Facilitative Broad' mediator may use techniques such as—*helping parties understand underlying interests, helping parties develop and propose broad, interest-based options for settlement, and helping parties evaluate proposals.*"

I felt it was important for respondents to be able to see what behaviors comprised each quadrant and how they differentiated from one another. I stressed in the cover letter that this questionnaire was not intended to lock anyone into a certain quadrant or particular way of mediating. It was more a "snapshot" of our natural tendencies as mediators and would simultaneously provide us with an overall picture of where the CDRC of Missoula County stands.

I wanted to know if, in our self-perceptions we were going to be stylistically consistent with one another. I wanted to see if we, as a particular mediation community, were mediating with a similar vision and outlook with regards to the process. On a larger scale, I wondered if this could be a useful standardized tool for the national mediation

community. Or were its critics correct in stating that the Grid established faulty assumptions about mediation and could eventually be detrimental to practitioners and clients alike.

Questionnaire Results

Of the 33 respondents, all but two fell into the Facilitative Broad quadrant of the Grid. The other two respondents fell into two different quadrants: one into Facilitative Narrow and one into Evaluative Broad. Stated differently, 94% of CDRC respondents tend toward a Facilitative Broad stylistic approach while mediating. In the Facilitative Broad approach, the mediator helps the disputants to define the subject matter, uncover underlying interests, and develop and choose their own solutions. The primary goal for the Facilitative Broad mediator is to facilitate communication between disputants so that the disputants can better arrive at their own decisions/solutions for their conflict.

The corner of each quadrant represents a "strong" tendency toward that approach. Over 30% of respondents fell into the "strong" area of the Facilitative Broad quadrant. The rest of the mediators in the Facilitative Broad quadrant were situated between the "strong" zone and the Mixed Zone with other quadrants. The average calculation for all respondents, for the CDRC mediators, is shown on the Grid in Appendix C.

Many respondents wrote comments on the questionnaires. These comments were varied and intriguing. I would like to share some of these comments, as they raise issues relevant not only to the questionnaire, but also to the mediation field in general. One respondent sated, "I really cannot give a value on the questions [for] each case that I mediate requires different skills and at times very different approaches. As an attorney, I do feel legal issues can be important, other times they are really irrelevant." This

mediator/lawyer was the only respondent to not fill out the questionnaire. This respondent went on to say that their answers to all but three of the questions would be "sometimes," or a "5" on each Likert scale (the scales ranged from 1 *strongly agree* – 10 *strongly disagree*). This person obviously changes his/her style in each mediation depending on the particular circumstances of the case. Thus, the respondent would most likely utilize techniques found in all of the quadrants while mediating different cases. This person may employ a technique or style not even associated with the Grid or mediation, but more along the lines of their background as a lawyer (this would tend toward a "hyper-evaluative" stance in relation to the Grid).

Art Lusse, Director of CDRC of Missoula County, stated that, "As a private mediator I always have a number of questions for the parties and or counsel about their expectations in mediation. I believe that a good mediator needs to be flexible within the 'Riskin Grid' depending on the parties' expectations." Art Lusse mediates for the CDRC and also has his own private mediation practice. The results of his questionnaire placed him in the "strong" section of the Facilitative Broad quadrant. However, as he notes, he feels it is necessary to be flexible with ones personal style *depending on the parties' expectations*. This outlook stresses the clarification of expectations prior to any mediation that Art undertakes. He feels that if everyone is clear as to what their particular roles and parameters are for the mediation, then there will be little confusion as the mediation proceeds. For example, if the disputants ask Art to evaluate their case and proposed solutions, then he may adapt to fit that role. Or, if Art is in the Courthouse performing a CDRC mediation, he will take strictly facilitative approach, utilizing no evaluative skills, because that is how the mediations are conducted—as an alternative to a

case in the courtroom. It should be noted that Art's background is as a lawyer. This may enable him to move within the Grid more easily than mediators who do not possess a similar legal background.

One respondent wrote in comments next to several questions. The most poignant was his/her response to question #24: "Developing options for settlement is the responsibility of the parties, not the mediator." The respondent answered "8," indicating that they disagree with this statement. S/he writes in the margin: "If parties don't know where to start, a mediator can help in brainstorming ideas." So, s/he feels justified in assisting parties in starting to explore possible settlements, if they are at a standstill. This quandary gets to the heart of the evaluative versus facilitative issue, for if the mediator generates options for settlement then s/he is evaluating the parties' stories and opinions. However, if the mediator's move is aimed to reorient parties toward their goals, then s/he is facilitating a brainstorming process for the parties (Stulberg, 1997). The line drawn between the evaluative and facilitative approaches in this situation seem to be a matter of perception.

Another respondent writes, "I have a sense that this questionnaire is geared more for lawyers than non-lawyers. But, then maybe it's just me." This is an interesting comment seeing that the MCI is intended to be an assessment tool for mediators. The respondent draws a clear distinction between lawyers and mediators. Perhaps this respondent was thinking that any mediator who filled out the questionnaire would inevitably land in the Facilitative Broad quadrant, whereas a lawyer would end up in the Evaluative half of the Grid.

A final respondent made a comment in the margin next to almost every question. At the top of questionnaire s/he wrote, "I have trouble picking numbers [for the Likert scales] without explaining." I will mention a few of his/her responses which speak directly to the facilitative/evaluative dichotomy. Question #4 asks: "The focus of the mediation is on legally relevant issues." S/he strongly disagrees with this statement and writes, "the focus is on communication." This view—that communication (as opposed to the specific legal issues) should be the central focus of a mediation—once again demonstrates a division in the mediation ranks. The other comment I will mention is this respondent's response to question #13: "Generally, parties are more capable of understanding their situations better than either lawyers or mediators." S/he marked that they strongly agree with this statement and then wrote in the margin next to the statement, "Personally, yes...Legally, no." In these four words we once again see a mediator vacillating between styles and answers. In some instances the parties are more capable of understanding their situations, but in others (where legal matters are complex) the mediators or lawyers may be savvier to understanding the complexities of the situation.

What do all of these comments add up to? It is apparent that the questionnaire raised some reaction and analytical thought from respondents. This is a reflection of the state of flux mediation is in right now. Experienced mediators understand that the intricacies of each case are going to be slightly different. They realize that each disputant is going to behave in his/her own individual manner and that, as a mediator, s/he must be able to work with each diverse personality as it arises. Because of this, it is quite difficult to categorize the orientation, strategies, or techniques of a mediator (Riskin, 1996). And,

as evidenced by some of the feedback I received on the questionnaire, some mediators resist this categorization. It may feel restrictive or false, as they see themselves and the process as one that must be malleable due to the differences embedded in each mediation.

Regardless of the complexities and ambiguity of what style is appropriate for mediators to use, I would like to draw attention back to the beginning of this section, where I presented the results of the questionnaire. Recall that 94% of respondents employed Facilitative Broad techniques. In addition, the other 6% were bordering on the Facilitative Broad quadrant, thus revealing that this particular mediation community, the CDRC of Missoula County, has a strong orientation toward promoting collaboration, consensual decision-making, and understanding underlying interests among mediation parties.

In the next section, I will extrapolate on these findings and how they relate to the present discussion in the field of mediation. I will also ruminate on the usefulness of the Riskn Grid and ponder the effectiveness of categorizing mediators according to their orientation. Finally, I will offer some prescriptive advice, based off of the questionnaire results, for the CDRC of Missoula County.

Discussion

Findings related to Literature

The results of the questionnaire administered to CDRC mediators do not necessarily shed new light on mediation literature or theory. However, the results do indicate that what is being hotly debated in the current literature is also a concern of everyday practitioners—like those at the CDRC of Missoula County—working in the

field. While professional mediation is struggling to firmly establish itself in the dispute resolution landscape, it finds itself going through typical adolescent "growing pains" (Imperati, 1997; Kovach & Love, 1998; Menkel-Meadow, 1997; Riskin, 1996; Schuwerk, 1997; Stark, 1997). It should therefore be reassuring to see that even in the midst of heated debate as to how one should properly mediate, that a varied group of volunteer mediators are all adhering to the guiding principles of mediation, as described in Moore's (1996) definition of the role of a mediator.

Granted, not all CDRC mediators are mediating with identical styles, but there does appear to be agreement, among this group, on what the core principles of facilitative mediation are. This is shown by the fact that 94% of CDRC mediators were placed, according to their responses, in the Facilitative Broad quadrant. These mediators strive to be impartial, let the disputants collaboratively decide the outcome, encourage party self-determination, and recognize the difference between mediation and adjudication (Love, 1997).

When lawyers do accompany their clients to CDRC mediations, every mediator acknowledges the difficulty of successfully conducting a productive mediation. Consequently, CDRC mediators are exposed to the adversarial/win-lose paradigm versus the collaborative/mediation paradigm. Because of this, CDRC mediators have awareness about the inherent differences of each. Many conversations concern how the lawyers operate in the session and how to best handle them, so the disputants can attempt to actually work with the framework mediation is providing them—to collaboratively engage in the process of decision-making.

The comments marked in the margins of many of the questionnaires, the mention of mediating differently in diverse contexts, and the difficulty for some with filling out the questionnaire demonstrate that CDRC mediators are not being complacent in their work. Rather, they care deeply about their role as a mediator. They critique their performance both individually and with their partners in post-mediation debriefings. Further evidence of their caring is seen in their participation in continuing education so that they may better improve their skills and learn more about the field of mediation.

This is not to say, however, that these are exemplar mediators. They can be judgmental, offer solutions, hypothesize possible court outcomes, and be biased toward one party—in a nutshell, they can be evaluative. I believe every CDRC mediator I have worked with has acknowledged these hardships and pitfalls. Because each mediation is unique and because each disputant possesses his or her own interpersonal skills, it is a challenge to successfully mediate each session without sometimes being evaluative.

These challenges are indicative of the "facilitative—evaluative" conversation in the literature. By nature, we are evaluative beings. When we experience something, we place a judgment or value on that experience. CDRC mediators like to see results; the county courts also like to see results. As Stark (1997) supports, "In truth, I am not even confident that I will always be able to follow my principles in my own mediations. (I enjoy resolving conflict and settling cases as well as the next person.)" (p.798). Oftentimes, mediators are unaware of their evaluative behaviors. They may become excited to resolve the case as it draws to a close. They may feel that they have discovered the most sensible and fair solution for the disputants. Thus, they enter into the content of the mediation and step out of their mediator parameters.

It is apparent to see why the discussion regarding Riskin's Grid and the style dichotomies has been flowering for some time. I agree with Riskin, as do most other authors, that his quadrants and dichotomies are representative of the current practices seen in mediation. These dichotomies and stylistic differences are noticeable in the small mediation community studied in this paper. However, I must return to the fact these mediators are driven to offer disputants with an opportunity to resolve their problems outside of the traditional adversarial system. Even if they sporadically use evaluative tactics and move around the Grid using certain techniques from different quadrants, these mediators are consistent with the core principles of mediation.

Potential Applications for Findings

Since the study was intended for the CDRC of Missoula County, it is important to share these results with my fellow mediators. I want this mediation community to better understand these intricate behaviors which propel our decisions in the mediation context. My understanding (from conducting mediations and analyzing the questionnaire) is that, on some level, these mediators are aware of the stylistic differences so commonplace in mediation. They can feel if a particular "move" worked or not. They have an intuitive sense of how to interact with parties and uncover hidden interests. However, I also feel as if many of my fellow mediators are unaware of their own overall style. They do not recognize when they are using facilitative or evaluative techniques. The subtleties between stylistic differences are lost during the course of a session. Oftentimes I will see mediators use strictly facilitative techniques for the majority of mediation, but when they sense an impasse arising they will begin to offer solutions or advice as to what a party should do.

I want to make the information in the literature less esoteric. The scholars and practitioners who are writing today have a wide range of experiences to draw from. CDRC mediators are primarily limited to one context—court-affiliated mediations. I want to share this information from diverse sources so that CDRC mediators may better understand why some of their techniques work and some do not. This information is not taught or discussed in mediation trainings. Therefore, most mediators, unless they are diligent readers of mediation literature, are unaware of these aspects of the field. They are still grounded in the process and the stage-model of mediation that is so widely expounded upon in the introductory courses, which lack stylistic information. They provide adequate structure, but are deficient in performance and theoretical information. I believe that initiating this discussion with my fellow mediators will broaden their perspectives, bolster their repertoire of skills, and improve their overall performance. My first steps to initiating the discussion will be to make this paper available to the CDRC and I will conduct a continuing education seminar discussing the "facilitative – evaluative" issues.

Another potential benefit for CDRC is that mediators who are more aware of their personal stylistic tendencies will co-mediate more effectively. Understanding one's own personal style is a key first step to becoming more aware of not only one's self, but also of those around you. Before entering sessions, mediators can discuss their individual orientations and their strengths and weaknesses. Consequently, the co-mediators may recognize when one mediator's style is working and let that individual be in charge. When it is more appropriate for the second mediator to lead, then they swap positions accordingly. Stulberg and Love (1996) support this idea of cohesive teamwork: "To

ensure that two heads are better than one...the co-mediation team must share a common vision of the mediation process. Mediators must work out a communication signals ahead of time, including signals that address both procedural decisions (for example, when a mediator conference is necessary) and tactical moves (for example, deciding which party to caucus with first)" (p.185&189). Such a system will insure that effective contributions are being made at the necessary times.

Furthermore, having a better understanding of the full range of techniques and styles utilized by contemporary mediators, CDRC co-mediators will be able to provide each other with more useful feedback after sessions. Currently, CDRC is struggling with a "Level" system, in which they are attempting to evaluate and recognize mediators on a scale ranging from "trainee" to "a mediator who can competently work solo." If CDRC mediators are more aware of techniques, skills, and styles, they will be able to offer each other more detailed and specific feedback. This will serve to not only improve the feedback time, but will eventually improve the overall abilities of mediators, because they have concrete examples and quotations to build off of. This will reduce the amount of vague and uninformed feedback that does not benefit either mediator in the post-mediation evaluation time.

This paper may enable CDRC mediators to better clarify their roles and expectations to disputants. If they say, "I will not evaluate or offer solutions," then that understanding will be fully understood by all. Therefore, if a disputant recognizes that one mediator is beginning to evaluate the content or generate solutions they can notify the mediator and everyone can return to their initial understanding. This will serve as a more thorough checks-and-balance system. Establishing the working relationship and roles

from the beginning, and actually understanding the full range of possible roles, will only help to strengthen the mutual respect and trust necessary in mediation.

Conclusion

It is my hope that this professional paper helps to strengthen the already well-respected and well-run CDRC of Missoula County. My knowledge of mediation has matured throughout the process of gathering data, reviewing literature, and writing this paper. I feel that with the information I have acquired I will conduct better mediations. This is not to say that I will help disputants to resolve every conflict, however I will offer them a more complete and thorough service. It would be uplifting to see that CDRC mediators benefit from participating in this study and I hope that CDRC will continue to sponsor its mediators to conduct research and promote the continuing success of its program.

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[i] This definition is concurrent with those found in related articles (Alfini, 1997; Kovach & Love, 1998; Phillips, 1997; Riskin, 1996; Stark, 1997; Stulberg, 1997)

[ii] Taken from informational sheet provided by the *Community Dispute Resolution Center of Missoula County* for mediation participants. The sheet is entitled: Missoula County Justice Courts: Mediation Facts.

[iii] Taken from *Community Dispute Resolution Center of Missoula County* informational sheet for mediators entitled: *Guide for Participation in Center Activities.*

[iv] They began by using expert panels of mediators to analyze the content validity of the questions. Krivis and MacAdoo wanted to insure that their questions were correlated with the factors Riskin had incorporated into his Grid. Their next step involved distributing their 48-item MCI to hundreds of mediators and trainees throughout the country. After statistical analysis of these returned questionnaires and considering written and verbal feedback from participants, Krivis and MacAdoo created the "purified" 26-item scale used for this professional paper.

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Appendix A:

Community Dispute Resolution Center of Missoula County:

Missoula County Justice Courts
Mediation Facts

&

Guide for Participation in
Center Activities

PLEASE READ AND RETURN TO JUSTICE COURT RECEPTIONIST

Community Dispute Resolution Center of Missoula County

Missoula County Justice Courts
Mediation Facts

What is mediation?

Mediation is a conflict resolution process in which a trained third party assists the participants to negotiate a mutually acceptable and informed agreement, if they so choose. If participants are unable to reach agreement during mediation, they retain their full right to utilize the legal system.

In mediation, decision-making authority rests solely with the participants. The role of the mediator is to facilitate communication, promote understanding, focus the parties on their interests, and support creative problem-solving that enables the parties to reach their own agreement. The mediation process may take up to two hours of the parties' time.

The mediators

The *Center* uses a co-mediation approach, with both mediators being volunteers trained in the skills and procedures of the mediation process.

The mediators facilitate negotiations between the parties. They have no decision-making power. All decisions are made by the participants.

The mediators are neutral. If they feel, or if one of the participants states, that the mediators' backgrounds or personal experiences might prejudice their performance, the mediators shall withdraw from the mediation unless all parties agree to proceed.

The mediators are also impartial. They are free from favoritism or bias in word or action. The mediators are committed to aiding all participants, as opposed to a single individual. The mediators will not take sides.

The parties

All parties must be present for mediation to proceed. All parties must have authority to reach agreement or, in special circumstances, must have made arrangements to reach the party with such authority by telephone during the mediation. No business phone calls or other interruptions are permitted during mediation.

It is the responsibility of the parties to be courteous, open and honest, and to negotiate in good faith.

What will happen during mediation

The mediators will first describe the mediation process and give participants a chance to ask questions. Each participant will then have an opportunity to tell his or her side of the story - without interruption. The issues to be discussed will be listed and negotiations will proceed.

If the parties reach an agreement, the terms of the agreement will be documented on a court form, which will be provided by the mediators. If the parties do not reach an agreement, this fact will be related to the presiding Justice Court Judge. Both parties will be required to complete an evaluation form about the mediation process, which will be filed with the case information.

Community Dispute Resolution Center of Missoula County

Guide for participation in Center activities

Approved as updated on February 3, 1999

POLICIES

Professional standards

Individuals conducting activities on behalf of the Community Dispute Resolution Center of Missoula County shall:

- Be neat and clean and avoid using strong perfumes or colognes.
- Be groomed in accordance with professional business standards.
- Treat clients, court and agency staff members, the public, Center staff members, and other volunteers with courtesy.
- Not give legal advice or coerce parties in mediation to reach agreement.
- Be punctual.
- Not be under the influence of alcohol.
- Not be under the influence of any illegal substance.
- Not use any tobacco product.
- Not chew gum.

Volunteer requirements

Volunteers shall:

- Be willing to spend no fewer than five hours each month on Center activities, including but not limited to mediation.
- Be willing to work with any assigned Center volunteer.

Conflicts among Center volunteers or between one or more volunteers and one or more paid staff members

If a conflict situation occurs, it is the responsibility of the person who recognizes the situation to contact the other person and invite him or her to discuss it, with the goal of reaching an agreement that meets the needs of both of the individuals.

If one of the parties refuses to enter into problem-solving negotiations, or if the two parties are unable to reach an agreement following a meeting for the purpose of doing so, one or both of the parties shall request the assistance of a Level V Center mediator to facilitate negotiations between them. The mediator chosen by the parties shall make no charge for services performed.

Community Dispute Resolution Center of Missoula County
Guide for participation in Center activities
Approved as updated on February 3, 1999

PROCEDURES

Missoula County Justice Court mediations

Pre-mediation procedures

- Mediators are to arrive at Justice Court 15 minutes prior to the scheduled mediation time, and are expected to do the following:
  - Check in with the daily Justice Court coordinator.
  - Meet with your co-mediator.
    - Scan the assigned case with your co-mediator to ensure impartiality and neutrality.
    - Review the case file.
      - If the case involves a landlord/tenant dispute, review the pertinent information in the MontPIRG booklet (copies available from the Justice Court clerk).
  - Determine if the parties are present.
    - If both parties are present, the mediators should introduce themselves, and ask approval for observers to be present during the conference - as a part of their training program.
      - If the parties approve the presence of observers:
        - One mediator leads the parties to the assigned conference room.
        - The other mediator contacts the assigned observers at their meeting place and leads them to the conference room.
      - If the parties do not approve the presence of observers:
        - Inform the daily Justice Court coordinator, who will reassign the observers.
    - If only one of the parties is present, the mediators should introduce themselves and state that the Center's standard procedure is to give the other party 15 minutes past the scheduled time in which to arrive.
    - If only one of the parties is present 15 minutes past the scheduled starting time, thank the attending party for his or her patience, give him or her a reminder to follow all court instructions, and then complete the Mediator's Report indicating which party was present and which one was absent.
- Observers are to assemble in the elevator lobby on the Justice Court floor of the Courthouse 15 minutes before the scheduled mediation time. This is a good time to get to know other people in the Center's program. The observers will be contacted by the daily Justice Court coordinator or by his or her representative.

Mediation procedures

- It is recommended that mediators have the following supplies with them: two pads and two pens (for note-taking by parties, if necessary), a calculator, extra observation forms (in case observers forget theirs), a blank mediator report form, and party and attorney evaluation forms (in the event they are missing from the packet provided by the Justice Court clerk), and a copy of the MontPIRG landlord/tenant booklet.
- It is appropriate to make the parties feel as comfortable as possible. Informal conversation not bearing directly on the situation can promote a relaxed atmosphere at the start of the conference.
- It is inappropriate for mediators to voice legal opinions or to coerce parties to reach an agreement.
- Most environmental factors over which the mediators have control can be viewed strategically. The following are some examples:
  - Seating of parties.
    - Parties seated opposite each other with mediators between them may remind the parties of a court setting, but the distance might make them feel more comfortable.
    - Parties seated on adjacent corners, with mediators across from them might provide them with safety but also closeness sufficient to produce collaboration.
    - Parties seated side-by-side might emphasize their need to work together to resolve the situation.
    - Are attorneys seated so they impede/enhance communication between the parties?
    - Are observers seated so they do not distract the participants (see observation protocol form)?
    - What is the best arrangement by which you can monitor non-verbal communication between the parties?
  - Outside windows can produce relaxation or distraction. Do you want the view or do you want the parties to have the view?
  - Where will non-involved parties go during caucuses? Can you direct them to the nearest restrooms, coffee location, water fountain, telephone?
  - What graphics tools are available?
    - Chalkboard?
    - Easel pad?
- Opening statements.
  - Decide beforehand who will cover which subjects.
  - Opening statements can vary stylistically, but must reference the following topics:
    - Do the parties have the authority to reach agreement (financial and otherwise)?
    - The process is confidential unless there is a threat of harm to one's self or to another person.
    - The mediator is both impartial and neutral. Define the terms.

    - The mediator is both impartial and neutral. Define the terms.
    - The mediator has no decision-making power; all decisions will be made by the parties.
    - The parties give up no legal rights by participating in mediation.
    - Length of the conference.
    - Parties' responsibility to dedicate uninterrupted time to the conference.
    - Procedural ground rules.
- Closing procedures.
    - Complete case outcome form (if any)
    - Have parties (and attorneys if present) complete Mediation Evaluation forms
    - Thank parties for their participation.
    - Complete Mediator's Report.
    - Properly destroy all confidential notes.
    - Collect Mediation Facts documents if the parties did not return them to the Justice Court receptionist.

Post-mediation procedures

- Mediators and observers must spend at least five minutes de-briefing following the mediation, for the purpose of mutual education and improvement of the service provided by the Center (see de-briefing format on reverse side of Mediator's Report).
- Mediators must complete and/or assemble the following forms:
    - Mediator's Report
    - Case outcome form, i.e., Stipulation for Dismissal, etc. (if any)
    - Party Mediation Evaluation forms
    - Attorney Mediation Evaluation forms (if any)
    - Observation Protocol, Evaluation, & Debriefing forms
- Observer responsibilities
    - Complete the Observation Protocol, Evaluation, & Debriefing form thoughtfully and completely, discuss its contents during the de-briefing period, and deliver the form to the mediators before leaving the room.
- Always replace chairs and tables in their original positions, clean all chalk boards, and adjust blinds or curtains to their pre-meeting positions.
- Shred or otherwise destroy all conference notes.
- One of the co-mediators places the package of forms listed above, in the Center folder on the Justice Court Clerk's desk.
- One of the co-mediators delivers the case file and the originals of the following forms to the appropriate Justice Court Clerk.
    - Mediator's Report
    - Case outcome form (if any)

Community Dispute Resolution Center of Missoula County
Guide for participation in Center activities
Approved as updated on February 3, 1999

EDUCATION

Initial training required of people who want to conduct mediations on behalf of the Community Dispute Resolution Center of Missoula County

Any person interested in becoming a mediator for the Center must complete the following candidacy steps:

- Complete an application that, in part, reflects the person's agreement to serve as a volunteer for one year, and to volunteer at least five hours per month to the activities of the Center during that year.

- *Level I*: Have completed a minimum 24 hour course in the mediation process after making application to the Center OR have completed such a course in the past and received approval of the same from the Program Director of the Center.

- *Level II*: Have completed four observations of Center mediations, including de-briefing sessions.

- *Level III*: Have co-mediated two Center mediations with a Level V mediator (defined below). Candidate is encouraged to be an active participant in the process. Level V mediator shall complete an educational progress form at the conclusion of each mediation, discuss his or her comments with the candidate, and offer mentoring support. The form shall be placed in a confidential candidate's file.

- *Level IV*: Have co-mediated four Center mediations with a Level V mediator, with the candidate and the Level V mediator sharing equally in the process responsibilities. Level V mediator shall complete an educational progress form at the conclusion of each mediation, discuss his or her comments with the candidate, and offer mentoring support. The form shall be placed in a confidential candidate's file.

- Following the above steps, the candidate shall complete an educational progress form and submit it to the President of the Center.

- The President shall convene a review panel consisting of her/himself and no fewer than two of the Level V mediators who completed educational progress forms for the candidate. The panel shall review all the forms submitted, including the form submitted by the candidate.

- The panel shall interview the candidate and reflect with the candidate on his or her understanding of the following issues:
  - Self evaluation of readiness to be a Level V mediator
  - Understanding of the mediation process, including ground rules, neutrality, impartiality, and confidentiality
  - The need to be able to work effectively with any Center volunteer
  - Determination of whether a given case is mediable
  - Recognition of the boundary between giving information and legal advice
  - Understanding of appropriate mediation styles
  - Awareness of when it is proper to terminate a mediation conference
  - The use of caucuses
  - Handling of power imbalances
  - Sensitivity to gender issues
  - Strategies for handling common and less common Justice Court scenarios
  - Familiarity with Justice Court procedures

- The panel shall then reach a decision regarding the candidate's readiness and competence to be a Level V mediator on behalf of the Center. The decision shall be made by a unified sense (as defined in the Bylaws of the Center) of the President and the Level V mediators in attendance, and shall be reported to the candidate no more than two calendar weeks following the last required co-mediation.

- *Level V*: A person who is sufficiently trained and experienced, and who is deemed competent to represent the Center as a sole mediator (if required) in the Justice Court program.

Continuing education requirements for volunteers of the Community Dispute Resolution Center of Missoula County

The purpose of these requirements is to maintain professional competence by improving existing skills and learning new skills.

Center-sponsored continuing education programs

The Center shall schedule at least six two-hour continuing education programs each calendar year. Each volunteer will be responsible for attending at least eight hours of continuing education each calendar year.

Volunteers are welcome to suggest continuing education topics, and to submit proposals for hosting one or more events. Events can consist of outside speakers, carefully planned role-play exercises, facilitated discussions among

volunteers, or videos of mediations, negotiations, conciliation, etc. Preparation for and hosting of a continuing education event will qualify for an additional two hours of continuing education credit.

The person in charge of record-keeping for the Center will keep a tabulation of events attended.

Other continuing education programs

Volunteers who attend functions outside the Center that contribute to professional growth may qualify for continuing education credit by submitting a request to the Program Director of the Center. The Program Director shall determine if each such request is to be granted, with the intention that no reasonable request will be denied.

Community Dispute Resolution Center of Missoula County
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ETHICS

Ethical standards

The Center expects that individuals conducting mediations on its behalf shall abide by the "Ethical Standards of Professional Responsibility" adopted by the Society of Professionals in Dispute Resolution, and by the Ethical Standards of Professional Responsibility for all Neutrals, adopted by the Montana Mediation Association (attached).

The Center expects that individuals conducting family mediations on its behalf shall abide by the "Standard of Practice for Family and Divorce Mediation" adopted by the Academy of Family Mediators (attached).

SPIDR'S ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY *Adopted June 1986*

General Responsibilities

Neutrals have a duty to the parties, to the profession, and to themselves. They should be honest and unbiased, act in *good faith, be diligent, and not seek to advance their own* interests at the expense of their parties'.

Neutrals must act fairly in dealing with the parties, have no personal interest in the terms of the settlement, show no bias toward individuals and institutions involved in the dispute, be reasonably available as requested by the parties, and be certain that the parties are informed of the process in which they are involved.

Responsibilities to the Parties

1. **Impartiality.** The neutral must maintain impartiality toward all parties. Impartiality means *freedom from* favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.

2. **Informed Consent.** The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.

3. **Confidentiality.** Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues, and a neutral's *acceptability*. *There may be some types of cases,* however, in which confidentiality is not protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process should be honored.

4. **Conflict of Interest.** The neutral must refrain from entering or continuing in any dispute if he or she believes or perceives that participation as a neutral would be a clear conflict of interest and any circumstances that may reasonably raise a question as to the neutral's impartiality.

The duty to disclose is a continuing obligation throughout the process.

Responsibilities to the Parties - continued

5. **Promptness.** The neutral shall exert every reasonable effort to expedite the process.

6. **The Settlement and Its Consequences.** The dispute resolution process belongs to the parties. The neutral has no vested interest in the terms of a settlement, but must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process. The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard, the neutral may find it advisable to educate the parties, to refer one or more parties for specialized advice, or to withdraw from the case. In no case, however, shall the neutral violate Section 3, Confidentiality, of these standards.

Unrepresented Interests

The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his or her judgment the needs of parties dictate, to assure that such interests have been considered by the principal parties.

Use of Multiple Procedures

The use of more than one dispute resolution procedure by the same neutral involves additional responsibilities. Where the use of more than one procedure is initially contemplated, the neutral must take care at the outset to advise the parties of the *nature of the procedures and the* consequences of revealing information during any one procedure which the neutral may later use for decision making or may share with another decision maker. Where the use of more than one procedure is contemplated after the initiation of the dispute resolution process, the neutral must explain the consequences and afford the parties an opportunity to select another neutral for the subsequent procedures. It is also incumbent upon the neutral to advise the parties of the transition from one dispute resolution process to another.

Background and Qualifications

A neutral should accept responsibility only in cases where the neutral has sufficient knowledge regarding the *appropriate process* and subject matter to be effective. A neutral has a responsibility to maintain and improve his or her professional skills.

Disclosure of Fees

It is the duty of the neutral to explain to the parties at *the outset of the process* the bases of compensation, fees and charges, if any.

Support of the Profession

The experienced neutral should participate in the development of new practitioners in the field and engage in efforts to educate the public about the value and use of neutral dispute resolution procedures. The neutral should provide *pro bono* services, where appropriate.

Responsibilities of Neutrals Working on the Same Case

In the event that more than one neutral is involved in the resolution of a dispute, each has an obligation to inform the others regarding his or her entry in the case. Neutrals working with the same parties should maintain an open and professional relationship with each other.

Advertising and Solicitation

A neutral must be aware that some forms of advertising and solicitations are inappropriate and in some conflict resolution disciplines, such as labor arbitration, are impermissible. All advertising must honestly represent the services to be rendered. No claims of specific results or promises which imply favor of one side over another for the purpose of obtaining business should be made. No commissions, rebates, or other similar forms of remuneration should be given or received by a neutral for the referral of clients.

***For further information, please contact the* International SPIDR Office:**

SPIDR
815 15th Street, NW Suite 530
Washington, DC 20005
202-783-7277

Appendix B:

Mediator Classification Index (MCI)

&

Cover Letter

Andrew Wyckoff
P.O. Box 8526
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awyckoff@selway.umt.edu

December 14, 1999

Greetings Fellow Mediators,

I hope all is going well with you this holiday season. I have seen many of you at the Courthouse in recent months, conducting mediations for our local disputants. To those whose paths I have not crossed—hello! I have been busy during my second year in graduate school, working on my Master's degree in Communication Studies. And now it is time for my thesis. The majority of work in my classes has centered on mediation and various communicative phenomena associated with the process. The culmination of this work is my thesis, which focuses on styles employed by mediators. We all carry different life experiences and viewpoints into the mediation session, and we all operate in slightly different ways. This is my area of investigation—how do we operate, what are our strengths, what can we improve upon, and are certain styles appropriate for particular contexts (i.e. divorce, "court-ordered," business, environmental, etc.).

I recently spoke with Art Lusse and proposed my idea to him. Art was enthusiastic, supportive, and offered some sage advice. He gave me the go-ahead to send out this questionnaire. The purpose of the questionnaire is to assess what style we each employ in the mediation room. This questionnaire was created three years ago by a lawyer from Harvard named Leonard Riskin. The version you are receiving is one that has been scaled down and refined by Jeffrey Krivis, a mediator and adjunct professor at Pepperdine University School of Law. I have completed the questionnaire and learned much, both from pondering the questions and from determining my results.

→What You Should Do:
What I would like to do is have you fill out the enclosed questionnaire (instructions provided) and fold them in thirds and return them to me in the self-addressed, stamped envelope. Typical return rate for mailed surveys hovers around 55% and I am hoping that we can do better (say 99% ☺). You can also respond over email (address listed above). Upon receiving your questionnaires I will provide your results to you, via mail, indicating what style you employ. I will provide the full range of styles, along with explanations, so that you know where you stand.

My aim is to improve our abilities as mediators, by better recognizing how we work in the mediation context. In turn, I feel, as does Art, that my project is of particular interest to the Center—we will all benefit from this assessment. In the Spring, I will conduct a seminar summarizing this research and addressing the relevant issues. I feel it would be valuable to explore what it is like to work with someone who employs a different style and what are the inherent strengths and weaknesses of each style.

Thank you for helping me with my thesis, but more importantly, helping the Center to continue to achieve its goals. I will follow this letter up with a phone call or email to remind everyone of the questionnaire. I realize this is a hectic time of year to be sending this out, but thank you for your participation!

Sincerely,
Andrew Wyckoff

Instructions

Review each statement below from the perspective that you are a mediator, and indicate the extent to which you agree or disagree by checking the appropriate box and recording the score

MCI'S Problem Definition

This section of the survey concerns the goals of a mediation. The statements are designed to measure the scope of the problem(s) that the mediation seeks to address or resolve.

1. I encourage the parties to focus on resolving the specific, legal problems.

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

2. I prefer to look beyond the legal issues in defining the problem to be resolved.

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

3. I am inclined to consider the parties' interests more important than the legal issues in defining the problems to be resolved at the mediation.

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

4. The focus of the mediation session is on legally relevant issues.

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

5. In learning about the issues of the case, it is important to understand the legal posture of the case.

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

6. I urge the parties to compromise on narrow issues.

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

7. I tend to decide how I will approach a case based on the legal documents, technical reports or legal briefs.

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

8. Even when the lawyer is present at a mediation, I ask the client to discuss the personal impact of the case

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

9. The interests of the parties are more important to me than settling the case

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

10. The parties' perception of the conflict is not as important to me as the actual evidence of the case

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

11. I view the mediation as an opportunity to help the parties understand each others' perception of the dispute.

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

12. My role is to help parties understand and reach settlement on the issues set forth in the legal documents.

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

13. Generally, parties are more capable of understanding their situations better than either lawyers or mediators.

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

MCI'S Role of the Mediator

This section of the survey concerns the mediator's activities. It measures the strategies and techniques that the mediator employs in attempting to address or resolve the problems that are the subject matter of the mediation.

14. I provide parties with direction as to the appropriate grounds for settlement (e.g., law, industry practice or technology).

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

15. To help parties negotiate realistically, I find it helpful to give an advisory opinion about the likely outcome of a case.

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

16. My principal strategy is to help parties understand the strengths and weaknesses of their legal positions.

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

17. I use the parties' relevant documents, pleadings, reports and legal briefs to help them look realistically at their case

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

18. The principal technique I use is to encourage the parties to explore the likely outcome at trial

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

19. A principal strategy I use is to suggest a particular settlement proposal or range to the parties.

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

20. I use private caucuses early to help the parties understand the weaknesses of their case.

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

21. I do not have to understand the legal posture of the case to serve as the mediator.

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

22. I focus on the process as opposed to the outcome of a mediation.

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

23. I prefer joint sessions over private caucuses.

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

24. Developing options for settlement is the responsibility of the parties, not the mediator.

Strongly Agree — Strongly Disagree

1 2 3 4 5 6 7 8 9 10

25. I must have expertise in the subject matter of the dispute.

Strongly Agree — Strongly Disagree

10 9 8 7 6 5 4 3 2 1

26. I do not consider it my responsibility to protect legal rights and responsibilities of the parties.

1 2 3 4 5 6 7 8 9 10

Appendix C:

Cover Letter

&

Explanation of Quadrants

&

Grid w/ average CDRC style orientation

Andrew Wyckoff
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awyckoff@selway.umt.edu

February 21, 2000

Greetings Fellow Mediators,

Well, thanks very much to those of you who responded to my questionnaire! I received back 33 of the original 50 questionnaires that I mailed out, for a response rate of 66%-- that is pretty good.

What I have done is calculate your "Personal Mediator Classification" and provided each of you with a grid, indicating where you stand according to your responses. I have also included a sheet which explains the four general categories—Evaluative Narrow, Evaluative Broad, Facilitative Narrow, and Facilitative Broad.

Many people commented on the questionnaire as they were filling it out. Some respondents noted that they could not answer particular questions or that so much depended on the situation. One respondent did not even fill out the questionnaire, stating that their personal style varied too much from mediation to mediation—it was too difficult to qualify. I appreciate all of these comments and thoughtful inquiries as to our personal behaviors in the mediation context. It shows me that we all care deeply about what we do. We are also, as a group, keenly aware of the many intricacies inherent in the mediation process.

Please remember that this questionnaire was not meant to "pigeon-hole" anyone into one particular style. Rather, it provides a snapshot of your natural tendencies as a mediator. It also indicates some general trends for us as a group—The Community Dispute Resolution Center of Missoula County. The questionnaire, and the results, should not limit our ability to move around the grid using different strategies and techniques depending on the circumstances. Mediation is a complex process and each case is different from the next. We conduct an important service for our local court system and I feel it is valuable to explore our values, beliefs, and behaviors, as mediators, in order that we do not become too complacent or stagnant.

I will be in touch in the upcoming months and thank you all again for your participation!

Sincerely,

Andrew Wyckoff

An Explanation of the Quadrants

- The upper-left quadrant is **Evaluative Narrow**. According to Leonard Riskin, who first developed the grid, "the principal strategy of the 'Evaluative-Narrow' mediator is to help the parties understand the strengths and weaknesses of their positions and the likely outcome at trial. Before the mediation starts, the 'Evaluative-Narrow' mediator will study relevant documents, such as pleadings, depositions, reports, and mediation briefs. At the outset of the mediation, such a mediator will ask the parties to present their cases in a joint session. Subsequently, most mediation activities take place in private caucuses in which the mediator will gather additional information and deploy evaluative techniques—i.e. *assess strengths and weaknesses of each side's case, urging the parties to settle, or predicting outcomes of court.*"

- The upper-right quadrant is **Evaluative Broad**. "The 'Evaluative Broad' mediator's principal strategy is to learn about the circumstances and underlying interests of the parties and other affected individuals or groups, and then to direct the parties toward an outcome that responds to such interests. The 'Evaluative Broad' mediator will emphasize options that address underlying interests rather than those that propose only compromise on narrow issues. She may appeal to shared values, lecture, or apply pressure. She may use techniques such as—*educating herself about underlying interests, predicting the impacts (on interests) of not settling, offering broad proposals of settlement, and urging parties to accept the mediator's or another proposal.*"
- The lower-left quadrant is **Facilitative Narrow**. "The 'Facilitative Narrow' mediator shares the 'Evaluative Narrow' mediator's general strategy—to educate the parties about the strengths and weaknesses of their claims and the likely consequences of failing to settle. However, she does not use her own assessments, predictions, or proposals. Nor does she apply pressure. She is less likely than the 'Evaluative Narrow' mediator to study relevant documents. Instead, believing the burden of decision-making should rest with the parties, the 'Facilitative Narrow' mediator may use techniques such as—*asking questions, helping parties to develop their own narrow proposals, helping the parties exchange proposals, helping the parties evaluate proposals.*"

- The lower-right quadrant is **Facilitative Broad**. "The 'Facilitative Broad' mediator's principal strategy is to help the parties define the subject matter of the mediation in terms of underlying interests and to help them develop and choose their own solutions that respond to such interests. In addition, many 'Facilitative Broad' mediators will help participants find opportunities to educate or change themselves, their institutions, or their communities. To carry out such strategies the 'Facilitative Broad' mediator may use techniques such as—*helping parties understand underlying interests, helping parties develop and propose broad, interest-based options for settlement, and helping parties evaluate proposals.*"