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Decision-Making in Mediation: The New Old Grid and the New New Grid System

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ARTICLES

DECISIONMAKING IN MEDIATION: THE NEW OLD GRID AND THE NEW NEW GRID SYSTEM

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"All models are wrong but some are useful."
George Box[1]
"'The matter does not appear to me now as it appears to have appeared to me then.'"[2]

INTRODUCTION[3]

In 1994 and 1996, I published articles that set forth a system for describing mediators' approaches to mediation; the system employed a "grid" consisting of two intersecting continuums.[4] One continuum represented the mediator's notion of the mediator's role; the concepts of "facilitative" and "evaluative" provided its anchors. The other dealt with the mediator's customary approach to problem-definition, and it ran from "narrow" to "broad." When these continuums intersected, as shown in Figure 1, they produced quadrants, which I said represented mediators' "orientations" toward mediation.

By offering this system, I hoped to help clarify discussions of mediation, which until that time had often been suffused with ambiguity, for this reason: an enormous range of diverse processes were called

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1 G.E.P. Box, *Robustness in the Strategy of Scientific Model Building*, *in* ROBUSTNESS IN STATISTICS 201, 202 (Robert L. Launer & Graham N. Wilkinson eds., 1979).

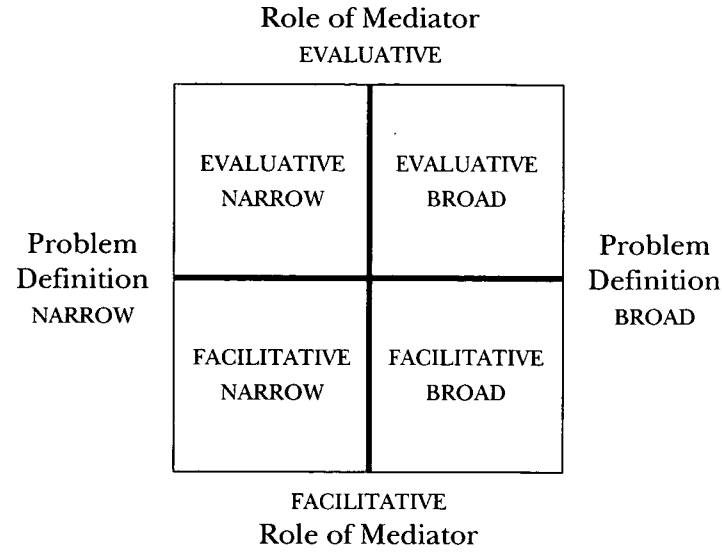
2 McGrath v. Kristensen, 340 U.S. 162, 178 (Jackson, J., concurring) (quoting Baron Bramwell in Andrews v. Styrap, 26 L.T.R. (N.S.) 704, 706 (1872)).

3 Some brief, preliminary thoughts on the topic addressed in this Article appeared in Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, DISP. RESOL. MAG., Winter 2003, at 22 [hereinafter Riskin, *Who Decides What?*], and Leonard L. Riskin, *Retiring and Replacing the Grid of Mediator Orientations*, 21 ALTERNATIVES TO HIGH COST LITIG. 69 (2003) [hereinafter Riskin, *Retiring and Replacing*]. After I published those articles, a colleague helped me recognize the difficulty of explaining what I called the "meta-process." Accordingly, in this Article, I present a newer, less ambiguous approach, which I call the "New New Grid System," and I adopt clearer descriptive terms.

I hope the following description of my writings on mediation grids, with current labels, will minimize potential confusion. What I now call the "Old Grid" appeared in Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994) [hereinafter Riskin, *Mediator Orientations*], and in Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) [hereinafter Riskin, *Understanding*]; the "New Old Grid," which appeared in Riskin, *Who Decides What?*, *supra*, at 22, and in Riskin, *Retiring and Replacing*, *supra*, at 69, is presented again in this Article in part II.A. The "New Grid System" appeared in Riskin, *Who Decides What?*, *supra*, at 22, and in Riskin, *Retiring and Replacing*, *supra*, at 69. The "New New Grid System," which replaces the "New Grid System," appears for the first time in this Article in Part II.B. For a fuller explanation, see *infra* notes 131 and 138.

4 *See* Riskin, *Mediator Orientations*, *supra* note 3; Riskin, *Understanding*, *supra* note 3.

FIGURE 1. THE "OLD GRID": MEDIATOR ORIENTATIONS



mediation, yet there was no widely accepted system for describing or identifying the variants. So I meant to supply a vocabulary and set of concepts for distinguishing among disparate processes that were commonly labeled mediation. I also thought that the grid would help parties in conflict and their lawyers decide whether to mediate, how to select a mediator, and how to prepare for and participate in mediation. And I believed it could help mediators understand their work better; help program administrators make choices about selecting, training, and assigning mediators; and help professional and government organizations regulate mediation practice.

The grid has found employment for all these purposes. It has stimulated or framed many of the discussions and debates about the nature of mediation and how to define and regulate it.[5] It has ap-

5 *See, e.g.*, James J. Alfini et al., *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997); Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309; Gary L. Gill-Austern, *Faithful*, 2000 J. DISP. RESOL. 343; Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41; Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145 (2001); John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather than One Eclectic Process*, 2000 J. DISP. RESOL. 295; L. Randolph Lowry, *To Evaluate or Not: That is Not the Question!*, 38 FAM. & CONCILIATION CTS. REV. 48 (2000); James H. Stark, *The Ethics of Media-*

peared in many books[6] and articles[7] on mediation and dispute resolu-

tion Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator, 38 S. TEX. L. REV. 769 (1997); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997) [hereinafter Stempel, *Beyond False Dichotomies*]; Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2001 J. DISP. RESOL. 371 [hereinafter Stempel, *Real Dichotomies*]; Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247 [hereinafter Stempel, *Inevitability*]; Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997); Donald T. Weckstein, *In Praise of Party Empowerment—And of Mediator Activism*, 33 WILLAMETTE L. REV. 501 (1997); Zena Zumeta, *A Facilitative Mediator Responds*, 2000 J. DISP. RESOL. 335.

The other most commonly used categorization is "transformative" and "problem-solving," which was presented by Professors Robert A. Baruch Bush and Joseph P. Folger. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994). Barbara Ashley Phillips has identified the "problem-solving—transformative" approach to mediation. BARBARA ASHLEY PHILLIPS, THE MEDIATION FIELD GUIDE: TRANSCENDING LITIGATION AND RESOLVING CONFLICTS IN YOUR BUSINESS OR ORGANIZATION 59 (2001); *see also* JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 31–41 (2000) (describing many of the assumptions inherent in the problem-solving approaches to mediation and offering a critique). Other commentators have developed systems of categorizing mediation. *See* Riskin, *Understanding*, *supra* note 3, at 14–16 (describing several systems of categorization); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 707–10 (1997) (classifying mediations in terms of "norm-generating," "norm-educating," and "norm-advocating" models).

6 Riskin, *Understanding*, *supra* note 3, has been reprinted in whole or in part in JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 171 (2001); RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 357–65 (2002); MEDIATION: THEORY, POLICY AND PRACTICE 152, 155, 165, 180–01 (Carrie Menkel-Meadow ed., 2001); LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 314–28, 427–33 (1997). It has been translated into Portuguese and published as Leonard L. Riskin, *Compreendendo as Orientações, Estratégias e Técnicas do Mediador: Um Padrão para Iniciantes*, *in* ESTUDOS EM ARBITRAGEM, MEDIAÇÃO E NEGOCIAÇÃO (André Gomma de Azevedo ed., 2001).

Riskin, *Understanding*, *supra* note 3, also won the first prize for best article on dispute resolution published in 1996, from the CPR Institute for Dispute Resolution Excellence and Innovation in ADR Awards.

The earlier article, Riskin, *Mediator Orientations*, *supra* note 3, has been reprinted in whole or in part in DISPUTE RESOLUTION: READINGS AND CASE STUDIES 301 (Julie Macfarlane ed., 2d ed. 2003); CARRIE MENKEL-MEADOW ET AL., APPROPRIATE DISPUTE RESOLUTION (forthcoming 2004); MELISSA NELKEN, UNDERSTANDING NEGOTIATION 438 (2001); PORTLAND FED. EXEC. BD., ADR/SHARED NEUTRALS PROGRAM HANDBOOK app. 1 (1997); ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 415 (3d ed. 2002). It has been translated into Czech and published in MEDIACE ANEB JAK REŠIT KONFLIKTY 50 (Otmara Hrušková et al., trans., 1996)

7 *See* sources cited *supra* note 5.

tion and in hundreds of mediation training programs[8] and law school and university courses.[9] It has been used to help regulate the practice of mediation,[10] to help parties select mediators,[11] to help mediators understand their own approaches[12] and to help organizations understand the mediation programs with which they are involved.[13] The terms "facilitative" and "evaluative" have become part of the language in the field.

The grid has attracted a lot of criticism, too.[14] The most passionate—and long-lived—criticism rested on the notion that evaluation was not properly part of the mediator's role and that I had done

8 For example, the grid is a standard feature of the numerous training programs sponsored in recent years by the Michigan Institute for Continuing Legal Education. Interview with Shel Stark, Education Director, Michigan Institute for Continuing Legal Education, in Ann Arbor, Mich. (Jan. 20, 2003).

9 I have not kept track, but I estimate that I have received and granted well over 100 requests to reprint these articles for training programs or for law school and other university courses—often for multiple uses. I also am aware that many trainers use these articles without permission.

10 For example, Michigan rules on court-ordered domestic relations mediation provide: "If the parties have not stipulated to a mediator, the parties must indicate whether they prefer a mediator who is willing conduct [sic] *evaluative mediation.* Failure to indicate a preference will be treated as not requesting *evaluative mediation.*" MICH. CT. R. 3.216(E) (3) (emphasis added).

11 This assertion is based on numerous casual comments from program administrators and my own experience in being invited to mediate or considered for a mediation.

12 *See* Jeffrey Krivis & Barbara McAdoo, *A Style Index for Mediators*, 15 ALTERNATIVES TO HIGH COST LITIG. 157, 164 (1997). Along with many other people, I find this instrument useful in giving mediators insight into their own practices or tendencies with respect to facilitation. I worry, however, about using it to impose a label on a mediator.

13 *See* E. PATRICK MCDERMOTT ET AL., AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM (2000), *available at* http://www.eeoc.gov/mediate/report/index.html [hereinafter MCDERMOTT, EVALUATION]; E. PATRICK MCDERMOTT ET AL., THE EEOC MEDIATION PROGRAM: MEDIATORS' PERSPECTIVE ON THE PARTIES, PROCESSES, AND OUTCOMES (2001), *available at* http://www.eeoc.gov/mediate/mcdfinal.html [hereinafter MCDERMOTT, MEDIATORS]; E. Patrick McDermott & Ruth Obar, *"What's Going On" in Mediation: An Empirical Analysis of Party Satisfaction with Mediator Style, the Factors that Yield the Highest Charging Party Monetary Return, and What Really Happens in the Mediation of Charges Before the Equal Employment Opportunity Commision*, 9 HARV. NEGOT. L. REV. (forthcoming 2004).

14 *See, e.g.*, Love, *supra* note 5, at 937; Love & Kovach, *supra* note 5, at 297; Kimberlee Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 72–73 (1998); Stulberg, *supra* note 5, at 985.

something of a disservice by including it on the map.[15] I anticipated that criticism and addressed it in the 1996 article; I said that I was simply trying to describe processes that were commonly *called* mediation,[16] and further, that it was "too late" to say that evaluation was not part of mediation because thousands of people who were known as "mediators" were "evaluating."[17] As further criticisms, concerns, and alternative approaches appeared, I reacted defensively and responded in writing only once, trying to deflect the criticism with humor.[18] I believed that the grid in fact helped people make sense out of a chaotic reality and that it could serve to describe the "approach" or "orientation" of virtually any mediator. Many friends and colleagues encouraged me in such beliefs, which hardened into self-satisfied complacency.

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15 Professors Kovach and Love have provided the most consistent criticism. Here is a convenient summary of their principal points, which Professor Love has styled "The Top Ten Reasons Why Mediators Should Not Evaluate":

I. The roles and related tasks of evaluators and facilitators are at odds.
II. Evaluation promotes positioning and polarization, which are antithetical to the goals of mediation.
III. Ethical codes caution mediators—and other neutrals—against assuming additional roles.
IV. If mediators evaluate legal claims and defenses, they must be lawyers; eliminating non-lawyers will weaken the field.
V. There are insufficient protections against incorrect mediator evaluations.
VI. Evaluation abounds: The disputing world needs alternative paradigms.
VII. Mediator evaluation detracts from the focus on party responsibility for critical evaluation, re-evaluation, and creative problem-solving.
VIII. Evaluation can stop negotiation.
IX. A uniform understanding of mediation is critical to the development of the field.
X. Mixed processes can be useful, but call them what they are!

Love, *supra* note 5, at 948; Love & Kovach, *supra* note 5, at 303; *see also* Kovach & Love, *supra* note 14, at 73; Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COSTS LITIG. 31, 31 (1996); Stulberg, *supra* note 5, at 1004–05 (1997). For a summary of criticisms related to the notion that a mediator may evaluate, see Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 27–32 (2001).

I do not intend to directly address the *propriety* of mediator evaluation in this Article. Instead, I hope to facilitate decisionmaking about whether, when, and how the mediator should evaluate. *See infra* notes 137–41.

16 *See* Riskin, *Understanding*, *supra* note 3, at 13.

17 *Id.*

18 *See* Leonard L. Riskin, *Mediation Quandaries*, 24 FLA. ST. U. L. REV. 1007 (1997).

This state of mind was firmly in place when Professor Jennifer Brown called to invite me to revisit the grid for a presentation at Yale Law School. Fifteen minutes later, it began to dissolve. Although I remain pleased with the considerable extent to which the grid has fostered understanding and dialogue, much of which has been helpful to the field, I am troubled by several aspects of the grid and the way in which people have used it. I wish I could say that, had I known the grid would have been so influential, I would have done a better job of constructing it. But the truth is that I did the best I could.

Two developments that have followed the appearance of the grid seem to require a better understanding of mediation. First, it has become clear that the "facilitative-evaluative" debate and other issues raised by the grid have significant real-world implications. They affect mediation training,[19] regulation and practice,[20] evaluation,[21] as well as who mediates,[22] how mediation is presented to the public, and mediators' self-identities.[23] Second, many participants in the field—mediators, lawyers, parties, program administrators, and regulators—have become much more sophisticated about mediation, so the old grid may serve their purposes less well.

And so, in the spirit of fostering more refined understanding and dialogue about mediation, in the following pages I describe weaknesses and limitations in the grid and problems they have fostered, and I proffer ways to address most of these problems. Part I sets out the background, purposes and nature of the grid system and identifies a series of problems and limitations associated with it. Part II first proffers a revised version of the grid of mediator orientations (the "New Old Grid"). It then proposes to replace the "Old Grid" and the "New Old Grid"—both of which are static and limited in other ways—with a "New New Grid" System.

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19 *See* Interview with Shel Stark, *supra* note 8.

20 *See* Welsh, *supra* note 15, at 34–57.

21 *See* MCDERMOTT, EVALUATION, *supra* note 13; MCDERMOTT, MEDIATORS, *supra* note 13.

22 Lela Love, for instance, claims that "[i]f mediators evaluate legal claims and defenses, they must be lawyers; eliminating non-lawyers will weaken the field." Love, *supra* note 5, at 941.

23 John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 891 (1997).

I. REVISITING THE GRID: THE "OLD GRID" AND ITS USES AND PROBLEMS

A. Reviewing the "Old Grid": Its Background, Nature, and Uses

I developed the grid system in response to a request from a large law firm to present a training program for its lawyers and clients on how to participate in mediation.[24] In planning that program, I realized that I could not advise anyone about taking part in mediation without knowing the nature of the process that would actually take place. Yet a diverse array of processes were called mediation, and there was no widely accepted method for describing these variations. Partly as a result of this situation, potential users of mediation often had no reliable way to know or learn what would take place in mediation. The problem was compounded by three disparities between "theory" and "practice," i.e., between conventional explanations of mediation and certain common mediator beliefs and behaviors.[25] The first disparity had to do with evaluation: the conventional wisdom of mediation trainers and authorities held that mediators did not predict court outcomes or tell parties how to resolve their disputes; in fact, however, many did so.[26] The second disparity concerned the issues to be mediated or the goals of the mediation. Most experts on mediation asserted that mediation was meant to deal with what was really at stake for the parties, i.e., their needs or interests, and to empower them to develop their own resolutions.[27] In fact, many mediations—especially those involving "legal disputes"—i.e., disputes that the parties were planning (or hoping or threatening) to litigate—did not encompass such issues; instead, they focused primarily on legal or other

24 *See* Riskin, *Understanding*, *supra* note 3, at 8.

25 For recent efforts to address gaps between theory and practice in dispute resolution, see Christopher Honeyman et al., *Here There Be Monsters: at the Edge of the Map of Conflict Resolution*, *in* THE CONFLICT RESOLUTION PRACTITIONER 1 (Shinji Morokuma ed., 2001).

26 *See* Lande, *supra* note 5, at 328 ("Until recently, the facilitative perspective has been the stated orthodoxy of the mediation field generally, not simply one faction."); *infra* notes 31–40 and accompanying text. I am describing an understanding that was common among people involved in "the modern mediation movement," i.e., those concerned with mediation in community and family disputes and in civil lawsuits. Labor mediators in some sectors commonly accepted more evaluative behavior. *See, e.g.*, DEBORAH M. KOLB, THE MEDIATORS 18–19 (1983).

27 *See* JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 7–8 (1984); Kovach & Love, *supra* note 15, at 31; Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 6–9 (1991); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982).

positional claims and attempted to reach resolutions "in the shadow of the law."[28]

Partly as a result of these disparities between theory and practice, most parties and lawyers, and even some mediators, did not recognize the existence of choices about the goals and characteristics of the mediation process; nor did they recognize the existence of issues about how, when, and by whom these choices should be made. This accounts for the third disparity between theory and practice: although virtually all proponents and exponents of mediation put party self-determination at its core,[29] in practice, parties frequently did not have the opportunity or knowledge necessary to exercise self-determination.[30]

By developing the grid, I meant to bring these issues to the attention of not only the lawyers and clients I was to train, but also mediators, program administrators, regulators and other potential participants. The method rested on two closely related questions, both of which focused on *the mediator*: "1. Does the mediator tend to define problems *narrowly* or *broadly*? 2. Does the mediator . . . *evaluate*—make assessments or predictions or proposals for agreements—or *facilitate* the parties' negotiations without evaluating?"[31]

B. Reconsidering the "Old Grid": Its Problems and Limitations

Although many have found the grid helpful, it contains or has acquired a bundle of limitations, which became apparent to me only recently. This Part describes problems associated with each continuum and three other major deficiencies of the "Old Grid": its failure to distinguish different kinds of decisions in and about mediation; its limited focus and static quality; and the fundamental idea that the grid can depict overall mediator orientations.

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28 I borrow the phrase from Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979). Although I did not say so explicitly, such cases informed my thinking in developing the grid. (I am grateful to Arnold Zack for bringing this to my attention. E-mail from Arnold Zack, Mediator and Arbitrator, to Leonard L. Riskin, Professor, University of Missouri-Columbia School of Law (June 12, 2001) (on file with author).) I did, however, believe that the grid could help describe a mediator's orientation toward any kind of dispute.

29 *See* Welsh, *supra* note 15 *passim*.

30 *Id.* The involvement of lawyers and the stereotypical lawyer's perspective, which I have called the "lawyer's standard philosophical map," sometimes contributed to this situation. *See* Riskin, *supra* note 27, at 43.

31 Riskin, *Mediator Orientations*, *supra* note 3, at 111.

1. The Facilitative-Evaluative/Role-of-the-Mediator Continuum

a. Description

When I developed the system, most mediation trainers and commentators held that mediators did not, or ought not, predict what would happen in court or tell parties what to do.[32] In practice, however, many mediators did give evaluations and some pushed parties toward settlement or a particular settlement.[33] On top of that, many parties or their lawyers seemed to want either or both of these services—or thought they were standard features of mediation.[34] Yet the subject of whether, when, and how a mediator should evaluate received almost no attention in writings or training programs.[35] Many

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32 *See supra* note 26.

33 *See* Kovach & Love, *supra* note 15, at 31; Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 523 (2002); Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 390 (1997); Welsh, *supra* note 15, at 30–31.

34 *See* Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 472 (1997), (dealing with a later time period but probably reflecting long-standing attitudes); McAdoo & Welsh, *supra* note 33, at 390.

One possible explanation of this disparity between theory and practice is this: much of the writing on mediation in the late 1970s and early 1980s dealt with mediations that lawyers did not typically attend, such as community mediation and divorce mediation, and in which, accordingly, there was much concern about protecting the autonomy or self-determination of the parties. For examples, see Welsh, *supra* note 15, at 15–21; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 813–14 (2001), and some of these writings drew on anti-law or anti-lawyer sentiments, suggesting that information about law often was not important in a mediation. *See* Welsh, *supra* note 15, at 15–18. Some commentators understood these writings to suggest that mediation had an essentially a-legal character and, accordingly, posed a danger to less powerful parties, which might be remedied by an infusion of law. *See, e.g.*, JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 117–19 (1983). In disputes that could plausibly wind up in court, however, the idea that mediation had an a-legal or non-legal character made little sense. Yet this conventional wisdom continued to have force in the literature, which often failed to distinguish between "legal" disputes and others.

35 *See* Kovach & Love, *supra* note 15, at 31. There may be a few exceptions to this generalization, but I am aware of only one—the approach to mediation developed by Gary Friedman and Jack Himmelstein, which focuses much attention on the relationship between law and mediation. In this approach, the mediator offers to predict how a court would deal with the case, but makes clear that the parties are under no obligation to do what a court would do. In other words, the mediator is to use law to free the parties from feeling constrained by the law's shadow. *See* GARY J. FRIEDMAN, A GUIDE TO DIVORCE MEDIATION: HOW TO REACH A FAIR, LEGAL SETTLEMENT AT A FRACTION OF THE COST *passim* (1993); THE CENTER FOR MEDIATION IN LAW, TRAINING

commentators and trainers confused the "is" and the "ought," treating the fact that many mediators evaluated like a dirty secret.

This situation produced several consequences that disturbed me. First, parties sometimes entered mediation expecting no evaluation, but getting one nonetheless—without asking for it, consenting to it, or preparing for it.[36] Second, the reverse sometimes happened: parties who expected or wanted an evaluation learned, once they got into a mediation, that the mediator would not or could not provide one.[37] And third, some mediators gave evaluations that, because of their nature or timing, impeded progress toward resolving the dispute or undermined other values associated with mediation.[38] It appeared to me that significant numbers of mediators maintained fixed attitudes and practices about whether—and how and when—they would evaluate, but there was no accepted system or practice for conveying such information to the parties or their lawyers.

In order to highlight these problems and the opportunities associated with them, in describing the role of the mediator, I chose to emphasize just one aspect of a mediator's behavior: the extent to which, in helping parties settle their dispute, the mediator tended to "evaluate," e.g., by assessing the strengths and weaknesses of a legal position or predicting outcomes in court.[39] I contrasted "evaluate"

MATERIALS 18–20 (2003) (similar discussions appeared in earlier versions of these materials); *see also* Videotape: Saving the Last Dance: Resolving Conflict Through Understanding (Harvard Law School Program on Negotiation & The Center for Mediation in Law 2001) [hereinafter Saving the Last Dance].

Recently trainers and commentators have paid attention to the when, where, how, and why of evaluation. *See, e.g.*, Marjorie Corman Aaron, *Evaluation in Mediation*, *in* MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS §§ 10.0–10.9, at 267–305 (Dwight Golann ed. 1996). Hamline University Law School recently offered a summer school course called "Evaluative Mediation." *See* HAMLINE UNIV. SCH. OF LAW DISPUTE RESOLUTION INST., SUMMER 2003 COURSE OFFERINGS, *available at* http://web.hamline.edu/law/adr/2summer.htm (last visited Sept. 9, 2003).

36 *See, e.g.*, Kovach & Love, *supra* note 15, at 31; Welsh, *supra* note 15, at 9–15 (analyzing Allen v. Leal, 27 F. Supp. 2d 945 (S.D. Tex. 1998), and describing several other cases). Marjorie Corman Aaron has pointed out a more subtle disjunction between theory and practice. She observed "mediators who seem to have formed a view about case value—an evaluation—and who thus directed their 'reality testing' questions to pressure a party to 'seeing' that evaluation." Memorandum from Marjorie Aaron, Executive Director, Center for Practice in Negotiation and Problem-Solving Lawyering, University of Cincinnati College of Law, to Leonard L. Riskin, Professor, University of Missouri-Columbia School of Law (Aug. 9, 2002) (on file with author).

37 This was a common occurrence. It *appears* to be what happened in the first mediation described by Barry Werth in BARRY WERTH, DAMAGES: ONE FAMILY'S STRUGGLES IN THE WORLD OF MEDICINE 310–25 (1998).

38 *See* Welsh, *supra* note 15, at 27–32; *see also* Welsh, *supra* note 34, at 813–14.

39 *See* Riskin, *Understanding*, *supra* note 3, at 23–24.

with "facilitate," by which I meant that the mediator assisted the parties' negotiations without evaluating.[40] And I put "evaluative" and "facilitative" at opposite ends of a continuum depicting the mediator's role (or the mediator's concept of the mediator's role). And I said that each of these terms *also* represented a continuum. Thus, evaluation could range from behavior that is principally informative (e.g., "Your case is weak on *x*.") to directive (e.g., "You should pay $*y*."), which I considered an extreme form of evaluation.[41] And facilitation could range from, say, asking parties how likely it was that their case could get to the jury, to simply keeping order while parties discuss whatever they wish, as they wish.

b. Problems

Both the continuum structure and the facilitative-evaluative terminology have caused problems.

i. The Continuum Structure Has Caused Confusion

Some commentators have dealt with facilitation and evaluation as if they were alternatives, treating the continuum—on which I said many mediators move around[42]—like a dichotomy.[43] And many commentators employed these concepts as if they were real and repre-

40 *See id.* at 24. The choice of these labels also derived in part from my commitment to the idea that mediation should rest on and enhance self-determination or autonomy of the parties and *should* deal with the real interests, not just the positions or legal claims, *see* Riskin, *supra* note 27, at 57, and from the assumption that evaluation *tends to* interfere with the development of both of these. As indicated below, I now find that assumption confusingly simplistic. *See infra* text accompanying notes 63–76.

41 As indicated below, I made a mistake by including directive behavior in the evaluative continuum. Instead, I should have distinguished between evaluation and direction. *See infra* text accompanying notes 66–74.

42 *See* Riskin, *Understanding*, *supra* note 3, at 36.

43 *See, e.g.*, Kovach & Love, *supra* note 14, at 75; Love & Kovach, *supra* note 5, at 306; *see also* Birke, *supra* note 5, at 310, 318 (arguing that mediation is both evaluative and facilitative); Stempel, *Inevitability*, *supra* note 5, at 269–85, (viewing the continuum as a false dichotomy). Some statements in my writings about the grid doubtless encouraged such dichotomous thinking. For example, I categorized mediators by quadrants, referring to "the evaluative-narrow mediator." Riskin, *Understanding*, *supra* note 3, at 26. Krivis and McAdoo, in creating a self-administered instrument based on the grid, did not actually treat the continuums as if they were dichotomies, but their classification system may have subtly, and inadvertently, encouraged such dichotomous thinking. Krivis & McAdoo, *supra* note 12, at 165

sented actual orientations toward practice,[44] and they routinely distinguished between "facilitative mediation" and "evaluative mediation."[45] Much in my 1994 and 1996 writings encouraged this.[46]

It is quite clear, however, that many—probably most—mediators engage in behaviors that fit into both categories. They evaluate *and* facilitate, a fact that I mentioned in the 1994 and 1996 writings.[47] As Professor Dwight Golann recently demonstrated, mediators often evaluate on some issues and facilitate on others, all within the same time block, and they typically decide on their moves at least partially in response to the personalities and conduct of the other participants.[48]

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44 Such limited, dualistic, and formalistic readings of the facilitative-evaluative role of the mediator dimension of the grid may have contributed to what some commentators have called a "polarization" in the literature. *See* Birke, *supra* note 5, at 309 (referring to Kovach & Love, *supra* note 15, at 31; Love, *supra* note 5; and Jonathan B. Marks, *"Evaluative Mediation"—Oxymoron or Essential Tool?*, AM. LAW., May 1996, at 48A); Stempel, *Inevitability*, *supra* note 5, at 269–85.

I am sure that my writings contributed to this reification and dualistic thinking. For instance, I said that the orientations were not ideal types, but corresponded to actual practices of a substantial portion of mediators, even though many mediators drew from each quadrant. Riskin, *Understanding*, *supra* note 3, at 26 n.60.

45 *See, e.g.*, *supra* note 35.

46 For instance, I sometimes referred to the "evaluative broad mediator." Riskin, *Understanding*, *supra* note 3, at 29–30. I asserted that most mediators operated from a predominant or default orientation. *Id.* at 24. And this dichotomous language about orientations took hold despite my assertions about the difficulties of categorizing mediators' orientations, strategies, and techniques. *Id.* at 36.

47 Riskin, *Understanding*, *supra* note 3, at 36; *see also* Golann, *supra* note 5, at 61 (documenting that mediators change approaches during a mediation session in response to circumstances); Krivis & McAdoo, *supra* note 12, at 165 (stating that a mediator may "move around the grid by using different strategies and techniques depending on the circumstances"); Stempel, *Beyond False Dichotomies*, *supra* note 5, at 952 ("Good mediators should be both facilitative and evaluative in varying degrees."); Stempel, *Inevitability*, *supra* note 5, at 250 (defining an "eclectic" approach to mediation that dissolves the strict dichotomy between evaluation and facilitation).

Unfortunately, the grid, because it purports to describe overall, predominant, or default "orientations," does not provide a good way to describe such mediators. Other commentators also have noted this. *See, e.g.*, Stulberg, *supra* note 5, at 991–92; Weckstein, *supra* note 5, at 526.

48 *See* Golann, *supra* note 5, at 61. The facilitative-evaluative continuum deals with the *role of the mediator*, and not the *nature of the process*. Thus, it refers to evaluations provided *by the mediator* and was not meant to include evaluations that were produced *by the parties* in a mediation. Mediator evaluation, for instance, does not describe processes in which the mediator encourages the lawyers to present their legal arguments or ask questions to elicit the lawyer's or client's views on the strengths or weaknesses of their cases. Although such procedures produce "evaluations," the *mediator* does not give her own evaluations; accordingly, such procedures do not raise the concerns often associated with evaluation by the mediator: for instance, that it is

There are other problems in my system of categorizing a mediator's approach toward her role. First, a mediator may both evaluate and facilitate on the same issue. For instance, a mediator might make a particular prediction or proposal and then facilitate discussion around it;[49] conversely, she might facilitate a discussion around a certain issue and then make a prediction or recommendation. In addition, a particular move can have both evaluative and facilitative aspects or objectives or effects. A prediction about what would happen in court, for example—given in the right manner, at the right time, in the right context—can help enable (or empower) the parties to negotiate in *light* of that information, and not merely in its *shadow*.[50] Thus, a mediator can predict what would happen in court and tell parties that they need not be limited by that; in fact, she may encourage them to use that information simply as a way to understand their court alternative, and then, using facilitation, help them develop options that improve upon it.[51] Such a mediator is providing the evaluation in order to set the stage for facilitation.[52] Next, the mediator might use either facilitative or evaluative moves, or both, to help the parties select one of the options. In other words, moves that I classified as evaluative and facilitative often travel in tandem. To make things more confusing, facilitation by the mediator can produce an

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not an appropriate part of the mediator's role, that it might interfere with party self-determination, that it might mean that the mediator is practicing law.

The production of an evaluation through a decision-tree analysis is more difficult to characterize. The mediator develops an understanding (or understandings) of the "value" of a legal claim based on the predictions of the parties or their lawyers as to the likelihood of various contingencies (e.g., getting to a jury or getting a verdict of a certain amount) coming to pass. *See* Marjorie Corman Aaron & David P. Hoffer, *Decision Analysis as a Method of Evaluating the Trial Alternative*, *in* MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS, supra note 35, §11, at 307.

Professor Dwight Golann recently described mediators' *evaluation of the bargaining process*, exemplified by a mediator's predictions to one side about the other side's likely reaction to a particular proposal. Golann, *supra* note 5, at 50. In preparing the grid, I did not envision a place for such behavior, which I consider negotiation coaching. But the "New Old Grid" and the "New New Grid" System provide ways to characterize and depict this behavior. *See infra* Parts II.A, II.B.2.b–c.

49 *See* Riskin, *Understanding*, *supra* note 3, at 37 (describing the work of Frances Butler).

50 *See id.* at 36–38.

51 *See id.* at 37 (describing the work of Gary Friedman).

52 Many commentators have recognized this relationship between evaluation and facilitation. Professor Jeffrey Stempel, for instance, posits a "broad notion of facilitation that encompasses use of evaluative techniques in appropriate circumstances." Stempel, *Beyond False Dichotomies*, *supra* note 5, at 961; *see also* Birke, *supra* note 5, at 317 ("[A]n evaluative mediator evaluates only part of the time. Facilitation creates the agreement if one is reached."); Welsh, *supra* note 15, at 32 n.137.

evaluation through the use of evaluative statements made by the lawyers or parties.[53]

In addition, it frequently may be difficult to characterize a particular intervention without knowing its actual impact, which may not accord with the mediator's intention.[54] For instance, I have suggested that generally *a question* (e.g., about what is likely to happen in court or what effect a failure to settle may have on business or personal interests) is facilitative,[55] whereas *a statement* about such matters is evaluative.[56] But a question can have an evaluative impact. This can happen, of course, when a mediator phrases and delivers the question in such a way as to make it evaluative—for example, "How *in the world* do you expect to be able to prove *that*?" But it can also happen when the mediator asks the question out of genuine curiosity or to help the party think it through, but the party or lawyer *interprets* the question as an evaluation.[57] Similarly, a mediator can present a statement in a soft way, without any pressure or intent to incline the parties toward using that evaluation to frame their agreement—which makes it essentially facilitative.[58] And of course, body language—deliberate or not—can have facilitative or evaluative effects.

Labeling a mediator's orientation as *either* facilitative or evaluative faces another challenge. Even assuming we can reliably label particular moves or strategies as either facilitative or evaluative, if the mediator engages in both kinds of activities, how can we determine the correct label? If a mediator spends 98% of her time in non-evaluative activities, for instance, but gives an evaluation as a last resort, how

53 This is a common practice in what I have called facilitative-narrow mediation, but, to my mind, it does not constitute evaluation *by the mediator.* A closer case is presented by the use of decision-tree analysis, through which the mediator produces an evaluation that is based on predictions of the parties and lawyers, which the mediator inserts into a "decision tree." *See supra* note 48. Rosselle Wissler has made the helpful distinction between mediators who evaluate the case and those who assist the parties in evaluating the case. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 656 (2002).

54 *See* Riskin, *Understanding*, *supra* note 3, at 36–37.

55 *See id.* at 28.

56 *See id.* at 27, 31.

57 Roselle Wissler has found that mediation participants are much more likely than mediators to perceive the mediator's interventions as evaluative. ROSELLE L. WISSLER, TRAPPING THE DATA: AN ASSESSMENT OF DOMESTIC RELATIONS MEDIATION IN MAINE AND OHIO COURTS 15, 69 (1999).

58 Since I developed the grid, I have become more aware of my own intentions in mediation. I have noticed, for instance, that sometimes I will ask a question in order to gently encourage or prompt a party toward a particular view or decision.

would we label her orientation?[59] And how can the grid account for the "centrality" of the evaluative activity?[60] In addition, categorizing a mediator's approach to the mediator's role as either facilitative or evaluative does not give appropriate recognition to either the time dimension or the interactive and dynamic process through which most thoughtful mediators tend to decide what to do in a mediation. In other words, it assumes a high level of rigidity in the mediator's conduct that is not always present and, when it is, may result in missed opportunities. (These complications may explain why, in a recent *Wisconsin Bar Journal* poll, the same person was voted the best facilitative mediator and the second-best evaluative mediator.[61])

In other words, to say that mediator *X* is "facilitative" is comparable to saying that my cousin Joe is "generous." Both adjectives have a modicum of predictive value. But knowing that Joe has a "generous" nature does not tell us whether he will contribute to Save the Whales; much depends on the manner, nature, and timing of solicitation, on Joe's mood, and the state of his portfolio. Likewise, knowing that mediator *X* has an "evaluative" approach does not tell us whether that mediator will evaluate or facilitate as to a particular issue in particular circumstances.

For all these reasons, it seems clear that labeling a mediator's approach to the role of mediator as *either* facilitative *or* evaluative—which offers convenience and perhaps a comforting belief that we understand what's going on—may obscure what's *really* going on.[62]

ii. The Facilitative-Evaluative Terminology Has Caused Confusion

The kinds of interpretive problems described above would afflict virtually any method of dividing behavior into categories. But the terms *evaluative* and *facilitative* present special problems, because—and I realized this only recently—*evaluating and facilitating are not oppo-*

59 For one useful approach, see Krivis & McAdoo, *supra* note 12, at 165.

60 David Geronemus and Margaret L. Shaw have pointed out that the grid does not capture this dimension. David Geronemus & Margaret L. Shaw, *Mediation in the Public and Private Sectors: Similarities and Differences*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA—PROCEEDINGS OF THE 53D ANNUAL CONFERENCE ON LABOR (forthcoming 2004).

61 Jane Pribek, *McDevitt: Master of Mediation*, WIS. L.J., Mar. 27, 2002, at 4. The mediator so honored, Joseph McDevitt, also ranked first in the most directive mediator and the best-prepared mediator categories. *Id.*

62 In the words of John Ashbery: ". . . For though there are / some / who can live without / compasses, it dissolves all complexity / if one is perpetually in the know." John Ashbery, *Runway*, NEW YORKER, May 21, 2001, at 85.

sites any more than kicking a football and playing a football game are opposites. And this partly explains why the evaluative-facilitative terminology has prompted so much confusion and what some see as polarization in the literature.[63]

The fundamental problem is this: mediation is facilitated negotiation. Its *essence* is facilitation.[64] If facilitation is the essence of mediation and if evaluation is the opposite of facilitation, evaluation would seem to rob mediation of its essence. This might be the gist of Kim Kovach and Lela Love's conclusion—with which I have belatedly come to sympathize—that "'[e]valuative' mediation is an oxymoron."[65]

However, as best I can reconstruct, I *meant* the term "evaluate" to include a certain set of predictive or judgmental or directive behaviors by the mediator that tend (or by which the mediator means) to direct (or influence or incline) the parties toward particular views of their problems, toward a particular outcome, or toward settlement in gen-

63 The polarization, of course, was made possible by the tendency among many commentators to treat the facilitative-evaluative continuum like a dichotomy, as described above. Richard Birke believes that the "facilitative-evaluative" debate has had a polarizing effect. Birke, *supra* note 5, at 309. John Lande believes that the "debate" has produced a number of benefits. Lande, *supra* note 5, at 327–32. He argues that it has "prompted a more refined understanding" of which methods are most appropriate in various situations and promoted self-consciousness about mediation practices. *Id.* at 327–30. He believes this increased sophistication may foster a greater willingness to examine mediation theory. *Id.* at 330–32. I find it ironic that so many practitioners of mediation who are committed to searching for common ground (myself included) have characterized much of the treatment of this issue in the literature as a debate rather than a dialogue or discussion. *See, e.g.*, RISKIN & WESTBROOK, supra note 6, at 394–97 (characterizing the treatment of this issue as the "Facilitative-Evaluative Debate").

64 I believe that this idea is widely shared among mediators. Bernard Mayer expresses it this way: "Mediation is in essence a form of facilitation where the focus is on helping people to resolve an identified conflict." BERNARD MAYER, THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITONER'S GUIDE 226 (2000). Professor John Lande has suggested that, in a sense, *evaluation by the parties* is the essence of mediation, at least mediation that is directed toward decisionmaking or dispute resolution (as opposed to mediation directed at improving the parties themselves). Before parties can reach an agreement, they must evaluate their alternatives. *See* Lande, *supra* note 23, at 873.

Another cause of the confusion is that the term "facilitation" is commonly applied to processes that are similar to mediation, but clearly are not mediation. For example, it is now common for organizations to hire people to facilitate meetings of all sorts. *See generally* ROGER SCHWARZ, THE SKILLED FACILITATOR: PRACTICAL WISDOM FOR DEVELOPING EFFECTIVE GROUPS (1994).

65 Kovach & Love, *supra* note 15, at 31.

eral;[66] and I believed that such behaviors often or typically interfere with party self-determination. In contrast, I meant the term "facilitate" to include a variety of actions by the mediator—not involving such influences—that tend (or that the mediator intends) to help, or allow, the parties to find their own way and make their own choices based on their own understandings. So I selected the terms "facilitative" and "evaluative" partly in order to highlight the mediator's impact on party self-determination, a fundamental espoused value of the "contemporary mediation movement"[67] that I thought was imperiled by mediation practices around evaluation that violated party expectations or desires.[68]

But I failed to emphasize that evaluation by the mediator—depending on the exact circumstances and the kind of evaluation presented—can either foster or impair self-determination, or both foster and impair it. As mentioned above, often mediators give evaluations without intending to direct the parties toward a particular solution. In addition, when evaluation by the mediator offers the only realistic opportunity for a party to understand the likely alternative outcome—say, in a court or administrative proceeding—it might support self-determination for that party by fostering informed consent;[69] but it also might impair self-determination by limiting either party's imagination or precluding their efforts to address underlying interests.[70] In such situations—which can arise when a mediation participant does not have ready access to a lawyer (for example, in some mediations connected with small claims or divorce proceedings) or has a lawyer who is unfamiliar with the relevant law or litigation practices—evaluation (in the sense of a prediction about what would happen in a court or administrative proceeding) also may promote other

66 Other evidence that I intended "evaluation" to include "direction" appears in my statement that "evaluative-broad mediators . . . often define the scope of the problem to be addressed themselves." Riskin, *Understanding*, *supra* note 3, at 33. I realize that I may be engaging in revisionist history here.

67 Welsh, *supra* note 15, at 15.

68 Party self-determination has many meanings. *See* Welsh, *supra* note 15 *passim*. Professor Nancy Welsh has argued that the original vision meant empowering the parties by giving them responsibility for "identifying the issues to be resolved, recognizing the concerns and interests underlying their positions, generating options for resolution of their dispute, and evaluating the resolution options." *Id.* at 19. The "thinning vision," which evolved in many court-connected mediation programs, merely gives parties the opportunity to consent to the outcome. *Id.* at 4.

69 *See* Weckstein, *supra* note 5, at 530–32.

70 Similarly, a mediator who offers a proposal for solution in response to the parties' request for such a proposal, can be seen as both fostering and impairing party self-determination.

values, such as fairness, and social policies associated with the relevant law.[71]

And there is a still more fundamental problem. The greatest threat to self-determination is caused by behavior that I placed at the extreme north end of the evaluative continuum, behavior "intended to direct some or all of the outcomes of a mediation."[72] I refer to a mediator who "urges/pushes parties to accept . . . settlement."[73] Such interventions, however, do not rightly belong on the same continuum as most other evaluations, because, as I maintained above, evaluations are not necessarily intended to direct an outcome and do not always have that effect. In retrospect, I should have labeled them "directive"[74] and distinguished them from "evaluative" interventions which, as explained above, can be either directive or non-directive, or both.

If we put "directive" at one end of the role-of-the-mediator continuum, what would serve at the other end? "Non-directive" springs to mind immediately; however, it carries a connotation from psychotherapy that might cause confusion.[75] "Elicitive," which has a history of use in writing about mediation, seems to fit better.[76] It implies that the mediator draws something from the parties—ideas, issues, alternatives, proposals. In Part II.A., I set forth a "New Old Grid" of mediator orientations that employs these terms.[77]

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71 *See* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 778, 787 (1999).

72 Riskin, *Understanding*, *supra* note 3, at 24.

73 *Id.* at 35.

74 Other commentators have used the term "directive" in describing mediator activities or approaches or orientations. In 1997, for example, John Lande used "directive" in the place of "evaluative." *See* Lande, *supra* note 23, at 850 n.40. Simon Roberts used "directive intervention" to describe one of three models of family mediation (the others being "minimal intervention" and "therapeutic intervention"). Simon Roberts, *Three Models of Family Mediation*, *in* DIVORCE MEDIATION AND THE LEGAL PROCESS 144, 145 (Robert Dingwall & John Eekelaar eds., 1988).

75 *See* CARL R. ROGERS, COUNSELING AND PSYCHOTHERAPY: NEWER CONCEPTS IN PRACTICE 115–28 (1942).

76 Other commentators also have used the term "elicitive" to describe approaches to mediation. *See, e.g.*, Peter T. Coleman, *Intractable Conflict*, *in* HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 440 (Morton Deutsch & Peter T. Coleman eds., 2000) ("Elicitive approaches to conflict intervention, particularly when working across cultures, tend to be more respectful of disputants, more empowering and sustainable, and generally more effective than prescriptive approaches."). Professor John Paul Lederach has developed "prescriptive" and "elicitive" ideal types to describe conflict resolution training designed to produce a mediation model that makes sense for a given culture. JOHN PAUL LEDERACH, PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES 63–100 (1995).

77 *See infra* Figure 3.

2. The Narrow-Broad/Problem-Definition Continuum

The narrow-broad/problem-definition continuum has significant limitations, too. As indicated below, however, I think it is worth retaining.

a. Description

When I developed the grid, most well-known authorities held that the great virtue of mediation, its highest use, was to help the parties address—in addition to their positional claims—what was really at stake for them.[78] This basic idea appeared in various formulations. Some spoke of the parties' underlying interests, the goals or motivations that prompted their positions.[79] Others talked about healing or repairing relationships, reconciliation, or genuine resolution (as opposed to just settling).[80] And virtually all mediation training programs at that time emphasized such approaches. However, a large proportion, perhaps a majority, of mediations—especially those involving matters that the parties planned to present in court—maintained a much narrower focus.[81] And, of course, this narrow focus was just what many lawyers and their clients wanted—or thought they wanted.[82] But many were unaware that they might have had choices in defining the subject matter in mediation.

I tried to capture this issue through the idea of "problem-definition." I had observed that many mediators tended to define the subject matter of a mediation in a routine or fixed manner. To the extent that the problem-definition depends on the mediator's mindset, mediators who maintain a narrow focus may deprive parties of the opportunity to explore their underlying interests or the roots and relational aspects of their conflict, and mediators who allow or encourage a broad focus may provide this opportunity.[83] I labeled the

78 *See* Riskin, *supra* note 27, at 34.

79 *See* JOHN M. HAYNES, DIVORCE MEDIATION 10–11 (1981); F.S.C. Northrop, *The Mediational Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347, 350–51 (1958).

80 *See* MARK S. UMBREIT, MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE *passim* (1995); Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308–09 (1971); Riskin, *supra* note 27, at 34.

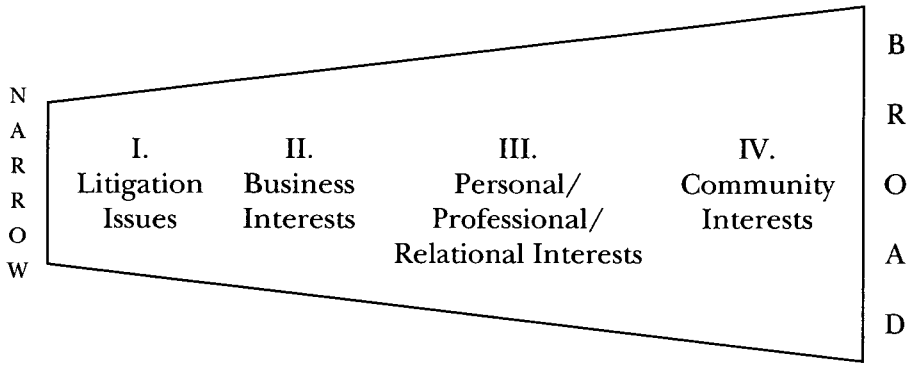
81 McAdoo and Hinshaw's recent survey, which asked Missouri lawyers how often mediators "[e]ncourage addressing issues beyond the legal causes of action, determined that 2 percent '[a]lways' and 21 percent '[u]sually' did so." McAdoo & Hinshaw, *supra* note 33, at 523.

82 McAdoo and Hinshaw's survey of Missouri lawyers concluded that 87% thought it important that a mediator "knows how to value a case." *Id.* at 524.

83 Riskin, *Understanding*, *supra* note 3, at 18–23.

poles of the problem-definition continuum *narrow* and *broad*, and illustrated a range of ways in which the problem—or subject matter—of a mediation could be defined.[84] In a dispute over reimbursement of travel expenses under a computer services contract, for instance, the problem could include litigation issues, business interests, personal/relational interests, or community interests. In this way, I *hoped to highlight the existence of choices* about what I considered the most important aspects of mediation—its focus and purposes.

FIGURE 2. PROBLEM-DEFINITION CONTINUUM



b. Problems

Overall, this continuum has drawn much less attention than the facilitative-evaluative continuum. Some have adopted it without comment, I assume because it made sense to them and appears easy to use.[85] Others have ignored it.[86] I am aware of no written criticisms. There are, however, several problems with this continuum or the way in which it has been used. The first results from the structure: The problem-definition continuum seems to obscure the dynamic relationships between different problem-focuses, the approaches and strategies of the mediator, and the wishes and actions of the parties or their lawyers. As I presented it, this continuum refers mainly to the media-

84 *See infra* Figure 3.

85 *See, e.g.*, Lela Porter Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, PEPP. DISP. RESOL. J. 255, 262 (2001); J.H. Wade, *Problem Definition*, 9 BOND DISP. RESOL. NEWS, May 2001, at 9.

86 *See, e.g.*, Birke, *supra* note 5 *passim*; Stempel, *Real Dichotomies*, *supra* note 5 *passim*; Stempel, *Inevitability*, *supra* note 5 *passim*; Jean R. Sternlight, *Lawyers, Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 *passim* (1999).

tor's tendency to be open to a broad conceptualization or deep investigation of the problem, and to assist the parties, if they are willing, toward a similar openness. In fact, a broad focus usually includes the narrow. In addition, attention to narrow issues may make it possible to focus more broadly. It may be essential, for example, to resolve a narrow issue, such as the amount of compensation, before addressing a "broader" issue, such as the parties' relationship—or vice versa. Thus, many mediators who begin with a broad approach will "retreat" to a narrow one if the parties so desire. Mediators who are open to a broad focus tend to jump around on this continuum, while mediators who are not open to such a perspective would tend to stay at the narrow end. It is easy for users of the grid to ignore these dynamic relations because the grid, in seeking to describe orientations or approaches, does not recognize a time dimension.

i. The Narrow-Broad/Problem-Definition Continuum May Not be Suitable for Describing Some Mediation Goals and Approaches

When I developed the grid system, I believed that the narrow-broad/problem-definition continuum would be useful in describing the goals or focus of virtually *any* mediation. But some commentators and practitioners apparently have disagreed; they may have ignored the problem-definition continuum—or the grid system—partly because they thought it did not or could not convey ideas about mediation goals or processes that they wanted to emphasize. For example, the principal goal of "transformative" mediation, as described by Bush and Folger, is to improve the parties themselves through "empowerment and recognition";[87] practitioners of transformative mediation approach both the process and content in an elicitive fashion.[88] I would, therefore, label this approach facilitative (elicitive, in the new terminology I recommend below) and broad.[89] In my way of thinking, the goal, or "problem," becomes improving the parties them-

87 BUSH & FOLGER, *supra* note 5, at 3.

88 *See* Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MED. Q. 263 *passim* (1996). *But see* Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 238 (1995) (arguing that Bush and Folger's approach would have mediators "orchestrate" the communication).

89 *See* Riskin, *Understanding*, *supra* note 3, at 20, 33. Jeffrey Stempel considers transformative mediation "a subset of facilitative mediation," although he recognizes that transformative "purists" would likely disagree. Stempel, *Real Dichotomies*, *supra* note 5, at 384.

selves. Professors Bush and Folger, however, contrast transformative mediation with what they call "problem-solving mediation,"[90] by which they mean mediation intended to settle a dispute.[91]

And in "narrative mediation," as developed by John Winslade and Gerald Monk, the mediator helps shape the parties' perspective on the dispute by eliciting their "stories" or senses of "meaning," rather than emphasizing "facts."[92] I also have considered this approach facilitative and broad. Winslade and Monk, however, like Bush and Folger, have contrasted narrative mediation with "problem-solving" approaches. I suspect that they, too, would find "problem-definition" uncomfortably close to "problem-solving."[93]

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90 BUSH & FOLGER, *supra* note 5, at 59–75. This has prompted confusion because that term, in much of the negotiation literature, refers to interest- or needs-based approaches as opposed to position-based or adversarial approaches. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). In the past few years, problem-solving has taken on a broader meaning in legal education. *See* Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785 (1999).

91 In Lisa Bingham's words, "Practitioners of the transformative model might well argue that the Riskin grid does not capture what they do, because it is off the scale on the facilitative end and qualitatively different from practice as described in his article." Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 118.

Perhaps John Lande's perspective can resolve this problem. He thinks of "empowerment and settlement as goals for mediation whereas facilitation and evaluation are techniques that mediators use." Lande, *supra* note 5, at 323.

92 WINSLADE & MONK, *supra* note 5, at 125–26.

93 Barbara Ashley Phillips calls her approach "problem-solving/transformative." PHILLIPS, *supra* note 5, at 73.

The problem-definition continuum also does not address some of the issues identified by Ellen Waldman in her system of classifying mediations—and setting the mediator's role—based on whether the mediation is "norm-generating," "norm-advocating," or "norm-educating." Waldman, *supra* note 5 *passim*.

There may be other important concepts about mediation, or approaches to it, that the problem-definition also cannot capture adequately—at least to the satisfaction of proponents of those approaches. Take the metaphor of depth, for instance, which Bernard Mayer has elaborated, MAYER, *supra* note 64, at 115–16, and which I assumed the narrow-broad problem-definition continuum would cover. Mayer focuses on three dimensions of resolution—cognitive, behavior, and emotional—and maintains that the neutral should help the parties understand and seek to resolve their conflict at the "appropriate level of depth . . . deep enough to address the real concerns that people have that are motivating their engagement in a particular conflict, but not so deep as to require them to work through fundamental life issues that are beyond their practical motivation." *Id.* at 115. Can the narrow-broad/problem-definition continuum bring focus to this issue, or would it be better to use "deep-shallow" interests? In preparing the grid, I considered using "depth" instead of

These examples suggest why many in the field prefer to use concepts other than the narrow-broad problem-definition continuum to describe the goals and scope of some mediations.

ii. Some Commentators Have Confused or Conflated This Continuum with the Role-of-the-Mediator Continuum

Many commentators display no interest in the dimension depicted by this continuum.[94] Others have confused or conflated this continuum with aspects of the facilitative-evaluative/role-of-the-mediator continuum. I believe that they assume (1) that a facilitative mediator approach would produce (or give the parties an opportunity to produce) a broad problem definition;[95] or (2) conversely, that an evaluative mediator approach would produce a narrow problem definition.[96] In other words, these commentators apparently believe that a mediator with a facilitative orientation would employ facilitative techniques not only in working toward resolving substantive issues, but also in setting the problem-definition, and that this would lead to a broad problem-definition, or at least would allow the parties to select a broad problem-definition. Similarly, they also seem to have assumed that "evaluative" mediators would tend to impose a narrow problem-definition.[97]

Such assumptions, however, are wholly unwarranted. An evaluative mediation approach would lead to a narrow problem-definition only if the mediator's approach to problem-definition is evaluative *and* narrow.[98] Likewise, a facilitative mediation approach would lead to (or make possible) a broad problem-definition only if the approach is facilitative *and* broad.[99]

"breadth"; one problem was that the opposite of "deep" was "shallow," which had a pejorative quality I wanted to avoid.

94 *See supra* note 86.

95 *See, e.g.*, Birke, *supra* note 5, at 317 ("It is the hope of the facilitative mediator that by finding shared and different interests a bargaining range may be created and, furthermore, that conflicting interests can be overcome."); Stempel, *Real Dichotomies*, *supra* note 5, at 377; Stempel, *Inevitability*, *supra* note 5, at 288–89.

96 *See, e.g.*, Stempel, *Real Dichotomies*, *supra* note 5, at 377; Stempel, *Inevitability*, *supra* note 5, at 288–89; Zumeta, *supra* note 5, at 337.

97 *See* Bingham, *supra* note 91, at 118; Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 98.

98 *See* Riskin, *Understanding*, *supra* note 3, at 26–28, 29–31.

99 *See id.* at 32–33, 45. Two well-known authorities on mediation have told me they do not believe that the orientation I described as facilitative-narrow exists in practice. In fact, however, the creation of the grid was greatly influenced by my extensive exposure to such practices, in which the mediator simply directs the process in such a way that the parties have no ready opportunities to discuss underlying interests or

Despite these problems, I think the problem-definition continuum is quite useful for bringing attention to the question of what will be the focus or goal of a mediation.

3. The Absence of a Distinction Between Procedure and Substance

One cause of the confusion and conflation described in Part I.B.2.b.ii is what I now see as the dominant conceptual weakness in my writings about the old grid—their failure to distinguish between the

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relationship issues. In my view, such mediators are directive as to the process and the role of the mediator and are directive as to the problem-definition. However, when working within that narrow problem—to understand or resolve it—their behavior is very elicitive (facilitative in the old terminology). Thus, for example, they would ask the lawyers questions about the strengths and weaknesses of their cases and the likely outcomes, rather than making statements (evaluations) about such matters. And they would not intend to direct the parties toward a particular resolution; instead, they would try to elicit the solution from the parties. The self-determination goal holds an important place for such mediators, but the self-determination applies to the outcome, not the process. For an elaboration of this distinction, see Welsh, *supra* note 15, at 4.

To the extent that the notion of an overall mediator approach is descriptively useful (an idea on which I cast doubt, *see infra* text accompanying notes 111–17), the facilitative-narrow approach was quite common at the time I developed the grid system, especially in mediations involving personal injury cases in which insurance is a major factor. (It seems likely that in the ensuing years, in non-family, court-connected mediations, the use of evaluative interventions has become almost routine.) *See* Welsh, *supra* note 34, at 805.

My model for the narrow-facilitative quadrant was provided by Midwest Arbitration & Mediation, then the Kansas City office of U.S. Arbitration & Mediation, which mediated primarily personal injury claims. The mediators (or the program itself) were very evaluative (directive) about the problem-definition; it coincided with the problem-definition typically employed by the lawyers and claims adjusters who used this service: how much money the defendant's insurer would pay the plaintiff, and when. These mediators and the organization also were directive about the role of the mediator; the mediator would not evaluate—i.e., make predictions about outcomes in court or assess the strengths and weaknesses of either side's case or push the parties to reach an agreement. Thus, for example, the mediators would ask the lawyers questions about the strengths and weaknesses of their cases and the likely outcomes, rather than making statements (evaluations) about such matters. And they would not intend to direct the parties toward a particular resolution; instead, they would try to elicit the solution from the parties (facilitate in the old terminology). I cannot document this by reference to any writings; however, in about 1985, I attended an advanced mediation training based on that model, conducted for Midwest Arbitration & Mediation mediators by Alan Alhadeff. (Alhadeff stopped using that model some time ago. Interview with Alan Alhadeff, Mediator, in Seattle, Wash. (April 4, 2002).) Since that time I have twice observed mediations in which U.S. Arbitration & Mediation mediators employed this model, and I have discussed the model with them and with others associated with the organization.

mediator's behavior in two aspects of mediation: (1) dealing with the substance of the dispute (i.e., understanding and addressing substantive issues); and (2) decisions that concern the procedures employed in the mediation. Because it lacked this distinction, the system did not recognize that the mediator's approach can be radically different in these spheres; for example, a mediator can be very directive (evaluative in the old terminology) in determining how aspects of the process would work (e.g., *whether* he would provide an evaluation, or whether private caucuses were included) and in establishing a problem-definition (say, a narrow one), but very elicitive (facilitative in the old terminology) in conducting the process within these parameters.[100] Barry Werth's *Damages*, an in-depth study of a medical malpractice case, provides an excellent example of such an approach in describing the work of mediator David Ferguson.[101] Ferguson described his approach as "facilitative."[102] And in helping the parties to understand and work to resolve the issue of how much the defendant's insurer would pay the plaintiff, he was very facilitative (elicitive in the new terminology). But, apparently, he was directive in determining an aspect of the process, i.e., in deciding he would not provide an evaluation even though the lawyers seemed to want him to do so.[103] Another mediator might have been elicitive as to what the mediator's role should be, and tried to accommodate the parties' wishes for an evaluation—either by giving one or by arranging for a neutral expert to give one.

Similarly, some mediators are very directive about determining the problem-definition, but elicitive in helping the parties work toward a resolution. Others may be elicitive in setting the problem, but directive in helping the parties resolve it.

My 1994 and 1996 writings on the grid largely ignored decisionmaking about procedure;[104] they seemed to treat the mediator's ori-

100 Kovach and Love pointed toward this idea in 1998. *See* Kovach & Love, *supra* note 14, at 94 n.128 ("A mediator can be 'directive' with respect to process decisions without 'evaluating' the case.").

101 WERTH, supra note 37, at 313–25.

102 *Id.* at 299.

103 I am making some inferences here. It seems likely that since the mediator was not a lawyer, he did not feel capable of predicting what would happen in court or providing lesser evaluations. In addition, one of the lawyers had participated previously in a mediation with this mediator, so he may have or should have known about the mediator's unwillingness or inability to give evaluations based on what would happen in court. And it is not entirely clear that the lawyers explicitly asked the mediator for an evaluation.

104 *But see* Riskin, *Understanding*, *supra* note 3, at 33 (describing how facilitative mediators help parties understand one another's situation).

entation as fixed, simply a factor with which the parties had to deal, because I wanted to underscore the problem of rigid behavior by mediators.[105] I did not address *how* the mediator, the parties, or both do or could or should go about deciding how the process would work or its focus. Most other writers likewise have not paid much attention to this issue.[106] Yet process decisions offer countless choices and opportunities for the development—or suppression—of self-determination.[107] And the importance of the distinction between the mediator's predispositions or tendencies as to substance and process undercuts the utility of using either the old grid[108] or its replacement[109] to describe a mediator's general orientation toward mediation.

4. Static Quality, Time, Other Possible Dimensions, and the Idea of Overall Mediator Orientations

I have explained above that the grid has a static quality, which I also acknowledged in 1996.[110] In claiming that the grid depicted overall mediator orientations, I ignored both the time dimension and the influence of the parties and their lawyers, i.e., the dynamic, interactive processes that characterize many mediations.[111] Because the problem-definition and the activities of the mediator can vary from

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105 Of course, I hoped that the grid would help parties and mediators negotiate about how the process would work and its goals, and many have used it for that purpose.

106 Prominent exceptions include Golann, *supra* note 5 *passim*; Kovach & Love, *supra* note 14, at 94 n.128. Professor Lisa Bingham has approached this issue from a more structural perspective, distinguishing between the degree of party self-determination at the system design level and in the dispute resolution process in an individual case. *See* Bingham, *supra* note 91, at 103–08.

107 *See id. passim.*

108 *See supra* Figure 2.

109 *See infra* Figure 3.

110 *See* Riskin, *Understanding*, *supra* note 3, at 35.

111 In the 1996 grid article, I wrote:

> At this point, I wish to simply describe—and to describe simply—the proposed system of categorization. For convenience, I sometimes will write *as if* the mediator alone defines the problem and selects the strategies and techniques she will employ. However, the question of how the mediator and the parties do, can, and should determine the scope and nature of a given mediation is extremely complex. Accordingly, I plan to avoid it in this Article and address it in a subsequent work.

Riskin, *Understanding*, *supra* note 3, at 26 n.60.

In this Article, I am not quite fulfilling that promise to deal with how participants *should* go about making decisions about the mediation process: I am, however, providing a system that should help them make such decisions. *See infra* Part II.

moment-to-moment, using any one construction of the grid to describe an entire mediation or a mediator's approach is like using one map to show the national boundaries in Central Europe during the 1990s. Such two-dimensional and static graphics cannot show change.

Another problem is that the grid takes account of only two dimensions of mediator behavior. When selecting a mediator or participating in a mediation, however, one might want to know about a variety of mediator characteristics. These might include the mediator's intensity or persistence,[112] timing,[113] transparency,[114] or the extent to which the mediator employs private caucuses, listens well, uses humor or deception, brings a dog,[115] or serves food.

Recalling the insight of George Box that prefaced this Article—"All models are wrong but some are useful"[116]—it must be obvious from the foregoing that I now doubt the usefulness of the idea of overall mediator orientations as a device for describing or understanding a particular mediator.[117]

II. THE PROPOSED NEW GRIDS AND NEW UNDERSTANDINGS

In Part I, I noted a series of problems with or limitations of the old grid. I suggested that both the structure and terminology of the facilitative-evaluative/role-of-the-mediator continuum have caused confusion and that the narrow-broad/problem-definition continuum

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112 David Geronemus and Margaret Shaw have identified how actively mediators intervene in the parties' barganing. Geronemus & Shaw, *supra* note 60, § 35-3.

> For example, if one side asks the mediator to convey an offer that the mediator believes may be unproductive, the mediator may respond in a variety of ways. Arranged from the least interventionist to the most interventionist these include: (1) conveying the offer, (2) asking questions about how the other side will react to the offer, (3) stating the mediator's view of how the other side will react, and (4) refusing to convey the offer unless it is reformulated.

Id.

113 David Geronemus and Margaret Shaw have noted another important aspect of time. Some mediators—or mediators in some programs—tend to do most of their work before and during the mediation sessions, while others begin earlier and remain involved, "until the case is definitively settled, adjudicated, or the parties insist that the mediator go away." *Id.*

114 Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1 *passim* (1997).

115 *See* Robert D. Benjamin, *Dogs as Conflict Mediators*, 19 MEDIATION NEWS, Dec. 2000, at 10–11.

116 Box, *supra* note 1, at 202.

117 I do think the idea has some utility if we consider the orientations as "ideal types," though in 1996, I did not seek to use them in that fashion. Riskin, *Understanding*, *supra* note 3, at 26 n.60.

remains useful, even though it may not be capable of describing certain kinds of mediation behaviors, and even though many commentators have ignored or misunderstood it. In addition, I suggested that the grid misses important issues because it: fails to distinguish between the mediator's behaviors with respect to substance and process; has a static quality that ignores both the interactive nature of mediation decisionmaking and the elements of time and persistence; is grounded on the idea of overall mediator orientations—an unrealistic notion that excludes attention to many other issues in mediator behavior, obscures much about what mediators do, and ignores the role and influence of parties.

In this Part, I offer two proposals. The first revises the old grid to deal with the terminological problem discussed above; on this "New Old Grid," "elicitive" and "directive" fill in for "facilitative" and "evaluative." The second proposal replaces both the old and the new mediator orientation grids with a new grid system, a series of grids meant to address most of the problems associated with the old grid.

A. *Revising the Grid: A "New Old Grid" of Mediator Orientations Using "Directive" and "Elicitive"*

For reasons given above, I believe the terms "directive" and "elicitive" would serve better than "evaluative" and "facilitative" to anchor the role-of-the-mediator continuum.[118] First, they more closely approximate my goal for this continuum, which was to focus on the impact of the mediator's behavior on party self-determination.[119] Second, the term "directive" is more general and abstract than "evaluative" and therefore may cover a wider range of mediator behaviors. Figure 3 shows a "new old grid" on which the terms "directive" and "elicitive substitute for "evaluative" and "facilitative."[120]

This "New Old Grid" of mediator orientations can better help us understand a range of mediator behaviors by focusing on the extent to which *almost any conduct* by the mediator *directs*[121] the mediation process, or the participants, toward a particular procedure or perspective or outcome, on the one hand or, on the other, *elicits* the parties' perspectives and preferences—and then tries to honor or accommodate them. Thus, it gets much closer to the fundamental nature—and

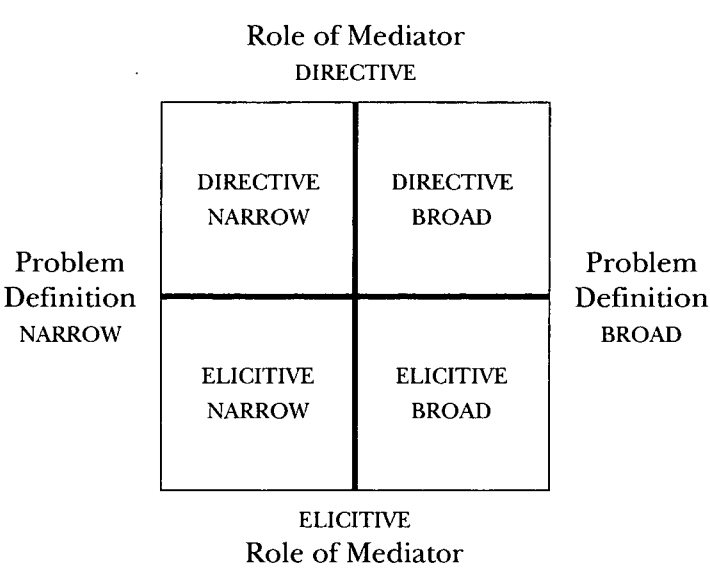
118 *See supra* text accompanying notes 63–68.

119 *See supra* text accompanying notes 74–76.

120 For a discussion of problems with the facilitative-evaluative terminology, see *supra* text accompanying notes 62–76.

121 *See supra* note 74.

FIGURE 3. THE "NEW OLD GRID": MEDIATOR ORIENTATIONS



intent and impact—of various kinds of mediator behaviors, especially as they affect party self-determination.[122]

I do not mean to assert that all elicitive behavior enhances party autonomy and all directive behavior undermines it. Directive mediator behavior almost always impairs party autonomy in the very short run; however, sometimes it also may be essential for fostering party autonomy. For example, a mediator may have to be directive in establishing and enforcing certain ground rules and pursuing particular lines of inquiry in order to protect one or more of the parties' ability to exercise their influence.[123] Using the terms "directive" and "elici-

122 Standards of practice and ethics for mediators invariably emphasize the mediator's obligation to foster self-determination by the parties. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS std. I (1994); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION std. I (2000); *see also* Welsh, *supra* note 15, at 33–57.

123 The mediator must be responsible for establishing and maintaining an environment in which the parties can work toward a resolution, and that inevitably requires that the mediator does some directing. Indeed, typically the parties will want the mediator to do that. In my own experience, when I ask the parties whether we should do this or that, they generally defer to me. So I elicit first, and then direct based on the parties' wishes that I have elicited.

In a sense, a mediator cannot help directing aspects of the process. Virtually everything the mediator does directs the parties' attention toward certain issues and, at least temporarily, away from others. The decision about who speaks first can have a powerful effect on determining the dominant "story" of the dispute for purposes of the mediation. *See* Sara Cobb & Janet Rifkin, *Neutrality as a Discursive Practice: The*

tive" also can help us recognize that mediators can direct (or push) the parties toward particular outcomes through "selective facilitation"—directing discussion of outcomes the mediator favors, while not promoting discussions of outcomes the mediator does not favor—without explicitly evaluating a particular outcome.[124]

Although I proffer this "New Old Grid" of mediator orientations, I have substantial reservations about using it, because it retains many of the limitations of the old grid. First, the very idea of an overall orientation could imply, to some, a kind of rigidity in a mediator, an unwillingness to respond to circumstances.[125] Thus, it may impair the mediator's ability, and that of the parties and their lawyers, to approach situations with an open mind. Second, as demonstrated above in connection with the old grid, it is nearly impossible—and generally unwise—to label a particular mediator with an overall orientation.[126] The change in terminology does not solve this problem, as it does not help us escape the kinds of complexities and ambiguities discussed above in connection with the evaluative-facilitative terminology.[127] For example, almost every mediator will direct on some issues and elicit on others. And nearly any move by a mediator can have both directive and elicitive aspects or intents or effects. Thus, a mediator might direct the parties toward a particular understanding of their situation in order to elicit options from them.[128] Similarly, when a mediator asks whether one party would consider a future business relationship with the other, this obviously has an elicitive thrust. But merely asking the question can be directive, too, in the sense that it

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Construction and Transformation of Narratives in Community Mediation, *in* 11 STUDIES IN LAW, POLITICS, AND SOCIETY 69, 71–73 (Austin Sarat & Susan S. Silbey eds., 1991). Many mediators typically direct the order by simply asking a particular side to proceed (usually the side that initiated the claim). But other mediators may elicit, by asking the parties whether either would prefer to go first. We could notice a similar distinction in mediators' behavior as to the order in which to take up issues.

124 *See* David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989). Although the mediator described in this article may have evaluated a bit, *see, e.g.*, *id.* at 635, she promoted the options that she and the wife favored by directing discussions toward those options and not directing discussions toward the options that the husband favored.

125 We should acknowledge the existence of such attitudes, but not encourage them.

126 *See supra* text accompanying notes 111–17.

127 *See supra* text accompanying notes 63–76.

128 For a fuller discussion of this issue and related ones, see *infra* notes 144–45 and accompanying text.

directs the party's attention toward a particular issue and, at least for the moment, away from other issues.

In other words, there is a complex, dynamic quality in the relationships between directive and elicitive mediator moves. They often travel in tandem, and a particular move can have both directive and elicitive motives and effects. And there's more to say: Directive and elicitive moves each contain the seeds of the other and yield to the other. For example, as a mediator becomes very directive—say, pushing parties to reach an agreement—if such direction does not produce an agreement, she may need to become more elicitive in order to allow the parties to provide their own "direction" in working out a solution. In other words, too much directive behavior must yield to elicitive behavior.[129]

Such mediator moves also have a dynamic relationship with the problem-definition and with the contributions of the parties. If working within a narrow focus does not produce a satisfactory agreement, for instance, one way to deal with this would be to broaden the focus. In some cases, the parties or lawyers would have come forward with directive behavior of their own, e.g., insisting on playing strong roles or defining the problem more broadly. All of this suggests, of course, that the relationship between mediator directiveness and self-determination is often complex and sometimes hard to ascertain.

The "New Old Grid" of mediator orientations is more useful than the old one in providing a quick overview. Yet, like the old grid, it resembles a map that shows only major highways and large cities. On such a map, additional information—such as smaller towns, smaller roads, rivers, airports, recreation areas and ball parks, topography, and weather—could inform and remind travelers of choices and decisions that can enrich their journeys. People concerned about mediation—mediators, consumers, trainers, regulators—also could benefit from maps of mediation that highlight particular issues. With this in mind, I put forth a series of other new grids in Part II.B.[130]

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129 Professor Lela Love said that she "notice[s] that direction produces resistance and that elicitation produces requests for direction (trust)." E-mail from Lela Love, Professor, Cardozo School of Law, Yeshiva University, to Leonard L. Riskin, Professor, University of Missouri-Columbia School of Law (Jan. 25, 2002) (on file with author). Professor Valerie Sanchez has explored a similar dynamic in negotiation. *See* Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669, 685–90 (2003).

Another example of the difficulty of labeling a move as directive *or* elicitive is a situation in which a mediator, in working to design the mediation process, elicits from the parties the wish that the mediator be directive as to particular issues.

130 It would be possible to prepare additional versions of the "New Old Grid" and commentary that respond to some of its problems that I described above. However,

B. Replacing the Mediator Orientation Grids: The "New New Grid" System[131]

I intend the "New New Grid" System to facilitate good mediation decisionmaking by bringing attention to two matters: an enormous range of potential decisions in and about a mediation, and the extent to which various participants could affect these decisions. The system works through a series of grids that—rather than focusing exclusively on the mediator, as did the old grids—give equal attention to all the participants, which ordinarily means the mediator, the parties, and the lawyers. In addition, the grids allow us to take account of time and the potentially dynamic nature of decisionmaking.

The system makes central the idea of participant "influence" with respect to particular issues. It provides a method for considering the influence that participants aspire to exert, actually exert, and expect others to exert, with respect to any of a wide range of decisions. It does this by dividing mediation decisionmaking into three categories: substantive, procedural, and meta-procedural.

1. Types of Decisionmaking

Substantive decisionmaking includes trying to understand substantive issues, such as what happened to give rise to the dispute, and trying to make agreements intended to resolve the dispute. It also includes establishing the problem-definition, i.e., the subject of the mediation.[132]

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any grid based on mediator orientations has two inherent problems that limit its utility in fostering the more refined understanding of mediation that is appropriate in today's more sophisticated mediation environment. First, the focus on the mediator tends to neglect the role of the parties and lawyers and the complex relationship between what they want and do and what the mediator wants and does. Second, as I have elaborated above, the focus on the mediator's *orientation* obscures what the mediator actually does.

131 I call this the "New New Grid" System to distinguish it from the "New Grid" System set forth in two recent, very brief articles. *See* Riskin, *Retiring and Replacing*, *supra* note 3; Riskin, *Who Decides What?*, *supra* note 3, at 22. For a listing of the various grids I have presented, see *supra* note 3; for an explanation of the relationships between the "New Grid" System and the "New New Grid" System, see *infra* note 138.

132 A variety of goals and problem-definitions are conceivably appropriate for a given mediation. For a discussion of problem-definitions, see *supra* Part I.B.2. The most common understanding about the goals of mediation appears in the preface to the Joint Standards: "Mediation is a process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute." *Preface to* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994). Professors Robert A. Baruch Bush and Joseph Folger, however, have promoted "transformative" mediation, in which the goal is to im-

Procedural decisionmaking means deciding what procedures will be employed to reach or address the substantive issues. Here is a list of potential procedural issues, which overlap to some extent.[133]

Logistics:

Location.

Time (dates, starting and ending times, number and length of sessions).

Pre-mediation submissions:

Required or optional?

Short letters, mediation briefs, litigation or other documents.

Should submissions include: legal analyses, underlying interests, goals for the mediation, or obstacles to achieving these goals?

Who receives the submissions: just the mediator, or all participants?

Attendance and participation:

Who attends?

Roles of lawyers, clients, experts, others.

Procedure during the mediation:

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prove the parties through "empowerment and recognition." BUSH & FOLGER, *supra* note 5, at 139–88. They contrast transformative mediation with mediations intended to resolve or settle disputes, which they call "problem-solving." The California Standards recognize the independent value of the goal of developing understanding. They define mediation as "a process in which a neutral person or persons facilitate communication and negotiations between the disputants to assist them in reaching a mutually acceptable agreement, *or a better understanding of each participant's interests, needs, values, and options.*" STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS pmbl. (Cal. Disp. Resol. Council 2000), *available at* http://cdrc.net/pg2.cfm#def (emphasis added). Recent Model Standards of Practice for Family and Divorce Mediation also give the goal of developing understanding equal billing with the goal of reaching agreement: "The primary role of the family mediator is *to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others* and to facilitate agreement among the participants." MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION std. I (2000) (emphasis added). A recent videotape illustrates an approach to mediation—elaborated by Gary Friedman, Jack Himmelstein, and Robert Mnookin—that seeks to resolve conflict through developing understanding. Saving the Last Dance, *supra* note 35. Bernard Mayer helpfully describes the following major "beliefs" about the purposes of conflict resolution: reaching an agreement, promoting personal transformation, addressing injustices in society, developing understanding, and addressing "everyone's procedural, psychological, and substantive interests." MAYER, *supra* note 64, at 108–15.

133 For an extensive discussion of how the resolution of some of these issues affects the quality of decisionmaking, see Lande, *supra* note 23, at 857–79.

Opening statements—Which side goes first? Do lawyers *and* clients speak? What is the focus of these statements?

Caucuses—Whether, when, why, and how to call caucuses. Who can call them? Whether to maintain confidentiality of communications?

Ending the mediation. Who decides?

Expressing the agreement in writing:

Whether, when, why, how, and by whom? How formal or legally-binding should the document be? Who decides?

Procedures for defining the problem(s) to be mediated (and/or deciding on the purposes of the mediation):

To what extent, if any, will the problem be defined by: The parties, e.g., through pre-mediation statements, pre-mediation briefs, or statements made during the mediation? The mediator, e.g., through the questions he asks the other participants? The mediation program managers, designers or sponsors, implicitly or explicitly? All the participants, through dialogue?

Developing options:

Will it happen? If so, when, how, and by whom?[134]

Developing and presenting proposals:

By whom, when, how, where?

Evaluation:

Will/should the mediator evaluate or arrange for evaluation? If so, how, what, why, and under what conditions and standards?

Reaching agreement:

Will the mediator apply pressure on the parties or lawyers to reach a particular settlement? Settlement in general?

The mediator's role:

Will the mediator direct or elicit as to particular procedural and substantive issues?

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134 For a discussion of the costs and benefits of generating options in negotiation, see Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601 (2003).

Will the mediator be transparent or obscure about the mediator's behavior?[135]

Will the mediator provide food?

Meta-procedural decisionmaking means deciding how *subsequent* procedural decisions will be made. The participants could make agreements, for instance, about who or what would determine any of a range of procedural issues, such as those mentioned above.[136]

A series of grids appears below. Each grid deals with a particular kind of decision and provides an example of an array of grids we could prepare that would shed light on particular aspects of decisionmaking in mediation. The concept that unifies the system is participant "influence"—the degree of influence that various participants either aspire to exert or actually exert with respect to a particular issue. On each of these grids, that concept is depicted on the north-south continuum. The north end of that continuum shows that most of the influence comes from the mediator; the south end shows parties and lawyers exerting most of the influence.[137] The east-west axis would depict a particular issue. Thus, the purpose of each grid in this series is to bring attention to the influence that each participant exerts (or would like to exert) with respect to a particular issue. A generic version of this grid appears in Figure 4.

2. Types of Decisionmaking Grids

Here are some examples of how grids could illuminate each of the three kinds of decisionmaking.[138]

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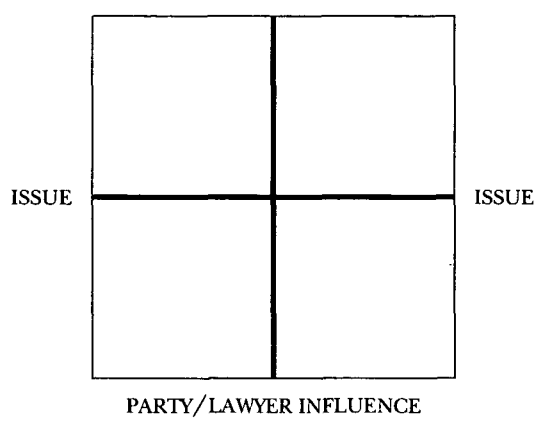
135 *See* Moffitt, *supra* note 114 *passim* (discussing the proper level of transparency in mediations).

136 *See supra* text accompanying note 132.

137 I considered using "control" instead of "influence." "Control," however, seems too strong, given the subtle ways in which participants affect the process, and one another, and the importance of attending to the potential or actual contributions of *all* participants.

138 In my previous brief efforts to produce a "new grid system," I presented only two categories of mediation decisionmaking, which I called the mediation process and the meta-process. *See* Riskin, *Retiring and Replacing*, *supra* note 3; Riskin, *Who Decides What?*, *supra* note 3. As I tried to explain that proposed grid system to various audiences, however, I noticed that the two categories sometimes confused me—as they did at least one other colleague. I think the "New New Grid" System that I present in this Article, which uses three categories of decisionmaking—substantive, procedural, and meta-procedural—is much clearer conceptually, at least standing alone. The two new-grid systems together, however, could engender even more confusion. So I suggest we all forget about the "New Grid" System and use the "New New Grid" System.

FIGURE 4. PARTICIPANT INFLUENCE (GENERIC GRID)



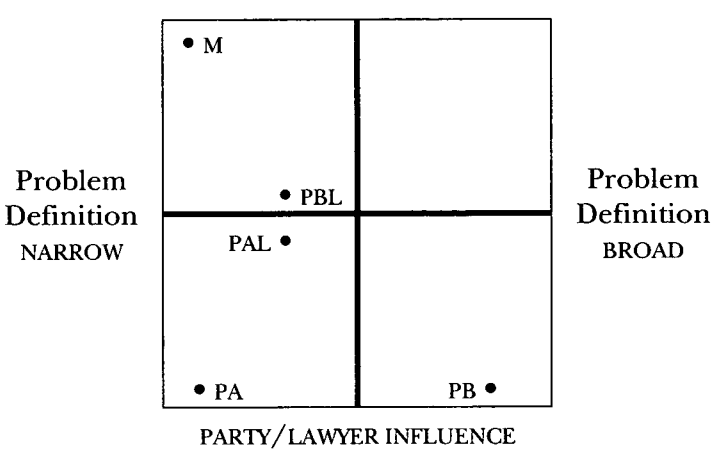
a. Substantive Decisionmaking Grids

Grids of substantive decisionmaking could deal with establishing the problem-definition or with understanding or resolving particular substantive issues. In addressing each of these focuses, I propose the use of two kinds of grids: one deals with participants' predispositions as to how that issue should be resolved and who should contribute to its resolution,[139] the second grid focuses on actual influence. The first grid would depict the participants' beliefs, attitudes or aspirations about a particular issue before the mediation or before the issue arises. Figure 5, for example, shows participant predispositions with respect to the substantive issue of problem-definition and their assumptions about the degree of influence they would, or would like to, exert with respect to this issue.

For those readers who are familiar with the "New Grid" System described in the brief articles, let me explain the relationship between the "New Grid" System and the "New New Grid" System: what I called the meta-process in the "New Grid" System includes what, in the "New New Grid" System, I call Meta-Procedural Decisionmaking and Procedural Decisionmaking. What I called the Mediation Process in the "New Grid" System appears in the "New New Grid" System as Substantive Decisionmaking.

139 A predisposition differs from an orientation, as I used that term in the old grid, in two ways. The idea of an orientation implies a certain constancy or consistency in attitudes and practices that have a pervasive impact on a mediation. A predisposition, however, refers to an attitude that exists at a particular moment—before the issue has actually arisen and before any of the participants knows the predispositions of the other participants; thus, it is inherently subject to change. In addition, a predisposition, as I use the term, applies only to a particular issue.

FIGURE 5. SUBSTANTIVE DECISIONMAKING: PREDISPOSITION REGARDING PROBLEM-DEFINITION



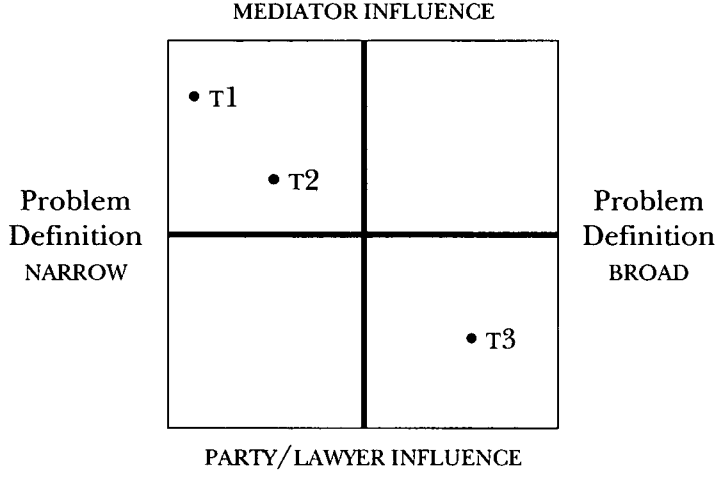
Point *M* shows that the mediator is predisposed to a narrow problem-definition and assumes that he or she would heavily influence the development of such a problem-definition. Point *PA* shows that party *A* is predisposed toward a narrow problem and definition and believes (or assumes) that he would exercise much influence in establishing that problem-definition. *PAL* shows that party *A*'s lawyer was predisposed toward a slightly broader problem-definition and assumed that his influence, combined with that of the mediator, would move the process toward it. *PB* shows that party *B* was predisposed to a broader definition of the problem and assumed that the parties or lawyers would exercise much influence or control over the process of reaching that problem definition. *PBL* would show that party *B*'s lawyer was predisposed toward a problem-definition of the same breadth as was party *A*'s lawyer and expected the mediator to play the strongest role in setting that definition.[140]

140 Notice that this grid does not make it easy to depict the expectations of a particular party or lawyer with respect to exactly who, among the parties and lawyers, would exercise influence over this issue. It would be feasible to depict such matters by using different colors or shades for each of the participants. This, of course, would detract from the simplicity I am trying to retain. Moreover, the purpose of this grid is not to accurately depict predispositions. Rather, I hope it can help participants become aware of their own and each other's predispositions, and thus facilitate the process of establishing the problem-definition.

Note, also, that this grid focuses on a particular moment in time, and it does not explain *why* participants hold particular predispositions. It is not clear, for example, the extent to which each participant's predisposition is related to assumptions about

The second kind of substantive decisionmaking grid would focus on actual influence. For instance, grids could show the operative problem-definition at various times during a mediation and the influences of the participants in setting that problem-definition, as illustrated in Figure 6.

FIGURE 6. SUBSTANTIVE DECISIONMAKING: INFLUENCE ON PROBLEM-DEFINITION AT VARIOUS TIMES



At *T1*, the mediation focuses on a narrow problem, and nearly all of the influence to develop that problem focus has come from the mediator. At *T2*, the mediation has a broader scope, and although the mediator's influence in developing that problem-definition still predominates, the parties and lawyers also have exercised some influence. At *T3*, the parties and lawyers have more substantially influenced the development of a broader problem-definition.

Alternatively, we could use separate grids to show the problem-definition at various times.[141] By using individual grids to depict par-

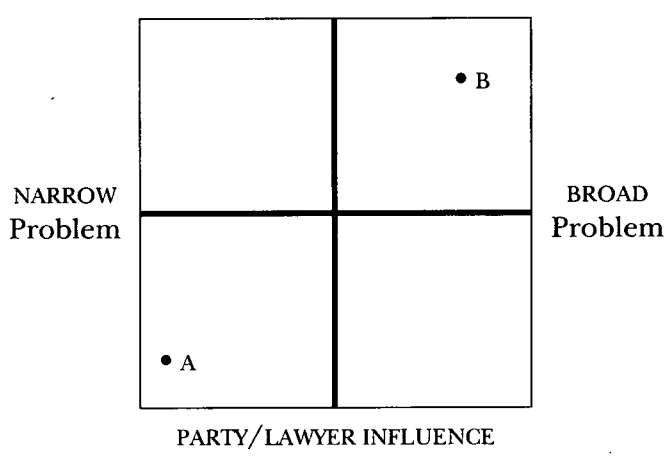
what others would want. Individuals' attitudes might change once they learn of the actual attitudes of others. Still, this sort of grid should be useful in helping participants focus on their own and each others' predispositions, thereby surfacing disparities, and allow them to discuss how and when to try to reconcile divergent views.

141 Figure 5 shows a way to depict each participant's *aspirations* with respect to an individual issue. Figure 6, however, does not present a way to separately identify the influence that individual parties and lawyers actually exert. (In real mediations, it often would be difficult or impossible to identify such influences.) I do not see this as a particular problem, because I do not expect the grids to provide accurate depictions of influence exerted by individual participants. Instead, I hope they will facilitate good decisionmaking by showing how each participant theoretically could influence a wide range of decisions.

ticular moments in a mediation, and considering each as a frame in a motion picture, it would be possible to get a sense of the flow of a mediation with respect to individual issues.[142]

Additional grids could bring attention to understanding and resolving particular substantive issues that fall within the problem-definition. On Figure 7, for instance, point *A* shows the parties or lawyers mainly influencing the *development of understanding* about a particular narrow problem, such as how much *X* will pay *Y*. Point *B* shows the mediator influencing the *understanding* of a broad problem, such as a breakdown in professional and personal relationships between *X* and *Y*.

FIGURE 7. SUBSTANTIVE DECISIONMAKING: INFLUENCE ON UNDERSTANDING PARTICULAR PROBLEMS



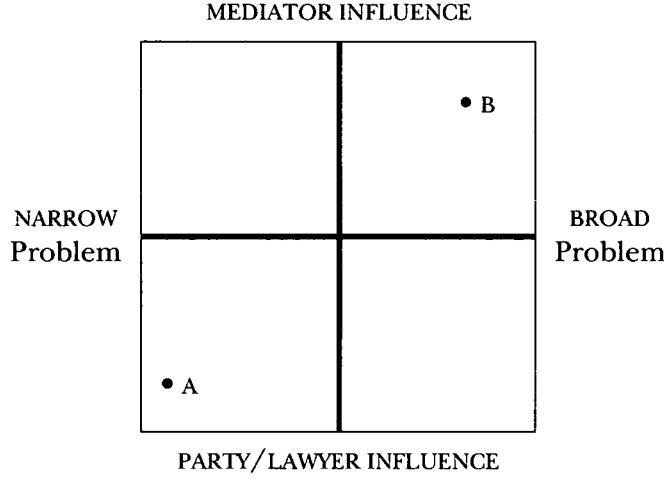
Similarly, in Figure 8, point *A* shows the parties or lawyers heavily influencing the *resolution* of a narrow issue and point *B* shows the mediator heavily influencing the *resolution* of a broad issue.

142 I am grateful to my University of Missouri colleague Art Hinshaw for this suggestion. In commenting on an earlier draft of this Article, Professor Nancy Welsh wrote:

> [J]ust as watching rushes enables a movie director to determine how well a film is capturing the desired theme or mood, a series of grids that capture key decisions made at critical moments in a mediation could and should enable an evaluation of the extent to which party self-determination is furthered by the process and the mediator.

E-mail from Nancy Welsh, Professor, The Dickinson School of Law, Pennsylvania State University, to Leonard L. Riskin, Professor, University of Missouri-Columbia School of Law (Aug. 15, 2002) (on file with author).

FIGURE 8. SUBSTANTIVE DECISIONMAKING: INFLUENCE ON RESOLVING PARTICULAR PROBLEMS



b. Procedural Decisionmaking Grids

I intend procedural decisionmaking to include choices about a variety of issues made before or, sometimes moment-to-moment, during a mediation.[143] Obviously, in making procedural decisions such as these, influence can come from mediators, parties, and participating lawyers. Sometimes, program administrators or designers make such procedural decisions. Some of these decisions are explicit and carefully determined—part of a formal dispute resolution design process.[144]

In some situations, mediators themselves direct the outcome of certain process decisions, either before the mediation or at its inception or during the process; in terms of the "New New Grid" System, we would say that the mediator exercised virtually all the *influence* over such decisions. In other situations, the mediator might elicit the parties' perspectives and desires, and make a decision that responds either fully or partially to such party desires or perspectives. The new grids would show that both the mediator and the parties exercised some influence over this decision. Sometimes, the parties assert their

143 *See supra* text accompanying notes 133–35.

144 *See* Bingham, *supra* note 91 *passim*; *see also* CATHY COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS *passim* (1996).

desires even if the mediator does not "elicit," and the new grids would allow us to depict the influence associated with such assertions.[145]

145 In the late 1970s and early 1980s, authorities commonly said that the mediator controls the process and the parties control the outcome. My colleague John Lande confirms my impression that this is part of the oral history of the field. Interview with John Lande, Professor, University of Missouri-Columbia School of Law, in Columbia, Mo. (Sept. 23, 2003). The idea that the mediator controls the process has never been quite clear to me. Most formal standards of ethics and practice do not address this issue directly. Some that do, however, seem to assign the parties some influence over procedural decisions. The *Standards of Practice for California Mediators*, for instance, provide that "[w]hile the responsibility for conducting the mediation process rests with the Mediator *in consultation with the parties*, responsibility for the resolution of the dispute rests with the parties." STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS § 1 (Cal. Disp. Resol. Council 2000), *available at* http://cdrc.net/pg2.cfm#def (emphasis added). But they do not clearly delineate responsibility for designing the process or making process decisions during a mediation. The Virginia *Standards of Ethics and Professional Responsibility for Certified Mediators* provides that in initiating the mediation process:

> 1.c. The mediator shall also describe his style and approach to mediation. The parties must be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and mediator must include in the agreement to mediate a general statement regarding the mediator's style and approach to mediation to which the parties have agreed.
>
> . . . .
>
> 2.c. The mediator shall reach an understanding with the participants regarding the procedures which may be used in mediation. This includes, but is not limited to, the practice of separate meetings (caucus) between the mediator and participants, the involvement of additional interested persons, the procedural effect on any pending court case of participating in the mediation process, and conditions under which mediation may be terminated by the mediator.

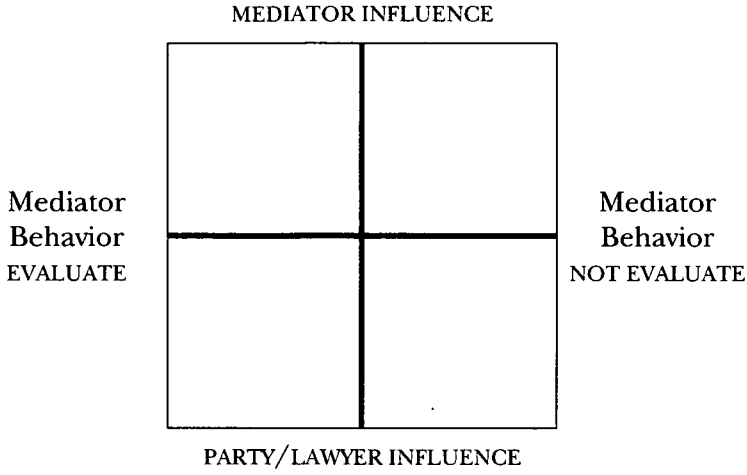
STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS, pt. D, §§ 1.c, 2.c (Jud. Council of Va. 2002), *available at* http://www.courts.state.va.us/soe/soe.htm (2002).

Michigan rules for court connected domestic relations mediation prohibit mediators from providing evaluations unless the parties specifically request it. MICH. CT. R. 3.216(E)(3), 2.411(B).

In actual practice a significant portion of mediation programs and mediators tend to be quite directive about making procedural decisions. Often mediation programs simply prescribe the rules of procedure. And many mediators, for example, simply describe their usual procedures to the parties—either before reaching an agreement to mediate or during the first session—by way of explaining how the process will work, essentially dominating—though perhaps without realizing it—both procedural and meta-procedural decisionmaking. Of course, many programs and mediators allow room for party influence, and some parties or their lawyers will exert influence on procedural and meta-procedural issues regardless of whether the mediator or program expresses openness to such influence.

Procedural decisionmaking grids could address any of a range of procedural issues, such as those listed above.[146] Figure 9, for example, shows the influence of the parties/lawyers and the mediator as to whether the mediator would provide an evaluation.

FIGURE 9. PROCEDURAL DECISIONMAKING: INFLUENCE ON EVALUATION BY MEDIATOR



Another version of that grid could show predispositions around that issue. And Figure 10 shows influences on decisionmaking about

146 *See supra* text accompanying notes 133–35. Professor Nancy Welsh, writing from a slightly different perspective, has suggested the existence of a range of process issues:

Key Procedural Issues/Decisions.

Use of caucus (predominant/not used)

Disputant (as distinguished from his/her attorney) participation in communication and negotiation (predominant/none)

Commitment to resolution/settlement (settlement as primary goal/settlement not relevant)

Key Substantive Issues/Decisions

Definition of issues (broad/narrow or single/multiple)

Selection of norms to be used to guide decisions making (mediator selection of norms/disputant selection of norms)

Application of norms to disputants' claims and settlement proposals (mediator application of norms/disputant application of norms)

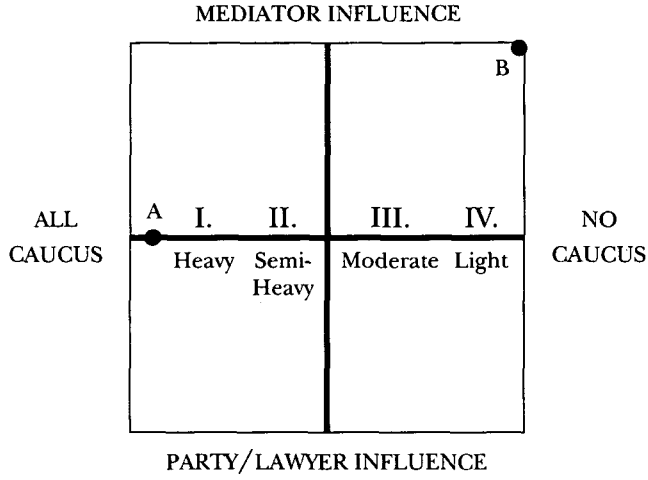
Creation of settlement options (mediator creation/disputant creation)

Selection of settlement options (mediator selection/disputant selection).

E-mail from Nancy A. Welsh, Professor, The Dickinson School of Law, Pennsylvania State University, to Leonard L. Riskin, Professor, University of Missouri-Columbia School of Law (Sept. 11, 2002) (on file with author).

the use of private caucuses. Point *A* shows a decision to use caucuses heavily that was reached through a process in which the mediator and the parties and their lawyers exercised equal influence. Point *B* depicts a decision to have no caucuses, influenced entirely by the mediator.

FIGURE 10. PROCEDURAL DECISIONMAKING: INFLUENCE ON USE OF CAUCUS



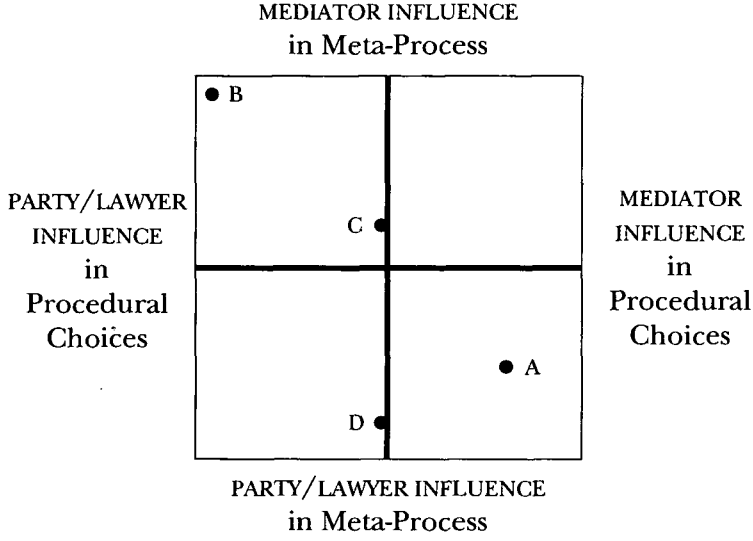
c. Meta-Procedural Decisionmaking Grids

Meta-procedural decisionmaking refers to deciding how subsequent procedural decisions will be made. One major issue in meta-procedural decisionmaking is what degree of influence various participants will have over specific procedural issues or over procedural issues in general. On Figure 11, the east-west continuum shows participant influence over procedural choices, with party/lawyer influence depicted at the west end and mediator influence depicted at the east end. The north-south continuum depicts participant influence over the meta-procedural decision about how much influence participants will have over subsequent procedural decisions.

Point *A* shows that the parties/lawyers exercised more influence during the meta-procedural decisionmaking, and that this produced the decision that subsequently the mediator would exercise most of the influence over procedural issues. Point *B* shows the mediator exerting almost all the influence in meta-procedural decisionmaking, which determined that the parties or lawyers would exert most of the influence over subsequent procedural choices. Point *C* shows that in the meta-procedural decisionmaking, the mediator exerted slightly

more influence than the parties/lawyers, and that this produced an agreement that the parties or lawyers and mediator would have equal influence in deciding subsequent procedural issues. And finally, point *D* shows that a meta-process dominated by the parties/lawyers also produced the outcome that the parties/lawyers and mediator would have equal influence in making procedural choices.

FIGURE 11. META-PROCEDURAL DECISIONMAKING: DECIDING WHO INFLUENCES PROCEDURAL DECISIONS



Similar meta-process grids could deal with the extent to which various participants would influence decisions about individual procedural issues, such as the use of private caucuses or mediation briefs, mediator evaluation, or the location of the mediation; or the degrees of influence participants would exercise over when procedural choices would be made.

3. The "New New Grid" System in Perspective

The grids I have set forth are examples only. The system would allow for the development of other grids for specialized purposes. Thus, some may find it useful to produce problem-definition grids that focus on the depth of the problem, rather than on the breadth;[147] the extent to which the mediation would focus on various dimensions of the conflict, such as cognitive, emotional and behav-

147 *See* MAYER, *supra* note 64, at 115.

ioral;[148] and the extent to which the process would focus on settling the dispute, resolving the dispute,[149] or transforming the parties.[150] Other procedural decisionmaking grids could address the issue of *how and when* (as opposed to whether) the mediator would evaluate, or on questions regarding the rules under which caucuses would be conducted.

A series of specifically focused grids, such as these, could help foster a high degree of awareness—among mediators, parties, lawyers, program designers, administrators, and evaluators—of the many possible issues for decision and the various degrees to which participants could contribute to understanding or resolving such issues. This awareness would support more active and sophisticated decisionmaking in and about mediation. Such grids also could be useful in evaluating, studying, or reflecting on completed mediations.

The new grid system divides mediation decisionmaking into three categories—substantive, procedural, and meta-procedural—because I find that breakdown useful and think others also will find it useful. In other words, this system is based on a series of constructs and does not in any sense represent a truth about how the mediation process works or should work. And in some mediations, it will be difficult or impossible to identify actual perspectives or real events that correspond to some of the constructs in the system. Take meta-procedural decisionmaking, for example. Formal meta-procedural decisionmaking appears in a range of mediations, especially those involving numerous parties and issues of public import.[151] But in many mediations, there is no *explicit* meta-procedural decisionmaking, i.e., no formal decisionmaking about how to make procedural decisions. It is common, for example, for the mediator or an organization that sponsors or manages a mediation program to simply announce certain procedural decisions—i.e., exercise all the influence. Thus, for instance, when the United States Postal Service launched the REDRESS program, under which thousands of employment disputes have since been mediated, responsible officials decided that the mediations would follow a "facilitative approach." After about a year, they enlarged the program

148 *See id.* at 42–46, 98–115.

149 Many commentators have distinguished settlement from resolution. *See* J. Michael Keating, Jr. & Margaret L. Shaw, *"Compared to What?": Defining Terms in Court-Related ADR Programs*, 6 NEGOT. J. 217 (1990) (suggesting that "settlement" typifies judicially-hosted settlement conferences, but that "collaboration" or "resolution" should be the goal in mediation).

150 *See supra* text accompanying note 140.

151 Interview with Hansjorg Schwarz, Mediator, in Berlin, F.R.G. (Aug. 5, 2003) (discussing the Vienna, Austria airport expansion).

and determined that the mediations would follow the "transformative" approach elaborated by Bush and Folger.[152]

Sometimes, on the other hand, program designers, sponsors, or managers make important decisions unknowingly, implicitly or indirectly. Most state farm-credit mediation programs funded by the U.S. Department of Agriculture in the 1980s, for example, provided mediations that were very narrow and brief.[153] This happened mainly because most state programs made very little money available to support mediators. As a result, the only mediators who could "afford" to make bids low enough to win contracts to mediate were those who were inclined to conduct mediations quickly, which they believed required a narrow problem-definition.[154]

Similarly, it will often be impossible to know the actual predispositions of individual participants as to particular issues; the participants themselves may have no such predispositions or be unaware of them. Likewise, we frequently will be unable to know the extent to which individual participants actually influence understanding or resolution of particular issues. And even if we could learn about actual influences exerted by individual parties or lawyers, the grids are not well suited to display them, nor are they suited to depict them.[155]

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152 Bingham, *supra* note 91, at 113; *see also* Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of REDRESS at the United States Postal Service*, 17 REV. PUB. PERS. ADMIN. 20 (1997) (describing the mediation program implemented by the Postal Service and analyzing its success based on surveys of participant in the process). I do not know the extent to which these decisions were influenced by Postal Service employees who were not responsible for the REDRESS program.

The decision to employ a transformative approach to mediation may be both a procedural and a substantive choice. In the transformative model, the mediator seeks direction from the parties (in my view, through elicitive procedures); but the transformative approach also puts "problem-solving" in the background, emphasizing a goal of improving the parties. *See* Folger & Bush, *supra* note 88 *passim*.

153 *See* Leonard L. Riskin, *Two Concepts of Mediation in the FmHA's Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21, 27–30 (1993).

154 *Id.* The Iowa and Minnesota programs were major exceptions. Administrators in these programs had more capacious visions of mediation—and more money and other resources—than did other state programs. *Id.* In some other high-volume programs, a narrow approach may develop because of time constraints or because of the mindsets of mediators and parties or their lawyers.

155 Although the predisposition grids lend themselves to depicting separately the attitudes of each participant, the influence grids do not allow a simple way to distinguish the influence of each party and of each lawyer. In a real mediation, however, each party and each lawyer might influence, or try to influence, the determination of any issue in different directions. For example, in the first mediation portrayed by Barry Werth, the plaintiffs wanted a broad problem-definition that would afford them some recognition for how much they had suffered and how well they had coped, and give them some understanding of what really caused the damage to their child. *See*

I do not think that any of these limitations reduce the utility of the "New New Grid" System. Its principal purpose is to shed light on what could or did happen in a mediation, and so to facilitate—to make more likely—wise decisionmaking. In other words, the system invites attention to what is and what could be, in order to facilitate decisionmaking about what should be. Thus, for instance, the grid system points out that, implicitly or explicitly, procedural and meta-procedural decisions get made, and that it is *possible* to make such processes open and to allow all participants to exercise influence in them. And it promotes awareness of the possibility—or likelihood—of differing perspectives among participants, even between clients and their lawyers.

In this Article, I do not mean to promote a particular approach to decisionmaking in general or in a given mediation. I believe there is often much to be gained—in terms of self-determination and the quality of process and outcome—from establishing an explicit decisionmaking process that offers the opportunity for all, or most, participants to influence important substantive, procedural and meta-procedural issues. And I hope that this Article encourages such processes by enhancing awareness of decisionmaking options. But many mediations that lack explicit decisionmaking about procedural and meta-procedural issues work fine. A choice to make procedural and meta-procedural decisionmaking more open and inclusive carries costs in terms of time, energy and financial expenditures. It also presents risks of undermining the efficiency and focus of a mediation and the ability of a mediator to act quickly. So resolving the issue of openness in decisionmaking requires a delicate balance. I do not seek to make that balance, only to mention it.

WERTH, *supra* note 37, at 310–25. On the other hand their lawyers seemed to want a narrow problem-definition, limited principally to what was likely to happen in court. *Id.* This desire doubtless was based, at least in part, on the assumption that this was best for the client. *Id.* It also seems clear that all the other participants—the mediator, the defendants, and their insurers and lawyers—shared the plaintiffs' lawyers' perspective. *Id.*

Nancy Welsh has described the tendency among lawyers to dominate mediation processes and to steer their clients toward narrow, financially grounded problem-definitions. Welsh, *supra* note 34, at 841, 855. For further discussion of divergences between lawyer and client perspectives, see ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 69–91 (2000) (describing principal-agent tensions in negotiation); and Leonard L. Riskin, *Represented Client in Settlement Conference: The Lessons of* G. Heileman Brewing Co. v. Joseph Out Corp., 69 WASH. U. L.Q. 1059, 1099–105 (1991) (discussing divergences between lawyer and client perspectives in mediation and settlement conferences).

4. Uses and Limitations of the "New New Grid" System

The "New New Grid" System, though far more refined than its predecessors, has several limitations. First, the grids in the new system, like their precursors, are not mathematically precise in any sense. Second, as mentioned above, it often will be impossible to know or depict the predisposition or influence of any participant with any degree of certainty. Sometimes, these attitudes or practices will rest on what the participant assumes other participants want or expect, and the outcomes will result from interactions between and among influences that are too complex and subtle to map, even if we could be aware of them. Think, for instance, about a mediator who tries to "successively reframe" the conflict, and parties who may or may not buy into such definition in varying degrees.[156] Sometimes, too, there will be a vast gulf between a participant's intention in these regards and the actual effect of her or his behaviors.[157]

I have considered, and abandoned, a number of ideas—some suggested by colleagues—about how to depict the influence of individual participants or the dynamic nature of such influences. These have involved overlaying transparencies, each displaying the influence of a particular participant; using different symbols or colors to denote different participants; adding dimensions; and changing shapes. Each of these ideas has merit, yet each seems to rob the system of the simplicity that I find so valuable. Most importantly, I think the weaknesses in the new grid system do not impair its primary function—to enhance understanding, facilitate clear conversations, improve decisionmaking, and bring attention to the subtle relationships among our intentions, our actions, and the effects of these actions.[158] I hope

156 *See* MAYER, *supra* note 64, at 132–39.

157 The grid can help us notice such discrepancies.

158 I have had very positive experiences using these grids in mediation training, teaching, and practice. As aids in understanding mediation demonstrations, for example, the new grids promote vastly more nuanced observations and discussions than did the old grid. I have also used them in connection with mediation role-play exercises. After participants read their confidential instructions, I ask them to pause and notice their predispositions and their intentions with respect to particular issues. Then, during the role-plays, I ring a bell to stop the action and ask the participants to notice their intentions with respect to influence on particular issues. Discussions among participants—during and after the role-plays—have led to rich insights about disparities among the participants' predispositions and disparities between an individual's intentions and the impact of her actions or other participants' perceptions of her intentions.

I have used such activities to greatest effect in specialized advanced mediation trainings based on mindfulness, which I have co-conducted with Ferris Buck Urbanowski in Texas, Iowa, and California. In such progams, participants learn, through

that the new grid system—the concepts and terminology—will produce similar benefits for participants in real mediations, enabling them to have a more mindful, moment-to-moment awareness that will lead to better decisionmaking.

CONCLUSION

In using these new grids, it may be helpful to view a mediation as a journey undertaken by a group. Like the tour guide or driver and the travelers, the mediator and the parties and their lawyers can divide or share decisionmaking responsibilities in many ways. The grids are maps to help the participants identify issues and understand and make decisions about them. The old grid and the revised grid of mediator orientations provide limited information dealing mainly with the mediator's orientation; thus, they place the mediator in the role of a tour guide who follows his own vision, or his program's vision. In the same way a brochure might help travelers select a packaged tour, and pack for it, the mediator orientation grids (the "Old Grid" and the "New Old Grid") can guide participants in choosing a mediator and preparing for a mediation.

But travelers could have a variety of purposes; they might want mainly to get to a destination, to enjoy the scenery on the way, or to get acquainted with each other or themselves. And their wishes may change during the trip. They might agree to go to Disneyland and hire a bus driver or guide to take them. But if they encounter bad weather or heavy traffic or a more appealing venue, such as a beach or a museum; if they get into a conversation and realize that none of them really wanted to go, but each thought the others did; if they experience transforming insights about themselves or one another—in any of these events, they might change their minds about where to go or how to get there, and wind up driving to the Getty Museum in car pools. Whether any of this will happen depends to a degree on the extent to which all or any of them can be aware of changing cir-

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meditation practice, to pay mindful attention to their thoughts, even fleeting ones, as well as to bodily sensations, judgments, and emotions. But the exercises described above also work well in more conventional mediation training programs in which participants have not had instructions or practice of mindfulness. For an overview of how mindfulness meditation might contribute to legal and dispute resolution education, see Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 46–60 (2002). *See generally* The Initiative on Mindfulness in Law and Dispute Resolution, *at* http://www.law.missouri.edu/csdr/mindfulness.htm (last visited Oct. 8, 2003); Harvard Negotiation Insight Initiative, *at* http://www.pon.harvard.edu. (last visited Oct. 8, 2003).

cumstances and the possibilities of choice, and can feel flexible enough to respond creatively. That, in turn, depends not only on the driver or tour guide's predispositions, behavior and openness, but also on the travelers' assertiveness and wisdom.

Plainly, the same situation exists in mediation. Often mediators and parties and their lawyers enter mediations with particular goals and expectations or predispositions about the mediation process. They might want to settle a particular issue or dispute, to understand that issue or dispute, to understand each other and themselves, or to change each other and themselves. In a mediation, as in a journey, goals or methods to achieve such goals can change with new learning and circumstances.[159] A mediation, like a trip to Cannes or Quebec or Kansas City, can be mundane, satisfying, or transforming—or all three.[160] The decisionmaking processes in a mediation hold—or can hold—endless opportunities for learning, changing goals and procedures, and changing methods for reaching goals. The outcome depends, in part, on the intentions, awareness, and flexibility of all the participants. I hope that this "New New Grid" System will help persons connected with mediation notice the vast array of important issues and decide them wisely.

Yet my enthusiasm is tempered by reservations, in addition to those I have noted above. The old grid's greatest virtue, its simplicity,

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159 I agree with much of Eric Galton's assertion:

> Empowerment in its truest sense is the mediator adjusting the process to what the people in a particular dispute want out of it and hope for it. They may hope for conciliation. They may hope just for economic settlement. They may simply want understanding and acknowledgement. They may just want to be heard. The imposition of a single form of mediation obliterates its essential diversity and flexibility and may even impose a process people don't want. In the end, it's about the people, not the mediators.

Eric Galton, *The Preventable Death of Mediation*, DISP. RESOL. MAG., Summer 2002, at 23, 25. But I worry about whether this statement gives sufficient attention to the role of the mediator in helping the parties determine what they want out of the mediation.

160 I am reminded of Shel Silverstein's poem, *Magic Carpet*:

> You have a magic carpet
> That will whiz you through the air
> To Spain or Maine or Africa
> If you just tell it where.
> So will you let it take you
> Where you've never been before,
> Or will you buy some drapes to match
> And use it
> On your
> Floor?

SHEL SILVERSTEIN, *Magic Carpet*, *in* A LIGHT IN THE ATTIC 106 (1981).

is also its greatest vice. The original system—based on just one static image of the mediator's orientation—fostered valuable dialogue and useful debate, but it also obscured our vision of many important issues and may have prompted an unproductive polarization in the academic literature. The "New New Grid" System is much more complex. I hope this complexity will produce more insight than confusion.

I do not expect anyone to use all the new grids. Instead, I anticipate some will choose versions that will be helpful for a particular purpose, and invent other versions for special purposes. In short, I hope that the "New New Grid" System—both its underlying concepts and the grids themselves—will promote more refined understandings and dialogues about mediation, and thus help us all make wise choices about whether, when, and how to use and structure mediation. And finally, I do not see this as the last word. I hope, and expect, that colleagues will critique and extend these ideas.