

HOW WILL LAWYERING AND MEDIATION PRACTICES TRANSFORM EACH OTHER?

JOHN LANDE*

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I. INTRODUCTION

In the past two decades, the use of mediation¹ in legal disputes has increased dramatically.² State legislatures have enacted statutes

* Assistant Professor, Department of Dispute Resolution, Nova Southeastern University. A.B., University of Michigan, 1974; Ph.D., University of Wisconsin-Madison, 1995; J.D., Hastings College of Law, 1980. I am enormously grateful to Bob Barrett, Jim Boskey, Baruch Bush, Aimee Delman, Greg Firestone, Janice Fleischer, Bill Howard, Jon Hyman, Ron Kelly, Lela Love, Mike Lowy, David Matz, Bobbi McAdoo, Craig McEwen, Rick Reed, Len Riskin, Nancy Rogers, Jean Sternlight, Fran Tetunic, Bill Warters, and Archie Zariski for their encouragement and very helpful comments, and to Aimee Delman for her diligent research assistance. I dedicate this Article to Marc Galanter, who has been a kind mentor and has provided a wonderful model of scholarship. Of course, I take responsibility for what follows, so don't blame these good people.

1. In general, mediation is a procedure in which the mediator tries to help disputing parties reach agreement and in which the mediator has little or no authority to impose a decision if the parties do not reach agreement. See CHRISTOPHER W. MOORE, *THE*

authorizing, and in some cases mandating, courts to order cases to mediation.³ In some areas, the use of mediation in litigation is so routine and accepted that lawyers⁴ do not wait to be ordered into mediation, but initiate mediation themselves.⁵ Indeed, in some places, mediation has become so much a part of the litigation process that lawyers may refrain from direct, unmediated negotiations, anticipating that they will conduct their negotiations in mediation.⁶ As

MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 8, 41-53 (2d ed. 1996). Practitioners and empirical researchers differ about many characteristics claimed to be essential to mediation, such as the goals of the mediation. See *infra* Part II.B. The definition in this footnote represents minimal characteristics that I believe most knowledgeable observers would accept.

2. Good data on use of mediation is hard to come by. Unlike the courts, where there is a clerk's office through which all lawsuits must flow, there is no central registry of mediation cases. Indeed, even in states like Florida, where there is a well-organized statewide system for providing mediation, it is impossible to get a full and accurate count. In Florida, at least 76,920 mediations were conducted in 1995. See SARAH SCHULTZ ET AL., *FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM* 26, 52, 79, 102 (9th ed. 1996). This figure understates the actual number of cases because data was not available from courts without coordinators of mediation services. See *id.* at v; see also Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 907 n.18 (1997).

The RAND Corporation made perhaps the best effort to count private alternative dispute resolution (ADR) cases by surveying ADR providers in Los Angeles about caseloads during the period of 1988-93. See ELIZABETH ROLPH ET AL., *INSTITUTE FOR CIVIL JUSTICE, ESCAPING THE COURTHOUSE: PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES* 18, 19 (1994). The RAND researchers found that the annual rate of growth of caseloads increased dramatically during this period, from about 15% in 1989 to 90% in 1993. See *id.* at 19 fig.3.1. Because some providers in the earlier years were not available to respond to the study, the figures for the earlier years actually understate the rate of growth. See *id.* at 19 n.3. In 1993, there were at least 23,672 private ADR cases in Los Angeles (including procedures other than mediation). See *id.* at 18 tbl.3.1.

3. See NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* app. B (2d ed. 1994 & Supp. 1996) (providing a state-by-state listing of significant mediation legislation). Although many points in this Article would apply to ADR procedures generally, this Article focuses on mediation because it is the quintessential third-party procedure for eliciting agreement and because of its widespread and generic applicability.

4. To avoid confusion, this Article uses the word "lawyers" to refer to lawyers only when they act as representatives. The word "mediators" refers to people who act as third parties assisting in negotiation, regardless of the mediators' profession of origin. This distinction is important because many lawyers act as mediators as part of their practices. The term "lawyer-mediator" is reserved for lawyers when they are acting as mediators.

5. In Florida, the courts may order cases to mediation. See FLA. R. CIV. P. 1.700(a). Within 10 days after a court-ordered referral to mediation, the parties may select their own mediator. See FLA. R. CIV. P. 1.720(f). The Florida Dispute Resolution Center reports that more than 90% of parties ordered to mediation agree on a mediator rather than having one assigned by the court. See SCHULTZ ET AL., *supra* note 2, at v. There are no statistics describing the number of cases in Florida in which the participants choose mediation without first having been ordered to mediation. See Interview with Sharon Press, Director, Fla. Disp. Resol. Ctr., in Fort Lauderdale, Fla. (Oct. 10, 1996).

6. See Barbara McAdoo & Nancy Welsh, *The Times They Are a Changin'—Or Are They? An Update on Rule 114*, HENNEPIN LAW., July-Aug. 1996, at 8, 10. In Hennepin County, Minnesota, lawyers view Minnesota Supreme Court Rule 114 as mandating use of ADR, usually mediation. A preliminary study based on 12 in-depth interviews with Hennepin County lawyers found that as a result of Rule 114, "[t]here may be less lawyer-to-lawyer negotiation" as lawyers prefer to "wait for a 'mandatory' mediator's assistance with

court planners perceive growth in the volume and complexity of their caseloads and that their resources do not keep pace with that growth, it seems likely that many courts will find it increasingly attractive to order large numbers of cases to mediation.⁷ Where mediation becomes routinely integrated into litigation practice, we can expect that this will significantly alter both lawyers' practices in legal representation and mediators' practices in offering and providing mediation services. I describe this new dispute resolution environment as a "liti-mediation" culture, in which it becomes taken for granted that mediation is the normal way to end litigation.⁸

This Article sketches out some aspects of both lawyering and mediation practice that may be affected by development of a liti-mediation culture. Part II examines the growth of the private market for mediation and an accompanying specialization of mediation practice. These changes seem likely to require mediators to develop market niches with identifiable characteristics of their mediation practices. Simultaneously, lawyers, as regular buyers of mediation services, will be expected to recognize and make decisions based on significant distinctions between mediation providers. Part II describes some of these distinctions that may evolve in the mediation market, particularly focusing on differences in various mediation goals and styles. The institutionalization of a liti-mediation culture

settlement." *Id.* at 10; see also Press, *supra* note 2, at 908 (noting that Florida lawyers are increasingly requesting mediation without waiting to be ordered to mediate).

7. See Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343, 346, 409-10 (1992). Finding that California courts are now faced with a greater number of cases and more complex cases than ever before, the authors made recommendations that included the development of an "ADR track" for some cases. *Id.* at 397; see also *id.* at 409-10.

8. See *infra* Part II.A. Mike Bridenback, the first director of the Dispute Resolution Center and current trial court administrator for Florida's Thirteenth Judicial Circuit, emphasized this view: "Mediation, in just ten short years, is not an alternative but the primary system of justice in Florida's civil and family courts." Announcement for the Florida Dispute Resolution Center's Annual Conference for Mediators & Arbitrators (1996) (on file with author). Liti-mediation culture is likely to vary in different communities. See *infra* note 23 and accompanying text. Thus, references to liti-mediation cultures refer to the various situations in different areas rather than a single, homogeneous, national liti-mediation culture. For example, my research suggests that different states have stronger and weaker "mediation cultures." I asked six experts on dispute resolution to rate the strength of the ADR cultures of 19 states and found that their ratings were highly correlated with each other and with the existence of certain types of statutes. See John Lande, *The Diffusion of a Process Pluralist Ideology of Disputing: Factors Affecting Opinions of Business Lawyers and Executives* 48-53 (1995) (unpublished Ph.D. dissertation, University of Wisconsin (Madison)) (on file with author). A survey of business lawyers and executives in several states revealed that there was greater support for use of mediation in Florida (identified by the experts as a strong ADR-culture state) than in Tennessee and Pennsylvania (identified as weak ADR-culture states). There were no comparable differences in support for arbitration, suggesting that these attitudes related more specifically to mediation than ADR generally. See *id.* at 177-83, 197-201. Although this suggests that there is significant variation between states, there is obviously considerable variation within states as well.

is likely to generate generally accepted vocabularies that reflect and reinforce such differences within local mediation markets. Part II speculates about the language that will be used to portray varied species of mediation in a liti-mediation world. Although proponents of competing mediation philosophies understandably seek to define the language and practice of mediation in their own terms, I advocate for pluralist local mediation cultures in which differences are clearly identified, respected, and valued.

Part III focuses on an important distinction between mediation practices. Much of the current ferment in the mediation field deals with a distinction between “facilitative” and “evaluative” approaches to mediation.⁹ A related distinction is between “empowerment” (or “transformative”) and “settlement” approaches.¹⁰ In Part III, I maintain that the essence of facilitative and empowerment approaches is a high priority devoted to promoting the principals’¹¹ exercise of their

9. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996). Professor Riskin’s framework has attracted a good deal of attention. Teachers and trainers have incorporated his framework into their presentations, and practitioners have used it to explain their version of mediation to potential clients. See *id.* at 49 n.125. At the 1996 Annual Conference for Mediators and Arbitrators, sponsored by the Florida Dispute Resolution Center, a major plenary session was entitled “Evaluative v. Facilitative Mediation: Current Ethical and Policy Considerations.” See James J. Alfini, Moderator, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997). Similarly, in September 1996, the Association of Broward County (Florida) Mediators sponsored a program entitled, “A Great Debate: Facilitative v. Evaluative Mediation,” featuring Mel Rubin and Arthur “Jim” Parkhurst. Professors Barbara McAdoo and Jeffrey Krivis are now developing a self-assessment questionnaire for mediators to identify their orientation within Riskin’s framework. See Barbara McAdoo & Jeffrey Krivis, *Mediator Classification Index* (unpublished manuscript, on file with the author). For a critique of Riskin’s framework, see Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 32 (1996), and for a response, see John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996). For a collection of sources on this topic, see 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, 953 n.7 (1997).

10. The clearest and strongest expression of the empowerment ideal is in ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). The Bush and Folger model of transformation was the focus of a lively discussion at a session of the ADR Section at the 1996 Annual Meeting of the Association of American Law Schools (*Models of Mediation*, Jan. 7, 1996). The subject of transformation was also highlighted at a popular session at the 1996 Annual Meeting of the Society for Professionals in Dispute Resolution entitled, “Transformation of What? The Meaning of Conflict Transformation” (Oct. 24, 1996). For two critical reviews of *The Promise of Mediation*, see Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 235-39 (1995), and James Boskey, *Books in Review*, ALTERNATIVE NEWSL., March 1995, at 22-23. For a detailed discussion of issues of empowerment, see *infra* Parts III.A and III.C.

11. In keeping with the emphasis on promotion of responsibility by the parties in a conflict who have retained lawyers and/or mediators, the parties are generally referred to as the “principals” because “clients” has a connotation of dependence on and deference to others’ judgments. Although parties are not principals of mediators in the sense of a legal

decisionmaking responsibility by eliciting what I refer to as “high-quality consent” to their agreements.¹² Part III analyzes how the concept of “empowerment” has been used and contrasts it with the minimal standards of consent required to create a legally enforceable agreement. Rather than achieving the minimal standards needed to settle a dispute, proponents of empowerment aspire to help principals achieve a higher standard of consent, what I call “high-quality consent.” As this can be confusing to apply in practice, Part III identifies a set of concrete mediation tactics that may promote—and be indicators of—this approach. These tactics include: (1) explicit consideration of the principals’ goals and interests, (2) explicit identification of plausible options for satisfying these interests, (3) the principals’ explicit choice of options for consideration, (4) careful consideration of these options, (5) mediators’ restraint in pressuring principals to accept particular options, (6) limitation on use of time pressure, and (7) confirmation of the principals’ consent to selected options. This set of tactics is offered as a cluster of factors that might be used to create a continuum of the quality of consent and not as absolute or necessary requirements. Although these tactics for eliciting high-quality consent may not be the norm in practice,¹³ even by practitioners who subscribe to this philosophy, they reflect the ideal to which much mediation theory aspires.¹⁴ Part III asserts that this

principal-agent relationship, the term is used in the sense of the parties being the principal decisionmakers. See BLACK’S LAW DICTIONARY 1192 (6th ed. 1990) (defining the adjective “principal” as meaning “[c]hief; leading; most important or considerable; primary; original” and “[h]ighest in rank, authority, character, importance, or degree”); see also *infra* Parts III.A, III.C; cf. Stempel, *supra* note 9, at 965-66 n.53 (criticizing reference to disputing parties as mediator’s “clients” or “principals”). I am grateful to Berkeley, California, mediator Ron Kelly for suggesting use of the term “principal.” For convenience, I use the term “participants” to collectively refer to the principals and their lawyers in mediation, but not the mediator.

12. The notion of evaluating dispute resolution by standards of quality is not original to me. Professor Carrie Menkel-Meadow, in particular, has made this a central theme in her work. See generally Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) [hereinafter Menkel-Meadow, *Whose Dispute Is It Anyway?*]; 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 (1991) [hereinafter Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*]; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) [hereinafter Menkel-Meadow, *Toward Another View of Legal Negotiation*]; see also generally Symposium, *Quality of Dispute Resolution*, 66 DENV. U. L. REV. 335 (1989).

13. See Deborah M. Kolb & Kenneth Kressel, *Conclusion: The Realities of Making Talk Work*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 459, 459-60 (Deborah M. Kolb ed., 1994).

14. See generally BUSH & FOLGER, *supra* note 10; ROGER FISHER ET AL., *GETTING TO YES* (2d ed. 1991); MOORE, *supra* note 1; Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 12.

standard for evaluating mediation processes is important for two reasons. First, this dimension may be an important distinguishing feature of mediation practices in the mediation marketplace described in Part II. Second, it is an important variable of mediation that is likely to be affected by the participation of lawyers as described in Part IV.

Part IV considers how the routine incorporation of mediation in litigation may affect both processes. This Part analyzes these possibilities by examining how the active participation of lawyers in mediation may alter the constellation of relationships of professionals and clients in a legal case. Regular participation of lawyers in mediation is likely to result in ongoing relationships between mediators and lawyers that may overshadow their respective relationships with the principals and dramatically affect the mediation process. As a result of the prominent role of lawyers in mediation, mediators may feel especially obliged to cater to the lawyers' interests, which often entails pressing the principals into settlement. The participation of lawyers may increase time pressure in mediation, putting additional pressure on principals. Moreover, extending lawyers' norms of adversarial bargaining and "client control" further adds to the pressure, all of which may undermine the quality of principals' consent.

Part V integrates the analysis of how the dynamics of litigation culture may affect both lawyering and mediation practices. In Parts V and VI, I contend that the possible changes in lawyering and mediation practices outlined in this Article are contingent upon the values, attitudes, and decisions of a wide range of actors, including mediators, lawyers, law school faculty, legislators, judges, court administrators, and the general public. I suggest that we are now in a critical period regarding these changes because they are likely to crystallize for an extended time—albeit with significant local variations—after the current period of institutionalization.¹⁵ I conclude with suggestions for developing the mediation field in the future.

II. THE GROWING AND INCREASINGLY SPECIALIZED MARKET FOR MEDIATION SERVICES

As the private market for mediation has grown, there has been an accompanying specialization of mediation practices. Mediators vary

15. Institutionalization processes have been analyzed in a variety of disciplines and using a variety of definitions. Though popular conceptions often focus on institutions as organizational structures, most scholarly analyses are much broader and include generally recognized norms, roles, and conventions. Thus, institutions may range "from handshakes to marriages to strategic-planning departments" and may cover "a wide territorial range, from understandings within a single family to myths of rationality and progress in the world system." Paul J. DiMaggio & Walter W. Powell, Introduction to *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 7-9 (Walter W. Powell & Paul J. DiMaggio eds., 1991). For an analysis of the institutionalization of ADR in the United States in recent decades, see Lande, *supra* note 8.

greatly in their training and experience, areas of expertise, and styles and techniques, among other characteristics. For mediators and buyers of their services (often lawyers) to make the mediation market operate effectively, it is becoming increasingly important for the buyers and sellers to accurately identify relevant distinctions between mediators. Part II.A provides an overview of how mediation buyers may go about shopping for a mediator in a liti-mediation culture typified by a large pool of increasingly specialized mediators. Part II.B describes two important dimensions that may differentiate mediators: their primary goals and techniques. Part II.C analyzes a controversy within the mediation field over what philosophies and styles may be appropriately called "mediation." Contrasting what I describe as a "single-school" position, which favors a relatively narrow and pure definition of mediation, I advocate a "pluralist" view that accepts the legitimacy of a broad range of mediation practices as long as they are clearly described to prospective mediation buyers.

A. Shopping for Mediators in a Liti-Mediation Culture

There was a time not long ago in the modern ADR era¹⁶ when the use of mediation in legal cases was extremely rare. It was so rare that some early mediating practitioners themselves did not have a name for the procedure.¹⁷ In a relatively short time, mediation has become so widely accepted that it is now enshrined in many statutes¹⁸ and generally viewed positively by lawyers,¹⁹ who are especially important actors in our adversarial legal system.²⁰ Indeed, even though some statutes only authorize, but do not mandate, use

16. Professor Jeffrey Stempel suggests that the 1976 Pound Conference is an appropriate point to mark the beginning of the modern ADR movement. Stempel argues that "new ADR" is more likely than "old ADR" to involve, among other things, mass-produced procedures affecting large classes of persons or entities. See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309-24, 334-40 (1996).

17. For example, when Henry Elson began mediating in 1971, he referred to his work as "nonadversarial law practice." Henry M. Elson, *Divorce Mediation in a Law Office Setting*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 143, 143-44 (Jay Folberg & Ann Milne eds., 1988).

18. See ROGERS & MCEWEN, *supra* note 3, apps. A-C (providing a comprehensive summary of mediation legislation).

19. See, e.g., Lande, *supra* note 8, at 133-76; Morris L. Medley & James A. Schellenberg, *Attitudes of Attorneys Toward Mediation*, 12 *MEDIATION Q.* 185, 189-92 (1994); DELOITTE & TOUCHE LITIG. SERVS., 1993 *SURVEY OF GENERAL AND OUTSIDE COUNSEL* 10-15 (1993); see also Folberg et al., *supra* note 7, at 365 (finding that judges familiar with ADR had high praise for ADR processes, especially mediation).

20. See Robert Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 *L. & SOC. INQUIRY* 1 *passim* (1994) (observing that the U.S. legal system relies on litigant activism in which investigation and presentation of claims is based on initiative of disputing parties acting primarily through lawyers).

of mediation, some courts routinely order most cases on their dockets to mediation.²¹ In areas where mediation has become a regular part of the litigation process, key actors in the legal system (such as judges, court administrators, and lawyers) may take it for granted that settlement negotiations will primarily take place in mediation. Shifting from a predominant culture of “litigotiation” that Professor Marc Galanter described a decade ago,²² we may be developing what might be called “liti-mediation” cultures in some areas where it has become taken for granted that mediation is the normal way of ending litigation.²³

In recent years, liti-mediation culture has expanded from what some might consider the isolated “backwaters” of low-status cases in areas like family law and small-claims court into the “heartland” of litigation,²⁴ including legal disputes of virtually every kind. Thus, a well-developed liti-mediation culture requires a market with both a substantial variety and volume of mediators to provide a range of acceptable mediation services. Full-fledged liti-mediation cultures are especially likely to develop in larger urban areas where there are greater caseload pressures and difficulties in reaching resolution because of more tenuous relationships between lawyers and the clients themselves.²⁵ Under these conditions, the pool of mediators is likely

21. See McAdoo and Welsh, *supra* note 6, at 10.

22. Galanter used the term “litigotiation” to refer to the strategic pursuit of settlement through mobilizing the court process. Thus, lawyers, and to some extent principals, pursue litigation with the private expectation of ultimately reaching settlement, but use the litigation process to gain strategic advantage in negotiation. See Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

23. As with litigotiation, in a “liti-mediation” culture, the initiation and conduct of litigation are oriented to obtaining favorable settlements, usually defined in adversarial terms. The two regimes differ in the cultural stories and practices typical of bilateral and mediated negotiations. For example, in typical litigotiation culture, lawyers work to create strong cases for trial and then engage in a ritual pretense of being reluctant to negotiate out of fear of losing advantage by appearing weak. While liti-mediation culture may not differ radically from that typical of litigotiation, there are certainly some differences. The existence of a formal and (quasi-) mandatory mediation procedure probably provides greater legitimacy of resolution through settlement. Moreover, mediation, especially with directive techniques, see *infra* note 40, provides a generally accepted mechanism for lawyers to settle while maintaining the appearance of strength for the “benefit” of clients and opposing parties alike. See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1369-70 (1995). As one reviewer suggested, lawyers may take strong positions for a variety of reasons, including protecting the clients’ interests and solving the lawyers’ problems in managing relationships with their clients, or some combination.

24. I am grateful to Marc Galanter for suggesting the concept of the “heartland” of litigation.

25. For an excellent analysis of these and other factors leading to increased litigation, see MARC GALANTER & JOEL ROGERS, *A TRANSFORMATION OF AMERICAN BUSINESS DISPUTING? SOME PRELIMINARY OBSERVATIONS* 41-47 (Inst. for Legal Stud., Disp. Processing Res. Program Working Paper No. 10-3, 1991).

to be relatively large²⁶ and characterized by relatively distant and professional (rather than close and personal) relationships with the various actors in a case.

In this market, both buyers and sellers of mediation services need to identify and distinguish differences between mediators. This is an important concern for both the buyers and sellers. For the sellers (i.e., the mediators and mediation businesses), regularly attracting new clients is obviously necessary to stay in business and prosper. Thus, it is not surprising that workshops on marketing techniques are perennial favorites at conferences for mediation practitioners.²⁷ In a large, diverse, and somewhat impersonal²⁸ market of mediation services, buying those services considered appropriate for particular cases is an important and difficult task, which is often performed by the principals' lawyers.²⁹ The lawyers are repeat players³⁰ who become familiar with the disputing practices and practitioners in their community³¹ and thus are usually in a better position than their clients to serve as expert shoppers for mediation services.³²

26. For example, nine of Florida's 20 judicial circuits have more than 200 certified mediators, with the most (441) working in the 11th Circuit, covering Dade County (Miami). See Florida Certified Mediators, RESOL. REP., July 1996, at 7.

27. See, e.g., Program Brochure, "The Business of Mediation: A Series of Seminars for Anyone Who Has Considered Making Mediation a Career!" (1993) (on file with author). This program, sponsored by the Southern California Mediation Association, spanned three Saturday mornings in 1993-94. See *id.*

28. Although many mediators operate as sole practitioners, largely trading on their personal skills and experiences, there is a major institutional sector of organizations in which the buyers do not necessarily select individual mediators but rather purchase a package of services including case administration as well as mediation. On a national level, some of the best known organizations include the American Arbitration Association, JAMS/Endispute, and Judicate. There are also local and regional providers of mediation services. For example, Mediation, Inc. and Florida Mediation Group serve a substantial share of the South Florida market.

29. See, e.g., ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 8-24 (1994).

30. See Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & SOC'Y REV. 95, 97-104 (1974); cf. Mark Suchman, On Advice of Counsel: Law Firms and Venture Capital Funds as Information Intermediaries in the Structuration of Silicon Valley 95-126 (1994) (unpublished Ph.D. dissertation, Stanford University) (on file with author) (observing that, in Silicon Valley, business lawyers' repeated experience of structuring start-up companies and matching them with venture capital funds enables lawyers to provide valuable advice).

31. The geographical scope of practice communities varies. Many lawyers and mediators practice only within a limited area around their offices. Others have regional, national, and transnational practices. Thus, references to practice communities relate to the group of colleagues and clients to which practitioners regularly relate, rather than to a local geographic area.

32. As Florida mediator Janice Fleischer pointed out, although lawyers are generally in a better position to evaluate mediators because of their greater experience, they may not make better selections of mediators in some cases because lawyers and their clients often have different interests. See Telephone Interview with Janice Fleischer, Coordinator, S. Fla. Off., Fla. Conflict Resol. Consortium (Oct. 26, 1996); see also *infra* note 174 (discussing differences in interests between attorneys and their clients).

How does one shop for a mediator?³³ I suspect that to a large extent, buyers of mediation services use processes similar to those of buyers of other professional services. Presumably, one of the first things that buyers do is identify mediators who have previously worked for them or trusted members of their networks of professionals. For some buyers, the search may begin and end there. Expert shoppers have probably worked with and developed this kind of information about numerous mediators, especially in liti-mediation cultures. Thus, even these buyers are likely to need additional information. Does the mediator have much experience (or, better yet, specialize) in the general type of case involved, such as family, personal injury, or perhaps more obscure categories of cases?³⁴ Does the mediator have some kind of certification?³⁵ Is the mediator a former judge?³⁶ Of course, shoppers may also be sensitive to differences in the level of mediators' fees both due to an intrinsic interest in costs and as a proxy believed to indicate the quality of services. In cases

33. This is an interesting and important question that deserves empirical research. I offer some hypotheses about the shopping process in this subpart. See Riskin, *supra* note 9, at 38-39 (discussing the mediator selection process).

34. As the practice of mediation has grown in recent years, mediators can now claim to have mediated many hundreds, and even thousands, of cases. I have attended numerous events where mediators introduced themselves by saying that they have mediated more than 1000, 2000, and even 5000 cases.

35. Certification of mediators has become a big business. Individual and organizational trainers are constantly offering training programs that often provide "graduates" with certificates suitable for framing and citing as credentials. The most recent *Alternative Newsletter* published by Professor James Boskey lists 58 organizations in the United States that offer training in ADR skills. Many of these organizations offer multiple trainings over the course of a year. See *Training in ADR Skills*, *ALTERNATIVE NEWSL.*, July 1996, at 12-19. Based on the level of practitioner experience, professional organizations like the Society of Professionals in Dispute Resolution offer stratified membership categories that can be used to create market distinctions. See *Soc'y of Profs. in Disp. Resol., Application for Membership* (1995) (on file with author). In Florida, the state government has gotten into the certification business to the extent that mediators who satisfy the legal requirements routinely advertise that they have been "certified by the [Florida] [S]upreme [C]ourt." *FLA. R. CERT. & CT.-APPTD. MEDIATORS* 10.010(a)(1), (b)(1), (c)(1) (1996). Recently, a growing number of universities have joined the training and certification market. For example, my dispute resolution program at Nova Southeastern University is one of at least 16 university programs in the United States that offer graduate certificates (typically involving at least ten credits of course work), 10 that offer masters degrees, and two that offer doctoral degrees. See Bill Warters, *Mapping the Contours of Graduate Study in Dispute Resolution*, (unpublished materials produced for a national symposium conducted in Fort Lauderdale, Fla., on March 22-24, 1996) (on file with author).

36. Some mediators and mediation organizations showcase mediators' prior judicial experience as a prime selling point. Indeed, the *Wall Street Journal* recently profiled the competition between ADR firms in recruiting former judges with "marquee power" such as a former chief justice of the California Supreme Court. Margaret A. Jacobs, *Retiring Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, *WALL ST. J.*, July 26, 1996, at A1. An official in one ADR company compared his firm with a merchandiser, saying, "[j]udges are like our inventory." *Id.* Judicial experience is likely to be especially valued by buyers seeking mediators with an "evaluative" style or settlement-orientation. See *infra* note 40.

that are, or might be, litigated, the significance of mediation charges is likely to be more symbolic than financial, considering that the differences in mediation costs are likely to be relatively small in the context of total litigation costs. Note that the criteria described in this paragraph are fairly standard, objective, and easy to ascertain.

Given the substantial populations of mediators in many markets, however, these criteria may not be adequate to weed out enough mediators to narrow the shopping search sufficiently to select a particular mediator, or these may not be the primary criteria that some buyers use. No doubt, some buyers will be very interested in whether particular mediators are more or less sympathetic to some types of parties (notably those with characteristics like the principals in a given dispute) and thus whether they are truly impartial. Although classic mediation theory requires or assumes that mediators are impartial, certainly many lawyers and principals hope that a mediator will be especially helpful to their side. For example, in mediation of tort cases, mediation shoppers may wonder whether the mediator tends to favor plaintiffs or defendants. If the opposing party or lawyer is "difficult," can the mediator effectively "handle" them?³⁷ If there are cultural differences between the parties, is the mediator sensitive to these differences?³⁸ While all these distinctions may be helpful, mediation buyers may be especially interested in distinguishing mediation services based more on what mediators actually do in mediation. In the next subpart, we consider some differences in mediators' styles and philosophies.

B. Mediator Styles and Goals

Mediation buyers will often want to distinguish the working styles of the mediators and match them to the perceived needs in particular cases or to the buyers' own general preferences about mediator styles and goals. This is where empirical research on mediators' promotional communications about their styles and especially the buyers' investigation and decisionmaking would be helpful. It would be interesting to see how the classifications used by mediation buyers and sellers relate to those developed by theorists.³⁹ For ex-

37. I am grateful to Palo Alto, California, mediator Althea Lee Jordan for suggesting the preceding buying criteria in this paragraph.

38. I am grateful to Palo Alto, California, mediator Michael J. Lowy for suggesting this criterion.

39. In daily life, people often use informal categories that reflect and affect their behavior. For example, Professors Lynn Mather, Richard Maiman, and Craig McEwen found that New Hampshire divorce lawyers use a variety of characterizations of their colleagues that presumably describe and affect the behavior of divorce lawyers and those with whom they deal. The categorizations include "reasonable," "client-driven," "papering" (i.e., engage in excessive discovery and motion practice), "just a business" (i.e., uncommitted to their clients' interests), "incompetent," "cause," "conflict-escalating" lawyers, "sleepers,"

ample, when mediators describe their services and lawyers shop for mediators, do they refer to the distinction between facilitative and evaluative styles?⁴⁰ Perhaps some of the more sophisticated buyers and sellers do and do so explicitly in those terms. However, it is probably somewhat more common for them to refer to this issue but to use different terms. For example, market participants may describe mediators and their styles as weak or strong. Other, more colloquial expressions may also be used. Thus, more directive mediators may be referred to as “muscle mediators,” “Rambo mediators,” “Attila the mediator(s),”⁴¹ or mediators who will “knock some sense” into the principals by “banging their heads together” or “twisting their arms.” More facilitative mediators may be referred to as “soft,” “touchy-feely,” “therapeutic,” “potted plant,” or “new age-y.”⁴² It is worth noting that most of these terms have strong and generally negative connotations. Although classic mediation theory clearly fa-

and “snakes.” Lynn Mather et al., *Negotiating a Divorce: Differences Among Lawyers* 8, 10, 13-14, 19-21 (June 1991) (paper presented at the Annual Meeting of the Law and Society Association).

40. Mediators using a facilitative style focus on eliciting the principals’ own opinions and refrain from pressing their own opinions about preferable settlement options. See Riskin, *supra* note 9, at 24. Mediators using an evaluative style develop their own opinions about preferable settlement options and may try to influence principals to accept them. See *id.* at 23-24. I believe that the term “evaluative” often refers to the level of directiveness or coercion that a mediator employs to reach a particular agreement or any agreement, at least at the extreme end of the continuum. Thus, in this Article, I generally use the term “directive” in place of “evaluative.”

Like most of the distinctions in this field, it is more useful to think of this as a continuum rather than a discrete dichotomy. Presumably most mediators’ styles would fall somewhere between the two extremes, and the question would be where a mediator’s style is located on this continuum. The importance of conceptualizing this as a continuum is reflected by the fact that a mediator makes multiple interventions in any given case, each of which might be classified differently. Thus, to identify a mediator’s “true” style would require some aggregation of multiple interventions and should somehow weigh the varying degrees that each intervention is facilitative or directive and take into account differing situational contexts. See Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985, 989 (1997). This suggests that it is probably impossible to create a truly valid measure of this dimension. This need not, however, prevent theorists and participants in the mediation market from finding the concept useful. See *id.* at 1004-05; cf. Stempel, *supra* note 9, at 952 n.9, 969-70 (criticizing use of bipolar and continuum models as creating false dichotomies but recognizing their value for purpose of discussion and analysis)

41. I am grateful to Berkeley, California, mediator Ron Kelly for relating an experience in which a principal in a mediation referred to the third party as “Attila the mediator.”

42. Dean James Alfini used the evocative terms “hashers,” “bashers,” or “trashers,” which I believe refer to the facilitative-directive distinction. See James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 66-73 (1991). “Hashers” tend to encourage the parties to communicate directly with each other and are willing to let the principals end the process without agreement. See *id.* at 71. “Trashers” work primarily in caucus, pressing to reach agreement by criticizing the merits of each side’s case. See *id.* at 66-67. “Bashers” focus primarily on criticizing each side’s position in a “mad dash for the middle.” *Id.* at 70.

vors minimal directiveness by mediators,⁴³ a substantial number of mediation buyers and sellers highly value “strong” mediators and look down upon those they consider too “touchy-feely.”⁴⁴ Thus, the issue of mediator directiveness clearly stirs fervent passions of theorists and market participants alike and is probably a factor used in promoting and shopping for mediators.⁴⁵

Many mediation buyers and sellers probably also focus on the mediators’ goals in mediation. Professor Robert A. Baruch Bush developed a typology of mediators based on their identification with one of five primary goals.⁴⁶ Bush labels these five types of mediators as “settlors,” “fixers,” “protectors,” “reconcilers,” and “empowerers.”⁴⁷ Settlers “see their job as settling cases, period—as many as possible, as quickly as possible.”⁴⁸ They tend to believe that what the principals most want (or need) is simply to end the case. When using a positional (rather than a problem-solving) approach to mediation,⁴⁹

43. See, e.g., MOORE, *supra* note 1, at 327-33.

44. See, e.g., Stempel, *supra* note 9, at 973-75. One Florida mediator with a facilitative philosophy told me that lawyers frequently pressed her to tell the principals “how much the case is worth” and were quite frustrated when she would not do so.

45. My experience has been that academics are often especially passionate proponents of facilitative approaches and criticize directive approaches, whereas lawyers and mediators who practice law and mediation for a living often have the opposite passions. However, there are many in each group who do not fit this generalization. The unflattering characterizations clearly rankle theorists and practitioners committed to the differing views. For example, two reviewers who strongly identify with a facilitative approach expressed concern about including in this Article pejorative references to that approach using such terms such as “weak,” which they believe is an inaccurate portrayal. On the other hand, a reviewer with an evaluative approach complained about descriptions of mediators’ evaluative settlement efforts as being like portrayals of a night with a prostitute. Though I agree that these are often misleading characterizations, the fact that these epithets are widely used—and touch sensitive nerves—says a lot about the current state of the field. See generally *infra* Part II.C.

46. See Robert A. Baruch Bush, *Ethical Dilemmas in Mediation* 17-18 (1989) (unpublished manuscript, on file with author). Bush notes that mediators often aspire to several or all of the goals, but that the goals sometimes conflict and the mediators must then choose between them. See *id.* at 15-17. Even when the goals do not conflict, many mediators unambiguously favor some goals over others. Nonetheless, the typology necessarily oversimplifies mediator motivation and behavior to some extent. Although in practice there are probably few, if any, mediators who perfectly embody the pure types such as settlers and empowerers, these labels do reflect some basic differences and will be used for convenience.

In *The Promise of Mediation*, Bush presents a somewhat different typology of mediators’ goals. See BUSH & FOLGER, *supra* note 10, at 15-32. I refer to the goals from Bush’s earlier manuscript because they better capture the distinctions between the goals, as described below. See *infra* note 54. Bush’s descriptions of the five roles are fairly brief. The descriptions in this Article include my own elaborations of Bush’s typology.

47. See Bush, *supra* note 46, at 17-18.

48. *Id.* at 17.

49. In a positional (or adversarial) approach, each participant sets extreme aspiration levels and makes a series of strategic offers intended to result in a resolution as close as possible to that person’s initial aspiration. See FISHER ET AL., *supra* note 14, at 4-7. A problem-solving approach involves a joint identification and selection of options maximizing the interests of all principals. See *id.* at 40-80; see also Riskin, *supra* note 9, at 13-

settlors often assume that all participants will be pleased to be rid of the dispute even though some, and possibly all, of the participants may be disappointed with the outcome of mediation. Not surprisingly, the mediator's settlement rate is likely to be critically important to mediation buyers and sellers for whom settlement is the primary goal.⁵⁰ An emphasis on settlement lends itself to being highly directive and thus may be characterized in practice with some of the same terms—such as “strong”—as a directive style generally. However, mediators who focus on other goals may also be quite directive, as we shall see shortly.

Another type of mediator, whom Bush calls “fixers,” emphasizes the development of optimal solutions.⁵¹ For fixers, “their job is to help the parties by relieving them of their problem and finding them the best possible solution to it—best for both parties, that is.”⁵² The quintessential fixers are “getting-to-yes” joint problem-solvers. They want to consider all the relevant information and options and then craft the solution that works best for all the principals.⁵³ Fixers probably vary in their levels of directiveness. Some may develop strong opinions about the best result for the principals and press them to accept it, while other fixers may be content to generate desirable options but be relatively detached about the principals' decisions.⁵⁴ Mediation buyers looking for fixers might identify the desired quality as being especially “knowledgeable,” “creative,” or “smart.”

Some of Bush's other types of mediators seem like variants of the general “fixer” species. “Protectors” are especially concerned with preventing any principal (especially those perceived to be weaker) from experiencing an unfair process and/or receiving an adverse outcome.⁵⁵ Protectors “see their job as making sure that nobody gets hurt or taken advantage of in the mediation process, and—in some cases—that not only the process but the final outcome is basically fair.”⁵⁶ Like the fixers, protectors focus generally on the quality of the outcome (or process), but focus primarily on avoiding harm rather

16 (citing sources and noting variety of terms used to distinguish problem-solving and positional approaches).

50. Critics are concerned that settlors may be more interested in getting “another notch on their belts” than in the substantive quality of the mediated resolution. See Frank E.A. Sander, *The Obsession with Settlement Rates*, 11 *NEGOTIATION J.* 329, 329-31 (1995).

51. See Bush, *supra* note 46, at 17.

52. *Id.*

53. See *id.*

54. In his subsequent book with Joseph Folger, Bush uses the more widely used term “problem-solving” (which I prefer), referring to the goals of fixers. Bush and Folger also describe this orientation as “directive, settlement-oriented,” which lumps together two approaches that often do not go together. BUSH & FOLGER, *supra* note 10, at 12.

55. See Bush, *supra* note 46, at 17-18.

56. *Id.*

than producing optimal benefit. Mediation buyers might describe protectors as “protective” or “prudent.”

Mediators of Bush’s “reconcilor” type are particularly concerned about the relationships between the principals and try to get the principals “to come to some kind of a new and more accepting understanding of one another.”⁵⁷ One might think of these mediators as fixers who focus on the quality of the process in mediation itself—and especially the quality of the resulting relationships—as possibly more important than the specifics of any agreements reached. Moreover, reconcilors may expand the scope of attention to include relationships with individuals not in the mediation. One might expect reconcilors to be concentrated in the ranks of community and family mediators, though there may well be a cadre of reconcilors who handle stereotypically hard-boiled problems such as those in business. Mediation buyers might refer to reconcilors as “sensitive” or “therapeutic.” Many reconcilors may favor less-directive tactics (which is why the term “therapeutic” might be used regarding both techniques and goals), though this need not always be the case. Some therapeutic mediators with strong beliefs about the importance of relationships may be quite directive, such as, for example, when a family mediator presses divorcing parents very hard to develop a good working relationship for the benefit of their children.

Bush refers to the fifth type of mediators as “empowerors.”⁵⁸ They focus on helping the principals “to exercise their power of self-determination to resolve the dispute on whatever terms they think best.”⁵⁹ One might think of empowerors as fixers who reject a directive approach. Empowerors are likely to work hard to get the principals to examine their options and their own interests, but display detachment about the options selected as long as the principals have engaged in a certain amount of careful deliberation. Lawyers are not typically interested in promoting their clients’ self-reflection,⁶⁰ so it seems unlikely that many lawyers would seek out mediators with empowerment philosophies. Still, some disputants may be most interested in this approach. Such mediation buyers might describe the kind of mediators they seek as “thorough and systematic.”

As this tour of mediator styles and goals demonstrates, some widely different activities take place in the name of mediation.

57. *Id.* at 18. This is similar to Bush and Folger’s concept of recognition. See BUSH & FOLGER, *supra*, note 10, at 2.

58. Bush, *supra* note 46, at 18.

59. *Id.*

60. Lawyers often say things such as that they hope the mediator will help them (the lawyers) when they have a “hard sell” with recalcitrant clients. See McEwen et al., *supra* note 23, at 1370. To that extent, lawyers may want a mediation to promote self-reflection. However, in such situations, the lawyers really want to reduce the principals’ control and lower their expectations, not increase their self-determination.

Should all these activities be entitled to carry the mediation label? I consider this question in the next subpart.

C. Single-School and Pluralist Theories of Mediation

This exercise speculating about the process of shopping for mediation services is useful for analyzing how mediation markets may become institutionalized by developing a generally accepted vocabulary reflecting distinctions within these markets. This institutionalization process entails both the conscious activity of “intellectual entrepreneurs” (such as promoters of mediation services, policymakers, and academic theorists and researchers)⁶¹ and the less-conscious interactions of individual buyers and sellers in the market. Over time, some conceptions gain currency and others fall into disuse. Institutionalization processes occur in relatively unsettled situations with “bursts of ideological activism” in which ideologies compete for dominance.⁶² After these ideological contests are settled, actions are guided by taken-for-granted traditions and what is perceived as common sense.⁶³ It seems clear that we are now right in the middle of such a period of ideological contest.⁶⁴

A fundamental issue in this institutionalization of mediation is whether there should be a single, relatively pure, conception of mediation that is appropriate for all mediators (which I call the “single-school” view), or whether a variety of conceptions should be accepted

61. Professor Paul DiMaggio argues that the success of an institutionalization project is usually premised on certain types of conceptualizations that institutional entrepreneurs advance:

Unless [legitimizing conceptualizations] are enacted by an organizational system that segments labor markets, evokes consumer (or state) demand, manufactures new areas of expertise, and classifies new products and services as qualitatively different from old ones, newly institutionalized forms will be highly unstable in their structures, public theories, and programs.

. . . Recruiting or creating an environment that can enact their claims is the central task that institutional entrepreneurs face in carrying out a successful institutionalization project.

Paul J. DiMaggio, *Interest and Agency in Institutional Theory*, in *INSTITUTIONAL PATTERNS AND ORGANIZATIONS: CULTURE AND ENVIRONMENT* 3, 15 (Lynne G. Zucker ed., 1988) (citations omitted).

62. Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 *AMER. SOC. REV.* 273, 279 (1986).

63. See *id.* at 279-81.

64. See BUSH & FOLGER, *supra* note 10, at 12. Bush and Folger make this contest quite explicit, arguing that the mediation movement is now at a “crossroads” where the mediation community must decide between a settlement-oriented, problem-solving approach and a transformative approach as the primary strategy for mediation. *Id.* The intense reaction to their book, pro and con, suggests that they have indeed “touched a nerve” and that the “correct” resolution of this matter is anything but taken for granted in the mediation community generally. See *supra* note 10.

as legitimate (which I refer to as the “pluralist” view).⁶⁵ The “single-school” view seems to be quite popular among mediators, judging from casual conversations I have heard at gatherings of mediators, though single-school mediators differ as to just what that school should be. Dean James Alfini captured this ethos in quoting a comment by a mediator who distinguished what she believed to be “good” mediation—some mediators call it “real mediation”⁶⁶—from what she considered substandard mediation practice.⁶⁷ For example, many mediators can identify quite clearly whether they subscribe to a facilitative or evaluative approach and to which goals they aspire. Not only do these mediators attest to the merits of their own approach, but they cast doubt on the merits of the others, as reflected in the less-than-flattering characterizations of the others as described above.⁶⁸ Professors Kimberlee Kovach and Lela Love clearly articulate a positive rationale for a single standard of acceptable mediation:

To develop rules, standards, ethical norms and certification requirements, legislators and administrators need well-defined and uniform processes. Similarly, meaningful program evaluations require uniformity. . . . “Mediation” should mean the same thing from state to state, and from one court to another within a state.⁶⁹

Some who hold a single-school view somewhat reluctantly accept the legitimacy of what they view as substandard mediation practices but plead, “Just don’t call it mediation.”⁷⁰

65. Others have also used the term “pluralist” in this context. See, e.g., Menkel-Meadow, *supra* note 10, at 236. For other descriptions of pluralist philosophies, see Stempel, *supra* note 9, at 950 (favoring an “eclectic model”); MOORE, *supra* note 1, at 53-55 (opposing “narrow” definition of mediation); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. (forthcoming 1997) (distinguishing whether theorists favor pure “bright line” definition of mediation or not); James B. Boskey, *Let 100 Flowers Bloom*, ALTERNATIVE NEWSL., Nov. 1996, at 1. I have used a related concept of “process pluralism,” referring to acceptance of the legitimacy of a variety of third-party ADR procedures. See Lande, *supra* note 8, at 7-8. This is in contrast to legal centralism, which holds that the courts, the law, and lawyers are and should be the primary means for handling disputes involving legal issues. See *id.*

66. McEwen et al., *supra* note 23, at 1392.

67. See Alfini, *supra* note 42, at 47.

68. See *supra* text accompanying notes 41-42. The fact that many of my dispute resolution students who have little or no professional mediation experience have very strong convictions about the “right” and “wrong” approaches is further evidence that these differences run deep.

69. Kovach & Love, *supra* note 9, at 32; see also Bush, *supra* note 46, at 20.

70. This is often expressed by mediators holding facilitative and empowerment philosophies who believe that directive and settlor approaches should be called “mediation-arbitration” (often referred to as “med-arb”), “nonbinding arbitration,” “neutral case evaluation,” or “private settlement conferencing.” See, e.g., Kovach & Love, *supra* note 9, at 32; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 948 (1997).

I am skeptical of a single-school approach for both philosophical and pragmatic reasons. Although I have my own preferences in mediation philosophy—I lean toward an approach promoting principals' exercise of responsibility in decisionmaking⁷¹—I am a pluralist because I believe that there is a positive value in having a diverse market that offers a wide variety of legitimate options for both mediation buyers and sellers. As a practical matter, I doubt that it is possible either to limit the style of mediator practices or to enforce a single-school usage of the term "mediation."⁷² Rather than trying to maintain distinctions about what is and isn't "real mediation," it would be more productive to try to concretely define distinct varieties of mediation in ways that are clearly recognizable by participants in the mediation market. While this would be no easy task in itself, I believe it is more likely to be successful and productive.⁷³

71. Substantively, this is somewhat similar to what Bush and Folger refer to as an "empowerment" approach. See BUSH & FOLGER, *supra* note 10, at 2. I do not like the "empowerment" label because it gives an impression of mediators conveying power to the principals. This is not necessarily an accurate description of behavior of practicing mediators who use this label. Moreover, even as an ideal reflecting the best intentions, I believe that mediators should not be trying to manipulate the power of principals. Finally, the term has become so clichéd in usage as to lose clear meaning. Below, I elaborate my view of a substantively similar, though differently labeled, approach. See *infra* Part III.A.

72. As the profiles of mediators in Deborah Kolb's book demonstrate, the range of mediation practices is indeed quite diverse, and it would be difficult to disenfranchise mediators from using the title. See generally WHEN TALK WORKS, *supra* note 13.

73. When explaining his rationale for using an inclusive approach in his categorizations of mediation, Leonard Riskin expressed the pluralist view very well:

I hope to facilitate discussions and to help clarify arguments by providing a system for categorizing and understanding approaches to mediation. I try to include in my system most activities that are commonly called mediation and arguably fall within the broad definition of the term. I know that some mediators object to such inclusiveness, and fear that somehow it will legitimize activities that are inconsistent with the goals that they associate with mediation. Although I sympathize with this view, I also disagree with it. Usage determines meaning. It is too late for commentators or mediation organizations to tell practitioners who are widely recognized as mediators that they are not, in the same sense that it is too late for the Pizza Association of Naples, Italy to tell Domino's that its product is not the genuine article. Such an effort would both cause acrimony and increase the confusion that I am trying to diminish. Instead, I propose that we try to categorize the various approaches to mediation so that we can better understand and choose among them.

Riskin, *supra* note 9, at 13 (footnotes omitted). Advocates of a single-school approach, see, e.g., Kovach & Love, *supra* note 9, at 32, and pluralists agree on the need for clearly understood distinctions in the mediation market. They differ regarding whether it is more appropriate and practical to use the term "mediation" as the distinguishing label or to use qualifiers distinguishing different varieties of mediation instead. I believe that limiting the use of the term "mediation" does not solve the problem because there is confusion between mediation and similar processes (like mini-trials), as well as between styles of what is commonly called "mediation." See *infra* notes 103, 107-22 and accompanying text. It is too much to expect the single term "mediation" to distinguish various subtly different processes. Distinct and meaningful descriptors can provide more information about the substantive differences being established.

As we have seen, the mediation market is quite diverse and currently in the process of institutionalization. Theorists and market participants are struggling to develop what they hope will become taken-for-granted definitions. These arguments over terminology are not “just” academic exercises; these debates shape the practices of mediators and lawyers regarding what it means to be a “good” practitioner, referring to shared meanings and norms within one’s practice community.⁷⁴ Thus, for mediators and lawyers to succeed in practice, especially in liti-mediation environments, most mediators will need to relate their practices to generally-accepted definitions, and lawyers will need to distinguish key differences in mediation practices. The next part of this Article illustrates a behavioral description of one important dimension of mediation.

III. APPROACHING THE IDEAL OF “HIGH-QUALITY CONSENT”

As suggested in Part II, there is now a major controversy over whether the primary goal of mediation should be to achieve the outcome of case settlement (the view of Bush’s settlors) or to provide a deliberative decisionmaking process in which principals exercise their best judgment (the view of Bush’s empowerors).⁷⁵ There is also a related contest over the degree of pressure, if any, that is appropriate for mediators to exert on principals (Riskin’s facilitative-evaluative distinction).⁷⁶ This Part focuses on these controversies, which are important issues that lawyers and mediators will increasingly need to confront. These issues define significant distinctions that lawyers and mediators will rely upon in the mediation market⁷⁷ because they reflect important variations in actual lawyering and mediation procedures.⁷⁸

Part III.A examines an empowerment perspective or, as I prefer to call it, an approach promoting principals’ exercise of their decisionmaking responsibility. This subpart analyzes the goals of this approach and examines two cases illustrating problematic mediation practices from this perspective. To provide a contrast with the higher standards of what I call “high-quality consent,” Part III.B reviews the legal standards of consent required for any settlement. In Part III.C, I define “high-quality consent” as a condition in which a principal has exercised his or her responsibility for making decisions in a dispute by considering the situation sufficiently and without excessive pressure. This subpart identifies seven factors that can be used

74. See John Lande, *Mediation Paradigms and Professional Identities*, *MEDIATION Q.*, June 1984, at 19, 41-45.

75. See *supra* notes 46-50, 58-59 and accompanying text.

76. See *supra* note 9.

77. See *supra* Part II.

78. See *infra* Part IV.C.

to define the quality of consent that a mediation process has achieved; I contend that achieving high-quality consent should be an important goal in mediation.⁷⁹ Because high-quality consent is defined as a continuous, rather than a dichotomous, concept, it suggests that the issue is not whether high-quality consent has been achieved but rather the level of quality.

A. Concepts of Empowerment and Principals' Exercise of Decisionmaking Responsibility

Recently, there has been a revival of interest in "empowerment" as the principal goal of mediation. This was often the motivation for mediation at the dawn of the modern ADR era, especially in neighborhood mediation projects.⁸⁰ As lawyers and courts became increasingly involved in offering or encouraging use of mediation in the 1980s, much of the focus shifted to efficiently handling larger volumes of cases and removing them from court dockets.⁸¹ That shift of emphasis toward settlement was accompanied by the use of more directive mediation techniques.⁸² I suspect that much of the current revival of interest in empowerment is a (often horrified) reaction to the institutionalization of directive, settlement-focused mediation.⁸³

79. Several reviewers noted what seemed to them to be an inconsistency between my advocacy of pluralism in mediation philosophies, see *supra* notes 71-73 and accompanying text, and my version of empowerment. However, this does not seem inconsistent to me. Like Riskin, having my own preferences "does not keep me from seeing the virtues of other approaches in appropriate cases," Riskin, *supra* note 9, at 13 n.17, and, I would add, with clear disclosure in all cases. Offering mediation buyers and sellers a wide range of choices is an even higher value for me than having a market limited to my preferred approach. Thus, I favor a vibrant mediation market in which advocates of different approaches fairly highlight the relative advantages of their approaches so that principals are given clear choices.

Bush and Folger argue that it is unlikely that, if offered their transformative style of mediation, potential mediation users would reject it. See BUSH & FOLGER, *supra* note 10, at 276-78. To support this view, Bush cites social science research describing general characteristics of dispute resolution procedures disputants favor that are consistent with a transformative model. See Robert A. Baruch Bush, "What Do We Need a Mediator For?" *Mediation's Value-Added for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 6-26 (1996). Even if the vast majority of mediation users would prefer transformative mediation if offered a clear set of choices, I would still want to respect the preferences of the minority who would prefer other styles, such as the settlor-style that I do not prefer. Providing principals with a choice between styles of mediation is very consistent with the value of promoting their responsibility for decisionmaking that is so central to empowerment philosophies.

80. See generally Peter Adler et al., *The Ideologies of Mediation: The Movement's Own Story*, 10 L. & POLY 317 (1988).

81. As some commentators have pointed out, many cases settled in mediation would probably have been settled through direct negotiation even without mediation. See, e.g., McEwen et al., *supra* note 23, at 1373. Thus, it is not completely accurate to think of mediation as removing cases from a court's trial docket.

82. See *supra* note 40.

83. See BUSH & FOLGER, *supra* note 10, at 1-12.

This revival is reflected by the recent publication of several books on empowerment,⁸⁴ especially Bush and Professor Joseph P. Folger's *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*,⁸⁵ which has stimulated a great deal of discussion and controversy within the mediation community.

What do people mean by the term "empowerment"? Professor Edward Schwerin presents a fascinating analysis of how the term has been used in social science literature generally as well as in the mediation literature.⁸⁶ Schwerin finds that theorists differ in the extent to which they refer to empowerment of individuals⁸⁷ or transformation of large-scale social and political relationships. While some of the mediation movement literature (and much of the social science literature) focuses on achievement of macro-political goals,⁸⁸ virtually all of the mediation theorists (as well as the social science theorists) include individual transformation as a major element of empowerment.

84. See EDWARD W. SCHWERIN, *MEDIATION, CITIZEN EMPOWERMENT, AND TRANSFORMATIONAL POLITICS* (1995); JONATHAN G. SHAILOR, *EMPOWERMENT IN DISPUTE RESOLUTION* (1994); KATHY DOMENICI, *MEDIATION: EMPOWERMENT IN CONFLICT MANAGEMENT* (1995).

85. BUSH & FOLGER, *supra* note 10. This book caps more than a decade of interest of both authors in this subject. Bush's publications include: Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WISC. L. REV. 893 [hereinafter Bush, *Jurisdictional Principles for Process Choice*]; Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989); Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335 (1989); Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989); Bush, *supra* note 79. Folger's publications include: Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, *MEDIATION Q.*, June 1984, at 61; Joseph P. Folger & Sydney E. Bernard, *Divorce Mediation: When Mediators Challenge the Divorcing Parties*, *MEDIATION Q.*, December 1985, at 5; JOSEPH P. FOLGER ET AL., *WORKING THROUGH CONFLICT: STRATEGIES FOR RELATIONSHIPS, GROUPS, AND ORGANIZATIONS* (1993); Joseph P. Folger & Robert A. Baruch Bush, *Ideology, Orientations to Conflict and Mediation Discourse*, in *NEW DIRECTIONS IN MEDIATION* (Joseph P. Folger & Tricia S. Jones, eds., 1994); Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263 (1996) [hereinafter Folger & Bush, *Ten Hallmarks*].

86. See SCHWERIN, *supra* note 84, at 55-91.

87. Although the individuals to be empowered specifically in the mediation context presumably are the principals, Schwerin finds that some of the mediation literature focuses on empowerment of the mediators. See *id.* at 77-79. Some studies of empowerment-oriented community mediation find that the mediators were indeed quite empowered, but that the principals were less so. See, e.g., Judy H. Rothschild, *Dispute Transformation, the Influence of a Communication Paradigm of Disputing, and the San Francisco Community Boards Program*, in *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 265, 319-20 (Sally Engle Merry & Neal Milner, eds., 1993).

88. These social and political goals include promotion of political awareness and participation, as well as outcomes of increased participation, greater social and material resources for the disadvantaged in society, and enforcement of legal rights protecting political participation. See SCHWERIN, *supra* note 84, at 81-87.

This Article focuses only on individual-level empowerment. This narrower definition of transformation deals with the development of individuals' knowledge, skills, and resources, typically focusing on those needed to resolve a particular dispute.⁸⁹ Bush and Folger's definition of empowerment encompasses elements of individual empowerment, using particular disputes as opportunities for personal transformation generally. They write that "empowerment is achieved when disputing parties experience a strengthened awareness of their own self-worth and their own ability to deal with whatever difficulties they face, regardless of external constraints."⁹⁰ In this view, people become empowered in mediation when they better understand their goals, options, skills, and resources, and then make conscious decisions about how they want to handle a dispute.⁹¹ Thus, Bush and Folger contend that a mediator oriented toward promoting empowerment would routinely and persistently act to help the principals become more deliberative in making decisions in a dispute.⁹² Bush and Folger do not conceive of empowerment as requiring mediators to be passive. Indeed, they argue that good transformative mediators should "push" principals to focus on the issues as much as possible, and that failing to do so would deprive principals of the greatest potential benefits of mediation.⁹³ In essence, transformative mediators try, gently but firmly, to help the principals in a dispute responsibly exercise their decisionmaking authority.⁹⁴

Why do theorists and practitioners who are concerned about empowerment consider the principals' exercise of their responsibility to be so important? There are several reasons. For some, at least

89. See *id.* at 77-78. Schwerin also finds that many mediators' discussions of empowerment include the related goals of promoting individuals' self-esteem and sense of control over their environments more generally (i.e., not limited to a specific dispute) and reducing dependency on professional and social services. While this general learning is often a very valuable product of mediation, it does not seem to be an element of consent. See *infra* Part III.C.

Some mediators associate the concept of empowerment with "equalizing" or "balancing" the power between the principals. See SCHWERIN, *supra* note 84, at 79; see also BUSH & FOLGER, *supra* note 10, at 95-96. I agree with Bush and Folger's critique that conceiving empowerment in terms of power balancing undermines mediators' efforts at impartiality. Moreover, I believe that it is virtually impossible for anyone to accurately measure and then balance power between principals. Thus, I do not use "empowerment" or similar concepts to incorporate the notion of equalizing power. This is not to say that mediators cannot or should not raise questions about whether differences in power are having or should have a substantial impact on the process and outcome in a mediation.

90. BUSH & FOLGER, *supra* note 10, at 84.

91. See *id.* at 85-87.

92. See *id.* at 95.

93. See *id.* at 210-211.

94. I use the term "exercise" rather than "take" or "assume" because the latter terms suggest that the responsibility was not originally that of the principals. The term "retain" thus seems more accurate, but does not reflect the active exercise of responsibility that I intend to convey (and promote).

part of the reason is instrumental: they believe that if principals exercise responsibility for their decisions and actions, it will produce benefits for the principals themselves, those they deal with, and society generally.⁹⁵ For some, exercising responsibility is an ultimate value in itself—or really two related values.⁹⁶ Probably most commonly expressed is the belief in the value of individuals making uncoerced decisions for and about themselves as an intrinsic good.⁹⁷ The terms “autonomy” and “self-determination”⁹⁸ reflect this view that values individuals’ unrestrained freedom to act as they choose, obviously limited by the rights (and perhaps reasonable expectations) of others.⁹⁹ A refinement of this perspective particularly values the making of informed and considered decisions.¹⁰⁰ In this view, principals carefully consider their situations and accept responsibility for making possibly difficult choices.¹⁰¹

As noted above, some advocates of empowerment are motivated in reaction to the spread of a strongly directive style of mediation.¹⁰² From this perspective, directive-style mediation actively undermines principals’ self-determination by pressuring principals to accept particular proposals based on others’ judgments rather than the principals’ own careful deliberation. We can get a sense of the problems seen in directive mediation by reviewing the description of a mini-trial¹⁰³ conducted by Professor Eric Green. Green is a pioneering and

95. See BUSH & FOLGER, *supra* note 10, at 28-32.

96. See *id.*

97. See *id.*

98. For example, official rules in Florida are designed to protect principals’ “self-determination.” FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.060. Similarly, the first point in the Model Standards of Conduct for mediators developed by the American Arbitration Association, the American Bar Association, and the Society for Professionals in Dispute Resolution is that “self-determination is the fundamental principle of mediation.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (Am. Arb. Ass’n et al. 1994).

99. Professor Ellen Waldman describes what she calls a “norm-generating model” of mediation in which unfettered party autonomy is the ultimate goal of mediation. Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 733 (1996).

100. Waldman uses the term “norm-educating model,” referring to an approach based on the assumption that parties must be educated about relevant norms (e.g., information about legal entitlements and relevant financial, technical, and psychological data) to truly exercise autonomy. *Id.* at 734-35. Her trichotomy is completed with a “norm-advocating model” in which party autonomy is an important value, but one subordinated to the achievement of other values, such as goals established by various statutes. *Id.* at 735.

101. See *id.* at 732.

102. See *supra* notes 83-85 and accompanying text.

103. The term “mini-trial” is somewhat misleading because, at least in theory, it is more like mediation than a trial. Mini-trials, which are most often used in business disputes, begin with summary presentations by lawyers to a panel consisting of high-level executives from each side. See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 230 (1992). After the lawyers’ presentations, a “neutral advisor” assists the parties in negotiation, possibly giving a prediction of the likely results in litigation. See *id.*

Although this case is usually referred to as a mini-trial in the published account, it is sometimes described as a mediation. Moreover, the case is highlighted in a book subtitled

prominent mediator who was a co-founder of Endispute,¹⁰⁴ and who “likes the role of ‘power mediator’ or ‘mediator with clout.’”¹⁰⁵ In one case described by a colleague and protégé of Green’s, an employer fired a sales representative who sued the employer for breach of contract and willful infliction of emotional distress.¹⁰⁶ In this case, Green received a referral from a judge, then called the principals’ lawyers, explaining that the judge suggested that he (Green) might be able to help settle the case. The judge had provided a great deal of information about the case to Green, including his impressions of the merits of the case.¹⁰⁷ To prepare for the mini-trial, during the weeks preceding its onset, Green had a series of conversations with both sides, mostly with each side separately.¹⁰⁸ In a conversation with the researcher writing the profile, Green described his process as gathering information and developing his own early assessment of prospects for settlement, including key issues and appropriate settlement values.¹⁰⁹ For example, apparently early in the mini-trial itself,

“Profiles of Mediators.” From the description of the process, it could have consistently been called a directive mediation. See Kolb & Kressel, *supra* note 13, at 473-74. It presents the same issues about exercise of responsibility even if it were consistently called a mini-trial. This is one reason why I believe that simply “not calling it mediation” would not resolve the underlying controversies about appropriate dispute resolution techniques. See *supra* notes 65-73 and accompanying text.

104. Endispute later merged with the Judicial Arbitration and Mediation Service (JAMS), and is now called JAMS/Endispute. See S. Gale Dick, *Making ADR Profitable*, 13 *ALTERNATIVES TO HIGH COST LITIG.* 1, 4 (1995).

105. Lavinia Hall, *Eric Green: Finding Alternatives to Litigation in Business Disputes*, in *WHEN TALK WORKS*, *supra* note 13, at 306. Green also described the mediator’s role as a “pest-advocate for settlement.” *Id.* at 286.

106. See *id.* at 285.

107. See *id.* at 286. The researcher describes the conversation with the judge as follows:

The parties appear to be at the point where the company would offer \$350,000, while the plaintiff[s] . . . attorney has mentioned \$750,000 during the settlement conference. The salesman has alleged damages as high as \$7 million. The judge tells Green that “heavy discovery” has already been done. The case cannot be calendared for trial for three months, but a firm trial date can be set then if it will create the right incentives to encourage the defendant to settle. It is the judge’s understanding that the plaintiff is hurting for cash. An expensive trial in three months, with the prospect of an appeal by the losing party (which in all likelihood will take another year), will result in the plaintiff losing his house. The plaintiff has strong incentives to settle. Finally, the judge notes that the plaintiff’s attorney, a bright junior partner in a big firm, seems very invested in the case and has spent a lot of time on it.

Id. at 286. In what turned out to be a critical effort to influence the process, Green encouraged the plaintiff’s attorney to bring to the mini-trial a senior partner who could “judge the case from a business point of view, not just a legal one.” *Id.* at 290. After the case settled, the plaintiff told Green that it was the senior partner who advised him (and the junior partner) to accept the ultimate \$550,000 offer. See *id.* at 301. “‘Otherwise,’ the plaintiff says, he feels ‘sure that my lawyer [the junior partner] would have advised me not to accept.’” *Id.*

108. See *id.* at 286.

109. See *id.*

Green told the researcher that he thought that the settlement range was \$500,000 to \$600,000.¹¹⁰ Green freely expressed his opinions to the principals and gave them strong advice based on his assessments. For example, in a private conversation before the mini-trial began, he told the plaintiff, "Do you really think the court will exclude that evidence? I disagree."¹¹¹ At another point, he said, "My advice would be to drop the claim for 'willful infliction of emotional distress.' In my opinion, that claim could be extremely messy."¹¹² When the plaintiff insisted on more than \$600,000, the maximum appropriate amount under Green's litigation decision analysis, he asked the plaintiff, "How greedy can you get?"¹¹³ Green got very angry late in the process when the defendant's representatives refused to accept a \$550,000 offer which, from their earlier statements, Green had inferred they might accept.¹¹⁴ The formal mini-trial session went nonstop for thirteen hours—from noon to 1:00 a.m. The day was even longer than that, considering that Green started the day with an 8:00 a.m. meeting with the president of the defendant company and its attorneys.¹¹⁵ Green used caucuses¹¹⁶ extensively, keeping the sides separated for seven hours.¹¹⁷ At 11:00 p.m., the plaintiff suggested stopping for the night, but Green told the researcher that he "want[ed] to keep the heat on and settle tonight . . . Their desire to go home may be the fuel needed for final settlement."¹¹⁸ Pressing hard on the defendant's representatives, Green said the defendant should know "that the judge has no desire to hear this case," suggesting that the court might rule against the defendant if it fails to "live up to its moral obligations" to settle the case.¹¹⁹ Green finally brought the parties together after hammering out an agreement in which the defendant agreed to pay \$550,000 in three installments

110. See *id.* at 298.

111. *Id.* at 297.

112. *Id.* at 293.

113. *Id.* at 299.

114. See *id.*

115. See *id.* at 297-98.

116. A caucus is when the mediator meets separately with some of the participants. Typically, the mediator meets with one side—including both a principal and his or her lawyer if the lawyer attends the mediation—and then the other side. There are many possible variations because a mediator may meet with a single principal or lawyer, just the lawyers, or just the principals. Many mediators set a "ground rule" that statements in caucus are confidential unless the principal agrees to permit the mediator to disclose particular information. See generally MOORE, *supra* note 1, at 318-26.

117. See Hall, *supra* note 105, at 300. Miami mediator John W. Salmon uses the term "terminal caucus" to refer to a process in which virtually all of the mediation is conducted in caucus and the participants reconvene all together only after the mediator has finished working out an agreement by "shuttling" back and forth between separate meetings with each side. See Interview with John W. Salmon, Miami mediator, in Ft. Lauderdale, Fla. (March 13, 1996).

118. Hall, *supra* note 105, at 299-300.

119. *Id.* at 298-99.

over a period of two years.¹²⁰ The parties signed a handwritten agreement on the spot and the attorneys agreed that the defendant's lawyer would draft a final agreement.¹²¹

This case demonstrates many features that disturb some people about a directive style of mediation. When judges make "suggestions," attorneys and principals often feel strongly pressured to accept the suggestions, even if the judges do not intend to limit the litigants' choices. The attorneys and principals may experience extra pressure when approached by a private-sector ("third-party") ADR provider who conveys the judge's suggestion and offers to mediate. When he entered the case, the third party already had significant information about the case and had developed ideas about what the ultimate result should be. He purposely used a variety of strong moves to push the participants toward his conception of the appropriate result. Although he certainly listened to the participants, his extensive use of caucusing limited the amount that the participants could communicate directly with each other. This procedure gave the third party tremendous power to influence the participants through careful characterization of the other sides' positions. The third party joined forces (at least temporarily) with one attorney to pressure the attorney's own client to take a more "reasonable" position. The third party used the pressure of time to prod the principals, in this case by continuing the process until the principals finally agreed. In addition to these relatively indirect forms of pressure, the third party strongly expressed his opinions, disparaged the participants' positions, and pressed hard for the participants to accept a particular agreement. He apparently implied that if the defendant did not make what he considered reasonable movement toward settlement, he (Green) might so inform the judge. While this case may represent an extreme on the scale of directiveness, a directive style is not unusual.¹²² Researchers Deborah Kolb and Kenneth Kressel find that many mediators extensively use heavy-handed "pressure tactics and arm twisting."¹²³

The tactics that Green used were relatively overt. Mediators' moves to influence the participants are often much more subtle than

120. See *id.* at 300.

121. See *id.*

122. I use this case for illustration because it provides an especially detailed account of directive mediation tactics. I do not intend to single out Professor Green for criticism because he is, after all, a successful and respected mediator who uses techniques that are quite common in some sectors. Although I criticize Green's tactics in this case, I believe there may be an appropriate place in the dispute resolution market for directive mediation under some conditions. It is not clear from the published account whether Green accurately described to the principals the kind of pressure tactics that he would use and how they compared with other mediation practices. If he did so, I would be less concerned about his procedures. See *supra* note 79 and *infra* notes 173-74, 269 and accompanying text.

123. Kolb & Kressel, *supra* note 13, at 461; see also *id.* at 479-83, 488.

the ones that Green used. Professors David Greatbatch and Robert Dingwall describe a process that they call "selective facilitation,"¹²⁴ in which the mediator directs the discussion toward some proposals and away from others.¹²⁵ Using sophisticated conversation analysis techniques¹²⁶ to analyze an audiotape of a mediation session, they present a case in which a divorcing couple owns a family residence (where the wife and the couple's two young children were then living) and a less valuable piece of rental property.¹²⁷ The wife wanted an agreement in which she would keep the family residence and the husband would keep the rental property.¹²⁸ The husband wanted to sell both properties and divide the proceeds.¹²⁹ A casual reading of the transcript might give the impression that the mediator did not favor either option, but a close examination reveals that the mediator subtly moved the process toward one option and away from the other.¹³⁰ The mediator never directly expressed an opinion about these two options, but she repeatedly returned to the option of keeping the properties; whenever the husband raised the sale option, the mediator either raised questions about it or steered the conversation back to the option of keeping the properties.¹³¹ Although the couple did not reach agreement in mediation about the real estate, the mediator apparently salvaged an agreement about support payments.¹³² Greatbatch and Dingwall report that the selective facilitation in this case was not unusual among the forty-five mediation sessions that they analyzed.¹³³

For settlers,¹³⁴ the mediation process in the two cases described in this subpart are not very problematic because the mediators focused intensely on trying to get an agreement. For those concerned about values other than simply settlement, these cases may be quite troubling. For example, if the plaintiff in Green's case had second thoughts in the following day or two and did not want to proceed with the agreement, one might question the quality of his consent. In the following subpart, we examine the legal standards of consent,

124. David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 L. & SOC'Y REV. 613, 613 (1989).

125. See *id.* at 618, 636-38.

126. Conversation analysis techniques provide much more detail than verbatim transcripts prepared by court reporters. Conversation analysis transcripts display utterances, pauses, voice inflections, and overlapping talk, thus providing a relatively complete depiction of conversations. See *id.* at 619 n.7.

127. See *id.* at 618.

128. See *id.*

129. See *id.*

130. See *id.* at 619-35.

131. See *id.* at 636.

132. See *id.* at 634.

133. See *id.* at 617.

134. See *supra* notes 48-50 and accompanying text.

which would almost certainly have been satisfied in this situation. In Part III.C, I suggest some standards of what I call "high-quality consent" under which there would be serious concerns about the quality of the plaintiff's consent.

B. Standard of Legal Consent

To provide the legal context and a basis for comparison in defining the "high-quality consent" in mediation discussed in Part III.C, it may be useful to consider the standard of consent that the courts use in determining whether to enforce agreements, including agreements settling disputes. In general, contract law has a low standard of consent and recognizes only a few narrow exceptions.¹³⁵ Contracts typically involve an exchange of promises in which a "promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."¹³⁶ In assessing a "manifestation of intention," courts use "an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention. A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct."¹³⁷ Note that under the objective standard, the courts generally do not analyze the care with which the parties negotiated the agreement (e.g., the parties' consideration of various alternatives that they might have chosen or the likely consequences of the various alternatives), the fairness of the agreement, or even their actual understanding of the agreement.¹³⁸ Although there is a doctrinal exception for "unconscionable" agreements, as most first-year law students know, that exception is quite limited.¹³⁹

135. See RESTATEMENT (SECOND) OF CONTRACTS §§ 12-19 (1981); see also *infra* notes 139-43 and accompanying text.

136. RESTATEMENT (SECOND) OF CONTRACTS § 2(1).

137. *Id.* § 2(1) cmt. b.

138. See *id.* §§ 17-19. According to a comment in the Restatement:

Almost never are all the connotations of a bargain exactly identical for both parties; it is enough that there is a core of common meaning sufficient to determine their performances with reasonable certainty or to give a reasonably certain basis for an appropriate legal remedy.

Id. § 20 cmt. b.

139. See *id.* § 208 cmt. d:

A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

The other factors negating assent, including misrepresentation,¹⁴⁰ duress,¹⁴¹ undue influence,¹⁴² and mistake,¹⁴³ are also fairly narrow.

As a matter of legal policy, using such an inclusive, (fairly) bright line approach seems prudent considering the courts' difficult role in adjudicating contentious disputes and the possible result that some parties will act more carefully knowing that they cannot easily evade the consequences. On the other hand, by definition, the law permits—and thus, perhaps, encourages—sharp practices that almost, but do not quite, run afoul of the law.¹⁴⁴ Thus, while contract doctrine regarding the required level of consent may produce good results in the adjudication context, considering the shadow that the law casts on negotiation, it may be counterproductive or at least suboptimal in its effect on negotiation.¹⁴⁵

The fact that the law tolerates unsavory negotiation practices is one reason that many people are interested in ways to improve the negotiation process. This concern reflects an intrinsic value in the disputing process itself, independent of the merits of the outcome or even the principals' satisfaction. For example, there might be a broad consensus of experts on divorce that, under the circumstances, the retention of the family residence in *Greatbatch* and *Dingwall's* case would be in the best interests of the children and perhaps the family as a whole, especially if that option had been developed so that the father's interests could also have been addressed.¹⁴⁶ Similarly, in *Eric Green's* case, the terms of the agreement that Green engineered might be quite appropriate under applicable legal or other norms.¹⁴⁷ Moreover, if one interviewed the participants after the mediations in these cases, the participants might feel quite satisfied with both the outcome and the process, particularly considering the legitimate values of being heard by a formally neutral third party, gaining resolution, and banishing fears of litigation.¹⁴⁸ Even

140. See *id.* §§ 159-73.

141. See *id.* §§ 174-75.

142. See *id.* §§ 176-77.

143. See *id.* §§ 151-58.

144. See, e.g., ROBERT J. RINGER, *WINNING THROUGH INTIMIDATION* (1978).

145. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 980 (1979). "[A] standard may have good characteristics as a background rule for private ordering but may nevertheless be unacceptable as a standard for adjudicating disputed cases." *Id.* The converse is true as well. Professors Mnookin and Kornhauser show that the "best interests of the child standard" for determining child custody may produce good results in adjudication, but creates perverse incentives in negotiation. *Id.* at 977-79.

146. See *supra* text accompanying notes 126-33.

147. See *supra* text accompanying notes 120-21.

148. Some commentators correctly point out that the termination of some cases does not necessarily completely resolve a conflict or even avoid future litigation. See Bush, *Jurisdictional Principles for Process Choice*, *supra* note 85, at 907 n.26. Nonetheless, settlement often does result in resolution, which is something that people may legitimately value.

so, many observers may not be satisfied, believing that the processes were inappropriate or did not realize their potential.¹⁴⁹ If the legal standards of consent do not provide adequate guidance for determining an appropriate or desirable quality of consent for an agreement in mediation,¹⁵⁰ we should consider other standards for evaluating consent, which we will examine in the next subpart.

C. Indicators for a Continuum of High-Quality Consent

If a mere objective “manifestation of mutual assent”¹⁵¹ is not enough to establish what one might consider high-quality consent, what is? This is obviously a difficult question to answer, and the following is the best that I have developed so far. I will use the term “high-quality consent” to refer to a condition in which a principal has exercised his or her responsibility¹⁵² for making decisions in a dispute by considering the situation sufficiently and without excessive pressure. Like many definitions, this relies on important terms (“sufficiently” and “excessive”) that are very ambiguous. In this subpart, I will suggest seven factors that may make this concept more concrete (though these factors admittedly entail some subjective judgment). These factors are intended to provide principals, their attorneys, mediators, or other observers with practical criteria for determining the quality level of consent of a principal in mediation.

This task is more difficult than it might appear for at least three reasons. First, as we shall see, the goal of high-quality consent is an ideal that is not completely achievable in practice. To produce the highest possible quality of consent would require more time and money than normally would be justified. Thus, the quality of consent to be obtained must be balanced with the value of resources to be committed and other criteria for evaluation.¹⁵³ Second, mediation

149. As described below, although I am critical of directive mediation styles involving substantial mediator pressure, I would be satisfied if principals chose such an approach after receiving a clear description of the procedures that are likely to be used. See *infra* notes 173-74, 269 and accompanying text; see also *supra* note 79.

150. Craig McEwen raised an important question about whether agreements reached in mediated negotiations should be judged by a higher standard than those reached in unmediated negotiations. See Telephone Interview with Craig McEwen, Daniel B. Fayerweather Professor of Political Economy and Sociology, Bowdoin College (Oct. 24, 1996). This is a large and important question beyond the scope of this Article.

151. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981).

152. I use the term “responsibility” to refer to both authority and accountability. By definition, the principals are the ones who are authorized to make the ultimate decisions in a dispute. The concept of accountability is clearest for representatives of organizations, such as executives and claims adjusters, who are accountable to others in their organizations. Principals acting solely as individuals are accountable to their own self-judgment, and they must live with the consequences of their decisions.

153. See *infra* notes 162-87 and accompanying text. I am grateful to Jim Boskey for highlighting the costs of producing high-quality consent.

processes are not single, discrete events, but are processes unfolding over time that may have more or fewer characteristics of high-quality consent at different points during the process. Finally, because the behaviors fostering (and impeding) the principals' deliberation and the application of pressure are subtle, proper analysis depends on the context.¹⁵⁴

The following list reflects my working hypotheses about factors affecting the quality of principals' decisionmaking. These suggestions are necessarily tentative and subject to revision depending on their usefulness in clinical practice and empirical research. The descriptions incorporate my own views about some controversial issues; I am hopeful that this discussion will contribute to some clarification of the issues, if not an eventual general consensus.¹⁵⁵ The factors include: (1) explicit identification of the principals' goals and interests, (2) explicit identification of plausible options for satisfying these interests, (3) the principals' explicit selection of options for evaluation, (4) careful consideration of these options, (5) mediators' restraint in pressuring principals to accept particular substantive options, (6) limitation on use of time pressure, and (7) confirmation of principals' consent to selected options.¹⁵⁶ I describe each of these factors below.

Note that these factors are suggested as possible indicators in a continuum of the quality of consent, not as necessary ethical or legal requirements in every situation.¹⁵⁷ This set of factors is intended to suggest some possible "best-practice" guidelines oriented to enhancing the quality of principals' consent. The fact that a mediation does not fully follow all of these guidelines does not necessarily suggest that there is anything wrong with the mediation, only that it does not fully achieve an aspirational standard on one (and, I would argue, important) dimension of mediation. Unlike the legal test for fraud, in which the absence of any element negates the existence of fraud,¹⁵⁸ these factors are suggestive, and not every factor is essen-

154. See Riskin, *supra* note 9, at 38 n.98.

155. For another effort to identify critical elements in empowerment-style mediation, see Folger & Bush, *Ten Hallmarks*, *supra* note 85. Folger and Bush's list of factors overlaps with mine in focusing on principals' decisionmaking responsibility, thorough consideration of issues, and avoidance of mediator pressure. Their list seems oriented to providing tactical advice to mediators and thus contains some specific prescriptions that might be included in some of my more general factors.

156. Because this scale is intended to reflect the quality of principals' consent, these factors focus primarily on the quality of the decisionmaking process, though the factors involving selection and evaluation of options do require careful analysis of potential outcomes by the principals. Evaluation of results by such criteria as fairness and efficiency is also important, but beyond the scope of this Article.

157. Cf. Moberly, *supra* note 65 (arguing that although evaluative methods present potential dangers, they are not unethical *per se*).

158. Lawsuits based on fraud sometimes refer to "deceit." The following is a recitation of the elements required for this cause of action:

tial. This is more like the test for a type of undue influence, referred to as "overpersuasion" in a line of California cases:

[O]verpersuasion is generally accompanied by certain characteristic elements which, when simultaneously present in a significant number, characterize the persuasion as excessive. These elements are "(1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys."¹⁵⁹

For example, in a case in which a police officer was pressured to resign by a deputy police chief soon after the officer had been charged with rape, the court upheld a civil service board's decision setting aside the resignation, finding that the evidence could support five of the seven factors of overpersuasion.¹⁶⁰

Just as the preceding seven factors can be assessed to create an implicit scale of overpersuasion, the seven factors I propose may be used to form a continuum of quality of consent in mediation. Thus, rather than indicating distinctly whether a principal has or has not given high-quality consent in a particular situation, one might say that the quality is better or worse considering all of these factors and then judge whether the quality of consent is "enough." Given the difficulty in defining this subjective concept, there can be obvious differences of opinion over how much is enough (or how much is appro-

The essential elements required to sustain an action for deceit are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage. The representation must have been made to him either directly or indirectly, and must have been of such a nature that it was reasonably calculated to deceive him and to induce him to do that which otherwise he would not have done. Generally, all of these ingredients, except for a few variants from the common-law rules in force in some American jurisdictions, must be found to exist, and the absence of any one of them is fatal to a recovery

37 AM. JUR. 2D Fraud and Deceit § 12 (1968) (footnotes omitted).

159. *Keithley v. Civil Serv. Bd.*, 89 Cal. Rptr. 809, 815 (Ct. App. 1970) (citation omitted). These behaviors have an eerie resemblance to the more directive style of mediation, especially with the use of multiple persuaders. Although principals in mediation often have their lawyers present, they may sometimes feel that their own lawyers have "turned on them," joining with the opposing side and the mediator in urging them to become "more reasonable." See *supra* note 107; see also *infra* text accompanying notes 214-15, 224.

160. See *Keithley*, 89 Cal. Rptr. at 815; see also generally 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, Contracts § 428 (9th ed. 1995).

appropriate considering other values such as efficiency and termination of a dispute). Indeed, this is probably the heart of the difference between settlers and empowerers.¹⁶¹ Defining the quality of consent as a continuum using fairly concrete behavioral indicators such as the following could help clarify such debates.

1. Explicit Consideration of Principals' Goals and Interests

It may seem obvious that it would be important for principals to identify their goals for resolving a dispute and the interests underlying their goals. Yet many mediators, lawyers, and principals often assume—incorrectly—that they know the goals and interests of the principals and that explicit discussion of these matters is thus unnecessary. No doubt many mediators and lawyers often assume that the principals simply want to end up with “more” of whatever they want, and that they usually just want more money. The principals may make similar assumptions about each other. Moreover, the principals and lawyers may enter mediation so fixated on obtaining particular outcomes that they do not consider what the principals' basic interests are that may be achieved with outcomes they had not considered. In terms of Leonard Riskin's typology, eliciting higher quality consent entails defining the problem broadly rather than narrowly.¹⁶² Riskin identifies four progressively broader levels of interests, which he calls litigation issues, business interests, personal/professional/relational interests, and community interests.¹⁶³ Clearly, to obtain high-quality consent, one need not necessarily expand the definition of a dispute to encompass all possible interests and issues. Rather, enhancing the quality of consent entails exploration of the principals' goals and interests to an appropriate extent under the circumstances. Eliciting interests explicitly increases the likelihood that principals will identify their interests.¹⁶⁴ As noted above, these interventions are not suggested as being necessary or appropriate in every case, and thus there are undoubtedly situations in which mediators quite wisely refrain from exploring all the interests.

161. See *supra* notes 48-50, 58-60 and accompanying text.

162. See Riskin, *supra* note 9, at 18-23; see also FISHER ET AL., *supra* note 14, at 40-55 (advising parties to identify interests underlying their positions); BUSH & FOLGER, *supra* note 10, at 85 (advocating empowerment by identifying goals); Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 12, at 794-829 (proposing model of problem-solving negotiation meeting parties' underlying needs).

163. See Riskin, *supra* note 9, at 18-23.

164. Many of the factors I suggest entail an element of explicitness. I am grateful to Mill Valley, California, mediator and trainer Gary Friedman for highlighting this value. This may be useful to assure that the matter is indeed dealt with and to minimize confusion.

2. Explicit Identification of Plausible Options

To make an informed decision, it seems obvious that it is necessary to identify various plausible options¹⁶⁵ for resolving an issue. In some cases, the discussion focuses on a single option, such as the first one suggested by a principal or thought of by the mediator. Moreover, mediators sometimes do not use a problem-solving approach seeking to develop options benefiting all principals,¹⁶⁶ which is a major potential benefit of mediation processes. The quality of principals' consent is diminished to the extent that there are serious plausible options that the participants do not identify. I believe that it can be quite appropriate for mediators to identify plausible options that the participants have not thought of and that, if done properly, this enhances rather than detracts from the quality of principals' consent.¹⁶⁷

We should not underestimate the difficulty of routinely identifying a wide range of plausible options. This demands a significant amount of time and emotional commitment, especially if the participants enter the process with strong commitments to a positional approach in which the participants make a series of counteroffers to

165. Some people advocate the use of brainstorming processes in which the participants are encouraged to suggest many different options, often including outrageous options, as a spur to creative thinking. See FISHER ET AL., *supra* note 14, at 60-70. While it can be a very useful technique to encourage people to suggest even silly options, this is not necessary for informed decisionmaking. The fact that one can almost always suggest a virtually infinite number of implausible options indicates that one need not consider all options to make informed judgments. Indeed, even limiting discussion to all plausible options may be impractical because there may be a virtually infinite number of plausible options in some situations, as when the issue is about allocation of a continuous commodity like money. If P demands \$100,000 and D offers \$10,000, there are at least 90,000 plausible options. Here, consideration of all plausible options would not entail explicit consideration of every single intermediate amount, but rather examination of the different principles on which the principals may base their decision of which amount to select. In addition, plausible options may include nonmonetary solutions, options based on linkages between issues, and possible contributions of parties not "at the table."

166. See *supra* note 49.

167. Some people would argue that it is inappropriate for mediators to suggest options because they believe this would undermine the principals' self-determination. I have frequently heard mediators say that it would be inappropriate to suggest options because it would unduly influence the parties or inevitably favor one party over another. I am concerned about mediators favoring some options over others, but I do not believe that mediator suggestions necessarily pressure principals excessively, which I believe depends on such things as the substantive balance, timing, and tone of mediators' suggestions. Thus, I would focus directly on the nature and effect of mediator efforts at influence rather than make the categorical assumption that mediator suggestions have adverse effects. Mediators who criticize directly suggesting options sometimes recommend that mediators can avoid (at least the appearance of) bias or pressure on parties by asking questions rather than making declarative suggestions. This formula seems wholly inadequate because, depending on the tone and context, some questions (e.g., "How greedy can you get?") can exert more pressure than declarative suggestions. See *supra* note 113 and accompanying text.

narrow and ultimately eliminate their differences.¹⁶⁸ In a given case, there may be multiple issues and subissues; theoretically, mediation processes should entail explicit identification of plausible options for all the issues. Even though this is an important ideal, it may be practically impossible to realize fully. Thus, one may judge mediation processes by the extent to which the mediators do promote explicit identification of plausible options, especially for the most important issues. In some situations, such as where the stakes are relatively small or the principals are quite familiar with the circumstances, principals may intelligently decide to restrict the consideration of options. In such situations, mediators oriented to eliciting high-quality consent can explicitly check if the principals want to consider additional options.¹⁶⁹

3. Principals' Explicit Choice of Options for Consideration

The third factor involves the principals explicitly choosing to consider the most plausible options. This factor is an extension of the preceding ones and is subject to similar limitations. As a practical matter, it is typically impossible or undesirable to fully evaluate the complete range of plausible options for each issue. Thus, some choices must be made to restrict the range of options and extent of evaluation. This factor involves mediators helping the principals to make these decisions consciously. Moreover, it encompasses an element of impartiality by which mediators do not implicitly or explicitly steer the principals to focus on one option over another without their consent. In this respect, the selective facilitation performed by Greatbatch and Dingwall's mediators¹⁷⁰ and the pressure tactics that Eric Green used¹⁷¹ reduce the quality of the principals' consent.

Normally, mediators do not threaten the quality of the principals' consent if the mediators do not press for consideration of particular options (at least if no side is taking inappropriate advantage over another). While this may reflect an ideal approach, I believe that it is often helpful for mediators to suggest that the principals focus on certain options for evaluation. In my view, this does not undermine the quality of the principals' consent if mediators do so explicitly and with limited pressure on the principals to accept the mediators' suggestions.

4. Careful Consideration of Options

To produce high-quality consent, the principals, after identifying plausible options, should decide what information they need to

168. See *supra* note 49.

169. I am grateful to Professor Fran Tetunic for suggesting this point.

170. See *supra* text accompanying notes 124-33.

171. See *supra* text accompanying notes 110-14.

evaluate the options and then weigh the likely favorable and unfavorable consequences. Clearly, the expected transaction costs of various options (e.g., settlement versus trial) are important subjects that should be considered. To enhance the quality of the principals' consent, mediators would elicit realistic (rather than unreasonably understated or exaggerated) estimates of the likely costs and consequences of trial. In cases pending in litigation, mediators may be especially prone to describing how judges (either generally or the particular judge sitting on the case) and juries "typically" decide cases like their case. Sometimes mediators portray litigation as almost completely negative and exaggerate the risks of litigation as a means of pressing the principals to settle. Clearly, this diminishes the quality of their consent.

Some advocates of empowerment argue that mediators should not express opinions about the substantive issues because doing so inevitably favors one side or another and excessively pressures the principals.¹⁷² While this may often be the result, I do not believe that a mediator's expression of opinion necessarily reduces the quality of the principal's consent (or the mediator's impartiality). For example, a mediator may present opinions about likely court results or typical resolutions in similar disputes without undermining the quality of principals' consent if the mediator first asks if the principals would like the mediator's opinion and, if so, presents this information without excessively pressing the principals to accept a particular option.¹⁷³ This risk can be further reduced if the mediator takes actions to promote high-quality consent, such as explicitly facilitating consideration of several options. This analysis suggests that mediators' expression of opinions (and, as discussed above, identification and selection of options for consideration) do not necessarily impair the quality of the principals' consent, but rather should be evaluated to determine the extent to which these practices in fact pressure the principals and whether the pressure is excessive.¹⁷⁴

172. See Kovach & Love, *supra* note 9, at 31-32.

173. See Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 62, 63 (1996); Laurence D. Connor, *How to Combine Facilitation with Evaluation*, 14 *ALTERNATIVES TO HIGH COST LITIG.* 15, 15 (1996) (concluding that innovative procedure is appropriate only by consent of principals).

174. Some advocates of empowerment question the need for mediators to express opinions, arguing that the principals' lawyers or other experts retained by the principals can provide this information. See, e.g., Kovach & Love, *supra* note 9, at 31. While this strategy may address the principals' needs in some cases, some principals may feel unsatisfied with this. Lawyers (and other professionals retained by one side in a dispute) have their own perspectives and interests that are not always congruent with those of their clients. Lawyers may take strong positions as a natural part of their role as advocates or simply to maintain the clients' confidence. On the other hand, clients are often aware that their lawyers may be more inclined to settle than the clients, raising doubts about the opinions expressed by the lawyers. See AUSTIN SARAT & WILLIAM L.F.

The impact of a dispute on the principals' relationships should often be an important consideration. Disputes don't happen in a vacuum. They happen in a web of relationships that give meaning to people's lives. Often, disputes arise out of problems in a relationship. In fact, considerations about the continuation of the relationship between the principals may be more important than the subject of the dispute itself.¹⁷⁵ Disputes may implicate a range of relationships between the principals and others who are not formally part of the dispute, if only because the principals may provide accounts of the dispute to relatives, friends, and other associates.¹⁷⁶ Important relationships are involved even in the stereotypical automobile negligence case in which the plaintiff has no prior relationship nor expected future relationship with the insurance company or its insured. Simply maintaining a dispute requires the principals to continue a set of relationships, albeit ones that are usually temporary and undesired. Often, incidents in the conduct of a dispute overshadow the event or transaction precipitating the dispute.¹⁷⁷ Given the importance of relationships to most people and the fact that relationship issues can easily be overlooked in the course of fighting over the "substance" of a dispute, mediators can increase the quality of principals' consent by focusing on the significance of relationships in the dispute.¹⁷⁸ This

FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 108-41 (1995). Although principals sometimes jointly hire third-party experts (such as appraisers) to provide impartial opinions, this approach presents financial and practical problems in many cases. Thus, some principals may especially value their mediators' perspectives, particularly if the principals have confidence in the mediators' integrity and impartiality. See Riskin, *supra* note 9, at 38 n.98.

175. The general counsel of a large conglomerate described the importance of relationships in many of the firm's disputes:

[M]any of our businesses, for example, are with an industry in which it's primarily a customer-dominated market. In other words, if I have a dispute with a car company, or if I have a dispute with [names of companies], . . . the overriding consideration is the long-term relationship. Whether we win, lose, or draw, the economics, how strong our case is—none of that matters

Lande, *supra* note 8, at 121.

176. See Herbert Jacob, *The Elusive Shadow of the Law*, 26 *L. & SOC'Y REV.* 565, 571, 581-83 (1992) (observing that whether divorcing parties got information about the law from personal network of relatives, friends, co-workers, and acquaintances affected how the parties defined the issues).

177. Someone told me of a case in which his mother was the plaintiff in a personal injury suit. According to the story, the insurance company offered more than the plaintiff had decided that she needed to settle. During the negotiations, however, the insurance adjuster implied that the plaintiff was partially at fault for the incident, and the plaintiff refused to accept the offer until the adjuster apologized for the statement. I don't know how accurate this particular story is, but it illustrates a common dynamic in which the initial dispute triggers other disputes about the conduct of the dispute. When attorneys are involved, sometimes the attorneys "go at it," thus multiplying the number of things that the principals may be angry about in the dispute.

178. This is different from Bush and Folger's concept of "recognition," by which they refer to empathy for and acknowledgment of others' problems. See BUSH & FOLGER, *supra* note 10, at 2. I believe that recognition can be a very important goal and benefit of medi-

factor does not necessarily require lengthy discussion of any particular relationships, but only a sensitivity to the significance of relationships and a willingness to raise relationship issues when it appears that they are or might be important to the principals.

5. Mediators' Restraint in Pressuring Principals to Select Particular Options

The choice of substantive options (e.g., whether to agree on x dollars or y dollars or not to agree at all) is the ultimate decision that principals must make in mediation and may be the most common subject of mediator pressure. Clearly, mediators reduce the quality of principals' consent when the mediators effectively pressure principals to substitute the mediator's judgment for their own judgment, as exemplified by the actions Eric Green took in the case described above.¹⁷⁹ Probably more common, mediators offer their opinions about the merits of a case without expressly urging the principals to take a particular position. Expression of such opinions does not necessarily result in excessive pressure and may be quite appropriate in certain situations. In some situations, however, it creates a risk of reducing the quality of principals' consent, especially if the mediator

tion. Like Bush and Folger, I distinguish it from some concept of empowerment. In this analysis, consideration of relationships is an element of high-quality consent because of the important meanings that principals derive from individuals' relationships. Focusing on emotional and relationship issues is an especially important potential benefit of mediation, considering that many lawyers feel ill-equipped to deal with such issues. See SARAT & FELSTINER, *supra* note 174, at 42-52, 128-33.

179. See *supra* text accompanying notes 109-14. One reviewer thought that I was too critical of Eric Green's techniques. The reviewer noted that many mediation authorities recognize a legitimate role of a mediator as an "agent of reality," and that many of Green's statements are about his perception of reality. Indeed, one of the techniques that I advocate is promotion of careful consideration of options. See *supra* text accompanying notes 165-78. Nonetheless, I have always been uncomfortable with the agent-of-reality concept because some mediators interpret this as a warrant establishing that mediators necessarily have superior knowledge of reality than the participants do. Though mediators often do have a privileged perspective (especially if they caucus extensively so that the mediators have more current information than any of the participants), the agency-of-reality claim is sometimes made to privilege the mediators' personal opinions, advice, and overly confident predictions. As the reviewer noted, agent-of-reality techniques are dangerous if the mediators give false impressions of what would happen in the absence of agreement, or if they make a participant feel so uncomfortable about the mediators' behavior (rather than the underlying reality of the situation) that the participant makes decisions primarily to reduce that discomfort.

While the participation of experienced attorneys may, as one reviewer suggested, mitigate harmful effects of mediators' pressure techniques, these techniques are especially risky if a principal is unrepresented or represented by incompetent counsel. Should the standard be that pressure tactics do not diminish the quality of consent if the mediators can assure that the principals are represented by (equally) competent counsel? Not as far as I am concerned. The critical distinction is whether the reality testing is primarily designed to help the principals better exercise their own judgment or to inhibit principals from doing so by pressuring them to accept the mediators' preferred options. Based on the published account of Green's case, his actions fall clearly in the latter category.

effectively urges the principals to accept a position expressed by the mediator or described as normal. This is especially dangerous if the mediator suggests that refusal to accept the mediator's position might result in some sanction, such as a report to the court that one side was responsible for unreasonably failing to settle. An actual or implied threat to withdraw the mediator's respect and cooperation is probably a more typical and more potent sanction.

Probably the greatest pressure that mediators exert is the pressure to reach settlement for the sake of settlement, based on the assumption that settling in mediation is almost always better than not settling. Deciding whether or not to settle is the ultimate decision that principals make in mediation. The right to trial is a precious value protected under the federal and state constitutions.¹⁸⁰ Principals may legitimately decide to take advantage of this right. If they are to enhance the quality of principals' decisionmaking, mediators, after discussing the principals' analysis of the dispute as described above, must respect principals' decisions not to settle if they so choose.

6. Limitation on Use of Time Pressure

Time pressure can impair people's judgment and can be used to reduce the quality of principals' consent. Time pressure often results from an apparent need to make a decision within a short time, though it also may result from efforts to prolong a dispute, as we saw in Eric Green's case.¹⁸¹ In some cases, time pressure results from external constraints that may be difficult or impossible to change, such as a trial date or a relevant external transaction. In such situations, mediators help participants by periodically focusing attention on those time constraints and helping principals to exercise decision-making responsibility as well as possible within those constraints. Indeed, mediators may provide a valuable service by eliciting agreements about the pace of the process and any deadlines that the principals may want to set.

In some situations, the mediator or a participant in a mediation may manipulate time constraints to pressure some participants. Depending on the circumstances, this may inappropriately reduce the quality of principals' consent, especially if the mediator initiates the time pressure. Inappropriate time pressure is a serious risk in mediation when there is an unnecessary expectation that the principals can reach and sign an agreement during a single-session mediation without further opportunity for advice, reflection, or negotiation. Thus, mediators can enhance the quality of principals' consent by

180. See U.S. CONST. amend. VII; see also, e.g., FLA. CONST. art. 1, § 22.

181. See *supra* text accompanying notes 115-18.

being genuinely open to continuing a mediation at a later time as appropriate. Mediators can enhance the quality of principals' consent by suggesting that principals take a reasonable amount of time, such as several days, to consider a proposed agreement before being expected to commit to it.¹⁸²

7. Confirmation of Consent

When principals are on the verge of reaching an agreement, mediators can ensure that principals' decisionmaking responsibility is honored by checking whether the principals understand the proposed agreement, need further information, and want to proceed with the agreement. Of course, this would not be effective if the mediators appear to simply "go through the motions," as some courts do when accepting plea bargains.¹⁸³ Rather, mediators oriented to ensuring principals' high-quality consent would make a serious inquiry, especially if a principal seemed uncertain or ambivalent. This is especially important in one-session mediations in which the mediator drafts an agreement that the principals are expected to sign at that session. Although the participation of the principals' lawyers in mediation may provide some assurance of high-quality consent, if the lawyers are strongly motivated to reach some settlement in the mediation, their presence may undermine rather than support the principals' decisionmaking responsibility, as described below.¹⁸⁴

As noted above, I hypothesize that cumulatively these seven factors are good indicators of the extent to which a mediation process enhances or diminishes the quality of the principals' consent, which is an intrinsic potential benefit of the process. For several reasons, the development of a fairly clear and generally accepted conception of high-quality consent may be an important influence in the devel-

182. Cf. 16 C.F.R. § 429.1 (1997) (Federal Trade Commission rule defining as unfair and deceptive act in which door-to-door seller fails to provide buyer with notice of right to cancel sale within three days of sale). I am grateful to Berkeley, California, mediator Ron Kelly for persistently emphasizing this point.

183. In criminal cases, defendants who plead guilty typically must go through a "cop-out" ceremony in court where the accused not only is made to assert publicly his guilt of a specific crime, but also a complete recital of its details. He is further made to indicate that he is entering his plea of guilt freely, willingly, and voluntarily, and that he is not doing so because of any promises or in consideration of any commitments that may have been made to him by anyone.

Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, L. & SOC'Y REV., June 1967, at 15, 32. This process is obviously a charade in many cases and virtually everyone involved knows it. Despite the guilty pleas and affirmations of voluntariness, Blumberg, in a random survey of 724 defendants, found that in presentence probation interviews following their guilty pleas, more than half the defendants claimed to be innocent. See *id.*

184. See *infra* notes 214-16, 223-25, 236 and accompanying text.

opment of both lawyering practices and mediation practices in the next century. First, mediators' philosophies about principals' responsibility in mediation may be an important distinguishing feature in the mediation marketplace.¹⁸⁵ If so, it will be vital for mediators to develop and project their own identities along this dimension in the market.¹⁸⁶ By the same token, to serve their clients profitably, lawyers, as regular buyers of mediation services, will need to recognize these key distinctions between mediators. Second, and more important, this issue may shape actual lawyering and mediation practices, as we consider in the next Part of this Article. These factors may provide useful guidelines for mediators, lawyers, and principals who champion values of empowerment. In addition, the behavioral factors comprising the scale suggest specific procedures that mediators of all persuasions, including dyed-in-the-wool settlers,¹⁸⁷ can readily include in their mediation practices without necessarily "buying the whole program." By the same token, lawyers who generally prefer settlor-style mediation may identify certain procedures that they might request to enhance their clients' interests without jeopardizing their goals of definite and efficient dispute resolution. We now consider how these and related issues will affect lawyers' and mediators' practices.

IV. POTENTIAL EFFECTS OF LAWYER PARTICIPATION IN LITI-MEDIATION

As mediation becomes a routine step in contested litigation,¹⁸⁸ we can expect that mediation and litigation procedures will co-evolve, i.e., the dynamics of litigation will influence the practice of mediation and vice versa.¹⁸⁹ Some obvious possibilities are that routine use of mediation in litigation could reduce the level of adversarial behavior in litigation generally,¹⁹⁰ and the incorporation of mediation into the

185. See *supra* Part II.

186. See Lande, *supra* note 74, at 41-45.

187. See *supra* notes 48-50 and accompanying text.

188. See *supra* notes 8, 23 and accompanying text (discussing development of "liti-mediation" culture).

189. Co-evolution is a process of mutual adaptation of different interdependent entities in which the development of each entity affects the other(s). See Suchman, *supra* note 30, at 321-24. "Various entities pivot around each other towards a stable but initially indeterminate end-state, creating their environment collectively, rather than adjusting to it individually." *Id.* at 321.

190. See Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & SOC'Y REV. 149, 178-81 (1994). Professors Craig McEwen, Lynn Mather, and Richard Maiman conducted a compelling study comparing divorce practice in Maine, where there is a mandatory divorce mediation scheme, and in New Hampshire, where there is not such a scheme. Based on interviews with 163 lawyers, they found that Maine lawyers typically acted reasonably in mediation and that the lawyers had less adversarial

litigation process could increase the level of adversarialness in mediation.¹⁹¹ This Part examines some possible and, indeed, likely changes as these two forms of practice evolve in tandem, particularly as lawyers routinely shop, plan for, attend, and participate in mediation. Although principals are not always represented by attorneys and attorneys do not always attend mediations, attorneys often do attend and participate actively in liti-mediation environments.¹⁹² Part IV.A focuses on how routine participation of lawyers in mediation is likely to result in ongoing relationships between mediators and lawyers that may overshadow their respective relationships with the principals. Part IV.A also describes how lawyers' participation may induce mediators to focus on lawyers' interests in pressing the principals into settlement and inhibit mediators from independently managing the process. In addition, lawyers' participation may significantly affect the timing of the mediation process, as described in Part IV.B. In liti-mediation cultures, the scheduling of mediation is likely to be determined by local norms about whether it is most appropriate at early, intermediate, or late stages of pretrial litigation. Part IV.B also describes how the mediation process may be rushed as it is oriented toward the time frame of litigation and limitations of lawyers' time. Part IV.C analyzes how an orientation of mediation toward the needs of lawyers and courts may enhance or undermine the principals' ability to exercise their decisionmaking responsibility. Lawyers' norms of adversarial bargaining and "client control" may be incorporated into mediation. This may have an especially powerful effect given the time pressures described in Part IV.B. Despite many lawyers' interest in using a problem-solving approach that enhances the exercise of the clients' decisionmaking responsibility, Part IV.C contends that the lawyers' very participation in mediation may undermine those possibilities if the lawyers bring adversarial approaches into mediation that reduce the quality of the principals' quality consent to settlement.¹⁹³

attitudes and behaviors than their counterparts in New Hampshire. See *id.*; see also McEwen et al., *supra* note 23, at 1367-68.

191. McEwen and his colleagues reported that the mandatory mediation in Maine did not appear to spoil the mediation process or undermine real mediation. See McEwen et al., *supra* note 23, at 1371-73, 1392-94. While these problems may not have occurred in Maine, I believe that without careful precautions, institutionalization of mediation may entail substantial risks to principals, as described in this Part.

192. See *infra* note 205.

193. Craig McEwen correctly points out that in analyzing the effects of lawyer participation in mediation, rather than comparing this to a process in which the principals do not retain lawyers at all, one should generally compare mediation processes in which lawyers attend mediation sessions with mediation processes in which lawyers are retained by the principals but do not attend mediation sessions. See McEwen, *supra* note 150. He suggests that when the lawyers do not attend mediation sessions, they may nonetheless have a major adverse effect if, for example, they give principals strict instructions about what

A. Relationships Between Principals, Lawyers, and Mediators

As mediation becomes more common, and especially where the courts are authorized to order cases into mediation,¹⁹⁴ most lawyers will feel the need to be able to advise clients about the use of mediation, select appropriate mediators, and competently represent their clients in mediation.¹⁹⁵ Indeed, the institutionalization of mediation may lead to establishment of an ethical duty to advise clients about mediation and even malpractice liability for failing to do so.¹⁹⁶ Nonetheless, I suspect that informal social pressure and (actual or perceived) court mandates will influence lawyers to routinely incorporate mediation into their practices much more than the threat of professional discipline or liability. As lawyers perceive that participation in mediation is normal or even the "in thing,"¹⁹⁷ they are likely to take it for granted as a normal feature of the legal process.¹⁹⁸

Institutionalization of mediation is likely to result in significant redefinitions of the relationships between principals, lawyers, and mediators. Over time, lawyers and mediators in the same professional community are likely to establish distinctive reputations and ongoing relationships with each other.¹⁹⁹ As the lawyers are likely to

they should not agree to and then second-guess agreements reached in sessions in which the lawyers did not participate. See *id.* While this certainly may be so, I believe that direct lawyer participation in mediation brings the serious risks described in this Article, which I suspect often exceed those that McEwen identifies. The issue deserves more analysis than is possible within the scope of this Article.

194. See ROGERS & MCEWEN, *supra* note 3, app. B.

195. The McEwen et al. study of divorce mediation in Maine found that "having incorporated mediation into their practices, Maine divorce lawyers report that they typically describe the process, seriously examine settlement options and approaches, and preach mediation's virtues to clients in preparing them to undertake the process." McEwen et al., *supra* note 23, at 1385.

196. See Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990); Frank E.A. Sander, *At Issue: Professional Responsibility, Should There Be a Duty to Advise of ADR Options? Yes: An Aid to Clients*, A.B.A. J., Nov. 1990, at 50, 50; ROGERS & MCEWEN, *supra* note 3, § 4:03.

197. See Elizabeth D. Ellen, *Attorneys and Court-Ordered Mediation: An Examination of the Lawyer-Neutral* (June 3, 1995) (paper presented at the Law and Society Association Annual Meeting). Ellen conducted a study of mediators in North Carolina, where the mediated settlement conference statute was modeled on Florida's mediation statute, particularly in its provisions governing certification and selection of mediators. Ellen found that lawyer-mediators comprised an elite group in the bar as compared with the nonmediators. See *id.*

198. See McEwen et al., *supra* note 23, at 1385. McEwen and his colleagues found that "[f]rom the perspective of clients, mediation in Maine simply appears as another step in the divorce process" and that Maine lawyers typically view it the same way. *Id.*

199. As one indication of this, many mediators in Florida begin their "opening statements" by telling the principals that the opening statement is directed to them (the principals) because the lawyers have heard it many times. See, e.g., Videotape: Circuit Civil Mediation with Martin I. Lipnak (on file with author).

be repeat players,²⁰⁰ mediators may well see lawyers as their (the mediators') clients rather than the principals,²⁰¹ with whom the mediators are much less likely to have repeat business. This alliance between mediators and lawyers—and mediators' great stake in their goodwill with the lawyers in their community—is likely to be reinforced if the lawyers (rather than the principals) typically do the shopping for mediators.²⁰² When the lawyers in a case (or their major clients) are roughly comparable in their repeat-player status, the mediator would presumably be equally dependent on both lawyers and would generally not have an incentive to favor one side or another.²⁰³ When one side is a repeat player (such as an insurance company or a lawyer who uses mediation frequently) and the other side is not, the mediation process could consciously or unconsciously be affected by an ongoing relationship between a mediator and a lawyer.²⁰⁴

200. See Galanter, *supra* note 30, at 114 (characterizing lawyers as quintessential repeat players).

201. For example, Eric Green identifies cases by the person who referred the case, such as "Judge X's case" or the "construction case from Attorney Y." Hall, *supra* note 105, at 283.

202. See *supra* notes 29-32 and accompanying text. It is true, as Greg Firestone correctly pointed out, that some attorneys may receive case referrals from mediators. Thus, the influence is not entirely a "one-way street." Nonetheless, I suspect that mediators are generally more dependent on receiving referrals from lawyers than the other way around, especially in liti-mediation environments where cases are ordered to mediation only after the litigation (and often the legal representation) has begun.

203. Mediators do not have formal authority to impose an ultimate resolution in a matter, and thus could not make a formal decision favoring one side or another. See, e.g., FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.050-.070. Nonetheless, mediators may help or interfere with particular individuals' efforts through the mediators' control over the process, including such decisions as what issues are worthy of discussion and what options are suitable for serious consideration, and subtle or not-so-subtle expressions of opinion about particular positions. See *supra* text accompanying notes 162-84.

204. A journalistic report highlighted risks of private ADR service providers regularly relying on certain lawyers or principals for work as neutrals. See Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53. Although this account focused primarily on adjudicatory ADR processes, the potential for abuse is similar with mediation, especially when the mediators use more directive techniques. See *supra* note 40. One attorney complained about perceived bias of a private ADR organization because he was a "one-shotter," Galanter, *supra* note 30, at 97, in a proceeding with a repeat player before the ADR organization:

"I realized the situation the minute I walked in the room," says the attorney. "There I was, a sole practitioner who may bring one case to JAMS [Judicial Arbitration and Mediation Service] in a year, going up against an insurance company that brings it thousands of cases every year."

Reuben, *supra*, at 57. Clearly, from an account like this, one cannot tell whether the ADR provider did or did not act improperly. However, this account highlights a serious potential problem. One attorney told me that he believes that insurance company claims adjusters have significant input in the choice of specific mediators in their cases. Another attorney summarized the problem in the following graphic and probably overstated quotation:

"Anytime you are paying someone by the hour to decide the rights and liabilities of litigants, and that person is dependent for future business on maintaining good will with those who will bring him business, you've got a system

Local norms about whether lawyers normally attend mediation sessions and, if so, how they participate may radically affect the constellation of relationships and the dynamics of the process. In some places, lawyers routinely attend mediation sessions;²⁰⁵ in other places, lawyers rarely attend.²⁰⁶ If lawyers do attend the mediation, they may affect the process dramatically. In some situations, the lawyers take a dominant role in which they do most of the talking, typically making their sides' opening statements and often responding to offers (presumably, though not necessarily, based on prior authorizations). In other situations, the lawyers are permitted only to observe and consult with their clients, but not speak for them.²⁰⁷

that is corrupt at its core," [Century City, California, attorney Joseph A.] Yanny charges. "They have taken Lady Justice and put her on the street corner, hooking for tricks."

Id. at 54. Of course, repeat players receive favored treatment in traditional litigation through their relationships with "institutional incumbents," e.g., judges and court clerks. Galanter, *supra* note 30, at 99. Therefore, any such dynamics in mediation would not be unique or necessarily greater than in traditional litigation.

Conflicts of interest may be prohibited by statute or rule. See, e.g., FLA R. CERT. & CT.-APPTD. MEDIATORS 10.070(b) (requiring mediators to disclose conflicts of interest). Nonetheless, it may not be clear whether disclosure is mandated (or normally provided) in some situations; thus, prudent mediation shoppers take the initiative to ask about it. See Harry N. Mazadoorian, *Disclosure Questions for ADR Counsel to Ask When Choosing Neutrals or Provider Groups*, 14 ALTERNATIVES TO HIGH COST LITIG. 95, 95 (1996).

205. For example, in Maine, lawyers usually attend divorce mediation sessions. Seventy-eight percent of lawyers interviewed said that they "almost always" attend mediation sessions and an additional 17% said that they "usually" did so. See McEwen et al., *supra* note 23, at 1359-60. In Florida, official estimates of lawyer attendance vary widely by type of court and geographical location. For example, in about one-quarter of the mediation programs in county court mediation (covering cases up to \$15,000), lawyers attend in more than half the cases. In about three-quarters of the programs in family mediation, lawyers attend in more than half the cases. In about three-quarters of the programs in circuit civil mediation (cases in which requested damages exceed \$15,000), lawyers attend in more than 80% of the cases. See SCHULTZ ET AL., *supra* note 2, at 39-40, 89-90, 109. Indeed, in circuit civil cases, "[i]f a party is represented by counsel, the counsel of record must appear unless otherwise stipulated to by the parties or otherwise ordered by the court." FLA. STAT. § 44.1011(2)(b) (Supp. 1996) (emphasis added).

206. For example, a lawyer-mediator in Northern California with a large family mediation practice reported that she had never attended a mediation on behalf of a client she represented, and that she is unusual in her mediation community because when she mediates, she occasionally suggests that the lawyers attend. See Interview with Althea Lee Jordan, California attorney and mediator, in Palo Alto, Cal. (Aug. 11, 1996). Data from 205 court-related divorce mediation programs indicated that lawyers did not play a role in mediation in 43% of the programs, and 33% reported that lawyers could participate by stipulation of the parties. See McEwen et al., *supra* note 23, at 1362 n.261 (analyzing data from a state ADR program database maintained by the National Center for State Courts (NCSC)). In several states, statutes permit exclusion of lawyers from mediation sessions. See *id.* at 1331 & nn.68-69.

207. According to data from the NCSC database as analyzed by McEwen and his colleagues, 11% of the court-related divorce mediation programs permitted lawyers to observe mediation sessions. See McEwen et al., *supra* note 23, at 1362 n.261. Lawyers in Maine reported flexibility in their approaches to the balance of their participation and that of their clients; sometimes the lawyers participate more actively and other times the clients participate more actively. See *id.* at 1363-64.

Some mediators explicitly define their expectations about the lawyers' role in the mediators' opening statement. The lawyers' role is often reflected in, and affected by, the seating arrangements. The individuals seated directly next to the mediators often act as the primary spokespeople for their side. If the principals sit next to the mediator, this often signals that the lawyers are expected to act primarily as advisors to their clients rather than as advocates with the mediator and other side. Some mediators emphasize limitations on the lawyers' advisory role by insisting that the lawyers sit behind their clients rather than sitting at the table. If principals are represented by counsel but their lawyers do not attend mediation sessions, the lawyers typically review any agreement that is reached in mediation and may or may not talk with the mediators by phone.

The complicated sets of relationships between mediators, lawyers, and principals may cause confusion about the nature of the relationships and thus about what behaviors are appropriate. For example, are the principals primarily the mediators' clients, primarily the lawyers' clients, or both equally? The significance of this issue is illustrated in a simulated mediation of a personal injury case from a training video featuring a prominent Florida mediator and trainer.²⁰⁸ After the plaintiff's lawyer completed the opening statement, the mediator turned to the lawyer and, referring to the plaintiff, asked, "Would you mind if I ask her a question or two?"²⁰⁹ The question implied that the principal was primarily the lawyer's—not the mediator's—client and that the mediator could not address the principal directly without the lawyer's consent.

Should the mediator normally assume that lawyers accurately present their clients' perspectives or should mediators periodically confirm the principals' positions themselves? If principals do not appear comfortable with their lawyers' statements, would it be an improper interference in the lawyer-client relationship to suggest that the lawyers confer with their clients or to ask the principals (perhaps in caucus) to confirm their positions? These quandaries reflect an ambiguity in the relationships between mediators, lawyers, and principals. If mediators are more assertive, they risk alienating the lawyers and perhaps the principals as well. If mediators do not pursue these issues, they clearly reduce the quality of the principals' consent by failing to examine the issues carefully. Although these problems can be addressed by mediators, especially by setting expectations in the opening statements,²¹⁰ they reflect serious potential

208. See Videotape, *supra* note 199.

209. *Id.*

210. I am grateful to Craig McEwen for highlighting the fact that mediators have some control over the role of lawyers in mediation, especially by setting expectations in the opening statement.

threats to the authority of both mediators and lawyers. If mediators assume that lawyers may legitimately use an adversarial approach to mediation, even a mediator's questions to a principal may be perceived as inappropriately interfering with the lawyer's strategy. In these situations, mediators may feel quite reluctant to probe a principal's thinking in much depth.

Consider further that the question "Would you mind if I ask her a question or two?" mirrors a typical interaction in litigation in which one attorney displays respect to an opposing attorney.²¹¹ Of course, rather than being the principal's adversary, the mediator is supposed to help the principals. Given the fact that some mediators use strong directive tactics to pressure principals,²¹² it may well be necessary and appropriate for lawyers to protect the principals from the mediator.²¹³ On the other hand, lawyers sometimes look to the mediators to provide precisely that kind of pressure on the lawyers' own clients that the lawyers feel unable or unwilling to effectively exert themselves.²¹⁴ It is not uncommon for lawyers to believe that their clients are taking unreasonable positions but feel that they (the lawyers) cannot argue too strongly with their clients without losing the clients' confidence. Indeed, McEwen et al. reported that more than half the Maine lawyers they interviewed spontaneously identified a benefit of mediation as having mediators "challenge clients to relinquish unrealistic positions and claims," thus reinforcing the lawyers' own advice.²¹⁵

This discussion shows how the participation of lawyers in mediation can complicate and confuse the relationships between lawyers, mediators, and principals. Given mediators' dependence on lawyers as regular sources of future business, it should not be surprising if mediators especially cater to lawyers' interests, possibly superseding the principals' interests.²¹⁶ Indeed, mediators and lawyers may find that they share an interest in pressuring principals to settle, especially in those liti-mediation cultures where the dominant norm favors settlement per se as the primary goal of mediation. The follow-

211. In fact, the mediator in the videotape had extensive experience as a litigator. Thus, the form of the question may be due, in part, to force of habit. I suspect, however, that this interaction reflected much more than simply an old habit.

212. See *supra* note 40.

213. McEwen and his colleagues found that virtually all the Maine lawyers they interviewed said that their principal role was to protect their clients from unfairness by the mediator or the other side. See McEwen et al., *supra* note 23, at 1360-62.

214. See *id.* at 1370; see also McEwen et al., *supra* note 190, at 163-66.

215. McEwen et al., *supra* note 23, at 1370; see also McEwen et al., *supra* note 190, at 163-66.

216. Although it may be relatively easy to parry requests from principals for facilitative mediators to be directive by expressing opinions about the merits of a case, I have heard several mediators express a serious dilemma about how to respond when such requests (or demands) come from attorneys who might be sources of future referrals in a tight market for mediators. See, e.g., *supra* note 44.

ing section considers how lawyers' participation in mediation may affect timing of litigation and mediation.

B. Timing in Liti-Mediation

Institutionalization of mediation as a normal step in litigation may affect the pattern and pace of litigation. Under the mandatory divorce mediation statute in Maine, mediation has become an expected settlement event, forcing the lawyers and principals to seriously focus on the issues.²¹⁷ McEwen and his colleagues found that the mandated mediation in Maine encouraged the lawyers and principals to settle earlier than they otherwise would have.²¹⁸ Conceivably, institutionalization of mediation could also delay settlement, depending on local judicial or legal norms about timing of settlement negotiations. If lawyers expect that they will eventually settle the cases in mediation, they may hold off conducting direct negotiations early in litigation.²¹⁹

There is a split of opinion in the mediation community over the best time to conduct mediation. Some argue that mediation is most appropriate early in litigation (or better yet, before litigation), when principals have not yet hardened their positions and invested a great deal in litigation expenses.²²⁰ Others argue that mediation is not appropriate until late in litigation because principals can make informed decisions only after completing discovery.²²¹ Whatever the local norms for the timing of mediation, where it becomes institutionalized, it is likely to be a (if not the) central settlement event around which other litigation activities revolve.²²²

217. See McEwen et al., *supra* note 23, at 1387.

218. See *id.* It is not clear how much time mediation saved, considering that the timing in the litigation varied. In cases that otherwise would have settled "on the courthouse steps" just before trial, a mediation conducted a week or two before trial resulted in some—but not substantial—time savings. On the other hand, when mediation occurred early in the litigation, it presumably resulted in much greater time savings.

219. See McAdoo & Welsh, *supra* note 6, at 10. In Hennepin County, Minnesota, where Supreme Court Rule 114 authorizes court referral to mediation,

[t]here may be less lawyer-to-lawyer negotiation going on now, with a preference to wait for a "mandatory" mediator's assistance with settlement. . . . [T]he sheer number of lawyers practicing makes informal, more civil negotiations difficult. Lawyers like the fact that with mediation under Rule 114, an outside neutral is brought to the case who can assist the lawyers to tone down their posturing, to be realistic about their cases, and to allow clients to be more actively involved in the ultimate resolution. In addition, mediation provides a specific day when all parties come to the table, with the task at hand being to settle.

Id.

220. See ROGERS & MCEWEN, *supra* note 3, § 4:06.

221. See *id.*

222. One of my students, who is a paralegal with extensive experience working for an insurance defense firm, describes how her conversations with clients and the lawyers in her firm often involve planning for their moves in mediation. See Interview with Noël

The involvement of lawyers in mediation may affect the timing of the process in several ways, generally adding time pressure to the mediation process. When lawyers attend mediation, the scheduling of mediation sessions may be more difficult because it obviously requires coordination of at least two additional schedules. Because lawyers often have tight schedules, the time available for mediation may be quite constrained. For example, in the dependency mediation clinic at my school, it is not unusual for lawyers to arrive late, have hearings or other appointments scheduled for a time soon after the mediation is set to begin, and be interrupted during mediation sessions by calls on their pagers and cellular phones.²²³ Given the pace of their schedules, they may want to settle cases as fast as possible, and they often express impatience if the principals, including their own clients, talk “too much.” If the lawyers do not consider the parties’ relationship concerns²²⁴ to be relevant or important, these issues may not be raised at all or discussed in much depth. When the principals are paying their lawyers on an hourly basis (often in addition to half of the mediator’s fees), the principals may also feel a financial pressure to avoid dealing with issues that are not legally relevant and thus “get the mediation over” as quickly as they can.

Given all these time pressures, everyone involved may be reluctant to consider scheduling additional mediation sessions and thus may try to complete a settlement in a single meeting. When mediation takes place shortly before a scheduled trial date, it may be difficult or impossible to schedule a second session even if all the participants agree that it would be productive. The regular presence of lawyers may thus lead to a norm of mediations conducted in a single, possibly rushed session. Indeed, that is what McEwen and his colleagues observed in divorce mediation in Maine, where mediation usually involves a single mediation session lasting two to three hours.²²⁵ By contrast, Jessica Pearson and Nancy Thoennes found that in public and private divorce mediation programs that lawyers did not attend, the mediations involved an average of 3.4 to 6.2 ses-

Miner, graduate student, Nova Southeastern University, in Fort Lauderdale, Fla. (Oct. 3, 1996); see also Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 15 REV. LITIG. 503, 510 (1996) (“ADR is now a central consideration in pretrial planning.”).

223. See Interview with Sharon Boesl, Director, Clinical and Community Outreach Center, School of Social and Systemic Studies, Nova Southeastern University, in Fort Lauderdale, Fla. (Sept. 29, 1996); Interview with Lynne Lucas, Fort Lauderdale mediator, in Fort Lauderdale, Fla. (Sept. 26, 1996). As Craig McEwen pointed out, norms for timing are a function of the local culture. Thus, if overscheduling by lawyers was considered unacceptable (especially by the judges), this time pressure could be reduced. See McEwen, *supra* note 150.

224. See *supra* notes 175-78 and accompanying text.

225. See McEwen et al., *supra* note 190, at 154.

sions, totaling an average of 6.3 to 8.7 hours, respectively.²²⁶ It is possible that the difference in the amount of time in mediation is a function of whether discovery had been completed prior to mediation. Given the view of many lawyers that mediation is appropriate only after discovery has been completed, it is possible that mediations with lawyers attending are more likely to occur with discovery largely completed. Obviously, if discovery had not been completed prior to mediation, one would expect that it would take additional time in mediation to collect and analyze the relevant information. Nonetheless, the participation of lawyers is likely to add time pressure in mediation for the reasons described above.

In sum, mediation is a central settlement event in liti-mediation culture. When the lawyers and parties expect that litigation will normally end in mediation, one can assume that they will plan their activities in litigation with an eye toward how the case will “play out” in mediation. Including lawyers in the mediation sessions may often restrict the time available and the scope of issues considered appropriate for discussion. Ironically, lawyers’ participation in mediation may reduce the quality of the principals’ consent unless mediators prepare to handle time pressures that may accompany the lawyers in mediation.

C. Use of Adversarial and Problem-Solving Approaches in Mediation

Regular participation of lawyers in mediation sessions may also affect the negotiation dynamics in mediation, possibly encouraging use of positional dynamics of offer and counteroffer rather than a joint problem-solving effort to seek mutual gains by analyzing the principals’ underlying interests.²²⁷ In a survey of 515 lawyers and fifty-five judges in New Jersey, Professor Jonathan Hyman and his colleagues found that, on average, the respondents estimated that about seventy percent of their cases were settled using positional methods, even though about sixty percent of the respondents said that problem-solving methods should be used more often.²²⁸ Hyman

226. See Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, in *DIVORCE MEDIATION*, *supra* note 17, at 429, 432.

227. See *supra* note 49.

228. See JONATHAN M. HYMAN ET AL., *CIVIL SETTLEMENT: STYLES OF NEGOTIATION IN DISPUTE RESOLUTION* (1995) at 165. In my survey of 128 business lawyers, 83% said that in more than half of suits between two businesses, it is appropriate to try to find outcomes addressing the underlying interests of each party. See Lande, *supra* note 8 (data on file with author). Moreover, 60% of the lawyers said that in more than half of suits between two businesses, outcomes other than or in addition to monetary payments would be appropriate. See *id.* Thus, at least in theory, the majority of lawyers support the use of problem-solving approaches in litigated cases. However, interviews with Hennepin County, Minnesota, lawyers suggest that there are barriers between this philosophy and

et al. suggest that problem-solving may be used less than lawyers would like due to fear that opponents will take advantage of them, perceived opportunities to gain advantage through positional methods, or simply habitual use of positional tactics.²²⁹ Thus, it would not be surprising if lawyers bring an habitual positional mindset into mediation,²³⁰ especially if the mediator is also a lawyer or retired judge. Mediators who also have that mindset may feel inhibited about asking questions to avoid interfering with each side's positional strategy, as suggested in Part IV.A.

As Professors David Lax and James Sebenius point out, lawyers' fears of losing strategic advantage through problem-solving tactics reflect real risks entailed in such an approach.²³¹ Lax and Sebenius also show, however, that using a mediator may reduce these risks by providing a neutral third party who can receive and analyze information in confidence.²³² Mediation can thus offer a useful forum for lawyers who want to use a problem-solving approach to negotiation. Indeed, McEwen et al.'s study suggests that mandatory divorce mediation in Maine may have offered just such opportunities and that most lawyers generally accepted them.²³³ The researchers found that lawyers generally adopt a norm of "the reasonable lawyer," who, rather than exacerbating conflict, typically tries to reduce it by "limit[ing] client expectations, resist[ing] identifying emotionally with the client, avoid[ing] substantially inflated demands, understand[ing] the likely legal outcome, assert[ing] the client's interests, respond[ing] to new information, and seek[ing] to reach a divorce settlement."²³⁴ This finding, though at odds with many popular conceptions of lawyer behavior, is consistent with many other analyses of lawyers' settlement orientations, even outside of mediation.²³⁵

actual practices, considering that settlements in mediation were not more "creative" than before mediation became institutionalized. See McAdoo & Welsh, *supra* note 6, at 10.

229. See HYMAN ET AL., *supra* note 228, at 166.

230. Leonard Riskin referred to this as a lawyer's "standard philosophical map." Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982); see also Michael J. Lowy, *Law School Socialization and the Perversion of Mediation in the United States*, 3 WINDSOR Y.B. ACCESS TO JUSTICE 245, 248-52 (1983) (providing an analysis of nine elements of "legalism" that lawyers may bring into mediation, resulting in the failure to realize the educational potential of mediation). Indeed, mediation practice guides often caution about the risks of aggressive attorneys obstructing settlement. See, e.g., KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICES* 89 (1994).

231. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 29-45 (1986).

232. See *id.* at 172-78; see also Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 248-49 (1993).

233. See McEwen et al., *supra* note 23, at 1365.

234. *Id.* at 1365; see also Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 541-46 (1994).

235. See McEwen et al., *supra* note 23, at 1364-68 and sources cited therein.

Being “reasonable,” however, is not the same thing as using a problem-solving approach. Indeed, being “reasonable” may involve lawyers pressuring their own clients to give up demands and expectations (perhaps correctly) perceived as unreasonable,²³⁶ rather than searching for options addressing the underlying interests of the principals. McEwen et al.’s data suggests that Maine lawyers may be more likely to address the concerns of both principals than lawyers in New Hampshire, where mediation practice is much less common.²³⁷ When asked about their primary goals in negotiating divorce cases (not limited to cases in mediation), 39.5% of Maine lawyers reported the goal of reaching “settlements fair to both parties,” compared with 28.3% of New Hampshire lawyers, whereas only 15.8% of Maine lawyers reported the goal of “getting as much as possible for [their] client,” compared with 33.3% of New Hampshire lawyers.²³⁸ This may indicate that Maine lawyers are more likely to use problem-solving tactics, especially in mediation. Nonetheless, Hyman et al.’s data described above²³⁹ suggests that we should be cautious about assuming a tight link between lawyers’ aspirations and actual problem-solving behavior.²⁴⁰

As we have seen, the participation of lawyers in mediation may have quite different effects on the use of adversarial and problem-solving processes in mediation. On one hand, their participation may contribute to thorough and careful problem solving. On the other hand, their participation may inhibit such a process by incorporating traditional adversarial approaches into mediation.

V. SUMMARY AND CONCLUSION

In liti-mediation cultures, lawyering and mediation practices may shape each other in significant ways. Where mediation becomes a

236. See *supra* text accompanying notes 214-16, 223-25.

237. See McEwen et al., *supra* note 190, at 178-79.

238. *Id.*

239. See *supra* notes 228-29 and accompanying text.

240. My survey of business lawyers also suggests that there are often loose links between attitudes and behaviors about desirable dispute resolution procedures. More than three-quarters (77%) of the business lawyers in the survey said that mediation would be appropriate in at least half of lawsuits involving a business. See Lande, *supra* note 8 (data on file with author). Nonetheless, over the course of their careers, which averaged eight to ten years, they personally had participated in a median of six to ten cases in which any ADR procedure was used. See *id.* For a description of the research design, see *id.* at 46-84. Although mediation services may have been less available at the outset of their careers than at present, this still represents a fairly low usage rate even if all the ADR cases had occurred in the year or two before the survey was conducted in 1994.

On the other hand, McEwen and his colleagues present data showing an approximate 20% reduction in the number of “adversarial divorce motions per case” coinciding with the introduction of mandatory divorce mediation in Maine. See McEwen et al., *supra* note 190, at 179. This may (or may not) indicate an increase in “reasonableness” or problem-solving behavior related to increased use of mediation.

routine part of litigation, the mediation market is likely to be sizable, complex, and specialized. Lawyers will recognize their clients' interests, and thus their own self-interests, in learning the variations between mediation practices in the relevant mediation markets. In a liti-mediation environment, lawyers are likely to focus their settlement efforts on mediation, displacing traditional lawyer-to-lawyer negotiation to some extent. Over time, they are likely to identify a set of mediators with whom they have good relationships and whom they can trust with their clients and favor with business referrals. Lawyers will learn how to practice advocacy in mediation, reading the mediators' moves and then coordinating or parrying as appropriate.²⁴¹ Indeed, evidence shows that lawyers quickly come to appreciate how they can use mediators to manage relationships with their clients during the awkward process of negotiation. Mediation, especially where there is a high settlement rate, can add predictability and control to lawyers' practices.

Lawyers' routine participation in mediation is also likely to have a major impact on mediation practice in liti-mediation cultures. Mediators will feel pressure to develop distinctive professional identities with identifiable characteristics of their mediation practices to maintain and grow their mediation businesses. Mediators will need to manage relationships with lawyers as repeat buyers of their services and professional colleagues who serve the same principals.²⁴² Regular participation of lawyers in mediation is likely to result in ongoing relationships between mediators and lawyers that may overshadow their respective relationships with the principals and dramatically affect the mediation process. Mediators can expect that lawyers will practice advocacy in mediation and thus mediators will develop strategies to finesse, reframe, or resist lawyers' advocacy at times. Mediators will also learn to recognize when lawyers seek the mediators' help by acting as "agents of reality" to reduce or otherwise reframe principals' expectations and demands. As this is a recurring problem for lawyers, mediators are likely to develop regular tactics for managing these interactions as part of a general definition of the mediators' relationships with the principals. Mediators will need to consider whether they see the lawyers or the principals as their primary clients.

To the extent that mediators view principals as their primary clients, mediators will develop tactics to manage their relationships with lawyers and principals to help the principals assess their goals

241. See generally Lawrence M. Watson, Jr., *Effective Legal Representation in Mediation*, in 2 *ALTERNATIVE DISPUTE RESOLUTION IN FLORIDA* 2-6 to 2-27 (2d. ed. 1995) (discussing lawyers' roles in mediation).

242. Of course, mediators serve all the principals, whereas lawyers serve only one side.

and the best way to achieve those goals. Of particular concern are the principals' priorities among potentially conflicting mediation goals, including speedy and efficient resolution, optimal problem-solving outcomes, enhanced relationships, and principals' exercise of responsibility for their decisions. Most mediators probably try to help principals achieve efficient settlements. Focusing on the principals' interests and priorities may lead mediators to consider—and explicitly discuss with participants—whether the principals have additional goals and which goals they want to take precedence.

Although lawyers' participation in mediation may well help their clients exercise responsibility for their decisions, I suspect that lawyers' participation often undermines the principals' exercise of decisionmaking responsibility. In general, lawyers normally do help their clients exercise decisionmaking responsibility by identifying key issues and providing an analysis that enables the principals to make more informed decisions. On the other hand, lawyers often feel the need to control their clients' decisionmaking.²⁴³ Moreover, when lawyers attend mediation, the lawyers' participation may, possibly subtly, undermine their clients' decisionmaking responsibility.²⁴⁴ This is especially likely when lawyers take an active speaking role, which, by definition, dilutes the role of the principals. In addition, lawyers' participation is likely to result in increased time pressure,²⁴⁵ which, in itself may undermine principals' responsibility taking. Moreover, time pressure is likely to inhibit the processes that permit and encourage high-quality consent, including explicit identification of principals' goals and interests²⁴⁶ and plausible options,²⁴⁷ principals' explicit choice of options for consideration,²⁴⁸ careful analysis of the options,²⁴⁹ mediators' restraint from pressuring principals to select particular options,²⁵⁰ and confirmation of consent.²⁵¹ These are certainly not inevitable results of lawyer participation, but I believe that they are quite likely if mediators do not develop explicit, or at least conscious, procedures for dealing with it.

Slightly reframing a question that Craig McEwen and his colleagues pose, we should consider whether the blending of mediation

243. See McEwen et al., *supra* note 190, at 163-64.

244. See McEwen et al., *supra* note 23, at 1327 (summarizing the critique that "legal advocacy and decision making diminish party autonomy and freedom—and thus 'empowerment'—by allowing lawyers and courts to shape decisions using legal rules in a way that may have little relationship to the parties' priorities, needs, and interests").

245. See *supra* text accompanying notes 223-24.

246. See *supra* Part III.C.1.

247. See *supra* Part III.C.2.

248. See *supra* Part III.C.3.

249. See *supra* Part III.C.4.

250. See *supra* Part III.C.5.

251. See *supra* Part III.C.7.

and the work of lawyers will favorably transform the practices of both law and mediation, thus justifying McEwen's call to "bring in the lawyers,"²⁵² or whether lawyers will co-opt, capture, and legalize mediation to the detriment of both law and mediation practices.²⁵³ My answer is "probably both."

Relying primarily on the research on mandatory divorce mediation in Maine, McEwen et al. argue that

[l]awyer participation in the mediation sessions permits intervention on behalf of clients and buffers pressures to settle. Lawyers may also counsel clients to moderate extreme demands. In addition, once lawyers become accustomed to mediation, lawyer involvement in mandated mediation does not appear to prevent the meaningful participation of parties or inhibit emotional expression between spouses.²⁵⁴

Not only has lawyer participation stabilized mediation, McEwen and his colleagues argue, but it may have moderated lawyers' adversarial attitudes about negotiation outside of mediation.²⁵⁵

On the other hand, Professor Carrie Menkel-Meadow²⁵⁶ and others²⁵⁷ worry that institutionalization of mediation in the courts and the attendant lawyer participation have corrupted mediation without particularly changing lawyers' adversarial attitudes. She finds that what is called "mediation" (at least of the court-ordered variety) is often "just another stop in the 'litigation' game which provides an opportunity for the manipulation of rules, time, information, and ultimately, money."²⁵⁸ Similarly, mediators Nancy Foster and Joan Kelly express concern about "replicat[ing] the values, norms, assumptions, and procedures of the adversarial divorce process."²⁵⁹

252. McEwen et al., *supra* note 23. Note that McEwen and his colleagues specifically focused on promoting fairness in divorce mediation cases. See *id.* at 1322. Although their argument could be applied to most disputes involving significant stakes and potential legal issues, one might make distinctions based on different types of cases, whether there are significant disparities in power, etc.

253. See McEwen et al., *supra* note 190, at 176.

254. McEwen et al., *supra* note 23, at 1394.

255. See *supra* text accompanying notes 233-38.

256. See generally Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*, *supra* note 12 (presenting a philosophical defense of settlement in certain situations).

257. See McEwen et al., *supra* note 23, at 1354-55, 1392 (citing critiques of lawyers as "spoilors" of "real" mediation).

258. Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*, *supra* note 12, at 17; see also Lowy, *supra* note 230, at 252-54.

259. Nancy J. Foster & Joan B. Kelly, *Divorce Mediation: Who Should Be Certified?*, 30 U.S.F. L. REV. 665, 673 (1996). Foster and Kelly express concern about problems with lawyers serving as mediators, arguing that, to perform appropriately, lawyer-mediators may face a difficult challenge to learn new behaviors and change assumptions about their roles. See *id.* at 674. Lawyers acting as advocates in mediation may face similar challenges and may be less likely to receive training or to consider differences between mediation and traditional litigation practices.

As many analysts have noted, mediation practices vary widely,²⁶⁰ so it should not be surprising that in some areas mediation and related lawyering practices take on the sunny cast that McEwen et al. depict in Maine, and that in other areas these practices have a darker (or at best a more mixed) image, as McAdoo and Welsh describe regarding Hennepin County mediation and Hyman et al. find in lawyer-to-lawyer negotiation in New Jersey. Even these geographic distinctions are too crude, as there are probably significant variations within most practice communities.

Rather than try to determine which portrayal is more accurate, I believe it makes more sense to frankly acknowledge the reality in all of these accounts. Indeed, when analyzed carefully, I think these pictures can be integrated fairly easily, yielding a composite of a glass that is both part empty and part full. McEwen and his colleagues Professors Lynn Mather, Nancy Rogers, and Richard Maiman have performed a great service by documenting liti-mediation²⁶¹ practices in Maine and identifying important benefits that may accrue from routinely involving lawyers in mediation practice. McEwen et al. make a compelling case that Maine-style practices can benefit principals, mediators, lawyers, and the legal system more generally. On the other hand, regular participation of lawyers in liti-mediation practice can easily spoil important benefits of mediation, especially the potential for helping principals in disputes retain and responsibly exercise the power to resolve their own problems.²⁶²

On balance, I would not support an unqualified call either to "bring in the lawyers" or to keep them out. Without appropriate precautions (and perhaps even with them), having lawyers regularly participate in mediation can predictably lead to the undermining of important values that mediation can promote, particularly the principals' careful exercise of their responsibility to make decisions about their disputes. On the other hand, having lawyers participate in mediation can provide real benefits and may be the optimal process in many cases, especially if some or all of the principals would have difficulty protecting their interests without professional advocates to speak for them.²⁶³

How will lawyering and mediation practices transform each other in the future? I submit that this will depend on the individual and collective values, decisions, and commitments of the actors in this

260. See, e.g., Menkel-Meadow, *supra* note 10, at 228-30; Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 *L. & SOC'Y REV.* 585, 587 (1987).

261. See *supra* notes 8, 23 and accompanying text (explaining liti-mediation).

262. See *supra* notes 214-16, 223-25, 236 and accompanying text.

263. I am grateful to Professor Nancy Rogers for highlighting the importance of attorneys in protecting people less able to protect themselves.

realm. We should expect that this will vary greatly by local culture and that local culture can, to a significant extent, be consciously developed.²⁶⁴ I conclude with some recommendations for how various actors in this collective drama might help bring this about.

VI. RECOMMENDATIONS

A. Mediators

I encourage mediators to embrace a great diversity of practices under the “mediation” label. Mediators of various persuasions (e.g., differently valuing promotion of settlement and empowerment) have good reasons to hold their values, and also have legitimate concerns about the implications of other philosophies. There is some merit to most mediation philosophies, and we should resist the temptation (which I confess to succumb to at times) to elevate our own approach as “real” mediation and denigrate others as false substitutes that should not share the mediation franchise. Though disparaging other approaches may feel satisfying in the moment, I am convinced that it is a counterproductive long-term strategy. It is unlikely that any camp will prevail completely, and if perchance one does, mediators, and, more importantly, principals, will lose the precious values of diversity and choice.

Instead, it would be much more helpful for adherents of differing mediation philosophies in local mediation communities to respectfully work together to concretely classify their differences as an aid to mediation consumers.²⁶⁵ Various methods exist for mediators to do this. One method is to observe and then discuss each others’ work.²⁶⁶ Another is to participate in peer consultation groups to discuss mediation cases, styles, and techniques.²⁶⁷ A third method is to operate a speaker’s bureau or other public education program. I participated

264. See Swidler, *supra* note 62, at 279-80; Lande, *supra* note 8, at 224-31.

265. See *supra* Parts II.A-B for one attempt to define market differences.

266. Local norms for observing mediation vary widely. For example, a California mediator with a busy practice told me that she had never had anyone observe her work and would be very concerned about clients’ reactions to having observers in her mediation sessions. This was typical of my mediation community when I was in practice in California. In Florida, where observation is mandated as part of the process for becoming certified, see FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010(a)(2), (b)(3), (c)(3), having observers is so routine that mediators often simply introduce the observers without seriously inquiring if the participants have any concerns about their presence. Even so, experienced Florida mediators may never see any other mediators’ work after becoming certified. At the 1995 annual training session of the Florida Academy of Professional Mediators, one Florida mediator who had done over 1000 mediations realized, after watching someone else do a mediation demonstration, that he had never seen anyone else do mediation since becoming certified and that he was not aware of many differences in styles. Mediators in a given community could create a norm, legitimizing particular observation procedures.

267. See Edward Blumstein & Patricia B. Wisch, *Who Nurtures the Nurturer? A Model of a Peer Support Group*, 9 *MEDIATION Q.* 267 (1992).

in such a group, which developed a training program for speakers and a directory of local mediators. Our discussions regarding how to present mediation to our community helped us identify relevant distinctions between mediation services.²⁶⁸ Given the critical role that lawyers play in liti-mediation culture—especially as mediation shoppers—it would be especially important to develop materials addressing lawyers' particular interests in mediation as well as mediators' concerns about lawyer participation in mediation. When attorneys attend mediations, mediators should consider discussing at the outset how the principals would like the attorneys to participate. Those especially interested in promoting disputants' responsibility for making dispute resolution decisions should find a public education strategy to be particularly appealing.

I encourage mediators primarily committed to an empowerment philosophy to appreciate the values of settlement and efficiency in mediation, especially for principals making informed choices and selecting mediators with those orientations. If mediators provide reasonable disclosure to principals about their procedures and gain the principals' consent to use those procedures,²⁶⁹ then these are legitimate choices that should be respected. By the same token, I encourage settlement-oriented mediators to appreciate that principals may have goals that they value as much or more than settlement itself. Rather than assuming that settlement is the only or primary goal, I encourage these mediators to assess and respect the principals' goals and priorities, recognizing that the principals' perspectives may well be somewhat different than those of their lawyers. Settlers should consider using at least some of the practices promoting high-quality consent,²⁷⁰ even if they do not adopt all of them. I would hope that all mediators become more aware of their own mediation styles and philosophies and describe them clearly, both in the shopping process and the mediation process itself.

B. Lawyers

To serve their clients' interests, and thus serve their own interests, lawyers should become familiar with the various styles of mediation practice in their local culture so they can competently advise clients about use of mediation, select mediators appropriate for particular cases, and constructively participate in mediation as appropriate. Given that mediation offers the special opportunity for a

268. See John Lande, *Speaking for Mediation*, *MEDIATION Q.*, Fall 1987, at 23, 28.

269. See Mazadoorian, *supra* note 204 (identifying questions ADR buyers might ask ADR providers); Aaron, *supra* note 173, at 63 (advising mediators to ask permission before offering evaluations).

270. See *supra* Part III.C.

problem-solving approach to negotiation, which many lawyers value,²⁷¹ lawyers should use their role as mediation shoppers to especially assess whether a problem-solving approach would be appropriate in particular cases and whether particular mediators would use it. Lawyers should also be sensitive to the impact of their participation and how it may affect (and sometimes impair) the quality of mediation offered and their clients' opportunities to assume responsibility for their decisions. Thus, lawyers should not simply assume that their clients need or want the lawyers to act as the primary advocates in mediation and should discuss with their clients the range of possible roles that the lawyer might take.

C. Law Schools

As liti-mediation becomes more common, law schools should prepare their students to advise and represent clients regarding mediation as described in the preceding subpart. Indeed, law schools have been making progress in adding courses on mediation and ADR to their curricula. Very few ADR course offerings existed a decade ago.²⁷² Today, most law schools provide some ADR courses, although these are often electives available only to a small fraction of the students. Although some schools, like the University of Missouri-Columbia,²⁷³ integrate ADR material into all the required first-year courses, this is beyond what most law schools are likely to do in the near future. At a minimum, however, all law schools should include some coverage of ADR in required courses like civil procedure and ethical lawyering/professional responsibility. Given the widespread use of mediation in family cases, mediation should be covered in family law courses as well. While law professors should certainly be free to expound their own philosophies of mediation in courses

271. See *supra* note 228 and accompanying text.

272. See Lande, *supra* note 8 (data on file with author). My survey of business lawyers asked how much information about ADR they had gotten from a number of sources, including their graduate or professional schools. On average, the lawyers in the sample had graduated from law school in the mid-1980s. Seventy-four percent said that they received "no information" about ADR from school, eighteen percent said "a little information," and eight percent said "more than a little information." See *id.*

273. See RONALD M. PIPKIN, FINAL REPORT TO THE UNIVERSITY OF MISSOURI-COLUMBIA SCHOOL OF LAW: PROJECT ON INTEGRATING DISPUTE RESOLUTION INTO STANDARD FIRST YEAR COURSES: AN EVALUATION (1993). Since 1985, the University of Missouri-Columbia School of Law has integrated ADR material into all first-year courses. See *id.* In 1995, six additional law schools began adapting this model in their curricula under a \$180,000 grant from the U.S. Department of Education's Fund for the Improvement of Post-Secondary Education. These schools are at DePaul University, Hamline University, Inter American University, Ohio State University, Tulane University, and the University of Washington. See Press Release from University of Missouri-Columbia School of Law (Nov. 2, 1995) (announcing expansion of dispute resolution teaching program) (on file with author).

teaching mediation skills, as a pluralist,²⁷⁴ I would hope that they would identify and legitimize a variety of styles and philosophies of mediation, discussing the benefits and problems of each. I would also hope that they would specifically address questions about the effects of lawyer participation in mediation and strategies that mediators might use to work constructively with lawyers on behalf of their joint clients.

D. Judges, Court Administrators, and Legislators²⁷⁵

Officials responsible for making and implementing mediation policy should act based on an appreciation of both the reach and limits of legal authority. On one hand, courts' authority to decide cases gives them great influence, even in formally nonbinding suggestions. Thus, a judge's comment or a policy merely encouraging the use of mediation may be widely interpreted as a directive that may result in formal or informal sanctions if the "suggestion" is not followed.²⁷⁶ If officials do not intend such statements to be interpreted as being mandatory or carrying even informal sanctions, they must say so clearly. In addition, officials dealing with court policy and administration are often understandably concerned about keeping court dockets moving by regularly settling a steady stream of cases.²⁷⁷ While this is certainly a legitimate goal, it is often in tension with other goals of dispute resolution.²⁷⁸ Of particular concern here is the potentially adverse impact of time and other settlement pressures on the disputants' exercise of their decisionmaking responsibilities.²⁷⁹ Unless officials make a conscious and careful effort to protect against inappropriate pressures,²⁸⁰ such pressures may well become a regular part of the legal culture.

Although judges and other public officials dealing with dispute resolution have great authority, they are often in a difficult position

274. See *supra* notes 65, 71-73 and accompanying text.

275. It is well beyond the scope of this Article to offer general recommendations about the overall goals and design of court mediation programs. For an excellent analysis of such issues, see ELIZABETH PLAPINGER & MARGARET SHAW, *COURT ADR: ELEMENTS OF PROGRAM DESIGN* (1992). The discussion here is limited to suggestions related to issues addressed in the body of this Article.

276. See McAdoo & Welsh, *supra* note 6, at 10; see also *supra* note 107 and accompanying text.

277. See Kovach & Love, *supra* note 9, at 31.

278. See *supra* notes 46-60 and accompanying text (discussing various goals of mediation).

279. See generally *supra* Part IV.

280. See generally SOCIETY OF PROF'LS IN DISP RESOL., *MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS* (1991) (recommending caution in mandating participation in mediation programs); ROGERS & MCEWEN, *supra* note 3, at chs. 7, 13 (arguing that judges should be prohibited from using economic and time pressures in connection with mediation to increase settlement rates).

to manage these processes because the regulatory tools generally used are blunt instruments and their policy directives often do not fully “penetrate” into daily practice.²⁸¹ As McEwen et al. persuasively argue, many regulations intended to protect against unfairness in mediation are ill-defined, vague, contradictory, difficult to implement, and unlikely to be effective, but likely to increase costs.²⁸² Indeed, there is a risk that such regulation will actually cause harm by lulling public officials and/or the general public into a false sense of security.²⁸³ Under these circumstances, I have no general prescription for officials other than to be cautious and not assume that official policies will be simply and directly implemented as intended.²⁸⁴ As we have seen with official “suggestions” to consider or use mediation, informal pressures may be quite powerful and sometimes override official policies. Indeed, various nonregulatory approaches may be more effective in assuring quality and achieving social goals.²⁸⁵ Thus, I see regulation as only one—and not necessarily the most important—component of a comprehensive approach to promote positive values in mediation.

E. Researchers

This Article suggests a narrow agenda for empirical research as well as a broad one. Starting with the narrower agenda, in Part II of this Article, I identified some distinctions that practitioners and analysts have used to differentiate mediators. Are these distinctions, or perhaps other “native concepts,” actually used in the mediation market? In Part III, I outlined a set of behavioral factors describing the quality of consent in mediation. Are these (or other factors) valid indicators? How can these factors be measured concretely? In Part IV, I hypothesized about possible changes that might occur in lawyering and mediation practices as part of the development of liti-

281. See Galanter, *supra* note 30, at 103.

282. See McEwen et al., *supra* note 23, at 1330-49. I share McEwen et al.’s skepticism about the efficacy of legal regulation to protect principals in mediation and safeguard larger social values of disputing. See Lande, *supra* note 74, at 44; Lande, *supra* note 268, at 28-30.

283. See McEwen et al., *supra* note 23, at 1335 (“[T]he primary virtue of legislating such mediator duties is to instill optimism in the rule-maker or legislator.”); cf. Susan S. Silbey, *Mediation Mythology*, 9 *NEGOTIATION J.* 349, 350 (1993) (suggesting that guidelines for selecting mediators perpetuate myth of informal, innovative, neutral, and nonauthoritative process and create “false expectations [that] disappoint users and practitioners of mediation alike”).

284. For example, while I endorse the notion that “[n]egotiations in family mediation are primarily conducted by the parties,” FLA. STAT. § 44.1011(2)(d) (Supp. 1996), and I even think that it is useful to include this statement in statutory language, we should not expect that this alone will make it so.

285. See Lande, *supra* note 74, at 44; Lande, *supra* note 268, at 28-30.

mediation culture. Which, if any, of these changes are actually occurring and why?

More broadly, the contemporary co-evolution of lawyering and mediation practices provides a wonderful opportunity to study the development of professional cultures and markets.²⁸⁶ We are now in a period when definitions of legitimate practice are coalescing, albeit in varying configurations in different local areas. It would be fascinating to analyze the forces leading to the development of particular local disputing cultures. One possibility is that general indigenous norms (i.e., norms not specifically relating to dispute resolution procedures) affect the evolution of norms about dispute resolution. If so, the development of mediation practice (or the predominance of a particular style of mediation) in a community may be a function of more general attitudes about human relationships in that community. Thus, we might hypothesize that liti-mediation culture may be more likely to be adopted in communities where residents have more cooperative relationships than communities with more adversarial relationships. Similarly, liti-mediation culture may be more likely to grow in more interconnected communities. Alternatively, there may be an inverse relationship such that mediation may especially take hold in those communities where indigenous social connections are especially frayed or lacking.

Is the development of a local disputing culture a function of the availability and perceived quality of indigenous alternatives for handling disputes? For example, is the growth of formal mediation a result of dissatisfaction with existing informal dispute processes? Or problems with the local courts? Or reactions to initial experiments with mediation?

Are there particular types of individuals and institutions that play key roles in the evolution of local disputing cultures? The obvious suspects include lawyers, judges, mediators, public officials, and other professionals and community leaders. Perhaps less obvious may be the activity of intellectual and organizational entrepreneurs who provide the conceptual and material structures needed to sustain a culture.

To what extent is the development of local disputing culture a result of historical coincidence of several (or certain) of these factors at the same time or the fact that significant events have (or have not) previously occurred?

The better we can answer these questions, the better we will be able to anticipate and shape the future of mediation. If the spread of

286. Andrew Abbott argues that the jurisdictional boundaries limiting the professional activities of particular professions often shift over time in relation to the activities of "neighboring" professions. See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 33-113 (1988).

liti-mediation cultures continues, we can expect that both lawyering and mediation practices will be profoundly affected. Although some of the changes would presumably be beyond our control, this Article suggests ways that various actors can help define and improve the range of disputing practices in their local communities.²⁸⁷

287. The ideas regarding the broader research agenda grew, in part, from my dissertation research. I am grateful to my committee, especially the chair, Mark Suchman, for nourishing these ideas. I also want to thank the participants at a faculty seminar of the Program on Negotiation at Harvard Law School in May 1995, who contributed some of these ideas.