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### Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role

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# BEYOND FORMALISM AND FALSE DICHOTOMIES: THE NEED FOR INSTITUTIONALIZING A FLEXIBLE CONCEPT OF THE MEDIATOR'S ROLE

JEFFREY W. STEMPEL\*

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## I. INTRODUCTION

This Article builds upon the issues aired during a panel discussion at the Fifth Annual Conference for Florida Mediators and Arbitrators, an event that marked the tenth anniversary of the Florida Dispute Resolution Center (DRC). In effect, the Conference marked the end of a decade of the ADR revolution in Florida. Court-ordered mediation was established and mandated for many state cases beginning with the enactment in 1987 of chapter 44, *Florida Statutes* ("Mediation Alternatives to Judicial Action"),<sup>1</sup> although this resulted from substantial ADR efforts during the 1970s and early 1980s that laid the groundwork for ADR's arrival as official state policy. Since ADR became official state policy, mediation has become part of the legal landscape in Florida, but issues continue to rage concerning the proper scope and process of mediation. The panel discussion, entitled "Evaluative v. Facilitative Mediation: Current Ethical and Policy Considerations," reflects a debate conducted nationally as well as in

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1. See Act effective Jan. 1, 1988, ch. 87-173, 1987 Fla. Laws 1202 (codified as amended in scattered sections of FLA. STAT. ch. 44 (1995 & Supp. 1996)).

Florida.<sup>2</sup> Expanding upon my comments in the panel discussion,<sup>3</sup> I defend the evaluative aspects of mediation and question the notion that "good" mediation must fit the facilitative model.<sup>4</sup> Primarily, however, I am not advocating evaluative mediation but rather endorsing flexible mediation that permits judicious use of evaluative techniques. Conceptual oversimplification occurs when the debate is cast in the wooden form of evaluation versus facilitation. Not only is this framing unwise and misleading, but it also may lead to government-sponsored unfairness when the mediation enterprise takes place under the auspices of court-compelled mediation.

In discussing the merits of evaluative and facilitative approaches, scholars and participants have tended to overlook or understate the importance of distinguishing between purely private mediation and the semi-public mediation that occurs in states such as Florida that have mandated mediation as part of the government's official dispute resolution process.<sup>5</sup> When this system prevails, it is of no real moment that the mediators are not state judicial employees. They nonetheless are an integral part of the state's dispute resolution apparatus. In this environment, the state errs when it mandates an excessively formal version of the facilitative model, one that in some cases may institutionalize unfairness. Instead, Florida law and policy should celebrate a more eclectic model of good mediation and, in appropriate cases, provide a meaningful possibility of reviewing mediated outcomes for fairness.

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2. See Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. (forthcoming 1997) (noting growth of mediator ethical costs and emerging questions).

3. See James J. Alfini, Moderator, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919, 922, 927-28, 932, 934-35 (1997) [hereinafter *Panel Discussion*].

4. See James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 47-50, 73-74 (1991) (noting that many or even the bulk of mediation professionals define proper or "good" mediation as employing exclusively facilitative approaches that preside over party-generated resolutions and suggest areas for party exploration, but refrain from providing legal judgments or rendering evaluation of the matter or any party positions).

5. A recent exception, published just after the panel discussion, is Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 62-75 (1996), which focuses on the degree to which mediation differs according to whether it occurs solely through the parties' efforts or is required as part of the court-related dispute resolution process. Although Professor Nolan-Haley does not emphasize the facilitative-evaluative debate, it is apparent that she concludes that a court-affiliated mediator should, on occasion, take affirmative steps to prevent the mediation from becoming an arena of injustice, even when the parties appear to have made a "voluntary" agreement. Although this proactive mediator should ordinarily avoid direct evaluation if possible, Professor Nolan-Haley's concern for unrepresented parties and for mediation outcomes that, at least largely, parallel likely adjudication outcomes implicitly suggests a role for judicious use of evaluative techniques by mediators in appropriate cases. See *id.* at 88-100.

## II. THE FALSE PREMISE OF THE FACILITATIVE-EVALUATIVE DICHOTOMY

### A. *The Unnecessary Either/Or Perspective on ADR*

Although the panel discussion provided a most interesting exchange of views, it proceeded on the basis of what I hope some day will be universally recognized as a false dichotomy.<sup>6</sup> In particular, the fallacious framework for our discussion has been the notion that mediation is, or must be, either "facilitative" (designed to allow parties to work out a consensual resolution of their disputes) or "evaluative" (designed to provide a neutral viewer's assessment of the relative merits of the issues in order to move the parties to a resolution).<sup>7</sup> In my view, notwithstanding respected views to the contrary,<sup>8</sup> this

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6. The formal title of the panel discussion—"Evaluative v. Facilitative Mediation: A Discussion"—suggests that the two modes of mediation are polar opposites with no common overlap. See *Panel Discussion*, *supra* note 3, at 1.

7. The facilitative-evaluative dichotomy has been widely accepted, at least for purposes of framing discussion, by many ADR commentators. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 11-12 (1994) (describing the mediation movement as being at a "crossroads" where it must choose between a "problem-solving" method of mediation, which makes use of evaluative techniques as a spur to settlement, and a "transformative approach," generally described as more facilitative in tone with an eye toward "fostering empowerment" of the parties); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 10-16 (1996) (reviewing variants of evaluative and facilitative approaches to mediation); 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, 340-42 (1996) (noting a variation in mediation and other ADR methods according to whether the device provides a primarily adjudicatory (evaluative) or settlement-brokering (facilitative in combination with evaluative) role); Leonard L. Riskin, *Two Concepts of Mediation in the FHA's Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21, 24-30 (1993) (noting the presence of a primarily evaluative and a primarily facilitative approach in mediations conducted under the auspices of the federal farm lending program); Craig A. McEwen, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV. 77, 78-84 (1991) (describing varieties of evaluative and facilitative approaches); 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, 1-4, 18-20 (1991) (perceiving a tension between a facilitative, party-centered view of mediation and systemic goals of case resolution consistent with legal norms); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 J.L. & POL'Y 7, 19-20 (1986) (describing evaluative and facilitative techniques employed by mediators).

Although some degree of polarity can be a useful analytic device or means of organizing discussion, labels of this type inevitably tend to organize thought as well, sometimes constricting it and leading analysis astray.

8. Professors Robert A. Baruch Bush and Lela Love, for example, are two prominent and respected commentators who can at least be interpreted as arguing that facilitative mediation is the one true way and that any infusion of evaluative techniques essentially corrupts mediation and alchemizes it into something else and something less. For example, Professor Bush has argued that mediation be defined in a more or less singular fashion and, implicitly, that his version of the facilitative approach—transformation and empowerment of the parties—should be the standard:

notion is simply wrong.<sup>9</sup> Good mediators should be both facilitative and evaluative in varying degrees. In addition, the view that mediators act as either facilitators or evaluators represents a triumph of excessively formalist thinking at a time when effective dispute resolution law and policy require a functional approach.

To some extent, I am setting up a straw entity in order to attack it in furtherance of my thesis. As the panel discussion at the DRC Conference unfolded, it became quite clear that panelists themselves had subtle and nuanced views on the topic. Those panelists previously identified with the facilitative perspective would not absolutely preclude mediators taking actions that would in all likelihood lead to making assessments of the disputants' positions<sup>10</sup> and behavior.

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[F]or every mediator to choose for himself what conception to adopt—which may be close to the present situation—does not seem a good idea at all. The result would be that different mediators would handle similar dilemmas in entirely different fashion. Not only would this be unfair to individuals, it would be damaging to the reputation of mediation as a whole. The lack of uniformity and common standards would undermine confidence in and respect for mediation.

Robert A. Baruch Bush, *Ethical Dilemmas in Mediation* 20 (1989) [hereinafter Bush, *Ethical Dilemmas*] (unpublished manuscript, on file with author); see also BUSH & FOLGER, *supra* note 7, at 7-8; Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications* (Nat. Inst. Disp. Resol. monograph 1992) (presenting revised and updated version of 1989 paper).

Professor Love makes a similar case for the benefits of facilitation and the need to define mediation as an essentially facilitative enterprise in her contribution to this Symposium. See Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 946 (1997) ("A Uniform Understanding of Mediation Is Critical to the Development of the Field.").

For reasons set forth below, I disagree that such singular uniformity is required or desirable.

9. Most polar models are wrong if taken too rigidly. See, e.g., Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1274-76 (1995) (arguing persuasively that litigation generally serves both dispute resolution and policy-setting functions and that adjudication cannot be exclusively or even primarily defined by either model).

Dichotomous models are useful heuristic devices for aiding understanding, particularly for framing issues and enabling discussion to proceed within a realm of common terminology and understanding. For example, even though I criticize the "evaluative-facilitative" model as inaccurate, this Symposium demonstrates the model's utility for framing and fomenting vigorous discussion. When another participant speaks of facilitative techniques, I have a basic understanding of what they mean. When I talk of evaluative approaches, they know basically what I mean. However, even good heuristic models work mischief when they are used not only to illustrate, but also to limit debate or thought or to create bright line criteria for identifying mediation practice as good or bad, legitimate or illegitimate, or pure or vulgarized.

10. See *Panel Discussion*, *supra* note 3, at 934 (comments of Professor Lela Love) (noting that when confronted with a party's desire to enter into an agreement barred by applicable law, mediators can raise "concerns about the legality of the agreement and advise them to get legal counsel"); *id.* at 922 (comments of Professor Cheryl McDonald) (rejecting the mediator's authority to state an opinion about a judge's decisionmaking reputation in landlord-tenant matters because "there are a lot more ways and more neutral ways in which both parties could be alerted to the possibility that judges, being human beings, might have particular biases that might have an impact on their case and that's

However, partisans of evaluation were willing to impose some limits on the evaluative mediator to prevent mediation from becoming early neutral evaluation or, worse yet from the perspective of a facilitative mediator, arbitration or coerced settlement engineered by a nonjudicial officer.<sup>11</sup> As applied to the hypothetical problems addressed by the panel, it seemed clear that neither ironclad facilitation nor inflexible evaluation enjoyed universal support.

In view of the panelists' tacit appreciation of these issues, the prominence of the facilitative-evaluative dichotomy surprises me. How can the battle lines be so strictly drawn when so many of the leading experts in the field seem not to subscribe to the premise of a vast gulf between types of mediation? To some extent, classifications and polarities serve as heuristic devices useful in illuminating a subject and organizing discussion and debate. Nevertheless, organizational labels and constructs tend to frame thought as well as discussion and can lead to narrowed and polarized analysis. When an organizational dichotomy or nomenclature moves from being an analytic device to becoming a yardstick for measuring and policing mediators, the unnecessary dichotomization of mediation styles becomes something more than incorrect. An excessively compartmentalized and polarized view of mediation establishes a system that may make mediation both less effective in resolving cases and more

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something they should both be thinking about"); *id.* at 928 (comments of Professor McDonald) (noting that to educate parties and attempt to correct misimpressions, a mediator "might point them towards the library" but should not offer his or her own assessment); *id.* at 923 (comments of Professor Robert Moberly) (noting that Florida Rule for Certified and Court-Appointed Mediators 10.090(d) "doesn't prohibit all opinions, but it does prohibit [a mediator's announced opinion] as to how the judge in that particular case will rule"); *id.* (comments of Professor Moberly) (suggesting a distinction between permitted and prohibited types of evaluation and urging "great caution in utilizing this sort of opinion and evaluation"); *id.* at 925 (comments of Professor Moberly) (observing that the mediator is allowed "to provide information . . . [although] [t]he line between information and advice may not always be so clear"); *id.* at 929 (comments of Professor Moberly) ("The Florida Rules don't prohibit all or even most evaluations. They only prohibit those specifically mentioned, or those that relate impartiality or self-determination. The Rules specifically allow mediators to point out possible outcomes of the case."); *id.* at 924 (comments of Javier Perez-Abreu) (accepting the premise that mediators are permitted to at least advise participants of relevant law and legal factors because in doing so "[y]ou're not giving them legal advice, you're telling them what's in the statute and what the law provides. You're not giving an opinion as to the law or as to its merits. I guess if you take it further and start analyzing the statute or interpreting the statute, you may get into trouble").

11. See *id.* at 928 (comments of Lawrence M. Watson, Jr.) (observing that the evaluation of party positions is permissible and useful and "becomes dangerous only when you start taking the decisionmaking process away from the parties"); *id.* at 922 (comments of Jeffrey W. Stempel) (noting that if the mediator provides an assessment of the merits of an issue or the likely adjudication outcome too early in the mediation process, it may warp the process and preclude the opportunity for a mutual resolution by the parties); *id.* at 928 (comments of Donna Gebhart) (approving nonevaluative techniques of alerting the parties and raising their consciousness as a required prelude to offering an assessment of position, circumstances, or possible outcomes).

dangerous to certain parties. When mediation is mandatory, these potential defects of the false dichotomy cause heightened concern.

### B. *The Perils of Formalist Characterization*

Related to the problem of the false dichotomy is the formalist application of the either/or construct. If, for example, one adopts as a first premise the view that mediation is by definition nonevaluative, and then rigidly applies this premise to issues of appropriate mediator behavior, the result is a formalist system that permits mediators little or no leeway to depart from the nonevaluative style. This sort of regulatory regimen may satisfy the nonevaluative ethos of some mediation scholars, but it does so at the risk of becoming a rigid system that prevents mediators from taking practical actions most appropriate to the cases they mediate.

A formal regulatory regimen also has the uncomfortable air of tautology and self-fulfilling prophecy. For example, if as the first leg of a syllogism one posits that "all mediation is nonevaluative and facilitative only," any situation of arguably evaluative or interventionist mediation becomes "nonmediation" or "improper mediation" when the syllogism is carried to conclusion. This not only results in an excessively narrow view of mediation, but also creates a regulatory regime that discourages flexible, hybrid approaches to dispute resolution. At its extreme, the "mediation is nonevaluative" mantra becomes an end in itself and loses sight of the ultimate goal of mediation or any other ADR technique: the efficient and just resolution of controversy. When the end instead becomes the preservation of a particular model of mediation (nonevaluative), attainment of this goal may overwhelm the more germane objective of just dispute resolution.

To attempt to illustrate my concerns and criticisms, I want to focus primarily on a hypothetical that touches on a major criticism of mediation: the possibility that it disserves women,<sup>12</sup> weaker parties, and less assertive entities.<sup>13</sup> I will also refer to two other hypotheti-

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12. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 444-46 (1992) (suggesting that mediation's elimination or de-emphasis of legal rights in pursuit of resolution disadvantages the typical woman in a domestic dispute due to the imbalance of power); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-51 (1991) (contending that more informal processes of mediation may discourage women disputants from asserting legal rights and encourage mediators to overlook such rights in seeking resolution of domestic matters). Both of these authors, however, are critical of both evaluative and facilitative mediation: an evaluative mediator might bludgeon a more pliable party into settlement by disparaging her case, while a facilitative mediator might encourage her to resolve the matter quickly, even at substantial cost to her legal entitlements.

13. See Joseph Singer, *Nonjudicial Resolution Mechanisms: The Effects on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569, 575 (1979) ("It is generally agreed that mediation between parties of significantly unequal power is inappropriate."); see generally RICHARD

cal mediation situations set forth in the panel discussion: a landlord-tenant dispute and a personal injury tort action.<sup>14</sup>

Regarding the family law hypothetical, assume a husband and wife are divorcing. The husband is a Harvard MBA investment banker. The wife quit school one year shy of her bachelor's degree to work to fund the husband's graduate education. Just as the husband began to profit from the capital (including spousal human capital) investment in the MBA, the couple had two children. The wife worked at home raising the infants and did not return to either school or a career. When she raised the possibility of hiring substantial childcare so she might finish her education, the husband insisted on the benefits of an at-home mother and, despite some initial protest by the wife, prevailed on the issue. The children are now two and three years old, respectively. The husband has initiated the divorce. The wife is concerned about the future but finds life with the husband a constant state of tension. She also wants out of the marriage. The wife is also generally exhausted from the rigors of child rearing. The couple enters mandatory mediation without formal counsel, and the husband's settlement offer is laughably low—but the wife has no idea that the offer is low.

Under this perhaps soap-operatic scenario, what should the good mediator do? Obviously, determining the "best" mediation strategy requires more information than this thin hypothetical can provide. However, the sketch provided suggests to me that some degree of evaluative mediation is in order. The ridiculousness of the husband's opening offer cannot go un rebutted. As long as the mediator operates within an acceptable range of discretion, procedure should be the mediator's choice, whether by commenting to one or both parties, insisting on counsel, or leading the parties either individually or collectively through a series of analyses designed to establish the appropriate parameters for dividing property and providing for ali-

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ABELLED, *THE POLITICS OF INFORMAL JUSTICE* (1982) (various contributors arguing that weaker parties do better in more formal disputing systems).

14. See *Panel Discussion*, *supra* note 3, at 921 (comments of Moderator James J. Alfini):

The first scenario I'd like to present [to the panel] is basically one you would find in the county courts in Florida. It's a landlord-tenant dispute. It's a dispute over the withholding of rent until an unsafe condition in an apartment is fixed up. Both parties, as is the case in most county mediations, are unrepresented. Both the landlord is unrepresented, and the tenant is unrepresented.

See also *id.* at 928 (comments of Dean Alfini):

Let's move on to the context in which we generally see the evaluative versus facilitative issues most clearly framed: big civil case mediation. Here in Florida, this is circuit court mediation. We have a circuit court mediation, a personal injury case, and the insurance adjuster is taking a hard line that there is no liability in this case. The mediator is a retired judge, and he knows, or thinks he knows that juries almost always find liability in these kinds of cases in that venue. May he reveal this to the parties?



mony and child support. Leading the parties through such analyses may, by implication, reveal the inadequacy and probable bad faith of the husband's opening offer.

Although there should probably be a presumptive preference for requiring mediators to first exhaust facilitative approaches before turning evaluative, mediators should have some discretion to make evaluative moves if necessary, and that choice should be given wide deference by the courts. For example, in the divorce scenario outlined above, straining to avoid sounding evaluative may needlessly prolong the process or provide opportunities for the husband to simply obfuscate. Further, even if the mediator begins by indirectly attempting to spur the wife toward making or obtaining a more realistic assessment of the husband's position, she may not understand or appreciate the significance of the indirect approach. At some point, the good mediator should be permitted to be blunt with the wife and tell her that the husband's offer is far lower than any imaginable court-ordered financial settlement.<sup>15</sup>

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15. In his professional responsibility casebook, Professor Stephen Gillers uses a similar hypothetical to prompt discussion regarding the lawyer's duty to settle a claim in the manner desired by the client, even though the lawyer thinks the proposal is completely inadequate and unfair to the client. *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 85-86 (4th ed. 1995) [hereinafter GILLERS, REGULATION OF LAWYERS] ("Accept the Offer" problem); *see also* STEPHEN GILLERS, TEACHER'S MANUAL FOR REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 40 (4th ed. 1995) [hereinafter GILLERS, TEACHER'S MANUAL] (commentary on problem). In the hypothetical, a matrimonial lawyer is faced with

a low-ball offer, in the ballpark for first offers but low and obviously an invitation for a counteroffer. I presented the offer to [the client] because I'm supposed to and told her not to be offended it's so low . . . . What she said next blew me away. "Take it." She doesn't want to negotiate, not even if she assumes—as I told her based on my experience she should—that I can get another \$250,000 on the property division and \$35,000 a year more on the support. Maybe more.

GILLERS, REGULATION OF LAWYERS, *supra*, at 86.

Professor Gillers concludes that the lawyer may continue to advise the client, implore her not to settle so quickly, and even withdraw (pursuant to Model Rule of Professional Responsibility 1.16(b)(3)) because he finds the client's decision "repugnant or imprudent." GILLERS, TEACHER'S MANUAL, *supra*, at 40. The lawyer may not, however, obstruct or sabotage the settlement if the duly informed client continues to insist on the low-ball offer.

Although mediators are not lawyers and do not represent the parties (and therefore should not give "legal advice" to the parties), it seems incongruous that a mediator who presides over the case due to court order has, under the facilitative model, so little discretion to attempt to prevent foolish settlements. The lawyer can not only advise the client, but also can fire a warning shot across the client's metaphorical bow by threatening to withdraw. The mediator can withdraw but not advise. Undoubtedly, the mediator can also ask the probing questions noted in the text. At some point, however, probing questions may become tantamount to advice or evaluation. Fans of the facilitative model would forbid this. I would not only endorse it in situations such as the lopsided divorce-settlement hypothetical, but would also urge that mediators be permitted to leapfrog the indirect approach, at least when a disputant has no counsel or has inadequate counsel. Ultimately, however, the mediator, like the lawyer or judge, probably must permit competent parties

Of course, if the mediator's conduct unfairly favors one side or otherwise results in injustice, courts should police the mediation process by setting aside or modifying agreements tainted by improper mediation. Nevertheless, mediation is not improper simply because it contains evaluative components. On the contrary, as this brief example underscores, nonevaluative mediation can improperly assist injustice. By simply "facilitating" the hypothetical divorce without editorial comment, the mediator is giving tacit legitimacy to the husband's efforts to unfairly impoverish his spouse and children in a manner no court would tolerate.<sup>16</sup>

The standard facilitative response to this scenario—and it is a good one—posits that the good mediator first tries to raise party awareness and permit the parties to obtain evaluative expertise. Parties are advised of the right to legal counsel, or are even urged to get counsel.<sup>17</sup> The parties are encouraged to grasp the implications that would become apparent if an evaluation occurred through the mediator asking, for example, whether the wife has thought about the children's college educations, private versus public primary and secondary school, family vacations, summer camps, childcare while she seeks to return to work, tuition if she finishes or continues college training, and so on. Although these techniques may be very effective in most mediations, they may be woefully ineffective in dealing with party imbalances of power, sophistication, or funding, particularly in the case of spouse driven by guilt, exhaustion, frustration, or impatience. Suggesting that a party seek out a lawyer may salve the mediator's conscience and that of the system as well, but this does little real good when a party irrationally resists legal counsel, or when poverty or time pressure preclude legal advice or result in substandard legal advice.

The anti-war bromide of the 1960s that "not to decide is to decide" remains apt, whatever one's historical views of U.S. foreign policy. When mediators are too studiously "neutral," there exists significant

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to enter into even foolish settlements, unless the proposed agreement is not just unwise but unconscionable.

16. At least I hope no court would tolerate it, although the settlement might be deemed unwise but not unconscionable or violative of public policy. If the settlement imperils the children's well-being, a court would presumably have authority to reject it (if in midtrial) or modify it on later motion. Whatever the trial court's decision, it would be subject to reasonably rigorous appellate review that would be likely to correct at least gross errors of law, procedure, or equitable distribution. By contrast, judicial review of private settlements or mediated settlements is highly deferential. A court at either the trial or appellate level is unlikely to disturb any but the most facially unconscionable mediated settlements.

17. 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, 1322-23, 1358-62 (1995) (concluding that the presence of attorneys substantially reduces the possibility that one party will take advantage of the other in family law mediation).

danger that they will favor the stronger, more sophisticated, meaner, or more deceptive party. Proponents of the facilitative approach tend to ignore or underappreciate this aspect of disputing activity. For example, Professor Lela Love criticizes the evaluative approach because

[i]n mediation, little protection exists from a mediator's inadequately informed opinion. . . . The mediator's opinion that one of the parties should buy a carpet to lessen the impact of sounds heard by a neighbor or that one of the parties does not have standing to bring a particular claim in court carries enormous weight.<sup>18</sup>

However, the mediator's silence also carries enormous weight. When the parties announce a settlement, the mediator's lack of editorial comment or other activity (other than wrapping up the case) suggests to the parties that their settlement falls within the legal system's zone of acceptability. If our hypothetical wife being taken to the financial cleaners by her investment-banker husband had any misgivings about the adequacy of his proposed settlement, those misgivings are effectively erased when the mediator—on the case because of the coercive power of the state—tacitly blesses the settlement. Professor Love and others are correct in highlighting the need to supervise the mediator's influence through action, but they err in overlooking the mediator's influence through inaction.

An illustrative, if absurd, example underscores the point. Imagine mediating between Pol Pot and Mother Theresa,<sup>19</sup> with neither represented by counsel.<sup>20</sup> Can anyone seriously suggest that the pure facilitative model, applied with inflexible formalism, is really the appropriate approach? ("You know, Mother Theresa, there may be some legal issues in this case and you might want to consult a lawyer, but otherwise if you and Mr. Pot want to agree that all relief aid

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18. Love, *supra* note 8, at 942-43.

19. This scene should probably be avoided by the statutory authority of courts to direct disputes away from mediation when it is deemed futile. Stranger things have happened, however. See Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1809-11 (1986) (describing a failed victim-offender mediation attempt involving mugging victim Bernhard Goetz, who later became notorious for the shooting of men intimidating him on a New York City subway train); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1273 (1994) (finding victim-offender mediation widespread but ill-advised in criminal matters).

20. When disputants have competent counsel, many of the concerns attending mediation or any other form of dispute resolution are greatly allayed. See McEwen, *supra* note 17, at 1322-23, 1346-47, 1358-62 (concluding that potential unfairness due to imbalances of power or sophistication are greatly reduced when parties have counsel). Unfortunately, a high percentage of parties participating in court-mandated ADR do so without lawyers. See *id.* at 1344-52; see also Nolan-Haley, *supra* note 5, at 82-83, 94-95 (noting that many or perhaps most disputants in mandatory mediation participate without counsel).

stops at the border and is delivered to Khmer Rouge soldiers, then we have a settlement."<sup>21</sup>) To be sure, a facilitative mediator may enable these two disputants to reach an agreement, but will the agreement be sufficiently fair that the judicial system should embrace it?<sup>22</sup>

In my view, even the commentators most associated with the facilitative and nonevaluative perspective<sup>23</sup> recognize this when applying their model of facilitative mediation to situations of unequal parties or strategic behavior.<sup>24</sup> Similarly, proponents of the evaluative mediation approach realize that mediation becomes a charade if the first meeting of the parties results in an immediate decree by the mediator.<sup>25</sup> Consequently, the debate in the literature is more complex than can be captured by the "facilitative versus evaluative" de-

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21. Jim Alfini, graciously commenting on this Article, found the hypothetical jarring and over-the-top in its absurdity. Although his grasp of reality is probably better than mine, I disagree with Alfini: if we had better information about characteristics of the parties, I predict we would find many mismatches between a disputant who is essentially fair and one who is ruthlessly selfish. Part of the lawyer's role is to level the playing field.

For a dispiriting example of attempted facilitative mediation when the parties are imbalanced in resources and attitude, see Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553 (1995). Notwithstanding legal representation, the wife in this divorce saga appears not to have received either full justice or adequate voluntary resolution. See *id.* at 595:

Under the laws of many states, attorneys have an ethical duty to advise clients about alternative dispute resolution. Although I would have advised Elizabeth about mediation, I would not have recommended it.

... [F]avorable indicators [for a positive outcome] began to melt away during mediation as the ugly presence of the power imbalance between [her husband] Paul and Elizabeth, seemingly dormant, began to reappear from deep within the relationship. Even with the help of her attorney and accountant, Elizabeth could not overcome Paul's power. The push to settle, the persuasive presence of the mediator, and the non-confrontational atmosphere conspired to render Elizabeth impotent against Paul. As the mediation progressed, Paul was more and more competitive and Elizabeth was increasingly cooperative, unconditionally so.

22. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (suggesting that even fair settlements may disserve justice by preventing full and public adjudication of controversies). Professor Fiss is clearly correct in noting that settlement resolutions are not necessarily wise or just. However, he is incorrect to the extent he suggests that adjudication is inevitably a preferred alternative. Courts render plenty of injustice. Disputants should be entitled to avoid or minimize these instances by exiting the system through settlement, provided that the settlement, even if unwise, is not coerced or unconscionable. When ADR is court-ordered, courts must be sensitive to the coercion issue lurking simply because the parties have been ordered to mediate, arbitrate, or obtain a third-party evaluation.

23. See, e.g., BUSH & FOLGER, *supra* note 7, at 18-21; see also Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 31-33 (1996).

24. For example, Bush and Folger, although stressing facilitation, also emphasize the need to empower the parties and prompt them to recognize the concerns of one another. They also advise mediators to note and compensate for differential power relationships. See BUSH & FOLGER, *supra* note 7, at 70-85.

25. See, e.g., *Panel Discussion*, *supra* note 3, at 922 (comments of Jeffrey W. Stempel); *id.* at 924 (comments of Lawrence M. Watson, Jr.).

scription, and panel discussions such as the present exchange invariably result in more refined analyses of specific situations with "evaluators" and "facilitators" differing relatively little in the concrete strategies they employ or advocate for presiding over particular situations.<sup>26</sup> For example, in her article in this symposium, Professor Lela Love, clearly a proponent of the facilitative approach and a critic of evaluation, deems it good facilitative mediation when "[m]ediators push disputing parties to question their assumptions, reconsider their positions, and listen to each other's perspectives, stories and arguments. They urge the parties to *consider relevant law*, weigh their own values, principles and priorities, and develop an optimal outcome. In so doing, mediators facilitate evaluation by the parties."<sup>27</sup> The activities Professor Love describes obviously have an evaluative dimension as well as a facilitative and empowering mission; these activities simply steer clear of the heavy-handed evaluation that fundamentally alters the mediation enterprise.

### III. FLORIDA'S REIFICATION OF THE FORMALIST FALSE DICHOTOMY

Unfortunately, Florida mediation law appears not to be so supple. Although the statutory language does not require a complete ban on evaluative mediation, the statute and the rules have been interpreted to mean codification of a rigidly facilitative perspective in which mediators are absolutely forbidden from expressing a view regarding the merits of the dispute. Florida's mediation statute defines mediation as "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties."<sup>28</sup> The Florida Rules of Civil Procedure and the Florida Family Law Rules of Procedure speak to the logistical administration of the mediation and even to such matters as compensation of the mediators. However, the Rules say nothing regarding the appropriate mediation style beyond simply defining the general principal that mediation is the facilitation of a party-driven agreement.

The Florida Rules for Certified and Court-Appointed Mediators are somewhat more specific. However, these Rules are largely patterned on the statutory language and thus contain a similar facilitative slant, although they do not textually foreclose some degree of helpful evaluation in the service of mediation. Arguably, the statute and the Rules, if properly interpreted, encourage flexibility and a

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26. See generally *Panel Discussion*, *supra* note 3 (despite ideological differences among participants, general concerns existed regarding appropriate mediator behavior in concrete situations).

27. Love, *supra* note 8, at 939 (emphasis added).

28. FLA. STAT. § 44.1011(2) (1995).

broad notion of facilitation that encompasses use of evaluative techniques in appropriate circumstances. Specifically, the Rules state:

Mediation Defined. Mediation is a process whereby a neutral third party acts to encourage and *facilitate* the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement.<sup>29</sup>

....  
General Principles. Mediation is based on principles of communication, negotiation, *facilitation*, and problem-solving that emphasize:

- (1) the needs and interests of the participants;
- (2) fairness;
- (3) procedural flexibility;
- (4) privacy and confidentiality;
- (5) full disclosure; and
- (6) self determination.<sup>30</sup>

In addition to noting fairness as an essential principle of mediation, the Rules contain other language suggesting that the facilitative notion of mediation need not exclude an evaluative component. For example, the role of the mediator as defined in the Rules "includes but is not limited to" the generally facilitative techniques of assisting the parties to identify issues, improve communication, explore alternative resolutions, and assist the parties to reach "voluntary" agreements.<sup>31</sup> If this broad language and the notion of a genuinely voluntary accord is treated seriously, mediation under the Florida Rules should not forbid activist mediation that occasionally takes an evaluative turn, particularly if this evaluation is done to further fairness.

Other provisions in the Rules buttress this assessment. For example, mediators "shall promote mutual respect among the parties throughout the mediation process."<sup>32</sup> In addition, the mediators "shall not unnecessarily or inappropriately prolong a mediation session if it becomes apparent that the case is unsuitable for mediation or if one or more of the parties is unwilling or unable to participate in the mediation process in a meaningful manner."<sup>33</sup> The mixed message of

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29. FLA. R. CERT. & CT.-APPTD. MEDIATORS Rule 10.020(b) (preamble) (emphasis added); *see also* FLA. STAT. § 44.1011(2) (1995).

30. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.020(d) (emphasis added).

31. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.020(c).

32. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.060(f) (wording of the self-determination article of the Rules).

33. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.050(b) (providing that the "mediator shall assist the parties in evaluating the benefits, risks, and costs of mediation and alternative methods of problem solving available to them").

mediation philosophy is to some extent encapsulated in the committee note to Rule 10.060 (Self-Determination), which provides:

While a mediator has no duty to specifically advise a party as to the legal ramifications or consequences of a proposed agreement, there is a duty for the mediator to advise the parties of the importance of understanding such matters and giving them the opportunity to seek such advice if they desire.<sup>34</sup>

In other words, because court-ordered mediation is nonbinding, the mediator must advise the parties regarding the gravity of settling a dispute that would otherwise be subject to litigation and the tacit advisability of obtaining appropriate legal advice.<sup>35</sup> However, the mediator is not required to advise the parties regarding even a one-sided settlement on which they appear to be embarking. Although the committee note expresses a useful sentiment and certainly does not foreclose the mediator from registering evaluative sentiments in the interests of avoiding unfairness, it continues to encourage use of the facilitative model of mediation in Florida.

For example, a mediator is unlikely to ever be censured for standing idly by while the wife in the divorce hypothetical sells her future and that of her children down the river, as long as the mediator has given at least a boilerplate disclaimer at the start of the mediation.<sup>36</sup>

The most express recognition of fairness dangers in mediation is found in section 44.102, *Florida Statutes*, which provides that "[a] court shall not refer any case to mediation if it finds there has been a significant history of domestic abuse that would compromise the mediation process."<sup>37</sup> Presumably, all such instances would be found to undermine mediation, and therefore courts would not refer domestic relations matters to mediation when there has been spousal or child abuse. However, "abuse" per se hardly exhausts the lists of power, attitude, and fairness concerns that attend mediation. For example, in the hypothetical divorce of the investment banker and the homemaker, I posit that there has been no "abuse" as the term is commonly understood.<sup>38</sup> Nonetheless, the wife is clearly more vulnerable

34. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.060 committee note.

35. See *id.*

36. For example: "Settlement of a legal dispute is an important event and becomes no less important because the settlement results from a mediated agreement. Any settlement you make as a result of this mediation will be legally binding and will conclude the matter at issue. You may take time to consult with a lawyer or other professionals prior to agreeing to any settlement that comes up during your mediation efforts."

37. FLA. STAT. § 44.102(2)(b) (Supp. 1996).

38. I realize that many observers would characterize it as abusive for a spouse to essentially slough off all child rearing onto the other spouse and devote available time to earning money and developing a career while the other spouse performs nanny operations at the expense of her own education and career. Without taking a position on this issue, I

and dependent. In a more informal setting, many commentators fear that she will be unlikely to stand up for her rights or even those of her children. If the mediator simply lubricates a settlement discussion, this could result in a substantially unfair settlement because of the absence of substantive legal evaluation by the mediator.

Although the language of the statutes and Rules is susceptible to permitting a wide range of mediation styles, it has been interpreted to require that mediators refrain from saying or doing anything that could be construed as evaluative. Florida's Mediator Qualifications Advisory Panel is occasionally asked to respond to questions posed by certified mediators. Advisory Panel opinions from 1995 reveal a highly restrictive Panel view of mediation—one that appears to forbid even isolated, minor, and useful evaluative action by mediators.<sup>39</sup>

For example, in Advisory Panel opinion 95-002, the hypothetical considered involved a creditor's collection action against a debtor for \$1250, an amount the debtor admits owing, but for which she wishes to arrange a graduated repayment schedule, offering to pay \$110 per month, an amount the creditor is readily willing to accept without pursuing the matter to judgment.<sup>40</sup> However, the note signed by the debtor provides for an effective interest rate of 29.5% per year, while the prevailing post-judgment interest rate is eight percent per year. The creditor has, of course, been through these sorts of disputes before. The debtor is generally naïve about the law. In the hallway prior to the mediation session, the mediator overheard the creditor suggesting to the debtor that she should avoid a judgment "because it would hurt her credit."<sup>41</sup>

The Advisory Panel then considered whether the mediator could ask the debtor (question 95-002A in the Panel's classification system): "Are you aware that the monthly payments do not cover the interest as it is accruing and you will be paying on this loan forever?"<sup>42</sup> and (question 95-002B) "[A]re you aware that if a judgment [was] entered against you, the interest would be reduced from 29.5% to 8%?"<sup>43</sup> The Panel declined to give an opinion as to (question 95-002C) whether making the interest rate comparison would be "interfering

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am using "abuse" to refer to more distinct and focused mistreatment of a spouse or child by the other spouse, such as physical violence or sustained verbal attack or other psychological abuse. This connotation of abuse, which I believe to be that generally held by judges, would not apply to cases such as the investment banker's divorce and to other domestic relations matters in which nonevaluative mediation poses significant issues of fairness and tacit coercion.

39. See Risetete Posey, *Latest MQAP Advisory Opinions*, RESOL. REP., Oct. 1995, at 2 (Mediator Qualifications Advisory Panel Op. 95-002); *id.* at 14 (Mediator Qualifications Advisory Panel Op. 95-005).

40. See *id.* at 2 (Mediator Qualifications Advisory Panel Op. 95-002).

41. *Id.*

42. *Id.* (emphasis omitted).

43. *Id.* at 3 (emphasis omitted).



with a contractual relationship," finding this a legal determination outside the scope of the Panel's authority.<sup>44</sup> In addition, the Panel considered (question 95-002D) whether a mediator's potential "question [can] be asked even if the framing of the question tends to advise or inform one or both of the parties involved?"<sup>45</sup>

The Panel essentially ruled that all such activity by the mediator violated Florida's prohibition against mediators providing legal advice. In particular, the Panel even found the mediator's action in question A to be unethical in that the "you will be paying on this loan forever" statement was a misrepresentation<sup>46</sup> and that simply advising the naïve debtor (question B) of the prevailing interest rate on judgments "violat[ed] the prohibition relating to the provision of legal advice."<sup>47</sup> In response to question D, the Panel stated that "[i]t is improper for a mediator to provide legal advice by any method" during the mediation—even the innocuous act of questioning a party to determine whether the party is taking foolish action with a minimal understanding of the law and the legal ramifications of the action.<sup>48</sup> In particular, the Panel found that a mediator question "designed to advise the party about her legal options, a role that is appropriate for an attorney, [is] inappropriate for a mediator"<sup>49</sup> and that "[i]t is improper for a mediator to provide legal advice by any method within the scope of a mediation, whether such advice be by statement, question or any other form of communication."<sup>50</sup>

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44. *Id.* (emphasis omitted).

45. *Id.* (emphasis omitted).

46. Although the "you'll be paying forever" statement is, of course, not literally true for a relatively small debt (even at 30% annual interest, monthly payments of \$110 will extinguish the debt in about 18 months, at a total approaching twice the outstanding debt principal), a more charitable Panel might have interpreted the mediator's comment as a figure of speech. "You'll be paying forever" can be construed simply to suggest that the interest payments will be out of proportion to the debt if repayment occurs on a limited piecemeal basis under a high interest rate. If the debt had been \$112,500 instead of \$1250, and the settlement provided for \$11,250 per month payments by the debtor, the mediator's statement about proportionality would be even more telling. On balance, however, this type of comment is both too exaggerated and too evaluative to be permitted absent compelling circumstances not reflected in the hypothetical.

47. Posey, *supra* note 39, at 3 (summary of Mediator Qualifications Advisory Panel Op. 95-002).

48. *Id.* at 5.

49. *Id.* at 4.

50. *Id.* at 5. The Panel did provide something of an escape valve for the pressure felt by the mediator in this hypothetical situation:

The mediator may, however, often obtain the desired information if the question is framed more generally. . . . by asking the following: 'Is interest levied on a judgment? Do either of you know?' These two questions set the stage for the parties to provide information to the mediator and to each other without placing the mediator in the position of providing that information. In so doing, the mediator assists in maximizing the exploration of alternatives, and adheres to the principles of fairness, full disclosure, self determination, and the needs and

Although the issues of interpreting the law<sup>51</sup> and the Rules are reasonably close, I believe the Panel opinion was in error and took an excessively restrictive view of mediator discretion under Florida law.<sup>52</sup> The statute prohibits a mediator's giving of "legal advice," an admittedly malleable term, but hardly one that requires the expansive definition placed upon it by the Panel. As a law professor, like most lawyers, I am frequently asked about legal problems by students and friends. Although I have yet to agree to represent any of them (and could not do so in Florida without obtaining pro hac vice admission because I am a member of the Minnesota bar), I feel compelled as a teacher or friend to at least alert them to the apparent legal issues and to inform them of sources of information, potential counsel, and so on. Am I practicing law? Not at all (although some older vintage lawyers might assert it). Am I giving legal advice? Only in the broadest sense. Calling these sorts of informal conversations, performed without retainer, fee, specific research, memorialized work product, accepted assignment, or client control, legal advice is akin to calling it investment advice if I suggest to my retiree father that perhaps he should reconsider his commitment to the Fidelity Magellan mutual fund (although this popular investment vehicle is doing better of late). If one is hyperliteral, I suppose my uninspired idea that Dad look at other investment vehicles is financial advice, although I don't expect a guest appearance on *Wall Street Week with Louis Rukeyser* anytime soon.

In much the same way, the Panel's broad definition of "legal advice" by a mediator is defensible but extreme. It serves the text of the statute but not its purpose. The purpose of the prohibition, of course, is to prevent the mediator from choosing sides, playing favorites, interfering with party-lawyer relations,<sup>53</sup> or impeding voluntary reso-

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interests of the participants [Rule 10.020(d)(1), (2), (5)], while honoring the commitment to all parties to move toward an agreement [Rule 10.070(a)].

*Id.*

51. See FLA. STAT. ch. 44 (1995 & Supp. 1996).

52. The Panel opinion is also regarded as extreme by Professor Moberly, an architect of the Florida mediation system, but someone with more agnosticism about evaluation than me. See Moberly, *supra* note 2 (evaluation permissible as last resort if even-handed); see also Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 712-15 (1994) (stating that mediators may evaluate but must remain impartial).

53. Despite their professed commitment to the moral high ground of noninterference, facilitative mediators are vulnerable on this score. For example, many mediators have taken to referring to the disputing parties as the mediator's "clients" or "principals" rather than merely the disputants who have retained the mediator. Although this characterization is touching in its connotative closeness, it misperceives the relationship. A disputant does not use a mediator as an "agent" in the way in which clients or other principals use lawyers or representatives as agents. In addition, of course, the party has no particular claim to the mediator's zealous advocacy (far from it). The mediator has a duty to serve the parties and the situation in the aggregate rather than to represent either party as such.

lution through needless, legalistic Monday-morning quarterbacking. As long as the mediator is not frustrating the purpose of the statute through these or similar tactics, the Panel (and the Florida dispute resolution establishment) should accord the statutory limit on "legal advice" the sort of constrained, common-sense view that we as lawyers would employ when determining whether our communications rise to the level of providing representation or services. Alerting disputants to potential pitfalls and fairness concerns, even if done through very specific questions or comments (rather than the general questions endorsed by the Panel) should not be roundly forbidden as impermissible legal advice.

Notwithstanding my disagreement, however, the Panel's legal determination is at least debatable. Yet even if the Panel's opinion correctly interpreted Florida mediation law and procedure, it is a disaster as a matter of public policy. In so broadly construing the notion of legal advice and constraining the mediator, the Panel appears to have elevated the formalist "facilitative" model of mediation above the practical needs of disputants and the fairness concerns that must animate decisionmaking in any government-sponsored proceeding.

Consider, for example, the practical effect of the Panel's ruling in the creditor-debtor case from which the opinion sprang. If the mediator follows Panel protocol and does not raise the interest rate comparison issue, the debtor blindly agrees to a settlement that is more onerous than standing by and permitting a default judgment. In addition, a debtor with limited funds also poses a collection problem for the creditor, especially when the debt is small. A more sophisticated debtor or one represented by counsel might use this leverage to extract a better settlement from the creditor (e.g., "We can cash this out now for \$800 [hidden in a client's mattress rather than a garnishable bank account] or you can spend a few hundred in counsel fees and other collection costs trying to get all \$1250 out of my client—and you may not succeed"). Although the settlement is no panacea for the creditor (the debtor may still default on the \$110-per-month payments), the debtor clearly has made a worse deal than that available to her in the absence of mediation. By failing to raise the interest rate comparison, the mediator has allowed the debtor to obtain demonstrably less in mediation than was available through litigation or other forms of ADR. By raising the interest rate comparison, the mediator would have provided the debtor with the tools to better gauge the alternatives. The debtor may well have opted for the resulting settlement in any event to avoid further uncertainty and inconvenience, but at least she would have been able to make a more informed decision. The mediator's comment would have leveled the playing field, but would not have thwarted genuine voluntary

resolution by the parties. Although the mediator may have been able to achieve this benefit with the less evaluative form of question, "Ms. Debtor, have you consulted a lawyer?", the answer is likely to be, "No, I can't afford one, certainly not one whose fees will be almost as much as the debt." At this point, common sense compels one to wonder why the facilitative charade is necessary. Why not allow the mediator, who is on the scene only because the state requires it (for a debt this small, neither side would be likely to voluntarily seek out and pay a mediator), to cut to the metaphorical chase and alert the debtor to the interest-rate pitfall?

The Panel's absolute prohibition on anything smacking of legal advice is more problematic. Imagine a variant of the hypothetical. The creditor and debtor make the same agreement of settlement, but the creditor insists on securing the repayment plan debt with a security interest in the debtor's home, an asset that would be exempt from execution to satisfy an ordinary judgment under Florida law.<sup>54</sup> However, armed with a security interest, the creditor, like a bank providing a mortgage, can force the sale of the debtor's home and effectively evict the debtor for missing a single \$110 payment. To say the least, it is questionable whether a sophisticated debtor or one with counsel would accept such a condition of settlement. If the mediator says nothing or gives only a general but futile suggestion of counsel,<sup>55</sup> the mediator permits the debtor to strike a deal far worse than what probably would have resulted if court-ordered mediation had not forced the parties to "bargain." If the mediator instead notes the normal homestead exemption and the impact of granting a security interest, the debtor is at least given a chance to make an informed and empowered decision. Aversion to "legal advice" and allegiance to a Pollyannic view of the facilitative model should not prevent such reasonable intervention by the mediator.

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54. See FLA. CONST. art. X, § 4. Indeed, Florida law is famous or perhaps infamous in that the state's homestead exemption has no limit. A millionaire deadbeat with a \$100 million estate and a billion dollars in debts can live in the estate secure in the knowledge that the creditors may never take any portion of the property. Most notoriously, former baseball commissioner Bowie Kuhn and former Kidder, Peabody investment banker Martin Siegel, accused of illegal insider trading, are generally perceived as having relocated to Florida when their debt and other legal problems arose to obtain the benefit of the unlimited homestead exemption. See generally JAMES B. STEWART, *DEN OF THIEVES: THE UNTOLD STORY OF THE MEN WHO PLUNDERED WALL STREET AND THE CHASE THAT BROUGHT THEM DOWN* (1991) (describing Siegel's move from Connecticut to Florida during the fallout from the Dennis Levine-Ivan Boesky-Michael Milken insider trading scandals).

55. Even suggesting legal aid counsel may be futile for less sophisticated debtors who are hesitant to approach lawyers or who, although poor, may fail to meet legal aid guidelines for obtaining free legal assistance. See Russell G. Pearce et al., Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122, 140-45 (1980) (finding, based on a statistical analysis of the ABA-ABF Survey of Legal Needs of the Public, that the use of lawyers is reduced when individuals have no pre-existing social or business contact with them).

Subsequent Panel decisions suggest the Panel continues to cling to a broad notion of impermissible legal advice and a crabbed notion of mediator discretion. For example, in opinion 95-005, the Panel was asked in question 95-005A: "What is the duty of a mediator who is informed during a caucus of a family (dissolution of marriage) mediation that one spouse possesses an asset of which the other spouse has no knowledge?"<sup>56</sup> The Panel stated that "the mediator should withdraw from the mediation unless the party discloses the asset," but suggested that the mediator has no authority to hint to the other party that further investigation might be in order.<sup>57</sup> Although withdrawal of the mediator is obviously superior to presiding over settlement tainted by fraud, the Panel opinion turns a blind eye to the likely second round of the dispute. There, a second mediator will preside over negotiation and probable settlement. This time, the spouse hiding an asset will be cagey enough not to alert the mediator and the case will likely settle favorably for the deceptive spouse. At this point, one wonders why mediation communications must be so privileged. If a judge found out about incipient fraud, would the only remedy be withdrawal rather than disclosing the hidden asset on grounds similar to the crime-fraud exception to the confidentiality of attorney-client communications? Although this issue is complex and beyond the scope of this Article, the Panel's answer to question A remains unsatisfying in large part because it envisions a nonactivist role for the mediator.

The Panel's answer to question 95-005C is more unsatisfying still. There, the question was: "Is a mediator who becomes aware that a plaintiff in a wrongful death action is making no claim for loss of consortium, which claim would appear to the mediator to be appropriate under the circumstances, bound to inform that party of this matter?"<sup>58</sup> The Panel's response: "[I]t is an ethical violation for a mediator to give legal advice to a party."<sup>59</sup> Continuing, the Panel stated:

[I]t is inappropriate for a mediator to give legal advice even if a party to the mediation is not represented by counsel. If the party is represented by counsel, which appears to be the case in your scenario, it would be clearly inappropriate to provide such legal advice. See rules 10.070(a)(1); 10.090(a) & (b).<sup>60</sup>

Again, the Panel embraces a narrow view of mediation and an excessively broad notion of legal advice. Particularly when a party has

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56. Posey, *supra* note 39, at 14 (Mediator Qualifications Advisory Panel Op. 95-005) (emphasis omitted).

57. *Id.* at 15.

58. *Id.* at 14 (emphasis omitted).

59. *Id.* at 15.

60. *Id.* at 16.

counsel, it hardly seems obstructionist if the mediator simply asks: "Counsel, did you decide not to make a consortium claim or is it considered covered by the settlement?" If the plaintiff is pro se (almost a *per se* problem with something as serious as a wrongful death action), the mediator will need to first provide some legal background, but the same question would seem equally apt to ensure that the parties settle with relatively complete knowledge of their options and the consequences of the settlement. Of course, this alerts the lawyer or party. This dollop of "legal advice," however, is but a small impurity in the facilitative model. In return, the legal system by this modest mediator intervention acts to minimize unfairness or mistake.

In some instances, "evaluative" mediators undoubtedly need to be reigned in to prevent mediation from being converted to arbitration and to prevent the evaluative mediator who jumps to conclusions from bullying one or both parties into an unsatisfactory resolution of a controversy. Nevertheless, it hardly follows that all evaluative mediation is bad and all nonevaluative mediation is good. Students and most lawyers intuitively appreciate this point. Sometimes, a little bit of evaluation or some steering of one or both parties toward a reasonable position is required, both to prevent injustice and to facilitate settlement.

Speaking of facilitation and evaluation as polar opposites or completely separate, parallel tracks of dispute resolution oversimplifies both the world and the analytic model. There really are no purely "facilitative" actions and purely "evaluative" actions by mediators. Rather, the effective mediator engages in a range of behaviors that span the facilitative-evaluative continuum. Some actions (e.g., remarking that the husband's settlement offer falls below the minimum legal standard) are clearly more evaluative. Other actions (e.g., asking the wife to detail her future goals for the children and estimating the financial resources required) are more facilitative but have a clear evaluative agenda. Still others (e.g., suggesting a visit to a marriage counselor) fit quite snugly within the realm of facilitation.

One's natural impulse is to speak of the range of mediator activities as falling along various points of a continuum marked at the poles by purely evaluative actions ("Mr. Husband, your offer is ludicrously low. You must want to litigate this matter rather than settle it.") and nearly purely facilitative techniques ("Mr. Husband and Ms. Wife, what is it that's troubling you about your marriage?").<sup>61</sup> However, the

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61. Of course, efforts to encourage the parties to discuss their feelings do not inevitably provide positive catharsis. For example, if a marriage is fraught with conflict and anger, airing those feelings may only make the parties more confrontational, impeding fur-

continuum metaphor, although common and thus comfortable, is not really accurate. Describing mediator conduct as a continuum yields too greatly to the false dichotomy. Many mediation actions are not compromises between the evaluative and facilitative poles of the dichotomy, but are instead actions not fully susceptible of categorization within either school of thought. The same or similar actions may be either essentially facilitative or primarily evaluative, depending on the context of the dispute.

#### IV. THE BENEFITS OF ECLECTIC FLEXIBILITY

##### A. *A Page of History . . . Or Reinventing the Flat Tire*

Modern society is, of course, more than a bit dissatisfied with litigation. Understandably, this antipathy toward litigation fuels much of the modern ADR movement. However, the admitted shortcomings of traditional litigation are just that—shortcomings. They are not indicative of an adjudicatory system rotten to the core. Consequently, a society interested in effective dispute resolution would presumably pay some attention to effective case resolution behaviors exhibited by judges. Among the most effective means of resolving disputes is the establishment of an early and firm trial date (which forces the parties to sharpen their respective pencils and talk settlement). Although the resolute trial date is not something most mediators would characterize as facilitative activity, it in a sense functions as the ultimate facilitative strategy, one that forces the parties to cooperate if they wish to avoid the rigors and risks of final adjudication.

Another effective judicial technique of case resolution is cajoling of settlement through informal conferencing with the parties, often after establishing some guides regarding likely case outcomes through pretrial rulings on particular claims, availability of information, or admissibility of evidence. In performing this role of a “settlement judge,” effective jurists alternately operate as both evaluators and facilitators in nudging litigants toward settlement. This strategy and the alternating evaluative-hybrid-facilitative tactics of the judge appear to bring about fair, effective, and lasting settlements. If there were enough such judges on the bench, the modern ADR movement might never have blossomed.

In reality, however, not all judges are good settlement judges (some are too arbitrary, some are too wishy-washy, some are too inefficient, and some are too unwilling to put in the time), and there are

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ther mediation and settlement. Sending husband and wife to a marriage counselor is undoubtedly a facilitative strategy, but it may not lead to cooperation if during the course of venting their frustrations, husband and wife lose whatever remaining reservoir of goodwill they possessed when first entering mediation.

not nearly enough judges to quickly address the thousands of disputes in the judicial pipelines of state and federal courts.<sup>62</sup> Consequently, some delegation to ADR mechanisms seems inevitable. Just the same, adherents of either a facilitative or an evaluative approach would do well to realize that the flexible and eclectic behavior of many of the most successful American judges fits neither model, although, in my view, the best judges lean toward the evaluative side of the scale. Rather than merely drawing out the parties' positions, effective judges usually provide some guidance to the parties regarding the range of trial outcomes (e.g., "We've never had a punitive damages verdict of six figures that's held up on appeal") or otherwise put evaluative pressure on the parties (e.g., denying the defendant's motion to strike the plaintiff's punitive damages claim).

At the risk of posing a question that many regard as *passé*, I must ask: Why, in designing and operating ADR programs intended to relieve the pressure on the court, would our disputing system insist that these ADR methods ignore the judicial dispute resolution tactics that have proven successful in the past? Of course, some of the answer is that part of the mission of the ADR movement is to provide choices to the parties that are unavailable in litigation. Surely, however, an equally important basis of the ADR movement is encouraging the least expensive and timeliest settlement possible that also meets minimum criteria of fairness. This ADR rationale would presumably be well-served by mimicking to some degree the judicial settlement techniques that work, techniques that seem to me to combine both the facilitative and the evaluative approach.

My suggestion that mediation learn from judicial settlement brokering rather than spurn it does not really address another justification of ADR: providing greater disputing variety than is available through adjudication. This ADR goal is obviously important—but it can be realized by voluntary actions by the parties, particularly more sophisticated parties. For example, if two patent disputants want to have the matter addressed by a panel of Nobel laureates rendering detailed technical findings of fact, they can so stipulate and exit the judicial system or government-annexed ADR systems such as Florida's court-ordered mediation. Similarly, if they wanted to ensure maximum mutual profitability without deciding the question of inventorship, they could opt for a task force of economists and marketing experts, who would craft a revenue sharing plan for the com-

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62. See COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 8-13 (1995) (finding that from 1904 to 1990, the federal appellate caseload alone increased 3868% while the number of appellate judges increased from 27 to 167 (in 1994) and that the civil case load alone has increased by more than 1400% since 1960, making it practically impossible for the judicial system to resolve cases swiftly and on a steady basis).



peting devices (including, no doubt, some lawyers on the task force to consider the antitrust implications).

Disputants should, of course, possess varied ADR options. However, when ADR is court-ordered, such as it is in Florida's mediation system or the court-annexed arbitration found in many federal and state courts,<sup>63</sup> the need is not so much for variety as it is for dependability, effectiveness, and fairness. When, pursuant to judicial order, a party is forced to mediate,<sup>64</sup> the form of mediation employed should retain the useful characteristics of the adjudication for which it substitutes. If "forced" to adjudicate rather than mediate, the parties may of course have differing resources, sophistication, and temperament. The stronger, smarter, or meaner party may extract a premium settlement from its opponent. When this occurs, however, it is the result of private bargaining that, no matter how unfair the outcome, the judicial system normally leaves undisturbed.<sup>65</sup> Thus, disputants who never enter the government-operated adjudication system or who exit that system prior to final judgment may normally make any settlement they choose, however foolish the settlement for one or more of the disputants.<sup>66</sup> The courts/government take no position on most settlements and refrain from interfering with most settlements because they have played no role or only a marginal role in bringing them about.<sup>67</sup>

However, the government's concern is quite different when the dispute is resolved in significant part because of the intervention of a government-sponsored ADR program. In these cases, the government bears some responsibility for effecting the settlement, and it also has legitimized the settlement to a large degree. Consequently, government-mandated ADR efforts such as court-ordered mediation

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63. In Florida, for example, the court may order nonbinding arbitration. See FLA. STAT. § 44.103 (1995). However, Florida courts have ordered arbitration only infrequently in the more than eight years of the statutory authority. For example, from 1991 through 1995, fewer than 500 cases were arbitrated, while more than 300,000 matters were mediated in county, family, and circuit court mediation programs. See Telephone Interview with Sharon Press, Director, Fla. Disp. Resol. Ctr. (Jan. 28, 1997).

64. The court can also order arbitration, even though it, like mediation, is nonbinding.

65. This is not always so. Settlement agreements are contracts, and the judicial system has long policed contracts using the yardstick of unconscionability. Unconscionability is generally defined as an agreement that is unreasonably favorable to one of the parties. See E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28, at 327-29 (2d ed. 1991).

66. Again, this freedom to make bad deals is not absolute. Class action settlements must ordinarily be approved by the court, as must settlements involving minors or anti-trust claims by the government.

67. At a minimum, however, the legal system has provided default rules that will govern resolution of the dispute if it is litigated. This creates a "shadow of the law" under which the parties must bargain. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-70 (1979) (noting that when reaching divorce settlements, disputants negotiate and settle cases with an eye to the range of likely outcomes at trial if settlement is not achieved).

must avoid not only the nonadjudicatory coercion of too much evaluative mediating, but also the danger of state-sponsored extraction of unfair settlements by the party with more leverage, in part due to the fastidiously facilitative efforts of the court-appointed mediator. Because the mediator is to some extent "forced" on the parties by the court, the disputants will often have a tendency to believe that whatever occurs under the auspices of the mediation is within the range of outcomes that would result from litigation. If the mediator permits the parties to reach settlements that fall outside this admittedly broad range of "adjudication default probabilities," at least one of the parties may pay a heavy price for the mediator's assiduously facilitative approach.

In my view, the price is too high. The world is awash in unfairness about which the legal system can do little or that legal intervention will only make worse, often while incurring substantial additional costs. Nevertheless, when the legal system requires mediation or other ADR, the courts have a duty to ensure that court-sponsored ADR does not impose more unfairness than would exist in the absence of judicially imposed ADR. If the courts force parties to mediate and force the mediator to blithely facilitate unfair case resolutions, the system becomes an active wrongdoer. To minimize the chance of these occurrences, court-ordered mediation must clearly enable mediators to adopt styles that not only encourage resolution, but also prevent unfairness. In addition, courts should take steps to reduce the chances of unfair mediated outcomes by ensuring that the mediators to whom cases are referred are not so inflexibly committed to either pure facilitation or pure evaluation.

### *B. Ignoring the Market—and Reality—at Peril*

By now, my disagreement with Florida's conventional wisdom about acceptable mediation behavior is obvious. Florida law appears to require that mediators be the legal equivalent of Woody Allen's "Zelig"<sup>68</sup> or political consultant Dick Morris: an entity that suppresses its own opinions and merely reflects the opinions of others. If Florida law accurately captures the preference of Florida citizens, one would expect litigants opting for or ordered into mediation to seek out purely facilitative mediators who refrain from any evaluative feedback to the parties.

In practice, however, it appears that the most highly sought mediators are those who provide exactly this sort of evaluative feedback to the parties and use some measure of evaluation as part of their facilitation of reasonable party dialogue leading to settlement. Each

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68. See ZELIG (United Artists 1985).

day in the field, many mediators do engage in what might be termed evaluative behavior,<sup>69</sup> and evaluative-style mediators, particularly former judges, appear strongly in demand as mediators.<sup>70</sup> To an extent, then, the modern market for ADR exhibits a strong preference for at least some of the evaluative tactics displayed by judges over the years.

Defenders of the facilitative approach would undoubtedly be quick to state that this activity, whatever its overall worth, is not true mediation.<sup>71</sup> Although this criticism is perhaps theoretically true, it is so in large part because the facilitation forces have defined mediation somewhat tautologically as including only facilitation and no evaluation. A mere drop of evaluation in their view converts mediation to med-arb (mediation combined with arbitration) or some similar mixed process. Rather than viewing the situation from the theoretical perspective of *ex ante* definition, it might be more accurate to define mediation *ex post*. If, in actual use of what is generally considered mediation, participants frequently prefer mediators who bring evaluative techniques to the process, the legal system may be bucking reality to insist that "real" mediation lacks any evaluative component.

Obviously, there is no objectively verifiable data from which one can accurately gauge the proportion of evaluative and facilitative activity currently occurring under the rubric of mediation. However, the anecdotal evidence provided by participants in the system is strongly suggestive. Mediators like Conference panelist Lawrence Watson, Esq., and others appear to be in demand (at least for parties with cases and resources large enough to afford the fees) not only for their interpersonal facilitative skills, but also for their ability to evaluate party positions and to encourage disputants to argue over the range of the reasonable. These sorts of mediators, at least by reputation, do not assiduously refrain from editorial comment, but use it selectively and fairly.

Even advocates of the facilitative approach readily acknowledge that it is not the exclusive approach to mediation as today practiced. For example, Professor Robert A. Baruch Bush, who champions a model of transformative and empowering mediation clearly within the

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69. See Alfini, *supra* note 4, at 66-72 (identifying the popular tactic of "trashing" that is highly evaluative, another "bashing" tactic that strongly incorporates evaluation, and the third identified tactic of "hashing" that most closely resembles the facilitative model of mediation).

70. See John Lande, *How Will Lawyering and Mediation Practices Transform One Another?*, 24 FLA. ST. U. L. REV. 839, 844-53 (1997); see also Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 26, 1996, at A1.

71. See, e.g., *Panel Discussion*, *supra* note 3, at 929 (comments of Professor Lela Love) ("It would be a different case if the parties chose the mediator for her evaluation abilities and specifically requested the mediator's evaluation. In that situation, the process is 'mixed'—not pure mediation . . .").

facilitative school, also identifies several other mediation styles that are substantially or primarily evaluative: "settlers," "fixers" or problem-solvers, "protectors," and "reconcilers."<sup>72</sup> Although one can quibble about whether all of these approaches are really mediation, it may be more productive to accept all as legitimate forms of mediation that vary in appropriateness according to the context of the particular case.

Although pure facilitators can make rhetorical claims that states such as Florida have embraced facilitative mediation and no other by force of statute and rule, this again seems overly formal and conclusory. Mediation in Florida and elsewhere should not be frozen in a "facilitation only" model simply by historical accident, i.e., because the facilitative model was uppermost in the minds of the profession when it adopted mediation as its major component of court-sponsored ADR. With an additional decade of experience, we can see that the disputing public appears to affirmatively desire some evaluative components in mediation. Rather than fight the market with an excessively formal commitment to the facilitative model, the legal profession and the judiciary should regulate mediator behavior with flexibility and restraint.

If this anecdotal evidence is correct, the market comprised of disputants is sending a powerful message in favor of hybrid mediation that permits some use of evaluative technique. Normally, American governments require a compelling reason for interfering in or reversing market decisions. Particularly in today's political climate, government intervention of this type must ordinarily be justified by a compelling case of market failure (e.g., badly distributed investment in education or national defense or discriminatory employment practices) or destructive choices by market participants (e.g., smoking). On this broad premise, both liberals and conservatives agree, even if they often divide in their assessment of specific situations. Courts, like any other arm of government, should operate under the same general standard. Consequently, if it appears that disputants do not want a purely nonevaluative mediator, there is no reason for the State of Florida to require that disputants have this type of mediator when the state orders them to mediate. In this sense, current Florida mediation law appears to ignore the actual market for dispute resolution services.

### *C. Distributional Concerns and the False Dichotomy*

Related to the problem of differential resources is the obvious fact that both adjudication and settlement normally result in a transfer of wealth. Usually, both trial and settlement require at least one

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72. Bush, *Ethical Dilemmas*, *supra* note 8, at 17-18; *see also* BUSH & FOLGER, *supra* note 7, at 11-12.

disputant to give up something to another disputant. Although creative mediation or negotiation can result in "win-win" outcomes of disputes, even these outcomes usually require one party to give up something in return for something surrendered by the opponent. When the system works well, litigation, ADR, and private settlement outcomes should largely result in at least corrective justice and perhaps even wealth creation. Adjudication is unlikely to result in distributive justice because courts exist primarily to enforce existing legal rights, most of which are based on the status quo rather than any entitlement to distributive just deserts.<sup>73</sup>

Thus, properly performed adjudication gives the parties what they would or should have had in the absence of the dispute. Whatever inequalities preceded the litigation remain after the litigation—but the litigation, at least usually, does not enhance inequality. However, favorable settlements extracted by parties with superior leverage may accentuate distributional inequity. Such settlements reached through court-ordered mediation that would otherwise have proceeded through adjudication arguably result in a government-sponsored program (mediation) that operates in some cases to enhance inequitable distribution of wealth rather than to maintain the existing assignment of wealth in society. Put another way, court-ordered mediation that allows one party to reach advantageous settlements it could otherwise not obtain serves to put the state in the position of enhancing distributional inequities rather than holding them steady or reducing them, the latter being the normally accepted roles of the modern industrialized nation-state.

Thus, current mediation orthodoxy lionizing the facilitative style and criticizing even minor mediator evaluation appears to ignore other aspects of reality as well. The cold, hard reality is that some disputants are better situated to extract favorable settlements from their opponents. Ironically, this probably occurs most often in the sorts of "smaller" cases more likely to be ordered into mediation. In larger cases, the parties are more likely to have equal financial strength and legal sophistication. Even when one or more of the parties lacks requisite sophistication, the sheer magnitude or importance of the dispute usually ensures that lawyers will be involved in the matter, thus tending to level the playing field of legal sophistication.<sup>74</sup>

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73. There are exceptions, of course, in any modern welfare state. Medicare, Medicaid, Social Security, public education, and the income tax can all be viewed as attempts at distributive justice, and to the extent that these programs create concrete legal rights, courts enforcing these rights can be seen as effecting distributive as well as corrective justice.

74. See McEwen, *supra* note 17, at 1322-23, 1346-48, 1358-62 (suggesting that lawyer involvement makes mediation outcomes fairer, more rational, and more in general conformity with prevailing law and policy).

There is a glitch in this reasoning, of course: not all lawyers are equally effective, and richer, more sophisticated disputants generally retain more effective lawyers. However, despite the reality of differing legal talent, time, and logistical support, the presence of counsel normally has a leavening effect. The disparity, for example, between the average matrimonial lawyer and the best of the bar is probably not as great as the disparity between the most sophisticated spouse and the least sophisticated spouse. At least all the lawyers have been to law school. Nonetheless, lawyers are at best only partial levelers, and many of the disputants are mismatched.

When mismatched parties, whether represented or pro se, are thrown together, any resulting settlement is more likely to favor the party with superior resources. Court-ordered mediation should operate to minimize this tendency, not enshrine it. In the absence of court-ordered mediation, of course, mismatched parties will probably continue to arrive at unbalanced settlements as long as the rivers flow. By definition, however, the disputants subject to possible court-ordered mediation have commenced litigation and, if not ordered to mediate, would have the claim presented to a neutral government official and perhaps a jury of citizens as well. Although these disputants, like most litigants, will probably settle rather than litigate to final judgment, they bargain in the shadow of the substantive law as regulated by the procedural rules of the jurisdictions.<sup>75</sup> When these same disputants are channeled into mediation, the objective of the court's enterprise is to obtain a brokered settlement. When government assumes an activist role encouraging settlement, it has a corresponding obligation to ensure that mediated resolutions are at least no worse than nonmediated settlements or litigation outcomes.

My discussion, of course, proceeds with a tacit suggestion that in court-ordered mediation, the "haves" tend to do better than the "have-nots," but the conventional wisdom is that this occurs in litigation as well.<sup>76</sup> Whether that aspect of litigation should be changed and how to change it lie well beyond the scope of this Article. My point is simply that state-sponsored ADR should not operate to enhance inequality and that this prospect is a genuine concern when mediator-brokered settlements contain no evaluative component. The distributional impact can also run in the other direction. A mediated settlement may result in case resolution that would otherwise not have occurred and may result in the richer party making to the poorer party a wealth transfer that the latter does not "deserve" ac-

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75. See Mnookin & Kornhauser, *supra* note 67, at 968.

76. See Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103-04 (1974) (suggesting that experienced litigants as well as those with greater resources will generally have advantage over episodic or poorer opponents).

ording to the applicable law.<sup>77</sup> This is the sort of "legal blackmail" about which businesses complain, particularly in the context of alleged "strike" suits over securities violations. It can be a serious problem, of course, but in the context of court-ordered mediation, it concerns me less. The wealthier party probably has only a slight additional incentive to "buy off" the poorer disputant in court-ordered mediation than has been provided by the pending lawsuit. To some degree, it is also true that the poorer party has only marginally more pressure to settle due to mediation than exists anytime one is embroiled in litigation.

#### *D. Additional Factors Favoring a Place for Flexible and Evaluative Approaches*

##### *1. Game Theory and the Effective Mediator*

Litigation and settlement can be profitably analyzed from the perspective of game theory. Game theory involves analysis of behavior based on the assumption that persons and entities will act strategically, seeking to "maximize their wealth given what they expect the other party to do."<sup>78</sup>

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77. For example, under current rules requiring securities fraud to be pleaded with heightened particularity, a disgruntled investor's claim may not be sufficiently detailed to survive a motion to dismiss in litigation, but New York Stock Exchange arbitrators may hear the matter and award damages, something that quite likely would not have occurred had strict legal formality been observed. See Marc I. Steinberg, *Securities Arbitration: Better for Investors than the Courts?*, 62 BROOK. L. REV. (forthcoming 1997) (noting many securities plaintiffs will do better in arbitration than in litigation).

78. MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 85 (1996). Although considered a branch of microeconomics, game theory involves a significant analytic wrinkle:

Traditionally, price theory posits rational economic actors who pursue the maximization of wealth straightforwardly in situations for which the opportunities available to one individual are considered independent of the choices of other individuals. In reality, however, the economic opportunities available to one actor may depend directly on the choices made by another.

*Id.* at 85. For further discussion of game theory, see *id.* at 85-89. See also DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994); ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989) (game theory suggests that parties will seize opportunities for strategic behavior, at least when the "game" is not a cooperative one, but they can be at least partially restrained by enforcement of particular rules or exposure of strategies); DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 130 (1994) (noting literature that observed a game player to have "obtained a disproportionately large payoff by misrepresenting her utility function in order to upset consensus on a fair outcome"); *id.* at 142-44 (noting that current political science scholarship sees most games as noncooperative rather than cooperative); Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1295-96 (1990) (noting that even with well-defined "rules" of the "game," such as litigation or settlement, parties will try to take advantage of one another).

The classic illustration of game theory is the "prisoner's dilemma" hypothetical, which posits that two suspects have been separated by the police and offered incentives to turn against one another and provide incriminating testimony. The first suspect to agree to co-

A full discussion of game theory is obviously impossible in this limited Article. However, applied to civil disputes, game theory suggests that disputants will behave strategically and seek to obtain an advantage in the settlement or adjudication of a case based on the opponent's expected conduct. When operating in this strategic fashion, a game participant will attempt to achieve the best result available. Thus, to return to the hypothetical divorce between the investment banker and the homemaker, the husband who knows or suspects that the wife is desperate to end the tension of the failed marriage will use this to his advantage by proffering the low-ball settlement discussed in the hypothetical.

One might even put a variant of the prisoner's dilemma into this scene.<sup>79</sup> Assume the husband has moved out and has been retaining his paycheck, creating a cashflow problem for the wife, who must continue to raise two children and manage a house. The husband's offer, an immediate cash settlement, provides perhaps an irresistible carrot to the wife, who must otherwise wait for a substantial amount of time in the hope of obtaining more money. If the marginal value of a dollar is high, the wife may not be able to resist settling cheaply but quickly, even if she knows the settlement is cheap. If the wife is less sophisticated and does not realize the offer is low, her incentives to cash out quickly but unwisely are heightened. In addition, the strategically behaving husband (or his lawyer) will be likely to paint the most excessively grim picture possible of the wife's ultimate chances for success should the matter be fully litigated. If both parties are without lawyers or the wife lacks a lawyer (or has a less-qualified lawyer), she is unlikely to realize that the husband has misled her regarding likely judicial outcomes. Consequently, when the husband and wife talk settlement, a purely nonevaluative type of mediator facilitation is likely to result in a technically "voluntary" settlement in which the wife and children receive an inadequate award.

Although this may be the outcome in the absence of court-ordered mediation, I find it more than a little troubling that mandatory mediation, even if nonbinding, holds the potential to contribute to such

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operate is offered a plea bargain that involves no incarceration, while the government will seek the maximum ten-year sentence against the noncooperating defendant. If both remain silent, the expected chance of conviction is only 10%, making the "estimated" sentence for each one year in jail if they remain firm in their noncooperation. If both cooperate, they will be convicted and the prosecutor will seek seven-year sentences. Under these circumstances, each defendant has a powerful incentive to race to cooperate to save himself at the expense of the co-defendant. In reality, of course, the probabilities and penalties are seldom so clear cut, but the theory works in practice (i.e., despite the adage about honor among thieves, many criminals turn state's evidence to obtain a lighter sentence) and has substantial value in explaining strategic behavior.

79. For a description of the prisoner's dilemma, see *supra* note 78.



outcomes by forcing the parties to work toward a resolution that is presided over by a mediator operating under the broad auspices of the judicial system. In addition, such a result becomes doubly tragic because effective mediation that makes judicious use of evaluative techniques has great potential to avoid the unfairness. For example, the mediator could advise the wife of the mediator's understanding of the general parameters of applicable law and the range of likely outcomes should the case be adjudicated, as well as the approximate time required for full litigation of the matter. In addition, and more evaluatively, the mediator could state that the husband's initial offer is markedly below the generally held range of permissible settlements for cases of this type. Either of these mediator actions would go a long way toward avoiding the unfairness that will likely result if the mediator merely "facilitates" the husband and wife in the direction of settlement. Unfortunately, either one of these reasonable mediator reactions appears to be forbidden by current Florida law.<sup>80</sup>

Further, game theory suggests that a party's strategic response will vary significantly according to intervening moves by the other party. The dispute game is generally a dynamic one in which the parties' attitudes, positions, and overtures will change over time or in response to the other party's conduct or intervening events (for example, the investment banker husband may be suddenly downsized, either spouse may find another romantic and economically secure interest, one spouse may discover another's infidelity or child abuse). These developments may either accelerate or inhibit party motivation to settle. They may also affect each side's professed terms of the settlement (an obvious example is the child abuse development, which obviously affects the child custody and visitation issues). A mediator providing evaluative feedback to the parties in light of the changed circumstances may be able to prevent unfair settlements in light of the changed scenario. Facilitation alone may provide the requisite flexibility, but if it does not, the mediator should be permitted to perform some evaluative activity.

## 2. *Chaos Theory and the Effective Mediator*

Related to the issue of dynamic game theory is the general law of inevitable change. Things seldom stay static, and the direction and magnitude of change is often annoyingly difficult to predict. An emerging branch of study, generally labeled chaos theory or complexity theory, posits that unpredictability is essentially inherent because of

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80. See discussion *supra* Part III (describing Florida law, as interpreted by Florida Mediator Qualifications Advisory Panel, as precluding any hint of mediator evaluation).

changes not resulting in chain-like ripple effects and manifestation.<sup>81</sup> The weather in Nebraska will not invariably move unchanged into Iowa. As one commentator put it, the flapping of a butterfly's wings may serve to prompt changes in air currents that ultimately result in a completely unanticipated subsequent weather outcome.<sup>82</sup> Law, like any other system, is nonlinear and moves in unpredictable ways at times.<sup>83</sup>

In litigation and ADR, chaos theory is almost a given. The shape of the dispute, the likely default outcome, and the attitudes of the parties will surely change throughout the course of the matter. Appropriately responding to these changes requires mediator flexibility, which of course will often take the form of generally facilitative techniques. Nevertheless, the mediator's arsenal of appropriate flexible responses should also contain an array of primarily evaluative techniques.

To illustrate: assume a changed version of the husband-wife hypothetical. Initially, the husband is not inclined to make a low-ball settlement offer. Rather, racked by guilt and being a basically honest person, he affirmatively wants to give his estranged wife and children more than their legal entitlement without the delay and expense of litigation. The initial mediation session appears to be moving in the direction of a voluntary settlement within the range of outcomes generally regarded as acceptable by the legal system. Then, the husband acquires a new love interest, a widow with three children (and a dead husband who had no life insurance). Rather suddenly, the husband's interest in a generous divorce settlement plummets. At the next mediation session, the husband has backtracked and now makes a low-ball offer. Still later in the process, he is visited by his mother, who inflicts significant guilt on him for his willingness to shortchange her grandchildren in favor of his prospective new family. Under these circumstances, the mediator obviously should not use the same techniques that would have been in order had the attitude of the husband not changed. Some different tactic will be necessary. Perhaps the case is no longer apt for mediation and should be referred back to court. Although essentially facilitative techniques may move the parties toward the acceptable range of resolutions, the mediator may need to perform the sort of evaluative appraisal that is appropriate had the husband begun with an adversarial, advantage-taking, low-ball initial stance.

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81. See BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISDICTIONAL PRIMER 44-45 (1994).

82. See *id.* at 45.

83. See J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1409-10 (1996).

Florida mediation law should not unduly tie the mediator to the purely facilitative mast. Just as important, the effective mediator should not tie him or herself to either a predominantly facilitative or a predominantly evaluative methodology that may become clearly inappropriate in light of changed circumstances. The point is perhaps even more effectively illustrated by imagining that the divorce hypothetical moves in a different direction. Assume the initially adversarial husband comes to realize that stealing a financial march on his wife is not only unfair to her, but also only serves to hurt his children. When a disputant has moved to a more cooperative stance (with or without a guilt trip from grandma), it would make little sense for the mediator to engage in heavy-handed evaluation (e.g., "Your offer is still five percent below the average for people in your income bracket, Mr. Husband, when are you going to quit nickel-and-diming your family?") when a more facilitative approach seems well-suited to the task (e.g., "Have both of you thought about the possibility of inflation and likely increases in college tuition? What about the chance that one of the children will want to attend graduate school?"). Because disputes are dynamic, and adjudication only partially predictable with effects and outcomes even chaotic, mediators must be able to shift between varying hybrids of the evaluative and facilitative modes to maximize effectiveness in spurring case resolution without sacrificing fairness.

### 3. *Value-Added Mediation*

Recent scholarship has suggested that mediation adds value to the disputing transaction by providing the parties with information and structured evaluation that they cannot themselves provide.<sup>84</sup> This view, although more self-consciously based on economic analysis, fits comfortably with the sociological and psychological scholarship that suggests parties benefit significantly from being accorded a relatively timely, reasonably formal opportunity to present their case to a neutral third party and to receive a fair and reflective hearing of the matter.<sup>85</sup> Depending upon the orientation of the parties, the case might ultimately be better resolved by varying degrees of neutral facilitation or neutral evaluation. However, both economic and sociological analysis tends to suggest that more value is added to the pro-

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84. See, e.g., Ian Ayres & Jennifer Gerarda Brown, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 324-31 (1994).

85. See E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 101-06 (1988); see also McEwen, *supra* note 17, at 1378-84; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 980-83 (1990) (noting that disputants have more satisfaction with the process when they can participate and be heard before a neutral third party).

cess when the mediator not only gives the parties a forum and assists them in new ways of assessing the dispute, but also provides some yardstick for assessing the options and some information about the range of default options if the matter is adjudicated rather than settled.<sup>86</sup>

#### V. THE LIMITS OF EVALUATION: MEDIATION MUST BE MEDIATION— MAYBE

Even my support of hybrid or evaluative mediation has limits. Mediation differs from arbitration or early neutral evaluation in significant part because of the procedural and substantive expectations of the parties. For example, in approaching mediation, the parties may present information differently, may argue for resolution not supported under current law, or may engage in other disputing behavior that differs rather substantially from the disputant's posture when he or she knows the case will be evaluated and even adjudicated by arbitrator. In these latter situations, the disputants are more likely to present information as advocacy and less as background for negotiation or problem-solving. When properly employed and faithfully participated in by parties genuinely desirous of exploring mediated resolution rather than adjudication, mediation offers substantial creative and transformative potential. Mediation can then accomplish things foreclosed in litigation without diminishing fairness.

To the extent mediation veers too far from the voluntary, cooperative, facilitative assumptions that spurred its growth, it loses some of this creative and transformative potential. Some of this is inevitable, however, when the mediation is court-ordered or when one or more of the parties is not approaching mediation in the cooperative spirit. Not every dispute will be amenable to facilitative mediation, and effective mediators must respond accordingly. Sometimes (perhaps oftentimes), however, the apt response will be to cease mediation and route the dispute toward a more adjudicatory alternative. Some disputes are simply not apt for mediation unless the mediator becomes so evaluative or coercive as to have ceased being a mediator and become an arbitrator or the equivalent.

Although keeping mediation as mediation has strong appeal, in seeking to implement effective ADR mechanisms, courts should give more serious consideration to granting omnibus discretion to ADR

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86. See McEwen, *supra* note 17, at 1378-84 (realizing that a lawyer's contributions of legal rules and options not only protect parties, but also add information that may increase settlement options); see also Ayres & Brown, *supra* note 84, at 373-85, 395 (suggesting that information imparted by the parties to the mediator, drawn from the parties by the mediator, or contributed by the mediator may increase opportunities for an informal resolution of the conflict).

officers. It is not at all clear that the best means of spurring dispute resolution might not be to initially assign all such claims to a judicial adjunct (either a corps of government employees or a panel of attorneys willing to fulfill the role) who can mediate, evaluate, arbitrate, presumptively find fact or law, or recommend in order to seek resolution.<sup>87</sup>

As long as the parties have the option of further review by the court that is not unduly deferential to the ADR official's determination, this style of approach would not appear to be an impediment to the right to a jury trial.<sup>88</sup> Merging ADR efforts and permitting facilitation or evaluation to proceed on a case-specific basis rather than a categorical basis may provide a more efficient means of serving both efficiency and fairness. At a minimum, such a merged approach would at least drive a stake (although probably not the final stake) through the heart of the false dichotomy of facilitation versus evaluation.

## VI. CONCLUSION

The magnitude of the ADR revolution during the past decade, particularly in Florida, has been vast indeed. But the developing ADR infrastructure should reject, once and for all, attempts to segregate and pigeonhole ADR devices according to particular models of theoretical purity. Ultimately, the best guarantee of effective ADR is the same as the best guarantee of effective adjudication: the common-law case-by-case determination of disputes through means apt for the instant case. False dichotomies only impede this goal.

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87. See Stempel, *supra* note 7, at 361-89 (proposing greater government operation of ADR premised on flexible intake and initial assignment of cases according to specific characteristics).

88. See *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 568 (E.D. Pa. 1979) (holding that compulsory court-annexed arbitration did not violate the Seventh Amendment as long as the dissatisfied party may demand a trial de novo with jury).