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Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime

*Jeffrey W. Stempel**

Preparation for the University of Missouri's lecture on dispute resolution and consideration of commentary prompted additional thoughts on the issue and a more refined perspective on the issue of facilitation-versus-evaluation and its role in the continued development of modern ADR. Rather than attempt to fine-tune a completed article, this reply will address the additional perspectives as well as note points of distinct conflict or quibble with commentators. First, this reply provides some additional assessment framing the facilitative-evaluative debate as well as a modified brief in support of the legitimacy of some elements of evaluation in the eclectic mediation that is rightfully becoming the norm. Second, I note for the record a few points of contention with my commentators and additional information suggesting that the definition of "proper" mediation should be broadly and eclectically defined so as to permit "trans-substantive" eclectic mediation applied through the exercise of considerable discretion by the mediator. Finally, I suggest an agenda for additional ADR research that should receive some of the energy previously expended on the facilitative-evaluative debate.

I. ANOTHER LOOK AT THE FACILITATIVE-EVALUATIVE DIVIDE

In the main article¹ and earlier writing,² I have argued that the definition of mediation according to the facilitative-evaluative dichotomy is unrealistically formalist as well as theoretically and empirically erroneous. In this issue's article, I have argued that the facilitative-evaluative split results from the analytic errors of overly formalist thinking and the history and sociology of the modern ADR movement. However, formalism persists in law and society, of course, because it

* Professor of Law and Associate Dean for Academic Affairs, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Len Riskin, Jean Stemlight, and official commentators John Lande, Richard Birke, Kim Kovach, Lela Love, Zena Zumeta, and Gary Gill-Austern as well to unofficial commentators attending the Alternative Dispute Resolution lecture at the University of Missouri and a faculty workshop at UNLV, including Raquel Aldana-Pindel, Bret Birdsong, Ann McGinley, and particularly Lynne Henderson. Continued thanks to Jim Rogers for his generous support of legal education and scholarship and to Dean Richard Morgan for his enthusiasm for ADR.

1. See Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247.

2. See Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997).

has its educational uses. At the risk of falling prey to the classification dichotomy I have previously criticized, I want to suggest that the facilitative-evaluative divide is in significant part a reflection of two other divisions within both the ADR community and the legal community at large.

A. The Procedure-Substance Split

Some people (lawyers, scholars, judges, dispute resolvers, policymakers) are more concerned about fidelity to procedural protocols while others are more concerned with the substantive rules governing disputes and substantive outcomes. Those in the dispute resolution community preferring facilitation tend to be proceduralists. For them, the observance of proper procedure is a high goal, perhaps the dominant goal. They reason, often implicitly, that adherence to the rules of procedure is the essence of neutrality, fairness, and the proper role of a dispute resolving apparatus.³ At some level, usually subconscious, there is a post-modern philosophical aspect of this preference. Because humans cannot perfectly know what is the "correct" result in a dispute, it is unwise to attempt to construct a yardstick for evaluating substantive outcomes.⁴ However, we can construct a system of procedures that may be followed from case to case. The outcomes of each case may be that the chips fall where they may, but this is of less concern than knowing that the system producing these falling chips followed an announced neutral format.

For others, the decisional framework governing disputes and the quality of outcomes in disputes is paramount. In extreme cases of this view, the end justifies the means. Recall the famous comment from the Vietnam War, where one soldier was infamously quoted saying "we destroyed the village to save it."⁵ One can find numerous historical examples where preference for a substantive outcome turned into the atrocities of the zealot.⁶ As something of a cheerleader for evaluation as a legitimate part of eclectic mediation, I do not intend to suggest that evaluators are so committed to a certain result or range of results to inflict similar violence on proper mediation procedure in order to ensure that mediated settlements meet their

3. See Stempel, *supra* note 1, at 252-55 nn.16-31 (describing facilitative theory of mediation and approach to mediation).

4. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES Ch. 3 (1987) (suggesting that legal process school's commitment to procedural neutrality fails to adequately address concerns of critical legal scholars); Peter Schank, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992). Many, perhaps most, post-modernists would take issue with my contention that being post-modern makes one a proceduralist. Some would say that being post-modern might make one more likely to embrace a preferred substantive result in disputes or policy debates on the ground that since truth is a socially constructed matter, society may as well construct and embrace "better" truths (*i.e.*, those preferred by the speaker or writer). See generally GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995); DENNIS PATTERSON, LAW AND TRUTH (1996). On the other hand, however, being post-modern, or even non-fundamentalist about the concept of truth or correctness in my view tends to make one less absolute about the right-or-wrong of dispute outcomes, which pushes toward a more proceduralist yardstick for defining good and bad in society and dispute resolution.

5. *Major Describes Move*, N.Y. TIMES, Feb. 8, 1968, at 14.

6. Next door to Halberstam's chronicle of excessive military zealotry was a more chilling example, the rise of the Khmer Rouge in Cambodia, where commitment to an agrarian socialist society was used to justify mass murder of intellectuals. Less bloodcurdling examples abound in politics and law.

substantive criteria. However, I think it is fair to say that those supporting the right of mediators to introduce some element of evaluation where necessary (myself included) are suggesting that for them substantive rules of decision and outcomes are as important as fidelity to a nonadversarial or nonjudgmental procedure.⁷

When it falls short of mania, a commitment to substantively good outcomes often results in a useful commitment to fairness and justice. Similarly, if fidelity to agreed procedure is not carried to extremes or used to blind the proceduralist to the overall quality issues, a commitment to procedure provides many benefits. But either orientation alone or applied to the extreme can prove problematic. In practice, we should not be surprised that most lawyers and other dispute resolvers (indeed, most people) are eclectic in their approach to the proper balance of substance and procedure. Despite the everyday eclecticism of society in this regard, it can clarify our thinking about dispute resolution to take into account this procedure-substance division among the profession. The divide between those who privilege procedure and those who prefer substance may explain the facilitative-evaluative division as well as any other factors, including the historical and sociological divisions addressed in the primary article.⁸

The additional dichotomy of procedure-substance pervades law and society and also accounts for some of the facilitative-evaluative division. In litigation in particular, there has long been a tension between procedure and substance. As discussed in the main article, lawyers have differed over the degree to which litigation procedure should be generic or substance-specific. The generic proceduralists carried the day during the Twentieth Century, particularly with the enactment of the Federal Rules of Civil Procedure ("Federal Rules") in 1938.⁹ Subsequent developments have whittled away at that construct. We now have local rules and standing orders that tend to differentiate among types of cases more than the Federal Rules. The dispute resolution local rules tend to be less generic. Not all cases must have mandatory arbitration or mediation or early neutral evaluation. Usually, it is the domestic relations matters and the "garden variety" contract and tort claims (up to a certain amount of claimed damages) that are part of court-sponsored dispute resolution.¹⁰

Still, the litigation system is largely generically proceduralist. The federal courts and the states have rules of procedure that do not on their face distinguish between the type of dispute at hand. Eclectic application of such general procedure has historically been our legal system's answer to the tension between substance and procedure. Federal Rules author Charles Clark referred to his generic, open courts procedure as the "Handmaid of Justice."¹¹ A leading civil procedure casebook

7. See Stempel, *supra* note 1, at 252-55 nn.21-31 (describing views of evaluative mediation).

8. See Stempel, *supra* note 1, at 271-85 nn.96-154 (describing history of mediation and sociological background of mediators, arguing that these factors account for a significant amount of facilitative-evaluative division).

9. See Stempel, *supra* note 1, at 251 n.13; Stempel, *supra* note 1, nn.141-46 and accompanying text.

10. See, e.g., FLA. R. CIV. P. 12.740 (requiring mediation of family law and small claims disputes); MINN. R. CIV. P. 114 (requiring mediation of disputes prior to trial); E.D. PA. LOCAL R. CIV. P. 49 (establishing court-annexed arbitration for tort and contract disputes where damage demand is less than \$75,000 and there is no request for injunctive relief).

11. See CHARLES CLARK, PROCEDURE, THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK (C. Wright & H. Reasoner eds., 1965).

suggests that the yardstick for evaluating procedure is whether it tends to produce just, equitable, and efficient resolution of disputes.¹² The eclectic part of the equation is this: a judge may be applying generic procedure but in a case involving problematic claims such as a defamation suit seeking millions in punitive damages, the judge may subtly demand more of the plaintiff in the way of detailed pleading specifying the alleged untruth and its impact on the claimant.¹³ By contrast, where the plaintiff has no lawyer and is attempting to stave off foreclosure of a modest home, the court may require less in the way of procedural formality through a relaxed application of the rules.¹⁴

B. *The Disputant Satisfaction-Just Outcomes Split*

Of course, to say that a system serves justice perhaps begs the question of what is "justice." Although this question pervades the law, it is particularly pronounced in the area of dispute resolution. In the dispute resolution community, it appears that some measure justice mostly by whether the disputants are satisfied with the resolution of their controversy (it may no longer even be seen as a controversy because of the skill of the mediator). Others measure outcomes by the substantive quality of the resolution in light of the legal system's default rules (or perhaps a yardstick different than the baseline legal norm for such decisions). To oversimplify: some view a "good" mediation as one that results in a resolution where the contestants walk away satisfied; others view a good mediation as one that reaches a substantively good result.¹⁵ Generally, the former are disproportionately facilitative and the latter are disproportionately evaluative.¹⁶

12. See JOHN J. COUND ET AL., *CIVIL PROCEDURE* 4 (6th ed. 1993).

13. See 2 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 12.34[1][b] (3d ed. 1997 & Supp. 2000); DAVID F. HERR ET AL., *MOTION PRACTICE* §§ 9.3, 9.4 (3d ed. 1998 & Supp. 2000) (stating that defamation claims are disfavored and courts as a practical matter require more detailed pleading for these to succeed).

14. See *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944) (taking relaxed or liberalized view of pleading requirements on behalf of pro se litigant of limited sophistication who was not fluent in English, in famous opinion by *Federal Rules* author Charles Clark).

15. See CRAIG MCEWEN & NANCY ROGERS, *MEDIATION* §§ 6:14-6:19 (2d ed. 1994 & Supp. 1999) (discussing means of evaluating mediation quality); DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* (1996) (discussing means of evaluating mediation quality). Commentator Zena Zumeta puts it this way: "Who owns the dispute and its resolution?" See Zena Zumeta, *A Facilitative Mediator Responds*, 2000 J. DISP. RESOL. 335, 338. In essence, Zumeta, a self-styled facilitator or transformative mediator has embraced the "party satisfaction" measure of assessing the quality of dispute resolution, suggesting that society has little or no right to police ADR outcomes that satisfy disputants even if they might be in tension with other social norms. Later, she puts it more starkly: "Power to the parties!" *Id.* As a member of the eclectic camp, I cannot give a John Lennon-esque "right on" to that statement. A better slogan might be power to the parties, but not absolute power to the parties or to any single party.

16. See James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation?"*, 19 FLA. ST. U. L. REV. 47 (1991). Although Alfini's well known article is generally cited for its finding that mediator styles differ and that many mediators incorporated significant evaluative components into the process, an implicit finding often overlooked in the article is that some mediators were committed to the facilitative procedure while others introduced the evaluative dimension, presumably because they were concerned about the outcome of the mediation as well as the desire to obtain settlement faster or because the mediator was taken with his or her own power. The same implicit showing exists in Leonard Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996), and in the recent empirical study of

Which camp is "right" in picking a measure for evaluating mediation? Again, I cast my vote for eclecticism: both measures of quality are important and should be used in evaluating the caliber of mediation and other forms of ADR.¹⁷ Disputant satisfaction is an important factor for measuring mediation but so is the substantive quality of outcomes. For example, a disputant may be so relieved to have a matter "over and done with" that she may express satisfaction with a mediation that can only be called a "defeat" according to prevailing legal norms; conversely, a disputant may be thrilled with the substantive outcome of a mediation that left the other disputant angry and hurt. Neither outcome is "good" mediation. In practice, mediators — despite having a presumptive orientation — are probably eclectic and pragmatic. They want the mediation to produce a result that is at least substantively defensible and that leaves the participants with at least a minimum level of satisfaction.

In the harder specific cases and in the hard work of defining the boundaries of acceptable mediation practice, however, the specific orientation and preference for a measure of quality will affect one's analysis of what constitutes quality (and, indeed, justice). Measuring mediation by customer satisfaction may tend to favor facilitation to the extent participants will probably prefer a nonevaluative, nonadversarial experience, at least during the process because this may be less stressful than substantive decision making or directly facing areas of significant disagreement. But for those with more focus on the actual resolution of disputes, evaluative mediation (or, more precisely, eclectic mediation with necessary doses of evaluative behavior) will be preferred.

C. The "Rules Versus Discretion" Split

As I suggested in the main article, a good deal of both the ADR community and the legal community is divided by their attitudes toward the utility of rules and the degree of strictness required in announcing and applying rules of decision or norms of procedure.¹⁸ I then framed the distinction as one of formalism versus functionalism or rules versus standards. Further reflection suggests to me that an equally important divide is "rules versus discretion." Although this split is of course a part of the rules versus standards division, the element of discretion may in fact be the more important variant in this analysis.

mediators found in Dwight Golann, *Variations in Mediation: How - and Why - Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41 (finding mediators to make both evaluative and facilitative moves in mediation even if largely adhering to a particular style; evaluative intervention may be directed at need to speed process or concern about substantive outcome).

I should add for clarification: this comment uses the term "evaluative" as a shorthand to describe a variety of mediator techniques that are to some degree not completely facilitative. I am not suggesting that a mediator who has made an "evaluative move" has attempted to adjudicate the dispute or to bludgeon a party into the mediator's preferred substantive outcome.

17. Although this reply, like the main article, is primarily concerned with mediation, its analysis on issues of evaluation of the proceedings, the need for further research, and doctrinal decisions for the future applies in many cases to other forms of ADR such as arbitration, early neutral evaluation ("ENE") and hybrid forms of dispute resolution.

18. See Stempel, *supra* note 1, at 270 nn.94-96.

Facilitative mediators, although celebrating the skill of the mediator who leads disputants to insight without what they regard as improper evaluation, tend (paradoxically in my view) to fear granting the mediator discretion to evaluate. As might be expected, eclectic evaluationists are quite comfortable with allowing the mediator considerable discretion in the conduct of a mediation. This is, of course, also a facet of what I have termed the excessive ideological-theological attitude held by some in the ADR community. Once having defined good mediation a particular way, the definition becomes a rule. Discretionary departures from the rule are considered too fraught with danger. But as I hope the main article has shown, excessive constraints on evaluative discretion are at least equally dangerous.

As discussed further below, it may be that one "size" of mediation does not fit all. However, in attempting to categorize the aptness of mediation style by subject matter, the inevitable conclusion to me appears to be that subject matter is of far less importance than the other factors addressed below.¹⁹ The next inevitable conclusion to follow holds that a mediator must operate under a legal regime that treats eclectic mediation as legitimate and that permits the mediator substantial discretion to do what he or she thinks best in each particular case.

D. The Perhaps Inherent Unmapability of Mediation Subject Matter

In the main article and during the lecture, I suggested that one means of reconciling the facilitative-evaluative tension might be to recognize that some disputes are more amenable to a more facilitative approach while others are more suited to a more evaluative mediation style (or rather, eclectic mediation with more evaluative events). In particular, I suggested that issues such as child custody and visitation might on the whole be better mediated in classic facilitative manner (assuming good faith by the parties) while contract and tort disputes between strangers would on the whole see more evaluation.²⁰ At the lecture, I suggested the following continuum attempting to site types of disputes along a facilitative-evaluative dimension:

19. See *infra* text and accompanying notes 20-24.

20. See Stempel, *supra* note 1, at 285-92 nn.155-78.

CONTINUUM

Facilitative EndEvaluative EndCustody
VisitationStranger Tort
Stranger Contract

Divorce

Franchise
LicenseAcquaintance Tort
Acquaintance Contract

Stranger Criminal

Acquaintance Criminal

Intellectual Property

Insurance Coverage

Employment

Acquaintance Civil Rights

Stranger Civil Rights

Statutory Interpretation

I use the term "acquaintance" to describe a dispute in which the contestants have some historical or ongoing connection. I use the term "stranger" to describe a dispute in which the parties' contact is largely confined to the facts and circumstances of the instant dispute.

Even in this simplified form, two dimensional as opposed to the four-dimensional approach of the Riskin Grid,²¹ it is apparent that generalizations are difficult to make. Generalizations by subject matter alone are particularly limited in utility. For example, although one might at first blush think that a breach of contract suit (where there are strongly established default legal rules and some certainty over legal "rights" and where the transaction is often inherently about money) would align more to the evaluative end of the spectrum while a custody matter (where the parties have a mutual interest in a third party's welfare and personal norms may well be more important than legal default rules) would align more reliably with the facilitative end of the spectrum.

However, as discussion of this aspect of my paper proceeded both at the Missouri lecture and in a UNLV faculty workshop, I became increasingly convinced that the subject matter of the dispute has relatively little to do with whether a more facilitative or evaluative eclectic mediation would be more apt. Rather than subject specific, the key determinants of the preferred approach will be context specific and are almost *sui generis*:

- the past relationship of the parties;
- current relations;
- prospects for future relations;
- the stakes of the dispute;

21. See Riskin, *supra* note 16.

- the certainty or uncertainty supplied by the legal regime that provides the "shadow of the law" necessary for many as a reference point for bargaining (*e.g.*, clarity of default rule, existence of helpful or controlling precedent);
- the stakes of the dispute;
- the divisibility of the matter at stake;
- the substitutability of items at issue;
- the political, public opinion and social climate; and
- the personality of the parties.

Based on feedback in Missouri and Nevada and continuing reflection on the area, I am now firmly convinced that these factors are what determines the apt mix of facilitation and evaluation in mediation. Whether the dispute is about contracts, torts, child custody, or civil rights has far less impact.

In addition, the case for evaluation (or at least the freedom to evaluate) is perhaps stronger than I have realized even in areas where society would prefer to see a facilitative resolution. For example, in a divorce involving minor children, there is something inherently attractive about the notion of the splitting spouses working through a purely facilitative process to arrange child custody. We think, perhaps (pardon the term) romantically about the marriage that did not work but where the spouses do not hate one another, are still bound by love of the children, and wish to achieve the best arrangement for the family irrespective of legal rules.

But it does not follow that an acceptable result will occur from pure facilitative mediation even under these ideal conditions. To take an extreme example for illustrative purposes, the spouses might decide on joint custody with the children in one home on odd-numbered days and in another home on even-numbered days. But most experts in family and child psychology would probably deem this arrangement nutty even under the best of circumstances. The fact that the divorcing spouses have come together in harmony on this resolution is nice — but it still does not mean that a mediator or a system in which the mediator acts, should countenance this arrangement.

As Kim Kovach and Lela Love point out in their commentary on the main article, a skilled facilitative mediator can attack this problem through pointed questioning such as:

Your proposal is that your child spend three days with you a week, including school weeks. That will involve a bus commute for Danny to and from school, an hour and a half each way, when he is staying with

you. Have you considered how spending three hours on a bus on school days will impact your son?²²

Laying aside the possibility that such pointed questioning is really more in the evaluative end of the spectrum or the evaluative sector of Riskin's Grid,²³ it still may not be enough. A more firm evaluative approach may be necessary by the mediator. Perhaps he should tell the divorcing parents if they have amicably but crazily hit upon a custody arrangement that no sane court will approve and force continued discussion rather than allowing an inapt "resolution" that may soon prove unworkable or be set aside by a court.

This type of scenario raises the question of whether the mediator is competent to engage in various degrees of evaluation. Facilitators have raised this issue as a defense against permitting any evaluation. I prefer to consider the issue as one requiring that the eclectic mediator be at least modestly familiar with the substantive subject matter of the dispute. An experienced family law attorney may fill the bill in the hypothetical above, but perhaps the mediator in this scenario is better served by psychological or sociological training.²⁴ As much as I find lawyers largely well-suited to do eclectic mediation, further reflection on the issue of types of disputes and types of mediation technique suggests to me another reason for not making mediation the exclusive province of lawyers.

E. The Persistent Presence of Formalist Dichotomies — and Their Possible Uses

The tensions discussed above have permeated the law throughout the Twentieth Century (probably forever). We should not be surprised if they persist during the Twenty-First and contribute to the continuing vitality of a facilitative-evaluative debate.

To some extent, a degree of formalist classification is inevitable and essential to daily existence. Simply to decide whether to leave the house, humans make "either/or" classifications. Is the weather "hot" or "cold?" Is it "raining" outside or dry? (An assessment less important in Las Vegas but not completely eradicated from human cognition even there.) Classification similarly helps organize and assess legal

22. See Lela P. Love & Kimberlee K. Kovach, ADR: *An Eclectic Array of Processes, Rather than One Eclectic Process*, 2000 J. DISP. RESOL. 295.

23. Love & Kovach describe this technique as "reality testing" distinguished from "neutral evaluation" *Id.* at 303-05. Although the question posed in the child custody hypothetical is less evaluative than the mediator saying "the idea of three days per week custody is nuts," the pointed question posited by Love & Kovach is indeed possessed of evaluative edge and yet they consider it proper facilitative mediation.

This hypothetical thus illustrates quite well the degree to which fidelity to a term or theoretical concept can get in the way of real world applications of ADR. The reality testing of pointed questions is at least partly evaluative and it is perfectly proper mediation. So, too, is the mediator noting that a disputant's settlement target far exceeds any damages award ever rendered by a court in connection with the type of claim at issue. These mediator techniques, as well as the more purely facilitative technique of drawing out the desires of the disputants, should all be recognized as permissible mediation. Under an eclectic regime, it would be - and dispute resolution professionals could move on to more pressing matters.

24. I am grateful to Lisa Key for pointing this out in discussion following the Missouri presentation.

topics such as mediation style. Although those of us who prefer to self-identify as functionalist would prefer that classifications and rules be written with suitable breadth and flexibility, we must at least concede that some rules and classifications are necessary if one is to have a coherent system of law — or anything else.

The hard questions at the margin are the particular rules or standards to enact or enunciate and the degree of flexibility accorded in their application. Similarly, the relevant professional community must determine whether to codify or banish certain rules and categories. I have argued for moving away from or beyond the facilitative-evaluative debate by codifying a view of mediation that is broad, flexible, and eclectic — one that vests substantial discretion with the mediator. Others have agreed. Richard Birke calls even more forcefully for an end to even the conversational terminology.²⁵ John Lande, however, finds some continued value in the efforts of facilitative mediators to set forth an "ideal type" of mediation as facilitative and notes several benefits from the "good fight" that facilitators have fought for this ideal.²⁶ To the extent that the facilitators have standards rather than rules or theology, I find a good deal of merit in Lande's "qualified praise" of the facilitative community.²⁷

Lande's comments have forced me to see even the most zealous facilitators in a more positive light. On a policy level, I continue to believe that the broad, eclectic, discretion-vested vision of mediation should be what our society enshrines as "good" mediation. But on the level of intellectual presence, Lande has convinced me that we should not completely eradicate the continuing facilitative-evaluative dialogue from the scene. Like Birke, however, I continue to think that we should move "beyond" the facilitative-evaluative debate to the extent that we spend less intellectual energy on this divide and invest more research and hard thinking into other dispute resolution issues.

F. Remembering the Benefits of Simple Negotiation and What This Suggests About the Facilitative-Evaluative Debate

On the matter of negotiation, the modern ADR movement has arguably been a mixed blessing. On one hand, raised dispute resolution consciousness has led to raised consciousness about bargaining and negotiation. There abounds an array of scholarship addressing game theory and the teachings that cognitive psychology may bring to bear on negotiated dispute resolution.²⁸ On the proverbial other hand, the current rapture about mediation and ADR proceeds from the unspoken premise that the judicial system has failed, and so has the legal profession, in adequately representing its disputing clients. Although this is hardly a golden age of

25. See Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309.

26. See John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321.

27. See Stempel, *supra* note 1, at 270 nn.94-95 (describing the distinction between more rigid "rules" and more flexible "standards" and arguing that overly rule-bound orientation impedes analysis).

28. See, e.g., Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43; Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789 (2000); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997).

adjudication, neither has the system become so clogged and ineffective as to create chaos.

More important, despite the current gnashing of teeth about the decline in lawyer professional values and the rise of "Rambo litigation" techniques,²⁹ the fact remains that most litigation does result in party-determined settlement, usually with the help of counsel, and no formal invocation of ADR or the courts beyond the filing of pleadings and some discovery.³⁰

In short, the traditional "sue and settle" system continues to work to a large degree. If anything, it may be improving as the law school curriculum provides additional information to students about negotiation as an art and science and gives to students less suggestion that the highest form of lawyering is full dress litigation.³¹ Modern law students are conversant with *Getting to Yes* and its progeny.³² Their forebears were not, at least not in terms of formal education. Despite the modern clucking about "Rambo litigation," in practice I found older litigators to be more strident and bellicose than lawyers my own age (perhaps in part because they were older litigators attempting to bully a neophyte). In the rush of enthusiasm over ADR and the occasional stories of "over-the-top" litigation, we should not lose sight of the fact that most lawyers do a more than credible job of helping clients find common ground in the face of adversity. To the extent that lawyering has gotten harder and meaner in the late Twentieth Century, it is more likely the result of clients and economic pressures rather than lawyer indifference to the possibility of value-maximizing negotiation.³³

29. The term "Rambo litigation," although having achieved its apparent zenith during the 1980s, continues to be employed today. It is based on the Sylvester Stallone movie character John Rambo, a soldier who literally took no prisoners but dispatched hundreds or thousands of the enemy in three 1980s movies. See also Richard L. Marcus, *Apocalypse Now?*, 85 MICH. L. REV. 1267 (1987) (using Rambo character as springboard for his review of PETER SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1985)).

30. In fact, despite mythology to the contrary, there is usually no discovery conducted in litigation prior to settlement. In only about five percent of civil litigation is there what most would agree are heavy or substantial discovery costs. See generally JAMES S. KAKALIK ET AL., *JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT* (1996); JAMES S. KAKALIK ET AL., *AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT* (1996); THOMAS E. WILLGING ET AL., *FEDERAL JUDICIAL CENTER., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS AND PROPOSAL FOR CHANGE* (1997); James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998).

31. Prior to the modern ADR movement, negotiation was not even taught as a separate law school discipline. Today, there are a variety of courses and excellent coursebooks and exercises on the topic. See, e.g., ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

32. See ROGER FISCHER & WILLIAM S. URY, *GETTING TO YES: NEGOTIATING CONSENT WITHOUT GIVING IN* (1981). At least, in my own probably uninformed way, I regard *Getting to Yes* as the inaugural work in the modern field of conflict resolution through negotiation even though it has precursors in publications and activities.

33. See Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998); Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931 (1993) (stating that discovery problems are confined to small set cases where litigants dispute with ferocity over large stakes, often expending considerable resources; character of civil litigation has

Because negotiation works most of the time, we should realize that this tells us something about the disputes that do not resolve themselves through bilateral communication prior to mediation or other forms of ADR. Almost by definition, these are disputes where the parties (or their counsel) are not communicating effectively, have not properly assessed the situation, are unrealistic in expectations, are acting in bad faith, face factors unique to the case, or perhaps need a definitive legal adjudication. The facilitative mediator can often improve communication, self-knowledge, or situation assessment — but not always.³⁴ Often, the mediated dispute (which, logically, should have settled through negotiation in most cases) requires the more evaluative involvement of a neutral third party to strip away the plaque that has prevented negotiation from reaching resolution. Viewed in this light, we should again not be surprised that most mediation is eclectic in order to be effective.

G. The Comparative Question: Mediation and Adjudication

To some extent, my championing of eclectic mediation that permits elements of evaluation has begged the question regarding the quality of substantive outcomes achieved in adjudication. I have implicitly suggested that the default legal regime that obtains in the absence of settlement is by and large a good one. I have implicitly suggested that most adjudication results, although perhaps too slow and expensive in coming, are by and large sound and just results. This view is certainly open to challenge. One might, for example, assert that adjudication and the default legal regime are sufficiently incoherent and unfair, that this should not be the gauge for assessing substantive outcomes. Rather, other criteria like party satisfaction, cost, delay, or expenditure of public resources should govern.³⁵

changed since 1970s because of increasing importance of civil litigation among commercial entities with means to wage protracted litigation wars).

34. For example, in their commentary, Love & Kovach describe the resolution brought about in a case where

damages for a back injury is in issue. Having the claimant explain to an adjuster her actual suffering can shift the dialogue to one in which the parties are jointly seeking a solution. In one situation involving a back injury, a claimant described not being able to cook for her family and having to endure her hated mother-in-law cooking meals in the claimant's kitchen, while she lay on the floor helplessly. Her voice, expressing her pain, and the vivid details in her story, resulted in the insurance adjuster reassessing his doubts about the severity of the back injury and ultimately wanting to resolve the matter in a mutually satisfactory manner. Once parties are motivated to find a resolution, the rest is easy.

See Love & Kovach, *supra* note 22, at 302.

What Love & Kovach do not note, however, is that this case should have been resolved at the outset, without any need for mediation, had the parties and lawyers been negotiating intelligently. To be sure, there may have been something magical when the adjuster could in fact hear and see the pain of the claimant. But good lawyers communicate this effectively in negotiation without the need for invoking an ADR infrastructure. Although the presence of the third party mediator and the coming together in mediation as an event and process is valuable, it often occurs in cases like this because for some reason, the negotiation that should have been sufficient fell short. In cases like this one, facilitative mediation is enough to make up for the factors that defeated negotiated solution - but in other cases, less facilitative and more evaluative approaches may be necessary.

35. I appreciate Chris Guthrie raising this point during the Missouri presentation.

Again, I remain something of a traditionalist on these issues. For the most part, the American legal system — both its substantive body of law (the default rules³⁶ that create much of the shadow of the law in which to bargain) and its adjudicative machinery — have worked well. Although there are of course the occasional injustices (perhaps more than occasional judging from the pages of legal periodicals), it appears that adjudication reaches acceptable results most of the time. Certainly, ADR advocates have not put forth a better yardstick, although they have suggested comparative advantages from ADR application of the default legal rules, particularly the rigidity or limitation of remedies available at court.

Until there is an alternative organizing construct, the body of legal principles and adjudicative outcomes should remain the standard by which we measure justice in ADR. To be sure, party satisfaction is important. To the extent it reveals advantages for mediation and other ADR methods over adjudication, this is a powerful brief for ADR — but it is not the sole criterion for evaluating ADR outcomes. Once again, at least some limited role for evaluation according to prevailing legal norms remains necessary. At least for the moment, this brings us back to eclectic mediation as the preferred methodology.

II. POINTS OF ENGAGEMENT WITH THE COMMENTARY

The comments on the main article are thoughtful, insightful, and even tactful in that most of the commentators are identified as facilitators and they have responded to my "attack" on facilitative orthodoxy with intellectual engagement rather than defensiveness. The response of the commentators also suggests to me that there is indeed substantial common ground among dispute resolution professionals and observers. I prefer to call that common ground eclectic mediation and to advocate its "codification" as the mainstream of mediation.

Kovach and Love appear not to be against evaluation *per se* but rather want mediation to be a more purely facilitative process. They are not so much opposed to evaluation in dispute resolution, but they want it called something other than mediation so that true mediation need not be muddled in identity.³⁷ Although their perspective is attractive, I think it would ultimately prove unworkable in practice. Indeed, it already has. Despite state statutes defining mediation as facilitative and despite the policing of a facilitative orthodoxy by some states, mediation appears to be eclectic in practice.³⁸ At some point, the Kovach and Love preference for cleaner categorization of dispute resolution methods must yield to reality and practicality.

36. The term "default rule" has become so ingrained in current legal scholarship that its popularizers no longer receive as much credit as they should for drawing attention to the importance of this concept through a range of legal issues. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). In my view, this is the key article in this modern trend. The article has been cited in more than 300 other law review articles since its publication.

37. See Love & Kovach, *supra* note 22.

38. See Stempel, *supra* note 1, at 267-69 nn.79-90; Golann, *supra* note 16 (describing case studies of actual mediations in which mediators used both facilitative and evaluative techniques to resolve disputes and that tactics changed during the course of the mediation process).

When people, even pretty sophisticated people, talk about mediation, they mean eclectic mediation. Only in the ranks of those with a great expertise is the facilitative-evaluative division finely observed.

To the extent one is concerned, as Kovach and Love are, about the degree to which parties may be disserved or surprised by trace elements of evaluation in the mediation they envisioned as facilitative, there are in crudest form two solutions. Society could attempt to slice mediation into finer categories and work hard to make sure that through disclosure and dispatching the parties get the subcategory of dispute resolution they need or desire. Alternatively, society could endorse eclectic mediation and let the mediator on a case-by-case basis mediate eclectically, using as little or as much evaluation as may be necessary to further the process. I opt for the latter approach on both theoretical and practical grounds.

To be sure, the eclectic regime puts significant responsibility on mediators, but so does a purely facilitative approach. To prevent abuses of either technique, the answer lies in having qualified mediators who do not assume inappropriate roles, play favorites, or abuse power.

As a practical matter, although work in the field suggests that eclectic mediation is what actually happens and what is here to stay, I suspect that most mediation done under an expressly eclectic regime will be largely facilitative. Although it may not have the linguistic clarity sought by Kovach and Love, it will probably not produce mediations displeasing to them — at least no more than occurs today.

Most important, eclectic mediation will minimize consumer confusion. Under the Kovach and Love construct, a mediator who is unable to move forward with purely facilitative techniques must logically either abandon the enterprise, expressly flag for the parties her movement into a more evaluative mode (even if only for a moment) and obtain party consent to the shift, or dispatch the disputants to another forum to proceed with neutral evaluation or some other ADR method. But the parties signed up for, or were referred to, mediation. They expect mediation, they hope for "one-stop shopping" for their dispute (subject to reverting to the litigation default if necessary), and they are not nearly as concerned as academicians about the precise techniques deployed as long as the process brings acceptable resolution. Even the most sophisticated disputants will be confused and possibly put off by a mediator's strict adherence to the facilitative mode interrupted by bursts of self-conscious rhetoric about changing modes or a mediator's decision to alter or end the process in which the parties have invested substantial effort.

Zena Zumeta takes me to task for not specifically addressing transformative mediation.³⁹ This is somewhat fair criticism. First, although transformative purists will probably disagree, I have generally regarded transformative mediation as a subset of facilitative mediation. Sure, transformative mediation has particular techniques and a somewhat more ambitious goal (changing lives) than garden variety facilitative mediation (producing party-generated resolution of disputes), but both processes are distinct from a purely evaluative or highly eclectic approach. Consequently, the main article's thesis regarding the facilitative-evaluative divide applies as well to transformative mediation. At least I think it does. Zumeta's

39. See Zumeta, *supra* note 15, at 335 ("Stempel leaves out a new thrust in mediation, the transformative mediation movement.").

thoughtful commentary does not persuade me otherwise. She notes that I do not expressly discuss transformative mediation but then does not produce any analysis suggesting that this omission (if it is an omission) undermines the thesis of the main article (although she articulates other analyses taking issue with the article).

Although not submitting written commentary to this symposium, Leonard Riskin provided useful commentary at the lecture itself. He had limited time but did note a few "quibbles" (his word) with the main article that prompt me toward clarification. He read the main article as suggesting that lawyers were nearly uniform in being high on the evaluation end of the eclectic spectrum and that nonlawyers were equally high on the facilitation end of the continuum. I certainly did not mean to take this extreme a view and apologize for any unclarity in the main article. My thesis as to general professional norms is just that — a general thesis of general group orientation. I do assert that on the whole, lawyers are more inclined to be evaluators than nonlawyers. I do not assert that all lawyers are evaluators and all nonlawyers are facilitators.

Riskin also took me to task for understating the degree to which a mediator may avoid what I regard as the pitfalls of too passive an approach by using activist facilitation techniques such as guiding the parties to insight through questioning. I agree and certainly would prefer that mediators use these sorts of techniques rather than brute evaluation — if the situation permits. In a smaller category of cases, however, my position is simply that the mediator may need to move beyond guiding questions and inform or "tell" the parties that a position is beyond the range of reasonable adjudicative outcomes in order to break logjams or avoid unfairness.

Gary Gill-Austern's comments⁴⁰ represent perhaps a more doctrinaire defense of mediation than even those of Kovach and Love, who I have generally regarded as the leading advocates of facilitative purity in mediation. I do not find myself in great disagreement with much of what he says: mediation should attempt to be a process of understanding and party-generated solutions with less evaluation rather than more, mediation should not become too much like arbitration or litigation, mediation should leave the parties feeling content with any resulting resolution, and mediation has significant transformative potential.

I am concerned, however, that Gill-Austern's faith in mediation is too much of a faith based on a romantic, almost theological view of the process rather than faith based on empirical evidence and substantive rationality. As much as I agree with his general orientation toward less adversarial models of dispute resolution, I am concerned whenever adherence to any social policy becomes something of a creed. I feel, for example, the same way about some of the writings of Owen Fiss, who has criticized settlement and argued that we need adjudication to establish social norms, often norms that will not be adequately generated through the political process.⁴¹ As much as I admire Fiss' writing in this area and its reminder that we must not forget core values in the face of the trendiness of ADR, neither should we become "litigation romanticists" (as Carrie Menkel-Meadow has suggested).⁴² Even issues

40. See Gary L. Gill-Austern, *Faithful*, 2000 J. DISP. RESOL. 343.

41. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

42. See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing From the McCrate Report*, 69 WASH. L. REV. 593 (1994).

like race discrimination and school integration can be resolved with means other than litigation. In fact, they may well be better resolved outside the litigation context — so long as *Brown v. Board* and its progeny have provided a sufficient shadow of the law in which to mediate. Just as one should not be a litigation romanticist, one should not be a facilitative mediation romanticist.

Gill-Austern's ideological commitment to facilitative mediation prompts him to question whether I have created "horrible hypotheticals" that have no relation to reality. He suggests my proposed pitfalls of overly pure facilitative mediation in certain contexts "might spark more concern were there an abundance, or even several, examples from real life."⁴³ Here, his devotion to mediation has blinded him to the empirical reality in my article. In the article, I noted a real situation in which an observer saw arguable abuses of facilitative mediation disadvantaging the wife in a divorce.⁴⁴ I also noted the several Florida mediation cases in which (prior to the Florida Supreme Court's February 2000 decision adopting revised rules):

- a mediator could not tell a debtor that he was about to agree to a settlement that imposed an interest rate upon him three times greater than the rate imposed on judgments;⁴⁵
- a mediator could not disclose secreted property in a divorce matter;⁴⁶ and
- a mediator could not even ask a wrongful death claimant, who appeared to have omitted a loss of consortium claim, whether he intended not to bring a consortium claim.⁴⁷

These are all real examples, not my mental musings. Although few in number, they undoubtedly reveal a potential unfairness problem with pure facilitative mediation that is so "high church" that it cannot eclectically adapt to the dispute at issue. The article also noted the significant concern of feminist scholars that facilitative mediation could disadvantage women in marital dissolution.⁴⁸

An undercurrent of the Gill-Austern comment seems to be that Leonard Riskin has in some way strayed from the one true path of good dispute resolution. Gill-Austern expresses dismay that Riskin's seminal 1996 article⁴⁹ appears to embrace the eclectic mediation by actual mediators described in the article — or at least Riskin is not in Gill-Austern's view sufficiently critical of these findings. Gill-Austern

43. See Gill-Austern, *supra* note 40, at 365-64 n.85.

44. See Scott M. Hughes, *Elizabeth's Story*, 8 GEO. J. LEGAL ETHICS 553 (1995) (cited in Stempel, *supra* note 1, at 252 n.21).

45. See Stempel, *supra* note 1, at 260 n.48.

46. See Stempel, *supra* note 1, at 260-61 n.49.

47. See Stempel, *supra* note 1, at 261 n.50.

48. See Stempel, *supra* note 1, at 255 n.30 (citing Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991)).

49. See Riskin, *supra* note 16.

contrasts this with Riskin's also important 1982 article *Mediation by Lawyers*,⁵⁰ a work Gill-Austern notes was inspirational to him as a law student.⁵¹

So, what has taken place in fourteen years? Has Riskin been corrupted by the evaluative components of the real world and the osmosis of working at law schools? I think not. Rather than seeing Riskin's scholarship as a losing of the faith, I see his work as evolving to reflect the reality of mediation in practice and demonstrating a subtle appreciation for the complexities of the topic. In the highest academic tradition, Riskin is not making an advocate's brief for evaluative mediation, he is simply studying mediation and examining the implications of different styles of mediation.⁵² To be sure, this work has stirred the metaphorical pot among dispute resolution professionals and scholars, but we are all the better for it.⁵³

Just as excessive zeal about facilitation is unwise, it is equally unwise to be blinded by adherence to an overly evaluative concept of mediation. For that reason, I found much to recommend in John Lande's commentary of "qualified praise" for facilitative mediation.⁵⁴ He notes that the facilitative mediation community and spokespersons like Kovach, Love, Zumeta, and Gill-Austern provide a valuable service in preventing dispute resolution from bending too far toward the evaluative end of the spectrum. I agree and find these commentators, including Lande, giving me pause. At the very least, eclectic mediation must be done by mediators sensitive to the perils of evaluation as well as sensitive to the shortcomings of facilitation. Some degree of supervision or review may also be necessary.

On another point (addressed further below), Lande praises facilitators for helping to keep mediation from becoming the exclusive domain of lawyers.⁵⁵ I agree, for a variety of reasons. Despite being an admitted lawyer chauvinist, who finds much to recommend from eclectic mediation by lawyers, I hope the field is never overly dominated by lawyers.

But, as Lande has suggested in informal conversation with me, the devil is in the details regarding our mutual concerns: How much evaluation is too much? What is the proper sociological balance between lawyers and nonlawyers in mediation? Indeed, what is the proper ratio of facilitation and evaluation in a world of eclectic mediation?

We cannot, of course, answer these questions in either a presumptive way or with scientific precision. As a result, I continue to remain committed to both an eclectic model of mediation and a common law approach to mediation, one that reacts to particular disputes rather than seeking to achieve grand rules of conduct or categorizations.

50. See Leonard Riskin, *Mediation by Lawyers*, 43 OHIO ST. L.J. 29 (1982).

51. See Gill-Austern, *supra* note 40, at 357 n.64.

52. Readers should not confuse Riskin's nonjudgmental academic inquiry as support for too much evaluation in mediation. In commentary on my paper and in his writings, Riskin appears to prefer that mediation be as facilitative as possible under the circumstances.

53. Although the Riskin *Grid* article became something of a lightning rod on the issue, Riskin did not invent the controversy but instead identified it, with a corresponding catalytic impact on scholarship in the area. Four years after the article appears, we continue to refer to it and debate its underlying implications.

54. See Lande, *supra* note 26.

55. See Lande, *supra* note 26.

In his very helpful commentary, Richard Birke notes the overwhelming presence of eclecticism and the futility of rigorous categorization.⁵⁶ He appears to agree with me that it is a false dichotomy and argues that the debate should be ended in order to permit the dispute resolution community to move on toward more important issues. I, of course, am happy to move beyond the false either/or, proper/improper, right/wrong dichotomy of the facilitative debate so long as the consensus or stasis Birke seeks is an eclectic one that does not choke off the development and deployment of effective mediation styles.

In addition, Lande's qualified praise of the facilitative ethos has prompted me to qualify my agreement with Birke in part. Although mediation scholars clearly need to address a number of important topics affecting dispute resolution, it is not necessary to eliminate all work and continued debate on the facilitative-evaluative issue. Essentially, the "war" is over, and eclectic mediation has carried the day and probably will continue to be the dominant form of mediation. However, continued attention to mediation styles can ensure that the eclectic mix of modern mediation does not become a new orthodoxy. Lande seems particularly concerned that mediation may become overly evaluative and sees a use for facilitative purists "blowing the whistle" should this occur. At the very least, facilitators can be mediation's watchdogs in this regard. They may also contribute additional information on selective uses of particular facilitative techniques.

Thus, on balance, I have been convinced that some continuing scholarly tension along the facilitative-evaluative dimension should not fade completely from the scene. However, it should fade to the background rather than maintain center stage.

III. A CONTINUING AGENDA FOR DISPUTE RESOLUTION PROFESSIONALS AND SCHOLARS

As the new century unfolds, dispute resolution as a field faces a number of specific issues more pressing than reaching complete accord regarding mediation styles or "resolving" the facilitative-evaluative debate (which is probably not subject to complete consensus due to the variety of persons, groups and cases involved in dispute resolution). In this section, I am suggesting something of an agenda for dispute resolution research that involves two dimensions: "epidemiological" and "operational."

"Epidemiological" information in the dispute resolution context is greater knowledge about the efficacy of dispute resolution (including lack of efficacy or collateral problems). At this juncture, alternative dispute resolution has for the past ten to twenty years been riding a wave and gaining significant ground on litigation. Lawsuits and the litigation system get continued bad press while arbitration and mediation are lionized (often without sufficient reflection) as panaceas to the delay, cost, and aggravation of litigation. Legal doctrine since the 1970s has shown greater

56. See Birke, *supra* note 25.

favor toward ADR.⁵⁷ Greater infrastructure now surrounds ADR in both law schools and the real world.

But missing or underdeveloped in this mix is a real knowledge of how well or poorly various ADR methods work in practice. The general information to date suggests that procedures such as arbitration, mediation, and early neutral evaluation ("ENE") have worked because (a) they remove cases from the system, and (b) the parties are satisfied with the resulting resolution of cases. The justice system needs more detailed information if ADR is to be maintained and improved.

For example, more study is needed on the issue of settlement rates. Although ADR is successful at a high rate, one could also classify litigation as "successful" in that upwards of 90% of civil cases settle prior to trial even if nothing is done.⁵⁸ Current data is relatively scarce on the question of settlement timing, resources expended, party satisfaction, and quality of outcomes. In short, one cannot say with certainty how much mediation either speeds resolution, makes it cheaper, or makes it a more satisfactory resolution than would have occurred without the third party mediator. There are significant theoretical works supporting the common sense view that a mediator is a resolution catalyst, and significant empirical data supporting that view,¹²³⁴²⁵ but hardly enough information either to consider the issue settled or inarguable.

An obvious task for ADR researchers is the determination of the degree to which ADR, particularly mediation, advances settlement along the dimensions of speed, cost, satisfaction and quality. Related to this is the question of the determinants of dispute resolution when parties merely negotiate in the face of pending litigation. We should ask not only how these results compare to ADR but also the extent to which these results vary according to the activities and orientation of counsel and the parties. As we now teach law students, one can be a good, "value-adding" negotiator or a bad, antipathy-creating negotiator. We should also know a good deal more about how this works in practice. Again, a significant amount of strong theoretical work has taken place, but relatively little empirical examination exists concerning the lawyer-negotiator's impact on dispute resolution, both in and out of formal mediation.

On the question of litigant satisfaction and just outcomes, much remains to be done. If, as I suggest, these two dimensions are an important source of differing views on the facilitative-evaluative question, it behooves the profession to know more about disputants' views on ADR outcomes and to make some assessment of the substantive quality of ADR outcomes. Currently, however, our information is largely restricted to surveys of disputant (or, more likely, attorney) satisfaction shortly after resolution. If party satisfaction is to be the touchstone of evaluating ADR, there should at least be longitudinal data indicating whether party views toward the settlement are stable over time. A disputant may become more sanguine about case resolution as time goes by or may find initial satisfaction turning into

57. See Jeffrey W. Stempel, *Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1380 (1996); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377 (1991) (discussing Supreme Court's shift from legal doctrine resistant to enforcement of arbitration agreements to one highly solicitous of such agreements).

58. See generally Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlement*, 46 STAN. L. REV. 1339 (1994).

embitterment, a feeling of regret or "being had." The extent to which either evolution of feeling occurs should be a major yardstick in our assessment of mediation or any other dispute resolution device.

I speak of dispute resolution or ADR rather than mediation alone because the party satisfaction measure and its temporal stability is an important gauge of the quality of ENE, arbitration, med-arb, summary jury trials, and plain vanilla litigation as well. In all these areas, there is data, but not definitive data. In particular, studies to date have been content to measure either attorney satisfaction as a proxy for party satisfaction or to measure satisfaction on the heels of the settlement. To fully evaluate user views of ADR, there must be sustained examination that does not measure party attitude only in the near aftermath when there may be either disappointment or euphoria.

On the quality of outcomes dimension, there has been even less examination. Lawyers have long held the view that "settlement is the best justice," suggesting that party satisfaction was *the* evaluative dimension for assessing dispute resolution long before the modern ADR movement blossomed. This same attitude has dominated the dispute resolution community, leading to relative disinterest in assessing the wisdom of the case resolutions resulting from mediation or old-fashioned unbrokered negotiation. However, if professionals are to praise the effectiveness of either mediation or private ordering through settlement, there should be at least some reliable indication that the results obtained are substantively defensible.

We intuitively believe that the results are defensible because the modern, Western tradition (holding relatively firm in what may have become a post-modern world, at least in academia) posits that people are rational actors and would not agree to or endorse mediated or negotiated settlements if the results were not reasonably decent. This is probably correct but it is not, or at least should not, be gospel. Society should have a better idea of what results from ADR (including ordinary negotiation) as compared to fully adjudicated or arbitrated outcomes. Should there be a divergence or a pattern of results, society must also determine whether these findings require revision of the status quo. To take perhaps the most obvious potential example: we may find that women in divorce do better or worse in mediation than in litigation or negotiation in the shadow of litigation. If so, surely that has implications for the manner in which we require (or don't require) mediation, its conduct, and administration and review, including whether a mediator stays on any jurisdiction's "approved list."

In short, there remains a good deal of empirical work to be done before we can bless modern ADR as an unalloyed benefit to society. Knowledge of ADR needs to progress beyond the theoretical and anecdotal in order to be accurately assessed.

On the operational dimension, ADR also faces a number of issues. By "operational," I mean the rules and norms that govern the actual conduct of ADR, particularly mediation. This includes questions of:

- mediator certification,
- mediator qualifications,
- mediator training,

- mediator immunity,
- mediation procedure and protocols,
- the intersection of ADR and unauthorized practice of law regulations,
- ADR ethics (particularly conflict of interest), and
- administration of ADR.

Richard Birke stated it well in closing his commentary in this issue:

Let's have symposia on whether substantive expertise matters, whether mediation should presumptively be multi-session or whether single sessions can work, whether team mediation makes good sense and if so when, what roles gendered and race-based assumptions play in our mediations, whether absolute confidentiality is really a prerequisite for successful mediation, what constitutes meaningful training, and other important questions.⁵⁹

On the issue of mediator certification and mediator qualifications, much has been written but the issue is far from resolution. Additional empirical work could prove fruitful. Is there a difference in party satisfaction or outcomes depending upon the existence and type of mediator certification in existence or the minimum qualifications required for mediators? We can ask the same questions regarding the regulation of arbitrators or ENE evaluators. To date, particularly for court-annexed arbitrators, the judicial establishment has been content to find lawyers with more than five years experience presumptively qualified. Perhaps this is too broad and lenient a standard. In the mediation field, the qualification and certification debate appears again to reflect some professional tension between lawyers and nonlawyers. Before further legislation or rulemaking on these topics, the profession may wish to await additional research and thinking on the issue.

Related to certification is the issue of mediator training. Training is now required in practically every jurisdiction with court-connected or mandated mediation but the training has hardly been evaluated. Some assessment should take place, the results of which may argue for revised curricula for ADR training. Again, while mediation has been the focal point of these discussions, the same issue applies to arbitrators and other dispute resolvers.

Mediator immunity must also be addressed. To the extent that the mediator is analogized to the judge, at least some degree of immunity would seem required, even if it is not the strong immunity traditionally accorded to judges. However, this question returns us to the facilitative-evaluative debate. If mediators are not evaluators in any way, the rationale for immunity is undermined. But a party may nonetheless claim to be harmed by negligent facilitation in mediation. This issue

59. See Birke, *supra* note 25, at 319.

needs further examination and a considered, probably nationally uniform, resolution if mediation and other ADR is to advance to its full potential.

The nature of ADR, particularly the facilitative-evaluative debate in mediation, also calls upon the profession to address the intersection of ADR and unauthorized practice of law regulations. One argument of the facilitative camp in mediation is that the facilitative approach avoids unauthorized practice regulation because the mediator does not give legal advice — and does not in a pure facilitative model provide opinions as to the range of case outcomes nor does she provide information as to the default legal rules governing disputes. Perhaps true, but even for the purely facilitative mediator there may be unauthorized practice issues. The facilitator nonetheless presides over dispute resolution that may have significant legal impact for the parties. Often this results in documentation of an agreement. Where the parties are not represented by their own counsel, there still arguably may be questions of whether the mediator is acting as a "lawyer for the situation" that should subject the mediator to unauthorized practice rules.⁶⁰

Lurking in the not-very-deep background of the unauthorized practice issue for ADR is the professional tension between lawyers and nonlawyers. If jurisdictions take an aggressive approach to unauthorized practice regulation of ADR, even pure facilitative mediators are at risk and there will be hydraulic pressure to make mediation an arena dominated almost exclusively by lawyers. Despite my attorney chauvinism, I think this would be a most unfortunate result in that it would deprive ADR of the expertise of nonattorneys, probably raise costs, and would probably restrict the facilitative and transformative potential of mediation in the face of dominance by more evaluatively inclined lawyers.

At the same time, my lawyer chauvinism makes me wary of too much more erosion in unauthorized practice rules. For decades, society has permitted title companies, realtors, insurance adjustors and document creators of all sorts to engage in what seems uncomfortably close to the practice of law.⁶¹ Today, pressure abounds to permit "multidisciplinary practice" where nonlawyer accountants or financial experts may exert too much control over lawyers in their organizations.⁶² In short, at the risk of being the stereotyped fuddy-duddy, I see some wisdom in at least maintaining or even strengthening the current edifice regarding unauthorized practice. The task for the immediate future is reconciling the values protected by practice-of-law regulation and the value achieved through nonlawyer dispute resolution, particularly in mediation. Valuable work has been done on the subject

60. I take the phrase "lawyer for the situation" from Louis Brandeis, who used the term during his Supreme Court confirmation hearings when his legal ethics were questioned for representing both parties to a business transaction. See GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* (1978) (describing Brandeis episode). Hazard later served as Reporter for the ABA Kutak Commission that wrote the *Model Rules of Professional Conduct*, which, in Model Rule 2.2, embodies the lawyer-for-the-situation ethos.

61. See generally GEOFFREY C. HAZARD, JR. & WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT*, pt. 5, rule 5.5 (2d ed. 1994 & Supp. 1998); CHARLES WOLFRAM, *MODERN LEGAL ETHICS* § 15.1 (1986).

62. See generally Symposium, *Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083 (2000). For now, momentum in favor of multidisciplinary practice has been slowed by the American Bar Association's rejection of a proposed amended Model Rule of Professional Conduct which would have permitted and regulated multidisciplinary practice.

but more remains to be done and policymakers will eventually need to take action based on the information provided by the ADR and scholarly communities.

Related to lawyer regulation and ADR is the question of ADR ethics or the professional responsibility of ADR professionals, particularly questions of conflict of interest, compromised loyalty, and neutrality. As noted above, the issue of neutrality is also important to achieving the proper mix of eclectic mediation. Improper or excessive evaluation may result in an insufficiently neutral or impartial mediator. To the extent that ADR is analogized to law practice, ADR professionals should probably be subject to professional responsibility rules similar to those governing attorneys. However, absolute parity risks undermining the flexibility and nonlegal nature of much dispute resolution, particularly ADR.

An additional remaining "loose end" of ADR is its administration and control. Currently, we have a relatively ad hoc world of ADR, with court-connected programs, private organizations, and individual, free-lancing dispute resolvers, including the nation's nearly one million attorneys. I have previously praised the concept of the multi-door courthouse as a means of coordinating ADR efforts, matching the most efficacious ADR to the situation, and providing some minimally acceptable level of quality control (as well as the opportunity for better longitudinal study).⁶³

ADR as part of a multi-door courthouse concept continues to make sense to me, but many in the ADR community probably are wary of too much government involvement in the process. Although I might think that society could use a "Ministry of Mediation" as much as Cardozo thought society could benefit from a "Ministry of Justice,"⁶⁴ this view is hardly established among lawyers or others in the ADR community. I would prefer to see some sustained exploration of the possibility of more organized dispensation of ADR in coordination with the judicial system and more active government involvement in ADR quality control. Private ordering has its advantages and personal liberty should permit disputants to exit "the system" in most cases. But for many disputants, particularly the unsophisticated or lawyerless, a more established, even bureaucratic organization may be more efficacious.

IV. CONCLUSION

In short, much remains for ADR practitioners and scholars. Important epidemiological and operational issues should be addressed and at least preliminarily resolved by the ADR community soon. To the extent that the facilitative-evaluative

63. See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996).

64. See Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921) (proposing that this justice ministry regularly review and examine the laws, propose changes, eliminations, or additions as necessary). His article was the driving force for states such as New York that established state law revision commissions for this purpose. As many know, the history of law revision commissions generally reflects a failure to achieve Cardozo's posited benefits. Although some might argue that this indicates a failure of the concept, others (including me) would argue that most such commissions were never adequately funded or supported by the legislative and executive branches, which tended to distrust the notion of "expert" law revision by unelected private citizens.

debate or related disagreement over technique diverts too much from these goals, the debate should be "put behind" us. Most effectively, the ADR community can both continue to monitor the mediator techniques issue and move more completely to these other issues by embracing a sufficiently eclectic middle ground of acceptable mediation.