

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Teaching the Ethical Values Governing Mediator Impartiality Using Short Lectures, Buzz Group Discussions, Video Clips, a Defining Features Matrix, Games, and an Exercise Based on Grievances Filed Against Florida Mediators

Paula M. Young*

I. INTRODUCTION

A mediator in a civil case calls one of the defendants a “spoiled brat” and identifies the defendants as “poor slob” who would never be recognized in court. The same mediator decides that the offer made by the plaintiff is acceptable and then attempts to impose the settlement on the defendants. When the defendants indicate that they will not settle at mediation, the mediator does not terminate the mediation at the parties’ request. In another civil case, the mediator tells one party that “if you go to court, you need to

* Associate Professor at the Appalachian School of Law (ASL). I teach negotiation, mediation, arbitration, dispute resolution system design, and insurance practice. For twenty years, I served as a commercial dispute litigator, mediator, and arbitrator. I earned degrees from Washington University (B.A., J.D.) and from the University of Missouri School of Law (LL.M. in Dispute Resolution). I thank and appreciate four wonderful research assistants: Sean Kennally, Mollie McCutcheon, Jason Gallagher, and Micah Blankenship. I also thank professors John Lande, Sophie Sparrow, and Ruth Vance for their comments about earlier drafts of this article. Members of the Virginia mediation community provided helpful feedback about the workshops at which I used the teaching techniques discussed in this article. Members of the Virginia Dispute Resolution Services’ (DRS) Ethics Committee—including Samuel Jackson, Lawrie Parker, Jeannette Twomey, John McCammon, and Frank Morrison—urged me to think more deeply about mediator impartiality and attempts to regulate it through a mandatory code of ethics. Greg Firestone permitted me to use and develop the analytical grid found at Appendix A. Sharon Press generously provided me access to the database of grievances filed against Florida mediators. Finally, I appreciate the cheerful help provided by Brenda Rice, my personal assistant.

be on medication and heavy drugs.” Another mediator, in a family mediation, acts “very aggressive[ly] and condescending[ly]” towards one party, yells at that party, and uses profanity when speaking to her. The mediator also tells the party that she will “lose in court” and that she makes a terrible witness. In another family mediation, the mediator shares her own personal story of divorce and then exhibits bias against men. She is rude, short, and impatient with the husband during the mediation process.

A mediator in an eleven-hour, single-session, family mediation threatens the wife with contempt of court, coerces her into staying past the time when she can bargain effectively, will not allow her to obtain food when she requests it, and uses verbal assaults to obtain an agreement. In a mediation involving a contractual dispute, the mediator advises the parties that the owner of the corporation facing bankruptcy has signed the contract in his individual capacity and thus can be sued individually. Up to that time, neither party has raised the issue. In a small claims case, the mediator advises the parties that the defendant’s wife has been “wrongfully named in the suit.” Another mediator explodes in anger when one of the parties asks that an additional term be included in the mediated settlement agreement.

A family mediator conducts a mediation for two married friends who plan to divorce. In another case, the law partners of a mediator have an ongoing relationship with the one of the mediating parties. During another mediation, the mediator invites one party and his counsel out for a drink without inviting the other party. After a failed divorce mediation, the mediator serves as legal counsel for the wife in the divorce proceedings.

These allegations appear in grievances filed against Florida mediators.¹ Whether true or not, they provide examples of mediator relationships, attitudes, or conduct that indicate the mediator has lost his or her impartiality towards one of the parties. Alternatively, the allegations indicate the mediator’s bias in favor of a particular substantive outcome, even if that outcome is simply to settle the dispute. They illustrate how mediator bias—actual or perceived—can directly affect the parties’ self-determination and the quality of the process that parties experience. Most of the grievances suggest significant lapses both in procedural justice, especially in terms of the parties’ ability to voice their concerns and preferences, and in providing even-handed, respectful treatment by the neutral.

These grievances offer new mediators and seasoned practitioners opportunities to identify, analyze, and discuss different sources of mediator bias. In this article, I describe a workshop presentation in which I used these grievances, other resources, and active learning techniques to teach the ethical values governing mediator impartiality.

1. See *infra* Appendix B.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

II. THIS ARTICLE

In an earlier article—*Teaching Professional Ethics to Lawyers and Mediators Using Active Learning Techniques*²—I discussed the barriers to learning about professional ethics (especially in the law school context), possible approaches to teaching professional ethics including the objectives of a course, the stages of learning in the context of professional ethics training, the design of an active or interactive learning environment, and various teaching methodologies.³ I then focused on several professional ethics courses in which the professors used active learning techniques to impart the knowledge, skills, and values of the legal profession.⁴ Finally, I surveyed the best practices for assessing student learning and reviewed the assessment techniques used in several professional ethics courses.⁵ The article concluded that we can create enthusiasm in students for professional ethics by providing well-designed training programs that use active learning techniques.⁶

Teaching Professional Ethics to Lawyers and Mediators Using Active Learning Techniques will serve as the first article in a series of articles I have planned on the use of active learning techniques to teach the core values of mediation: mediator impartiality, party self-determination, confidentiality, and quality of the process/mediator competence. This article is the second article in that series. In Section III, I summarize the first article in the series. In Section IV, I describe the role of mediator impartiality as a core value of the mediation field. I evaluate the definitions of mediation found in several ethics codes as they relate to mediator impartiality. Next, I discuss the value of impartiality in building trust between the mediator and the parties, and its role in supporting party self-determination. I then discuss the views of leading authors in the field who express skepticism about the existence of mediator impartiality and its unchallenged (or at least unexamined) status as a core value of mediation. I then discuss the overlap between elements of procedural justice and mediator impartiality.

2. Paula M. Young, *Teaching Professional Ethics to Lawyers and Mediators Using Active Learning Techniques*, 40 SW. U. L. REV. 127 (2010) [hereinafter Young, *Teaching Professional Ethics*].

3. *Id.* at 132–48.

4. *Id.* at 148–65.

5. *Id.* at 168–73.

6. *Id.* at 174.

I devote the majority of Section IV to a description of the active learning⁷ or interactive teaching methodologies I use to teach the ethical values governing mediator impartiality in a workshop environment. These techniques include short lectures, buzz group discussions, video clips, a defining features matrix or analytical grid, and an exercise based on grievances filed against Florida mediators. It develops “Another Grid for the Perplexed,”⁸ which conceptually organizes possible sources of mediator bias. This section distills and organizes the thinking of many leaders in our field on the topic of mediator impartiality.

Section V illustrates how an instructor can assess student learning by using the exercises based on grievances filed against Florida mediators. Section VI provides an analysis of the learning objectives met in the workshop, a consideration of the limits to the scope of the workshop given the time available for the course, a description of how I have scaled the workshop for use in my law school courses, a summary of the evaluations provided by workshop participants, and an acknowledgement that the workshop provides an opportunity to interact with true adult learners. In Section VII, I conclude that the conceptual framework provided by “Another Grid for the Perplexed” allows mediators to quickly and effectively resolve ethical dilemmas arising in the moment. I also conclude that instructors should work creatively to design ethics courses that use active learning techniques.

Appendix A provides a copy of “Another Grid for the Perplexed,” illustrating examples of the different sources of mediator bias. Appendix B provides copies of thirteen exercises based on the grievances filed by parties against Florida mediators. This article makes these grievances available to ethics trainers for the first time in this format.

7. For a discussion of active learning techniques, see generally CHET MEYERS & THOMAS B. JONES, *PROMOTING ACTIVE LEARNING: STRATEGIES FOR THE COLLEGE CLASSROOM* (1993) (with chapters on informal small groups, cooperative student projects, simulations, case studies, guest speakers, and the effective use of technology); WILLIAM M. TIMPSON ET AL., *TEACHING AND PERFORMING: IDEAS FOR ENERGIZING YOUR CLASSES* (1997) (with chapters on lecture; questions, answers and discussions; energy, creativity, and spontaneity; and three chapters on using theater techniques and improvisation in class). For a discussion of active learning techniques used to teach Millennial generation students, see J. BRADLEY GARNER, *A BRIEF GUIDE FOR TEACHING MILLENNIAL LEARNERS* (2007). For a discussion of self-regulated learning, see generally BARRY J. ZIMMERMAN, *SELF-REGULATED LEARNING: FROM TEACHING TO SELF REFLECTIVE PRACTICES* (1998); Michael H. Schwartz, *Teaching Law Students to be Self-Regulated Learners*, 2003 MICH. ST. L. REV. 447.

8. See *infra* note 116 and accompanying text.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

III. SUMMARY OF FIRST ARTICLE IN THE SERIES

A. *Commitment to Teaching Professional Ethics Effectively*

As I noted in the first article in this series, the legal academy has given teaching theory and methodology greater attention.⁹ Even so, professors teaching professional ethics courses in law schools tend to use more traditional methods of teaching, especially lecture and Socratic dialogue.¹⁰ The ABA standards governing law schools do not press for the use of more active learning techniques.¹¹ I also noted in that earlier article that the mediation field could be accused of even less concern for mediation ethics, including how, or whether, we teach the subject.¹² Only seventeen states have a mandatory ethics code for mediators.¹³ Very few states impose any requirement that instructors include a discussion of mediation ethics in courses designed to train new mediators.¹⁴ Similarly, very few states require mediators to obtain additional ethics training as a condition to remaining certified, registered, or rostered.¹⁵

9. See Young, *Teaching Professional Ethics*, *supra* note 2, at 148.

10. *Id.* at 135.

11. ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 302(a)(5), (b)(2) (2007-2008).

12. See Young, *Teaching Professional Ethics*, *supra* note 2, at 149.

13. See Paula M. Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 736–37 n.48 (2006) [hereinafter Young, *Take It or Leave It*].

14. ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON CREDENTIALING, REPORT ON MEDIATOR CREDENTIALING AND QUALITY ASSURANCE § 1(C), at 3–6 (Discussion Draft Oct. 2002), http://www.abanet.org/dispute/taksforce_report_2003.pdf (recommending that the task force develop “model standards for mediator preparation programs [and] [o]utline one or more model systems of mediator credentialing . . . focusing initially on the accreditation of mediator preparation programs”).

15. For example, by Administrative Order, the Florida Supreme Court has imposed continuing mediator education (CME) requirements on all certified mediators. Fla. Sup. Ct. Admin. Order No. A0SC08-23 (June 30, 2008), at 10-13, *available at* http://www.flcourts.org/gen_public/adr/index.shtml. It requires certified mediators to complete sixteen hours of CME, including four hours of ethics training, in each two-year certification renewal cycle.

The Georgia Commission on Dispute Resolution (GODR) sets standards for continuing mediation education that appear in Appendix A to the ADR Rules. GA. SUP. CT., UNIFORM RULES FOR DISPUTE RESOLUTION PROGRAMS, app. A (1993), <http://www.godr.org/pdfs/CURRENT%20ADR%20RULES%20COMPLETE%2003-28-08.pdf>.

This same appendix declares that “neutrals must be competent.” *Id.* at R. 5.4. The rules require six hours of additional CME during every two-year registration renewal cycle. GA. SUP. CT., UNIFORM

I noted that “the rules governing confidentiality in mediation make it difficult for mediators to talk with others about ethical dilemmas that arise in a particular mediation.”¹⁶ We typically work alone, in small conference rooms, under potentially stressful, dynamic, and emotionally-charged conditions. I argued that as a field, we should care deeply about whether mediators understand their ethical obligations, whether they can resolve ethical dilemmas “in the moment,” and whether poor experiences in mediation undermine the public’s trust in the judicial system.¹⁷

As I noted in my earlier article:

Most mediators learn the theory and skills of mediation through highly interactive experiential teaching methods, including discussion, role-plays, video clips, and performance feedback. Accordingly, instructors will face little resistance to using these types of methodologies when teaching mediation ethics. In fact, these adult learners may expect a more interactive learning environment.¹⁸ Even so, my experience suggests that, at least in basic mediation training, instructors rely heavily on lecture to discuss ethics with trainees. They do so because of the time constraints existing in most courses.¹⁹

I hope this series of articles will offer trainers some additional methods for conveying this important knowledge, set of skills, and professional values.

B. Methods for Teaching Mediation Ethics

As noted in my first article in the series, “Thompson suggests that instructors teaching mediation ethics should focus on four ‘competency areas’: (1) self-awareness of potential sources of bias; (2) knowledge of professional standards; (3) analysis of ethical dilemmas and development of

RULES FOR DISPUTE RESOLUTION PROGRAMS, app. B (1993). The rule does not require, however, additional ethics training. *Id.* at 16–17. The GODR can remove a neutral from the registry if he or she fails to meet the requirement. *Id.* at 16.

The Virginia Supreme Court requires mediators to obtain re-certification every two years. Mediators seeking re-certification must complete an additional eight hours of training, including two hours of mediation ethics instruction. Training Guidelines for the Training and Certification of Court-Referred Mediators § G (effective Jan. 1, 2000), <http://www.courts.state.va.us/drs/main.htm>. The Virginia Ethics Committee, on which I served, revised these guidelines. Virginia’s DRS office has not yet implemented the revisions. However, provisions cited in this article may be different by the time of its publication.

16. See Young, *Teaching Professional Ethics*, *supra* note 2, at 150.

17. *Id.* at 151.

18. *Id.* at 151-52 (citing Linda Morton, Janet Weinstein & Mark Weinstein, *Not Quite Grown Up: The Difficulty of Applying Adult Education Model to Legal Externs*, 5 CLINICAL L. REV. 469, 475–77, 496 (1999)). *Best Practices* provides a long list of other teaching methodologies that instructors can use in the design of a professional ethics course. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 132–33 (Clinical Legal Education Association 2007) [hereinafter BEST PRACTICES].

19. Young, *Teaching Professional Ethics*, *supra* note 2, at 151-52.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

skills to decide on a course of action; and (4) performance in the moment when the mediator faces an ethical dilemma.”²⁰ In that earlier article, I described in some detail several of the active learning techniques she uses to teach mediator ethics.²¹ I found only Thompson’s article on techniques for teaching mediation ethics. Otherwise, mediation instructors cover the topic from time to time at the major dispute resolution conferences. In the face of this gap in the literature, I considered by analogy the articles about active learning in innovative law school courses designed to teach legal and judicial professional ethics.²² My earlier article also discussed active learning techniques in general.²³

C. *Assessing Student Learning*

The first article also discussed in detail methods for assessing student learning. I noted that the authors of *Best Practices* devote over thirty pages to the principles governing student assessment.²⁴ The authors identify the best practices for assessing student learning as (1) being clear about the goals of each assessment; (2) assessing whether students learned what the instructor taught (as opposed to testing topics not taught by the instructor); (3) conducting criteria-referenced assessments, rather than norm-referenced assessments (also known as reliability of the assessment method); (4) using assessments to inform students of their level of professional development; (5) being sure the assessment is feasible in light of the subject, time, training required to implement the assessment, equipment or technology needed, number of assessments required, and financial cost; (6) using multiple assessment methods; (7) distinguishing between formative and summative assessments; (8) conducting formative assessments throughout the term of the course; (9) conducting multiple summative assessments throughout the term of the course, when possible; (10) ensuring that summative assessments also serve as formative assessments; and (11) requiring students to compile

20. *Id.* at 143 (citing Mary Thompson, *Teaching Ethical Competence*, DISP. RESOL. MAG., Winter 2004, at 23 (describing several types of interactive training exercises designed to teach mediation ethics)). In the text of this article, I have used only last names in identifying referenced authors.

21. *Id.* at 131 n.12.

22. *Id.*

23. *Id.*

24. BEST PRACTICES, *supra* note 18, at 235–64.

educational portfolios.²⁵ Thus, instructors may want to separately focus on ways to accurately gauge whether trainees have understood the basic values of and ethical guidelines that apply to the mediation field.

IV. TEACHING THE ETHICAL VALUES GOVERNING MEDIATOR IMPARTIALITY USING SHORT LECTURES, BUZZ GROUP DISCUSSIONS, VIDEO CLIPS, A DEFINING FEATURES MATRIX, GAMES, AND AN EXERCISE BASED ON GRIEVANCES FILED IN FLORIDA AGAINST MEDIATORS

This section of the article describes the approach I took in teaching both new and experienced mediators about the ethical values governing mediator impartiality at a two hour workshop sponsored by the Virginia Mediation Network (VMN), a statewide organization of mediators that offers two training conferences each year. Each conference offers at least two credit hours of ethics training. In describing the lesson plan for this workshop, I also intend to “think-out-loud” about how and why I developed each component of the workshop.²⁶ In this section, I quote extensively from the original sources so instructors can use these quotes in their training programs, if they like.

A. *Short Lecture on the Core Values of Mediation*

I start most workshops with a short, Power Point lecture²⁷ to allow students to absorb some of the basic knowledge about mediator neutrality.

25. *Id.* at 239–64. See also Young, *Teaching Professional Ethics*, *supra* note 2, at 168-69 (describing assessment tools used in innovative law school courses on legal ethics).

26. For a discussion of the thinking out loud teaching technique in the grade school context, see *Think Aloud Strategy* (Teacher Vision), <http://www.teachervision.fen.com/skill-builder/problem-solving/48546.html>. It allows the expert to show the novice the expert’s thinking and problem-solving methodology by saying aloud what the professor is thinking as he or she takes each step to solve the problem. The professor illustrates the reasoned approach to the problem.

27. See DONALD A. BLIGH, *WHAT’S THE USE OF LECTURES?* (2000). The research on lecture as a teaching methodology shows: (1) student attention and concentration during lectures declines after fifteen to twenty minutes; (2) students cannot listen to an entire lecture effectively; (3) lectures no more effectively transmit information than other teaching methodologies; (4) lecture less effectively promotes thought or change in attitudes than other teaching methods; (5) a lecture’s effectiveness depends on the educational level of the audience; (6) students do not pay attention to the lecture 40% of the time; (7) students retain 70% of the information in the first ten minutes of the lecture, but in the last ten minutes of the lecture they retain only 20% of the information; and (8) “four months after taking a traditional lecture oriented introduction to psychology course, students knew only 8% more than a control group of students who had never taken the course.” James E. Groccia & Marilyn S. Miller, *Creating Interactive Learning Environments, Program for Excellence in Teaching*, University of Missouri School of Law 2–3 (Sept. 1996) (unpublished presentation notes, on file with author). See also Young, *Teaching Professional Ethics*, *supra* note 2, at 135 n.32.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

As a “top-down” learner,²⁸ I like to convey the big picture to students and trainees so they have a broader context in which to put the more specific information they will learn in the workshop. The first slide summarizes the “core values” of mediation: party self-determination, mediator impartiality, and confidentiality of mediation communications.²⁹ To that list, I have added “quality of the process/mediator competence.” Obviously, a workshop on mediator impartiality will relate directly to the second core value on this list.

1. Definitions of Mediation

These core values find expression in the various definitions of mediation. For example, the 2005 Model Standards³⁰ define mediation as “serv[ing] various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify

28. See M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139, 162 (2001) (top down sequencers “process information best if they have the general concepts first as an anchor to the facts that come later”; bottom up sequencers “process information best if they have the facts first from which the general concepts follow”).

29. The mediation field talks in terms of the “core values” of mediation. For a discussion of the core values of mediation, see Carol L. Izumi & Homer C. La Rue, *Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 86. The authors argue:

The three core values of self-determination, mediator neutrality, and confidentiality are interdependent qualities that define mediation as it was originally envisioned and gave rise to the promise of mediation as a distinct alternative to adjudication. These values are integral to the legitimacy of mediation as a consensual, flexible, creative, party-driven process to resolve disputes.

Id. See also Art Hinshaw, *Mediators as Mandatory Reporters of Child Abuse: Preserving Mediation’s Core Values*, 34 FLA. ST. U. L. REV. 271, 277–84 (2007) (describing mediator neutrality as the “*sine qua non* of mediation”).

30. In the fall of 2002, a committee composed of representatives from the American Bar Association (ABA), Association for Conflict Resolution (ACR), and the American Arbitration Association (AAA) revised the model standards developed a decade earlier by members of the field. After an extended drafting, review, and comment period, the Joint Committee of drafters developed its April 2005 draft and presented it to its sponsoring organizations for their approval. On August 9, August 22, and September 8, 2005, the ABA House of Delegates, the Board of Directors of ACR, and the AAA, respectively, adopted the model standards with one revision governing contingency fees. Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 APPALACHIAN J. OF L. 195, 203–06 (2006) [hereinafter Young, *Rejoice!*] (providing a history of the Revised 2005 Model Standards of Conduct for Mediators).

interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.”³¹ The Florida Supreme Court defines mediation as “a process whereby a *neutral and impartial third person* acts to encourage and facilitate the resolution of a dispute *without prescribing what it should be*. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.”³² Virginia statutes define mediation as “a process in which a mediator facilitates communication between the parties and, *without deciding the issues or imposing a solution on the parties*, enables them to understand and to reach a mutually agreeable resolution to their dispute.”³³ These definitions emphasize the facilitative nature of the mediator’s process interventions and party control over the outcome.

2. Perspectives on Mediator Impartiality

a. Code Definitions of Mediator Impartiality

All mediation ethics codes attempt to define the nature of mediator impartiality. The 1994 Model Standards of Conduct for Mediators—adopted by the ABA, the AAA, and the Society of Professionals in Dispute Resolution—defined mediator impartiality as “freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all participants as opposed to any one individual.”³⁴ This statement focuses on the objective behavior of the mediator. In contrast, the revised 2005 Model Standards define the concept differently: “Impartiality means freedom from favoritism, bias, or prejudice.”³⁵ This iteration of the standard shifts the focus to the subjective attitude of the mediator towards the parties or the outcome of the mediation. As one of my Virginia colleagues has noted, how would you determine whether a mediator had violated this subjective standard?³⁶ He also asked whether a mediator could ever remain free of

31. MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmb1. (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

32. FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.210 (2000) (emphasis added), *available at* http://www.flcourts.org/gen_public/adr/bin/RulesForMediators.rtf.

33. VA. CODE ANN. § 8.01–581.21 (West 2007) (emphasis added).

34. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994) (amended 2005).

35. Model Standards require a mediator “where appropriate . . . [to] make the parties aware of the importance of consulting other professionals to help them make informed choices.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II.A–B (2005).

36. Telephone Interview with Samuel S. Jackson, Jr., Adjunct Professor of Law, Georgetown University Law Center, in McLean, Va. (May 14, 2008).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

some sort of bias.³⁷ This colleague suggested that any code of ethics should instead focus on the objective behavior of the mediator.³⁸ Another standard in the 2005 Model Standards takes this approach. It provides: “A mediator shall conduct the mediation in an impartial manner and avoid conduct that gives the appearance of partiality.”³⁹ The subsections of this standard similarly focus on the objective behavior of the mediator. Thus, an instructor may wish to point out this distinction to trainees.

b. Other Descriptions of Mediator Impartiality

Well-known mediators and professors teaching mediation have provided their own perspectives on this topic. Benjamin, a well-known Oregon mediator, suggests that the term “neutrality” has many meanings:

In the classic sense of the term “neutral,” the mediator: (1) will not intervene in the substance of the dispute; (2) is indifferent to the welfare of the clients; (3) has no previous or present relationships with the parties outside the mediation; (4) will not attempt to alter perceived power variances; (5) is disinterested in the outcome; and (6) is unconcerned with the impact of the settlement on unrepresented parties The ambiguity of the term is even more confusing for clients in conflict, many of whom come to mediation with the preconceived notion that a mediator is or should be just like a judge.⁴⁰

One author has described mediator impartiality as a “basic principle[] of the mediation process . . . and quite frequently included as integral elements of codes of ethics for mediators.”⁴¹ Other authors call mediator impartiality a “longstanding characteristic[] of Western mediation practice,”⁴² “essential,”⁴³ an “assumption built into the problem-solving model,”⁴⁴ “a

37. *Id.*

38. *Id.*

39. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II.B (2005).

40. Robert Benjamin, *The Risks of Neutrality—Reconsidering the Term and Concept*, 17 MEDIATION NEWS 8, 8–9 (Summer 1998), available at <http://www.mediate.com/articles/benjamin.cfm> [hereinafter Benjamin, *Risks of Neutrality*].

41. KIMBERLEE K. KOVACH, MEDIATION IN A NUTSHELL 151–52 (2003) [hereinafter KOVACH].

42. JACQUELINE NOLAN-HALEY ET AL., INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES 306 (2005) [hereinafter NOLAN-HALEY ET AL.].

43. FORREST S. MOSTEN, MEDIATION CAREER GUIDE: A STRATEGIC APPROACH TO BUILDING A SUCCESSFUL PRACTICE 25 (2001) (“While appearing neutral is important, actually maintaining neutrality is essential. Both being neutral and appearing that way are easier said than done.”).

foundational claim of the field,”⁴⁵ and “deeply imbedded in the ethos of mediation, even though observers disagree about the meaning and achievability of the notion.”⁴⁶ Some authors note the importance of a mediator’s impartiality to the process of building trust with the parties and in supporting party self-determination. Several experienced mediators explain that:

Trust is attained and maintained when the mediator is perceived by the disputants as an individual who understands and cares about the parties and their disputes, has the skills to guide them to a negotiated settlement, treats them impartially, is honest, will protect each party from being hurt during the mediation . . . and has no interests that conflict with helping to bring about a resolution which is in the parties’ best interest.⁴⁷

Other authors agree saying that: “In order to gain the disputants’ trust and confidence, a mediator should assure the disputants of the mediator’s impartiality about the dispute and the individuals involved.”⁴⁸ Richardson, a mediator and Dean of the School of Architecture and Planning at the University of New Mexico, calls impartiality “a keystone in building trust, establishing ongoing relationships, and working effectively with participants I hold a sacred ‘contract’ with a group to act in an impartial manner.”⁴⁹ Stulberg explains further:

If the mediator is neutral and remains so, then he and his office invite a bond of trust to develop between him and the parties. If the mediator’s job is to assist the parties to reach a resolution, and his commitment to neutrality ensures confidentiality, then, in an important sense, the parties have nothing to lose and everything to gain by the mediator’s intervention [T]here is no way the mediator could jeopardize or abridge the substantive interest of the respective parties.⁵⁰

The authors of a family mediation book assert that:

One of the goals of mediation is to return control of the settlement process to the parties. In order to accomplish this goal, mediation statutes may define the role of the mediator as someone who is neutral in regard to the parties’ interest and whose purpose is to facilitate

44. JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* 35–36 (2000) (agreeing with many critics that mediator impartiality does not truly exist).

45. Christopher Honeyman, *Understanding Mediators*, in *THE NEGOTIATOR’S FIELDBOOK* 581, 581 (Andrea K. Schneider & Christopher Honeyman eds., 2006).

46. LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 264 (3d ed. 2005).

47. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 113 (5th ed. 2007).

48. JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 115 (2006).

49. Jennifer Thomas-Larmer, *Best Practices: A Participant Accuses You of Taking Sides . . .*, *MEDIATE.COM*, Jan. 1999, <http://www.mediate.com/articles/takingsides.cfm> [hereinafter *Best Practices: A Participant Accuses You*].

50. Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Suskind*, 6 *VT. L. REV.* 85, 96 (1981) [hereinafter *Stulberg, Reply to Professor Suskind*].

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the attainment of parties' goals, whatever they may be. Neutrality therefore becomes a critical assumption of the mediation process⁵¹

Other authors suggest that: "Mediator neutrality, later incorporated in all mediation ethics codes, anchored its success and confirmed the dominant conception of mediation as a process designed to facilitate dialogue among negotiating parties."⁵² In summary, these authors indicate that mediator impartiality provides parties with confidence in the mediator and the process, and preserves party self-determination.

c. Impartiality as an Aspirational, and Unachievable, Goal

Many scholars and practitioners acknowledge the difficulty of maintaining actual neutrality or impartiality in mediation. Several authors challenge whether mediator impartiality can exist. One author calls it a "folklore."⁵³ Cobb and Rifkin also put it in the class of "folk concepts."⁵⁴ They call mediator neutrality "transparent" and "opaque."⁵⁵ "[T]ransparent because it operates on the basis of widely held assumptions about power and conflict, and opaque because it is exceedingly difficult to raise questions about the nature and practice of neutrality from *within* this consensus."⁵⁶ The 2002 draft of the Model Rule for the Lawyer as Third-Party Neutral, prepared by the CPR-Georgetown Commission on Ethics and Standards in ADR, explicitly states that "absolute neutrality is unobtainable even under the best of circumstances."⁵⁷ Its drafters believed, however, that rules against conflicts of interest served two objectives: "(i) to protect parties from actual harm suffered by conflicts of interest, and (ii) to protect the process, the public, and the parties from the 'appearance' of improper influences [or self-interest]."⁵⁸ Hinshaw notes: "Practically speaking . . . once a mediator

51. Connie J. A. Beck et al., *Research on the Impact of Family Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 471 (Jay Folberg et al. eds., 2004).

52. ALFINI ET AL., *supra* note 48, at 12.

53. *Id.* at 35.

54. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 *LAW & SOC. INQUIRY* 35, 37 (1991).

55. *Id.* at 35.

56. *Id.* at 37 (emphasis in original).

57. CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, *MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL* R. 15 (2002) (adopting an approach requiring broad and continuing disclosures of any circumstances potentially affecting the mediator's neutrality and suggesting that the mediator make the disclosures in writing).

58. *Id.* at 17 (discussing Rule 4.5.4 governing conflicts of interest).

makes it past the mechanical conflicts check and the mediation begins, it is often difficult for the mediator to be completely impartial due to the relational nature of the mediator's task."⁵⁹ Moore concludes: "No one can be entirely impartial."⁶⁰

Mayer, a partner at CDR Associates, suggests: "[T]he term *neutral* is associated with being inactive, ineffective, or even cowardly In the middle of intense conflict, many do not believe anyone can or should be neutral."⁶¹ Another author states: "Neutrality is an illusion; there is no such thing as a detached or objective observer."⁶² Cloke argues that: "[T]here is no such thing as genuine neutrality when it comes to conflict. Everyone has had conflict experiences that have shifted his or her perceptions, attitudes, and expectations, and it is precisely these experiences that give us the ability to empathize with the experiences of others."⁶³ Cloke recommends that mediators shift their focus from the concept's emphasis on "formality, perspective, objectivity, logic, or dispassionate judgment" to the concept's "concern for fairness and lack of selective bias."⁶⁴ He argues that parties seek a mediator who is "honest, empathetic, and 'omnipartial,' meaning on both parties' sides at the same time."⁶⁵ Rather than ignoring his or her past experiences, the mediator should instead use them "to gain an open, honest, humble perspective on the present [conflict]."⁶⁶

Alfini, Press, Sternlight, and Stulberg acknowledge that mediators are not neutral "with regard to everything."⁶⁷ They state:

Each of us has preferences, interests, commitments to certain moral principles and to an evolving philosophy of life which, when challenged or transgressed, will prompt us into advocating and acting in a manner that is faithful to these dictates. There is clearly no reason to be apologetic or hesitant about defending or advocating such considered judgments. It is also true, however, that mediation as a dispute settlement procedure can be used in a variety of contexts, not all of which would meet approval with everyone's

59. Hinshaw, *supra* note 29, at 281.

60. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 52 (2d ed. 1996) [hereinafter MOORE].

61. BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* 83 (2004).

62. RONALD S. KRAYBILL ET AL., *PEACE SKILLS: A MANUAL FOR COMMUNITY MEDIATORS* 20 (2001).

63. KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 12–13 (2001) (stating that "[j]udges have the most intractable bias of all: the bias of believing they are without bias").

64. *Id.* at 13.

65. *Id.* Other authors call for mediators to "hold themselves equidistant from each of the parties." Beck et al., *Research on the Impact of Family Mediation*, *supra* note 51, at 472.

66. CLOKE, *supra* note 63, at 13.

67. ALFINI ET AL., *supra* note 48, at 166.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

considered judgments. What is important is that one keep distinct his personal posture of judgment from the rule defined practice of the mediator and act accordingly.⁶⁸

Beck, a professor in the Psychology and Law Program of the University of Arizona, and her co-authors report that individuals most likely maintain impartiality when the mediator's "cognition (thoughts), affect (feelings), and behavior are neutral."⁶⁹

In the divorce mediation context:

[T]he mediator should hold no prior attitudes toward the couple or issues in the divorce, have no preexisting negative or positive feelings concerning the mediation process with the couple or the specifics of the proposed divorce, and no prior experiences relevant to the mediation.

None of these three contingencies is likely to occur in mediation. Mediators *do* have prior experiences, thoughts, and feelings that all have been shown to influence their mediation responsibilities. Mediators work with divorcing couples every day, expressing attitudes and building cognitions—which make these two individual-level variables most likely to predict mediator behavior. With repetition, these attitudes and cognitions become easily accessible to the mediator and are likely reflected in his or her work. This is a problematic dynamic [A]ttitudes often become more extreme when they are expressed frequently.⁷⁰

Honeyman and several other scholars express concern that a mediator will not be aware of his or her biases. Accordingly, he or she will not keep them out of the interventions they make in the process.⁷¹ Lerner, writing in the context of legal ethics, says that values, intuitions, expectations, and needs "operate below the radar of our consciousness, automatic, 'emotional' reaction, rather than thoughtful, reasoned analysis [and so they] may drive our responses to stressful questions of ethics and professional responsibility."⁷² Accordingly, even with the use of best practices and holding the best intentions to remain impartial, mediators still harbor biases that may, or do, affect the process.

68. *Id.* (thus referring to the Quadrant 3 sources of bias discussed *infra* Part IV.E.3).

69. Beck et al., *Research on the Impact of Family Mediation*, *supra* note 51, at 471.

70. *Id.* (citations omitted).

71. Honeyman, *supra* note 45, at 582, 585–87; EDWARD BRUNET ET AL., *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE: CASES AND MATERIALS* 252 (3d ed. 2006).

72. Alan M. Lerner, *Using our Brains: What Cognitive Science and Social Psychology Teach us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIPIAC L. REV. 643, 643 (2004).

d. Mediator Impartiality as a “Straightjacket”

Still other authors suggest that mediator impartiality can adversely affect the mediation in unwanted ways. For instance, Kraybill, a professor in the Conflict Transformation Program at Eastern Mennonite University, asserts: “Neutrality is never a necessary or constructive goal in conflict, particularly in relation to issues of justice.”⁷³ Beck and her co-authors express even greater concern. “If, for whatever reason, litigants presume mediator neutrality but then perceive mediator bias at one or many points throughout the process, their level of frustration and dissatisfaction with the process is likely to increase substantially.”⁷⁴ Mediators create party presumptions about mediator impartiality in their agreements to mediate, their opening orientation monologues, and in joint session behaviors. In addition, a mediator’s caucus behaviors can severely undermine the parties’ perceptions about his or her impartiality. “Ironically, both litigants may end up equally distrusting of and frustrated by the mediator, if he or she engages in these apparently highly supportive private conversations with one or both parties.”⁷⁵

Benjamin credits the techno-rational belief system and methods of scientific inquiry for the attractiveness of the term “neutral.”⁷⁶ However, the etymology of the word shows its ties to the word “neuter.”⁷⁷ He suggests that we should consider as its opposite not “partisan” or “partial,” but “involved” and “engaged.”⁷⁸ He writes:

In many other cultures, the last person people want to help them settle their conflict is a remote, unfamiliar neutral. Even in our own culture, parties in conflict may think they want a neutral, but when questioned, they are really looking for a third party who will hear and validate their concerns.⁷⁹

He notes the increasing use of the term “balanced” in describing the mediator’s role.⁸⁰ By using this term, a mediator can avoid party misunderstanding and a potential ethics grievance.⁸¹ Hinshaw, apparently agrees, saying:

73. KRAYBILL ET AL., *supra* note 62, at 19.

74. Beck et al., *Research on the Impact of Family Mediation*, *supra* note 51, at 473.

75. *Id.*

76. Benjamin, *Risks of Neutrality*, *supra* note 40, at 2.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* See *infra* notes 311–32 and accompanying text (discussing grievances filed against mediators based on allegations of bias, conflicts of interest, or other breaches of impartiality).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

During this process, the mediator may engage in what are considered legitimate mediator moves that may favor one side over the other at any given moment as the mediator spends time focusing on each party's interests and aspirations. The challenge is to cultivate the relationship necessary for a successful mediation without compromising the mediator's professional distance from the parties.⁸²

Hinshaw calls this limited bias the phenomenon of "equidistance," in which the mediator creates symmetry between the parties when gauged by the process as a whole.⁸³

Benjamin also argues that neutrality, when practiced to the extreme, "can straitjacket and constrain the use of strategies necessary to manage difficult conflicts. Neutrality . . . [can] disincline[] mediators . . . to sense and respond to the natural feel of conflict and to over rely on structured protocols and formulaic practice approaches."⁸⁴

Brunet and his co-authors also suggest that the notion of mediator impartiality reflects American culture. In other cultures, parties expect mediator activism and involvement.

For example[,] in both the Navajo Peacemaker Court and the Filipino Katarungang Pambarangay system . . . the mediators have confidence in their own knowledge of the community values which all participants are assumed to share. Two aspects of these mediations mark them especially: (1) the mediators openly inject concerns larger than the participants themselves; for example, community harmony and even spiritual guidance which they understand the parties share; and (2) the mediators are rarely ever strangers or unknown volunteers or professionals even though they are not to be biased towards one side or the other.⁸⁵

Cloke also finds neutrality in conflict resolution problematic. He says:

[N]eutral language is bland, consistent, predictable, and homogeneous; it is used to control what cannot be controlled. When confronted with something unique, or with paradox, contradiction, or enigma, a stance of neutrality makes us incapable even of observing without denying or destroying the very thing being observed, which is often a conflict that is riddled with paradoxes, contradictions, and enigmas.⁸⁶

82. Hinshaw, *supra* note 29, at 281.

83. *Id.*

84. Robert D. Benjamin, *Managing the Natural Energy of Conflict: Mediators, Tricksters, and the Constructive Uses of Deception*, in BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 79, 81 (Daniel Bowling & David A. Hoffman eds., 2003) (citing Robert D. Benjamin, *The Risks of Neutrality*, 17 MEDIATION NEWS 8-9, (Summer 1998)).

85. BRUNET ET AL., *supra* note 71, at 255-56.

86. CLOKE, *supra* note 63, at 13.

Finally, Gunning worries that “[t]he American model of mediation emphasizes ‘neutrality’ in a mediator and generally defines neutrality as requiring non-intervention on the part of the mediator.”⁸⁷ But when parties come to mediation with imbalances of power reflecting broader issues of racism or other societal power imbalances, the mediator’s silence, rather than indicating neutrality, reinforces the more powerful person’s interpretative framework.⁸⁸ Grillo expressed similar concerns about sexism’s power in mediation when the mediator reinforces gender-based stereotypes, power imbalances, and outcomes, while seeming to act with impartiality.⁸⁹

Menkel-Meadow has summed up these various thoughts about mediator impartiality by asking whether a mediator “should be totally ‘neutral’ or merely ‘unbiased’ or actually ‘enmeshed’ in and knowledgeable about the dispute or disputants.”⁹⁰

As discussed below, participants in the VMN workshop reflected this range of opinions about the role and value of mediator impartiality.

B. Buzz Group Discussion of Procedural Justice in Mediation

In an attempt to get workshop participants to begin the processing (second) stage of learning,⁹¹ I ask them to consider why we should concern ourselves with mediator impartiality. I ask if mediator impartiality is a nice theoretical value or if it actually affects the experience of parties in mediation. In the VMN workshop, I next give a short lecture about the research on procedural justice.⁹² That research shows that parties look for four essential elements in any dispute resolution process—whether in court,

87. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 80.

88. *Id.* at 80–81.

89. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1590 (1991). For a discussion of race and gender in the context of bias towards the parties, see *infra* notes 172, 175 and accompanying text.

90. Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 24 (2004) [hereinafter Menkel-Meadow, *From Legal Disputes*].

91. Learning theory suggests that students must complete four stages of learning: (1) absorbing information, (2) processing information, (3) retaining and recalling information, and (4) transferring the information to a new situation and solving problems. See Young, *Teaching Professional Ethics*, *supra* note 2, at 144 n.78.

92. Thus, I am giving a new concept to participants to absorb. For a summary of the robust research on procedural justice, see Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171 (2005).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

in arbitration, or in mediation.⁹³ First, parties need to feel that they have sufficient time and opportunity to tell their stories about the dispute, voice their concerns, and offer evidence in support of their views.⁹⁴ They also need to have some control over the presentation of this information.⁹⁵ The literature has called this component of procedural justice “voice.”⁹⁶ Second, parties need to feel that the third-party—whether a judge, an arbitrator, or a mediator—has considered those stories, concerns, and the evidence.⁹⁷ Third, disputing parties need to feel that the third-party neutral has treated the parties even-handedly.⁹⁸ Finally, parties must feel that the third-party neutral treated them with respect and dignity.⁹⁹

No research explains why parties look for these elements of procedural fairness. Three hypotheses—the “social exchange” hypothesis, the “group values” hypothesis, and the “fairness heuristic” hypothesis—may explain the importance of procedural justice.¹⁰⁰ The first hypothesis suggests that procedural justice, especially adequate voice, serves the disputants’ goals of

93. Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?* 79 WASH. U. L.Q. 787, 817–30 (2001) [hereinafter Welsh, *Making Deals*]; Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 84–87 (2001); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 574, 575–82 (2004). See also Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101 (suggesting that courts should pay more attention to ADR design issues rather than, as they have, experiment blindly; asserting that research shows parties prefer mediation when it satisfies procedural justice concerns; and suggesting that the lower use of ADR on a voluntary basis may indicate a failure in the full implementation of the system design in courts; urging courts to collect data that would help the field understand court-connected ADR processes and outcomes better); E. Patrick McDermott & Danny Ervin, *The Influence of Procedural and Distributive Variables on Settlement Rates in Employment Discrimination Mediation*, 2005 J. DISP. RESOL. 45, 48–50 (“[P]arties to a dispute must first be given a fair chance to voice their concerns. Second, parties must have control over the outcome of mediation since mediation is about self-determination. Third, the mediator must be perceived as (and be) fair and neutral.”).

94. See Nancy Welsh, *Disputant's Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 185.

95. *Id.*

96. *Id.*

97. *Id.* at 184–85.

98. *Id.* at 184.

99. See *id.* at 184–85 (“Perceptions of procedural justice influence disputants’ . . . perceptions of the legitimacy of the institution that provided or sponsored the dispute resolution process.”); Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 405 (2004–05).

100. See Welsh, *Making Deals*, *supra* note 93, at 826–27.

reaching favorable outcomes by enhancing the likelihood of getting a favorable outcome.¹⁰¹ The second hypothesis posits that procedural justice gives disputants the message that they are valuable members of society.¹⁰² It conveys to them messages about their status in society, which, in turn, bolsters their self-esteem and self-respect. Procedural justice may demonstrate to disputants that courts “recognize their own role as that of ‘public servants and [recognize] . . . the role of citizens as clients who have a legitimate right to certain services.’”¹⁰³ The last hypothesis asserts that people fear being exploited by authoritative decision-makers.¹⁰⁴ Their positive evaluations of procedural justice provide a mental shortcut reassuring them that they have not been exploited.

The research also shows that procedural justice affects parties’ perceptions about the justice of the substantive outcome.¹⁰⁵ It also affects their compliance with those outcomes. And, it affects their perceptions of the legitimacy of the authorities producing those outcomes.¹⁰⁶ Welsh explains:

If disputants perceive that the third party is treating them and their dispute in a procedurally just manner, then it becomes somewhat easier to trust that the third party’s decision will be based on all relevant information and that the third party will attempt to make a substantively just decision.¹⁰⁷

I pause here to ask the workshop participants to discuss in buzz groups¹⁰⁸ the following question that appears on a Power Point slide: “Why should we worry about procedural justice in the context of mediation?” I explain that at the end of the five minutes I have allotted for this discussion, one person in the buzz group will report the comments of the group.¹⁰⁹ This instruction allows one buzz group member to take notes of the conversation. Using buzz groups, even in a workshop involving over 100 people, changes the pace, energy, and focus of the learning process. Buzz groups allow the

101. *See id.* at 821–23.

102. *Id.* at 823–26.

103. *Id.* at 824; Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 93 (“According ‘due process’ to individuals is equivalent to recognizing their status as members in good standing in their social group . . .”).

104. Hensler, *supra* note 103, at 93.

105. Welsh, *Making Deals*, *supra* note 93, at 791–92 (“Ultimately, insuring that mediation comes within a procedural justice paradigm serves some of the courts’ most important goals—delivering justice, delivering resolution, and fostering respect for the important public institution of the judiciary.”).

106. *Id.* at 818.

107. *Id.* at 830.

108. For a discussion of the use of buzz groups, see BEST PRACTICES, *supra* note 18, at 132. I usually ask trainees to work in buzz groups of three or four people.

109. This time allocation assumes I am conducting a two-hour workshop.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

learners to share their own expertise and experiences. It shifts the focus from the “sage on the stage” to the learners themselves, with the instructor playing the role of “guide on the side.”¹¹⁰

Moreover, buzz groups generate discussion without much effort on my part. Participants have already had the chance to test their ideas within a small group of colleagues. More fearful, shy, or introverted participants may feel more comfortable contributing to the discussion in these small groups, especially if they know that a more extroverted member of the group will report the comments or ideas of the group members to the workshop participants. Finally, in these buzz groups, participants engage in the second step of learning: processing.

I give warning signals to the participants to let them know when two minutes remain in the discussion period, when one minute remains, and when time has elapsed. These warnings allow all members in the buzz group an opportunity to make comments before the discussion time has elapsed. I then ask for each buzz group to give me two comments. By limiting the scope of the report from each buzz group, I typically can allow every buzz group to make a contribution to the discussion. In some circumstances, by the time I get to the buzz groups on the opposite side of the room from where I began to solicit the comments, earlier buzz groups have captured and reported all the ideas or comments. For that reason, the next time I ask for a buzz group report, I will start on the opposite side of the room and alternate reporting sides for the remaining time in the workshop. In that way, no buzz group feels consistently left out. After hearing from all the buzz groups, I will open the floor to any remaining comments or ideas. Sometimes, depending on the goal of the segment of the workshop, I will record the ideas on a flip chart or overhead. Other times, I will simply repeat or paraphrase them to ensure that all workshop participants can hear the comment or idea. If I am tied to a microphone, I will try to make sure the buzz group reporter speaks into it.

At the end of this discussion of procedural justice, I note that even when the neutral, like a mediator, has no (or should have no)¹¹¹ control over the

110. See, e.g., Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1 (2003).

111. I add this parenthetical because unskillful or arguably unethical mediators do exercise control over the outcome in mediation. Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 58, 66–71 (2005) (describing the dangers to the core values of mediation from mediator evaluations and suggesting precautions mediators should take when shifting to an evaluative role;

substantive outcome of the process, parties still want the mediator to show “consideration” and to treat the parties even-handedly.

C. *Short Lecture on Research About Party Grievances Filed Against Mediators*

To reinforce the lessons of this section of the presentation, I share some of the findings of my empirical research about grievances filed against mediators in five states.¹¹² At this stage in the workshop, I have looped back. I am asking students to again absorb (first-stage learning) some additional information. My 2005 empirical research revealed that of the three types of mediator conduct that most frequently trigger grievances against mediators from unhappy participants in the mediation process, conduct which makes a party believe that the mediator has lost his or her impartiality leads as a reason for the complaints. It is the most frequently cited reason for filing a complaint in Virginia and Maine.¹¹³ It appears as the second most frequently raised allegation in Florida, Georgia, and Minnesota.¹¹⁴ Clearly, problems with mediator impartiality can affect the quality of the process for some participants.

mediator should engage in evaluation of legal issues only after: (1) giving an early and clear warning of the risks of evaluative interventions; (2) providing the basis and context for the evaluation; (3) urging the parties to get independent legal advice; and (4) going to the library to do adequate research). See also L. Randolph Lowry, *To Evaluate or Not: That Is Not the Question!*, 38 FAM. & CONCILIATION CTS. REV. 48, 48–50, 55–58 (2000) (proposing that all mediators employ evaluative techniques and should understand when and how to use them rather than avoiding their use); James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 774 (1997) (suggesting evaluation happens along a continuum of interventions); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985, 989 (1997) (suggesting a mediator should be able to move quickly between the orientations to engage the parties in constructive conversation); Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 709–12 (1997) (discussing how mediators shift between facilitative interventions and other interventions identified with other models of mediation and advocating the use of the different approaches, including evaluative interventions, as long as the parties are informed of the role the mediator plays in a particular session).

112. Young, *Take It or Leave It*, *supra* note 13, at 748–76 (appendices to the article provide data for two more states that came to light after I had submitted the article for publication). I have also learned that Tennessee has implemented a mediator grievance system. See, e.g., Tenn. Admin. Office of the Court, Tenn. Alternative Disp. Resol. Comm’n Formal Grievance Decisions, <http://www.tsc.state.tn.us/GENINFO/programs/ADR/adrdir.asp> (last visited Jan. 30, 2009).

113. Young, *Take It or Leave It*, *supra* note 13, at 774–75.

114. *Id.*

Interference with a party’s self-determination, by offering legal advice, by giving legal opinions, by recommending settlement, or by engaging in more overt acts of coercion

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

D. Short Lecture on Some Attributes of Mediator Bias

1. Introduction

The next part of the workshop allows participants to consider the elements of mediator impartiality beginning, as if at the top of a wide-mouth funnel, with its more general attributes and moving to more specific attributes of the concept.¹¹⁵ This part of the workshop also lets participants gain greater understanding of my explanations, review examples of mediator partiality or bias, and make comparisons between different aspects of mediator partiality or bias by using “Another Grid for the Perplexed.”¹¹⁶

I begin with a short lecture on the general nature of mediator partiality or bias. It can be actual, potential, or in appearance only. Next, I identify the possible sources of bias: (1) a mediator’s *relationships* with the parties or their lawyers; (2) a mediator’s reaction to *conduct* or attributes of the parties or their lawyers; (3) the *relationship* the mediator may have to the substantive outcome in the dispute; and (4) *conduct* of the mediator that indicates bias in favor of a particular outcome. As part of this lecture, I show an uncompleted “Another Grid for the Perplexed” containing four quadrants that correspond to the sources of conflict I have just identified.¹¹⁷ A copy of the completed grid appears in Appendix A of this article.

formed the most frequent allegation [lodged against mediators] in Florida and Georgia and the second most frequent allegation in Virginia. Poor quality of the process or an ineffective mediator style formed the most frequent allegation in Minnesota, the second most frequent allegation in Maine, and the third most frequent allegation in Virginia. Surprisingly, breaches of confidentiality got traction only in Minnesota as a basis for a complaint. These complaints arise apparently because some parenting consultants misunderstand how much confidential information they may reveal to the appointing court.

Id. Descriptions of the complaints filed against mediators in seven states appear at Appendices C to I of my article.

115. Jacobson would call this a “top-down” sequencing approach to organizing information. See Jacobson, *supra* note 28, at 162 (processing “information best if they have the general concepts first as an anchor to the facts that come later”).

116. I have borrowed the name of the grid from Leonard Riskin, although I acknowledge that this is “another” grid for the perplexed. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17–38 (1996).

117. For other examples of the use of uncompleted or partially completed matrices or outlines, see Kevin C. McMunigal, *Diagramming Crimes*, THE LAW TEACHER, Fall 2004, at 1, available at <http://lawteaching.org/lawteacher/2004fall/lawteacher2004fall.pdf>; Charles B. Sheppard, *The*

I borrowed the idea for the grid, an amazingly useful analytical tool, from Firestone, a Florida mediator, who spoke about mediator impartiality and neutrality at the October 2003 conference of the ACR.¹¹⁸ He suggested that the mediation field think about these issues along two dimensions that create four quadrants on a grid.¹¹⁹ On one side of the grid are the terms “parties” and “outcome.” On the other side of the grid are the terms “relationship” and “conduct.”¹²⁰ The resulting four quadrants are the following: “relationship-parties,” “conduct-parties,” “relationship-outcome,” and “conduct-outcome.”¹²¹

2. Unnecessary Distinction Between “Neutrality” and “Impartiality”

In his conference presentation, Firestone made a distinction between mediator impartiality and neutrality.¹²² His use of the two terms may reflect the distinction made in the Model Standards of Practice for Family and Divorce Mediation. These standards define “impartiality” as “freedom from favoritism or bias in word, action[,] or appearance, and includes a commitment to assist all participants as opposed to any one individual.”¹²³ These standards define “conflicts of interest” as “any *relationship* between the mediator, any participant[,] or the subject matter of the dispute, that

Grading Process: Taking a Multidimensional, “Non-Curved” Approach to the Measurement of a First-Year Law Students’ Level of Proficiency, 30 W. ST. U. L. REV. 177, 192 n.42 (2000) (describing exercises that include graphic organizers or other work product that the instructor partially completes and the student then fully completes).

118. Greg Firestone, Florida Mediator, Impartiality and Neutrality: Are These Concepts Still Relevant to the Practice of Mediation at ACR Third Annual Conference: The World of Conflict Resolution: A Mosaic of Possibilities (Oct. 15-18, 2003), [hereinafter Firestone Conference Presentation] (audio tape on file with author). The discussion in this article builds on and modifies the approach to the grid taken by Firestone. I continue to revise it. A copy of the completed grid appears as Appendix A to this article.

119. See *infra* Appendix A. I first discussed this grid in Paula M. Young, *The Who of Mediation, Part II: Wisely Choosing a Mediator*, THE INSURANCE RECEIVER, Summer 2005, at 11, available at http://www.iair.org/files/newsletters/2005/The_Insurance_Receiver_-_Vol_14_Num_02_Summer_2005.pdf [hereinafter Young, *The Who of Mediation, Part II*]. I then expanded the discussion in Young, *Rejoice!*, *supra* note 30, at 209–20. I would like to thank the editors of the Appalachian Journal of Law for their permission to republish parts of that discussion in this article.

120. See *infra* Appendix A.

121. Firestone Conference Presentation, *supra* note 118.

122. *Id.*

123. See MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard IV.A. (2000). This definition of “impartiality” suggests a Quadrant 2, 3, or 4 bias, as discussed *infra* Part IV.E.2-4.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

compromises or appears to compromise the mediator's impartiality."¹²⁴ Kovach explains:

According to the standards, impartiality refers to the specific conduct of the mediator with regard to the participants. This means that the mediator will not act with favoritism or bias toward either party.¹²⁵ On the other hand, neutrality is used to describe the nature of the relationship between the mediator and the parties, particularly the mediator's freedom from prejudice in conducting the process.¹²⁶ Essentially, neutrality demands that the mediator withdraw if she is unable to remain neutral throughout the process.¹²⁷

Several other authors also recognize a distinction in the terms, but their use of the terms is not consistent. Moore, for instance, states: "Impartiality refers to the absence of bias or preference in favor of one or more negotiators, *their interests, or the specific solutions that they are advocating*."¹²⁸ Neutrality, on the other hand, refers to the relationship or *behavior* between intervenor and disputants."¹²⁹ Nolan-Haley also seeks to preserve the distinction in the use of the terms. She says: "[S]cholars use the term impartiality interchangeably with neutrality, and this confluence has caused considerable confusion in practice. Impartiality implies an absence of bias or favoritism.¹³⁰ Strictly speaking, a *neutral* mediator has *no power over the parties and no personal stake in the outcome*."¹³¹ Folberg, Milne, and Salem also recognize a distinction in the terms, saying: "Neutrality can be seen as impartiality on the part of the mediator towards both parties.

124. See MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard IV.B. (2000) (emphasis added). This definition suggests a Quadrant 1 or 3 bias, as discussed *infra* Parts IV.E.1, IV.E.3.

125. With its focus on conduct, this definition of "impartiality" suggests a Quadrant 2 or 4 bias, as discussed *infra* Parts IV.E.2, IV.E.4.

126. With its focus on the relationship with the participants, this definition of "neutrality" suggests a Quadrant 1 bias, as discussed *infra* Part IV.E.1.

127. KOVACH, *supra* note 41, at 152.

128. This definition of "impartiality" suggests a Quadrant 1, 2, or 3 bias, as discussed *infra* Part IV.E.1-3.

129. MOORE, *supra* note 60, at 52 (emphasis added). This definition suggests a Quadrant 1, 2, 3, or 4 bias, as discussed *infra* Part IV.E.1-4. See also Rachael Field, *Neutrality and Power: Myths and Reality*, ADR BULLETIN, May/June 2000, at 16, available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1089&context=adr> (using "neutrality" to describe the "mediator's sense of disinterest in the outcome of the dispute" and using "impartiality" as referring to "an even-handedness, objectivity[,] and fairness towards the parties during the mediation process").

130. This definition of "impartiality" suggests a Quadrant 1, 2, or 3 bias, as discussed *infra* Part IV.E.1-3.

131. NOLAN-HALEY ET AL., *supra* note 42, at 306 (emphasis added). This definition of "neutrality" suggests a Quadrant 3 or 4 bias, as discussed *infra* Part IV.E.3-4.

Under this definition, there should be an absence of mediator bias, such that his or her attitudes and values do not impinge on the mediation process or settlement agreement.”¹³²

Other authors, including myself, consider the terms interchangeable. In fact, the terms are not consistently defined and do not consistently tie to the “grid” discussed below.¹³³ Practitioners, trainers, authors, and scholars also reflect the distinctions made in many ethics codes between conflicts of interest and impartiality, further confusing the discussion. Going further, one scholar suggests that talking about mediator impartiality in the frame of “conflicts of interest” imports some values and concerns expressed in the lawyer ethics codes that are not relevant to mediation practice.¹³⁴ No matter how an ethics code defines these terms, trainers can use “Another Grid for the Perplexed” without adhering to any distinction in the definitions of “impartiality” or “neutrality.”

132. Beck et al., *Research on the Impact of Family Mediation*, *supra* note 51, at 471 (showing how the use of the terms can shift between actions towards the parties and attitudes about the outcome and be used in the same sentence to define each other).

133. See KOVACH, *supra* note 41, at 151–52 (“both [terms] describe basic principles of the mediation process”).

134. LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* 745–55 (2d ed. 2005) (“[T]he same phrase used in ethics for attorneys where it has a different meaning and a well-developed body of law [causes] some [to] jump[] to the erroneous conclusion that a mediator has a conflict of interest because she formerly was a partner of one of the attorneys in the mediation, or she formerly represented one of the parties in the mediation. Neither of these relationships constitutes a conflict of interest for a mediator, but they should be disclosed.”). See also Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 *ARIZ. L. REV.* 329 (1984) [hereinafter Riskin, *Toward New Standards*]. Riskin correctly noted that:

The traditional approach [to lawyer ethics] . . . saddles the lawyer with the burdens of the notion of representation. The idea of undivided loyalty to an individual client is inconsistent with a neutral posture toward all the parties. The vision of a lawyer working for the self-conceived interests of a client, usually in opposition to the interests of others, contrasts starkly with the actual and appropriate orientation of a lawyer who acts as mediator or impartial advisory attorney. Second, because the traditional approach is informed by such a limited notion of what lawyers do, it is of no help whatever in encouraging or guiding neutral lawyers who do not have a lawyer-client relationship with the parties.

Id. at 342. Since Riskin wrote this article, state bar associations have revised the rules governing lawyer mediators. See, e.g., VA. RULES OF PROF'L CONDUCT R. 2.10 (2004). See also MODEL RULES OF PROF'L CONDUCT R. 2.4(b) (2008) (discussing the role of lawyers serving as third-party neutrals).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

E. Use of “Another Grid for the Perplexed”

1. Quadrant 1: Mediator Bias Based on Relationships with the Parties or Their Lawyers

As the last section indicates, ethics codes often deal with the mediator’s impartiality towards the parties in provisions governing conflicts of interest. Alfini and his co-authors suggest that “[m]ost people will conclude that the mediator is impartial if the mediator does not know either of them and has no preconceived notion about the dispute.”¹³⁵ Kovach further explains that:

[T]he danger is that one party may believe any previous dealings between the mediator and the other party may create a bias. The intensity, frequency, and duration of such prior relationships are factors which may impact such perceptions. Usually, the longer the relationship has lasted or the closer in time to the present mediation, the more difficult the problem becomes.¹³⁶

Similarly, Schepard explains the risks of prior relationships with the parties:

While an experienced mediator may be able to separate prior professional services rendered from those now offered in mediation, the possibility of parties’ misperception is just as important as the reality of the mediator’s ability to function effectively, despite serving in a previous role. A mediator’s prior relationship with a participant may haunt the mediation process, if another participant perceives that the mediator is not acting in an impartial fashion due to information gleaned from the prior relationship. For example, a lawyer who has drafted a will for one or both of the participants may have had access to financial information that one participant believes may prejudice the mediator’s views about property division resulting from divorce.¹³⁷

I suggest that parties also consider the nature of the mediator’s relationship. For example, serving on the board of trustees of the local Baptist church with one of the parties raises different concerns than a relationship limited to chit-chat at the coffee hour after the religious service.

Ethics codes do not bar mediators from serving when the mediator has a prior relationship with one of the participants to the mediation.¹³⁸ They

135. ALFINI ET AL., *supra* note 48, at 115. For a discussion of a mediator’s preconceptions about the dispute, see *infra* Part IV.E.3.

136. KOVACH, *supra* note 41, at 156–57.

137. Andrew Schepard, *The Model Standards of Practice for Family and Divorce Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 527 (Jay Folberg et al. eds., 2004). Schepard serves as the Director of the Center for Children, Families, and the Law, and is a Professor of Law at Hofstra University School of Law.

138. Kovach describes this type of absolute prohibition as “extremely difficult as well as unfair. As a practical matter, these kinds of relationships assist with business development. Currently, most

instead require disclosure of any relationships to the parties.¹³⁹ If the parties waive the conflict of interest, the mediator may serve. Mediators should err on the side of over-disclosure of conflicts of interest or potential conflicts of interest. Arguably, if the situation permits, they should check for conflicts with the same care imposed on lawyers by legal ethics rules.

Mediators must also avoid creating any conflicts of interest during the course of the mediation—for instance, by buying stock in the company owned by one of the parties. One neutral describes a situation in which he helped a thirty-two member task force to develop a rate-moderation plan for an electric utility.¹⁴⁰ The facilitated meetings occurred in the region where the utility planned to increase rates.¹⁴¹ The facilitators flew in the same plane to the location with the Public Service Commission (PSC) staff.¹⁴² A consumer, based on this in-flight relationship that arose during the facilitation, accused the facilitator of bias in favor of the PSC.¹⁴³

Finally, mediators should avoid creating an appearance of impropriety by representing parties in the future in the same or similar matter.¹⁴⁴ Alfini and his co-authors note that a “mediator’s potential to be an adversary in subsequent legal proceedings would . . . curtail the disputant’s willingness to confide during mediation.”¹⁴⁵ I discuss this issue in greater detail in the next section.

situations involving prior relationships are resolved or determined on a case-by-case basis.” KOVACH, *supra* note 41, at 157.

139. Craver suggests that a mediator must first “assess how well he/she knows the individual and if this relationship raises any concerns for the mediator regarding his/her ability to remain impartial.” Based on that assessment, and erring on the side of caution, the mediator can serve after disclosure and party waiver, or he or she can decline to serve. Charles Craver, *Negotiating Ethics: How to be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713 (1997). See also Sandra A. Sellers & Gina Viola Brown, *Ethics and Online Dispute Resolution*, in DISPUTE RESOLUTION ETHICS 247 (“Short of complete independence from merchants or funders, how can the impartiality of [ADR] providers and the process be ensured? The focus should be placed on disclosing existing relationships”); Phyllis M. Hix, *Mediation, or Is It? Everything You Thought You Knew, but Maybe Didn’t*, 65 DEF. COUNS. J. 256, 265 (1998) (advising mediators to “DISCLOSE, DISCLOSE, DISCLOSE”) (capitalization in original). A model rule suggests that the parties’ waive the conflict of interest in writing. CPR-GEORGETOWN COMM’N ON ETHICS AND STANDARDS IN ADR, MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL R. 4.5.3, cmt. 3 (2002).

140. See *Best Practices: A Participant Accuses You*, *supra* note 49, at 2 (describing Ric Richardson’s experience).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. ALFINI ET AL., *supra* note 48, at 206. This comment arises in the context of rules governing confidentiality of mediation communications. They further explain: “Court testimony by a mediator, no matter how carefully presented, will inevitably be characterized so as to favor one

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

In light of concerns about conflicts of interest, Firestone suggests that parties should consider the following situations, by example, when choosing a mediator.¹⁴⁶ Has the mediator served as an arbitrator in a case in which one party received an unfavorable award?¹⁴⁷ Has the mediator represented a party in a legal matter previously?¹⁴⁸ Has she provided therapeutic counseling to one of the lawyers?¹⁴⁹ Does she play golf with one of the lawyers?¹⁵⁰ Do their children play on the same soccer team? Does the mediator get most of his or her business from one company or firm? Can she remain impartial to the party who is not the repeat player in the referral system and an ongoing source of livelihood?

a. Buzz Group Discussion of Conflicts of Interest

In the training workshop, I indicate that conflicts of interest can be past, present, or created in the future, but I do not reveal the discussion of the topic set out above. Instead, I ask the buzz groups to answer the following question appearing on a Power Point slide: “What types of past relationships could give rise to actual bias, potential bias, or the appearance of bias?” As noted above, I will elicit a couple of comments or examples from each buzz group.

b. Video Clip for the Visual Learners

After the buzz groups report their comments or examples, I show a short video clip from the library of the Hamline University Law School Mediator Case Law Project.¹⁵¹ The clip shows how a mediator’s interaction with a

side or the other. This would destroy a mediator’s efficacy as an impartial broker.” *Id.* Thus, rules that limit the ability of the lawyer-mediator from representing either party in the same or similar matter may also reassure parties that they can be candid with the mediator because they need not fear that the lawyer-mediator will have an adversarial relationship to the party sometime in the future.

146. Firestone Conference Presentation, *supra* note 118.

147. MOORE, *supra* note 60, at 53.

148. VA. RULES OF PROF’L CONDUCT R. 2.10(c), (d), (f) (2004).

149. Schepard, *supra* note 137, at 527 (“[A] mediator who provided marriage counseling [for one of the parties] may be perceived by a participant as having information about the personality and behaviors of an individual that may color the mediator’s views about his or her participation in mediation.”).

150. Moore would call this a tie to the party’s “ongoing social network.” MOORE, *supra* note 60, at 52.

151. Hamline University School of Law, Dispute Resolution Institute, <http://law.hamline.edu/MediationLawVideosListing.aspx?id=225&taxId=183> (last visited Jan. 30,

“repeat player” can affect the other party’s perception of the mediator’s impartiality.¹⁵² It typically draws an excited response from the audience. After the clip, I ask the participants to discuss why the film has caused the response they have experienced. Up to this point in the training session, I have made few attempts to meet the information absorption styles of “visual” learners.¹⁵³

I follow this discussion with three more rounds of buzz group discussion that respond to the following questions: What types of current (mid-mediation) relationships could give rise to actual bias, potential bias, or the appearance of bias? What types of future relationships could give rise to actual bias, potential bias, or the appearance of bias? Why should we worry about future relationships a mediator might have with a party?¹⁵⁴

2009) (using the video clip from *Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12 (Minn. 2004)). See also James Coben & Peter N. Thompson, *2006-2007 Mediation Case Law “Revue”*: Lessons Learned from State and Federal Litigation About Mediation, ABA Section of Disp. Resol., Ninth Annual Conference (April 25–26, 2007) (using video reenactments to encourage discussion of mediation ethics issues); Dwight Golann, *Using Video to Teach Negotiation and Mediation*, DISP. RESOL. MAG., Winter 2007, at 8 [hereinafter Golann, *Using Video*].

152. Hamline University School of Law, *supra* note 151. Instructors should put these film clips on a DVD because downloading them off the Hamline website during a training session can waste precious time.

153. “Visual” learners absorb information more easily through pictures, diagrams, charts, insets, shaded boxes, colors, illustrations, cartoons, mind maps, colored outlines, video, overheads, and T-charts. Jacobson, *supra* note 28, at 151–52, 161–62. They tend to be “right-brained,” “global” thinkers who “see the whole immediately.” *Id.* Their thinking “may involve redundancies until the process is complete. [T]hey rel[y] on illustration and analogy [with] a wide focus of attention [and] connect[] information to people.” *Id.* For discussions of various techniques law professors can use to appeal to visual learners, see William C. Bradford, *Reaching the Visual Learner: Teaching Property Through Art*, THE LAW TEACHER, Fall 2004, at 13; Matthew J. McCloskey, *Visualizing the Law: Methods for Mapping the Legal Landscape and Drawing Analogies*, 73 WASH. L. REV. 163 (1998); Angela Passalacqua, *Using Visual Techniques to Teach Legal Analysis and Synthesis*, 3 J. LEGAL WRITING INST. 203 (1997); William Wesley Patton, *Opening Students’ Eyes: Visual Learning in the Socratic Classroom*, 15 LAW & PSYCHOL. REV. 1 (1991) (describing the use of visual organizers and T-line analysis of exam questions and answers). See also Fred Galves, *Will Video Kill the Radio Star? Visual Learning and the Use of Display Technology in the Law School Classroom*, 2004 U. ILL. J.L. TECH. & POL’Y 195; Julian Hermida, *The Use of TV Shows in the Classroom*, THE LAW TEACHER, Spring 2005, at 6; Kimberlee Kovach, *Virtual Reality Testing: The Use of Video for Evaluation in Legal Education*, 46 J. LEGAL EDUC. 233 (1996); Elyse Pepper, *The Case for “Thinking Like a Filmmaker”*: Using Lars Von Trier’s *Dogville* as a Model for Writing a Statement of Facts, 14 J. LEGAL WRITING INST. 171 (2008). For a description of the use of video clips in ADR courses, see Golann, *Using Video*, *supra* note 151, at 8.

154. I hope this question will elicit concerns about the possible damage to the reputation of mediation that could arise when mediators seem to use their mediation practices as “feeders” for work in their professions of origin. Rule 4.5.3(d) of the Model Rule for the Lawyer as Third-Party Neutral prohibits lawyer-neutrals from entering into “any financial, business, professional, family[,] or social relationship or acquir[ing] any financial or personal interest that is likely to affect impartiality or that might reasonably create the appearance of partiality or bias, without disclosure and consent of all parties.” CPR-GEORGETOWN COMM’N ON ETHICS AND STANDARDS IN ADR,

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

c. Short Lecture on Future Relationships with Participants in the Mediation

In a two-hour workshop, I devote a few minutes to discussing four examples of ethics codes that regulate the future relationships of mediators with parties. I intend to help participants think about the boundaries of the limitations, especially in terms of the length of the disqualification, the scope of the disqualification, and the persons with whom the mediator may not establish future relationships. Thus, the Alabama code states a narrow substantive disqualification, but a broad time limitation on future relationships with “parties.”¹⁵⁵ The ethics code provides: “A mediator *must* avoid the appearance of a conflict of interest both during and *after* the mediation. Without consent of all parties, a mediator shall not subsequently establish a *professional relationship* with one of the *parties* in a *substantially related matter*.”¹⁵⁶

In Florida, the ethics code states a broad substantive limitation, but places no express temporal limitations on future relationships. The language also suggests that it applies to all future relationships, including those with participants or lawyers, as well as with the parties.¹⁵⁷ Somewhat oddly, it bans the solicitation of future relationships, presumably during the mediation process, but it does not expressly ban the relationships themselves.¹⁵⁸ This language may reflect a concern that the mid-mediation solicitation of future business could directly affect one party’s perception of the mediator’s impartiality. In contrast, a ban of future relationships themselves seems designed to protect the perceived integrity and reputation of the mediation process, the court-sponsored mediation program, or the referring judge. The Florida ethics codes provides: “During the mediation process, a mediator shall not solicit or otherwise attempt to procure future *professional services*.”¹⁵⁹

MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL R. 4.5.3(d) (2002). The comment to this model rule explains that the limitation tracks the language of the 1977 Code of Ethics for Arbitrators in Commercial Disputes. *Id.* at R. 4.5.3 cmt. 7.

155. ALA. CODE OF ETHICS FOR MEDIATORS Standard 5(b)(8) (1996), *available at* http://alabamadr.org/index.php?option=com_content&task=view&id=24&Itemid=38.

156. *Id.* (emphasis added).

157. FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.340(d) (2000).

158. *Id.* at R. 10.330(c).

159. *Id.* at R. 10.340(d) (emphasis added).

The Georgia ethics code delegates to the mediator the decision about the proper substantive and temporal scope of the disqualification. It provides:

Subsequent to a mediation, a mediator *shall* not establish *another relationship* with any of the *participants* in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with the parties . . . the mediator should consider factors such as *elapsed time following the mediation, the nature of the relationships established, and services offered* when determining whether the relationships might create a perceived or actual conflict of interest.¹⁶⁰

The Massachusetts ethics code provides yet another approach. It restricts any future relationships related to the subject of the mediation, but allows them after one year if they do not relate to the subject of the mediation.¹⁶¹ The code provides:

(bb) A neutral may not *subsequently* act on behalf of any *party* to the dispute resolution process, nor represent one such *party* against another, in any matter *related to the subject* of the dispute resolution process.

(cc) A neutral may not *subsequently* act on behalf of any *party* to the dispute resolution process . . . in any matter *unrelated to the subject* of the dispute resolution process *for a period of one year*, unless the parties to the process consent to such action or representation.¹⁶²

I spend time discussing this aspect of a mediator's potential conflicts of interest because mediators may overlook the specific code requirements that apply to them, or they may not have had a prior opportunity to consider the public policy issues that arise from future relationships with participants in mediation.

d. Learning Specific Code Provisions Governing Conflicts of Interest

If the time allocated for the training session allows, the instructor could then tie this more general discussion of the bias created by relationships to the parties or lawyers to specific provisions of an aspirational or mandatory

160. GA. SUP. CT., UNIFORM RULES FOR DISPUTE RESOLUTION PROGRAMS, app. C, ch. 1 (1995), available at <http://www.godr.org/files/APPENDIX%20C,%20Chap%201,%201-19-2010.pdf> (emphasis added).

161. MASS. UNIFORM RULES ON DISPUTE RESOLUTION R. 1(a) (2005), reprinted in MASS. SUPREME JUDICIAL CT. R. 1:18, available at <http://www.mass.gov/courts/admin/legal/newadrbook.pdf>.

162. *Id.* at R. 9(e)(iv)(bb)-(cc) (emphasis added).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

code of ethics that applies to mediators.¹⁶³ Rather than lecture further on the topic, the instructor could teach this specific code-related material in several ways. As noted in my first article of this series, my law school students especially enjoy playing *Mediation Ethics Jeopardy*.¹⁶⁴ The instructor might pay particular attention to the information absorption needs of tactile,¹⁶⁵ kinesthetic,¹⁶⁶ or visual learners¹⁶⁷ in choosing other teaching methodologies.¹⁶⁸ For purposes of illustrating applicable law or rules, an instructor can use the provisions of the 2005 Model Standards,¹⁶⁹ which I have discussed in my article analyzing the revised Model Standards.¹⁷⁰

2. Quadrant 2: Mediator Bias Based on the Conduct or Attributes of the Parties or their Lawyers

a. *Party Conduct or Attributes that Can Trigger Mediator Bias*

Next, Firestone urges mediation parties to consider whether the mediator can maintain, through his or her conduct, neutrality towards the parties.¹⁷¹ Will the mediator become frustrated, disrespectful, or heavy-handed if he or she believes a party or client is uncooperative? Does the mediator hold any racial,¹⁷² socioeconomic,¹⁷³ or cultural biases?¹⁷⁴ Can he

163. See Young, *Take It or Leave It*, *supra* note 13, *passim* (describing the mediator disciplinary systems in Florida, Virginia, Georgia, Maine, and Minnesota; providing grievance data for those states plus North Carolina and Arkansas). See also TENN. STANDARDS OF PROF'L CONDUCT FOR RULE 31 NEUTRALS § 11 (proceedings for discipline of Rule 31 mediators).

164. See Young, *Teaching Professional Ethics*, *supra* note 2, at 166.

165. Jacobson, *supra* note 28, at 155.

166. *Id.* at 155–56 (kinesthetic learners learn well by moving in class or watching movement and by simulations, role-plays, clinical experiences, externships, internships, clerkships, and other experiential learning; they do better if they can dance to music, stand, or pace while studying).

167. For a discussion of the needs of visual learners, see *supra* note 153.

168. Jacobson, *supra* note 28, at 150–57. See also M.H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. ASS'N LEGAL WRITING DIRECTORS 27 (2004).

169. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005).

170. Young, *Rejoice!*, *supra* note 30, at 210–12.

171. Firestone Conference Presentation, *supra* note 118.

172. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360–61, 1375–91; Cherise D. Hairston, *African-Americans in Mediation Literature: A Neglected Population*, 16 MEDIATION Q. 357 (1999); Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405 (1998); Howard Gadlin, *Conflict Resolution, Cultural Differences, and the Culture of*

work with people who express racial bias? Does she think in traditional ways that may impose gender biases or reinforce gender-role expectations in the mediation?¹⁷⁵ Does the mediator hold internalized homophobia?¹⁷⁶ Does

Racism, 10 NEGOTIATION J. 33 (1994); Gunning, *supra* note 87, at 59–69; Michel G. Hermann, *The Dangers of ADR: A Three-Tiered System of Justice*, 3 J. CONTEMP. LEGAL ISSUES 117 (1990); Carrie Menkel-Meadow, *Do the “Haves” Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999) [hereinafter Menkel-Meadow, *Do the “Haves” Come out Ahead*] (considering whether the use of ADR by “repeat players” gives them an advantage over “one-shotters” with less information and power).

173. I have noticed that my students express some dismissive mannerisms when I discuss a small claims mediation between an unmarried Appalachian couple who no longer wanted to live together. The man lived on his monthly disability check, and the woman lived on her minimum wage fast-food job. The parties negotiated over pets, poorly working televisions, a microwave stand they had purchased at Wal-Mart, a collection of glass horses, and a concrete cast of a deer. I reminded the students that these items represented important possessions for the parties, either from a financial standpoint or from an emotional standpoint. See also Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855 (1999); Carrie Menkel-Meadow, *Do the “Haves” Come out Ahead*, *supra* note 172, at 20. One of the exercises at Appendix B shows how socioeconomic bias can affect a mediator’s impartiality or at least a party’s perception of it.

174. Winslade and Monk pay particular attention to the risk that mediators will bring their own cultural frames to the mediation process and express them in favor of a certain person or outcome.

It makes more sense to see mediators as unlikely to be able to stand outside time and space and their own culturally and historically located values. As they respond to people’s stories, mediators are likely to select for emphasis some perspectives over others, or to attune themselves to some people more than to others.

WINSLADE & MONK, *supra* note 44, at 36.

175. Feminist authors express concern about the treatment of women in the mediation process because of potential cultural biases that affect the mediator’s interactions with the parties or the types of outcomes the mediator can envision for the parties in light of these cultural values. For a sample of the different perspectives on the gender bias issue, see Grillo, *supra* note 89, *passim*; Becky H. Hernstein, *Women and Mediation: A Chance to Speak and to Be Heard*, 13 MEDIATION Q. 229 (1996); Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27 (1993); David Maxwell, *Gender Differences in Mediation Style and Their Impact on Mediator Effectiveness*, 9 MEDIATION Q. 353 (1992); Cheryl Regehr, *The Use of Empowerment in Child Custody Mediation: A Feminist Critique*, 11 MEDIATION Q. 361 (1994). But see Menkel-Meadow, *From Legal Disputes*, *supra* note 90, at 22–23 (cautioning “litigation romanticists” to measure alternatives to litigation against the fairness and power distributions seen in litigation).

176. Allan E. Barsky, *Mediating Separation of Same-Sex Couples*, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 351 (Jay Folberg et al. eds., 2004). This author cautions mediators who work with gay, lesbian, and transgendered parties by saying, “Mediators are obviously entitled to their own views of homosexuality, but in a professional role, they are ethically obliged to serve clients without judgment or prejudice and without imposing values or beliefs.” *Id.* He also notes the effect the mediator may have on the parties by disclosing his or her own sexual orientation: “[W]hereas some mediators favor self-disclosure about their sexual orientation, others decide that such disclosure violates the notion of a mediator as a neutral third-party.” *Id.* at 365. He also recommends that mediators should not assume that a potential

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

anger make the mediator uncomfortable in a way that he may cut off a party's expression of it?¹⁷⁷ Does crying make the mediator uncomfortable in a way that he may suppress the expression of sadness, fear, vulnerability, regret, and other emotions expressed in this way or other ways? Can she work with borderlines, narcissists, sociopaths, and other high conflict personalities without those parties pushing her buttons or manipulating her?¹⁷⁸

Mosten would add the following questions to this self-awareness¹⁷⁹ inventory:

When people treat each other badly, can [the mediator] nevertheless work with them? When people act stupidly or self-destructively, do[es] [the mediator] bleed for them or wash [his] hands of them? Are there particular ethnic groups, lifestyles, cultures,

mediation party is married or has children. Instead, during the intake process, the mediator should use inclusive language or open-ended questions. For instance, she might ask: "Who was living in the family home prior to separation?" *Id.*

177. ROGER FISHER & DANIEL L. SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005); DANIEL GOLEMAN, *HEALING EMOTIONS: CONVERSATIONS WITH THE DALAI LAMA ON MINDFULNESS, EMOTIONS, AND HEALTH* (2003); Clark Freshman et al., *The Lawyer-Negotiator as Mood Scientists: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1 (reviewing a variety of studies and giving some advice for legal negotiators); Daniel L. Shapiro, *Emotions in Negotiation: Peril or Promise?*, 87 MARQUETTE L. REV. 737 (2004). See also Nina R. Meierding, *Managing the Communication Process in Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 243 (Jay Folberg et al. eds., 2004) (noting that a mediator who reframes the parties' words to reduce the emotional intensity expressed by them faces some risks. "An angry party may feel that the mediator is taking sides, dismissing the passion or anger behind the statement, or invalidating the seriousness of the situation. The new language may feel *neutered* rather than *neutral!*") (emphasis in original).

178. See generally WILLIAM A. EDDY, *HIGH CONFLICT PERSONALITIES: UNDERSTANDING AND RESOLVING THEIR COSTLY DISPUTES* (2003). See also Pamela Lehman & Norman R. Page, *Enhancing Mediator Neutrality Through Question-Asking*, Sept. 2007, <http://www.mediate.com/articles/pageLehman.cfm> (last visited Jan. 30, 2009) (advising mediators to avoid loaded questions like, "To what defect of your personality do you attribute this error?").

179. Kovach suggests: "When confronting neutrality issues, often the mediator's first hurdle is self-analysis." KOVACH, *supra* note 41, at 158. Similarly, Mosten says:

Being neutral doesn't mean liking every participant or being devoid of biases in favor or against certain people. Don't worry; mediators aren't saints. Every professional mediator I know has biases and develops nonneutral feelings toward parties. The key is to be able to recognize those feelings, acknowledge them, and work to make sure they do not pollute the process by favoring one party over the other.

MOSTEN, *supra* note 43, at 26.

genders, or other categories of people whom [the mediator] just do[esn't] like or with whom [she has] trouble working?¹⁸⁰

Greer, describing one of his early mediations, admits: "I took an instant disliking to the owner because he was manipulative, loud, and generally obnoxious. He was skilled in the use of high-pressure tactics, and he did not wait long to try to intimidate me."¹⁸¹ Another example of bias based on the conduct of the parties appeared on "The Lighter Side" page of *Dispute Resolution Magazine*. The mediator explained that he was resigning as the mediator in the dispute because one party's "outbursts are too stressful for a man of my age I am retiring effective today . . . to preserve my sanity. Every time Mr. [] tries to be 'helpful' or provide 'useful' information, Mr. [] goes apeshit I just can't take it."¹⁸²

Kovach suggests that a mediator's attempt to correct imbalances in negotiating power or skills (attributes or behavior of the party) implicates mediator impartiality, because "he becomes an advocate for the weaker less capable party"¹⁸³ The inclination to intervene can also arise when "some parties are more verbose and willing to participate than others Neutral behavior may require that the mediator allows the parties adequate time to speak and express themselves during the process."¹⁸⁴ Other authors note that:

[s]ometimes it is quite difficult not to agree with one party (the wife who is being left or the employee who clearly got passed over for a well-deserved promotion), but allowing those feelings to interfere with neutrality while running the process is deadly. The parties see it and lose trust in the mediator's ability to let them make their own decisions.¹⁸⁵

Another author cautions mediators about their caucus processes. A party may perceive bias or favoritism if the mediator spends more time in

180. MOSTEN, *supra* note 43, at 26.

181. John N. Greer, *The Worst Was the First: Lessons from a Rookie*, MEDIATE.COM, Feb. 2008, <http://www.mediate.com/articles/greerJ1.cfm> (last visited Jan. 30, 2009) [hereinafter Greer, *Lessons from a Rookie*] (expressing concerns about the power imbalance between the parties and their age, gender, race, and cultural differences). Studies show that female mediators intervene more often than male mediators on behalf of either divorcing spouse in family mediations. See Jay Folger & Susan Bernard, *Divorce Mediation: When Mediators Challenge the Divorcing Parties*, 10 MEDIATION Q. 5, 20 (1985).

182. *A Mediator's Retiring Words*, DISP. RESOL. MAG., Winter 2004, at 32. The editors specifically disclaim the authenticity of the transcript, but acknowledge it as a description of one hazard of the field.

183. KOVACH, *supra* note 41, at 152. A mediator's efforts to create a "fair" agreement by interventions on behalf of a weaker party can also create a Quadrant 3 bias. See *infra* Part IV.E.3.

184. KOVACH, *supra* note 41, at 154.

185. ABRAHAM P. ORDOVER & ANDREA DONEFF, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION 124-25 (2002).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

caucus with the other party.¹⁸⁶ The mediator should advise parties in advance that he or she may need to spend more time with one party to gather helpful information or to formulate a settlement proposal.¹⁸⁷ The extra time should not be construed as favoritism towards one party or bias against the other party.¹⁸⁸

Relationships that relate to how the mediator will be paid can affect a mediator's impartiality and conduct towards the parties. Does the mediator accept referral fees from lawyers who regularly use her in mediation, therefore consciously or unconsciously creating a bias in favor of the referring attorneys and their clients?¹⁸⁹ Is one party paying the full cost of the mediation so that the mediator may show bias in favor of that party?¹⁹⁰ Is the party a repeat player—in other words, someone who uses the mediator's services on a regular basis?¹⁹¹ Can the mediator remain even-handed knowing that she may be dependent on one party for her next referral?¹⁹² Arguably, the fee paying, referral making, or repeat business attribute of a party could trigger mediator bias in favor of that party.

Finally, Honeyman notes the irony of personal bias. “[A]n *actual* personal bias may remain unknown to all participants. The *appearance* of personal bias, however, may leave the mediator blissfully ignorant of any problem, while causing one party to act based on [his or her] perception that the mediator is biased against [him or her].”¹⁹³

186. JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK* 23–24 (2000).

187. *Id.*

188. *Id.*

189. MOORE, *supra* note 60, at 52 (“Neutrality also means that the mediator does not expect to obtain benefits or special payments from one of the parties as compensation for favors in conducting the mediation.”). For a discussion of referral fees in the context of legal ethics, see Helen W. Gunnarsson, *Fee Not-So-Simple: Referral Fee Dos and Don'ts*, 93 ILL. BAR J. 236 (2005).

190. “This practice occurs routinely in such areas as the mediation of employment discrimination lawsuits, where the defendant employer pays the mediator's fee, personal injury litigation, and the like.” ABA, ACR & AAA, *Reporter's Notes*, § V(I), available at http://www.abanet.org/litigation/standards/docs/mscm_reporternotes.pdf [hereinafter *Reporter's Notes*]. People commenting on the draft standards expressed concern that if the standards precluded these types of fee arrangements, some parties might have to forgo the benefits of mediation. *Id.*

191. Kovach characterizes the “repeat player” issue as a Quadrant 1 issue of future relationships with participants. KOVACH, *supra* note 41, at 157.

192. These situations also raise questions about the mediator's relationship to the outcome or fee. The next section of the article discusses this issue.

193. Honeyman, *supra* note 45, at 585.

This quadrant likely represents the largest category of mediator biases because each mediator in the field will hold a host of different biases triggered by a vast variety of participant conduct or attributes.

b. Buzz Group Discussion of Party Conduct or Attributes that Can Trigger Mediator Bias

In the workshop, I ask the buzz groups to consider the following questions: (1) “What kinds of *conduct* of a party or his or her lawyer might affect a mediator’s impartiality?” and (2) “What *attributes* of a party or his or her lawyer might affect a mediator’s impartiality?” These questions always generate some interesting answers. One participant disclosed that she had difficulty staying neutral towards parties who wanted to open the mediation session with a prayer. Another participant described a session in which one of the parties, a law enforcement officer, removed her holstered gun from her waist and placed it prominently in the center of the mediation table. Yet another participant explained her difficulty with parties who exhibited narcissistic behavior that reminded her of a former boss. Another participant described her difficulty in working with a party whose mannerisms reminded her of a brother she did not like. Another participant described the adverse reaction she had in a car accident case to the white plaintiff who used the word “them” in a joint session discussion involving an African-American defendant.

c. Learning Specific Code Provisions Governing Freedom from Bias Based on the Behaviors or Attributes of Parties

If time permits, the instructor can again tie the general discussion to specific provisions of an aspirational or mandatory code. For example, the 2005 Model Standards discuss these aspects of conduct neutrality in Standard II.¹⁹⁴ I discuss the relevant provisions of the standards in a previous article.¹⁹⁵

194. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II (2005).

195. Young, *Rejoice!*, *supra* note 30, at 213–14.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

3. Quadrant 3: Mediator Bias Based on His or Her Relationship to the Outcome

a. Introduction to Topic

Up to this point, even novice mediators can generally understand the problems that arise when a mediator's impartiality can be affected by the relationships he or she has with participants in the process or the conduct of the parties in that process. The next two quadrants of the grid—both of which focus on the outcome of the mediation—may be less accessible to mediators who have not yet had much practice experience. In other words, like law students, more inexperienced mediators may lack the professional “context” for fully processing (stage two learning) the ethics information.

Party self-determination is at the core of this quadrant of the grid, but it focuses on the mediator's relationship with the outcome of the mediation.¹⁹⁶ The literature on mediator impartiality tends to focus on this aspect of impartiality. In an ideal setting, a mediator will defer to the high-quality decision making of the parties to settle—or not—and on what terms.¹⁹⁷ One author reminds us that the mediator should stay outside the conflict itself by “refusing to slip into the role of judge, adviser, or advocate.”¹⁹⁸ Stulberg reminds us that the role of the mediator is not that of a philosopher-king who participates in the affairs of his citizenry.¹⁹⁹ Gifford warns that “[i]f a mediator intrudes excessively into the substantive content of the negotiated agreement, she virtually becomes an adjudicator and not a mediator.”²⁰⁰ The resulting agreement will not likely serve the parties' interests. In addition, the parties may resent the agreement because one or both of them may sense that the mediator imposed it on the parties.²⁰¹ Another mediator says: “If you have substantive experience on the issue at hand, you may have to fight you[r] own tendencies to be partisan.”²⁰²

196. BRUNET ET AL., *supra* note 71, at 225 (“[O]ne can argue that in mediation all outcome-determining norms must be generated by the parties.”).

197. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 854–57 (1997).

198. DAVID W. AUGSBURGER, *CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS* 197 (1992).

199. Stulberg, *A Reply to Professor Susskind*, *supra* note 50, at 114.

200. DONALD G. GIFFORD, *LEGAL NEGOTIATION THEORY AND APPLICATIONS* 206 (1989).

201. *Id.*

202. *Best Practices: A Participant Accuses You*, *supra* note 49, at 3 (quoting Jonathan Raab). Two mediators also note:

Rose, a well-known California mediator, writes:

Clients brought a complex set of goals and objectives to the process. Instead of trying to design the outcome, based on my formal law school training and professional legal expertise, I had begun discovering both the necessity for and the value of ceding to clients the responsibility for dealing with the content of their settlement. Without consciously intending to do so, I had begun practicing the art of . . . working within a “client-centered” process.²⁰³

Moore explains: “Mediators are advocates for a fair process and not for a particular settlement.”²⁰⁴ In Stulberg’s description of the problem, a mediator should not have a “substantive commitment to a particular outcome or range of outcomes for a given dispute.”²⁰⁵ Haynes talked about the

Another potential trap occurs when the mediator has a background in a professional field (e.g., medical, construction, real estate) and may feel that his or her background knowledge would help to move things along. A mediator’s expertise in a relevant content area should serve to make the mediator a more informed listener and aid in formulating insightful questions, but not to add opinions or factual information This type of input could negatively impact the parties’ perception of the mediator’s neutrality.

Lehman & Page, *supra* note 178, at 1.

203. Chip Rose, *The Client-Centered Process: Common Ground for Mediators and Collaborative Professionals*, FAM. MEDIATION NEWS, Fall 2007, at 1, 5, available at <http://www.mediate.com/articles/rose6.cfm> (“A process can be defined as client-centered when it is *of, about, and for the clients.*”) (emphasis in original).

204. MOORE, *supra* note 60, at 52–53 (suggesting a mediator should not “indicate his personal opinion or approval of the solution that [the parties] ultimately developed”).

205. Stulberg, *Reply to Professor Susskind*, *supra* note 50, at 115. In contrast, and unlike any other set of UPL guidelines for mediators, the Virginia UPL guidelines allow mediators to give parties a sense of the range of the verdicts juries had awarded in similar types of cases. See DEP’T OF DISPUTE RESOLUTION SERVS., SUPREME COURT OF VA., GUIDELINES ON MEDIATION & THE UNAUTHORIZED PRACTICE OF LAW ch. 2, § 4 (1999), http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf [hereinafter VIRGINIA UPL GUIDELINES]. The mediator, however, must be sufficiently familiar with the awards in a given type of case and in a particular location by virtue of his or her experience or his or her familiarity with empirical evidence. *Id.* Also, the mediator should not make specific outcome predictions in a case. The mediator may also provide a “range of possible outcomes.” *Id.* As a matter of good practice, the mediator should advise parties that no two cases are identical. The mediator should also take care that this type of intervention does not undermine party self-determination or the mediator’s impartiality. *Id.* See generally Paula M. Young, *A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the “Authorized Practice of Mediation” Paradigm to “Unauthorized Practice of Law” Disciplinary Bodies*, 49 S. TEX. L. REV. 1047, 1203–29 (2008) [hereinafter Young, *Kangaroo Court?*] (describing mediator conduct that could be deemed the practice of law).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

concept in terms of asserting “power in controlling the process but deny[ing] power in relation to the content.”²⁰⁶ Bernard and his co-authors simply say:

[W]e recommend a strictly neutral settlement strategy as an initial position. Deviating from this stance should be explicitly and deliberately chosen and justified. We are impressed with the difficulty of making such powerful value decisions for others. Should mediators attempt to do so, they should act openly and with the obligation to explain their judgment to the parties.²⁰⁷

Winslade and Monk quote one author who expresses concern that “instrumental goal-directed thinking leads to a privileging of ‘substantive issues over relational and identity management aims.’”²⁰⁸ They quote Folger and Bush as expressing the concern that a “settlement orientation” narrows “the range of subject matter that a mediation conversation can address.”²⁰⁹ Moreover, the mediator can, through imposition of his or her views, change the frames of reference of the parties, thus potentially suppressing social justice issues, ignoring power imbalances, and allowing third-parties to covertly determine outcomes.²¹⁰

Honeyman takes a more nuanced approach to the topic by realizing that the urge to control the outcome of the mediation can arise as part of a mediator’s philosophy of practice or style.²¹¹ A mediator can focus on an immediate settlement (problem-solving or evaluative orientation) or on the improvement of the relationship (transformative orientation).²¹² Those orientations to the process can affect the outcome of the mediation. In addition, more evaluative mediators may exercise more control over the outcome by exercising more control over the information parties use to reach

206. John M. Haynes, *Mediation and Therapy: An Alternative View*, 10 *MEDIATION Q.* 21, 23 (1992), reprinted in ALAN S. RAU ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 384 (3d ed. 2002) [hereinafter Haynes, *Mediation and Therapy*].

207. Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 *MEDIATION Q.* 61, 73 (1984).

208. WINSLADE & MONK, *supra* note 44, at 36.

209. *Id.* (quoting Folger & Bush).

210. *Id.* at 48 (quoting Folger & Bush).

211. See Honeyman, *supra* note 45, at 581–89.

212. Carrie Menkel-Meadow challenged whether the transformative approach to mediation was not without its own biases, agendas, and interests about the outcome of mediation that might run counter to those of the parties. She asked: “What goals should any process serve? From what to what are we seeking to transform people? Who are the ‘we’s’ that preside over this transformation?” Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 *NEGOTIATION J.* 217, 235–38 (1995), quoted in ALAN S. RAU ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 428–29 (3d ed. 2002).

a decision.²¹³ In the context of this Quadrant 3 discussion, Honeyman identifies what he calls “situational bias” arising from an attorney-mediator’s concurrent adherence to a legal code of ethics.²¹⁴ Thus, if the mediator realizes that a mutually acceptable settlement would be unlawful, he or she would thereafter have problems acting “whole-heartedly” in his or her role as mediator.²¹⁵ In effect, the mediator would likely discourage the parties from taking this unlawful path for the sake of the “public-interest” and thereby exert control over the outcome of the mediation.²¹⁶

213. Honeyman, *supra* note 45, at 584–85. *See also* BRUNET ET AL., *supra* note 71, at 254 (“Even providing information is not neutral and unproblematic.”). Nonetheless, Virginia’s Standards of Ethics and Professional Responsibility for Certified Mediators (Standards of Ethics) provides:

1. The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant. 2. A mediator shall *give information* only in those areas where qualified by training or experience. 3. *When providing information, the mediator shall do so in a manner that will neither affect the parties’ perception of the mediator’s impartiality, nor the parties’ self-determination.*

STANDARDS OF ETHICS & PROF’L RESPONSIBILITY FOR CERTIFIED MEDIATORS § F (Judicial Council of Va. 2005) (emphasis added). The Virginia Ethics Committee, on which I served, revised these standards. Virginia’s DRS office has not yet implemented the revisions. Nonetheless, provisions cited in this article may be different by the time of its publication.

I could do a training workshop focusing on these provisions of the ethics code. When could a mediator satisfy the requirements of the final condition? Virginia’s UPL Guidelines provide additional guidance to mediators. They suggest a mediator may (1) “provide legal resources and procedural information to disputants”; (2) make statements that declare the law on a given topic so long as the mediator is competent to do so by training or experience; (3) ask “reality-testing questions,” even if they “raise legal issues,” so long as they do not predict the specific resolution of a legal issue; (4) inform the parties about outcomes in a particular court or type of case based on personal observation or empirical research, so long as the mediator does not make a specific prediction in a specific case; and (5) inform the parties about the general enforceability of mediated agreements. VIRGINIA UPL GUIDELINES, *supra* note 205, ch. 2, § 4. Virginia’s DRS office takes a very liberal view of the scope of these activities as its examples indicate. Virginia mediators can provide parties with copies of relevant statutes or court cases, with reference information that will allow parties to do their own legal research, or with printed brochures. Virginia’s Dispute Resolution Services guidelines see these activities as supporting the parties’ abilities to make fully-informed decisions. *Id.* Mediators may provide parties information about local court procedures for scheduling matters, required fees, or the steps parties must follow to have the “mediated agreement entered as a court order.” *Id.* The guidelines recognize that for many parties in court-connected or community mediation programs, the mediator will be the principal source for this type of information. *Id.* *See generally* Young, *Kangaroo Court?*, *supra* note 205, at 1203–40.

214. *See* Honeyman, *supra* note 45, at 586–87.

215. *Id.*

216. *Id.* at 586. *See also* ORDOVER & DONEFF, *supra* note 185, at 128 (“Mediators have an obligation to make sure [through reality testing questions and independent professional advice] that the agreements reached are not illegal or impossible to execute.”); KOVACH, *supra* note 41, at 156

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Very few authors have commented on the risks associated with a therapist-mediator who blurs professional roles.²¹⁷ These therapists may mediate with a particular outcome in mind, specifically “the best interest of the child” as a matter of mediator philosophy.²¹⁸ Barsky, a professor at the School of Social Work of Florida Atlantic University, provides the following example of this type of outcome bias in the family mediation context:

All of us have preconceptions and biases about the nature of family, what is “good” for separating couples and their children, and what types of parenting rights and responsibilities society “should” promote. As family mediators working with same-sex couples, it is imperative to be aware of our preconceptions and biases, ensuring that these do not inhibit our ability to practice in an impartial, respectful, and client-centered manner.²¹⁹

Donaghy cites a study of community mediators who “set aside their position of neutrality and act[ed] as advocates for the parties.”²²⁰ They coached tenants in landlord–tenant disputes to begin seeing their situation as one of disparate power and resources in comparison to the landlords.²²¹ The community mediators encouraged the tenants to lobby for change in the landlord–tenant relationship.²²² In doing so, they controlled the outcome of the mediation.

Schwarz, writing in the context of group facilitation, considers the issue from the perspective of the use of neutral questions, paraphrasing, and summarizing. He admits that a neutral is “not neutral about the content of a group’s discussion when it involves how to manage group or interpersonal

(“[S]hould an illegal matter surface during mediation, such as the option of paying past due rent with cocaine, then the mediator should immediately terminate the session.”).

217. For a discussion of the risks of any mediator blurring his or her professional roles, see Young, *Kangaroo Court?*, *supra* note 205, at 1211–29. *See also* Honeyman, *supra* note 45, at 584 (“[C]areful research . . . supports the dismaying finding that all mediators are more evaluative than they think.”).

218. *See* Barsky, *supra* note 176, at 371; Beck et al., *Research on the Impact of Family Mediation*, *supra* note 51, at 472 (describing the euphemism of “expanded” neutrality).

219. Barsky, *supra* note 176, at 371. *See also* Schepard, *supra* note 137, at 527 (“Impartiality towards the outcome means that a mediator does not have any preconceived views about a particular settlement. A mediator should not lead the parties toward a particular outcome, such as selling the house or joint custody. The participants are responsible for the outcome, not the mediator.”).

220. Brendan Donaghy, *Bad Apples, Bad Barrels*, *MEDIATE.COM*, Aug. 2007, <http://www.mediate.com/articles/donaghyB2.cfm> (last visited Jan. 30, 2009).

221. *Id.*

222. *Id.* *See also* KRAYBILL ET AL., *supra* note 62, at 20 (making the distinction between party advocates, issue advocates, and process advocates).

process more effectively.”²²³ In managing this process, the author encourages neutrals to choose words that make a distinction between the roles of the facilitator and the group members; and avoid judgmental words that “contain some built-in evaluation, implying that the facilitator either approves or disapproves of . . . [an] idea.”²²⁴ He further recommends that the facilitator decline assignments when he or she cannot be substantively neutral because he or she has strong feelings about the subject matter of the dispute. He explains that:

[T]here are two working criteria for judging neutrality: facilitators must believe that their personal views about the substance of the facilitation will not significantly affect the facilitation, and the client group must believe that [the] facilitator’s personal views about the substance of the facilitation will not significantly affect her facilitation.²²⁵

Firestone suggests that parties should consider the following situations because they change a mediator’s relationship to the outcome of the mediation.²²⁶ Does the mediator brag about a high settlement rate?²²⁷ Does the court-connected program director refer cases to mediators with high settlement rates?²²⁸ Should a party, therefore, be concerned that the mediator views the case as the next notch on his belt? Does the mediator have a vested interest in the outcome because his fee is based on a percentage of the agreed settlement? Does she unduly prolong the mediation

223. ROGER M. SCHWARZ, *THE SKILLED FACILITATOR: PRACTICAL WISDOM FOR DEVELOPING EFFECTIVE GROUPS* 18 (1994).

224. *Id.* at 140.

225. *Id.* at 242.

226. Firestone Conference Presentation, *supra* note 118.

227. Beck et al., *Research on the Impact of Family Mediation*, *supra* note 51, at 472 (suggesting that mediators who achieve a settlement without focusing on underlying causes for the conflict may direct the conversation between the parties and “inadvertently lead them to push couples towards a particular result”; even a problem-solving approach that considers underlying causes of the conflict can cause the mediator to direct the parties “towards particular discussions that can lead to solutions”). Christopher Moore, however, suggests that “mediators, although neutral in relationship to the parties and generally impartial toward the substantive outcome, are directly involved in influencing disputants toward settlement.” CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 327 (1986). Coben expresses concern that consumers may not be aware that mediators have this bias towards settlement or that the mediator will use a variety of tools to achieve settlement. “Such ‘control or play upon by artful, unfair, or insidious means so as to serve one’s purpose’ is the very definition of manipulation.” James R. Coben, *Mediation’s Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 J. ALTERNATIVE DISP. RESOL. EMP. 4, 6 (2000). See also ORDOVER & DONEFF, *supra* note 185, at 125 (“Pushing the parties toward a settlement is just as much a showing of partiality—it is still taking sides; it just happens to be your side instead of one of the parties.”).

228. Persons commenting on the draft standards expressed concern that in court-connected programs, program administrators may steer cases to mediators known to have high settlement rates. *Reporter’s Notes*, *supra* note 190, § V(C). This practice may undermine a mediator’s ability to maintain an impartial relationship to the outcome.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

session to earn a larger fee?²²⁹ Does he act in a way to ensure future referrals from the repeat player?

Honeyman would characterize some of these concerns as aspects of “situational bias,” a term referring to the pressures a mediator may feel as a result of his or her source of appointment or arising from obligations to parties not immediately involved in the mediation.²³⁰ He describes the organizational pressures that the third parties who maintain rosters of mediators may exert on the mediator through repeated appointment as a mediator or in monitoring settlement rates.²³¹ Even when the appointing organization does not consider settlement rates of mediators, mediators may still perceive the need to be “successful.” A mediator described the pressure he felt in this situation: “If I failed to get an agreement my first time out, I was afraid the [Maryland] Commission [on Human Rights] might not have me back.”²³²

Firestone also urges us to consider whether a mediator believes, for example, that all civil rights-related mediations must result in an agreement consistent with Title VII law.²³³ Can he mediate with impartiality as to the outcome in an air pollution case if his son suffers from severe asthma? Can she mediate with impartiality an abortion clinic real estate boundary dispute if she opposes abortion?

Time pressures also may lead mediators to seek the first possible agreement rather than the best possible agreement, especially if he or she “need[s] to show progress to the mediator’s appointing agency or peers”²³⁴ Mediation, therefore, can “favor a quick or easy way out instead of a real and enduring solution.”²³⁵ A rookie mediator described a failed mediation in which self-imposed time pressures affected his ability to

229. Isolina Ricci, *Court-Based Mandatory Mediation: Special Considerations*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 404 (Jay Folberg et al. eds., 2004) (“Couples unaware of the terms of the state or local mandate may not question attending regular mediation sessions for [six] or [eight] months, assuming that long-term negotiations are expected by the state mandate.”).

230. Honeyman, *supra* note 45, at 586.

231. *Id.* See also *Best Practices: A Participant Accuses You*, *supra* note 49, at 2 (describing how an electricity consumer accused a facilitator of bias because the consumer perceived the facilitator as “invested in ‘getting a settlement.’”).

232. Greer, *Lessons from a Rookie*, *supra* note 181, at 2.

233. Firestone Conference Presentation, *supra* note 118.

234. Honeyman, *supra* note 45, at 588. For a discussion of the use by a mediator of time constraints to pressure parties into a settlement, see *infra* notes 270, 278–98 and accompanying text.

235. Honeyman, *supra* note 45, at 587.

work with the parties.²³⁶ He admitted that he had taken time off from his day job and “was very conscious of the need to get back to the office in a reasonable amount of time.”²³⁷

Perhaps the most difficult philosophical decision mediators face is whether they must intervene to ensure a fair outcome, especially when the mediator perceives that one party has little power or negotiating skill. In whatever way the mediator resolves this issue, it could affect his impartiality or the perception by one party of his partiality. Scholars have carefully debated whether a mediator must ensure a “fair” outcome.²³⁸ I only outline the contours of that debate in this article.

Mnookin identifies five elements defining a party’s power in the relationship: (1) the legal rules governing the issues in the divorce, including marital property distribution, child custody, and child and spousal support obligations; (2) the parties’ best alternatives to a negotiated agreement; (3) each party’s risk tolerance; (4) the parties ability to retain and use lawyers and other professionals in the divorce process; and (5) each party’s support for his or her positions and the extent to which they will manipulate the other party to gain advantage in the negotiation.²³⁹

236. Greer, *Lessons from a Rookie*, *supra* note 181, at 2.

237. *Id.*

238. See, e.g., STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 298–99 (2d ed. 2007) (framing the debate as the libertarian view and the egalitarian view based on comments made by James Boskey); Cecilia Albin, *The Role of Fairness in Negotiation*, 9 NEGOTIATION J. 223 (1993); Albie M. Davis & Richard A. Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes*, 6 MEDIATION Q. 17 (1984); Delgado et al., *supra* note 172; Carl M. Dibble, *Bargaining in Family Mediation: Ethical Considerations*, 4 MEDIATION Q. 75 (1984); Desmond Ellis & Laurie Wight, *Theorizing Power in Divorce Negotiations: Implications for Practice*, 15 MEDIATION Q. 227 (1998); Susan N. Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387; Folger & Bernard, *Divorce Mediation*, *supra* note 181; Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41 (2000), reprinted in ALAN S. ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 384 (3d ed. 2002); Haynes, *Mediation and Therapy*, *supra* note 206, at 22–30 (“But the task of the mediator is to help the participants develop and articulate their own unique sets of moral precepts. The core of mediation is reconnecting people to their own inner wisdom or common sense.”); Joan B. Kelly, *Power Imbalances in Divorce and Interpersonal Mediation: Assessment and Intervention*, 13 MEDIATION Q. 85 (1995); Judith Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991); Bernard Mayer, *The Dynamics of Power in Mediation and Negotiation*, 16 MEDIATION Q. 75 (1987); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making*, 74 NOTRE DAME L. REV. 775 (1999) [hereinafter Nolan-Haley, *Informed Consent*]; Riskin, *Toward New Standards*, *supra* note 134; Jeswald W. Salacuse, *The Art of Advising Negotiators*, 11 NEGOTIATION J. 391 (1995); Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909 (1998); Donald T. Saposneck, *What Is Fair in Child Custody Mediation?*, 8 MEDIATION Q. 9 (1985).

239. ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 25 (2000).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Honeyman, discussing “structural bias,” counter-intuitively suggests that the mediation process will tend to “benefit weaker parties over stronger ones, moderate factions over radical, and negotiators over principals.”²⁴⁰ The field recognizes that persons acting in “bad faith” can also use mediation as a tool to gain power and strategic advantage.²⁴¹

Some mediators assert that they can or should redress these sources of power imbalances.²⁴² Nolan-Haley suggests that, in mediations in which the parties appear pro se, “fairness demands that these parties know their legal options before making final decisions in mediation.”²⁴³ Maute advises that a mediator should “refuse to finalize an agreement when one party takes undue advantage of the other, when the agreement is so unfair that it would

240. Honeyman, *supra* note 45, at 587–88 (“In the process of altering positions . . . the stronger party is thus led toward positions and proposals based on ‘defensible’ criteria . . . [thereby] los[ing] ground because she is led to compete more within the weaker party’s frame of reference.”).

241. *Id.* at 589.

242. For a discussion of this issue, see Field, *supra* note 129, at 16. See also BRUNET ET AL., *supra* note 71, at 200 (“Some would draw a line at content-neutrality, however, when the result would be unfair to one of the parties or have detrimental effects on individuals with interests that are not represented at the table.”).

243. Nolan-Haley, *Informed Consent*, *supra* note 238, at 837. Judith Maute goes even further, stating that: “When the parties are not independently represented, the lawyer-mediator represents them jointly in a limited capacity. When mediating a litigable dispute, the neutral lawyer is accountable to both the legal system and her clients Where the mediation substitutes for legal process, the neutral lawyer[-mediator] has a duty to protect the public value of fairness.” Maute, *supra* note 238, at 509. No ethics code imposes this duty on a mediator. They typically require much higher levels of unfairness before a mediator must take any action. The ethics codes typically require the mediator to withdraw without otherwise “policing” the fairness of the agreement. For example, Virginia’s Standards of Ethics states: “Under circumstances in which the mediator believes that *manifest injustice* would result if the [settlement] agreement was signed as drafted, the mediator shall withdraw from the mediation prior to the agreement being signed.” STANDARDS OF ETHICS & PROF’L RESPONSIBILITY FOR CERTIFIED MEDIATORS § J (Judicial Council of Va. 2005) (emphasis added). See also Fla. Mediator Ethics Advisory Comm., Op. 98-005 (Aug. 7, 1998), available at http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/1998%20Opinion%20005.pdf (mediator should not have signed a settlement agreement negotiated when he was partially absent from the session and which he suspected resulted from duress). Virginia’s Standards of Ethics further require the mediator to inform the parties if he or she decides that the integrity of the mediation process has been compromised by, for example: “(a) the inability or unwillingness of a party to participate meaningfully; (b) *gross inequality* of bargaining power or ability; or (c) *gross unfairness resulting from non-disclosure or fraud by a participant*.” STANDARDS OF ETHICS & PROF’L RESPONSIBILITY FOR CERTIFIED MEDIATORS § L (Judicial Council of Va. 2005) (emphasis added). After requiring the mediator to inform “the parties” (which suggests a duty to inform both parties), Section L then instructs the mediator to discontinue the mediation, but to adhere to any confidentiality requirements. *Id.* The ethics codes never require a mediator to give legal advice or otherwise act as a legal representative for one of the parties. See generally Young, *Kangaroo Court?*, *supra* note 205, at 1211–19 n.341.

be a miscarriage of justice, or when the mediator believes it would not receive court approval.”²⁴⁴

A modified approach to mediator neutrality permits mediators to give unrepresented parties professional information.²⁴⁵ Most ethics codes only permit a mediator to provide information he or she is qualified to give by virtue of the mediator’s training or experience, and then only if the mediator can do so without looking partial to one party or undermining party self-determination.²⁴⁶ These ethical limitations arise out of a concern that

244. Maute, *supra* note 238, at 505–06.

245. Nolan-Haley, *Informed Consent*, *supra* note 238, at 837.

246. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI.A.5 (2005).

The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

Id. Another standard defines party self-determination as “the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.” *Id.* at Standard I.A. However, the standards caution that “[a] mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.” *Id.* at Standard I.A.2.

The divorce model standards describe the mediator as “an impartial facilitator . . . [who] may not impose or force any settlement on the parties.” MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard III.A.1 (2000). They also provide that a “mediator shall not provide therapy or legal advice.” *Id.* at Standard VI.B. However, a mediator “should facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging the participants to consult appropriate experts.” *Id.* at Standard VI.A. Another standard allows the mediator to give “information that the mediator is qualified by training or experience to provide” so long as that act is consistent with standards governing self-determination and mediator impartiality. *Id.* at Standard VI.B.

The Florida Standards of Conduct provide:

- (a) Providing Information. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.
- (b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.
- (c) Personal or Professional Opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

professional opinion as to how the court in which the case has been filed will resolve the dispute.

FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.370(a)-(c) (2000). The Committee Notes to this rule state:

The primary role of the mediator is to facilitate a process which will provide the parties an opportunity to resolve all or part of a dispute by agreement if they choose to do so. A mediator may assist in that endeavor by providing relevant information or helping the parties obtain such information from other sources 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.

Id. at R. 10.370 committee's note. The Florida rules make the mediator "responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination." *Id.* at R. 10.310(a). The Committee Notes to this rule state:

On occasion, a mediator may be requested by the parties to serve as a decision-maker. If the mediator decides to serve in such a capacity, compliance with this request results in a change in the dispute resolution process impacting self-determination, impartiality, confidentiality, and other ethical standards. Before providing decision-making services, therefore, the mediator shall ensure that all parties understand and consent to those changes.

Id. at R. 10.310 committee's note. *See also* Love & Cooley, *supra* note 111, at 58-59 (describing the dangers to the core values of mediation from mediator evaluations). Finally, the Florida rules provide that "[a] mediator shall respect the role of other professional disciplines in the mediation process and shall promote cooperation between mediators and other professionals." FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.670 (2000).

Virginia's Standards of Ethics provide:

(1) The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant. (2) A mediator shall *give information* only in those areas where qualified by training or experience. (3) When providing information, the mediator shall do so in a manner that will neither affect the parties' perception of the mediator's impartiality, nor the parties' self-determination.

STANDARDS OF ETHICS & PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS § F (Judicial Council of Va. 2005) (emphasis added). *See also* VA. RULES OF PROF'L CONDUCT R. 2.10(b)(2), cmt. 3 (2008) (similar language). A Virginia Supreme Court rule, however, gives lawyer-mediators more flexibility in their roles:

offering advice²⁴⁷ or information can change the dynamic of the negotiations between the parties because it may favor one of the parties. It therefore presents the risk that it will undermine party self-determination or affect the parties' perception of the mediator's impartiality, implicating at least two of the core values of mediation.

One mediator recommends that the mediator avoid becoming an advocate for either side by providing information, advice, or other negotiating support: "The stronger party will likely see the mediator as biased and feel ganged up on by the mediator and the weaker party Neither should the mediator passionately aid both parties as, again, the weaker side would benefit more from such assistance."²⁴⁸ Bush expresses even more reservation about policing the fairness of the outcome or the balance of power between the parties.²⁴⁹ Those interventions intrude on the "decision-making autonomy and . . . self-determination . . . even if there is a nondisclosure [of pertinent information], [because] all parties know that this is a risk of negotiation."²⁵⁰

(c) A lawyer-mediator may offer *legal information* if all parties are present or separately to the parties if they consent (d) A lawyer-mediator may *offer evaluation of*, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.

Id. at R. 2.11(c)–(d) (emphasis added). Taken together, the Virginia Rules of Professional Conduct and the Virginia Standards of Ethics prevent a mediator from offering legal advice, but allow a mediator to provide information in specific contexts. They authorize a lawyer-mediator to provide *legal information* under certain conditions and to provide at least three types of case evaluation, subject to the constraints of maintaining impartiality and party self-determination. *See id.* at R. 2.11(c)–(d), cmt. 7. *Compare* Conn. Formal Ethics Op. 35 (1988) and Or. Formal Ethics Op. 488 (1983) (advising that a lawyer-mediator may give all parties in a divorce mediation information on legal rules and explain whether party proposals fall within reasonable legal tolerances) *with* Wis. Formal Ethics Op. E-79-2 (1980) (lawyer-mediator may not educate the parties as to their legal rights and responsibilities).

247. *See* Haynes, *Mediation and Therapy*, *supra* note 206, at 22–30. "When asking questions, the mediator does not give advice [The mediator should avoid the imperative] and accept the couple's right to make the decisions—even if the decisions are not those the mediator would choose for them [T]he person issuing the imperative believes that his or her command is correct, factually or morally." *Id.* at 26–28.

248. Norman R. Page, *Dealing with Power Imbalances: Another Stab*, MEDIATE.COM, June 2005, <http://www.mediate.com/articles/pageN2.cfm> (last visited Jan. 30, 2009). *See also* ORDOVER & DONEFF, *supra* note 185, at 125 ("Of course, there is a definite line not to cross—practicing law or providing professional advice.").

249. Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1 *passim*.

250. *Id.* at 36 (discussing the study of ethical dilemmas reported by mediators and creating nine conceptual categories for analyzing them). Gunning, on the other hand, believes the mediator's

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

If the parties agree to an outcome that the mediator believes is unwise or against public policy,²⁵¹ like a racially-discriminatory hiring policy at a unionized manufacturer, Stulberg suggests the mediator protect his or her neutrality by using what is now often called “reality testing” questions:

The mediator should press the parties to examine whether or not they believe that (1) they would be acting in compliance with the law or with principles they would be willing, as rational agents, to universalize; (2) their activities will be acceptable to their respective constituencies and not overturned by public authorities; and (3) in the short and long run, their proposed actions are not contrary to their own self-interest. If the parties . . . still find the proposed course of action acceptable . . . [the mediator] can withdraw.²⁵²

Noll, while recognizing the mediator is a moral agent in the mediation process, stops short of requiring the mediator to assure an outcome that meets any standard of fairness independent from the standard on which the parties agree.²⁵³ Mediators concerned about the fairness of the outcome can withdraw from the mediation at any time or question the parties about the standards of fairness they intend to apply to the agreement or proposal.²⁵⁴

Mediators may have some difficulty spotting Quadrant 3 sources of bias, largely because they may reflect the identity, style, goals, and values of the mediator. In attempting to regulate these types of biases, we ask mediators to commit to a very broad vision of party self-determination, including the right of parties to make dumb, ill-informed, selfish, and legally unsound decisions. It also asks mediators to accept that some parties will decide not to consult lawyers or other professionals in making binding decisions in the mediation process. It asks mediators to accept parties as competent adults capable of running their own lives with great wisdom, even if the outcomes do not reflect the mediator’s perspective or expected outcome.

failure to intervene undermines party self-determination by undermining the informed decision-making of the parties. See Gunning, *supra* note 87, at 86–93.

251. See *supra* note 216 about unlawful outcomes negotiated by the parties.

252. Stulberg, *Reply to Professor Susskind*, *supra* note 50, at 116.

253. DOUGLAS NOLL, PEACEMAKING: PRACTICING AT THE INTERSECTION OF LAW AND HUMAN CONFLICT 407 (2003).

254. *Id.*

b. Buzz Group Examples of a Mediator's Relationship to the Outcome

At the VMN workshop, I did not disclose this discussion. Instead, I explored these issues by first providing an example: A disabled party files a claim under the Americans with Disabilities Act of 1990 (ADA)²⁵⁵ against a local store that sells DVD players.²⁵⁶ The disabled party explains in mediation that the store had no handicap access. The store owner explains that he has looked into the cost of having a wheelchair ramp installed. Given his current profit margin, he cannot afford its cost. However, he would be happy to settle by offering the other party the most expensive DVD in the shop in exchange for dismissal of the claim. The disabled party agrees. The mediator, however, believes—as a matter of law and as a matter of his own sense of social justice—that he cannot continue as the mediator unless the store owner agrees to install the ramp consistent with the requirements of the ADA. Or, he begins to guide the parties to an outcome that involves the construction of a ramp. Does the mediator have a bias towards a particular outcome?

I also quickly explain why most mediation ethics codes ban contingency fee agreements.²⁵⁷ Payment of the mediator based on a percentage of the final settlement amount may undermine a mediator's desire to convey a settlement offer between parties in caucus that might yield a lower contingency fee for the mediator.²⁵⁸

Following these examples, I ask the buzz groups to identify any other examples of situations in which a mediator's relationship to the outcome can undermine his or her impartiality in dealing with the parties or the dispute.

c. Learning Specific Code Provisions Governing Outcome-Oriented Interventions of the Mediator

As noted above, if the workshop format permits, the instructor could tie this discussion to the specific provisions of an aspirational or mandatory code of ethics. For example, the 2005 Model Standards address these

255. 42 U.S.C. §§ 12101 *et seq.*

256. I did not create this example, but borrowed it from another instructor. I cannot, however, recall from which instructor.

257. These contingency fee bans typically appear under a separate section of the ethics code governing fees. Most mediators would not understand them as an issue of mediator impartiality.

258. *But see* Scott R. Peppet, *Contrarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 228 (2003).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

aspects of impartiality in the standard dealing with party self-determination.²⁵⁹ This treatment shows how the fundamental values of party self-determination, mediator impartiality, and confidentiality often overlap or create tension between values. I have discussed the relevant provisions of the standards in a prior article.²⁶⁰

4. Quadrant 4: Mediator Conduct Affecting the Substantive Outcome

I explain that the final quadrant of the grid represents conduct that also undermines both the mediator's impartiality and party self-determination. The mediator's conduct can undermine party self-determination intentionally or unintentionally. Conduct falling in this quadrant of the grid gets the most attention in the codes of conduct governing mediators.

a. Introduction to the Topic

Kovach reminds us that "if mediators become too influential over the outcome, the agreement may cease to be that of the parties."²⁶¹ Riskin and his co-authors state: "[T]he greater the mediator's direct influence on the substantive outcome of the mediation, the greater the risk that one side will suffer as a result of mediator biases."²⁶² Mediator conduct that affects the outcome of the mediation may reflect a mediator's belief that he knows more than the parties about the law, their dispute, the best outcome,²⁶³ or other factors. Accordingly, he plays a role in its substantive resolution. As Rose explains: "We do not find out [the parties'] inner needs and macro goals by becoming 'talking-head' experts. On the contrary, the limited usefulness of our attempts to provide answers must give way to the infinite potential of our ability *to ask questions*."²⁶⁴

Mediator conduct affecting the substantive outcome may also reflect a lack of mediation skill or an over-reliance on the skills the mediator has

259. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (2005).

260. Young, *Rejoice!*, *supra* note 30, at 214–15.

261. Kimberlee K. Kovach, *Mediation*, in THE HANDBOOK OF DISPUTE RESOLUTION 311 (Michael L. Moffit & Robert C. Bordone eds., 2005) [hereinafter Kovach, *Mediation*].

262. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS, *supra* note 46, at 402.

263. In this case, the bias or behavior could overlap with behavior identified in Quadrant 3 of the grid. *See supra* Part IV.E.3.

264. Rose, *supra* note 203, at 4.

developed in his or her profession of origin (typically as lawyers).²⁶⁵ For instance, does she fall back on her lawyerly problem-solving skills of giving legal advice because she lacks the skills to adopt a less directive approach?²⁶⁶ Does the mediator engage in interventions or processes

265. For a more in depth discussion of this problem, see Young, *Kangaroo Court?*, *supra* note 205, at 1177–84, 1211–29. *See also* Honeyman, *supra* note 45, at 581–82 (using a matrix of three criteria to examine mediator impartiality: skill differences; policies and philosophies; and biases).

266. Honeyman, *supra* note 45, at 583 (“An effective mediator will] vigorous[ly] use . . . the skill set already possessed. Thus, it should be no surprise that mediators who possess the skills of evaluation find more moments to call upon those skills than mediators whose skill set is more rounded.”).

While the mediation ethics codes may permit mediators to provide information under certain conditions designed to protect party self-determination, they do not, however, allow mediators to give legal advice to parties. Instead, mediators should advise parties of the opportunity to consult with experts, including lawyers. For example, the 2005 Model Standards require a mediator “where appropriate . . . [to] make the parties aware of the importance of consulting other professionals to help them make informed choices.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I.A.2 (2005).

The aspirational ethics standards for family mediators provide that “[a] family mediator should inform the participants that they may seek information and advice from a variety of sources during the mediation process.” MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard I.C (2000). Another standard requires the mediator to inform the parties before the mediation begins “that they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process.” *Id.* at Standard III.A.4. It also requires the mediator to inform the parties:

that the presence or absence of other persons at a mediation, including attorneys, counselors or advocates, depends on the agreement of the participants and the mediator, unless a statute or regulation otherwise requires or the mediator believes that the presence of another person is required or may be beneficial because of a history of threat of violence or other serious coercive activity by a participant.

Id. at Standard III.A.7. Yet another standard provides: “The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.” *Id.* at Standard VI.C.

The Florida rules require a mediator to refer parties to seek independent legal counsel “[w]hen a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations.” FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.370(b) (2000). Another rule requires the mediator to “respect the role of other professional disciplines” and promote cooperation between professionals working with the parties. *Id.* at R. 10.670.

Virginia contemplates referrals to both lawyer and non-lawyer experts, such as accountants, financial planners, or child psychologists. Virginia’s Standards of Ethics provide: “The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant.” STANDARDS OF ETHICS & PROF’L RESPONSIBILITY FOR CERTIFIED MEDIATORS § F(1) (Judicial Council of Va. 2005). A Virginia statute defines mediator misconduct as including:

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

inconsistent with the definition of mediation?²⁶⁷ Does she provide an expert judgment about the facts or what has happened?²⁶⁸ Does he evaluate the merits of each party's legal position, the likely outcome at trial, or predict what a particular judge might do in the dispute being mediated?²⁶⁹ Does she

failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

VA. CODE ANN. § 8.01-576.12 (West 2007). In Virginia, these required disclosures are known as the "four legals."

267. For example, one aspirational code includes the following definition:

Family and divorce mediation . . . is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.

MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Overview and Definitions (2000). According to a policy statement of ACR, mediators engage in "improper mediation practice" when they:

- hold themselves out as a legal representative of the parties;
- state that, by virtue of having a mediator, parties to a mediation do not need a lawyer;
- advise parties about their legal rights or responsibilities, or imply that a party can rely on the mediator to protect her or his legal rights;
- draft an agreement that goes beyond the terms specified by the parties;
- coerce a decision (explicitly or implicitly);
- interfere with or ignore the parties' self-determination;
- fail to act with impartiality;
- apply legal precedent to the specific facts of the dispute; or
- offer any personal or professional opinion as to how the court (judge or jury) in which a case has been filed will resolve the dispute.

See Assoc. for Conflict Resolution Bd. of Dir., *The Authorized Practice of Mediation: Proposed Policy Statement of the Association for Conflict Resolution 11* (Aug. 28, 2004).

268. DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 233 (2006) [hereinafter *GOLANN & FOLBERG*] ("Here[,] the neutral is assuming the role of advisory arbitrator in the case. This is the most dangerous form of evaluation, because the loser is likely to feel, with some justification, that the neutral has taken sides against him.").

269. *Id.* Most ethics codes would not allow these types of mediator interventions. *See supra* notes 213, 246, 266. Riskin and his co-authors suggest: "The need for impartiality increases in direct proportion to the extent to which the mediator will evaluate. In other words, the greater the

give parties sufficient time and opportunity to consult with independent legal counsel or other professionals?²⁷⁰

Alfini and his co-authors suggest that the mediator is more likely tempted to interject legal rules into the mediation when it “is used in substantive areas that are more traditionally defined by the parties’ legal rights, particularly where such dispute has become a court case and has been referred to a lawyer-mediator.”²⁷¹ Kovach makes a distinction between norm-generating, norm-educating, and norm-advocating roles on the part of the mediator, and identifies the last two roles as creating the greatest risks to mediator impartiality and party self-determination.²⁷² Purnell says that giving legal advice is “inherently partial: the attorney’s goal is not to educate her client about the law but to marshal her knowledge to his service by formulating the best possible legal position she can given the facts of his particular situation.”²⁷³ Riskin and his co-authors suggest that “[t]he need for impartiality increases in direct proportion to the extent to which the mediator will evaluate.”²⁷⁴

Other conduct by the mediator can imperil the mediator’s impartiality while undermining party self-determination. Does she generate options on

mediator’s direct influence on the substantive outcome of the mediation, the greater the risk that one side will suffer as a result of the mediator’s biases.” RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS, *supra* note 46, at 402. A Virginia Supreme Court rule, however, gives lawyer-mediators more flexibility in their roles as evaluators. See discussion of Rule 2.11(c)–(d) *supra* note 246. Golann and Folberg describe several criteria for judging when a mediator should offer an evaluation. GOLANN & FOLBERG, *supra* note 268, at 233. They describe the following type of evaluation as the “classic” type offered by mediators:

A mediator can offer a prediction of what will happen if a particular issue or the entire matter is adjudicated. Here the mediator is not saying how he personally would decide the issue, but rather is assessing how a judge, jury, or arbitrator in that jurisdiction, with all their quirks and foibles, is likely to respond. To put it another way, in this model the mediator is offering a “weather forecast” about the atmosphere in some future courtroom, but not advocating rain.

Id.

270. KOVACH, *supra* note 41, at 154–55 (“An additional aspect of neutral and fair process includes allowing each party to obtain the information necessary for informed decision making As a result, permitting the disputing parties to be accompanied by counsel or other representative is often considered an element of a fair and neutral process.”).

271. ALFINI ET AL., *supra* note 48, at 167.

272. Kovach, *Mediation*, *supra* note 261, at 312.

273. Sandra E. Purnell, *The Attorney as Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986, 1009 (1985), reprinted in ALAN S. RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 403–04 (3d ed. 2002).

274. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS, *supra* note 46, at 264.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

her own or provide an opinion about, or evaluation of, a proposed option?²⁷⁵ Does she truly respect party-self determination as a matter of mediation philosophy?²⁷⁶ Does she add terms to the settlement agreement on which the parties have not agreed? Does the mediator use coercion, intimidation, or other heavy-handed tactics to get the parties to reach an agreement?²⁷⁷

b. Video Clip of Highly Directive Interventions by a Mediator

I start this next part of the workshop with a short video clip depicting the final caucus session in *Vitakis-Valchine v. Valchine*, a well-known case among instructors in which the mediator arguably used misrepresentation, legal evaluation, coercion, artificial time limits, and threats to force a party to settlement.²⁷⁸ This clip elicits a strong response from the audience, many of whom ask: “Did that really happen?!!”

In that case, a Florida court ordered mediation for a husband and wife who had been in divorce proceedings for two years after their twelve-year marriage dissolved.²⁷⁹ The mediation lasted seven to eight hours.²⁸⁰ Lawyers represented both parties in the mediation, and the wife’s brother also attended the session.²⁸¹ The mediator put the parties into caucus almost immediately and kept them there for the remaining time of the mediation.²⁸²

275. See Young, *Kangaroo Court?*, *supra* note 205, at 1122–29 (discussing the code provisions governing option generation or evaluation by the mediator).

276. Honeyman, *supra* note 45, at 584 (“There is no bright-line test to be had of whether a transformative, facilitative[,] or evaluative mediator is operating primarily on conviction or on [skill] capacity.”).

277. See Young, *Take It or Leave It*, *supra* note 13, at 748–84 (discussing grievances filed against mediators based on the use of coercion or other heavy-handed techniques). See also *Randle v. Mid Gulf, Inc.*, 1996 WL 447954 (Tex. App. 1996) (reversing and remanding a trial court’s summary judgment enforcing a mediated settlement agreement when the mediator did not permit a party to leave the mediation session without signing the agreement even though the party complained of chest pains, had a history of heart disease, and had not taken his heart medications that day). John Haynes identified the “safeguard against the mediator’s misuse of power” as ensuring that any mediated agreement be acceptable to both parties before they sign or otherwise formalize it. Haynes, *Mediation and Therapy*, *supra* note 206, at 22–30.

278. *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001).

279. *Id.* at 1096.

280. *Id.*

281. *Id.*

282. *Id.*

The couple had created several frozen embryos.²⁸³ The wife wanted to keep them.²⁸⁴ According to the wife's later testimony, "the mediator told her that the embryos were not 'lives in being' and that the court would not require the husband to pay child support" for a child born from the embryos.²⁸⁵ He said: "The judge will *never* give you custody of embryos."²⁸⁶ Several of these statements could be deemed legal advice, legal evaluation, or the prediction of what a specific judge would do in a specific case.

During the discussion about the wife's right to the embryos, the mediator entered the wife's caucus room, threw papers on the table and said: "That's it; I give up."²⁸⁷ In the presence of the wife, the mediator got a call and asked the caller to "have a bottle of wine and a glass of . . . strong drink ready for me."²⁸⁸ The mediator then set a deadline by saying: "You guys have five minutes to hurry up and get out of here because [my] family is more important to me."²⁸⁹ The mediator repeatedly said "that his daughter was leaving for law school" in the near future.²⁹⁰ These statements suggest the imposition of artificial time pressures.

According to the wife's later testimony, the mediator also told the wife that she had no right to the husband's federal pension money.²⁹¹ He further stated that the pensions were only worth \$200 per month and that it would cost the wife \$70,000 to get a ruling on the pension distribution issue.²⁹² During the mediation, the wife allegedly had no knowledge of the present value of the husband's pensions or of the marital estate.²⁹³ A later review of the couple's assets showed that the financial settlement short-changed the wife by \$34,000, not including the pensions.²⁹⁴ The mediator's statements could be deemed legal advice, legal evaluation, or possible factual misrepresentation. The wife's lack of knowledge about the assets of the couple suggests she had to make decisions without informed consent.

Finally, the mediator tried to overcome the wife's reluctance to settle by saying that she could contest the terms of the mediated agreement at the

283. *Id.*

284. *Id.*

285. *Id.* at 1097.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

hearing on the settlement.²⁹⁵ This statement indicates the mediator's knowledge that the wife had not consented to the terms of the written agreement, and it may misrepresent applicable law about the binding effect of a signed mediated agreement.

The mediation resulted in a twenty-three page agreement dealing comprehensively with alimony, bank accounts, IRAs, and the husband's pensions.²⁹⁶ It also indicated that the wife reluctantly agreed to allow the husband to dispose of the frozen embryos.²⁹⁷ Before the family court, she argued that she signed the agreement because she felt pressured, saw no alternative, and believed everything that the mediator said.²⁹⁸ Nonetheless, the court entered the mediated agreement as the final order of dissolution.²⁹⁹

After the workshop participants view the video clip, I ask them to identify the conduct of the mediator that troubled them and to explain how that conduct affected both party self-determination and the mediator's impartiality. I next ask the buzz groups to identify other examples that would fit in this quadrant of the grid. I highlight again for the participants the idea that Quadrant 4 represents an overlap between the core values of impartiality and party self-determination. This comment "closes the loop" of learning for this quadrant.³⁰⁰ After this discussion, I provide the participants with a copy of the completed grid that provides examples of the sources of bias we have discussed.³⁰¹

c. Learning Specific Code Provisions Governing the Use of Mediator Interventions that Undermine Party Self-Determination over the Outcome of the Process

As noted above, the instructor can tie this more general discussion to specific code sections if he or she has the time. For example, the 2005

295. *Id.*

296. *Id.* at 1096.

297. *Id.*

298. *Id.* at 1097. Viewers of this video do not always remember that the wife had her lawyer and brother present during the mediation to advise and support her.

299. *Id.*

300. See Young, *Teaching Professional Ethics*, *supra* note 2, at 144-45 (summarizing that the instructor "closes the loop" by (1) giving students an experience, (2) reviewing the experience, (3) having students make conclusions from the experience, and (4) helping them plan the next steps in light of that experience).

301. See *infra* Appendix A.

Model Standards require the mediator to protect party self-determination as to mediator selection, process design, participation in or withdrawal from the process, as well as to outcome.³⁰² I have discussed the relevant provisions and the related commentary in an earlier article.³⁰³

V. ASSESSING WHETHER THE WORKSHOP PARTICIPANTS HAVE LEARNED THE ETHICAL VALUES GOVERNING MEDIATOR IMPARTIALITY

A. *Use of Grievances Filed Against Florida Mediators*

The last part of the workshop provides participants with the third and fourth steps in the learning process: retaining and recalling, and transferring the knowledge to a new situation and solving problems.³⁰⁴ In the workshop, I ask participants to review and analyze thirteen grievances filed with the Florida Mediator Qualifications Board (MQB) relating to mediator impartiality.³⁰⁵ This exercise allows participants to assess whether they understand, retain, and can recall the concepts I have presented. It also invites them to apply the concepts to a new fact pattern.³⁰⁶ An instructor can also assess student learning by grading the student's analysis of the grievances.³⁰⁷

To complete and de-brief these grievance exercises in the workshop requires about thirty to forty minutes depending on the number of buzz groups and the number of grievance exercises used.³⁰⁸ Alternatively, I will hand out the incomplete exercises, invite participants to complete them, and then provide—when they exit—a copy of my sample answers. As a parting “gift,” I also typically provide a copy of the law review article that explains how the provisions of the 2005 Model Standards address issues of mediator

302. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I.A (2005). The new standards shift the focus of self-determination to process choices, as well as to outcome choices. *Reporter's Notes*, *supra* note 190, § V(C).

303. Young, *Rejoice!*, *supra* note 30, at 216–20.

304. See Young, *Teaching Professional Ethics*, *supra* note 2, at 144–45.

305. For a discussion of the role of the MQB in Florida's regulatory structure governing mediation in the state, see Young, *Take It or Leave It*, *supra* note 13, at 792–95, 804–12.

306. See Young, *Teaching Professional Ethics*, *supra* note 2, at 144–45.

307. See *supra* notes 24–25 and accompanying text for a discussion of assessing student learning.

308. For instance, an instructor could have several buzz groups work on the same grievance exercise, thereby using only three or four of the grievances. Thus, when they report their conclusions, remaining participants would hear the recitation of the facts once by the first reporting buzz group for that grievance, but could get additional insight about that grievance from several buzz groups.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

impartiality.³⁰⁹ This handout serves two purposes. First, verbal learners may prefer it.³¹⁰ Second, I never have time to discuss specific code sections, even in a two-hour workshop.

1. Analyzing the Grievances

In the workshop, time permitting, I ask each buzz group to analyze—using “Another Grid for the Perplexed”—one of the MQB grievances. Each buzz group gets a copy of one of the thirteen grievance scenarios. I instruct the buzz group members to identify the source or sources of the alleged mediator bias. I also instruct the members to identify the procedural justice factors that seem missing or that the mediator allegedly compromised.

2. Background Information for Instructors About the Exercises

The Florida MQB is the umbrella organization primarily responsible, through committees or hearing panels formed from its membership, for responding to matters involving mediator qualifications, ethics, or moral character.³¹¹ It consists of fifty-one members drawn from the state’s judges, lawyers, and mediators in the three regions of Florida.³¹² Three divisions—located in north, central, and south Florida—make up the Florida MQB.³¹³ Each division of the MQB consists of three circuit or county judges, three certified county mediators, three certified circuit mediators, three certified family mediators (at least two of which are non-lawyers), at least one, but not more than three, certified dependency mediators, and three attorneys licensed to practice in Florida who are not certified mediators.³¹⁴ The chief

309. See Young, *Rejoice!*, *supra* note 30, at 209–20.

310. “Verbal” learners absorb information from reading and writing text. They tend to be “left-brained,” “serialistic” learners who process information in a linear, logical, step-by-step, efficient process. They see the whole picture later in the process and tend to work independently. Jacobson, *supra* note 28, at 151, 160–61.

311. See Young, *Take It or Leave It*, *supra* note 13, at 792–93. I thank the Ohio State Journal on Dispute Resolution for permission to reprint this discussion.

312. *Id.*

313. *Id.* at 792.

314. FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.730(b) (2005). The three attorneys must have substantial trial practice. They cannot be certified as mediators or judicial officers during their terms on the board. At least one of the attorneys must have substantial experience in the dissolution of marriages. *Id.* at R. 10.730(b)(6). It has become increasingly difficult to find experienced trial or family law attorneys to serve on the MQB who are not also

justice of the Florida Supreme Court makes appointments to the unpaid MBQ positions for staggered four-year terms.³¹⁵

The Florida Dispute Resolution Center (DRC) uses the MBQ pool of volunteers to create complaint committees that handle the ethics grievances received by the DRC against mediators.³¹⁶ Each complaint committee consists of three MBQ members: one judge or attorney (who acts as the chair and the due process watchdog); one mediator who is certified in the area to which the grievance refers; and one other certified mediator.³¹⁷ A complaint committee ceases to exist after it disposes of the grievances assigned to it.³¹⁸

Complaint committees may refer grievances against mediators to a hearing panel composed of five MQB members: one circuit or county judge (who serves as the chair and the due process watchdog); three certified mediators, at least one of whom must be certified in the practice area in which the grievance arises; and one attorney.³¹⁹ Like the complaint committees, the hearing panels cease to exist after disposing of all assigned cases.³²⁰ Persons cannot serve on both the complaint committee and the hearing panel in the same mediator grievance.³²¹ The hearing panels provide an adjudicatory function and cannot conduct investigations of grievances.³²²

In comparison to other states I researched, Florida provides to the public the greatest amount of information pertaining to the allegations and dispositions of grievances filed against its mediators. In contrast, the few other states with mediator grievance systems provide a very brief summary of the party's complaints, little procedural history, and a very short description of the disposition.³²³

Instructors should know that the grievance scenarios in Appendix B to this article do not include the disposition of the grievance by the MQB. I eliminated the summary of the disposition of the grievance after a workshop I conducted in Florida. The participants, rather than focusing on the application of the concepts we had discussed in the workshop, wanted to instead argue with the disposition of the case. Almost uniformly, they felt

certified mediators. Telephone Interview with Sharon Press, Director of Florida's DRC, in Tallahassee, Fla. (Aug. 12, 2005).

315. FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.730(c) (2005).

316. Young, *Take It or Leave It*, *supra* note 13, at 794.

317. FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS R. 10.730(d) (2005).

318. *Id.*

319. *Id.* at R. 10.730(f).

320. *Id.*

321. *Id.* at R. 10.820(a).

322. *Id.* at R. 10.740(c).

323. See Young, *Take It or Leave It*, *supra* note 13, at 933–36.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the MQB had acted too leniently in disciplining the mediator. These comments became distracting and time consuming.

Instructors should know, however, that most of the grievances filed against Florida mediators do not result in an imposed sanction of any type.³²⁴ In many cases, the MQB dismisses the grievance as not stating a claim under the rules, as not supported by sufficient evidence, as stating only a technical violation of the rule, or as otherwise not warranting further action.³²⁵

I have also deleted references to specific Florida ethics rules because they proved confusing to participants when I used the grievances in other states like Virginia and Kentucky. In addition, the rule citations became dated as Florida continued to update and re-number the applicable rules. I have also re-written all of the scenarios for style and to eliminate allegations that did not potentially focus on mediator impartiality.

3. Working with the Grievance Exercises

As noted above, if time permits, I allow the buzz groups, as part of their report, to read the facts of their assigned grievance to the other workshop participants. I simultaneously project those facts on a Power Point slide. The group's reporter will also explain how the members applied the concepts learned in the workshop. The instructor could then open the discussion to all participants.

Alternatively, instructors could have each buzz group role-play the scenario and then ask the remaining participants to analyze the situation using the grid and procedural justice framework. This approach would take substantially longer, but would provide more experiential learning, improve retention of the material learned in the workshop,³²⁶ and would appeal to visual,³²⁷ aural,³²⁸ oral,³²⁹ kinesthetic,³³⁰ and tactile³³¹ learners.

324. *Id.* at 910–32.

325. *Id.* Sharon Press, the former Director of the Florida DRC, likes to tell the story of a person who filed a complaint because he or she did not like what the mediator was wearing. Another complainant alleged that the mediator failed to feed her. After a factual investigation, the complainant admitted that the mediator had provided food; it was just not very good. Remarks of Sharon Press, Dir. Fla. Disp. Resol. Center, Symposium on Ethics in the Expanding World of ADR, South Texas Law Review (Houston, Tex. Nov. 2, 2007).

326. *See* Young, *Teaching Professional Ethics*, *supra* note 2, at 144–45. *See also* James E. Groccia & Miller, *supra* note 27, at 5 (noting that simulations and role-plays better ensure student retention of the materials covered).

327. *See supra* note 153.

In closing, I remind workshop participants that parties may perceive partiality or bias even when the mediator's conduct indicates it does not exist. At the same time, I suggest that unhappy parties would probably not file a grievance against a mediator unless the mediator has also compromised two or more procedural justice factors.³³² I hope that this comment reinforces my sense from reading all the grievances filed in Florida that good practices—consistent with the elements of procedural justice—will help mediators avoid complaints from unhappy parties. More importantly, they will consistently provide parties a much higher quality mediation experience.

VI. ANALYSIS OF COURSE DESIGN AND INSTRUCTION

A. *Learning Objectives Reached in the Workshop*

This article has forced me to think about my thinking in connection with this workshop.³³³ I have structured the curriculum around fairly narrow learning objectives because of the two-hour time limit imposed on the workshop. From the list of objectives identified in Section IV.A of the first article in this series,³³⁴ this workshop intends that participants will, at least on a superficial level:

328. "Aural" learners absorb information best by listening to lectures, audio tapes, discussions in class, or discussions with study group members, buzz group members, professors, tutors, and teaching assistants. They benefit from taping class lectures or discussions and reviewing them later. They may need to eliminate sound-based distractions while listening. They may also need to eliminate other distractions by sitting in the front row of class or not taking notes during lectures. Jacobson, *supra* note 28, at 155.

329. "Oral" learners absorb information best by talking out ideas in class, in buzz groups, in study groups, with professors, with tutors, and with teaching assistants. They may find it helpful to read assigned materials out loud when studying at home. *Id.* at 154–55.

330. "Kinesthetic" learners need to move around or see movement to assist their information absorption. Accordingly, CALI tutorials, simulations, role-plays, clinical experiences, externships, internships, and clerkships aid these learners. *Id.* at 155. When studying at home, these learners may benefit from moving to music, pacing, or standing. *Id.* Some kinesthetic learners doodle, knit, or otherwise keep their hands busy during class sessions.

331. "Tactile" learners learn by touching and manipulating objects, even if it is a book or a handout. They can also benefit from CALI tutorials, simulations, role-plays, clinical experiences, externships, internships, and clerkships. *Id.*

332. I am currently reviewing all the Florida grievances for procedural justice issues.

333. For a discussion of the thinking out loud teaching technique, *see supra* note 26.

334. *See Young, Teaching Professional Ethics, supra* note 2, at 141-43.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

- Gain some mastery of the rules creating the boundaries of, or lower limits to, ethical conduct in connection with mediator impartiality;
- Learn to avoid conduct that will put a mediator before a disciplinary board;
- Understand that avoiding conduct that will put a mediator before a disciplinary board is not the same as engaging in conduct consistent with professional ethics, professional responsibility, or good practice;
- Gain an appreciation of the social content involved in the rules, values, and norms of mediation ethics and professionalism;
- Recognize professional ethics issues when they arise, especially in complex situations or in moments of stress;
- Learn to “unpack” ethical dilemmas in a conscious way, successfully describe their features, and select the standard of judgment or framework of analysis to identify ethically appropriate action;³³⁵
- Apply the rules, values, and norms in a “real world” context to reach an appropriate ethical decision;³³⁶
- Resolve to act in conformity with the moral judgments made by the mediator; and³³⁷
- Gain an appreciation that resolving an ethical dilemma often requires the good judgment of the self-regulated mediator.³³⁸

335. See *supra* notes 117–121 and accompanying text for a discussion of “Another Grid for the Perplexed” used in the workshop.

336. Robert P. Burns, *Teaching the Basic Ethics Class Through Simulations: The Northwestern Program in Advocacy and Professionalism*, 58 LAW & CONTEMP. PROBS. 37, 38 n.4, 42 (1995) (explaining: “Practicing lawyers understand the context of the practice in which ethical issues arise and are themselves deeply involved in that practice. Legal education[, however,] is disengaged from that practice. Thus[,] students have neither the imagination nor the incentives to appreciate the importance of ethical issues”; making the analogy that learning ethics rules without contextual application of them is like “knowing all the grammatical rules of a language” but still not being able to speak or write). See also Alan M. Lerner, *Law and Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solvers*, 32 AKRON L. REV. 107 (1999); Frank E. A. Sander & R. N. Mnookin, *A Worthy Challenge: The Teaching of Problem Solving in Law Schools*, DISP. RESOL. MAG., Summer 2000, at 21.

337. Lois R. Lupica, *Professional Responsibility Redesigned: Sparking a Dialogue Between Students and the Bar*, 29 J. LEGAL PROF. 71, 72 n.6 (2004-2005) (citing Edward J. Conry & Donald R. Nelson, *Business Law & Moral Growth*, 27 AM. BUS. L.J. 1, 7–8 (1989)).

338. Burns, *Teaching the Basic Ethics Class*, *supra* note 336, at 38–39.

Under Josephson's schema for cognition in law school—synthesis, then judgment, then problem-solving, then issue spotting, then understanding, and then knowledge acquisition, in descending order³³⁹—this workshop asks participants to acquire some knowledge about mediator impartiality, understand some aspects of it, spot potential ethics issues relating to impartiality, and engage in problem-solving by applying their knowledge to new facts set out in the Florida grievances, which, in turn, requires the exercise of judgment on the part of the participants. The workshop may also require participants to engage in some synthesis of the different sources of mediator bias. This schema demands higher-order thinking.

The last time I gave this workshop, a mediator at a community mediation center asked: “Why should we care which attitude or behavior fits in which quadrant of the grid?” I responded that I hoped the grid analysis allowed her to better understand the theoretical underpinnings for the specific rules governing mediator impartiality. Moreover, my experience as a mediation instructor has told me that mediators often have difficulty transferring ethical guidelines set out in the typically drafted framework of an ethics code into principles they can use in the moment. The 2005 Model Standards, for instance, provide guidelines that affect mediator impartiality in six separate standards without showing how they relate to each other and without always showing the aspects of impartiality they affect.³⁴⁰ The grid, I hope, will help mediators understand on a gut level why something that just happened in the mediation should make them consider a possible ethical dilemma. Mediators often need to make these decisions in the midst of a difficult conversation³⁴¹ or an emotionally intense moment in the mediation. In that moment, a mediator would have difficulty consulting a set of mandatory or aspirational ethics rules to determine an appropriate response.

B. Limits to the Scope of the Workshop

The workshop could begin with a much broader “top down” discussion of the commonly recognized attributes essential to professionalism: “(1) subordinating self-interest to the interest of others, (2) adhering to high ethical and moral standards, (3) responding to societal needs, (4) evincing core humanistic values, (5) exercising accountability, (6) demonstrating

339. MICHAEL JOSEPHSON, *LEARNING & EVALUATION IN LAW SCHOOL* 58 (Ass'n of Am. Law Schools 1984), cited in Steven Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 12 (1996).

340. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005).

341. See generally DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 1–9 (1999).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

continued commitment to excellence, (7) exhibiting a commitment to scholarship, (8) dealing with high levels of complexity and uncertainty, and (9) reflecting upon actions and decisions.³⁴² The workshop could more explicitly explore a working definition of professionalism in the mediation field rather than examine lapses in professionalism.³⁴³ Moreover, the workshop could use participant expertise to develop the “ideals” of the mediation field or profession.³⁴⁴ It could also compare the ideals and core values of two other professions—say the legal and social work professions—to reinforce the distinctions that exist between the professions and, perhaps, help workshop participants further understand the reasons for the ethics rules governing mediators.

342. See Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 479 (2008).

343. *Id.* at 481. For instance, Hamilton identifies the following elements of professionalism in the context of law. Each lawyer:

1. Continues to grow in personal conscience over his or her career;
2. Agrees to comply with the ethics of duty—the minimum standards for the lawyer’s professional skills and ethical conduct set by the Rules;
3. Strives to realize, over a career, the ethics of aspiration—the core values and ideals of the profession, including internalization of the highest standards for the lawyer’s professional skills and ethical conduct;
4. Agrees to both hold other lawyers accountable for meeting the minimum standards set forth in the Rules and encourage them to realize core values and ideals of the profession; and,
5. Agrees to act as a fiduciary, where his or her self-interest is over-balanced by devotion to serving the client and the public good in the profession’s area of responsibility: justice. This includes:
 - a. Devoting professional time to serving the public good, particularly by representing pro bono clients; and,
 - b. Undertaking a continuing reflective engagement, over the course of a career, on the relative importance of income and wealth in light of the other principles of professionalism.

Id. at 482–83.

344. For example, the ideals of the practice of law include: “the commitment to seek and realize excellence at both the skills of the profession and the other core values and ideals of the profession; integrity, honesty, and fairness.” *Id.* at 490–91. The core values of the legal profession include the following: representing clients competently, acting with diligence, communicating with the client, showing loyalty to the client, keeping client information confidential, providing “zealous advocacy on behalf of the client” as constrained by the role of the lawyer as the officer of the legal system, exercising independent professional judgment, providing “public service to improve the quality of justice,” maintaining and improving the quality of the legal profession, “ensur[ing] equal access to the justice system, educating people about the justice system,” and respecting the legal system and “all persons involved in the legal system.” *Id.* at 489–90.

I could also spend some time discussing the four components of personal conscience: (1) recognizing moral issues in a situation; (2) formulating a morally defensible position to the situation; (3) giving priority to moral concerns or values that compete with other concerns or values; and (4) implementing moral action.³⁴⁵

The workshop could also highlight the challenges professionals face in the legal and social work professions as they try to practice ethically. These challenges include “power, arrogance, greed, misrepresentation, impairment, lack of conscientiousness, and conflict of interest.”³⁴⁶ This discussion could highlight any overlap that exists with the mediation field or profession, especially in the area of conflicts of interest, self-interest, and institutional constraints that pull practitioners away from the ideals or core values of mediation.

Moreover, the workshop does not permit a more in-depth discussion of mediator impartiality under different organizational matrices or theories.³⁴⁷ It also does not permit higher-order thinking about the “fairness” debate or the risks to mediator impartiality of a more evaluative style of mediation. Either topic could serve as the focus of follow-up workshops.

In addition, the workshop does not explore how the mediator might discuss neutrality in his or her agreement to mediate or in the opening monologue. It does not develop the skills a mediator may need when accused by a party of partiality or bias. For instance, several authors describe the need to invite parties to let the mediator know when the party perceives bias.³⁴⁸ The mediator can then discuss the situation with the party. If they can resolve a misperception about the mediator’s impartiality, the mediator can continue in the process.³⁴⁹ If the perception remains, the mediator will need to withdraw.³⁵⁰

No two-hour workshop could cover all these additional topics, but a trainer could explore them over a series of workshops.

While I consciously attempt to teach to persons with varying information absorption styles, the workshop presentation still tends to emphasize the delivery of information in a form that appeals to aural, oral, visual, and verbal learners.³⁵¹ Kinesthetic³⁵² and tactile learners may feel a

345. *Id.* at 484–88.

346. *Id.* at 478.

347. *See, e.g.,* Honeyman, *supra* note 45, at 585–88.

348. *See, e.g.,* *Best Practices: A Participant Accuses*, *supra* note 49.

349. *Id.*

350. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II.C. (2005).

351. *See* Jacobson, *supra* note 28, at 151–52, 154–55, 160–61.

352. I do, however, consciously move about the room like “Donahue” to help the kinesthetic learners. *See supra* note 330 (addressing the preferences of kinesthetic learners).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

little frustrated (or lost) with the presentation. The instructor might improve the experience for visual and tactile learners by distributing a blank grid. Trainees could fill it in as the workshop discussion proceeds and then check their completed grid against the grid appearing at Appendix A to this article. Thus, over the workshop, the participants would fill in the grid, quadrant by quadrant, with their insights and examples.

The instructor could also improve the experience in the workshop by using more experiential role-plays or simulations. For instance, the instructor could use the simulation techniques described by Burns and Tzannes and other legal ethics trainers that I summarize in the first article in this series.³⁵³ Several workshop participants could play the role of mediator, parties, disciplinary counsel, and defense counsel in a disciplinary proceeding based on a grievance appearing in Appendix B to this article. Remaining workshop participants could sit as the disciplinary body analyzing the situation, applying the relevant rules or standards, rendering a decision, and imposing sanctions. This approach would especially appeal to visual, aural, tactile, and kinesthetic learners. The instructor could also offer this simulation as a follow-up workshop.

C. *Scaling the Workshop for Law School Courses*

I have used the same workshop format in my Certified Civil Mediation practicum course, which meets twice a week for 110 minutes. To jump-start the discussion, I ask students to read before class a shorter article I wrote about the impartiality grid.³⁵⁴ We complete the grid in class. Students analyze the grievances at Appendix B as graded homework. Before turning them in to me, we close the learning loop³⁵⁵ by discussing their answers in class.

In my Dispute Resolution survey course, I also assign my shorter article as a reading.³⁵⁶ While we do not discuss mediator impartiality in depth, we touch on some of its aspects when we view and de-brief the video mediation called *Red Devil Dog Lease*.³⁵⁷ The video clip, in which the mediator recommends a possible option to settle the dispute, raises Quadrant 2, 3, and

353. See Young, *Teaching Professional Ethics*, *supra* note 2, at 158-60.

354. Young, *The Who of Mediation, Part II*, *supra* note 119, at 9-12.

355. See Young, *Teaching Professional Ethics*, *supra* note 2, at 144-45.

356. *Id.*

357. RED DEVIL DOG LEASE MEDIATION VIDEO (West American Casebook Series 1991).

4 issues about the mediator's impartiality. The mediator, for instance, comes across as a bit paternalistic towards the female party, suggests an option that may be financially impossible, and may show some disregard for party self-determination. We also discuss in that course the limits on evaluation imposed on Virginia's certified lawyer-mediators.³⁵⁸

On the final exam in the Dispute Resolution course, I test whether students have read my shorter article by asking them to choose a mediator from a roster of three or four mediators. Each mediator has disclosed an actual or potential conflict of interest or bias. Students earn exam points by analyzing the impartiality issue with some sensitivity to the situation of the parties.

D. Evaluation of the Workshop by Participants

Fifty participants in the Spring 2008 VMN workshop provided written evaluations. Of those evaluators, twenty-eight rated the content, organization, and teaching techniques as "excellent," sixteen rated those three aspects of it as "good," and six rated them as "fair."³⁵⁹ Only one participant rated the teaching techniques I used as "poor." The positive comments included: "superb," "also fun," "great ethics session," "really excellent," "very informative," "good content," "enjoyed exploring the four quadrants," "good interactive workshop," "great examples," "thanks for the grid—nice resource tool," "like[d] the different approach to ethics," "down to earth academics," and "great way to think about some of the ethical issues other than referring to the code."

Less positive comments included: "a relatively straight-forward topic ma[d]e complex," "felt the quadrant system a bit confusing," "poor A/V," and "probably confusing for new mediators and not as helpful as I thought it would be." Two participants did not like the buzz group work saying: "too many small group sessions," and "not set up well to be continually breaking into groups." Finally, participants recommended that in the future I provide in the handouts copies of the Power Point slides, and that I make sure to use the microphone during all aspects of the presentation.³⁶⁰

In subsequent workshops, I have provided copies of the Power Point slides in the handouts to participants and changed the format of the slides to make them more readable, even by persons with sight impairments.

358. See *supra* note 246 and accompanying text.

359. These numbers reflect an average of the number of evaluations in each category for the three aspects of the program evaluated.

360. E-mail from Robin M. Morrison, Administrator, Virginia Mediation Network, to author (Sept. 30, 2008, 11:44 a.m. CST) (on file with author).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Otherwise, given the overwhelming positive feedback for the workshop, I have kept the format the same.

E. Limited Barriers to Learning in the Workshop

I do not face many of the barriers to learning that professors teaching legal ethics face in the law school context that I discussed in the first article in this series.³⁶¹ Many mediators come to the field as a second career or a “calling.” Accordingly, most of the workshop participants would fit the profile of a highly-motivated, true adult learner.³⁶² Most participants have little fear of speaking before the group, and some are very eager to share their thoughts, insights, and experiences. For me, the session feels more like an energized conversation with colleagues who can teach me as much as I can teach them. I always leave with fresh examples and new insights to the topic.

VII. CONCLUSION

The use of “Another Grid for the Perplexed” offers mediators a conceptual way of thinking about issues relating to mediator impartiality. As I gain more experience as a mediator and hear the comments and stories of other mediators, I continue to refine it as a teaching tool. While I may continue to revise its organization, I believe the four-quadrant approach to identifying sources of mediator bias provides a tool that allows mediators to resolve ethical dilemmas quickly and with greater assurance than other tools that exist. It does not, however, substitute for a careful reading of the ethics code that applies to the practicing mediator.

As a member of the Standing Committee on Mediator Ethical Guidance of the American Bar Association’s Section of Dispute Resolution,³⁶³ the grid

361. See Young, *Teaching Professional Ethics*, *supra* note 2, at 132-39.

362. Morton et al., *supra* note 18, at 475-77, 496.

363. For access to the opinions of this committee, see Standing Committee on Ethics, Committee on Mediator Ethical Guidance, American Bar Association Section of Dispute Resolution, <http://apps.americanbar.org/dch/committee.cfm?com=DR018600&edit=1> (last visited April 1, 2011). The nine-member committee includes: myself; James Alfani (South Texas College of Law); Robert C. Bordone (Harvard Law School); Jay Folberg (University of San Francisco); Nancy Lesser (private mediator); Lela P. Love (Cardozo Law School); Hon. Ellen Sickles James (retired); Leila C. Taiffe; and Larry Watson. Committee on Mediator Ethical Guidance, <http://www2.americanbar.org/directory/pages/groupprofile.aspx?committee=DR018600> (last visited April 1, 2011).

has helped me analyze several questions posed to the committee by practicing mediators. As a mediator, my deeper understanding of mediator impartiality has made me a more skillful and patient mediator. As a member of Virginia's Mediation Ethics Committee, it has helped me revise Virginia's mediation ethics code.³⁶⁴

As a law professor and mediation ethics trainer, I am strongly committed to the use of active learning techniques to convey the knowledge, skills, and values of our field. I hope this series of articles will suggest ways in which we can improve ethics training for new and experienced mediators. I invite my colleagues to suggest and share additional tools they use to teach mediation ethics.

364. The seven-member committee included: myself; Lawrie Parker (Executive Director of Piedmont Dispute Resolution Center); Jeanette Twomey (Mediation Works and trainer for the Northern Virginia Mediation Center); John McCammon (founder of the McCammon Group); and lawyer-mediators Lawrence Hoover, Samuel Jackson, and Frank Morrison. Three of the committee members, including myself, serve or have served on the Virginia Supreme Court's Mediator Review Board. Hoover, Jackson, Twomey, and Morrison teach mediation at Virginia law schools. The committee met over a three-year period at the invitation of the Director of the Dispute Resolution Services, Department of Judicial Services, Office of Executive Secretary of the Supreme Court of Virginia.

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

APPENDIX A

“Another Grid for the Perplexed”

	RELATIONSHIP	CONDUCT
PARTIES	Past → Present → Future Conflicts of Interest Source of conflicts of interest: <ul style="list-style-type: none"> • Former client, • Business or social relationships, • Repeat player in mediation, • Investment in party’s business, or • Future representation as lawyer or other professional 	Uncooperative party Racial, cultural, or gender bias Uncomfortable with a party’s emotional expression Personality conflict Difficulty working with high conflict personalities Favoritism based on referral fees, who is paying, or repeat player
OUTCOME	Desire to maintain high settlement rate Court pressures to maintain a high settlement rate Contingent fees Belief Title VII or ADA cases must be resolved in a certain way Personal or ethical opinions about how the dispute should be resolved Prolonging the mediation beyond time when it is likely to settle or beyond the time the parties wanted to mediate	Unskillful use of coercion, intimidation, or heavy-handed tactics Over-reliance on legal skills by offering legal advice Lack of respect for party self-determination Adding terms to the settlement agreement to which parties have not agreed Artificial time pressures or unduly long mediation sessions

APPENDIX B**Some of the Grievances Filed with the Florida Mediator Qualifications Board Relating to Mediator Impartiality (1992 to 2007)³⁶⁵**

Grievance Scenario No. 1:

A party filed a grievance against a mediator in a small claims case involving a business that sought to collect money owed on a debt. The defendant acknowledged that he owed the debt and he agreed to the entry of a judgment against him. However, he wanted his wife dismissed from the suit because she had not incurred any of the debt. The plaintiff-creditor (complainant) would not do so because the couple jointly owned all their property and the husband had no current employment. The plaintiff-creditor alleged that the mediator gave legal advice during the mediation by advising the defendant that the defendant's wife was "wrongfully named in the suit."³⁶⁶

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
 _____ Q2: Conduct-Parties
 _____ Q3: Relationship-Outcome
 _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
 _____ Problems with consideration by the neutral
 _____ Problems with even-handed treatment by the neutral
 _____ Problems with respect and dignity

365. The complaints survived the facial sufficiency review. For a discussion of this process, see Young, *Take It or Leave It*, *supra* note 13, at 804-14.

366. See Fla. Mediator Qualifications Bd., Op. 12 (Cent. Div. 1995), *reprinted in* THE RESOLUTION REPORT, Spring 1995 (on file with author).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Grievance Scenario No. 2:

An attorney filed the grievance against the mediator in a county court contract case involving two corporations represented by lawyers at the mediation. The defendant-corporation was allegedly bankrupt and thus judgment proof. During mediation, in joint session, the mediator pointed out to both parties that the individual who had appeared at mediation on behalf of the defendant corporation had signed the contract in his individual capacity, not on behalf of the corporation, and thus he could be sued individually. Neither party had raised this fact in the mediation previously.³⁶⁷

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

367. See Fla. Mediator Qualifications Bd., Op. 5 (S. Div. 2002), *reprinted in* THE RESOLUTION REPORT, Winter 2002 (on file with author).

Grievance Scenario No. 3:

Parties to the mediation filed this grievance against a mediator in a circuit case, in which the original defendants counterclaimed against the plaintiff. The mediation involved offers of settlement by the original plaintiff to the defendants. The complainants alleged that the mediator told the complainants that they were “too poor” to try their case, addressed one of the complainants as “a spoiled brat,” and declared the complainants “poor slobs” who would never be recognized in court. The mediator offered to go across the street to the courthouse to discuss this situation with the judge so that the complainants would understand. The complainants also alleged that the mediator decided that the offer made by the plaintiff was acceptable and then attempted to impose the settlement on the complainants. Finally, the complainants alleged that despite repeatedly stating that they did not wish to settle at mediation, the mediator would not terminate the mediation. The mediator admitted having told the complainants that “in [the mediator’s] experience, if people are too poor to properly prepare their case the results are always disastrous.”³⁶⁸

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
 _____ Q2: Conduct-Parties
 _____ Q3: Relationship-Outcome
 _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
 _____ Problems with consideration by the neutral
 _____ Problems with even-handed treatment by the neutral
 _____ Problems with respect and dignity

368. See Fla. Mediator Qualifications Bd., Op. 95-002 (S. Div. 1995), *reprinted in* THE RESOLUTION REPORT, Fall 1995 (on file with author).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Grievance Scenario No. 4:

A party filed this grievance in a case involving an eleven-hour, single session, family mediation. The complainant alleged that due to gender bias, the mediator showed partiality to the husband. In addition, the complainant alleged that the mediator threatened her with contempt of court, coerced her into staying past the time when she could bargain effectively (the mediation began at approximately 10 a.m. and concluded at 9 p.m.), would not allow her to obtain food when she requested it, and used verbal assaults to obtain an agreement.³⁶⁹

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

369. See Fla. Mediator Qualifications Bd., Op. 97-003 (N. Div. 1997), *reprinted in* THE RESOLUTION REPORT, Spring 1998 (on file with author).

Grievance Scenario No. 5:

A party filed this grievance against a mediator in a circuit court case. The complainant alleged that: (1) the mediator was rude to the complainant and his female attorney who were from “out-of-town” by “dismissing what counsel had to say” and walking out of the room during her presentation; (2) the complainant and his attorney were subjected to “ethnic profiling and stereotyping”; (3) the mediator behaved “more like . . . an attorney for the plaintiff than a mediator”; and (4) the mediator exhibited a lack of impartiality by telling the complainant that “if you go to court, you need to be on medication and heavy drugs.”³⁷⁰

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

370. See Fla. Mediator Qualifications Bd., Op. 2005–004 (Cent. Div. 2005) (on file with author).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Grievance Scenario No. 6:

A party filed this grievance against a mediator in a circuit court case and alleged that the law partners of the mediator had an ongoing business relationship with the other party. The business relationship involved the same issues as the underlying case of the mediation. The complainant also alleged that the mediator conveyed the other party's offer to the complainant and added that "he thought that this was a good solution."³⁷¹

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

371. See Fla. Mediator Qualifications Bd., Op. 2001-007 (Cent. Div. 2001), *reprinted in* THE RESOLUTION REPORT, Spring 2002 (on file with author).

Grievance Scenario No. 7:

A party filed this grievance against a family mediator who met with the complainant and his wife for a meeting whose purpose and length of time the parties disputed. The complainant alleged that the parties met to mediate a divorce agreement. Further, the complainant alleged that during the course of this meeting, the mediator provided legal advice to the complainant's wife about alimony and attorney's fees. At the conclusion of the meeting, the mediator provided the parties with financial affidavits to complete and scheduled a follow-up meeting. The parties never returned to mediation because the complainant felt that the mediator had indicated a bias towards his wife. Subsequent to the mediation, the complainant's wife hired the "mediator" as her counsel in the divorce.³⁷²

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

372. See Fla. Mediator Qualifications Bd., Op. 2002-004 (N. Div. 2002), *reprinted in* THE RESOLUTION REPORT, Winter 2003 (on file with author).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Grievance Scenario No. 8:

A party filed this grievance in connection with a family mediation. The complainant alleged that the mediator was “very aggressive and condescending” to the complainant, yelled at the complainant, and used profanity when speaking to the complainant. The mediator also told the complainant that she would “lose in court” and that she would make a terrible witness. Finally, the mediator purposely misled the complainant in order to get an agreement.³⁷³

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

373. See Fla. Mediator Qualifications Bd., Op. 2002–006 (S. Div. 2002) (on file with author).

Grievance Scenario No. 9:

A party filed this grievance against a mediator in a circuit court case. The complainant alleged that during the course of the mediation, the mediator used a culturally insensitive term to describe the other party.³⁷⁴

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

374. See Fla. Mediator Qualifications Bd., Op. 2002-007 (S. Div. 2003), *reprinted in* THE RESOLUTION REPORT, Winter 2003 (on file with author).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Grievance Scenario No. 10:

A lawyer filed this grievance against a mediator in a county case. The complainant alleged that the mediator made statements, in front of the other side, that favored the other party and “exploded” in anger towards the end of the mediation when the complainant brought up an additional term for the agreement while the mediator was drafting the stipulation.³⁷⁵

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

375. See Fla. Mediator Qualifications Bd., Op. 2005-005 (Cent. Div. 2005), *reprinted in* THE RESOLUTION REPORT, Fall 2006 (on file with author).

Grievance Scenario No. 11:

A party filed this grievance against a family mediator. The complainant alleged that the mediator displayed bias towards the opposing side and interfered with the parties' self-determination by visibly reacting to the child support order, which was already in place, and inquiring if the opposing party was intending to get an attorney and/or appeal the order. After the mediation concluded, the mediator shared with the party her personal story of divorce. It appeared to the complainant that the mediator showed bias against men as a result of her own divorce experience. The mediator was also "rude, short, and impatient" with the complainant throughout the process.³⁷⁶

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

376. See Fla. Mediator Qualifications Bd., Op. 2006-001 (N. Div. 2006) (on file with author).

[Vol. 11: 309, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Grievance Scenario No. 12:

A party filed this grievance against a family mediator who conducted a family mediation for friends who were divorcing. The complainant alleged that the mediator had a personal and business relationship with both parties. In addition, the mediator allegedly gave advice about specific marital assets and who would win in court and presented her own proposal regarding a custody arrangement. The mediator also seemed partial to the complainant's ex-husband.³⁷⁷

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

377. See Fla. Mediator Qualifications Bd., Op. 2002-002 (S. Div. 2002), *reprinted in* THE RESOLUTION REPORT, Summer 2002 (on file with author).

Grievance Scenario No. 13:

A party filed this grievance against a family mediator. The complainant alleged that the mediator made statements reflecting “favoritism or bias” and proposed that the other party and opposing counsel go out for a drink with the mediator after the mediation. In addition, the mediator did not require full financial disclosure from the other party and allowed the mediation process to continue in his office with the attorneys after the complainant dismissed the mediator.³⁷⁸

a. Identify the source or sources of mediator bias identified in this grievance.

Grid Quadrants:

- _____ Q1: Relationship-Parties
- _____ Q2: Conduct-Parties
- _____ Q3: Relationship-Outcome
- _____ Q4: Conduct-Outcome

b. Identify the procedural justice factors that the mediation participants may perceive are missing or the mediator has compromised.

Procedural Justice Factors:

- _____ Problems with voice
- _____ Problems with consideration by the neutral
- _____ Problems with even-handed treatment by the neutral
- _____ Problems with respect and dignity

378. See Fla. Mediator Qualifications Bd., Op. 2001-005 (N. Div. 2001), *reprinted in* THE RESOLUTION REPORT, Winter 2002 (on file with author).