Introduction

MEDIATOR STYLES—sometimes referred to as mediation models—are terms used to describe a neutral’s approach or conduct during mediation. Many scholars have categorized mediator styles using a variety of terms and concepts. Few have examined mediator styles in conjunction with impartiality provisions of newly developing ethical standards of conduct. Tension has developed because mediators are guided by written definitions and ethical standards, yet their actual roles may be dictated by their own personal style, values, and commercial needs in conjunction with the participants’ particular needs.

This Article examines current laws, policies, and procedures that define and attempt to regulate the mediation field. Specifically, this Article concentrates on three inter-related aspects of mediation: (1) definitions of the term “mediation” to highlight the prominent role of mediator impartiality in the mediation process; (2) impartiality requirements found in ethical standards of conduct; and (3) mediator styles and mediation models. The objective is to illustrate the tension created by requirements of mediator neutrality and impartiality when
applied to various mediator styles and mediation models and to propose possible solutions to alleviate the tension.

As a side note, this Author acknowledges that scholars and practitioners have been debating the appropriateness of evaluative and facilitative mediator styles for more than a decade. This Article does not seek to participate in such a debate. Rather, this Author describes various styles employed by mediators and summarizes some of the criticisms to the extent they relate to mediator neutrality and impartiality.

The Article is divided into several main sections. Part I examines definitions of "mediation." Although no universally accepted definition exists, most definitions include key terms and provisions such as a neutral third party, mediator impartiality, and party self-determination. Part II summarizes some of the impartiality provisions found in various ethical standards of conduct designed to regulate the mediation field with respect to civil disputes. Part III examines mediator styles and mediation models (hereinafter referred to collectively as mediator styles, unless otherwise specified). Part IV provides an in-depth analysis of the mediator's dilemma: How can a mediator be neutral and impartial when engaged in any and all mediation styles?

This Author concludes that mediator styles can and do affect the mediator's ability to remain neutral and impartial. Part V, therefore, poses recommendations to help alleviate the tension between mediator styles and impartiality requirements. In turn, these recommendations can be used to initiate a dialogue about the regulation of the mediation field, including the appropriateness of mediation definitions. The conclusion is set forth in Part VI.

I. Defining the Nature of Mediation

From the earliest development of mediation, scholars, practicing mediators, regulators, and legislators have attempted to define the term "mediation." Most agree that mediation involves a neutral and impartial third party who assists others in resolving a dispute. Simply put, mediation is facilitated negotiation because the mediator has no decision-making authority. The various definitions include other key terms and many acknowledge varying styles, techniques, and orientations of mediation. The conventional definitions of mediation are significant as ethical standards develop, evolve, and indeed begin to

1. This Article is limited to a discussion of general civil mediation standards of conduct and does not address specific subject areas such as the regulation of family law and divorce mediation, which are often regulated by separate rules and procedures.

2. See infra Part I.A.
impinge on mediator styles. As Professor Joseph Stulberg wrote over two decades ago: "[P]aradoxically, while the use of mediation has expanded, a common understanding as to what constitutes mediation has weakened . . . . It is important . . . . to identify and clarify the principles and dynamics which together constitute mediation as a dispute settlement procedure."3 The natural starting point is to examine and recognize definitions of mediation before addressing other aspects of this Article.

A. Various Definitions of "Mediation"

The term "mediation" does not have one established definition, although it includes many universally-accepted components. Among representative examples, mediation has been defined as:

"[F]acilitated negotiation."4

"[A]n informal process in which a neutral third party with no power to impose a resolution helps the disputing parties to try to reach a mutually acceptable settlement."5

"Third party dispute settlement technique integrally related to the negotiation process whereby a skilled, disinterested neutral assists parties in changing their minds over conflicting needs mainly through the noncompulsory applicants of various forms of persuasion in order to reach a viable agreement on terms at issue."6

"[T]he intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."7

"[A] process involving a neutral third party in a purely facilitative, process-director's role, who makes no substantive contribution to the parties' struggle with the dispute."8

"A process in which the disputing parties select a neutral third party to assist them in reaching a settlement of the dispute. The pro-

7. Id. at 277.
cess is private, voluntary, informal and nonbinding. The mediator has no power to impose a settlement.\footnote{9}

"[A]n impartial third party helps others negotiate to resolve a dispute or plan a transaction. Unlike a judge or arbitrator, the mediator lacks authority to impose a solution."\footnote{10}

"A voluntary process in which an impartial mediator actively assists disputants in identifying and clarifying issues of concern and in designing and agreeing to solutions for those issues."\footnote{11}

The foregoing definitions highlight the consensual and informal process inherent in mediations. Requirements of fairness and just result are noticeably absent from the definitions. Most definitions, however, include key provisions, such as the mediator's ability to be neutral and impartial and the parties' ability to negotiate a resolution of their own choosing—party self-determination. The following section examines the meaning of "neutrality," "impartiality," and "party self-determination" as applied to mediations. Understanding these key terms is a prerequisite to the study of various mediator styles.

\section*{B. Key Provisions}

\subsection*{1. The Significance of Mediator Neutrality}

Neutrality means the refusal to ally with, support, or favor any side in a dispute; "belonging to neither side nor party."\footnote{12} A mediator's neutrality is her ability to be objective while facilitating communication among negotiating parties.\footnote{13} Neutrality can be both transparent and opaque: "[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."\footnote{14}

\footnote{9. \textsc{Dictionary of Conflict Resolution, supra note 6, at 277.} In a similar definition, Dwight Golann adds that the following definition does not preclude a mediator from providing some evaluation: "a process in which disputing parties are assisted by a neutral third party to negotiate a resolution of their dispute, where the neutral third party is not given the power to impose a resolution upon them." \textsc{Golann, Mediating Legal Disputes, supra note 8, § 10.}

\footnote{10. \textsc{Leonard L. Riskin & James E. Westbrook, Dispute Resolution and Lawyers 313 (2d ed. 2003).}

\footnote{11. \textsc{Dictionary of Conflict Resolution, supra note 6, at 278.}

\footnote{12. \textsc{The American Heritage Dictionary 460 (1983).}

\footnote{13. \textsc{See James J. Alfini et al., Mediation Theory and Practice 12 (2001).}

2. The Significance of Mediator Impartiality

"Impartiality means freedom from favoritism and bias in word, action and appearance." The key to this requirement is the mediator’s ability to serve all participants concurrently. A mediator must not exhibit any partiality or bias based on any party’s background, personal characteristics, or performance during the mediation. The role of impartiality should apply to all aspects of the mediation, including communication (both spoken and unspoken), the way questions are asked and positions and interests are reframed, the use and arrangement of furniture, seating arrangements, and methods to greet the participants as they arrive for the mediation. Impartiality also has been applied to relational issues such as conflict of interest concerns between the mediator and any of the participants.

Based on the principle of “impartiality,” many scholars debate whether mediators should report to an appropriate authority regarding a participant’s “bad faith” behavior and whether such reports infringe on a mediator’s impartiality. Mediator reporting also may affect procedural fairness in a mediation and lower the parties’ sense of expectation and empowerment. A mediator must realize that not only is her actual impartiality at stake, but also the appearance of impartiality.

When mediation professionals compare the concepts of neutrality and impartiality, some equate neutrality to the mediation process, including its outcome. Others equate impartiality to the relationship between the mediator and participants. Still others refer to the two terms interchangeably. For purposes of this Article, the terms are used interchangeably unless otherwise designated.

16. Id.
17. Id.
18. See Karen A. Zerhusen, Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator, 81 Ky. L.J. 1165, 1169–70 (1993) (noting that a mediator’s impartiality applies to all aspects of the mediation process, from the arrangement of furniture to the way the mediator poses positioning statements).
19. 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 (discussing the pros and cons of a mediator’s authority to report “bad faith” behavior to outside sources such as courts and administrative agencies).
20. Id. at 74.
21. See id. at 85–87 (using the terms “neutrality” and “impartiality” interchangeably as the authors discuss the standard of conduct for mediator impartiality).
3. The Requirement of Party Self-Determination

Party self-determination is considered the "fundamental principle of mediation." Party autonomy is evidenced not only by references to the word "self-determination" but also by a mediator's responsibility to help parties reach a voluntary and informed decision. To achieve party autonomy, a mediator may provide information to the parties regarding the mediation process, raise issues, and help parties explore various options. The mediator must be cautious not to jeopardize her neutrality and impartiality. Likewise, she must be careful to the extent she is directive because many ethical standards of conduct specifically preclude a mediator from coercing parties to settle or otherwise exert undue influence.

A mediator can jeopardize party self-determination by raising issues or suggesting options, especially when done after the parties have agreed to a settlement, albeit one that appears unfair or one-sided. These concerns also affect the mediator's duty of neutrality and impartiality because a simple question or suggestion may appear to advance only one party's interests. Party self-determination is thus directly related to, and affected by, the mediator's duties of neutrality and impartiality. Even though this Article focuses on the concepts of mediator neutrality and impartiality, discussions of party self-determination are included to the extent the concepts intricately interface with one another.

II. Impartiality Requirements in Ethical Standards of Conduct

During the last two decades, many governmental entities and professional organizations have begun to develop ethical standards of conduct for mediators ("Standards"). This Author has conducted extensive research regarding Standards, having examined the Model

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22. Dispute Resolution Ethics, supra note 15, at 73.
23. Id.
24. Id.
25. Id. at 73–74.
Standards of Conduct for Mediators including its 2005 revision\(^ {27}\) ("Model Standards"), the Uniform Mediation Act\(^ {28}\) ("UMA"), and state-wide Standards found in thirty-six states, including twenty-seven court-connected Standards and thirteen Standards promulgated by professional organizations.\(^ {29}\)

Although Standards are varied in form and content, all those examined require mediator impartiality.\(^ {30}\) Nevertheless, the impartiality provisions are far from uniform in scope. Some Standards have extensive definitions of impartiality, some have virtually nothing other than a statement that a mediator shall maintain impartiality, and others fall somewhere in between. Some impartiality provisions address conflict of interest concerns between the mediator and participants rather than addressing mediator behavior. All of these aspects of impartiality are discussed in this Part.

A. The Model Standards of Conduct

The Model Standards define impartiality as “freedom from favoritism, bias or prejudice,” avoiding even the appearance of partiality.\(^ {31}\) Additional comments instruct a mediator to maintain impartiality in respect to the participants’ "personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason."\(^ {32}\) The Model Standards provide fairly straightforward guidance, yet leave room for interpretation, thereby acknowledging the flexible nature of the mediation process.

B. The Uniform Mediation Act

Technically the UMA is not an ethical code of conduct. It focuses primarily on confidentiality and privilege issues, leaving ethical Standards to the expertise of professional organizations such as the American Bar Association ("ABA"), the American Arbitration Association

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\(^ {29}\) See Exon, Why Ethical Standards Create Chaos, supra note 26, at app. A. Some states have both court-connected standards and standards promulgated by a professional organization. As a result, this Author examined forty sets of Standards for the thirty-six states.

\(^ {30}\) See id. at 395–96.

\(^ {31}\) Model Standards of Conduct for Mediators II.A, B.

\(^ {32}\) Id. at II.B.1.
and the Association for Conflict Resolution ("ACR"). One exception exists regarding mediator impartiality, and that portion of the UMA is summarized in this Part.

The ACR intended that both the mediator and the process be neutral, therefore, it urged the drafters of the UMA to include mediator impartiality as part of the definition of "mediator." The drafters of the UMA refused.

Instead, section 9 of the UMA addresses the principle of impartiality as it relates to conflict of interest concerns. A mediator must disclose facts that might affect a mediator’s impartiality, including financial, personal interest in the outcome, and existing or past relationships. If any conflict of interest exists, the participants may waive it by agreeing to allow the mediator to proceed. Otherwise, section 9 simply states that a “mediator must be impartial.”

Although not specifically referring to “impartiality,” section 7 of the UMA aligns with the notion of mediator impartiality because it prohibits mediators from reporting to outside authorities such as courts and administrative agencies. This non-reporting principle is consistent with the separate confidentiality principle, and fosters public confidence in a neutral mediator and neutral process.

C. Various State Standards

1. Standards that Define Impartiality

Some Standards provide helpful definitions of impartiality. Many Standards include definitions of impartiality similar to the Model Standards. For example, the Minnesota Code of Ethics for Neutrals and the Montana Mediation Association Standards of Practice Ethical

33. David A. Hoffman, Symposium: Introduction, 2003 J. Disp. Resol. 61, 64–65 (acknowledging the ethical standards already developed by the ABA, AAA, and ACR).
34. Id. at 65.
37. Rausch, supra note 35, at 614.
39. Id. § 9(a).
40. Id. § 9(g).
41. Id.
42. Id. § 7.
43. Id. § 8.
44. Id. § 7 cmt. 1.
Guidelines for Full Members both define impartiality as “freedom from favoritism or bias either by word or action, and a commitment to serve all parties as opposed to a single party.” Massachusetts simply defines “impartiality” as “freedom from favoritism and bias in conduct as well as appearance.” Twelve other states incorporate similar definitions into their Standards.


47. ALABAMA CODE OF ETHICS FOR MEDIATORS 5(a) (Ala. Ct. for Dispute Resolution 1997), available at http://www.alabamaadr.org/index.php?option=com_content&task=view&id=24&Itemid=6 (defining impartiality as “freedom from favoritism or bias in work, action, and appearance, impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward agreement”); REQUIREMENTS FOR THE CONDUCT OF MEDIATION & MEDIATORS III.5.A (Ark. Alternative Dispute Resolution Comm’n 2001), available at http://courts.state.ar.us/pdf/0516_conduct.pdf (“Impartiality means freedom from favoritism or bias in work, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward agreement.”); FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.330(a), available at http://www.flcourts.org/gen-public/adr/bin/RulesForMediators.pdf (defining mediator impartiality as “freedom from favoritism or bias in word, action, or appearance” and instructing the mediator to assist all parties rather than any one person); GUIDELINES FOR HAWAII MEDIATORS III.1 (Haw. Comm. on Mediation Standards 2002), available at http://www.courts.state.hi.us/attachment/3D52CA4AB783B29B7EC64289CC8/guidelines.pdf (“Impartiality means freedom from favoritism and bias in word, action, and appearance. Impartiality implies a commitment to aid all participants, as opposed to a single individual in reaching a mutually satisfactory agreement.”); MARYLAND STANDARDS OF CONDUCT FOR MEDIATORS II.A, B (Md. Program for Mediator Excellence 2006), available at http://www.courts.state.md.us/macro/approvedstandardsofconduct42006.pdf (defining impartiality as “freedom from favoritism or bias, prejudice”); MANUAL OF STANDARDS & ETHICS FOR COURT MEDIATORS, Dirs. & STAFF III.A.1 (Neb. Office of Dispute Resolution 2001), available at http://www.supremecourt.ne.gov/mediation/pdf/StandardsEthics-Manual-June-2001-version.pdf (“A mediator should strive to maintain impartiality towards all parties and be free of favoritism or bias in appearance, word, and action. A mediator is committed to aiding all parties, as opposed to a single party, in exploring the possibilities for resolution.”); CODE OF ETHICAL CONDUCT 4.B (N.M. Mediation Ass’n 1995), available at http://cio.state.nm.us/content/guidelinesStds/archive/adr/NMMACodeofEthics.pdf (“Impartiality, in word or action means: i) freedom from bias or favoritism. ii) A commitment to aid all parties equally in reaching a mutually satisfactory agreement. iii) That a mediator will not play an adversarial role in the process of dispute resolution.”); NORTH CAROLINA STANDARDS OF PROF’L CONDUCT FOR MEDIATORS II.A (N.C. Dispute Resolution Comm’n 2006), available at http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/standardsofconduct.pdf (defining impartiality as the “absence of prejudice or bias in word and action... [and] a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution”); TENN. SUP. CT. R. app. A § 6(a), available at http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/TNRulesOfCourt/06supct25_end.htm#31 (“Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to an individual party
Some Standards caution mediators to avoid partiality, including the appearance of partiality,\textsuperscript{48} or require a mediator to “avoid any conduct that gives the appearance of either favoring or disfavoring any party.”\textsuperscript{49} Like the Model Standards, some state Standards warn mediators about prejudice or partiality based on “any party’s personal characteristics, background, or behavior during the mediation.”\textsuperscript{50}

In conjunction with impartiality provisions, a mediator may raise questions to enable the parties to consider the “fairness, equity, and feasibility” of proposed settlement options and may withdraw from the mediation if she believes she can no longer maintain impartiality.\textsuperscript{51}
mediator may withdraw either based on her personal opinion regarding impartiality or based on a party's request.\textsuperscript{52}

2. Standards that Refer to Impartiality Without Defining It

Other Standards provide less guidance because they prohibit impartial behavior without defining what it means. For example, several states refer to impartiality by simply requiring a mediator to be "impartial and evenhanded."\textsuperscript{53} Michigan's impartiality provision states:

A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is possible to remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.\textsuperscript{54}

Like the Michigan impartiality provision, some states have vague descriptions of impartiality because they may require a mediator to maintain impartiality or conduct the mediation in an impartial manner.\textsuperscript{55} One example requires mediators to "approach the mediation

\textsuperscript{52}See, e.g., \textit{Texas Ethical Guidelines for Mediators} 9 cmt. (Tex. Advisory Comm'n on Court-Annexed Mediations 2005), \textit{available at} http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf; \textit{Utah R. of Ct.-Annexed Alternative Dispute Resolution} 104, Canons II(e), (f), \textit{available at} http://www.utcourts.gov/resources/rules/adr/104.htm.

\textsuperscript{53}Miss. Ct. Annexed Mediation R. for Civil Litig. XV.B, \textit{available at} http://www.mssc.state.ms.us/rules/msrulesofcourt/court_annexed-mediation.pdf. Utah also requires a mediator to conduct proceedings in an "evenhanded manner," but is much more specific than Mississippi. \textit{Utah R. of Ct.-Annexed Alternative Dispute Resolution} 104, Canon III(a). Utah goes on to require a mediator to "treat all parties with equality and fairness at all stages of the proceedings," \textit{id.}, and then specifically defines "impartial." \textit{Id.} at Canon III(a)(1).


\textsuperscript{55}Cal. R. Ct. 3.855(a), \textit{available at} http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_3.pdf (specifying that a "mediator must maintain impartiality toward all participants in the mediation process at all times"); \textit{Colorado Model Standards of Conduct for Mediators II.B} (Colo. Council of Mediators 1995), \textit{available at} http://www.courts.state.co.us/chs/court/mediation/modelstandards.pdf ("The mediator shall conduct the mediation in an impartial manner and should avoid conduct that gives the appearance of partiality."); \textit{Ind. R. Ct., Rules for Alternative Dispute Resolution} 7.4(C), \textit{available at} http://www.in.gov/judiciary/rules/adr/index.html#7 ("A neutral shall be impartial and shall utilize an effective system to identify potential conflicts of interest at the time of appointment."); \textit{Okla. Stat. Ann.} tit. 12, ch. 37 app. A (2005) (Code of Prof'l Conduct for Mediators) (requiring a mediator to "maintain impartiality at all times").
process in an impartial manner. If at any time . . . [mediators] are unable to do so . . . [they should] withdraw from the mediation process." These state Standards do not specifically define impartiality, choosing to focus on conflict of interest concerns rather than mediator behavior.

3. Standards that Treat Impartiality as a Conflict of Interest Consideration

Standards that focus on conflict of interest issues may prohibit a mediator from taking part in a mediation where she is related to, or employed by, one of the parties, or may require the mediator to disclose dealings or relationships that may raise questions about impartiality. Some Standards are more specific because they require a mediator to disclose whether she provided prior services to any of the participants or simply has had a personal or professional relationship with one of the parties. In some instances, a mediator is precluded from having an interest in the outcome of the dispute or precluded from having a financial interest in the outcome other than a fee arrangement. Without defining "impartiality," several Standards require mediators to disclose prior or existing affiliations with any party and preclude any financial or other interest in the outcome of the mediation.

Finally, some Standards take a more thorough approach and do not commingle mediator impartiality with conflicts of interest. These Standards set forth separate provisions for impartiality and conflicts of interest.
As exemplified from this sampling of Standards, principles of impartiality are not standardized. Some Standards define impartiality as it relates to mediator conduct while others relate it more to conflict of interest concerns. Still other Standards simply require a mediator to be impartial, providing no guidance as to what constitutes impartiality and allowing a great deal of room for individual interpretation. On one hand, while a workable definition of impartiality is necessary, the definition must take into account that mediation is a flexible, fluid process. Nonetheless, the lack of clarity in many impartiality provisions may encourage mediators to supply their own interpretations of impartiality, which could undermine the integrity and credibility of the mediation practice.

III. Mediator Styles and Mediation Models

A mediator's orientation or approach to mediation may dictate the style she uses. Style refers to the mediator's activities—her interpersonal communications with, and behavior towards, all mediation participants. A mediator may adopt one or a combination of several styles of mediation, and in fact, most mediators mix their styles and techniques in individual mediations.

Many scholars have used descriptive words and phrases to define mediator styles and mediation models. The three most common styles are: "evaluative" and "facilitative," coined by Professor Leonard L. Risi-
kin, and "transformative," coined by Professors Robert Baruch Bush and Joseph Folger.

Professor Riskin acknowledges inherent problems with his scholarship—problems that have created confusion and misunderstanding of what he wanted to accomplish. As a result, he has proposed changing the words "evaluative" and "facilitative" to "directive" and "elicitive," respectively. Professor Riskin's newer research emphasizes mediator influences as well as influences by participants. For purposes of this Article, however, references will continue to be made to evaluative and facilitative styles since these terms are widely adopted and used throughout the mediation field.

Professor Riskin and others acknowledge that many dynamics may affect a mediator's style, including personal beliefs (predispositions), timing, participant influences, and the subject matter of the mediation. A mediator may be more evaluative in an employment case and more facilitative in a neighborhood dispute. A mediator may begin a mediation using facilitative techniques, and at the end of a long day, urge the participants toward settlement using evaluative techniques. A mediator may combine both styles by proposing several alternatives in an evaluative style and then fostering communication in a facilitative manner so that participants may discuss the proposal.

67. See Riskin, Grid for the Perplexed, supra note 65; Leonard L. Riskin, Mediator Orientations, Strategies and Techniques, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994). Professor Riskin developed a grid based on two continuums. The horizontal continuum, categorized as the Problem-Definition Continuum, recognizes the goals of the mediation. One end represents a narrow view of the parties' goals, such as how much money to pay to a party. The other end relates to a broad view of the goals. The broad view recognizes the economic goal, but goes further by assessing underlying interests and how the parties may use their interests creatively to transform the dispute. Riskin, Grid for the Perplexed, supra note 65, at 17. The vertical continuum relates to the mediator's activities or her individual style; one end signifies an evaluative mediator while the other relates to a facilitative mediator. Id.

68. See infra notes 89–97 and accompanying text.

69. Leonard L. Riskin, Decisionmaking in Mediation: The New Old Grid and the New New Grid System, 79 NOTRE DAME L. REV. 1 (2003–2004) [hereinafter Riskin, Decisionmaking in Mediation]. Professor Riskin believes that the new terminology more closely aligns with his goal for the role-of-the-mediator continuum, which relates to the mediator's effect on party self-determination. Id. at 30. Furthermore, he believes that "directive" is more descriptive than "evaluative" because the former is more general and abstract, and therefore, may cover a wider range of mediator activities. Id.

70. Id. at 34–51.

71. ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION 375–431 (3d ed. 2002); Riskin, Decisionmaking in Mediation, supra note 69, at 34–41.
Furthermore, mediator styles may relate to substantive issues as well as process issues.\textsuperscript{72}

In addition to the main mediator styles known as facilitative, evaluative, and transformative, other scholars refer to mediator styles and mediation models based on personal behavior, commercial needs, and legal or social norms. One must understand mediator behavior or the type of mediation being conducted to be able to comprehend how styles and models interact with impartiality requirements. The following sections summarize many of the styles and models.

A. Facilitative Mediator Style

A facilitative mediation style emphasizes party interests and may be referred to as interest-based mediation.\textsuperscript{73} The facilitative mediator is viewed as a third-party educator or facilitator; she seeks to emphasize the parties' own problem solving, creativity, and personal evaluations.\textsuperscript{74} The mediator encourages party attendance, facilitates communication, poses questions to uncover the parties' underlying needs and interests, helps educate the parties by assisting them to understand the other's needs and interests, and otherwise attempts to provide a comfortable forum in which the parties can develop their own creative solutions to a problem.\textsuperscript{75}

Facilitative mediation may seem therapeutic due to the process by which it reaches an outcome—an emphasis on information and understanding to reach an agreement rather than through a mediator's influence or coercion.\textsuperscript{76} This mediation style is much more "touchy-feely" than evaluative mediation. Hence, facilitative mediators may be referred to as "'soft,' 'touchy-feely,' 'therapeutic,' 'potted plant,' or 'new age-y.'"\textsuperscript{77}

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\textsuperscript{72} Riskin, Decisionmaking in Mediation, supra note 69, at 34–35.
\textsuperscript{73} Kenneth Fox, What Private Mediators Can Learn from the Peace-Builders, 7 Cardozo J. Conflict Resol. 237, 239 (2006).
\textsuperscript{75} Lande, Sophisticated Mediation Theory, supra note 66, at 321, 322 ("Mediators using a facilitative style focus on eliciting the principals' opinions and refrain from pressing their own opinions about preferable settlement options."); Riskin, Grid for the Perplexed, supra note 65, at 29–30, 32–34.
\textsuperscript{76} Murray S. Levin, The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion, 16 Ohio St. J. on Disp. Resol. 268 (2001).
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A "productive-facilitative mediator" may have more expertise in the general process of mediation rather than subject matter expertise, though expertise regarding substantive issues may be another valuable asset. As a facilitative mediator approaches the narrow end of Riskin's continuum, she may help the parties evaluate their proposals through her questioning. Sometimes, the mediator may encourage participants to brainstorm possible solutions.

The facilitative mediator's goal is to avoid a directive approach while concentrating on party empowerment and self-determination. A facilitative mediator may act in a directive capacity to the extent the mediator decides which questions to pose, which solutions to emphasize, and how she engages the participants. Nevertheless, the facilitative mediator should be capable of maintaining neutrality and impartiality as long as she does not require participants to accept her suggestions.

B. Evaluative Mediator Style

Margaret Shaw provides an insightful assessment of evaluative mediators; they use a "continuum of behaviors" that include questioning regarding strengths and weaknesses of a case, providing information, offering procedural or substantive advice, predicting possible outcomes by a court adjudication, and suggesting ways to resolve a dispute. Despite Shaw's assessment, scholars interpret an evaluative style in diverse ways.

Some prefer that a mediator evaluate issue by issue. Others use "less intrusive techniques" by recommending a "range of fair outcomes." Under the latter method, an evaluative mediator predicts how she thinks a fair and reasonable person might settle. Others prefer the Socratic method of questioning. By posing questions in a way to educate the parties, the mediator offers a reality check. An evaluative mediator may go so far as to advocate for a particular settlement

78. Levin, supra note 76, at 268.
79. Riskin, Grid for the Perplexed, supra note 65, at 29.
82. Maureen E. Laflin, Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 493 (2000).
83. Id.
84. Id. at 493–94.
Irrespective of the various interpretations, an evaluative mediator becomes directive in her approach, no matter what aspect of the mediation she emphasizes.\textsuperscript{85}

Scholars refer to evaluative mediators as more directive in their approach, coining such names as "‘muscle mediators,’ ‘Rambo mediators,’ [and] ‘Attila the mediator(s).’"\textsuperscript{86} In many instances, a mediator engages in an evaluative style for court-connected cases and cases in which the parties are represented by counsel. The mediator may attempt to influence the participants to adopt her opinion,\textsuperscript{87} which may compromise her neutrality and impartiality. Many view these types of mediations as akin to a settlement conference.\textsuperscript{88}

C. Transformative Mediator Style

Over a decade ago, Professors Bush and Folger pioneered the concept of a transformative mediator.\textsuperscript{89} While most mediations focus on problem-solving outcomes, the transformative mediator offers a different approach. She helps parties focus on their relationship through their conflict interactions.\textsuperscript{90} In doing so, the transformative mediator helps the parties focus their communication on their conflict and how productive changes may affect the conflict.\textsuperscript{91}

The shift is away from a problem-solving outcome and toward a more open communication style; parties achieve "moral growth" by emphasizing individual "empowerment and recognition."\textsuperscript{92} In other words, "the emphasis is on shifts in parties’ interaction, shifts from relative weakness to greater strength (the empowerment dimension) and movement from self-absorption to openness (the recognition dimension)."\textsuperscript{93} Recognition applies to a person’s ability to empathize and begin to understand the other party’s perspectives and points of view, not receiving recognition from another.\textsuperscript{94}

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\item \textsuperscript{85} Riskin, \textit{Grid for the Perplexed}, supra note 65, at 27.
\item \textsuperscript{86} Lande, \textit{Lawyering and Mediation Transformation}, supra note 77, at 850.
\item \textsuperscript{87} Lande, \textit{Sophisticated Mediation Theory}, supra note 66, at 322–23.
\item \textsuperscript{88} Levin, supra note 76, at 269.
\item \textsuperscript{89} BUSH \& FOLGER, supra note 5.
\item \textsuperscript{90} Id. at 82–83.
\item \textsuperscript{91} Joseph P. Folger, \textit{Mediation Research: Studying Transformative Effects}, 18 Hofstra Lab. \& Emp. L.J. 385, 393 (2001).
\item \textsuperscript{92} BUSH \& FOLGER, supra note 5, at 2–12. The authors define “empowerment” as “the restoration to individuals of a sense of their own value and strength and their own capacity to handle life’s problems.” Id. at 2. “Recognition” is “the evocation in individuals of acknowledgment and empathy for the situation and problems of others.” Id.
\item \textsuperscript{93} Folger, supra note 91, at 393.
\item \textsuperscript{94} BUSH \& FOLGER, supra note 5, at 96.
\end{itemize}
\end{footnotesize}
The transformative mediator encourages parties to define issues and decide the terms of settlement themselves by helping them understand the other party's perspective. Through this style of mediation, the parties may grow, develop, and change their own perspectives to become better human beings. Ultimately, transformative mediation can transform the character of the individual disputants as well as society in general.

Although transformative mediation does not accentuate problem-solving, parties may settle an underlying dispute as part of their relational transformation. Hence, the transformative mediation style is not mutually exclusive from the problem-solving approach seen in facilitative and evaluative mediations.

D. Additional Mediation Styles and Models

As the mediation practice develops, some scholars venture out to coin new terms to define a mediator's style or a mediation model. This section summarizes some of the less commonly known terms. Notwithstanding the varied terminology, most are analogous to either facilitative or evaluative mediator styles.


Robert D. Benjamin, a mediation practitioner and scholar, opines that a mediator can be viewed as a "trickster" because she manages and survives conflict rather than trying to defeat or stop it. The "trickster-mediator" accomplishes this task by offering a "third perspective that shares traits of both sides of the dichotomy, thereby transforming a conflicted dyad into a more harmonious triad." The purpose behind the trickster-mediator seems appropriate because the mediator reframes the conflict into an impartial third perspective. Yet, the term "trickster" itself is offensive on its face when referring to a mediator, and appears to conflict with a neutral third party's goal of helping others reach peace and resolve conflict.

95. Id. at 2-12.
96. Id. at 20.
97. Id. at 11-12.
98. 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 a Mediator Impact the Process of Conflict Resolution 79, 80 (Daniel Bowling & David Hoffman eds., 2003). Benjamin writes: "[P]ersonality traits that best serve mediators may not be the most obvious or commonly presented. They are as follows: (1) confused, (2) voyeuristic, (3) compulsive, and (4) marginal." Id. at 84.
99. Id. at 95.
Others have softened the trickster phraseology. Professor John W. Cooley refers to mediators as “magicians.”\textsuperscript{100} James C. Freund refers to mediators as “prime negotiator[s]” because he believes mediators become an integral part of the negotiations that transpire during mediations.\textsuperscript{101}

These scholars are correct on one hand because they refer to the creativity and ingenuity necessary for mediators to reframe issues, add an impartial third story, pose alternative solutions, and otherwise think outside the box. On the other hand, the scholars may go too far by emphasizing a third-party perspective that takes on a shape of its own or the mediator’s personal orientation. Irrespective of the label given to the mediator’s style, the mediator’s directive approach may infringe on the parties’ rights of self-determination, which in turn may affect the mediator’s neutrality and impartiality.

2. Dictates of Commercial Needs

The commercial nature of the mediator’s role may influence her neutrality and impartiality, especially in light of whom she considers to be her client. If a mediator considers attorney-advocates to be her clients, she may assert a directive style that she thinks the attorneys desire, in hopes of securing future business with them. A particular style or technique may be important to the mediator who wants more business and plans to sell her services based on her settlement record.

Business requirements also may be important to the party who is searching for the type of mediator who will provide the best service under the facts of a case. For example, in a highly specialized situation such as a construction defect case involving many participants, the parties and their attorneys may want an attorney-mediator or a retired judge who has the expertise to provide a highly evaluative mediation. Even when attorneys are not involved in the mediation, a mediator may continue to exhibit the directive or evaluative style, although she may be more amenable to a facilitative style by focusing on the parties’ underlying interests.


\textsuperscript{101} James C. Freund, \textit{The Neutral Negotiator: Why and How Mediation Can Work to Resolve Dollar Disputes} 12–15 (1994) (noting that a mediation is really a negotiation in which the mediator becomes the “prime negotiator”).
In each situation, the mediator may attempt to appease clients to obtain future referrals rather than focus on the process. If the mediator exhibits favoritism toward a participant, she may jeopardize her neutrality. The end result is that a client's commercial needs may dictate the mediator's behavior in spite of the neutral approach set forth in ethical Standards. Commercial mediators' willingness to go beyond ethical guidelines is proof that the Standards, while well meant, are not always followed.

Professor Bush addresses commercialism by examining a mediator's ability to sell her services and the corresponding need of the client to know what he or she is getting when searching for a mediator. Rather than differentiate between evaluative and facilitative mediators, Bush emphasizes mediator goals and describes mediators as "'settlers,' 'fixers,' 'protectors,' 'reconcilors,' and 'empowerors.'"

The settlor's job is to settle as many mediations as quickly as possible. If this is the case, arguably a mediator will be directive in her approach and may even cross the line to coerce the parties, knowing the primary purpose is to settle the dispute.

The fixer mediator emphasizes problem solving through solutions. Her goal is to relieve the parties of their problem while finding a solution that is best for everyone. This type of mediator needs to be creative and knowledgeable; more than likely, this mediator will use a facilitative approach. The fixer mediator should be able to maintain neutrality and impartiality as long as she does not adopt the alternatives that she proposes.

The remaining types of mediators are "variants of the general 'fixer' species." Protectors strive to create a fair process, especially for the weaker of the parties. They attempt to ensure that no one is

102. During the 2004 Annual Conference of the Association for Conflict Resolution, a comment was made in one session that the mediator would do whatever was necessary for the money.

103. See Deborah M. Kolb & Kenneth Kressel, The Realities of Making Talk Work, When Talk Works: Profiles of Mediators 461 (2001) (noting that mediators' needs to sell themselves may result in them exerting "pressure tactics and arm twisting" which ultimately jeopardizes their neutrality).

104. See Lande, Lawyering and Mediation Transformation, supra note 77, at 851 (citing Robert A. Baruch Bush, Ethical Dilemmas in Mediation 17-18 (1989) (unpublished manuscript)).

105. Id.

106. Id. at 852.

107. Id.

108. Id.
hurt or taken advantage of through the mediation process. Sometimes protectors go so far as to ensure that the final outcome is fair.\textsuperscript{109} In an attempt to help the weaker of the parties and ensure substantive fairness of the outcome, observably the mediator steps out of her neutral and impartial role. For as soon as a mediator begins to assist one party to the disadvantage of the other party, a mediator is no longer neutral and impartial.

Two final mediator types may conform to neutrality and impartiality values. The reconcilor helps the parties concentrate on understanding each other and focuses on the quality of the mediation rather than attempting a final settlement. Reconcilors are sometimes referred to as “therapeutic” or “sensitive.”\textsuperscript{110} Finally, some mediators are empowerors because their goal is party self-determination. Empoweror mediators may generate options but remain detached from them so that the parties may settle voluntarily. Some refer to this type of mediator as a fixer who does not take a directive approach.\textsuperscript{111} Clearly, reconcilor and empoweror styles do not run afoul of neutrality and impartiality.

3. \textit{“Michigan Mediation”}

The Michigan style of mediation resembles arbitration because a neutral third party renders a decision. In this type of mediation, court rules require a neutral evaluation. Normally the court selects three evaluators from a panel of attorneys. After reviewing written briefs and hearing some argument from counsel, the panel makes an “award.”\textsuperscript{112} Although the award is not binding, the rejecting party will be sanctioned if it fails to obtain a better result at trial.\textsuperscript{113}

In 2000, the Michigan Supreme Court revised its Court Rules regarding Alternative Dispute Resolution primarily to change terminology.\textsuperscript{114} What was known as the “Michigan Mediation” pursuant to Michigan Court Rule 2.403 changed when the term “mediation” was changed to “case evaluation.”\textsuperscript{115} A new court rule, Rule 2.411, was added to describe mediation using generally recognized principles con-

\begin{itemize}
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Id. at 853.
\item \textsuperscript{111} Lande, \textit{Lawyering and Mediation Transformation}, supra note 77, at 853.
\item \textsuperscript{112} See Laurence D. Connor, \textit{How to Combine Facilitation with Evaluation}, 14 \textit{Alternatives to High Cost Litig.} 15 (1996) (explaining the “Michigan Mediation” procedure).
\item \textsuperscript{113} Id.
\item \textsuperscript{114} See MICH. CT. R. 2.411 cmt.; see also id. at 2.403.
\item \textsuperscript{115} See MICH. CT. R. 2.411 cmt.; see also id. at 2.403.
\end{itemize}
istent with the definitions of mediation provided in Part II of this Article.\(^\text{116}\)

Other variations of the traditional “Michigan Mediation” continue to exist. Florida has a statute that regulates Campus Master Plans and Campus Development Agreements.\(^\text{117}\) It requires that parties mediate disputes that arise while implementing executed campus development agreements.\(^\text{118}\) Pursuant to this mandate, each party selects a mediator, and the two mediators in turn select a neutral third mediator. The panel of three mediators issues a recommendation to resolve the dispute.\(^\text{119}\)

Attorney Laurence D. Connor uses a hybrid evaluation-facilitation type of mediation similar to the “Michigan Mediation.”\(^\text{120}\) He refers to himself as a “special” mediator.\(^\text{121}\) First he evaluates the mediation in a similar manner to the “Michigan Mediation,” although he does not disclose his recommended award.\(^\text{122}\) Then he begins the second phase of the mediation using a facilitative style.\(^\text{123}\) During the facilitative phase, Connor uses both joint sessions and private caucuses and relies extensively on party involvement.\(^\text{124}\) If the parties cannot settle the matter, Connor terminates the mediation and discloses his award, including the reasons for it.\(^\text{125}\) Often, on the eve of trial, the parties may rely on Connor’s recommended award to settle the matter between them.\(^\text{126}\) By disclosing his “award,” Connor becomes highly evaluative. Some believe such conduct impinges on mediator impartiality.\(^\text{127}\) On the other hand, he may be able to maintain impartiality by simply divulging his opinion in the form of an “award” without forcing the parties to accept it.

4. The Effect of Social Norms on Mediation

Societal roles may affect a mediator’s style. Professor Ellen Waldman theorizes that mediations can be classified into “three separate

\(^{116}\) See Mich. Ct. R. 2.411 cmt.; see also id. at 2.403.


\(^{118}\) Id.

\(^{119}\) Id. Typically, however, Florida prohibits mediators of civil court cases from offering an opinion regarding a final court outcome.

\(^{120}\) Connor, supra note 112.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id.

\(^{124}\) Id.

\(^{125}\) Id.

\(^{126}\) Id.

\(^{127}\) See infra notes 153–67 and accompanying text.
models." First, the "norm-generating" model is seen as a traditional mediation model that includes the typical stages of introduction, storytelling, exchange of party views, generation and selection of options, and agreement writing. The mediator reframes issues and helps the parties manage their conflict. The parties establish their own norms, so to speak, by creating solutions based on their personal needs rather than social norms.

The second model is termed the "norm-educating" model. It is basically the same as the norm-generating model except that the mediator goes farther by referring to "relevant social and legal norms." The parties maintain autonomy by deciding whether or not their final resolution conforms to the social or legal norms. This style of mediator looks like a broad facilitator under Riskin's grid. For example, in a divorce mediation involving children, a mediator might refer to relevant psychological studies concerning children's needs as well as legal standards for the division of property. The "norm-educating" mediator must be careful not to step over the line of neutrality and impartiality. One can visualize a mediator doing so when helping to educate the least powerful party. Thus, the mediator should carefully provide the same information to all parties in her attempt to maintain neutrality and impartiality.

The third model identified by Professor Waldman is the "norm-advocating" model. Using the same basic stages and techniques of the first two models, explains Professor Waldman, this mediator not only educates the parties about relevant legal and ethical norms but also mandates that these norms be incorporated into a final settlement. Realizing that the norm-advocating model contradicts the traditional vision of mediation, Professor Waldman cautions that the model should be limited to situations in which one party is not capable of waiving certain rights or where the dispute affects society in general. Although seldom used, the norm-advocating model is best suited for mediations involving bioethical, zoning, environmental,

129. Id. at 713.
130. Id. at 713–18.
131. Id. at 731–32.
132. Id. at 790.
133. Id. at 730, 731.
134. Id. at 742.
135. Id. at 745.
136. Id. at 753–54.
and some discrimination disputes. This mediator style can be classified as a narrow evaluator under Riskin’s grid. As long as the norm-advocating mediator reinforces norms without regard to the particular needs of any one party, the mediator may be able to maintain her impartiality.

IV. Analysis of the Tension Between Mediator Styles and Impartiality Requirements

A. A Summary of the Problem Posed by the Research

Mediators are guided by written definitions and Standards, yet their actual roles may be dictated by their own personal style, values, and commercial needs in conjunction with the practical needs (or at least the perceived practical needs) of the participants. A mediator’s style, or the model she employs in mediation, can affect the outcome of the mediation.

Little empirical research exists to measure the effect of a mediator’s style, although many scholars hypothesize about such effects. One research project measured the extent to which evaluative and facilitative mediators’ styles affected party satisfaction and the amount of money obtained by a mediated settlement. That research project was limited to a study of evaluative versus facilitative mediator styles in the context of the Equal Employment Opportunity Commission’s (“EEOC”) mediation program. Another more generic study focused on four neutrals who worked on one simulated dispute. The study illustrated that mediators employ various styles within a single mediation and that the final outcome of the mediation may be due in part to a mediator’s style combined with the disputants’ personalities and approaches. A third study concluded that a mediator’s style in community mediations did not affect the final outcome.

137. Id. at 746.
139. Id. The authors’ study focused on 645 employment law cases that were mediated at the EEOC from March 1 to July 31, 2000. Id. at 75, 90. The study compared the results of mediations conducted by evaluative and facilitative mediators and found, among other findings, that the participants were most satisfied with a facilitated mediation and obtained more monetary relief in an evaluative mediation in which the claimant was represented by counsel. Id. at 95-105.
140. Id.
141. See Golann, Variations in Mediation, supra note 66, at 61.
As illustrated in Part II, many definitions of mediation include a key provision that requires the mediator to serve as a neutral and impartial third party. More impressive is the fact that every set of Standards requires mediator impartiality. Nevertheless, specific mediator styles and the commercial needs of the participants (whether attorney advocates or disputing parties) actually can force a mediator out of her neutral and impartial role.

The resulting dilemma is whether mediator impartiality requirements can and should apply to all types of mediator styles. The following Part IV.B examines how mediator styles can impact a mediator’s duties of impartiality and neutrality.

B. The Effect that Styles Have on a Mediator’s Neutrality and Impartiality

A mediator’s involvement in the mediation readily can be seen when comparing different mediator styles. Irrespective of the differences in styles, mediators may interpret the same styles differently. Some who say that they are facilitative mediators actually may engage in evaluative techniques and vice versa. Some mediators may confuse style with strategies or tactics when referring to their approach. When describing a particular style such as facilitative or evaluative, the mediator should be cognizant of whether that style applies to the process, the substance, or both. Some mediators who espouse an evaluative mediation style may overstep their bounds by interjecting their personal opinions and values to the same extent that a settlement judge exhibits during a mandatory settlement conference. These variances in interpretation need to be considered when examining the effect that styles have on a mediator’s neutrality and impartiality. Furthermore, a mediator’s impartiality cannot exist in a vacuum; it affects other mediation values, most notably party self-determination. This section is divided into subparts aligned with the three main mediator styles, including analogous counterparts.

1. Facilitative Style

The facilitative category of mediators includes Riskin’s classification of a facilitative mediator as well as others classified as fixer.
reconcilor,\textsuperscript{145} empoweror,\textsuperscript{146} norm-generating,\textsuperscript{147} and norm-educating.\textsuperscript{148} A facilitative mediator emphasizes the needs and interests of the parties and reinforces the concept of self-empowerment. The facilitative mediator should be able to perform this task while maintaining her neutrality and impartiality, especially when the mediator is seen as a "process person" who does not contribute substantive information\textsuperscript{149} and the ultimate goal is problem-solving rather than settlement of issues.

Some scholars criticize the facilitative mediator because her passivity may lead to an uneven balance of power between the participants.\textsuperscript{150} Professor Jeffrey Stempel is concerned that a facilitative mediator passively allows the stronger party to control the weaker party.\textsuperscript{151} Such a scenario can occur in mediations where the mediator is serving in a purely facilitative manner and the parties have divergent levels of power. Yet, if the mediator attempts to balance the power between the participants, certainly she will assume a partial role and violate impartiality requirements.

Another criticism can be raised: If a mediator fails to balance the parties' relative power, she may violate some Standards that require her to do so.\textsuperscript{152} The problem becomes one in which a facilitative mediator's style may infringe on requirements in Standards, creating the mediator's dilemma.

A possible solution might be that the facilitative mediator concentrate on a specific problem by empowering both participants rather than attempting to balance the parties' relative power. This solution might work for some facilitative mediators, but not necessarily all of them. The mediator's dilemma may persist for these other mediators, especially due to the passive imbalance of power.

\textsuperscript{145} See supra note 110 and accompanying text.
\textsuperscript{146} See supra note 111 and accompanying text.
\textsuperscript{147} See supra notes 129–30 and accompanying text.
\textsuperscript{148} See supra notes 131–33 and accompanying text.
\textsuperscript{149} See Love & Boskey, supra note 142, para. 41 (reflecting on James Boskey's summarization of Lela Love's writings that a mediator is "purely a process person and does not contribute substantive information to the process other than agenda structuring," and noting his disagreement with Love's position).
\textsuperscript{150} Lande, \textit{Sophisticated Mediation Theory,} supra note 66, at 326.
\textsuperscript{151} Id.
\textsuperscript{152} See Exon, \textit{Why Ethical Standards Create Chaos,} supra note 26, at app A. Appendix A includes a list of those Standards that require a mediator to balance the power between the disputants. Id.
2. Evaluative Style

a. General Criticisms of the Evaluator Style

An ongoing debate exists regarding evaluative mediators. Many scholars criticize the evaluative mediator for crossing the neutral/impartial threshold. Professors Kimberlee Kovach and Lela Love refer to evaluative mediation as an "oxymoron." They advocate for mediator regulation rather than "unfettered evaluations and assessments" of a case. They argue that a mediator’s evaluative style jeopardizes her neutrality because any assessment will, in all likelihood, favor one party to the detriment of the other. Once neutrality is jeopardized, so is a party’s trust in the mediator. The disfavored party may withdraw from the mediation or actually feel as though the mediation environment has become antagonistic because the disfavored party becomes angry, hurt, or alienated.

Some critics argue that evaluative mediators may engage in unethical conduct. Some argue that by evaluating the substance of the mediation, the mediator interferes with party self-determination. Others counter that the mediator’s evaluation actually enhances party self-determination by helping parties change the way they think.

153. See Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996) [hereinafter Kovach & Love, “Evaluative” Mediation is an Oxymoron].
155. Id. at 31.
156. Kimberlee K. Kovach & Lela P. Love, Mapping Mediation: The Risks of Riskin’s Grid, 3 HARV. NEGOT. L. REV. 71, 101 (1998) [hereinafter Kovach & Love, Mapping Mediation] (advocating that mediators should not use an evaluative style); Love, supra note 74, at 937, 940, 945 (contending that evaluative mediators promote “adversarial behaviors” such as positioning and polarization and can actually stop the negotiation process). Contra Lande, Lawyering and Mediation Transformation, supra note 77, at 874-76 (explaining that an evaluative mediator does not necessarily impair his or her impartiality).
157. Brian Wessner, A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs, 4 CARDOZO ONLINE J. CONFLICT RESOL. 1 ¶ 44 (2002), http://www.cojcr.org/vol4no1/notes01.html (noting that a mediator will engage in unethical and immoral conduct if she evaluates and has no legal background).
159. See Robert B. Moberly, Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?, 38 S. TEX. L. REV. 669, 675 (1997) (noting that “protections against violating principles of self-determination and impartiality are sufficient to protect the parties”).
Some critics contend that an evaluative mediator engages in the unauthorized practice of law.\textsuperscript{160} Still others contend that an evaluation can lead to an adverse effect in the way the mediator delivers an evaluation. For example, if an evaluation is given in a joint session, the party on the losing end may "resist" the evaluation and stop listening in an effort to save face.\textsuperscript{161}

Another criticism is that evaluative mediators may inhibit parties from engaging in their own problem-solving methods.\textsuperscript{162} The mediator may re-orient the dispute towards her preferences rather than the participants' creativity.\textsuperscript{163} Opponents contend that rather than provide an evaluative assessment, the mediator should encourage the parties to understand each other, become creative, and seek to solve their own problems.\textsuperscript{164} Nevertheless, even some proponents caution that a mediator's evaluation should be used to assist the facilitative process rather than serve as the sole source of the mediation style.\textsuperscript{165}

Professor Riskin acknowledges that as a mediator becomes more directive in her approach, she may become biased and appear incapable of maintaining her neutrality.\textsuperscript{166} Proponents, however, argue that a mediator has to include some element of evaluation in her style. Although the debate continues, some scholars believe that we must examine what really occurs during a mediation, as opposed to what should occur.\textsuperscript{167}

b. Effects of Related Evaluative Styles

Often a mediator's style affects her ability to maintain impartiality, no matter how the style is coined. Whether termed evaluative,\textsuperscript{168} directive,\textsuperscript{169} trickster,\textsuperscript{170} magician,\textsuperscript{171} prime negotiator,\textsuperscript{172} settlor,\textsuperscript{173}

\textsuperscript{160} McDermott & Obar, supra note 138, at 77.
\textsuperscript{161} See Marjorie Corman Aaron, ADR Toolbox: The Highwire Art of Evaluation, 14 Alternatives to High Cost Litig. 62 (1996) (advocating that a mediator provide an evaluation in private sessions to maintain neutrality and help the losing party from losing face).
\textsuperscript{162} Kovach & Love, Mapping Mediation, supra note 156, at 103 (noting that "[j]udging blocks the imagination").
\textsuperscript{163} Id. at 103-04.
\textsuperscript{164} Kovach & Love, "Evaluative" Mediation is an Oxymoron, supra note 153, at 31.
\textsuperscript{165} See Love & Boskey, supra note 142, at para. 51 (articulating Boskey's feelings of discomfort at the idea that a mediator's sole tool will be evaluative techniques).
\textsuperscript{166} Riskin, Grid for the Perplexed, supra note 65, at 47-48; see Aaron, supra note 161, at 62 (noting that when a mediator evaluates a case, the party on the losing side may perceive the mediator's lack of neutrality and begin to view the mediator more as an adversary).
\textsuperscript{167} McDermott & Obar, supra note 138, at 77-78.
\textsuperscript{168} See supra notes 81-88 and accompanying text.
\textsuperscript{169} See supra note 69 and accompanying text.
\textsuperscript{170} See supra notes 98-99 and accompanying text.
protector,\textsuperscript{174} norm-advocating,\textsuperscript{175} or Michigan Mediation,\textsuperscript{176} these types of mediators easily can exceed their neutral and impartial responsibility.

In each case, these types of mediators may influence parties to adopt a position that the mediator thinks is rational or best for everyone involved in the mediation. At the very least, when a mediator evaluates the dispute, her opinion usually favors one party over the other, which arguably jeopardizes her impartiality.\textsuperscript{177} In some instances, and most notably with the protector mediator, a mediator may attempt to ensure a fair result. To the extent that a mediator inserts herself into the dispute, she begins to advocate for the benefit of one party rather than for all parties, which jeopardizes her impartiality. The traditional Michigan Mediation is an extreme example. It clearly obstructs party empowerment since a panel of three attorneys renders an opinion, and the parties are required to take it or leave it. Once the panel renders an opinion in favor of one party, it compromises the principles of neutrality and impartiality by taking sides.

c. Effects of Attempts to Balance Power

The late Professor James Boskey argued that a mediator might want to use evaluative techniques to help "level the playing field" where oppression is apparent, such as when a power imbalance exists in the process.\textsuperscript{178} He contended that the parties cannot enter into a "truly voluntary" agreement if one or both have some factual misunderstanding.\textsuperscript{179} He also acknowledged that a mediator can avoid the appearance of partiality if she offers an evaluation in a joint session rather than a private caucus.\textsuperscript{180} Despite Boskey's well-reasoned opinion, his scenario is a specific example of a mediator exceeding her neutral and impartial role by attempting to assist the weaker, or at least the perceived weaker, of the parties.

\textsuperscript{171} See supra note 100 and accompanying text.
\textsuperscript{172} See supra note 101 and accompanying text.
\textsuperscript{173} See supra note 106 and accompanying text.
\textsuperscript{174} See supra notes 108-09 and accompanying text.
\textsuperscript{175} See supra notes 134-37 and accompanying text.
\textsuperscript{176} See supra notes 112-16 and accompanying text.
\textsuperscript{177} See Love & Boskey, supra note 142, at para. 21 (noting Love's position that mediators should not evaluate because they jeopardize their neutrality).
\textsuperscript{178} Id. at para. 60.
\textsuperscript{179} Stark, supra note 81, at 792 (citing to James Boskey, The Proper Role of the Mediator: Rational Assessment, Not Pressure, 1994 NEGOTIATION J. 367, 370).
\textsuperscript{180} Love & Boskey, supra note 142, at para. 92.
Other scholars also are concerned about the mediator’s involvement in the participants’ power balance. As previously discussed, Professor Jeffrey Stempel is concerned that a facilitative mediator passively allows the stronger party to control the weaker party. Professor John Lande acknowledges Stempel’s fear, yet believes that a mediator can equally side with the stronger party, aggravating the distribution of power problems which are at the heart of Stempel’s apprehension. Regardless, once the mediator attempts to equalize the parties’ power, she loses her ability to maintain neutrality and impartiality.

d. Informed Decision-Making and a Final Outcome

As an evaluative mediator becomes an “activist”—one who takes control of the mediation by advising parties how to proceed—her impartiality begins to wane. Such a scenario does not bother Professor James Stark because he believes in the mediator’s ability to disclose information, even at the risk of appearing biased, to ensure the parties are making an informed decision. He does not believe that the mediator’s impartiality is at issue.

Professor Susskind, on the other hand, suggests that while the “activist” mediator is not neutral, she remains “nonpartisan” as to the outcome. In other words, the activist mediator advocates for the best “possible outcome” while remaining disinterested in the individual parties. By taking a personal interest only in the outcome of the mediation, the mediator guides and controls or otherwise trains the parties on how to focus on alternative solutions to advance their respective interests. Professor Maureen Laflin has added her own criticisms to the mix:

181. Lande, Sophisticated Mediation Theory, supra note 66, at 326.
182. See supra note 151 and accompanying text.
183. Lande, Sophisticated Mediation Theory, supra note 66, at 326.
184. See Laflin, supra note 82, at 491 (noting that the “[a]ctivist, evaluative ADR” takes control of the outcome of the mediation process and this should not be connoted as mediation because it is more “akin to neutral evaluation”).
185. The panel’s award in the Michigan Mediation constitutes an extreme activist mediator. See supra notes 112–16 and accompanying text.
186. Stark, supra note 81, at 796 (noting that the dilemma between party informed consent and the appearance of mediator bias is not the same thing as a conflict between competing values of informed consent and mediator impartiality).
187. Id. at 796–97 (advocating that the mediator provide enough information to the parties to be “reasonably informed,” not necessarily fully informed).
188. Laflin, supra note 82, at 498.
189. Id.
Yet mediators who see their role as one of training the parties, no matter how impartial they may be, are paternalistic. And mediators who approach the process as "advocates of a good solution" are necessarily adopting an attitude of power and control over the outcome, an attitude which cannot but compromise the principles of self-determination and impartiality.\textsuperscript{190}

Both Professors Susskind and Laflin make credible, yet flawed, arguments. First, by taking an interest in the substantive outcome of the mediation, a mediator may affect party self-determination. The problem is not solved by simple semantics such as using the terms "guide," "control," or "train" to describe the methods used to get parties to focus on their own interests in creating a workable solution. Any attempt to guide, control, or train parties can lead the parties to pursue the mediator's interest rather than their own.

Second, Professor Laflin goes too far in her argument because she contends that a mediator's ability to "advocate . . . a good solution" always compromises self-determination and impartiality.\textsuperscript{191} This is not always the case. A mediator must remain neutral and impartial to both the parties' interests and the outcome of the mediation. If a mediator crafts her words carefully, she may offer solutions or advice without compromising the parties' problem-solving abilities or her own neutrality and impartiality.

A related criticism relates to an evaluative mediator's substantive advice and how that advice affects the final outcome of a mediation. The advice can pose particular problems if the mediator believes that the law dictates the standard of fairness in mediations. As a result, an evaluative mediator may seek to promote fairness by attempting to predict a legal outcome.\textsuperscript{192} Some scholars contend that an evaluative mediator's emphasis on the legal outcome implies that a legal solution is the best outcome for the dispute.\textsuperscript{193} Professor Lande contends that "this presumes that the legal rules provide firm results, the rules are reasonably clear, judges and juries consistently follow the rules, and mediators can accurately assess the likely results."\textsuperscript{194} Lande makes a sound argument that often cases go to mediation because the law is not clear, and the ability to predict a likely litigation outcome is diffi-

\textsuperscript{190.} Id.
\textsuperscript{191.} Id.
\textsuperscript{192.} Lande, \textit{Sophisticated Mediation Theory}, supra note 66, at 326.
\textsuperscript{193.} See Levin, \textit{supra} note 76, at 271 ("Evaluation turns the process away from problem solving toward an adversarial contest—sharing turns to posturing . . . Moreover, too much emphasis on a likely legal outcome overlooks the possibility that the legal solution is not necessarily the best solution.").
\textsuperscript{194.} Lande, \textit{Sophisticated Mediation Theory}, \textit{supra} note 66, at 326.
The evaluative mediator, therefore, may create a social injustice by providing an incorrect prediction.\textsuperscript{196}

e. The Overly Zealous Evaluator

Mediation can reach an extreme level when the mediator strives to establish a settlement agreement using fear or pressure to the extent that it constitutes undue influence\textsuperscript{197} or coercion.\textsuperscript{198} Professors Nancy A. Welsh and Carrie Menkel-Meadow are wary about a mediator's overly-zealous conduct.\textsuperscript{199}

One can visualize how a mediator might begin to assert undue influence by comparing the traditional judicial settlement conference with mediation. In the former, the parties are presented with a potential settlement arrangement and are given an opportunity to passively accept or reject it. With mediation, the concept of party self-determination means that the parties dominate the dispute resolution process by creating options and solutions, controlling the substantive discussions, and deciding on a final settlement.\textsuperscript{200} Even though mediation is based on party empowerment, it also requires active mediator participation in the process. As a mediator becomes more directive or aggressive, she may try to influence the parties, thus affecting party control.

Examples of coercive conduct include scenarios where the mediator forces the parties to remain in session well into the evening hours without adequate food, strong-arming the parties to continue mediat-

\textsuperscript{195} Id.

\textsuperscript{196} Id.

\textsuperscript{197} "Undue influence" is defined as "unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare." \textsc{Restatement (Second) of Contracts} § 177(1) (2003).

\textsuperscript{198} "Coercion" has been described as a higher form of pressure than "undue influence" because it "works on mental, moral, or emotional weakness." \textit{Odorizzi v. Bloomfield Sch. Dist.}, 54 Cal. Rptr. 533, 539 (Ct. App. 1966). The two terms also have been distinguished because "undue influence" is based on some type of "confidential relationship" whereas such a relationship is not necessary in a coercive situation. Id. at 540; see \textit{Lonnie Chunn, Note, Duress and Undue Influence—A Comparative Analysis}, 22 \textit{Baylor L. Rev.} 572, 576–77 (1970).

\textsuperscript{199} See \textit{Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities}, 38 S. Tex. L. Rev. 407, 411–12 (1997) ("One of the most troubling of our ethical dilemmas in ADR [is determining] when is a solution suggested . . . by a third party neutral too coercive on the parties."); Welsh, \textit{supra} note 154, at 7, 15 (referring to the "thinning vision of party self-determination in court-connected mediation" and noting that the principle of party self-determination is different in mediation as opposed to a traditional judicial settlement conference).

\textsuperscript{200} See Welsh, \textit{supra} note 154, at 16–18.
ing until a final settlement is reached, failing to provide sufficient
time for the parties to reflect on the adequacy of a final agreement, or
emphasizing the mediator's opinion regarding the legal outcome if
the case went to litigation.201

f. Current Suggestions for the Evaluative Mediators

A long-standing debate has focused on how a mediator should
evaluate a dispute. Scholars have suggested many solutions to help
ease the tension created by the foregoing criticisms. The evaluative
mediator can maintain neutrality and impartiality by providing the
same assessment to all disputing parties. The mediator must act with-
out coercion. A mediator can accomplish these goals by offering her
assessment in a joint session, after the parties request the evalua-
tion.202 Alternatively, if a mediator renders opinions in separate
caucuses, she also can maintain neutrality and impartiality by simply
providing an invited assessment without pushing any party to adopt a
specific course of conduct. Arguably, a neutral and impartial mediator
can evaluate a case by rendering a personal opinion based on her par-
ticular expertise but at the same time not force it on any party. Profes-
sor Riskin goes so far as to contend that if a lawyer mediator discusses
legal ramifications with the parties in a neutral manner, this may actu-
ally diffuse advocacy because parties may not feel the need to bring in
their own lawyers.203 Another approach is for the mediator to distance
herself from the parties when offering advice; she can do this by pre-
dicting what an individual lawyer, judge, or jury might advise in a par-
ticular situation,204 or by calling in a "specialist."205

201. See supra notes 162–65 and accompanying text.
202. See Lande, Lawyering and Mediation Transformation, supra note 77, at 874–76 (con-
tending that a mediator does not affect her impartiality when she expresses an opinion
about a likely court outcome or typical resolutions of similar disputes, especially when the
opinion or evaluation is invited by the parties).
203. Leonard L. Riskin, Toward New Standards for the Neutral Lawyer in Mediation, 26
Ariz. L. Rev. 329, 335 (1984) [hereafter Riskin, Toward New Standards] (noting that a neu-
tral lawyer who serves as a mediator may provide legal information in such a way that the
parties will not feel the need to hire independent counsel who may influence the process,
which results in the parties' ability to reach their own agreement without relying on the
lawyers' perspectives).
204. Id. at 336; Golann, Mediating Legal Disputes, supra note 8, § 10.6.9 (noting that a
mediator can predict what a judge or jury might find in terms of damages and liability
rather than make a personal statement such as, "I think there should be a liability finding
here").
205. Golann, Mediating Legal Disputes, supra note 8, § 10.3.3. To maintain her cred-
ibility and rapport with the participants, the mediator may call in a "specialist" to render a
formal evaluation. This method prevents any perceived association with one party, avoids
Scholars like Dwight Golann and Marjorie Corman Aaron have written extensively on the subject of how an evaluative mediator can remain neutral, offering a variety of suggestions. First and foremost, they caution that a mediator should not comment on the substance of the mediation; she should remain passive. In addition to the foregoing discussion, they contend that a mediator can remain neutral by using a Socratic method of questioning, carefully selecting phraseology that is devoid of her point of view, evaluating the merits of a “no agreement” alternative, paying attention to the timing in which the evaluation is rendered, and considering the dynamics of evaluating in a joint session or in a private caucus.

The current suggestions provide guidance to evaluative mediators, but fall short of practical solutions. The suggestions are limited solely to evaluative mediators. They fail to consider the tensions that are developing as new Standards are created, especially when the Standards include fairness provisions such as balancing antagonism by the perceived loser, and equalizes the playing field from the mediator’s perspective. 

Golann, Mediating Legal Disputes, supra note 8.

Id. § 10.2. By leading the parties through a process to evaluate their own case, the mediator helps them formulate their own evaluation of the case while maintaining her neutrality. Id.

Id. § 10.5. To maintain a level of credibility—the trust and rapport that a mediator may engender during the mediation—she needs to cautiously pose questions. The mediator should carefully select the phraseology so that she does not reveal her point of view. A good way to do this is to pose questions in a joint session and direct them to all parties equally. Id.

Id. § 10.4. A mediator may provide a neutral evaluation regarding the value and merits of a “no-agreement” alternative. The mediator does not interfere with the participants’ creativity, ability to generate options, and responsibility to formulate their own resolution of a dispute because the no-agreement alternative evaluation does not seek to resolve the dispute. Id.

Id. § 10.5. A mediator has a better chance of maintaining neutrality if she waits longer to express her evaluation. As a result, she can: learn more about the parties, facts, and case; gain a better understanding of the attorneys’ positions; and build trust and rapport with the participants. Id.

Id. § 10.6.1. Some scholars advocate for mediator evaluation in a joint session so that all participants hear the same thing. Sometimes if an evaluation is presented in a joint session, the losing party will lose face and focus on the evaluation without moving forward in the mediation process, believing that the mediator’s neutrality may be jeopardized. Id. Others believe the best way to evaluate a case is during private sessions because the mediator may need to present her evaluation differently to suit participants’ personalities and corporate cultures. Also, the mediator can alleviate potential animosity by presenting her evaluation in private caucuses. Id. Both positions—evaluating in private caucuses or in a joint session—are valid and show how the timing and logistics of delivering an evaluation impact a mediator’s neutrality.
power, ensuring informed decision-making, and ensuring a substantively fair outcome. Quite simply, the current solutions exacerbate the mediator's dilemma because they are limited to one mediator style, restricted in scope by applying only to methods to provide a neutral evaluation. The current solutions do not address the impact that developing Standards have on mediator styles or the interrelated nature of many of the various mediation values set forth in Standards.

3. Transformative Style

A transformative approach to mediation means that the mediator is less likely to be directive in terms of solving a problem because she does not influence the final outcome. Rather, the mediator may be directive in terms of communication as she enables the parties to control the decisions regarding their outcome. In this regard, a transformative mediator easily can remain impartial because she does not influence the outcome, as so often happens in a problem-solving approach.\textsuperscript{213}

V. Recommendations to Alleviate the Tension Between Mediator Styles and Impartiality Requirements

It is readily apparent that all types of mediators cannot conform to impartiality requirements in Standards. Conversely impartiality requirements found in Standards cannot apply uniformly to all mediator styles. The majority of the analysis and recommendations relate to facilitative and evaluative mediator styles and their related counterparts because a transformative mediator always can remain impartial.

The current debate regarding suitable mediator conduct needs to continue, albeit with a new focus. Rather than limit the discussion to methods of proper evaluation in mediation, scholars, mediators, regulators, and legislators need to focus the current debate towards appropriate compliance with impartiality provisions and the simultaneous use of practical mediator styles and conduct. The following four alternatives address the mediator's dilemma—how can a mediator be neutral and impartial when engaged in certain mediation styles?

A. Alternative 1: The No-Action Approach to Developing Impartiality Requirements

Currently, thirteen states do not have Standards even though most of these jurisdictions recognize and embrace the benefits of me-
Common reasons for not developing ethical Standards are that: (1) the mediation industry is prematurely developed in a particular state; and (2) the tension between mediation values and traditional mediator styles is too great to enable the development of a set of Standards with the clarity necessary to be instructive to the practicing mediator. The absence of Standards means that a jurisdiction may have no rules regarding impartiality.

Consequently, the first alternative is the no-action alternative, which means that states that currently lack ethical Standards should not yet develop them. Even though a state may lack a set of Standards, Alternative 1 may be superfluous if a state statute or court rule defines mediation by incorporating impartiality requirements.

Before enacting comprehensive Standards, the states should thoroughly analyze the mediator’s dilemma—the conflict between mediator styles and the ability to simultaneously maintain mediator impartiality. While developing Standards, states should take into account the various mediator styles and how each may affect mediator impartiality. The states may want to consider Alternatives 2, 3, or 4 as they develop their own ethical Standards.

Alternative 1 should not apply to states that already have enacted Standards because these states have spent years working on the best possible set of ethical guidelines. They would suffer an extreme disservice if they were told to cancel everything and start anew. States that already have Standards should consider Alternatives 2, 3, or 4.

B. Alternative 2: Redefine Mediation to Remove the Requirement of Mediator Impartiality

Several scholars theorize that a mediator cannot be impartial. Robert D. Benjamin contends that rather than being objective and neutral, mediators should be “balanced” in their communications with parties to protect both parties rather than either one. Benjamin theorizes that a mediator cannot be neutral since she becomes part of the system, yet his proposition seems extreme.

214. This Author is unable to locate general civil Standards, whether court-connected or by a professional organization, for the following states: Alaska, Arizona, Connecticut, Delaware, Kentucky, Louisiana, Maine, Missouri, Nevada, North Dakota, Ohio, Rhode Island, and South Dakota.
217. Id.
Although Benjamin makes an interesting argument that the mediator becomes part of the system, conceivably the mediator can continue to be neutral as long as she does not offer alternatives or advice that benefit only one party. For example, a mediator who, with the participants’ approval, offers an opinion regarding the merits of the case and a probable outcome, may not lose her impartiality as long as she does not urge the parties to adopt this position. Benjamin’s approach seems to apply to evaluative mediators, implying that facilitative mediators can be impartial.

Semantics aside, whether a mediator employs balancing or evaluative techniques, the dilemma persists. Can the mediator conduct the mediation pursuant to impartiality requirements and simultaneously maintain any mediator style?

Professor John Lande believes in the eclectic nature of mediation. He makes a sensible argument that existing mediation values, such as confidentiality and neutrality, may not be absolutely necessary.

Another problem is that mediators may use an evaluative style unconsciously. An ethical rule that completely prohibits such techniques could create an “unfair ethical [trap] for unwary parties and mediators.”

Despite the traditional definitions of mediation which rely on key values such as party self-determination and mediator impartiality, industry standards and commercial dictates appear to be driving the profession in a new direction. Ethical Standards illustrate a new trend toward a fair result and related fairness concepts, such as ensuring informed decisions and balancing power—aspirational concepts that are not part of the traditional definitions of mediation. Promoting fairness under any style or model of mediation creates tension with mediator impartiality.

218. Lande makes a similar observation. See, e.g., Lande, Lawyering and Mediation Transformation, supra note 77, at 876.

219. Lande, Sophisticated Mediation Theory, supra note 66, at 333 (agreeing with Jeffrey Stempel’s “preference for eclectic approaches by mediators”).

220. Id. at 332–33 (acknowledging that many effective mediators have some ties to the disputing participants, such as mediators who are members of organizations, tribes, and communities connected to the participants, Postal Service mediators involved in employment cases, and ombuds who are employed by a participating organization).


222. Exon, Why Ethical Standards Create Chaos, supra note 26, at 419.
The tendency to embrace fairness concepts means that the mediation field is changing. The definition of mediation should change accordingly. Other than potential conflicts of interest, why should a mediator remain neutral and impartial?

The answer lies with Alternative 2: the definition of mediation should be broadened to refer to a conciliatory process of using a third party to assist disputants to reach a desired goal. The new definition of mediation is generic enough to apply to many different mediator styles. The reference to a "desired goal" is adequately flexible to apply to issue deciding, problem solving, and relational objectives—goals indicative of evaluative, facilitative, and transformative mediators or any variation of these main mediator styles.

The new, simplified definition of mediation also removes requirements of mediator impartiality other than conflict of interest concerns. Concurrently, existing Standards would need to be modified to delete the requirements of mediator impartiality. By removing impartiality requirements from corresponding Standards, regulators would enable any and all types of mediator styles and mediation models to comply simultaneously with the broader definition of mediation and the simplified Standards. All mediator styles, therefore, could stand side-by-side with ethical Standards that have deleted requirements of mediator impartiality.

Some scholars may contend that Alternative 2 is impractical and severe because it appears to push the mediation field backward rather than allow it to progress forward. They may argue that mediation is flexible enough to sustain existing definitions of mediation or that ethical opinions can fill the chasms left open by the inadequacies or inconsistencies of Standards.\textsuperscript{223}

Professor Michael Moffitt might criticize the broadened definition of mediation, arguing it is not helpful if a descriptive definition lacks the dual components of structure and behavior.\textsuperscript{224} According to Professor Moffitt, defining mediators as "third parties, not otherwise involved in a controversy, who assist disputing parties in their negotiations," provides a structural component which identifies the mediator yet fails to limit the broad, sweeping nature of the description to the

\textsuperscript{223} See Paula M. Young, \textit{Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators}, 5 APPL. J.L. 195, 197–98, 200 (2006) (acknowledging that the revised Model Standards provide guidance and serve as a foundational framework for states that do not yet have mediation standards and advocating reliance on advisory or ethics opinions for more detailed assistance).

mediation field.225 Furthermore, he contends such a definition says "little."226

Professor Moffitt's potential criticism fails to take into account that current definitions of mediator—such as "distributive mediator," "facilitative mediator," "community mediator," "family law mediator," and so forth—are qualified. Each qualifying word enhances the behavioral component that may appear lacking in the simplified definition of mediation offered in Alternative 2. Additionally, the definition of "mediator" signifies its limited scope to the mediation field.

Professor Moffitt's concern that a broadened definition of mediation arguably extends to anyone who attempts to resolve a controversy fails to acknowledge other practical difficulties. Without a mandate for mediator licensing, anyone may fit the third party characterization of the simplified definition of mediation. Standards become a critical component to help qualify the special goals and values of mediation. A definition, standing alone, cannot serve as the all-encompassing guide for the mediation practice. It can, however, serve as a flexible point of beginning that does not collide with impartiality requirements.

Additionally, none of the potential criticisms takes into account that most jurisdictions lack enforcement mechanisms. A few states, such as Florida, Georgia, and North Carolina, have specific mechanisms in place to enforce ethical obligations of mediators and address consumer complaints about mediator conduct.227 Until standardized enforcement mechanisms are commonplace, ethical Standards must be adequate to specifically address the mediator's dilemma regarding mediator style and impartiality.

C. Alternative 3: Redefine Mediation to Suit Mediator Styles—The Contract Approach

Another approach is to differentiate between the two main mediator styles—evaluative and facilitative—and redefine them as separate and independent processes. Rather than broaden the definition of mediation to encompass all types of mediator styles, Alternative 3 proposes the creation of two distinct types of mediation, each with its own narrowed definition.

225. Id. at 88–89.
226. Id. at 89.
227. See Young, supra note 223, at n.240.
A facilitative as well as transformative mediation could remain as the conventional definition of mediation. It would include the traditional values of party self-determination and mediator impartiality.

Evaluative mediation could be redesignated as its own process called a "Mediated Settlement Conference." The evaluative mediator would not need to behave in a neutral and impartial demeanor. She could engage in all types of evaluative techniques except for coercive conduct.

In conjunction with the modified definitions of mediation, the parties could be presented with a menu of mediator behaviors that they would embrace. This is where mediator styles come into play. Presented with a brief description of evaluative, directive, facilitative, elicitive, empoweror, fixer, and norm-educating styles, compartmentalized within either definition, the parties could assert true control over the process by defining how they want their mediator to act and their process to be conducted.

Alternative 3 provides both clarity and uniformity in the mediation process because it will satisfy the disputing parties' needs and interests, the mediator's personal values and commercial needs, and the guiding principles set forth in written definitions and Standards. By allowing the participants to handle such preliminary matters before the mediation session begins, participants in essence enter into a contract to select the mediator style and the process. In turn, the parties truly determine the outcome of the mediation from both a procedural and substantive perspective.

To allow parties an opportunity to select the process of their choice, it is necessary to educate them before they engage in the mediation process. The parties need to know what a mediator can and should do. The parties need to understand the concept of mediator styles along with the corresponding processes of either mediation or Mediated Settlement Conference.

228. This is not a new idea. Dwight Golann has devised a set of prescriptions to help evaluative mediators maintain neutrality. Foremost in his suggestions is to allow participants to enter into a contract before beginning the mediation whereby they authorize the mediator to employ a certain style. See Golann, Mediating Legal Disputes, supra note 8, § 10.1.

229. John Bickerman, an attorney-mediator, advocates for this position. John Bickerman, Evaluative Mediator Responds, 14 Alternatives to High Cost Litig. 70 (1996). He contends that parties should have the independence to select the type of mediator who they think will provide the best mediation service for their kind of dispute, or at least allow the mediator to use a variety of styles as dictated by market forces. Id. at 70. Mr. Bickerman also points out that a mediator does not exceed her role of neutrality when she provides
Rather than allow the mediator to educate the parties, as is most often done at the beginning of a mediation, someone who is not part of the specific mediation session could perform the task; possible people include court personnel in court-connected mediation programs, an administrator in a private or neighborhood mediation, or a written pamphlet prepared by any of these people or by a professional mediation organization. The mediation education would create party awareness of appropriate mediator behavior under either process.

1. The Role of a Facilitative Mediator in Mediation

A facilitative mediator may continue to serve under the traditional notions of mediation; she should be able to maintain neutrality and impartiality since her main responsibility is to enhance participant communication by emphasizing their interests. Through efforts to foster participant creativity, problem-solving, and personal evaluation, a facilitative mediator should be able to maintain the objectivity necessary to remain impartial. The mediator cannot, however, seek to ensure a fair result, attempt to balance the participant’s power, or promote informed decision-making. Consequently, Standards would need to be modified to fit within the new description of “mediation.”

2. The Role of an Evaluative Mediator in a Mediated Settlement Conference

If participants want a more directive mediator, they may choose the Mediated Settlement Conference rather than a traditional mediation. In a Mediated Settlement Conference, the participants could agree at the outset of the mediation to allow certain mediator behavior.

The participants could authorize the mediator to offer evaluation and even go so far as to encourage the parties in one direction. Under this process, the mediator could be authorized to ensure a just and fair result, a balanced process, and advocacy on behalf of a weak party if performed in a non-intimidating manner. Such authorizations mean that the evaluative mediator in this setting need not necessarily maintain impartiality. Standards would need to be modified accordingly.

In a Mediated Settlement Conference, the mediator would be expected to express some sort of evaluation. If the definition does not “frank assessments” regarding a case. Id. The parties can make intelligent decisions based on their positions of being fully informed. Id.
require the mediator to be impartial, the mediator could approach the process as though she was facilitating and enhancing party communication as well as encouraging parties to resolve a dispute.

D. Alternative 4: Create a Hierarchy of Values Within Mediation Standards

The fourth and final alternative posits an organizational hierarchy, or prioritization of mediation values, within a single set of Standards. Standards would retain the typical values such as party self-determination, neutral process, impartial third-party mediator, and prohibition of conflicts of interest. The only difference would be to prioritize the values. The single, most important value would essentially trump other values. Some lesser values could trump the least important values. Such an approach is analogous to the posture in the current ABA Model Rules of Professional Conduct wherein Rule 1.6, Confidentiality of Information, specifically trumps all but one designated rule.230

The complexity of Alternative 4 lies in the process of determining the most important value. Party self-determination is touted as the fundamental principle of mediation and therefore may be considered the most important value. The notion of informed decision-making, balance of power, and balanced process are inherent parts of party autonomy because arguably a party cannot decide on a final resolution for a mediated dispute unless the party fully comprehends the consequences of that decision. In such a scenario, a mediator could sacrifice her impartiality to ensure that the parties are fully informed of the consequences of their decision so that no party takes advantage of any other party. This is just one example of how an evaluative mediator could direct and guide the parties without the fear of violating the ethical requirements of impartiality.

Alternative 4 would continue to promote the flexibility of various mediator styles and mediation models while concurrently requiring mediators to conform to all Standards. Mediation would continue as a flexible, fluid process during the evolution of ethical Standards and other guidelines necessary to regulate an industry.

230. Language in the following ABA MODEL RULES OF PROF'L CONDUCT illustrates that each of the rules is limited by Rule 1.6: Rules 1.8(f), 1.9(b), 1.10(b), 1.14(c), 2.3(c), 4.1(b), 8.1(b), and 8.3(c). ABA Model Rule 3.3, Candor to the Tribunal, is the only rule that requires disclosure of information otherwise deemed confidential pursuant to Rule 1.6. Id. at 3.9(c).
Several scholars already have weighed in on this type of alternative. Professor Michael Moffitt proffers the same basic approach with respect to the revised Model Standards, noting that the revised Model Standards fail to create any "hierarchy of ethical concerns" by disregarding ethical tensions such as those posed in this Article.\textsuperscript{231} Professor Moffitt advocates for specific guidance by designating one standard that trumps the others.\textsuperscript{232}

Professor Ellen Waldman acknowledges the internal inconsistencies of Standards, especially since they apply to such a far-reaching field in terms of subject matter application and mediator style.\textsuperscript{233} Because it is difficult to create an all-encompassing set of Standards to apply to all types of disputes and scenarios, Professor Waldman proposes a "fact-specific, context-specific balancing approach."\textsuperscript{234} She explains that mediators should consciously acknowledge mediation values yet determine which values are dominant and which are subordinate.\textsuperscript{235} Mediators can engage in this weighing and balancing process by assessing the type of dispute and relational needs of the individuals, including the balance of power and resources.\textsuperscript{236} The presence of representatives, such as attorneys, also affects the mediation dimension, especially when the representatives do not appear to be equally competent. Thus, "mediators should strive for . . . conscious, mindful consideration of the values at stake and the construction of a deliberate set of priorities that takes into account the particular circumstances of the case."\textsuperscript{237}

Professor Waldman makes a passionate argument in favor of a balancing process by individual mediators based on subject matter and relational factors. While seemingly well-reasoned, it allows for the unfettered discretion of individual mediators. A better approach would be for the Standards to highlight the most important mediation value and then allow mediator freedom to decide how to balance other subordinate values. In this manner, the Standards would provide at least some guidance, yet maintain the flexibility and fluidity inherent in mediations.

\textsuperscript{232} \textit{Id.}
\textsuperscript{233} Telephone Interview with Ellen Waldman, Professor of Law, Thomas Jefferson Sch. of Law, in San Diego, Cal. (Aug. 9, 2007).
\textsuperscript{234} \textit{Id.}
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} \textit{Id.}
VI. Conclusion

For years a dialogue has taken place regarding mediator styles and whether evaluative techniques are appropriate. Although some people may want to continue the dialogue, the simple fact is that mediators assert a variety of styles such as facilitative, evaluative, transformative, or some derivative classification. Mediators have the flexibility to use a variety of styles for a number of reasons—most notably due to the participants' unique needs. Despite choices regarding style, mediators are mandated to serve with impartiality. This Article demonstrates the tension between impartiality requirements and mediator styles most commonly associated with evaluative mediators.

The tension has resulted in the mediator's dilemma. How can a mediator be neutral and impartial when engaged in any and all mediator styles? It is time to address the mediator's dilemma so that we may act progressively as the mediation field matures.

This Article proposes several alternatives to ensure the integrity and credibility of the mediation field. First, for states that do not have Standards, wait and study the mediator's dilemma before adopting impartiality requirements that conflict with mediator styles. Second, broaden the definition of mediation by removing mediator impartiality requirements. Such an approach would permit mediators to be flexible enough to conform to any and all mediator styles. Third, narrow the definition of mediation so that different definitions with correspondingly different mediator duties apply to facilitative and evaluative mediators, the two most common mediator styles. Fourth, create a hierarchy of values within Standards that would allow flexibility while maintaining the rigors of the most important ethical values. Now it is up to the scholars, practicing mediators, regulators, and legislators to begin the dialogue for change and choose the most beneficial alternative.