Article

# Evaluative Mediation (Part I), an Analysis

## Evaluative Mediation, Working Method or Not?

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## 1 Introduction



The phenomenon of evaluative mediation has invited much debate among both scholars and mediators. At the heart of that debate is the question of a definition of mediation. Considering all prevailing schools of mediation, it was my conclusion – as I wrote in the *Corporate Mediation Journal (CMJ) 2*018/2[1] – that doctrine will not be able to prevent that mediation will continue to occur in all kinds of shapes and forms. I wrote as follows:

> I will leave it to mediators and other (non)believers to crush each other's skull about what is right or wrong in this respect. In daily life users of mediation do not always care how their problems are solved as long as they are solved. In a broader sense, this may be correct, but it is useful that a certain understanding about what mediation entails and what to expect when engaging a mediator, will be made possible by seeking consensus on a number of core values that will at least have to be observed in order to speak of mediation. These core values, I believe, are of universal value in each and every mediation.

The core values concerned are voluntariness of front-end and back-end participation consent (and the freedom to end the mediation at will at any time), impartiality of the mediator, confidentiality and (respecting) party autonomy.

In a number of countries, voluntariness and confidentiality no longer apply in full, but as regards other core values, those mentioned are the only safeguards against abuse and malpractice. Irrespective of what definition of mediation one wants to adhere to, core values are the anchor that keeps the ship of mediation positioned. Given due observation of core values, it is a free for all. Whether one wants to turn to a mediator in a flowery shirt and sandals, or to one in pinstripes with a necktie, this is a personal choice, as is the choice for the working method. The latter choice, however, does require informed consent on the part of the participants in the mediation. The observation of core values will have to be the universal underpinning of what participants may expect when consenting to mediation and what they expect to be able to rely upon. The overriding element is party autonomy.

What does the foregoing mean with regard to evaluative mediation? How does this working method relate to the core values of mediation? This question can only be answered by looking closer at the phenomenon of evaluative mediation. Considering the *mer à boire* of literature and opinions, it is not the easiest question to answer.[2] Still, in this issue of *CMJ*, an attempt will be made to ring-fence the phenomenon of evaluative mediation. In the second issue of *CMJ,* later this year, how to deploy evaluation in mediation will be investigated.

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1. Brink M. (2018). A Definition of Mediation? *Corporate Mediation Journal,* 2, 40-45.

2. Nevertheless, as D. J. Della Noce observes in *Conflict Resolution Quarterly*, Vol. 27, No. 2, Winter 2009, "[…] there is a remarkable lack of empirical literature on the subject what exactly qualifies as competent evaluation practice".



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## 2 Subject Matter Expertise

Evaluative mediation has a direct relationship with subject matter expertise on the part of the mediator. Without it, any evaluation will lack merit and authority.
The dispute over the question of whether subject matter expertise can be a hindrance to being a good mediator is flawed by the assumption that a mediator who avails of subject matter expertise will always bring his or her knowledge forward. A good mediator will know when to make use of subject matter expertise and when not to. It is my belief that availing of subject matter expertise is hardly ever a handicap for a mediator. At the same time, subject matter expertise need not be brought into the discussions but it may help the mediator to better understand what is being said and also to realise what is not being said. A mediator without subject matter expertise will hopefully not engage in evaluation. As a rule, it can be said that evaluation should only be considered by a mediator who avails of subject matter expertise. Another question is what can be understood to constitute subject matter expertise. For now, I mention only two definitions from the vast array of literature: Honeyman (1993),[3] who in the United States led the Test Design Project, a project team trying to formulate quality standards for mediators, and drafted the Interim Guidelines for Selecting Mediators, observed as follows with regard to subject matter expertise:

> We concluded that a […] mediator needs enough knowledge of the type of parties and the type of dispute to be able to facilitate communication; develop options; empathize; and alert parties (particularly pro se parties) to the existence of legal information relevant to their decision to settle.

Riskin (1996)[4] defines subject matter expertise as "… substantial understanding of the legal or administrative procedures, customary practices, or technology associated with the dispute".
Subject matter expertise is not a prerequisite in order to be a good mediator, though.

## 3 What is Evaluative Mediation?

There is much misunderstanding about the nature of evaluative mediation. Many scholars and mediators mentioning the working method of evaluative mediation describe it, *grosso modo,* as directive and pressing, with a negative connotation. They consider exercising influence as undesirable. Yet, these scholars and mediators forget that pointing the parties in a certain direction is something different from disrespecting party autonomy. Urging a party to accept a certain solution rapidly crosses a line, not only of impartiality, but also of self-determination of the party. There is a thin line, but one to be respected, between recommending a solution and urging a party to accept a solution.
Prein[5] calls evaluative mediation the most directive and substantive form of mediation, whereby the least space is left for self-determination of the parties. The one, however, does not necessarily follow from the other. What matters is that the core values are observed – in particular, but not limited to, the autonomy of the parties – and self-determination of the parties remains intact. Lowry[6] defines evaluative mediation as including a range of activities such as expressing an opinion about a party's case, recommending a solution or predicting the ultimate outcome, if the case were to be resolved in another forum. The problem with definitions such as these is that they speak 'about a range of activities'; yet, not all of these activities constitute evaluation or are the expression of an evaluative working method. These definitions include a combination of actions which ought not to be seen, and cannot all be seen, as either evaluative or evaluation. The only remaining element(s), in my view, which can justifiably be called evaluative is predicting the (ultimate) outcome if the case were to be resolved in another forum.[7] This would then have to take the form of the expression of a substantive outcome as the result of adjudication, perhaps also assessing the strengths and weaknesses of a party's case. Assessment need not always entail evaluation. Much depends on framing in this respect, which, as always, can make a big difference. For example, 'a court is probably not going to agree with this' or 'I wonder whether a court would agree with this' or 'Do you expect a court to agree with this?' These are three different interventions of which only the first one might be considered to be within the ambit of evaluation. Assessing the strengths and weaknesses of a party's case by the mediator can only be done by anticipating – or perhaps more by speculating – what might be the outcome of the case in another forum.
I do not consider it to be evaluative when a mediator explains to a party that the outcome in another forum is not a given and, therefore, a party might think twice before continuing to stick to the conviction that the case is bound for success in another forum. Issuing a warning that the outcome of adjudication – as a rule, leaving rare exceptions aside – cannot be predicted is, I believe, a common intervention in mediation and a fair warning for each party. Neither does recommending a solution in all events imply evaluation (as will be discussed more elaborately in Part II, in the next issue of *CMJ*).

3. Honeyman C. (1993, October). A Consensus on Mediator's Qualifications. *Negotiation Journal,* 9(4), p. 306.
4. Riskin L.L. (1996). Understanding Mediator's Orientations, Strategies and Techniques: A Grid for the Perplexed. *Harvard Negotiation Law Review*, 1(7), 35-36 and 90-91.
5. Prein H. (2017). Benaderingen. In A.F.M. Brenninkmeijer, H.J. Bonenkamp, K. van Oyen & H.C.M. Prein (red.), *Handboek Mediation.* Den Haag: SDU, p. 268.
6. Lowry L.R. (2000 January). To Evaluate or Not, That is Not the Question? *Family and Conciliation Courts Review,* 38(1), 48-61.
7. There may be a stark difference between the outcome of a case in first instance and the 'ultimate' outcome in the highest resort.



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Urging – as mentioned, a dangerous notion in mediation – the parties to do or not to do something can be proffered in a simple suggestion or a threat, a distinction that holds a world of difference. How to define a threat? A 'threat' in mediation may have many gradations. What is the difference between a warning and a threat and when does the one become the other? I would think that alerting parties to the risks they run when they continue to fight – without choosing sides – can qualify as threatening, but is a harmless threat, particularly when there are attorneys present. There is nothing wrong with explaining to parties that the outcome of adjudication cannot be predicted and they – even if they believe they have a strong case – are well advised to think twice before putting the solution to their problem in the hands of a third party. They are better advised to remain the owner of a solution of their choosing. The same applies to a reminder on the part of the mediator that to continue to fight has a price, in terms of time, energy, costs and – as already mentioned – uncertainty.

It is a different matter when mediators threaten the parties to stop the mediation if they do not follow the mediator's view or suggest they had better concede because, otherwise, one ought no longer count on either the mediator's continued sympathy or achieving a positive result in another forum.

That the outcome of adjudication cannot be predicted is one thing that forty-five years of litigation practice as an attorney and thirty-five years of practice as a (substitute) magistrate in lower court, district court and court of appeal have taught me. Pointing out to parties in mediation that the outcome of litigation cannot be predicted does not in itself imply an opinion that the likely outcome of a case will (will not) be successful in another forum. Given that the outcome of adjudication cannot be predicted with any degree of certainty – apart maybe in very limited situations, such as apply for statutes of limitation – it is at the same time a fair warning against mediators expressing an opinion on the outcome of a case in another forum than mediation.[8]

An opinion on the merits of a case can be no more than the view of one individual mediator and is by no means a universal truth. Yet, evaluation as the expression of the opinion on the outcome of a case in another forum by the mediator, may – as such – qualify as an evaluation and, according to some, also turn a mediation into an evaluative mediation.

The point I am making is that an 'evaluative mediation working method' is not an apt expression. One can speak of evaluation in mediation. Evaluation is a different process from facilitating the conversation between autonomous parties, that is, judging or calculating the quality, importance, amount or value of something.[9]

All the other elements of the definition pertain to 'assertive', to 'active' or 'directive', 'settlement oriented', 'deal making' and so on . Yet, all those notions do not (necessarily) imply evaluation as in expressing (or, even having) an opinion on the (best) outcome of a case or about its strengths and weaknesses. In this context, it is helpful to realise that mediators are not objective; they have to be neutral and impartial. Particularly when a mediator avails of subject matter expertise, he or she will understandably have an insight into what is (is not) a possible and workable solution. However, that is not to say this solution has to be explained to the parties, let alone be imposed upon them.

Riskin has described evaluative mediation as the working method whereby the mediator

- points out the strong and weak points of a case;
- predicts the possible outcome of a court case;
- makes proposals for solutions in relation to the position of each party;
- exercises a certain influence on the parties to come to a settlement or to accept a certain arrangement or a zone of potential agreement;
- investigates the underlying interests and
- discusses what the consequences will be of the failure to come to a solution.[10]

Meyerson[11] mentions a definition of evaluative mediation along the same lines:

> So-called evaluative mediators assist the parties in assessing the strengths and weaknesses of their case, helping them reach a mutually acceptable resolution through a clearer understanding of their alternatives to a negotiated agreement, which includes discussions of the probable results of litigation, and its attendant costs, delays and disruptions.

Burns[12] observed that "evaluative mediators" began with a joint session, then broke into separate caucuses and thereafter shuttled between the parties, selectively carrying information back and forth. In the typical initial session, each party was given the opportunity to state its case without interruption from the other. The issues raised in the parties' briefs were discussed (implying that it was the norm for the mediators to require and

8. I remember one mediation in which someone turned down an obviously splendid offer, much to the despair of his own attorney, but obtaining a much better result in litigation afterwards. In the reverse, I have experienced that an in itself fair offer was turned down in mediation only to end up with nothing in court. All of this serves to confirm how precarious it is to predict the outcome of litigation.

9. Retrieved from https://dictionary.cambridge.org/dictionary/english/evaluation (consulted on April 4, 2021).

10. Riskin L.L. (1996). Understanding Mediator's Orientations, Strategies and Techniques: A Grid for the Perplexed. *Harvard Negotiation Law Review,* 1(7), 27-28. Della Noce D.J. (2009 Winter). Evaluative Mediation: In Search of Practice Competencies. *Conflict Resolution Quarterly*, 27(2), 200, points out that neither Riskin nor Lowry based a description of practice on the empirical research of mediators who were intentionally engaging in such practice.

11. Meyerson B.E. (2010). The Case against Treating Evaluative Mediation as the Practice of Law. In *AAA Handbook on Mediation* (2nd ed.). New York: JurisNet, p. 762.

12. Burns S. (2001). Think Your Blackest Thoughts and Then Darken Them: Judicial Mediation of Large Money Damage Disputes. *Human Studies*, 24, 227-249.





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read briefs). Mediators asked questions at this stage in order to clarify uncertainties and formulate the case in legal and practical terms. The mediators did not undermine either party's case or exert pressure in the joint session. Those behaviours were reserved for, and characteristic of, the caucus sessions. The mediators "displayed neutrality" in the joint session.[13] Thus, mediator activity was organised to move the parties towards settlement, which meant identifying and overcoming "settlement obstacles". The relevant approach, according to Burns, would come down to ignoring interest-based bargaining and searches for creative solutions, providing substantive assessments, discussing the law with the lawyers, displaying neutrality in joint sessions but exercising mediator influence in caucus and focusing on the positional bargaining of offers and counteroffers.[14]

Della Noce[15] interpreted the behaviour aimed at successfully overcoming settlement obstacles as competent behaviours for an evaluative mediator. Detailing norms of evaluative practice in behavioural terms/competencies, Della Noce comes up with a whole list, broken down in actions prior to mediation (inter alia, require parties to submit briefs, disclose the current negotiating range in their briefs, communicate with the lawyers rather than the parties, ending the initial joint session and moving to separate caucuses), in caucus sessions (inter alia, prevent parties from talking directly to another, offer negative evaluations of the case of the party in the caucus room, act as devil's advocate, offer only positive evaluations of the opposing party's case) and only hold a final joint session if useful to finalise the settlement.

The aforementioned definitions all also contain a combination of various interventions, whereby the discussion of *probable* results goes beyond the discussion of possible results and can be seen as evaluation.

I do not see what would be wrong with discussing *possible* outcomes of litigation. One of my mediations involved a fight about a contractual penalty because shareholders had transferred their shares to a foundation without – as the shareholders' agreement demanded – first offering their shares to their co-shareholders. The Articles of the Corporation contained a stipulation that shareholders who wanted to transfer shares would first have to offer their shares to their co-shareholders, in the absence of which the transfer would be null and void, according to the applicable laws. Yet, neither party invoked the nullity – either out of ignorance or with purpose – and the case revolved around the contractual penalty and the amount thereof. Nullity of the transfer to the foundation might have raised the question as to whether a contractual penalty had become due at all. I raised the issue thus: that I wondered whether a transfer to the foundation might, or might not, have been valid and I asked whether the parties had looked into that question. Upon their denial, I suggested that, before the next session, they would each do some research, preferably jointly, into that question. I did not vent it as my opinion that the transfer had been null and void, but simply wondered aloud whether the consequences of the concurrence of the stipulations in the Articles of the Corporation and the shareholders' agreement had been sufficiently researched. The lawyers, nevertheless, did not delve into the relevant question and, in the next session, the case was solved, without an answer to the question as to whether or not it had concerned a non-existing transfer.

A distinction is made between 'process control' and 'outcome control'. Process control in mediation is about the way decisions come about, whereas outcome control pertains to what is being decided; in other words, the substantive aspect of decision-making. Other expressions used are 'means control' and 'ends control' and, in a much broader context, 'therapeutic approach' and 'bargaining approach'. When the focus of attention of a mediator is on the proceedings rather than on the substance of the discussions according to the relevant categorisation, his or her attention will go to the contribution the parties render verbally and/or by means of body language. The mediator will aim his or her attention predominantly on the framing of emotions and attitudes and direct all energy at the improvement of the communication and the interpersonal relationships (referred to as 'orchestrators' with a 'communicative frame'). A more substance-oriented mediator may (which does not equal '*will*', on the basis of his or her subject matter expertise, consider mediation more as a (distributive) negotiation process aimed at the formulation of the goal of the mediation and finding a solution to the issue which is so identified (referred to as 'deal maker' with a 'settlement frame').[16] The mediator of the latter type supposedly would use caucus more than a mediator of the former type. I am not sure that I agree. Negotiation occurs in all types of mediation, so if caucus is associated with negotiation, then it may be used equally often or equally little by all types of mediators. I am not aware of any research into this issue.



## 4 Antagonists

Much of the discussion about an evaluative working method in mediation stems from the idea that evaluative mediation is a specific, coherent working method. I hope to have expressed already in this article that do not believe this view to be correct. It is not about 'either-or' but about 'and-and'. One thing in mediation does not exclude the other. A deal maker with a settlement frame can be very sensitive to the psychological aspects and emotional needs of the parties, whereas – as already

13. Heisterkamp B.L. (2006). Conversational Displays of Mediator Neutrality in a Court Based Program. *Journal of Pragmatics*, 38, 2051-2064.
14. Burns S., (2001).Think Your Blackest Thoughts and Then Darken Them: Judicial Mediation of Large Money Damage Disputes. *Human Studies*, 24, 227-249.
15. Della Noce D.J. (2009 Winter). Evaluative Mediation: In search of Practice Competencies. *Conflict Resolution Quarterly*, 27(2), 193-2014.
16. Kolb D.M. (1983). *The Mediators.* Cambridge, MA: MIT Press.

mentioned – an orchestrator with a communicative frame can have to deal with fierce negotiation battles between the parties. Kolb,[17] as well as many others, have observed that there is not one type of mediator, nor only one working method:

> The mythic World of mediation is one in which one practitioner of the art is pretty much like another in regard of motives and orientation to the role. In the mythic world, mediators are impartial neutrals who have no authority and no wish to impose their views on the disputing parties. Also, the process is entirely voluntary and noncoercive. […] We are not the first to observe that the mythic world is not supported in practice. Scientific inquires have persistently raised doubts about claims of mediators' 'neutrality', noncoerciveness, and presumed unity of purpose and motive. […] We suggest that these myths [of a uniform working method, MB] have become more of a liability than an asset and that a new perspective is needed, one that recognizes the increased professionalization and practical realities of the work.

Kolb noted that mediators do not form a homogenous group. Many mediators have their own perception of what makes mediation useful and successful, for example, transformative versus solution-oriented mediation and mediators with a communication frame versus those with a settlement fame, whereby each frame brings a different positioning of the mediator and different strategies into the dynamics. I pose the view that certain traits of all styles – apart perhaps from evaluation, if that is a style – may pop up in mediation, without even being identified as such. The word 'frame' ignores the fact that there need not be a frame at all, but a variety of interventions in one mediation.[18] Now that mediation is a commercial activity for many mediators, it can occur that they pressure for success in order to promote their own success. Pressing for a solution can sometimes camouflage an infringement of the core values of mediation. There is also – Kolb noted – among mediators an enormous difference in their capability to cope with tensions, which may make the profession much harder for some than for others. In my view, all these observations underpin the importance of the core values I mentioned earlier as the anchor to keep the ship of mediation positioned.

Much opposition against evaluative mediation has been levied by Love.[19] I will mention briefly the top ten reasons she listed in support of that opposition:

1. The roles and related tasks of evaluators and facilitators are at odds. Evaluation, assessment and deciding for someone else require different techniques as expression of different competencies, education and ethical guidelines. Evaluation distracts from facilitating the own process of the parties and threatens to jeopardise the impartiality of the mediator.
2. Evaluation promotes positioning and polarisation, which are antithetical to the goals of mediation. Knowing that evaluation may be part of the mediation will cause the parties to behave and position differently than in the case the mediator's opinion will not be a factor.
3. Ethical codes caution mediators – and other neutrals – against assuming additional roles.
4. If mediators evaluate legal claims and defences, they must be lawyers; eliminating non-lawyers will weaken the field.
5. There are insufficient protections against incorrect mediator evaluations.
6. Evaluation abounds: the disputing world needs alternative paradigms. There are plenty of other ways and means to obtain the opinion of a third party (e.g. neutral evaluation, rent-a-judge, arbitration). Mediation must be mediation.
7. Mediator evaluation detracts from the focus on party responsibility for critical evaluation, re-evaluation and creative problem solving. They will not take their own thinking to another level if someone else decides for them.
8. Evaluation can stop negotiation. The expression of an opinion by the mediator will disrupt the process. The party obtaining the feeling not be supported in its views will detach mentally and perhaps withdraw physically, while the party believing to have found support for its views will become more dug in.
9. A uniform understanding of mediation is critical to the development of the field. When attorneys advise clients about the advantages and disadvantages of mediation, when courts and institutions create mediation programmes and panels of mediators, when consumers go to the Yellow Pages to find a mediator, they should know what they are getting. They should have a clear understanding of the goals of the process and the tasks the neutral will perform.[20]
10. Mixed processes can be useful, but call them what they are!

Parties sometimes request that neutrals assume a variety of roles. 'Mixed processes' abound: med-arb, mini-trials, summary jury trials and mediation and neutral evaluation. These mixed processes can address particular needs of a situation and can be very helpful. Mediators are not foreclosed from engaging in some other process or helping parties design a mixed process. Whatever the service being provided, however, it should be requested by the parties and accurately labelled.

17. Kolb D.M. & Kressel K. (1994). *When Talk Works, Profiles of Mediators.* San Francisco, CA: Jossey-Bass, p. 466.
18. Compare Moore Chr. W. (2003). *The Mediation Process, Practical Strategies for Resolving Conflict* (3rd ed.). San Francisco, CA: Jossey-Bass, pp. 80-81, who refers to levels of intervention, targets of intervention and focus of intervention.
19. Love L.P. The Top Ten Reasons Why Mediators Should Not Evaluate. *Florida State University Law Review*, 1997,Volume 44, p. 937.
20. My point is all along that observation of the core values is what it is all about. Otherwise, the profession is drawn into the impossible and undesirable phenomenon – as Lela Love and others suggest – of wanting to regulate the process and the tasks of a mediator.



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Aaron[21] is much more nuanced than Love and points to a number of advantages of evaluative mediation:

- It can help the parties to appreciate the relativity of their own judgment and bottom lines.
- It may meet the emotional need of the parties to be heard and to learn the perspective of a third party. They will have their 'day in court' in a much safer setting than in a real court, and the mediation procedure is not binding for the parties.
- Evaluation of the situation by the mediator can sometimes help the parties to the legitimisation to abandon a previous standpoint without having to give up their initial strong stand. The legitimisation may under circumstances also have function vis-à-vis rank and file, superiors or others. It may help a party to blame the mediator for having to have had make a concession.

In addition, she points to where the possible downsides are:

- The credibility of the mediator is at risk when he or she engages in evaluation. The neutrality is at risk with the party that hears something negative to the case, will readily believe that the mediator has chosen sides. This may jeopardise the suggestions of a compromise because this will be perceived to be to the advantage of the other party.
- The mediator may get caught in his or her own evaluation and have little room left for solutions other than those based upon the evaluation.
- When the parties know that evaluation may take place, they may keep certain cards close to their chest. This will impact the content of the discussions. The parties will make increased effort to convince the mediator to seek solutions and will become more entangled in their own convictions. This will smother creativity.
- Where other issues are involved than just being legally or objectively right (e.g. emotional barriers), then evaluation will not add anything.

Aaron comes to the conclusion that – given the inherent dangers of evaluation – this instrument ought only to be considered when absolutely necessary and, even then, with the utmost restraint and modesty. A necessity for evaluation will only exist when no other intervention to break an impasse can be imagined and the side effects of evaluation do not matter anymore, meaning that, otherwise, all is lost. She does not agree with Love that evaluation would have to be avoided in all events. She frames this as follows:

> A mediator's ultimate weapon for influencing divergent case assessments is to offer an evaluation. Evaluation is an important, risky, and controversial tactic that should be carefully considered, structured and delivered.
>
> To understand the difference between evaluation and other mediator interventions, consider this metaphor. If mediators were doctors, fostering an information exchange might be the equivalent of recommending exercise and diet. Helping lawyers and parties to rigorously analyze their own views on disputed issues would be like administering medicine with potentially uncomfortable side effects.
>
> Mediator evaluation would be akin to surgery. Just as surgery can range from an arthroscopic procedure to a major operation, evaluation can vary from small and low-risk to comprehensive and potentially threatening. Most people would not choose a doctor whose first response to every illness was to bring out a scalpel. At the same time, few would feel comfortable with a physician who refused to perform surgery regardless of need. The challenge for a mediator is to know when and how to perform evaluative 'surgery' in the safest possible way.

In daily life, mediation is a flowing dynamic whereby the merging of one approach into another is not always clearly marked. Mediation ought not to become a rigid straightjacket.

I consider evaluation in mediation the rendering of an opinion on what might be the outcome of adjudication or what, according to the perception of the mediator, could be considered a reasonable outcome. Such an opinion ought to be in line with the core values not be expressed without the previous *expressis verbis consent* (in so many words) of the parties.



## 5 Mediator's Proposal

In this first Part, it has become clear that the notion of a 'mediator's proposal' – whatever that may mean – is not a synonym for evaluative mediation nor an oversimplified perception of evaluative mediation, as we have seen. One definition of a mediator's proposal is that

> it is a settlement proposal that the mediator makes to all parties, and each party is requested to accept or reject it, on the exact terms proposed, in a confidential communication to the mediator. It calls for either an unconditional 'yes' or 'no' response, without modification, and the mediator is not permitted to disclose the responses that he or she receives unless both responses are 'yes'. Thus, if one party says 'yes' and the other party says 'no', the one who said 'yes' will not be prejudiced if settlement negotiations (or subsequent mediations) occur at a later stage of the litigation.[22]

One common feature of evaluation in mediation and a mediator's proposal is that both will have to be the *ulti-*

21. Aron M.C. (2009). Merits Barriers: Evaluation. In D. Golan & J. Folberg (Eds.), *Mediation, The Roles of Advocate and Neutral* (2nd ed.). New York: Aspen, p. 218.

22. Hochman S.A. (2021). A Mediator's Proposal – Whether, When and How It Should Be Used. Retrieved from https://www.mediate.com/articles/HochmanS1.cfm (consulted on April 4, 2021).

*mum remedium.* Only at the very end, when there is nothing to be gained, when nothing is ventured and all will otherwise be lost because an agreement between the parties is certain not to happen, the mediator may consider to impinge upon the parties' autonomy. In neither case – a mediator's proposal or evaluation – ought the mediator to cross the line of party autonomy without their express consent.

## 6 In Conclusion, a Tale of Two or More Mediators

Mediation has always known many shapes and appearances, from meetings with tribe elders in the stone age to diplomatic masterpieces in the space age. After Roscoe Pound put alternative dispute resolution back on the agenda of practitioners in the legal field in the United States in conferences in 1906 and 1976,[23] mediation has developed strongly in the field of family law and employment law. The prevailing school which was developed – stimulated by the appearance of the school of interest-based negotiation[24] – was that of facilitative mediation. Development, however, did not stop there. As Gulliver[25] already in 1979 observed:

> For the purpose of exposition and clarification, mediators' roles can conveniently be described on a continuum representing the range of strengths of intervention. This continuum runs something like this: from virtual passivity, to 'chairman', to 'enunciator', to 'prompter', to 'leader', to virtual arbitrator.



I see 'a tale of two or more mediators' in the appearance of mediators who will, and mediators who will not, engage in the merits of the case, or do special things. This invites a not always simple response. My response: the observation of the core values is paramount. There is no objection against mediators changing roles, as long as this does not happen without the previously informed consent of the parties. Moberley[26] had a point:

> We say that the parties are entitled to self-determination. If the parties want evaluation, and believe it helps resolve their dispute, the principle of self-determination calls for allowing evaluation, not prohibiting it.

It is not uncommon that, in a relatively new field like mediation, there is some lack of clarity and a certain insecurity as to what the future will hold. Sociologist Jarrett[27] – and in agreement with him, Kawakami[28] – proffers that the eye ought to be on the diverse social forces that emerge in a developing field and on the combined potential of those forces. The variety of backgrounds of offerers of mediation services (psychologists, lawyers, accountants, doctors, engineers and other professions) and of preferences for approaches may cause confusion on the part of both mediators and their potential clients. This invites tension, now that all involved seek to distinguish themselves professionally. In turn, this will lead to increased formalisation and regulation, particularly where it comes to neutrality and independence. Institutionalisation can then be expected. In the end, specialisation will be the result, as is already occurring in many countries. This underpins the various approaches to mediation. It also confirms my opinion that mediation, as a recognisable phenomenon, can only exist when mediators join forces by underwriting the core values of mediation, rather than engaging in fruitless fights over working methods. Jarrett studied the field and found the following:

> Some interviewees also reported a kind of language game in which mediators espouse a certain approach to the exclusion of others. This language game creates a situation in which one form of mediation becomes deliberately incompatible and incomprehensible to another, so that the practitioner can dismiss the competing approaches out of hand, without the need to intellectually justify the dismissal. For example, a facilitative mediator can dismiss evaluative mediation simply because the latter involves some form of assessment and judgment of the substantive aspects of the dispute, and therefore abridges a purported philosophical commitment to party autonomy. Yet it is inconceivable that a facilitative mediator would not, on occasion, rationally navigate a dispute through some form of judgment, albeit unstated. Conversely, the evaluative mediator can dismiss the facilitative mediator for not providing honest evaluations and directions to the parties. Yet it is inconceivable that an experienced evaluative mediator would not, on occasion, allow the parties to frame the dispute as they determine it, despite his or her better judgment. Thus, philosophical and ideological commitments can blind one to the realities of actual practice in the mediation room. The result is that espoused theory in the mediation field may not accurately reflect actual practice.

23. Traum L. & Farkas B. The History and Legacy of the Pound Conferences. (2017) *Cardozo Journal of Conflict Resolution*, Volume 18:677, p. 677-698.
24. Fisher R. & Ury W. (1981). *Getting to Yes, Negotiating Agreement Without Giving In*, first published in 1981.Arrow Books, London (Ed. 1987)
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As recommended by Kawakami,[29] the field will (have to) continue improving and diversifying the pool of mediators who are able to handle complex mediations:

> One sure way to increase the utility and popularity of mediation is by increasing the talent pool of mediators through interdisciplinary training and fostering a culture that protects cognitive diversity.

Or, as Riskin[30] put it aptly:

> It is too late for commentators or mediation organizations to tell practitioners who are widely recognized as mediators that they are not, in the same sense that it is too late for the Pizza Association of Naples, Italy, to tell Domino's that its product is not the genuine article.

To which I add my mantra: as long as the core values are observed and mediators, changing roles, do so only with the previously informed consent of the parties.



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