

**MEDIATOR PRACTICE MODELS:  
THE INTERSECTION OF ETHICS AND  
STYLISTIC PRACTICES IN MEDIATION\***

*Excerpts*

SAMUEL J. IMPERATI, J.D.\*\*  
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\*\* EXECUTIVE DIRECTOR OF THE INSTITUTE FOR CONFLICT MANAGEMENT, INC. THE AUTHOR MEDIATES AND TRAINS MEDIATORS NATIONALLY. ANY COMMENTS REGARDING THIS ARTICLE CAN BE ADDRESSED TO THE AUTHOR, 11524 SW VACUNA CT., PORTLAND, OREGON 97219-8901. THE AUTHOR ACKNOWLEDGES THE ABLE ASSISTANCE OF J.F. BORDEN, WILLAMETTE UNIVERSITY GRADUATE STUDENT, ATKINSON GRADUATE SCHOOL OF MANAGEMENT.

## I. SCOPE

This Article addresses mediator ethics and stylistic practices at the operational level and specifically examines the practical implications of the *Model Standards of Conduct of Mediators (Model Standards)*,<sup>1</sup> as compared with other professional ethical codes governing mediation. While this Article compares national standards with those in the State of Oregon, the reader will come to understand the broad implication of this discussion and how it transcends both legal and professional boundaries.<sup>2</sup> Thus, this Article explores ethical issues and practical questions that regularly arise in mediation, along with some possible answers. It also proposes an additional model standard designed to ensure the parties and the mediator have mutually and clearly defined expectations.

This discussion is valuable for mediators because it provides the opportunity to view ethics from the parties' perspective. Several issues and positions are presented to provoke dialogue with the intention of giving mediators, parties, and advocates further guidance on how best to create a clear, workable understanding on how mediation will be conducted. This will assist adverse parties in resolving their dispute or, at a minimum, clearly define the expectations between the parties and the mediator.

In this Article, the term "ethics" connotes the moral codes or philosophical standards that place mediators in accordance "with the rules or standards governing the conduct of the members of the profession."<sup>3</sup> "Stylistic practices" are those operational practices that mediators currently use which will be contrasted with the ethical codes. A "model" is a combination of ethical codes and stylistic practices that individual mediators apply in practice. Because mediation takes place at the intersection of logic and emotion, clear collaborative ground rules are essential. Thus, agreement as to which model will be used in a particular mediation is necessary to increase the likelihood of success and user satisfaction.

Part II examines three stylistic models used in mediation: "facilitative," "evaluative," and "empowerment and recognition" as background to this Article. Part III provides a precursory discussion of mediator ethics and various professional ethical codes. Part IV addresses the differences between these codes and specifically discusses each standard of the *Model Standards*. Part V offers a practical guide for mediators to define ethical behavior, and concludes the Article by proposing an additional standard to make the *Model Standards* more usable and internally consistent.

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## II. COMPETING PRACTICES: STYLISTIC MODELS OR DIFFERENT PROCESSES?

The Preface to the *Model Standards* defines mediation as:

[A] process in which an impartial third party – a mediator – facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement.<sup>4</sup>

Was it the *Model Standards* authors' intent to define mediation in such a way as to encourage one model of mediation over another, thereby eliminating particular mediation models? Or did they attempt

1. The *Model Standards* is a joint ethical code promulgated by the Society of Professionals in Dispute Resolution (SPIDR), the American Arbitration Association (AAA), and the American Bar Association (ABA). *Reprinted at* 5 WORLD ARB. & MEDIATION REP. 223 (1994).

2. The author does not necessarily hold the positions set forth in this Article. Several of the issues and positions are presented to provoke discussion in the hope of giving mediators, parties, and advocates further guidance on how best to create a workable ethical code that will serve the legitimate interests of adverse parties who are attempting to resolve their dispute.

3. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 450 (New College ed. 1981).

4. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Preface (1995).

to define the process of mediation broadly enough to include stylistic diversity in the profession? The answers to these questions drive the debate surrounding mediator practice models and ethics. An exploration of the continuum of practice models becomes the starting point for further discussion. The principal question regarding the continuum of models is: “Should the mediator evaluate – make assessments, predictions, or proposals for agreements – or merely facilitate the parties’ negotiation without evaluating?”<sup>5</sup> Mediators, whether they know it or not, usually have a predominant orientation based on a combination of their personality, experiences, education, and training.<sup>6</sup>

### ETHICS OR STYLISTIC PRACTICE?

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FACILITATIVE  
(Least Interventionist)

EVALUATIVE  
(Most Interventionist)

Although few professional mediators occupy the continuum’s polar extremes, for purposes of analysis it will be helpful to explore those extremes and eventually fashion a workable ethical and practical standard for the mediation profession.

An important aspect of any human interaction is to have a predictable process. The more predictable the process, the more comfortable the users will be in choosing that process over various other alternatives – for example, litigation, which most parties are more familiar with than mediation. If a consensus on ethics and process is not reached, the profession and those it serves will suffer when the public’s expectation of a mediator’s behavior is inconsistent with reality. This risk exists because of competing mediator practice models.

The two theoretical models for discussion, “facilitative” and “evaluative,” are described below. The differences in the models demonstrate how parties easily may become disenfranchised with a process that appears unpredictable. As a result, parties may participate less than fully in the process. This continuum is also an example of mediation’s growing pains. The result of those pains are the struggles of a profession attempting to guide itself. “The more sophisticated mediation techniques become, and the more attorneys and their clients learn about mediation, the more that people with problems are being drawn to mediation . . . .”<sup>7</sup> Mediation commentator Kimberlee Kovach suggests a possible explanation for the growing pains:

A major obstacle in determining ethics for mediators is that mediation has yet to be formally established as a profession. Assuming movement in that direction, the development of ethical standards appears to be occurring contemporaneously with the creation of the profession. Additional problems face the mediator. There is a built in inconsistency in the development of “standards” for mediators. The entire premise of mediation is its lack of rigidity. Mediation is a flexible process, and that flexibility is one of mediation’s key benefits.<sup>8</sup>

This growth process is complicated because mediation is a profession that draws from several occupations, each with ethical standards that may not apply in the mediation context. Additionally, the standards may conflict and the philosophical bases for the standards may collide, or both, leading to a substantive struggle within the mediation profession over what is the “best” ethics and practice model. Again, Kovach describes the dilemma.

There are no definitive standards of competency and, in fact, testing for mediators in the traditional sense is not advised. In order to encompass the variety of mediator styles, it would

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5. Leonard L. Riskin, *Mediator Orientations, Strategies, and Techniques*, 12 ALTERNATIVES TO THE HIGH COST OF LITIG. 111, 111 (1994).

6. *Id.* at 111, 113.

7. Richard C. Reuben, *The Lawyer Turned Peacemaker*, A.B.A. J., Aug. 1996, at 54, 56. Seventy-seven percent of attorneys surveyed indicate that their clients willingly use mediation. *Id.* at 57.

8. KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 190 (1994).

seem that ethics must likewise possess elasticity. Yet flexibility is not normally a component of ethics. Moreover, setting and enforcing guidelines of any nature seem almost antithetical to the mediation process. But, because of the impact mediators can have on individual lives, there is a need for some type of guidance concerning certain mediator actions. The challenge is creating guidelines which are sufficiently specific in directing mediator conduct, while simultaneously allowing for some flexibility in the process.<sup>9</sup>

#### A. *The Facilitative Model*

The continuum of mediation models measures the level of intervention of the mediator. The facilitative model of mediation is premised on the assumption that the mediator is totally neutral and does not present personal views on the merits of the case.<sup>10</sup> In other words, a facilitative mediator is theoretically the least interventionist and, at most, would offer an option for settlement only after it becomes clear that the parties cannot generate one on their own.<sup>11</sup> For a facilitative mediator, a “good” settlement is one that the parties can accept, even if one side should or could achieve a better result in a courtroom.<sup>12</sup> Such a mediator is not apt to remedy a substantive power imbalance between the parties by giving the weaker party helpful factual or legal information. However, a facilitative mediator will ensure that both parties have a full opportunity to be heard on all issues.<sup>13</sup>

Achieving agreement regarding the standards and criteria to be used in mediation is a paramount facilitative task.<sup>14</sup> The goal is to ensure that neither party feels coerced into settlement and that they both believe that the settlement is mutually beneficial.<sup>15</sup> Under the facilitative model, the mediator’s focus is on the parties’ “interests,” as opposed to “positions” and the arguments used to support those positions.<sup>16</sup> The mediator usually meets with the parties in joint session only. The mediator raises, and helps the parties manage, relationship issues such as marital, business, governmental, and social issues that are preventing the parties from reaching an agreeable solution. The mediator aids the process by keeping the parties focused on their goal of reaching a mutually beneficial solution. “In its ‘purest’ form, mediation is facilitative . . . [yet it is rare] for the mediator not to intrude somewhat in the process.”<sup>17</sup>

In the SPIDR Northwest survey, only 8% of mediators identified the facilitative style as “best.”<sup>18</sup> Yet, mediators are reluctant to say that the evaluative style is better. The style most frequently acknowledged publicly by mediators is the facilitative style. But the reality is that if mediators are actually practicing a form of mediation that is not facilitative, and if, in fact, it is more evaluative, then the profession of mediation is doing a disservice to the public by espousing one style while practicing another. Thus, mediation as a profession needs to be more accurate when describing the potential varieties of mediation services available so that the parties can select for themselves the most applicable model or process for their dispute.

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9. *Id.*

10. JOHN W. COOLEY, *MEDIATION ADVOCACY* 18 (1996).

11. *Id.* at 19. This is a “combined facilitative-evaluative approach.”

12. See Robert A. Baruch Bush, “*What Do We Need A Mediator For?*”: *Mediation’s “Value-Added” for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 20 (1996) (“[p]arties usually prefer the consensual processes, even where the outcomes they receive in these processes are unfavorable.”).

13. *Id.*

14. KOVACH, *supra* note 12, at 84 (“The mediator’s introduction also serves as the vehicle through which rules of the procedure are introduced.”).

15. Mediation is “a private, voluntary, informal process where a party-selected neutral assists disputants to reach a mutually acceptable agreement.” KOVACH, *supra* note 12, at 1.

16. A party’s position is what the party wants, whereas a party’s interest is the business or personal need underlying their position.

17. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 228 (1995) (book review).

18. See *supra* notes 4-7 and accompanying text.

### B. *The Evaluative Model*

A mediator who subscribes to the evaluative<sup>19</sup> model pushes for a settlement, often by presenting the mediator's own views on the relative merits of the case.<sup>20</sup> On the continuum, such an evaluative mediator would be termed an interventionist because he or she offers options at all stages of the mediation, whether subtly or overtly.<sup>21</sup> An evaluative mediator who believes that injustice is being done may intervene to direct the settlement in a fashion consistent with the mediator's notion of justice. Under the evaluative model, the focus is on the parties' "positions" as opposed to "interests."<sup>22</sup> Occasionally, the focus may be on perceived positions of parties not even represented, such as the public.<sup>23</sup>

The evaluative mediator is involved substantively in resolving the dispute.<sup>24</sup> He or she usually meets with the parties separately, shuttling between them. A settlement may be reached based on strengths and weaknesses or the cost of not settling, rather than on a mutually beneficial solution. Relationship issues are not usually the focus of the mediation.

In the SPIDR Northwest survey, 6% of mediators thought the "best" mediation style was evaluative.<sup>25</sup> Although "many practicing mediators have an evaluative orientation . . . most mediation trainers, teachers, and professors do not teach evaluation as a permissible component of mediation."<sup>26</sup> At some point, a mediator can become so evaluative that one is compelled to ask whether the process has been transformed into a different ADR process. "Evaluative behavior, as well as any other mediation technique, becomes undesirable if and when it tends to compromise the free consent of the parties."<sup>27</sup> This is predicated on the underlying premise of the *Model Standards* that mediation is based on party self-determination.<sup>28</sup>

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### C. *The Empowerment and Recognition Model*

Another perspective of the mediator's role is known as the "empowerment and recognition model" and is located on the facilitative or less interventionist end of the continuum.<sup>29</sup> Under this concept, the mediator encourages the parties to choose independently whether and how to resolve their dispute, while respecting one another in the process.<sup>30</sup>

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Under the empowerment and recognition model, the mediator's job is to guarantee the parties the fullest opportunity for self-determination and mutual acknowledgment.<sup>31</sup> A distinguishing characteristic

19. The term "directive" sometimes is used synonymously with the term "evaluative."

20. COOLEY, *supra* note 14, at 20.

21. *Id.* at 18.

22. Lela P. Love, *The Top Ten Reasons That Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 939 (1997).

23. For example, in a product liability mediation, the manufacturer may desire to keep the mediation settlement confidential. A highly evaluative mediator might seek the incorporation of what was perceived to be the public interest in making the matter public.

24. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 64, 69 (1994).

25. *See supra* notes 4-7 and accompanying text.

26. Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31, 31 (1996).

27. Lawrence M. Watson, Jr., A Time and Place for Evaluative Mediation (The Florida Experience) 10 (Oct. 1996) (unpublished paper of the American College of Civil Trial Mediators, on file with author).

28. The Model Standard of Self-Determination is addressed more fully later in this Article, *infra* notes 82-89 and accompanying text.

29. *See* Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role, and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267 (1989).

30. *Id.*

31. In that approach, mediators focus on two kinds of activities. First, they focus on supporting – and not supplanting – the parties' own deliberation and decision making processes. That is, wherever opportunities arise for parties to think about and make choices – about participation, procedures, goals, issues, options, evaluative criteria, whether an agreement should be reached and on what terms – at all of these "party decision points," the mediator helps the parties enrich the informational

of this model is that the mediator must ensure the disclosure of all relevant information to the parties and must consider all possible options and advice before final decisions are made.<sup>32</sup>

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#### D. Preliminary View of Ethical Standards and Stylistic Practice Models

The *Model Standards* indirectly address the ethics-stylistic practice issue. The *Model Standards* allow a mediator to mediate only when he or she “has the necessary qualifications to satisfy the reasonable expectation of the parties.”<sup>33</sup> Although the *Model Standards* deal primarily with procedural expertise, they also refer to the parties’ expectations regarding practice models.<sup>34</sup> The *Model Standards* seem to endorse the facilitative model over the evaluative model. They focus on self-determination as the fundamental principle of mediation, relying on “the ability of the parties to reach a voluntary, uncoerced agreement.”<sup>35</sup> The comments to the *Model Standards* state that “the primary role of the mediator is to *facilitate*<sup>36</sup> a voluntary resolution of a dispute.”<sup>37</sup> However, as discussed above, this does not necessarily preclude the evaluative approach if the parties make an informed decision to select it after full disclosure.

The similarities between the *Model Standards* and additional ethical codes, as well as their differences, help to highlight further the relationship between ethics and stylistic practices. If the *Model Standards* are interpreted facilitatively, then they may ignore some of the more creative and successful developments in the practice of mediation. If, however, the *Model Standards* include a more evaluative style, then they may fail to serve as a clear and effective guide for ethical mediator conduct. As a result, the debate as to which style is best rests in part upon the nature of the existing codes that are explored in Part III, as well as a prenegotiation discussion between the parties, their representatives, and the mediator. The debate, however, cannot stop here. Mediators should explore the parties’ desires and needs before they unilaterally impose a model on unwitting parties. To not do so is to diminish the parties’ right of self-determination.<sup>38</sup>

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environment, clarify and consider their own goals, options and preferences of fostering empowerment in mediation. It relates directly to the enhancement of participation, control and self-determination that the above discussion identifies as one of mediation’s most valued products.

At the same time, in the approach we have been advocating, mediators focus on inviting, encouraging and supporting the parties’ presentation to and reception from one another, of each other’s perspective and new and altered views of one another, at all points where the opportunity arises – with one important proviso. The proviso is that the parties themselves wish to engage in this dimension of the discussion. There are usually many points in a mediation where such opportunities are presented. We argue that mediation practice should include in its focus a constant attention to those points, and a conscious, intentional attempt to work with them whenever the parties are voluntarily interested in doing so. We have called this the practice of fostering recognition, and it relates directly to the enhancement of interpersonal expression and communication, that also is identified here as a highly valued product of mediation.

Bush, *supra* note 16, at 29-30 (footnotes omitted).

32. Bush, *supra* note 33, at 278.

33. MODEL STANDARDS, *supra* note 1, Standard VI cmt.

34. *Id.* Standard I.

35. *Id.* Standard I.

36. “Facilitate” means make easy or make easier, as opposed to “evaluate,” which is defined as examine and judge. AMERICAN HERITAGE DICTIONARY, *supra* note 3, at 469.

37. MODEL STANDARDS, *supra* note 1, Standard VI. The focus is on the mediator’s facilitative role in the process: “The parties decide when and under what conditions they will reach an agreement. . . .” *Id.*

38. See *supra* note 38.

### III. OVERVIEW OF RELEVANT ETHICAL CODES

As mediation began to grow in popularity, various professional groups established unique codes of ethics governing their mediating members. Beginning in 1992, however, mediation practitioners realized that multiple ethical codes were not serving the profession properly and focused on the development of one universal ethical code to guide all mediators. The *Model Standards*, incorporating the philosophies of the SPIDR, the ABA, and the AAA, were developed for the purpose of providing a “general framework for the practice of mediation.”<sup>39</sup> The *Model Standards* were published “to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.”<sup>40</sup> Additionally, the Introductory Note to the *Model Standards* states that these standards were developed “to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it – a beginning, not an end. The model standards are intended to apply to all types of mediation.”<sup>41</sup>

Although the *Model Standards* for mediators have been developed by merging the philosophies of SPIDR, the ABA, and the AAA, there is no single organization to which all mediators belong. “With a number of codes in existence, it is very difficult, at any given time, for the mediator, not to mention the parties, to determine exactly what code of ethics should be followed. Fortunately, in most instances the code provisions are essentially consistent, although cases of inconsistency do exist.”<sup>42</sup> The relevant ethical codes explored in this Article are:

- (1) SPIDR, ABA, AAA, *Model Standards of Conduct for Mediators (Model Standards)*;<sup>43</sup>
- (2) Oregon Mediation Association (OMA), *Standards of Mediation Practice (OMA Standards)*;<sup>44</sup>
- (3) Oregon State Bar (OSB), *Code of Professional Responsibility (the DRs)*;<sup>45</sup>
- (4) American Bar Association (ABA), *Model Rules of Professional Conduct (Model Rules)*;<sup>46</sup>
- (5) Oregon Dispute Resolution Commission (ODRC), *Standards of Mediator Conduct*, for court-annexed cases.<sup>47</sup>

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39. The *Model Standards* have been approved by SPIDR and the AAA. However, as of January 1997, the ABA has not adopted these standards. See *supra* note 1.

40. MODEL STANDARDS, *supra* note 1, Preface.

41. *Id.* Introductory Note.

42. KOVACH, *supra* note 12, at 192.

43. MODEL STANDARDS, *supra* note 1.

44. OREGON MEDIATION ASSOCIATION, STANDARDS OF MEDIATION PRACTICE (1993).

45. OREGON CODE OF PROFESSIONAL RESPONSIBILITY (1994).

46. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

47. OR. ADMIN. R. 718-40 (1993).

## IV. DIFFERENCES AMONG THE CODES AND COMPARISONS TO THE MODEL STANDARDS

The following chart provides an overview of the differences among the codes.

<b>ETHIC</b>	<b>COMBINED CODE</b>	<b>OMA</b>	<b>OSB</b>	<b>ABA</b>
<b>Self-Determination</b>	Standard I.			
<b>Impartiality</b>	Standard II.	Responsibilities to the Parties-1		
<b>Conflict of Interest</b>	Standard III.	Responsibilities to the Parties-1 & General Responsibilities	DR 5-106 (a) DR 5-106 (b)	Rules of Professional Conduct 2.2(a)(2)-3
<b>Competence</b>	Standard IV.			
<b>Confidentiality</b>	Standard V.	Responsibilities to the Parties-3	DR does not specifically address, but ORS 36.205 is operative	
<b>Quality of Process</b>	Standard VI.			
<b>Advertising</b>	Standard VII.	Responsibilities to the Profession and the Public-2		
<b>Fees</b>	Standard VIII.	Defining the Precess-5		Rules of Professional Conduct 2.2(a)(2)-4
<b>Obligations to Mediation</b>	Standard IX.	Responsibilities to the Profession and the Public-1		
<b>Informed Consent</b>	Standard I. Comments	Responsibilities to the Parties-2		
<b>Full Disclosure</b>	Standard VI.	Defining the Precess-3	OAR 718-40-100(3)(c)	
<b>Additional Roles</b>	Standard VI. Comments	Defining the Precess-6	DR 5-106 (b)	
<b>Independent Advice/Info.</b>	Standard VI. Comments	Defining the Precess-2	DR 5-106 (a)	

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### A. *The Model Standards*

The *Model Standards* cover nine concerns that frame ethical issues for mediators. A brief discussion of the framework and component parts of each of the *Model Standards* will be followed by an analysis of the differences between the codes and their practical implications.

(1) *Self-Determination*: A mediator shall recognize that mediation is based on the principle of self-determination by the parties.

(2) *Impartiality*: A mediator shall conduct the mediation in an impartial manner.

(3) *Conflicts of Interest*: A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation.

(4) *Competence*: A mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties.

(5) *Confidentiality*: A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.

(6) *Quality of the Process*: A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principles of self-determination by the parties.

(7) *Advertising and Soliciting*: A mediator shall be truthful in advertising and soliciting for mediation.

(8) *Fees*: A mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties.

(9) *Obligation to the Mediation Process*: Mediators have a duty to improve the practice of mediation.<sup>48</sup>

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#### 1. *Standard I: Self-Determination*

The *Model Standards* define self-determination as a “fundamental principle of mediation” based on “the ability of the parties to reach a voluntary, uncoerced agreement.”<sup>49</sup> Under this Standard, the charge of mediators is limited to “provid[ing] information about the process, rais[ing] issues, and help[ing] the parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute.”<sup>50</sup> In the comments section of this Standard, the mediator is advised to “make the parties aware of the importance of consulting other professionals . . . to help them make informed decisions.”<sup>51</sup> However, Standard I fails to address which ethical obligations a mediator owes the parties concerning the choice of different mediation models.<sup>52</sup>

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48. MODEL STANDARDS, *supra* note 1, Standards I-IX.

49. *Id.* Standard I.

50. *Id.*

51. *Id.* Standard I cmt.

52. *See id.* Standard I.

## 2. *Standard II: Impartiality*<sup>53</sup>

### a. *Overview*

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The impartiality concept raises some additional issues worthy of consideration by the parties and the mediator:

(1) Can a mediator ethically agree in advance to accept full payment from only one side of the mediation? The answer, at least as to existing common practice, is yes, with the appropriate premediation disclosures and informed consent of all parties.<sup>54</sup>

(2) What are the ramifications of using “captive mediators” – mediators or service providers routinely used by a given party who is a frequent litigant – for example, an insurance company? A “reasonable person” obviously would see this as a question of impartiality.<sup>55</sup> A mediator has the obligation to inform both parties of the frequency with which the mediator mediates for a given party, institution, or advocate.<sup>56</sup> Again, this disclosure would be designed to alleviate any ethical implication through the informed consent of the parties by full disclosure of a mediator’s current or past affiliations.

(3) What is the role of the mediator, if any, in protecting the public interest if the only parties at the table are private interests? The answer to this question may depend on the mediator’s ethical code and the parties’ fully informed decisions.

The practical solution for a party or the attorney advocate in mediation is to ask the mediator how he or she handles these situations. If the parties make an informed decision, the likelihood of an ethical problem is diminished and confidence in the process of mediation is increased substantially.<sup>57</sup> This is desirable regardless of the mediation model.

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53. The following are practice ethical scenarios:

(1) You are mediating your first small claims case. The plaintiff wants \$1,000 for this contract claim, of which \$750 is for pain and suffering. Neither party is aware that noneconomic damages are unavailable as a matter of law in this case. You are convinced that the case will settle if the plaintiff knows this. What do you do, if anything?

(2) The attorneys for the parties hire you to mediate. The plaintiff has been having trouble proving damages. You read a recent study and know that the land in question is probably worth \$150,000. There is a huge skill imbalance between the two attorneys. The unsophisticated plaintiff’s attorney is unaware of this study, probably never will discover it, and seems willing to settle the case for \$5,000. The defense attorney is very sophisticated. You know you can’t come right out and tell the plaintiff that the land is worth \$150,000 based on the study. Instead, you ask him if he plans to attend that Continuing Legal Education program on condemnation law next week, knowing that the new study will be discussed there. Is this ethical? Would it make a difference if the parties are unrepresented?

54. MODEL STANDARDS, *supra* note 1, Standards II & V.

55. *Id.*

56. *Id.*

57. Further concerns include: How does a mediator, who notes an unidentified substantial legal issue or provides legal or factual information, maintain impartiality? How does an Oregon mediator fulfill the obligation of impartiality and, at the same time, satisfy the requirements in OR. ADMIN. R. 718-40-100(3)(c) regarding full disclosure when the mediator believes that one party is not fully disclosing all relevant information to the other party, but the other party does not realize it? *See* OR. ADMIN. R. 718-40-100(3)(c) (1993).

b. *Impartiality and Professional Advice: “Legal Information” versus “Legal Advice”*

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The philosophical differences between the evaluative model and the facilitative model track the competing views regarding whether communicating a legal statement constitutes offering “legal advice” or “legal information.”<sup>58</sup> The former is the predicted application of the law to the facts at issue.<sup>59</sup> The latter is a generic statement of the law without reference to how that law will be applied to the facts of the case being mediated. As a practical matter, however, perhaps there is no difference between the two statements if the legal information enlightens one party regarding a defense of which that party previously was unaware.<sup>60</sup>

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3. *Standard III: Conflict of Interest*

Under the *Model Standards*, a conflict of interest is defined as “a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination.”<sup>61</sup>

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Again, the only plausible solution in determining whether a conflict of interest exists is to inform the parties that the possibility may exist and let them determine bias for themselves. This would apply regardless of the mediator’s style.

4. *Standard IV: Competence*

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58. The following are practice scenarios:

(1) You go to your office early before your mediation and boot up LEXIS. You discover that the U.S. Supreme Court just issued a decision on the time limits for filing preference claims in a Chapter 11 bankruptcy. You go to the mediation and during the joint session realize that the case is right on point and that one party has a complete win. Neither party is aware of the new case. What, if anything, do you do?

(2) You are mediating a small claims case and tell one party in caucus that the judge who will be hearing the case if it doesn’t settle hates doing the small claims docket and is a stickler on the law regardless of the equities. You suggest that the party weigh that information in the analysis. The plaintiff says he’ll get an attorney and demand a jury trial. You tell him the law does not provide for that because of the amount in dispute. You also tell him a small claims case is not appealable. Is this ethical?

59. In judicial settlement conferences, cases often are evaluated as opposed to facilitated. However, like the various mediation models, each judge evaluates or facilitates in varying degrees.

60. The distinction between legal information and legal advice is further complicated by a 1991 change in DR 5-106(A). *Former* DR 5-106 stated that a mediator should give advice only “in the presence of all parties in the matter.” That provision was commonly construed to mean legal advice. DR 5-106 was amended to delete the quoted language. The 1991 OSB business session transcript suggests that the purpose of the amendment to DR 5-106 was to allow the mediator to advise one party privately. Requiring the presence of all parties interfered with the mediator’s ability to provide “reality therapy” in the evaluative sense.

61. MODEL STANDARDS, *supra* note 1, Standard III.

As with any profession, competence is a prerequisite for a meaningful outcome.<sup>62</sup> The *Model Standards* state: “A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively.”<sup>63</sup> Did the drafters of the *Model Standards* unwittingly suggest that the mediator needs to have some modicum of subject matter expertise in the dispute being mediated in order to fulfill the ethical implications of this standard? Or were the authors of this standard referring to process competence as opposed to subject matter expertise or familiarity? It may have been left ambiguous purposefully; after all, the Introduction to the *Model Standards* states the standards are “a beginning, and not an end.”

A mediator cannot engage effectively in an evaluative-type mediation if the mediator does not have subject matter expertise. However, a facilitative mediator would not need subject matter expertise because he or she does not give information, opinions, or predictions. In the legal setting, parties often look to mediators to have both process familiarity and subject matter expertise.<sup>64</sup> Whether the mediator is facilitative or evaluative, some subject matter understanding usually is required simply to help the parties communicate effectively and reach resolution. Efficient communication would be thwarted if the parties had to explain terms of art, customs, or standards of the community or industry which the mediator did not know or fully understand.

### 5. *Standard V: Confidentiality*

Maintaining confidentiality is critical to the integrity of the mediation process. Confidentiality encourages candor, allows a full exploration of the issues, and increases the likelihood of settlement. It also minimizes the inappropriate use of mediation as a discovery technique.<sup>65</sup>

#### a. *Model Standards*

Under the *Model Standards*, a mediator is not allowed to disclose information that a party expects to be confidential “unless given permission by all parties or unless required by law or other public policy.”<sup>66</sup> When appropriate, researchers may gain access to statistical data and, with the parties’ permission, may review files, observe mediation, and interview participants.<sup>67</sup>

The general rules are modified to allow “[t]he parties [to] make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.”<sup>68</sup> However, the *Model Standards*, on the surface, do not allow these same parties the discretion to choose which mediation model best suits their dispute. Is this paternalism, philosophical zealotry, or inadvertence?

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62. OR. REV. STAT. ' 36.210 (1995), as amended by SB 160 B-Engrossed (LC743) 1997 (Mediators and programs providing services under ORS 36.100-36.210 and mediators and programs providing services that the ODRC determines comply with the standards established under ORS 36.175 are not civilly liable except for bad faith, malice, or willful and wanton disregard of another’s rights, safety, or property.). In part, competency is ensured by giving the user of professional services a cause of action for failing to perform the professional service in a manner consistent with community standards. See Oregon Uniform Jury Instruction, Nos. 45.01 and 45.02.

63. MODEL STANDARDS, *supra* note 1, Standard IV.

64. In the SPIDR Northwest survey, 64% of respondents answered that a competent mediator needed “both process expertise and subject matter familiarity.” See *supra* notes 4-7 and accompanying text.

65. COOLEY, *supra* note 14, at 60-62.

66. MODEL STANDARDS, *supra* note 1, Standard V.

67. *Id.* Standard V cmt.

68. *Id.*

6. *Standard VI: Quality of the Process*

The *Model Standards* state, “A quality process requires a commitment by the mediator to diligence and procedural fairness.”<sup>69</sup> Additionally, “The parties decide when and under what conditions they will reach an agreement or terminate a mediation.”<sup>70</sup> These tenets create the framework for the requirement that parties should decide the appropriate role or mediation model for the mediator.

Offering any advice, whether legal, financial, or psychological, while mediating disputes is strongly discouraged.<sup>71</sup> The *Model Standards* distinguish mediation from practicing law or other professions, such as therapy.<sup>72</sup> The parties are encouraged to consult with other professionals to aid them in making informed decisions.<sup>73</sup>

However, the *Model Standards* comments regarding professional advice give neither the parties nor the mediator any practical guidance on the gray line that exists between offering information and offering professional advice. It is at this intersection that the debate over facilitative versus evaluative is waged. A facilitative mediator is reluctant to give any advice, whether legal, financial, or psychological, whereas an evaluative mediator will offer advice, albeit often cloaked as information. Given the diversity of the mediation profession and the variety of interest groups that it serves, is it even possible to have one universal definition of when mediator information becomes “legal advice,” “financial advice,” or “psychological advice?”<sup>74</sup> Do the fundamental tenets of the profession (i.e., the *Model Standards*) obligate mediators to use collaborative processes to explore with the parties the underlying process needs surrounding their dispute?<sup>75</sup>

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Within the context of mediation, the mediator’s acknowledging a “substantial legal issue” without the parties’ informed consent may destroy at least one party’s view of the mediator’s impartiality. This likely will subvert the process of mediation because disclosure of a “substantial legal issue” usually empowers one party over another.<sup>76</sup> Parties seeking a mediator may select one who will not derail the resolution of the dispute by raising uncovered “substantial legal issues.”

The only practical solution for mediators would be to rely on the parties’ right to self-determination and informed consent. Specifically, the mediators and the parties should agree on how the mediator should behave if he or she spots a “substantial legal issue.” “Just because a mediator has a law degree – or even an up-to-date license to practice – does not mean that he or she will give accurate legal advice, prediction, or evaluation.”<sup>77</sup> Therefore, the issue can be resolved by allowing the parties to determine whether, and under what circumstances, the mediator will raise the “substantial legal issue.” The mediator’s impartiality is less likely to be questioned and the parties will more readily accept the practical ramifications of this form of mediation intervention.

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69. MODEL STANDARDS, *supra* note 1, Standard VI.

70. *Id.*

71. *Id.* Standard VI cmt.

72. *Id.*

73. *Id.* Standard I cmt.

74. Advice is the application of profession specific information to the operative facts being explored, with the recommendation that the recipient of that information act consistent with such recommendation. In contrast, professional information is the pronouncement of a generally accepted principle of law, business, or psychology made without the intent that the recipient will act on the recommendation without independent verification.

75. The argument has been made that the role of disinterested observer is almost certainly not what the parties expect of a mediator. The selection of a mediator, whether the voluntary choice of the parties or required by statute, is a call for assistance in finding an answer to a problem shared by two or more individuals or organizations. McKay, *supra* note 107, at 21.

76. Kovach & Love, *supra* note 30, at 31. Kovach and Love argue further that such “mediator evaluation tends to perpetuate or create an adversarial climate. Parties try to persuade the neutral of their positions,” rather than seek to discover the opposing party’s interests. *Id.*

77. Menkel-Meadow, *supra* note 74, at 61.

### 7. *Standard VII: Advertising and Solicitation*

The *Model Standards* state that all advertising or communication regarding mediation services or qualifications must be truthful.<sup>78</sup> The comments provide that a mediator may refer to meeting a specific public or private entity's qualifications only if there is a procedure for such certification.<sup>79</sup>

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Oregon's attorney-mediators struggle to accurately describe the models they employ in advertising. Of the 161 mediators listed in the "Oregon Lawyers' ADR Resource Directory 1995-96," who describe their "philosophy/style," 25% describe their style as either "variable" or "flexible." Approximately 10% used the descriptive word "facilitative," and only 1% use the term "directive" (i.e., evaluative).

Two things can be noted from these advertisements. First, most mediators (64%) do not advertise their style, forcing potential parties to speculate. Second, of those who do advertise their style, a majority describe themselves as "flexible" or "variable," terms that fail to describe a particular mediation style. Mediation needs a common vocabulary to help eliminate confusion over stylistic and practical behaviors.

Adoption of a uniform vocabulary, especially in advertising, will lead to more consistent expectations by mediation consumers. Without it, the ambiguity between mediator styles and the parties' expectations will continue, to the detriment of the mediation profession. Finally, if the mediator engages the parties in a collaborative dialogue using the questions that appear in Section V, there is an even smaller chance of misunderstanding.

### 8. *Standard VIII: Fees*

Under the *Model Standards*, a mediator must "fully disclose and explain the basis of compensation, fees, and charges," and the fees must be "reasonable."<sup>80</sup> The comments further state that no fee can be contingent on the result or amount of settlement.<sup>81</sup> This bar on contingent fees ties in philosophically with the tenets of mediator impartiality and conflicts of interest. The comments also address the sharing of fees by co-mediators (reasonable allocation) and fees for referral (which should not be accepted).<sup>82</sup> For attorneys who mediate, DR 2-107 addresses similar issues.<sup>83</sup>

Mediators should disclose factors about mediation style that may affect the fee charged. For example, a mediator may need to point out that, in general, a facilitative mediation takes longer than an evaluative mediation.<sup>84</sup>

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78. MODEL STANDARDS, *supra* note 1, Standard VII.

79. *Id.* Standard VII cmt.

80. MODEL STANDARDS, *supra* note 1, Standard VIII.

81. *Id.* Standard VIII cmt.

82. *Id.*

83. OREGON CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 50, DR 2-107 (division of fees among lawyers).

84. A study of human nature indicates that it takes less time to tell a party what to do than it takes to ask them questions that enable them to explore for themselves what is in their best interest. A facilitative mediator tends to ask questions, whereas an evaluative mediator tends to make declaratory statements. A mediator must convey this information impartially so that the parties can make a fully informed decision.

### 9. *Standard IX: Obligation to the Mediation Process*

The *Model Standards* impose a duty on the mediator to actively improve the practice of mediation by educating the public, making mediation accessible, correcting abuses, and improving his or her own skills.<sup>85</sup> In addition, Standard VI imposes an affirmative duty on the mediator to recommend other options, such as arbitration, counseling, neutral evaluation, and other processes.<sup>86</sup> These standards certainly encourage mediators to grapple with stylistic practices that are incongruent with the emerging ethical standards of the profession.

## V. CONCLUSION AND PROPOSAL

None of the four ethical codes examined – the OSB, the OMA, the ABA, or the *Model Standards* – completely encompass the continuum of mediation models that highlight the dilemma mediators face when seeking ethical guidance. Thus, even if mediation participants are familiar with these codes, that familiarity in and of itself will not help them predict the mediator’s style. This is an additional reason the mediator should seek the informed consent of all parties because participants generally do not understand the various ethical codes governing mediators and the intersection of practice styles within the ethical codes. Thus, additional duties are imposed on the mediator to seek the informed consent of all participants because the parties do not understand the process. According to Menkel-Meadow, “[t]hese more complex issues [i.e., mediation style and philosophy] can be dealt with temporarily by requiring third-party neutrals to specify in advance what philosophies and methods they use so that clients and consumers can select, on an informed basis, what kind of third-party neutral they want.”<sup>87</sup>

Thus, informed consent will rest on the mediator’s disclosing the continuum of mediation models and ethical codes and will allow the participants to determine the mediation model best suited for their individual needs. The mediator then can attempt to match the most applicable ethical standard to the style of mediation the participants chose, or the mediator can withdraw on grounds that he or she cannot “satisfy the reasonable expectation of the parties.”<sup>88</sup>

The facilitative model should not be used as a default. If the parties are laboring under the misunderstanding that the mediator will raise an issue or an option, then that assumption is influencing the parties’ decision whether or not to settle because of the absence of input from the mediator. One cannot simply assume that the facilitative model is better ethically or stylistically because the parties may be assuming just the opposite. The Northwest SPIDR survey found that 58% of mediators feel that the typical parties to a mediation expect a combination of directive (evaluative) and facilitative styles.<sup>89</sup> In other words, the parties may expect an evaluative model just as likely as a facilitative model.

As the mediation profession matures, it is important to remember that the purpose of mediation is to allow the parties to settle their disputes on their own terms. Parties to a mediation are more likely to be satisfied with the process and the outcome if they clearly understand what to expect during the mediation and the mediator fulfills that expectation. A discussion between the prospective mediator and the parties will resolve most of the issues raised in this Article.<sup>90</sup>

As a practical matter, in the real world of conflict, each party, at some level, desires the mediator to be “facilitative” with them and “evaluative” with regard to the other side’s position. To resolve this

85. MODEL STANDARDS, *supra* note 1, Standard IX cmt.

86. *Id.* Standard VI cmt.

87. Menkel-Meadow, *supra* note 98, at 131.

88. MODEL STANDARDS, *supra* note 1, Standard IV.

89. *See supra* notes 4-7 and accompanying text.

90. Robert A. Baruch Bush led a workshop entitled, “Can We Have It Both Ways? Mediation as a Facilitative or an Evaluative Process” (Seattle, Washington, Apr. 1997). This Article supports the position that, in fact, the parties can have it both ways.

dilemma, a mediator must explain the process of mediation in such a way as to conform the parties' expectations to the selected mediation model. While there is no standard explanation, there are critical decision points that serve as a guide. In addition to exploring any ambiguities in operationalizing the controlling ethical code, the mediator should consider discussing one or more of the following decision points with the parties, thus securing their agreement and determining how the mediation will proceed:

(1) Will we use a facilitative, evaluative, combination, or some other model for this mediation? What do these terms mean to you? Can the model change, and if so, under what circumstances?

(2) Will we use an "interest-based" or "rights-based" approach?

(3) Is your relationship with the other party or adherence to the law more important to your belief that the process and resolution is just? What will you look for when determining fairness?

(4) Are there time or financial constraints affecting your choice of mediation models?

(5) Will the parties meet only in joint session, only in private caucus, or both? Under what circumstances and conditions, if any, will the process move from joint session to caucus or vice versa?

(6) Will there be premediation submissions to the mediator? If so, will they be confidential? Will they be shared with the other side, in whole or in part?

(7) Must both parties fully disclose all relevant information, or is it appropriate for a party and/or the mediator to have information that the other party does not have?

(8) How much subject matter expertise should the mediator have, and when and how should such expertise be used?

(9) Should the mediator offer options or propose settlement terms?<sup>91</sup> If yes, under what circumstances?

(10) Should the mediator offer opinions? If yes, under what circumstances?

(11) Should the mediator raise issues, claims, or defenses? If yes, under what circumstances?

(12) Should the mediator make the parties aware of the importance of consulting other professionals? If yes, under what circumstances?

(13) Should the mediator intervene if one party is about to accept a settlement when, in the mediator's opinion, that party is likely to achieve a more favorable result in court or elsewhere?

(14) Should the mediator raise or advocate for the interests or rights of a party missing from the mediation? If yes, under what circumstances?

(15) Should the mediator offer "legal information" as contrasted with "legal advice"? If yes, under what circumstances?

(16) What exceptions to confidentiality, if any, will be observed in this mediation?

(17) Should the mediator rectify "power imbalances" between the parties? If yes, under what circumstances?

(18) Should the mediator raise or suggest other ADR processes (e.g., mini-trial, summary jury trial, arbitration)? If yes, under what circumstances?

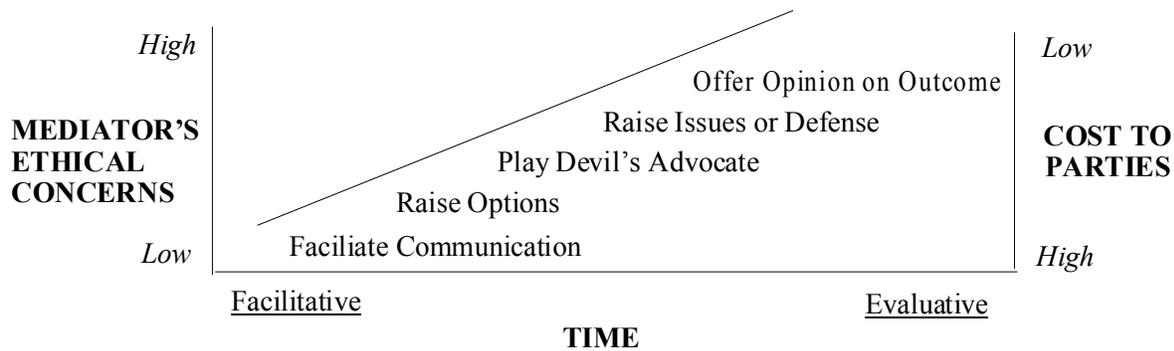
(19) When, if ever, should the mediator declare the mediation over?<sup>92</sup> More specifically, should the mediator withdraw or postpone a session if a party cannot participate because of drug or alcohol use or other physical or mental incapacity?

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91. ORS 36.195(3) allows the mediator to "propose settlement terms either orally or in writing."

92. *Id.*

The following graph can help mediators visualize some of the aforementioned questions.



It is time for the mediation profession to draw on its strength, the use of collaborative processes, to convene the various interests groups to explore and develop a practical code that encourages the parties to pick the mediation model that works for them. The *Model Standards* are a first step toward such a code that incorporates the complexity of mediation styles and ethical dilemmas. It would be inappropriate, however, to legislate one model to the exclusion of another.<sup>93</sup>

In the interim, this author proposes the following amendment to the *Model Standards* in an effort to guide the mediator in helping the parties reach an informed collaborative decision on what will happen during the mediation:

The mediator has a duty to impartially inform all participants of the continuum of existing stylistic models and which model(s) the mediator practices. Additionally, the mediator is obligated to inform the parties of the mediator's profession, the relevant ethical codes governing his or her behavior, and the practical impact of those codes on the specific mediation. Only then can a mediator reasonably expect the parties to possess enough relevant information to make an informed, self-determined decision regarding the most appropriate model of mediation for their particular dispute.

Comments:

- (1) The Model Standards do not endorse a particular mediation model. To appreciate the applicability of the various practices, participants should be fully informed and the mediator should fully advise the participants of the practical decision points that need to be made during the mediation.
- (2) The mediator should understand that regardless of the participants' preferences, evaluative mediation by its very nature requires a heightened ethical responsibility.<sup>94</sup>

Without the proposed model standard, the confusion inherent in the status quo will continue. The

93. The ABA's *Standard of Practice for Family and Divorce Mediation*, while currently being reviewed, is an example of a code whose ethical/stylistic underpinnings are evaluative. STANDARD OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (1984). Conversely, the *North Carolina Dispute Resolution Commission's Standards of Professional Conduct for Mediators* are facilitative. NORTH CAROLINA DISPUTE RESOLUTION COMMISSION'S STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS (1996).

94. According to Lawrence M. Watson, President of the American College of Civil Trial Mediators, the evaluative mediation model is beneficial as long as:

- (1) Evaluation is evenly applied to both parties.
- (2) Evaluation fairly recognizes both strengths and weaknesses of both sides.
- (3) Probing, confrontational, or potentially embarrassing evaluative questions and observations are restricted to private caucus.
- (4) Both parties feel their side of the story has been understood and appreciated.
- (5) A mediator's evaluative data is received as "input" rather than "determination."

Thus, after disclosure and the parties' informed consent, an evaluative model can serve to resolve a dispute ethically as long as the parties' self-determination is not compromised. Watson, *supra* note 31, at 6.

risk of continued incongruity between the expectations of mediation users and mediation, as it is practiced, is the erosion of public confidence in the process. Ultimately, when the parties are not informed thoroughly of the ethical and practical aspects of mediation, it is not unreasonable to suggest that they may look on the one mechanism that offers the best hope of resolving future disputes – mediation – in the same negative vein as litigation.<sup>95</sup> Mediation, as a growing profession, should seek to foster a reputation built not on perception, but on clear understanding of mediation's great success in the resolution of disputes. Engaging the parties in a collaborative process to establish ground rules for the practical decision points during the mediation will help balance the tension between mediation's aspirations and its actual practice. Only with such a process can we honor the fundamental tenets of mediation and the public it serves.

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95. In a Harris Executive Poll of 400 senior executives at Business Week Top 1000 corporations, 62% of the executives indicated a belief that the current legal system significantly hinders U.S. competitiveness in the global marketplace. Michele Galen, *Guilty*, BUSINESS WEEK, Apr. 13, 1992, at 60-65.