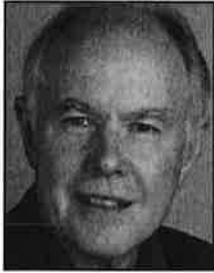

Who decides what in mediation? Making space for difference



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Introduction

Since the first decade of the modern mediation field, in the 1970s, self-determination has been the distinguishing feature of mediation.¹ Whereas in arbitration or adjudication the third party is the decision maker, mediators assist the parties but have no decision-making power.² In mediator codes of conduct, party self-determination has been enshrined as a guiding principle from very early on.³ Although the meaning of the term seems self-evident, over the years it has been interpreted differently by mediators using different models of mediation. Each model has its own principles and methods, and each one appeals to different mediators and clientele⁴. This diversity of approaches has generated healthy debate and provided potential clients with a choice of mediation models, and the extent to which self-determination has been applied differs widely from model to model.

For example, an evaluative mediator might hold that advising and guiding the parties toward outcomes that respect given norms is within the realm of self-determination, where a transformative mediator might consider such guidance as interference. Is it necessary that all mediators work the same way? Most of us would answer, "No." A more appropriate question is, "Should codes of conduct oblige mediators to clearly discuss with the parties the process to be used in mediation and obtain their agreement thereon?" We believe they should, and many codes require just that.⁵ By clearly describing their methods beforehand with each party, mediators provide prospective parties with the opportunity to determine for themselves if this model of mediation is likely to suit their situation. This discussion would then be reviewed in the presence of all parties before the mediation contract is signed. There are several models available and the public should be

made aware of the possibility of choosing the model they consider appropriate.

Over the years mediation has continuously evolved and mediation theorists have introduced many new approaches, such as interest-based practice and accountability for substantive fairness, with power-balancing as a means of achieving it. In the 1990s transformative⁶ or party-driven⁷ mediation was introduced. These various approaches have not been universally accepted by mediators; while some codes of conduct authorize a wide range of practice, other codes favor one approach to the exclusion of others.

Mediator codes of conduct are currently being written or revised that will have a profound influence on how mediation is practiced in years to come. Moreover, in Quebec, the government is in the process of amending the Civil Code of Procedure to include the practice of mediation in a formal framework of detailed prescriptions potentially limiting choice of approach⁸. Some mediator codes of conduct restrict methods of practice by obliging mediators to practice a certain model of mediation⁹; others override party decision-making and terminate mediation if parties do not respect certain rules.¹⁰ We maintain that these restrictions are unnecessary and counterproductive. In our opinion, mediator codes of conduct and other forms of mediation regulation should be drafted in ways that allow different models of mediation to be practiced and new methods to develop in the future.

A brief overview of these approaches follows.

Interest-based mediation

In the early 1980s, the mediation field was strongly influenced by the publication of *Getting To Yes: Negotiating Agreement Without Giving In*¹¹, where authors Fisher



and Ury introduced the notion that by exploring and focusing on parties' underlying interests, problems could be clearly defined and solved in ways that would produce creative, mutually acceptable outcomes.

Although not universally adopted, interest-based mediation became widely used and the method became known as facilitative mediation.¹² This entailed mediators leading parties through a series of specific negotiation steps or stages to facilitate settlement via collaborative rather than adversarial bargaining. By applying such strategies as "Separate the People from the Problem," "Focus on Interests, Not Positions," and "Use Objective Criteria," mediators began taking on a more directive role, and as a result, some of the responsibility for solving problems shifted to the mediator's shoulders. Many saw this as effective mediating while others saw it as diminishing party self-determination.

Mediator accountability for substantive fairness

A parallel development introduced in the early 1980s was the quest for substantive fairness. In the 1970s practitioners made no particular claim that mediated agreements were substantively fair by some objective standard. The mediator's duty of impartiality applied to the conduct of the process itself, but the only guarantee regarding outcome was that any agreement would be "mutually acceptable" to the parties.¹³ In 1981 mediation theorist Lawrence Susskind argued that mediators could not ignore the potential for parties to make unwise decisions and therefore agree to unfair deals, and he suggested that the mediator was accountable to intervene in ways that reduced that risk of unfairness.¹⁴

Another mediation theorist, Joseph B. Stulberg, countered that substantive intervention to ensure a fair agreement would contradict the mediator's duty of impartiality, and even worse, compromise his or her ability to serve the central function of facilitating a mutually acceptable agreement between the parties.¹⁵

This debate has continued, but over time a majority of mediators have taken the position that substantive fairness of outcome

is indeed one of the mediator's key responsibilities. Even though there is no significant body of research that documents the substantive fairness of mediated agreements, particularly in cases involving parties of unequal power,¹⁶ some competency tests now ask whether the mediator helped to develop an "agreement that is balanced, fair, realistic."¹⁷ This responsibility for creating outcomes that the mediator thinks are acceptable, fair or workable is often taken seriously by mediators and directly affects their approach to intervention in disputes across the sectors of practice.

Examining the strategy of power-balancing

To ensure fairness, some mediation theorists proposed that mediators engage in the practice of power-balancing when they intervene in disputes. Christopher Moore, author of one of the basic and widely used texts on mediation practice, advocates

"assisting the weaker party in obtaining, organizing and analyzing data, . . . educating the party in planning an effective negotiation strategy, aiding the party in developing . . . resources [to continue to negotiate, and] encouraging the party to make realistic concessions. . . ."¹⁸

John Haynes, another widely recognized authority and a founder of divorce mediation, claims that power-balancing is effective in preventing unjust outcomes. He states, "When the power balance interferes with the couple's ability to negotiate a fair agreement, I believe the mediator has a responsibility to correct that imbalance."¹⁹

"[T]he mediator intervenes to take charge of the way the couple communicate and reorganizes it to *disempower* the overly powerful spouse and *empower* the powerless spouse."²⁰ (emphasis added)

Other voices pointed out that the existence of differing cultural norms might constitute an obstacle to ensuring fairness. Thus, the emphasis placed on sequential turn-taking, on encouraging rational discussion of problems and solutions, and on discouraging strong and extended emotional "outbursts"—can inadvertently work to the

disadvantage of groups in society unaccustomed, unskilled, or uncomfortable with communicating in this manner.²¹

Another obstacle stands in the way of ensuring fairness. The very nature of mediation as an informal process means that mediators can never count on the completeness or accuracy of the information presented by parties in the session. Nor is there any way for mediators to require more information or to authenticate what is offered.²² If the mediator facilitates a settlement based on partial information, the resulting outcome is likely to lack substantive fairness.

Perhaps more important to the credibility of the mediation, as Stulberg argues persuasively, the power-balancing mediator becomes an advocate for one party and loses the trust of the other party. Once that trust is lost, the mediator cannot work effectively because one of the parties no longer is confident of the mediator's impartiality or neutral motives.²³ Nonetheless, some codes of ethics recommend²⁴ or prescribe²⁵ that mediators accept the responsibility to balance power and alter the dynamics of parties' relationships. The commitment to balancing power often overrides a commitment to party-determined choices and party-created outcomes.

Transformative or Party-driven Mediation

In 1994, the authors of *The Promise of Mediation, Responding to Conflict Through Empowerment and Recognition*²⁶ proposed a renewed emphasis on party empowerment in mediation, allowing parties to address disputes in their own way, and leaving it up to them to be the ultimate judge of what constitutes both an acceptable process and a fair outcome.

Called transformative or party-driven²⁷ mediation, this approach defines party self-determination very broadly, placing decision making control entirely in the hands of the parties and not the mediator. This applies not only to the content and outcome of discussions but to the parties' manner of interaction²⁸. Parties determine what they need to have in place during a mediation session to be able to have the most



productive conflict interaction possible. When there is disagreement about this the parties are supported in having a conversation about this and determining whether and how the process can continue.

Transformative mediators do not use power-balancing and believe they should not be obliged by codes of conduct to do so. In describing mediation to a prospective party beforehand, the transformative mediator explains that if the discussion between the parties appears to be unbalanced, the mediator does not intervene to balance the power. What the mediator does instead is to fully support each party, both in presenting their views as fully and powerfully as they choose to, and in using whatever manner of expression they choose—rational, emotional, or both.²⁹

Transformative practitioners believe that parties themselves hold the ultimate defense against injustice—the ability to leave when they choose to do so—and that right is fully supported by the mediator.³⁰

Critics have claimed that by taking a non-directive position towards the parties, transformative mediators risk allowing the stronger party to dominate. Transformative mediators respond that each party holds an ultimate veto over how the conversation will take place, and if, at any point, one party believes that the other is no longer acting reasonably, he or she can call a halt, request a separate meeting, end the session, or terminate the mediation.³¹

Parties are viewed as the best judges of what justice is.³² Thus party-driven, transformative mediation practice, based on and shaped by the fundamental principle of genuinely supporting party choice, acts as a brake against unfair outcomes in individual cases, even when the parties are of unequal power.³³ By systematically deferring to party decision-making over every aspect of both process and substance as the mediation unfolds, the transformative mediator helps parties regain confidence in their ability to clarify and express their views, and take perspective. In this more constructive context, it will be easier for parties to assess for themselves the fairness or unfairness of mediation pro-

cess and outcomes.

Given this brief description of transformative mediation's foundational respect for the principle of party self-determination, it is important that codes of mediator conduct not exclude this approach, or any other approach that places party-self-determination at the heart of the mediation process. Instead, it is important that codes of conduct require mediators to fully explain their role within the context of the mediation model they propose so that parties will know what to expect in the mediation session.

Codes of Conduct and Diverse Mediation Practice

Some codes attempt to make space for a wide range of practice, including party-driven approaches while others, narrowly constructed, mandate more strictly mediator-driven modes of practice. Two Canadian examples will serve to illustrate this point.

The ADR Institute of Canada Code of Conduct for Mediators³⁴ governs mediators among the 1800 members of the Institute. It allows mediators to support party self-determination without proviso. Its stated objective is to apply “guiding principles for the conduct of mediators... [and] “protection for members of the public who use mediators...”

Without using the term “self-determination,” the code clearly states, “It is the right of parties to a Mediation to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute. Every Mediator shall respect and encourage this fundamental principle of Mediation.” It also states, “The Mediator shall provide the parties at or before the first Mediation session with information about the Mediator's role in the Mediation. The Mediator shall discuss the fact that authority for decision-making rests with the parties, not the Mediator.” Reinforcing this idea, it states, “The Mediator shall make reasonable efforts before Mediation is initiated or at the start of the Mediation to ensure that the parties understand the Mediation process.” Once the parties have been made aware of the process the mediator intends to use, they “shall

prepare and execute a Mediation agreement setting out... the terms under which the parties are engaging the Mediator.”

We consider this to be a helpful approach. Having made it clear that parties are in charge, the code need not arm the mediator as the final arbiter of the parties' conduct. Instead, it gives the mediator and the parties each a potential veto by stating, “The Mediator *may* suspend or terminate the Mediation if requested, in writing, by one or more of the parties,” and “The Mediator may suspend or terminate the Mediation with a written declaration by the Mediator that further efforts at mediation would not be useful at this time.” This should be read in conjunction with the indication that, “A Mediator who considers that a Mediation in which he or she is involved may raise ethical concerns (including, without limitation, the furtherance of a crime or a deliberate deception) may take appropriate action, which may include adjourning or terminating the process.” (emphasis added). In all these respects, the ADR Canada *Code of Conduct* for Mediators can be said to be inclusive of both mediator-driven and party-driven models of mediation.

This code of conduct stands in direct contrast to the Ontario Bar Association's (CBAO) Model Code of Conduct³⁵ which contains restrictions having the effect of overriding party self-determination. It governs Ontario mediators working under the Mandatory Mediation Program (MMP) in place in Ottawa, Toronto and Windsor.

The CBAO code begins with a section mandating mediator respect for party self-determination, but it is followed by another section mandating considerable mediator decision-making power over questions of both process and potential outcome.

It states: “Self-determination is the right of parties in a mediation to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute. It is a fundamental principle of mediation which mediators shall respect and encourage.”

The above statement appears to allow par-

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- teach clinical lawyering skills, the insight emerged that transformative practices in mediation rest on similar theoretical and practical grounds as the approach called "client-centered" lawyering in the legal profession, which similarly stresses the centrality of client choice and control. See, e.g., Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 *ARIZ. L. REV.* 501, 506 (1990) (reviewing the development and principles of client-centered lawyering and the reasons for its use). In short, the kinds of alternative practices discussed in this section can be and probably are followed by mediators who do not explicitly label themselves "transformative mediators." Indeed, part of our intention in using the terminology is to recognize this likelihood.
- 8 Quebec Official Publisher, 2013, An Act to Establish the New Civil Code of procedure, art. 1 – 7; 605 – 615 : <http://www.assnat.qc.ca/fr/travaux-parlementaires/projets-loi/projet-loi-28-40-1.html>. For a critical analysis of the Draft Bill, see Réseau pour une approche transformative du conflit : Mémoire amendé présenté à la Commission des Institutions, 30 mars 2012, http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/C1_mandats/Mandat-16641_memoires-deposes.html
 - 9 THE MEDIATOR CODE OF CONDUCT AND ETHICS-ALBERTA COURTS obliges a prospective mediator to fill out a form in which he or she must agree to use interest-based mediation. http://www.albertacourts.ab.ca/portals/ext_qb_civilmediation/CodeofConductandEthics.pdf
 - 10 Ontario Ministry of the Attorney General The CBAO Model Code of Conduct for Mediators, Section XI. Termination or Suspension of Mediation: <http://www.attorneygeneral.jus.gov.on.ca/english/courts/mediation/codeofconduct.asp>
 - 11 Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement Without Giving In*, New York, Random House Business, (1981)
 - 12 Carole J. Brown, *Facilitative Mediation: The Classic Approach Retains its Appeal at Mediate.com*: <http://www.mediate.com/friendly/cfm?id=1180> (last visited March 20, 2013)
 - 13 Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 *VT. L. REV.* 85, 88–91 (1981). Stulberg's theory is cast entirely in terms of fostering an agreement, without regard to the terms of that agreement, which are entirely in the parties' hands.
 - 14 Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 *VT. L. REV.* 1, 13–18 (1981). Susskind argues that "the success of a mediation effort must also be judged in terms of the fairness . . . of the agreements that are reached" and that mediators must strive "to achieve just and stable agreements . . ." *Id.* at 14.
 - 15 Stulberg, *supra* note 16, at 86–87, 96–97, 110–17. Stulberg's argument against the "accountability" view suggested by Susskind is based primarily on his analysis of how such "non-neutrality" would make it impossible for the mediator to discharge his or her primary functions of helping the parties achieve an agreement of any kind.
 - 16 To the contrary, one well-known study of outcomes in mediation compared to outcomes in court, for similar cases, showed that racial minorities more often than not achieved poorer outcomes in mediation than in court, whereas the reverse was true for non-minority parties. See MICHELLE HERMANN ET AL., *AN EMPIRICAL STUDY OF THE EFFECTS OF RACE AND GENDER ON SMALL CLAIMS ADJUDICATION AND MEDIATION* (1993) (cited in JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT, & JOSEPH B. STULBERG, *MEDIATION THEORY AND PRACTICE* 2–11 (2d ed., 2006), at 371–75). This type of study lent credibility to claims made earlier that mediation, as an informal process, would disadvantage minorities. Similarly, some studies of divorce mediation have shown that mediation produces agreements for "joint custody" far more often than such custody is awarded in court decisions—a result that may suggest that women, who seek "primary custody" more often, fare worse in mediation than men. See, e.g., Roz Zinner, *Joint Custody: Smart Solution or Problematic Plan*, <http://www.adr.com/adr4/joint.htm> (last visited Oct. 20, 2011). Even the extensive research conducted on workplace mediation in the U.S. Postal Service's REDRESS Program, while it shows that managers and employees express roughly similar degrees of satisfaction with mediated outcomes, presents no evidence of what those outcomes were, or how they compared with outcomes of similar cases in other forums. See LISA BLOMGREN BINGHAM, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE*, 19–22 (2003) (citing multiple studies of the REDRESS mediation program). In other words, like most of the research done to demonstrate mediation's value over the years, this research measures attitudes about outcomes rather than the objective fairness of the outcomes themselves.
 - 17 Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 *OHIO ST. J. ON DISP. RESOL.* 965, 977–78 (2004) (citing Supreme Court of Virginia Mediator Mentee Evaluation Form (available at http://www.courts.state.virginia.com/adradmin/adc/drs/programs/drs_mediation/forms/adr1001.pdf))
 - 18 CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 391–93 (3d ed. 2003) (quoting in part James A. Wall Jr., *Mediation: An Analysis, Review, and Proposed Research*, 25 *J. CONFLICT RESOL.* 157, 164 (1981)).
 - 19 John Haynes, *Power Balancing in Divorce Mediation: Theory and Practice* (Jay Folberg & Anne Milne eds., 1998) at 280–81 (quoting in part Jeffrey Z. Rubin & Bert R. Brown, *The Social Psychology of Bargaining and Negotiation* (1975) at 79).
 - 20 *Idem*, at 290–291.
 - 21 See, e.g., Leah Wing, *Whither Neutrality? Mediation in the 21st Century* (unpublished paper, www.prasi.org/uploads/12_PRASI_Wing.doc); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1555–75 (1991) at 1572–87; Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *WIS. L. REV.* 1359, 1391 (1985); Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 *J. DISP. RESOL.* 55, 60–62 (1995) (discussing this view of ADR among both minority and feminist critics and identifying specific examples of such critics)
 - 22 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.* (1989) 260–66 (discussing the limitations on mediator's ability to act as protectors of parties' rights). Unlike judges or even arbitrators, who have the authority and the tools to demand and test the authenticity of evidence, mediators have no such authority or tools. *supra*, note 27
 - 23 Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* at 35, 245; (1984); Joseph B. Stulberg, *Mediation Theory and Practice* 2–11 (2d ed., 2006) at 86–87, 91–97. See also Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?* 6 *CARDOZO J. CONFLICT RESOL.* 213 (2005) (giving examples of how justice is served in mediation by measures that stop short of power-balancing, *id.* at 241–44, and concluding that, "mediation . . . powerfully exemplifies those features of a procedure suitably viewed as one of pure procedural justice . . . [P]arty-acceptability of outcomes is, and should be, the defining feature of justice in mediation. Standards independent of the process are not needed." *Id.* at 245)
 - 24 For example, the ADR Institute of Alberta, in their Code of Ethical Conduct for Mediators, in "a commentary with examples and guidelines", writes, "Impartiality does not prevent a mediator acting to assist the mediation process. For example, recognizing an unequal balance of power and seeking to rectify it." <http://www.adralberta.com/PDF/CodeOfEthicsAgreement.pdf>
 - 25 For example, Ontario Ministry of the Attorney General, CBAO Model Code of Conduct, *supra*, note 13
 - 26 Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation, Responding to Conflict Through Empowerment and Recognition*, San Francisco, Jossey-Bass (1994); a fully revised and almost completely new edition was published as Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation, The Transformative Approach to Conflict*, New and Revised Edition, San Francisco, Jossey-Bass (2005) (though the two editions bear the same name, with the exception of the first and last chapters, they are essentially different books). See also the work of the Institute for the Study of Conflict Resolution: <http://www.transformativemediation.org>
 - 27 See *supra*, note 10.
 - 28 Transformative mediation mediators view conflict as a crisis in human interaction, whereby parties are caught up in a negative conflict cycle due to experiencing a sense of reduced agency and connection. They believe that the mediator can help parties regain these strengths and reverse the conflict cycle by supporting party expression and choices.
 - 29 See BUSH & FOLGER (2005) *supra* note 29, at 131–214 (presenting a case study showing how a mediator offers support of this kind to the parties).
 - 30 See James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS Program*, 18 *HOFSTRA LAB. & EMP. L.J.* 429, 439 (2001) (describing a case example from workplace mediation illustrating mediator supporting party decision to leave the mediation session).
 - 31 The result of this consistently supportive posture is that parties on both sides become aware that they are being treated fairly. The transformative mediator does not decide *a priori* which party is weaker and therefore needs more assistance. The so-called weaker parties are given the same opportunities as the so-called stronger parties to express themselves as they choose. Both sides are helped to be effective advocates for themselves, on their own terms, and as extensively as they choose.
 - 32 Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?* 6 *CARDOZO J. CONFLICT RESOL.* 213 (2005) at 241–45 (agreeing that party-acceptability, when practices of self-determination have been followed, is ultimately the best guarantor of the "justice" of an agreement, concluding that, "[P]arty-acceptability of outcomes is, and should be, the defining feature of justice in mediation. Standards independent of the process are not needed.")
 - 33 See BINGHAM, *supra* note 19, (research documenting perceived fairness of transformative mediation outcomes, by employees as well as managers); Dorothy J. Della Noce & Hugo C. M. Prein, *The Case for Transformation: A Review of Theoretical and Empirical Support in TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS*, Joseph P. Folger et al., eds., 2010) at 93, 94–105 (summarizing results of numerous studies documenting perceived outcome fairness in transformative mediations).
 - 34 ADR Institute of Canada, Inc. Code of Conduct for Mediators: http://www.adrcanada.ca/resources/documents/National_Mediation_Rules_2012August3th.pdf
 - 35 Ontario Ministry of the Attorney General, CBAO Model Code of Conduct, *supra*, note 13.
 - 36 See Stulberg, *supra* note 35
 - 37 Joseph P. Folger, *HARMONY AND TRANSFORMATIVE MEDIATION PRACTICE: SUSTAINING IDEOLOGICAL DIFFERENCE IN PURPOSE AND PRACTICE*, *NORTH DAKOTA LAW REVIEW* (2008) 84:3, 823–860 at p. 855: "...the core values of an adopted approach to practice need to resonate, to some degree, with a mediators' personal ideology – their views of human nature, conflict, and the role of social institutions in addressing conflicts. It is difficult for mediators to practice confidently and effectively within a framework if it is not consistent with their core values. Skills that mediators learn in training or that they adopt from their professional backgrounds easily get overridden by their personal value orientation in the throes of actual intervention work."
 - 38 Peter Miller, coauthor with Robert A. Baruch Bush of *Transformative Mediation and Lawyers: Insights from Practice and Theory in TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS* (2010) Joseph P. Folger et al., eds., (private communication with one of the co-authors, March 14, 2013)
 - 39 For a co-author of this article who practices transformatively, this also means referring enquiring parties to a detailed 8-page portrait of transformative mediation as well as a short video, both available online, before setting up an exploratory meeting to determine whether this approach makes sense to them or whether they would prefer another approach with another mediator: <http://www.johnpeterweldon.com>
 - 40 ADR Institute of Canada, Inc. Code of Conduct for Mediators, *supra*, note 37. In 2011, France amended Section 21 of its basic law on civil, penal, and administrative procedure to include a one-page chapter on mediation briefly setting out universally accepted principles: central role of the parties, mediator impartiality, competence and diligence, and confidentiality of the proceedings, leaving ample room for the practice and free choice of a wide diversity of mediation practice: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000350926>



ties “to make their own voluntary and non-coerced decisions”, but in the section entitled XI. Termination or Suspension of Mediation, the code orders that mediators shall terminate a mediation if any one of the following situations is perceived to exist in the opinion of the mediator and it has not been not rectified by the parties:

- (a) the process is *likely to prejudice* one or more of the parties;
 - (b) one or more of the parties is using the process inappropriately;
 - (c) one or more of the parties is *delaying the process to the detriment of* another party or parties;
 - (d) the mediation process is *detrimental to* one or more of the parties or the mediator;
 - (e) it appears that a party is *not acting in good faith*;
 - (f) there are other reasons that are or appear to be counterproductive to the process.
- (emphasis added)

The loosely definable terms reproduced in italics mandate mediators to 1) form an opinion about what they perceive to be happening in the room (or which might perceptibly happen in the future), 2) point out the offending situation to the party or parties, 3) require parties to rectify the situation, and 4) terminate mediation if they consider that the parties have not complied with their instructions. In these key respects, the CBAO code can be said to mandate a mediator-driven model of mediation and thereby exclude approaches to practice which prioritize party self-determina-

tion of parties at all points in the mediation.

How might a transformative mediator respond in situations such as these? Rather than requiring a party or parties to rectify conduct that appears to fall under these categories, a transformative mediator would continue with his or her central task of helping each party regain a sense of competency and perspective. This means systematically supporting party expression and choices, deferring to the parties’ own judgment³⁶. The parties themselves determine whether they believe the other is using the process inappropriately, whether the process is detrimental to them, whether the other is acting in good faith or whether they believe that the mediation process is counterproductive.

Conclusion

In the information age, approaches in all fields are constantly evolving and new approaches are continuously being made available to the public on a wide scale. Thus, facilitative mediation is no longer what it was in the 1980’s. Transformative mediation has evolved considerably beyond its initial description in 1994. Other mediation approaches have been introduced since then and this trend will continue and probably accelerate. In our opinion, mediators will be at their most effective when they are able to adopt the type of mediation that corresponds best to their view of conflict and human nature³⁷. In order to protect the public’s right to choose the type of mediation which they consider appropriate to help them deal with

the various types of conflict they encounter, mediator codes of conduct must be capable of embracing an expanding body of diverse mediation theory and practice.

Veteran mediator Peter Miller suggests that ethical practice would require mediators to be totally transparent with prospective clients about the nature of their role and its limits. If clients agree to continue on this basis, mediators should then follow through by adhering to the description provided to the clients; ethical practice announces itself and doesn’t switch mediation models midstream³⁸. By this logic, transformative mediators would be obliged to disclose that they do not regulate parties’ conversation or limit what can and cannot be discussed.³⁹ Facilitative mediators would have to disclose that they intervene to balance power, and describe the measures they adopt to achieve their sense of power balance. And evaluative mediators would have to disclose that party decisions will have to conform to external norms, specifying the nature of the norms to be applied.

For informed consumer choice to become a reality, space for the diversity of mediation practice must be made in codes of conduct and other forms of mediation regulation. With the maturing of the mediation field, one size no longer fits all. Inclusive codes of conduct presently exist; they emphasize the basic principles common to all mediation models: party self-determination, independence and impartiality of the mediator, and confidentiality of the proceedings.⁴⁰

1 Alison Y. Taylor, *Toward a Comprehensive Theory of Mediation*, 19 *Conciliation Courts Review* 1, 4 (1981); Anne Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* (Jay Folberg & Anne Milne eds., 1998). JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT, & JOSEPH B. STUIBERG, *MEDIATION THEORY AND PRACTICE* 2–11 (2d ed., 2006) at 718–20; Robert A. Baruch Bush, *Staying in Orbit or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 *N.D. L. REV.* 735–38 (2008). See also Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 *HARV. NEGOT. L. REV.* 1, 15–21 (2001); Jacqueline Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, 5 *Penn. St. Y. B. Arb. & Mediation* (2013) available at <http://www.ssrn.com/abstract/2249862>

2 Leonard L. Riskin, “Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed” (1996); (3d Ed. 2005).

3 See, e.g., *ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES*, STANDARD I.C., III.C. (1984), 18 *FAM. L. Q.* 363, 363–65 (1984). See also Welsh, *supra* note 4, at 34–52 (analyzing the principle of self-determination in the mediator ethics rules of the Florida state mediation system, adopted in 1992).

4 The Association for Conflict Resolution’s Model Standards for Mediator Certification Programs recognizes seven distinct mediation frameworks: facilitative, transformative, narrative, evaluative, inclusive, analytical and responsive - frameworks being defined as ‘philosophies and methodologies that identify how the mediator carries out and identifies his practice’: [http://www.acrnet.org/uploaded/files/Practitioner_ModelStandardsOfConductforMediatorsfinal05\(1\).pdf](http://www.acrnet.org/uploaded/files/Practitioner_ModelStandardsOfConductforMediatorsfinal05(1).pdf); Alexander, N., *The Mediation*

Metamodel: *Understanding Practice, Conflict Resolution Quarterly*, vol. 26, no. 1, Fall 2008 © Wiley Periodicals Inc., identifies six distinct mediation models: evaluative, settlement, facilitative, wise counsel, traditional, and transformative; Boule, L. et Kelly, K.J., *Mediation Principles, Process, Practice*, 1998, Toronto, Butterworths, identify four models: evaluative, settlement, facilitative and transformative. The International Mediation Institute (IMI) certifies mediators according to distinct criteria based on the three different mediation models recognized by the Institute: facilitative, evaluative and transformative: <http://immediation.org>

5 For example, *Mediate BC Society Standards of Conduct* dictates, “A mediator must ensure that all participants understand the nature of the mediation process, the procedures to be followed, the role of the mediator and the relationship of the participants to the mediator.” http://www.mediatebc.com/PDFs/1-28-Standards-of-Conduct-Standards_Conduct.aspx

6 For a recent overview of transformative mediation, see John Peter Weldon, *Transformative Mediation: Putting Self-Determination into Practice*, *Canadian Journal of Arbitration and Mediation*, (2012) Vol. 21, No. 1, page 30: http://www.adrcanada.ca/resources/documents/ADRIC_JOURNAL_2012_Vol21_No1.pdf

7 The terms “party-driven” and “party-centered” are suggested by two sources: First, colleagues using transformative practices in ethno-political conflict settings, in searching for a clear way to refer to these practices in their context, found that “party-driven” was the term best understood by the parties. See Folger & Bush, *Transformative Practice in Ethno-Political Conflict: An Emerging Initiative in TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS* 31–50 (Joseph P. Folger et al., eds., 2010). Second, in discussions with colleagues who



- teach clinical lawyering skills, the insight emerged that transformative practices in mediation rest on similar theoretical and practical grounds as the approach called "client-centered" lawyering in the legal profession, which similarly stresses the centrality of client choice and control. See, e.g., Robert D. Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 *ARIZ. L. REV.* 501, 506 (1990) (reviewing the development and principles of client-centered lawyering and the reasons for its use). In short, the kinds of alternative practices discussed in this section can be and probably are followed by mediators who do not explicitly label themselves "transformative mediators." Indeed, part of our intention in using the terminology is to recognize this likelihood.
- 8 Quebec Official Publisher, 2013, An Act to Establish the New Civil Code of procedure, art. 1 – 7; 605 – 615 : <http://www.assnat.qc.ca/fr/travaux-parlementaires/projets-loi/projet-loi-28-40-1.html>. For a critical analysis of the Draft Bill, see Réseau pour une approche transformative du conflit : Mémoire amendé présenté à la Commission des Institutions, 30 mars 2012, http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CJ_mandats/Mandat-16641_memoires-deposes.html
 - 9 THE MEDIATOR CODE OF CONDUCT AND ETHICS- ALBERTA COURTS obliges a prospective mediator to fill out a form in which he or she must agree to use interest-based mediation, http://www.albertacourts.ab.ca/portals_ext/qb_civilmediation/CodeofConductandEthics.pdf
 - 10 Ontario Ministry of the Attorney General The CBAO Model Code of Conduct for Mediators, Section XI, Termination or Suspension of Mediation: <http://www.attorneygeneral.jus.gov.on.ca/english/courts/named/codeofconduct.asp>
 - 11 Roger Fisher and William Ury, Getting to Yes: Negotiating an Agreement Without Giving In, New York, Random House Business, (1981)
 - 12 Carole J. Brown, Facilitative Mediation: The Classic Approach Retains its Appeal at Mediate.com: <http://www.mediate.com/practicing/cjn?id=1180> (last visited March 20, 2013).
 - 13 Joseph B. Stulberg, The Theory and Practice of Mediation: A Reply to Professor Susskind, 6 *VT. L. REV.* 85, 88–91 (1981). Stulberg's theory is cast entirely in terms of fostering an agreement, without regard to the terms of that agreement, which are entirely in the parties' hands.
 - 14 Lawrence Susskind, Environmental Mediation and the Accountability Problem, 6 *VT. L. REV.* 1, 13–18 (1981). Susskind argues that "the success of a mediation effort must also be judged in terms of the fairness . . . of the agreements that are reached" and that mediators must strive "to achieve just and stable agreements . . ." *Id.* at 14.
 - 15 Stulberg, *supra* note 16, at 86–87, 96–97, 110–17. Stulberg's argument against the "accountability" view suggested by Susskind is based primarily on his analysis of how such "non-neutrality" would make it impossible for the mediator to discharge his or her primary functions of helping the parties achieve an agreement of any kind.
 - 16 To the contrary, one well-known study of outcomes in mediation compared to outcomes in court, for similar cases, showed that racial minorities more often than not achieved poorer outcomes in mediation than in court, whereas the reverse was true for non-minority parties. See MICHELLE HERMANN ET AL., AN EMPIRICAL STUDY OF THE EFFECTS OF RACE AND GENDER ON SMALL CLAIMS ADJUDICATION AND MEDIATION (1993) (cited in JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT, & JOSEPH B. STULBERG, *MEDIATION THEORY AND PRACTICE* 2–11 (2d ed., 2006), at 371–75). This type of study lent credibility to claims made earlier that mediation, as an informal process, would disadvantage minorities. Similarly, some studies of divorce mediation have shown that mediation produces agreements for "joint custody" far more often than such custody is awarded in court decisions—a result that may suggest that women, who seek "primary custody" more often, fare worse in mediation than men. See, e.g., Roz Zinner, Joint Custody: Smart Solution or Problematic Plan, <http://www.adrc.com/adr4/joint.htm> (last visited Oct. 20, 2011). Even the extensive research conducted on workplace mediation in the U.S., Postal Service's REDRESS Program, while it shows that managers and employees express roughly similar degrees of satisfaction with mediated outcomes, presents no evidence of what those outcomes were, or how they compared with outcomes of similar cases in other forums. See LISA BLOMGREN BINGHAM, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE*, 19–22 (2003) (citing multiple studies of the REDRESS mediation program). In other words, like most of the research done to demonstrate mediation's value over the years, this research measures attitudes about outcomes rather than the objective fairness of the outcomes themselves.
 - 17 Robert A. Baruch Bush, One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance, 19 *OHIO ST. J. ON DISP. RESOL.* 965, 977–78 (2004) (citing Supreme Court of Virginia Mediator Mentee Evaluation Form (available at http://www.courts.state.va.us/courtadmin/ococ/disp/programs/disp_mediation/form/adr1001.pdf))
 - 18 CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 391–93 (3d ed. 2003) (quoting in part James A. Wall Jr., *Mediation: An Analysis, Review, and Proposed Research*, 25 *J. CONFLICT RESOL.* 157, 164 (1981)).
 - 19 John Haynes, Power Balancing in Divorce Mediation: Theory and Practice (Jay Folberg & Anne Milne eds., 1998) at 280–81 (quoting in part Jeffrey Z. Rubin & Bert R. Brown, *The Social Psychology of Bargaining and Negotiation* (1975) at 79).
 - 20 *Idem.* at 290–291.
 - 21 See, e.g., Leah Wing, Whither Neutrality? Mediation in the 21st Century (unpublished paper, www.prasi.org/uploads/12_PRASI_Wing.doc); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 *YALE L.J.* 1545, 1555–75 (1991) at 1572–87; Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 *WIS. L. REV.* 1359, 1391 (1985); Isabelle R. Gunning, Diversity Issues in Mediation: Controlling Negative Cultural Myths, 1995 *J. DISP. RESOL.* 55, 60–62 (1995) (discussing this view of ADR among both minority and feminist critics and identifying specific examples of such critics)
 - 22 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.* (1989) 260–66 (discussing the limitations on mediator's ability to act as protectors of parties' rights). Unlike judges or even arbitrators, who have the authority and the tools to demand and test the authenticity of evidence, mediators have no such authority or tools. *supra*, note 27
 - 23 Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* at 35, 245; (1984); Joseph B. Stulberg, *Mediation Theory and Practice* 2–11 (2d ed., 2006) at 86–87, 91–97. See also Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?* 6 *CARDOZO J. CONFLICT RESOL.* 213 (2005) (giving examples of how justice is served in mediation by measures that stop short of power-balancing, *id.* at 241–44, and concluding that, "mediation . . . powerfully exemplifies those features of a procedure suitably viewed as one of pure procedural justice . . . [P]arty-acceptability of outcomes is, and should be, the defining feature of justice in mediation. Standards independent of the process are not needed." *Id.* at 245)
 - 24 For example, the ADR Institute of Alberta, in their Code of Ethical Conduct for Mediators, in "a commentary with examples and guidelines", writes, "Impartiality does not prevent a mediator acting to assist the mediation process. For example, recognizing an unequal balance of power and seeking to rectify it." <http://www.adralberta.com/PDF/CodeOfEthicsAgreement.pdf>;
 - 25 For example, Ontario Ministry of the Attorney General, CBAO Model Code of Conduct, *supra*, note 13
 - 26 Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation, Responding to Conflict Through Empowerment and Recognition*, San Francisco, Jossey-Bass (1994); a fully revised and almost completely new edition was published as Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation, The Transformative Approach to Conflict*, New and Revised Edition, San Francisco, Jossey-Bass (2005) (Although the two editions bear the same name, with the exception of the first and last chapters, they are essentially different books). See also the work of the Institute for the Study of Conflict Resolution: <http://www.transformativemediation.org>.
 - 27 See *supra*, note 10.
 - 28 Transformative mediation mediators view conflict as a crisis in human interaction, whereby parties are caught up in a negative conflict cycle due to experiencing a sense of reduced agency and connection. They believe that the mediator can help parties regain these strengths and reverse the conflict cycle by supporting party expression and choices.
 - 29 See BUSH & FOLGER (2005) *supra* note 29, at 131–214 (presenting a case study showing how a mediator offers support of this kind to the parties).
 - 30 See James R. Antes et al., Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS Program, 18 *HOFSTRA LAB. & EMP. L.J.* 429, 439 (2001) (describing a case example from workplace mediation illustrating mediator supporting party decision to leave the mediation session).
 - 31 The result of this consistently supportive posture is that parties on both sides become aware that they are being treated fairly. The transformative mediator does not decide *a priori* which party is weaker and therefore needs more assistance. The so-called weaker parties are given the same opportunities as the so-called stronger parties to express themselves as they choose. Both sides are helped to be effective advocates for themselves, on their own terms, and as extensively as they choose.
 - 32 Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?* 6 *CARDOZO J. CONFLICT RESOL.* 213 (2005) at 241–45 (agreeing that party-acceptability, when practices of self-determination have been followed, is ultimately the best guarantor of the "justice" of an agreement, concluding that, "[P]arty-acceptability of outcomes is, and should be, the defining feature of justice in mediation. Standards independent of the process are not needed.")
 - 33 See BINGHAM, *supra* note 19, (research documenting perceived fairness of transformative mediation outcomes, by employees as well as managers); Dorothy J. Della Noce & Hugo C. M. Prein, *The Case for Transformation: A Review of Theoretical and Empirical Support in TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS*, Joseph P. Folger et al., eds., 2010) at 93, 94–105 (summarizing results of numerous studies documenting perceived outcome fairness in transformative mediations).
 - 34 ADR Institute of Canada, Inc. Code of Conduct for Mediators: http://www.adrcanada.ca/resources/documents/National_Mediation_Rules_2012August30.pdf
 - 35 Ontario Ministry of the Attorney General, CBAO Model Code of Conduct, *supra*, note 13.
 - 36 See Stulberg, *supra*, note 35
 - 37 Joseph P. Folger, HARMONY AND TRANSFORMATIVE MEDIATION PRACTICE: SUSTAINING IDEOLOGICAL DIFFERENCE IN PURPOSE AND PRACTICE, *North Dakota Law Review* (2008) 84:3, 823–860 at p. 855: "...the core values of an adopted approach to practice need to resonate, to some degree, with a mediators' personal ideology – their views of human nature, conflict, and the role of social institutions in addressing conflicts. It is difficult for mediators to practice confidently and effectively within a framework if it is not consistent with their core values. Skills that mediators learn in training or that they adopt from their professional backgrounds easily get overridden by their personal value orientation in the throes of actual intervention work."
 - 38 Peter Miller, coauthor with Robert A. Baruch Bush of *Transformative Mediation and Lawyers: Insights from Practice and Theory in TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS* (2010) Joseph P. Folger et al., eds., (private communication with one of the co-authors, March 14, 2013)
 - 39 For a co-author of this article who practices transformatively, this also means referring enquiring parties to a detailed 8-page portrait of transformative mediation as well as a short video, both available online, before setting up an exploratory meeting to determine whether this approach makes sense to them or whether they would prefer another approach with another mediator: <http://www.johnpeterweldon.com>
 - 40 ADR Institute of Canada, Inc. Code of Conduct for Mediators, *supra*, note 37. In 2011, France amended Section 21 of its basic law on civil, penal, and administrative procedure to include a one-page chapter on mediation briefly setting out universally accepted principles: central role of the parties, mediator impartiality, competence and diligence, and confidentiality of the proceedings, leaving ample room for the practice and free choice of a wide diversity of mediation practice. <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000350926>



