reactions of the parties at the time of the incident or to the events that followed. Expressions of feeling would be encouraged and explored, not managed or squelched. Transformative mediators, even more than problem-solving mediators, might seek to exploit the conflict for its learning potential—trying to help the parties grow in learning about themselves and their conduct as consumers, as business operators and as disputants.

But at some point in the mediation, the goals and actions of broad problem-solving mediators and transformative mediators would diverge. Problem-solving mediators would eventually work to identify concrete issues about which the parties could negotiate and then manage a bargaining process designed to help them achieve an interests-based resolution. Transformative mediators, by contrast, would continue to "follow" the parties, looking for opportunities for empowerment and mutual recognition, but allowing them to take their conversation wherever it might lead—in the direction of settlement or not.[32] Finally, whatever the similarities and differences between broad problem-solving and transformative approaches to the car wash matter, both would likely look very different from a narrow, settlement-oriented process focused on finding a monetary compromise to end the dispute.

§3.6 FROM GOALS TO ACTIONS: HOW MUCH INFLUENCE SHOULD THE MEDIATOR EXERT?

In addition to differing over the most important goals of the process, mediators are strongly divided regarding the related issue of what kind of actions are appropriate for a mediator to use to achieve her goals. In particular, how should a mediator use—or not use—her considerable power?

The central disagreement here is referred to as the *facilitative-evaluative* debate, terms we will define shortly. But it is really part of a broader controversy over how active the mediator should be in attempting to produce a resolution or influence its terms. Each camp—the traditional facilitative and the evaluative school—has roots that can again be traced to forces influential in the rise of the mediation movement. And, as we shall see, this debate is largely, although not completely, about the wide array of meanings attached to the principles of mediator impartiality, neutrality and party self-determination. Before we examine the debate, however, it is important that we identify three ways in which a mediator can exert influence on the parties and the process:

- **Influence over the structure and ground rules of the mediation.** Here we refer to how much control the mediator exerts over how the mediation process will operate, especially in its early stages. Sometimes called the "meta-process" or "the process about the process,"[33] this might include decisions about who will participate, the number and identity of mediators,

32. Robert Baruch Bush & Joseph Folger, *Transformative Mediation: Core Practices*, *in* Transformative Mediation Sourcebook at 45.
33. *See* Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientation*, 9 Disp. Resol. Mag. 22, 24 (2003).

time limits, procedures for exchanging information, whether or not private sessions will be used and conditions for terminating the process.

- **Influence over the process in operation.** Here the focus is on the mediator's influence over the way in which the participants' ongoing communications are managed. This encompasses the many decisions that must be made in the midst of the process, ranging from the sequencing of speakers or choice and sequence of topics to be negotiated, whether and how to control emotional exchanges, whether and when to separate the parties, when to take breaks, how long a session will last and whether and when to declare an impasse.
- **Influence over the outcome.** Here the debate centers on how much influence — if any — the mediator should exert over whether an agreement is reached or the specific terms of a resolution. Suppose that one or both parties is being unreasonable? What if one lacks basic information about his rights? Suppose the parties lack the creativity to come up with effective solutions to their dispute? What if they want help in deciding whether to accept a settlement proposal? Suppose they are considering a resolution that seems unwise to the mediator? What is the proper allocation of control over the outcome between the parties and the neutral?

Separating Process from Outcome? In the world of mediators, it is common to hear the expression "the mediator is in charge of the process; the parties control the outcome." This allocation of decision-making responsibility has considerable intuitive appeal, inasmuch as it corresponds to the respective expertise of mediators (over process issues) and the parties (over their own fate and what matters to them.)[34] But as in law, attempts to draw a bright line between "procedure" and "substance" raise as many questions as they answer. Why is this so?

First, mediation is, if nothing else, a dynamic and fluid process. To suggest that one of the participants — the mediator — unilaterally controls even the most clearly "procedural" aspects of the enterprise is to ignore the reality that parties and their lawyers can exert great influence over process decisions. For example, in our car wash case, who is really controlling the process if, in the face of mediator "direction" to the contrary, the customer refuses to participate unless his (non-party) spouse is permitted in the room? Or suppose that the mediator does not generally believe in separating disputants, but one party refuses to discuss an important topic in front of the other party?

Second, mediator and participant views about how to define the problem to be solved are not static. Attitudes can be changed by events, people and ideas. In our car wash case, a mediator who starts out predisposed to try to re-establish business dealings between the owner and the customer might well abandon this goal in the face of party resistance, time limitations or information pointing to the likelihood of future conflict if relations were restored.

Third, as suggested earlier, process decisions often have an enormous impact on outcomes. In our car wash case, for example, a mediator's decision to conduct

34. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.4 and 2.1 (2006) Appendix E, *infra* (similar allocation of decision-making as between lawyer and client).

the mediation through heavy use of private meetings with each side — perhaps to avoid a potentially destructive recurrence of some earlier emotional outburst — might all but foreclose any opportunity for the participants to gain the kind of trust and understanding needed to attempt a possible restoration of their relationship or some other interests-based solution to their dispute.

Still, in the world of mediation, there is greater consensus about this question than the question of whether the neutral should influence substantive outcomes. On the latter topic, deep ideological differences have arisen between "facilitative" and "evaluative" theorists and practitioners.

What Is "Facilitative" Mediation? In the classic facilitative model of mediation, the mediator moderates a structured process of communication aimed at generating a negotiated outcome of the parties' own creation. In this model, the mediator studiously avoids interjecting her own opinions or ideas for solutions. Instead, facilitative mediators assume that, because the parties know their situation better than anyone else, they can create better solutions themselves than an outsider can propose, or impose. (Historically, this model can be traced directly back to the community mediation movement with its ideals of citizen empowerment and "de-legalizing" disputing.)

The facilitative mediator focuses on the negotiating process itself, seeking to create optimal conditions for the parties to determine whether and how to resolve their problem. To this end, facilitative mediators generally prefer that the parties negotiate face-to-face as much as possible. Such neutrals may be directive about structure and process: asking questions, suggesting an agenda of topics to be negotiated and deciding the sequence of discussions and whether and when to meet privately with the parties. They work to keep discussions and behavior productive and may ask questions or challenge the parties to try to get them to assess the options realistically. But while facilitative mediators may assist in analyzing or even suggesting options, they refrain from recommending solutions, giving advice, offering opinions or making predictions about the court (or other) alternative to a mediated resolution. For the most part, they reject pressure of any kind as a method of achieving resolution.

What is "Evaluative" Mediation? In evaluative mediation, by contrast, the mediator assumes (or determines) that the parties want her to assist in obtaining a settlement by providing feedback on their viewpoints and positions and/or offering help or direction as to possible agreement terms. This guidance may be based on the mediator's "industry knowledge" or experience with similar matters.

A mediator's evaluation may be based on law, other specialized knowledge or her personal reaction to the parties' perspectives on the dispute or their settlement proposals. When a mediator with a background in commercial construction advises the parties that the solution they are considering is not viable from an engineering standpoint, that is evaluative mediation. If a mediator with a degree in family counseling tells a divorcing couple that a proposed parenting arrangement may be psychologically harmful to the children, she is evaluating. And when any mediator offers his view of the strength of an argument or the fairness, practicality, durability or wisdom of a proposal, he is evaluating as well.

Our primary focus will be on *legal* evaluations, by mediators with legal knowledge. Such interventions may include pointing out weaknesses and strengths in a

party's position; predicting the court outcome or other consequences of failing to reach agreement; or critiquing, suggesting and recommending specific solutions. As evaluations are often most effectively delivered in private, evaluative mediators tend to make greater use of "shuttle diplomacy" than do facilitators. In highly directive forms of evaluative mediation, the mediator may also exert considerable pressure on the parties to reach a resolution. Many proponents of evaluative mediation are those who entered the mediation field to serve in court-based or private commercial settings, in which efficiency is valued and most participants are sophisticated and/or represented by counsel.

Before we examine the debate about how the mediator *should* act, it may be helpful to examine the following excerpt from the leading attempt to categorize how mediators (in litigated disputes) *do* behave in each of these mediator role conceptions, formed by varying combinations of a broad or narrow approach to defining the problem and a facilitative or evaluative orientation:

Mediator Orientations, Strategies and Techniques

Leonard L. Riskin

12 Alternatives 111, 111-112 (1994)

Each of the two principal questions—does the mediator tend toward a narrow or broad focus? And does the mediator favor an evaluative or facilitative role?—yield responses that fall along a continuum. Thus, a mediator's orientation will be more or less broad and more or less evaluative. . . .

MEDIATOR TECHNIQUES

Role of Mediator

EVALUATIVE

Problem Definition **NARROW**	Problem Definition **BROAD**
Urges/pushes parties to accept narrow (position-based) settlement **Proposes** narrow (position-based) agreement **Predicts** court or other outcomes **Assesses** strengths and weaknesses of each side's case	**Urges/pushes parties** to accept broad (interest-based) settlement **Develops and Proposes** broad (interest-based) agreement **Predicts** impact (on interests) of not settling **Educates self** about parties' interests
Helps parties evaluate proposals **Helps parties** develop & exchange narrow (position-based) proposals **Asks** about consequences of not settling **Asks** about likely court or other outcomes **Asks** about strengths and weaknesses of each side's case	**Helps parties** evaluate proposals **Helps parties** develop & exchange narrow (interest-based) proposals **Helps parties** develop options that respond to interests **Helps parties** understand interests

FACILITATIVE

Evaluative-Narrow

The principal strategy of the evaluative-narrow mediator is to help the parties understand the strengths and weaknesses of their positions and the likely outcome at trial. To accomplish this, the evaluative-narrow mediator typically will first carefully study relevant documents, such as pleadings, depositions, reports and mediation briefs. Then, in the mediation, she employs evaluative techniques, such as the following, which are listed from most to least evaluative:

- Urge parties to settle or to accept a particular settlement proposal or range.
- Propose position-based compromise agreements.
- Predict court (or administrative agency) dispositions.
- Try to persuade parties to accept mediator's assessments.
- Directly assess the strengths and weaknesses of each side's case (usually in private caucuses).

Facilitative-Narrow

Like the evaluative-narrow, the facilitative-narrow mediator plans to help the participants become "realistic" about their litigation situations. But he employs different techniques. He does not use his own assessments, predictions or proposals. Nor does he apply pressure. Moreover, he probably will not request or study relevant documents, such as pleadings, depositions, reports or mediation briefs. Instead, because he believes that the burden of decision should rest with the parties, the facilitative-narrow mediator might ask questions—generally in private caucuses—to help the participants understand both sides' legal positions and the consequences of non-settlement. Also in private caucuses, he helps each side assess proposals in light of the alternatives.

Here are examples of the types of questions the facilitative-narrow mediator might ask:

- What are the strengths and weakness of your case? Of the other side's case?
- What are the best, worst, and most likely outcomes of litigation? How did you make these assessments? Have you thought about [other issues]?
- How long will it take to get to trial? How long will the trial last?
- What will be the associated costs—in money, emotions, or reputation?

Evaluative-Broad

The evaluative-broad mediator also helps the parties understand their circumstances and options. However, she has a different notion of what this requires. So she emphasizes the parties' interests over their positions and proposes solutions designed to accommodate these interests. In addition, because the evaluative-broad mediator constructs the agreement, she emphasizes her own understanding of the circumstances at least as much as the parties'.

Like the evaluative-narrow mediator, the evaluative-broad mediator is likely to request and study relevant documents, such as pleading, depositions, and mediation briefs. In addition, she tries to uncover the parties' underlying interests by such methods as:

- Explaining that the goal of mediation can include addressing underlying interests.
- Encouraging the real parties, or knowledgeable representatives (with settlement authority) of corporations or other organizations to attend and participate in the mediation. For instance, the mediator might invite such individuals to make remarks after the lawyers present their opening statements, and she might include them in most settlement discussions.
- Asking about the participants' situations, plans, needs and interests.
- Speculating about underlying interests and asking for confirmation.

Facilitative-Broad

The facilitative-broad mediator seeks to help the parties define, understand and resolve the problems they wish to address. She encourages them to consider underlying interests rather than positions and helps them generate and assess proposals designed to accommodate those interests. Specifically, she might:

- Encourage the parties to discuss underlying interests in joint sessions. To bring out such interests, she might use techniques such as those employed by the evaluative-broad mediator.
- Encourage and help the parties to develop their own proposals (jointly or alone) that would respond to underlying interests of both sides.

The facilitative-broad mediator does **not** provide assessments, predictions or proposals. However, to help the participants better understand their legal situations, she will likely allow the parties to present and discuss their legal arguments. In addition, she might ask questions such as those listed for the facilitative-narrow mediator and focus discussion on underlying interests.

In a broad mediation, however, legal argument generally occupies a lesser position than it does in a narrow one. And because he emphasizes the participants' role in defining the problems and in developing and evaluating proposals, the facilitative-broad mediator does not need to fully understand the legal posture of the case. Accordingly, he is less likely to request or study litigation documents, technical reports or mediation briefs.

However, the facilitative-broad mediator must be able to quickly grasp the legal and substantive issues and to respond to the dynamics of the situation. He needs to help the parties realistically evaluate proposals to determine whether they address the parties' underlying interests.

§3.7 THE FACILITATIVE-EVALUATIVE DEBATE: CASE EXAMPLES AND A HYPOTHETICAL DISCUSSION

Few mediation theorists or practitioners, we think, would quarrel with the propriety of a facilitative approach to mediation. Many would probably also agree that, in the abstract, a non-directive, non-evaluative stance is to be preferred. Yet in practice, for a variety of reasons, mediators often gravitate to a more directive or evaluative stance. Why is this so, and why is it controversial?[35] In order to explore some of the current controversies concerning facilitative and evaluative mediation, we present three actual cases, followed by an imaginary discussion.

Case One: An Incident of Vandalism

In Philadelphia, citizens can file private criminal complaints against those who have victimized them by conduct that, while technically "crimes," do not rise to a level at which the local prosecutor will generally file charges. Because of high volume and most judges' dislike of such "trivial" community matters, these cases are required to go through a mandatory mediation process before they can reach a judge for a trial.

A recent mediation was typical of those in the program: The complainant alleged threatening conduct and minor acts of vandalism (spray-painting a fence, dumping trash on the lawn) by his next-door neighbor and her teenage son. The volunteer mediator at the courthouse dispute resolution program spent the first hour of the two-hour session attempting to get the neighbors to talk with one another, examine the history of the problem and explore potential tension-avoiding solutions to their conflict. Throughout this period, the defendant, while not admitting guilt, appeared eager to work out "anything reasonable" for the future, including taking steps to control the son's hours outside. However, the complainant refused to discuss a resolution on these or any other terms, vowing to "see that justice is done" in court.

The mediator knows that no judge will listen to this case for more than a few minutes, that the almost certain resolution is a court-ordered "stay away" order (with no finding of guilt) and that another day in court will be costly for the disputants in terms of lost work time. She also has in mind specific ideas for an agreement that will meet the complainant's concerns for the future. What should she do?

Case Two: An Unsophisticated Husband

Husband and Wife recently separated and are locked in a bitter dispute over the custody of their five-year-old son. Wife has primary custody of the child by mutual agreement. At the start of this voluntary mediation, Husband seeks twice-weekly

35. For a summary of the controversy regarding evaluative mediation, *see* CHRIS GUTHRIE, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 146-154 (2001). *See also* LELA P. LOVE, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

contact with the child, once on a week night, once on a weekend. Both Husband and Wife have bitter feelings about their separation and neither thinks that a reconciliation is feasible. Despite these feelings, neither has anything terrible to say about the other as a parent. After a considerable period of time attempting to resolve this through exploration of their schedules and relationships with the child, Wife (who has counsel present) proposes one afternoon visit every other weekend. The mediator knows the offer is way below what any court would award, but that the judge will also likely rubber-stamp any agreement reached in mediation and signed off on by a mediator. Husband, who has been quite passive throughout, is unrepresented (being unable to afford both counsel and his child support obligations) and is unaware of his rights. Bemoaning his circumstances but nevertheless seemingly poised to accept the offer, he twice asks the mediator his prediction of what would happen in court. What should the mediator do?

Case Three: A Serious Slip and Fall Accident

A personal injury suit was filed following an out-of-town tourist's slip on ice in front of a private home two winters ago. The plaintiff was quite seriously injured. After the start of discovery, the parties agreed to attempt to settle the claim through a half-day mediation effort. Both parties were represented by counsel and were present at the mediation, along with a representative of the defendant's insurance carrier. From their presentations and a summary of the proofs and experts they planned to produce at trial, it is clear to the privately retained mediator that there is considerable doubt about how a jury would decide as to both liability and damages and that each side would thus have significant risks if the case were tried. The parties, who have very different assessments of the likely trial outcome, are very far apart in their opening positions with respect to a dollar settlement. What should the mediator do?

What Should the Mediator Do in Each Case? An Imaginary Discussion Between Facilitative (*F*) and Evaluative (*E*) School Representatives

F: What is the one thing that is most unique about mediation, that most distinguishes it from other forms of dispute resolution? It is that the outcome is a self-determined, rather than an imposed decision. And true self-determination is premised on maximizing the participation of the parties, enabling them to choose the factors and norms on which they make decisions and encouraging them to create as many of the options for resolution as they can. This empowers people and makes them less dependent on law or lawyers in handling conflict. Injecting the law, legal predictions or the mediator's views, especially if no one asks for them, undermines this goal. Once an evaluation has been provided or a proposal recommended, the mediator becomes an authority figure, and the parties will see him or her as

the repository of the solution. The mediator is simply steering the parties toward a resolution that he favors.

E: No one would quarrel with self-determination as a good thing. But so long as no one is being coerced in such a way as to override his or her free will, that principle is better honored by evaluative mediation. Your opposition to evaluation doesn't give disputants much credit. Why does their decisional autonomy suddenly disappear if the mediator floats an idea (perhaps one based on what the parties themselves have said)? Can't the participants hear a legal assessment without being overwhelmed? Indeed, telling the participants the mediator's assessment of the likely court outcome can actually *enhance* self-determination. It seems to me that a disputant can only exercise real self-determination if adequately informed of both his non-legal and legal alternatives to a mediated result. We are hardly empowering people if, as in the first two cases, we let them make important decisions when they are ignorant or mistaken about the law.[36]

Telling uninformed parties the law may further self-determination in another way. In my experience, most lay disputants are intensely interested in at least hearing a mediator's prediction of the court alternative and may be reluctant to make a decision without it. Providing legal information can actually *free* them from their curiosity about or overemphasis on the law as a decision factor or at least put it into some perspective as a guiding principle. To put it in process terms, one may have to evaluate *in order to* get to your beloved facilitative format. In the vandalism case, for instance, the complainant seemed to harbor a completely unrealistic hope of seeing his neighbor rot in jail. Only if he is disabused of that notion might he be open to talking with his neighbor and to engaging in finding practical alternative approaches to resolving the conflict.

To the extent that unrepresented parties are required by the court to take part in mediation prior to trial, it seems to me that the mediator has a special obligation to offer an evaluation. Parties forced into a process should not be allowed to reach final agreement without at least having some access to information about the court alternative[37] and fairness norms that are built into the law.[38] While it may be preferable to suggest that they get independent legal advice from their own lawyer,[39] that's simply not a realistic option for many unrepresented parties. Besides, if you're concerned about promoting mediation as an alternative to litigation, allowing unrepresented, uninformed litigants to make decisions that are unfair or out of line with likely court outcomes will come back to haunt all of us. How will Husband in the divorce case feel in a week or a month if

36. JAMES H. STARK, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 776 (1997).
37. *See* JACQUELINE M. NOLAN-HALEY, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 80 (1996); RUSSELL ENGLER, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators and Clerks*, 67 FORDHAM L. REV. 1987 (1999).
38. JUDITH L. MAUTE, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991).
39. *See* Model Standards of Conduct for Mediators §I(A)(2) (2005), Appendix B, *infra*.

he learns that he settled his case for far less than he would have gotten in court? Do you think he'll recommend mediation to his friends?

As for the slip and fall case, I see no problem with the mediator's evaluating. There is no danger of overreaching because the parties have lawyers to protect them and their self-determination. If they make a decision that they later regret, perhaps because of bad advice, this is still self-determined. The decision to hire the wrong lawyer or not to assert themselves with their lawyers, was theirs alone.

F: Are you done? (Pause) I have a problem with the premise of the whole evaluative school—that court outcomes can be predicted. Anyone who has seen courts in action knows that the predicted outcome of a trial-level proceeding is far from a scientific matter. The most an evaluator can do is provide an educated hunch about a range of likely outcomes, with a disclaimer. And, unlike an adjudicator, mediators who evaluate are doing so without the benefit of proofs, trial procedure, exclusion of improper evidence, etc.

E: Some information from a disinterested source—even if it's not perfect and which the parties are free to ignore or reject—is better than none at all, isn't it?

F: Providing legal information—whether in the form of a specific prediction about the outcome of a case or more generalized information (e.g., "*judges rarely jail people in these matters*" in the vandalism case)—is not likely to fall evenly on the parties. Someone—the defendant in Case One, Husband in Case Two—will be favored and the other person's position weakened. What about the promise (and the obligation) to be neutral and impartial?

Evaluating poses a serious risk to the parties' perception of the mediator's impartiality. Won't it seem that the mediator has either formed a preference for one side or isn't dealing evenhandedly with both? Even worse, won't the mediator *actually* be compromising that core principle by helping one side at the expense of the other? Rather than helping to resolve a matter, might that not actually harden the resolve of the party favored by the prediction? Might it not provoke anger, mistrust, the need to save face or even termination of the mediation by the disfavored party—especially if the evaluation contradicts that party's (or lawyer's) prior evaluation of the strength of his position?[40]

E: That's a possible risk, I agree. But the mediator's inaction can be just as problematic. Nothing could be *less* impartial than if, say in the divorce case, the mediator sits idly by while Wife and her lawyer take advantage of uninformed Husband. To do nothing would give the impression that Wife's proposed outcome would be perfectly acceptable to the court when that's not true. If he remains silent, the mediator is, in fact, favoring the wife. Evaluation is *needed* to remain impartial in fact.

40. Dwight Golann & Marjorie Corman Aaron, *Using Evaluations in Mediations*, 52 Disp. Resol. J. 26 (Spring 1997).

As to party perceptions, I think you underestimate the intelligence of most mediation participants. Most negotiators understand that an honest, objective evaluation does not mean that the mediator is biased.[41] Besides, since much evaluation is conducted in private session or caucus with each side, the other party need not even know what's being said.

F: Now we are getting to the heart of the problem—squandering and even perverting the real potential of the mediation process! The more that *private* evaluation creeps in, the further we get from the parties, as opposed to the mediator, being in control of what's being decided. Private sessions, while helpful for some purposes, ought not to become the place where most of the action takes place. By the end, the mediator may have orchestrated a deal, but the participants have not created it together in any meaningful sense and may largely be in the dark about what really took place. Any possibility for enhancing understanding or the ability to resolve future disputes by talking with each other have been undermined.

And another thing: Retreating to private meetings can easily lead to questionable mediator manipulation. We both know the kinds of things some mediators will do in order to broker a deal in a hard-fought case (like Case Three) in which no one can know for sure what the court outcome will be. To close the gap in positions, the mediator will use pressure or even slanted predictions focusing only on each side's weaknesses or risks.[42]

E: I'm not sure that is so troublesome, especially if it's done to neutralize the negotiators' overconfidence. But once we get away from the specific topic of offering legal predictions, I think our views are much closer than you realize. Almost all facilitators would agree that the mediator's role includes serving as an "agent of reality" by questioning a party's unrealistic or unwise expectations or demands. Facilitative types like you sometimes say that a good mediator asks questions rather than making statements.[43] But what's the difference between a facilitator's reality testing in the form of a skeptical or rhetorical question (To Husband in Case Two: "*How do you think you'll feel about this agreement in three months*?" To victim in Case One or Wife in Case Two: "*Do you think a court would think that a fair result?*") and a direct evaluation in the form of a stated prediction or opinion? It sounds to me as though you might want to examine your motives here. Is there some anti-law or anti-lawyer sentiment or turf issue operating here?[44]

F: I wouldn't say I'm hostile to law or lawyers in mediation. But the logical conclusion from *your* argument is that law training should be a

41. JOHN BICKERMAN, *Evaluative Mediator Responds*, 14 ALT. HIGH COST LITIG. 70 (1996).
42. STARK, *supra* note 36, at 774.
43. LELA PORTER LOVE, *Mediation: The Romantic Days Continue*, 38 S. TEX. L. REV. 735, 741 (1997) (encouraging mediators to focus on their roles as facilitators of communication between parties); JOHN D. FEERICK, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 472 (1997) (discussing the decision of the standards-drafting committee that "mediators should be effective facilitators and not necessarily evaluators").
44. *See* ELLEN WALDMAN, *The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion*, 1 VA. J. SOC. POL'Y & L. 87, 96-101 (1993) (reviewing and critiquing the anti-law bias sometimes found in the mediation literature).

requirement for mediating all law-related disputes. That would effectively bar many outstanding non-lawyers from mediating in areas in which skills other than legal analysis or argumentation should be most valued. Maybe we ought to not even call these two activities the same thing. Call one "mediation" and the other "neutral evaluation" and then at least the public will be able to make an informed choice[45] of the kind of neutral they want.

E: Now it sounds as if we've gotten down to a debate about labels or semantics. But even here we disagree. Many parties—in court and community mediations, for example—don't get to choose their mediator. More important, it's too late in the game to go back. All of the major forms of the process—from the narrowest of "settlement-oriented" to the most "therapeutic"—are widely understood to be "mediation." Usage determines meaning.[46] Moreover, except for the real purists out there, most mediators employ more than one style in the same case, depending on what's needed.

F: Would you at least agree that an evaluation shouldn't take place without the parties' consent?

E: Perhaps. . . .

§3.8 THREE FUNDAMENTAL NORMS: SELF-DETERMINATION, IMPARTIALITY AND NEUTRALITY[47]

The speakers in our hypothetical conversation make reference to three norms that are considered fundamental to the mediation movement: party self-determination, mediator impartiality and mediator neutrality. Each of these concepts is susceptible to different meanings and, in operation, is potentially in tension with the others. How do we define these terms? How might different shadings of meaning affect a mediator's philosophy and role conception?

- **Party self-determination.** Most observers and the profession's ethical standards[48] proclaim this to be a foundational principle underlying mediation. Based on respect for individual autonomy, party self-determination is what differentiates mediation from all other processes in which a neutral third party intervenes in a conflict resolution capacity. It can be defined as the participants' right, once in mediation, to decide (a) whether to continue to participate and (b) on what terms, if any, to reach an agreement. We are talking about consensual decision making *in* mediation as opposed to

45. *See* LELA P. LOVE & JOHN W. COOLEY, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45 (2005).
46. *See* LEONARD L. RISKIN, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 25 (1996).
47. A fourth—the principle of confidentiality—might also be considered a fundamental mediation norm. Because there is widespread general agreement as to its basic meaning and importance across all sectors of mediation practice, we discuss confidentiality in connection with our examination of mediator skills, starting in Chapter 6, and in our examination of mediator ethics in Chapter 12.
48. Model Standards of Conduct for Mediators §I (2005). *See* Appendix B, *infra*.