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## **“What Do We Need a Mediator For?”: Mediation’s “Value-Added” for Negotiators**

ROBERT A. BARUCH BUSH\*

### **I. A FAMILIAR SCENARIO: “WHY DO WE NEED A MEDIATOR?”**

A simple question inspires this lecture: What is the “value-added” of mediation for those trying to negotiate resolutions to conflicts? The question is one that mediators and proponents of mediation must be able to answer because it is one that parties to conflict—and their lawyers—frequently and justifiably raise.<sup>1</sup> To give the question sharper contours, let’s imagine a scenario that, in some variation, is unfolding more and more often as ADR

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<sup>1</sup> This lecture focuses on the question of mediation’s value to the parties themselves, not the social or public value that may be generated by its use. Demonstrating the social value of mediation is important in justifying its support or sponsorship by public authorities—for example, through rules requiring the use of mediation or public funding of mediation programs. For discussion of the social value of mediation, see Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989-90). See generally NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 5:02 (2d. ed. 1994); U.S. DEP’T OF JUSTICE, *PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION*, REPORT OF THE AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY (1984); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985). However, regardless of whether disputants’ use of mediation has social value, disputants must be convinced that using the process will be beneficial to them privately, or they will simply refrain from using it—and resist legal directives to do so. The discussion here tries to develop a sound answer to parties’ questions about what private value mediation can provide them, particularly by contrast to the simple use of direct and unmediated negotiation.

processes gain greater currency: Several parties were embroiled in a serious dispute—let us say, over land-use issues involved in a proposed development project and their environmental consequences. One party was on the verge of filing—or perhaps already had filed—legal papers to block the project. Before things proceeded further, however, one lawyer suggested that all sides consider the possibility of entering into some type of ADR process. After an initial round of client consultations to describe the variety of ADR options that might be used, the discussion began to focus on mediation as an option.<sup>2</sup>

Parenthetically, I note that for those of us present today who are lawyers or law students, providing clients with information and advice of this kind about ADR processes is probably the most important ADR-related function we will perform in our professional work. That is, most of us will not spend the majority of our careers working directly as mediators, arbitrators or any other type of neutral third party. Rather, our primary involvement with ADR processes—other than negotiation itself—will be advising clients about them and representing clients in them. Thus, as in the scenario imagined here, the likelihood is that we ourselves, as lawyers, will be called upon increasingly to inform and advise our clients about ADR processes as a normal part of client counseling.<sup>3</sup> The obvious corollary is that law schools should prepare students for this task in the courses they offer on ADR.<sup>4</sup>

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<sup>2</sup> This scenario is based on one used as part of the Mini-Workshop on Alternative Dispute Resolution at the 1996 Conference of the Association of American Law Schools. The opening session of the mini-workshop presented a "role play" of lawyers counseling clients about choosing among ADR options.

<sup>3</sup> This is likely to become the case not only because clients seek this kind of advice, but also because legal authorities begin to require that lawyers provide it. Indeed, some jurisdictions already require lawyers to do this, as a matter of professional responsibility, and the issue is under consideration elsewhere. See *Colorado Adopts Ethics Rule*, 10 ALTERNATIVES TO THE HIGH COST OF LITIG. 70 (1992); Frank E.A. Sander & Michael L. Prigoff, *Should There be a Duty to Advise of ADR Options?*, A.B.A. J., Nov. 1990, at 50, 51 (debate between authors).

<sup>4</sup> To elaborate on the point made in the text, I think that our main obligation to our students, despite the value of skills training in specific processes like mediation, is to teach these future lawyers how to provide their clients with accurate and helpful information and advice about when and how to use different ADR processes, what to expect from them and what to demand from ADR providers, as educated consumers. Some of the major texts on dispute resolution directly address this issue. See, e.g., LEONARD L. RISKIN & JAMES WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987); STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* (2d ed. 1992). See also Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10

## MEDIATION'S "VALUE-ADDED" FOR NEGOTIATORS

To return to our scenario, once the discussion began to focus on mediation, the lawyers agreed that in order for everyone to feel fully informed about this option, they should call in an expert on mediation to explain its workings, advantages and limits, and answer questions that might arise, before recommending it to their clients. That expert was a mediator himself, though in this case he was being asked to "brief" everyone on the uses and limits of mediation rather than to serve as mediator. The mediator began by explaining generally how mediation works and pointing out the differences between mediation and other, binding processes like arbitration. He then said that, although mediators take different approaches to the process, mediation is best understood as, in essence, a process of "facilitated or assisted negotiation" in which the mediator facilitates the parties' own negotiation process. Again, parenthetically, I think that many mediators would themselves endorse this description of the process and probably use very similar terms to explain the process to their clients.<sup>5</sup>

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NEGOTIATION J. 49 (1994) (example of how the subject might be presented to not only future lawyers, but current practitioners).

<sup>5</sup> However, other mediators might offer a different description. As discussed further on, different approaches to mediation practice are possible and currently in use. *See infra* notes 63-71 and accompanying text. They have been distinguished in a variety of ways, and a variety of terms have been used to express the distinctions. *See, e.g.*, Deborah M. Kolb & Kenneth Kressel, *Conclusion: The Realities of Making Talk Work*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 459 (Deborah M. Kolb & Assocs. eds., 1994) [hereinafter *WHEN TALK WORKS*] (settlement/ communication distinction); Kenneth Kressel et al., *The Settlement-Oriented vs. the Problem-Solving Style in Custody Mediation*, 50 J. SOCIAL ISSUES 67 (1994) (settlement/problem-solving distinction); Susan Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 L. & POLICY 7, 19-30 (1986) (bargaining/therapeutic distinction).

Recently, Professor Leonard Riskin suggested a framework that distinguishes between "evaluative" and "facilitative" approaches to mediation; this framework has attracted considerable attention. *See* Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO THE HIGH COST OF LITIG. 111 (Sept. 1994); Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7, 25, 35 (1996). In the evaluative approach, the mediator assesses the strengths and weaknesses of parties' claims, predicts court outcomes, develops and proposes a settlement and pushes the parties to accept settlement; the facilitative approach is essentially assisted negotiation, as the expert describes it in our text. The question of which framework for distinguishing approaches to mediation makes most sense is beyond the scope of this lecture. In fact, all of the frameworks have strong commonalities. For a discussion of this point, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 59-68 (1994).

For the purposes of this lecture, I take the view that "assisted negotiation" defines and

The parties and lawyers listened politely to the rest of the expert's presentation. However, when he finished, they seized on his description of the "essence" of mediation and asked bluntly:

If mediation is simply, as you put it, assisted negotiation, then why do we need it at all? Why do we need a mediator? We ourselves, as businesspeople, are experienced negotiators; beyond that, we're all employing lawyers here who are expert negotiators. Surely, with all this expertise, we can negotiate by ourselves. What is added by a mediator? What is the value-added of the mediation process, compared to the negotiation process we can conduct for ourselves; and why should anyone pay for it, as well as spend the time to participate? Why should we consider this process a valuable product that we should pay extra for when we can accomplish the same thing ourselves?

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describes one possible approach to mediation practice. (Later on, I will suggest some of the specific practices that I believe this approach should encompass. See *infra* text accompanying notes 51-62.) Moreover, as the quoted scenario on the next page implies, the remainder of my discussion focuses on how to explain to negotiators the value of using a mediator who follows *this approach*. If an evaluative approach to mediation were the subject, some of the questions discussed in the text might not even be raised, and the answers given might thus be irrelevant. However, my point here is specifically to demonstrate that "mediation as assisted negotiation" does indeed have value for negotiators—and to suggest what constitutes the core of such an approach—because I do not believe that mediation must be evaluative or directive to be useful and attractive to disputants. In fact, I suggest that just the opposite is true: mediation will be more valuable, and more attractive, to disputants when it facilitates and assists rather than supplants or directs the parties' negotiation. See *infra* text accompanying notes 63-71.

There is another reason for focusing this inquiry on the value of mediation as assisted negotiation. If we sought to explain why evaluative intervention is of value to negotiators, the question would apply well beyond the mediation process: we might equally ask, what value do processes like early neutral evaluation, advisory arbitration or summary jury trial, have to negotiators? That question is certainly worth answering, but it is not a question uniquely about mediation. And that is the point. When mediation follows an evaluative model, it is not very distinct from these other evaluative processes. Some argue that, for this very reason, it should not be called mediation at all. See, e.g., Kimberlee K. Kovach & Lela P. Love, "Evaluative" *Mediation Is An Oxymoron*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31 (1996). Whatever one's view on this question, the point here is to examine whether mediation has value to negotiators even when—and perhaps precisely because—it is fundamentally *different* from other processes. This will help determine whether mediation has any unique value to offer negotiators that is not duplicative of other dispute resolution processes.

## II. "MEDIATION AS AN ALTERNATIVE": THE PROPER FRAMEWORK FOR COMPARISON

Thus far the scenario; now for some commentary. First of all, the imaginary exchange presented in the scenario is actually a very realistic one, in my experience. Parties and lawyers frequently cannot understand, without some good explanation, what a mediator will contribute to their case—besides another bill. As a former student of mine argued to me when we met at a conference in a state that had recently adopted court-ordered mediation:

I enjoyed learning about mediation in law school. But now that I'm in the world of practice, I frankly don't see the point. I work for a major civil litigation firm, and almost all the cases we handle settle before trial—and they always have—whether or not there's a mediator involved. So what does having a mediator add? As far as I'm concerned, it's just another hoop you have to jump through and an additional expense. Tell me, am I missing something?

Before trying to answer the questions posed by my student and the parties in our scenario, it is important to note that these questions themselves show an intuitive clarity about mediation's "place" in the dispute resolution universe that some scholars might envy. Many dispute resolution scholars, including myself, have presented and analyzed mediation as "an alternative to adjudication."<sup>6</sup> In fact, we are now coming to see that this comparative framework is itself misconceived. The "standard" method of case disposition, to which mediation or any other alternative process should be compared, is not adjudication or trial at all, but rather *settlement*—either by direct party negotiations or, where parties have lawyers, by negotiation between lawyers. A solid body of research tells us that throughout the country the vast majority of disputes are settled before a legal claim is ever filed; and of those cases that are brought to court, the large majority end in a negotiated settlement of some kind, and

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<sup>6</sup> See Bush, *supra* note 1; Riskin, *supra* note 1; Warren E. Burger, *Isn't There a Better Way?*, A.B.A. J., Mar. 1982, at 274; Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 112-114 (1976); Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420 (1982); Jay Folberg, *Divorce Mediation—A Workable Alternative*, in *ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* 11 (Howard Davidson et al. eds., 1982); Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 466 (1991); Terri Garner, *Comment, Child Custody Mediation: A Proposed Alternative to Litigation*, 1989 J. DISP. RESOL. 139.

fewer than 10% are adjudicated to a verdict.<sup>7</sup> Given this context, if a process is being proposed as an "alternative" method of resolution, to what should it be compared?

The answer, clearly, is that it should be compared to the standard method of resolution, not to an exceptional method used in a tiny fraction of cases. Viewed in proper perspective, mediation and other third-party processes are alternatives not to court, but to unassisted settlement efforts, including party-to-party, lawyer-to-party and lawyer-to-lawyer negotiation. Thus, the relevant question to be asked and answered about mediation is: How does it compare to, and what advantages does it have over, the negotiation process in its various configurations? This point has recently been articulated very clearly by one of this Journal's own advisors, Dean Nancy Rogers, and her colleagues Craig McEwen and Richard Maiman.<sup>8</sup> Once made, the point seems obvious; but until now, it seems to have escaped many of us. However, as our scenario illustrates, it has not escaped the "consumers" of mediation—disputing parties and their lawyers. They see the true comparison and properly demand that mediators answer the question: "What do we need you for, since we can negotiate settlement for ourselves? In practice, you are providing an alternative to unassisted negotiation; what real value does this alternative have to offer us?"

### III. SEARCHING FOR ANSWERS: RECENT SCHOLARSHIP ON "BARRIERS" TO NEGOTIATED SETTLEMENT

Redefining the comparative framework in this way not only helps clarify the question that is raised about mediation's value, it also points directly to a subject that may provide some answers. That subject is the

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<sup>7</sup> See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162-164 (1986) (of roughly 1650 federal and state court cases, only 7% were tried to a verdict, 15% ended in another form of judicial determination, 9% settled following a ruling on a motion and the rest (69%) were otherwise settled); David M. Trubek et al., *The Costs of Ordinary Civil Litigation*, 31 UCLA L. REV. 72, 89 (1983) (roughly 8% of civil suits filed in state and federal courts went to trial, 22.5% were resolved by judicial action such as summary judgment or dismissal and the remainder were settled); JONATHAN M. HYMAN ET AL., CIVIL SETTLEMENT 26-27 (1995) (New Jersey lawyers surveyed about recently completed civil cases indicated that 75% were resolved by settlement).

<sup>8</sup> See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1373 (1995); ROGERS & MCEWEN, *supra* note 1, §§ 4:04, 5:03.

negotiation process itself. Therefore, let me move away from the topic of mediation altogether for the moment and turn to some insights from the very rich literature on negotiation—including both research and theory—that has accumulated in recent years. This literature includes major contributions by scholars whose work you have probably encountered, such as Lax and Sebenius at Harvard;<sup>9</sup> Bazerman and Neale at Northwestern;<sup>10</sup> and Mnookin, Ross and others at Stanford.<sup>11</sup>

These scholars and others have developed a body of work that uses the perspectives of many different disciplines to investigate a troubling and important question: Why do negotiations often fail to produce agreement, even when negotiators have the best training and skills available? Why is "getting to yes," in practice, not as easy as some have suggested? What are the barriers that make reaching agreement harder than we might think, even for skilled negotiators? I cannot do justice to this complex body of work in the brief time available here.<sup>12</sup> However, I want to mention a few of the major insights regarding the negotiation process—especially its limits—that this literature has produced, because they are directly relevant to the questions under discussion.

One theme that the negotiation scholars have developed is the "barriers" concept.<sup>13</sup> That is, they suggest that the most important factors in explaining failed negotiations are two kinds of "informational barriers" that impede negotiations and agreement. These barriers arise from structural and perceptual dynamics inherent in the negotiation process itself, and in this

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<sup>9</sup> See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986).

<sup>10</sup> See MARGARET A. NEALE & MAX H. BAZERMAN, *COGNITION AND RATIONALITY IN NEGOTIATION* (1991).

<sup>11</sup> See *BARRIERS TO CONFLICT RESOLUTION* (Kenneth J. Arrow et al. eds., 1995) [hereinafter *BARRIERS*].

<sup>12</sup> I note also that recent negotiation scholarship has generated many other important insights directed to other questions. See, e.g., Barbara Gray, *The Gender-Based Foundations of Negotiation Theory*, 4 *RESEARCH ON NEGOTIATION IN ORGANIZATIONS* 33 (1994); ROY J. LEWICKI & BARBARA BENEDICT BUNKER, *DEVELOPING AND MAINTAINING TRUST IN WORK RELATIONSHIPS* (Max M. Fisher College of Business (The Ohio State University) Working Paper No. 94-49, 1994). These scholars are exploring alternative ways to conceptualize the negotiation process altogether, focusing on its significance as relationship-forming activity rather than as instrumental bargaining. My focus here on the "barriers" literature stems from its direct relevance to the questions at hand.

<sup>13</sup> For a good introduction to this framework, see Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 *OHIO ST. J. ON DISP. RESOL.* 235 (1993) (discussing his 1992 Schwartz Lecture on Dispute Resolution at The Ohio State University College of Law).



sense they represent "bugs" in the process that can undermine it despite the parties' skills and their desire to reach a settlement.

### A. *The Meaning of "Failed Negotiations"*

Here we have an apparent contradiction: If, as noted above, the vast majority of cases (even those brought to court) do in fact settle, where is the problem the barriers literature describes? The explanation is that, for negotiation scholars—and probably for disputants themselves—a "failed negotiation" may mean either of two things.<sup>14</sup> First and most obvious, failure may mean impasse, the inability to reach any agreement. Second, even where agreement is reached, the negotiation may be considered a failure (or at least, not very successful) because the costs of reaching settlement (including time and indirect costs) were unnecessarily high or, more importantly, because the terms agreed to were "sub-optimal"—they failed to realize all the gains that were actually available from exchange between the parties. Excessive bargaining costs or unrealized joint gains are common, the literature suggests, even where agreements are reached. Thus, negotiation often "fails," despite substantial settlement rates, both because some cases do not reach settlement at all and because many others reach settlement at undue cost or on sub-optimal terms.

### B. *Strategic Barriers*

The question remains, why is this kind of failed negotiation so common? As mentioned before, the negotiation scholars point to certain kinds of informational barriers as the cause. In general, two kinds of barriers are identified, with many variations of each type. The first kind are described as "strategic barriers." These arise because each negotiator usually holds certain private information, and each has a strategic incentive to hide this information or even mislead the other side about it, in order to win a larger share of the stakes. Even though this kind of strategic concealment will probably result in sub-optimal outcomes, it is often quite rational, because openness and honesty could mean both giving up one's own advantage and creating one for an opponent who is ready and willing to exploit it.<sup>15</sup>

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<sup>14</sup> See Robert H. Mnookin & Lee Ross, *Introduction* to BARRIERS, *supra* note 11, at 3, 3-7.

<sup>15</sup> See *id.* at 7-10; LAX & SEBENIUS, *supra* note 9, at 29-40. Lax and Sebenius, in their discussion of the problem of strategic behavior, articulate the now widely used concepts of "value claiming" and "value creation" to describe competitive and cooperative behavior by negotiators. In their framework, the tension between the opportunities to claim value and to

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Looking at it differently, parties are (rightly) suspicious of each other in bargaining, and therefore not likely to put full and honest information on the table. Since everyone knows this is so, no one can rely upon the information put forth by the other. Thus, the barrier created by strategic behavior is informational poverty and unreliability. There is not enough reliable information on the table to enable the parties to identify possibilities for mutually beneficial exchange, and there is no way to improve the informational environment as long as strategic incentives exist.<sup>16</sup> As a result, deals are not made, or the deals that are made are sub-optimal.

### C. Cognitive Barriers

A second kind of informational barrier also arises, which impedes the use of whatever information parties do manage to put forth (despite strategic incentives), because of what negotiation scholars call "cognitive biases." The insight here is based on psychological research showing that, in the

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create it leads to rational but ironically self-defeating strategic behavior. Dealing with this "negotiator's dilemma" is the task of the negotiator, but it is quite a difficult one, and the failure to "manage" the dilemma effectively often results in sub-optimal bargains, if not impasse. Lax and Sebenius base their work on earlier work on strategic bargaining and game theory by Schelling and Raiffa, see THOMAS C. SHELLING, *THE STRATEGY OF CONFLICT* (1960); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982), and subsequent refinements of that work by Walton and McKersie, see RICHARD E. WALTON AND ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965). Related to the work of Lax and Sebenius is a growing body of work in the field of game theory that models negotiating behavior under conditions of imperfect information. See, e.g., Peter C. Cramton, *Bargaining with Incomplete Information: An Infinite-Horizon Model with Two-Sided Uncertainty*, 51 REV. ECON. STUD. 579 (1984); Kalyan Chatterjee, *Incentive Compatibility in Bargaining Under Uncertainty*, 97 Q.J. ECON. 717 (1982); Roger B. Myerson, *Analysis of Two Bargaining Problems with Incomplete Information*, in *GAME-THEORETIC MODELS OF BARGAINING* 115 (Alvin E. Roth ed., 1985). This work in game theory, though more technical in form and presentation than that of Lax and Sebenius, suggests similar conclusions regarding the barrier effects of strategic behavior.

<sup>16</sup> Some scholars argue that strikes and lockouts provide examples of the serious problems that arise from the inability of negotiators to transcend strategic barriers. They suggest that a strike or lockout often represents the only way that labor or management can convey to the other side the seriousness of a position, because every other kind of statement made within the negotiation process is seen as a strategic maneuver and therefore unreliable. Strikes and lockouts thus become the only reliable "signals" negotiators can use as a last-resort means of communicating serious positions. See ROBERT WILSON, *NEGOTIATION WITH PRIVATE INFORMATION: LITIGATION AND STRIKES*, 11-13 (Stanford Center on Conflict and Negotiation Working Paper No. 43, 1994).

cognitive processes by which people assimilate information, there are regular and identifiable "departures from rationality" that lead to distortion and misinterpretation of the information received.<sup>17</sup> Negotiation scholars have shown that the same cognitive biases that operate elsewhere also affect the negotiation process.<sup>18</sup>

As an example, consider "loss aversion": In making decisions, individuals tend to give prospective losses more significance than prospective gains of actually equivalent value. Therefore, if taking an action would involve both getting something and giving something up, the object gained will seem less valuable than the object given, even if it is actually of equal or somewhat greater worth—because people tend to "feel the pain" of a loss more than they "feel the pleasure" of a gain. The action may therefore not be taken, despite its rational desirability, due to the cognitive distortion of value. In negotiation, loss aversion results in the reluctance of negotiators to make "trade-offs," even when an objective comparison shows

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<sup>17</sup> NEALE & BAZERMAN, *supra* note 10, at 41-43, point to the work of Kahneman and Tversky as the seminal work on "cognitive heuristics." See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124 (1974); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453 (1981). As Neale and Bazerman put it, "Kahneman and Tversky . . . provided critical information about specific, systematic biases that influence judgment; they also suggest that decision makers rely on . . . simplifying strategies, called cognitive heuristics, to make decisions, [whose] . . . use can sometimes lead to severe decision errors." NEALE & BAZERMAN, *supra* note 10, at 43.

<sup>18</sup> Some of the major work translating the insights on cognitive biases to the negotiation context has been done by Neale, Bazerman, Ross, Tversky and colleagues and students working with them. See, e.g., NEALE & BAZERMAN, *supra* note 10; Margaret A. Neale & Max H. Bazerman, *The Effects of Framing and Negotiator Overconfidence on Bargaining Behavior and Outcomes*, 28 *ACAD. MGMT. J.* 34 (1985); Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in *BARRIERS*, *supra* note 11, at 86 [hereinafter Bazerman & Neale, *Role of Fairness*]; Max H. Bazerman & J.S. Carroll, *Negotiator Cognition*, 9 *RESEARCH IN ORGANIZATIONAL BEHAVIOR* 247 (1987); Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS*, *supra* note 11, at 26; Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 *NEGOTIATION J.* 389 (1991); Lee Ross & A. Ward, *Psychological Barriers to Dispute Resolution*, 27 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 255 (1995); Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in *BARRIERS*, *supra* note 11, at 44; Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 *MICH. L. REV.* 107 (1994).

that each side would gain more than it is giving up in the trade.<sup>19</sup>

The barrier created by this and other cognitive biases is informational distortion.<sup>20</sup> Even the information that is revealed by the parties gets distorted as it is received and processed. Because of cognitive biases, each party is incapable of reading the information provided by the other side—including offers and demands—accurately and objectively. Therefore, each is likely to analyze this information with a false and distorted perspective that, once again, leads them to miss opportunities for deals entirely, or

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<sup>19</sup> See Mnookin & Ross, *supra* note 14, at 16–17; Kahneman & Tversky, *supra* note 18, at 54–59. In the literature, loss aversion is linked to a related cognitive bias called “framing.” In this cognitive pattern, people have different attitudes when choosing between two outcomes of equal value, one certain and one contingent, depending on whether the outcomes are viewed as potential gains or potential losses. When both outcomes are seen as gains, people tend to choose the certain outcome, i.e., they are risk-averse; but when both are viewed as losses, they tend to choose the contingent outcome, i.e., they are risk-seeking. In other words, despite the fact that the choices are objectively fixed, they will be seen and compared differently depending on whether the choice is framed as “certain gain v. contingent gain” or “certain loss v. contingent loss.” See NEALE & BAZERMAN, *supra* note 10, at 44–48; Korobkin & Guthrie, *supra* note 18, at 109, 129–138. This difference of interpretation can not be explained in rational terms; rather, the process of cognition seems to “trick” us into reacting differently to different frames—a point also evident in loss aversion. The consequences of the “framing effect” for negotiation can be very significant. For example, if a concession can be framed not as “giving up something of value,” but rather “reducing a liability,” loss aversion will be avoided. Likewise, if a settlement offer and possible verdict can both be framed as gains rather than losses, by comparison to the status quo, acceptance of the offer is more likely. See Mnookin & Ross, *supra* note 14, at 16–17.

<sup>20</sup> The example given in the text, loss aversion, is only one of many cognitive biases that have been identified and shown to affect the negotiation process as “barriers to settlement.” Some of the most important are: (1) framing, *see supra* note 19; (2) equity seeking (i.e., seeking outcomes that provide not merely gains but gains proportional to perceived past injustice done by others), *see Mnookin & Ross, supra* note 14, at 11–13; Bazerman & Neale, *The Role of Fairness, supra* note 18; Korobkin & Guthrie, *supra* note 18, at 142–150; (3) reactive devaluation (i.e., devaluing proposals or offers solely because they have been offered by an adversary), *see Ross, supra* note 18; Korobkin and Guthrie, *supra* note 18, at 150–160; (4) misattributional error (i.e. attributing others’ actions or proposals to evil motives rather than situational constraints, while seeing one’s own acts as wholly innocent), *see Mnookin & Ross, supra* note 14, at 13–15; and (5) judgmental overconfidence, (i.e., being overly optimistic about the likelihood of attaining outcomes that favor oneself), *see Mnookin & Ross, supra* note 14, at 17–18; Kahneman & Tversky, *supra* note 18, at 46–50. All of these biases can and do create barriers to negotiated settlement, in ways that can easily be imagined. Still other cognitive barriers are noted and discussed in NEALE & BAZERMAN, *supra* note 10, at 12, 48–77.

make deals that fail to realize all possible joint gains.

Together, strategic and cognitive barriers help explain why reaching negotiated agreement is difficult, no matter how skillful the negotiators. Impasses and sub-optimal bargains result because of decisions that are made with inadequate and unreliable information, which is further distorted through biased interpretive processes. And the strategic incentives and cognitive biases responsible for these informational barriers are very difficult for the parties themselves to change or transcend.<sup>21</sup>

#### IV. ONE ANSWER TO THE QUESTION: MEDIATION LOWERS THE BARRIERS TO SETTLEMENT

##### A. *The Scholars' Answer*

The obvious question that flows from the study of the barriers problem is: What can be done to eliminate or lower these barriers? What is striking is that negotiation scholars themselves place great hope in mediation as one potential solution to this problem. Their general suggestion is that

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<sup>21</sup> With regard to the difficulty of negotiators overcoming strategic barriers by themselves, Gilson and Mnookin discuss the problem in the context of lawyers' incentives to exchange or conceal information in the litigation process. See Ronald J. Gilson & Robert H. Mnookin, *Cooperation and Competition in Litigation: Can Lawyers Dampen Conflict?*, in BARRIERS, *supra* note 11, at 184, 192-211. Their discussion suggests that, in order to reduce strategic behavior in a particular negotiation, there must be some meta-framework surrounding the negotiation in which norms, rules or agreements are set regarding information exchange that everyone is confident will be followed by all sides. This might take various forms: a network of individual lawyer relationships, a "reputational market" for honesty, an unwritten code formed by large firms, judicial or professional rules and so on. What is obvious from the list itself is that these kinds of quasi-institutional frameworks are costly and difficult to establish, and defections from them difficult to police. As a result, it is unrealistic to expect negotiators to give up strategic behavior and rely on such frameworks to guarantee openness in information exchange. Lowering strategic barriers, in short, is hard for negotiators to do without a larger framework to rely on, and the larger frameworks are hard to create.

Regarding the difficulty of negotiators overcoming cognitive barriers themselves, one of the most telling indicators of this is Neale and Bazerman's discussion of whether "negotiator experience and expertise" helps them to correct cognitive biases. See NEALE & BAZERMAN, *supra* note 10, at 81-96. They review the evidence and conclude that it "paints a very pessimistic picture of the idea that experience will, in fact, eliminate decision biases." *Id.* at 86. Even training on how to avoid cognitive biases has not been much help: "Using extensive training to cure biases in decision making has met with only limited success." *Id.* at 94. Thus, negotiators, even after being made aware of cognitive biases and trained in how to avoid them, apparently find this very difficult to do for themselves.

## MEDIATION'S "VALUE-ADDED" FOR NEGOTIATORS

mediators' interventions can somehow reduce both strategic and cognitive barriers to settlement: They believe that mediators can take steps that will improve the information flow between the parties and the parties' sense of confidence in the reliability of the information provided. They also suggest that mediators can do things that will remove or reduce the parties' cognitive distortions of this information as they process it and make decisions.<sup>22</sup> The negotiation scholars themselves do not go into much detail regarding the specific practices mediators might follow to achieve these effects; rather, they suggest some general ideas that mediation researchers and theorists might develop further.<sup>23</sup>

However, even without all the details, this accumulated body of negotiation scholarship does offer a general answer to the question at the heart of our discussion: What is the value-added of mediation to negotiators; what does the mediator add or facilitate that the parties could not accomplish on their own? The study of strategic and cognitive barriers suggests a powerful answer. First, *mediators can help parties put more information on the table and ensure that it is more reliable* and less suspect than would be the case if the parties negotiated alone. As a result, parties can enrich their informational environment, gain greater clarity and then go ahead as they would in negotiation and make decisions for themselves—but on an improved information base. Second, *mediators can help parties perceive each other*—including past and present actions, attitudes, motivations and positions—*more fully and accurately* than they would if left to themselves. The parties can thus avoid responses in negotiation that are based upon false assumptions about one another stemming from cognitive biases.<sup>24</sup> The implication of the theory is that, with better information and less interpretive distortion (i.e., with the barriers lowered) settlements will be reached more often and on terms that come closer to optimality.

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<sup>22</sup> See LAX & SEBENIUS, *supra* note 9, at 172-176; Mnookin & Ross, *supra* note 14, at 22-24; NEALE & BAZERMAN, *supra* note 10, at 136-140.

<sup>23</sup> The fullest discussion is offered by LAX & SEBENIUS, *supra* note 9, at 172-176. For example, they suggest that a mediator can: (1) facilitate information flow and communication "[b]y acting as a selective conduit of information"; (2) "help a negotiator understand the interests and predicaments" of the other side; (3) "foster each negotiator's creativity" in putting forward novel proposals; (4) "reduce [their] vulnerability" to perceptions of weakness by the other side that lead to "excessive claiming"; and (5) "blunt conflict escalation . . . by enhancing trust [and] convey to each negotiator a more sympathetic understanding of his counterparts." *Id.* at 172-174.

<sup>24</sup> For suggestions along these lines by Lax and Sebenius, see *supra* note 23.

### B. *Putting the Answer in Practitioners' Terms*

What this discussion shows is that, according to one substantial body of scholarly work, mediation really does have added value for negotiators. It can help them achieve results that they cannot achieve for themselves by reducing the informational barriers that are inherent in unassisted negotiation. Thus, even good negotiators have something to gain from the assistance of a mediator.

As a practical matter, however, can this body of knowledge be conveyed to real-world disputants in a real case, who want to know why they need a mediator and why they cannot simply negotiate for themselves? To return to our scenario, how can the mediator respond to the questions posed there in a way that condenses this scholarly argument into a clear and concise answer for the parties and their lawyers?

The answer might run something like this:

You ask what a mediator would add to your negotiation process. Fair question. The answer is that she can help you understand your situation—and your options and each other—better and more fully than you do now, and better than you will if you continue working on your own. I say this because research and experience has shown that gathering reliable information and analyzing it accurately is much easier when parties are working with a mediator than when they are working alone. And if you understand the situation, options and each other more completely and accurately, you will be able to make better decisions on what you want to do—to see if there is a deal that can be made; if there is one, to see how to move towards making it; and if not, to see what your other options are. All this would be easier to see because of the increased clarity that a mediator can help you attain about the situation and each other. The bottom line: a mediator's assistance will help you make the best possible decisions for yourselves—which means a better chance of reaching settlement, and on better terms.<sup>25</sup>

### C. *Yet Another Question*

This answer—or something like it—gives the parties the basics of what negotiation theory says about mediation's value to negotiators. However, the answer itself immediately raises another question: Will disputants and lawyers really be impressed with this response? The gist of the answer is that a mediator will help improve the flow of information and reduce the

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<sup>25</sup> In the workshop role play on which our scenario is based, *see supra* note 2, the answer of the expert—played by Professor Leonard Riskin—followed very similar lines.

effects of false or biased assumptions. Will the prospect of such assistance really be viewed as valuable by practical negotiators interested in reaching a deal?

To put the point more sharply: Isn't it more likely that the kind of "assistance" parties might value, if they want any at all, is something quite different? For example, if they were told that a mediator would help them by predicting what the court would decide if they went to trial, or by providing expertise in problem-solving and identifying a solution good for both sides, or by overcoming resistance on both sides and giving them a firm "push" toward settlement—aren't these kinds of help more likely to be what negotiators are looking for?<sup>26</sup> Explaining that mediation will "enrich the decisionmaking environment" is fine in theory, but will this explanation seem relevant to the parties—to put it bluntly, will it "sell"? If not, then regardless of what the negotiation literature shows, it will not satisfy negotiators demanding to know what a mediator will do for them.

## V. SEARCHING FOR ANSWERS AGAIN: RECENT SCHOLARSHIP ON PARTY ATTITUDES TOWARD DISPUTE RESOLUTION PROCESSES

In effect, what we have just done is to shift the focus to a different question, although it is certainly related to the one with which we began. The new and broader question is: What are parties looking for, in general, when they are considering whether to bring an intervenor into their conflict? Even more broadly, what do parties most desire in a conflict handling

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<sup>26</sup> As noted above, *see supra* note 5, some mediators take an approach that involves this kind of prediction, advice-giving and even arm-twisting. *See, e.g.,* Kolb & Kressel, *supra* note 5, at 470-474, for one good summary of this approach. Presumably, one reason that some mediators follow this approach is that they believe this is what parties need and want. The view that this is so is indeed expressed by both mediators and by some lawyers. *See* Deborah M. Kolb, *William Hobgood: "Conditioning" Parties in Labor Grievances*, in *WHEN TALK WORKS*, *supra* note 5, at 149, 170-171 (citing comments by William Hobgood, a labor mediator, that "pretty early on, I get a feel for what a settlement will look like. You get a 'fix' on things because you've been there before. That's why the parties want you."); James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U.L. REV. 47, 68-71 (1991) (citing comments by a mediation program that attorneys complain if "the mediator assigned to their case was 'not pushy enough.' . . . [T]he attorneys had come to expect mediators who would 'hammer some sense' into the other side."). *See also, e.g.,* JAMES C. FREUND, *THE NEUTRAL NEGOTIATOR: WHY AND HOW MEDIATION CAN WORK TO RESOLVE DOLLAR DISPUTES* (1994); DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* (1996). As discussed in the text below, *see infra* text accompanying notes 27-45, other evidence suggests that what parties value in mediation is quite different.



process, with or without an intervenor? Or, to relate the broad question to our subject of mediation, what features do parties value in conflict handling processes that mediation can uniquely offer? These questions may seem to go beyond the scope of the topic at hand. However, a little reflection shows that this is not so. Indeed, the answers to these new questions will determine whether the above explanation of mediation's value to negotiators will have any salience to parties and lawyers, or whether it is just a nice piece of theory without practical relevance.

In looking for answers to this second set of questions, I want to point to another part of the literature of the field—the scholarship on party attitudes toward dispute resolution processes. There is a rich literature on this subject, including studies of party satisfaction with mediation and other processes, as well as research that tries to identify what *leads to* party satisfaction—what effects and features of processes parties value most. In numerous studies, researchers have interviewed and surveyed parties who have participated in different processes to determine levels of party satisfaction, rates of compliance with agreements or decisions and other post-process attitudes and effects. As is well known, the consistent finding of these studies is that mediation produces high levels of satisfaction and compliance, and that these levels are typically much higher than those generated by court processing of similar cases.<sup>27</sup>

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<sup>27</sup> See, e.g., Janice A. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes: Effectiveness and Limitations*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 31, 33-37 (Kenneth Kressel & Dean G. Pruitt eds., 1989) [hereinafter *MEDIATION RESEARCH*] ("Disputing parties typically . . . feel satisfied with the process and would return if a dispute arose in the future. [One study] found that 80-89 percent of disputants . . . were satisfied with the mediator . . . and the mediation process. Similar or slightly lower satisfaction rates were found [in four other studies]."); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH*, *supra*, at 9, 18-22 ("More than three-fourths of the . . . mediation clients [of two different programs studied] expressed extreme satisfaction with the process . . . . In contrast, only 40 percent of . . . respondents [in one study] were satisfied with the court process, and only about 30 percent of the [other] sample . . . ."); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11, 45-47 (1984) ("Our portrait of compliance and litigant satisfaction is much like that which emerges in other studies of small claims mediation, of custody mediation, and of mediation of neighborhood and interpersonal disputes. Rates of compliance and satisfaction are quite high in mediated cases and seem consistently higher than those reported in comparable adjudicated cases . . . ."). See generally ROGERS & MCEWEN, *supra* note 1, § 4:04, nn.28-29 and accompanying text (citing similar findings in studies of mediation of civil claims such as tort and contract actions). In most studies, the premise seems to be that increased rates of compliance are themselves linked to higher satisfaction levels,

More important to our discussion here are the research findings and theory on *why* mediation tends to produce high levels of satisfaction and compliance, especially by comparison to court procedures. These findings on this question are consistent across two different kinds of studies.

## A. Evaluation Studies

The first studies are evaluation studies of mediation itself, in which follow-up questions are asked of parties to elicit the reasons for their high satisfaction and compliance levels. Some of the most frequently given reasons are the following: mediation enabled the parties to deal with the issues they themselves felt important; it allowed them to present their views fully and gave them a sense of having been heard; it helped them to understand each other. Significantly, these and other commonly cited reasons relate to how the process worked rather than the outcome it produced.<sup>28</sup> Parties report high satisfaction levels with mediation, and for similar reasons, even in cases where no settlement was reached, and even when the parties "did worse" in mediation than they might have done in court—suggesting that settlement production per se, and even quality of outcome, are not what parties find most valuable about mediation.<sup>29</sup>

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although both may be linked to third variables such as perceptions of fairness, as discussed *infra* text accompanying notes 28-32. Many of the studies try to measure not only party attitudes but objective impacts of mediation, but those findings are not specifically relevant to the issue under discussion.

<sup>28</sup> See, e.g., Pearson & Thoennes, *supra* note 27, at 19 (noting that respondents cite all of these factors to explain their high satisfaction levels); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 254-260 (1981) (linking high satisfaction levels to parties' perception of "processual advantages" including: opportunities for free expression of emotions and feeling, closer attention to a range of issues dividing the parties, full involvement of the parties in shaping the agreement and reduction of polarization between parties—all of which also tend to produce higher rates of compliance).

<sup>29</sup> See, e.g., Joan B. Kelly & Lynn L. Gigy, *Divorce Mediation: Characteristics of Clients and Outcomes*, in *MEDIATION RESEARCH*, *supra* note 27, at 263, 278 (finding "substantial satisfaction among those who try but are unable to reach agreement"); Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in *MEDIATION RESEARCH*, *supra* note 27, at 394, 395-396 ("User satisfaction with mediation is typically 75 percent or higher, even for those who fail to reach a mediated agreement."); ROGERS & MCEWEN, *supra* note 1, § 4:04, n.29 and accompanying text ("Research . . . consistently shows that disputants come away well-satisfied with the experience even when mediation fails [to produce a settlement]."); McEwen & Maiman, *supra* note 28, at 254-260 (reporting that "winners" and "losers" both give mediation similar

## B. Procedural Justice Studies

The second group of studies is associated with "procedural justice" theory.<sup>30</sup> These studies use various research techniques to measure attitudes about consensual processes like negotiation, mediation and nonbinding arbitration, by comparison to impositional procedures like adjudication or binding arbitration, in real and hypothetical situations. Their findings show that *parties usually prefer the consensual processes, even where the outcomes they receive in these processes are unfavorable*. Moreover, the main reason for this preference is the value that disputants place on "process

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ratings on fairness); Michelle Hermann et al., *The Metrocourt Project Final Report* (Jan. 1993) (University of New Mexico Center for the Study and Resolution of Disputes) (finding that minority claimants, who seem to fare worse in mediation than in adjudication, nevertheless report greater satisfaction with mediation than with adjudication).

<sup>30</sup> The term expresses the view that subjectively perceived fairness is an important factor in assessing social procedures of all kinds. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 3-5 (1988). The early procedural justice literature focused in large part on studying disputant preferences for adversarial as opposed to inquisitorial adjudicatory procedures and maintained that disputants preferred the former because it gave them more "process control"—i.e., greater opportunity to put what they felt was important information before the judge. See generally John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1272-1273, 1287-1289 (1974); Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J., 258, 250-262 (1976). Part of the thesis was the premise that the ultimate concern of disputants was obtaining a favorable outcome, and higher degrees of process control were valued because they seemed likely to improve the chances of such an outcome. Thus, procedural justice was valued because it helped produce substantive (or distributive) justice.

A "second generation" of procedural justice scholarship has challenged this premise, arguing that process control is valued not only because of its presumed benefit in attaining favorable outcomes, but also because the experience of participation and expression is itself valued highly by disputants. See LIND & TYLER, *supra*, at 94-106, 206-217. Lind and Tyler, the foremost exponents of this view of procedural justice, describe numerous studies showing that, "the perception that one has had an opportunity to express oneself and to have one's views considered [i.e., process control] . . . plays a critical role in fairness judgments." *Id.* at 106. In fact, "virtually all of the studies of procedural fairness in dispute resolution" have shown that process control produces higher assessments of procedural fairness "even where subjects received negative outcomes." *Id.* at 97. Based on a wide array of research on procedure in areas ranging from management to governance to dispute resolution, Lind and Tyler conclude that high degrees of process control generate high levels of perceived fairness and satisfaction and that process control is valued because of the importance people place on being treated with dignity and having an opportunity to express themselves, independent of the ultimate outcome of the procedure. See *id.* at 206-217.

control," a term that includes both the opportunity for meaningful participation in determining the outcome of the procedure (whatever it may ultimately be) and the opportunity for full self-expression. Consensual processes like mediation and negotiation offer a greater degree of process control, and hence they are seen by parties as "subjectively fairer" and are preferred, regardless of whether they ultimately lead to favorable outcomes.<sup>31</sup> In other words, procedural justice research shows that parties care as much about how dispute resolution is conducted as they do about what outcome results; and consensual processes provide the "how" that parties value most.

## C. The Common Answer

Thus, when we examine why mediation generates high levels of party satisfaction and compliance, by comparison to court hearings, two distinct kinds of research—evaluation and procedural justice studies—tell us the same thing: Parties' favorable attitudes toward mediation stem largely from *how* the process works, and two features in particular are responsible. Those features are: (1) the greater degree of participation in decisionmaking that parties experience in mediation; and (2) the fuller opportunity to express themselves and communicate their views, both to the neutral and to each other, that they experience in the process.<sup>32</sup> Because of these features,

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<sup>31</sup> See LaTour et al., *supra* note 30, at 279-282; McEwen & Maiman, *supra* note 27, at 47; McEwen & Maiman, *supra* note 28; Tom R. Tyler et al., "Preferring, Choosing, and Evaluating Dispute Resolution Procedures: The Psychological Antecedents of Feelings and Choices" (American Bar Foundation Working Paper, 1993); Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 L. & HUM. BEHAV. 313 (1993); Stephen B. Goldberg & Jean M. Brett, *Disputants' Perspectives on the Differences Between Mediation and Arbitration*, 6 NEGOTIATION J. 249 (1990); Dean G. Pruitt et al., *Goal Achievement, Procedural Justice and the Success of Mediation*, 1 INT'L J. CONFLICT MGMT. 33, 42 (1990). In these and similar studies, disputants show a clear preference for processes with high levels of process control and prefer less autocratic, more consensual processes over those with the opposite character. See generally Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367 (1987).

<sup>32</sup> See, e.g., Pearson & Thoennes, *supra* note 27, at 18-29, where the authors conclude that "the degree of disputant participation may be the key distinction between mediation and adjudication . . . [I]n mediation, disputants retain the opportunity to shape settlements and to accept or reject them." *Id.* at 29. By contrast, they report that "the degree of control exercised by lawyers and judges [in the court process] seemed shocking to many." *Id.* at 20. Moreover, several studies of mediation programs show that when the kind of mediation offered by the program *lacks* the features mentioned in the text—and thus lacks real process control—satisfaction levels are very low. See, e.g., NANCY THOENNES ET AL., EVALUATION OF THE

parties find mediation highly valuable, even when no settlement is reached, and even when a mediated settlement embodies a less favorable outcome than they could have obtained in court.

There is thus a substantial body of research that answers our question about what parties value in dispute resolution processes. The most remarkable thing is what the answer is *not*. Despite what we might have thought, parties do not place the most value on the fact that a process provides expediency, efficiency or finality of resolution.<sup>33</sup> Not even the likelihood of a favorable substantive outcome is considered most important. Rather, an equally, if not even more highly, valued feature is "procedural justice or fairness," which in practice means the greatest possible opportunity for *participation* in determining outcome (as opposed to

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USE OF MANDATORY DIVORCE MEDIATION (1991) (reporting high levels of dissatisfaction among clients where mediation involved perceived pressures to settle and narrow focus of issues); Pearson & Thoennes, *supra* note 27, at 18-21 (reporting much lower satisfaction rates, by comparison to other programs studied, for a program where practice was more concerned with "expediting the processing" of cases than with providing opportunities for participation or expression).

<sup>33</sup> When explaining mediation to parties, placing emphasis on efficiency benefits is not only unnecessary—as pointed out in the text—but probably misleading. The reason is that while mediation and other ADR processes are often advocated on the grounds that they will provide the benefits of speed, cost savings, etc., there is still no clear evidence that this is the case. On the contrary, evidence is mounting that ADR processes have much more limited impact in these dimensions than originally expected. *See, e.g.,* John Barkai & Gene Kassebaum, *Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation*, 16 PEPPERDINE L. REV. 543, 557-564 (1989) (finding, based on one of the most extensive studies of a state court-ordered arbitration program, that time and cost savings, both public and private, were of limited and uncertain dimensions, even though settlements tended to occur earlier); Deborah R. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 273-275 (1986) (reporting similar findings from studies of programs in three states).

Much of this evidence concerns court-ordered nonbinding arbitration, but the picture may not be too different for mediation when more evidence is accumulated. Thus far, the evidence on mediation's "efficiency" impact is mixed. *See* Kressel & Pruitt, *supra* note 29, at 394, 398-399 (1989); ROGERS & MCEWEN, *supra* note 1, § 4:04 (accompanying text at nn.33-34), § 5:03 (accompanying text at nn.29-30), § 6:02; Marc Galanter & Mia Cahill, "Most Cases Settle" *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1356-1366 & n.105. The discovery that ADR's efficiency impacts may not be as great as expected is related to the realization that ADR processes are generally alternatives to negotiation, not trial—so that cost and time gains must be measured by reference to party negotiation. *See supra* notes 7-8 and accompanying text. Using this standard, the gains, even where they exist, may be modest rather than substantial.

## MEDIATION'S "VALUE-ADDED" FOR NEGOTIATORS

assurance of a favorable outcome), and for self-expression and communication.

### D. *The Answer in Practical Terms*

To frame the importance of these findings for our topic—mediation's value to negotiators—let us return to our initial scenario for a moment. Imagine that we revised the scene as follows: Before answering the parties' question about what a mediator would add, the expert asked them a question of his own: "Tell me, first of all, what is it that you really want most from whatever process is used to handle this situation? Knowing that will help me to answer your question." Now, we might have assumed that the parties would respond by saying: "We want whatever it takes to get this dispute over with, as soon as possible and as cheaply as possible." Or perhaps, "I want my rights enforced so that this project \_\_\_\_\_ [is stopped for good] [is allowed to proceed full force] (with the blank completed differently by each party)."

However, the research just described suggests that their response is unlikely to be either of the above options. Instead, each party would probably say, in some fashion:

Well, I do want to get this settled quickly, on reasonable terms. *But not* without my having real participation and control in the process—so that I am involved in making decisions, not just the lawyers and the judge; so that they're my decisions, and better decisions, and I'm more in control of the situation. Also, I want to be able to say what I want to say, and feel that I've really been heard—and hear something real from the other side as well. I want a chance to communicate, and not just hear legalese and debating points.

To this kind of clarification, the expert might then respond, "If this is what matters to you, then it's pretty clear that going to court or to arbitration will not meet your desires, because you won't get that kind of participation and communication in either forum. But now I can answer your question about mediation, because . . . ." The expert would then continue with his explanation of mediation's value as described earlier—which would now resonate with the parties' own expression of their preferences.

### E. *Another Question*

However, there is a weakness in this revised scenario: the party-attitude research described above, of both kinds, focuses on comparing adjudication, on the one hand, with consensual processes—including *both* mediation and

negotiation—on the other. This research may help answer questions about why disputants would prefer to use mediation rather than go to court. But that is not the question we are asking today; rather, the question is, why should they use a mediator rather than negotiate on their own? In short, does the party satisfaction and procedural justice research tell us anything useful about the comparison between mediation and negotiation?

## VI. WHAT MEDIATION HAS TO OFFER NEGOTIATORS: MORE OF WHAT THEY VALUE IN NEGOTIATION ITSELF

There are a number of ways to answer the above question. However, describing a recent study of “lawyered mediation”—mediation with both parties and lawyers present—seems a particularly good way to start because it offers some concrete answers that go right to the point.<sup>34</sup> This study looked at a court-ordered mediation program which allowed and encouraged lawyers to attend sessions with their clients, a somewhat unusual practice in such programs. Though some had predicted that lawyers would try to avoid attending mediations, it turned out that they attended willingly and regularly, and they seemingly found the process very productive.<sup>35</sup> In order to understand and explain these results, researchers studied the program and interviewed many of those involved, especially the lawyers who had participated in mediations.

One of the study’s major questions was: Why had these lawyers decided that mediation was useful and worth participating in? The answers the researchers received are directly relevant to the questions we are asking today about mediation’s value to negotiators. The study’s main finding is striking: The lawyers decided that mediation was useful because they saw it as “an improvement on negotiation.”<sup>36</sup> That is, these lawyers asked themselves the very same question we imagined parties asking in our scenario—“Can mediators add value to our negotiation process?”—and reached a positive conclusion.

The reasons they gave for this conclusion are even more striking. The lawyers valued mediation over unassisted negotiation because they found that:

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<sup>34</sup> See McEwen et al., *supra* note 8.

<sup>35</sup> Some have argued that encouraging lawyer attendance at mediations is problematic because they believe that lawyers will strongly resist attending mediations, and that when they do attend they will obstruct the process. See *id.* at 1351–1355. In fact, this program had the opposite result: the lawyers attended mediation sessions willingly; and not only were the lawyers not obstructive, but mediators and lawyers found each other’s contributions complementary and hence very productive. See *id.* at 1358–1373.

<sup>36</sup> See *id.* at 1371.

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- it structures the negotiation process in ways that lead to increased information becoming available to the negotiators, so that attorneys can better advise clients about what to do;<sup>37</sup>
- it increases clients' sense of participation in and control over their case, which is frequently attenuated in lawyer-lawyer negotiation;<sup>38</sup> and
- it "provides a setting for communication between the parties that settlement [negotiation] does not, a setting in which parties can and do discuss and explain needs and problems and express anger and disappointment . . . , not just exchange demands and positions,"<sup>39</sup> in which clients can feel that "another person has heard their side of the story[,] that the other side . . . has heard their side"<sup>40</sup> and in which "[suspensions and] misconceptions that clients tend to have about the other side" are cleared up.<sup>41</sup>

With these findings in mind, recall what the party satisfaction and procedural justice literature has shown about why disputants prefer consensual processes over impositional ones: the former offer greater opportunities for *participation* and *communication*. Both mediation and negotiation are preferred over court for this reason.<sup>42</sup> Here is the point: the lawyered mediation study shows that disputants find mediation "an improvement on negotiation" *for the very same reason*. That is, although both negotiation and mediation involve more and better party participation and communication than court proceedings, mediation provides even greater levels of both of these desired features than negotiation—and thus adds value to the negotiation process. This same conclusion can be reached by a theoretical analysis, but the concrete findings of the lawyered mediation study make it very clear. They confirm that just as the party-attitude research explains why parties prefer both negotiation and mediation to trial, it also explains why parties will value mediation over unassisted negotiation: because mediation offers more of the "process control" that parties value in consensual processes generally.<sup>43</sup>

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<sup>37</sup> See *id.* at 1369, 1381–1382.

<sup>38</sup> See *id.* at 1381.

<sup>39</sup> *Id.* at 1382–1383.

<sup>40</sup> *Id.* at 1383–1384.

<sup>41</sup> *Id.* at 1370.

<sup>42</sup> See *supra* notes 27–32 and accompanying text.

<sup>43</sup> Although this study concentrated on lawyers' views of mediation, it seems likely that the clients' views are very similar. It seems clear that lawyers found these features of



## VII. MEDIATION AS "ASSISTED NEGOTIATION": THE COMMON LESSON OF THE NEGOTIATION AND PARTY-ATTITUDE SCHOLARSHIP

It is important to acknowledge a seeming inconsistency between the two bodies of work that we have discussed today, particularly as they offer answers to parties' questions about mediation's value. According to the negotiation literature, mediation's value lies in the fact that it can increase the likelihood and optimality of settlement. On the other hand, the party-attitude literature shows that what parties *themselves* will see as valuable about mediation is *not* primarily its effects on settlement production or quality but rather its mode of operation (i.e., its high degrees of party participation and communication).<sup>44</sup> The question is this: Given the findings of party-attitude research on what parties value—process control, even more than outcome effects—do the conclusions of negotiation scholarship, about mediation's value in "lowering barriers to settlement," still make sense as part of an answer to parties' questions about the value of mediation?

In fact there is no fundamental inconsistency between these two bodies of work, and both are important sources for an answer to the question about mediation's value to negotiators. First, the procedural justice literature does not look at party valuations of dispute resolution processes as an "either/or" matter—either parties value process quality, or outcome effects, but not both. The literature suggests instead that party valuations are "both/and" in character: outcome effects (i.e., settlement production and quality) are valued by parties—but not solely or primarily; and process quality (i.e.,

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mediation valuable because their clients place importance on having better information, greater participation and fuller communication. In fact, many of the specific comments reported in the study make it clear that the lawyers valued mediation because it helped them satisfy clients better. See McEwen et al., *supra* note 8, at 1364–1373, 1378–1385. A number of the studies of mediation cited earlier also demonstrate that the two features mentioned in the text—participation and communication or expression—are what make mediation so attractive and satisfying to participants. See, e.g., Pearson & Thoennes, *supra* note 27, at 18–29; McEwen & Maiman, *supra* note 28, at 254–260. Both of these studies suggest that the more attention is given to these two dimensions of "process control," the more parties will value the process.

<sup>44</sup> The reason for this inconsistency is not hard to see. Negotiation scholarship, looking at the parties' process from the *outside*, assumes both that parties value outcome effects (settlement production and quality) and see how mediation can enhance them by lowering the barriers that impede the negotiation process. Party-attitude scholarship, looking at how parties view dispute resolution from the *inside*, finds that outcome effects are less important to them than process quality, and sees how mediation can improve the process quality of unassisted negotiation.

party participation and communication) is also valued—as much or even more so.<sup>45</sup> Therefore, parties should be responsive to explanations of mediation's value in terms of *both* outcome effects and process quality. The procedural justice and negotiation scholarship is thus consistent, although the emphasis of each is different. In particular, the important lesson of the procedural justice literature is that it makes no sense to frame explanations entirely in outcome terms and ignore or omit the process quality dimension—which is what some of the negotiation literature tends to do.<sup>46</sup>

Second, there are strong points of commonality between these two bodies of work, which teach an important lesson about mediation's value to negotiators. If we look at the specific kind of assistance that each body of work sees mediation as offering negotiators, there are strong correspondences between them.<sup>47</sup> For example, helping to lower strategic barriers by increasing information flow and quality corresponds in some degree to improving the quality of party participation and control. That is, when parties have minimal and unreliable information as a result of strategic maneuvering, this can be as destructive to the quality of party participation and decisionmaking as any intrusion by an outside force or authority. Improving the informational environment simultaneously improves the quality of participation. In similar fashion, helping to lower cognitive barriers by reducing bias in interpretation corresponds to improving the quality of interparty communication. To put it differently, mediation's assistance in lowering barriers to settlement simultaneously enhances procedural justice, and vice versa.<sup>48</sup>

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<sup>45</sup> See LIND & TYLER, *supra* note 30, at 203–220.

<sup>46</sup> In fact, in the major examples of the "barriers" literature cited earlier, *see supra* notes 9–14 and accompanying text, there is scarcely any reference to the notion that negotiators might value something other than obtaining an "optimal outcome." Indeed, some phenomena that might be seen, from the procedural justice viewpoint, as tied to the desire for process control—such as the desire to feel that one's grievance about a past injustice has been heard—are seen in the barriers literature primarily as obstacles to reaching an agreement. *See, e.g.,* Mnookin & Ross, *supra* note 14, at 11–13. The suggestion here is that a full explanation of how mediation can help with a phenomenon like "equity seeking" should mention how mediation can not only remove it as a barrier to settlement, but also satisfy it with the opportunity for expression and communication.

<sup>47</sup> Compare *supra* text accompanying notes 15–21 and *supra* text accompanying notes 27–33.

<sup>48</sup> Rogers and McEwen's discussion of how lawyers might explain mediation's value to clients implicitly confirms this point, by describing both kinds of potential impacts—barrier reduction and procedural justice enhancement—as benefits offered by mediation. *See* ROGERS & MCEWEN, *supra* note 1, § 4:04, text accompanying nn.1–32.

An important lesson can be derived from this commonality in the way two distinct bodies of scholarship conceptualize mediation's "added value" for the negotiation process. *Both* see mediators as adding value by *facilitating* and supporting the activities of the negotiators themselves—their information exchange, communication, deliberation and decisionmaking—rather than by exerting pressure, offering evaluative judgments or engaging in other kinds of directive interventions. Thus both support the practice followed in our original scenario of explaining mediation as assisted negotiation; and together they help clarify just what constitutes the assistance and why it is valuable to negotiators.<sup>49</sup> At the same time, they support the view that mediation need not be directive or judgmental to be genuinely valuable—a point I will return to in my conclusion.<sup>50</sup>

### VIII. THE CONCRETE MEANING OF "ASSISTED NEGOTIATION": THE IMPORTANCE OF "EMPOWERMENT AND RECOGNITION" TO MEDIATION PRACTICE

#### A. *The Picture Thus Far*

The foregoing discussion has focused on offering theoretical answers, based on research and scholarship, as to why negotiators should see mediation as valuable—with mediation defined, as in our original scenario, as facilitated or assisted negotiation. We have seen that the insights of two distinct bodies of scholarship are consistent and mutually reinforcing, and that they suggest two main theoretical answers to the question of mediation's value to negotiators:

- (1) the assistance mediation provides can help cure inherent problems in the negotiation process by improving the quality of information, communication and hence party decisionmaking; and
- (2) this kind of enhancement of negotiation is something that parties really value and want—not only or primarily because it produces better outcomes (though it probably will), but also because it simultaneously increases the "process control" that leads parties to prefer negotiation in the first place.

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<sup>49</sup> See *supra* note 5 and accompanying text.

<sup>50</sup> See *infra* text accompanying notes 57–71; see also *supra* note 5 and accompanying text.

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Thus, there is strong theoretical support for the statement that mediation as facilitated or assisted negotiation will be both genuinely useful and actually appealing to parties trying to negotiate resolution to conflict.

With the discussion of the lawyered mediation study, we moved from theory to reality. This study confirms that real-world negotiators see mediation as providing just the sort of "facilitation and assistance" the theory suggests it does. It also confirms that negotiators regard this assistance as a real added value. As other such studies are conducted, we can expect these conclusions to accumulate additional weight. Thus, looking back on our original scenario, and the mediator's explanation of what mediation has to offer, we see now that this explanation is based on a solid body of evidence about what negotiators need and want, and how mediation can provide it. It is not only a sound explanation, it is also one that should have real appeal to parties and lawyers.

### *B. Putting the Picture in a Different Light*

Now I want to throw a different light on the picture presented today, by reframing somewhat the conclusions reached thus far. Suppose we put the question that we have been examining in a slightly different form, by asking: What is the most important product or effect that mediation *uniquely* offers, *as an alternative to negotiation*, that parties to conflict in fact value? Based on the material reviewed today, it is clear that the answer is not greater speed, lesser cost, increased likelihood of settlement or even improved quality of outcome.<sup>51</sup>

Instead, we can say that the most important product that mediation provides (that other negotiation alternatives do not) is a *twofold, qualitative improvement* over the way the negotiation process works when unassisted. One dimension of this improvement is an *increased level of party participation in and control over decisions* made in the process. This includes, for each party, greater ability to acquire and exchange information and to analyze it accurately, as well as greater direct involvement in decisionmaking when lawyers or other agents are involved. The result is a qualitatively different deliberation and decisionmaking process, which enables parties to accept or reject terms of agreement with clarity, as they see fit, and thus to effectuate their desires in conflict situations more fully.

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<sup>51</sup> The emphasis here is on what mediation can offer that other negotiation alternatives cannot. So, for example, nonbinding arbitration or mini-trial may offer as much benefit as mediation in saving time and cost and in promoting settlement. If so, then these benefits are not unique products of mediation, and an explanation of mediation's value based on them would apply equally to other processes. Explaining mediation's value to negotiators means describing what mediation can *uniquely* offer them. See *supra* note 5.

Along with others, I have described this as the "value of self-determination" in mediation.<sup>52</sup> People value the experience of self-determination. They believe they know what is best for themselves and they want the opportunity to effectuate it, in conflict as in other aspects of their lives.<sup>53</sup> The evidence presented today shows that mediation provides that opportunity, to an even greater degree than negotiation.

The second way in which mediation improves negotiation is by *improving the character and quality of the communication that occurs between the parties* as human beings during the process. This includes an increased opportunity to present and receive a broad range of messages—verbal and nonverbal, rational and emotional—and, even more importantly, the reduction of all kinds of distortion and misunderstanding that otherwise tend to skew the interpretations that parties place on each other's statements and actions. In simple terms, conflict leads disputants to demonize each other, and mediation "de-demonizes" people to one another. Again, the evidence presented today suggests that parties value this "product" highly.

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<sup>52</sup> 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, 267-268 (1989); Bush, *supra* note 1, at 14; JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 245 (1984) (stating that the "overriding feature and redeeming value of mediation [is that] . . . it is a consensual process that seeks self-determined resolutions"); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 113-116 (1981). There is evidence that this value is gaining wider recognition. Recently, three major organizations—the American Arbitration Association, the Society for Professionals in Dispute Resolution and the American Bar Association—jointly adopted standards of conduct for mediators, the very first section of which declares: "Self-determination is the fundamental principle of mediation." MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (1995).

<sup>53</sup> When presenting the ideas discussed in this section, I am often challenged on the grounds that it is unrealistic to think that disputants are really interested in achieving greater self-determination or, as discussed just below in the text, greater ability to view others positively rather than negatively. The realistic view, it is said, is that disputants simply want their problem solved and their case settled, as quickly and cheaply as possible. I sometimes respond to this question by pointing to the lists of best-selling books featured regularly in major newspapers, and noting that two categories of books appear with great regularity on these lists: books on self-help and self-improvement, and books on communicating better and improving relationships with others. Clearly, large numbers of people buy books on these two topics—clearly related to the values discussed in the text—of their own free choice and expense. Although this is certainly not a scientific demonstration, I suggest that it raises doubts about the "unrealism" of the views expressed here about how people value self-determination and relating positively to others.

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People do not want to be regarded by each other, or even to regard each other, as demonic and ill-intentioned, and to relate to each other on the basis of such mutual negative characterization.<sup>54</sup> Mediation enables them to deal with a conflict without doing so, and even to find more positive ways of regarding each other, despite serious disagreement.

This way of describing the most valued products of mediation—in terms of the two important qualitative improvements it brings to the parties' experience of the negotiation process—raises one last set of questions. Mediation can increase self-determination and decrease mutual demonization in dispute handling better than any other process, including negotiation itself; and disputants value these effects so highly that they prefer processes that provide them. Therefore, why not design and practice an approach to mediation that aims at producing these valued effects *intentionally and directly*, instead of one that produces them accidentally, if at all? Why focus mediation practice solely on the objective of speedily and cheaply reaching a settlement—or reaching a good, creative, fair or optimal settlement? If these were the only valued products of mediation, it might make sense for mediators to focus on arm twisting, case evaluation, deal-making or problem-solving.<sup>55</sup> But the evidence suggests that there are other products of the process that parties value equally or even more highly. Therefore, why shouldn't mediators focus their practice on providing those products?

### C. "Empowerment and Recognition" in Mediation Practice

These questions point to the importance of what my colleague Joe Folger and I have called "empowerment and recognition" in mediation practice.<sup>56</sup> These two concepts relate directly to what are described here as mediation's most valued products. The thrust of the work that Folger and I, and others, have been doing is to articulate an approach to mediation that is explicitly focused on providing these products. In that approach, mediators focus on two kinds of activities.<sup>57</sup>

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<sup>54</sup> See *supra* note 53.

<sup>55</sup> There is considerable evidence that a large majority of mediation practitioners focus solely or primarily on these objectives and use one or more of the approaches to practice described in the text. See BUSH & FOLGER, *supra* note 5, at 33–68, for a review of some of this evidence.

<sup>56</sup> See BUSH & FOLGER, *supra* note 5, at 84–112; Bush, *supra* note 52, at 267–275; Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* — (forthcoming 1996).

<sup>57</sup> The brief summary given in the following paragraphs is based on a much more extensive description and explanation of this approach to mediation—which we call the

First, they focus on supporting—and not supplanting—the parties' own deliberation and decisionmaking 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 environment, clarify and consider their own goals, options and preferences and make decisions for themselves. This is what we have called the practice of fostering empowerment in mediation.<sup>58</sup> 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 perspectives 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,<sup>59</sup> and it relates directly to the enhancement

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“transformative approach”—published elsewhere. See BUSH & FOLGER, *supra* note 5; Folger & Bush, *supra* note 56. The term “transformative” is meant to reflect that fact that, when mediation practice follows this approach, participants can experience changes and improvements not only in the situation that gave rise to the conflict, but also in their personal capacities for self-determination and relating positively to others. As noted above, see *supra* notes 53–54 and accompanying text, our view is that disputants are interested in both kinds of change or transformation. Others have also been striving to articulate and develop this sort of approach to mediation, whether or not using the exact same terms. See, e.g., Sally Ganong Pope, *Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition*, 13 MEDIATION Q. \_\_\_\_ (forthcoming 1996); Trina Grillo, *Respecting the Struggle: Following the Parties Lead*, 13 MEDIATION Q. \_\_\_\_ (forthcoming 1996); Albie Davis, *The Logic Behind the Magic of Mediation*, 5 NEGOTIATION J. 17 (1989). See generally Kolb & Kressel, *supra* note 5, at 466–468, 474–479.

<sup>58</sup> The parties' exercise and strengthening of their capacity for self-determination, through making such choices, is what we mean by the empowerment effect of the mediation process. See BUSH & FOLGER, *supra* note 5, at 85–89, 95–96; Folger & Bush, *supra* note 56. Mediators foster empowerment by supporting party deliberation and decision making throughout a mediation session. For concrete examples of the kinds of specific practices involved, in a case study, see BUSH & FOLGER, *supra* note 5, at 139–188.

<sup>59</sup> The parties' exercise and development of their capacity for self-transcendence,

of interpersonal expression and communication, and de-demonization, that is also identified here as a highly valued product of mediation.

If mediation practice follows an approach centered around fostering empowerment and recognition, the effects or products of the process will be precisely the ones that research shows are valued most by disputants. First, parties will experience increased self-determination in dealing with the dispute at hand. We suggest also that this will contribute to an increased capacity for self-determined decisionmaking in the future. Second, parties will experience improved, de-demonized communication with one another. Again, we believe that this experience will lead to an increased capacity for the same kind of enhanced communication in future situations. Finally, and primarily because of the first two effects, there will also be an increased likelihood that parties' specific concerns will be resolved on terms that they themselves see as fit and desirable, if such a resolution is at all possible. If it is not possible, it will be because the parties themselves have decided that their best options lie elsewhere. In other words, the parties may decide that they have a "BATNA" outside of mediation that they want to pursue—a decision which is itself a crucial exercise of self-determination.<sup>60</sup>

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through giving consideration to the other party's diverse perspective, is what we mean by the recognition effect of the process. See BUSH & FOLGER, *supra* note 5, at 89–94, 96–97; Folger & Bush, *supra* note 56. Mediators foster recognition by supporting party perspective-taking at all points in a mediation session where parties choose to engage in this effort. For concrete examples of the kinds of specific practices involved, in a case study, see BUSH & FOLGER, *supra* note 5, at 139–188.

<sup>60</sup> The term "BATNA" stands for "best alternative to negotiated agreement" and was popularized by Fisher and Ury. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 97–106 (2d. ed. 1991). In effect, the BATNA represents a party's freedom to reject a proposed settlement, and this freedom represents the best guarantee that mediation will not be used to oppress parties in weaker positions. See BUSH & FOLGER, *supra* note 5, at 275–276. Allowing and encouraging parties to pursue their BATNAs, where they think it appropriate, is one of the ways—among others—that empowerment-centered mediation avoids the risk of unfairness that some have rightly seen in mediation. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).



To return one last time to the imagined scenario of the parties and the mediation expert: The expert's statement that mediation is facilitated or assisted negotiation naturally evokes the question, "Exactly what kind of assistance or facilitation are you talking about?" A satisfying answer to this question must describe a form of help that is both valuable to and valued by negotiators. Based on all of the foregoing discussion, I suggest that *fostering empowerment and recognition is precisely the kind of assistance that negotiators need and value*. In other words, empowerment and recognition logically belong at the center of the practice of mediation as assisted negotiation.<sup>61</sup> When they are placed there, then the process will be as useful and attractive to its potential users as the theory suggests it should be.<sup>62</sup>

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<sup>61</sup> For a more detailed discussion of what empowerment-and-recognition-centered mediation might look like, see BUSH & FOLGER, *supra* note 5, at 99-226; Folger & Bush, *supra* note 56. In the second source, we identify ten specific practices that mediators following this approach regularly employ and that mediators following a more evaluative or directive approach typically do not.

<sup>62</sup> The dimensions of value described here are framed primarily in terms of "process control" benefits—participation, communication, self-determination and de-demonization—whose value to parties is evident from the party-attitude literature. However, it is important to realize that these dimensions relate very directly to other measures of value that have long been described as benefits to participants in mediation. For example, the ability to reach "creative solutions" to specific problems has long been cited as an important benefit of mediation. See, e.g., Riskin, *supra* note 1, at 32-35. There is an obvious connection between the process-related value of participation and the benefit of creative solutions, which is likely to emerge from such participation.

Similarly, the ability to preserve or restore important relationships has also been cited as one of mediation's important benefits to parties. See, e.g., Sander, *supra* note 6, at 33-35; Riskin, *supra* note 1, at 120-124. The process-related value of de-demonization is, again, clearly connected to the production of this benefit beyond the process itself. Thus, there is a direct correspondence and continuity between the explanation of mediation's value advanced in this essay, and other descriptions of mediation's benefits to parties. The advantage of the argument developed here is that it relates directly to "products" that disputants *themselves* have identified as highly desirable, rather than to benefits that seem to some outside observer to be things that parties "ought" to consider valuable.

Another point worth noting concerns the view advanced by some procedural justice theorists regarding *why* parties value process control so highly. Lind and Tyler argue that the reason is not related to parties' concern for instrumental gain, but rather to their desire for social connection and belonging. See LIND & TYLER, *supra* note 30, at 221-242. Although I concur with their view that individuals' values are not adequately explained by instrumentalist theories of human nature and motivation, I suggest that there may be another explanation beyond the desire for social connection. Folger and I have argued, based on work by others,

IX. WILL IT PLAY IN PEORIA AND ON PARK AVENUE?: THE  
VIABILITY AND VALUE OF DIFFERENT APPROACHES TO MEDIATION  
PRACTICE

This conclusion has direct relevance to a controversy that is going on within the mediation field today, over the viability and value of different approaches to practice. Within this discussion, supporters of an empowerment-and-recognition-centered approach have met with the criticism that this form of mediation ignores what disputants primarily need and want—which, the critics say, is the resolution of conflicts (on fair and optimal terms, some would add).<sup>63</sup> As these writers see it, in order to reach the desired goal of (fair and optimal) resolution, mediation practice necessarily and properly involves, in most contexts, a certain degree of evaluation, direction and even application of pressure by the mediator.<sup>64</sup>

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including Gilligan, see CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982), that moral development is also a primary force in human motivation. See BUSH & FOLGER, *supra* note 5, at 242–251. According to this view, people make choices, including choices about how they want to deal with conflict, out of a desire to develop and enact their capacities for morally superior forms of awareness and behavior. In short, people want, if possible, to act with both strength and compassion, and they value social processes that give the chance, and help them, to do so. See *id.* Mediation can be one such process, and this may explain its attractiveness.

<sup>63</sup> See James Boskey, Book Review, THE ALTERNATIVE NEWSLETTER, Mar. 1995, at 22, 23 (reviewing ROBERT A. BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994)); Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 233–238, 240 (1995) (reviewing ROBERT A. BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994); DEBORAH M. KOLB & ASSOCS., WHEN TALK WORKS: PROFILES OF MEDIATORS (1994); THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES (Sally Engle Merry & Neal Milner eds., 1993)).

<sup>64</sup> See Menkel-Meadow, *supra* note 63, at 225–230; Boskey, *supra* note 63, at 23. Menkel-Meadow includes “evaluative” and “activist or accountable” mediation within her description of viable “models of mediation” and “diversities of practice.” See Menkel-Meadow, *supra* note 63, at 228–230. She also points approvingly to descriptions of the work of one particular mediator, Lawrence Susskind, who is profiled in WHEN TALK WORKS, *supra* note 5, one of the books included in Menkel-Meadow's review. From the description of Susskind's work there, see John Forester, *Lawrence Susskind: Activist Mediation and Public Disputes*, in WHEN TALK WORKS, *supra* note 5, at 309; Kolb & Kressel, *supra* note 5, at 470–474, 479–483, and indeed from Susskind's own writing, see Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981), it is clear

Moreover, in this view, this kind of "evaluative" practice is what parties expect and want from mediators.<sup>65</sup> Therefore, if mediators focus on merely "facilitating" party deliberation, decisionmaking and communication—that is, on fostering empowerment and recognition—either they will have no clients, or they will be pushing upon clients a "service" that is neither needed nor wanted. Empowerment and recognition are thus portrayed as "an agenda" being pursued by some mediators, for various reasons, which is of no real interest to most disputants.<sup>66</sup>

The research and scholarly evidence reviewed today strongly suggest that this critique is misinformed and misguided. The evidence shows clearly that disputants place great value on the degree and quality of participation, expression and communication afforded them in mediation—as much or more value, in fact, than they place on substantive outcome. The evidence also shows that what negotiators need most, to overcome the kinds of informational barriers that confront them, is help in acquiring reliable information and analyzing it accurately, so that they can make better informed and sounder decisions. All of this strongly suggests that mediators who focus on fostering empowerment and recognition will not only attract clients, but also send them away satisfied—whether or not a settlement is achieved. In other words, this approach to practice is both practically (and commercially) viable and substantively valuable; and those who would dismiss or marginalize it are simply ignoring a wealth of evidence about what negotiators need and value.<sup>67</sup>

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that the kind of mediation he practices and advocates includes, at certain times, a considerable measure of evaluation, direction and pressure.

<sup>65</sup> See *supra* note 5; *supra* note 26 and accompanying text.

<sup>66</sup> Both of the critics cited above make these suggestions, implicitly or explicitly. See Boskey, *supra* note 63, at 23; Menkel-Meadow, *supra* note 63, at 235-237.

<sup>67</sup> The claim that disputants will find this approach to mediation attractive and satisfying is not merely a theoretical proposition. Many of the studies cited earlier, in their detailed reports of what parties to mediation find most valuable, describe practices and impacts that relate directly to either empowerment or recognition. See, e.g., Pearson & Thoennes, *supra* note 27, at 19-21, 24, 29; McEwen & Maiman, *supra* note 28, at 254-260; McEwen et al., *supra* note 8, at 1364-1373, 1378-1385.

Those who claim that empowerment-and-recognition-centered mediation is not what disputants want may also claim that the evidence of party preferences reviewed here is not persuasive, because parties' subjective views of value are not necessarily objectively valid. That is, parties may suffer from a "false consciousness" that prevents them from realizing what is really of greatest value to them. See LIND & TYLER, *supra* note 30, at 4; Galanter & Cahill, *supra* note 33, at 1357-1359. Such an argument, whatever its factual validity, would be ironic coming from the critics of the approach to mediation advocated here. One of their strongest objections to this approach has been that it imposes on the parties an outsider's view

Indeed, that evidence might even be read to suggest that it is the evaluative approach to practice that negotiators neither need nor want. To the extent that evaluation and other techniques can be and are used purely to enrich the informational environment—without any accompanying direction and pressure on parties—it is possible that these techniques could be useful ways to “assist negotiation.”<sup>68</sup> However, evaluation can easily turn into direction and pressure, and there is considerable evidence that, in practice, it often does.<sup>69</sup> The literature reviewed here shows that, where this happens, the corresponding reduction of party control and self-determination will reduce satisfaction—even if settlement results—because of the value parties place on process control. In fact, the general implication of the research is clear: The more mediators use directiveness and pressure, and the less attention they give to enhancing party decisionmaking and interparty communication, the less parties will be attracted to and satisfied by the process.<sup>70</sup>

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of what is important—empowerment and recognition rather than settlement. *See, e.g.,* Boskey, *supra* note 63, at 23; Menkel-Meadow, *supra* note 63, at 236–238. Once the evidence is put forth that parties themselves do value empowerment and recognition—which correspond to expressed procedural justice preferences—it would be ironic to dismiss this evidence itself on the grounds that parties do not really know what is good for them. Thus, the critics cannot have it both ways. If parties’ preferences should count—as they indeed should—then so should evidence of what those preferences are.

<sup>68</sup> A suggestion was made by Dean Nancy Rogers, in response to the argument presented here, that many parties may prefer a non-coercive evaluative approach to mediation to a facilitative, empowerment-and-recognition-centered approach. In fact, the findings of the party-attitude studies made thus far do not tell us which of these approaches parties find preferable, for two reasons. First, the studies made thus far have not distinguished between these two approaches in surveying or interviewing parties to mediation. Second, it is not clear that sufficient numbers of practitioners of both approaches could be found, so that a valid study of their clients’ attitudes could be made. This argues for expansion of these approaches to practice, at least to the point where a broad enough base for valid study exists.

<sup>69</sup> For a review of some of the literature related to this point, see BUSH & FOLGER, *supra* note 5, at 63–75. *See also* Alfini, *supra* note 26, at 66–75; ROGERS & MCEWEN, *supra* note 1, §§ 7:04–7:05. The latter is an extended discussion of settlement pressure in mandatory mediation.

<sup>70</sup> *See, e.g.,* THOENNES ET AL., *supra* note 32 (reporting high levels of dissatisfaction among clients where mediation involved perceived pressures to settle and narrow focus of issues); Pearson & Thoennes, *supra* note 27, at 18–21 (reporting much lower satisfaction rates, by comparison to other programs studied, for a program where practice was more concerned with “expediting the processing” of cases than with providing opportunities for participation or expression); McEwen & Maiman, *supra* note 28 (reporting high rates of perceived unfairness in sessions where parties felt heavily pressured by mediators to reach

Thus, mediation practice need not and should not focus on settlement production, and mediators do not have to "sell" their expertise as evaluators, deal-makers or problem-solvers. Instead, they can confidently advertise, and provide, the product that negotiators need and value most: assisted negotiation—in which fostering empowerment and recognition are central elements. In fact, for practitioners of empowerment-and-recognition-centered mediation, the evidence reviewed here suggests useful new ways to describe the assistance they can offer. In mediation with this approach, the value-added for negotiators is clear and simply stated: it enhances the quality of both party decisionmaking and interparty communication, which themselves lead to better quality outcomes—whether or not in the form of settlements.

In sum, those who support or engage in the practice of mediation as assisted negotiation need not be hesitant or doubtful about the value of the service they are providing. They have solid answers to the questions that may be asked about the value of their service—whether those questions come from parties, lawyers or others within and beyond the mediation field.<sup>71</sup>

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agreement).

<sup>71</sup> As stated at the outset, this discussion has focused on how to explain to negotiators themselves the value of mediation as "assisted negotiation" has to offer. The value focused on here has thus been private value to the parties, as they themselves define it. The argument was developed that mediation's ability to foster empowerment and recognition, which directly relates to the kind of process control that parties demonstrably value in dispute resolution, is a benefit that negotiators will readily understand and appreciate when it is properly explained to them. The exclusive focus here on private benefit, however, in no way implies that the fostering of empowerment and recognition in mediation has no public benefits. For a discussion of the very important public benefits of an empowerment-and-recognition-centered approach to mediation, see BUSH & FOLGER, *supra* note 5, at 28-32, 229-259; Bush, *supra* note 1.