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# ORIENTING TOWARD PARTY CHOICE: A SIMPLE SELF-DETERMINATION TOOL FOR MEDIATORS

*Robert A. Baruch Bush\* and Dan Berstein\*\**

## INTRODUCTION

Across every approach to mediation practice, self-determination—the right of the parties to make their own decisions about all aspects of the mediation process—is seen as a robust ethical standard and an essential foundation for a quality process. Inside the mediation field’s big tent of divergent philosophies, virtually all mediators are united by their universal desire to honor party choices. Yet we often have trouble operationalizing this core principle. In this article, we quickly review why choices matter and how practitioners may inadvertently compromise them. Then we share a method for orienting mediation sessions toward party choices. We conclude with a practical, user-friendly tool that can help any mediator adopt a choice lens, as described below, when they practice.

## I. WHY PARTY CHOICES MATTER

There is a plethora of perspectives about why empowered choices are vital to mediation and life outside of it.<sup>1</sup> For the purposes of succinctly demonstrating its import, this paper will briefly explain why party self-determination is an ethical duty and how it functions as a means of empowerment.

### *A. An Ethical Duty*

Though there are diverse approaches to mediation practice, self-determination is a core ethical obligation that is consistent across all of them. The American Bar Association, American Arbitration Association, and Association for Conflict Resolution have codified this as the first ethical standard for mediation, defining it as the

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1. See, e.g., Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of the Partnership*, 19 CLINICAL L. REV. 429, 447–52 & nn.49–51, 58–64 (2013) (discussing these “life benefits” beyond mediation).

“act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”<sup>2</sup> The Model Standards stress that these choices can be exercised at any stage or any moment during the mediation.<sup>3</sup>

Fundamental to mediation is this ethical imperative that mediators support party choices at every opportunity throughout the process. Indeed, mediation is the only third-party process in which the parties, rather than the third party, are the decision-makers. This is the distinguishing feature of mediation as a dispute resolution process, so supporting party decision-making is central to the role of the mediator.<sup>4</sup>

### *B. A Means of Empowerment*

Self-determination is more than just an ethical standard—it is also a known mechanism for empowerment. Deci and Ryan popularized self-determination theory, summarizing how people achieve empowerment and growth through intrinsically motivated behaviors decided without external interference, with an understanding that the act of making these choices satisfies key human needs for autonomy, competence, and relatedness.<sup>5</sup>

Beyond professional mediation ethics, self-determination is also widely understood as a means of supporting motivation, growth, and empowerment.<sup>6</sup> For this reason, it is a key value and practice across a diverse array of fields and applications beyond our world of conflict resolution and mediation.<sup>7</sup> In our classes and trainings, we emphasize that when parties exercise their capacity for self-determination, they shift out of the experience of weakness and indecision that often accompanies conflict, and move to a sense of their own strength and competence—which is the practical meaning of empowerment.<sup>8</sup>

## II. HOW WE COMPROMISE SELF-DETERMINATION

Despite self-determination being a core ethical standard for mediators, practitioners still often inadvertently compromise it. This happens for several reasons, including unconscious biases, competing values, and simple human error.

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2. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard No. 1 (AM. ARB. ASS'N, AM. BAR ASS'N & ASS'N FOR CONFLICT RESOL. 2005).

3. See, e.g., Robert A. Baruch Bush, *A Pluralistic Approach to Mediation Ethics: Delivering on Mediation's Different Promises*, 34 OHIO ST. J. DISP. RESOL. 459, 505–08 (2019) (though not binding in themselves, the Model Standards are widely seen as authoritative in the field, and they have been adopted by some jurisdictions as binding on mediators practicing there).

4. See Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253, 262–70 (1989).

5. Edward Deci & Richard Ryan, *Self-Determination Theory*, in 1 HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY 416, 416–436 (Paul A.M. Van Lange et al. eds., Sage Publ'ns Ltd., 2012); see also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* at 59–63, 250–56 (Jossey-Bass rev. ed. 2005) (relating the value of empowerment in mediation to research and theory in many fields, including political philosophy, developmental psychology and social psychology).

6. See Deci & Ryan, *supra* note 5, at 416–436; see also discussion *infra* note 7.

7. See Bush, *supra* note 1, at 447–52 & nn.49–67 (2013) (for a discussion of how empowerment is given importance in other fields).

8. See BUSH & FOLGER, *supra* note 5, at 51–59, 131–214 (Jossey-Bass rev. ed. 2005) (describing this phenomenon in detail).

### A. Unconscious Bias

Recent research has shown that people are not conscious of their implicit biases that may affect their attitudes, thoughts, and behaviors resulting in prejudice, stereotypes, and discrimination.<sup>9</sup> Though a common impulse has been to provide bias awareness trainings to help practitioners surface these thinking problems and correct them, studies have demonstrated that these trainings are often ineffective at changing behaviors because many unconscious biases still remain.<sup>10</sup> The trainings increase knowledge about bias, but the biases nonetheless persist and may lead mediators to supplant party decision-making (for example, in order to prevent what they perceive as unfairness to one side).

Our awareness of the permanence of discriminatory biases despite best efforts for training suggests that mediators are likely to unwittingly compromise self-determination in the absence of some procedurally fair processes and techniques that could help them stay oriented toward party choices despite the inevitable biases that arise along the way.

### B. Competing Values

While self-determination is recognized as a core value by most mediators, it is not the only value that animates mediators' practices. Other values also weigh heavily in the minds of many mediators and can distract them from supporting party choices. Many research studies document the ways in which some mediators exert influence on party choices in order to achieve settlements, or to ensure that settlements are just.<sup>11</sup> In addition, some mediators may become so focused on fostering understanding or reconciliation that they end up overriding party preferences in the name of promoting understanding, empathy, and reconciliation.<sup>12</sup> In sum, other values often work to weaken or confuse a mediator's focus on preserving party self-determination.

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9. Nao Hagiwara et al., *A Call for Grounding Implicit Bias Training in Clinical and Transitional Frameworks*, 395 LANCET 1457, 1457–60 (2020).

10. See Ivuoma N. Onyeador et al., *Moving beyond Implicit Bias Training: Policy Insights for Increasing Organizational Diversity*, 8 POL'Y INSIGHTS FROM BEHAV. BRAIN SCI. 19, 20; see also MARGARET A. NEALE & MAX H. BAZERMAN, COGNITION AND RATIONALITY IN NEGOTIATION 81–96 (1991) (regarding the limited success achieved by “training” parties to resist or overcome biases in negotiation).

11. See Deborah M. Kolb & Kenneth Kressel, *Conclusion: The Realities of Making Talk Work, in WHEN TALK WORKS: PROFILES OF MEDIATORS* 459, 468–70 (1994); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT. RESOL. 117, 137–38 (2004); see also JONATHAN G. SHAILOR, EMPOWERMENT IN DISPUTE MEDIATION: A CRITICAL ANALYSIS OF COMMUNICATION 48 (1994) (reporting based on findings of detailed case studies of three mediations that, for two out of the three mediators studied, “everything the mediators do is geared toward ... the procurement of mediation's product – an agreement,” and noting that mediators created their own meaning of a “good agreement”). But see Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: The “Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 870–71 & nn.38–40 (2008).

12. See John Paul Lederach & John Kraybill, *The Paradox of Popular Justice: A Practitioner's View, in THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 357, 358–63, 369–70 (Sally Engle Merry & Neal Milner eds., 1993); MARK S. UMBREIT, *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE* 137 (1995). See generally Jennifer Michelle Cunha, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283, 292–93 (1999) (discussing pre-European Maori law).

### C. Human Error

Human beings are imperfect. We all make mistakes. Without having clear structures or procedures to reduce practitioner fallibility, human errors can balloon into serious problems.

This realization was well-documented in Atul Gawande's work popularizing the use of simple checklists to reduce the risk of catastrophic error in hospitals and beyond.<sup>13</sup> Gawande cites the example of highly trained doctors in intensive care units (ICUs) triggering accidental problems due to the routine mistakes that occur when various staff are engaging in hundreds of daily tasks when a patient is hospitalized. Gawande shares how Peter Pronovost was able to reduce the ten-day line infection rate from 11 percent to zero by implementing a five-step checklist for very basic prevention steps, and by authorizing nurses to check-in if these steps were missed. Later, Pronovost replicated these findings in hospitals in Michigan, continuing to demonstrate the value of checklists.<sup>14</sup>

The techniques on the checklist were basic and commonly known but the tool supported memory recall and highlighted the minimum necessary steps that often could inadvertently get overlooked in the process. Gawande's book, *The Checklist Manifesto*, makes the compelling case that people in all fields can similarly reduce destructive mistakes by using simple checklists.

If a mediator is dealing with complicated situations, or just having a bad day, human error and other factors can creep in and impede their ability to stay oriented toward party choices. For instance, mediators may find themselves stepping in to push for a possible settlement simply because they are too tired or emotionally triggered to remain disciplined in allowing the parties to make their own decisions. This article adapts the checklist mentality to a mediation discourse that can become as complex as the hundreds of interconnected actions and events that occur every day in ICUs. Just as line infections are a preventable risk in hospital settings, compromised self-determination can be mitigated in mediation if we develop some user-friendly reminders of the field's most essential core value.

## III. A METHOD FOR ORIENTING PRACTICE TO PARTY CHOICES

Below we share a method we used to distill the basic, commonly known actions that manifest party self-determination in mediation, just as Peter Pronovost gathered the five core steps for preventing ICU infections. Our process began by reviewing transcripts of mediations to sift through their complexity and distill core elements that help mediators to notice party choices.<sup>15</sup>

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13. Atul Gawande, *The Checklist*, NEW YORKER, (Dec. 2, 2007), <https://www.newyorker.com/magazine/2007/12/10/the-checklist>; ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2011).

14. See Peter J. Pronovost et al., *Improving Patient Safety in Intensive Care Units in Michigan*, 23 J. CRITICAL CARE 207, 207–16 (2008); Brigitte M. Hales & Peter J. Pronovost, *The Checklist—a Tool for Error Management and Performance Improvement*, 21 J. CRITICAL CARE, 231–35 (2006).

15. Often, analyses of mediation sessions are based on summaries or recollections that lack significant details about what was said or what occurred during the session. Transcripts are far more detailed, complete and accurate, and they allow for much greater precision in analyzing both party comments and mediator interventions. Case transcripts are used in teaching student mediators by one of the authors of

### *A. Distilling Empowered Choices from Transcripts*

Self-determination can often feel like a lofty value to achieve as a practical matter, so we looked for a rigorous process to analyze mediation discourse and uncover concrete ways to operationalize this pivotal ethical standard.

This work builds on a discourse analysis approach for mediation pioneered by Della Noce, Antes, and Saul.<sup>16</sup> In their research, they developed an Interactive Rating Scale Assessment as part of quality assurance efforts for the field of mediation. Their work was originally part of the Practice Enrichment Initiative funded by the Hewlett Foundation and Surdna Foundation. It relied on discourse analytic research to isolate the “discourse strategies” used by mediators and collect, code, and analyze the methods used in the mediation session.<sup>17</sup> Their work coalesced the codable “moves” and “strategies” mediators use in order to assess a mediator’s competence and abilities.

Building on the power of this analysis, one of the authors of this article conducted a more recent exercise with students at Hofstra Law School, disseminating mediation transcripts as part of a classroom exercise that invited these students to notice when parties are exercising self-determination. Distilling the moves these parties made led to the following list of ten different ways a party’s self-determination manifests during a mediation session:

- Self-Advocacy
- Self-Awareness
- Persuasiveness
- Responsibility
- Clarity
- Problem-Solving
- Self-Protection
- Self-Expression
- Deliberation
- Decision-Making

Reviewing these ten types of party moves, it was clear that these indicators could be used to help practitioners more clearly notice, highlight, and serve party self-determination.<sup>18</sup> The next section of this paper focuses on our efforts to adapt

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this article. See, e.g., BUSH & FOLGER, *supra* note 5, at 131-214 (presenting a complete transcript of a mediated case, along with detailed commentary based on the transcript).

16. See Dorothy J. Della Noce et al., *Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model*, 19 OHIO ST. J. DISP. RESOL. 1005 (2003).

17. See Dorothy J. Della Noce, Ideologically based patterns in the discourse of mediators: A comparison of problem-solving and transformative practice (Apr. 3, 2002) (Ph. D. dissertation, Temple University) (regarding the theory and methods of discourse analytic research) (on file with author); see also Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOT. J. 271, 287-94 (1999) (Noce applies the methods of discourse analysis to actual transcripts of mediations by different mediators to identify the underlying ideology of each mediator).

18. See Robert A. Baruch Bush & Peter F. Miller, *Hiding in Plain Sight: Mediation, Client-Centered Practice, and the Value of Human Agency*, 35 OHIO ST. J. DISP. RESOL. 591, 605 (2020). The authors note that this classroom exercise was performed in the teaching of transformative mediation practices, but the self-determination elements are universal and applicable to all approaches to mediation, *id.* In response to transformative mediators who might question whether a checklist for “recognition shifts” might also be of value, the authors note that these moments of recognition are far easier for mediators to recognize

this list into a framework that assists practitioners in noticing party self-determination as part of their work.

### *B. Ways to Notice Self-Determination*

We examined each of the indicators of party self-determination unearthed from the discourse analysis process in order to develop a framework to help mediators orient themselves toward noticing party self-determination. The goal was to provide concrete steps mediators can apply in order to help orient the session, and their interventions, around party choices.

For each indicator, we present a metric that can help the mediator notice its occurrence, along with a concrete example of what it might look like in a mediation session. The intention is to help any practitioner who is thinking about possible interventions to look for ways they can appreciate and defer to party choices as they pursue those interventions. In that sense, being on the lookout for these metrics and orienting the process toward them is a best practice for prioritizing and honoring party self-determination.

Below we explain and offer an example for each metric. The examples are drawn from the transcript of a simulated mediation between two parents concerning what if anything to do about changes in the behavior of their teen-aged kids (daughter Kim and son John) due to the son's disclosure that he is gay—which he has revealed to Mom, but hidden from Dad.<sup>19</sup> The kids have distanced themselves from Dad because they think he won't understand, and Mom promised them she would not reveal John's sexuality to Dad. Not knowing more, Dad thinks the kids are going through psychological challenges and need therapy.

#### *i. Self-Advocacy*

##### Metric

A mediator can notice the occurrence of self-advocacy, when a party engages in assertive talk to “stand up for themselves”. (This is different from the *Persuasiveness* metric discussed below.)

##### Example

Early on in the mediation, Dad tells Mom that Kim has “never been able to talk to you”. Mom replies strongly, “That’s not true. She’s been able to talk to me. She’s been very close to you, but I don’t think it’s fair for you to say that she can’t talk to me – it’s actually pretty insulting!”<sup>20</sup>

Comment: Mom is choosing to stand up for herself in the face of an accusatory statement from Dad.

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and appreciate, *id.* The authors believe the most value is in a checklist for self-determination that will empower mediators of any philosophy to support party agency, *id.*

19. Transcript of DVD: What the Parents Know (Institute for the Study of Conflict Transformation 2011) (transcript attached as Appendix A) [hereinafter Transcript] (quotes of attached Transcript are edited to convey the speaker's comments clearly, but the substance of the comments is all found in Transcript) (Transcript edited slightly in this adaptation by the article's authors).

20. *Id.* at ll. 171–73.

## ii. Self-Awareness

### Metric

A mediator can notice the occurrence of increased self-awareness, when a party engages in reflective talk that shows new awareness about their own feelings or behavior, or about the broader situation.

### Example

Early on, in response to Mom's suggestion that Dad look at his own role in the situation, he states emphatically that *"This is not my stuff, I'm making objective observations and things are not good."*<sup>21</sup> Then, somewhat later, he quietly says that *"I'm not saying that I don't have room to grow here, in what it means to be a parent.... I'm just kind of floundering here, and part of me thinks it's my fault and part of me thinks it's not my fault."*<sup>22</sup>

Comment: From strong initial statements that none of this is "his stuff", Dad's now choosing to express an awareness of his feelings and the situation that has changed markedly.

## iii. Persuasiveness

### Metric

A mediator can notice the occurrence of party persuasiveness, when one party uses an argument to influence the thinking or decision-making of another party. (This is distinguished from *Advocacy*, where there is a strong self-assertion but no attempt to persuade the other party.)

### Example

Dad states that the problem is with Kim, not John, and John is totally fine. Mom argues, *"It's not just Kim that's changing, it's also John. You don't even pay attention to him. He is 16 and going through changes. When you're in that age range you're changing all the time, but you're not there for him, you're not there to talk to him about what's going on, or how is he. Kim is there for him, I'm there for him, but you're not there for him."*<sup>23</sup>

Comment: Here Mom has chosen to persuade Dad that he's not seeing the situation accurately, and that he's missing something, especially concerning John.

## iv. Responsibility

### Metric

A mediator can notice the occurrence of party responsibility, when a party chooses to accept responsibility for something that has already happened in the situation, or for doing things going forward.

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21. *Id.* at ll. 184–85.

22. *Id.* at ll. 367–71.

23. *Id.* at ll. 382–98.



### Example

In a private session with the mediator Mom discloses that John has shared that he is gay, and she and Kim both know this, but she promised John that she would not tell Dad. Recognizing that John won't tell Dad himself, Mom says *"Maybe I should never have made that agreement.... We're hiding it from Dad and that's creating a lot of problems."*<sup>24</sup>

Comment: Mom's statement shows that she is choosing to acknowledge her own responsibility in the creation of the problem of unequal knowledge.

## *v. Clarity*

### Metric

A mediator can notice the occurrence of party clarity, when a party becomes clearer in their description of their situation, perspective or choices.

### Example

Continuing the private discussion about her promise to John, Mom says *"I don't know what to do, because leaving Dad in the dark hurts him and makes me sad. But if I break that confidence, I risk an enormous upset with John. It's like I'm screwed if I do and screwed if I don't! But I just can't say anything to Dad, I really can't. Keeping John's confidence is just too precious, too important."*<sup>25</sup>

Comment: Mom "gets" and chooses to express a very clear picture of the bind that she is in—and clarity can be attained about a positive or a negative aspect of the situation.

## *vi. Problem-Solving*

### Metric

A mediator can notice the occurrence of party problem solving, when a party suggests options or solutions to the problem facing them.

### Example

Still in the private session, Mom says, without prompting, *"So I have an idea. I mean, do you do mediations where you can have kids come too? I could suggest that we all come and have another session with the kids being there too, and maybe John would say something there to Dad."*<sup>26</sup>

Comment: Mom has chosen to suggest a very specific idea of how to move forward in the situation.

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24. *Id.* at ll. 493–511.

25. *Id.* at ll. 513–16, 528–31, 679–81.

26. *Id.* at ll. 579, 690–92.

### vii. *Self-Protection*

#### Metric

A mediator can notice the occurrence of self-protection, when a party expresses a behavioral boundary or otherwise makes a choice to protect themselves from negative treatment.

#### Example

Returning to a joint conversation, Mom suggests to Dad the idea of another mediation with the kids there, and Dad asks why the four of them can't just talk together without a mediator. Mom responds, *"My problem is that you get really nasty about me and you say I'm not good with the kids, and I'm not willing for you to do that with them there. I would rather have someone who's going to keep it in check. Because even today you've insulted my being their mother, and I don't want that in a meeting."*<sup>27</sup>

Comment: Mom chooses to draw a very clear line about what she is and isn't willing to do in the conversation moving forward.

### viii. *Self-Expression*

#### Metric

A mediator can notice the occurrence of self-expression, when a party finds a way to express themselves in a full and authentic way.

#### Example

Earlier on in the session, when the parties are expressing their experience of the conflict, Dad says *"It feels like the family is beginning to disintegrate. The things that held us together are no longer happening. It's like pulling teeth to get them to happen, and I'm not getting any kind of support from Mom. I feel like this is just a big uphill battle. And every week I feel like I'm losing a bit more."*<sup>28</sup>

In response, Mom says *"So you want me to give you support and make it work for you, but when I try to give you support, you won't listen to me, you say everything I do is not support, everything I think, do, say, hear, be is wrong! It's like I am in a little box – you got me in a little box!"*<sup>29</sup>

Comment: Both Mom and Dad capture and choose to express their experience of the conflict in their own words, in a clear and powerful way.

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27. *Id.* at ll. 797–802.

28. *Id.* at ll. 266–71.

29. *Id.* at ll. 345–54.

*ix. Deliberation*Metric

A mediator can notice the occurrence of deliberation, when a party takes time to think about a possible decision, or comments on the efforts they are making to think through the situation.

Example

After Mom has the idea of doing another mediation with the kids present, she begins examining the idea further and says, *"The bottom line is I need to have John have a conversation with his Dad, and I've tried everything to have him do it. I've talked to Dad about talking to John and he just insults me.... I don't want Kim in the middle. Dad's been very close with her but I don't want to put her in the middle.... I don't know, so maybe one idea would be in terms of another mediation, maybe just Dad and John and me.... But I think maybe the best thing is if we all do something together."*<sup>30</sup>

Comment: Mom's "conversation with herself" shows how she has chosen to weigh the pro's and con's of her own idea of another mediation, and getting clearer about them.

*x. Decision-Making*Metric

A mediator can notice the occurrence of decision-making, when a party expresses a clear choice about what to say or do about some aspect of the mediation or the problem.

Example

When the mediator asks Mom if she is ready to talk further with Dad, Mom says, *"Yeah, I think I will just suggest that we talk about having another mediation with all of us present and see what Dad says, just take it from there."*<sup>31</sup>

Comment: Mom has made the choice to ask for another mediation.

#### IV. TAKEAWAY TOOL: A "CHOICE LENS CHECKLIST" FOR MEDIATORS

Based on the metrics identified and illustrated above, here is a simple checklist designed to help a mediator orient themselves toward supporting party choices—similar to the checklists mentioned earlier in this article used by hospital staff to avoid behaviors that can lead to infection.

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30. *Id.* at ll. 616–18, 628–35, 643–46.

31. *Id.* at ll. 711–713.

- ☐ Did a party use assertive talk to state their viewpoint? (**Self-Advocacy**)
- ☐ Did a party demonstrate a new realization about some aspect of their experience of the conflict? (**Self-Awareness**)
- ☐ Did a party make an argument to try to convince the other party? (**Persuasiveness**)
- ☐ Did a party take responsibility for some aspect of the conflict, either looking backward or going forward? (**Responsibility**)
- ☐ Did a party clearly and sharply describe something about their situation, perspective or choices? (**Clarity**)
- ☐ Did a party suggest an option for what to do? (**Problem-Solving**)
- ☐ Did a party establish a boundary or limit about what they would allow others to do? (**Self-Protection**)
- ☐ Did a party express something in powerful, compelling, or authentic terms? (**Self-Expression**)
- ☐ Did a party demonstrate explicitly or implicitly that they were thinking through some aspect of the situation? (**Deliberation**)
- ☐ Did a party communicate a choice of what to do, whether about the mediation process itself or some aspect of the conflict? (**Decision-Making**)

For mediators, the takeaway is this: You can use this tool before, during, or after a mediation session to remind yourself of some key indicators of parties exercising self-determination. When you describe in your opening remarks some of the possible things the parties can achieve, and your role in helping them, you might say that you will be trying to support their own actions in taking one or more of these steps. But apart from transparency with the parties about your role and their options in the process, how can you use this checklist in the mediation process, and why is it important?

First, how to use it: Prepare yourself beforehand to notice, and then make every effort to actually notice when each of these party actions occurs in the session. In preparing yourself in this way, it's important to realize that these party actions are usually "small steps", as in the examples given above. In other words, when you orient to party self-determination you are not looking for major shifts, but for "micro-shifts" that occur in the unfolding conversation. It is noticing those smaller shifts that will encourage your deference to the parties' choices and self-determination.

Now, most importantly, what is the point of having and using this checklist? You might think that having noticed that one of these actions has occurred, you

should then use your training to choose and employ a specific intervention that supports party choice or empowerment in light of that party action. In our view, this is not the most valuable function of the checklist. There is really no simple or effective strategy that dictates that, when you see “self-advocacy” you should use a reflection, or when you see “problem-solving” you should use a summary.

Rather than dictating the best “strategic response” to each of the party actions on the checklist, the purpose and value of the list is, as the title of this article states, *to orient us as mediators* to what we should hold in mind as our general and ongoing focus: to support and never supplant party choice and self-determination. The overall point here is that when a mediator is sensitive to and orients to these signs that parties are making important choices for themselves in a session, it serves to *remind the mediator* that s/he is there to *support* these choices, not to direct or influence them. In other words, when we as mediators see that the parties are making important choices for themselves, that recognition itself is the best safeguard to keep us from overriding party self-determination. Simply *noticing* that the parties themselves are taking steps toward empowerment helps the mediator stay in their proper role, in accordance with our universal ethical principles prioritizing party choices above all else. And again, as noted above, this orientation asks us to notice even “small steps” that parties make in exercising self-determination.<sup>32</sup>

This connects to the discussion above regarding how easy it is for mediators, due to unconscious bias, competing values, and simple human error, to drift from their stated commitment to supporting self-determination.<sup>33</sup> The checklist is a powerful tool that can reinforce a core commitment that is easy to forget, even for mediators who take self-determination seriously.

## V. HOW THE CHOICE LENS CHECKLIST CAN PROTECT MEDIATORS FROM LIABILITY

Having a tool to support self-determination may also serve as a way to protect mediators from complaints. Though it is relatively rare for mediators to be held legally liable for malpractice, there are still a variety of mechanisms available for parties to hold a mediator responsible if they violate the core ethic of self-determination. For instance, in Florida there was a 2002 grievance involving a mediator improperly overriding self-determination and trying to persuade a party to accept a settlement.<sup>34</sup> In a separate case, a mediator spent over \$10,000 defending a lawsuit that was ultimately dismissed, alleging that a company had felt forced to settle.<sup>35</sup> A mediator who uses the checklist to apply a choice lens throughout the mediation session could reduce the likelihood that upset parties might pursue such actions, because those parties will have seen the mediator’s tangible commitment to self-determination.

32. See Robert A. Baruch Bush and Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 86–95 (2002). In mediation training, mediators attend to the parties’ conversation with a “micro-focus” on party actions and monitoring/maintaining the mediator’s intentions to ensure that interventions have a supportive and not directive purpose, *id.* Using the Choice Lens Checklist can be greatly helpful in both these core mediator activities, for all mediators following a non-directive approach to practice, *id.*

33. See *supra* notes 5–14 and accompanying text.

34. Robert A. Badgley, *Mediator Liability: A Snapshot*, LORD BISSELL BROOK LLP 6, 6 (2013), <https://godr.org/wp-content/uploads/sites/5/2019/11/Mediator-Liability-Article.pdf>.

35. *Id.* at 5.

It is especially important to demonstrate sound mediation practices as there is always the possibility that legal liability or other types of private accountability for mediator mistakes will increase. For this to happen, all it might take is one “path-breaking mediator liability case” where a mediator violates a conspicuous and unquestionable duty—like self-determination.<sup>36</sup> This becomes increasingly likely as parties become more informed of their rights in mediation, including proposals that parties be provided a “Party Bill of Rights” informing them more clearly of their rights to self-determination.<sup>37</sup> As more parties begin to understand their rights, and advocate for them, it is helpful for mediators to have tangible ways to demonstrate their commitment to party control of the process. The Choice Lens Checklist not only helps support a vital mediation ethic and mitigate implicit bias, but it also may act as a way to prevent potential liability.

## VI. CONCLUSION

Self-determination is a fundamental ethical standard for mediators and a vital means for empowering parties, yet it is often inadvertently compromised by mediators’ unconscious biases as well as competing values and human error.<sup>38</sup> Using robust discourse analytic techniques, we derived ten key indicators of self-determination and adapted them into a checklist tool that can help mediators remain oriented to party choices, whatever their approach or model of practice. This tool can be used to help train mediators to highlight party decisions, to assist mediators in operationalizing self-determination during their sessions, and to evaluate their practices.<sup>39</sup> Those mediators who practice transparently could also use this framework to help parties understand that the mediator values party self-determination, and appreciate how the mediator will orient the session around party choices.

Visit <https://bit.ly/PartyChoices> to download a printable copy of the Choice Lens Checklist and provide anonymous feedback about how it helps you in your practice.

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36. See generally Michael L. Moffitt, *The Four Ways to Assure Mediator Quality (and Why None of Them Work)*, 24 OHIO ST. J. DISP. RESOL. 191 (2008).

37. Charles Bultena et al., *Mediation Madness v. Misfit Mediators*, 11 S.J. BUS. ETHICS 53, 53–75 (2019).

38. See *supra* notes 2–14 and accompanying text.

39. See Della Noce et al., *supra* note 16.