

# REFRAMING THE MEDIATION LENS: THE CALL FOR A SITUATIONAL STYLE OF MEDIATION

Tanya M. Marcum, J.D.,\* Charles R. Stoner, D.B.A.,\*\* and Sandra J. Perry, J.D.\*\*\*

## I. INTRODUCTION

Mediation can resolve a significant portion of custody disputes in divorce cases and often has a positive impact even when custody issues are not resolved after the mediation process has concluded. The process of mediation itself focuses the parties' attention on the needs of the child and helps parties be realistic in their expectations regarding custody.<sup>1</sup> In the emotionally charged arena of family law, mediation seeks to serve as a more conciliatory and subjective process than the traditional legal process based on an adversarial process with rigid rules and procedures. In mediation, the parties have an opportunity to resolve the custody issues themselves.<sup>2</sup>

Good mediators realize the importance and value of listening to the parties during the mediation process. Mediators attempt to promote an understanding between the parties of the positions of each parent, the needs

---

\* Tanya M. Marcum, J.D., is an assistant professor of law in the Department of Business Management and Administration at Bradley University. Marcum received her Juris Doctor from the Thomas M. Cooley Law School. She has authored or co-authored over twenty scholarly articles on various law topics.

\*\* Charles R. Stoner is the McCord Professor of Executive Management Development and Professor of Business Management and Administration at Bradley University. Stoner received his doctorate from Florida State University. He has authored or co-authored eight books and over fifty refereed articles. Stoner's research and consulting focuses on leadership and interpersonal dynamics.

\*\*\* Sandra J. Perry, J.D., is a professor of law in the Department of Business Management and Administration at Bradley University. Perry received her Juris Doctor from Southern Illinois University School of Law. She has authored or co-authored over twenty-five refereed articles on various law topics.

1. "The central quality of mediation [is] its capacity to reorient the parties toward each other . . . by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N.D. L. REV. 705, 719 (2008), citing Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).
2. A core characteristic and benefit of mediation is perceived to be that the participants in the process will determine the outcome, rather than an outside body such as the court. See *id.* at 718.

of the parties, and especially the needs of the children.<sup>3</sup> Although the approaches and styles used by mediators may vary,<sup>4</sup> the goal is the same—getting the parties to think about the children first while putting their differences aside.

Most mediators are required (or opt) to receive training prior to beginning their careers as mediators. This is especially true in the area of mandatory mediation. During training, mediators are introduced to different models of mediation. Once in practice, mediators develop their own style or styles that they believe fit best the type of mediation or needs of the parties.

The researchers interviewed three distinct groups of mediators involved in child custody mediation in the state of Illinois. The interviews with these mediators revealed three themes associated with child custody mediation: the mediators' perceptions of the purposes of mediation and the impacts upon the parties;<sup>5</sup> the mediators' perceptions of the stumbling blocks associated with mandatory child custody mediation;<sup>6</sup> and the mediators' distinct styles. This article describes a qualitative research study that explores mediators' styles in child custody and visitation mediation in the Tenth Judicial Circuit of Illinois, a state that recently mandated mediation for these issues.

## II. COMMON MEDIATION MODELS

The three most common models or methods used by mediators when involved in the resolution of disputes between parties are the facilitative, the transformative, and the evaluative models.<sup>7</sup> These three models are a standard part of mediators' formal training.

- 
3. Charles R. Stoner, Sandra J. Perry & Tanya M. Marcum, *The Court, the Parent, and the Child: Mediator Perceptions of the Purpose and Impact of Mandated Mediation in Child Custody Cases*, 13 J.L. FAM. STUD. 151 (2011).
  4. Mediation has a grass-roots background from the community as well as an institutionalized development from the court. The "field of medication is so diverse, with little or no agreement (or formal standards) as to what a 'good mediation' style is." Ilan G. Gewurz, *(Re)Designing Mediation to Address the Nuances of Power Imbalance*, 19 CONFLICT RESOL. Q. 135, 140 (2001), citing J.J. Alfini, *Trashing, Bashing and Hashing It Out: Is This the End of 'Good Mediation'?* 19 FLA. ST. U. L. REV. 47-75 (1991).
  5. Stoner, *supra* note 3.
  6. Sandra J. Perry, Tanya M. Marcum & Charles R. Stoner, *Stumbling Down the Courthouse Steps: Mediators' Perceptions of the Stumbling Blocks to Successful Mandated Mediation in Child Custody and Visitation*, 11 PEPP. DISP. RESOL. L.J. 441 (2011).
  7. See Matthew Daiker, *No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators*, 24 REV. LITIG. 499, 507 (2005), and Jaime Abraham, *Note: Divorce Mediation – Limiting the Profession to Family/Matrimonial Lawyers*, 10 CARDOZO J. CONFLICT RESOL. 241, 246 (2008).

In facilitative mediation,<sup>8</sup> the mediator attempts to create an environment whereby the parties themselves can reach a solution mutually agreeable to each party.<sup>9</sup> The mediator seeks to have the parties recognize their problems and seek resolutions. Utilizing this process during mediation, the mediator asks questions of the parties;<sup>10</sup> validates and normalizes parties' points of view;<sup>11</sup> searches for the needs and interests underneath the positions taken by parties;<sup>12</sup> and assists the parties in finding and analyzing options for resolution.<sup>13</sup> The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The focus of the mediator is the process itself, while allowing the parties to be creative in their focus on the resolution.

Facilitative mediators want to ensure that parties come to agreements based on knowledge of relevant information and an understanding of all issues. They want the parties to have the major influence on decisions made regarding the minor children. Encouraging the parties to brainstorm creative resolutions is a common strategy used by facilitative mediators.<sup>14</sup>

The evaluative mediation model is a process modeled on settlement conferences held by judges.<sup>15</sup> The evaluative mediation emerged in court-mandated or court-referred mediation.<sup>16</sup> The mediator takes a more active role in the overall mediation process, perhaps even suggesting a possible resolution.<sup>17</sup> An evaluative mediator points out the weaknesses of each party's case, and makes predictions regarding the outcome in court, sometimes referred to as a reality check.<sup>18</sup> Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness.<sup>19</sup> They help the parties evaluate their legal position and the costs versus the benefits of pursuing a

- 
8. LEONARD L. RISKIN, MEDIATOR ORIENTATIONS, STRATEGIES AND TECHNIQUES, 12 ALTS. TO HIGH COST LITIGATION 111 (1994).
  9. Abraham, *supra* note 7.
  10. Susan Nauss Exon, *The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577, 591 (2008).
  11. Abraham, *supra* note 7.
  12. Exon, *supra* note 10.
  13. Abraham, *supra* note 7.
  14. Exon, *supra* note 10.
  15. Murry S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. DISP. RESOL. 268 (2001).
  16. Exon, *supra* note 10, at 593.
  17. *Id.*
  18. Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 485 (2000).
  19. *Id.* at 493

legal resolution rather than settling in mediation. The evaluative mediator structures the process and directly influences the outcome of mediation.<sup>20</sup>

Transformative mediation<sup>21</sup> is based on the values of empowerment of each of the parties as much as possible, and recognition by each of the parties of the other parties' needs, interests, values, and points of view.<sup>22</sup> In transformative mediation, the parties structure both the process and the outcome of mediation, and the mediator follows their lead. The role of the mediator is to be very neutral in order for the parties to recognize the needs of each other and to reach a solution that fits those needs.<sup>23</sup>

### III. METHODS

#### A. Demographics of Mediators in Sample

The mediators in our sample circuit, the Tenth Judicial Circuit of Illinois, were professional counselors, retired judges, and attorney mediators. The mediators in our sample were overwhelmingly attorneys. Both male and female mediators were interviewed in the attorney-mediator and counselor-mediator categories.<sup>24</sup>

All mediators received professional training as mediators, with the exception of the retired judge mediators. In Illinois, each judicial circuit must address mandatory training for mediators.<sup>25</sup> The local circuit rules include the requirements for mediators.

First, a mediator must have a law degree or masters or higher degree in a social science field related to marriage and family interpersonal relationships.<sup>26</sup> Retired judges who have served in family court are deemed

---

20. Some believe that an important role of court-mandated mediation is to serve as a "settlement satellite for the court system," a role that is welcomed by some. See Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N. DAK. L. REV. 705, 735 (2008).

21. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (Jossey-Bass Publishers, 1994).

22. Abraham, *supra* note 7, at 247-48.

23. *Id.* at 247.

24. Interviews were conducted after applying and receiving approval from Bradley University's Committee on the Use of Human Subjects. As part of the approval, confidentiality of the identities of the interviewees was required. In addition, each interviewee signed an informed consent that also promised confidentiality. Each interviewee was told that he/she would not be identified in any article published about this research other than as an attorney mediator, counselor mediator, or retired judge mediator. Each interviewee quoted in this article was contacted and read the quotation and asked whether it was accurate. Therefore, in the text of the article, each quote is identified only as being made by an attorney mediator, counselor mediator, or retired judge mediator.

25. ILL. SUP. CT. R. 905.

26. Amended Adm. Order 2006-10, TENTH JUD. CIR. OF ILL. 2-3, available at <http://www.peoriacounty.org/download?path=/familylaw%2FLocalMediationRules.pdf>.

qualified.<sup>27</sup> Second, if the mediator is engaged in a licensed discipline, the mediator must maintain that license.<sup>28</sup> Third, the mediator must be a member of the Association for Conflict Resolution or Mediation Council of Illinois.<sup>29</sup> Fourth, the mediator must complete a specialized training course in family mediation of at least forty hours.<sup>30</sup> A particular course was specified as meeting the requirements and a procedure exists to have other courses or experience be evaluated for sufficiency. Fifth, the mediator must maintain professional liability insurance,<sup>31</sup> and finally, the mediator must obtain continuing education.<sup>32</sup>

The circuit chosen for this study began mandatory mediation on January 1, 2007, when the statewide mandate came into effect in Illinois. Our interviews were conducted during the third quarter of 2009. Accordingly, the mediator subjects in this study drew their impressions from mediation experiences that had occurred over the previous thirty months. The researchers determined that such a restrictive selection methodology would allow the greatest degree of respondent experience similarity, particularly with regard to the relative recency of mediation training and the similarity of economic context within which mediations were conducted.

The researchers began the exploratory and pilot phases of this study by recognizing the presence of three somewhat distinct groups of mediators. The first group was comprised of attorneys who also served as mediators. In most cases, these individuals were family practice attorneys who engaged in limited mediation activity. There was general agreement within this group that successful mediation required them to “take their attorney hat off and put their mediator hat on.” Understandably, all attorney-mediators recognized and abided by the commitment that there could be no overlap between family-practice clients and mediation clients.<sup>33</sup>

---

27. *Id.* Notably, this requirement is part of the formal education section of the local rule, not part of the training section. However, in practice, this language is interpreted to mean that retired Illinois family court judges are “grandfathered” as to the training requirements.

28. *Id.*

29. *Id.*

30. *Id.* at 3. The following issues must be included in the training program: conflict resolution; psychological issues in separation, dissolution and family dynamics; issues and needs of children in dissolution; mediation process, skills and techniques; and screening for and addressing domestic violence, child abuse, substance abuse and mental illness.

31. *Id.*

32. *Id.* (“All approved mediators are required to complete ten (10) hours of circuit-approved continuing education every two (2) years of which two (2) hours must cover domestic violence issues and provide evidence of completion to the Chief/Presiding Judge or his/her designee every two (2) years.”).

33. *Id.* at 6. (“A mediator who is a mental health professional shall not provide counseling or therapy to the parties or their children during or after the mediation. An attorney-mediator may not

The second group consisted of counselors who also served as mediators. Similar to attorneys, counselor-mediators accepted that counseling clients could not be mediation clients.<sup>34</sup> Although a rotational system of mediators was in place for situations when clients and their attorneys had no mediator preference, this feature of the mediation process was rarely used. Consequently, counselor-mediators conducted relatively few of the mediations that had occurred in the circuit under consideration.<sup>35</sup>

The third group included retired judges who served as mediators. These judge-mediators handled the overwhelming bulk of the mediations within the circuit studied. Judge-mediators were “grandfathered” into the mediation system and were not required to participate in or complete the forty-hour mediation training program.<sup>36</sup>

## B. Qualitative Analysis

Qualitative methodology was used to attain perspectives for this study.<sup>37</sup> Qualitative research offers important advantages over traditional quantitative approaches, advantages that seem especially pertinent when examining complex, multi-layered issues such as mandated mediation.

The researchers selected participants from the list of approved mediators for the circuit being studied. Face-to-face interviews with fifteen mediators were completed. Interviews within each of the three mediator categories continued until saturation was achieved. As such, three judge-mediators, six attorney-mediators, and six counselor-mediators were interviewed. Additionally, two non-mediators within the circuit who had extensive experience with the mediation process since its mandated

---

represent either party in any matter during the mediation process or in a dispute between the parties after the mediation process.”)

34. *Id.*

35. In the year of our study, 2009, of the external cases referred, counselor-mediators did 2%, 38% were done by attorney-mediators, and 60% were done by retired judge-mediators.

36. Order 2006-10, *supra* note 26, at 2-3. Stating:

Formal Education: Possess a degree in law or master’s or other advanced degree in a field that includes the study of psychiatry, psychology, social work, human development, family counseling or other behavioral science substantially related to marriage and family interpersonal relationships or other degree program approved by the Chief Judge or his/her designee. If engaged in a licensed discipline, the mediator must maintain said license in full force and effect. Any retired Illinois Judge who has served in family court is deemed qualified to submit his or her name to the Chief Judge.

*Id.* This is part of the formal education section of the local rule, not part of the training section. However, in practice, this language is interpreted to mean that retired Illinois family court judges are “grandfathered” as to the training requirements.

37. Many classic qualitative studies have been built on sample sizes that are quite small. Doctoral dissertations utilizing this methodology are often limited to less than ten respondents. The key here is not the number of cases, but rather the level of interviewing depth and the method of in-depth analysis.

inception (a sitting judge and a non-mediator family attorney) were also interviewed to assure that saturation had been achieved.<sup>38</sup>

While considerable speculation and a variety of assumptions have surrounded mandated mediation, our research goal was to uncover or discover the critical orientations of this strategy by listening to those directly involved. As such, our theory or model was discovered by carefully studying the data (the interviews). This approach, known as “grounded theory” is a key methodology for exploring and revealing a deep understanding of a complex social phenomenon. In short, our methodology provided depth by letting those directly involved dictate underlying themes rather than have the researcher impose them for verification. In their classic work, Glaser and Strauss outline the dynamics of this qualitative methodology and their frameworks guided our investigation.<sup>39</sup> It has become a widely accepted method for careful study of important social issues.

Our study used the most careful and rigid methodology for the field.<sup>40</sup> First, we interviewed until we reached “the theoretical saturation point.” In other words, we continued our interviewing process until it became clear that additional perspectives were not being added. As Taylor and Bogdan note, “qualitative researchers define their samples on an ongoing basis as the study progresses . . . whereby researchers consciously select additional cases to be studied according to the potential for developing new insights . . .”<sup>41</sup>

Our analysis of the interviews was also uniquely rich. Interviews were audio taped to ensure accuracy. Each interview was studied and coded using a line-by-line approach. Further, two researchers, working independently, coded each interview. Next, all three researchers met to reach agreement or in qualitative terms, achieve “concordance.”<sup>42</sup> This is a discursive and reflective process that requires one to “return to the data” whenever interpretative differences appear. This process is a time-consuming but unbelievably rich approach that often reveals issues and patterns and frequently prompts the proverbial “aha” moment. The primary researchers conducted all analysis and coding.<sup>43</sup> This process of sitting

---

38. BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967); GARY D. SHANK, *QUALITATIVE RESEARCH: A PERSONAL SKILLS APPROACH* (2d ed. 2006).

39. GLASER & STRAUSS, *supra* note 38.

40. ANSELM L. STRAUSS & JULIET CORBIN, *BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY* (1998); STEVEN J. TAYLOR & ROBERT BOGDAN, *INTRODUCTION TO QUALITATIVE RESEARCH METHODS* (3d ed. 1998).

41. TAYLOR & BOGDAN, *supra* note 40, at 26-27.

42. Rosaline S. Barbour, *Checklists for Improving Rigour in Qualitative Research: A Case of the Tail Wagging the Dog?*, 322 *BRIT. MED. J.* 1115-17 (2001).

43. STRAUSS & CORBIN, *supra* note 40.

together for hours and pouring over each interview allows one to “listen to the data.” That is, themes emerge from the words of the participants. Given these stringent parameters, our sample size of fifteen is actually considered quite acceptable and rather large. Again, we sampled until we achieved “saturation.” Insights, perspective, and depth of understanding are the keys here rather than generalizations.

Confirmability—the use of additional documentation to confirm or help assure confidence in the respondents’ perspectives—was achieved through external data (secured from the circuit court under consideration, which provided checks on mediator perceptions of the extent of mediation and mediation success rates). Further, the qualitative techniques of respondent validation and member checking were utilized. Here, each participant was contacted, apprised of the study’s results, and asked to confirm that their personal perspectives were indeed included in our results. Additionally, the interviews with the non-mediator sitting judge and family practice attorney helped confirm that key perspectives were not omitted from consideration.

#### IV. THE FUNDAMENTAL FRAMEWORK FOR SUCCESSFUL MEDIATION

“A mediator is a communicator conduit.”<sup>44</sup>

No *a-priori* assumptions regarding mediator styles were made. Rather, the mediators that were interviewed described their approaches when working with parental couples. Assessment of these approaches allowed the researchers to designate and label a series of mediator styles.

Ideally, the style of mediation that is employed should depend on the demands of the specific mediation circumstances. For example, parents come to mediation with wide-ranging needs, levels of emotional intensity, fears, and apprehensions. Their abilities to communicate and engage in respectful dialogue also vary considerably. In fact, meaningful dialogue and joint decision making is often clouded by an imminent breakdown in relationships that may be manifested through anger and intransigence. Accordingly, the adept and successful mediator must be able to modify and flex styles and approaches as the situation demands. As one attorney commented, “[y]ou have to have some experience, first of all, in reading people . . . [i]s it somebody that’s going to be receptive to doing [mediation].”<sup>45</sup>

---

44. Interview with current sitting judge (2009).

45. Interview with Attorney (2009).



Regardless of the unique style or approach and beyond any specific tactics, we uncovered a four-staged mediation framework that was foundational for successful mediation. However, in our study, mediators differed considerably in their abilities to utilize this framework.

First, successful mediators established a setting where the parental parties felt safe and fear was minimized. This required the mediator to be aware of power and control issues.<sup>46</sup> These issues could range from subtle to intense but generally signaled a threat that could limit or thwart meaningful exchanges. Power exchanges and deep suspicions regarding intent and motivation often existed between parents. Emotional abuse was present in some examples.<sup>47</sup> Consequently, the mediators in our study noted that their capacity to establish a safe and balanced environment of exchange was essential for mediation progress.

Beyond these interpersonal concerns, mediators also had to address threats and confusion arising from uncertainty and misinformation about the process of mediation and the impending litigation. Understandably, since the meditative process was new and foreign to most parents, anxiety levels and fears were considerable. In this regard, mediators set a limited but clear set of procedural expectations or ground rules.<sup>48</sup> Typically, mediators insisted on respect and respectful exchanges, although they clearly recognized that emotion would likely challenge this rule from time to time.

Second, mediators took upfront time to clarify the mediator's role with the process of mandated mediation. Since parents often lacked an understanding of what to expect from the mediator or had significant misconceptions, establishing clarity of role was especially important. One attorney-mediator stated:

---

46. Critics of mediation observe that mediation is desirable only when the parties' bargaining power is relatively equal. See Steven C. Bowman, *Idaho's Decision on Divorce Mediation*, 26 IDAHO L. REV. 547, 558 (1989-1990); Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U.L. REV. 43, 57 (1995). One author asserts that two factors interplay: the nature of the power imbalance and the style and approach of the mediator, and that the "strengths and weaknesses of specific mediation styles make a style more or less effective in dealing with a type of power dynamic." Ilan G. Gewurz, *(Re)Designing Mediation to Address the Nuances of Power Imbalance*, 19 CONFLICT RESOL. Q. 135, 139 (2001).

47. It is estimated that abuse is prevalent in about thirty percent of marriages thus making it important for the mediator to provide a safe setting for the mediation and to recognize cases of abuse. See Gerencser, *supra* note 46, at 56.

48. Most mediators would agree that the mediation process should start with an opening discussion led by the mediator. See Melissa J. Schoffer, *Note: Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation*, 43 FAM. CT. REV. 323, 325 (2005).

I make it clear to people that as a mediator, I do not take sides . . . I don't make decisions and I don't care how good somebody has been and how many things they've done right. I have no ability to reward anybody for all their good past practices. And no matter how much somebody has screwed up . . . I can't punish anybody. So I can't reward, and I can't punish. I can listen and see if we can try to find some solutions . . .<sup>49</sup>

Third, all successful mediators practiced deep listening. Here, mediators looked beyond the words that parents expressed in an attempt to extract the underlying meaning and needs that were being represented. As one attorney-mediator suggested, "A lot of the time, it's just a matter of me listening to what they're saying because the words they use aren't necessarily what they're saying."<sup>50</sup> The importance of the mediator's role as listener is heightened by the fact that the parental parties may not be equally adept at communicating their needs. In short, some parents are simply more verbal and expressive than others, and the mediator may need to employ follow-up questions and probes to extract deeper meaning. At times, mediators needed to reflect their interpretations of meaning and seek further clarification. For example, one mediator noted, "Sometimes you have to go even further and say, OK you're saying this but I'm hearing this; is that what you mean?"<sup>51</sup>

Fourth, mediators tried to identify the goals and needs of each parent. The mediator's ability to summarize and clarify the positions and needs of both parents was viewed as being critical. The mediator, as an impartial and objective third party, was able to describe and clarify needs and goals that the parental parties were probably unable to do.

## V. STYLES OF MEDIATION

The mediators in our sample provided the researchers with narratives regarding their own practice of mediation, including their self-described styles. While somewhat similar to the three traditional styles of mediation noted earlier, the styles revealed in this research appeared more expressive and nuanced. Thus, we have chosen to expand beyond the limits of the three styles of mediation. As a result, six predominate styles emerged. We have labeled these styles superordinate goal, teaching or coaching, constructive realism, emotional expression, facilitative dialogue, and directive or assertive. Each of these styles can be seen as a form of one of the three dominant models of mediation or a hybrid of more than one

---

49. Interview with Attorney-Mediator (2009).

50. Interview with Attorney-Mediator (2009).

51. Interview with Attorney-Mediator (2009).

model. Some of the styles are more likely to be adopted by attorney-mediators or retired judge mediators and others, by counselor mediators, based on the differences in their training, education, and experience in the legal system.

#### A. Superordinate Style

This style is a derivative of a successful psychological model of conflict resolution—the use of a superordinate goal.<sup>52</sup> The superordinate goal style begins by recognizing that the parents have considerable arenas of disagreement and conflict. However, they do have a common goal—the needs of their children. Parents are led to see that the only way this underlying or superordinate goal can be realized is if they work together for the child's best interests. According to one counselor-mediator:

I try to keep them really focused and keep bringing up the interests of the child and try to keep them really focused on that . . . I try to get them to look at it through the eyes of the child . . . and try to get them removed from the conflict between the two of them.<sup>53</sup>

Further, an attorney commented that:

[Mediation is] getting people to focus on the fact that children issues must be resolved. They need to be resolved in the right way because these kids need a mom and they need a dad when this is all over with.<sup>54</sup>

Note that the attempt here is not to diminish the underlying parental conflict. Rather, the attempt is to encourage a temporary postponement of parental positioning in order to pursue a broader underlying interest that is highly important to both parties. In this case, that broader interest is the needs of the children. Inherent in this approach is the need to encourage the parents to put their own issues aside, at least temporarily, to focus on the children. Given the level of animosity that often resides between parental partners, this temporary shift requires the mediator to be both sensitive and focused.

This approach is quite outcome-oriented.<sup>55</sup> Mediators encouraged brainstorming of alternatives and expansive exploration of options. The

---

52. The classic study in this area was originally proposed by Muzafer Sherif. See Muzafer Sherif, *Superordinate Goals in the Reduction of Intergroup Conflict*, 63 AM. J. OF SOCIOLOGY 349 (1958).

53. Interview with Counselor-Mediator (2009).

54. Interview with Attorney (2009).

emotional component was not minimized. Instead, parents were encouraged to allow the child's interests to supersede and prevail. While all mediators used this approach to some extent, counselor-mediators seemed most sensitive to consciously using this style.

#### B. Teaching/Coaching Style

The attempt with this style was to help parents develop skills that would enable them to come together and reach joint decisions about their children. Those using this style strongly felt that skill building was provided to help parent live their lives better. The assumption was made that even though tension and animosity existed, child-focused decisions could still take place. In part, this approach was born from a further assumption that both parents needed to be involved in key decisions affecting their children.

In this style, parents were taught a set of skills regarding how to interact with and relate to one another. Further, the skills that were developed, hopefully, transcended the immediate encounters and promoted productive parental encounters on future issues.

Procedurally, those using this style used the children and their needs as the foundation for all discussions (reminiscent of the superordinate style). Parents were taught how to compromise rather than adamantly cling to emotionally laden personal agendas. This style assumed that mediation could not focus on telling parents what to do. Rather, the mediator, through listening, questioning, and guiding allowed parents to extend their joint decision making as far as possible. One counselor-mediator noted: "If we can teach [parents] new skills to get along with this person who is going to be part of their lives forever because they have children, then to me [mediation's] a wonderful service."<sup>56</sup>

Not surprisingly, drawing from their professional training, this style was more common among counselor-mediators than attorney-mediators. Also, this style was likely to require more direct mediation time than other approaches. Consequently, those using this style uniformly advocated for extending the number of prescribed mediation meetings.

Importantly, counselor-mediators were careful to note that one should not get into counseling issues. Instead, the focus should remain on building decision making skills and allowing the needs of the children to supersede the needs of the parents. The use of this style was consistent with the mediator's perspectives on mediation. Consider the following comments

---

55. For a discussion of the outcome-oriented mediation style, see Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 505 (2005).

56. Interview with Counselor-Mediator (2009).

from two counselor-mediators indicating the importance of focusing on the needs of children:

I think [mediation's] acknowledging people's stories. Acknowledging that they have feelings. Giving people resources to get that taken care of and then we have a job to get done. Mediation is to do what's in the best interests of your children. This is family mediation . . . If you do not recognize people's stories or their feelings, they will not go to your co-parenting plan . . . They have to be heard.<sup>57</sup>

Mediation will help put people on the right step if it's done well. It empowers them to really learn how to talk and solve problems.<sup>58</sup>

### C. Constructive Realism Style

In constructive realism, the mediator played an evaluative role and helped the parties understand what was realistic or what was likely to happen if issues proceeded for judicial interpretation. In this regard, constructive realism follows the traditional evaluative style of mediation. Lawyer-mediators and judge-mediators typically used this style. Understandably, counselor mediators lacked the background and perspective to offer credible stances regarding litigation expectations, and no counselor-mediators used this approach. In fact, some counselor-mediators felt that this style was an improper and an overly-directive method of mediator involvement.

In using constructive realism, the mediator explained the likelihood of given outcomes to parental clients. This included blunt and direct comments when extremely low probability of a given outcome was likely. This style was predicated on the realization that one or more of the parents may approach custody and visitation deliberations with unrealistic expectations. One attorney-mediator explained it this way: "Kind of getting people to see, you know, what is realistic here . . . You know, I've never seen an order come out like this. Has your attorney explained the law to you?"<sup>59</sup>

Part of constructive realism was helping parties know what to expect from the process and what to expect from the system. An attorney-mediator said: "I have the whole spiel that I give them basically when they come—initially explaining what to expect . . . Some lawyers prep people fairly well. Most really don't."<sup>60</sup>

---

57. Interview with Counselor-Mediator (2009).

58. Interview with Counselor-Mediator (2009).

59. Interview with Attorney-Mediator (2009).

60. Interview with Attorney-Mediator (2009).

#### D. Emotional Expression Style

Many of the mediators in our study realized that some period of emotional expression was necessary as a building step for subsequent focus and agreement. As one judge-mediator noted: “Some people need to release all the venom they’ve built up before we can talk about the issues.”<sup>61</sup>

This approach requires that mediators recognize that people hold back their emotions thus they are less able to make good decisions.<sup>62</sup> People who are involved in the conflict of divorce experience such feelings as anger, fear, disgust, shame, mistrust, sadness, and betrayal.<sup>63</sup> It is important that mediators recognize that these emotional feelings often saturate the conflict.

The fine line or nuance to using this style is to permit enough emotional expression that feelings are surfaced rather than suppressed, while keeping emotions from thwarting further discussion and mediation progress. Accepting the legitimacy of feelings and emotions without evaluative commentary seemed to be critical here.

#### E. Facilitative Dialogue Style

Mediators began by having each parent express their initial positions. At times, this task was given as a written assignment between sessions. With these statements in play, the mediator helped the parental parties make incremental moves to an acceptable middle ground. Many mediators expressed that this style as an ideal approach to mediation. Importantly, facilitative dialogue emphasized the need to move forward rather than become stymied by the past. Consider the following comments from an attorney-mediator:

I let them talk about why they want custody, and then I start to back off of that. Let’s put that aside, and let’s talk about scheduling issues. Once you get them talking about scheduling issues, you can start making some agreements on the scheduling. And then you’ve got them talking. You’re seeing how they’re talking to each other, and how they’re listening to each other; how much do they respect the other person’s role in the child’s life.

---

61. Interview with Judge-Mediator (2009).

62. Melinda S. Gehis, *Good Mediators Don’t Ignore Emotion*, 46 N.H. B.J. 28 (2005).

63. *Id.*

And then you can go back to custody issues and see if you can make progress there.<sup>64</sup>

Facilitative dialogue looked for ways to negotiate differences. The mediator was careful to understand that the mediator's role was not to change minds. Rather, the mediator encouraged progressive steps toward agreement. Strategies utilized to this end included summarizing, clarifying points of agreement, and objectively delineating points of disagreement. As one judge-mediator noted: "My job is not to talk you into anything or to change your mind about anything. My job is to see how you both feel and whether we can work on that."<sup>65</sup>

Typically, facilitative dialogue began with the mediator trying to put the parental partners at ease. This was followed by a review of the process that was being used and the place of mediation within the overall family law perspective. Most mediators felt such a brief review was necessary to have a common base of understanding given that there was often uncertainty regarding what had been discussed between the parties and their respective attorneys.

#### F. Directive/Assertive Style

Some mediators, either because of personal preference or their read of the situation, believed that they needed to be assertive and forceful to move the mediation process forward.<sup>66</sup> Again, there are some components to this style that are similar to the traditional evaluative style. However, the directive/assertive style provides some interesting refinements. One attorney-mediator said: "I need to be a little bit more forceful to make them make their progress—do everything rather than just say you need to look at these certain areas."<sup>67</sup>

At the extreme, a number of attorney-mediators and judge-mediators used a sub-style that we have labeled as "horrible-izing." For those employing this tactic, it was often the mediator's point of entry with the parental couple. In horrible-izing, the mediator confronted the couple with a perspective on the harsh realities that they faced. The mediator carefully explained to the parents the possible negative outcomes that could arise if they are unable to work together to address custody and visitation issues.

---

64. Interview with Attorney-Mediator (2009).

65. Interview with Judge-Mediator (2009).

66. Some scholars have referred to this method as a form of the evaluative model, even further describing it as a very direct approach, nicknaming it as "muscle mediators," "Rambo mediators," and "Attila the mediators." See Exon, *supra* note 10, at 593.

67. Interview with Attorney-Mediator (2009).

Mediators went over the impact and ramifications of not reaching a mediated agreement. Mediators described these outcomes in terms that they hoped would dissuade parents from settling for or accepting a mediation breakdown. Some mediators even explained the historically devastating impact that litigation could have on the children. In short, by presenting the time-consuming, expensive, and stress-laden impact of litigation, mediators hoped that parents would choose to avoid or minimize the court-imposed route of action.<sup>68</sup> Three judge-mediators made the following comments:

I explain to them, you know, what a custody case is about and how expensive it is and how emotionally draining it is and how it's unlikely that if they go through a full contested divorce they'll ever be able to communicate effectively about their kids . . . Some people need to hear that, and then say, 'I don't want to do that.'<sup>69</sup>

I want to tell them in the most honest terms possible what custody and visitation litigation looks like. How long it takes. Stress level. Cost . . . I explain to them how litigation can unravel in directions that no one can foresee. I think it's rarely healthy for kids to talk to judges . . . Judges are not overly trained in understanding kids.<sup>70</sup>

If the mediation doesn't help, then they gotta go back to court. I think they get a sense that this could be a long, drawn-out, and very expensive and painful process because there is nothing like a contested custody case to stir up the kind of feelings that may never be assuaged.<sup>71</sup>

Some mediators, particularly counselor-mediators were critical of this style. One counselor-mediator noted:

And even though we talk about mediation as a way for the parties to come together and communicate and resolve problems, the attorneys bring that more directive, leverage-seeking, you'd better do this or this will happen kind of style to mediation. And that's not really mediation. It's sort of the attorneys using their experience to strongly advise, and it doesn't help

---

68. A mediator's tactics can be seen as abusive or bullying. "[The mediator] said to them . . . 'Your family is going to be destroyed in this case [if you don't settle]. You got zero . . . chance of success on [getting damages in] this and your family is going to be destroyed . . .'" Bush, *supra* note 20, at 736, citing Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 8 (2001), quoting Transcript of Settlement Hearing at 36-38, Allen v. Leal, 27 F. Supp. 2d 945 (S.D. Tex. 1998).

69. Interview with Judge-Mediator (2009).

70. Interview with Judge-Mediator (2009).

71. Interview with Attorney-Mediator (2009).



[parents] really come to be able to talk about the issues and resolve them while together.<sup>72</sup>

## VI. THE CALL FOR A SITUATIONAL STYLE OF MEDIATION

Regardless of mediation style, the study revealed an underlying four-step framework that mediators felt was fundamental for mediation success. First, a safe mediation setting had to be established. Second, mediators had to specify the process of mandated mediation to assure understanding and clarity of expectations for parental partners. Third, mediators had to practice deep listening. Fourth, mediators identified, summarized, clarified, and communicated the underlying goals and needs of each parent. Importantly, the mediators suggested if any step in this framework was missed or minimized, the mediation process was mitigated and the probability of positive, functional outcomes was reduced.

Beyond the six mediation styles revealed in this study, one must question whether differences in styles really matter? In other words do the words, style, model, methods, artistry, or practices<sup>73</sup> really make a difference in the practice of mediation? An array of contingency models<sup>74</sup> suggests that style does matter.

There is a deeper, nuanced thread that runs through our interviews and data, suggesting two important challenges that mediators should address to maximize their effectiveness. First, mediators must be able to “read the situational context,” recognizing that each couple and each situation presents a unique background of issues, needs, and demands.

This study revealed three situational variables that mediators should assess: (1) the “emotional intensity” being experienced by the parents, which may color and affect their capacity and willingness to engage in meaningful dialogue; (2) the “goal similarity” of the parents, which may either foster or minimize the probability of agreement on custody and visitation outcomes; and (3) “communication clarity,” which represents the ability of each parent to communicate their needs in an open, direct, and comprehensible manner. The mediators’ choice of style and approach

---

72. Interview with Counselor-Mediator (2009).

73. Various terms are often used to describe the practice of mediation, such as style, approach, model, framework, theory, orientation, modes, technique, tools, skills and functions. See Dorothy J. Della Noce, *Communicating Quality Assurance: A Case Study of Mediator Profiles on a Court Roster*, 84 N.D. L. REV. 769, 803 (2008).

74. F.E. FIEDLER, *A THEORY OF LEADER EFFECTIVENESS* (New York: McGraw-Hill 1967); Steven Kerr, Chester A. Schriesheim, Charles J. Murphy & Ralph M. Stogdill, *Toward a Contingency Theory of Leadership Based Upon the Consideration and Initiating Structure Literature*, 12 *ORG. BEHAVIOR & HUMAN PERFORMANCE* 62, 82 (Aug. 1974).

should be affected, at least to some extent, as these three situational variables are factored into the mediators' assessment.

Second, mediators should be willing "adapt and flex" their style of mediation according to the demands of the situational context. In short, we encourage mediators to select the style that best matches the situation. Of course, this often requires the mediator to shift from personal style preferences and strategy to adopt an appropriate context-driven style of mediation.<sup>75</sup> We recognize that each mediator has a degree of comfort with their present, preferred style, and we realize the preferred style has brought some measure of success. However, each mediator has the capacity to adapt and modify their preference based on the unique needs surfacing from their interaction with each parental couple.

Accordingly, exposing mediators to a variety of styles allows them to build a stronger and deeper array of style options—thus serving parental clients more fully. In short, what is important is the flexibility of the mediator to quickly identify the needs of the parties and make adjustments in practice to best serve the situation before him or her.<sup>76</sup>

---

75. Gerwurz, *supra* note 4.

76. One author calls for mediators "to be trained to identify power imbalance and to be capable of adjusting their style to the ever-changing power relations that exist in a given mediation." *Id.* at 159.