

The Implications of Recent Procedural Justice Research  
on the Evaluative-Facilitative Debate

Lisa Patnoe  
2002

## Introduction

Mediation is an established element in the world of dispute resolution.<sup>1</sup> It first gained popularity in neighborhood disputes as well as labor and employment disputes.<sup>2</sup> Later, it gained prominence in the family law context,<sup>3</sup> and now in many jurisdictions, mediation is a mandatory component of domestic dispute resolution.<sup>4</sup> As mediation programs proliferated, members of the mediation and litigation communities espoused its efficiency.<sup>5</sup> This proliferation led to increased legislation and funding supporting the creation and maintenance of mediation programs.<sup>6</sup> Last year, the National Conference of Commissioners on Uniform State Laws enacted the Uniform Mediation Act,<sup>7</sup> which offers guidance regarding mediation practice to legislators across the country. Although the Uniform Mediation Act is in its infancy, researchers have studied the role of mediation in dispute resolution for over a quarter of a century.<sup>8</sup>

---

<sup>1</sup> It is even riding the cyberspace wave in the form of on-line dispute resolution. “The American Bar Association (ABA) has established . . . a Task Force to study the emergence of standards for the resolution of disputes arising from business to business (B2B) and business to consumer (B2C) e-commerce transactions . . . . The Task Force has sought and continues to seek information from interested individuals and groups on (1) the core features of an effective dispute resolution process for both B2B and B2C e-commerce disputes; and (2) examples of useful models on which to base guidelines or processes, including codes of conduct, existing complaint resolution procedures and useful analogs in the brick and mortar context.” American Bar Association Task Force on E-commerce & Alternative Dispute Resolution, *Draft: Preliminary Report & Concept Paper*, at <http://www.law.washington.edu/ABA-eADR> (last visited Jan. 9, 2001).

<sup>2</sup> Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309, 311 (2000).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 312.

<sup>6</sup> *Id.*

<sup>7</sup> The National Conference of Commissioners on Uniform State Laws enacted the Uniform Mediation Act on August 16, 2001. UNIFORM MEDIATION ACT (2001). Available at <http://www.pon.harvard.edu/guests/uma/> (last visited Jan. 9, 2001).

<sup>8</sup> *E.g.*, Lon L. Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

Researchers have suggested that the two best predictors of long-term participant satisfaction with mediation are joint problem-solving and the implementation of procedural justice.<sup>9</sup> “Procedural justice” refers to the fairness of a process used to arrive at an outcome.<sup>10</sup> Researchers exploring procedural justice in mediation, as well as other dispute resolution forums, assert that disputants find a procedure to be fair when they have the opportunity to tell their stories, even when telling their stories has no effect on the resolution of the dispute.<sup>11</sup>

Researchers contend that it is not the opportunity to speak that enhances assessments of fairness, but that the opportunity for disputants to speak is one factor contributing to their perception that the authorities have treated them with respect and dignity.<sup>12</sup> Researchers also

---

<sup>9</sup> Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 44 & n.56 (1997).

<sup>10</sup> Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. (forthcoming 2001).

<sup>11</sup> E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. OF PERSONALITY & SOC. PSYCHOL. 952, 957 (1990).

<sup>12</sup> Sumner J. Sydeman et al., *Procedural Justice in the Context of Civil Commitment: A Critique of Tyler’s Analysis*, 3 PSYCHOL., PUBLIC POL’Y & L. 207, 210-211 (1997); E. Allan Lind, Tom R. Tyler, & Yuen J. Huo, *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. OF PERSONALITY & SOC. PSYCHOL. 767, 768 (1997).

Sydeman, et al. report that

[r]esearch with felons and malpractice litigants has revealed that the most important determinants of perceived fairness are participation, dignity, and trust. Participation involves the presentation of one’s own views and evidence, and the ability to influence decisions. Thus it involves having a *voice* in the process (process control) and may also relate to decision control. Research on the importance of voice suggests that the opportunity to speak may have value in and of itself, regardless of its impact on decision control (i.e., influence on the final decision). In other words, voice without decision control should still heighten perceptions of procedural justice.

Sydeman, *supra* at 210 (citations omitted).

Lind Tyler & Huo explain that

[b]ecause procedural fairness judgments are used as summary judgments about relationships with groups and authorities, it makes sense that fairness will be defined largely in relational terms....The particular relational issues that people seem to consider most in making procedural justice judgments are inferences about the authority’s motivations, especially the authority’s willingness to consider one’s needs and to try to make fair decisions (which we term *trust in benevolence*), (b) feelings that

suggest that when participants find a procedure fair, that assessment is based largely on respectful treatment by mediators.<sup>13</sup> With treatment by mediating authorities being the primary determinant of how fair disputants find a process, the importance of what techniques mediators use diminishes as long as those techniques demonstrate respect for the disputants. This finding is particularly relevant to the long-standing debate over whether a facilitative or an evaluative approach to mediation is most appropriate. If *any* techniques that make a disputant feel treated with respect help lead to successful implementation of a settlement, the facilitative/evaluative debate has little relevance. Therefore, if the primary goal of mediation is to reach settlements that disputants will successfully implement, the issue of technique is virtually moot.

A mediator is an authority without legitimate power to coerce an agreement. Research indicates that dignified and respectful treatment by the mediator suggests that the person accorded the treatment is a full-fledged member of the group within which the dispute resolution procedure takes place.<sup>14</sup> This recognition of the person as a full-fledged member of the group validates that person's group membership, and that validation can be a determinative element when the disputant evaluates whether the procedure was fair.<sup>15</sup> Perceptions of fairness are important because disputants are more likely to accept and implement resolutions when they believe a resolution process is fair.<sup>16</sup> Furthermore, there is a direct correlation between when a

---

the authority has treated the person with the dignity and respect appropriate for a full-fledged member of the group (*status recognition*), and (c) the belief that decisions are based on a full and open accurate assessment of the facts (*neutrality*).

Lind Tyler & Huo, *supra* at 768.

<sup>13</sup> TOM R. TYLER, ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 186 (1997).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. OF PERSONALITY & SOC. PSYCHOL. 850, 857 (1994); Lind, Tyler & Huo, *supra* note 12, at 767 (citations omitted).

disputant feels treated fairly early in the mediation process and the disputant's evaluation at the end of the process that the procedure was fair.<sup>17</sup>

**A DESCRIPTION OF MEDIATION AS IT IS CURRENTLY PRACTICED AND ITS  
THREE PRINCIPAL THEORIES – EVALUATIVE, FACILITATIVE AND  
TRANSFORMATIVE**

Mediation is one of many ways to settle a dispute.<sup>18</sup> Although many commentators refer to mediation as a form of alternative dispute resolution, most suits are settled prior to a verdict.<sup>19</sup> In fact, individuals and organizations settle the vast majority of disputes before a suit is filed.<sup>20</sup> Further, even when disputants do file a legal claim, fewer than ten percent of those claims are resolved with a trial verdict.<sup>21</sup> As important as it is to reach a resolution, *implementing* the resolution is no less important. Therefore, it is crucial that disputants perceive any conflict resolution process requiring future action as fair because such perceptions affect the disputants' acceptance of authority and their compliance with the resolution.<sup>22</sup>

Although people may feel an obligation to abide by court judgments more than they feel obligated to arrive at settlements in mediation, even legal mandates require significant voluntary compliance to be effective.<sup>23</sup> The procedural justice studies that have focused on the need for, the desirability of, and the achievement of voluntary compliance with the law apply to mediation

---

<sup>17</sup> Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 77 (Joseph Sanders & V. Lee Hamilton eds., 2001).

<sup>18</sup> Others include arbitration and trial.

<sup>19</sup> Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 5-6 (1996).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Lind, Tyler & Huo, *supra* note 12, at 767 (citations omitted).

<sup>23</sup> Tyler & Lind, *supra* note 17, at 66.

because although mediation settlements are theoretically never coerced,<sup>24</sup> a settlement is without full value if not successfully implemented.

Therefore, although a disputant may feel satisfied at the end of a mediation session where the parties have forged an agreement, it is more desirable still that the disputants comply with the agreement reached.<sup>25</sup> Belief that the dispute resolution procedure was fair will help to facilitate compliance.<sup>26</sup> Participants in mediation generally find the process to be fair and satisfying.<sup>27</sup> This suggests that mediation participants usually comply with the settlement agreement. However, while participants find mediation satisfying,<sup>28</sup> there is little agreement on the definition of mediation.<sup>29</sup>

Proponents of mediation claim that it offers justice achieved through autonomy and self-determination rather than the law;<sup>30</sup> that mediation has a needs-based, rather than rights-based orientation;<sup>31,32</sup> and that while “agreement is only a superficial indicator of success,” fairness is the *sine qua non* of mediation.<sup>33</sup>

---

<sup>24</sup> Some researchers suggest that subtle social signals indicating what is or is not appropriate to discuss or that participants are inappropriately expressing emotions may amount to a form of coercion in a mediation where the participants supposedly decide what the agenda is. *See generally, e.g.,* Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1987).

<sup>25</sup> Lind, Tyler & Huo, *supra* note 12, at 767 (citations omitted).

<sup>26</sup> Tyler & Lind, *supra* note 17, 67-68.

<sup>27</sup> Bush, *supra* note 19, at 17. For a discussion of when participants or commentators feel that mediation is less than fair, see notes 43 through 48 and 55 through 57 and accompanying text.

<sup>28</sup> *Id.*

<sup>29</sup> Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER SOC. POL’Y & L. 269, 278 (1996) (citing 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 (1989)).

<sup>30</sup> Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*. 74 WASH. U. L.Q. 47, 49 (1996).

<sup>31</sup> Ellen A. Waldman, *Therapeutic Jurisprudence/Preventive Law and Alternative Dispute Resolution: Substituting Needs for Rights in Mediation Therapeutic or Disabling?*, 5 PSYCHOL., PUB. POL’Y & L. 1103,1105 (1999).

<sup>32</sup> Some researchers assert that this focus on needs rather than rights can perpetuate the reduced social standing of marginalized groups. Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Justice*, 82 MARQ. L. REV. 155, 157 (1998).

<sup>33</sup> Kuriloff & Goldberg, *supra* note 9, at 44 & n.54.

Other conceptions of mediation downplay objective fairness, saying that the “essence of mediation lies in encouraging disputants’ unfettered autonomy in the resolution of their dispute.”<sup>34</sup> In other words, the purpose of mediation is facilitation of an agreement. If the disputants agree to the settlement, it is fair *per se*.

Other commentators characterize mediation as facilitated negotiation.<sup>35</sup> Mediators more fully develop the facts and nuances of each party’s positions, and facilitate the parties’ understanding of each other’s position.<sup>36</sup> Lastly, some emphasize mediation’s positive effects on interpersonal relationships and its potential to help achieve social justice.<sup>37</sup>

Some of the most frequently cited reasons for disputant satisfaction with mediation are that mediation allows the participants to deal with the issues *they* care about and to fully present their perspectives.<sup>38</sup> Further, mediation gives participants “a sense of having been heard and help[s] them to understand each other.”<sup>39</sup> Interestingly, the cost or length of the process does not significantly alter disputants’ sense of whether the process was fair.<sup>40</sup> Even lawyers, who could lose fees by not litigating at lengthy trials, support the use of mediation. In an ABA survey, fifty-one percent of the responding lawyers preferred mediation over litigation.<sup>41</sup> Research in North Carolina demonstrates that ninety-three percent of that state’s attorneys support

---

<sup>34</sup> Waldman, *supra* note 32, at 156.

<sup>35</sup> Bush, *supra* note 19 at 3.

<sup>36</sup> *Id.* at 13.

<sup>37</sup> *See generally* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) (describing the practice of transformative mediation which values positive transformation of the parties more than reaching a settlement to the dispute focused on transforming parties).

<sup>38</sup> Bush, *supra* note 19, at 17.

<sup>39</sup> *Id.*

<sup>40</sup> E. Allan Lind, et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 L. & SOC’Y. REV. 953, 982 (1990). In fact, although most people think that trials are, in general, more complex, time-consuming and costly than settling, some trial participants felt trial to be more understandable and fair than bilateral settlement. *Id.*

mediation.<sup>42</sup>

However, such positive perceptions of mediation are not universal. Commentators cite the danger of court-mandated mediation in cases where abused spouses endure forced contact with their abuser,<sup>43</sup> as well as the perpetuation of power imbalances engendered by needs-based, rather than rights-based settlement.<sup>44</sup> Those concerned that power imbalances promote unfair agreements between disputants assert that needs-based mediation disfavors people who define their needs minimally.<sup>45</sup>

One study showed that although the objective outcomes for minority disputants were worse than outcomes for whites, the minorities subjectively held more favorable impressions of the mediation process than the whites.<sup>46</sup> One researcher suggested that minorities may define their needs more minimally than whites, thus allowing mediation agreements to meet those needs more easily than the more broadly defined self-perceived needs of the whites.<sup>47</sup> Given this dynamic, settlement based solely on disputants' perception of needs is not itself a worthy goal.<sup>48</sup>

Whether or not it is always appropriate, mediation's attention to need, rather than rights, may be its most radical characteristic.<sup>49</sup> It is the focus on need that most distinguishes mediation from litigation.<sup>50</sup> Litigation's primary focus is helping people effect their rights.<sup>51</sup>

---

<sup>41</sup> Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 984 (2000) (citing Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54, 58).

<sup>42</sup> Welsh, *supra* note 10.

<sup>43</sup> Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce in Mediation Research and Policy*, 6 PSYCHOL., PUB. POL., & L. 989, 997 (2000).

<sup>44</sup> Waldman, *supra* note 31, at 1116.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1113.

<sup>47</sup> *Id.* at 1110-13.

<sup>48</sup> *Id.* at 1118.

<sup>49</sup> *Id.* at 1105.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

Commentators describe mediation, on the other hand, as minimizing the focus on rights and emphasizing fulfillment of party needs.<sup>52</sup> However, need may not be appropriate as the benchmark for success in a mediation because needs (beyond the basics of food and shelter) are fundamentally subjective.<sup>53</sup> In contrast, the law objectively defines rights, and those rights are designed “to effect societal notions of justice and morality.”<sup>54</sup>

Whereas there is disparity in how people define the depth of their needs, one critic of using perceived satisfaction of need as the sole benchmark of success in mediation suggests that, “human need is not, by definition, self-justifying.”<sup>55</sup> Mediators should not ignore rights in the mediation process for the sake of focusing on needs. There is a tension in mediation between the opportunity to create settlements that lie outside the standard and conservative boundaries of established jurisprudence and the desire of some mediators to help broker objectively just outcomes. One advantage of mediation is its ability to effectuate an agreement that satisfies the interests of the parties, even if that agreement might not satisfy a judge. However, a party -- especially a disenfranchised one -- may define her needs in so minimal a manner as to forego a significant benefit that is her right.<sup>56</sup> This forbearance may be due simply to low expectations. If so, the mediation, by focusing on satisfying the party’s needs rather than her rights, could simply perpetuate the participant’s “residence in America’s underclass.”<sup>57</sup>

---

<sup>52</sup> *Id.* at 1105-06.

<sup>53</sup> *Id.* at 1108.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1111.

<sup>57</sup> *Id.* at 1111. Waldman illustrates this possibility with an example contrasting the perceived needs of Geoffrey, a Harvard Law School graduate working as an attorney who slips on a wet napkin at Starbucks with those of Graciella, a young, single, Hispanic mother with imperfect English language skills who slipped on a rotted banana peel in the grocery store. *Id.* at 1109-12. Both accident victims break a bone. *Id.* In mediation, Graciella gets an apology and \$50 and believes that it is fine because she did not expect more. *Id.* at 1111. Geoffrey, having a keen sense of entitlement, seeks to recover a considerable sum and will probably succeed. *Id.* Waldman admits that the characters are stereotypical, but asserts that “data

The tension between valuing rights, in contrast to needs, in mediation is only one area in which commentators question the definition (and even the worth) of mediation. Even a brief survey of the literature regarding mediation reveals many differences of opinion as to how mediation is defined. However, one characteristic consistent in all mediation is that a mediator cannot (legitimately) force a settlement agreement on disputants. “A coerced settlement is inconsistent with a legitimate mediation process, as is any resolution that lacks voluntary and informed consent of the disputants.”<sup>58</sup>

This view of coercion is shared among the three generally recognized types of mediation or mediator behaviors—transformative, facilitative, and evaluative. These mediation styles reflect the spectrum of conceptions of mediation.<sup>59</sup> Transformative mediation has as its highest goal the personal growth of the participants. Facilitative mediation de-emphasizes settlement while emphasizing communication between the participants with the mediator acting only as a responsive conduit. Evaluative mediation emphasizes settlement and supports mediator comments apprising the participants of the strengths and weaknesses (and, at times, the probable value in a trial setting) of their respective cases. While one could describe all mediation as operating in the shadow of the law, evaluative mediation references the law more often than facilitative or transformative mediation.

While these differences among the three styles of mediation can be significant, the similarities among all types of mediation are equally significant. Most important among the

---

does . . . provide some support for the notion that satisfaction with the mediation process does not necessarily correlate with beneficial outcome and that minorities do not fare as well as other groups in unrepresented negotiations.” *Id.*

<sup>58</sup> Donald T. Weckstein, *Alternative Dispute Resolution Symposium Issue: In Praise of Party Empowerment – and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 502 (1997). However, in some situations, circumstances themselves can amount to coercion. *See generally* Grillo, *supra* note 24.

<sup>59</sup> JAMES J. ALFINI, ET AL., *MEDIATION THEORY AND PRACTICE* 170 (2001).

similarities is that the participants must construct and agree to a settlement. A settlement is never legitimately fashioned or ordered by the mediator. Additionally, in principle, the parties are free to frame their dispute as they wish, without regard to what may be actionable in a court or the rules of evidence that apply in a trial setting. The disputants are free to focus on the interests that concern them, rather than solely on legal issues.<sup>60</sup>

Perhaps the most radical and least legalistic view of mediation is embodied in the theories of transformative mediation. Robert Baruch Bush and Joseph Folger are champions of transformative mediation.<sup>61</sup> They assert that “[a] transformative mediation offers the parties opportunities for personal empowerment and encourages the parties to give and receive recognition of each other’s interests, concerns, and needs.”<sup>62</sup> Bush and Folger state that “mediation’s strength [is] its ability to transform relationships and foster communication skills by empowering individuals and encouraging mutual respect among parties.”<sup>63</sup> Further, they assert that “mediation may work to achieve social justice by cultivating self-help skills, empowering communities, and reallocating power among groups.”<sup>64</sup> As described by Bush and Folger, the hallmarks of a transformative approach are:

(1) mediators describe their role or objective “in terms based on empowerment and recognition;”<sup>65</sup>

---

<sup>60</sup> Some commentators assert that this is not always true. *See, e.g.* Grillo, *supra* note 24. Sometimes mediators guide participants away from expressing their concerns or emotions and towards issues the mediator sees as relevant.

<sup>61</sup> *See generally* BUSH & FOLGER, *supra* note 37 (describing the practice of mediation which has as a primary goal transformation and empowerment of parties rather than reaching settlement).

<sup>62</sup> ALFINI, et al., *supra* note 59 at 182.

<sup>63</sup> Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1170 (1997) (citing BUSH & FOLGER, *supra* note 37.)

<sup>64</sup> *Id.*

<sup>65</sup> ALFINI, ET AL., *supra* note 59 at 141 (citing BUSH & FOLGER, *supra* note 37.) Bush and Folger describe empowerment as helping “the parties to (1) clarify their own goals, resources, options, and preferences and make clear decisions for themselves about their situation” and recognition as

- (2) the parties are responsible for outcome;<sup>66</sup>
- (3) the mediator does not judge the parties' opinions and choices;<sup>67</sup>
- (4) the mediator approaches the mediation with the belief that the parties are able "to do the job;"<sup>68</sup>
- (5) the mediator allows the parties to express emotion and responds to those expressions;<sup>69</sup>
- (6) the mediator explores the parties' uncertainties.<sup>70</sup>
- (7) the mediator stays in the present; by focusing on what the parties are saying and exploring what arises rather than taking a long view of identifying and solving the problem that brought the disputants to mediation;<sup>71</sup>
- (8) the mediator is responsive to comments about the past and helps parties to rethink their opinions of each other and to clarify their options.<sup>72</sup>
- (9) the mediator believes that the mediation is only one step in the conflict interaction and that settlement at the end of the mediation session is not the only measure of success.<sup>73</sup>
- (10) the mediator feels successful "when empowerment and recognition occur, even in small degrees."<sup>74</sup>

Transformative mediation requires that voice be an integral part of the process. The mediator acts on the assumption that the parties are able to create a resolution and encourages their participation, including the expression of emotions and recounting past events. The stated

---

"consider[ing] and better understand[ing] the perspective of the other party, *if* they decide they want to do so." *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 141- 42.

<sup>68</sup> *Id.* at 142.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 142-43.

<sup>71</sup> *Id.* at 143.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 143-44.

<sup>74</sup> *Id.* at 144.

hallmarks of transformative mediation discount settlement as *the* measurement of success and focus on the mediator's obligation to facilitate mutual understanding of what the disputants are saying. This focus, rather than engaging in long-view problem solving, strongly implies that voice and the empowerment it brings are valuable. Transformative mediation may seem to have some of the loftiest goals, but some commentators consider facilitative mediation to be the purest form of mediation. Additionally, there is an enormous emphasis in the field's literature on the difference between facilitative and evaluative mediation.

**THE TENSION BETWEEN EVALUATIVE AND FACILITATIVE MEDIATION METHODS AND A PROPOSAL THAT A MULTIFACETED APPROACH WOULD HELP RELIEVE THAT TENSION.**

Research indicates that in most mediations, mediators are not guided solely by any one theory of mediation. Mediators who employ evaluative techniques comment on the strengths and weaknesses of the parties' cases while, in theory, those who use facilitative techniques do not evaluate, but rather solely facilitate communication between the parties. Given that mediators rarely employ only facilitative or evaluative techniques, embracing multiple techniques may help to reduce tensions between proponents of each view of mediation.

In the mediation community, there are significant disagreements between proponents of facilitative mediation and supporters of evaluative mediation.<sup>75</sup> The debate over the value and authenticity of each approach has been extended and vigorous.<sup>76</sup> Facilitative purists believe that the "essence of mediation lies in encouraging disputants' unfettered autonomy in the resolution of their dispute."<sup>77</sup> "Unfettered autonomy," however, seems an elusive ideal in dispute resolution. What is commonly characterized as facilitative mediation is most often a mediator

---

<sup>75</sup> Birke, *supra* note 2, at 309.

<sup>76</sup> *Id.*

<sup>77</sup> Waldman, *supra* note 32, at 156.

helping the participants communicate their concerns. Thus, the facilitative mediator's purpose is to help the disputants communicate well enough to forge their own solution. Mediators using only facilitative techniques do not offer their opinions; they emphasize improving communication, clarifying issues, keeping participants calm and remedying information deficiencies that might delay or impede settlement.<sup>78</sup> In principle, mediators accomplish these goals through questions or comments that guide the disputants' communication, rather than through any evaluation of the participants' cases.<sup>79</sup>

Proponents of facilitative mediation point out that the purpose of mediation is to create a solution that meets the perceived needs of the disputants,<sup>80</sup> as opposed to a solution that meets anyone else's ideas of what is appropriate. These proponents believe that a mediator's expressed evaluation reduces disputant participation in the process and may lead to disputants being less satisfied with the mediation process as well as the outcome.<sup>81</sup> Others concerned with mediation believe that a more active role on the part of the mediator, including evaluation of the merits of the disputants' cases, leads to more effective mediation. Commentators refer to evaluative mediators as those who evaluate the strengths and weaknesses of disputants' cases.

Different goals for mediation seem to inform facilitative and evaluative styles of mediating. Leonard Riskin describes facilitative and evaluative mediator behaviors as being on

---

<sup>78</sup> Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 28, 32 (1996).

<sup>79</sup> In practice, asking a question can be a form of evaluation. Imagine a situation where a child informs her parent that she has decided to forego a college education for an opportunity to work on a cruise ship. The parent asks the child, "Do you think that getting a great tan and knowing your way around the bowels of the Love Boat is going to help you have a fulfilling career at 40?" This is an extreme example, but it is easy to see that questions, though identified as a facilitative technique, can easily sway toward evaluation.

<sup>80</sup> Waldman, *supra* note 32, at 157. Other researchers have also proposed that the primary goal of mediation, especially in contrast to other forms of dispute resolution, is to reach needs-based (rather than rights-based) solutions. *Id.*

<sup>81</sup> Riskin, *supra* note 78, at 45.

opposite ends of one continuum.<sup>82</sup> “At the extreme of this evaluative end of the continuum fall behaviors intended to direct some or all of the outcomes of the mediation....At the extreme of this facilitative end is conduct intended to simply allow the parties to communicate with and understand one another.”<sup>83</sup> He goes on to explain that the facilitative mediator believes that the disputants comprehend their situation better than anyone else, perhaps even their lawyers, and thus, the disputants can create better solutions than anyone else involved in the mediation.<sup>84</sup> For this reason, “the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.”<sup>85</sup>

In contrast, “[t]he mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement—based on law, industry practice or technology—and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.”<sup>86</sup> Though the evaluative style of mediation is on the rise, some critics oppose its use.<sup>87</sup> These critics assert, among other things, that evaluation destroys mediator neutrality<sup>88</sup> because each piece of information shared by the mediator favors one participant over another.<sup>89</sup>

Proponents of evaluative techniques counter that evaluation “provides disputants with enough information to make decisions confidently in mediation and to avoid subsequent feelings of loss or disappointment.”<sup>90</sup> They also assert that, at times, disputants want the mediator’s

---

<sup>82</sup> *Id.* at 23-24.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 769-70 (1997).

<sup>88</sup> Waldman, *supra* note 32, at 157.

<sup>89</sup> Stark, *supra* note 87, at 777.

<sup>90</sup> *E.g.* Waldman, *supra* note 32, at 167.

opinion and that the information offered by the mediator can help facilitate resolution.<sup>91</sup> These proponents explain that a disputant cannot make an informed decision without being aware of the relevant social and legal norms.<sup>92</sup> Furthermore, it is difficult for uninformed disputants to make prudent negotiating decisions.<sup>93</sup>

Social cognition theory adds another dimension to the support for evaluative techniques in mediation.<sup>94</sup> Literature within the social cognition field defines “information control” as a perception of personal control occurring when one gets information relating to a stressful situation.<sup>95</sup> Having this relevant information helps disputants understand the process and the implications of their decisions.<sup>96</sup> This likely empowers disputants in a way that supporters of all mediation styles would appreciate.

In some cases, the implementation of a more facilitative or more evaluative style may not affect the outcome of mediation. One researcher, in a review of empirical literature concerned with mediation mandated by the court, did not identify any important differences between the outcomes of mediations completed in a more facilitative manner and those conducted in a more evaluative manner.<sup>97</sup> Furthermore, the study found that mediators may not run “facilitative” or “evaluative” mediations, cleaving tightly to one style or the other, as implied by the copious commentary treating the two styles as distinct and conflictive.<sup>98</sup>

---

<sup>91</sup> James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 487 (1996).

<sup>92</sup> *Id.*

<sup>93</sup> Riskin, *supra* note 78, at 46.

<sup>94</sup> Sydeman et al., *supra* note 12, at 211.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Welsh, *supra* note 10, at n.5 (citing Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 76 n.23 (2000)).

<sup>98</sup> Birke, *supra* note 2, at 309-10.

Data from a recent study supports the conclusion that mediators mix facilitative and evaluative techniques.<sup>99</sup> Often mediators begin with facilitative techniques focusing on a broad range of potential disputant concerns and significantly vary the styles they use during the mediation.<sup>100</sup> The differences in style noted seemed to arise largely in response to the nature and behavior of the disputants.<sup>101</sup> The literature on facilitative versus evaluative mediation often includes commentary on the justice available to disputants, with evaluative proponents asserting that evaluative mediation may produce more just mediation.<sup>102</sup> The assertion is that if disputants are aware of the resolutions offered by the legal system, they will make more informed decisions. These informed decisions may be better ones that disputants will feel are more fair. This, in turn, can lead to comfortable implementation. For example, if an unjustly insulted disputant who suffered significant losses because of a public insult knows that he can prove libel, the insulted disputant may not be satisfied with an apology and no financial recompense. If he does not know his rights during the mediation, he might agree to settle for just a public apology. Later, if he found out that he could have recovered his financial losses, he would find the mediation, in retrospect, less fair. This could result in a breakdown of other aspects of the settlement implementation.

Jeffrey Stempel, a respected member of the mediation community, has recently suggested that the dispute resolution commentators should move beyond the debate engendered by the evaluative/facilitative continuum proposed in 1996 by Riskin.<sup>103</sup> Stempel asserts that an eclectic

---

<sup>99</sup> Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 61 (2000).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 254-55 (2000).

<sup>103</sup> See e.g., Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371, 380 (2000).

approach toward mediation is both theoretically sound and, in fact, common practice.<sup>104</sup> Stempel contends that different situations require different approaches and techniques.<sup>105</sup> Both facilitative and evaluative techniques can be useful and effective.<sup>106</sup> However, some facilitative techniques lend themselves to situations like family disputes, while evaluative techniques are often more appropriate in commercial disputes where maintenance of a relationship is not at issue.<sup>107</sup> The recent research yielding the relational model of authority supports the inference that a variety of evaluative or facilitative techniques may be successful as long as mediators treat dispute participants with respect and dignity.<sup>108</sup> This research suggests that mediators treating disputants with dignity and respect, rather than any choice between facilitative and evaluative techniques, may have a greater effect on the disputants' assessments of fairness, and their willingness to follow through with any agreement reached.<sup>109</sup>

**THE CONCEPTS OF PROCEDURAL JUSTICE, THE GROUP-VALUE MODEL,  
THE RELATIONAL MODEL OF AUTHORITY, AND THE FAIRNESS HEURISTIC  
THEORY.**

When mediation participants find a procedure, they are more likely to successfully implement any settlement that arises out of that mediation. For this reason, procedural justice research findings are important to the development of mediation theories and practices.

Together, the group-value model and the relational model of authority suggest that disputants find mediations more fair when the authorities and other participants involved in the process treat the disputant with dignity and respect. The fairness heuristic theory suggests that

---

<sup>104</sup> Stempel, *supra* note 102, at 248-250.

<sup>105</sup> *Id.* at 250.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

treatment of the disputant at the beginning of the procedure is especially important in influencing that disputant's perception of the fairness of the procedure.

No matter what the style of a mediation, there are attendant issues of justice: procedural, distributive and possibly retributive. Distributive justice focuses on the substantive fairness of outcomes themselves;<sup>110</sup> procedural justice focuses on the fairness of the process used to reach the outcome;<sup>111</sup> and retributive justice considers punishments for wrongs.<sup>112</sup>

Both the group-value and relational authority models of justice posit that disputants will find a procedure fair when they are treated with dignity and respect.<sup>113</sup> It is important to recognize that people evaluate dispute resolutions not only based on the outcome, but also based on how fair they found the process.<sup>114</sup> In fact, research indicates that disputants are equally concerned with both the fairness and the outcome of a procedure.<sup>115</sup> This is also true for litigants.<sup>116</sup>

Whether or not litigants perceive the procedure as fair is the most important factor in whether or not they are satisfied.<sup>117</sup> While it is not surprising that disputants want resolution

---

<sup>108</sup> See generally, Tyler & Lind, *supra* note 17.

<sup>109</sup> *Id.*

<sup>110</sup> Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 1000 (2000). An example of evaluating distributive justice is a person believing that the \$2,300 she received from a tort settlement is fair because she believes that amount justly compensates her for her loss.

<sup>111</sup> Welsh, *supra* note 10.

<sup>112</sup> Tom R. Tyler & Robert J. Boeckmann, *Commonsense Justice and Inclusion Within the Moral Community: When Do People Receive Procedural Protections from Others?*, 3 PSYCHOL. PUB. POL'Y & L. 362, 365 (1997). An example of retributive justice is executing a convicted murderer as punishment, rather than as a way to bring back to life the victim (an impossible act).

<sup>113</sup> Tyler & Lind, *supra* note 17.

<sup>114</sup> Tyler, *supra* note 16, at 850.

<sup>115</sup> Bush, *supra* note 19, at 19. Studies on procedural justice in the workplace show that procedural justice is at least as important as distributive justice in producing affective commitment and motivation. Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 559 (2001).

<sup>116</sup> Sydeman et al., *supra* note 12, at 210.

<sup>117</sup> *Id.*

proceedings to be fair, it is worth noting that disputants' assessments that procedures were fair motivate compliance with the resolution as much as their satisfaction with the outcomes.<sup>118</sup> Although the outcome affects disputants' attitudes toward a settlement, disputants' assessments that the process is fair are the most important factor influencing their willingness to accept decisions by a third-party.<sup>119</sup>

The value placed on procedural fairness by disputants was demonstrated in a automobile mediation program in New Jersey. In the program, "fairness judgments" affected disputants' intentions to accept the award more than winning or losing the dispute.<sup>120</sup> A federal court-connected mediation program offers support for the notion that procedural fairness competes in importance with assessments of the outcome in determining whether a result is accepted.<sup>121</sup> In that program, with amounts in dispute ranging from \$10,000 to \$800,000, the primary factor in the decision to accept the settlement was how fair the disputants found the process to be, as opposed to the outcome.<sup>122</sup>

Research indicates that fairness judgments play at least as much of a role as outcome in determining whether disputants accept and comply with settlements. Fairness judgments appear to be based on both instrumental and non-instrumental group-value concerns.<sup>123</sup> Instrumental concerns are concerns with the result of the mediation.<sup>124</sup> Non-instrumental concerns are concerns about issues other than the outcome of the mediation, such as how the authorities treat

---

<sup>118</sup> *Id.*

<sup>119</sup> Tyler, *supra* note 16, at 857.

<sup>120</sup> Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 883 (1997).

<sup>121</sup> It is worth noting here that, theoretically, mediation participants always have the option of refusing any settlement. Practically, there are times when disputants may feel pressured, by circumstances, other mediation participants, or the mediator, into accepting a resolution with which they are not satisfied.

<sup>122</sup> Tyler, *supra* note 16, at 884.

<sup>123</sup> E. Allan Lind, et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 953 (1990).

one during the procedure.<sup>125</sup> Given that fairness judgments so significantly affect acceptance of and compliance with the law, and in the case of mediation, settlements, it is important to understand how people decide whether a procedure is fair.

Based on a richer understanding of procedural justice and fairness judgments, recent research in the field of procedural justice has shifted from the stance that the opportunity to be heard is the key determinant of fairness. This newer perspective includes the group-value model of justice and its extension, the relational model of authority, and the fairness heuristic theory. Together, these theories offer an explanation of disputants' behavior that makes common sense and is theoretically sound.<sup>126</sup>

### **The Relational Model of Authority and its Development from Group-Value Model and the Fairness Heuristic Theory.**

Tyler and Lind, important researchers in the area of procedural justice, describe two models that examine how procedures can improve the likelihood that disputants will accept the outcome of a dispute resolution process.<sup>127</sup> They describe the models as the “discourse and

---

<sup>124</sup> Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. DISP. RESOL. 885, 891 (1998).

<sup>125</sup> *Id.*

<sup>126</sup> They also explain inconsistencies in previous research regarding whether subjects based fairness judgments on procedures or outcome (otherwise referred to as non-instrumental or instrumental concerns).

[P]eople are instrumentally focused in making choices among possible procedures for resolving a dispute ... disputants choose procedures based on what they expect to gain from those procedures, i.e., whether they think those procedures facilitate their likelihood of winning. However, when making evaluations of their experience *after* the dispute has been resolved, disputants were found to evaluate their experience in noninstrumental terms, i.e., by considering issues of procedural justice.

Tyler & Lind, *supra* note 17, at 68-69 (emphasis added).

<sup>127</sup> *Id.* at 67.

consensus” perspective and the “legitimacy and deference” perspective.<sup>128</sup> The consensus perspective,

emphasizes the convergence of the attitudes of the parties toward a common feeling that a particular solution is fair, a convergence thought to occur through discussion and consideration of the views and needs of others in a conflict. Having reached an agreement people willingly embrace this decision and voluntarily obey it.”<sup>129</sup>

Ironically, there is little empirical support for the discourse and consensus perspective even though it appears to describe mediation, which is an ever more popular form of dispute resolution in the United States.<sup>130</sup> Although it may seem, counterintuitive, the relational model of authority developed, not from the discourse and consensus perspective, but from the legitimacy and deference perspective.<sup>131</sup>

The legitimacy and deference perspective focuses on “people’s feelings of obligation to obey the decisions of third-party legal authorities.”<sup>132</sup> As will become clear, the legitimacy and deference perspective applies to mediation even though most people may not consider a mediator a typical “authority” because of her lack of power to impose a settlement.<sup>133</sup>

A mediator’s ability to gain the trust and cooperation of disputants is imperative to a successful mediation that results in an implemented resolution. The relational model of authority explains how authorities gain such trust and its effects on voluntary compliance with decisions. Again, even though mediators cannot demand settlements, this author believes that most disputants see the mediator as a kind of authority figure. As such, any understanding of how to enhance voluntary compliance with the decisions of authority figures in legal disputes can be

---

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 67-68.

<sup>132</sup> *Id.*

helpful in mediation. Such gains can help mediators learn how to increase the likelihood that a resolution will be reached and implemented.

The legitimacy and deference perspective, rather than focusing on creating decisions that the parties embrace, focuses on creating a feeling of obligation to defer to decisions made by authorities.<sup>134</sup> Researchers have found that “irrespective of their judgments about a decision, people obey it if they regard the authority who made the decision as entitled to be obeyed.”<sup>135</sup> It is clearly not a legitimate goal of mediation to have the disputants obey the mediator’s decisions regarding the conflict. However, disputants have arrived at mediation because they were unable to settle a conflict themselves. Hence, it is desirable that the mediator have enough influence over the parties to effectively facilitate their arrival at an agreement. More importantly, for the long-term success of the mediation, it is important that the disputants find the mediation process fair.

Lind and Tyler, working from the legitimacy and deference perspective, have developed the relational model of authority, which offers insight into how procedures should be structured and how disputants should be treated in order to exact the highest fairness assessments from disputants and, hence, achieve voluntary compliance with settlement agreements. A discussion of the group-value model is necessary to understand the relational model of authority.

The group-value model is the foundation for the relational authority model. Lind and Tyler’s group-value model posits that people value three aspects of procedure: trust in benevolence, status recognition, and neutrality.<sup>136</sup> Researchers describe trust in benevolence<sup>137</sup>

---

<sup>133</sup> Tyler & Lind refer to mediators as authorities. *Id.* at 67.

<sup>134</sup> *Id.* at 67-68.

<sup>135</sup> *Id.* at 68.

<sup>136</sup> Lind, Tyler & Huo, *supra* note 12, at 768.

<sup>137</sup> “Trust in benevolence” was formerly called trustworthiness. *Id.* at 768 & note 1.

as a belief that the authority is willing to consider the disputant's needs and will try to make fair decisions.<sup>138</sup> Status recognition arises from the authority figure treating the disputant with dignity and respect.<sup>139</sup> Lastly, acceptance of the neutrality of the authority is founded on the disputant's belief that decisions "are based on a full and open accurate assessment of the facts."<sup>140</sup>

Trust in benevolence, status recognition, and neutrality are the "relational elements of procedures."<sup>141</sup> These relational elements are distinct from elements that affect the favorability of the outcome.<sup>142</sup> "Treatment by the group ... is conceptually separate from the outcomes received."<sup>143</sup> In contrast to outcome-related elements, relational elements carry "identity-relevant implications for the individual making the judgment."<sup>144</sup> In other words, the relational elements of trust, status recognition and neutrality tell the disputant who she is and how she is valued in the group.

The group-value model posits that when dispute resolution participants evaluate procedures through the lens of relational elements, they perceive them as fair if those procedures indicate the participant "is a full-fledged member of the group or society mandating the procedures."<sup>145</sup> Furthermore, the relational constructs are more important to a person judging the

---

<sup>138</sup> Of course, when considering mediation, one must always remember that the "authority" cannot legitimately impose a solution. This, however, does not mean that participants do not see the mediator as some form of authority. The mediator's conduct clearly influences the proceedings (or she would not be there) and mediator neutrality is necessary to appropriate mediation.

<sup>139</sup> Lind, Tyler & Huo, *supra* note 12, at 768.

<sup>140</sup> *Id.*

<sup>141</sup> TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 11 (2000).

<sup>142</sup> *Id.* at 92.

<sup>143</sup> *Id.* at 96.

<sup>144</sup> *Id.* at 92.

<sup>145</sup> Lind, Tyler & Huo, at 767.

fairness of a group procedure than are judgments regarding the favorability of the outcome.<sup>146</sup> For example, it is probable that if you are well treated during the course of a procedure but do not get what you want at the end of the procedure, you are still likely to find the procedure fair. Conversely, even if you get what you want from a procedure, if the authorities treat you shabbily during the procedure, you are likely to assess the procedure as less fair.

It should again be noted that it is important for disputants to find a procedure fair because they are more likely to accept decisions arising from procedures they believe are fair.<sup>147</sup> In mediation, the more fair a disputant finds the procedure, the more likely that the disputant will comply with the terms of the resolution — arguably the primary object of mediation.

Tyler and Lind built on the group-value model to create the relational model of authority,<sup>148</sup> which can help mediators understand how to obtain the best results from mediation. The basic difference between the group-value model and the relational model of authority is that the group-value model considers relations with peers and the relational model of authority considers relations with group authorities. Researchers have distinguished the group-value model from the relational model of authority thusly:

[P]eople use the justice of their experiences with others to understand their status. The relational model of authority extends this argument by suggesting that the relational indices of interpersonal respect, trustworthiness and neutral treatment, which are key antecedents of procedural justice, also communicate social information. That is, the way group authorities treat people tells those people about their status within the group. Further, social identity theory suggests that people more generally draw self-identity from group memberships, and that these identities shape

---

<sup>146</sup> TYLER & BLADER, *supra* note 141.

<sup>147</sup> Tyler, *supra* note 16.

<sup>148</sup> Tyler & Lind, *supra* note 17, at 65.

their sense of self and their behavior toward others within their group and toward the outsiders.”<sup>149</sup>

So, the relational elements of respect, trustworthiness and neutral treatment are the most important elements in people’s assessment of the fairness of a process. These elements also tell parties how the authorities perceive them. This, in turn, gives them information about their social status and value in the group.<sup>150</sup> When authorities treat a party to a procedure “in a dignified and polite fashion,” that party will usually report receiving fair treatment<sup>151</sup> and such treatment will help the party accept the legitimacy of the authority.<sup>152</sup> It appears that the positive effects of voice on procedural justice evaluation are directly related to people feeling valued by their group.<sup>153</sup>

Additionally, researchers have found that relational concerns are relevant to fairness assessments outside the United States as well. In other cultures, research subjects also define fairness largely in relational terms.<sup>154</sup> Across cultures, the elements people consider most when making procedural justice judgments are trust in benevolence, status recognition, and neutrality.<sup>155</sup>

Lind developed the fairness heuristic theory. This theory suggests that participants in a procedure unconsciously decide whether to cooperate with or resist the authorities based on whether they feel threatened by exploitation.<sup>156</sup> Lind proposes that the importance of procedural justice arises from this fundamental tension in all social groups – “the inequality of power

---

<sup>149</sup> TYLER, ET AL., *supra* note 13, at 186.

<sup>150</sup> As these status judgments may affect the self-respect of the people participating in the procedures, it is not difficult to understand their power. *Id.* at 187.

<sup>151</sup> Tyler & Lind, *supra* note 17, at 75.

<sup>152</sup> *Id.* at 76.

<sup>153</sup> E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 230-240 (1988).

<sup>154</sup> Lind, Tyler & Huo, *supra* note 12, at 777.

<sup>155</sup> *Id.* at 768.

between the individual on the one hand and the group, organization, or society on the other.”<sup>157</sup>  
Such inequality creates the possibility of exploitation.

In addition, and in contrast to the possibility of exploitation, there are many benefits to being a member of a group. The large groups constituting the residents of New York City and United States citizens have recently realized such a benefit. That benefit is the outpouring of financial and emotional support for the families of victims of the terrorist attacks of September 11, 2001. These supportive responses come in large part because the supporters consider themselves to be part of the same group as the victims.

While there are obvious benefits to being part of a group, there are also drawbacks. When one is a member of a group, one gives up a certain amount of autonomy in favor of obedience to the authorities of the group.<sup>158</sup> This surrender creates the possibility of exploitation of the group member by the authorities. Lind suggests that participants to a procedure unconsciously evaluate the probability of exploitation based on the existence or lack of fairness in a procedure.<sup>159</sup> If the participants, or in the case of mediation, the disputants, find the procedure fair, they are less worried about the authorities exploiting them and thus can give themselves over to the process with fewer concerns.<sup>160</sup>

Tyler and Lind tie together the procedural justice concerns addressed in the relational model of authority with the outcome-oriented findings of previous procedural justice research. They state,

---

<sup>156</sup> *Id.*

<sup>157</sup> Tyler & Lind, *supra* note 17, at 77.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

[T]he real sting of unfairness and feared exploitation lies in the diminution of one's social self-identity. Outcome-oriented theories of justice judgments fail to recognize that people are generally quite ready to accept that they must often accept outcomes that are less than all they had hoped for; what people really worry about is rejection or the implication of rejection by society. To lose any specific hoped-for outcome is a normal part of social life, but rejection by authorities carries the implication that one is less of a person than others .... People tend to view their treatment by authorities as especially diagnostic of how they are seen by society, because they view authorities as a personification of society.<sup>161</sup>

In other words, normal people do not expect to always get what they want. They understand that things will not always go their way. The occasional undesired outcome is not unexpected or terribly disturbing. On the other hand, when group authorities treat a person shabbily, that person's status in his group is threatened. Losing status as a valued member of a group is a much more fundamental and frightening harm than receiving an undesired outcome in any one specific situation.

It seems that it is desirable that participants feel valued, rather than threatened, as a condition precedent for their willingness to compromise and reach agreement. Because mediation participants view the mediator as a type of authority figure, they will perceive her behaviors as "diagnostic" of their social standing. If those behaviors indicate that the mediator is being and will continue to be fair to the participants, those behaviors will diminish the disputants' fear of exploitation. When the participants' social self-identity is unthreatened, secured by the affirming, respectful treatment of the mediator, the participants are more trusting of the mediator and of the process itself. Furthermore, the theory embraces the reality that most adults recognize they will not always get exactly what they want. Compromise is an inherent part of successful participation in any group.

---

<sup>161</sup> *Id.* at 78.

In a mediation setting, if participants can compromise without fear of exploitation, they will surely be more inclined to do so.

Again, it is likely that trust in the authorities and the process will lead to a higher degree of cooperation and investment in the process, which in turn will lead to a higher rate of resolutions. Therefore, it is reasonable that any techniques, whether traditionally perceived as evaluative or facilitative, that make disputants feel secure in their social standing will help make participants unafraid of exploitation and thus, indirectly, enhance both assessments of procedural justice and dispute resolution rates. Furthermore, higher assessments of procedural fairness lead to better compliance with settlements. In sum, the relational model of authority serves as a basis for the hypothesis that when mediators treat disputants with dignity and respect, the disputants are more likely to reach settlements that will be implemented, regardless of whether those mediators use primarily facilitative or evaluative techniques. Empirical testing of the relational model of authority may be a more useful intellectual pursuit than continued attention to the evaluative/facilitative split.

Additionally, the fairness heuristic theory goes on to posit that there is a primacy effect that gives a special weight to assessments of procedural justice as compared to those of distributive, or outcome-oriented, justice.<sup>162</sup> Participants in a procedure first experience the procedure itself, not the outcome.<sup>163</sup> At the early stages of the procedure, the participants form their “original justice judgment on the basis of procedures and social process and then later incorporate outcome information into their overall

---

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

impressions of the fairness of the encounter.”<sup>164</sup> This primacy effect results in procedural justice assessments having more weight than distributive justice assessments.<sup>165</sup> Again, when disputants think that the mediation process is fair, they are more likely to find the totality of the mediation – the process and the outcome – fair. Positive assessments of procedural fairness lead to enhanced implementation of settlements.

Furthermore, Lind asserts that if participants feel fairly treated by the group or authority, that treatment leads the participants to later engage in social activity that is generally cooperative and that reflects an expectation of fair treatment.<sup>166</sup> Conversely, if participants feel unfairly treated, they will act to maximize short-term, individually beneficial outcomes.<sup>167</sup> For example, a party to a custody dispute that feels unfairly treated is more likely to violate the terms of that agreement than a participant who feels the dispute resolution procedure was fair. A clear implication for the mediation process is that ensuring respectful and dignified treatment of disputants, especially at the very start of a mediation, may lead to more cooperative participants, higher assessments of fairness, and higher probability of compliance with any settlement achieved. This suggests an attractive effect that is larger in scope than effective implementation of a settlement. It is an enticing idea that a mediator, by conducting a respectful and fair mediation, could help lead a disputant to feel the world is a reasonably fair place and that being generally cooperative is an acceptable life choice. This idea, though enormously appealing, is certainly too broad and complex to address in this article. Here, the focus is

---

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 79.

<sup>167</sup> *Id.*

that respectful treatment of disputants leads to positive assessments of procedural fairness regardless of whether facilitative or evaluative techniques are used.

### **Conclusion**

The discussion herein leaves innumerable avenues, conflicts and developments unexplored. Faced with the impossibility of addressing here all the procedural justice research that mediators and commentators could usefully apply to the continuing discourse regarding mediation, one observation is enlightening. The findings related here indicate that the hot debate between proponents of the facilitative and evaluative styles of mediation does not need to be resolved once it has been recognized that respectful treatment of disputants is the best way reach settlements that will be accepted and implemented by the parties.

Whether or not a mediator offers opinions or just asks clarifying questions is not a key determinant of fairness or successful implementation. Whether a mediator employs evaluative or facilitative techniques is not a principal predictor of the long-term success of the mediation. The relational model of authority and fairness heuristic theory strongly suggest that it is primarily the dignity and respect with which the participants are treated and an opportunity to voice concerns that are the key elements in procedural fairness and, thus, long-term success. One of the most important elements in a successful mediation is dignified and respectful treatment of the participants throughout the procedure. Respectful treatment should include an opportunity for the disputants to voice concerns. Both evaluative and facilitative techniques allow for such respectful treatment and some opportunity for voice.

Some of research on the facilitative-evaluative rift outlined above indicates that the use of facilitative or evaluative techniques may depend more on the disputants than the mediator and

has no effect on the achievement of a resolution.<sup>168</sup> Part of the debate between facilitators and evaluators has centered on the disputants having sufficient opportunity to voice their complaints. The thrust of this dispute is that in a facilitative mediation there is adequate opportunity for disputants to voice their concerns and, in contrast, in an evaluative mediation, increased input from the mediator causes inadequate opportunity for input from the disputants themselves. Increased input from the mediator (in the form of evaluation) may reduce opportunities for disputants to contribute to the process, as the process is then presumably guided more by the mediator's legal framework and less by the concerns of the disputants. Given recent procedural justice research findings, it seems that any of the features of facilitative or evaluative mediation that enhance disputants' sense of being valued by their group may improve satisfaction and compliance with a mediated resolution.

Perhaps facilitative purists can learn that giving disputants information, which can make them less anxious and feel more like full-fledged participants in a complex decision-making process, will make the disputants feel respected and valued and will lead to a positive and desirable resolution. Likewise, evaluative mediators can learn that the respect accorded to a disputant who is allowed broad leeway in identifying the issues she wishes to focus on, is likely to result in an accepted and complied with agreement. What mediators should focus on, regardless of the techniques employed, is that the more respect accorded to the disputants with whom they work, the more probable it is that the mediation will produce a functioning and long-lasting agreement.

---

<sup>168</sup> Golann, *supra* note 99.