

EVALUATIVE VERSUS FACILITATIVE MEDIATION: A DISCUSSION*

JAMES J. ALFINI,** MODERATOR

DEAN ALFINI: We are celebrating the tenth anniversary of the Florida Dispute Resolution Center. The Center was founded in 1986, and soon thereafter, in 1987, the statute was passed that gave to every judge in the state the power to send any case to mediation or arbitration.¹ In 1988, a set of rules were promulgated by the supreme court that essentially operationalized the statute.² Since that time, literally tens of thousands of cases have been mediated here in the State of Florida in the court-sponsored programs at the circuit level, the family level and in the county courts. Tens of thousands of cases! They represent a significant body of experience.

That body of experience is now causing a bit of trauma. People are making judgments about what works and what doesn't work, and sometimes these judgments about what works and what doesn't work collide with traditional notions of what's "good mediation," how mediators should behave, and how mediators should perform. This collision between the pragmatic and the ideal, or traditional, to some extent is being crystallized in the debate over facilitative versus evaluative mediation. May a mediator offer an evaluation of the case to the parties? Those who argue in favor of facilitative mediation say, "Absolutely no. Never." Never should a mediator evaluate a case. Those who argue in favor of a more pragmatic approach to mediation say, "Well, it isn't the way I would start out, but if the parties want it, certainly I'll offer an evaluation, or even sometimes I'll offer it on my own if I think it's warranted. I generally wait for awhile, though." This debate is raging in the law reviews and the literature on dispute resolution.³ We have with us today a very able panel to address

* This Discussion took place at the Fifth Annual Conference for Mediators and Arbitrators presented by the Florida Dispute Resolution Center on August 23, 1996, in Orlando, Florida. Many thanks to Sharon Press, Director of the Florida Dispute Resolution Center, who was responsible for the casting of this discussion and who suggested various scenarios. Some of the scenarios used in the discussion are based on actual grievances filed with the Florida Mediator Qualifications Board.

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1. See Act effective July 1, 1987, ch. 87-123, §§ 1-7, 1987 Fla. Laws 995, 995-97 (codified as amended in scattered sections of FLA. STAT. ch. 44 (1995 & Supp. 1996)).

2. See FLA. R. CIV. P. 1.700-830. These rules were adopted on December 31, 1987, and became effective on January 1, 1988. See *In re Proposed Rules for Implementation of Florida Statutes Sections 44.301-.306, Rules of Civil Procedure*, 518 So. 2d 908, 909 (Fla. 1987).

3. See, e.g., Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 24 (1996) (presenting a four-quadrant grid describing the varieties of mediator behavior as facilitative-

this debate. I won't tell you where any of them come out on this beforehand, but I think you'll get the sense after awhile. Some are from the State of Florida and others are from outside of the state. Let me introduce them to you.

Over here on my far right is Professor Lela Love. Professor Love directs the Mediation Clinic at the Cardozo Law School in New York City. Next to Lela is Donna Gebhart. Ms. Gebhart is a lawyer and appellate mediator in Florida who has also mediated large civil cases in the circuit court. Next to Donna is Professor Cheryl McDonald. Professor McDonald is an assistant professor of law at Pepperdine in California and directs the Dispute Resolution Clinic at the law school. Next to Cheryl is Jeff Stempel. Jeff Stempel is a professor of law at Florida State University. He has written extensively on ADR issues. Next to Jeff is Lawrence Watson. Larry is one of the preeminent mediators in Florida. He mediates large civil cases in the circuit mediation program as a partner with the law firm of Carlton Fields in Orlando and is a former president of the trial lawyer's section of The Florida Bar. He is a converted "Rambo" litigator, basically. Next to Larry is Kathy Reuter. Kathy is the director of the county mediation program here in Orlando and also directs the contract family mediators as well. Next to Kathy is Javier Perez-Abreu. Mr. Perez-Abreu is a lawyer and a certified family mediator in Florida. Next is Carmen Stein. Carmen is a practicing psychotherapist and family mediator in Florida. So we have Kathy and Carmen as the two non-lawyers on the stage. Next to Carmen Stein is Robert Moberly. Bob is a professor of law at the University of Florida law school. Bob and I served together on the Florida Supreme Court Committee on Mediation and Arbitration Rules (Committee). You might pull out those Rules because I'm about to refer to them. While Bob and I were on the Rules Committee chaired by Larry Watson, Larry would inevitably, invariably, refer to anything that came out of our mouths as a bit "teachy-preachy," but after awhile he became a convert, I think. He became softer, kinder, and gentler, but still has that "Rambo" litigator look in his eyes.

broad, facilitative-narrow, evaluative-broad, and evaluative-narrow). For a critical view of evaluative mediation, see Kimberlee K. Kovach & Lela P. Love, "*Evaluative*" Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 21, 32 (1996) (criticizing evaluative mediation for perpetuating or creating an adversarial climate and being inconsistent with the primary objectives of mediation: to promote self-determination of parties, to help the parties examine their real interests, and to develop mutually acceptable solutions). The evaluative/facilitative terminology has already found its way into the legal practice literature and has been adopted by commentators offering advice as to how lawyers might represent clients in mediation. See, e.g., JOHN W. COOLEY, NAT'L INST. FOR TRIAL ADVOCACY, MEDIATION ADVOCACY app. A-2 at 86-88 (1996) (recommending that lawyers and their clients decide whether they want an evaluative or facilitative mediator, or a combination of both, prior to the mediator selection process and describing the roles and functions that various types of mediators may assume to assist parties in resolving disputes).

What I'm going to do with these people up here is essentially conduct a Socratic dialogue. Those of you who went to law school will be familiar with this form of pedagogical abuse. I'll develop some short hypotheticals and ask questions of the panel, but what I'd like you to do is keep in mind a few provisions from the Florida Rules for Certified and Court-Appointed Mediators as we proceed. If you'll turn to the bottom of page nine, you'll find Rule 10.090, "Professional Advice." Let me do a short dramatic reading of that rule:

(a) Generally. A mediator shall not provide information the mediator is not qualified by training or experience to provide.

(b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel.

(d) Personal Opinion. While a mediator may point out possible outcomes of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.⁴

You might also keep in mind over on page seven the impartiality provisions of the Rules:

(a) Impartiality. A mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to an individual party, in moving toward an agreement.

(1) A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.⁵

Okay. With those in mind, let's ask our panel to have at it. The first scenario I'd like to present to them is basically one you would find in the county courts here in Florida. It's a landlord-tenant dispute. It's a dispute over the withholding of rent until an unsafe condition in an apartment is fixed up. Both parties, as is the case in most county mediations, are unrepresented. The mediator tells the parties in joint session that she's familiar with the judge in this case, and the judge is unsympathetic to landlords. What about that, Ms. Reuter? Is that okay? Can a county court mediator tell the parties that the judge is unsympathetic to landlords?

4. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.090.

5. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.070.

MS. REUTER: I think that falls into giving an opinion that you aren't qualified to give, first of all, and also that you shouldn't be giving.

DEAN ALFINI: Why is that an opinion? Would you agree with that, Professor Stempel? Is that an opinion? It sounds more like information to me. It doesn't say how the judge is going to come out, just that judges are unsympathetic to landlords.

PROFESSOR STEMPEL: It seems to me that it's an opinion, but it may be one that the person is perfectly qualified to give if the mediator has experience in the area. I guess my first reaction would be that it might warp the wheels, so to speak, to come out with that early in mediation. If that was the first or second sentence out of the mediator's mouth, it tends to cast, if not a pall, at least an aura over the proceeding. The landlord better wake up and do something reasonable to resolve the case, but that may be more of a nudge than you want to give at that juncture. It seems to me that statement becomes a lot less problematic if you've gone on for awhile and it appears that the tenant is expecting a judge like Justice Brennan at the end of his or her rainbow who is going to solve this dispute by making the landlord be decent or generous. Meanwhile, the landlord is expecting a judge more like Justice Scalia, who will back him or her by holding the tenant to the letter of a lease with language extremely favorable to the landlord. Both are probably mistaken, and where this mistake gets in the way of effective resolution, I see nothing wrong with a mediator providing an assessment of the likely range of judicial outcomes or even an assessment of the particular judge assigned. So, at least down the way, this sort of comment seems appropriate as a dose of reality for the disputants, but it would probably be over-intervention to offer these assessments at the outset of the mediation.

DEAN ALFINI: Would it matter, Professor McDonald, if you did it in joint session or in separate session?

PROFESSOR MCDONALD: I think it would matter a good deal. What sounded like a preliminary nudge gets a lot more like a push if it's done in caucus or separate sessions. I'm not sure that I agree that it would be okay even in joint session, or even later in the session. I think that there are a lot more ways and more neutral ways in which both parties could be alerted to the possibility that judges, being human beings, might have particular biases that might have an impact on their case, and that's something they should both be thinking about.

DEAN ALFINI: Okay. What if the mediator went a step further. Does it become an easier case if the mediator says, "I know, given what I've seen of these kinds of cases before, there is no way, Mr. Landlord, that the judge is going to go your way in this case. You

better give a little bit." He says this maybe in separate session, but he says it. Professor Love, what do you think?

PROFESSOR LOVE: I don't think stating an opinion like that is proper behavior for a mediator. The mediator is giving a prediction about the court outcome, and is also compromising his or her neutrality since the prediction so clearly favors the tenant. I wouldn't do it as a mediator. I think it violates the Florida Rules that you read.

PROFESSOR MOBERLY: Yes, I think that's exactly the scenario that the committee intended to prohibit when it adopted Rule 10.090(d), particularly the last phrase. We heard testimony that certain mediators, particularly some ex-judges in an unnamed county, tended to say, "I know this judge, I've worked with this judge, I know how this judge will rule." This is what the last phrase is intended to prohibit. The phrase doesn't prohibit all opinions, but it does prohibit an opinion as to how the judge in that particular case will rule.⁶

DEAN ALFINI: What about the first one I mentioned? What if the mediator just says, "Well, I know this judge, and the judge generally doesn't like landlords?"

PROFESSOR MOBERLY: Yes, I think that starts to infringe not only on the impartiality, but on the self-determination provisions. You're suddenly exerting pressure designed, in my opinion, to deter or prevent real honest self-determination, and that verges on coercion.

DEAN ALFINI: Okay. So there are overarching concerns that creep in. Maybe the general principle that mediation is or should be an exercise in party self-determination is being eroded by this behavior, says Professor Moberly. Maybe the mediator takes a less than impartial approach to the parties as well. Or maybe even being somewhat unfair by loading the dice, so to speak. So there's a fairness aspect, an impartiality aspect, and a self-determination aspect.

PROFESSOR MOBERLY: I do distinguish that from giving an evaluation, which I'm sure we'll probably discuss. Some academic writers suggest a bright-line approach that would say you should never evaluate. Some lawyers take the approach that you evaluate, then they suggest that evaluation is part of the normal process, especially in circuit civil mediation. A third school of thought is opposed to a bright-line prohibition, but urges great caution in utilizing this sort of opinion and evaluation.⁷

6. Professor Moberly chaired the Standards Subcommittee of the Florida Supreme Court Committee on Mediation and Arbitration Rules. For further discussion of the Committee's work and related issues, see Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. L. REV. 701 (1994).

7. See Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. (forthcoming 1997). Professor Moberly's article is based

DEAN ALFINI: Why isn't the second a clear evaluation? "I know this judge and there's no doubt in my mind that in this case, before this judge, you're going to lose, Mr. Landlord."

PROFESSOR MOBERLY: Well, that is an evaluation and it's a prohibited evaluation.

DEAN ALFINI: Okay, I see—and the other one is maybe an evaluation and maybe not prohibited.

PROFESSOR MOBERLY: Right, and we can explore that.

DEAN ALFINI: All right, are we all comfortable with that?

MR. WATSON: No, I'm not. I'd like to ask, what exactly is it that we're not supposed to be evaluating? The question arises: Can you be evaluative about winning or losing the case based upon the merits of the case? I would agree that that's clearly prohibited and improper. The next question, however, is: Can we be evaluative about the difference between proceeding with a resolution of the case through adjudication and proceeding with a resolution of the case through reconciliation? In an evaluation of the prospect of going forward with adjudication, we talk about the characteristics of that process. "This is what happens when you get in front of a jury; this is what it costs," and, by the way, "This particular judge to whom you've been assigned seems to have a track record of not being particularly favorable in landlord-tenant cases. Just an observation about your resolution path." That's not necessarily an evaluation of the outcome of your particular case.

DEAN ALFINI: Okay. Even if in both or one of those instances we aren't crossing the ethical line, it may not be wise practice—you may be digging a hole that's going to be difficult to climb out of. Let's go on to a family case, a family mediation scenario. We have a divorce mediation here in Florida involving custodial issues. During the opening statement, the mediator reads to the parties the relevant provisions of the shared parental responsibility statute here in Florida. Any problem with that, Mr. Perez-Abreu?

MR. PEREZ-ABREU: I normally don't do that in an opening statement, but I don't see it as a problem. You're not giving them legal advice, you're telling them what's in the statute and what the law provides. You're not giving an opinion as to the law or as to its merits. I guess if you take it further and start analyzing or interpreting the statute, you may get into trouble.

DEAN ALFINI: So you're drawing a line between information and advice. This is strictly information. Does it matter if you're a lawyer-mediator or nonlawyer-mediator? May a nonlawyer-mediator tell them about a state statute?

on an address delivered to a symposium sponsored by the *South Texas Law Review* on October 25, 1996, entitled "The Lawyers Duties and Responsibilities in Dispute Resolution."

MR. PEREZ-ABREU: I don't think it makes a difference. There is a committee note on the Rule that talks about lawyers specifically. So if you want to draw that distinction, there is a commentary down at the bottom of the rule.⁸ I don't think it makes a difference in the context of the question that you've posed.

DEAN ALFINI: Okay. Let me change the question a little bit, Javier. Suppose, as you suggest, the mediator goes a step a further and during the mediation says, "Now, remember I told you about the shared parental responsibility statute," and then goes on to explain what it means. For example, if the kid changes schools, then you, the custodial parent, have to talk to the other parent and get him or her involved in this decision. Carmen, is that okay?

MS. STEIN: Well, I think at that point it still falls back into providing information that you're qualified to give. I would do that. In order to explain, I feel I'd be giving my advice, but that's the law.

DEAN ALFINI: Okay. So you're giving them information on the law. If the law is clear, if it's clear-cut, you're not advising them but you're giving them information. Are we beginning to walk a slender line here, Professor Moberly? Is that okay?

PROFESSOR MOBERLY: The Rule clearly allows the mediator to provide information the mediator is qualified to provide. The line between information and advice may not always be so clear, but I think it's clear under the Rules that a knowledgeable family mediator can provide information such as a state statute or guidelines for child support or joint custody. Those to me would clearly fall within the Rule allowing information.

DEAN ALFINI: Suppose then that the mediator as they proceed says, "Okay, let's pull out some worksheets here, and here are the child support guidelines from the statute. Let's sort of work through them. Let me tell you how they generally work." Is that okay, Carmen?

MS. STEIN: I hope so. That's what I do.

DEAN ALFINI: Let me box you in a little bit then. I think we all have to admit though that maybe we're sort of allowing a little bit more in the family area than we might in some of the other areas, but maybe that's okay. Suppose though, Carmen, the parties tell you that their plan is to have the kid spend every other night of the week

8. The committee note to Florida Rule for Certified and Court Appointed Mediators 10.090 provides:

Mediators who are attorneys should note Florida Bar Committee on Professional Ethics, formal opinion 86-8 at 1239, which states that the lawyer-mediator should "explain the risks of proceeding without independent counsel and advise the parties to consult counsel during the course of the mediation and before signing any settlement agreement that he might prepare for them."

FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.090 committee note.

with a different parent. One night with the mother, one night with the father, then the next night with the mother, the next night with the father. You know from your knowledge of the mental health literature that this will be emotionally unhealthy for the child. You tell them that. Is that okay?

MS. STEIN: I think in that case, I'm walking a very thin line because at that point I may be practicing psychotherapy.

DEAN ALFINI: So as a mental health professional, you're always concerned about—

MS. STEIN: My other license.

DEAN ALFINI: That's right. Just as a lawyer-mediator should be concerned about his or her other life, which is practicing law and not giving legal advice, you're concerned at that point about giving professional advice, in your case offering psychotherapy.

MS. STEIN: At that point, if I'm doing mediation.

DEAN ALFINI: Well, but then again, we're drawing this distinction between information and advice. Suppose you said, "Look, I just read a study that some Harvard psychology professor did, and here is what they found: that this is very unhealthy for a child." Is that okay?

MS. STEIN: That would worry me because being a licensed psychotherapist carries a lot of weight. They ought to be given not only my personal opinion, but my opinion as a professional. I'd probably present it in the way of saying, "Maybe this is something you might want to consider, this might really stretch everything, especially for the child." I may at the end tell them before they leave, "If you'd like to take this research or read it on your own, you are welcome to do so," but I don't think that I'd put myself in a position to give professional advice either as an expert mediator or as an expert therapist.

DEAN ALFINI: Okay. Donna Gebhart, I know you're not a family mediator, or I don't think you're a family mediator.

MS. GEBHART: I will be.

DEAN ALFINI: Oh, you will be? Okay. What do you think of this? Is that okay?

MS. GEBHART: I would probably, as the mediator in that situation, ask the parties whether they had considered the potential effect upon the child psychologically, rather than offer information or my own opinion.

DEAN ALFINI: So you suggest a "good practice" device there to avoid the issue.

MS. GEBHART: Essentially.

DEAN ALFINI: What about you out-of-staters? Lela, are you okay with this discussion?

PROFESSOR LOVE: My concern with giving someone a study that leans in any particular direction is that studies exist which

prove all sorts of points of view. By picking any one point of view, you're essentially taking a position, and pushing your own theory. In New York State, women's groups have objected to the institutionalization of mediation in the courts because they believe that mediators push for joint custody, which disadvantages women in certain circumstances. I'd like that sort of evaluative activity to be considered "bad mediation" and to be discouraged or prohibited instead of being an argument that mediation should not be court-connected.

DEAN ALFINI: So sometimes, even if we're willing to call it just information and not advice, it's going to help one party or the other. Now, in the scenario that I gave you, at least our information, or advice, didn't help either one. Both parties seem to want to go off on this nutsy course. But most often, through information by way of legal advice, or psychological advice, psychological study will put another arrow in the quiver of one or the other party, and at that point the mediator becomes less impartial, less neutral.

PROFESSOR LOVE: Correct. While providing parties with a whole statute is sometimes problematic, the mediator picking out particular provisions that assist one of the parties is always problematic. There may be other provisions that would lean the other way, and the mediator is taking sides by selecting certain legal information.

MR. PEREZ-ABREU: One way of maintaining neutrality on that issue is taking it from the point of view of the child and saying, "Well, has anybody thought about the child and what impact that would have on the child?" You don't necessarily need to get into the questioning, and that way you're not taking one side, or not taking the "bad" side. You're taking the child's side, which nobody represents.

PROFESSOR MCDONALD: Although family law has never been my area, and I'm certainly not familiar with Florida law, my experience with the law in general has been that it's very rarely so clear that any one individual could pull out any piece of a statute and say this is objectively what the law is. That may be an incorrect assumption with respect to this area here in Florida. I got uncomfortable with the idea of even saying at the beginning, "Well, here's the statute, let's move on from there." I believe the point that Lela made is valid. Any time you pick or choose a particular section and elect to leave something else out, you're potentially arming the quiver of one party or another. Whether or not objectively that's what's happening, there is the potential, which I see as a serious danger.

PROFESSOR STEMPEL: But what if instead one or both of the parties comes in and they say, "We think every-other-night custody is just great. In fact, my husband just showed me this great article on how wonderful it is." Your professional view is that there is misin-

formation, one-sided misinformation that's leading to this result. As a mediator, are you now liberated to level the playing field a little bit?

PROFESSOR MCDONALD: Well, it would be better if somebody else leveled the playing field, in my opinion. If you could say as mediator, "This is an interesting study, have you consulted professionals about this? Have you looked for other articles?" you might point them towards the library, but it seems to me that if you pop out with some article that you choose, you're sort of showing your colors, your biases, at that point.

DEAN ALFINI: Let's move on to the context in which we generally see the evaluative-versus-facilitative issues most clearly framed: big civil-case mediation. Here in Florida, this is circuit court mediation. We have a circuit court mediation, a personal injury case, and the insurance adjuster is taking a hard line, asserting that there is no liability in this case. The mediator is a retired judge, and he knows, or thinks he knows, that juries almost always find liability in these kinds of cases in that venue. May he reveal this to the parties?

MR. WATSON: I think, yes. Again, I think we're talking about the process, not the outcome or the merits of this particular case. If the parties were unrepresented, it might be an improper observation to make. You must take this evaluation issue in light of the issue of self-determination. If you're evaluating in a way that interferes with the parties' consensual agreement, with their independent decision about the settlement, I don't care if you're "evaluating" or "hypothesizing"; whatever you're doing, it's wrong. The evaluation becomes dangerous only when you start taking the decisionmaking process away from the parties.

DEAN ALFINI: So essentially what you're saying is that, given the hypothetical I posed, it's an evaluation but it's an okay evaluation.

MR. WATSON: Yes. I don't see anything here that would indicate that a hard-boiled insurance agent is going to give a rip what this mediator-judge thinks or doesn't think the juries are going to do.

MS. GEBHART: I pretty much agree with Larry. I would do it in private session because I think that to do something like that in joint session definitely disturbs the balance of the playing field. I'd add the caveat that, in the very beginning, in the introduction portion of the mediation session and throughout, I would stress to the parties that I'm there to help them communicate. I'm there to help them evaluate their case and the benefits of settlement, and I would stress that they are the ultimate decisionmakers and that I have no decisionmaking authority. I think that's the most important.

DEAN ALFINI: So you'd do it in a separate session as a sort of reality test?

MS. GEBHART: Yes, because if they're going to evaluate whether or not the case should be tried, and what's in their best interests, then they need to have pertinent information. If that's pertinent information, then they should have it.

DEAN ALFINI: So you would do it with the defendant, but would you ever do it with the plaintiff? Would you never arm the plaintiff in that way in separate session?

MS. GEBHART: I would "reality-test" with the plaintiffs as to whatever I perceived might be pitfalls in their case that they should consider.

DEAN ALFINI: What about the question I posed—would you tell the plaintiff, "They're crazy over there on the defense side. I know what juries will do in this jurisdiction, and they'll generally find liability, so their hard-line, no-liability tactic is out to lunch."

MS. GEBHART: No.

DEAN ALFINI: So you would do something with one side but not with the other. Does that bother you, Lela?

PROFESSOR LOVE: I'd like to go back to your first question. I don't think the judge or former judge-mediator should give the opinion that the jury in this type of case will almost always, and probably in this instance, find liability. I think that opinion is an improper evaluation for a mediator to make. It would be a different case if the parties chose the mediator for her evaluation abilities and specifically requested the mediator's evaluation. In that situation, the process is "mixed"—not pure mediation—and the mediator is bound by more than one set of ethical norms. Of course, the neutral mediator must be competent to give the opinion and should be liable for careless opinions which could cost the parties a great deal. The process should be labeled mediation *and* neutral evaluation.

DEAN ALFINI: Okay. So I hear you disagreeing with Larry. That is, under the situation I posed, mediators should never offer that kind of advice, particularly if not asked by the parties for that advice.

PROFESSOR LOVE: That's correct.

DEAN ALFINI: Okay. So we have a disagreement here, Bob Moberly. Where do you come out on this?

PROFESSOR MOBERLY: I think there's a distinction between ethics and good practice on this issue. The Florida Rules don't prohibit all or even most evaluations. They only prohibit those specifically mentioned, or those that violate impartiality or self-determination. The Rules specifically allow mediators to point out possible outcomes of the case. Our Committee discussed this for quite a bit of time, and I don't think the Committee would have approved any kind of statement that prohibited all evaluations. The language allowing mediators to point out possible outcomes was a

compromise. So pointing out possible outcomes isn't specifically prohibited, but it may not always be good practice.

DEAN ALFINI: What about the "teachy-preachy" guys on the Committee. You don't think that we would have opposed this?

PROFESSOR MOBERLY: As I recall, a total bar on evaluations was proposed by one or the other of the "teachy-preachy" persons, but the attorneys and the judges did not accept it. Since our Committee deliberations, I've talked to a lot of practicing attorneys who have said, "I won't hire a mediator in a large civil circuit case where there are lawyers on both sides unless that person is knowledgeable and willing to give us an opinion."

DEAN ALFINI: Let me go a step further and make it a little tougher on you. What if the mediator then says, "Given my experience with juries in this jurisdiction, I think that this case is worth about \$70,000. In fact, I put it right about there—no more, no less." How is that?

PROFESSOR MOBERLY: This is without the request of the parties?

DEAN ALFINI: Yes.

PROFESSOR MOBERLY: I don't think the Rules prohibit that. It may or may not be good practice, but I think the Rules specifically allow that, unless it begins to infringe on self-determination or amounts to coercion. I think that if there are attorneys on both sides in large civil litigation cases, you'd have a tough case to make for coercion or violations of self-determination.

DEAN ALFINI: Donna Gebhart, what do you think? Would you agree with him?

MS. GEBHART: Even if asked, I wouldn't put a dollar value on cases.

DEAN ALFINI: Why not?

MS. GEBHART: Because that's the client's decision, and that's really important because mediation is in fact the client's process. I believe very strongly that when, or if, I evaluate the case, because they generally value what I say, it will affect their decision. They may be settling for something that they wouldn't really be happy with. So I decline to do that. And I wouldn't. I just don't think it's proper.

PROFESSOR MOBERLY: I think that we have to distinguish here between unethical conduct and bad practice. It may very well be bad practice. Probably Lela would classify Donna and herself as bright-line, anti-evaluation. Larry is clearly pro-evaluation. I would classify myself as anti-bright-line, but very cautious about the use of evaluations.

DEAN ALFINI: Does this sound like a law school lecture?

PROFESSOR MOBERLY: It isn't prohibited or unethical, even though it may sometimes be very bad practice.

DEAN ALFINI: Okay. I think that's an important distinction to make—the distinction between bad practice and unethical. Would you agree with Professor Moberly, Donna, that it may not be unethical here, but it's not wise, not good practice?

MS. GEBHART: Absolutely. I don't think it's unethical, particularly if you are asked. But even in the case where you're not asked, I don't think it's unethical. I don't think it's unethical, but it isn't something that I'd recommend doing. It's not something that I would personally feel comfortable doing because I feel that I'd be taking a portion of the decisionmaking away from the client.

MR. WATSON: I'd like to point out again that I feel the measure against which you are improperly evaluative or not is the self-determination issue. If I were mediating a case where I was asked that question, and I realized I'm going to now dictate what the numbers are going to be—no. No. I don't do that. On the other hand, if my answer to the question is just one little bit of data the parties want measured with all the other data that they've got, and they're going to put that data in and make up their own mind, there is nothing wrong with answering the question. In civil trial cases, where we have aggressive, strong trial lawyers present with equally aggressive, strong, hard parties, they just aren't going to be swayed by what we say. If we really think we are, we're taking ourselves too seriously.

DEAN ALFINI: Kathy, it seems like we were taking ourselves very seriously in the county court context. We were saying that a mediator can't say how a judge would feel, but it's okay at the circuit level for a mediator to talk about what juries will do.

MS. REUTER: I don't think it's okay for either one.

DEAN ALFINI: Do you see any distinction between the two?

MS. REUTER: None at all. When you point out possible outcomes, to me, that means you might win, you might lose—you might win \$10,000, you might win \$5000, you might win \$100,000. But giving a personal opinion about whether you win or lose, saying almost always for a jury, or almost always for a judge—suppose it's one of those one-out-of-one-hundred cases, and this person goes on to trial and comes back and says, "Well, gee whiz, you said that judge always rules for the landlord. Well, I'm a tenant, and he ruled for me. You know, I might have listened to you."

DEAN ALFINI: In other words, how does that mediator or that retired-judge-mediator, or nonattorney-mediator, or whoever the mediator may be, know that his or her experience is the universal experience? That's still a personal opinion.

MS. REUTER: It's an opinion.

DEAN ALFINI: Okay. So you don't see any distinction between the county context or the circuit context in this regard. If a county mediator can't talk about how a judge would come out, then a circuit mediator shouldn't be able to talk about how juries come out.

MS. REUTER: No, because you're leading people to what you think they should do, and it may not be what they should do. By saying that the jury almost always does this, or the judge almost always does this, you're putting people on the spot because, if you're a mediator, they think you should know. Especially if you're an attorney, they think you should know.

DEAN ALFINI: Professor Stempel, you're a relatively new arrival to this state. How does this sound to you? Where do you come out on this evaluative-versus-facilitative issue?

PROFESSOR STEMPEL: Well, I don't want to sound like I'm fleeing your caricature of the Ivory Tower, but I think I'm more receptive to the evaluative mode than other people. I guess I'm curious, particularly where you raised it with your second hypothetical about the family law situation. As we know, there has been a lot of debate in the literature about whether mediation is a good deal or a bad deal for women in the family law situation. Some people say, "Well, the mediators are choosing sides." I think there's a certain not-to-decide-is-to-decide issue. If you really let people work it out without a whole lot of structure, or without imparting much information because you're afraid of being evaluative, and even if you're using what I think is a very good technique, which Lela and Cheryl suggested ("Well, have you thought about this, have you thought about that?"), I am concerned, particularly where the parties aren't represented by counsel or where there are substantial differences between the disputants in terms of economic wealth or sophistication. In those types of cases, a mediator who just stays on the periphery is essentially being a party to survival of the strongest or survival of the most aggressive, and I'm not sure that we might be able to call those sorts of resultant settlements volitional. I'm not sure that we really want a state-sponsored apparatus being a part of that, particularly if it does have any kind of empirical impact and disadvantages women on child support, custody issues, and the like. At some point, if you're going to have a court-ordered mediation program, mediators can't stand idly by and watch miscarriage-of-justice settlements either, and that may require a more aggressive approach than just raising the question.

DEAN ALFINI: Okay. We're going to get to that one in a moment, but before we do, Javier, let me give you an opportunity to jump into the fray here. Let's take this scenario: The parties say, "Look, we're not getting anywhere. We really like you, we think you're a fair per-

son. We think you're a knowledgeable person, an impartial person. Tell us what you think."

MR. PEREZ-ABREU: Well, they can ask, but I try to avoid as much as possible getting into the evaluative mode. I do try to take a middle-of-the-road approach. Towards the end of the mediation, if I think that there's one critical issue that I can assist with and give an evaluation, and it's going to get the case done, then I may go ahead and put on the evaluator's hat, but I would avoid doing it as much as possible. I try to get into asking questions in the facilitative mode as much as possible and leave that as a last resort type of tactic.

DEAN ALFINI: Why?

MR. PEREZ-ABREU: Just being conservative by nature. I don't consider myself in the Ivory Tower, but at the same time I think that the mediation process is one where you want the parties to make their own decision. You don't want to influence them to go one way or the other, so I leave that as a last resort. If it's going to take the critical decision in getting it done, then I may put on the evaluative hat at that point.

DEAN ALFINI: Okay. Let me turn to one more scenario in the short time that we have left. I'm going to give Jeff Stempel his unfairness scenario. We have a debtor and a creditor. They are about to come to an agreement in the mediation. The mediator is a lawyer, and the mediator knows that the agreement that they are about to reach violates the state's usury statute. The mediator knows that the interest rate being agreed to is well above that permitted by law in that jurisdiction. May the mediator intervene at that point and give them legal advice or an evaluation so to speak? Lela?

PROFESSOR LOVE: Let me explain my bright-line approach before I answer that question. I wouldn't object to Larry giving a *requested* evaluation, as long as the process of evaluating was recognized as a whole set of different activities than mediation. That is, in forming an opinion, Larry or any neutral has determined the facts, the burden of proof, the relevant law, and the law's application to a very idiosyncratic situation. All those activities take a very high level of professional competence and should be taken on very seriously. I think Larry and I would agree that mixed processes, like a mediator providing a neutral evaluation or med-arb,⁹ might be useful under certain circumstances, but the different activities should be labeled accurately and governed by appropriate standards. Larry said he wouldn't give an opinion if he thought it would interfere with self-determination. The truth is that we never know what happens when we utter something. We never know the weight it has with

9. For a discussion of the benefits of med-arb, see Sherry Landry, *Med-Arb: Mediation with a Bite and an Effective ADR Model*, 63 DEF. COUNS. J. 263 (1996).

people. Consequently, being conservative, one reason mediators should not evaluate is that evaluation *might* interfere with self-determination.

DEAN ALFINI: Okay. Let's get back to the fairness issue. What if they're about to agree to something that would be unfair, if not illegal, as far as the debtor is concerned? Is that okay?

PROFESSOR LOVE: No. I don't think that a mediator can be a part of an agreement that's illegal, and I also think that people shouldn't enter into agreements if they don't have the proper information.

DEAN ALFINI: Tell us what the mediator should do at that point.

PROFESSOR LOVE: Were there lawyers involved in this?

DEAN ALFINI: No. Unrepresented parties and a lawyer-mediator. Nonlawyer, unrepresented parties.

PROFESSOR LOVE: I would say to the parties that I had some concerns about the legality of the agreement and advise them to get legal counsel.

DEAN ALFINI: Okay. She would advise the parties to seek independent legal counsel. Jeff Stempel, would you come in on your white charger and do more than that?

PROFESSOR STEMPEL: Not as you've framed the issue. These issues are at least relative. Of course, in a debtor-creditor case we could have significant power imbalances. At the same time, even when you have sophisticated parties, I guess one has to think of the jurisprudential issues. If this is a settlement that's illegal and can be set aside later, maybe there is even invited error on the part of one of the parties that's trying to snooker the other. Whether you, as a mediator appointed by the state, want to be a party to that is, I think, a rather tough question, even though you might want to say, "Well, these are big boys and girls now. Let them rough it out and pay a higher interest rate." I'm comfortable with a mediator allowing sophisticated and equivalently powerful parties to enter into settlements that skirt the line of legality, but not where they want to enter into a clearly illegal agreement.

DEAN ALFINI: Well, let me paraphrase Josh Stulberg here.¹⁰ Who appointed the mediator God? If the parties are happy with this, why not just let it happen? I mean, laws are there really strictly as guidelines.

PROFESSOR STEMPEL: You wouldn't let people enter into a slavery contract. Now, usury isn't the most heinous law; I mean, it borders on being a blue-law if you're a law-and-economics type, I

10. See Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

guess. People will pay what they'll pay, but I think I'd be hesitant to extend the libertarian reasoning that far. Jim, just to raise the issue, they are there and they are talking in part because there is court-ordered mediation. If you weren't on the scene, they'd be out there doing discovery and having motions in front of a court, and that might be horribly inefficient, but it would be creating a different set of inputs that would affect our chaos theory a little bit differently. When you're there as a mediator facilitating things, you're a part of that process, even if you stand idly by.

DEAN ALFINI: Okay, Carmen, I know you're not a lawyer, but do you think the lawyer-mediator should right the injustice that might be done here and do something about an agreement that might be okay with the parties but doesn't conform to the law?

MS. STEIN: Well, I guess I'd have to answer that with our own rule. I don't think I have the expertise or training to really say what the lawyer can or cannot do.

DEAN ALFINI: Okay. Let's give you a law degree.

MS. STEIN: It treads a very fine line because on the one hand you really can't offer the opinion. You can't jump up and say, "Wait a minute, that's illegal." You can't do that because you're taking away the self-determination of the people.

DEAN ALFINI: Okay. Does it depend on how unjust it is? Suppose the usury statute says no more than eight percent and the agreement would call for nine percent, as opposed to twenty percent or fifty percent.

MS. STEIN: Well, I think if it's illegal or unjust it just has to be across the board. I don't think it would be up to me to decide. For some things seem very unjust that wouldn't be fair for other people, but on the other hand, on the other side, of course, it's almost a form of abuse from a psychological point of view to stand pat and allow somebody to walk away feeling more abused than when they began mediation.

DEAN ALFINI: We'll let the first one with his or her hand up have the last word. Javier.

MR. PEREZ-ABREU: I refer everybody to Mediator Qualifications Advisory Panel Opinion 95-002.¹¹

DEAN ALFINI: Okay. Let's give our cast a hand.
(APPLAUSE)

11. See Risetse Posey, *Latest MQAP Opinions*, RESOL. REP., Oct. 1995, at 2 (Florida Mediator Qualifications Advisory Panel Op. 95-002); see also Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 963-64 (1997) (summarizing panel opinion).

