

COMMUNICATING QUALITY ASSURANCE: A CASE STUDY OF MEDIATOR PROFILES ON A COURT ROSTER

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Rosters, lists of mediators who purport to meet a specified set of criteria, have become a popular feature in the landscape of mediator quality assurance mechanisms. In fact, rosters have been described as “the single most important form of credentialing for mediators today.”¹ While membership on a roster is certainly not an assurance of competence per se, many mediators use this membership as a “substitute credential”² of competence since, by virtue of accepting a mediator for its roster, the organization that maintains the roster vouches that the mediator has met its criteria for membership.

In addition to their quality assurance function, rosters also serve an important communicative function for the general public. When advertised or otherwise made available for public use, rosters convey various quality assurance messages, including information about the nature of mediation, what qualifications should be valued in a mediator, and who is qualified to

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1. AMERICAN BAR ASSOCIATION TASK FORCE ON CREDENTIALING, SECTION OF DISPUTE RESOLUTION: REPORT ON MEDIATOR CREDENTIALING AND QUALITY ASSURANCE 25 (2002) [hereinafter ABA TASK FORCE], *available at* http://www.abanet.org/dispute/taksforce_report_2003.pdf (last visited Aug. 12, 2008); *see also* CHARLES POU, JR., MEDIATOR QUALITY ASSURANCE: A REPORT TO THE MARYLAND MEDIATOR QUALITY ASSURANCE OVERSIGHT COMMITTEE 18-19 (2002) (a predecessor to the foregoing ABA Task Force Report, with descriptions of various mediator rosters and membership criteria).

2. The ABA Task Force distinguished three types of credentials for mediators: regulated credentials, degree-related credentials, and substitute credentials. ABA TASK FORCE, *supra* note 1, at 19-21. The Task Force referred to “a degree or credential in an unrelated field, such as law, psychology, human resources management, etc., as a substitute credential. We also include in this category substitute credentials such as a training certificate.” *Id.* at 21. Later in the Report, the Task Force included roster membership as a substitute credential. *Id.* at 25-26.

be a mediator. To date, however, there has been no analysis of the nature or quality of the information provided to the public via mediator rosters.

This article presents an analysis of descriptive information mediators provide on the roster profiles made available to the public in one court-connected mediation program that we call the “California Superior Court.”³ We examined the same mediator profiles provided to the public on the court website, guided by a single research question: What do the profiles on the roster communicate to the public about mediation and about mediators? We frame this research question in Part I with a discussion of the function of mediator rosters. Part II describes the methods utilized for this study. Next, Part III reports our findings and interpretations of the data. Finally, Part IV comments on the policy implications of our research and recommendations for future research.

I. COMMUNICATING QUALITY ASSURANCE: MEDIATOR ROSTERS

Mediator rosters are simply lists of mediators who purport to meet a specified set of criteria as a condition for inclusion on the list. Those who maintain rosters set various criteria for membership, in their own discretion. For example, inclusion on a roster might be conditioned on a mediator meeting certain minimum standards of education,⁴ training,⁵ experience,⁶ or

3. With this pseudonym we attempt to mask the local jurisdiction of the court; however, the need to report the data in a meaningful way make it impossible to mask the fact that the program studied is in California. Therefore, it must be noted that this research project involved the collection and study of pre-existing data, specifically, public documents and records that were prepared by the court for a purpose other than this research and that were made available by the court for the use of the general public. There is no expectation of privacy around such materials. We did not obtain any data through interaction or intervention with the mediators who are members of the court roster, nor did we obtain any identifiable private information from the mediators or the court. Nonetheless, as a matter of professional courtesy we do desire to preserve privacy for the program we studied, and the mediators who participate in that program, at least as much as is possible in a study of this kind. The identity of the program and the mediators is not the relevant empirical issue. See *infra* Part II for a discussion of the various steps we have taken to preserve privacy.

4. For example, the Supreme Court of Virginia, Office of the Executive Secretary, maintains a roster of certified mediators for courts throughout the state. In its *Guidelines for the Training and Certification of Court-Referred Mediators*, the court provides: “[a]n applicant for certification shall have a bachelor’s degree from an accredited college or university or shall submit evidence of relevant experience and qualifications sufficient to support certification.” Supreme Court of Virginia, *Guidelines for the Training and Certification of Court-Referred Mediators* (2007) [hereinafter Supreme Court of Virginia], available at <http://www.courts.state.va.us/tom/tom.pdf> (last visited Aug. 13, 2008).

5. Minimum training requirements are common for inclusion on a roster. For example, The Commonwealth of Kentucky, Court of Justice, requires a mediator who offers to provide general mediation services to complete, at a minimum, forty hours of training with an approved mediation training program covering communication skills, conflict resolution theory and practice, mediation theory, practice, and techniques, and the court process. Commonwealth of Kentucky, Court

performance,⁷ alone or in various combinations. Membership on a roster is a statement that the mediator has met the minimum standards to be considered qualified to mediate for those clients who would seek a mediator through that particular roster. In effect, those who maintain the roster vouch,⁸ or at least appear to vouch,⁹ for the quality of the mediators who are listed on the roster.

Rosters have become a popular feature in the landscape of mediator quality assurance mechanisms. In fact, rosters have been described as “the single most important form of credentialing for mediators today.”¹⁰ While any actual or apparent assurance of quality conveyed by roster membership is, strictly speaking, limited to the specific terms and purposes of the individual roster, mediators often use roster membership in one forum as a way to assert their qualifications or credentials to a wider audience in other forums. In this sense, roster membership serves as a “substitute credential”¹¹ of mediator quality. Moreover, roster membership is valuable to mediators as a marketing device, because rosters are typically provided to interested members of certain target groups, or even the general public, in order to aid in the selection of a qualified mediator.

of Justice, Application to Be Placed on the Mediator Roster [hereinafter Commonwealth of Kentucky], available at <http://courts.ky.gov/NR/rdonlyres/6E18E3F1-6095-4D0C-8F0A-2AB1C75FE28A/0/MEDADR7.pdf> (last visited August 13, 2008). The Supreme Court of Virginia requires anywhere from 24 to 58 hours of training, depending on the court roster to which the mediator is applying. Supreme Court of Virginia, *supra* note 4, at 2-3.

6. Experience requirements are typically framed in terms of completion of a minimum number of mediation hours and/or cases. For example, Kentucky requires fifteen hours of participation in actual dispute mediation, in at least three cases, under the guidance of a mediator qualified under its own guidelines or a mediation training center. Commonwealth of Kentucky, *supra* note 5.

7. See, e.g., The Institute for the Study of Conflict Transformation Mediation Roster, available at www.transformativemediation.org (last visited Aug. 12, 2008) (requiring a performance-based assessment for its mediators); United States Postal Service REDRESS™ Mediation Program Roster, available at <http://www.usps.com/redress/outside.htm> (last visited August 13, 2008) (requiring an evaluation by the Manager of Dispute Resolution and/or the EEO ADR Coordinator of the mediator’s performance during one pro bono mediation); Netherlands Mediation Institute (NMI) Roster of Certified Mediators, available at <http://www.nmi-mediation.nl/> (last visited Aug. 12, 2008) (including a performance assessment). See also Hugo C. M. Prein, *De vaardigheidstoets bij de certificering tot NMI-mediator*, 7 TIJDSCHRIFT VOOR MEDIATION 83, 83-93 (2003) (explaining the requirements of a knowledge test and a performance-based competency test as the basis for NMI mediator certification).

8. ABA TASK FORCE, *supra* note 1, at 25.

9. In our data for this study, the court placed the following disclaimer on each mediator’s profile: “Neutrals listed on this website serve voluntarily on the ADR panels of the [name omitted] Court. The information contained in the personal profiles has been provided directly by the Neutrals. The Court does not make any representations or warranties regarding the accuracy of such information.”

10. ABA TASK FORCE, *supra* note 1, at 25.

11. *Id.* at 26.

Despite their popularity and prevalence, rosters—as mechanisms of quality assurance—suffer from certain inherent weaknesses. The accuracy of the information provided is questionable, because rosters are built largely through mediator self-reporting on a standardized application form. There is little indication that those who maintain rosters do any independent verification of the claims made by the mediators.¹² Likewise, the validity of the information provided, in terms of assuring mediator quality, is questionable. With the possible exception of rosters that are built on performance-based assessments,¹³ the nexus between roster membership and actual competence to practice may be tenuous at best, since many rosters rely on criteria that are not demonstrably related to practice competence.¹⁴

Nonetheless, the number of active mediator rosters in the United States is estimated to be in the thousands.¹⁵ In fact, rosters are used to provide quality assurance in a wide variety of mediation programs, including those operated by various state and federal courts, government agencies, community mediation centers and private providers.¹⁶

As a matter of public policy, the use of rosters in court-connected mediation programs is of particular interest. Court-connected mediation programs have a special responsibility to the public regarding the mediation services they offer, which includes assuring the quality of the mediators to whom cases are referred and educating the public about the nature of mediation.¹⁷ Where rosters are in place, courts may and do use the roster itself to discharge both of these functions. The roster serves as an actual or apparent imprimatur from the court regarding the quality of the mediators, and also as an important communication tool for educating the public about the nature of mediation and the practitioners the program provides. The consequences of this communicative and educative function cannot be underestimated. In effect, rosters enable court-connected mediation programs to

12. See, e.g., discussion *supra* note 9 (quoting the disclaimer provided by the court regarding the roster under study in this article).

13. See *supra* note 7 (providing examples of mediation programs using performance-based assessment for quality control).

14. See Dorothy J. Della Noce et al., *Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model*, 19 OHIO ST. J. ON DISP. RESOL. 1005, 1006 (2004) (suggesting that, despite the wide variety of mediator quality assurance schemes that have evolved, only performance-based assessment schemes bear any actual relationship to mediator practice competence).

15. ABA TASK FORCE, *supra* note 1, at 25.

16. *Id.*

17. CENTER FOR DISPUTE SETTLEMENT AND INSTITUTE OF JUDICIAL ADMINISTRATION: NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS §§ 2.0, 3.0, 6.0, available at <http://www.mbf.org/JAGWG2BADRNationalStandards.pdf> (last visited Aug. 12, 2008).

delegate their responsibility for quality assurance. Through rosters, courts place the burden of selection of a qualified mediator on the consumer who will use the services, and the responsibility for educating consumers about mediation and the mediators on the very mediators who will provide the services to those consumers. Thus, the kind of information that is provided by the mediators, and by implication the courts, to the public, is deserving of scrutiny. Yet, to date, there has been no analysis of the nature or quality of the information provided to the public via mediator rosters.

II. RESEARCH METHOD

A. RAW DATA

This is a case study of the nature and quality of the information provided to the public via mediator rosters in one court system. We analyzed the publicly available mediator profiles compiled by the “California Superior Court” (hereinafter, “court”).¹⁸ The court maintains panels (i.e., rosters) of neutrals who are available to handle cases in the Civil, Family, and Probate Departments of the court. Profiles of the neutrals are made available to the public on the court’s website, so that members of the public may select a neutral from the roster. We used as our data for this study the same mediator profiles that are available to the general public for selection of a mediator in that jurisdiction.

All mediators who wish to be members of the court’s roster must join the pro bono panel; mediators may also apply for membership on the “party pay” roster if they demonstrate additional qualifications.¹⁹ The court provides on its website a document entitled Pro Bono Mediation Panel Requirements, setting forth the qualifications for joining the pro bono roster. Mediators who wish to be included on the roster must complete an Application for Appointment to Alternative Dispute Resolution (ADR) Panel (hereinafter, “Application”).²⁰ The Application asks mediators for such information as educational background, legal experience, professional licenses, ADR training and experience, ADR work style, and professional

18. See discussion *supra* note 3 (regarding the identity of the court and our efforts to maintain privacy).

19. While there is mention of additional qualifications for those who wish to join the Party Pay Panel in the document entitled “[name omitted] Superior Court Civil Alternative Dispute Resolution (ADR) Programs,” which must be served by the plaintiff on each defendant along with the complaint, the nature of those requirements could not be found anywhere on the official website of the court program under study.

20. This Application can be accessed electronically and was last accessed for purposes of data collection for this study on April 22, 2008. For purposes of preserving privacy, the actual document is not included here and the interested reader is asked to contact the author.

affiliations, publications, and awards. Some parts of the Application require only that boxes be checked or completed, while others invite descriptive narratives of 600 characters or less. The profile information presented on the court's website for the public is drawn directly from the Application.²¹

Members of the public who are seeking a mediator can search the mediator profiles either by using a specific name or a random search function. For random searching, the profiles are presented in categories: Civil Department, Family Law Department, and Probate Department. We analyzed profiles only from the Civil Department roster for this study, noting that the categories of practice on that roster also included family and probate areas of practice.

B. SAMPLE

There are 730 active mediator profiles on the Civil Department roster on the court's web site.²² Within the Civil Department roster, the profiles are further subdivided according to either "party pay" or "pro bono" services. All 730 mediators are members of the "pro bono" roster; of those 730, 325 also participate in the "party pay" roster. Finally, the profiles are further subdivided within these two categories according to the substantive content of the dispute, such as Business/Corporate, Contract Breach, Family, Medical Malpractice, Personal Injury, and Real Estate.

The search function was organized in such a way that we could not obtain a random sample of the mediators. However, a random sample was not necessary because we did not seek to make a statistical generalization of our observations to a population, but rather to provide the thick description²³ necessary to a case study of one roster system. The value of a case study lies in its in-depth, contextualized focus on understanding a particular, situated social phenomenon.²⁴ Hence, the appropriate approach to sampling is information-oriented. With this in mind, we selected a purposive sample of mediator profiles, using maximum variation sampling strategies in order to generate as wide a variety of mediator profiles from

21. See discussion *supra* note 9 (quoting the language used in the disclaimer provided by the court regarding the roster).

22. Telephone Interview with Senior Management Analyst at the court program under study (Mar. 20, 2008).

23. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 3-30 (1973).

24. ROBERT E. STAKE, *THE ART OF CASE STUDY RESEARCH* 37 (1995); ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* 47-48 (3d ed. 2002).

the roster as possible.²⁵ Through this process, we generated a sample of 140 mediator profiles, which contained at least two mediators drawn from each category of practice. This sample comprised 19% of the overall population of profiles on the site. We numbered each profile for identification. To preserve privacy²⁶ as much as possible, only those numbers are used to reference specific profiles. We also mask identifying data, such as names, places of employment, and unique credentials, whenever we display excerpts from a particular profile for illustrative purposes in our analysis.

C. DATA ANALYSIS

1. *Inductive and Deductive Strategies*

The profiles provided a wealth of communication data. Items of particular interest were: (1) the mediators' forced-choice responses to "check box" items, and (2) the mediators' narratives provided in three sections of the Applications where mediators were able to express themselves in their own words on designated topics. As the study progressed, it also became apparent that we should consider the court's Application itself as a structuring influence²⁷ on the profiles.

First, we analyzed the forced-choice information provided on the profiles quantitatively to create a demographic description of the mediators in the sample. Next, we engaged in a reflexive cycle of both inductive and deductive analyses of the mediators' narratives, which were submitted with the Application and included in the mediators' Profiles.

Our research group held inductive data analysis sessions for more than ten weeks, guided by the basic principles of constant comparative analysis that comprise grounded theory.²⁸ During this time we undertook repeated

25. We first selected ten categories of substantive practice that were expected to include large numbers of mediators on the rosters. Within each category, we selected profiles from both the "party pay" and the "pro bono" rosters. When presented with a list of eligible mediators using these search strategies, we then applied a simple random sampling procedure to the listed profiles to come up with the pool of profiles for examination. We eliminated any duplicate profiles. This process yielded 82 profiles for closer examination. We then returned to the categories from which we had not sampled, and within each remaining category made a random selection of two additional mediators. In this second stage of sampling, noting that we were drawing more and more mediators who had already been selected, we continued to eliminate duplicates.

26. See discussion *supra* note 3 (regarding the identity of the court and our efforts to maintain privacy).

27. Rom Harre & Luk van Langenhove, *Reflexive Positioning: Autobiography, in POSITIONING THEORY* 60, 63 (R. Harre & L. van Langenhove eds., 1999).

28. BARNEY G. GLASER, *BASICS OF GROUNDED THEORY ANALYSIS: EMERGENCE VS. FORCING passim* (1992); BARNEY G. GLASER & ANSELM STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* 21-22 (1967); ANSELM L. STRAUSS & JULIET CORBIN, *BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY*

readings of the narratives, identified categories that emerged from the data, and tested the fit of these categories for explanation of the narratives. We also tacked back and forth across the various types of data as we built hypotheses.

Our deductive analysis of the “mediator work style”²⁹ narratives requires a more detailed explanation. We noted that the mediators’ check-

PROCEDURES AND TECHNIQUES 23-31 (1990); Anselm Strauss & Juliet Corbin, *Grounded Theory Methodology: An Overview*, in HANDBOOK OF QUALITATIVE RESEARCH 273-285 (N.K. Denzin & Y.S. Lincoln eds., 1994).

29. The term “work style” is both problematic and consequential. For decades, scholars and practitioners alike have been attempting to describe and explain the simple and undeniable fact that different mediators practice their craft differently. For examples of studies that have attempted to identify and explain the differences among mediators, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 95-130, 229-59 (1994) [hereinafter PROMISE I]; DEBORAH M. KOLB, THE MEDIATORS 134-50 (1983); DEBORAH M. KOLB & ASSOCIATES, WHEN TALK WORKS: PROFILES OF MEDIATORS 459-92 (1994); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 47-75 (1991); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 23-25 (2003) [hereinafter *New Grid*]; Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, ALTERNATIVES TO HIGH COST LITIG., Sept. 1994, at 7 [hereinafter *Alternatives*]; Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 35-48 (1996) [hereinafter *Grid*]; Susan S. Silbey & Sally Merry, *Mediator Settlement Strategies*, 8 L. & POL’Y 7, 7-32 (1986).

The fact that differences exist is not seriously disputed. Unfortunately, any discussion of what and how to name those differences, and the significance to accord those differences, leads immediately to struggles with nomenclature. First, adjectives for various approaches to mediation practice abound. Sometimes the adjectives succeed in clarifying real differences; more often, the abundance of adjectives used to describe different approaches to mediation obscures meaningful differences in practice, or complicates the discussion by applying different adjectives for what is essentially the same approach to practice. Second, no matter which adjective is applied, there is also the problem of the appropriate noun. For example, is facilitative mediation (or any other kind of mediation) properly called a style, a technique, an approach, an orientation, or a model? The choice of terms is consequential. For example, if one adopts the notion that mediator differences are matters of technique or style, then it is easy to argue that one can be eclectic, blending and switching styles and techniques at will. On the other hand, if one claims that mediator differences are approaches, orientations, or especially, models, then something more complex and cohesive is being described, such as a philosophy, ideology, theory, or identity. In that case, an argument that one can blend approaches, orientations or models, or switch from one to another at will, is less defensible. See Dorothy J. Della Noce, *Ideologically Based Patterns in the Discourse of Mediators: A Comparison of Problem Solving and Transformative Practice*, at 338-40 (April 3, 2002) (unpublished Ph.D. dissertation, Temple University) (on file with UMI Dissertation Service).

In my previous writings, I have made clear that I consider mediation practice more a matter of a cohesive philosophy, ideology, and theory than decontextualized skill. See, e.g., Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 42-43 (2002) [hereinafter *Clarifying*]; Dorothy J. Della Noce et al., *supra* note 14, at 1005-58; Dorothy J. Della Noce et al., *Signposts and Crossroads: A Model for Live Action Mediator Assessment*, 23 OHIO ST. J. ON DISP. RESOL., 197, 197-230 (2008) [hereinafter *Signposts*]; Dorothy J. Della Noce, *Ideologically Based Patterns in the Discourse of Mediators: A Comparison of Problem Solving and Transformative Practice*, at 321-23 (Apr. 3, 2002) (unpublished Ph.D. dissertation, Temple University) (on file with UMI Dissertation Service). I reject the notion of “style” for having insufficient explanatory power for

box responses and narratives regarding their work styles were entirely self-report information, without any independent verification from the court. While self-reports provide valuable communication research data, particularly with respect to how subjects position themselves and others in a social context,³⁰ self-reports are subject to the social desirability bias, or the tendency to present oneself in ways that others are expected to find desirable or pleasing. Hence, we saw reason to interrogate the self-report data further, by comparing how the mediators positioned themselves through their responses to forced-choice check-box items, how the mediators positioned themselves in their own narratives,³¹ and how these features related to objective markers of various mediator work styles that could be drawn from the literature.

We developed a coding scheme for each of the three work styles the court allowed a mediator to choose in the check boxes. Through its Application, the court has effectively embraced a particular taxonomy of mediation practice that has begun to appear with some frequency in the mediation literature: facilitative, evaluative, and transformative mediation.³² The Application does not provide definitions of the three work styles, nor does it instruct applicants on how to distinguish among the work styles. A search of the court's web site failed to produce any definition of the work styles offered either to the mediators or to the public that is presumed to be using this information to select a mediator. Given the lack of definition for each of the three work styles, it is fair to presume that the narrative is an important opportunity for mediators to clarify their work styles for the public in their own voices, and that this information will be of interest to members of the public who are trying to decide upon a mediator.

the problem of mediator differences. While I believe, and have argued elsewhere, that the research bears out this position, a full discussion on this topic is beyond the scope of this article. Nonetheless, to keep matters uncomplicated for purposes of the study reported in this article, I will temporarily put aside my qualms and adopt the usage the court employs: "work style."

30. See *infra* notes 34-48 (discussing positioning theory and its relevance to this study).

31. The language that mediators use can be analyzed for markers that indicate their preferred work styles. For examples of the analytical process, see *Clarifying*, *supra* note 29, at 59-60; Della Noce, *supra* note 29, at 119-304; Della Noce et al., *supra* note 14, *passim*; and *Signposts*, *supra* note 29, *passim*.

32. For examples of how this taxonomy is used by scholars and practitioners, see, e.g., Jerry Roscoe, *Advocacy Skills: Tips for Selecting a Good Mediator*, available at <http://www.mediate.com/articles/roscoe.cfm> (last visited Apr. 10, 2008); Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative and Transformative Mediation*, available at <http://www.mediate.com/articles/zumeta.cfm> (last visited Apr. 10, 2008); Susan Nauss Exon, *The Effect That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation* (Aug. 24, 2007) (unpublished draft), available at http://works.bepress.com/susan_exon/1/ (last visited Apr. 10, 2008); see also Robert A. Baruch Bush, *Staying in Orbit, Or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N.D. L. REV. 705, 723 n.57 (2008) (providing additional evidence that this particular taxonomy of practice is now in common use).

Drawing from the theoretical and empirical literature describing these three approaches to practice, we created an analytical grid of key conceptual and linguistic markers for each approach.³³ We then analyzed each

33. It is beyond the scope of this article to elaborate upon the nature of the analytical grid and how it was derived. That discussion is reserved as the subject of a forthcoming publication. However, we provide this brief introduction and key literature for each of the three orientations to practice. The terms “facilitative” mediation and “evaluative” mediation are generally credited to Riskin. *Grid*, *supra* note 29, at 8; *Alternatives*, *supra* note 29, at 7. Riskin himself has repudiated the assumptions on which the “grid” was based. *See New Grid*, *supra* note 29, at 12. However, the terms have “stuck” in the field at large. *See* MALCOLM GLADWELL, *THE TIPPING POINT* 89-132 (2002) (describing the “stickiness factor” for certain social phenomena). It is not clear that either adjective—facilitative or evaluative—designates a coherent model for mediation practice. *See* Dorothy J. Della Noce, *What Is a Model for Mediation Practice?* 15 *MEDIATION Q.* 133, 133-42 (1997) (suggesting criteria for defining models for mediation practice). However, there is sufficient literature concerning the nature, goals, underlying values, and practices of each approach to mediation to identify distinguishing markers for each approach.

Facilitative mediation can be described as a process in which the mediator assists the parties in problem-solving, typically using a wide variety of communication strategies to encourage the parties to engage in future-oriented, and typically interest-based, negotiation for the purpose of reaching a mutually acceptable settlement agreement. Facilitative mediators claim to maintain control of the process, while keeping decisions about the substantive content and outcome in the parties’ hands. For elaborations on the nature of facilitative mediation, *see, e.g.*, Bernard Mayer, *Facilitative Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 29, 29-51 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004) [hereinafter *DIVORCE AND FAMILY MEDIATION*]; Kolb, *supra* note 29, at 488-92; Della Noce, *supra* note 29, at 198-247; *Grid*, *supra* note 29, at 45; *New Grid*, *supra* note 29, at 11.

Evaluative mediation can be described as a process by which the mediator “make[s] assessments about the conflict as well as its resolution and communicate[s] those assessments to the parties,” with a focus on analyzing the substantive content of the dispute and offering whatever judgments about that content that are useful to achieving a settlement. Randolph Lowry, *Evaluative Mediation*, in *DIVORCE AND FAMILY MEDIATION*, *supra* note 33, at 72, 73. Evaluative mediators take an interest in both the content and process of the settlement negotiations, and exert a considerable degree of influence over both. For elaborations on the nature of evaluative mediation, *see, e.g.*, Stacy Burns, *The Name of the Game Is Movement: Concession-Seeking in Judicial Mediation of Large Money Damage Cases*, 15 *MEDIATION Q.* 359, 359-67 (1998); Stacy Burns, “*Think Your Blackest Thoughts and Then Darken Them*”: *Judicial Mediation of Large Money Damage Disputes*, 24 *HUMAN STUDIES* 227, 227-49 (2001); Stacy Burns, *Pursuing “Deep Pockets”*: *Insurance-Related Issues in Judicial Settlement Work*, 33 *J. OF CONTEMP. ETHNOGRAPHY* 111, 111-53 (2004); *Grid*, *supra* note 29, at 9-10; *New Grid*, *supra* note 29, at 11; Dorothy J. Della Noce (forthcoming), *Evaluative Mediation: In Search of Practice Competencies*, *CONFLICT RESOLUTION QUARTERLY*.

The term “transformative” mediation is generally credited to Robert A. Baruch Bush & Joseph P. Folger. *PROMISE I*, *supra* note 29, at 14-15. Transformative mediation can be described as a process by which the mediator “works with the parties to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution.” Robert A. Baruch Bush & Sally Ganong Pope, *Transformative Mediation*, in *DIVORCE AND FAMILY MEDIATION*, *supra* note 33, at 53, 59. Transformative mediators, working with a social/communicative or constructionist perspective on human interaction (*see Clarifying*, *supra* note 29, at 5 (explaining this perspective and its relationship to transformative practice)), which places the mediator’s focus on the quality and development of moment-to-moment interaction, reject the notion that strict divisions between process and content are possible, and thus claim to put control of both into the parties’ hands. *See* Joseph P. Folger, *Who Owns What in Mediation? Seeing the Link Between Process and Content*, in *DESIGNING MEDIATION: APPROACHES TO TRAINING & PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK* 55, 55-61 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001) (discussing

narrative in light of these markers. Where possible, we assigned each narrative to a work style or combination of work styles; otherwise, we noted that there was not enough information in the narrative on which to assign a code. We used coding teams for this process, and conducted reliability checks. Our process demonstrated inter-rater reliability of 89%. After assigning a code to each narrative, we then compared the codes assigned to the work styles the mediators claimed in their check-box responses.

2. *Positioning Theory as an Analytic Lens*

The concept of “positioning” has already been addressed several times in this article, and that concept deserves some elaboration. As we conducted our analysis we drew from existing literature and considered the explanatory power of existing theories to help make sense of the data. We found that positioning theory³⁴ provided a powerful analytic lens for making sense of the individual profiles as both individual and institutional communicative events.

Positioning theory states that in the course of interaction, each participant continuously positions himself or herself, both individually and “in relation to” the other.³⁵ That is, positioning is a dynamic communicative process in which one takes up certain roles or attributes for himself or herself, and simultaneously assigns certain roles or attributes to other participants in the interaction.³⁶ For example, in positioning oneself as a teacher in an interaction, an individual thereby positions those with whom she is engaged as students. In positioning oneself as a victim in an interaction, one thereby positions those with whom he is engaged as oppressors. Positioning can be intentional or unintentional, deliberate or forced, and

the interrelationship of mediation process and the content of parties’ disputes). For elaborations on the nature of transformative mediation, *see, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 41-237 (2d ed. 2005) [hereinafter PROMISE II] (presenting a more fully developed articulation of the transformative approach’s theoretical basis as well as a much more detailed description of specific practices to enact the model in mediation sessions); Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263, 263-76 (1996); PROMISE I, *supra* note 29, at 79-261; Della Noce, *supra* note 29, at 58-75; Della Noce et al., *supra* note 14, at 1005; *Signposts*, *supra* note 29, at 197.

34. Bronwyn Davies & Rom Harre, *Positioning and Personhood*, in *POSITIONING THEORY: MORAL CONTEXTS OF INTENTIONAL ACTION* 32, 32-52 (R. Harre & L. van Langenhove, eds., 1999) [hereinafter *POSITIONING THEORY*]; Rom Harre & Luk van Langenhove, *The Dynamics of Social Episodes*, in *POSITIONING THEORY*, *supra* note 34, at 1-13; Luk van Langenhove & Rom Harre, *Introducing Positioning Theory*, in *POSITIONING THEORY*, *supra* note 34, at 14-31.

35. van Langenhove & Harre, *supra* note 34, at 22.

36. *Id.* at 17.

tacit or explicit.³⁷ Positioning can also be resisted, challenged, or contested by one who is being positioned, and repositionings can be negotiated.³⁸

Positioning theory supports a close analysis of the communicative strategies that individuals use to create and display their identities and situate themselves in society. At the same time, because the act of positioning reveals a speaker's assumptions about the rights, duties, and obligations accorded to all participants in the interaction, a positioning analysis provides insight into the speakers' implicit moral orders: what they believe is normal, right, good, and expected in a certain interaction.³⁹ Likewise, the theory supports an analysis of power relations, which are made visible in terms of symmetrical or asymmetrical rights and obligations of positioning.⁴⁰ Finally, positioning theory directs a researcher's "attention to a process by which certain trains of consequences, intended or unintended, are set in motion."⁴¹

While positioning theory is typically applied to the analysis of conversational interaction, it is also useful for understanding certain other forms of interaction. For example, positioning theory can provide insight on how institutions position individuals. Most notable is the institutional positioning that occurs "when an institution wants to classify persons who are expected to function within that institution, performing a certain range of tasks."⁴² Examples include institutional selection and appointment procedures, like those involved in creating rosters. This dynamic is characterized as "forced self-positioning," a process through which a person is more or less compelled by the institution to position himself or herself in particular ways and highlight certain attributes of personal and social identity, usually in response to some sort of interview or application.⁴³ Another example is "reflexive positioning," which one accomplishes through autobiographical talk and written autobiographies.⁴⁴ "Reflexive positioning" is intentional communication that conveys a selected, partial, carefully weighed story of a self, while at the same time revealing certain assumptions about the audience and the broader social institutions in which and about which the story is told.⁴⁵ When reflexive positioning is carried out in written form,

37. *Id.* at 20-30.

38. *Id.*

39. *Id.* at 23.

40. Harre & van Langenhove, *supra* note 34, at 6.

41. Davies & Harre, *supra* note 34, at 40.

42. van Langenhove & Harre, *supra* note 34, at 27.

43. *Id.* at 26-27.

44. Harre & van Langenhove, *supra* note 27, at 61.

45. *Id.*

the speakers are presumed to have the opportunity for “backward scanning,” and thus to be strategic, selective, and reflective about the information they choose to put forward.⁴⁶ Reflexive positioning can be deliberate and strategic, as when one deliberately expresses one’s own identity for the achievement of one’s own goals.⁴⁷ It can also be forced, as in the case of institutional positioning just described.

In the case of the mediators’ profiles, positioning theory allows us to analyze profiles as strategic acts of reflexive positioning by the mediators that display selected aspects of their identities in keeping with their own goals, and also as acts of forced positioning compelled by the court through the Application form. Positioning theory suggests that the mediators made certain deliberate and reflected choices about how to present themselves as they prepared their profiles, and those choices were shaped by such factors as the purposes for which they sought roster membership, the demands of the Application imposed by the court, the presumed audience for which they believed they were writing, and even the limited character count available. Hence, we use the language and concepts of positioning theory throughout the remainder of this article to analyze how the mediators constructed their professional selves,⁴⁸ and to support reasoned inferences regarding the mediators’ assumptions about the nature of their work, their presumed public audience, and their institutional context.

46. *Id.* at 66-67.

47. van Langenhove & Harre, *supra* note 34, at 24-25.

48. For examples of studies that used positioning theory to investigate the construction of professional selves in first-person narratives, see Jane Jorgensen, *Engineering Selves: Negotiating Gender and Identity in Technical Work*, 15 *MGMT. COMM. Q.* 350, 350-80 (2002); Camilla Vasquez, *Moral Stance in the Workplace Narratives of Novices*, 9 *DISCOURSE STUD.* 653, 653-75 (2007).

III. FINDINGS

A. DEMOGRAPHICS OF MEDIATORS IN PROFILE SAMPLE

The information provided on the court website allowed us to profile the sex, profession, training experiences, and declared work styles of the mediators; other demographic information (such as race, ethnicity, and age) was not available.

1. *Sex*

Table 1 illustrates that the sample contained more than 3 times as many male as female mediators: 106 males and 34 females.

TABLE 1
SEX OF MEDIATORS IN SAMPLE

Sex of Mediator	Number	Percent of Sample (n=140)
Male	106	75.7%
Female	34	24.3%

2. *Professions*

While a wide range of professions appeared in the sample, Table 2 illustrates that the mediators were overwhelmingly attorneys. In fact, more than 2/3 of the sample, or 70.7%, identified themselves as attorneys exclusively. The number of attorneys represented in the sample actually jumps to 84.2% if we also consider those who identified themselves primarily as mediators/arbitrators and secondarily as attorneys. Only 22 mediators, or 16.8% of the sample, identified themselves solely as members of other professions (although within this figure are included one judge who chose not to identify as a lawyer and one law student).

Only 30 mediators, or 21% of the sample, identified their primary occupation as that of mediator or arbitrator. For all others, 79% of the sample, mediation is presented as a secondary occupation.

TABLE 2
PROFESSIONS OF MEDIATORS IN SAMPLE

Profession	Number	Percent of Sample (n=140)
Attorney	99	70.7
Mediator/Arbitrator (primary designation) + Attorney (secondary designation)	19	13.5
Mediator/Arbitrator (primary designation) (alone or with a non-attorney secondary designation)	11	7.9
Others, e.g., Doctor, Civil Engineer, Construction Manager, Real Estate Broker, Law Student, College Student, Consultant, Judge, Investigator, EEO Specialist	11	7.9

3. *ADR Training*

The mediators reported their ADR training experiences on their application form. The ten most common sources of training identified in the sample are listed in Table 3.⁴⁹ Notably, Table 3 suggests that the Straus Institute at Pepperdine School of Law dominates the ADR training experiences for mediators on the roster, with 59% of the mediators having trained at Pepperdine. In fact, 36 of the mediators (26%) reported that they had ADR training *only* at Pepperdine. At the same time, Table 3 illustrates the general dominance of training from sources identified with the legal profession, when the figures for Pepperdine, the Los Angeles County Bar Association, the Los Angeles Superior Court, the American Bar Association, the American Arbitration Association, and the California Court of Appeals, are considered as a whole.

49. Some of the mediators listed more than one source of training, so there is overlap among these programs and the percentages do not total 100. Mediators did identify 91 other sources of training; however, each of these other sources was identified by 6 mediators or fewer.

TABLE 3
ADR TRAINING OF MEDIATORS IN SAMPLE

Training Source	Number	Percent of Sample (n=140)
Pepperdine Law School/Straus Institute ⁵⁰	83	59%
LACBA (Los Angeles County Bar Association)/DRS ⁵¹	63	45%
SCMA (Southern California Mediation Association)	16	11%
LASC (Los Angeles Superior Court)	13	9%
UCLA (Various Programs)	8	5.7%
NASD (Various Programs)	7	5%
American Bar Association (Various Programs)	7	5%
American Arbitration Association	7	5%
California Academy of Mediation Professionals	7	5%
California Court of Appeals	7	5%

It should be noted that, while mediators were required to identify the sources of their training programs, there was no requirement that they indicate in which work style(s) they were trained, if any. Some mediators listed the names of the training programs they attended, but given the lack of a common identification structure or vocabulary for the course names it was not possible to draw many conclusions about the nature, quality, or content of the trainings. For most of the training programs, it could not be determined which mediation work style was the subject of the program, if any.⁵² One conclusion, however, is inescapable: training and work style

50. We treated these two entities as a single entity, based on the training programs that the mediators identified, which were offered at the Straus Institute.

51. Some mediators (36) listed their training source as LACBA (Los Angeles County Bar Association) and some (27) listed their training as DRS (Dispute Resolution Services). Investigation showed that DRS is a “service of the Los Angeles County Bar Association.” See Los Angeles County Bar Association Dispute Resolution Services Homepage, <http://www.lacba.org/showpage.cfm?pageid=23> (last visited July 10, 2008). Therefore, we can treat these two programs as the same entity, just as Straus Institute is included within Pepperdine University School of Law. See *supra* note 50 and accompanying text.

52. We observed that the single most frequently mentioned program at The Straus Institute/Pepperdine Law School for mediators who identified specific titles of training programs was “Mediating the Litigated Case.” The published agenda for this program would suggest that it encompasses the facilitative work style (although such a conclusion cannot be drawn with complete confidence solely on the basis of an agenda). Pepperdine University School of Law Straus Institute for Dispute Resolution, *Mediating the Litigated Case*, available at http://law.pepperdine.edu/straus/training_and_conferences/mediating_graziadio08.html (last visited August 14, 2008). In contrast, only five mediators identified a training program that was clearly labeled as transformative mediation, and the source of this training was uniformly identified as the U.S. Postal Service REDRESS™ program.

were treated as unrelated by the court and by the mediators. No matter what their training experiences, mediators could identify themselves as capable of utilizing any work style at all.

4. Fees

The private hourly fees disclosed by the mediators are summarized in Table 4. The range disclosed was \$0-\$750. The mean hourly fee amount was \$290, and the median hourly fee amount was \$300. The sample was bi-modal, with the two most common hourly fees identified as \$250 and \$300.

TABLE 4
PRIVATE FEES OF MEDIATORS IN SAMPLE

Hourly Fee	# of Mediators
\$0-95	10
\$100-195	12
\$200-295	39
\$300-395	52
\$400-495	20
\$500-595	5
\$600-695	0
\$700-795	2

5. Work Styles

The court's Application form asks mediators to disclose their "work style"⁵³ by checking one or more of three boxes: transformative, facilitative, or evaluative.⁵⁴ To develop a profile of the mediators' self-declared work styles across the sample, we counted how many mediators checked the three boxes provided, and in what combinations.

We observed that 90.7% of the mediators claimed a work style; 9.3% of the mediators claimed no work style. Most mediators who claimed a work style identified themselves as using a combination of work styles. As Table 5 illustrates, if we add the mediators who claimed that they practiced multiple styles, in all of the various possible combinations, 97 mediators (or more than 69% of the sample) claimed to use a variety of work styles. The

53. See *supra* note 29 and accompanying text (discussing the term "work style").

54. See *supra* note 33 and accompanying text (discussing these three work styles).

most commonly claimed combination is facilitative and evaluative (52, or 37% of the sample), but a notable number (33, or 24% of the sample) claimed to use all three styles. No mediator claimed to practice a combination of evaluative and transformative mediation. Just over 20% of the mediators claimed to practice using one work style only, no matter the style.

If the work styles are considered individually, whether mediators claimed to use a particular work style alone or in combination with others, the facilitative style is the dominant approach claimed by mediators in the sample: 124 mediators (88.6%) claimed to practice the facilitative style alone or in combination with other styles. This figure becomes even more impressive if one considers that 9.3% of the mediators claimed *no* style. In other words, only 2.1% of the mediators who claimed *any* style did *not* claim the facilitative style. In contrast, 87 mediators (62% of the sample) claimed to practice the evaluative style either alone or in combination with others, and 46 mediators (32.8% of the sample) claimed to practice the transformative style either alone or in combination with others.

TABLE 5
SELF-DECLARED ADR WORK STYLES FOR MEDIATORS

Number of Styles Claimed	Style(s)	Number of Participants	Percentage of Participants
3	Facilitative, Evaluative, Transformative	33	23.6
2	Facilitative and Evaluative	52	37.1
2	Facilitative and Transformative	12	8.6
2	Transformative and Evaluative	0	0.0
1	Facilitative only	27	19.3
1	Evaluative only	2	1.4
1	Transformative only	1	0.07
0		13	9.3

B. THE MEDIATORS' NARRATIVES: INDUCTIVE ANALYSIS

The mediators' narratives were of particular interest because, at first glance, the mediators had the opportunity to describe themselves and their practices in their own words, and to position themselves and their practices as they chose for the public audience. As we conducted the analysis of the mediators' narratives, however, it became clear that we could not overlook

the positioning force of the Application itself.⁵⁵ Because the profiles were created by the mediators in response to the demands of the Application, the Application pre-structured and constrained the mediators' statements about themselves and the mediation process. The Application reflected what the court deemed relevant to communicate to the public about the qualifications of mediators, and shaped what the mediators and the public would deem relevant. In other words, the Application positioned the mediators (forced self-positioning) even as the mediators were positioning themselves (deliberate and strategic self-positioning).

In order, the Application requested the following information from mediators:

- Basic contact information;
- Nature of panel request (type of neutral, types of cases, facilities where service will be provided);
- Education (dates, institutions and degrees obtained);
- Legal experience (active law practice, number of years);
- Professional licenses (type, date, number, status, plus opportunity to submit *600-character narrative description* of “professional history”);
- History of professional disciplinary and criminal actions;
- ADR training/experience (organization, course title, hours, dates);
- Years of experience as a neutral (mediator, arbitrator, settlement officer);
- ADR work style (check boxes plus opportunity to submit *600-character narrative description*);
- Requirements for participants to submit a brief (check boxes plus opportunity to submit *600-character narrative description*);
- Affiliation with other dispute resolution organizations (name of organization, nature of affiliation, number of years);
- ADR awards;
- ADR publications;
- Language/bicultural capabilities; and
- Number of ADR proceedings handled (check boxes organized on a grid by type of case and nature of neutral role).

55. Harre & van Langenhove, *supra* note 27, at 63; *see also supra* notes 42-47 and accompanying text (discussing forced self-positioning as an effect of institutional classification schemes).

The Application itself communicated to the mediators the types of information considered relevant to the mediators' qualifications to be on the panel. Although there were three areas where mediators were provided opportunities to provide brief narratives in their own words, it is fair to acknowledge that those narratives cannot be viewed as completely unconstrained. However, while it must be acknowledged that the mediators' choices of how to position themselves and their practices were made in the context of the Application, it must also be acknowledged that individuals may still choose to either accept or resist the positioning force of such text.⁵⁶ Thus, while the mediators might not have been fully freed from the positioning influence of the Application, in their narratives they at least had the opportunity to contest its influence and reposition themselves. Thus, the narratives provide insight into the mediators' construction of their professional identities, as well as their orientation to the power of the court as an institution, and the imagined audience for whom they were writing.⁵⁷

As we compared and contrasted the narratives across mediators within each of these categories, patterns of discursive positioning by the mediators became apparent. These patterns, on the one hand, illustrated that the mediators were responding to the force of the Application itself; on the other hand, these patterns reflect the meaning the mediators themselves constructed. We organize our discussion of these patterns according to the same topical areas the court provided: (1) Professional History, (2) ADR Style Descriptions, and (3) Briefs.

1. *The Professional History Narratives: Mediator Claims to Authority*

The first opportunity for a descriptive narrative presented on the Application is for a 600-character description of the mediator's "professional history." While professional history is not defined on the Application, it appears in a section framed by the bolded caption "Professional Licenses." Hence, to an extent, "professional history" is marked as an invitation to discuss background in licensed professions.

Thirty-eight of the mediators (27% of the sample) chose not to provide any information in the professional history section of the application. Of the remaining 102 mediators who provided a narrative in this section, 81

56. See discussion *supra* note 38 and accompanying text (regarding the malleable nature of positions in interaction).

57. Harre & van Langenhove, *supra* note 34, at 67; see also *supra* notes 42-47 and accompanying text (discussing insights that can be gained by examining institutional positioning).

(79%) were lawyers and 21 (21%) were non-lawyers. We mark this difference because the mediators themselves marked it as significant in their narratives, as we illustrate below.

As the structuring force of the Application would predict, the mediators demonstrated a tendency to indicate as significant their membership in licensed professions in this section, citing licenses or certifications in law, real estate, contracting, education, medicine, therapy, counseling, engineering, and building inspection. In fact, of the 102 mediators who provided narratives in this section, only 5 presented no evidence of belonging to any licensed profession. However, the mediators differed in the weight given to their licensed professions in their narratives, depending on whether they held a law license. The law license provided mediators with a claim to authority that those who did not hold a law license struggled to match. This difference can be seen in two noteworthy patterns of discourse that we observed across these narratives: (1) positioning through *claims to legal authority*; and (2) positioning through *claims to mediation authority*.

a. Positioning Through Claims to Legal Authority

Mediators used a number of strategies in their professional history narratives to position themselves as qualified by making claims to legal authority. “Claims to legal authority” refers to communication whereby the mediators positioned themselves as legitimate or credible through the use of signs and symbols traditionally associated with the legal system, especially by means of marking the legal profession as the “in group,”⁵⁸ and themselves as members of that group. We identified a number of communication strategies that served this function, including: (1) explicitly marking *bona fide credentials* of the legal profession, (2) implicitly signaling in-group membership through *linguistic devices*, and (3) “*bootstrapping*” in-group status.

58. PETER M. TIERSMA, LEGAL LANGUAGE 51 (1999).

(1) *Marking Bona Fide Credentials of the Legal Profession*

Mediators who marked that they possessed the *bona fide credentials* of a member of the legal profession did so explicitly in a number of ways.

The following references to bona fide credentials were common:

- The number of years of law practice experience;
- Titles or positions held in the legal system;
- Areas of practice specialty;
- The types of legal cases with which one had experience;
- The number of cases litigated;
- The courts in which one had practiced;
- Owning or building one's own law practice;
- Identification of clients or classes of clients represented;
- Descriptions of success as a litigator, e.g., cases won;
- Factors which made one a successful litigator;
- The names of the law firms with which one was associated;
- The name of the law school from which one graduated;
- The year one obtained a law degree;
- The jurisdictions in which one had been admitted to the Bar;
- The year in which one had been admitted to the Bar;
- Teaching in a law school;
- Publications;
- Membership in legal groups or associations; and
- Appointments as judge or judge pro tempore.

Examples of these references can be found in the following narratives:

Mediator 50: Judge [name omitted] has extremely broad legal experience. He retired from the California State Bar Court in 2001, where he was the Supervising Judge. Previously, he was in private practice for 10+ years, specializing in complex civil litigation. Between 1968-1985, he was a Deputy D.A. where he headed the Organized Crime Section, the [place omitted] Office and the Consumer Section. He teaches evidence at [place omitted] law school, has lectured for the CEB and the Cal. Judges Ass'n, tried over 250 trials and written two books on trial preparation. He is now writing a third on effective and ethical trial conduct.

Mediator 52: Civil trial work since 1973 including government entity liability, medical device litigation, product liability involving automobile design, wrongful termination, construction

litigation, professional negligence, toxic tort litigation, bad faith, business litigation, negligence and matters involving the sexual victimization of minors. Member: American Board of Trial Advocates, Consumer Attorneys of California and Consumer Attorneys Association of Los Angeles.

Mediator 56: [Name omitted] was an associate and partner in [law firm name omitted] (1977-90) and a partner in [law firm name omitted] (1990-99). He started his own firm in January 1999. A general litigator early in his career, Mr. [name omitted] now practices principally in the area of environmental law. He represented private clients and public agencies for more than 25 years in such areas as lead/aluminum recycling, landfills, waste-to-energy, pharmaceutical, petroleum production/refining, paints/coatings, soaps/detergents, aerospace component manufacturing;

What is striking in each of the above examples is the absence of any reference to mediation credentials. In fact, 44 (54.3%) mediators who were also attorneys mentioned *only* legal credentials and made no reference to mediation credentials in describing their professional backgrounds. This displays an orientation of the mediators to legal credentials alone as sufficient credentials for mediation practice.⁵⁹ Another 37 mentioned their legal credentials in addition to certain mediator credentials. Notably, not a single lawyer who completed this section failed to display his or her bona fide legal credentials in some form.

(2) *Signaling In-Group Membership Through Linguistic Devices*

Mediators did not only signal their membership in the legal profession through explicit references to their bona fide legal credentials. They also signaled implicitly, through a variety of *linguistic devices*, that they were members of the in-group of the legal profession, engaging in what Professor Peter Tiersma calls “talking like a lawyer.”⁶⁰ In their professional history narratives, mediators made use of the impersonal constructions,⁶¹ jargon,⁶²

59. In contrast, credentials from the legal field have been designated “substitute credentials” by others. See ABA TASK FORCE, *supra* note 1, at 21 (designating credentials from the legal field as substitute credentials).

60. TIERSMA, *supra* note 58, at 51.

61. *Id.* at 67-69. “Impersonal construction” refers to the tendency of members of the legal profession to speak in the third person, even about themselves, rather than use the first or second person.

telegraphic speech,⁶³ and legal slang⁶⁴ that characterize legal communication.

Mediator 114: [name omitted] is an AV-rated principal of [law firm name omitted]. Since joining this firm in 1992, Mr. [name omitted]'s practice has emphasized insurance coverage, 'bad faith,' and appellate [sic] law. His recently published appellate decisions include [name omitted] v. [name omitted], __ Cal. App. 4th __ (2001) and [name omitted] v. [name omitted], __ Cal. App. 4th __ (2001). [first name omitted] received his J.D. (Order of the Coif, top 3%) from the University of Southern California Law Center in 1990. He was an editor of the Southern California Law Review. Mr. [name omitted] is receiving ADR training and certification at UCI.

Mediator 130: Asst Ill Atty Gen, Inheritance Tax Div, determine appropriate tax liability of decedents' estate/trusts and later as condemnation counsel, Ill Med Cen Comm, to acquire/allocate land to various med service providers; hospitals, clinics and med schools. 3 yr Deputy LACDA, I tried mostly misdemeanor trials/juvenile ct proceedings. Transferred to felony trials, I resigned to go private. Certified family law specialist. 20 yr probate law specialist, subspecialty in conservatorships. Represent prospective conservatees. Van Nuys Probate Ct volunteer. Judge Pro Tem, Small Claims/Unlawful Detainer Cts.

It is fair to say that the language of these examples would not be intelligible to the average member of the public, given the many features of legal language that are incorporated into each narrative.⁶⁵ Such language is noteworthy for a number of reasons. First, when used by lawyers to speak among themselves, the use of legal language signals that they belong, that

62. *Id.* at 106-10. "Jargon" refers to "words and phrases that are commonly and fairly exclusively used by a profession or trade." This term includes the technical language and terms of art of the profession or trade.

63. *Id.* at 136-37. "Telegraphic speech," which can be a feature of spoken or written language, refers to the pattern of omitting "excess or predictable verbiage" from a message, particularly where the content can be assumed by all participants who share a common social context.

64. *Id.* at 137-39. "Legal slang" refers to the tendency of members of the legal community to shorten words or phrases, or create novel terms for which there is no equivalent. This can be demonstrated by a number of strategies, such as *clipping*, or creating a shortened form of a legal term (such as *pro tem* for *pro tempore*); employing *acronyms* (such as *TRO* for *temporary restraining order*); using *legal idioms* (such as *grant cert* for *grant a writ of certiorari*, or using a *statute number* as a shorthand reference to the statutory contents); and replacing a common *adjective-noun combination* with an adjective alone (such as *specials* for *special damages*).

65. *Id.* at 55.

they are members of the same social group, or what we deem “the professional in-group.” The shared language creates and emphasizes in-group cohesion while setting the group members apart from other members of society.⁶⁶ Second, it is a commonplace that legal language does not communicate very well with outsiders to the profession, particularly the general public.⁶⁷ Hence, when used by lawyers in situations where the audience includes non-lawyers, it signals that in-group communication is valued more highly than effective communication with outsiders, such as the general public. In fact, where a decision between legal language and common language must be made, legal language is seen as “the prestigious choice.”⁶⁸ It also suggests that the assumed audience for the mediators, or the audience to whom they wish to speak, is (fellow) lawyers. This could reflect a presumption that those who actually choose mediators from the rosters are the lawyers, as gatekeepers to the clients, rather than the clients themselves. Third, the use of legal language signals an orientation to the legal system as the prevailing system for intelligibility, and it thereby legitimates the authority and power of legal institutions.⁶⁹

(3) “*Bootstrapping*” In-Group Status

The two patterns defined above were observed almost exclusively in the narratives of lawyers in presenting their professional histories. It would seem logical that lawyers would position themselves as qualified by making reference to their status as members of the legal “in-group.” However, a third pattern emerged, in which a significant number of mediators who were *not* members of the legal profession nonetheless positioned themselves as affiliated with the in-group, by “*bootstrapping*” on the bona fide credentials of others. In other words, they claimed for themselves the endorsement of those who had bona fide legal credentials, as a way of positioning themselves as affiliated with the in-group. This strategy was typically enacted by citing:

- References or recommendations from judges;
- Membership on other court panels;
- Training or education taken from legal sources, such as law schools, bar associations or courts;
- Positions teaching or training in a law school or other legal venue; and

66. *Id.* at 51, 242-43.

67. *Id.* at 55.

68. *Id.*

69. *Id.* at 243.

- Experience as an expert witness or consulting expert in the courts.

The following narratives provide examples of these strategies:

Mediator 1: I've mediated over 350 cases for LASC since the panel's inception in August 1994. Twelve years ago I started my own mediation practice, May 1993. I have taken a total of 358 training hours to be a mediator. I've completed approximately over 1100 mediations all of which were solo. I am now on the U.S. Bankruptcy Court Panel, the Equal Employment Opportunity Panel, the U.S. Postal Service Panel in addition to LASC. I have been asked and agreed to train Pepperdine people in mediation at the courthouse in Beverly Hills. I am recommended by Honorable [name omitted] as a mediator.

Mediator 104: Professional full-time mediator since 1994, when he founded The Mediation [group name omitted]. Successfully mediated over 750 mediations. Member of AAA's National Registry of Mediators and Specialty panels in Commercial, Construction, Employment Mediation. Training mediators since late-1994 when he founded [organization name omitted]. Teaches Advanced Mediation Skills for L.A. County Bar and Institute of [name omitted]. Faculty at Pepperdine Master's Forum every year since inception.

Mediator 127: 30 years of construction management including management and resolution of my employers' (general contractors) disputes. More recently, consulting with disputing parties and serving as expert witness in construction scheduling, pricing, contracting, administration and management matters. Years of helping subcontractors, contractors, and the owner reach agreement in on-the-jobsite change order negotiations provides practical dispute resolution experience. All supplemented with Pepperdine Master of Dispute Resolution Degree.

These mediators mention membership on court panels (Mediator 1), training in the courthouse or for the Bar (Mediators 1, 104), recommendation by a Judge (Mediator 1), a degree from a law school-related ADR program (Mediator 127), and experience as an expert witness (Mediator 127) as significant aspects of their 600-character professional history. This displays an orientation to the importance of establishing credentials that have currency among members of the legal system, and positioning oneself as an "insider" in that system. As with the use of legal language noted above, it

signals an orientation to the legal system as a system for intelligibility, and legitimates the authority and power of legal institutions.⁷⁰ In all, thirteen (43%) of the non-lawyer mediators used some version of this strategy.

b. Positioning Through Claims to Mediation Authority

Whether referencing legal credentials or not, mediators also used a number of strategies in their professional history narratives to position themselves as qualified through reference to bona fide mediation credentials. By “mediation credentials,” we refer to credentials that have gained currency in the mediation field, regardless of one’s qualifications in any other profession. These strategies included making references to:

- The number of cases mediated;
- Experience mediating certain types of disputes or cases;
- Years of experience as a mediator;
- The number of training hours completed;
- Experience as trainer for other mediators;
- Owning or building one’s own mediation practice;
- Degrees earned in dispute resolution;
- Membership on other mediation panels; and
- Certification as a mediator.

The following excerpts provide examples of references to bona fide mediation credentials:

Mediator 22: Founded in 1982, [name of business omitted] specializes in facilitation and mediation. In addition to the [name of court omitted], [name of mediator omitted] serves as a mediator for the [name omitted] Superior Court, for the [name omitted] Center for Dispute Settlement, for the Center for Conflict Resolution and in private practice. Ms. [name of mediator omitted] received her MDR, Masters in Dispute Resolution through the Pepperdine School of Law, Straus Institute of Dispute Resolution.

Mediator 98: Currently serves as the Director of the ADR Center of [city name omitted]-based [firm name omitted], engaged in a full-time ADR practice. Conducts mediation and arbitration, provides private judging services, acts as an ADR consultant, and serves as settlement counsel. In private trial practice before appointment as a United States Magistrate Judge in 1985. Has mediated over 1,000 cases, many of which involved multi-party, class action, multiple lawsuit and other complex matters.

70. *Id.*

Formally trained in advanced mediation technique by the Federal Judicial Center.

Mediator 117: This is my 10th year on the Superior Court Mediation Panel. Together with my private mediation practice, I have mediated hundreds of cases over the years. I am a law school educated non-attorney Mediator, thus often more effective as a Neutral with Counsel and clients, focusing attorney and parties towards speedy resolution. I am active as a real estate broker and have extensive familiarity with current real estate contracts, codes of ethics, condominium HOAs, CC&Rs, disclosures & industry custom and practice, customary procedures & laws governing residential and commercial transactions.

Mediators utilized references to bona fide mediation credentials whether they were lawyers or non-lawyers. However, there was a difference in the degree to which they did so. Only 37 lawyer mediators (34% of the total sample, or 46% of the lawyers who provided any background narrative) utilized these strategies. For lawyer mediators, references to legal credentials predominated; references to mediator credentials were generally positioned as supplemental to references to their legal credentials. In contrast, *all* non-lawyer mediators made reference to their mediation credentials.

It should be noted that the list of bona fide mediation credentials that was drawn from the sample is much smaller than the list of bona fide legal credentials. This says something, no doubt, about the state of development of the mediation field itself.⁷¹ It also speaks to the relationship between the legal field and the mediation field. Membership in the legal system in-group, whether conveyed through bona fide credentials, in-group linguistic devices, or bootstrapping, is treated as important information for the assumed audience. Mediation credentials are more limited, and also treated as of less importance to the audience, particularly by lawyer mediators (who either fail to mention them at all or position them as supplemental to legal background). At the same time, this positions the mediation field as a less cohesive, prestigious and powerful group.

71. See *Clarifying*, *supra* note 29, *passim* (arguing that the mediation field remains undeveloped theoretically, and this inhibits progress in policy and practice); see also Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RES. 545, 552-58 (examining the development of theory and policy in the mediation field).

2. *The ADR Style Description Narratives: Positioning the Mediator for Influence*

Information provided by the mediators in the ADR Style Description portion of the profile provides insight on how the mediators position themselves with respect to the clients and the dispute itself. We observed that the mediators used this narrative opportunity to establish their right to influence the process and the outcome. Two patterns were mediator strategies for: (1) constructing “good” mediation and the “good” mediator, and (2) minimizing practice differences.

a. Constructing “Good” Mediation and the “Good” Mediator

In their ADR Style Description narratives, the mediators had the opportunity to “put their best foot forward,” so to speak, in presenting themselves and their abilities to the market of prospective clients who would use the rosters. Presumably, in a roster made available to the public, the mediators would take care to position themselves as at least good, if not the best, at doing what they do. This positioning is an important site for analysis because, as mediators position themselves as good mediators, they also construct images of the very nature of “good” mediation and the “good” mediator for the public. Two noteworthy patterns emerged here: (1) “Good” Mediation is All about the Settlement, and (2) The “Good” Mediator is Large and in Charge. These patterns are discussed below, with illustrations from the mediators’ narratives.

(1) *“Good” Mediation Is All About the Settlement*

In their comments about their mediation work styles, mediators frequently indicated their perceptions and preferences regarding the goal of mediation. This goal was most commonly expressed as settlement, as the following excerpts illustrate:

Mediator 35 (claimed all three work styles): Inclusive style of mediation, using the approaches necessary to help the parties and their counsel reach a settlement, including assisting in a full expression of the position of each side; assisting the parties to negotiate in a cooperative, problem-solving manner; clarifying and testing the understanding of the strengths and weaknesses of each party’s case in caucus; evaluating the case if requested; and continuing to push for the development of alternative solutions until a satisfactory agreement is reached at the mediation session/ in follow-up sessions or telephone calls.

Mediator 68 (claimed all three work styles): While it is the parties and their counsel who determine whether or not a case will settle, my experience as a litigator suggests an impartial participant can assist counsel in clarifying issues, guiding clients and eliminating or reducing personal rancor. My goal as a neutral is to determine whether it is possible to settle a case and, if so, to close the deal.

Mediator 72 (claimed the facilitative and evaluative work styles): My approach to mediation is engaged facilitation. I lead the parties to realistically understand the case. I assist and coach with the negotiation. And, I advocate for settlement.

Mediator 118 (claimed the facilitative and evaluative work styles): Focus: Identification of the problems at issue, options for solution, and selections which meet the minimum thresholds of acceptability for parties in dispute. Style: defined by facts and circumstances surrounding each case matter. Goal: Mutual settlement agreement.

These excerpts are fairly typical. When mediators discussed the goal, presumed outcome, or preferred outcome for mediation, they focused upon settlement. Most often, the actual words “settlement” or “settlement agreement” were used. Sometimes, the mediator used synonymous terms that implied a settlement agreement, such as “win/win,” mutually acceptable solution, resolution, or consensus resolution.

No matter what language they used, mediators did not step outside the settlement frame⁷² to offer any other possible outcome as a valuable endpoint of mediation. Accordingly, settlement is naturalized as the only reasonable and expected outcome of the mediation process. Other possible outcomes of conflict resolution processes, such as insight, personal growth, interpersonal understanding, empowerment, transformation, relationship repair, and such are rendered both invisible and valueless. This displays a single, narrow orientation to conflict itself: conflict is a problem in need of a solution.⁷³ Also, in casting settlement as the goal of mediation, the mediators are presuming that it is indeed the goal of the public who would use mediation. In this sense, the communication of settlement as a valuable

72. See KOLB & ASSOCIATES, *supra* note 29, at 459-79 (discussing the settlement frame and its consequences); PROMISE I, *supra* note 29, at 63-77 (describing the patterns of problem-solving practice that characterize the settlement frame).

73. See PROMISE I, *supra* note 29, at 57-59 (describing the problem-solving view of conflict); Della Noce, *supra* note 29, at 47-60 (describing the problem-solving view of conflict).

goal is a statement by the mediators that they know what the public wants⁷⁴ and it is settlement. In another sense, this message also conveys to the public that settlement is what they *should* want, and certainly the “value” of what they will get. That is, it not only reveals mediator assumptions, it reproduces and propagates them. Moreover, little is said about the quality of the settlement reached. Settlement is considered a valuable end in and of itself, regardless of the nature or quality of the settlement. Mediators do not utilize terms that would invoke fairness, justice, economic parity, or other potential measures of the quality of a settlement agreement. The primary reference to the quality of the settlement, when a reference to it was made at all, was that it would be one agreed upon by the parties.

(2) *The “Good” Mediator Is Large and in Charge*

Mediators did not only construct an image of good mediation, they also constructed an image of the good mediator. The mediators used language that positioned themselves as agents (i.e., thinking, acting subjects with capacity and authority) while simultaneously positioning the parties as objects. Consider the positions of the mediator and the parties in the following excerpts:

Mediator 99 (claimed the facilitative work style): I generally employ a collaborative method, where I first engage the parties in a group meeting, and then break into caucuses. At times, when emotions dictate, a joint meeting is not held, and I have the parties go directly to caucusing. I believe the breadth of my background leads [sic] itself to an understanding of the parties’ positions, and through this understanding, I believe I will be able to fashion resolutions to disputed cases.

Mediator 38 (claimed all three work styles): Highly facilitative and very effective. I assist parties with evaluation of strengths & weakness, emphasizing informed choice in light of costs, risks, and available settlement options. I am creative, keep the parties moving, and don’t give up. If useful, I use a transformative style that addresses emotions, relationships and communication to help move the parties past the conflict.

74. See Della Noce, *supra* note 29, at 323-24, 338-39 (identifying, through comparative discourse research, that mediators construct an image of “what the client wants” in order to define the situations in which they could justifiably exert influence, despite apparent contradictions of the rhetoric of party self-determination).

Mediator 55 (claimed facilitative and evaluative work styles):

My ADR style is a combination of facilitative and evaluative. I begin by reading the briefs submitted by the parties. I start the mediation with a short joint session, then speak with the parties on each side separately. During this conversation I find out what is most important to the parties in terms of resolution. (It's not always money, just usually.) I also point out the strengths and weaknesses of the parties' respective cases during this conversation and give the parties an opportunity to explain why they believe the things I see as weaknesses are not really weaknesses,

Mediator 72 (claimed the facilitative and evaluative work styles): My approach to mediation is engaged facilitation. I lead the parties to realistically understand the case. I assist and coach with the negotiation. And, I advocate for settlement.

Mediator 117 (claimed all three work styles): My approach to the dispute is dependent on those involved, but many of my agreements are reached when parties thought it was not possible. My approach is more facilitative but transformative when necessary. I have been successful in making the most acrimonious parties and attorneys settle by presenting options and benefits of settlement, versus the expense and stress of trial. Often my job as Neutral is to help attorneys as well as parties examine innovative options that resolve the dispute with everyone feeling satisfied but still in 'control' of the results.

Note that in the preceding excerpts the mediators are positioned with agency—they think, strategize, decide, lead, coach, fashion resolutions, present options and benefits, succeed in getting settlements, and even assert ownership over those settlements. In contrast, the disputing parties (and their attorneys) are positioned as objects. They must be lead, coached, and made to settle. The parties are positioned as responding to the mediators' questions and to the opportunities the mediators give them; the mediators do not position themselves as responding to the parties. In other words, the parties are positioned as disabled and incompetent, bringing only problems—such as intransigence, emotions, lack of rational thinking—to the mediation, while the mediators are the active and creative forces who can and will bring the solutions.

For many of the mediators, a second pattern was woven into the one just described. The mediators positioned themselves as subject matter experts. While it would seem, by definition, that this would certainly be a

position adopted by the self-described evaluative mediators,⁷⁵ its use was not limited to evaluative mediators. Consider the following excerpts:

Mediator 48 (claimed facilitative and evaluative work styles): I prefer facilitative mediation as in my experience success in such proceedings is more satisfying and lasting. However, in cases in which I have some expertise, litigation of business related matters, real estate, landlord-tenant, bankruptcy proceedings, among others, I can perform the evaluative function and will do so if requested or required.

Mediator 60 (claimed the facilitative work style): Having a background in Law, Medical and Engineering, I examine the strengths and weaknesses of each side's position. Insight into the motivation of each side provides me with the method of reaching a consensus [sic] settlement.

Mediator 133 (claimed the facilitative work style): Mr. [name omitted] believes that he is most effective when parties need an intervener to facilitate discussions to reach a conclusion to a dispute, litigated or not. He will lean on his background of working in the insurance industry for eighteen years to assist parties in evaluating a dispute as an insurance company/adjuster would.

Mediator 127 (claimed all three work styles): I will use all appropriate tools and methods to facilitate the parties reaching a mutually acceptable agreement. I prefer to meet individually with each party to work with any potential destructive emotions, to focus on interests in lieu of positions, and to identify areas and issues which can add value to all parties. The parties may later join in group session, if appropriate. You will benefit from the best of my jobsite construction experiences coupled with the education offered by the Pepperdine Master's Degree.

Mediator 128 (claimed all three work styles): I use facilitative methods in questioning to validate and normalize the parties [sic] points of view and find interests underneath the formal positions taken by the parties. If an evaluative method is appropriate, I will focus on the legal rights of the parties rather than their needs and desires examining the weaknesses or strengths of their case. This may result in more shuttle diplomacy. If the parties wish to

75. See *supra* note 33 and accompanying text (regarding the nature of evaluative mediation).

structure the mediation process and outcome I may use a transformative technique.

It is interesting that these mediators chose to position themselves as subject matter experts, particularly given the variety of work styles they claimed. Subject matter expertise should be relevant only to mediators who claim an evaluative style, because evaluative mediators embrace the exercise of influence over both the content and process of settlement negotiations. In contrast, facilitative mediators claim to separate content from process, and take control only of process while leaving control of content (and hence outcomes) in the parties' hands.⁷⁶ Yet both Mediators 60 and 133, who claimed *only* the facilitative work style, positioned themselves as subject matter experts. To carry the contrast even further, transformative mediators claim to leave both process *and* content in the parties' hands,⁷⁷ yet mediators 127 and 128 (who claimed to use the transformative style among others) positioned themselves for subject matter expertise. One function of such positioning is obviously to establish the authority of the mediator to influence the content as well as the process of the mediation. Another function is also apparent: it elides differences between the several work styles.

b. Eliding Practice Differences

Mediators who chose a single check box to identify their work styles rarely addressed the subject of moving between or among a variety of work styles. However, most mediators who checked more than one box, and who also provided a narrative in this section, directed their comments to the subject of how to employ more than one work style and provided an account to that effect. An account is an explanation, typically offered when one perceives that he or she is being evaluated for violating a norm, rule, or expectation.⁷⁸

It is worth remembering that the title of this section of the Application is "ADR Style Description." The section simply invites a description of work style, not an account for selecting more than one style in the preceding check boxes. The Application form did not discourage mediators from claiming more than one work style; in fact, it expressly offered that option. Nonetheless, the mediators offered accounts for doing so, suggesting that the mediators themselves thought this behavior required some

76. *Id.*

77. *Id.*

78. Marvin B. Scott & Stanford Lyman, *Accounts, in* LIFE AS THEATER: A DRAMATURGICAL SOURCEBOOK 219, 219 (Dennis Brissett & Charles Edgley eds., 2d ed. 2005).

justification or explanation. The mediators' accounts showed two distinctive patterns: (1) the claim of flexibility, and (2) the claim of omniscience. These patterns in the accounts functioned to elide the differences in work style, while simultaneously functioning to position the mediator as a process expert.

(1) Claiming Flexibility: True Expertise Transcends Any Individual Work Style

While the Application characterized differences in mediation practice as matters of work style, the mediators were free to accept or reject this terminology in their own narratives. A number of alternative concepts for describing differences in practice are commonly used in the mediation field, including such terms as style, approach, model, framework, theory, and orientation. Nonetheless, the mediators who supplied a narrative in this section uniformly adopted the term "style" (more so even than the court's term "work style") to describe their form of practice. While other terms were offered by a number of mediators, such as approach, methods, modes, technique, tools, skills, and function, these terms were most commonly used as synonyms to supplement the word "style." No mediator in the sample used the terms model, framework, or orientation in their ADR Style Description narrative to describe the different forms of mediation practice. This choice of language in itself functions to minimize differences between mediators.⁷⁹

Mediators also used other strategies to elide the meaning of work style differences. Consider how the mediators in the following excerpts discuss the matter of work style by calling attention to the virtues of flexibility:

Mediator 3 (claimed both the transformative and facilitative work styles): I do not have just one style. Because every dispute has different dynamics, each one calls for different tools. I have to be flexible and remember that each case is different. Some cases require me to hear underlying interests and to manage participants emotions; some require me to be facilitative as an experienced neutral. I emphasize creative problem-solving techniques that focus on quality optimal solutions by asking questions to help the participants understand both sides of the dispute. Twelve years of operational management and leading various levels of personnel taught me to listen to all sides.

79. See discussion *supra* note 29 (discussing the term "work style").

Mediator 18 (claimed all 3 work styles): I do not utilize a fixed style of mediation. It varies from case to case. Sometimes I may be transformative, facilitative and evaluative, all in the same mediation.

Mediator 43 (claimed all 3 work styles): I tend to prefer a facilitative style for Mediations but I do not have a preconceived style for any matter. The style employed is normally dependent upon the matter type, the issues (legal or otherwise) involved and the desires and/or wishes of the parties.

Mediator 50 (claimed both the facilitative and evaluative work styles): [Name] does not have a fixed approach to mediation, letting the nature of the dispute and the parties' needs determine how best to proceed. He engages the litigants in looking at the applicable facts and substantive law, including the evidentiary issues. He can be evaluative in his mediation approach, but prefers that the parties arrive at a disposition through facilitative discussion.

Mediator 67 (claimed all 3 work styles): Multi-track or blended ADR work style is inclusive of the evaluative, facilitative and transformative techniques. Its design and goal is to narrow issues between the parties, resolve the dispute and settle cases in whichever way seems most apt for the parties and issues involved.

Mediator 76 (claimed all 3 work styles): I utilize the mediation approach that I determine is best suited to the particular problem in question at the time. I believe that a mediator has to be flexible enough and confident enough in his own skills to adapt the mediation style to suit the parties needs and that best facilitates the mediation at hand. No one style works in every situation. I have no specific requirements, I make every effort to work with the parties to facilitate a mutually acceptable resolution.

An interesting feature of these excerpts is how the mediators emphasize the virtue of their own flexibility and simultaneously position an identification with a single work style as negative, and in fact, rigid. Mediators 3 and 76 imply that claiming a single work style is inflexible (through the use of the word "flexible"), Mediators 18 and 50 refer to it as "fixed," Mediator 43 calls it "preconceived" (a word that conjures images of bias), and Mediator 67 implies it is an exclusive rather than inclusive approach (and of course, including is better than excluding).

Rather than claim expertise in a single work style, the mediators positioned themselves as process experts by virtue of their ability to move among different work styles or blend work styles. At the same time, the mediators communicated that work style matters little, if at all: it is the skill of the individual mediator that makes a difference. In the next excerpt, Mediator 104 states this most explicitly, bolstering his opinion with references to his mediation and training experience:

Mediator 104 (claimed all 3 work styles): As a mediator who has successfully mediated over 900 cases and has trained hundreds of mediators, I've learned that really good mediators don't have just one style. Because every dispute has different dynamics, each one calls for different tools from the mediator. Some cases require me to be stern, experienced neutral, analyzing parties' legal standing and evaluating their economic options. Other cases require me to hear underlying issues and to manage participants' emotions. Sometimes, I have to do both. Knowing what is needed and the ability to provide it is what I bring to the table.

By implication, mediators who would claim a single work style are positioned as deficient individuals with limited abilities—having mastered “just” one style. There is a clear message from most of the mediators that more is better, and a consumer would do well to look for mediators who have checked more than one box for work style.

(2) *Claiming Omniscience: An Expert “Knows” Which Style Is Best and When*

Mediators claim the ability to transcend the various work styles and provide accounts for how they accomplish this. This reveals an inherent contradiction. In one sense, they are saying differences in work style are irrelevant to a true process expert. At the same time, having checked more than one box themselves, they must acknowledge that the differences do matter. The challenge for the mediators is articulating what the differences in work style mean in practice, and positioning themselves as experts in that regard.

The primary difference we observed between mediators who claimed facility with two or more work styles was that some framed these work styles as *techniques or skills* that were easily blended or combined, while others framed these work styles as different approaches that required some sort of *diagnostic “fit.”* For illustrations of the first approach, refer to Excerpts 67, 104, and 128 in the prior subsections, and consider also the following excerpts:

Mediator 1 (claimed all three work styles): My style is to hear all parties ‘out’ first which means each person gets a chance to tell their story. I insist on one person talking at a time so as to enable the parties to actually hear each other. I am a very adaptable mediator in that I allow the parties, by virtue of who they are, which method of mediation I will use, whether it be transformative, facilitative, or evaluative. I may use all three, if warranted, within one mediation. I can be assertive or not, depending on the needs of the situation. I ask a lot of questions. I probe for answers. I am kind, gentle, and candid.

Mediator 89 (claimed all 3 work styles): My ADR style is a combination of facilitative, transformative & evaluative. Mediations typically begin with brief separate private caucuses followed by a joint session to begin informal constructive dialogue between the parties. Separate private caucuses follow. I conduct shuttle diplomacy, probing strengths & weaknesses in each side’s case & identifying creative avenues for compromise & resolution. When requested, I’ll aggressively [sic] bring my 30 plus years experience to bear in an evaluative style. Highly skilled in fostering attorney and client confidence that their best interests are being served.

The mediators who prepared these excerpts claimed that they blended or combined the different work styles. Mediator 1 refers to “method.” Mediators 67 and 104 use the language of “tools” and “techniques.” Such language functions to reduce the concept of “work style” to the application of decontextualized and even somewhat mechanistic skills. In this sense, the primary value of work style to a mediator lies in having as many as possible, because having more work styles simply means having more tools and techniques. The more work styles a mediator can use, the more skills he or she has at his or her disposal, and thus, the more valuable he or she is. The further implication, since work styles are simply a matter of tools or techniques, is that the skilled mediator “knows” which tool or technique to apply when. The mediator is the expert and the parties need not trouble themselves about style differences.

Other mediators treat work style as something more contextualized and cohesive than a skill, tool or technique. However, these mediators then mark the importance of their own diagnostic skills, or their ability to identify the contingencies that call for each style. Consider these excerpts, as well as excerpts 43, 50, and 76, above:

Mediator 16 (claimed both the transformative and facilitative work styles): My style of mediation is facilitative when dealing

with court assigned cases as my purpose is to settle the cases. In private practice, I use a facilitative style when appropriate and a transformative style when the goal is to resolve the conflict and maintain the relationship. I have been trained in both approaches and am comfortable in both styles.

Mediator 56 (claimed both the facilitative and evaluative work styles): Most cases require both facilitative and evaluative skills. I will normally emphasize one style over another depending on (a) my initial conference with the parties (b) my impression and understanding of the facts/legal issues and (c) the style the parties feel comfortable will likely lead to a successful mediation (assuming a consensus on style is clear). I try to find out the reasonable settlement boundaries, then work with the parties, confidentially, to develop good ‘offer’ and ‘counter-offer’ strategies. I engage in a lot of shuttle diplomacy during my mediations.

Mediator 38 (claimed all 3 work styles): Highly facilitative and very effective. I assist parties with evaluation of strengths & weakness, emphasizing informed choice in light of costs, risks, and available settlement options. I am creative, keep the parties moving, and don’t give up. If useful, I use a transformative style that addresses emotions, relationships and communications to help move the parties past the conflict.

Mediator 113 (claimed all 3 work styles): Different styles of mediation are required at different points in the same mediation in order to achieve success. Before beginning each mediation, I talk to counsel in order to ascertain their objectives and discover the barriers to success in order to determine which styles will help us achieve those objectives. Then I am flexible and change style as the situation requires during the mediation.

Each of these mediators claimed a version of the contingency approach⁸⁰ to the problem of work style. That is, each suggested that style matters in certain circumstances, and moreover, that the mediator has the expertise to evaluate those circumstances and select the appropriate style for each contingency. In effect, the mediators positioned themselves as able to diagnose the situation and choose the mediation work style with the best “fit.”

80. See generally Hugo Prein, *A Contingency Approach for Conflict Intervention*, 9 GROUP & ORG. MGMT. 81,102 (1984) (discussing the nature and effectiveness of the contingency approach).

The value of a work style, according to these mediators, is that some styles work better than others for certain situations. The mediator's expertise lies in diagnosis and prescription. The further implication is that the skilled mediator "knows" how to diagnose and which style to apply when. The contingencies that mattered to the mediators, however, were not a subject of universal agreement. Various contingencies were fundamental to diagnosis for different mediators, such as type of case (Mediators 16, 43), problem or issues in question (Mediators 38, 43, 76), nature of dispute (Mediator 50), mediator's understanding of the facts (Mediator 56), parties' needs (Mediators 50, 76), parties' wishes or desires (Mediator 43), party goals (Mediator 16), party consensus (Mediator 56), and barriers to settlement (Mediator 113). Sometimes the mediator simply indicated that he or she would change style "when appropriate" (Mediator 16). Again, the result of this is that the mediator is positioned as the expert and the parties need not trouble themselves about style differences.

In sum, the mediators took pains to explain their claims of competency in more than one work style, but their explanations actually served to elide the differences between work styles. The importance of work style as a distinguishing concept for mediators was thereby minimized by the mediators, in an apparent act of resistance to the court's own positioning of work style as a significant factor in the mediator selection process. The public could learn nothing about work styles per se from these narratives. What the public could learn, or what was communicated by the mediators, was that the differences are relatively trivial, they matter only to the mediator, the mediator *can* decide what is best, and the mediator *will* decide what is best.

(3) Briefs: Positioning Parties as Petitioners

The third section of the profile for which a narrative is invited is identified by a bolded caption stating "*I require a brief with the following format:*". Again, it is important to observe that this language creates its own expectations, and positions the mediators to either comply by stating their desired format for briefs, or resist by indicating no such desire. Interestingly, 65 mediators (46% of the sample) resisted the positioning force of the application, and left this section entirely blank. One mediator provided a non-responsive answer. Of the remaining 74 mediators, 61 (44% of the sample) required a brief and 13 (9% of the sample) used other terms to indicate a positive disposition toward brief submission even if one was not required (such as "optional," "helpful," "suggested," "preferred," "welcome," "permitted," and "accepted"). Given that the preparation and submission of briefs is a normal and customary part of law practice, but not

customary in other businesses and professions, it is noteworthy that 52% of the lawyers in the sub-sample indicated a requirement for or positive disposition toward briefs, and 57% of the non-lawyer mediators also did so.

Of the 74 mediators who indicated a requirement for or positive disposition toward briefs, 66 (89%) stated their preferences for the contents and/or formats of the briefs. Generally, these preferences included details pertaining to the timeline for submission of the briefs, preferred lengths of the briefs, and desired contents of the briefs. The following examples are illustrative:

Mediator 5 (lawyer; claimed the facilitative and evaluative work styles): Please provide at least three days prior to the hearing and limit briefs to five pages or less setting forth the general background, important applicable case law or statutes [sic] and status of settlement negotiations.

Mediator 26 (lawyer; claimed the facilitative and evaluative work styles): The mediation brief must set forth the claims and defenses, state what discovery has been conducted and what essential discovery remains to be accomplished, whether any potentially dispositive motion has been made or is anticipated, set forth whether there has been any settlement discussion and, if so, the status of such discussion, summarize the facts, set forth the amount and basis of damages sought, and briefly set for [sic] the governing law (statutes, key cases, legal principles). The brief may be in letter or pleading form and should be the equivalent of a two page letter.

Mediator 27 (non-lawyer; claimed the facilitative and evaluative work styles): Briefs are to be submitted to Mediator minimum of one business week prior to the scheduled mediation date. Each issue should be clearly and briefly described, including all legal issues. The Briefs should *only* include the facts of the case as understood by each party. The format is to be as required by the Courts.

Mediator 32 (lawyer; claimed the transformative work style only): Each party should submit to the mediator and the adverse parties a written statement five calendar days before the mediation. The written statement should contain a concise statement of the facts of the case and the factual and legal contentions in dispute. The statement should contain citations of authorities, which support important legal propositions. The written statement of a party

claiming damages should contain a list of all special damages, a statement of any general and punitive damages, and the total amount of damages.

Mediator 61 (non-lawyer; claimed the transformative and facilitative work styles): Please submit a summary brief to allow me to understand the type and status of the case, including what discovery has occurred, if any offers have been presented and if any witnesses will be involved in the mediation process.

Mediator 67 (lawyer; claimed all three work styles): I do request a brief list of clients' positions (submitted in camera if preferred) delivered seven calendar days prior to the mediation proceeding. An exemplar Summary of Positions is mailed to counsel or pro per parties with the introductory letter.

Mediator 69 (lawyer; claimed all three work styles): I request briefs of no more than ten pages. Long legal dissertations are not recommended. Be concise and set out the basic facts. Please try and have basic information exchanged such as an agreement as to what specials the parties agree on and on what specials they disagree.

Mediator 90 (lawyer; claimed all three work styles): I require the parties to submit a Mediation Statement discussing the facts, supporting evidence, applicable law, and any prior settlement discussions. If the dispute involves documents, such as a contract, please include such documents as exhibits to the Mediation Statement. Counsel are encouraged [sic] to bring any other evidence to the mediation hearing. The Mediation Statement should be either in a brief or letter format and should be sent to my office by mail or by fax at least five days before the mediation.

The preferences articulated regarding submission of briefs are of interest for how they position the mediator as an authoritative quasi-judicial hearing officer while simultaneously positioning the parties as petitioners. Note how the mere articulation of requirements for a brief places the mediator in the position to demand certain behaviors and accommodations of the parties and their counsel, while the parties and their counsel are placed in the position of discerning what will please and accommodate the mediator. The mediator assumes a position of power vis-à-vis the parties and their counsel, by virtue of being authorized to set terms that the parties and their counsel must meet.

The preferences are also of interest for other reasons. First, there appeared to be no relationship between the mediators' claimed work styles and their desire for briefs. The definitions of the different work styles would suggest that only evaluative mediators would require briefs, but such was not the case. Even a mediator who claimed only the transformative approach set forth requirements for a brief. Second, setting forth requirements for briefs places a legal frame around the mediation process. Briefs are typically used in the legal profession, but not in other professions. The requirements for the briefs are set out using legal language, which further enhances the legal frame. As described earlier,⁸¹ this language orients to the legal system as the primary system for intelligibility. It also assimilates mediation into the legal system, making the so-called alternative process look very much like a standard legal process.⁸²

The mediators also used the narratives regarding briefs to position themselves as having power vis-à-vis the parties and their counsel, by establishing expectations on the issue of confidential communications between the mediator and each of the parties. Sometimes these expectations positioned the mediator as the keeper of secrets. One who keeps secrets has a great deal of power. The following examples are illustrative:

Mediator 2 (lawyer; claimed facilitative and evaluative work styles): Please fax or e-mail your brief three business days in advance, or earlier. You may write it in letter format. I have no page limit, but please be concise. Include the following, with these headings: 1) List of All Parties and Counsel; 2) Key *undisputed* Issues of Fact & Law (Liability & Damages); 3) Key *disputed* Issues of Fact & Law (Liability & Damages); 4) Chronology of Settlement Negotiations; 5) Possible Impediments to Settlement. You may add whatever else will be useful. All counsel should agree in advance to exchange briefs. You may additionally send me a side letter for my eyes only.

Mediator 51 (lawyer; claimed all three work styles): Well written briefs serve to expedite an ADR hearing and are read before the hearing. Briefs should present the facts, applicable laws as well as a reasonable result that the party would like to see from the ADR hearing. In mediations, a party may include jury verdict

81. See *supra* notes 60-69 and accompanying text.

82. Dorothy J. Della Noce, Joseph P. Folger & James R. Antes, *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RESOL. L.J. 11, 21-23 (describing the phenomenon of assimilation in court-connected mediation programs); see also notes 86-88, *infra*, and accompanying text.

research or a confidential addendum to their briefs containing confidential information that the party believes would assist me in helping them resolve their dispute. Except for confidential addendums, briefs should be served upon the parties.

Mediator 76 (non-lawyer; claimed all three work styles): I do require a concise narrative brief that summarizes all of the relevant facts and circumstances. I don't need to know everything but I do want to understand the rudiments of the case. I also ask that each party provide a 'Proposed Settlement Agreement,' at least in outline form, with the brief. This is extremely confidential and will not be shared with the other parties. I do this to insure that the attorneys have discussed the realities of the case with their clients and are coming to the table in a good faith effort to settle the case.

Mediator 82 (lawyer; claimed facilitative and evaluative work styles): I ask for two briefs. One to be exchanged setting forth factual summary, unique legal issues, positions taken and suggested resolutions. The second brief (in letter form) is for my eyes only and requests a candid assessment setting forth settlement ranges and prioritizing the relief requested.

In sum, the narratives regarding the briefs further enhanced the power of the mediators. They positioned the mediators as quasi-judicial hearing officers and the parties as petitioners. They positioned the mediators as insiders in the legal system, while positioning mediation itself as a part of that system. Sometimes these requirements also positioned the mediator as the keeper of secrets.

C. THE MEDIATORS' NARRATIVES: DEDUCTIVE ANALYSIS

In an earlier section, we discussed the quantitative distribution patterns observed regarding the work styles claimed by the mediators using the check-boxes on the Application. Because this was self-report information, without any independent verification from the court and subject to the social desirability bias, and also because of observations presented in the previous section regarding the pattern of eliding differences between work styles, we wanted to further interrogate how mediators positioned themselves in terms of work style. As described above in Part II, we compared the work styles that the mediators checked in the check-box section of the Application, the language used by the mediators in their narratives, and how these features related to objective markers of various mediator work styles that could be drawn from the literature.

Of the 140 mediators in the sample, 56 (40% of the sample) gave no narrative description at all concerning their work style. We found that another 34 (24% of the sample) did not provide enough information on which to make a coding decision regarding work style. Fifty mediators (36% of the sample) provided sufficient information in their narrative on which we could base a coding decision.

Of that 50, 13 narratives were assigned a code that matched the mediator's own claimed style. This represented 9% of the overall sample, and 26% of the codable sample. Eight of these mediators claimed the facilitative work style, and 5 of them claimed a mixed facilitative/evaluative work style. Consider these two narratives, in which the mediators offered descriptions of practice that are consistent with the work styles they claimed:

Mediator 100 (claimed the facilitative work style): I attempt to assist each party to gain an understanding of the needs, interests, and goals of each party and assist them in looking at all of the information they need to make their decisions. I assist the parties in reaching a mutually satisfactory resolution. I do not make the decision but merely facilitate the process of cooperative problem solving among the parties. The only requirement is that each party has an open mind and is willing to truly listen to what the other parties have to say.

Mediator 85 (claimed both facilitative and evaluative work styles): I generally am a facilitative neutral. I attempt to uncover the interests of the parties and bring them to a common ground. If this approach does not result in a resolution, I will then use the evaluative approach to resolve the matter.

The remaining 37 mediators who had codable narratives (26% of the overall sample, and 74% of the codable sample) demonstrated notable disparities between the language they used in their narratives and the work styles they claimed to use. The most common pattern of disparity observed was dubbed *overreaching*: mediators claimed two or three work styles, but used language and concepts that pertained to only one of the two, or two of the three, claimed work styles. The following examples illustrate this pattern.

Mediator 35 (claimed all three work styles): Inclusive style of mediation, using the approaches necessary to help the parties and their counsel reach a settlement, including assisting in a full expression of the position of each side; assisting the parties to negotiate in a cooperative, problem-solving manner; clarifying and testing the understanding of the strengths and weaknesses of each

party's case in caucus; evaluating the case if requested; and continuing to push for the development of alternative solutions until a satisfactory agreement is reached at the mediation session/ in follow-up sessions or telephone calls. [Coded as facilitative/ evaluative.]

Mediator 127 (claimed all three work styles): I will use all appropriate tools and methods to facilitate the parties reaching a mutually acceptable agreement. I prefer to meet individually with each party to work with any potential destructive emotions, to focus on interests in lieu of positions, and to identify areas and issues which can add value to all parties. The parties may later join in group session, if appropriate. [Coded as facilitative]

Mediator 137 (claimed both facilitative and evaluative work styles): The facilitating of dialogue to assist the parties to accomplish an amicable solution which reveals results [sic] in a settlement both parties can feel that they are the authors. [Coded as facilitative]

Mediator 49 (claimed both transformative and facilitative work styles): I employ "problem-solving" or mutual gains negotiation facilitation to assist the parties in crafting their own solution to a conflict.

1. Introduction: Mediator's role; Process; Ground rules
2. Joint Session: Gather information; Allows each party to hear each other
3. Breaks: Review issues; Develop options by asking questions
4. Private Sessions: Identify interests; Confidential communications
5. Joint or Private: Review options; Consider alternative to agreement; Clarify agreement [coded as facilitative]

This pattern suggests that mediators who claimed to be able to practice a variety of work styles, whether in terms of integrating the work styles or being able to shift from one to another as the perceived contingencies dictate, actually had more limited preferences or orientations. While not explicitly revealed or acknowledged by the mediators, these preferences emerged when mediators described their work styles in their own words. This suggests that mediator claims to facility in multiple work styles are, and should be, suspect. It might also explain why mediators felt compelled

to give an accounting when they selected more than one work style, as well as why they used that accounting to elide, rather than elucidate, differences among the work styles.

IV. INSIGHTS AND IMPLICATIONS

We return now to the research question that guided this project from its inception: What do the profiles on the roster communicate to the public about mediation and about mediators?

A. "TALKING LIKE A MEDIATOR" IS NOW "TALKING LIKE A LAWYER"

Tracy and Spradlin⁸³ noted, in a 1994 study of the conversational moves of experienced mediators, that mediators face a particular dilemma in positioning themselves with respect to their clients. Because they have no institutional basis of authority to influence the parties or the process, mediators must present themselves in ways that give them interactional power. Tracy and Spradlin found that mediators created their interactional power, and hence their right to influence the mediation process, by "talking like a mediator" in the course of a mediation session. "Talking like a mediator" included displaying expertise and interactional fairness, as well as making efforts to distinguish mediation from other professions.

In our data, we see the same effort by mediators to position themselves for influence with respect to clients. However, unlike the mediators in Tracy and Spradlin's study, the mediators in our sample were not yet involved in direct interaction with clients. Rather, they were faced with the task of presenting their qualifications to be selected as mediators by prospective clients whom they could only imagine at the moment in which they wrote their narratives. These mediators had a modicum of institutional authority by virtue of being on the court's roster. The challenge for each mediator was to display one's background and work style in such a way as to influence the potential clients to select that mediator from among the others on the list, or in other words, to generate sufficient confidence in members of the public that they would select that mediator from the roster.

In contrast to Tracy and Spradlin, who identified a pattern of mediators constructing their interactional power in the absence of institutional power, what we see in our data is a pattern of mediators establishing their right to exert *interactional power* in the mediation room, over content as well as

83. Karen Tracy & Anna Spradlin, "Talking Like a Mediator" *Conversational Moves of Experienced Divorce Mediators*, in NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 110, 110-11 (Joseph P. Folger & Tricia S. Jones eds., 1994).

process, by actively constructing their *institutional power* in advance. In particular, the mediators clothed themselves in the institutional power of the legal system. They emphasized their status as in-group members, used legal language, emphasized their legal and subject matter expertise, required particular legal procedures of the parties, and positioned themselves as quasi-judicial officers while positioning the parties as petitioners. Moreover, unlike the mediators in Tracy and Spradlin's study, these mediators did not attempt to distinguish mediation from the legal profession. On the contrary, they actively created the impression that mediation was simply an extension of the legal profession. As a result, it appears that "talking like a lawyer" is the preferred position for mediators in the program studied, rather than "talking like a mediator."

B. LAWYERS ARE PRESUMED TO BE COMPETENT MEDIATORS

The profiles also reveal an assumption that being a lawyer is a sufficient basis for being deemed a competent mediator. The lawyer mediators conveyed this assumption in the way they framed their professional histories and their expertise. Mediators who were not lawyers also conveyed, and reinforced, this assumption when they bootstrapped in-group status on the legal credentials of others and emphasized sources of education and training associated with legal institutions. The end result is an elision of any difference between mediation and law as separate professions. But it must be noted that that elision of difference serves the interests of the legal profession rather than the interests of the mediation field. When law and mediation are not differentiated, legal credentials have more prestige, more currency and more power. Law is positioned to subsume mediation; mediation is not positioned to subsume law.

This pattern is noteworthy for a number of reasons. First, non-lawyer mediators appear to be working against their own interests. Second, while important institutions in the mediation field are taking steps to eliminate a presumption that qualification as a lawyer is the equivalent of qualification as a mediator,⁸⁴ mediators themselves are perpetuating the presumption. Third, as the Supreme Court of Florida recognized,⁸⁵ favoring lawyers in the mediator pool is contrary to a public policy of encouraging diversity. For example, the Supreme Court of Florida found that, on its circuit civil

84. *See, e.g.*, Gregory Firestone, 7 *ACResolution* 3 (Spring 2008) (describing the Florida Supreme Court's removal of any requirement that a certified mediator must be an attorney, in accordance with policy positions taken by the Association for Conflict Resolution, the American Bar Association, and the Association for Conflict Resolution).

85. *Id.*

court roster that required that mediators also be lawyers, only 22% of the mediators were female. That statistic is remarkably similar to the roughly 24% of the sample in this study who were female.

C. THE MARCH TOWARD ASSIMILATION CONTINUES

In a previous study, Professors Della Noce, Folger, and Antes⁸⁶ identified a pattern in court-connected mediation programs that they called “assimilation.” Specifically, they noted that patterns of policy and practice in some court-connected programs revealed a “process of adapting mediation to the underlying values and norms of the court system.”⁸⁷ This process was significant because it enhanced the power and legitimacy of the legal system and its key stakeholders, namely, lawyers and judges, while diminishing the power of mediators and the general public.

The current study provides support for the earlier findings by Della Noce et al.⁸⁸ and demonstrates the existence of the assimilation phenomenon in another court-connected mediation program. The findings illustrate patterns of practice that position mediation as a part of the legal system rather than an alternative process. At the same time, by illustrating how mediators also position themselves as part of the legal system, this study extends the previous findings of Della Noce et al. and reveals that mediators are complicit in enacting assimilation.

D. DIFFERENCES ARE NOT BEING TAKEN SERIOUSLY

As noted earlier,⁸⁹ several scholars have studied the issue of differences in mediation practice for years. Some have developed taxonomies for understanding and making sense of important differences in practice and their consequences for the experience of the parties and the conflict outcomes themselves;⁹⁰ others have been focused on identifying unique practice competencies for different approaches to mediation so that thoughtful policy initiatives could be implemented.⁹¹ The findings of this study suggest,

86. Della Noce et al., *supra* note 82, at 21-23.

87. *Id.* at 21.

88. *Id.*

89. *See supra* notes 29, 33 and accompanying text (discussing the issue of defining practice differences in the mediation field and the taxonomies now in popular use).

90. For examples of such taxonomies, *see, e.g.*, PROMISE I, *supra* note 29, at 229-59; PROMISE II, *supra* note 33, at 7-130; *Grid*, *supra* note 29, at 35-48; *New Grid*, *supra* note 29, at 23-25.

91. For discussions of the relationship between practice competencies and policy, *see, e.g.*, *Clarifying*, *supra* note 29, at 59-65; Della Noce, *supra* note 29, at 332-41; Della Noce et al., *supra* note 14, at 1006; *Signposts*, *supra* note 29, at 197-230.

however, that the differences in practice are not being taken seriously by the court or by mediators.

First, the court itself demonstrates an indifference to practice differences. While it does appear to suggest that differences are noteworthy by providing check boxes for the mediators to identify their work styles and narrative space for the mediators to describe their work styles, in reality the court does not seriously address the matter of difference. There is no “official” definition of each work style provided by the court as guidance to the mediators or the public; there is no accountability required of the mediators to claim only work styles in which they are truly competent or in which they have taken training; and there is no determination of whether mediators are accurately describing the work styles they claim to use. Mediators can decline to address the issue altogether (by refusing to select check boxes and by refusing to provide narratives), and many of them do.

Second, the mediators themselves resist the court’s effort to make mediator work style differences a factor in mediator selection. They actively elide differences in practice. They claim to be able to enact multiple forms of practice, blend practices, or shift from one form of practice to the other, at will. These claims are highly suspect, a fact the mediators seem to observe when they take pains to account for their choices in their narratives. These claims also lack empirical support. Kressel et al.⁹² concluded from their research that there was “no evidence that mediator style was a function of case characteristics.” This finding has yet to be contradicted by credible research. Moreover, even if one argues that style is contingent on case or other characteristics, there is no persuasive evidence in the empirical research regarding which practice style is most appropriate for which contingencies. The mediators in this study reflected the vagaries of their own idiosyncratic contingency approaches when they tried to explain what contingencies were relevant, and the answer appeared to be, whatever the mediators deemed relevant. Bush and Folger⁹³ explained these difficulties by elevating the discussion beyond mere style, stating that “our experience is that combining models is not possible, because of the incompatible objectives of different models and the conflicting practices that flow from these diverse objectives.” There is empirical evidence supporting Bush and Folger’s claim.⁹⁴

92. Kenneth Kressel et al., *The Settlement Orientation vs. The Problem-Solving Style in Custody Mediation*, 50 J. OF SOC. ISSUES 67, 73 (1994).

93. See PROMISE I, *supra* note 29, at 228.

94. Della Noce, *supra* note 29, at 195-97.

This study suggests that there is room, and in fact a pressing need, for empirical research with respect to mediators' claims that they can blend and shift work styles. To be credible, such research must begin with careful operationalization of each work style, and include observational analysis of mediators at work. Until there is a credible body of research on this topic, mediators' claims in this regard must be considered part of the mythology in the mediation field.⁹⁵ Such claims perpetuate pleasing and socially acceptable explanations of mediator behavior, even if they cannot be confirmed empirically and are actually contradicted by empirical evidence.⁹⁶ At a more critical level, the claims must be seen as a strategic way for mediators to enhance their marketability.⁹⁷

Whatever the motivation for the mediators, and despite its disclaimers to the contrary,⁹⁸ the court makes the mediators' claims part of an official public document when it allows mediators to advertise such claims on a roster. The court gives its imprimatur to unsubstantiated claims, conveys its imprimatur to the public, and perpetuates the mythology that all mediation practice is the same.

E. THE PARTIES CANNOT CHOOSE THE STYLE OF MEDIATION

When differences are not taken seriously by the court or by the mediators, there are consequences for the parties. In recent years, the issue of a mediator's preferred work style has entered the quality control discussions in the field. Because there are a variety of approaches to practice, each with its own distinctive set of goals, best practices, and implications for the experience of the parties, a number of scholars have asserted that the very definition of "good" mediation, and how to measure it, depends on the style or model in use.⁹⁹

One particularly thorny question is who should properly make the choice of approach for mediation: the mediator or the participants. The value of self-determination that shapes much of the rhetoric about

95. For discussions of the mythology of the mediation field, see KOLB & ASSOCIATES, *supra* note 29, at 459-93; *Clarifying*, *supra* note 29, at 43-44; Susan Silbey, *Mediation Mythology*, 9 NEGOTIATION J. 349, 349-53 (1993).

96. See *Clarifying*, *supra* note 29, at 43-44 (providing discussion of and citations to empirical evidence that disputes the prevailing mythologies of mediation practice).

97. See *id.* at 57-58 (providing example from USPS REDRESS program of relationship between marketing goals of mediators and their claims about their own practice competency); KOLB & ASSOCIATES, *supra* note 29, at 479-83 (discussing the pressures of the "business side" of mediation on the boundaries of good practice).

98. See *supra* note 9 and accompanying text (quoting the disclaimer of responsibility offered to the public by the court program which is the subject of this study).

99. See, e.g., Della Noce, *supra* note 29, at 335-36; *Clarifying*, *supra* note 29, at 59-65; Della Noce et al., *supra* note 14, *passim*; *Signposts*, *supra* note 29, *passim*.

mediation is sometimes interpreted as a mandate that style of practice be chosen by the participants rather than imposed by the mediator.

For private practice, free market principles are generally assumed to prevail. But for programs that have “captive” users, such as court-connected mediation programs and other institutional programs, the matter of who chooses the mediators’ approach is a programmatic and political dilemma. If the program itself chooses the mediation model, implicitly or explicitly, it can be accused of undermining party self-determination or creating a hegemonic model. If the program does not choose, it can be accused of overlooking the important differences among mediators that are widely acknowledged in the field.

Courts have shown a general reluctance to explicitly identify a preferred work style for the mediators who provide services under court programs. As a result, programs like the one under study are choosing a “full disclosure” approach, requiring mediators to describe their own work style and thereby inform the public, so the public can choose the work style thought most suitable for their preferences and their conflict.¹⁰⁰

This study reveals, however, that such an approach is a sham, unless the courts carefully define the differences for the public and for mediators, and exercise some oversight regarding the claims made by the mediators. The evidence here is that the parties are not being given sufficient information to choose—not by the courts and not by the mediators themselves. The disparities between the styles that mediators claim and the descriptions that they offer demonstrates, when viewed in the best possible light, a lack of understanding of what each style of mediation entails. Viewed in less charitable lights, the disparities suggest a lack of willingness to differentiate and even motives to obfuscate. If mediators cannot or will not offer clear descriptions of the style that they utilize, parties seeking to mediate lack the necessary information to make valid decisions regarding their choice of mediator. This inhibits individuals from taking control of the process through which they attempt to resolve their own disputes, contrary to the rhetoric of self-determination on which the field of mediation is supposedly built.

100. The Supreme Court of Virginia provides, in its Standards of Ethics and Professional Responsibility for Certified Mediators, that “[t]he mediator shall also describe his style and approach to mediation. The parties must be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and mediator must include in the agreement to mediate a general statement regarding the mediator’s style and approach to mediation to which the parties have agreed.” Virginia’s Judicial System, Standards of Ethics and Professional Responsibility for Certified Mediators, *available at* <http://www.courts.state.va.us/soe/soe.htm> (last visited August 18, 2008).

F. ROSTERS MAY ACTUALLY UNDERMINE QUALITY ASSURANCE EFFORTS

This study would suggest that rosters composed of self-reported qualifications are of very limited value. They fail to communicate quality assurance or to educate the public adequately about the nature of good mediation and good mediators. Instead, that burden is shifted to the mediators, who have economic and other incentives for making over-reaching or even inaccurate claims.

This failure has consequences for development of the mediation field. It undermines the continuing efforts within the mediation field to establish clarity about the nature and consequences of different approaches to mediation. It undermines efforts to establish verifiable methods of ensuring mediator competencies, such as performance-based tests. It also sends a message that efforts within the field to improve theory and practice are irrelevant, if not downright troublesome.

G. THE PUBLIC FACE OF COURT-CONNECTED MEDIATION

In sum, these profiles provide important insights into the “face” of court-connected mediation in the program studied. First, the profiles communicate to the public who they can expect to see in the mediation room. They can expect mediators to be mostly male, and mostly lawyers. They can expect that the mediators engage in mediation as an avocation but not as a vocation. They can expect that the mediators (lawyers or not) will be oriented to the legal system as the legitimate system of intelligibility and authority, and that their training will be largely sponsored or provided by legal institutions.

Second, the profiles communicate that the mediators will speak with an authoritative voice in the room. Members of the public most likely can expect legalistic formality rather than informality. This dynamic is established in the profiles, where the mediators create their authority in a number of ways: by establishing their credentials, by establishing their expertise in the process, by using legal language, and by requiring briefs of the parties and their counsel, among other things. Settlement is established as the only meaningful goal of the mediation process, and control of the process for achieving settlement (and often even the content of that settlement) is held in the hands of the mediator. Even if a mediator wanted to cede authority to the parties, and establish an informal process once in the mediation room, that mediator would have to actively work against the expectations created in the profiles.

Third, the profiles convey that differences in mediator work style are essentially meaningless to anyone but the mediator. The mediators actively elide differences in work styles while simultaneously establishing themselves as experts on determining the best style to use in any given case and at any given moment. Without adequate definitions of the work styles offered to the public on the court's website, the public is left to depend on the mediators' self-proclaimed expertise.

The question is whether this is a desirable face for court-connected mediation to put forward. This is a policy question for the mediation field (and especially its policy-setting institutions) as much as it is for the courts. Adequate answers depend on continued empirical research into mediator practice competencies, thoughtful policy decisions about the desired goals of mediation and the appropriate methods to achieve those goals, and credentialing or other quality control systems that are rationally related to quality and also enforce a measure of accountability.