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INTRODUCTION

Professor Leonard Riskin developed his controversial grid to "categorize the various approaches to mediation."[1] Consistent with his pluralistic view, Riskin argues that mediation includes both *facilitation* and *evaluation*.[2] Facilitative mediation occurs where the mediator strives to help the parties communicate with one another so they can resolve their dispute on their own terms. Mediators who use a facilitative approach "assume that [their] principal mission is to clarify and to enhance communications between the parties in order to help them decide what to do."[3] Evaluative mediation, by contrast, occurs where the mediator tries not only to help the parties communicate with one another but also to provide the parties with information and opinions on the substance of their dispute. Evaluative mediators, thus, "assume that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement—based on law, industry practice or technology."[4]

Riskin's categorization of mediation has engendered much debate among academics and practitioners.[5] Although most in the mediation community accept Riskin's *positive* assertion that mediation

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1. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13 (1996) [hereinafter Riskin, *Grid*]; *see also* Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 111 (1994) [hereinafter Riskin, *Mediator Orientations*].

2. *See, e.g.*, Riskin, *Grid*, *supra* note 1, at 17.

3. *Id.* at 24.

4. Riskin, *Mediator Orientations*, *supra* note 1, at 111. To bring the distinction between facilitative and evaluative mediation into the sharpest possible focus, Riskin classifies behaviors that fall at the extreme end of each type of practice: "At the extreme of [the] facilitative end," Riskin explains, "is conduct intended simply to allow the parties to communicate with and understand one another." Riskin, *Grid*, *supra* note 1, at 24. An extreme evaluative mediator, by contrast, engages in "behaviors intended to direct some or all of the outcomes of the mediation." *Id.*

5. *See, e.g.*, James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919, 919 (1997) [hereinafter Alfini, *Discussion*] (noting that the debate over facilitative and evaluative mediation "is raging in the law reviews and the literature on dispute resolution"); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1887 (1997) ("The current, most heated debate concerns the question whether mediation is facilitative or evaluative or both."); Leonard L. Riskin, *Foreword*, 2000 J. DISP. RESOL. 245 (introducing a symposium on the facilitative/

as currently practiced includes both facilitation and evaluation,[6] a vocal group of purist critics rejects Riskin's pluralist view of mediation on *normative* grounds. These purist critics—including such prominent mediator-scholars as Professors Kim Kovach,[7] Lela Love,[8] and

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evaluative debate); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing A Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 949-50 (1997) (noting that the facilitative versus evaluative debate is raging in Florida and nationally) [hereinafter Stempel, *Beyond Formalism*]; Harry M. Webne-Behrman, *Forum, The Emergence of Ethical Codes and Standards of Practice in Mediation: The Current State of Affairs*, 1998 WISC. L. REV. 1289, 1299 ("Mediators are currently engaged in significant professional debates that will impact modes of practice in the coming generation. Nowhere is this more acute than in the debate between 'evaluative' and 'facilitative' orientations to mediation."); *Should Mediators Evaluate? A Debate Between Lela P. Love and James B. Boskey*, CARDOZO ONLINE J. CONFLICT RESOL. (Dec. 10, 1997) [hereinafter Love/Boskey Debate].

6. Even some of the harshest critics of the normative implications of Riskin's grid accept its descriptive accuracy. Professors Kim Kovach and Lela Love, for instance, concede that the Riskin Grid is descriptively accurate, *see* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 76 (1996) [hereinafter Kovach & Love, *Mapping Mediation*], and that regulatory regimes "mirror[ ] the inclusive picture of mediation offered by the Grid," *id.* at 82. *See also* Kathy Kirk, *Mediation Training: What's the Point, Are the Tricks Really New, and Can an Old Dog Learn?*, 37 WASHBURN L.J. 637, 643 (1998) (noting that "in Kansas there are two distinct styles of mediation used: facilitative and evaluative").

While most appear to accept the descriptive accuracy of the Riskin Grid, some scholars challenge it. *See, e.g.*, John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 850 n.40 (1997) (contending that "it is more useful to think of this as a continuum rather than a discrete dichotomy"); Stempel, *Beyond Formalism*, *supra* note 5, at 952 (arguing that "the view that mediators act as either facilitators or evaluators represents a triumph of excessively formalist thinking at a time when effective dispute resolution law and policy require a functional approach"); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock*, 24 FLA. ST. U. L. REV. 985, 986 (1997) [hereinafter Stulberg, *Piercing*] (calling Riskin's "facilitative/evaluative dichotomy" a "false one").

Others offer alternative models of mediation. *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 28-32 (1994) (distinguishing between "transformative" and "problem solving" mediators); DEBORAH M. KOLB, THE MEDIATORS 23-45 (1983) (distinguishing between "orchestrators" and "deal-makers"); James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is This the End of 'Good Mediation'?*, 19 FLA. ST. U. L. REV. 47, 66-73 (1991) (identifying "trashing," "bashing," and "hashing it out" as three styles of mediation) [hereinafter Alfini, *Trashing*]; Jeanne M. Brett et al., *Mediator Style and Mediation Effectiveness*, 2 NEGOTIATION J. 277, 280 (1986) (distinguishing between deal-making mediators and those who engage in shuttle diplomacy); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 707 (1997) (identifying "norm-generating," "norm-educating," and "norm-advocating" as three models of mediation).

7. *See* Kimberlee K. Kovach & Lela P. Love, *'Evaluative' Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996) [hereinafter Kovach & Love, *Oxymoron*]; Kovach & Love, *Mapping Mediation*, *supra* note 6.

Josh Stulberg[9]—argue that mediation is in fact, and should be, solely a facilitative process "designed to capture the parties' insights, imagination, and ideas that help them to participate in identifying and shaping their preferred outcomes."[10] For the purists, evaluation has no place in mediation.[11]

I do not seek in this article to add my voice to the chorus debating the relative merits of the pluralist and purist approaches to mediation.[12] Instead, despite my belief that the pluralists win this debate as both a positive *and* normative matter, I intend to imagine for purposes of this article that the purists actually prevail upon state legislatures, regulators, mediation trainers, and members of the mediation community at large to mandate a purely facilitative approach to mediation. Having successfully conjured up an image of

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8. *See* Kovach & Love, *Mapping Mediation*, *supra* note 6; Kovach & Love, *Oxymoron*, *supra* note 7; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997) [hereinafter Love, *Top Ten Reasons*]; Love/Boskey Debate, *supra* note 5 (comments of Lela P. Love).

9. *See* Stulberg, *Piercing*, *supra* note 6. Stulberg's critique differs from Kovach and Love's in that he believes Riskin's "facilitative/evaluative dichotomy is a false one . . ." *Id.* at 986. Nevertheless, he shares their view that mediation should be understood solely as a facilitative process. *Id.* ("I argue that any orientation that is 'evaluative' as portrayed on the Riskin grid is conduct that is both conceptually different from, and operationally inconsistent with, the values and goals characteristically ascribed to the mediation process.").

10. Stulberg, *Piercing*, *supra* note 6, at 1001.

11. *See generally* sources cited *supra* notes 7-9.

12. *See* sources cited *supra* notes 7-9; *see also* Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 62, 62 (1996) (identifying "strategies mediators can use to reduce the risks of evaluation"); Alfini, *Discussion*, *supra* note 5 (moderating a debate involving Donna Gebhart, Lela Love, Cheryl McDonald, Robert Moberly, Javier Perez-Abreu, Kathy Reuter, Carmen Stein, Jeff Stempel, and Lawrence Watson on the relative merits of evaluative and facilitative mediation); Alfini, *Trashing*, *supra* note 6; John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996) (responding to Kovach and Love); Dwight Golann & Marjorie Corman Aaron, *Using Evaluations in Mediation*, 52 DISP. RESOL. J. 26, 26 (1997) (attributing to others the argument that "[e]valuation is a legitimate weapon in the mediator's arsenal"); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical For Mediators To Evaluate Or Advise?*, 38 S. TEX. L. REV. 669, 678 (1997) (arguing "against ethical rules that prohibit mediator evaluation"); James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From An Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769 (explaining how and when it is appropriate to offer an evaluation); Stempel, *Beyond Formalism*, *supra* note 5, at 950 (endorsing "flexible mediation that permits judicious use of evaluative techniques" and arguing that "[c]onceptual oversimplification occurs when the debate is cast in the wooden form of evaluation versus facilitation"); Donald T. Weckstein, *In Praise of Party Empowerment—And Of Mediator Activism*, 33 WILLAMETTE L. REV. 501, (1997) (advocating activist or evaluative mediation).

this purely facilitative mediation world, I then seek to make the impertinent claim that mediation is highly unlikely to be a purely facilitative process as long as lawyers serve as mediators.

This claim rests on two intuitions, one about lawyers and the other about non-lawyers' perceptions of lawyers. My first intuition is that lawyers are unlikely to possess the personalities, predispositions, skills, and training necessary to mediate in a purely facilitative, non-evaluative way. The facilitative mediator, according to the purists, aims to reorient parties toward one another, to listen carefully, to help the parties communicate, to attend to emotions and relationship issues, and to avoid opining based on law.[13] The professionals who seem best-suited to mediate according to the purist model are psychotherapists, social workers, school counselors, clergy, and others who are inclined toward, and thoroughly trained in, the use of such skills. In contrast, lawyers—who tend to be better speakers than listeners, better thinkers than feelers, and better advisors than counselors—operate according to a "standard philosophical map"[14] that compromises their ability to function successfully as purely facilitative mediators.

My second intuition is that disputants perceive lawyers and non-lawyers differently. They imagine that lawyers possess greater knowledge of the law and legal system, less emotional and interpersonal sensitivity, and lower ethical standards than other professionals who might serve as mediators. This means, in turn, that disputants are likely to perceive facilitative behavior on the part of lawyer-mediators differently than *identical* behavior on the part of *non*-lawyer-mediators. Suppose, for instance, that a mediator asks a plaintiff in a personal injury case the following facilitative question: "Can you describe what your life has been like since the accident?" Disputants are likely to ascribe different connotations to this question—even if it is phrased the same way, spoken in the same tone, and accompanied by identical body language—depending upon the professional background of the mediator. If the mediator is a psychotherapist, for instance, disputants are likely to perceive that the mediator is asking the question out of genuine interest in the plaintiff's feelings. If the mediator is a lawyer, the disputants are more likely to suspect that the mediator is asking primarily to get a sense of the money damages appropriate to the case. Disputants, in short, are likely to share a "standard perceptual map" that predisposes them to

13. *See generally infra* Part I.

14. *See* Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-44 (1982) [hereinafter Riskin, *Philosophical Map*].

view lawyer-mediators as evaluative rather than facilitative dispute resolvers.

There is a growing body of empirical evidence on the lawyer's philosophical map and the non-lawyer's perceptual map. Drawing from that evidence, and from what can reasonably be inferred from it, I argue in this article that mediation is unlikely to be purely facilitative as long as lawyers serve as mediators. I begin in Part I by describing the purist approach to mediation. In Part II, I use available empirical evidence as well as a mediation hypothetical to develop my argument that lawyer-mediators compromise purely facilitative mediation. Finally, I conclude in Part III by briefly considering some of the implications of this argument for lawyering. Specifically, I explore whether lawyers can—and whether they should—behave differently.

I. THE PURIST VIEW OF MEDIATION

Mediation is a process in which an impartial third party helps others resolve a dispute.[15] Mediation differs from litigation, as well as arbitration and many other dispute resolution processes, in that the mediator, in contrast to a judge or arbitrator, is not authorized to impose a decision.[16] Rather, the mediator is authorized only to aid the parties in developing their own agreements.[17] Mediation, in short, is "facilitated negotiation,"[18] and the mediator is the negotiation facilitator.

While the purists acknowledge that a range of facilitative and evaluative activities currently fall under this generally accepted definition of mediation,[19] they reject this inclusive conception of mediation on normative grounds. For the purists, mediation must be a purely facilitative, non-evaluative process in which "parties are taught how to resolve their own disputes, listen to each other differently, broaden their own capacities for understanding and collaboration, and create resolutions that build relationships, generate more harmony, and are 'win-win.'"[20]

Because the purists view mediation as a purely facilitative process, the purists expect the mediator to behave in a purely facilitative

15. *See* Riskin, *Grid*, *supra* note 1, at 7.

16. *See, e.g.*, LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 313 (2d ed. 1997).

17. *Id.*

18. *See* Riskin, *Grid*, *supra* note 1, at 13.

19. *See supra* note 6.

20. Love, *Top Ten Reasons*, *supra* note 8, at 943-44.

way. To do so, the facilitative mediator assists "disputing parties in making their own decisions and evaluating their own situations."[21] Through the careful deployment of communication skills, information gathering and organizing skills, and "counseling and calming skills,"[22] the facilitative mediator may "push disputing parties to question their assumptions, reconsider their positions, and listen to each other's perspectives, stories, and arguments" and may "urge the parties to consider relevant law, weigh their own values, principles, and priorities, and develop an optimal outcome."[23] The facilitative mediator may not, however, offer "an opinion or judgment as to the likely court outcome or a 'fair' or correct resolution of an issue in a dispute."[24]

The purists *pre*scribe mediator facilitation and *pro*scribe mediator evaluation for three primary reasons. First, the purists argue that mediation "should stand as a distinct and clear-cut alternative to the evaluative and frequently highly adversarial processes that lawyers know best."[25] The civil litigation system rests on an adversarial paradigm, which posits that the "truth" of a dispute emerges through the presentation of competing positions to a judge or jury empowered to decide by applying rules of law to the "facts" asserted by the disputants.[26] Like litigation, such familiar "alternative" dispute resolution processes as arbitration[27] and "rent a judge" procedures[28] are premised on the adversarial paradigm. Because disputants can participate in any number of adversarial, evaluative dispute resolution processes, the purists argue that "[w]e need a genuine alternative to the adversarial paradigm of disputants who fight and a neutral who assesses."[29] That alternative, claim the purists, is a purely facilitative, non-evaluative mediation process.

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21. *Id.* at 939.

22. *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 36 (1994).

23. Love, *Top Ten Reasons*, *supra* note 8, at 939.

24. Kovach & Love, *Mapping Mediation*, *supra* note 6, at 80.

25. Kovach & Love, *Oxymoron*, *supra* note 7, at 32.

26. *See, e.g.*, Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 34-36 (Harold J. Berman ed., 2d. ed. 1971).

27. "[A]rbitration typically contains the essential elements of court adjudication: proofs and arguments are submitted to a neutral third party who has the power to issue a binding decision." STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 199 (2d ed. 1992).

28. *See generally* Barlow F. Christensen, *Private Justice: California's General Reference Procedure*, 1982 AM. B. FOUND. RES. J. 79 (describing California's "rent a judge" procedure).

29. Love, *Top Ten Reasons*, *supra* note 8, at 943; *see also id.* at 944 ("In the corporate world, phalanges of consultants assist in promoting creative problem-solving and building teams capable of successful collaboration. Similarly, the legal community

Second, the purists argue that evaluation undermines party self-determination, which they see as "the fundamental goal of mediation."[30] They contend that evaluative behavior undermines party self-determination because the mediator's words and actions have a profound impact on the parties' ability to exercise their self-determination. "The truth is that we never know what happens when we utter something," Love argues. "We never know the weight it has with people."[31] Specifically, mediator evaluations may redirect the

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needs a model from among the array of dispute resolution processes that will assist parties to evolve in their understandings, relationships, and arrangements, using the opportunity represented by conflict situations."); Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 306 ("Should the mediation process become engulfed by the adversarial paradigm now, disputants will be robbed of one of the richest opportunities to experience collaborative approaches to problem solving and dispute resolution."); Stulberg, *Piercing*, *supra* note 6, at 988 (noting that the critics of the Riskin Grid "maintain that evaluative activity by a mediator distorts the distinctive attributes of the mediation process . . .").

30. *See, e.g.*, Kovach & Love, *Mapping Mediation*, *supra* note 6, at 88 (identifying "voluntary self-determination by parties" as "the fundamental goal of mediation"); Kovach & Love, *Oxymoron*, *supra* note 7, at 32 (identifying "promoting self-determination of parties and helping the parties examine their real interest and develop mutually acceptable solutions" as the "primary objectives of mediation"). The purists rely in part on the Model Standards of Conduct for Mediators to support their contention that party autonomy is the primary goal of mediation. *See, e.g.*, Kovach & Love, *Oxymoron*, *supra* note 7, at 31 ("*The Model Standards of Conduct for Mediators*, recently promulgated by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution, are at odds with 'evaluative mediation.' These standards say that the principle of self-determination is central to the mediation process and prohibit a mediator from providing professional advice."); Love, *Top Ten Reasons*, *supra* note 8, at 940-41 ("The Model Standards of Conduct for Mediators highlight party self-determination as being the fundamental principle of mediation. The committee that created the Model Standards rejected mediation as an evaluative process.").

31. Alfini, *Discussion*, *supra* note 5, at 933-34 (quoting Lela Love); *see also id.* at 930 (quoting Donna Gebhart) ("I believe very strongly that when, or if, I evaluate the case, because they [i.e., parties] generally value what I say, it will affect their decision. They may be settling for something that they wouldn't really be happy with."); Kovach & Love, *Mapping Mediation*, *supra* note 6, at 100 ("The exact impact of actions and words is unknowable. If a precondition to giving an evaluation is determining that an evaluation will be 'non-directive' or will not interfere with self-determination, the safest and wisest course is to give no evaluation at all."); Love, *Top Ten Reasons*, *supra* note 8, at 943 (noting, for example, that "[t]he mediator's opinion that one of the parties should buy a carpet to lessen the impact of sounds heard by a neighbor or that one of the parties does not have standing to bring a particular claim in court carries enormous weight."). In short, the purists believe evaluative mediation undermines party autonomy because they overestimate mediators and underestimate parties. The purists claim to have a great deal of respect for parties embroiled in disputes. They claim that they perceive parties to "have the resources and creative capacity to resolve their own disputes better-and differently-than an arbitrator or a

parties from each other to the mediator,[32] lock parties into adversarial negotiation positions,[33] prevent parties from sharing information with one another,[34] and stop parties from engaging in creative problem-solving.[35] In short, mediator evaluation may prevent parties from "craft[ing] outcomes for themselves."[36]

Third, the purists advocate a purely facilitative, non-evaluative approach because they believe evaluation threatens the neutrality of the mediation process. Neutrality, which "is deeply imbedded in the ethos of mediation,"[37] promotes parties' confidence and trust in the process,[38] encourages parties to share information with one another,[39] and plays a part in producing high levels of party satisfaction.[40] The purists contend that evaluation threatens the neutrality

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judge would," *see* Kovach & Love, *Oxymoron*, *supra* note 7, at 32, yet they believe these parties will wilt in the face of a mediator's expression of her opinion.

32. *See, e.g.*, Kovach & Love, *Mapping Mediation*, *supra* note 6, at 99 ("If the neutral assumes an evaluative role or orientation, the parties' focus during the process shifts towards influencing the neutral decision-maker and away from crafting outcomes for themselves.").

33. *See, e.g., id.* at 100 ("Evaluation inhibits or eliminates party participation when it undermines one party's negotiation position and, conversely, locks another party into a particular posture.").

34. *See, e.g., id.* at 102 ("If the mediator ultimately provides an evaluation, the mediator can expect to elicit only information like that shared in an adversarial process, especially if the parties are sophisticated. Accordingly, the evaluative mediator is handicapped in building an information base upon which more optimal, 'win-win' solutions might develop.").

35. *See, e.g., id.* at 103 ("An evaluative orientation on the part of the neutral tends to replicate the adversarial process and place the parties in an adversarial mode. The resulting defensive and offensive postures of the parties inhibit collaboration and creativity.").

36. Kovach & Love, *Mapping Mediation*, *supra* note 6, at 99; *see also id.* at 102-03 (arguing that mediators "must embrace a facilitative orientation to assist the parties in generating a truly self-determined outcome").

37. Riskin, *Grid*, *supra* note 1, at 47.

38. *See, e.g.*, Kovach & Love, *Mapping Mediation*, *supra* note 6, at 101 (connecting mediator neutrality and "the trust of parties").

39. *See, e.g., id.* at 101-02 ("Mediators enhance the informational environment—both in terms of the quantity and the reliability of the information—by using as inducements for openness their own neutrality and the benefits of a mutually advantageous or 'win-win' outcome.").

40. *See, e.g.*, Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 923 (1997) (reporting based on a review of empirical studies that the "perceived neutral role of the mediator" enhances party "perceptions of the legitimacy of the dispute resolution process"); Chris Guthrie & James Levin, *A 'Party Satisfaction' Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 893 (1998) (noting that party satisfaction with the mediation process is enhanced when it is "unbiased"); Nina R. Meierding, *Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements*, 11 MEDIATION Q. 157, 163, 170 (1990) (finding "a high level of satisfaction" among parties to

of the mediation process because any evaluation "invariably favors one side over the other."[41] When a mediator offers an opinion favoring one party, that opinion can have deleterious consequences. The advantaged party "may get locked into an unacceptable claim or position and negotiations may stop altogether."[42] The disadvantaged party, by contrast, "is likely to withdraw from the mediation, believing that the mediator has 'sided' with the other party."[43] Only by steadfastly refusing to evaluate can a mediator "encourage parties to examine and articulate underlying interests; recognize common interests and complementary goals; and engage in creative problem-solving to find resolutions acceptable and optimal for all parties."[44]

In sum, the purists believe that evaluation is "conceptually different from and operationally inconsistent with, the values and goals" of facilitative mediation.[45] Evaluators and facilitators use "different skills and techniques" and possess "different competencies, training norms, and ethical guidelines to perform their respective functions."[46] Because of the fundamental differences between facilitation and evaluation, the purists contend that mediation must be a purely facilitative, non-evaluative process that "reorient[s] the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitude and dispositions toward one another."[47]

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mediation in which the vast majority of them felt the mediator was "unbiased"); Joseph P. Tomain & Jo Anne Lutz, *A Model for Court-Annexed Mediation*, 5 OHIO ST. J. ON DISP. RESOL. 1, 16 (1989) (attributing party satisfaction with court-annexed mediation in part to "unbiased" mediators); Mary P. Van Hook, *Resolving Conflict Between Farmers and Creditors: An Analysis of the Farmer-Creditor Mediation Process*, 8 MEDIATION Q. 63, 70 (1990) (finding that impartiality is an important part of successful farmer-creditor mediation).

41. Kovach & Love, *Oxymoron*, *supra* note 7, at 31; *see also* Love, *Top Ten Reasons*, *supra* note 8, at 939 (arguing that evaluation "can compromise the mediator's neutrality—both in actuality and in the eyes of the parties—because the mediator will be favoring one side in his or her judgment").

42. Love, *Top Ten Reasons*, *supra* note 8, at 945.

43. *Id.* at 945; *see also* Kovach & Love, *Mapping Mediation*, *supra* note 6, at 101 ("To the extent that a mediator's evaluation favors or disfavors a party or seems wrong to a party, the disadvantaged party may withdraw from the mediation.").

44. Kovach & Love, *Oxymoron*, *supra* note 7, at 31.

45. Stulberg, *Piercing*, *supra* note 6, at 986.

46. Love, *Top Ten Reasons*, *supra* note 8, at 939; *see also* Kovach & Love, *Mapping Mediation*, *supra* note 6, at 109 (noting that evaluative and facilitative mediation assume "different qualifications, skills, and tasks").

47. Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

II. LAWYER-MEDIATOR FACILITATION

The presence of *lawyer*-mediators compromises the purely facilitative mediation process envisioned by the purists in two ways. First, lawyers seldom have the personalities and skills necessary to mediate in a purely facilitative way. Second, disputants are likely to perceive lawyer-mediators as evaluative even when they are exhibiting facilitative behaviors. Empirical evidence, though certainly not conclusive, provides some support for *both* propositions.

A. *The Lawyer's Standard Philosophical Map*

Professor Riskin observed nearly two decades ago that most lawyers operate according to a "standard philosophical map" which rests on the twin assumptions that disputants are adversaries and that disputes should be resolved according to the application of law to fact.[48] Because lawyers rely on this philosophical map, they are inclined to behave in an evaluative fashion. Lawyers "put people and events into categories that are legally meaningful,"[49] "think in terms of rights and duties established by rules,"[50] and "focus on acts more than persons."[51] To do this, lawyers exercise formidable cognitive skills but are often plagued by an "under-cultivation of emotional faculties."[52] This underdevelopment of emotional faculties makes it difficult, if not impossible, for lawyers to do what facilitative mediators must—"be aware of the many interconnections between and among disputants and others,"[53] appreciate "the qualities of these connections,"[54] and "be sensitive to emotional needs of all parties."[55] In sum, Riskin observed, "[t]he philosophical map employed by most

48. Riskin, *Philosophical Map, supra* note 14, at 43-44. In a recent reflection, Professor Jim Coben argues that the lawyers' standard philosophical map also includes "the notion of law as the exclusive measure of fairness and equity, the assumption that justice is done within the adversarial system when the zealous advocate vigorously represents her clients' interests without regard to other's interests, and the idea that a duty exists to zealously exploit rules and processes to aid the client." James R. Coben, *Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophical Map*, 50 U. FLA. L. REV. 735, 737 (1998).

49. Riskin, *Philosophical Map, supra* note 14, at 45.

50. *Id.*

51. *Id.*

52. *Id; see also* Beryl Blaustone, *To Be Of Service: The Lawyer's Aware Use of The Human Skills Associated With The Perceptive Self*, 15 J. LEGAL PROF. 241, 243 (1990) ("[F]ew lawyers are intrapersonally developed; that is, few are self-aware of their own behavioral preferences, modes of communication, values, and sense of self.").

53. Riskin, *Philosophical Map, supra* note 14, at 44.

54. *Id.*

55. *Id.*

practicing lawyers and law teachers . . . differs radically from that which a mediator *must* use."[56]

Riskin's observations about lawyers appear to be supported by a fairly sizeable body of research on lawyers and law students.[57] Consistent with Riskin's observations, researchers have found that lawyers approach the world with "a cognitive and rational outlook,"[58] possess relatively underdeveloped emotional and interpersonal faculties, and tend toward an adversarial orientation. These characteristics, in turn, make it unlikely that lawyer-mediators can sustain purely facilitative behavior in mediation.

1. *Analytical Acumen*

Most lawyers, perhaps by personality as well as by training and practice, approach the world in an abstract, analytical way. Lawyers are deemed so rational and analytical, in fact, that "brain researchers have selected lawyers when they wished to test an occupational group that is characteristically analytical in its preferred mode of thought."[59]

Scholars using a variety of methodologies have demonstrated that lawyers are analytically inclined. Researchers using a brain-dominance testing instrument, for instance, have found that nearly 90% of lawyers are "left-brain dominant," indicating an analytical orientation.[60] Researchers have also used the Myers-Briggs Type Indicator (MBTI) to assess lawyers' personalities. The MBTI, which is

56. *Id.* at 43 (emphasis added). According to Riskin, the mediator's philosophical map rests on the twin assumptions that "all parties can benefit through a creative solution to which each agrees" and that each "situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it." *Id.* at 44.

57. For a more comprehensive treatment, see Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997) [hereinafter Daicoff, *Know Thyself*]; *see also* Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547 (1998) [hereinafter Daicoff, *Changing Spots*].

58. Riskin, *Philosophical Map*, *supra* note 14, at 45.

59. Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 761 (1998) (citing to Stephen Arndt & Dale E. Berger, *Cognitive Mode and Asymmetry in Cerebral Functioning*, 14 CORTEX 78, 82-84 (1978) and Robert E. Ornstein, *The Split and the Whole Brain*, HUMAN NATURE, May 1978, at 76, 78).

60. *See* Strong, *supra* note 59, at 761-62 n.14 (citing to Cynthia Kelly & Bernice McCarthy, Presentation at the Annual meeting of the Association of American Law Schools (Jan. 4, 1985)).

based on Jungian psychology, measures four dimensions of personality, including whether one is inclined toward "thinking" or "feeling."[61] Thinkers "make decisions more analytically and impersonally" than Feelers.[62] "When making decisions, they place more value on consistency and fairness than on how others will be affected. They look for flaws and fallacies, excelling at critiquing conclusions and pinpointing what is wrong with something."[63] Researchers from the 1960s to the 1990s have found that lawyers are substantially more inclined toward the "thinking" orientation than the population as a whole.[64] Lawyers, in short, "tend to be more logical, unemotional, rational, and objective"[65] than others and place a "great emphasis on logic, thinking, rationality, justice, fairness, rights, and rules."[66]

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61. RENEE BARON, WHAT TYPE AM I? 5 (1998).

62. *Id.* at 27.

63. *Id*; *see also* Larry Richard, *The Lawyer Types*, 79 A.B.A. J. 74, 76 (July 1993) ("Thinkers make decisions in a detached, objective and logical manner. They employ syllogistic thinking, and make a conscious effort not to let their personal preferences get in the way of making a 'right' decision. Feelers, on the other hand, prefer to make decisions by using a more personal, subjective and values-based approach.").

64. In 1967, Paul VanR. Miller, who administered the MBTI to first-year students from four law schools and a control group of liberal arts undergraduates, found that "72% of the law students were 'Thinking' types whereas 54% of the liberal arts undergraduates were 'Thinkers.'" Paul VanR. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460, 465 (1967). Nearly two decades later, Gerald Macdaid and colleagues found that 74.6% of recent male law school graduates and 64.9% of primarily-male practicing lawyers preferred "thinking" to "feeling" on the MBTI. Strong, *supra* note 59, at 762 n.14 (citing to GERALD P. MACDAID ET AL., MYERS-BRIGGS TYPE INDICATOR ATLAS OF TYPE TABLES 311-12 tbls. 8623162 & 8629439 (1986)). More recent research supports these findings. Don Peters found that nearly 80% of the more than 600 University of Florida law students who took the MBTI in the 1980s preferred the thinking orientation. Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1, 17 (1993). Vernellia Randall found that 77.9% of entering law students preferred the thinking orientation to the feeling orientation. Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 91 (1995). Larry Richard found in his large study of practicing lawyers that "fully 81 percent of male lawyers preferred thinking, as did 66 percent of female lawyers." Richard, *supra* note 63, at 76. *See also* THOMAS L. SHAFFER & ROBERT S. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 94-95 (1977) (using the 16PF "personality factors" test to find that law students, law faculty, and law alumni are "more 'tough-minded' than other people are"); Frank L. Natter, *The Human Factor: Psychological Type in Legal Education*, 24 RES. PSYCHOL. TYPE 24, 24 (1981) (finding in a pilot study of 28 law students that 63% of them preferred the "thinking" orientation on the MBTI); Don Peters & Martha M. Peters, *Maybe That's Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 N.Y. L. SCH. L. REV. 169, 181 n.43 (1990) (finding in a pilot study of 23 law students enrolled in a legal clinic that more than 60% of them preferred the "thinking" orientation on the MBTI).

65. *See* Daicoff, *Know Thyself*, *supra* note 57, at 1405.

66. *Id.*

2. *Emotional Un*intelligence

Lawyers' analytical tools give them "enormous power,"[67] allowing them "to generalize on the basis of diverse facts (working to abstraction from the bottom up)" and "to apply an existing legal rule or factual generalization to a new set of facts (working through abstraction from the top down)."[68] As a result, lawyers can successfully perform the critical task of translating "the complex and undefined difficulties presented by a client into a problem of a known type that can be reduced to puzzle form and attacked by the use of a familiar set of rules."[69] Unfortunately, however, lawyers' analytical prowess is "purchased at the price of a loss of concrete information" because abstract analysis necessarily reduces complexity.[70] When information is too complex or too subtle to lend itself to abstract reduction, lawyers often have difficulty understanding, interpreting, and working with such information.[71] One task that requires "a gestalt appreciation of an unedited set of concrete data, rather than abstract analytical reduction," is the "recognition and interpretation of subtle displays of emotion."[72]

For all their analytical skills, most lawyers seem fairly uninterested in, and unskilled at, dealing with emotional and interpersonal content.[73] Researchers using the MBTI, for example, have found not only that lawyers are more inclined toward the "thinking" orientation than the population as a whole,[74] but also that lawyers are substantially less inclined toward the "feeling" orientation.[75] Feelers "make decisions more subjectively [than Thinkers], according to their values or what is more important to them. They also place greater emphasis on how other people will be affected by their choices and actions . . . . It is possible for them to decide whether something is acceptable or

67. Strong, *supra* note 59, at 776.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 776-77.

72. *Id.* at 777.

73. In Howard Gardner's terms, lawyers may possess relatively high levels of "logical-mathematical" and "linguistic" intelligence, but they tend not to possess such high levels of the "personal" intelligences, HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES 73-98, 128-69, 237-76 (1983), especially "*the ability to notice and make distinctions among other individuals* and, in particular, among their moods, temperaments, motivations, and intentions." *Id.* at 239.

74. *See supra* text accompanying note 64.

75. *See supra* text accompanying note 64. Of course, given the scoring of the MBTI, high scores on "thinking" necessarily mean low scores on "feeling."

agreeable without needing logical reasons."[76] Professors John Barkai and Virginia Fine administered the Truax Accurate Empathy Scale to law students and found that even after undergoing empathy training, law students obtained an average score below Level Five on the scale, "the *minimum* level of facilitative interpersonal functioning."[77] Professor G. Andrew Benjamin and his colleagues, who undertook a comprehensive study of the mental health and well-being of law students and lawyers, found elevated levels of mental distress[78] and speculated that this could be due to the "[u]nbalanced development of [law] student interpersonal skills."[79] Professor James Hedegard, in his study of BYU law students found "drops in sociability and, more generally, interest in people" during the first year of law school.[80] And Professor Sandra Janoff, who studied the moral reasoning of law students before and after the first year of law school, found that law students became less "caring" during their first year of formal legal education.[81]

On balance, this research suggests that lawyers are "less interested in people, in emotions, and interpersonal concerns" than

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76. BARON, *supra* note 61, at 27.

77. John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505, 526 (1983). Prior to the empathy training, the experimental group obtained an average score of 2.46, while the control group scored 2.16, both on a seven-point scale. *Id.* at 526 n.63. Following the four-hour empathy training, the experimental group (which received the empathy training) scored 4.91, while the control group (which obviously did not receive the empathy training) scored 1.39. *Id.* at 526 n.64.

78. G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 247 ("[O]n the basis of epidemiological data, only 3-9% of individuals in industrial nations suffer from depression; prelaw subject group means did not differ from normative expectations. Yet, 17-40% of law students and alumni in our study suffered from depression, while 20-40% of the same subjects suffered from other elevated symptoms.") (footnote omitted).

79. *Id.* at 250. Benjamin et al. explain "[c]onventional legal education that concentrates on the development of analytic skills while ignoring interpersonal development may increase distress levels and prevent the alleviation of symptoms," *id*, and identify excessive workloads and high student-faculty ratios as other potential causes of elevated mental distress, *id.* at 248-49.

80. James M. Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-Relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students*, 1979 AM. B. FOUND. RES. J. 791, 835.

81. Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 229 (1991).

others.[82] In fact, the research "suggests that humanistic, people-oriented individuals do not fare well, psychologically or academically, in law school or in the legal profession."[83]

3. *Adversarial Orientation*

Whether because of their innate personalities, their legal training, the realities of law practice, or some combination thereof, lawyers tend to mirror the adversarial system. Research shows that lawyers are competitive and aggressive[84] and that they perceive the world in rule-based, law-and-order, rights-oriented terms. Lawyers tend to operate, in other words, on the assumption that society can best resolve its disputes through the aggressive application of rules to facts.

Researchers using different theoretical frameworks have found that lawyers are disproportionately oriented to an adversarial worldview. Professor Lawrence Landwehr, for instance, assessed lawyers using a test instrument derived from Professor Lawrence Kohlberg's theory of moral reasoning and development.[85] Kohlberg's

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82. Daicoff, *Know Thyself, supra* note 57, at 1405.

83. *Id; see also* Richard, *supra* note 63, at 76 ("Feelers have a rough time of it [in the legal profession] . . . . The constant adversarial mentality wears on the feeler, while for the thinker it can represent one of the most stimulating parts of practice."). Interestingly, in her study of law students, dental students, and social work students, Barbara Nachman found that "[r]egard for feelings of others as an aim of discipline, concern for human suffering as an ethic instilled in the children, and appeal to consideration for others as a method of discipline ('you will make mother feel bad') was [sic] more frequently reported by social workers than by the other two groups." Barbara Nachmann, *Childhood Experience and Vocational Choice in Law, Dentistry, and Social Work*, 7 J. COUNSELING PSYCHOL. 243, 249 (1960).

84. *See, e.g.*, Martin J. Bohn, Jr., *Psychological Needs of Engineering, Pre-Law, Pre-Medical, and Undecided College Freshmen*, 12 J.C. STUDENT PERSONNEL 359, 361 (1971) (finding in a "psychological need" study that lawyers were "perceived a having some definite need requirements, such as the needs to be a leader, to attract attention, and to avoid feeling inferior or taking a subordinate role"); John M. Houston et al., *Assessing Competitiveness: A Validation Study of the Competitiveness Index*, 13 PERSONALITY & INDIVIDUAL DIFFERENCES 1153 (1992) (confirming that lawyers are more competitive than nurses); Janet S. St. Lawrence et al., *Stress Management Training for Law Students: Cognitive-Behavioral Intervention*, 1 BEHAVIORAL SCI. & LAW 101, 106 (1983) (noting law students' "competitive approach to life"); Sue Winkle Williams & John C. McCullers, *Personal Factors Related to Typicalness of Career and Success in Active Professional Women*, 7 PSYCHOL. WOMEN Q. 343, 354 (1983) (speculating that "achievement in law may be associated with the traditionally masculine characteristics of aggressiveness and competitiveness").

85. Lawrence J. Landwehr, *Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers*, 7 LAW & PSYCHOL. REV. 39 (1982).

theory,[86] which has been called "the most widely accepted theory describing how individuals develop their capacity to reason as moral agents,"[87] posits that there are six stages of moral reasoning.[88] In his assessment of nearly 200 lawyers, Landwehr found that more than 90% of lawyers reside at Kohlberg's stage four, while only 30-50% of the population as a whole is concentrated at that stage.[89] Stage four is a "law and order" stage, and those at stage four are inclined toward "authority, fixed rules, and the maintenance of the social order."[90] Landwehr found that fewer than three percent of lawyers are at Kohlberg's stage five, while approximately 25% of the adult population as a whole is at that stage.[91] Those at stage five, like those at stage four, are legalistic in orientation, but they recognize "the relativism of personal values and opinions" and place "a corresponding emphasis upon procedural rules for reaching consensus."[92] Those at stage five, in short, are less deferential to established rules and are more willing to question established frameworks for resolving disputes.[93]

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86. *See generally* 1 ANNE COLBY & LAWRENCE KOHLBERG, THE MEASUREMENT OF MORAL JUDGMENT (1987).

87. Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 506-07 (1995).

88. 1 COLBY & KOHLBERG, *supra* note 86, at 15-19.

89. Landwehr, *supra* note 85, at 44. Landwehr speculates that the unusual concentration of lawyers at stage four is a consequence of "legal thinking." *Id.* at 49.

90. Lawrence Kohlberg, *The Cognitive-Developmental Approach to Moral Education*, 56 PHI DELTA KAPPAN 670, 671 t.1 (1975).

91. Landwehr, *supra* note 85, at 45.

92. Kohlberg, *supra* note 90, at 671 t.1.

93. *See, e.g.*, Landwehr, *supra* note 85, at 46 ("The cognitive structure of a stage 4 person may permit careful scrutiny of whether someone has acted within the civil or criminal legal rules but the same structure severely inhibits the ability to question the rules themselves. In contrast, the stage 5 cognitive process is one of questioning and opting for changing the law when such change is perceived as necessary to achieve social goals.") (footnote omitted); *see also* June Louin Tapp & Felice J. Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974). Tapp and Levine developed a "legal socialization and development" model influenced by Kohlberg's theory. *Id.* at 2, 12. According to their model, individuals engage in legal reasoning at one of three levels: preconventional, conventional, and postconventional. *Id.* at 2. They developed an open-ended questionnaire designed to assess legal reasoning according to their model. They then administered their questionnaire to college students, teachers, prison inmates, and law students, finding that law students approach the world in accord with the "law-and-order, conventional level" of their model. *Id.* at 22, 25-26. They also found that twice as many prison inmates as law students (16% to 8%) approach the world in accord with the postconventional level, *id.* at 25-26, a level at which "legal directives are not derived from the dictates of unilateral authority," but rather "are human constructs reflecting the active, consensual participation of equals moving toward shared expectations."

Challenging the universality of Kohlberg's theory,[94] Professor Carol Gilligan[95] posited that women reason in a "care"-based, relationship-oriented way, while men are more inclined to reason in an abstract, "rights"-based way.[96] Applying a Gilligan-based assessment instrument to law students, Janoff found that male students were likely to enter law school with a "rights" orientation, while "women were more likely to respond to moral dilemmas with a care perspective."[97] At the end of the first year, however, "there was no significant difference between the rights orientations of women and men."[98] By the end of the first year, women, like men, "were less likely to be oriented to the interconnectedness of others. They also were more likely to regard individuals as separate entities. In addition, women were more likely to rely on principles for conflict resolution and to seek reasons for particular behaviors."[99] The research evidence suggests then that "lawyers' approach to problems and values is significantly more homogeneous and more focused on objective, rational analysis of rules and codified rights than the general population."[100]

4. *Summary*

Lawyers are analytically oriented, emotionally and interpersonally underdeveloped, and as adversarial as the legal system within

94. "[I]n the research from which Kohlberg derives his theory, females simply do not exist." *Id.* at 18. "Kohlberg's six stages that describe the development of moral judgment from childhood to adulthood are based empirically on a study of eighty-four boys whose development Kohlberg has followed for a period of over twenty years." *Id.* (citations omitted).

95. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

96. *See, e.g., id.* at 62-63. For a thoughtful philosophical exploration of the "care" perspective, see NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984).

97. Janoff, *supra* note 81, at 218.

98. *Id.* at 232.

99. *Id.* at 232-23; *see also* Janet Taber et al., *Project, Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1251 (1988) (finding fewer differences than expected between the moral reasoning of male and female law students and lawyers and speculating that "[t]he socialization of female law students and graduates into the traditional 'legal' mode of thinking may explain the fact that women and men did not differ on any of the abstract factors").

100. Daicoff, *Know Thyself, supra* note 57, at 1397. *But see id.* at 1409 ("While there is evidence to suggest that their stage of moral development and decision-making styles may be more homogeneous than the general population and more focused on maintaining rules, regulations, social order, and conformity, there is also evidence that their stage of moral development does not differ from the moral development of other similarly educated adults, and that law school has no real effect on their moral development.") (footnotes omitted).

which they operate.[101] Lawyers' default personality or "philosophical map" may serve them well when they represent clients in litigation[102] or when they function as neutrals in processes like arbitration or evaluative mediation, but does it serve them well when they attempt to function as facilitative mediators?

On the one hand, it seems likely that lawyers' analytical skills, emotional distance, and comfort with a rule-based regime will aid them in carrying out *some* of the facilitative mediator's tasks. Lawyer-mediators, for instance, will likely be able to discern the substantive content conveyed by disputants, identify issues to be discussed, structure the conversation in a logical and linear fashion, avoid emotional involvement in the dispute, and contemplate a variety of legal considerations that might potentially aid the parties in reaching resolution.

On the other hand, it seems likely that lawyers' personalities and predispositions will preclude them from mediating in a purely facilitative, non-evaluative way. Lawyers are so analytically inclined, for instance, it seems unlikely that they will consistently be able to exercise the flexibility, creativity, and imagination necessary to aid parties in resolving their disputes.[103] Lawyers, in other words, are likely to skillfully exercise "[j]udgment, criticism, tough-mindedness, and practicality,"[104] but to the detriment of the imagination, creativity, and "generation of options and breakthrough ideas"[105] necessary in facilitative mediation.[106]

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101. *See supra* Part II.A.1-3.

102. *See generally* Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997) (demonstrating experimentally that lawyers are less likely than their clients to fall prey to psychological barriers that may impede their clients from accepting economically-rational settlements). *But see* Daicoff, *Know Thyself*, *supra* note 57, at 1394 (noting that lawyers' rational, unemotional personalities "might explain why lawyers and their clients at times have trouble interacting with and relating to each other").

103. *See generally* Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 611 (1973) (noting that in law school "[i]magination and creativity, supreme achievements by most educational standards, seemed to have been demoted in favor of attaining legal tools, vocabulary, and skills of analysis").

104. JAMES L. ADAMS, CONCEPTUAL BLOCKBUSTING: A GUIDE TO BETTER IDEAS 46 (3d ed. 1986).

105. Kovach & Love, *Mapping Mediation*, *supra* note 6, at 103.

106. Theorists from various disciplines warn of the detrimental impact that judging and analysis can have on the conceptualization and creative resolution of problems and disputes. *See, e.g.*, ADAMS, *supra* note 104, at 46 ("Judgment, criticism, tough-mindedness, and practicality are of course essential in problem-solving. However, if applied too early or too indiscriminately in the problem-solving process, they are extremely detrimental to conceptualization."); ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 58 (2d

Because lawyers appear to possess relatively underdeveloped emotional and interpersonal faculties, it seems unlikely that lawyers will be skilled at actively listening to parties, attending to their verbal and non-verbal cues, picking up on subtle displays of emotion, and "reorienting" the parties toward one another.[107] Lawyers, in short, are unlikely to "recognize the importance of yearnings for mutual respect, equality, security, and other such non-material interests as may be present" in the mediation.[108]

Moreover, lawyers tend to be so adversarial, it seems likely that their mediation behavior will be influenced, even if only subtly, by their awareness of potentially applicable legal principles and procedures. It seems unlikely, in other words, that lawyers, in contrast to other professionals with different personalities, skills, and knowledge, will truly be able to mediate outside "the shadow of the law"[109] and the legal system.

Although the available empirical evidence does not—and could not—describe how *all* lawyers behave, it does describe the tendencies that most lawyers are likely to exhibit. Consistent with Riskin's astute observations, the empirical evidence suggests that most lawyers are unlikely to be able to sustain purely facilitative, non-evaluative behavior in mediation.

B. *The Disputant's Standard Perceptual Map*

Many in the mediation community acknowledge that most lawyers are not well-suited to mediate in a purely facilitative, non-evaluative way. Riskin, for instance, observed that "most lawyers, most of the time" operate according to the lawyer's standard philosophical map, rather than the mediator's philosophical map.[110] Even Kovach

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ed. 1991) ("Nothing is so harmful to inventing as a critical sense waiting to pounce on the drawbacks of any new idea. Judgment hinders imagination.").

107. Based on a review of "videotaped and transcribed law student-client and attorney-client first interviews," for instance, Professor Gay Gellhorn concluded that "clients reveal critical self-information in their opening words, regardless of when those words occur and regardless of the legal interviewer's role in eliciting them. This information usually is not acknowledged by legal interviewers, with negative consequences. Failure to hear and see affects the legal interviewer's ability to form a relationship with a client, to comprehend the full range of information the client needs to share, and to collaborate with the client to tell a story in legally and emotionally effective language." Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 321 (1998) (footnote omitted).

108. Riskin, *Philosophical Map*, *supra* note 14, at 44.

109. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

110. Riskin, *Philosophical Map*, *supra* note 14, at 45.

and Love recognize that most lawyers are disinclined to mediate in a facilitative way. "Lawyers like most people feel more comfortable with what they know best," Kovach and Love acknowledge.[111] When functioning as mediators, "they revert to their default adversarial mode, analyzing the legal merits of the case in order to move towards settlement."[112] Although "many such 'mediators' also have training in facilitative techniques, case evaluation dominates their practice."[113]

Despite widespread recognition that lawyers are not likely to be drawn to, and skilled at, facilitative mediation, many in the mediation community would argue that those few lawyers capable of purely facilitative behavior are the very lawyers that gravitate toward mediation. But even if a subset of lawyers is capable of mediating in a purely facilitative, non-evaluative way—and it seems likely that such a subset exists—the mediation process is still unlikely to be a truly facilitative one because disputants are likely to perceive facilitative behavior on the part of lawyer-mediators differently than they perceive facilitative behavior on the part of *non*-lawyer-mediators. Disputants, in short, are likely to see the world through a "standard perceptual map" that predisposes them to perceive lawyers as evaluators.

Although we do not possess a wealth of empirical evidence about the disputant's perceptual map, what we do know from that evidence, and what we can reasonably infer, suggests that disputants are likely to see and hear lawyer-mediators differently than non-lawyer-mediators. In short, disputants are likely to perceive lawyer-

111. Kovach & Love, *Mapping Mediation*, *supra* note 6, at 96.

112. *Id.* at 94.

113. *Id*; *see also* Jonathan M. Hyman, *Slip-Sliding Into Mediation: Can Lawyers Mediate Their Clients' Problems?*, 5 CLINICAL L. REV. 47, 87 (1998) ("Many lawyers will feel most comfortable with a narrow, evaluative approach to mediation."); Kovach & Love, *Mapping Mediation*, *supra* note 6, at 96 ("Lawyers customarily speak for their clients and present adversarial arguments about the merits of the case. Accordingly, they attempt to draw mediation back into their adversarial paradigm."); *id.* at 105 (arguing that the exclusion of non-lawyer mediators pulls "mediation back towards the adversarial norm"); Love, *Top Ten Reasons*, *supra* note 8, at 942 (arguing that "if the field is theirs, lawyer-mediators will likely pull mediation into an adversarial paradigm"); Paul J. Spiegelman, *Certifying Mediators: Using Selection Criteria to Include the Qualified—Lessons from the San Diego Experience*, 30 U.S.F. L. REV. 677, 693 (1996) ("Restricting the practice of mediation to lawyers or other professionals could deprive mediation of its nonadversarial approach, potentially transforming it into the type of legalistic process to which it is supposed to be an alternative.").

mediators as legal experts who possess "hard" personalities and questionable ethics. These perceptions, in turn, are likely to render mediation evaluative, at least from the perspective of the disputants.[114]

1. *Lawyers as Legal Experts*

From the first year of law school to the final days of law practice, lawyers are likely to find that non-lawyers perceive them as professionals to whom they should defer because of their perceived intelligence and substantive expertise in innumerable legal areas. Law students routinely report receiving questions like the following from family and friends: "How much can I get from Bob in the divorce?" "If a cop stops me for speeding, does he have the right to search under my seat?" "Your uncle and I have never had a will. Would you prepare one for us?" Similarly, practicing lawyers routinely receive questions from clients about areas of the law with which they are wholly unfamiliar. When a client hires a divorce lawyer, for example, he is likely to assume that he can also get expert advice from the lawyer on estate planning, criminal matters, or workers' compensation issues. Although laypersons seem generally aware that *doctors* have limited subject matter expertise—e.g., most adult males realize they should not consult an OB/GYN or a pediatrician if they are having stomach problems—they often overestimate the breadth of *lawyers'* knowledge and expertise.

What systematic empirical evidence there is supports the anecdotal experiences of most law students and lawyers. In the early 1990s, for instance, the ABA commissioned Peter D. Hart Research Associates "to conduct a comprehensive survey of the public's view of the [legal] profession."[115] The researchers found, among other things, that "[n]early two-thirds of the public view lawyers as smart and knowledgeable."[116] When "[a]sked whether or not various qualities described lawyers," in fact, "the strongest positive responses were that lawyers were smart and knowledgeable and know how to solve

114. This argument rests on the assumption that the mediator will disclose his or her professional background to the disputants either prior to, or at the outset of, the mediation. It may, in fact, be the case that some mediators in some mediation programs may not disclose that they are trained as lawyers. *See* Riskin, *Philosophical Map, supra* note 14, at 36 (reporting that lawyer-mediators in the Houston Neighborhood Justice Center in the early 1980s were "enjoined not to give legal advice, and they generally do not let disputants know that they are lawyers"). Nevertheless, most in the mediation community seem to assume that mediators will disclose their backgrounds as lawyers to the parties prior to, or at the outset of, the mediation (or that their backgrounds will be disclosed by the courts that refer cases to mediation).

115. Gary A. Hengstler, *Vox Populi*, 79 A.B.A. J. 60, 60 (1993).

116. *Id.* at 61.

problems."[117] The public, in short, "perceive[s] lawyers as smart, knowledgeable, and competent problem solvers in civil disputes."[118]

Disputants' perceptions of lawyers as intelligent and knowledgeable professionals may give lawyer-mediators credibility with disputants that non-lawyer-mediators do not have.[119] Assuming disputants believe their disputes have a legal dimension, they may, for instance, appreciate having a mediator with legal expertise mediating their dispute. On the other hand, disputants may overestimate lawyers' legal knowledge and understanding of legal processes. This, in turn, may cause them to interpret facilitative comments and questions from lawyer-mediators differently than from non-lawyer-mediators, imputing legal opinions to members of the former group but not to members of the latter.

2. *Lawyers as Gladiators*

Lawyers are also likely to find that non-lawyers perceive them as verbal gladiators who possess "hard" personality traits consistent with the gladiator image.[120] The available empirical evidence suggests that non-lawyers perceive lawyers as dominant and aggressive professionals who are lacking in caring and compassion.

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117. Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 809-10 (1998); *see also* Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1 ("As for confidence in lawyers' abilities [in a *National Law Journal*-sponsored survey], 64 percent [of the general public] said they either were 'very certain' or 'somewhat certain' that if they hired an attorney, he or she would perform competently.").

118. Hengstler, *supra* note 115, at 64.

119. *See, e.g.*, Joseph B. Stulberg, *Book Review*, 14 OHIO ST. J. ON DISP. RESOL. 259, 264 (1998) (reviewing DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS (1996)) (arguing that mediators should be lawyers in "legal mediation" to "elicit the confidence of advocates").

120. *See, e.g.*, David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYER'S ROLE AND LAWYERS' ETHICS 83, 89 (David Luban ed., 1983) ("Litigation is commonly referred to as a war, or more often as a battle. The other battle metaphors flow from this premise. For example, some refer to the roles that trial lawyers play in this war. They can be heroes, hired guns, gladiators, warriors, champions, generals, lone gunfighters, or the man on the firing line."); Annetee J. Scieszinski, *Return of the Problem-Solvers*, 81 A.B.A. J. 119, 119 (1995) ("The media, which for better or worse educates the public about the role of the lawyer, paints a gladiator who will end up either the conqueror or the conquered."); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y. 119, 121-22 (1997) ("[The] 'gladiator' model of legal education and lawyering celebrates analytical rigor, toughness, and quick thinking. It defines successful performance as fighting to win: an argument, a conflict, or a case. Even in more informal settings such as negotiations or in-house advising, lawyering often proceeds within the gladiator model.").

Researchers using the Revised Interpersonal Adjective Scales (IAS-R), for instance, attempted to assess how subjects rate lawyers and other professionals on the "dominance" scale.[121] "Dominant" individuals are "forceful, assertive, dominant and self-confident"[122] and are inclined to "direct, persuade, advise, control, influence, organize and supervise."[123] Preferring "the roles of leader, chairman, executive, official and arbiter,"[124] dominant individuals "actively take charge, make decisions, and win arguments."[125] Researchers found that subjects rated lawyers very high on the "dominance" scale,[126] more than three times as high as they rated the second-place profession.[127] Conversely, survey evidence demonstrates that non-lawyers rate lawyers quite low in compassion and caring. In the ABA-sponsored Hart survey,[128] for instance, researchers found that "[t]he majority view is that, compared to lawyers in the past, today's attorney is less caring and compassionate."[129] In fact, "[f]ewer than one in five felt the phrase 'caring and compassionate' describes lawyers, as contrasted to nearly half (46 percent) who said the phrase does *not* apply."[130]

It is conceivable that disputants' perceptions of lawyers as gladiators might serve lawyer-mediators well in facilitative mediation. For instance, disputants might perceive lawyer-mediators as "strong" and objective neutrals likely to guide them to an efficient resolution.

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121. Heather M. McLean & Rudolf Kalin, *Congruence Between Self-Image and Occupational Stereotypes in Students Entering Gender-Dominated Occupations*, 26 CANADIAN J. BEHAVIOURAL SCI. 142, 148 (1994). In addition to lawyers, the study subjects assessed the personalities of engineers, physicians, nurses, rehabilitation therapists, and teachers. *Id.*

122. Jerry S. Wiggins & Ross Broughton, *The Interpersonal Circle: A Structural Model for the Integration of Personality Research*, 1 PERSPECTIVES IN PERSONALITY 1, 42 (Robert Hogan & Warren H. Jones eds. 1985). *See also* Jerry S. Wiggins, *A Psychological Taxonomy of Trait-Descriptive Terms: The Interpersonal Domain*, 37 J. PERS. & SOC. PSYCHOL. 395, 405 (1979) (explaining that "dominance" is an "interpersonal trait" comprised of the following adjectives: dominant, assertive, forceful, domineering, firm, self-confident, self-assured, un-self-conscious).

123. Wiggins & Broughton, *supra* note 122, at 21.

124. *Id.*

125. *Id.* at 42.

126. McLean & Kalin, *supra* note 121, at 151 ("Higher dominance scores were clearly evident for the occupation lawyer than for the other occupations.").

127. *Id.* at 152 (showing a mean score for lawyers above .75 and a mean score for engineers, the second-highest-scoring profession, below .25).

128. *See supra* text accompanying note 115.

129. Hengstler, *supra* note 115, at 62.

130. *Id.* (emphasis added).

On the other hand, disputants' views of lawyer-mediators as gladiators seems likely to undermine the lawyer-mediators' efforts to mediate in a purely facilitative, non-evaluative way. Because disputants are likely to view lawyer-mediators as dominant, aggressive, and uncaring, disputants may be hesitant to open up to lawyer-mediators in the same way they would open up to psychotherapist-mediators or social worker-mediators. They may expect lawyer-mediators to be uninterested in, and inattentive to, emotional considerations present in the dispute, and they may be inclined to grant undue deference to lawyer-mediators because of their perceived "take charge" personalities.

3. *Lawyers as Deceivers*

Jokes targeting lawyers' perceived dishonesty—e.g., "How do you know when a lawyer is lying? When his lips are moving"[131]—are among the most common of lawyer jokes and reflect a widespread public sentiment that lawyers are dishonest and unethical. The survey data on this score are voluminous. Since 1976,[132] for instance, no more than 25 percent of the population at any one time has rated lawyers "high" or "very high" in "honesty and ethical standards" in Gallup polls.[133] Consider, for example, a 1995 Gallup poll, in which a mere 16 percent of those surveyed rated lawyers' ethical standards "high" or "very high," placing lawyers seventeenth (tied) out of twenty six professions.[134] Or consider a 1996 Gallup poll, in which 18 percent of those surveyed rated lawyers' ethical standards as "high" or "very high,"[135] ranking lawyers below pharmacists, clergy, college teachers, medical doctors, dentists, engineers, police, funeral directors, bankers, public-opinion pollsters, journalists, TV reporters,

131. Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 286 (1998).

132. While I rely on survey data from 1976 to the present, I do not in any way mean to imply that the public's view of lawyers has been unusually low during the last quarter of the twentieth century. In fact, there is evidence to suggest that lawyers were held in even lower regard earlier in the century. *See* Galanter, *supra* note 117, at 810 ("In reading the polls' story of declining regard for lawyers, we should be wary of assuming that opinion about the legal profession has fallen from its normal plane of respect to a historic low. This 'historic low' reading comports with the scenario, favored by many lawyers, in which the profession has fallen from an earlier state of grace into an abject and debased condition. Public estimation of lawyers was far lower at earlier points in American history.").

133. Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outside Views of the Legal Profession*, 21 HARV. J. L. & PUB. POL'Y 835, 852 t.6 (1997) (citing to the Gallup/CNN/*USA Today* Poll, December 9-11, 1996).

134. *Id.* at 852 t.6.

135. *Id.*

building contractors, and local officeholders.[136] In short, "according to Gallup polls, majorities of Americans consistently give pharmacists, members of the clergy, dentists, and doctors high ratings for honesty and ethics, yet no more than 27 percent of Americans surveyed since 1976 rate lawyers as highly ethical."[137]

Disputants' perceptions of lawyers as dishonest and unethical cannot possibly aid lawyer-mediators in mediation unless it makes it easier for lawyer-mediators than for non-lawyer-mediators to exceed deflated expectations on the part of the disputants.[138] It seems much more likely, however, that this perception will be harmful to lawyer-mediators in mediation. Because disputants are likely to enter mediation with fairly low opinions of lawyer-mediators' honesty and ethical standards, disputants are more likely to be skeptical of the neutrality and impartiality of lawyer-mediators than non-lawyer-mediators.

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136. *Id.* at 853 t.7. Lawyers, who placed 15th on the list of 26 professions, ranked ahead of newspaper reporters, business executives, labor union leaders, real estate agents, stockbrokers, senators, congressmen, state officeholders, insurance salesmen, advertising practitioners, and car salesmen. *Id.* Psychologists, psychotherapists, counselors, and social workers, among others, were not included in the survey.

137. *Id.* at 851. Black and Rothman report other survey data demonstrating that members of the public have a low opinion of lawyers' honesty and ethical standards. They report data from the 1995 American Family Values Survey showing that few people think lawyers are good role models. *Id.* at 854 (citing to Michaels Opinion Research, American Family Values Survey 1995, Aug. 9-26, 1995) ("Only two percent of respondents considered lawyers excellent role models, but 78 percent of those surveyed classified lawyers as fair or poor role models. Moreover, lawyers ranked eleventh out of fifteen comparison groups included in the survey, receiving lower ratings than athletes, journalists, and radio announcers."). They report data from a 1987 Yankelovich Clancy Shulman survey in which only 35 percent of respondents indicated that they perceive lawyers to have "high ethical standards." *Id.* at 854-55 (citing to Yankelovich Clancy Shulman, *Time*/Yankelovich Clancy Shulman Poll, Jan. 19-21, 1987). Additionally, they report data from the Hart and Teeter Research Companies finding that "18 percent of respondents gave lawyers high or very high rankings [of their ethical standards], and 41 percent said lawyers have low or very low ethical standards." *Id.* at 855 (citing to Hart and Teeter Research Companies, NBC News/*Wall Street Journal* Poll, Oct. 27-31, 1995). *See also* Hengstler, *supra* note 115, at 62 (reporting that the ABA-commissioned Hart survey found that "barely one in five (22 percent) said the phrase 'honest and ethical' describes lawyers. Nearly twice as many (40 percent) said this description does not apply."); James Podgers, *Message Bearers Wanted*, 85 A.B.A. J. 89, 89 (1999) (reporting that only 14 percent of respondents in a 1998 ABA-sponsored survey by M/A/R/C Research gave lawyers a "high confidence" rating).

138. *See, e.g.*, Guthrie & Levin, *supra* note 40, at 888-89 (asserting that "[a] party is likely to report high levels of satisfaction with mediation if it meets or exceeds her prior expectations.").

4. *Summary*

Disputants are likely to view lawyer-mediators as legal experts possessing more comprehensive knowledge than they in fact possess, as adversarial types endowed with "hard" personalities, and as advocates uninhibited by stringent ethical standards.[139] Because of this standard perceptual map, disputants are unlikely to experience the mediation process as a purely facilitative one, even if the lawyer-mediators exhibit purely facilitative behaviors.

It is possible, of course, that disputants perceive *lawyers* and *lawyer-mediators* differently. There is evidence, for instance, that the public believes judges are more ethical than lawyers, and perhaps lawyer-mediators are viewed more like "judges" than "lawyers." There is evidence suggesting that non-lawyers who hire lawyers view them more favorably than they view lawyers generally,[140] and perhaps disputants perceive lawyer-mediators the same way they perceive their own counsel. There is also evidence suggesting that disputants who have completed mediation rate mediators, at least some of whom were lawyers, quite favorably.[141] But even if disputants perceive lawyers more favorably when they occupy the role of mediator, disputants' perceptions of lawyer-mediators are inevitably going to be informed by their perceptions of lawyers generally.

C. *Mediation Hypothetical*

The empirical evidence on lawyers and non-lawyers' perceptions of lawyers suggests that mediation is unlikely to be purely facilitative as long as lawyers serve as mediators. While the empirical evidence is compelling, some may find a mediation anecdote more insightful than any compilation of studies and statistics.[142] Consider, then, the following mediation hypothetical:

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139. *See supra* Section II.B.1-3.

140. *See, e.g.*, Galanter, *supra* note 117, at 808 (reporting based on several surveys that "[o]ver half of American adults have used lawyers and most report themselves satisfied with the service provided"). *But see* Daicoff, *Changing Spots*, *supra* note 57, at 552 (contending that the ABA's 1993 poll "debunked the idea that people hate lawyers in general but like their own").

141. For a recent compilation of the research on party satisfaction, see Guthrie & Levin, *supra* note 40.

142. *See, e.g.*, Don Peters, *Oiling Rusty Wheels: A Small Claims Mediation Narrative*, 50 FLA. L. REV. 761, 761-62 (1998) ("Stories help people learn. They foster understanding of complicated interactions. They help make sense of multi-layered processes by showing how disparate elements come together creating integrated action sequences.").

Suppose that a plaintiff named Patty, who has slipped and fallen in the Mom-and-Pop Grocery Store, agrees to mediate her claim against David, the proprietor of that store. Suppose, further, that this mediation progresses in expected fashion,[143] passing through the following four stages before the parties succeed (or not) in resolving their dispute: (1) introduction; (2) opening statements; (3) information gathering; and (4) assisted negotiation.

1. *Introduction*

The mediation process typically begins with mediator introductions.[144] Suppose the lawyer-mediator begins this hypothetical mediation as follows:

> Good afternoon. My name is Greg Lopez. I have been asked by the court to attempt to mediate your dispute. I have not met either of you before, so I'd like to begin by introducing myself. *I am a lawyer with 10 years of experience representing clients in lawsuits, but I am here today as a mediator, not as a lawyer.* My role is to learn about the matters that have brought you here and to aid you in developing solutions that will be acceptable to each of you.

Now suppose the mediator is a *non*-lawyer who begins the mediation as follows:

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143. While there is no such thing as a "typical" mediation, most academics and practitioners characterize the process similar to the way I have characterized it. *See, e.g.*, MARK D. BENNETT & MICHELE S.G. HERMANN, THE ART OF MEDIATION 25 (1996) (identifying intake, contracting, information gathering and issue identification, agenda setting, resolving each issue, reaching agreement, and drafting the agreement as stages of mediation); JOHN W. COOLEY, MEDIATION ADVOCACY 15 (1996) ("Classical mediation consists of eight stages: (1) initiation, (2) preparation, (3) introduction, (4) problem statement, (5) problem clarification, (6) generation and evaluation of alternative(s), (7) selection of alternative(s), and (8) agreement. In a typical mediation, stages 4, 5, 6, and 7 sometimes overlap or are repeated before the parties reach a consensus on all issues and conclude a final agreement."); DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 62 (1996) (emphasis in original) (arguing that "mediation usually takes place in two or three basic stages: the *opening session* (also commonly referred to as the joint session), *private caucuses*, and less commonly, *moderated negotiations*"); KOVACH, *supra* note 22, at 31 (arguing that the "basic model" of mediation is comprised of nine mandatory stages-preliminary arrangements, mediator's introduction, opening statements by the parties, information gathering, issue and interest identification, option generation, bargaining and negotiation, agreement, and closure-and four optional stages-ventilation, agenda setting, caucus, and reality testing); JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT 58 (1987) (arguing that mediation is comprised of "six distinct, consecutive segments" which he labels as follows: begin the discussion, accumulate information, develop the agenda and discussion strategies, generate movement, escape to separate sessions, and resolve the dispute).

144. *Id.*

> Good afternoon. My name is Greg Lopez. I have been asked by the court to attempt to mediate your dispute. I have not met either of you before, so I'd like to begin by introducing myself. *I am a psychotherapist with 10 years of experience counseling clients in individual and group settings, but I am here today as a mediator, not as a psychotherapist.* My role is to learn about the matters that have brought you here and to aid you in developing solutions that will be acceptable to each of you.

In each introduction,[145] the mediator discloses his background, explains that he is appearing as a mediator, and explains further that he intends to facilitate the disputants' negotiations. The only difference between the two introductions, of course, is that the mediator in the former discloses that he is a lawyer, while the mediator in the latter discloses that he is a therapist. This single difference is critical, however, because the introduction "sets the stage for the remainder of the mediation."[146] It is at this introductory stage that the mediator attempts to establish credibility with the disputants[147] and control over the process,[148] and the disputants, in turn, form their first impressions of the mediator.[149]

With these introductions, the mediators have set very different stages for the remainder of the mediation because the disputants—Patty and David—are likely to perceive each of the mediators differently based on their respective professional affiliations. The disputants, in short, are likely to perceive the lawyer-mediator as more knowledgeable about the law and legal processes, more controlling

145. Each introduction is truncated, of course. In a typical mediation, the mediator will provide additional information about factors including the process, behavioral guidelines, and confidentiality. *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS 20, 194 (2d ed. 1996) (identifying eleven elements that the "opening statement usually contains").

146. KOVACH, *supra* note 22, at 32.

147. *See, e.g.*, STULBERG, *supra* note 143, at 65 ("Beginning effectively is extremely important. If the mediator is hesitant, rambling, disorganized, or disrespectful, the parties will not have any confidence that he can help them. If the mediator presents himself as a person who is confident, articulate, and decisive, the parties instinctively will trust him.").

148. *See, e.g.*, COOLEY, *supra* note 143, at 16 (noting that in the introductory stage of the mediation the mediator, among other things, "establishes control of the process").

149. It is possible, of course, that the disputants may have met the mediator prior to the onset of the mediation session, in which case they will obviously have formed first impressions of the mediator prior to the mediation session.

and less compassionate, and less honest than the non-lawyer-mediator.[150] These perceptions may, as noted above, imbue the lawyer-mediator with some credibility that the non-lawyer-mediator does not possess.[151] It seems likely, however, that the disputants' perceptions of the members of each profession will increase the chances that the disputants will perceive the former mediator as relatively more evaluative, and relatively less facilitative, than the latter.

Indeed, some proponents of facilitative mediation object to mediators identifying their professional affiliation.[152] This reaction to the disclosure of the mediator's professional background suggests that these scholars may share my view that disputants' perceptions of the mediator and mediation process are likely to be colored if they learn the mediator is a lawyer.

2. *Opening Statements*

Following introductions, the mediator typically invites each party to make an opening statement. "The opening statement stage," Kovach explains, "is the time for parties to fully express and explain to the mediator, and, more importantly, to each other, in their own words, how they view the dispute."[153] Suppose Patty, the plaintiff in this dispute, makes the following opening statement:

> After church on Sunday, I went to the Mom-and-Pop Grocery Store to buy groceries for the week. I started down the fresh fruit aisle, when I heard my friend Lula, who sings in the church choir with me, shout at me from behind. I started to turn back to talk to her, and as I did, my heel slipped on a grape peel on the floor. I fell down and broke my arm and my jaw as I landed. Also, my dress caught on my shopping cart and ripped off, so I was left nearly naked on the floor. One of the store employees pointed and laughed at me. Another employee came over and tried to help me up.[154]

Consider the manner in which the lawyer-mediator and the non-lawyer-mediator are likely to "hear" Patty's story. Employing his well-honed analytical skills, the lawyer-mediator is likely to skillfully translate Patty's story into a legally cognizable one, identifying causes of action (e.g., negligence, intentional infliction of emotional distress), elements which must be established to make out each cause

150. *See supra* Section II.B.
151. *See supra* Section II.B.
152. *See supra* note 114.
153. KOVACH, *supra* note 22, at 32.
154. The "facts" of this hypothetical are based loosely on the facts of a hypothetical contained in KOVACH, *supra* note 22, at 257.

of action (e.g., breach of duty, outrageous conduct), prospective defendants (e.g., grocery store, "laughing" employee), key issues (e.g., constructive notice), witnesses (e.g., "laughing" employee, "helping" employee, Lula), damage items (e.g., medical expenses, lost wages, pain and suffering), and affirmative defenses (e.g., comparative fault).

The non-lawyer-mediator may also have a sense of the legal claims relevant to the dispute, but the non-lawyer-mediator—particularly if she is a psychotherapist or social worker—is more likely than the lawyer-mediator to be attentive to the emotional, non-material considerations present in the dispute. She is likely to wonder not only about the legal claims, in other words, but also about the impact of the broken jaw on plaintiff's singing in the choir, the embarrassment she suffered as a consequence of lying naked on the floor, the reactions of the employees to her fall, etc. Rather than internally translating all of plaintiff's claims into money damages,[155] the non-lawyer-mediator is more likely than the lawyer-mediator to be cognizant of non-monetary considerations that might be important to the plaintiff, like an apology from the "laughing" employee.[156]

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155. *See, e.g.*, Spiegelman, *supra* note 113, at 695 (arguing that "requiring mediators to be lawyers . . . risks placing too heavy an emphasis on reducing disputes to a dollar figure at the expense of creatively exploring options.").

156. Consider Professor Kenney Hegland's oft-repeated anecdote:

> In my first year Contracts class, I wished to review various doctrines we had recently studied. I put the following:
>
> In a long term installment contract, Seller promises Buyer to deliver widgets at the rate of 1000 a month. The first two deliveries are perfect. However, in the third month Seller delivers only 999 widgets. Buyer becomes so incensed with this that he rejects the delivery, cancels the remaining deliveries and refuses to pay for the widgets already delivered. After stating the problem, I asked 'If you were Seller, what would you say?' What I was looking for was a discussion of the various common law theories which would force the buyer to pay for the widgets delivered and those which would throw buyer into breach for canceling the remaining deliveries. In short, I wanted the class to come up with the legal doctrines which would allow Seller to crush Buyer.
>
> After asking the question, I looked around the room for a volunteer. As is so often the case with first year students, I found that they were all either writing in their notebooks or inspecting their shoes. There was, however, one eager face, that of an eight year old son of one of my students. It seems that he was suffering through Contracts due to his mother's sin of failing to find a sitter. Suddenly he raised his hand. Such behavior, even from an eight year old, must be rewarded.
>
> 'OK,' I said, 'What would you say if you were the seller?'
>
> 'I'd say 'I'm sorry.'

Riskin, *Philosophical Map*, *supra* note 14, at 46 (quoting from Kenney Hegland, *Why Teach Trial Advocacy? An Essay on Never Ask Why*, in HUMANISTIC EDUC. IN LAW,

3. *Information Gathering*

Given their initial interpretations of Patty's story (as well as David's), the mediators are likely to go about their next task[157]—gathering additional information—in slightly different ways. The lawyer-mediator will be more inclined to ask questions designed to elicit the legally relevant information about the dispute, while the non-lawyer-mediator will be more inclined to ask questions designed to elicit information about all aspects of the dispute, not merely those that are legally relevant. Even if both mediators go about gathering additional information in the same, facilitative way, Patty and David are likely to hear each mediator's open, closed, and reality-testing questions a little differently:

To gather general information about the dispute, the mediator will begin by asking "open" or "open-ended" questions, which are designed to elicit "the broadest possible answer[s]."[158] In the dispute between Patty and David, the mediator might ask Patty such open-ended questions as: "What else can you tell me about your fall?" or "How did you feel when the accident happened?" or "What do you want from David?"

Closed questions, by contrast, call for less elaborate, more focused answers. Closed questions may take a number of forms, including requests for clarification, leading questions, and yes/no questions.[159] In the dispute between Patty and David, the mediator might ask Patty such closed questions as: "Have you had any prior injuries to your arm or jaw?" or "What problems has this accident caused your family?"

Reality-testing questions, which may be open or closed, challenge the respondent to consider the strengths and weaknesses of her story or claims.[160] Consider the following reality-testing questions that the mediator might ask Patty in this case: "What do you think the jury will make of the fact that you were looking back at Lula when you fell?" or "Given that he did not yet realize that you had seriously

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Monograph III, at 68-69 (1982)). For more on apology, see Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999).

157. *See, e.g.*, KOVACH, *supra* note 22, at 115 ("Information gathering is a significant stage of mediation and should not be overlooked or hurried through. Once parties begin to focus on issues and options for settlement, they become reluctant to share additional information. They stop listening, and become entrenched in positions. Therefore, the information exchange must occur early in the session.").

158. *Id.* at 117.

159. *Id.* at 117-18.

160. *See, e.g., id.* at 33 (describing "reality testing" as "checking out with each side the realistic possibility of attaining what he or she is hoping for").

hurt yourself, do you think the jury will find the employee's laughter outrageous?"

Upon hearing these facilitative questions, Patty and David are likely to perceive them differently depending upon whether the mediator is a lawyer or non-lawyer. When a lawyer-mediator asks an open question like, "How did you feel when the accident happened?", a closed question like, "What problems has this caused your family?", or a reality-testing question like, "What do you think the jury will make of the fact that you were looking back at Lula when you fell?", disputants like Patty and David will assume he is inquiring about, and subtly opining on, legally relevant aspects of the dispute. This assumption, in turn, will influence the information they disclose (and withhold) and will increase the likelihood that the mediation will be adversarial and evaluative.

4. *Assisted Negotiation*

After introducing himself and the mediation process, and after eliciting information through opening statements and follow-up questioning, the mediator focuses on facilitating negotiation between the parties. The mediator is likely to begin by identifying the issues to be addressed in the mediation. In so doing, the mediator strives to "identify negotiating issues precisely"[161] and in "language that is nonjudgmental."[162]

The lawyer-mediator, accustomed to translating client stories into legally cognizable claims and causes of action, is likely to identify the negotiating issues in legalistic terms: e.g., "whether defendant was negligent," "whether plaintiff was contributorily negligent," "whether defendant's employee engaged in outrageous conduct." The non-lawyer-mediator, who is probably unfamiliar with the law of negligence and intentional infliction of emotional distress, is more likely to frame the negotiating issues in non-legalistic, nonjudgmental terms: e .g., "Patty's fall," "the fruit aisle," "customer relations." Framing the issues in legalistic, adversarial terms is likely to lead to a legalistic, adversarial mediation, while framing the issues in non-legalistic, nonjudgmental terms is more likely to result in a facilitative mediation.

Even assuming the lawyer-mediator successfully frames the negotiation issues in non-legalistic and nonjudgmental terms—e.g., "Patty's fall," "the fruit aisle," and "customer relations"—the lawyer-

161. STULBERG, *supra* note 143, at 84.
162. *Id.* at 83.

mediator is likely to have difficulty behaving in a purely facilitative way when he then attempts to "move the parties toward generating ideas, options or alternatives which might resolve the case."[163]

To aid the parties in generating options, the mediator must engage the parties in a period of "divergent" thinking, "during which a variety of potential solutions are generated before any are critically evaluated, let alone adopted."[164] In this case, for instance, the mediator might aid Patty and David in considering any or all of the following options: money damages, store credit, store coupons, termination of the laughing employee, apology by the laughing employee, new store policies regarding fruit aisle clean-up, posting of warning signs in the fruit aisle, etc. This process requires "[i]magination and creativity,"[165] yet, as Dean Paul Brest and Professor Linda Krieger recognize, "'creative' is not the first adjective that comes to mind when people think of lawyers. We [lawyers] are viewed—perhaps by ourselves as well as by others—as conservative, risk-averse, precedent-bound, and wedded to a narrow, legalistic range of problem solving strategies."[166] Brest and Krieger concede that "[t]here may be substance to this view,"[167] and indeed, the empirical evidence described above paints a picture of lawyers as rigidly analytical or "convergent" in their thinking,[168] which calls into question the lawyer-mediator's ability to perform the critical facilitative task of option generation.

Because of the difficulty the lawyer-mediator may have assisting the parties in generating options and ideas, the lawyer-mediator may, during this stage of mediation, "meet privately with each party"[169] in caucus.[170] The caucus "enables the parties and the mediator to be more direct."[171] The mediator may "take[ ] a more active role in prompting options,"[172] urge the parties "to take a realistic look

163. KOVACH, *supra* note 22, at 33 (noting that the mediator engages in option generation "[o]nce the mediator has the issues identified").

164. Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 541 (1994).

165. *Id.*

166. *Id.*

167. *Id.*

168. *See supra* Section II.A.1.

169. KOVACH, *supra* note 22, at 33.

170. *See, e.g.*, STULBERG, *supra* note 143, at 107 ("A mediator chooses to meet separately with the parties—to *caucus* with them—because he believes that doing so will contribute to the settlement process.").

171. KOVACH, *supra* note 22, at 165.

172. *Id.*

at their objectives,"[173] and "educat[e] the parties about the negotiating process."[174] Given the more active and direct role the mediator is likely to play in caucus, it seems even more likely in caucus than in open session that Patty and David will view the lawyer-mediator's facilitative behavior as more evaluative than the non-lawyer-mediator's identical behavior.

5. *Summary*

At each stage of the mediation, the lawyer-mediator is more likely than the non-lawyer-mediator to be drawn to evaluative behaviors and to have difficulty with facilitative behaviors. And even if a fraction of lawyer-mediators in a fraction of mediations can sustain facilitative conduct, disputants like Patty and David are likely to perceive lawyers differently from non-lawyers in ways that preclude the process from being a purely facilitative, non-evaluative one. It is possible, of course, to imagine a mediation in which the lawyer mediates in a purely facilitative way and the disputants perceive the lawyer-mediator's conduct in a purely facilitative way. Nonetheless, mediation, at a bare minimum, is much more likely to be evaluative, and much less likely to be facilitative, when lawyers serve as mediators.

D. *The Lawyer-Mediator's Role*

Given that lawyers are unlikely to be able to mediate in a purely facilitative way, should lawyers be allowed to serve as mediators? The answer to this question turns on one's view of mediation.

The mediation purists believe that mediation must be a purely facilitative, non-evaluative process open only to mediators who behave in a purely facilitative way. Lawyer-mediators appear not to have a place at the purists' mediation table. To be sure, the purists have *not* advocated a ban on lawyer-mediators. Nonetheless, because purists are committed to a purely-facilitative process, and because lawyer-mediators are unlikely to be able to conduct such a process, a prohibition against lawyer-mediators seems consistent with the purist view of mediation.[175]

The mediation pluralists, by contrast, believe that mediation should be open to facilitative *and* evaluative mediators. "It is too late," Riskin argues on behalf of the pluralists, "for commentators or

173. *Id.*
174. *Id.*
175. *See, e.g., supra* text accompanying notes 111-13.

mediation organizations to tell practitioners who are widely recognized as mediators that they are not, in the same sense that it is too late for the Pizza Association of Naples, Italy to tell Domino's that its product is not the genuine article."[176] Because the pluralists have adopted an inclusive view of mediation, the lawyer-mediator does have a place at the pluralists' mediation table despite the lawyer-mediator's proclivity for evaluation.

Like the purists, I believe that mediators should strive to facilitate. Unlike the purists, however, I believe, along with the pluralists, that mediation should be an eclectic process in which different types of mediators are available to suit different disputants.[177] Some mediated disputes demand a facilitative approach, and in those disputes, non-lawyer-mediators are likely to be better mediators than lawyer-mediators. Other mediated disputes call for a relatively more evaluative approach, and in those disputes, lawyer-mediators can use their evaluative skills—including their analytical acumen, emotional detachment, and legal expertise—to great advantage.[178] In all likelihood, most mediated disputes call for some combination of facilitative and evaluative approaches, and in those disputes, lawyer-mediators and non-lawyer-mediators each have unique attributes to offer to disputants.

III. The Implications for Lawyering

I have argued in this article that lawyers operate according to a standard philosophical map that predisposes them to practice law and mediation in an evaluative rather than a facilitative way. The purpose of this part of the article is to ask—and propose tentative answers to—three questions. First, should lawyers adopt a different philosophical map? Recognizing the value of the lawyer's standard philosophical map, I argue that lawyers should retain—but enrich—the standard philosophical map. Second, assuming lawyers should enrich the standard philosophical map, is it possible for them to do so? The empirical evidence on this point is unclear, but I believe it

176. Riskin, *Grid, supra* note 1, at 13.

177. The leading proponent of "eclectic mediation" is Professor Stempel. For his most recent thoughts on this topic, see Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. Disp. Resol. 247.

178. It is worth observing that the typical lawyer's discomfort with emotion may be detrimental in evaluative as well as facilitative mediation. A lawyer-mediator uncomfortable with emotion may fail to develop rapport with the disputants, neglect a claimant's emotional harms, ignore the emotional tension between the disputants, etc. Any of these "failings" on the part of the mediator might undermine even an evaluative mediation.

supports the proposition that one socializing institution—law school—can help enrich the lawyer's standard philosophical map. Third, assuming law schools *can* influence the standard philosophical map, what *should* law schools do? Acknowledging that there are significant impediments to major reform in the legal academy, I make only one proposal: that law schools and law professors should strive to teach law students not only to "think like a lawyer" but also to "feel like a lawyer."

A. *Should Lawyers Adopt a Different Philosophical Map?*

What philosophical map *should* guide lawyers? From a normative perspective, lawyers should adopt whatever philosophical map induces them to produce the most justice or happiness or other agreed-upon good for their clients and society. However, the purpose of this inquiry is not to address the *normative* question—i.e., the "should" question with a capital "S"—but rather the *prescriptive* question—i.e., the "should" question with a lowercase "s."[179] From a prescriptive perspective, lawyers should adopt whatever philosophical map enables them to function effectively as lawyers.

Thoughtful people may very well disagree about what it means to be a good lawyer, but I suspect all would agree that to function at a high level lawyers need to have the ability to use multiple approaches to address client problems.[180] Good lawyering, in short, demands *flexibility* because the tasks that lawyers commonly perform—e.g., counseling a client, writing a brief, picking a jury, arguing a motion, negotiating a deal—require different approaches and demand different skills.

The lawyer's standard philosophical map—which advances an analytical, non-emotional, adversarial orientation to law practice—reflects an evaluative approach to lawyering. Guided by the standard map, lawyers are well-equipped to write persuasive legal briefs, argue pre-trial motions, cross-examine witnesses, and perform other evaluative tasks. Because the lawyer's standard philosophical map

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179. The distinction between "normative" and "prescriptive" is often slippery. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1474 (1998) (observing that "normative analysis is no different from prescriptive analysis" in conventional economics). The basic idea, however, is that normative refers "more broadly [to] the ends of the legal system" while prescriptive refers more narrowly to the achievement of specified ends. *Id.* at 1474.

180. *But see* Daicoff, *Changing Spots*, *supra* note 57, at 590 (acknowledging that "it may undermine the American legal system to have lawyers change in these ways, if equal access to justice and lawyer satisfaction depend on rational, objective lawyers adopting the amoral professional role").

advances this critically important component of lawyering, lawyers should certainly not abandon it.

The problem with the lawyer's standard philosophical map is that it serves only as a partial guide. Most assuredly, the lawyer's standard philosophical map does help lawyers perform such evaluative tasks as writing briefs and arguing motions, but it provides much less guidance to lawyers called upon to listen to and counsel distressed clients, negotiate with co-counsel, work with a family to create an estate plan, solve a problem in a novel way, and perform other facilitative tasks. The lawyer's standard philosophical map, in short, is like any geographic map. Though helpful, geographical maps are limited because they depict a three-dimensional world in two dimensions. Likewise, the lawyer's standard philosophical map charts a course appropriate for a two-dimensional world despite the fact that lawyers inhabit a three-dimensional world which requires them to approach problems in flexible fashion.

Cartographers have not abandoned two-dimensional maps, but they have developed globes to more accurately depict the Earth's geography. Likewise, lawyers should not abandon their standard philosophical map, but they should seek to enrich it so that it more accurately reflects the skills and approaches that good lawyering demands. Good lawyering requires lawyers to develop evaluative skills, like analytical reasoning, dispassionate analysis, and "adversarialness." These attributes, in turn, enable lawyers to participate effectively in evaluative processes like trial. Good lawyering also requires lawyers to develop facilitative skills, like listening, empathizing, and creative problem-solving. These attributes enable lawyers to effectively interview and counsel clients, negotiate with co-counsel and opposing counsel, develop relationships with colleagues, etc. The lawyer's standard philosophical map facilitates the development of the former set of attributes, but lawyers need to cultivate something like a "mediator's philosophical map" to help develop the latter set of attributes.[181]

B. *Can Lawyers Adopt a Different Philosophical Map?*

Assuming lawyers *should* enrich the philosophical map that guides their behavior, *can* they? The answer to this question depends on the origins of the lawyer's standard philosophical map. If lawyers

181. Riskin contrasts the lawyer's standard philosophical map with a mediator's philosophical map in his seminal 1982 article. *See* Riskin, *Philosophical Map, supra* note 14, at 43-44.

are born with the standard philosophical map—if, in other words, they are innately analytical, dispassionate, and adversarial in orientation—it seems likely that they will have difficulty embracing other orientations. If, on the other hand, the lawyer's standard philosophical map is a product of socialization, education, and training, it seems likely that those institutions that play a central role in the development of lawyers may be able to help lawyers change.

Unfortunately, the evidence on the origins of the lawyer's standard philosophical map is inconclusive. Most of the available research is designed solely to assess lawyers' and law students' personality traits, not to determine how or when lawyers developed those traits. For example, Landwehr's assessment of lawyers' moral reasoning informs us that lawyers are adversarially oriented,[182] but it does not tell us how or when lawyers developed that orientation. Similarly, the MBTI research indicates that lawyers and law students are more inclined toward the "thinking" orientation than the "feeling" orientation,[183] but it does not tell us where this inclination originated.[184] And several researchers have found that lawyers and law students are competitive and aggressive,[185] but they have not documented the source of these tendencies. Thus, most of the research on lawyer attributes does not identify the source or sources of the lawyer's standard philosophical map.

There is some evidence to suggest that lawyers have acquired aspects of the lawyer's standard philosophical map long before beginning their formal legal training. Professor Susan Daicoff, who has carefully reviewed and summarized the empirical evidence on lawyer attributes in two articles,[186] observes that "[e]mpirical research over the last forty years has established that attorneys differ from the general population in the United States"[187] and contends that some attorney attributes appear "before law school, and thus are long-standing, ingrained personality traits that are likely to be very difficult to change."[188] But there is also evidence to suggest that lawyers

182. *See supra* text accompanying notes 85-93.

183. *See generally* sources cited *supra* note 64.

184. *But see* Randall, *supra* note 64, at 91 (finding a strong preference among law students for the "thinking" orientation at the beginning of their first year of law school).

185. *See generally* sources cited *supra* note 84.

186. *See* Daicoff, *Know Thyself, supra* note 57; Daicoff, *Changing Spots, supra* note 57.

187. Daicoff, *Changing Spots, supra* note 57, at 566.

188. Daicoff, *Changing Spots, supra* note 57, at 594. One study of pre-law students provides support for the claim that some of these lawyer attributes appear to be present prior to legal training. *See* Bohn, *supra* note 84. In this study, Professor

acquire the standard philosophical map—or that it becomes more prominent—during law school. For example, Janoff found that law students became less "caring" during the first year of law school,[189] Hedegard found that law students became less sociable and that they lost interest in other people during the first year of law school,[190] and Benjamin and his colleagues found that law students experienced elevated levels of mental distress after attending law school.[191]

The research evidence is inconclusive, but it suggests that lawyers acquire the standard philosophical map through some combination of nature *and* nurture. Lawyers probably possess attributes from early in their lives that are consistent with the lawyer's standard philosophical map, but subsequent life experiences—in particular, law school—appear to play a critical role in strengthening these attributes and inculcating others consistent with the lawyer's philosophical map. Most lawyers are probably born with some degree of analytical acumen, for example, but law school is likely to hone it, place renewed emphasis on it, and stunt emotional development in the process. Because law school seems to play such a formative role in charting the lawyer's standard philosophical map, law school can probably play a formative role in charting a better map.

C. *What Role Should Law Schools Play?*

Like many before me[192] (and many after, I suspect), I believe law schools should strive to enrich the philosophical map that informs the way lawyers practice law. Because I recognize that law schools are remarkably resistant to fundamental change, I make only one modest proposal in this article.

Law schools commonly claim that they teach law students how to "think like a lawyer." Thinking like a lawyer is important, but law

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Martin Bohn found that pre-law undergraduates were more competitive than pre-med, engineering, and undecided undergraduates. *Id.* at 361. Pre-law students appeared to have a psychological need "to be a leader, to attract attention, and to avoid feeling inferior or taking a subordinate role." *Id.* This study suffers from two significant limitations, however. First, Bohn included only male undergraduates in his study. *Id.* at 359. Second, there is no way of knowing how many of the undergraduates who identified themselves as "pre-law" actually became lawyers, particularly given that they appear to have participated in the study as college freshmen. *Id.*

189. *See supra* text accompanying note 81. For a different view, see generally Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306 (1981) (finding that the first year of law school did not affect the moral development of law students).

190. *See supra* text accompanying note 80.

191. *See supra* text accompanying notes 78-79.

192. *See, e.g.*, Coben, *supra* note 48.

schools tend to overestimate the importance of analytical skills to the detriment of emotional insight. I believe that law schools and law professors can enrich the lawyer's standard philosophical map by encouraging law students enrolled in the traditional law school curriculum—particularly the first-year curriculum—not only to *think* like lawyers but also to *feel* like lawyers.

Talk of feelings often gives law professors (as well as law students and lawyers) pause. Many law professors are uncomfortable because they worry that acknowledging the relevance of feelings will undermine their efforts to teach thinking. This is misguided for two reasons:

First, law students need to appreciate the important role that emotion can play in the development of legal doctrine (even if feelings are often rationalized or described as "policy reasons" in the classroom). Tort law, for example, is designed not merely to achieve efficiency through appropriate levels of deterrence but also to promote corrective justice by compensating injured victims. When courts require tortfeasors to compensate victims, they are motivated not merely by thoughts of abstract justice but also by feelings of compassion. Emotions are even central to understanding legal doctrine and behavior in a Corporations or Business Organizations course. Professor Robert Thompson, a leading corporate scholar, explains that the students who take his Corporations course learn that it not just "a class on business and money" but rather a class that "is really about people and core human emotions."[193] More generally, Professor Susan Bandes observes in the introduction to her acclaimed book, *The Passions of Law*:

> The law . . . is imbued with emotion. Not just the obvious emotions like mercy and the desire for vengeance but disgust, romantic love, bitterness, uneasiness, fear, resentment, cowardice, vindictiveness, forgiveness, contempt, remorse, sympathy, hatred, spite, malice, shame, respect, moral fervor, and the passion for justice. Emotion pervades not just the criminal courts, with their heat-of-passion and insanity defenses and their angry or compassionate jurors but the civil courtrooms, the appellate courtrooms, the legislatures. It propels judges and lawyers, as well as jurors, litigants, and the lay public.[194]

Second, and more significantly, lawyers represent clients. Clients come to lawyers with problems about which they often have deep

193. Jane Salem, *Devil's Advocate*, 30 VANDERBILT LAWYER 25, 25 (2000).

194. Susan A. Bandes, *Introduction*, in THE PASSIONS OF LAW 2 (Susan A. Bandes ed. 1999).

feelings, including sadness, fear, embarrassment, anger, and vengeance. Law students might think that feelings play an important role only in domestic disputes or criminal law, but the fact is that clients embroiled in disputes over employment rights, the use of intellectual property, alleged breaches of commercial contracts, or almost any topic experience a range of emotions that good lawyers identify, and if appropriate, help their clients voice. Good lawyers, in short, must (and inevitably, do) both think *and* feel for their clients.

It is one thing, of course, to urge law schools and law professors to teach their students to embrace the emotive aspects of law and lawyering in the classroom. It is another thing altogether to facilitate this. Nonetheless, I offer the following three suggestions.

One way law professors can embrace the emotive aspects of law is by expanding the conventional classroom dialogue. Law professors can inquire not only about the legally relevant facts, the issues presented, and the holding of a case, but also about the emotive aspects of a case. What do you think the plaintiff wanted? How did the plaintiff feel after incurring the injury? How did the defendant feel when the plaintiff accused him of carelessness? What options did the lawyers have for helping their respective clients address the dispute between them?

Law professors can also enrich their classes by assigning—and then discussing—"case-study" materials that provide more detailed information about the participants in disputes. In a Torts class, for example, professors might assign *The Passengers of Palsgraf*[195] (a book chapter providing details about the lives of some of the people involved in the famous *Palsgraf* case), A CIVIL ACTION[196] (a book describing a toxic tort case primarily from the perspective of the plaintiff's counsel) or DAMAGES[197] (a book describing a medical malpractice case involving a severely compromised baby told from the perspective of the plaintiffs, the defendants, and their counsel). Law students are more likely to empathize with disputants if they read about them through case-study materials than if their only exposure to the disputants is through the arid recitations of "facts" typical of most appellate cases.

Third, law professors might enrich their law school courses by including some experiential exercises which can be conducted inside

195. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 111-51 (1976).

196. JONATHAN HARR, A CIVIL ACTION (1995).

197. BARRY WERTH, DAMAGES: ONE FAMILY'S LEGAL STRUGGLES IN THE WORLD OF MEDICINE (1998).

or outside the classroom. In their pioneering work at the University of Missouri, for example, Professors Riskin and Westbrook have devised—with the help of scholars from around the country—a supplemental first-year curriculum designed to inculcate in students a broader conception of what it means to be a lawyer.[198] The centerpiece of the supplementary curriculum is a set of dispute resolution exercises in which students conduct simulations designed to help them "try on" the role of lawyer or disputant in client counseling, negotiation, mediation, arbitration, and the like.[199] Research evidence suggests that the so-called Missouri plan has succeeded in inculcating in its students a broader conception of the lawyer.[200]

Through these and other innovations in the standard curriculum, as well as through the teaching of lawyering and dispute resolution courses that give primacy to empathy, listening, and the like, law schools may be able to enrich the philosophical maps that guide at least some of their students.

CONCLUSION

Riskin's grid has engendered a robust debate on the practice of mediation. Thoughtful scholars have argued on the one hand that there is no such thing as purely facilitative mediation[201] and on the other hand that it is the only kind of mediation.[202] By comparison, I have made the rather modest claim that lawyer-mediators compromise facilitative mediation because of the way they tend to be *and* the way disputants tend to perceive them. Because I embrace an eclectic view of mediation, I am not troubled by the implications of my argument for the practice of mediation. I am troubled, however, by the implications of my argument for the practice of law. In my view, law

198. *See* Leonard L. Riskin & James E. Westbrook, *Integrating Dispute Resolution Into Standard First-Year Law School Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509, 509-14 (1998).

199. *See* LEONARD L. RISKIN ET AL., INSTRUCTOR'S MANUAL WITH SIMULATION AND PROBLEM MATERIALS TO ACCOMPANY RISKIN & WESTBROOK DISPUTE RESOLUTION AND LAWYERS (2d ed. 1998).

200. *See* Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 609, 626-30 (1998).

201. *See* Stempel, *supra* note 177; *see also* Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309, 310 (arguing that "there is no such thing as a purely facilitative mediation of a legal dispute").

202. *See supra* Part II. *See generally* John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 327 (noting that the debate has been fruitful but often characterized by "rigid, orthodox, extremist, narrow, purist, dogmatic, emotional, strident, and even just plain irritating" arguments) (footnotes omitted).

schools can, and should, attempt to enrich students' views of lawyering. In law school, students should begin to learn what it means to *be* a lawyer, not merely what it means to think like one.