

12-1-2006

Team Mediation: An Interdisciplinary Model Balancing Mediation in the "Matrix"

David C. Hesser

Elizabeth Jarrell Craig

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Civil Law Commons](#), [Dispute Resolution and Arbitration Commons](#), [Legal History Commons](#), and the [Other Law Commons](#)

Recommended Citation

David C. Hesser and Elizabeth Jarrell Craig, *Team Mediation: An Interdisciplinary Model Balancing Mediation in the "Matrix"*, 7 Pepp. Disp. Resol. L.J. Iss. 1 (2006)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol7/iss1/4>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Team Mediation: An Interdisciplinary Model Balancing Mediation in the “Matrix”

David C. Hesser and Elizabeth Jarrell Craig*

I. INTRODUCTION

In much of the world, ADR is an underdog to violence, hatred, and war. Certainly the human race has learned more about peacefully resolving disputes since the . . . cave-men . . . But in the competition between ADR and violence, ADR and its precursors have most often been overwhelmed by our more base nature, allowing war heroes to cast their long shadow.

Mediation as a form of alternative dispute resolution (“ADR”) continues to evolve and professionals need to embrace new techniques that offer improvement of the process. Mediation traces its origins to approximately 4,000 years ago in Sumerian society.² In 1922, Sir Leonard C. Woolley, an archaeologist, began excavating the city of Ur in the land between the Tigris and Euphrates rivers referred to as Mesopotamia.³ In his efforts he discov-

* David C. Hesser, J.D. University of Arkansas at Little Rock, William H. Bowen School of Law; LL.M. Tulane University Law School; Attorney-mediator. David C. Hesser, P.L.C., Alexandria, Louisiana; Board Certified Family Law Specialist and Certified Divorce Financial Analyst.

Elizabeth Jarrell Craig, M.A. Northwestern State University; Licensed Professional Counselor; Licensed Marriage and Family Therapist; board certified by the National Board of Counselor Certification; Partner, Life Solutions Inc., counseling and psychotherapy, Alexandria, Louisiana.

¹ JEROME T. BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT* 265 (2004).

² C. LEONARD WOOLLEY, *THE SUMERIANS* 93 (1965). China also has a long history of dispute resolution where more than 4,000 years ago under the reign of Shuen, mediation developed. See Cao Pei, *The Origins of Mediation in Traditional China*, 54:2 *DISP. RESOL. J.* 32 (1999).

³ John T. Stevenson, *Early Mesopotamia* (2000), available at <http://www.angelfire.com/nt/theology/04meso.html>. William Ury, an expert in a closely related field of social anthropology, helped to launch dispute resolution into a new era with the widely read book *Getting to Yes*. See ROGER FISHER & WILLIAM URY, *GETTING TO YES, NEGOTIATING AN AGREEMENT WITHOUT GIVING IN* (2d ed. 1991). The book’s description of interest-based negotiation was adopted as the main method of negotiation for attorneys in collaborative divorce settlement meetings. See PAULINE H. TESLER, *COLLABORATIVE LAW ACHIEVING EFFECTIVE RESOLUTION IN*

ered a sophisticated society that utilized mediation to resolve disputes.⁴ During its evolution, mediation has been employed to resolve almost every type of dispute and has been analyzed with great sophistication by leading scholars in the field.⁵ Currently there are numerous law reviews and journals dedicated to dispute resolution, which publish scholarly research concerning mediation, arbitration, collaboration and several variances of these models.⁶ The collaborative law model is defined as a dispute resolution method that utilizes two attorneys to help the disputants reach a settlement after the disputants have signed a disqualification agreement not to litigate the dispute in court.⁷ Should either of the disputants decide to litigate the matter, they are required to obtain new attorneys.⁸ The collaborative law model as expanded by the collaborative divorce model lead to the usage of teams of professionals to resolve divorce cases.⁹

The collaborative divorce model incorporates the same disqualification agreement as does the collaborative law model, but adds professionals, such as divorce coaches, who assist the divorcing couple in putting aside their emotions in order to have more rational settlement negotiations.¹⁰ The central premise of the collaborative models is the use of face-to-face settlement

DIVORCE WITHOUT LITIGATION 83-84 (2001). Interest based negotiation theory was first developed by Mary Parker Follett, a "Quaker social worker and pioneer in the areas of informal education and community building . . ." BARRETT, *supra* note 1, at 210.

⁴ WOOLLEY, *supra* note 2; Roger J. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U. L. REV. 591, 594 n.22 (1988).

⁵ See generally BARRETT, *supra* note 1.

⁶ Dispute resolution journals and law reviews include: African Journal on Conflict Resolution, Caradizo Online Journal of Conflict Resolution, Collaborative Law Journal, Conciliation Quarterly, Conflict Resolution Quarterly, Cooperation and Conflict: Nordic Journal of International Studies, Dispute Resolution Journal, Ethnic Conflict Research Digest, Family Court Review, Hamline Journal of Public Law and Policy, Harvard Negotiation Law Review, International Negotiation: A Journal of Theory and Practice Dispute Resolution Journal, International Negotiation - Journal of Conflict and Security Law, Journal of Dispute Resolution- University of Missouri-Columbia School of Law, Journal of Conflict Resolution, Journal of Humanitarian Assistance, Journal of Peace Research, Peace and Conflict: Journal of Peace Psychology, Peace and Conflict Studies Peace Colloquy, Mediation Quarterly, Negotiation Journal, Ohio State Journal on Dispute Resolution, Online Journal of Peace and Conflict Resolution, Peace Research: Canadian Journal of Peace Studies, Pepperdine University-Dispute Resolution Law Journal, Rutgers Conflict Resolution Law Journal, Willamette College of Law- Journal of International Law and Dispute Resolution.

⁷ The International Academy of Collaborative Professionals ("IACP") website provides basic information concerning the collaborative process. See generally IACP website, available at <http://www.collaborativepractice.com/t2.asp?T+WhatIsCollab>; JULIE MACFARLANE, DEPARTMENT OF JUSTICE CANADA, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES (2005); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351 (2004).

⁸ MACFARLANE, *supra* note 7, at 52.

⁹ See IACP, *supra* note 7.

¹⁰ See FORENSIC ACCOUNTING IN MATRIMONIAL DIVORCE (James A. DiGabriele et al. eds. 2005); MACFARLANE, *supra* note 7, at 52.

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

meetings under the protective umbrella of a disqualification agreement.¹¹ The face-to-face settlement meetings utilize trained professionals who employ a settlement skill set that is analogous to a traditional mediator's skill set.¹² As practitioners in Louisiana, we have witnessed first hand the potential of the collaborative divorce team model.¹³ The promise of the collaborative divorce model suggests that other dispute resolution models can benefit by adding additional professionals. In the area of civil mediation, the team approach to dispute resolution may be able to improve on the traditional mediation model.

In traditional mediation the role of the mediator has been defined as "[A] form of facilitated negotiation in which an impartial third party attempts to help disputing parties reach a mutually satisfactory solution to their problems, without the element of compulsion."¹⁴ Mediators generally begin with a joint session where they explain the mediation process to the parties and attorneys.¹⁵ Following this explanation, each side usually makes a statement of their case.¹⁶ At this point, most civil mediations separate the parties into different rooms and the mediator confers with each side in private caucuses to exchange information and offers.¹⁷ The role of the traditional mediator may include attempts to:

- Encourage exchanges of information,
- Provide new information,
- Help the parties to understand each other's views,

¹¹ See IACP, *supra* note 7.

¹² See IACP, *supra* note 7.

¹³ John Lande, a commentator, opined that the collaborative law "movement could produce a major advance in dispute resolution . . ." John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1330 (2003). Since 2001, collaborative divorce has gained acceptance in Louisiana. It initially developed from grant funding from the Rapides Foundation for a pilot project which included funding for four interdisciplinary trainings, advertising and promotional costs. The success of the process should not be solely measured in quantity but rather in the quality of the results of the participants. Success in collaborative law has been documented by William H. Schwab with empirical evidence. Schwab, *supra* note 7, at 375.

¹⁴ L. Randolph Lowry, *Preparing Your Client . . . for Mediation*, 53 DISP. RESOL. J. 30, 31 (1998) (citing David Plimpton, *Mediation of Disputes: The Role of the Lawyer and How Best to Serve the Client's Interest*, 8 ME. B.J. 38 (1993)). The mediator does not have the authority to impose an outcome on the parties. STEPHEN B. GOLDBERG, DISPUTE RESOLUTION NEGOTIATION, MEDIATION, AND OTHER PROCESSES 103 (1992).

¹⁵ GOLDBERG, *supra* note 14, at 107; THE MARTINDALE-HUBBELL ADR PRIMER 12 (2001), available at <http://www.martindale.com/pdf/mediation.pdf>.

¹⁶ THE MARTINDALE-HUBBELL ADR PRIMER, *supra* note 15, at 13.

¹⁷ *Id.* at 14.

- Let them know that their concerns are understood,
- Promote a productive level of emotional expression,
- Deal with differences in perceptions and interest between negotiators and constituents (including lawyer and client),
- Help negotiators realistically assess alternatives to settlement,
- Encourage flexibility,
- Shift the focus from the past to the future,
- Stimulate the parties to suggest creative settlements,
- Learn (often in separate sessions with each party) about those interests the parties are reluctant to disclose to each other, and
- Invent solutions that meet the fundamental interests of all parties.¹⁸

Mediators are generally either attorneys or mental health professionals.¹⁹ Even though some mediators are mental health professionals, the “mediator’s role is not that of a therapist.”²⁰ A conflict to the mediator’s duty of being impartial would develop if a mediator assumed a role in counseling the parties or therapy of the parties.²¹ There is however, no doubt that the emotional issues facing the parties impact mediations.²²

The collaborative law model, as modified in the collaborative divorce team model, provides a mental health coach for each divorcing spouse to assist in the emotional aspects of the divorce.²³ Practitioners have found that such assistance with the emotional aspects is of critical importance to the success of resolving the divorce amicably.²⁴ The proposed creation of a new civil interdisciplinary mediation model will combine the benefits of the collaborative divorce team model into the arena of civil mediation.²⁵ We call this new concept: “Team Mediation.”²⁶

¹⁸ GOLDBERG, *supra* note 14, at 103.

¹⁹ JEFF ATKINSON, *Mediation and Other Alternatives*, in THE AMERICAN BAR ASSOCIATION GUIDE TO FAMILY LAW: THE COMPLETE AND EASY GUIDE TO THE LAWS OF MARRIAGE, PARENTHOOD, SEPARATION AND DIVORCE 2 (1996), available at http://www.abanet.org/publiced/practical/books/family/chapter_15.pdf.

²⁰ ELIZABETH WAMPLER, *The Mediation Process in Divorce and Custody*, in MEDIATING CONFLICTS INVOLVING CHILDREN AND FAMILIES; A GUIDE FOR COURTS 2-14 (2004), available at http://www.sconet.state.oh.us/dispute_resolution/studentbook/Chap_02.pdf (citing Joan B. Kelly, *Mediation and Psychotherapy: Distinguishing the Differences*, 1 MEDIATION QUARTERLY 33, 33-44 (Sept. 1983)).

²¹ See generally MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (A.B.A. 2005), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>.

²² WAMPLER, *supra* note 20, at 2-15. Wampler discusses the emotional component in terms of divorce/custody matters. *Id.*

²³ TESLER, *supra* note 3, at 45.

²⁴ *Id.* at 66 n.12. See also IACP, *supra* note 7.

²⁵ This concept was first presented at the IACP 2005 Forum. See IACP, *supra* note 7.

²⁶ The concept is not new to the divorce field in that Lois Gold discussed the use of interdisciplinary mediations in 1982 in terms of combining the efforts of attorney/mediators and a therapist. Lois Gold, *The Psychological Context of the Interdisciplinary Co-Mediation Team Model in Martial Dis-*

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

In 1982 Lois Gold created a dispute resolution model called the: "Co-Mediation Team Model."²⁷ Her model is composed of "one male and one female, a Lawyer and a therapist, [who] meet jointly with a couple in a series of one and one half hour" meetings.²⁸ Lois Gold's model has some similarities to the advocated civil Team Mediation model; however her model is more accurately described as a precursor to the collaborative divorce model.²⁹ Gold's concept of interdisciplinary mediation for divorces was certainly profound in 1982 in that it recognized the weakness in attempting settlement discussions without assistance for the emotional component. Gold's model differs substantially from the proposed civil Team Mediation model in that her model: (1) seems to suggest that the mental health professional may provide therapy; (2) allows the attorney/mediator to help the parties to understand "their rights and options,"³⁰ (3) does not provide for separate attorneys for the parties; (4) requires gender balance; (5) does not use neutral experts; and (6) is not designed for civil cases.³¹

The Team Mediation model proposed herein lays a different foundation for the resolution of civil disputes utilizing an interdisciplinary team, which will attempt to balance mediation styles in a team dynamic in such a way as to provide the parties with a greater chance of success. Such a model will likely be met with skepticism and, as with any new idea, its benefits will need to be demonstrated to overtake the skeptics.

solution, 20:2 FAM. CT. REV. 45, 49 (Dec. 1982). See also WAMPLER, *supra* note 20, at 15. Other commentators also suggested the use of a lawyer/therapist team approach. See J.M. Wiseman, & J.A. Fiske, *A Lawyer-Therapist Team as Mediation in Marital Crisis*, 25 SOCIAL WORK 442 (1980); M. Black, & W. Joffe, *A Lawyer/Therapist Team Approach to Divorce*, 16:1 FAM. CT. REV. 5 (1978).

²⁷ Gold, *supra* note 26, at 49.

²⁸ *Id.*

²⁹ Gold, *supra* note 26, at 49. This is clear as her model advocates a gender balance concept, which was later used in the collaborative divorce model. See KAREN FAGERSTROM ET AL., *A NEW CONCEPT: COLLABORATIVE DIVORCE A PROBLEM TO BE SOLVED NOT A BATTLE TO BE FOUGHT* 69 (1997).

³⁰ *Id.* While a mediator will assist in helping the parties explore their options the mediator should not give legal advice.

³¹ Gold, *supra* note 26.

II. MEDIATION THEORY

A. Introduction

In 1996 Professor Leonard Riskin introduced the provocative concept of having a “Grid” to assist parties in the selection of mediators.³² Riskin explained that there were four levels/issues of a mediation that corresponded to different degrees of breadth in a problem definition continuum.³³ Then he explained that mediators have different orientations which impact the mediation.³⁴

B. Riskin’s Mediation Levels/Issues

Riskin creates four levels of mediation issues that he lists on a problem-definition continuum: (1) the litigation issues; (2) the business interests; (3) the community interests; and (4) the personal/professional/relational issues.³⁵ Litigation issue mediations have a narrow scope with the primary goal of settling the matter through an agreement similar to the result in adjudication.³⁶ Litigation issue mediations focus on the strengths and weaknesses of the disputants.³⁷ The business interests involve “any of a number of [business] issues that a court would probably not reach.”³⁸ The mediation might help the parties recognize “their mutual interest in maintaining a good working relationship.”³⁹ Community interests consider the broader aspects of the communities and entities “that are not parties to the dispute.”⁴⁰

The personal/professional/relational issue “focus[es] attention on more personal issues and interests.”⁴¹ The personal/professional/relational issues are of significant concern to the Team Mediation model. Riskin accurately recognizes that “sometimes the people are the problems.”⁴² This notion was

³² Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

³³ Riskin, *supra* note 32, at 18-22. Riskin has since modified his analysis of how we should understand the impact of mediators’ orientation styles. *Id.* However, his revised analysis does not change the fact that the orientation of a mediator is a significant factor in the way mediations are conducted and their outcome. *Id.*

³⁴ *Id.* at 25-35.

³⁵ *Id.* at 19. For ease of discussion the personal/professional/relational issues are discussed as item number four.

³⁶ *Id.* at 19.

³⁷ *Id.* at 19.

³⁸ *Id.* at 19-20.

³⁹ *Id.* at 19.

⁴⁰ *Id.* at 21-22.

⁴¹ *Id.* at 20.

⁴² *Id.* at 20.

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

discussed by Roger Fisher and William Ury when they suggested that to settle a dispute the mediator needs to “separate the people from the problem.”⁴³ Unfortunately, the people cannot always be separated from the problem.⁴⁴ It is, however, critical to successful mediation that the personal/professional/relational issues are recognized and understood. Riskin explains the importance of this issue:⁴⁵

In other words, a principal goal of mediation could be to give the participants an opportunity to learn or to change. This could take the form of moral growth or a ‘transformation,’ as understood by Bush and Folger to include ‘empowerment’ (a sense of ‘their own capacity to handle life’s problems’) and ‘recognition’ (acknowledging or empathizing with others’ situations). In addition, the parties might repair their relationship by learning to forgive one another or by recognizing their connectedness. They might learn to understand themselves better, to give up their anger or desire for revenge, to work for inner peace, or to otherwise improve themselves. They also might learn to live in accord with the teachings or values of a community to which they belong.⁴⁶

While attempts to deal with the personal/professional/relational issues are made by the mediator, the authors suggest that a mental health professional may have more success in this endeavor. A central premise of Team Mediation is that these issues are better addressed by a trained mental health professional in a defined role of a mediation coach.

C. Mediator’s Orientations

Riskin characterizes mediators as having two principle types of orientation: evaluative and facilitative.⁴⁷ These types of orientation are further defined along the problem definition continuum as either narrow or broad, thus defining mediators into four quadrants: evaluative-narrow, evaluative-broad, facilitative-narrow and facilitative-broad.⁴⁸ Riskin explains that a facilitative mediator is a:

⁴³ FISHER & URY, *supra* note 3, at 37.

⁴⁴ See Riskin, *supra* note 32.

⁴⁵ *Id.* at 20.

⁴⁶ Riskin, *supra* note 32, at 20.

⁴⁷ See *id.* at 25-35.

⁴⁸ *Id.* at 24.

[M]ediator who facilitates [and] assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.⁴⁹

Riskin explains that an evaluative mediator is a “. . . mediator who evaluates [and] assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement - based on law, industry practice or technology - and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.”⁵⁰ Such definitions provide helpful insight into what mediators do in conducting mediations. Riskin carries his analysis a step further with his narrow/broad distinctions.⁵¹

In Riskin’s subsequent expansion of the Grid he highlights what he deems to be “good mediation decision making by bringing attention to two matters: an enormous range of potential decisions in and about a mediation, and the extent to which various participants could affect these decisions.”⁵² The system’s central focus is on “participant ‘influence’ with respect to particular issues. It provides a method for considering the influence that participants aspire to exert, actually exert, and expect others to exert with respect to any of a wide range of decisions.”⁵³ In essence, Riskin proposes a new look at the subjective nature of mediation substance and interpersonal dynamics. To frame mediation in terms of the mediator’s behavior without regard to participant interaction “ignores the dynamic, interactive nature of mediation.”⁵⁴

It is, therefore, within this context that the combining of interdisciplinary collaboration principles with those of traditional mediation is formulated. Prior discourse has, in fact, led into this new construct, which uses mental health professionals to potentiate mediation resolution. It certainly makes sense for the parties, as well as the mediator, to come to the media-

⁴⁹ *Id.*

⁵⁰ Riskin, *supra* note 32, at 24.

⁵¹ *See id.* at 26-35. A detailed analysis of Riskin’s narrow/broad distinctions will be discussed as needed in the explanation of the Team Mediation model. *See infra* notes 83-98 and accompanying text.

⁵² Leonard Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 34 (2003).

⁵³ *Id.*

⁵⁴ Leonard Riskin, *Replacing the Mediator Orientation Grids, Again: The New New Grid System*, 23:8 ALTERNATIVES 128 (2005).

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

tion table as prepared as possible and, to date, this function has been serviced by the parties' attorneys. Much of the client preparation by the attorney emphasizes case familiarization with the facts. Less attention is generally paid to the mediation process. Riskin's more recent Grid analysis highlights the importance of all participants' influence, including the disputants; therefore, maximum attention and emphasis needs to be placed on their overall readiness in order to positively contribute to the mediation and, to the extent they are able, avoid obstacles to resolution.⁵⁵

Some scholars have characterized Riskin's Grid as controversial.⁵⁶ In reality, the Grid is only controversial in that it highlights an obvious flaw of traditional mediation: that a single mediator must help the parties navigate settlement waters with currents of emotion, law and finance. Chris Guthrie explains that lawyers may have some difficulty acting as facilitative mediators as they are "thinkers" rather than "feelers."⁵⁷ "Thinkers 'make decisions more analytically and impersonally' than Feelers."⁵⁸ His opinion is well founded on research by Paul Van R. Miller, Gerald Macdaid, Don Peters, Martha M. Peters, Vernellia R. Randall, Larry Richard, Thomas L. Shaffer, Robert S. Redmount and Frank L. Natter.⁵⁹

⁵⁵ See generally Riskin, *supra* notes 52 and 54.

⁵⁶ Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 146 (2001).

⁵⁷ *Id.* at 156-63.

⁵⁸ *Id.* at 157 (citing RENEE BARON, WHAT TYPE AM I?: DISCOVER WHO YOU REALLY ARE 5 (1998)).

⁵⁹ Guthrie, *supra* note 56, at 157 n.64. Chris Guthrie explains that:

In 1967, Paul VanR. [sic] 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. [sic] 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. Graham B. Strong, *The Lawyers Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 762 n. 14 (citing to, [sic] 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." Larry Richard, *The Lawyer Types*, 79 A.B.A. J. 74, 76 (July 1993). See also, THOMAS L. SHAFFER &

Researcher Graham Strong, using a brain-dominance testing instrument, indicated that nearly ninety percent of lawyers are “left-brained dominant” and use an analytical, logic-based approach to situations.⁶⁰ The Meyers-Briggs Type Indicator (MBTI), based on Jungian psychology and measuring four dimensions of personality, was used to evaluate a group of lawyers and revealed that they registered dominance in the thinking versus feeling quotient. Chris Guthrie outlines a body of research from the 1960’s to the 1990’s, which demonstrates that lawyers tend toward analysis, logic and rationale in their presentation.⁶¹ The extent to which lawyers are inclined, pre-law school, toward emotional insight and an intuitive orientation is the extent to which lawyers, in general, operate seamlessly in the mediation arena. Naturally, these attorneys generally experienced elevated levels of success in preparing their clients for the mediation. The mediation coach functions within this setting as an assistant to this process. In these cases, the coach may make a difference in the speed at which the preparation progresses. However, Professor Susan Daicoff, reviewing the empirical evidence on lawyer personality traits, observed that some attorney attributes surface “before law school, and thus are long standing, ingrained personality traits that are likely to be very difficult to change.”⁶² In other words, the traits used by a coach to elicit a skill set which readies the client for mediation may not come naturally to attorneys. Daicoff further found that lawyers generally demonstrate a “lower interest in people, emotional concerns, and inter personal matters” than the majority of the population.⁶³ Janoff tested a group of lawyers using Lawrence Kohlberg’s “Six Levels of Moral Reasoning Instrument” and found that eighty-five percent of those inventoried operate in society at level five as opposed to sixty-five percent of the popula-

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).

Id.

⁶⁰ Graham B. Strong, *The Lawyers Left Hand: Non-Analytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 761 n.14 (1998).

⁶¹ Guthrie, *supra* note 56, at 157.

⁶² Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change?* 11 GEO. J. LEGAL ETHICS 547, 594 (1998).

⁶³ Susan Daicoff, *Lawyer, Know Thy Self*, 46 AM. U. L. REV. 1337, 1405 (1997).

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

tion.⁶⁴ Level five on the scale measures the inclination toward a “law and order” perception of the world.⁶⁵

Such distinction is significant because attorneys make up a substantial portion of mediators in the United States.⁶⁶ The orientation of the attorney/mediators strongly suggests the need for additional help from mental health professionals in mediation. Without such help the attorney/mediators are forced to “deal” with the emotional aspects, not only without the necessary mental health training, but also without a general orientation to being feelers. “When functioning as mediators, they revert to their default adversarial mode, analyzing the legal merits of the case in order to move towards settlement.”⁶⁷ It is recognized that many lawyers who gravitate to mediation may be more facilitative than the average attorney population, but there is still a concern that the emotional aspects of mediation are not properly or efficiently handled by attorney-mediators.⁶⁸ It is also recognized that mental health/mediators do not have the proper legal training to understand all of the legal issues raised in mediation.

David Hoffman and Daniel Bowling define personal qualities of a mediator and what impact they have on the mediation.⁶⁹ The qualities of centering, congruence and integration increase a mediator’s ability to comprehend, and favorably impact, the mediation.⁷⁰ They state that mediators need not fundamentally change who they are.⁷¹ “It is rather that [] mediators accord [] clients the respect of behaving in a manner that creates safety and inclusion for them as individuals, regardless of their background, appearance or station in life.”⁷² Ideally a mediator exhibits a “quality of being” in which the individual feels fully in touch with and able to marshal his or her spiritual, psychic and physical resources, in the context of his or her relationship with other people and with his or her surrounding environment.⁷³

⁶⁴ See generally Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193 (1991).

⁶⁵ PAUL H. MUSSEN, ET AL., *CHILD DEVELOPMENT AND PERSONALITY* 328-29 (6th ed. 1984).

⁶⁶ See generally Chris M. Currie, *Should a Mediator also be an Attorney?* (2000), available at <http://www.mediate.com/articles/currie/cfm>.

⁶⁷ Guthrie, *supra* note 56, at 165 n.112 (citing Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71, 94 (1996)).

⁶⁸ *Id.*

⁶⁹ See generally DANIEL BOWLING AND DAVID HOFFMAN, *BRINGING PEACE INTO THE ROOM* (2003).

⁷⁰ *Id.* at 27-28.

⁷¹ *Id.* at 24.

⁷² *Id.* at 77.

⁷³ *Id.*

Hoffman and Bowling describe a “system approach” to mediation that is similar in nature to the school of psychology devoted to family interactive behavior.⁷⁴ Systems theory postulates that the principle agent for change in family dynamics is inherently dependent upon the members of the system: their attitudes internal communication interactions and individual perceptions.⁷⁵ The parties’ influence upon each other, themselves, and what affect it exerts on the overall process and value of the system is, in many ways, the set of dynamics used by the mediation coach to guide a client’s development in preparation for the mediation.⁷⁶ The use of psychological theories and a different orientation of mental health professionals call for the infusion of mental health professionals into the mediation process.⁷⁷

III. TEAM MEDIATION MODEL

A. Description of Process

Team Mediation employs two or more professionals to guide the parties in the settlement of their case. The mediator, preferably an attorney/mediator, is assisted by a mental health professional who serves as the mediation coach. The mediation coach is responsible for the preparation of the parties for the mediation. How effectively this job is accomplished may mean the difference between a satisfactory or unsatisfactory conclusion to the mediation. Research has demonstrated that outcome satisfaction is not solely related to monetary measures of settlement.⁷⁸ Under the definitions set forth in Riskin’s Grid, he characterized the broad approach as “facilitative,” which lends in scope and practice to the coaching discipline.⁷⁹ The broad approach expands the ADR setting to operate from an interest versus position base. Riskin explores this in a series of questions designed to elicit shared values, which, as a function of time and expertise, falls into the domain of the mediation coach. What if a dynamic was introduced which may actually prevent or at least lessen stalemates, defensive postures, and com-

⁷⁴ *Id.* at 31-32, 37.

⁷⁵ *Id.* at 38.

⁷⁶ *Id.* “A more fruitful approach may be to examine the process continually. Seeking to understand the relationship’s that are evolving and coming into existence as the process unfolds.” *Id.*

⁷⁷ This is not to say that there are not many mental health professionals who conduct mediations as the mediator. In such situation there may be a need for an infusion of legal knowledge.

⁷⁸ E. Patrick McDermott & Ruth Obar, ‘What’s Going On’ in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit, 9 HARV. NEGOT. L. REV. 75, 77 (2004). Using an EEOC mediation program database, research indicated that monetary outcomes were higher in the “narrow” mediation method, but overall participant satisfaction (both sides) was greater when a “broad” approach was implemented. *Id.*

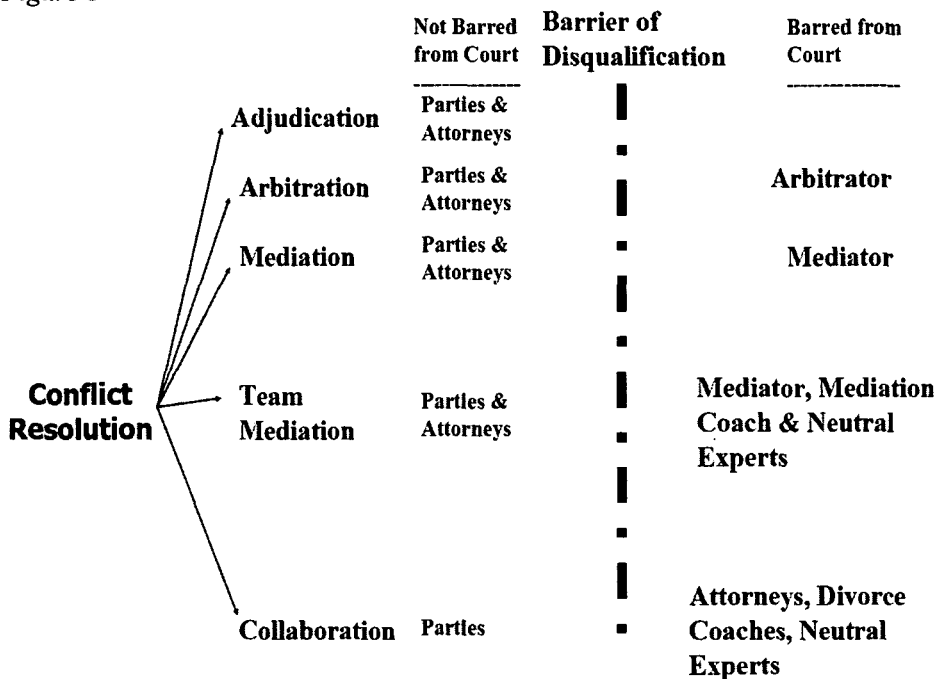
⁷⁹ Riskin, *supra* note 32, at 13.

[Vol. 7: 1, 2007]

munication breakdowns in the mediation sessions? How might such proposed preparations affect the function of time in resolving the dispute?

The Team Mediation model is distinguishable from other dispute resolution processes. Figure 1 depicts the different dispute resolution processes with a dividing line called the barrier of disqualification.

Figure 1



© Copyright 2005

In litigation, arbitration and traditional mediation, the parties and attorneys do not sign an agreement that they will not go to court to resolve their dispute. In arbitration and mediation however, the arbitrator or mediator is protected from having to testify by statute.⁸⁰ In collaborative law and collaborative divorce, the parties agree by contract that the collaborative attorneys

⁸⁰ La. R.S. §§ 9:4109-4112 (2006).

and/or collaborative team cannot participate in litigation.⁸¹ In Team Mediation, the parties and their attorneys are free to move forward with litigation, if the mediation does not resolve their case. This ability to proceed to litigation is slightly more limited than in traditional mediation, as the Team Mediation contract prevents the mediator from participating in court proceedings and prevents the mediation coach or the neutral professional from participating in litigation.⁸² The Team Mediation model differs from the collaborative models, as the attorneys for the parties are not barred from litigation.

B. How Does the Process Work?

In a typical Team Mediation either of the parties' attorneys will contact a mediator regarding setting up the mediation. In any case, where there are significant personal injuries, death or potential emotional issues, Team Mediation should be suggested as an option. If the attorneys are receptive to the Team Mediation model then the mediator should contact the mediation coach or provide a list of mediation coaches to the attorneys. In most cases, it is expected that there will be one mediation coach who will assist the plaintiff. In some cases there may also be a separate mediation coach for the defendant depending on the circumstances. Prior to the scheduled mediation date, the mediation coach should meet with the plaintiff. If it is a significant personal injury case, more than one session with the plaintiff will likely be necessary. The mediation coach will discuss problematic emotional barriers to settlement with the plaintiff's attorney and the mediator. This information may or may not be shared with the defendant's attorney depending on whether there are confidential issues or a desire to maintain privacy.

On the day of the mediation, the mediator and the mediation coach will introduce themselves as well as any neutral financial professional ("NFP") or other expert. The mediator will begin by explaining the process and give each side a chance to speak. The attorneys will generally give a presentation of their client's side of the case. Once this is done the parties will usually separate into caucuses and discuss settlement proposals with the mediator. The primary difference between Team Mediation and traditional mediation is that the mediation coach will be able to discuss issues and help the plaintiff to focus rationally on settling the case rather than bogging down into emotional issues. The mediation coach may be able to help the plaintiff's attorney better understand the emotional barriers to settlement and the mediator to understand how to reach and discuss the issues better with the

⁸¹ IACP, *supra* note 7. See forms on disk, in PAULINE H. TESLER, COLLABORATIVE LAW ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (A.B.A. 2001).

⁸² See appendix, Voluntary Team Mediation Agreement.

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

plaintiff. The mental health coach may also be able to assist the mediator in discussions with the plaintiff's attorney. By the middle part of the mediation process, it is expected that a settlement offer will have been conveyed to both sides and some progress in settlement will have been made. Attorneys employing traditional positional bargaining may prolong the process, but attorneys can make progress in separate caucuses as long as the offers are not offensive to the other side. Later in the process, it is expected that the mediators will have conveyed more offers back and forth, until the parties begin to get closer in settlement terms. At this point, there will be a need for the mediation coach to discuss with the plaintiff how close they are to resolving the case and to help the plaintiff let go of the "fight mentality" that might inhibit settlement.

Once a final agreement is determined, the parties' attorneys will need to prepare a basic settlement document or fill in a settlement form. The mediation coach should not contribute to the legal terms of this document. It is also advisable that the mediator should not contribute to the legal terms of the document as well.⁸³ This is important because the contractual protections of the Team Mediation agreement may not protect the team if a court feels that the team has overstepped its role in the settlement. Should the case not settle, it is important for the team to follow up with the attorneys over the next few days and weeks to help the parties settle the case. There may be a need for additional mediation meetings or discussions.

C. How to Use the Concepts of a Team

We believe that those qualities suggested by Hoffman and Bowling for development in the mediator may also be carried in the mediation participants, particularly the charging party, through a series of pre-meeting coaching sessions with the mediation coach. These sessions do not in any way constitute therapy because no diagnosis or remedial "treatment" is part of the paradigm.⁸⁴ The coach's duties center on helping the client to think and respond in a manner most conducive to receiving a satisfactory outcome. This substantially improves the traditional mediation model where the attorney generally prepares the client for mediation. The mediation coach is a licensed mental health professional whose function is similar to the divorce

⁸³ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II(B) & Standard III(A) (A.B.A. 2005).

⁸⁴ DIGABRIELE, *supra* note 10, at 21.

coach in the collaborative models. By having a mental health professional involved, the Team Mediation model can overcome the obstacle of the attorney's limited training and focus, which are not targeted toward the cultivation of settlement and negotiation. The mediation coach brings a new skill set and tools that may favorably impact the negotiation process.

Rather than continue the debate over lawyer personality traits, which inevitably leads to the nature versus nurture argument, we believe the road to more successful mediations may be traveled by tapping the resources of an objective professional to assist the attorneys and the mediator in the mediation process. Much like the divorce coach in the collaborative, interdisciplinary team model, the mediation coach role confines itself to the development of interpersonal communication skills, which can be learned in a solution-focused, short-term manner. Susan Gamache defines this as "helping the client anticipate the feeling of being in the room with the other party," developing the client's personal strengths which help facilitate constructive negotiating, and addressing emotional concerns such as anger, fear, or guilt which could pose obstacles in the mediation.⁸⁵

During the first meeting with the client, the mediation coach assesses the needs and wants presented and encourages the client to "tell his/her story." During this period, the client may form an overall "vision" of what he or she wishes for the mediation based on a prescribed purpose and a mission.⁸⁶ From this comes a set of goals and objectives that the client creates. Other techniques that clients may learn before the meeting are active listening, relaxation exercises and a new language system with which to address concerns during the mediation. The client also learns relationship dynamics and problem solving constructs. The coach may rehearse the mediation process with the client and the client may view videos of other mediations and role-play scenarios. The work product and therapeutic alliance formulated by the client and coach will hopefully encourage creative and imaginative options for the client at the mediation. Again, these coaching sessions are in place to teach a skill set, not to conduct remedial therapy.

In addition to working with the client, the mediation coach may, with permission of the client, consult with the lawyer and mediator before the mediation to discuss problems or potential conflicts. It may be appropriate to review the participants' personality and emotional styles in order to minimize the potential for surprise. In essence, the coach informs and supports the lawyer and mediator, both prior to, and during, the mediation, based on these variables. Consider the obstacle to resolution posed by the angry client or the grieving spouse. If their needs are timely addressed in a

⁸⁵ Susan Gamache, *Divorce Coaches and Collaborative Team Members*, in *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 189, 190-91 (Shelia M. Gutterman ed. 2004).

⁸⁶ WILLIAM URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* 22 (1991).

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

caring manner, the mediator's job becomes less burdensome to manage because, even if the client is motivated to settle, the unexpected could scuttle the process, if not unduly prolong the caucuses. If the coach is present during the mediation, the coach's presence may work toward soothing emotional intensity and/or reducing conflict.

The nature of the dispute determines whether one coach or two is needed. Personal injury suits, insurance claims, and other generic civil cases may call for the plaintiff to team with the coach. The corporate defendant may not desire any coaching beyond that provided by the company attorney. Negative connotations do not result for the defendant in this arrangement, because the coaching increases the level of positive communication and the potential success of the mediation, thereby benefiting the defendant. However, ongoing contractual disputes, family or small business suits and discrimination matters, may require a coach for each side; such may be the case in any suit with the potential for a future relationship. It is important that the plaintiff and defendant each have separate coaches to remove the possibility of triangulation (an implied perception that boundary issues may exist).

In summary, there are four key reasons to approach civil mediation from a team perspective using a mediation coach: (1) to assess the cases interpersonal dynamics as they may impact the mediation process; (2) to teach a mediation skill-set to the parties; (3) to consult as a team member with other professionals; and (4) to assist the mediator and/or parties during the mediation.

D. The Neutral Financial Professional and Other Experts

The Team Mediation model efficiently allows for the addition of other team members such as a neutral financial professional ("NFP"). The NFP can function in Team Mediation much like the NFP functions in the collaborative divorce model. In the collaborative divorce model the NFP can:

[P]rovide many valuable services for couples going through a collaborative divorce including: (1) evaluation of assets and liabilities related to a division of property, (2) evaluation of tax consequences for the division of assets and liabilities, (3) evaluation of alimony issues, (4) evaluation of child support issues,⁸⁷ and (5) assistance in creating budgets for two households.

⁸⁷ DIGABRIELE, *supra* note 10, at 24.

The main focus of an NFP in the Team Mediation model must be that of assistance in the evaluation of financial information from an impartial position. The NFP can provide services in evaluating the financial information for both the plaintiff and the defendant in a tort case. The plaintiff may be interested in: (1) understanding how the settlement will affect the plaintiff's lifestyle; (2) getting answers to tax implications of the settlement; and (3) finding out more about defendants' proposed structured settlement. In these situations, the NFP could look over the plaintiff's budget and let the plaintiff know how X amount of money from the settlement could be invested to generate an income stream for the plaintiff. The NFP may help the plaintiff feel more comfortable about getting information on a proposed structured settlement if such information comes from the NFP. In situations like this, the NFP can help the plaintiff to understand the options and obtain a more informed result.

The NFP may assist the defendant by answering questions the defendant has about (1) tax issues related to potential settlements; (2) the economic value of a proposed structured settlement; and (3) the impact settlement may have on plaintiff's lifestyle and budget.⁸⁸ By exploring these issues the defendant may develop a better understanding of plaintiff's financial interests, which may promote settlement.⁸⁹

It is expected that the plaintiff will gain more benefit from the NFP being involved in mediation. The defendant of course collaterally benefits if this helps the parties settle. This scenario is not much different from a collaborative divorce case. In a collaborative divorce often times one spouse is financially savvy and the other is not.⁹⁰ When this occurs, the NFP spends more time helping the less savvy spouse evaluate the financial issues. This does not mean that the NFP is only working for one side, but means that the NFP can focus more effort in evaluating the financial issues with the side that needs the most help.

Use of an NFP in Team Mediations is acceptable according to the ethical rules for financial professionals.⁹¹ The American Institute of Certified Public Accountants ("AICPA") has adopted ethical rules for Certified Public Accountants and the CFP Board of Standards Code of Ethics and Professional Responsibility governs Certified Financial Planners. AICPA Rule 102

⁸⁸ It is expected that the plaintiff and the attorney will be much more receptive to a structured settlement if the NFP is able to indicate the financial benefits of the settlement and dispel myths about the defendant's motive for the structured settlement.

⁸⁹ The NFP could be present at the mediation or could meet with the parties prior to the mediation. Each case will have its own nuances, which will likely cause the NFP to vary how each case is handled.

⁹⁰ FAGERSTROM, *supra* note 29, at 28-29.

⁹¹ DIGABRIELE, *supra* note 10, at 26-28.

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

requires a CPA to maintain integrity and objectivity.⁹² The AICPA Ethics Rulings on Independence, Integrity and Objectivity indicate that CPAs can serve as experts without taking on the role of an advocate.⁹³

To promote integrity and objectivity, the mediator may hire the NFP with funds obtained from the parties. This will enable the NFP assist the mediator by evaluating the financial information in much the same manner as a financial expert does when the he or she is hired as a neutral expert for a court. This usage of the NFP enables the mediator to guide the NFP in meeting with the parties and discussing the information. It will also help prevent either side from feeling that the NFP is working more for one side or the other.

IV. THE MATRIX

The Team Mediation model strives to create a new place for mediation. Traditional mediation is likely the most used ADR method in the United States.⁹⁴ Traditional mediation is able to settle a fairly high percentage of cases, but is not always able to obtain the optimal results.⁹⁵ An optimal result is one that balances the desired monetary outcome and the level of satisfaction. While many attorneys might equate a high dollar settlement with a

⁹² AICPA, http://www.aicpa.org/about/code/et_102.html (last visited Sept. 29, 2006). Rule 102 provides, "Integrity and objectivity. In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others." *Id.*

⁹³ AICPA Ethics Rulings 101.202 and 101.203 explain:

Question – Would the performance of expert witness services be considered as acting as an advocate for a client as discussed in interpretation 102-6? Answer – No. A member serving as an expert witness does not serve as an advocate but as someone with specialized knowledge, training, and experience in a particular area who should arrive at the present position objectively.

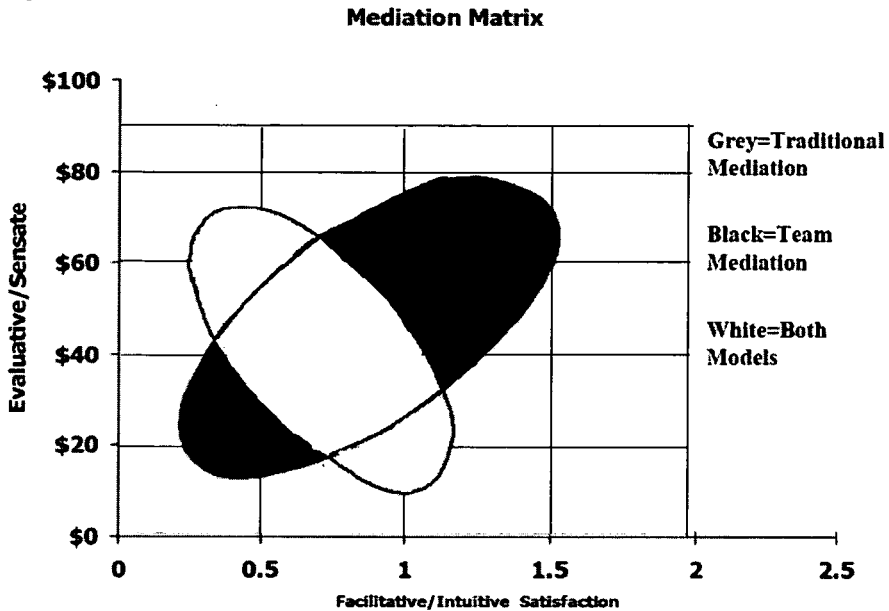
AICPA, http://www.aicpa.org/about/code/et_102.html (last visited Sept. 29, 2006).

⁹⁴ See U.S. Department of Transportation, <http://www.doctr.ost.dot.gov/asp/adr.asp>. According to the United States Department of Transportation, mediation has proven to be the type of ADR that is most successful in workplace disputes and is less time-consuming and less expensive than the more formal EEO complaint process. *Id.* See also, Jeffery M. Senger, *United States Attorney Bulletin Evaluation of ADR in United States Attorney Cases* (Nov. 2000), available at <http://www.usdoj.gov/odri/article3.pdf>; Henry G. Stewart, *Mandatory Mediation Under Collective Bargaining Agreements* (A.B.A. 1999), available at <http://www.bnabooks.com/ababna/adr/99/adr04.pdf>.

⁹⁵ McDermott and Obar, *supra* note 78. McDermott's conclusions indicate that the style of the mediator impacts the monetary result and the satisfaction of the charging party. *Id.* at 97. Facilitative mediators produced greater satisfaction and evaluative mediators produced higher settlements for the charging party. *Id.* at 98, 101.

high level of satisfaction that is not always the case for disputants. Figure 2 depicts the Mediation Matrix.

Figure 2



Traditional mediation creates an oval shaped continuum between the following two axes. The horizontal axis measures the level of satisfaction that disputants obtain. The vertical axis measures the level of monetary result that the disputants obtain. The area depicted by the grey oval shows the potential ranges for traditional mediation settlements. The black oval depicts the Team Mediation potential settlements. The overlap between the two models shows the success of both models.

The satisfaction axis is also consistent with the facilitative/intuitive mediation styles and the monetary axis is consistent with the evaluative/sensate mediation styles.⁹⁶ This entire chart is the mediation matrix, which repre-

⁹⁶ Research needs to be conducted to consider our hypothesis that the facilitative mediation style is analogous to the intuitive measures from the Myer-Briggs measures and the sensate style as being analogous to the evaluative mediation style. Some commentators agree that intuition is important to being a good mediator. See, e.g., James MacPherson, *Delivering the Promise America's Most Suc-*

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

sents both models of mediation and the realm of potential settlements. No mediator style guarantees a particular location on the matrix, but instead only increases the potential placement on the matrix. The addition of factors from the parties also influences where the settlement will be rated on the matrix. The key point of the matrix however is that the differing styles influence the result and the mediation model can influence the ultimate placement on the matrix. The Team Mediation model is able to add the missing components that were evident in the debate between facilitative and evaluative mediation styles. In the Team Mediation model an evaluative mediator is tempered by the influence of a mediation coach. This adds an entirely new dynamic to mediation. The hope is that a mental health mediation coach will lean towards the facilitative side of the matrix, which will influence the evaluative style of an attorney/mediator. The other team members, if needed or desired by the parties, can help improve the placement of the settlement on the matrix. The ideal placement on the matrix is a 45 degree placement balanced between the two axes so that the monetary result is balanced by the disputants' satisfaction levels.

This is the placement favored by the Team Mediation model. Such placement on the matrix allows the parties a balance in the mediation result through the use of more team members. Such team members may or may not add to the costs of team mediation as compared to traditional mediation. There should be an added improvement of the chance of success in obtaining a settlement as all of the components necessary to settle the case are in the model. This would justify any additional costs. However, the increase in the expertise of the team by having more than one profession involved allows for a more efficient use of time. A mental health professional mediation coach is going to be much more efficient at helping a party put aside emotional issues than a traditional attorney/mediator. Additionally, an attorney/mediator is going to be able to grasp the legal issues more efficiently than a traditional mental health/mediator. When this occurs, the costs of Team Mediation could be lower in cases where the team is able to function more efficiently than in the traditional mediation model.

cessful Mediators, ACRolution (Winter 2005), available at
<http://www.mediationnetwork.net/articles/MacPersonArticle.pdf>.

V. APPENDIX – DOCUMENTATION

A. Voluntary Team Mediation Agreement:

VOLUNTARY TEAM MEDIATION AGREEMENT

In the Matter of the Dispute Between the Following Parties:

CLAIMANT

v.

RESPONDENT

This agreement is voluntarily entered into by and between the undersigned parties and their counsel for purposes of achieving final resolution.

The parties have designated [mediator] to serve as the impartial third party to facilitate mediation of this dispute as Mediator. The [mediation coach] is designated to serve as plaintiff's mediation coach.

For the purposes of this team mediation, the undersigned further agree to the following terms:

1. **TIME AND PLACE:** The team mediation will begin on _____ at o'clock ___M., at the office of_____. The mediator shall have the authority, with the parties' permission, to adjourn the mediation and schedule additional sessions as needed to facilitate the resolution of this dispute.
2. **JURISDICTION:** The team mediation proceedings shall be governed by this agreement and the enforcement of any settlement shall be governed by the laws of the State of _____.
3. **NORMS OF TEAM MEDIATION:** The team mediation shall be conducted in accordance with the (norms of team mediation), which the undersigned parties have received and read and which are incorporated into this agreement by reference and which the undersigned parties agree to follow.

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

All parties recognize that team mediation is voluntary settlement negotiation. The mediator will conduct brief private conferences (“caucuses”) with each of the parties following a joint session attended by the mediation coaches and all participants in the team mediation.

4. **MEDIATOR’S ROLE:** The mediator is to serve as an impartial third party in assisting the parties toward settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement. The mediator will not render any final decision on the merits of the dispute.
5. **MEDIATION COACHES’ ROLE:** The mediation coach is to serve as a coach and counselor in assisting one of the parties for emotional related issues toward settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.
6. **NEUTRAL EXPERT’S ROLE:** The neutral experts are to serve as impartial third parties in assisting the parties toward settlement in their area of expertise. Such advice must be neutral and may not compel or coerce the parties to enter into a settlement agreement. Neutral experts will not render any final decision on the merits of the dispute. The neutral experts will only be hired as agreed by the parties.
7. **FEES:** Mediation fees for [mediator] will be charged at the rate of ___per hour, with a minimum charge of two hours, plus an administrative fee of ___. (There will be an additional \$50 administrative fee for each party over two.) The mediation coach and any other professionals will bill for their services independently.
8. **CANCELLATION POLICY:** In the event of a cancellation, the administrative fee will be billed and paid by the canceling party. If the parties do not agree on the identity of the canceling party, the cancellation fee will be billed and paid, pro rata, by all of the parties. The only exception to the cancellation policy would be a case that cancels and reschedules at the time of cancellation, but only if the cancellation occurs before seven working days of the scheduled mediation.
9. The parties agree to apportion fees as follows: _____ Fees will be divided equally between _____, unless otherwise determined at mediation.

10. **COOPERATION:** The parties agree to cooperate with each other and with the mediator and mediation coaches in a good faith effort to negotiate a prompt and reasonable resolution of this dispute. The parties further agree to permit the opposing parties and/or their counsel to make a full presentation of their position to the mediator and mediation coaches without unnecessary interruptions or objections.

11. **CONSULTING WITH ATTORNEYS:** The parties agree to obtain legal advice on any issue of interest to them from their own attorney and not to rely upon the mediator or mediation coach for such advice. All parties are encouraged to consult with their attorneys before and during the team mediation and before finalizing a settlement.

12. **PRIVACY AND CONFIDENTIALITY:** The participants agree that the team mediation proceedings are settlement negotiations and agree that all such settlement discussions shall be inadmissible in the court of law. The parties agree to maintain the confidentiality of the team mediation with regard to all oral and written communications made or used in connection with the dispute resolution process. Furthermore, unless agreed otherwise by the parties in writing, the mediator, mediation coach and neutral experts shall be bound to the confidentiality of all matters made known to them, as well as to any notes or writings prepared by them. The mediator, mediation coach and the neutral experts shall maintain the privacy of the team mediation. The parties agree that any mediation coach or firm retained by either party, or attorney, who assists in the mediation before, during or after the mediation, is forever disqualified from appearing as a witness (whether expert or otherwise) for either party to testify as to any matter related to such person's or firm's work product, notes, counseling or other assistance in the team mediation. All notes, work papers, summaries and reports shall be inadmissible as evidence in any proceeding involving these parties. Such mediation coaches shall be exempt from discovery or subpoena.

13. **TEAM MEDIATION MATTER:** Both parties and attorneys agree to treat this matter as a team mediation matter. Each party and each attorney acknowledges that he or she has been counseled on the principles of team mediation and agrees to act in good faith regarding the use of the mediation coach and the neutral experts.

14. **NEUTRAL EXPERTS:** The parties may also agree and designate neutral experts for purposes of the team mediation. Such neutral experts are forever disqualified from appearing as a witness (whether expert or other-

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

wise) for either party to testify as to any matter related to such person's or firm's work product, notes, counseling or other assistance in the team mediation. Such experts may include, but are not limited to: financial experts, CPAs, structured settlement experts, economist, therapists, personal or real property valuation experts, vocational consultants, private investigators, doctors, mental health professionals or any other persons retained or employed as neutrals in the team mediation process. These experts shall be exempt from discovery or subpoena.

15. **HOLD HARMLESS:** The parties understand that the mediator and the mediation coach are not legal advisors and are not to provide legal advice to any party involved in mediation. The parties agree to hold the mediator and mediation coach harmless for any observations, suggestions or indications that they may make in the course of mediation. In the event any party to this agreement makes any effort to attempt to compel the mediator, mediation coach, or neutral expert's testimony, to divulge any information or to produce any documents relating to the mediation, such party agrees to pay all attorneys fees and expenses of the mediator, mediation coach or neutral expert in resisting such efforts.

16. **WRITTEN SETTLEMENT AGREEMENT:** Each participant is advised that, if an agreement is reached as a result of this mediation and the mediator assists in the preparation of a written settlement agreement, each participant has the right to independently review the settlement agreement with their own counsel before executing the same.

AGREED TO and EXECUTED this _____ day of _____, 2006.

BY:

BY:

BY:

BY:

BY:

BY:

B. Norms of Team Mediation

NORMS FOR TEAM MEDIATION

1. **DEFINITION OF TEAM MEDIATION:** Team Mediation is a process under which an impartial person, the Mediator, facilitates communication between the parties to promote reconciliation, settlement or understanding among them. The mediator may suggest ways of resolving the dispute. The mediator is assisted by a mediation coach who will assist the plaintiff through counseling (but not therapy), so the plaintiff will be able to participate without any emotional impediments to settlement. Other parties may also have a mediation coach if needed. Additionally, other professionals may serve as neutral experts to assist the parties in evaluating information which may be helpful to settlement.
2. **CONDITIONS PRECEDENT TO SERVING AS MEDIATOR, MEDIATION COACH AND/OR NEUTRAL EXPERT:** The mediator, mediation coach and/or neutral expert shall not participate in the resolution of any dispute in which he/she has any financial or personal interest. Prior to accepting an appointment, the mediator, mediation coach and/or neutral expert shall disclose any circumstances likely to create a presumption of bias or prevent a prompt resolution between the parties.
3. **AUTHORITY OF MEDIATOR:** The mediator does not have the authority to decide any issues for the parties, but will attempt to facilitate the voluntary resolution of the dispute by the parties. The mediator is authorized to conduct joint and separate meetings with the parties and to offer suggestions and evaluations to assist the parties to achieve settlement. If necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice may be made by the mediator or the parties through the use of neutral experts.
4. **PARTIES RESPONSIBLE FOR NEGOTIATING THEIR OWN SETTLEMENT:** The parties understand that the mediator and other team members will not and cannot impose a settlement in their case. The mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the parties. The mediator does not warrant or represent that settlement will result from the team mediation process.

[Vol. 7: 1, 2007]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

5. **AUTHORITY OF REPRESENTATIVES:** Party representatives must have authority to settle and all persons necessary to the decision to settle shall be present or shall be immediately accessible by phone. In the latter event, party representatives should have access by phone to those who will, in all probability, rely on the recommendation of the representative present at the team mediation. The names and addresses of such persons shall be communicated in writing to the mediator.
6. **TIME AND PLACE OF TEAM MEDIATION:** The mediator shall fix the time of each team mediation session. The team mediation shall be held at any location agreeable to the mediator and the parties, as the mediator shall determine.
7. **IDENTIFICATION OF MATTERS IN DISPUTE:** At or before the first session, the parties have the right to send a "Confidential Position Statement," to the mediator, which shall be typewritten, letter form and no more than four (4) pages, discussing the factual and legal issues and any other matters influencing settlement.
8. **PRIVACY:** Team mediation sessions are private. The parties and their representatives may attend team mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator and mediation coach.
9. **CONFIDENTIALITY:** Confidential information disclosed to a mediator by the parties or by witnesses in the course of the team mediation shall not be divulged by the mediator. All records, reports or other documents received by a mediator and mediation coach while serving in the capacity as a mediator or mediation coach shall be confidential. The mediator and mediation coach shall not be compelled to divulge such records or to testify in regards to the team mediation in any adversary proceeding or judicial forum. Any party that violates this agreement shall pay all fees and expenses to the mediator, mediation coach, neutral expert and other parties, including reasonable attorneys' fees, incurred in opposing the efforts to compel testimony or records from the mediator mediation coach or neutral expert.
10. **NO STENOGRAPHIC RECORD:** There shall be no stenographic record of the team mediation process and no person shall tape-record any portion of the team mediation session.

11. **NO SERVICE OF PROCESS AT OR NEAR THE SITE OF THE TEAM MEDIATION SESSION:** No subpoenas, summons, complaints, citations, writs or other process may be served upon any person at or near the site of any team mediation session upon any person entering, attending or leaving the session.

12. **TERMINATION OF TEAM MEDIATION:** The team mediation shall be terminated: (a) by the execution of a settlement by the parties; (b) by declaration of the mediator to the effect that further efforts at team mediation are no longer worthwhile; or (c) after the completion of one full team mediation session, by a written declaration of a party or parties, to the effect that the team mediation proceedings are terminated.

13. **CONTINUATION OF THE TEAM MEDIATION:** If the case does not settle in team mediation, the mediator and mediation coach will, with the permission of the parties, follow-up on the status of the case until he or she feels that further efforts are no longer available.

14. **INTERPRETATION AND APPLICATION OF RULES:** The mediator, mediation coach and neutral experts shall interpret and apply these rules.

15. **FEES AND EXPENSES:** The mediator's fee, mediation coach's fee and neutral expert's fee shall be agreed upon prior to team mediation and shall be paid upon completion of the team mediation. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the team mediation, including fees and expenses of the mediator, mediation coach, and the expenses of any, neutral witnesses, any witnesses and the cost of any proofs or expert advice produced at the direct request of the parties and mediator, shall be borne equally by the parties unless they agree otherwise.