

*[EXCERPTED AND EDITED FROM...]*

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**A PLURALISTIC APPROACH TO MEDIATION ETHICS:  
DELIVERING ON MEDIATION'S DIFFERENT PROMISES**

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I. INTRODUCTION

Over the last two decades, it has become well accepted that the mediation process does not follow a single, uniform approach. Although that may once have been the case, the mediation field today is composed of practitioners following recognizably different approaches to practice—with different views of the goals, appropriate methods, and underlying assumptions of the practice of mediation.<sup>1</sup> Two widely used and discussed approaches or models of mediation are known as the “facilitative” and “transformative” models.<sup>2</sup> While some have claimed that talented mediators can (and should) combine the two in serving their clients; others have argued that combining these approaches is practically difficult if not impossible, as well as conceptually incoherent.<sup>3</sup> That is, the two models operate on such different foundations, and with such divergent methods, that no mediator can competently “integrate” the two or switch from one to the other as circumstances require. Rather, principled mediators must, and do, choose an approach to practice, either facilitative or transformative, and then offer their clients the very best enactment of that model that their training and experience allows. Alternatively, whether or not they do this consciously and intentionally, the vast majority of mediators gravitate to one or the other of these models in actual practice. In effect, most mediators can fairly be described as

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<sup>1</sup> ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT*, 99–101 (2d ed. 2005); JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 140 (2001); Grace D’Alo, *Accountability in Special Education Mediation*, 8 HARV. NEG. L. REV. 201, 205 (2003).

<sup>2</sup> See ALFINI ET AL., *supra* note 1, at 169; ELLEN WALDMAN, *MEDIATION ETHICS: CASES AND COMMENTARIES* 19–25 (2011); Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965, 981–84 (2004). Other recognized models include “evaluative mediation” and “narrative mediation.” See ALFINI ET AL., *supra* note 1; WALDMAN, *supra* note 2. This Article does not address those models.

<sup>3</sup> See BUSH & FOLGER, *supra* note 1, at 228–32. See also Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. J. 39, 59–60 (2002).

following the facilitative or the transformative model—one or the other, but not really a combination of both.<sup>4</sup>

If this is so, a problem is posed for the regulation of mediators through codes or standards of ethics—one of the major tools of professional regulation. The problem is that any single or unitary code of practice is unlikely to be capable of coherently regulating the conduct of both facilitative and transformative mediators. If a single code attempts to do so, it is likely to fall prey to one or the other of two fatal mistakes: either it will wind up being “exclusive,” adopting provisions that make sense as regulatory principles for only one of the two models of mediation;<sup>5</sup> or it will end up being overly “inclusive,” adopting provisions of a general and malleable character in order to “reach” both models.<sup>6</sup> The first error results in favoring one model of practice and delegitimizing the other; the second error results in a code under which almost any practice can be justified, which is thus of little value for either regulation or ethical guidance.

The best solution to this problem in ethical regulation is to recognize the pluralistic character of mediation practice and to respond with a pluralistic approach to ethical regulation.<sup>7</sup> That is, mediators following different models of practice should be governed by different ethics codes designed to hold them accountable to the principles of their specific mode of practice. In this way mediator ethics regulation would follow a pluralistic approach that requires mediators to “declare” their model of practice, and then be held accountable to standards designed specifically for that model. The benefit of this approach is that mediators will receive clear and coherent guidance in resolving difficult dilemmas faced in practice, and clients will receive services that conform to their expectations and deliver high quality and consistent professional help.

This argument for a pluralistic approach to mediator ethics is explored, in this Article, in the context of a hypothetical case involving a classic dilemma faced by mediators in practice. The specifics of this hypothetical will allow for the examination of how two different codes of ethics, both currently used in the field, would advise a mediator to handle the dilemma presented.

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<sup>4</sup> Susan Oberman, *Book Review: Mediation Ethics Edited Ellen Waldman*, in ACRESOLUTION 24, 24 (Fall 2012). *See also* Della Noce et al., *supra* note 3. *But see, e.g.*, Michael Williams, *Can't I Get No Satisfaction? Thoughts on "The Promise of Mediation,"* 15 MEDIATION Q. 143 (1997) (arguing that good mediation can and should include both facilitative and transformative practices).

<sup>5</sup> *See infra* notes 101–36 and accompanying text.

<sup>6</sup> *See infra* notes 137–75 and accompanying text.

<sup>7</sup> *See infra* notes 176–217 and accompanying text.

That examination will show that neither code alone is sufficient to guide and regulate both facilitative and transformative mediators. After this analysis, the Article examines several other ethical codes to show that this problem is common and then proposes a solution that would address the problem by enacting a pluralistic framework for mediator ethics.

### III. MEDIATION MODELS AND MEDIATION CODES

The mediation field is not short on ethical codes. On the contrary, codes or standards of conduct have been promulgated for many years by different agencies, including state court systems, professional associations, and even private mediation providers.<sup>8</sup> These codes purport to offer guidance to mediators in situations just like the one faced in the case of Jose and Lilly. At the same time, they can be seen as regulating the behavior of mediators, so that clients like Jose and Lilly receive appropriate professional services.<sup>9</sup> Whether regarded as guidance for mediators or consumer quality control for clients, ethical codes are an important presence in the field. However, these well-intentioned policy statements often create—rather than resolve—dilemmas for the mediators they are intended to guide and regulate. The reason for this is simple: the codes are drafted without recognition of the pluralistic character of mediation practice today. They effectively cast all mediators in a single mold, whereas in practice the mediators being addressed are not practicing a single monolithic process called mediation.<sup>10</sup> They are practicing two significantly different processes called facilitative mediation and transformative mediation. At this point, a short summary of these two models is needed to establish that they are indeed different and distinct in both aim and in method.

#### *A. The Facilitative (Protective/Directive) Approach*

In the facilitative approach, mediation is seen as a process aimed at reaching fair and creative resolutions of specific problems faced by parties in conflict. To achieve that goal, the

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<sup>8</sup> See Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 388 (2006) (providing a comprehensive review of different mediation ethics codes).

<sup>9</sup> See SHAPIRA, *supra* note 11, at ch. 2.

<sup>10</sup> See Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997); see *infra* text accompanying notes 187–90.

mediator leads the parties through a sequence of stages: opening the session, setting ground rules, gathering information, defining issues, exploring options, generating movement by forceful persuasion, and achieving agreement.<sup>11</sup> While the description of stages in the literature differs from text to text, the commonalities are very clear. What is also clear is the principle that the mediator controls and directs the process at every stage and that effective mediation requires the exercise of such mediator control to keep the process moving toward agreement and to protect against unfairness.<sup>12</sup> From this fundamental principle of mediator control of the process, specific mediator practices follow, many of which involve limiting or overruling party self-determination in order to ensure a fair or just outcome.

Some of the practices recommended and documented in mediation literature include encouraging or steering the parties, especially through probing and pointed questions, to consider the fairness/justice dimensions of issues being discussed or solutions being proposed;<sup>13</sup> advising parties who lack relevant information, regarding legal rights or otherwise, to obtain that information before reaching any agreement (and even providing them with information within the mediator's knowledge);<sup>14</sup> openly discussing the importance of (and asking parties to commit to) achieving just outcomes, in mediators' opening statements on the aims of the process;<sup>15</sup> and directly suggesting or supporting specific proposals aimed at creating a fair outcome.<sup>16</sup> In general, it is a common view that "[w]hen disparities in power or knowledge disable a weaker

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<sup>11</sup> This approach is known as "facilitative mediation." On the view of problem-solving as the goal of facilitative mediation, see Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217, 225–27 (1995); LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 180–86 (2005). On the view that the process involves a series of stages, see ALFINI ET AL., *supra* note 1, at 107–40 (2006); Bush, *supra* note 2, at 969–71 (both offering a good summary of the stages followed in facilitative mediation).

<sup>12</sup> See Bush, *supra* note 2, at 969–71; Stulberg, *supra* note 15 (presenting a good description of the classical view of how the mediator controls the process); see also Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 470–74 (D.M. Kolb & Associates, eds., 1994) (summarizing what they call the "settlement-oriented" mediator's strategies for controlling the process, based on their close qualitative study of several mediators at work). This practice of mediator process control, despite the importance placed on party self-determination in mediation theory, is often explained with the conventional wisdom that "the parties control the outcome, but the mediator controls the process." *Id.*

<sup>13</sup> See, e.g., James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Ruminant on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 84–85 (2004); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 180–82 (2002).

<sup>14</sup> See, e.g., Hyman & Love, *supra* note 24, at 85–86; Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U.L.Q. 47, 92–96 (1996); Waldman, *supra* note 21, at 732–42 (1997).

<sup>15</sup> See, e.g., Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87, 91–91 (2004).

<sup>16</sup> See, e.g., Waldman, *supra* note 21, at 742–56; Kolb & Kressel, *supra* note 23, at 471–74.

party from effective bargaining the mediator must intervene to avoid a patently unfair agreement . . . .”<sup>17</sup> To do so, many recognized mediation experts recommend that the mediator affirmatively engage in “power-balancing”—a practice directly aimed at “minimizing the negative effects of unequal power.”<sup>18</sup>

While there are many other practices used by facilitative mediators aimed at moving the parties toward agreement on the issues that separate them,<sup>19</sup> the methods mentioned here illustrate the primacy placed on the mediator’s role in protecting against unfairness in the process or outcome. All these practices stem from the view that the facilitative mediator is expected to

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<sup>17</sup> Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 521 (1991); see also Nolan-Haley, *supra* note 25; Coben, *supra* note 24, at 83–87.

<sup>18</sup> The facilitative mediator’s job of power-balancing is recognized as a key part of his or her work by many authoritative sources. For example, Christopher Moore, author of one of the basic and widely used texts on mediation practice, includes the following advice regarding power-balancing: “Mediators can work with both weaker and stronger parties to minimize the negative effects of unequal power . . . .” CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 391–93 (3d ed. 2003) (quoting in part James A. Wall Jr., *Mediation: An Analysis Review and Proposed Research*, 25 J. CONFLICT RESOL. 157, 164 (1981)). Moore believes that the mediator has substantial tools at his or her disposal that can effectively protect weaker parties from the effects of unequal power in the mediation, and thus prevent unjust outcomes. According to Moore and others, the mediator is expected to use these tools to do just that. John Haynes, another widely recognized authority and one of the founders of divorce mediation, goes even further in his endorsement of power-balancing and his claim that it is effective in preventing unjust outcomes: “Power balancing is important because . . . differential power or resources is likely to result in an unequal distribution . . . . When the power balance interferes with the couple’s ability to negotiate a fair agreement, I believe the mediator has a responsibility to correct that imbalance.” John Haynes, *Power Balancing*, in *DIVORCE MEDIATION* 277, 280–81 (J. Folberg & Ann Milne eds., 1988) (quoting in part JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 79 (1975)). Haynes goes on to explain that there are multiple strategies by which the mediator can “correct” the power imbalance, including “controlling the communication” between the parties. . . . [T]he mediator intervenes to take charge of the way the couple communicate and reorganizes it to disempower the overly powerful spouse and empower the powerless spouse.” *Id.* at 289–90. It is very clear that these well-respected mediation experts regard power-balancing as a key responsibility of the facilitative mediator, that they identify practical strategies to discharge this responsibility, and that they believe that the mediator’s power-balancing can effectively protect weaker parties from stronger ones who could otherwise take advantage of their power to gain unjust and unfair agreements.

<sup>19</sup> These practices include both *managing the parties’ communication* and *problem-solving*. See Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of the Partnership*, 19 CLINICAL L. REV. 429, 436–39 (2012–2013) (summarizing the practices described below in this footnote and citing sources documenting them). Both involve measures that intrude on party self-determination. *Managing communication* goes on throughout a session, to avoid the disorganized and unproductive exchange the parties are likely to have if communication is not structured and controlled. Key practices include: *structuring the session* (the mediator organizes and structures the entire session, including when to move from one stage to the next); *controlling the flow of information* (mediators firmly control the flow of information—they direct turn-taking, prevent party interruptions, and ask “probing questions” to elicit more information); and *controlling and filtering negative expression* (mediators filter the subjects discussed and modes of expression used and control parties when they get emotional or hostile; they “reframe” party statements into non-antagonistic language; and they limit discussions of the past to keep parties “focused on the future”). The practices of *problem solving* are also central to the mediator’s work, with the mediator serving, in effect, as the lead problem solver. Several practices are central: *identifying underlying “needs and interests”* (mediators translate parties’ demands into “needs and interests,” probing for the interest that underlies a demand, and leading the parties into an integrative or interest-based bargaining process); *devising creative solutions that meet all sides’ needs* (mediators act, themselves, as skilled integrative bargainers and identify solutions that will “solve the problem” faced by the parties); and *persuading the parties to accept the solution and reach agreement* (mediators use a variety of techniques for “closing the deal,” using persuasion on one or both parties, including “devil’s advocacy” and “reality testing”).

monitor for and ensure that mediated agreements meet standards of substantive fairness, even if this involves overriding or limiting party self-determination.<sup>20</sup>

### *B. The Transformative (Supportive/Nondirective) Approach*

By contrast, the most fundamental principle of the transformative approach is that the mediator's job is "to support and never supplant party deliberation and decision-making," on every matter whether regarding process or outcome.<sup>21</sup> Thus, mediators following this approach do not control or direct the process, do not use interventions that intentionally steer the discussion, and do not substitute their judgment for the parties' on any matter of process, substance, or communication. In short, the process is not mediator-driven, but *party-driven*. What mediators do, instead of directing the process themselves, is to *support the parties' own process* of presenting their views, thinking about what is being said, and making their own decisions on how to understand the situation, their options, and each other—and ultimately on what, if anything, they want to do about all of these things.

Thus the essential work of the transformative mediator is to *support the parties' choices*, rather than to direct them in any way, and to do so without judging the fairness or justice of the process or outcome the parties choose.<sup>22</sup> This means becoming a participant in, but *not* the controller of, the conversation. The mediator's role is supportive but non-directive participation.

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<sup>20</sup> According to some knowledgeable observers, a minority of facilitative mediators is gradually moving away from directive practices that prioritize substantive fairness over party self-determination. See Email from Peter Miller to author (Aug. 26, 2018) (on file with author). Miller, who is very active in the practitioner community in New York, reports examples of this move by both mediators and mediation trainers with whom he personally works. He also notes, which is certainly true, that Professor Joseph Stulberg, one of the foremost authorities on facilitative mediation, has long supported the primacy of party self-determination. Indeed, Stulberg's work was one of the main sources for Bush's account of self-determination as the guiding value of mediation. See Bush, *supra* note 10; see also *supra* note 15 and accompanying text. Nevertheless, the majority of commentary and research on facilitative mediation supports the account of the text that this approach places highest priority on achieving agreements that are substantively fair.

<sup>21</sup> Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation: Theoretical Foundations*, in TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS [hereinafter SOURCEBOOK] 15, 25 (Joseph P. Folger et al., eds., 2010).

<sup>22</sup> See Robert A. Bush & Joseph P. Folger, *Transformative Mediation: Core Practices*, in SOURCEBOOK, *supra* note 32, at 31, 31–50 (discussing specific practices that support party deliberation and decisionmaking without controlling it); see also Bush, *supra* note 30, at 439–45 and accompanying notes (providing an expanded account of the practices summarized in the text here). The reason for employing supportive rather than directive practices is that the aim of the process is *party empowerment and interparty recognition*—and thus positive interactional change—rather than resolution or even a just resolution; and interactional change is most likely achieved through mediator support rather than mediator direction. See Robert A. Baruch Bush, *Staying in Orbit or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N.D.L. REV. 705, 747–48 (2008). Although, even considering justice as a goal, it has been persuasively argued that steady support for party choice is itself the best guarantee of justice and fairness. See Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213 (2005).

The mediator's job is to support party decisionmaking but never supplant it, whether to ensure fairness or for any other reason. Specific practices flow from these principles, which respect and facilitate party self-determination even if doing so may allow risks of unfairness in the process or outcome.

First of all, mediators in this model *let go of control* of the session and its outcome, rather than holding onto it firmly. From the very opening of the session, parties can interrupt each other (and the mediator), change topics, return to subjects discussed earlier, and so forth. The mediator supports this freedom of choice, and refrains from “organizing” the discussion and thereby exercising influence over the process or outcome.<sup>23</sup> Meanwhile, the mediator listens attentively but “without an agenda”—i.e., without thinking about how to “use” what is being said, for example, to plan toward a solution or to “balance power.”<sup>24</sup>

At the same time, the mediator uses a variety of methods to “*amplify*” the parties’ exchange. Such “amplification” places parties in control of their own discourse, rather than controlling it in any way. For example, mediators “reflect” party’s narrative comments *without* changing or filtering their content or tone. Building on the attentive listening s/he did, the mediator “mirrors” each party comment back, staying close to the party’s actual language and being careful not to filter or soften what is said.<sup>25</sup> This kind of response allows the speaking party to hear and consider her own thoughts, and thus to define more deliberately *for herself* what she wants to say. Mediators also offer verbal “outlines” of segments of the conversation, listing but

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<sup>23</sup> The skill of letting go of process control involves many different specifics; one specific aspect of the skill is to avoid “we” talk by the mediator, which implies the mediator holds the same status as the parties in making choices. Instead, mediators learn to use the “you” form of address to convey respect for the parties’ authority over the conversation. See Della Noce et al., *Signposts and Crossroads: A Model for Live Action Mediator Assessment*, 23 OHIO ST. J. DISP. RESOL. 197, 212–15 (2008)

<sup>24</sup> In one training manual, the skill is explained by an analogy to “listening like a cow”:

Pay attention . . . Just be there. Don’t be thinking about a solution, or how you should fix it. Just listen hard and try to be present. It’s very bad business to invite heartfelt speech and then not listen . . . [This] is a theory of attention that depends little on therapeutic skills and formal training: listening like a cow. Those of you who grew up in the country know that cows are good listeners . . . This is a great antidote to the critical listening that goes on . . . where we listen for the mistake, the flaw in the argument. Cows, by contrast, manage at least the appearance of deep, openhearted attention.

INSTITUTE FOR THE STUDY OF CONFLICT TRANSFORMATION, TRANSFORMATIVE MEDIATION: PRINCIPLES AND PRACTICE (2010) (citing MARY ROSE O’REILLY, *RADICAL PRESENCE* 27–29 (1998)).

<sup>25</sup> For concrete examples of the use of reflection and summary in mediations, see Bush & Folger, *supra* note 33, at 39–44 and see generally Robert A. Baruch Bush & Sally G. Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPPERDINE DISP. RES. L.J.67 (2002). For an extended case study illustrating all of the skills discussed here in the text, see BUSH & FOLGER, *supra* note 1, at 131–270. Note the contrast between the practice of reflection as described here, and the practice of “reframing” as used in facilitative mediation, where filtering and softening party language is a central skill. See *supra* note 30.

not editing or shaping the topics the parties have mentioned and the differences they expressed on each topic, again in whatever terms the parties choose to use.<sup>26</sup> Moreover, in both reflecting and summarizing, mediators embrace rather than suppress the “hot” parts of the conversation.<sup>27</sup> Rather than limiting or reframing negative and emotional expression, mediators allow it and then include the negative and the emotional in their reflections and summaries. All these practices allow and help parties to become more effective advocates *for themselves*, expressing their views to each other clearly and forcefully, without the mediator controlling or “power-balancing” their exchange.

Finally, when parties make choices—about what to say, or when and how to say it, or what options to consider or reject—the mediator does not question them in order to influence what is and is not chosen. In fact, the transformative approach largely avoids questioning parties at all (e.g., to probe or influence), instead using questions only to “check-in” when parties show signs of hesitation or uncertainty about some aspect of the discussion. The aim of such questions is, as with the other methods mentioned here, to increase the parties’ opportunity for self-determination and choice—but not to monitor or shape the choices being made, even in order to prevent what might be seen as injustice.

### *C. Different Models, Different Aims, Different Skills—Different Ethics?*

It should be clear from the above comparison of methods that the practices of facilitative and transformative mediation are very different. The difference is understandable, considering the very different conceptions the two models hold of the aim of mediation and the role of the mediator in the process. In relation to ethical codes, the last point is the crucial one. As discussed above, professional ethics codes begin from the conception of the professional’s role in relation to the client(s).<sup>28</sup>

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<sup>26</sup> See Bush & Folger, *supra* note 33, at 41–44 (describing and illustrating the practice of summary). In courses on transformative mediation, law students and lawyers usually find summary a more familiar skill, since it involves more of the kind of “issue-spotting” that they are trained and accustomed to do by their legal training.

<sup>27</sup> See Della Noce et al., *supra* note 34, at 213–14 (discussing this practice and the rationale for it). Once again, this skill contrasts sharply with the skills taught and practiced in facilitative mediation, as discussed above. Indeed, it has been argued that the implicit “rules” of facilitative mediation—rules that are “applied” by the mediator in controlling the process—require the suppression of expressions of blame as well as negative emotions generally. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555–75 (1991) (describing the use of rules of rationality, prospectivity, and compromise in ways that disadvantage women and minorities).

<sup>28</sup> See *supra* text accompanying notes 11–21.



In mediation, the mediator's role is . . . . This sentence cannot be completed easily because in mediation, given the pluralistic nature of practice as described above, the description of the mediator's role is not singular. Rather, the mediator's role can be defined in one or the other of two different ways: In the facilitative model, the mediator's role is "problem-solver" and guarantor of fairness, guiding the parties to a resolution that meets the needs and interests of both/all parties and avoids injustice to anyone.<sup>29</sup> In the transformative model the mediator's role is "conversation supporter," supporter of the parties' communication and decisionmaking, as they explore issues and options for resolution whose justice they alone judge and define.<sup>30</sup> These two roles point down two different paths, as the above discussion of the key practices of each model illustrates: The facilitative role points and leads the mediator into managing communication, solving problems and guarding against unfairness, all of which include many highly directive practices. The transformative role points and leads the mediator into following and amplifying the parties' conversation, using non-directive but supportive practices that enhance but never supplant the parties' own choices, even if those choices lead to what might seem to others like unjust outcomes.

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<sup>29</sup> See *supra* text accompanying notes 22–29.

<sup>30</sup> See *supra* text accompanying notes 32–38.