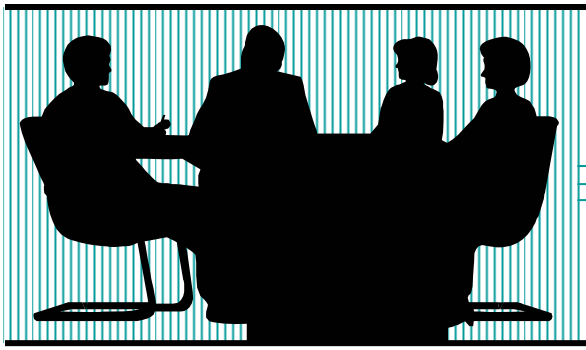

ADR NEWS

A publication of the Tennessee Alternative Dispute Resolution Commission

VOLUME 8, ISSUE 3 **SPRING 2008**

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* *We Want to Hear From You!* *

The ADR Commission wants to hear from Rule 31 mediators. Are you appointed by the court as a special master? If you are, what types of matters do you hear and how often are you appointed? Please provide your responses to Programs Manager Andrea Ayers at **andrea.ayers@tncourts.gov**.

Your responses will be greatly appreciated.

The Who of Mediation–Part 1: A New Look at Mediator "Styles"

*by Paula M. Young**

In 1994, Len Riskin, the C.A. Leedy Professor of Law at the University of Missouri Columbia and Director of its Center for the Study of Dispute Resolution, inadvertently started a great debate about what "style" of mediation was "best." When he published the article entitled, *Mediator Orientations, Strategies and Techniques,* 12 Alternatives to the High Cost of Litigation 111 (1994), he described four styles of mediation based on how broadly the mediator defined the problem presented by the parties (and thus the depth of intervention the mediator was likely to take) and the role of the mediator—either facilitative or evaluative. According to this analytical scheme, a mediator could be: narrow/facilitative, narrow/evaluative, broad/facilitative or broad/evaluative.

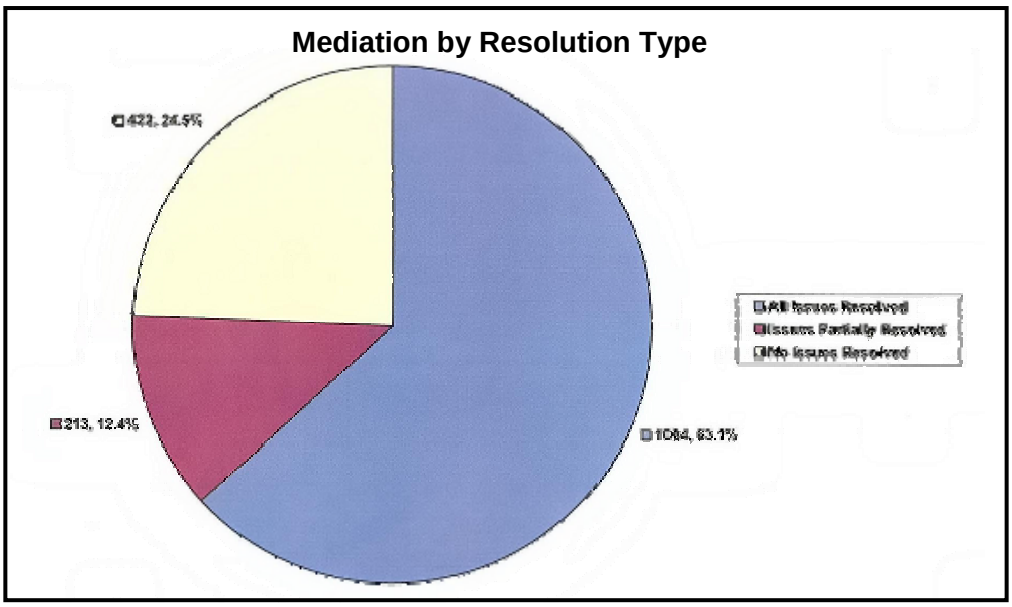
The two-dimensional grid based on this analysis supposedly predicts the strategies each type of mediator is likely to use, and, Riskin thought at the time, the amount of self-determination the parties would have in the process. *See* Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, 9 No. 2 Disp. Resol. Mag. 22 (2003). This analytical scheme came out of an invitation from a Kansas City law firm whose partners hoped its lawyers would participate more effectively in mediations by, among other things, making more skillful choices about which mediator to use. *Id.* at 22. Unexpectedly, the Riskin grid—as it quickly became known—began to polarize the mediation community. It led to the labeling of mediators.

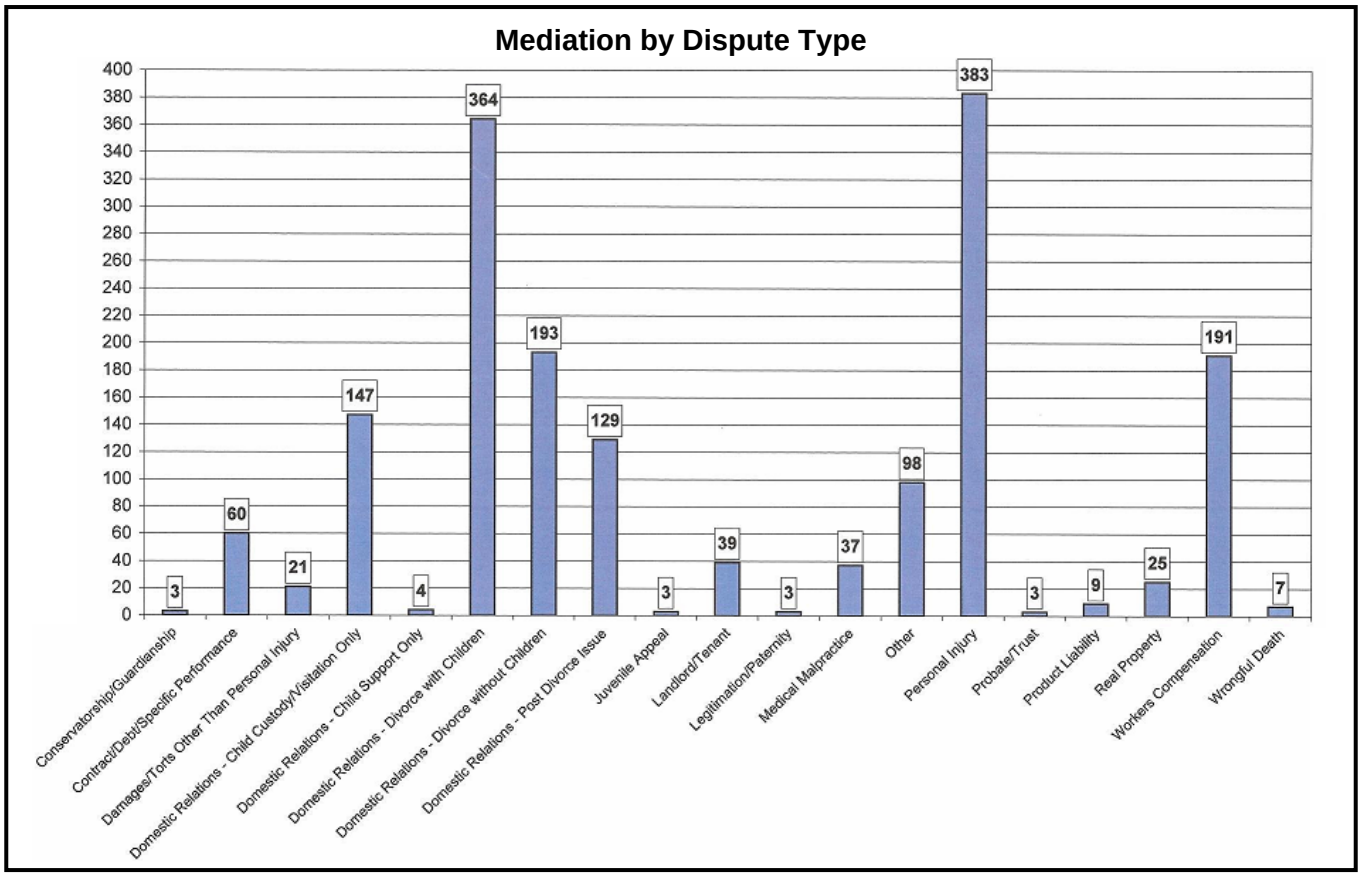
See "The Who of Mediation . . ." (Continued on pages 4–6)

Tennessee Mediation Statistics

Effective January 1, 2008, except as to matters pending in state courts outside of Tennessee and the Federal Court System, any mediation performed by a Rule 31 mediator must be reported via an on-line submission process to the ADR Commission within 15 calendar days of the date of the last mediation session. To see the complete policy that was adopted by the ADR Commission please visit http://www.tncourts.gov/geninfo/Publications/ADR/ADRPolicies.pdf.

Between January 1, 2008, and April 15, 2008, a total of 1,719 mediation reports were submitted by approximately 215 Rule 31 listed mediators. Below are some preliminary results of the data collected.





Victim-Offender Mediation: The Case for Restorative Justice

*by Joseph G. Jarret, Esq.**

Introduction. Over the last decade, the number of victim-offender mediation programs around the world has increased eightfold. According to the United States Department of Justice, more than 1200 such programs exist across America. The exponential growth in this field—and its influence on criminal justice systems—continues to result in the regular creation of new programs. As will be seen below, the State of Tennessee is no exception.

The Tennessee Model. Codified in §16-20-101, Tennessee Code (the Code) and entitled "The Victim-Offender Mediation Center," Tennessee's program recognizes that the resolution of felony, misdemeanor, and juvenile delinquent disputes can be costly and complex in a judicial setting where the parties involved are necessarily in an adversary posture and subject to formalized procedures. As such, the Tennessee General Assembly called for the establishment and use of victim-offender mediation centers to help meet the need for alternatives to the courts for the resolution of certain disputes. Like other such programs in the U.S. the Tennessee model appears to be based upon the notion of "restorative justice," a concept that has various connotations. However, for the purpose of this piece, restorative justice is best defined as an attempt to make crime victims "whole again" by building upon the concepts of mediation, restitution, and community participation. This assertion is based upon the express language of the Code which reads that the intent of the program is to "Encourage continuing community participation in the development, administration, and oversight of local programs designed to facilitate the informal resolution of disputes between and among members of the community." The Code further provides for the creation and operation of corporations formed to provide victim-offender mediation, provided such corporations are nonprofit in nature, thus precluding part of the organization's net earnings to inure to the benefit of any private shareholders or individuals. Interestingly, in the interest of professional/community diversity, the Code precludes a majority of the directors of such a corporation to consist of members of any single profession.

The Effective Mediator. In order to effectively empower victims of crime as well as assist them in having what they perceive as a worthwhile mediation experience, the mediator should take the time to understand the impact various types of crime have upon victims. This will assist the mediator in responding appropriately to crime victims as well as achieve a better understanding of what victims experience from the time a crime is committed until it has been resolved in the justice system. To quote Verna Wyatt, executive director of You Have the Power,[1] "Arrests, or even convictions, don't magically bring victims to terms with the impact of crimes committed against them." This is not to suggest, however, that mediators should become experts in "victimology" [2] but rather, that they, at a minimum, appreciate the wide range of human emotions that erupts upon suffering the indignity of becoming a victim of crime. Research by the United States Department of Justice has revealed that feelings of fear, anger, shock, disappointment, embarrassment, depression, and self-blame are prevalent in most crime victims. Consequently, although restitution is often a component of victim-offender mediation, some victims may come to the mediation table seeking something as complex as assurances that they will not suffer subsequent criminal acts against their person or property, to something as simple as an apology. The ultimate challenge for the mediator then, is to have the patience to compassionately but realistically guide the victim away from positions that seek recompense beyond that which is available to him or her, without minimizing the emotional angst that so often plagues victims of crime. Equally challenging are those cases in which the offender did not intentionally commit the crime that is the subject of the mediation. In cases where the offender was under the influence of alcohol or controlled substances, he or she may not be as contrite as one would expect or hope.

Again, such scenarios provide further challenges for the mediator.

Summary. It is essential that the mediator called upon to handle victim-offender cases remains dedicated to creating an atmosphere that is conducive to assisting both parties in expressing their feelings and perceptions of the offense, while striving to dispel any misconceptions they may have had of one another prior to sitting down at the mediation table. In so doing, the mediator is in a far better position to assist the parties in reaching an agreement that will serve to outline the steps the offender will ultimately take to repair the harm suffered by the victim as well as begin the journey towards emotional healing for all.

[1] You Have the Power was founded by Tennessee First Lady Andrea Conte in 1993 and is designed to raise awareness about crime and justice issues as well as prevent violent crime and reduce victimization.

[2] "Victimology" has been most commonly defined as the study of the physical, emotional, and financial trauma that people suffer as a result of criminal activity.

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The Who of Mediation–Part 1: A New Look at Mediator "Styles"

*by Paula M. Young** *(Continued from page 1)*

On the problem definition dimension of the original grid, a mediator who defined the problem narrowly would consider and help the parties resolve only the litigation-related issues. If the mediator defined the problem increasingly more broadly, he or she might next consider business interests, then personal, professional or relationship interests, and finally community interests involved in the dispute.

The other dimension of the grid focused on the role of the mediator and identified two roles or styles of mediation: evaluative and facilitative. One can look at these two styles from several perspectives: their focus, goals, processes used, and outcome orientation. According to several authors, facilitative mediation—the style of mediation most frequently taught to new mediators—focuses on providing the parties consensus building process-skills. Mediators using this style assume that the parties are intelligent and capable and that they understand better than any mediator ever could the dispute and possible resolutions of it. Mediators using this style intend to enhance the participation of all parties involved in the mediation, generate party-to-party discussions, and reopen and improve channels of communication. They also use techniques designed to identify each party's interest and needs underlying their hardened positions, help the parties evaluate unreasonable expectations, and help the parties identify solutions to the dispute through brainstorming and option generation techniques. Facilitative mediators generally show a preference for joint sessions rather than caucus and reserve caucus for times when the parties can not talk to each other face-to-face. The mediator remains responsible for the process, but not for the outcome.

Evaluative mediators are often defined as focusing on the substance of the dispute. They assume the parties need more help in assessing or predicting litigation outcomes and formulating solutions to the dispute. The techniques of evaluative mediators often include review of the underlying legal documents, assessment of the law or facts underlying the dispute, and active participation in the resolution of the dispute through case evaluation, the prediction of outcomes at trial, or other substance-oriented assistance. Often, these mediators use more caucuses, in which the mediator attempts to convince the parties to accept a recommended solution. They often apply pressure to settle. They typically control the expression of emotion as not being helpful or as actually hindering the process. The style looks a lot like shuttle diplomacy and makes the mediator more responsible for correctly translating for the other party the verbal, non-verbal, emotional, and psychological communication of the other side expressed during caucus. These mediators see themselves as "dealmakers" willingly deciding what is best or "fair" for the parties. One author suggests that most evaluative mediators are lawyers or retired judges who tend to "revert to their default adversarial mode, analyzing the legal merits of the case to move towards settlement." He suggests this "legalized" style is more akin to early neutral evaluation or non-binding arbitration. Douglas Noll, *Peacemaking: Practicing at the Intersection of Law and Human Conflict* 91-92 (Cascadia 2003).

Even these short descriptions show how quickly this debate becomes one of stereotypes. Less skillful mediators, some argued, used the more heavy-handed evaluative style. On the other hand, only touchy-feely people wearing Birkenstocks were truly facilitative. For a more comprehensive discussion of these styles see Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 Harv. L. Rev. 7 (1996); Kimberlee Kovach & Lela Love, *"Evaluative" Mediation is an Oxymoron*, 14 Alternatives to High Cost of Litigation 31 (1996). Noll, *supra*, at 86-89, 91-99; Charles Craver, *Mediation: A Trial Lawyer's Guide*, 35 Trial 37 (June 1999).

The style discussion got even more complicated when, in 1994, R. Baruch Bush and Joseph Folger published a book entitled *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994). Bush and Folger introduced the concept of yet another style of mediation known as the transformative style. The focus of mediators using this style is on relationship-building. A mediator using this style views the primary goal of the process as allowing parties to experience moral growth. Settlement itself is not the principle goal. The mediator seeks to generate mutual respect between the parties and to get each party to truly appreciate the interests and

viewpoints of the other party. These mediators see conflict as an opportunity to transform people from fearful, defensive, and self-centered beings to confident, responsive, and caring beings. These mediators hope to transform the parties into relatively self-sufficient problem-solvers so they can resolve future controversies that arise between them. The mediator consciously avoids judgments about the parties' views or decisions, including whether they are "fair." These mediators cede control of the process to the parties, allowing the parties to make process-related decisions, including the need for any ground rules. They also allow for expressions of emotions. These mediators care very much about the empowerment and recognition of the parties. Noll suggests that the transformative mediation process is not another style, but an orientation to outcome, joined by two other orientations: the problem-solving orientation and the narrative orientation. Noll, *supra*, at 100-106.

The problem-solving orientation focuses on solving problems (duh) and reaching a settlement of the dispute. This orientation sees conflict as a clash of interests and needs, as generally described by Roger Fisher, William Ury and Bruce Patton in *Getting to Yes* (2d ed., Penguin 1991). The focus of this orientation is to search for common interests and to look for ways to satisfy the parties' interests and needs in a collaborative way that "expands the pie," if possible, or looks for value creating trades. Its opposite approach is the distributive-adversarial-positional form of negotiation. Noll suggests that this overall orientation is then further subdivided into the bargaining mode and the therapeutic mode based on an analysis by Susan Silbey and Sally Merry, *Mediator Settlement Strategies*, 8 Law and Policy J. 7, 12-19 (1986). Under the bargaining mode, the mediator claims substantive expertise in law and adjudication. He or she may achieve settlement by criticizing the litigation system for its cost, inefficiency and unpredictability. Mediators using the therapeutic mode, in contrast, claim substantive expertise in managing interpersonal relationships. The therapeutic mediator "focuses on emotional concerns, criticizing the legal system for its tendency to ignore emotions and destroy relationships." Noll, *supra*, at 101.

The narrative mediation orientation finds its description in John Winslade & Gerald Monk's, *Narrative Mediation: A New Approach to Conflict Resolution* (Jossey-Bass 2000). These New Zealand mediators suggest that reality is constructed from people's conversations or discourses with each other. *Id*. at 41-44; Noll, *supra*, at 104. Conflict, according to this orientation, is normal and expected. The mediator helps the parties construct a new narrative about the conflict that reframes the parties' perception about it so they can solve the dispute collaboratively. *Id*. The orientation assumes that conflict reflects culturally created perceptions of unmet needs. "Problems are seen as constructed within a pattern of relationships, and social context is the key to understanding self and identity." Noll, *supra*, at 104. The mediator helps the parties change the context of the dispute to a new one in which new choices become possible for the parties. The mediator searches for an outcome defined as a new reality without the conflict-laden story. *Id*. at 106.

Even before Riskin developed the first grid, another scholar put mediators into three categories: the thrashers, the bashers and the hashers. James Alfini, *Trashing, Bashing and Hashing it Out: Is this the End of "Good Mediation"?*, 19 Fla. St. U. L. Rev. 47, 66-73 (1991). Trasher mediators, often experienced trial lawyers, "spend much of the time 'tearing apart' the cases of the parties." *Id*. at 66. The technique discourages direct party negotiations. After this trasher process, the mediator suggests to the parties more "realistic" settlement options. Basher mediators, according to Alfini, focus on the opening settlement offers the parties bring to the mediation. The basher then attempts to move the parties to a number somewhere in between the original offers. Most bashers are retired judges "who draw on their judicial experience and use the prestige of their past judicial service to bash out an agreement." *Id*. at 69. Trashers and bashers will likely keep the parties in mediation until they reach a settlement. The hashers, in contrast, encourage party-to-party negotiation. One described himself using these terms: "[f]acilitator, orchestrator, referee, sounding board, scapegoat." *Id*. at 71. The hasher is less likely to keep the parties at the table if one of them expresses a desire to leave. *Id*. at 72. "Flexibility is the hallmark of the hasher style of mediation . . . they are willing to employ trasher and basher methodologies if they believe it to be appropriate in a particular case." *Id*. at 73.

Perplexed? You betcha. Especially if you, as a mediator, saw your interventions as far more complex and variable.

Riskin's New Grid System

A decade after his first "grid" article, Riskin looked again at the question of mediator style, orientation, or strategies. Perhaps influenced by his 20-year experience in mediation, or his understanding of "living in the moment" derived from his mindfulness meditation practice, or perhaps because of the increasingly shriller debate about which style was "best," he took a more nuanced and fresh look at the original grid. *See* Leonard Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, 9 No. 2 Disp. Resol. J. 22 (2003). He now suggests, I think, that we mediators should be gentler with each other. Instead of labeling ourselves and each other (bad, bad evaluator or flakey, inefficient facilitator, or weird transformative mediator), mediators can ask instead what the parties need in the moment. Mediators can also listen better when the parties ask us for what they need in the moment. He suggests that we consider the interventions or actions that mediators take during a mediation as if they were a series of frames in a motion picture. In each frame, what is the mediator doing and why? In that moment, what approach is the mediator taking? What strategy or technique is the mediator employing? What orientation is the mediator exhibiting? In the moment, is that choice effective? If not, what happens in the next moment? If so, what opportunities did the intervention create in the next moment? The mediation process gains through this analysis a dynamism both in practice and theory that we may have missed before.

The new Riskin system asks whether the mediator is using a strategy, style, technique, approach, or orientation —in that moment—at her own direction (mediator influence) or at the invitation of the parties (party/lawyer influence). During any mediation, the answer to that question will depend on the needs of the moment. Even the most evaluative mediator will have moments of highly facilitative interventions. Even that mediator will have moments when he or she will focus on emotion or the need for the parties to empathize with each other and truly understand each other's perspectives. As Riskin explains, by example: "At [one point on the grid evaluating problem definition], the mediation is focused on a narrow problem and nearly all of the influence to develop the problem definition has come from the mediator. At [a second point on the grid], the mediation has a broader scope, and although the mediator's influence in determining that problem definition still predominates, the other participants also have experienced some influence. At [a third point on the grid], the participants have influenced the development of a broader problem definition." *Id*. at 25.

Lawyers, mediators or scholars could develop additional grids relating to each meta-process in the mediation: will the mediator request pre-mediation submissions (yes, because she finds them useful, therefore disclosing mediator influence); will she focus only on the legal positions of the parties and not consider underlying interests (no, unless the lawyers explain they want something more akin to early neutral evaluation, therefore disclosing lawyer influence); will she employ caucuses (no, because she has decided that the best work occurs when the parties are together, therefore disclosing mediator influence); will she make a mediator's proposal when the parties cannot close the gap (yes, but only as a last resort and only if the parties request it, therefore disclosing shared mediator and party influence).

Lawyers and clients could also use these grids, Riskin suggests, to determine pre-dispositions toward influence—theirs and the potential mediator. This knowledge would help lawyers choose the best mediator for the particular dispute involving particular parties. *Id*. at 25. They would know in advance, for instance, that they wanted an evaluation of the legal case. They could then choose a mediator willing to provide that evaluation.

Riskin's new grids (one no longer suffices) focus on behaviors in the moment and over time rather than on labels that apply to the mediator throughout the mediation interaction. Yet, again, Riskin has enlivened the debate over mediator styles by providing these new analytical tools. Lawyers and clients can use them to participate in mediation at a much more sophisticated level and with more control over the process—if they wish.

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Important Dates & Upcoming Events

June 20, 2008 ..... Rule 31 Mediator Applications Deadline for ADRC Review on 07/15/08

July 15, 2008 ..... ADR Commission Meeting
Administrative Office of the Courts, Nashville

October 10, 2008 ..... ADRC Sponsored Mediation Workshop
Vanderbilt University Law School, Nashville

October 28, 2008 ..... ADR Commission Meeting
Administrative Office of the Courts, Nashville

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