A VIEW FROM WITHIN: RECONCEPTUALIZING MEDIATOR INTERACTIONS

Debbie De Girolamo*

This paper explores mediator interactions from within the mediation process. It is difficult to obtain access to mediations due to issues of confidentiality and litigation privilege, thus restricting direct empirical research. During a yearlong ethnographic study during which the author was a participant-observer of a number of commercial mediations, the nature of mediations was explored from an independent observational perspective – separate from the process yet within the process. In this study, real life patterns of interactions are examined through case study analysis. It offers a reconceptualization of the nature of mediator interventions, one that moves beyond the accepted understanding of third party intervention. It suggests that the mediator has a fugitive identity in mediation, reflecting a traditional neutral third party intervener role, a party role and an adviser role.

Dans le présent document, l’auteure explore les interactions des médiateurs dans le cadre du processus de médiation. Il est difficile d’obtenir l’accès aux séances de médiation en raison du secret professionnel et du privilège relatif au litige, et cette difficulté limite la recherche empirique directe. Au cours d’une étude ethnographique qui s’est déroulée sur une année et à laquelle l’auteure a participé comme observatrice d’un certain nombre de médiations commerciales, la nature des médiation a été explorée d’un point de vue observationnel indépendant – distinct du processus bien qu’au sein du processus. Dans la présente étude, des situations réelles d’interaction sont examinées au moyen de l’analyse d’études de cas. L’auteure offre une reconceptualisation de la nature des interventions du médiateur, qui va au-delà de ce qui est reconnu comme l’intervention d’une tierce partie. Le médiateur aurait une identité fugace dans le processus de médiation, cette identité s’expliquant par un rôle traditionnel de tiers intervenant neutre, un rôle de partie et un rôle de conseiller.

* Queen Mary, University of London (Centre for Commercial Law Studies) and London School of Economics and Political Science. I am very grateful to Simon Roberts, Fiona Cownie, Tony Bradney and Ben Babcock for their advice and support.
I. INTRODUCTION

Despite the growing reliance on mediation in civil justice processes, remarkably little is known about how it actually works. There exists a need for empirical research that provides greater visibility into the interactions and changes that occur during the mediation process. While there has been considerable research based on information received from mediators and participants in mediations, direct observations of commercial, non-court mandated mediations are limited. It is difficult to obtain access to mediations due to issues of confidentiality and litigation privilege and this has, in large part, restricted direct empirical research. As a result, the real-life patterns of mediator interactions are obscure. Attempts have been made through the literature to define mediator interactions, to label them facilitative, evaluative, directive, transformative, for example. Yet what do these labels mean? The literature does not provide us with a first-hand account of what goes on in the process and the nature of the mediator’s role in that process. Such an account would enable us to place the process under microscopic view, to


bare its elements and ultimately, to challenge or confirm current mediation orthodoxy.

In an attempt to overcome this deficiency, I conducted an ethnographic study of commercial mediation in England and Wales. During a 12-month period of fieldwork research in 2006 and 2007, I was a participant-observer of the mediation process which provided me with direct access to mediations. This gave me the opportunity to explore the nature of mediations, not from the mediator perspective, not from the party perspective, but from an independent observational perspective – separate from the process yet within the process. The intent of the ethnographic study was to gather “thick description” of human behaviour, which would guide an analysis of the behaviour. Labels describing actions were discarded; instead, actions created patterns that became discernible.

For this paper, the focus will be on the mediator and the nature of the mediator’s interactions with the parties. It will first explore certain theories underlying mediation, providing an overview of the nature of mediation as negotiation and the interventions undertaken by mediators. It will then consider the ethnographic data obtained during the yearlong investigation of mediation through an examination of one case study, concentrating on interactions between mediator and parties during a mediation. It will offer a reconceptualization of the nature of mediator interventions, one that moves beyond the accepted understanding of the third party intervener as one who stands outside the dispute and separate from the parties. It will suggest that the mediator has a fugitive identity in mediation, reflecting a traditional neutral third party intervener role, a party role and an adviser role. This is a shifting role, one that permeates throughout the process. It is a role that challenges the way we think about mediation and the mediator’s role within that mediation. In the various roles he takes on, we will see that the mediator becomes an integral player in the dispute itself, no longer holding himself separate from the parties or their dispute. The importance of this research lies in the data itself: it is the data as reflected in the case study explored in this article, which illuminates this fugitive identity and gives it voice.

II. THE NATURE OF MEDIATED NEGOTIATIONS

The focus of this study rests on the premise that mediation is negotiation and the actions of the mediator occur within a negotiation framework. In Gulliver’s deconstruction of the negotiation of disputes, he examined the involvement of a third party intervener with the stalled negotiations of parties in conflict. For him, mediation is an integrated part of negotiation and cannot be separated as a distinct stand-alone process. As Gulliver believes, one cannot possibly begin to understand the process of mediation without understanding the process of negotiation. The Gulliver negotiation map comprises eight stages: (i) search for a negotiation arena; (ii) setting the agenda; (iii) exploration of the range of the dispute; (iv) narrowing the differences; (v) preliminaries to final bargaining; (vi) final bargaining; (vii) ritual confirmation of the settlement; and (viii)

---

3 The fieldwork site is described more fully below.

implementation of the agreement. Arguably for Gulliver, this is the shape of a mediated negotiation as well.

Others, although seeing mediation as a negotiation process, describe mediation as having stages distinct from negotiation phases such as those described by Gulliver. For example, mediation has been described as having four basic phases during which the business of mediation is conducted: (i) preparation; (ii) opening joint session; (iii) private meetings; and (iv) conclusion. Negotiation may have been the original structure in which disputing parties were engaged, but it becomes altered as a result of the introduction of a third party and its impact on the process and the parties; therefore, the processes are said to be distinguishable. Baruch Bush refers to a generally accepted description of mediation as “a process of ‘facilitated or assisted negotiation’ in which the mediator facilitates the parties’ own negotiation process” and gives his view that “assisted negotiation” defines and describes one possible approach to mediation practice. Notwithstanding the view one takes about the nature of mediation and the interventions of the third party, underlying it all is the concept that mediation is negotiation. Parties seek mediation when they are unable to resolve a dispute directly with the other party. If they were able to do so directly, they would engage in direct negotiations. The third party intervention in a negotiation adds a contextual layer to party negotiations.

Evident in many definitions of the mediation process is the description of the third party intervener as being neutral or impartial, having no interest in the dispute or its outcome. He cannot take sides or be perceived to take sides. See e.g., Stulberg who suggests that justice demands a mediator be neutral as he considers mediation is “a process for displaying and promoting justice”. In his view, a neutral mediator is desired by the parties. Joseph B Stulberg, "Must a Mediator be Neutral? You’d Better Believe It!" (2012) 95 Marq L Rev 829 at 829-830 & 834.

---

5 Ibid at 122-170.
7 Mackie et al., ibid at 43-44.
8 Ibid at 162-163.
9 Baruch Bush, supra note 6 at 3-4.
10 This view that mediation is negotiation is more fully explored in Debbie De Girolamo, The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action (Routledge, forthcoming).
11 In the literature, the intervener is often described as neutral. See e.g., Christopher W Moore, The Mediation Process: Practical Strategies for Resolving Conflict (San Francisco: Jossey-Bass, 1996) at 51-53 & 197-198; Michael D Lang & Alison Taylor, The Making of a Mediator: Developing Artistry in Practice (San Francisco: Jossey-Bass, 2000) at 161-162 & 179-181; Susan Nauss Exon, “The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation” (2007-2008) 42 USF L Rev 577; Mulcahy, supra note 2; Simon Roberts & Michael Palmer, Dispute Processes: ADR and the Primary Forms of Decision-Making (Cambridge: Cambridge University Press, 2005) at 197; Susan Blake, Julie Browne & Stuart Sime, A Practical Approach to Alternative Dispute Resolution (Oxford: Oxford University Press, 2011) at 177. It is not within the purview of this paper to examine the mythology related to the role of neutrality in mediation nor to examine the definitions of neutrality or its sister terms “impartiality” or “equidistance”. For purposes of this study, it is important that it plays a role in contextually situating mediation within an understanding that the third party intervener is generally accepted as a neutral intervener among the parties.
12 See e.g. Stulberg who suggests that justice demands a mediator be neutral as he considers mediation is “a process for displaying and promoting justice”. In his view, a neutral mediator is desired by the parties. Joseph B Stulberg, "Must a Mediator be Neutral? You’d Better Believe It!" (2012) 95 Marq L Rev 829 at 829-830 & 834.
is there to assist the parties in their negotiation. Mediation is consensual, collaborative negotiation facilitated by a non-aligned third party who does not determine outcome. The mediator is understood to act within the confines of a defined role – that is, as neutral and as facilitator.13

III. MEDIATOR INTERVENTIONS

The mediator works within the framework of mediated negotiations. The nature of a mediator’s interventions within this negotiation process depends on the mediator’s vision of what mediation should be.14 Kolb and Kressel say it depends on whether the mediator views the dispute through a transformative or pragmatic lens: “...there is a tendency for practitioners to define their roles and structure their activities according to whether it is settlement they seek or a change in the ways the parties communicate with each other.”15 Although different labels are attached to the various activities of mediators, the literature seems to support Kolb and Kressel’s conclusion regarding the existence of two basic visions. Whether it is Bush and Folger’s satisfaction and transformation stories, Merry and Silbey’s bargaining and therapeutic strategies, Kressel and Pruitt’s task-oriented and socio-emotional approaches, Alfini’s “trashing, bashing and hashing it out” or Riskin’s evaluative/directive and facilitative/elicitive orientations, there is a consistency in the underlying tenets of these models.16 Arguably, they reflect a dichotomy between two fundamental philosophies in mediation theory; that is, the importance of settlement or the need for improved communication. The approaches, although described differently, may be rooted in similar theories.

---

13 As stated in note 11, this is a standard view of mediation intervention within the western model of mediation. It is often described as a process where a neutral third party assists parties to come to agreement. Whether the term is neutrality, impartiality or non-alignment, there is expected to be maintained, at a minimum, a distance between the parties and the mediator.


In addition to these dichotomous approaches, there are others suggesting a differentiated approach. For example, Kressel sees mediators attacking underlying or latent causes to conflict and in so doing, assist parties to address the conflict. This does not fall into a therapeutic approach to mediation says Kressel as the goal is to solve the problem by examining and dealing with the root causes of conflict. Winslade, in focusing on discourse, sees disputants embedded within a social constructionist view of conflict, impacted by cultural influences. To move away from the conflict, parties are encouraged to change their stories of conflict; once they do so, they are able to create a new discursive reality with the other party that does not include their original conflict. Waldman suggests a three-fold mediation approach focusing on normative values and the extent to which norms are used in resolution. The norm generating model shies away from social or legal norms with parties creating new norms on which to base settlement; the norm educating model ensures parties are conversant with relevant norms affecting their dispute; and the norm advocating model presses for the incorporation of a particular norm during the decision-making process and for resolution.

From these characterizations, the literature has more recently developed a tripartite categorization based on the facilitative and evaluative dichotomy created by Riskin and the transformative approach of Bush and Folger. Some commentators seem to have fallen into a pattern of referring to these categories as primary approaches taken by mediators together with the additional reference to Winslade and Monk’s narrative mediation introduced in 2000. Still others offer diverse labels such as Picard’s insight mediation (blending transformative, narrative and problem-solving approaches to mediation to seek insight into the conflict which ostensibly leads to resolution), Perloff’s quadrant system (positing evaluative, facilitative, narrative and transformative approaches within a quadrant alongside systemic and humanistic approaches), and McDermott and Obar, who together with Stempel, refer to eclectic mediation (eschewing a pure dichotomy of facilitative or evaluative mediation approaches). These latter commentaries suggest some combination of approaches, rejecting a rigid approach.

20 Riskin, “Understanding Mediators” supra note 16; Bush & Folger, Promise supra note 16; Winslade & Monk, supra note 18. For examples of the categorizations of these approaches as primary approaches, see Exxon, supra note 11 and Jarrett, supra note 14. With regard to the evaluative/facilitative dichotomy, it is referred to as a blended problem-solving or pragmatic approach alongside transformative and narrative mediation: see e.g. Picard & Melchin, supra note 14; Michal Alberstein, “The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations” (2009-2010) 11 Cardozo Journal of Conflict Resolution 1 and Michal Alberstein, “Forms of Mediation and Law: Cultures of Dispute Resolution” (2007) 22 Ohio St J Disp Resol 321; Christopher Harper, “Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation” [2006] J Disp Resol 595.
Whatever the theoretical premise to the approach, strategies invoked can be flexible, responsive and adaptable. A panoply of tactics is available to mediators in the pursuit of a mediated solution. These approaches and strategies are suggestive of the ever-changing roles mediators invoke. Mediators may be seen to be passive, facilitative, evaluative, questioning, directive, procedural, reflexive, or contextual interveners, for example. Gulliver points to a continuum of strategies that a mediator follows, alternating between strategies as the circumstances require, moving “…from virtual passivity, to ‘chairman,’ to ‘enunciator,’ to ‘prompter,’ to ‘leader,’ to virtual arbitrator.” These categories reflect levels of mediator intervention in the process and can all occur in one mediation. Mackie and others list what they see to be the various roles of a mediator during the course of a mediation including: process manager, facilitator, problem-solver, information-gatherer, reality tester, scapegoat/lightning conductor/sponge, observer and witness, messenger, negotiation coach, dealmaker and post-breakdown resource. These roles suggest an intervention in which the mediator is a catalyst for change. Bowling and Hoffman refer to the “integrative mediator” who “has an extraordinary opportunity to shape the direction of the parties’ interactions and discussions.” This is because, they say, the process is fluid and the relationship between the mediator and the parties is in flux. A mediator will act with the intent of fulfilling the objective of mediation as determined by the mediator. For example, when concerned about content, the literature suggests that the mediator will define issues, propose solutions and predict outcomes. On the other hand, when preoccupied with improving communication, the mediator may explore interests, reframe issues, create empathy and seek greater understanding.

If one follows the theory that mediation is an assisted negotiation, then as Gulliver states, one must look at the interventions of the mediator in the context of a negotiation framework. It is within such a context a mediator sets out to achieve what is likely the intended goal of the mediation; for many, that is to settle the dispute.


Kressel, “Strategic Style” supra note 1 at 274-275; Stempel, “Ideology” ibid; Frank EA Sander, “Achieving Meaningful Threshold Consent to Mediator Style(s)” (2007-2008) 14 Dispute Resolution Magazine 8 at 10; Exon, supra note 11 at 589; Riskin, “Understanding Mediators” supra note 16, too sees the flexibility of mediator actions which is reflected in his New New Grid.

Gulliver, supra note 4 at 220.

Mackie et al, supra note 6 at 286-288; See also Bernard S Mayer, Beyond Neutrality: Confronting the Crisis in Conflict Resolution (San Francisco: Jossey-Bass, 2004) at 215-247 where he explores role flexibility of the mediator as a conflict specialist, who may offer, in addition to the traditional third party neutral services, services as an advocate for a party or as an expert adviser, as required and requested by the parties to suit their particular disputing needs for a specific dispute.


Ibid.

Roberts & Palmer, supra note 11 and Gulliver, supra note 4. Compare Della Noce, Baruch Bush & Folger, supra note 14 at 44 who suggest the negotiatory framework is imported from other fields by mediators for application in their practice as a result of an absence of knowledge of or reliance on articulated mediation theory.
Some commentators speak specifically of the mediator’s role in the negotiation itself and the ability of the mediator to: overcome negotiation barriers through control of the information exchange; reconceptualize the dispute; give voice to the parties; diffuse tension; challenge the positions; and expand the proverbial pie. Marian Roberts, in her conversations with sixteen mediators about their craft, firmly puts negotiation at the centre of the mediation process, as does Gulliver.

Some refer to the mediator as becoming a party in the negotiation. For example, for Gulliver, the mediator positions himself directly in the negotiation dyad:

He himself interacts with each party and with both together, and they may communicate to and through him. He becomes a party in the negotiations. He becomes a negotiator and as such, he inevitably brings with him, deliberately or not, certain ideas, knowledge, and assumptions as well as certain interests and concerns of his own and those of other people whom he represents. Therefore he is not, and cannot be, neutral and merely a catalyst. He not only affects the interaction but, at least in part, seeks and encourages an outcome that is tolerable to him in terms of his own ideas and interests. He may even come into conflict with one or both of the parties.

Roberts picks up on this idea that a mediator becomes a party to the negotiation when parties are separated from each other during the mediation: the mediator meets with each party privately, working with the parties separately to come to resolution. In discussing the role of the mediator in what she terms “shuttle mediation” (that is, shuttling between parties), she says that “[t]he mediator may act as a simple conduit, passing messages back and forth, or may negotiate actively on behalf of those disputants who obviously cannot negotiate directly.”


30 Gulliver, supra note 4 at 213-214.

31 Roberts, supra note 29 at 154. See also RS Dampf, “The Two Sides of Mediation: Tips from the Mediator: Of Sticks and Stones” (1997) 45 La BJ 138 at 138 where he comments on the mediator as active negotiator for the parties, negotiating with both parties to challenge their positions. For another example of a practitioner’s view of the mediator as negotiator, see also James C Freund, The Neutral Negotiator: Why and How Mediation Can Work to Resolve Dollar Disputes (New York: Prentice-Hall Law & Business, 1994) at 12-16. Katz sees a mediator’s role through a political frame; that is, as political leader who acts as advocate or negotiator, assisting parties with bargaining which allows them to ‘save face and survive’. See Neil H Katz, “Enhancing Mediator Artistry: Multiple Frames, Spirit, and Reflection in Action” in Margaret S Herrman, ed, Handbook of Mediation: Bridging Theory, Research, and Practice (Oxford: Blackwell, 2006) 374 at 376-378. The reference to mediator as advocate also occurs in Charkoudian et al., supra note 2 at 307 when charting mediator behaviours, and in David Dyck, “The Mediator as Nonviolent Advocate: Revisiting the Question of Mediator Neutrality” (2000) 18 Mediation
Mulcahy and Burns refer to mediators as go-betweens during mediation, becoming a party advocate against non-parties or aligning himself against a party to play “devil’s advocate” against that party. Exon, when examining the ability of mediators to maintain impartiality, says they become advocates for the benefit of one party when they evaluate the dispute, thus impacting their impartiality negatively. When Gulliver, Roberts and others state that the mediator becomes a party to the negotiation, it is in the context of a third party becoming involved in a negotiation between parties in conflict and in the context of that third party actively positioning himself within the negotiation to impact it in the various manners described above. As Gulliver states, mediator presence and participation in a two party dispute turns the “initial dyad” into “a triadic interaction of some kind”. Two parties become three, with the third interacting with the others in different ways. It is within this framework that mediator actions are explored in this study.

IV. THE RESEARCH PROCESS

A. An Ethnographic Account

It is through ethnography that this paper offers an opportunity to observe a mediator in action. The ethnographic method creates the ability to see beyond one’s own reality and aim for clarity of understanding of what is being observed. This is one reason why ethnography is well suited to the study of law in society and, more particularly, to the study of conflict and its resolution. During my fieldwork, I was a participant–observer of the mediation process conducted at the request of parties in conflict. I gathered data about a number of mediation sessions through my participation in and observation of mediations. My approach to fieldwork reflects Geertz's “thick description” and my data will be presented through the case study method created by Turner’s “social drama”. One aspect of this approach is to textualize interpretations of the observations. Ethnography is about recording what one sees and to strive to do it objectively; that is, not from the native’s perspective nor from the ethnographer’s personal perspective, but from the data's perspective. That is the first step. The second is the analysis of the data from which meaning is ascribed to the data. Generalizations are made about the data: this is the interpretative exercise that

32 Mulcahy, supra note 2 at 519-521; Burns, “Blackest Thoughts” supra note 2 at 241 and Burns “Deep Pockets” supra note 2 at 120 & 150. Burns’ point about the alignment by the mediator against parties is seen in Greatbatch & Dingwall’s work, supra note 2 at 638.
33 Exon, supra note 11 at 605.
forms part of the ethnographic exercise. It involves interpretation of the data, supported by the data. Ultimately, the hope is to discover patterns of action not readily discernible without this foray into an ethnographic methodology.

Though one case study is presented here, its data is reflective of the shifting identities taken on by a mediator in many of the mediations that form my ethnographic study. The importance of the case study is in its detail. It offers an opportunity to consider the patterns of social behaviour by a mediator from the beginning to the end of a real-life mediation. The actions taken and the words uttered are those of the parties: I took copious notes during the process. I wrote, as best I could, verbatim comments of the dialogue and noted observations regarding conduct and interactions as they occurred. I was present throughout the mediation, in the room with the parties whenever the mediator was present with them. The data as presented here through “thick description” focuses on the story of mediator intervention. The case study is not offered as a conclusive model of mediator behaviour; instead, it provides an opportunity to explore mediator conduct in the process. As Gulliver noted in his examination of the negotiation process, the two-pronged model he proposes is not a definitive model of the negotiation process, but a series of patterns reflecting “the untidiness of actual social behaviour.”

It is through the detail that patterns emerge.

B. The Ethnographic Fieldwork Site

My fieldwork site was at a preeminent British organization which focused on commercial mediations. As a mediation service provider, the organization advised, guided and administered the mediation process for commercial disputes, providing access to its panel of accredited mediators. The physical locale for my ethnographic study was London, England. I attended the organization’s offices during regular business hours as a member of the team through which mediations were administered.

My role during the year was multi-fold. However, the most important role was as participant-observer in 38 commercial mediations during the period between December 2006 and September 2007. I attended these mediations as an assistant mediator and independent researcher observing the process with the consent of all parties.

---

36 For further discussion about the ethnographic method, see De Girolamo, supra note 10.

37 Due to the constraints of space, one case study is offered here, chosen for its interactions in both joint session and private meetings. Further cases will be explored in similar “thick description” detail in the author’s book, ibid. These cases together with the one explored in this article and further additional unpublished data comprising the ethnographic record of my year-long study support the patterns of interactions observed and analysed in this article. It is a case typical of those observed: it involves two parties who attend the mediation with their legal team (comprising a solicitor and at times, a barrister as well) and they have consensually selected the third party intervener to assist their attempt to resolve their dispute.

38 Gulliver, supra note 4 at 173. Gulliver sees negotiation to be comprised of a cyclical network of information exchange and learning, and a developmental model of eight stages of the negotiation process. See at 81-120 and 121-170.

39 This general category of commercial disputes included disputes relating to employment, property, intellectual property, personal injury, construction, engineering, finance, insurance, IT, medical negligence, partnership, professional negligence and shipping.

40 The mediations were randomly selected. Once a mediation was confirmed as scheduled, I would be advised of its date. As long as I was available on that date, it was a commercial mediation and it was within a two-hour train ride from London, I accepted.
As stated above, this paper draws upon “thick description” of a single mediation observed during my fieldwork.

V. MEDIATION IN ACTION

A. The Dispute

This was a mediation of a two party case. The parties were in litigation and voluntarily chose to participate in mediation. Golden Co. commenced an action against Finn Coopers for breach of contract in relation to an alleged arrangement it claimed Coopers was part of.

Coopers entered into a contract for the supply of equipment from Golden, a manufacturer and supplier of large industrial equipment used in construction and mining industries in Europe. Golden had a distributorship system which sold Golden’s equipment. Coopers purchased equipment directly through Golden at prices much lower than he would otherwise have obtained had he purchased the equipment from Golden’s distributors. To receive the discounted prices, the equipment was to be used by Coopers in his business. To ensure this, Golden included a provision in the Sale Agreement stating that the equipment would not be subject to resale during the twelve month period following purchase. Breach of this provision would entitle Golden to repayment of the total value of the discounts Coopers received.

The sale was concluded. Coopers received the equipment at the discounted prices. The equipment was then resold within twelve months of purchase. Golden became aware of the resale and commenced litigation against Coopers. Coopers defended the action primarily on the basis of reliance on statements made by a certain Mr. X as agent of Golden. Mr. X was allegedly an employee of Golden with whom Coopers negotiated the purchase of the equipment. Coopers alleged he was advised by Mr. X that the contract provision restricting resale would not be enforced by Golden as it was an arrangement intended to appease Golden’s distributors regarding the direct sale of equipment by Golden at much reduced prices than those offered by the distributors. Coopers further alleged that Mr. X, as an employee of Golden, was Golden’s agent in the sale transaction and as such, entitled Coopers to rely on Mr. X’s assertions regarding Golden’s intended enforcement of a legal obligation owed to it by Coopers. Mr. X was not a party to

41 Parties were advised before the mediation that I would be attending as assistant mediator and external researcher. As part of the ethnographic exercise of engaging with my fieldwork site as a participant-observer, I attended the mediation with the appointed lead mediator who had full control and responsibility for the mediation. The assistant mediator’s primary goal was to observe the ‘live’ mediation, to learn about the process, and to help the lead mediator in any way that the lead mediator required. My interventions during the meetings with the parties was minimal, often dealing with administrative matters such as time-keeping and document collection. There was no doubt in anyone’s mind as to who was conducting each mediation: the parties looked to the mediator for guidance and the mediators conducted the process at their discretion. With regard to my presence at the mediations as external researcher, one issue that arises during ethnographic studies is the impact of the observer on the observed, with some arguing that the presence of the ethnographer alters the behaviour of the observed (see Bowling & Hoffmann, supra note 25 at 10). From my experience, this phenomenon was not in evidence during my observations: parties were in conflict, they were at the mediation table for their own purposes and they had nothing to gain by altering their behaviour for the researcher.

42 For the sake of anonymity, the names of the participants and selective details of the dispute have been altered.
the action and was no longer employed by Golden. Coopers also defended the action on the basis that the repayment provision of the contract was unenforceable as it was a penalty clause.

The mediation was organized through the fieldwork organization. A mediator was selected by the parties from a list of recommended mediators. The mediator had been trained and accredited by the organization. He had mediated professionally for several years and also practiced law.

Coopers attended the mediation with his solicitor. Golden was represented by company executives and its legal advisers. Each team had their own private room and a boardroom had been set aside for the joint meetings.

The main distinctive feature of the mediation model used for this mediation was the series of private meetings held with parties rather than joint sessions as often occurs in family or community mediation, for example. However, it needs to be noted that many mediations make extensive use of private meetings with joint sessions rare. It is a typical framework used by other organizations for commercial mediations as well as for court-connected mediations. It should also be noted that, during the mediations of this ethnographic study, the processual framework of the mediation was at the discretion of each mediator – some phases were followed, others ignored.

1. PreMediation Meeting with the Coopers Team

The mediator met privately with the Coopers team first and explained the purpose of the process. He described it “as a powerful day because it is your day, your resolution.” He encouraged Coopers and his solicitor in the opening joint session to “take the opportunity to say what you think is powerful and I will give each of you the chance to say it... I want to achieve clarity and at the end of the day, if there is no settlement, we need an understanding of each case and from understanding comes empowerment.” He said that there would be no negotiation during the opening session; instead, there would be exploration of the case. Administrative details were discussed and the meeting concluded.

2. PreMediation Meeting with the Golden Team

The mediator, in his premediation meeting with the Golden team, described the aim of the opening session and the need to disclose information during the session. Logistics regarding the room allocation were also discussed.

43 It should be noted here that the organization did not espouse an evaluative model of mediation. Mediators were to facilitate the negotiation as a neutral, independent third party intervener.
44 This was a typical scenario. Also typical is the attendance by the parties with their legal representatives as mentioned earlier. Most often, the parties were business entities with one or more company representatives attending on behalf of the company.
45 See e.g. mediations conducted by JAMS in the United States: JAMS, Mediation Defined, online: JAMS <www.jamsadr.com/mediation/defined.asp>, and in England: ADR Chambers UK, Mediation, online: ADR Chambers UK<www.adrchambers.co.uk/mediation>; In Place of Strife, The Mediation Chambers, What is Mediation?, online: In Place of Strife <www.mediate.co.uk/what_is_mediation/index.html> and for mediations under the Ontario Mandatory Mediation rule, see Colleen M Hanyak, “Through the Looking Glass: Mediator Conceptions of Philosophy, Process and Power” (2004-2005) 42 Alta L Rev 819 which provides a discussion on the practice in court-connected mediations.
3. The First Joint Meeting

The parties were invited into the boardroom. After introductions were made, the meeting began with the mediator stating that the “objective [of the day] is to reach a negotiated resolution to the dispute. My role is to help to reach a negotiated solution. I am not a judge, I am not an arbitrator. I am not here to make a decision. We will talk about the case, but I won’t say what is right or wrong.” He talked about confidentiality of the process, particularly of the private meetings and the objective of the joint session. He concluded his opening remarks by stating, “this is your day, your process, your opportunity. If nothing else, be clear and confident about what the case is about, what the other side’s case is. This is your opportunity.”

Golden’s solicitor began by discussing legal issues relating to the agency and penalty clause arguments of Coopers’ defence. He outlined the evidence disclosed during the course of the proceedings. Coopers’ solicitor was then invited to give Coopers’ statement. He reiterated Coopers’ defence to the claim: in particular, Mr. X’s representations, his status as an agent of Golden, and Golden’s inflated damages claim. The solicitor also advised of Coopers’ intention to join Mr. X in the action.

Once the Coopers solicitor finished, the mediator turned to him and said, “Before I give you the opportunity to respond, I raise a question regarding apparent authority. It doesn’t arise here. Golden says it doesn’t arise because of the payment that was made to Mr. X. Coopers knew that he did not have authority because he [Coopers] was paying him.” The Coopers solicitor replied, “There was a suggestion of a payment. It was nominal. He [Mr. X] indicated he had authority from Golden, he had authority in the deal, and they were running side by side.” The mediator then referred to the various email messages between Coopers and Mr. X: “How do they support your argument that Golden was aware of this?” The solicitor replied, “They clearly show Mr. X in breach of the duty so he has liability in the matter and Coopers was not aware of this; he was already in it when Coopers became aware.” The mediator responded by referring to the payment made to Mr. X, “When was it made – the end of the year; the beginning of the next? This deal was up and running since [February].” Discussion between the two legal teams about the payment ensued. The mediator intervened again, asking Coopers how he links Mr. X to Golden and what evidence he has to prove that resale of discounted equipment is common practice. The mediator asked Golden the same question: how does it reply to the allegation that it was common practice. The parties discussed Mr. X’s involvement.

The mediator interrupted the parties and referred them to an admission made by Coopers early in the dispute whereby Coopers acknowledged that he had lied to Golden about the reason for the early resale of the equipment. The mediator wanted clarification from Coopers about his and Golden’s understanding of the defence position regarding the evidence Coopers was relying on to support his statement that Mr. X had directed him to lie to Golden, particularly with respect to a [June] email from Mr. X to Coopers. The mediator stated, “What is the document? The [June] email does not raise it, so which document says that he was told by Mr. X?” Coopers’ solicitor referred to Coopers’ letter to Golden regarding the resale of the equipment. The mediator replied, “That is a response only. I thought you were pointing to evidence or a document that supports the evidence that he [Mr. X] scripted it out.” The Coopers team acknowledged it had
no further documents. The mediator said, “There’s something hanging there. We understand what we do not have.” Further dialogue about the evidence continued between the legal teams.

Before concluding the joint session, the mediator inquired whether the parties wanted to discuss the penalty clause or any other issues. He said, “We know the issues now. I want to avoid the situation where the parties are trading arguments and points. I will discuss the case with you but I want you to say that you tried to persuade the other side. This is the opportunity for it. If you have done it, then now is the time to discuss in private. I will start with Golden.” And so, the joint session ended. The parties retreated to their private rooms.

The mediator moved between rooms, meeting with each team sequentially. It was during these private meetings that the mediator focused on the parties’ basis for their dispute and their desire for resolution.

4. First Private Meeting with the Golden Team

In the first private meeting with Golden after the joint session, the mediator discussed Mr. X and his evidence at trial. He referred specifically to the letter relied on by Coopers to support his position that Mr. X told Coopers to lie to Golden about the resale. Golden said, “They talk about the [June] email…we’re not sure about that.” The mediator stated, “There is the reference to the [June] email in the statement and I read it to support the argument that [Mr. X] was feeding lines to Coopers. The answer we got wasn’t what we thought.” And later, “The issue of the letter did not arise until [October] – there is an oddity in terms of chronology.” Golden pointed out that Coopers could have asked Golden about the efficacy of the payment to Mr. X but instead lied about it and claimed a loss. The mediator replied, “It is a form of defence – we have all been there! What are your priorities - the action vigorously pursued?”

After some discussion about its priorities, Golden acknowledged that sometimes their clients buy too much equipment and resell any not needed. To that, the Mediator stated, “here, the intention was not to keep any.” Golden then refers to Coopers being aware that Mr. X was not working on behalf of Golden and the payment to Mr. X shows it. The mediator stated, “In relation to that, what makes things less certain, [Mr. X] suddenly is not the key prosecution witness, what will he say? I appreciate they do not start from a promising start, but I wonder what dirt will he fling against [Golden]. I understand the desire to show the [distributor group], to protect against the behaviour, but you are not in control of the evidence. He is the wild card. How will it play to your reputation? In court, how will it play out?” Golden was willing to play it out, believing that Mr. X would present a worse case for Coopers than for Golden. The mediator also explored the issue of Coopers’ ability to pay a judgment, the costs of litigation and the penalty clause defence. On this latter point, “Regarding the penalty point, it is still hanging out there if won’t be resolved today. This is their long shot – you’ll be thinking, given the litigation risk, how comfortable you are on it, there could be a scenario where you win all except the penalty [issue]. I understand your eloquent argument, but you should take into account [if] a bad judge does not like

46 Recall that the Coopers solicitor referred to Coopers’ letter to Golden as evidencing Mr. X’s involvement in scripting Coopers’ response to Golden. This is the document that Coopers admits evidences the lie he told Golden regarding the reason for the resale of the equipment and which he said was scripted by Mr. X.
the clause.” The session ended soon after but not before the Mediator reminded Golden of Coopers’ intention of joining Mr. X to the action, and agreeing with Golden’s view that Mr. X is a “loose cannon”.

5. First Private Meeting with the Coopers Team

In the next private session with Coopers, the mediator began, “I hope you found the opening session helpful so you could see where the other side is coming from. Let’s discuss privately. You’ve to start at the beginning by showing the agreement, which on the face looks real, is a sham. The onus is on you to show it. From the bundle of documents, if you take out the recent documents, there is nothing in the file that would upset the view that [Golden] was aware of the scam. Then you have the [messages] and you rely on them that there was this arrangement. In relation to that, the [letter] which I do not understand, it is of dubious evidential weight because I’m not clear what it says.” Coopers tried to explain what happened. The mediator said, “The documents may finger [Mr. X] but none suggest he was doing it for Golden.” Coopers explained the history of Mr. X’s involvement.

Moving to the issue of the payment to Mr. X, Coopers described it as a consultancy fee. The mediator asked, “How to prove it without documents?” Further, “Mr. X is a wild card – you don’t know what he would say.” Later, the mediator raised the issue of Coopers’ response to Golden’s initial inquiry about the resale: “The issue of the initial response – they say that is odd. Why wasn’t the response that [Golden], ‘you knew about this’, because you say that [Golden] knew of the deal.” In answer, Coopers said, “It is easy to say it now. At the time I thought this was a game, a manufactured play to protect against the [distributors]. So, [Mr. X] told us what would happen – a withdrawal of terms and that would be it. Every manufacturer was doing it” to which the mediator replied, “You’ve said it before, won’t you need credible evidence?” Coopers retorted, “I’ve gone on the internet and see massive discussions.” The mediator responded by saying “it does happen. It is different here Golden will say. Golden is aware occasionally [clients] over-order and flag a couple on sale and they persevere it. This is different because this is a preconceived plan with [Golden] complicit in it” “...this is your word against the evidence.”

In response to Coopers’ statement that Golden introduced Mr. X to Coopers, the mediator said, “This is the measure of the issues you are facing at trial because you are not both right. You need to say that [Golden] is complicit in a large scam to dredge around the [distributorship group]. The judge will take persuading. It is one thing to say [Mr. X] did the deal on one side and another to say that [Golden] is in on it and the deal is so common that when [Mr. X] did it, he did it on [Golden]’s behalf.”

When the Coopers team commented that Golden will not want to go public about the discounts it provides outside the distributorship system, the mediator told them that Golden was not concerned by this because (1) it has pursued action in similar cases; (2) Mr. X was a bad seed; (3) it will be seen to have dealt with it; and (4) it will have protected the distributors. The Coopers solicitor then referred to Golden’s allegations of conspiracy suggesting dishonesty and premeditation on the part of Coopers. The mediator responded, “The evidence says you were premeditated, that you knew it was a scam that the [distributors] could not know about it, plus [there is the] issue of payment. How will a judge view it?” Coopers
acknowledged that there was a weakness in his case, but reiterated the point that Golden introduced Mr. X to him and that the documents show Mr. X was acting outside his duties. In response, the mediator said that if he was acting outside his duties, he was not a representative of Golden and therefore a court will say that Coopers was aware that Mr. X was not part of Golden. Coopers’ solicitor retorted that Coopers entered into the Sale Agreement for the benefit of Golden to which the mediator said, “[Golden] says it was not for [Golden’s] benefit.” The solicitor continued, “It was to protect the [distributors] and there is liability for [Mr. X].” The mediator responded, “They say it is your issue not theirs.” And further, “What will Mr. X’s evidence be?” The solicitor responded, “Everyone is aware of this practice.” The mediator replied, “He says the contrary in the [witness] statement. To the extent [Mr. X] says that [Golden] knew everything, how persuasive will it be to a judge?” The solicitor continued, “There is evidence this is going on.” The mediator followed with, “What evidence is there of a scam?” When Coopers said that he would find evidence of the discussion, the mediator said, “It will only be evidence of the discussion, not the complicity of [Golden].”

The mediator then turned the discussion to the status of prior settlement offers saying, “If you do not do a deal, it will go to trial. There will be cross-examination; I was fairly restrained today. In trial, the gloves will be off; it will go big time. They’ve made a Part 36 offer.”

After discussing the history of offers and questioning Coopers’ solicitor about worst case scenarios, there was some issue as to whether the Part 36 offer was still open for acceptance. The mediator said, “One way forward – you should seek confirmation of a starting point and it would be reasonable to receive an offer from you.” Coopers agreed and asked the mediator to inquire if Golden will take a discount for Mr. X’s involvement. The mediator ended the session by stating, “My feeling is that the offer remains open, the costs are higher and there is no discount, but it gives us something to work on.”

6. Second Private Meeting with the Golden Team

During the subsequent private session with the Golden team, the issue of Mr. X becoming a party to the action was discussed in relation to the status of the Part 36 offer. Golden raised the need for an indemnity from Coopers in the event he claims against Mr. X and Mr. X claims against Golden. The mediator asked whether it was an indemnity for costs only or for full liability, stating, “it would likely not be the latter because [if] it is found you had liability in relation to him...” When the Golden solicitor said Mr. X could defend by stating that a Golden executive knew about the scam but that Coopers could not join Golden to the claim because it would be res judicata, the mediator said it would not be res judicata because a settlement would have been reached. Another team member said that it would not be Coopers joining Golden in legal proceedings - it would be Mr. X. The mediator responded, “It is [Mr. X] joining you. What is the basis he brings action?” The question is, if he pursues [Mr. X], the basis is ‘you have misrepresented to me you were a [Golden] representative and I pursue you for losses’. Mr. X’s defence is either he was a [Golden] representative and he wins.

---

47 A Part 36 offer is a formal settlement offer made pursuant to the rules of court which has cost implications on judgment. In England and Wales, costs normally follow the event (the losing party pays a portion of the legal costs of the successful party). A Part 36 offer provides a deviation from the usual costs order. See Civil Procedure Rules, 1998 SI 1998/3132.
Does he join Golden? ‘They are suing me and I bring in [Golden].’ On what basis? That he was an agent of [Golden]? ‘There is that risk. It is a good way of putting it.’ The solicitor continued, ‘Is there any prospect that [Mr. X] will drag you back in and in a costly way?’ This led to the conclusion that there was little risk of it and therefore no need for an indemnity.

Discussion then concentrated on the elements of the offer to take to Coopers. Golden asked about interest on the amount. The mediator said, ‘My take on it – you know they won’t say ‘great, that’s fine’. There will be a counteroffer. Let’s start there. If you ask for interest, then, it is much higher than the Part 36 offer. The counteroffer will be south of this.’ On the interest calculation that Golden was suggesting, the mediator pointed out that ‘judges do not give [that rate] these days.’ Golden agreed that interest would not form part of the offer, but wanted Coopers to know the amount of interest accruing. The mediator responded, ‘That is sensible. It sets the bona fides clear to them.’

7. Second Private Meeting with the Coopers Team
In the following private session with the Coopers team, the mediator relayed the Golden offer. After some time alone to formulate a response, the team advised the mediator of the counteroffer to be proposed to Golden. Coopers formulated a choice for Golden: an immediate payment or a higher amount paid over time. After the mediator reiterated the terms and said he would convey the offer, the Coopers solicitor added, “Make it clear it is not derisory.” The mediator replied, ‘You are making a pragmatic offer. There is not much wriggle room.’ On the nature of the offer being inclusive of costs, the mediator said, ‘You do not want the sum to be assessed; it should be a final sum. The question is what will the reaction be.’ When Coopers’ solicitor began giving reasons for the offer, the mediator said, ‘In my view, it is not outrageous.’ With that, he left the room.

8. Third Private Meeting with the Golden Team
The mediator introduced the Coopers offer advising that this is “what he can realistically pay – what can be afforded.” The team inquired whether any security for the payment was offered to which the mediator replied that none was offered. Golden, also after private reflection, conveyed its response to the counteroffer. The mediator said, ‘My initial reaction is that this is a robust counteroffer. You have gone from saying you would accept £120,000 versus £112,000 now in instalments.’ Counsel retorted that Golden’s original claim was for £162,000 plus costs and that the Part 36 offer was a significant reduction of the claim and a genuine attempt to settle the action. The mediator replied, ‘You have their perception that this is [a £89,000 claim] and the nature of the clause. You’ve done your level best to say the clause will stand up to scrutiny. How will this be perceived? It is robust, not much movement. So it is up to you how you want to move to conclusion. Here you have bells and whistles. So, what is their reaction? I can tell you there is a genuine desire to settle.’

After hearing the reasons for the offer, the mediator said, ‘I gave you my view. I am trying to give their perspective because it is difficult seeing it from our perspective. How will it be perceived? They will see it as robust. I understand your argument that you are starting at £192,000.’ Golden stuck with its counteroffer of £112,000 with payment in instalments, plus provisions for interest accruing on default and security for the payment on the basis that it was a
reasonable offer. When Golden said it would win at trial with Coopers having to pay several hundred thousand pounds, the Mediator said, “I have had that discussion. I’ve discussed it. Take it from me, they know the doomsday scenario. ...You have every right to take this to trial if there is not sufficient money on the table. If settlement is desired, they may say that this figure won’t do it. They may not see much movement.” Further, “I can’t predict their reaction. The possible reaction is that it is not in the ballpark. You need to understand the reaction.” Golden confirmed its intention. The mediator reiterated the terms and concluded the session with “This may bring the mediation to an end. I will do my best to keep it alive, but I am sure you took this into account in formulating the offer.”

9. Third Private Meeting with the Coopers Team

The mediator relayed the Golden offer and left the room. After some private reflection, Coopers counterproposed with a lower number and without security for the payment except in the event of default. The mediator’s reaction to the offer: “Regarding the proposal and not giving security until a default, this is odd because [they] need security now because if you do default...” Coopers interrupted and said, “I do not like the idea of giving security. I will pay it.” The mediator spent the entire session with the Coopers team attempting to convince it to give security for the payment. Coopers was adamant that he would not give security; that he was good for the payment. The mediator was equally adamant that Golden would insist on security. For example, “Is there something that you could do on security? Do not push them on it.” Further, in response to counsel’s suggestion that Golden could apply to court for security in the event of non-payment, the mediator said, “It does not attract me because I do not want to go to court. Here is an enforceable contract secured by property.” And later, he said, “If there is no security, [they] would have a bare promise to pay.” When Coopers flatly declined to consider further the need for security, the mediator stated, “There may be push back, but let’s see what they say.” The offer was reiterated and the mediator left the room.

10. Concluding Meetings

In the following session with Golden, the mediator introduced the offer, “I’ve got a counterproposal. I am not entirely surprised to see it.” He described the offer and left Golden to consider it. Golden agreed to waive the requirement for security without further discussion. A further counteroffer was proposed by Golden who instructed the mediator to advise Coopers that it is the ‘final offer’. The offer was accepted by Coopers: “I’m not happy, [but] will accept it.” The mediation then turned to the details of the settlement agreement, with the mediator available for assistance on drafting the agreement and reviewing the draft prior to finalization. The agreement was concluded without further issue. The parties came together for signing and pleasantries were exchanged. The mediation concluded. Resolution was reached.

VI. CASE ANALYSIS: SHIFTING IDENTITIES

The Case Study highlights the shifting mediator identity during the interactions with the parties throughout the mediation. The changes are fluid, alternating from one to another in a single session and throughout the sessions. The changes occur
with each party and occur frequently. This may be reminiscent of Gulliver’s continuum of strategies or the panoply of roles undertaken by a mediator as suggested by Mackie and others, yet the ethnographic data tells a more compelling story. Recall the words of the mediator when introducing both parties to the process: “[The] objective [of the day] is to reach a negotiated resolution to the dispute. My role is to help reach a negotiated solution.” This mediator’s vision is one steeped in a negotiation framework and his interventions are guided by his vision of the process as a negotiation for settlement and his place within that negotiation.

At the beginning of this mediation, the mediator does what is expected of every mediator. In the premediation private meetings and during the first joint session, he describes the process and his role. The mediator is acting as self – he is explaining the process, the parties’ involvement in that process and his own position within the process. He is the third party intervener selected to help the parties to negotiate a resolution to their dispute. He says at the outset that he is not a decision-maker; he will not judge. He invites the parties to tell him about their dispute. He is acting as mediator.

In the first joint session, he also begins to facilitate information exchange, ostensibly a mediator function. However, we see that he does not merely ask questions about the dispute as a disinterested party; rather, he sheds his mediator cloak, stepping into the fray of the negotiation as another persona. He becomes the party in dispute; more particularly, he takes on the mantle of Golden in his dialogue with the Coopers team. When one examines his comments relating to the issue of apparent authority, it is clear the mediator steps into the shoes of Golden and engages in competitive negotiation with Coopers: he undermines Coopers’ factual position on the issue of Mr. X’s authority through reference to the problem of the payment made to Mr. X. The mediator clearly states his (and obviously Golden’s) view that Mr. X did not act within the scope of his authority with Golden. He then raises another weakness in the Coopers case – the acknowledged lie. Golden had not raised this significant point - the mediator did. He challenges the Coopers team to support its position that Mr. X had advised Coopers to lie and that it was all part of the sham that Golden was participating in. And, that was not all: when referred to a document purporting to show this by Coopers, the mediator dismisses its value as evidence. These interactions by the mediator with Coopers illustrate the mediator’s identity as Golden, the party in dispute. In addition, we should not forget that this interaction occurred with Golden’s presence in the joint session which highlights the contrast in this shift in identity from that of self to opposing party. Golden was silent during this exchange – it had no need to intervene since the mediator became a member of team Golden during this intervention with Coopers.

The joint session ends with the mediator stating what he believes occurred during the joint session and its benefit. He transitions the movement into the next phase of the mediation – the private meetings with the parties. A shift occurs

---

48 For Gulliver and Mackie’s descriptions of the activities of mediators, see discussion at supra notes 23 and 24, respectively.

49 Interestingly, this mediator does not refer to the role of neutrality or impartiality in the process. See earlier discussion about neutrality and impartiality in the literature at supra notes 11 and 13.
again - this time it is the mediator voice that is heard at the conclusion of the joint session, commenting on and in control of process.

In the first private meeting with the Golden team, the mediator becomes Golden’s adviser: he confirms the difficulty of Coopers’ reliance on the letter as evidence of Mr. X’s role in the transaction; more particularly, the answer provided by Coopers was not what they expected, and he points to other weaknesses in the Coopers story (for example, the chronology of events). He continues to align himself with Golden as Golden’s adviser when describing the Coopers allegations as typical defence arguments. The mediator does not remain in this persona during whole of the session, however. He reverts to mediator voice when asking Golden about its priorities, and when reminding Golden about litigation costs and the possibility of an impecunious defendant at the end of the day. Another shift occurs: he takes on the Golden party voice when empathizing with the Golden team by maligning Coopers’ intention regarding the equipment: “here, the intention was not to keep any.” He shifts again to become Coopers in arguing against Golden’s contention that Coopers was aware Mr. X was acting without the authority of Golden and that the payment to him proved it. As Coopers, the mediator retorts that no one knows what Mr. X will say in court; that he is an unknown; and that he could harm Golden: “he is the wild card. How will it play to your reputation?” And further, arguing the penalty clause defence may find merit with a judge. The mediator then reverts to a Golden party voice when commiserating with Golden that Mr. X is a “loose cannon”.

This party persona continues in the following private meeting with the Coopers team. In the session, the mediator, as Golden, focuses on the weaknesses in the Coopers documentary and testamentary evidence and states that nothing proves Golden was participating in a sham as alleged by Coopers. He argues Golden’s case against Coopers, countering Coopers’ arguments – in other words, he is negotiating on the merits, or lack thereof, of Coopers’ defence: “The documents may finger Mr. X but none suggest he was doing it for Golden.” He continues to challenge Coopers as Golden on the lie to Golden by asking, “Why wasn’t the response to Golden, ‘you knew about this’, because you say that Golden knew of the deal.” And further challenging Coopers’ response – “You’ve said it before, won’t you need credible evidence?” And later, defending the Golden position by pointing out that sales may occur but Coopers is alleging something more than a mere sale – he is alleging Golden’s complicity in the resale of the equipment.

The mediator also dons an identity as Coopers’ adviser (despite the fact that Coopers has his legal adviser present in the meeting) when he speaks of what Coopers needs to prove to convince a judge of his position that Mr. X was Golden’s agent and Golden was aware of the deal, and the difficult case he would face if he proceeds to trial. This soon shifts again to the Golden voice when he engages with the Coopers team to counter each of its arguments against Golden: for example, countering the allegation that Golden would not want a public trial by advising that it has pursued such claims in court before and that it was a matter of principle to be seen to have dealt with a breach of the Sale Agreement. Another example occurs when Coopers takes umbrage at the allegation by Golden that Coopers was dishonest in his premeditated conduct. The mediator retorts: “The evidence says you were premeditated, that you knew it was a scam....” Competitive negotiation between Coopers and Golden occurs with the mediator taking on the Golden identity.
Towards the end of the meeting, the mediator then shifts again to his mediator self, by suggesting a way forward to resolution in relation to the Part 36 offer.

The mediator shifts between three identities during the following private session with Golden. First, he briefly acts as Coopers when Golden raises the issue of an indemnity from Coopers. The mediator argues against the need for a full indemnity, protecting Coopers against this demand. He immediately thereafter becomes Golden’s adviser: he corrects the view of Golden’s other advisers on the issue of res judicata telling Golden that the matter would not be res judicata if Golden settles with Coopers and Golden could find itself joined in the action against Mr. X. He continues to assess the risk to Golden of being included in any action against Mr. X, but concludes this risk assessment in the guise as mediator by stepping out of the adviser identity and putting the question of risk directly to the Golden solicitor: “Is there any prospect that Mr. X will drag you back in and in a costly way?” He concludes the session as Golden’s adviser, stating that a judge would not order the interest rate Golden wishes to apply to the settlement offer.

In the second private meeting with Coopers, the mediator relays Golden’s offer and receives Coopers’ counteroffer. This is typical mediator activity. He also takes on a party voice in this session, agreeing with the Coopers team that the offer is a decent one: as he says, it is a “pragmatic offer” and “it is not outrageous”.

The mediator begins the next session with the Golden team with mediator activity. He first conveys the offer with Coopers’ explanation for the offer. He then receives Golden’s offer. He attempts to get Golden to consider Coopers’ reaction to the offer it was intending to make; in other words, to make Golden consider Coopers’ perspective about the claim – that it is “a robust counteroffer”. He is a facilitator here, seeking to broaden the Golden perspective about Coopers’ reaction to the offer.

The mediator changes identity again in the subsequent meeting with Coopers. He becomes Golden in insisting that Coopers provide security for the payment of the settlement figure. He pushes for the security and the need to have more than a mere promise to pay. As the mediator subsequently learns, the refusal to provide security was a non-issue with Golden, highlighting the contrast in identities, moving beyond a mediator role and taking on a self-interested party identity.

The mediator then takes on the mantle of self, once again when dealing with the finalization of the settlement agreement and the conclusion of the mediation. He assists the parties in ensuring all points of agreement have been included in a written document and brings them together for a final ritual, confirming agreement.

VII. A RECONCEPTUALIZATION: WHO IS THIS THIRD PARTY INTERVENER?

In this Case Study, the mediator becomes a party to the negotiation as stated by Gulliver and Roberts; the mediator takes on the party reality as suggested by

50 Gulliver, supra note 4 and Roberts, supra note 29.
Benjamin; and, the relationship between the mediator and the parties is not extrinsic to the negotiation as envisioned by Bowling, Hoffman and de Bono. The mediator is clearly at the epicentre of a process the parties have chosen to resolve their dispute. Gulliver refers to the initial dyad of the two party negotiation becoming a triad with the introduction of the mediator. The mediator becomes the third party to a two-party negotiation. Gulliver comes close to describing the interactions of the mediator when he said that the mediator becomes a party in the negotiation, but Gulliver does not go far enough as it becomes clear the mediator is not just an added presence in a negotiation there to assist the parties to resolution. By deconstructing this mediation process, it is apparent that Gulliver’s triad may be an oversimplification. Indeed, the deconstruction of mediator actions through the ethnographic data presented here and its analysis offers a reconceptualization of the nature of mediator interventions in mediation that moves beyond the accepted understanding of third party interventions.

As mentioned earlier, the use of the facilitative and evaluative nomenclature became typical in the literature exploring mediator styles together with the Bush and Folger transformative approach to mediation. These primary approaches have been augmented by other developments including narrative, strategic and insight mediation, for example. Despite these developments, the facilitative/evaluative divide still lives on in the nomenclature of mediator practice. As a result, it serves as a pertinent reference point for a discussion about the need to move beyond categorizations of mediator action found in the literature today.

An evaluative mediator is often described as one who gives an opinion on the legal merits of the parties’ positions, assesses the strengths and weaknesses of positions, makes suggestions for resolution, controls the discussion between parties, and focuses on legal outcomes and rights. A facilitative mediator on the other hand is described in terms of gentle intervention: one who supports and guides, who does not opine, advise or propose solutions.

---


53 See earlier discussion herein regarding mediator interventions as discussed in the literature.

54 See discussion at note 20.

55 See discussion at notes 20-21.

parties on determining the strengths and weaknesses of their case through information exchange and self-assessment, and helps the parties come to their own solution. Arguably, these may not be sufficient or appropriate descriptions of the two approaches. For example, there are varying views on the extent to which conduct can be seen to be evaluative. Mediators themselves often label their approaches as evaluative, facilitative or transformative (or a mix of all three), yet the descriptions they provide of their approach is inconsistent with the label attached to it.

In using such labels, it is not clear what conduct is being referenced. Picard learns that there is no agreement on the meaning of the words evaluative and facilitative among mediators. Mediators use the words to describe their approach to their practice, yet these words mean different things to different people. Della Noce examines the use of labels in court roster mediator descriptions of mediator activity, concluding that labels of mediator actions such as evaluative, facilitative or transformative do not disclose what it is that mediators actually do. The purpose of the exploration in this article is to move beyond labels imposed by the literature and which have found their way into practice thus obscuring the action underlying the label.

Labels can mask the nature of actions and they can support mediator mythology. For example, one may argue that reality testing or playing devil’s advocate reflects a normal part of the mediator repertoire. Reality testing and playing devil’s advocate are phrases often used by mediators to label what they believe are challenges to a party’s position with the aim of ensuring that the party understands the weaknesses of his or her case. The Case Study suggests that the

57 Descriptions of the evaluative and facilitative mediator are plentiful. The descriptions given of evaluation and facilitation are based on a general reading of the literature in this area, beginning with Riskin, supra note 16 and other writings cited herein.
59 Della Noce “Evaluative Mediation” supra note 56 at 195-196.
61 Ibid.
62 See e.g. Della Noce “Mediator Profiles” supra note 56 at 808 & 819-22 and Della Noce, “Evaluative Mediation” supra note 1 at 196.
64 During the ethnographic fieldwork, mediators who described themselves in non-evaluative terms often described their interventions as ‘reality testing’ or ‘playing devil’s advocate’. See e.g.,
actions of the mediator go beyond reality testing or playing devil’s advocate – at times, the mediator loses his mediator persona and takes on the opposing party identity to progress the negotiation. He is not just a facilitative mediator who says he is merely playing devil’s advocate nor is he an evaluative mediator whose actions include reality testing. He becomes part of the negotiation between the parties as a party. These are catchwords used to mask the nature of the intervention. The mediator is negotiating as principal under the guise of mediator parlance and he is permitted to do so by the authority bestowed upon him by the mediator mantle.

This study suggests another way of seeing what mediators do. Its analysis offers an opportunity to move beyond labels that may categorize, stigmatize or stagnate theoretical and practical developments. The intent is to step away from such categorizations of mediator action, and in so doing, let the actions speak for themselves to enable a clarity of view regarding the interactions that occur at mediation, particularly between parties and mediator. The interest is to discover patterns that emerge from the observations of mediation in action. The analysis offers a conceptualization that seeks to “tell it like it is”.

In this conceptualization, the mediator voice begins the mediation during the premediation and joint session meetings. This is not the only time he acts as mediator during the course of a mediation. The mediator identity emerges throughout the process when the mediator may be, among other things, describing and controlling the process, setting the agenda, determining the issues, exploring facts and interests, relaying information including offers, considering the other side’s perspectives, and moving parties to conclusion. This is one identity - that of third party intervener invited by the parties to assist with the resolution of their dispute, an identity that conforms to a recognizable tableau of mediator interventions.

Another identity is as party. There are two aspects to party identity: that of opponent and that of party proper. As opponent, for example, in the two party dispute between Party A and B, the mediator takes on the identity of Party B to negotiate directly with Party A. The same occurs with Party B: the mediator takes on the identity of Party A and negotiates directly with Party B. In this identity, the mediator may undermine a party’s factual position on issues, he may articulate a contrary view on evidentiary points or refute them totally, he may refer to weaknesses of articulated positions, he may argue the other party’s case against the party or he may make demands. These interventions are distinct from mediator interventions. With these interventions, the mediator steps into the negotiation as a party against a party. This identity begins to challenge the orthodoxy of mediation practice. The mediator is no longer a disinterested intervener, separate from the parties. The mediator engages in direct negotiation with the party against the party. A facilitated or assisted negotiation becomes a direct negotiation where mediator is submerged by party voice.

As party, the mediator however is not only a party adversary; she also assumes direct party identity. For example, when with Party A, on occasion, she becomes Party A, articulating Party A’s interests, concerns and demands: in essence

aligning herself with Party A as a member of Party A. A similar occurrence arises when with Party B. In this form, the mediator may agree with party demands, articulate party interests, seek ways to protect party concerns, or criticize the other party and its position. These actions result in the disappearance of the mediator persona, leaving in its wake, a fortified party voice.

These identities evolve further into one of party adviser. When discussing the case with Party A, the mediator becomes A’s adviser, recommending courses of action, formulating offers and responses, opining on merits and giving legal advice. This also occurs in her discussion with Party B. In this persona, the mediator enters the realm of expert consultancy, sharing her professional expertise with the parties for the parties.

A mediator becomes much more than the non-aligned third party intervener throughout the course of a mediation. He takes on the negotiation directly as party together with an advisory and mediatory role: the mediator is mediator; the mediator is party; the mediator is party adviser. He begins as the third party intervener in the mediated negotiation as described by the literature. However, the mediator is much more than an intervener to the negotiation – he goes beyond assisting or facilitating a party with their negotiation or actively negotiating on behalf of an unable party as is suggested in the literature. The mediator is the third party intervener and becomes the party as well as the party adviser. The mediator takes on the mantle of these personas during the course of mediation: when no longer separate from the mediated negotiation as third party intervener, the mediation becomes his negotiation; the party becomes his client. His identity merges with party identity in the search for resolution.

By approaching mediator interactions in terms of these identities, the nature of the interactions become clearer than they would otherwise be through the use of terminology that indicates a mediator is evaluative, facilitative, transformative and the like. The identities suggest new relationships are created with the parties in the process. It is no longer a relationship of the distant third party intervener; it is also a relationship of adviser, adversary and supporter. These identities posit the mediator in the very centre of the mediated negotiation, where he is embedded in the negotiation moves of the parties.

The mediator shifts between these identities. These identities create the persona we call mediator. Mediation depends on interactions to effect change in the parties to move them to negotiated order. By assuming these personas, the mediator becomes a powerful catalyst for change during the process to resolution.

What does this mean for the field? A new understanding of mediation emerges from the ethnographic data leading to a reconceptualization of a process that is called mediation and for an acknowledgement of a mediator’s active engagement in the interaction between parties and with parties beyond that which is offered by the literature. This impacts a number of issues: for example, mediator neutrality and impartiality, argued to be fundamental elements of mediation; the role of transparency in mediation and the extent to which mediator interventions are not seen for what they are, yet accepted as that which they are not; the place of power in mediation and how it is affected by these identities; the extent to which mediators are qualified to engage in negotiations with and against parties; and the efficacy of a process that portrays itself as something more than what it is. Given

---

65 Roberts & Palmer, supra note 11 at 155.
the direct and principal role played by a mediator in the mediated negotiation, such issues must be made subject to further research scrutiny.