

YADA, YADA, YADA: SEINFELD, THE LAW AND MEDIATION

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I. INTRODUCTION

In the *Seinfeld* episode *The Chinese Woman*,¹ Elaine is confronted with a mild annoyance from Paul, her friend Noreen's new boyfriend. Every time Elaine attempts to call Noreen,² Paul answers the telephone dragging Elaine into boring and insignificant conversations.³ Frustrated with Paul's dreadful and inconsiderate habit, Elaine resorts to hanging up the telephone anytime Paul, rather than Noreen, answers her calls.

As the episode progresses, Elaine notifies Jerry that Noreen and Paul may be breaking up, which prompts Jerry to interject, "Hey, wouldn't it be funny if Paul and Noreen broke up because you kept hanging up on him?"⁴ Jerry's comment befuddles Elaine who then asks for clarification. Jerry adds, "Well you know, if Paul thought it was some guy hanging up because he was having an affair with Noreen"⁵ Presented with this revelation, Elaine finally realizes the effects of her actions upon others.

Rather than simply speaking to Elaine's perspective, Jerry's insight results from a complete evaluation of the circumstances. By suggesting that Elaine's hang-ups are the catalyst for romantic tensions between Noreen and Paul, Jerry forces Elaine to move beyond her own perspective and to consider how her actions have impacted others. Initially, Elaine voiced her frustrations with Paul's irritating and inconsiderate habit, but Jerry's assessment forces Elaine to acknowledge her own irritating and inconsiderate actions.

Jerry Seinfeld, however, is hardly the first person to recognize the efficacy of mediation techniques to resolve conflicts. When a

¹ *Seinfeld: The Chinese Woman* (NBC television broadcast Oct. 13, 1994) [hereinafter *The Chinese Woman*].

² Played by Kelly Coffield. "Seinfeld" *The Chinese Woman* (Oct. 13, 1994), <http://www.imdb.com/title/tt0697676/>.

³ Jerry characterizes Paul as "a long-talker." *The Chinese Woman*, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

party suffers injury at the hands of another, the American adversarial system provides three basic options: the injured party can simply do nothing; the injured party can resort to the court system by filing a complaint; or the injured party can engage an alternative dispute resolution mechanism⁶ tailored to address the injured party's specific harm.⁷ One such method of alternative dispute resolution is mediation.

General frustrations with formal legal processes have fueled mediation's rapid ascent within legal culture.⁸ Concurrently, a multitude of studies have sought to analyze popular culture's influence upon society's perceptions of the legal profession.⁹ Because television serves as a significant medium through which popular culture's views are disseminated,¹⁰ academics have focused upon television's ability to influence viewers' perceptions of the law. But at the same time that mediation has begun to obtain mainstream acceptance by the legal profession, relatively little scholarship has sought to assess popular culture's representations of mediation.

Cognizant of the legal profession's increased use of mediation, popular culture has begun to represent mediation as a viable method for resolving conflicts. Prime examples consist of *The Office*,¹¹ countless *Saturday Night Live* skits, and the summer 2005 box office hit, *Wedding Crashers*.¹² Nonetheless, few shows feature more conflict, and revolve around the resolution of such conflict, than *Seinfeld*.

This Note proposes that *Seinfeld* offers a critique of formal law while also presenting a novel view of mediation techniques in the context of both legal and everyday disputes. Although not all solved conflicts fit perfectly into a modern "ideal" mediation

⁶ Although there is no universal definition for alternative dispute resolution, a commonly accepted definition is "a structured dispute resolution process with third party intervention which does not impose a legally binding outcome on the parties." KARL MACKIE ET AL., THE ADR PRACTICE GUIDE: COMMERCIAL DISPUTE RESOLUTION 9 (2d ed. 2000).

⁷ Natasha C. Meruelo, *Mediation and Medical Malpractice: The Need to Understand Why Patients Sue and a Proposal for a Specific Model of Mediation*, 29 J. LEGAL MED. 285, 291 (2008).

⁸ Cletus C. Hess, *To Disclose or Not to Disclose: The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct*, 95 DICK. L. REV. 601, 602-03 (1991).

⁹ See generally Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579 (1989); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785 (1993); Kimberlianne Podlas, "The CSI Effect": *Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429 (2006).

¹⁰ See Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 193 (2008).

¹¹ *The Office: Diversity Day* (NBC television broadcast Mar. 29, 2005).

¹² WEDDING CRASHERS (New Line Cinema 2005).

framework,¹³ *Seinfeld*'s characters are constantly engaging in mediation-styled activity.¹⁴ By belittling the nature of disputes and the invocation of formal legal action while casting mediation techniques in a favorable light, *Seinfeld* not only exemplifies legal culture's shift toward mediation, but actually advocates mediation processes as a means for individual members of society to resolve their own conflicts.

This Note will first explore the popularity of *Seinfeld* and discuss the influence of *Seinfeld* on legal culture. Part III details cultivation theory and explores the possible influences *Seinfeld* may have in shaping its viewers' impressions of formal law. Specific instances in which *Seinfeld* has ridiculed formal legal practices and offered social criticisms of the legal profession are analyzed in Part IV. Part V describes a specific episode of *Seinfeld*¹⁵ and illustrates the consequences of parties' refusal to reach mutually satisfactory resolutions, the need for mediation to resolve highly contentious disputes, and the inadequacy of the legal system to provide an adequate resolution to the parties' conflict. Basic mediation principles are introduced in Part VI. Finally, Part VII provides detailed accounts of evaluative, facilitative, and transformative approaches to mediation as well as examples of *Seinfeld* disputes resolved through the strategies of these mediation models.

II. SEINFELD, POPULAR CULTURE, AND LEGAL CULTURE

*Seinfeld*¹⁶ aired on the National Broadcasting Company (NBC) from 1989 to 1998¹⁷ and continues to run in syndication in over two hundred American television markets, which represents over ninety-nine percent of the viewing audience.¹⁸ Jerry Seinfeld and Larry David pitched *Seinfeld* to network executives as a show about nothing.¹⁹ The show chronicles the mundane details of Jerry

¹³ See discussion *infra* Part VII.A–C.

¹⁴ *Id.*

¹⁵ *Seinfeld: The Parking Space* (NBC television broadcast Apr. 22, 1992) [hereinafter *The Parking Space*].

¹⁶ Originally titled "The Seinfeld Chronicles."

¹⁷ *Seinfeld* – Show Description, http://www.sonypictures.com/tv/shows/seinfeld/about/?sl=show_description (last visited Aug. 27, 2009).

¹⁸ *Id.*

¹⁹ This is mirrored in *The Pitch*, where George and Jerry pitch an idea for a show called "Jerry" as a "show about nothing." *Seinfeld: The Pitch* (NBC television broadcast Sept. 16, 1992) [hereinafter *The Pitch*].

Seinfeld's Manhattan life through a host of eccentric acquaintances, including his three closest friends: George Costanza, Elaine Benes, and Cosmo Kramer.²⁰ In the show, Jerry plays a fictionalized version of himself—a standup comedian who critiques the everyday oddities with which most people fail to concern themselves.²¹

Unlike most television sitcoms, *Seinfeld* did not seek to teach its audience lessons or demonstrate character development.²² Instead, the show's characters continuously exhibit their selfishness and egocentric traits. In situations where most sitcoms seek to impact their audience and reveal characters' vulnerabilities, *Seinfeld* made no attempt to invoke audience sympathies²³ and rebuked the notion of character development.²⁴

In addition to captivating audiences and being named "TV Guide's Greatest Television Show of All Time,"²⁵ *Seinfeld* has attracted the attention of academics.²⁶ With contributions such as "It's not you; it's me!"²⁷ "festivus,"²⁸ and "shrinkage,"²⁹ *Seinfeld*'s impact and contributions to popular culture cannot be overstated.

²⁰ These characters are played by Jason Alexander, Julia Louis-Dreyfus, and Michael Richards, respectively. *Seinfeld* – Show Description, *supra* note 17.

²¹ *Id.*

²² TV1, *Seinfeld: About*, <http://www.tv1.com.au/Shows/Seinfeld/About/> (last visited Aug. 27, 2009).

²³ For example, George's fiancé Susan dies after licking the toxic glue on several hundred wedding invitations that George purchased at discount. Nonetheless, *Seinfeld*'s characters, including George, show little remorse or emotion and make no effort to invoke an emotional reaction from the show's audience. See *Seinfeld: The Invitations* (NBC television broadcast May 16, 1996).

²⁴ This is exemplified by the producers' mantra: "No hugging, no learning." See TV1, *Seinfeld: About*, *supra* note 22; see also *Seinfeld: The Secret Code* (NBC television broadcast Nov. 9, 1995) (Kramer says to Jerry, "Well you know the important thing is that you learned something," to which Jerry responds, "No I didn't.>").

²⁵ *The 50 Greatest TV Shows of All Time*, T.V. GUIDE, May 4, 2002; TV Guide Names Top 50 Shows, Weekly Magazine Says 'Seinfeld' Is Greatest of All Time – CBS News, <http://www.cbsnews.com/stories/2002/04/26/entertainment/main507388.shtml>.

²⁶ Thomas S. Hibbs, Professor and Chair of Philosophy at Boston College, Lecture: Nihilism in Popular Culture: *Seinfeld*, *The Simpsons* and *Ally McBeal* at the University of Notre Dame (Dec. 2, 1999). For a discussion of Hibbs' lecture, read John Huston, *Hibbs Examines 'Seinfeld,' Other Shows About 'Nothing,'* NOTRE DAME OBSERVER, Dec. 3, 1999, <http://www.nd.edu/~observer/12031999/News/5.html>; Dana Weaver & Mary Beth Oliver, Television Programs and Advertising: Measuring the Effectiveness of Product Placement Within *Seinfeld*, Annual Meeting of the International Communication Association, in Acapulco, Mexico (June 2000); WILLIAM IRWIN, *SEINFELD AND PHILOSOPHY* (Open Court 1999); GREG GATTUSO, *THE SEINFELD UNIVERSE: THE ENTIRE DOMAIN* (Citadel Press 1996); Katherine Gantz, "Not That There's Anything Wrong with That": Reading the Queer in *Seinfeld*, in *MEDIA AND MESSAGES: STRATEGIES AND READINGS IN PUBLIC RHETORIC* (Greg Barnhisel ed., 2005).

²⁷ *Seinfeld: The Lip Reader* (NBC television broadcast Oct. 28, 1993).

In no respect immune from popular culture, the legal profession has also succumbed to the influences of *Seinfeld*. In *General Electric Corp. v. DirecTV, Inc.*,³⁰ for example, DirecTV's counsel began its brief, "Perhaps it was the excitement surrounding the final episode of 'Seinfeld' . . . that inspired GE Capital to submit a 33-page brief about nothing" ³¹

In fact, a remarkable number of judicial decisions have cited *Seinfeld* to demonstrate legal concepts. For instance, in *Clancy v. King*,³² the court footnoted to *The Wig Master* to exemplify the duty of good faith implicit in all contracts.³³ Similarly, *Ultrasound*

²⁸ *Seinfeld: The Strike* (NBC television broadcast Dec. 18, 1997).

²⁹ *Seinfeld: The Wife* (NBC television broadcast Mar. 18, 1994).

³⁰ Gen. Elec. Capital Corp. v. DirecTV, Inc., No. 3:97 CV 1901 PDC, 1998 WL 849389 (D. Conn. 1998).

³¹ *Id.* at *1.

³² *Clancy v. King*, 954 A.2d 1092 (Md. 2008).

³³ Jerry had purchased a jacket from a men's clothing shop but following an unrelated personal quarrel with the salesman sought to return the jacket:

Jerry: Excuse me, I'd like to return this jacket.

Clerk: Certainly. May I ask why?

Jerry: For spite.

Clerk: Spite?

Jerry: That's right. I don't care for the salesman that sold it to me.

Clerk: I don't think you can return an item for spite.

Jerry: What do you mean?

Clerk: Well, if there was some problem with the garment. If it were unsatisfactory in some way, then we could do it for you, but I'm afraid spite doesn't fit into any of our conditions for a refund.

Jerry: That's ridiculous, I want to return it. What's the difference what the reason is?

Clerk: Let me speak with the manager. Excuse me . . . Bob! (*walks over to the manager and whispers*)

Bob: What seems to be the problem?

Jerry: Well, I want to return this jacket and she asked me why and I said for spite and now she won't take it back.

Bob: That's true. You can't return an item based purely on spite.

Jerry: Well, so fine then. Then I don't want it and then that's why I'm returning it.

Bob: Well you already said spite so . . .

Jerry: But I changed my mind.

Bob: No, you said spite. Too late.

Seinfeld: The Wig Master (NBC television broadcast Apr. 4, 1996).

The court then notes:

In attempting to exercise his contractual discretion out of "spite," Jerry breached his duty to act in good faith towards the other party to the contract. Jerry would have been authorized to return the jacket if, in his good faith opinion, it did not fit or was not an attractive jacket. He may not return the jacket, however, for the sole purpose of denying to the other party the value of the contract. Jerry's *post hoc* rationalization that he was returning the jacket because he did not "want it" was rejected properly by Bob as not credible.

Clancy v. King, *supra* note 32, at 1109 n.27.

Imaging Corp. v. Hyatt Corp.,³⁴ utilized *Seinfeld* in a claim for promissory estoppel where the defendant failed to honor the plaintiff's hotel reservation.³⁵ The court cited Jerry for the proposition that, "Anyone can take a reservation; it's the holding of the reservation that's important."³⁶ And in *New York v. FCC*,³⁷ the Second Circuit referenced *The Maid*³⁸ and illustrated the anxieties that may result from changed area codes resulting from the Federal Communications Commission's regulation.³⁹

While most *Seinfeld* references have sought to illustrate legal concepts, judges have also cited *Seinfeld* for simple humor,⁴⁰ as a source of authority,⁴¹ as a means of rebuking criminal defendants,⁴²

³⁴ *Ultrasound Imaging Corp. v. Hyatt Corp.*, No. 1:06-CV-02778-JEC, 2007 WL 2345256 (N.D. Ga. 2007).

³⁵ *Id.* at *5.

³⁶ In *The Alternate Side*, a car rental agency failed to have a car on hand despite the fact that Jerry had made a reservation:

Agent: I'm sorry, we have no mid-size available at the moment.

Jerry: I don't understand. I made a reservation. Do you have my reservation?

Agent: Yes, we do. Unfortunately, we ran out of cars.

Jerry: But the reservation keeps the car here. That's why you have the reservation.

Agent: I know why we have reservations.

Jerry: I don't think you do. If you did, I'd have a car. See, you know how to take the reservation, you just don't know how to hold the reservation and that's really the most important part of the reservation, the holding. Anybody can just take them.

Seinfeld: The Alternate Side (NBC television broadcast Dec. 4, 1991) [hereinafter *The Alternate Side*].

³⁷ 267 F.3d 91 (2d Cir. 2001).

³⁸ In this episode, Elaine receives a telephone number with a "646" area code and begins experiencing social ostracization as a result. *Seinfeld: The Maid* (NBC television broadcast Apr. 30, 1998).

³⁹ *New York v. FCC*, 267 F.3d at 94.

⁴⁰ In *Charvat v. Dispatch Consumer Serv., Inc.*, 769 N.E.2d 829, 830-31 (Ohio 2002) and *United States v. Lyons*, 453 F.3d 1222, 1225 fn.1 (9th Cir. 2006), both courts utilized *Seinfeld* to express their displeasure with telemarketing:

Jerry: (*phone ringing*) Hello.

[Telemarketer]: Hi. Would you be interested in switching over to TMI long-distance service?

Jerry: Oh, gee, I can't talk right now. Why don't you give me your home number and I'll call you later?

[Telemarketer]: Well, I'm sorry. We're not allowed to do that.

Jerry: I guess you don't want people calling you at home.

[Telemarketer]: No.

Jerry: Well, now you know how I feel (*hangs up*).

The Pitch, *supra* note 19.

⁴¹ *People v. Saiz*, 32 P.3d 441, 454 (Colo. 2001) (Bender, J., dissenting) (emphasizing the importance of non-verbal cues with respect to admitting evidence in a criminal proceeding and citing Kramer for the proposition that "[n]inety-four percent of our communication is nonverbal . . .").

⁴² See *United States v. Harper*, 463 F.3d 663 (7th Cir. 2006). Defendant's conviction for tobacco diversion was affirmed. Defendant's scheme consisted of purchasing cigarettes in Indiana,

to admonish defendants for bringing frivolous lawsuits,⁴³ and to commend parties for their willingness to assist others.⁴⁴ Perhaps the most stunning reference to *Seinfeld* came in *Lopez v. Northwestern Memorial Hospital*,⁴⁵ where plaintiffs appealed the trial court's decision and claimed the trial judge committed reversible error by chiding an expert witness for being a "fast-talker."⁴⁶

Despite scholars' acknowledgement of *Seinfeld*'s impact on popular culture and judicial opinions referencing *Seinfeld*, the legal attitudes expressed in *Seinfeld* itself have gone largely unnoticed.⁴⁷

III. CULTIVATION THEORY

Much of what we know derives not from direct experience, but from various forms of storytelling.⁴⁸ By weaving together powerful

where cigarettes were taxed at 15.5 cents per pack, and driving the cigarettes into Illinois for sale, where taxes were ninety-two cents per pack. The court footnoted *The Bottle Deposit*, which consisted of a similar scheme devised by Kramer and Newman to exploit Michigan's higher deposit for soda bottles by using a postal truck to transport recyclables collected in New York for return in Michigan. *Seinfeld: The Bottle Deposit* (NBC television broadcast May 2, 1996).

⁴³ *Gentile v. Stay Slim, Inc.*, 819 N.Y.S.2d 848 (N.Y. Sup. Ct., Queens County 2006) (dismissing plaintiffs' class action complaint and noting, "The complaint reads like an episode from the *Jerry Seinfeld Show* [sic], people are happily eating ice-cream and wondering how something that tastes so good can have so few calories. It turned out that the product did not have as few calories as advertised."). The New York Supreme Court of Queens County appropriately referenced *Seinfeld* insofar as this exact scenario presented itself in *The Non-Fat Yogurt*. See *Seinfeld: The Non-Fat Yogurt* (NBC television broadcast Nov. 4, 1993) [hereinafter *The Non-Fat Yogurt*].

⁴⁴ *Caswell v. BJ's Wholesale Co.*, 5 F. Supp. 2d 312, 320 n.3 (E.D. Pa. 1998) (praising defendant for assisting plaintiff and disagreed with Jackie Chiles' legal advice to Jerry in *The Finale*, which asserted, "Good Samaritan law? Never heard of it. You don't have to help anybody. That's what this country is all about!").

⁴⁵ *Lopez v. Northwestern Mem'l Hosp.*, 873 N.E.2d 420 (Ill. App. Ct. 2007).

⁴⁶ *Id.* at 435.

⁴⁷ This is particularly surprising in light of how often *Seinfeld*'s characters find themselves immersed in legal conflicts. Perhaps the frequency of the characters' legal disputes derives from Jerry Seinfeld's personal fascination with law. In addition to involvement in various legal disputes, Mr. Seinfeld's most recent movie, *A Bee Movie*, revolves around a college-educated bee that discovers humans have been stealing bees' hard-earned honey. Upon discovering that humans have engaged in such massive theft, Jerry's character brings suit seeking injunctive relief to prohibit human collection of bees' honey. After determining that the bees had standing, the court ultimately finds for the bees and the injunctive relief is granted. Interestingly, the bees then find themselves with an abundance of honey and cease honey production. Discontinued honey production, however, means bees no longer pollinate plants and massive plant extinction results. *A BEE MOVIE* (Paramount Pictures 2007). This makes one wonder whether the movie, like the show *Seinfeld*, seeks to provide social commentary on frivolous lawsuits.

⁴⁸ Kimberlianne Podlas, *The Monster in the Television: The Media's Contribution to the Consumer Litigation Boogeyman*, 34 GOLDEN GATE U. L. REV. 239, 256 (2004).

narratives and character portrayals, television socializes its viewers and teaches them various aspects of society;⁴⁹ television serves as society's storyteller.⁵⁰

While scholars have advanced numerous theories to explain the influence of television on a viewer's information, beliefs, and attitudes, cultivation theory has established itself as most prominent.⁵¹ Theorists in the fields of social and cognitive psychology hypothesize that viewers' perceptions of social reality are "cultivated" in accordance with their exposure to television programming.⁵²

This exposure often influences viewers' attitudes, standards of judgment, and behaviors.⁵³ Cultivation theory, however, should not be taken to say that popular culture creates views of social reality; rather it asserts that viewers' perceptions of social reality are refined by what they observe.⁵⁴ Thus, long-term or heavy television exposure results in subtle, cumulative influences leading viewers to hold beliefs that are consistent with the imagery and messages of television programs.⁵⁵ Where a viewer repeatedly absorbs a particular depiction on television, the viewer will presume that representation is common in reality.⁵⁶

Research has indicated that television portrayals of judges and litigants can profoundly affect social perceptions of litigation and courtroom conduct.⁵⁷ Empirical data has demonstrated that popu-

⁴⁹ Michael J. Porter et al., *Re(de)fining Narrative Events: Examining Television Narrative Structure*, 30 J. POPULAR FILM & TELEVISION 23, 28–29 (2002).

⁵⁰ Kimberlianne Podlas, *The "CSI Effect" and Other Forensic Fictions*, 27 LOY. L.A. ENT. L. REV. 87, 98 (2007).

⁵¹ Steven Eggermont, *Television Viewing, Perceived Similarity, and Adolescents' Expectations of a Romantic Partner*, 48 J. BROAD. & ELEC. MEDIA 244, 248 (2004).

⁵² Michael Asimow, *Law and Popular Culture: Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 553–54 (2000).

⁵³ Kimberlianne Podlas, *Guilty on All Accounts: Law & Order's Impact on Public Perception of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1, 11 (2008) [hereinafter Podlas I]. For example, "[i]nternational students who were heavy viewers of daytime talk shows exhibited beliefs consistent with the reality of American culture broadcast [sic]." Kimberlianne Podlas, *Broadcast Litigiousness: Syndi-Court's Construction of Legal Consciousness*, 23 CARDOZO ARTS & ENT. L. J. 465, 484 (2005) [hereinafter Podlas II] (citing a study by Joseph R. Dominick & Hyung-Jin Woo, *Daytime Television Talk Shows and the Cultivation Effect Among U.S. and International Students*, 45 J. BROAD. & ELEC. MEDIA 598 (2001)).

⁵⁴ David Ray Papke, *The Impact of Popular Culture on American Perceptions of the Courts*, 82 IND. L.J. 1225, 1227 (2007).

⁵⁵ Podlas I, *supra* note 53, at 11. Viewers "perceive the real world as resembling what they see on television," and "adopt attitudes conforming to that visage." Podlas, *supra* note 50, at 98.

⁵⁶ Podlas II, *supra* note 53, at 483.

⁵⁷ Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndi-Courtrooms Bias Our Juror Citizenry*, 39 AM. BUS. L.J. 1, 21 (2001); Kimberlianne Podlas, *As Seen on TV: The*

lar culture depictions of litigation impacts parties' responses when disputes arise as well as the parties' assessments of their disputes.⁵⁸ Studies have also shown that television representations of attorneys influence viewers' expectations and satisfaction with real world attorneys.⁵⁹

Gerbner asserts that cumulative exposure to television programming generates a unique collection of beliefs in viewers.⁶⁰ Even though viewers may not recollect specific aspects of what they learn from television, individuals retain general impressions that affect their decisions.⁶¹ Strikingly, people usually do not "source discount" information acquired from television even though they are aware that the information derives from fiction, not fact.⁶² That individuals' decisions are impacted by what they observe on television is significant since viewers' attitudes, once formed, are very resistant to change.⁶³ Accordingly, television's divergence from reality may transcend the entertainment experience so as to cultivate a distorted perspective of the world in its viewers.⁶⁴

With respect to *Seinfeld*, the audience is frequently presented with character conflicts. Typically, these conflicts stem from mundane, everyday occurrences to which the audience can easily relate. Nonetheless, *Seinfeld* advances everyday conflicts beyond conventional boundaries in order to humor its audience with the extreme consequences that result when parties neglect to cure their disagreements. *Seinfeld*'s ability to impact its viewers' perceptions, opinions, and decisions is particularly relevant because the show presents itself as "a show about nothing"⁶⁵ when in fact it is about everything. Since *Seinfeld* does not purport to offer its audience an inside look at the criminal justice system or courtroom drama,

Normative Influence of Syndi-Court on Contemporary Litigiousness, 11 VILL. SPORTS & ENT. L. J. 1, 1-2 (2004).

⁵⁸ Podlas II, *supra* note 53, at 491-505.

⁵⁹ See Michael Pfau, *Television Viewing and Public Perceptions of Attorneys*, 21 HUM. COMM. RES. 307 (1995).

⁶⁰ George Gerbner et al., *Growing Up With Television: Cultivation Processes*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH, 17-25 (Jennings Bryant & Dolf Zillman eds., 1994).

⁶¹ Podlas II, *supra* note 53, at 483.

⁶² Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. ENT. L. REV. 653, 670 (2007).

⁶³ Gerbner et al., *supra* note 60, at 23-25.

⁶⁴ Podlas II, *supra* note 53, at 483.

⁶⁵ This is also mirrored in *The Pitch*, where George and Jerry pitch an idea for a show called "Jerry" as a "show about nothing." *The Pitch*, *supra* note 19.

viewers are much less likely to “source discount” the expressions and attitudes they observe.⁶⁶

By providing numerous representations of the law, viewers who fail to appreciate or recognize *Seinfeld*'s exercise of satire may see *Seinfeld* as a commentary on social problems. For example, Jackie Chiles⁶⁷ is a reoccurring attorney who spoofs Johnnie Cochran by imitating his speech style, delivery,⁶⁸ and obsession with money. Under cultivation theory principles, audiences will come to view attorneys as cunning and greedy even though they may not think of Chiles in particular when expressing such opinions.⁶⁹

These principles extend beyond the characters appearing in *Seinfeld* to the disputes that arise, the responses to conflict, the outcomes of invoking formal legal processes in resolving one's disputes, and the uses of alternative dispute resolution or mediation techniques to repair relationship and dissolve conflicts. *Seinfeld* viewers will take much more than laughs away from the episodes.⁷⁰ *Seinfeld*'s audience will come to adopt attitudes reflected in the show, namely that formal legal processes are corrupt and inadequate to cure parties' disputes—often leaving both parties in a worse condition. Further, *Seinfeld* viewers are also shown that utilizing self-help⁷¹ and alternative dispute resolution techniques, such as mediation, are best suited to resolve conflicts and serve parties' interests.

⁶⁶ Asimow, *supra* note 52, at 555.

⁶⁷ Played by Phil Morris. “Seinfeld” The Maestro (1995), <http://www.imdb.com/title/tt0697726/>.

⁶⁸ “Your face is my case.” *Seinfeld: The Abstinence* (NBC television broadcast Nov. 21, 1996) [hereinafter *The Abstinence*].

⁶⁹ Podlas II, *supra* note 53, at 483.

⁷⁰ See *Gentile*, 819 N.Y.S.2d 848. The trial court references *Seinfeld* in dismissing plaintiffs' class action complaint against a diet foods company that had misrepresented the nutritional facts of its products. The court's reference to *Seinfeld* is particularly remarkable insofar as *The Non-Fat Yogurt* presented this exact scenario to its audience. *The Non-Fat Yogurt*, *supra* note 43.

⁷¹ This is an area extremely ripe for further consideration. There are numerous instances where characters take it upon themselves to settle disputes rather than allow legal processes to consume their time. For a small sampling see *Seinfeld: The Statue* (NBC television broadcast Apr. 11, 1991); *Seinfeld: The Revenge* (NBC television broadcast Apr. 18, 1991); *Seinfeld: The Airport* (NBC television broadcast Nov. 25, 1992); *Seinfeld: The Rye* (NBC television broadcast Jan. 4, 1996). Unfortunately, a full account of self-help in *Seinfeld* is beyond the scope of this Note.

IV. SEINFELD'S MOCKERY OF FORMAL LEGAL PRACTICES

From the beginning⁷² through the final episode,⁷³ *Seinfeld*'s storylines incorporate legal disputes and parody legal topics. But rather than present meritorious claims, *Seinfeld* typically magnifies the absurdities and deficiencies that have come to be associated with formal legal practices. *Seinfeld* illustrates a multitude of defects in American law and ultimately depicts the legal system as flawed, inconvenient, and ineffective.⁷⁴

In *The Pen*,⁷⁵ *Seinfeld* portrays litigation as the result of petty and over-emotional adults. During this episode, a dispute erupts between Morty Seinfeld,⁷⁶ Jerry's father, and a condominium association member named Jack Klampus.⁷⁷ Initially, Morty and Jack squabble over a dinner bill's unaccounted-for Coke. Morty asks Jack to pay \$20 to cover his costs for dinner but Jack denies having a Coke and issues a check for \$19.45. Morty and Jack's dispute finally boils over after Jack gives Jerry his beloved "astronaut pen."

Based upon these simple and seemingly insignificant facts, Morty and Jack come to blows. The following day, a fellow community resident named Evelyn⁷⁸ acts as an intermediary and asks the Seinfelds whether they have decided on a lawyer,⁷⁹ although the episode ends without revealing whether formal litigation is

⁷² In the pilot episode, Kramer informs Jerry, "You know, I was almost a lawyer." *Seinfeld: The Seinfeld Chronicles* (NBC television broadcast July 5, 1989).

⁷³ Where Jerry, Elaine, George, and Kramer stand trial as "The New York Four" for violating a good Samaritan law. *Seinfeld: The Finale* (NBC television broadcast May 14, 1998) [hereinafter *The Finale*].

⁷⁴ *Seinfeld* exemplifies the ineffectiveness of the law through two episodes, both of which revolve around Jerry's property being stolen. In *The Robbery*, Jerry's television and other items are stolen after Kramer leaves Jerry's apartment door open. After taking a statement, the police officer says, "Well, Mr. Seinfeld, we'll look into it and uh, we'll let you know if we uh, you know, if we find anything." When Jerry asks whether the police ever find anything the officer responds, "No." *Seinfeld: The Robbery* (NBC television broadcast June 7, 1990). But in *The Alternate Side*, Jerry's car is stolen and when he asks Kramer and George whether he should call the police Kramer responds, "What are they going to do?" Instead, Jerry calls his carphone and talks with the car thief. Kramer eventually takes the telephone from Jerry and asks the thief to return his gloves from the car's glovebox, which the thief actually does. *The Alternate Side*, *supra* note 36. These two episodes convey a message that invoking formal legal processes rarely serves the interests of the parties. Conversely, where the interested parties decide to resolve the conflict amongst themselves there is a greater likelihood of achieving a mutually acceptable outcome.

⁷⁵ *Seinfeld: The Pen* (NBC television broadcast Oct. 2, 1991) [hereinafter *The Pen*].

⁷⁶ Played by Barney Martin. "Seinfeld" *The Pen* (1991), <http://www.imdb.com/title/tt0697749/>.

⁷⁷ Played by Sandy Baron. *Id.*

⁷⁸ Played by Ann Morgan Guilbert. *Id.*

⁷⁹ Specifically Evelyn asks, "Has Morty decided on a lawyer yet?" And then offers:

fully pursued. By premising a lawsuit on such a minor dispute, *Seinfeld* portrays litigation as irrational and self-righteous. A simple dispute revolving around a Coke and a pen becomes infinitely more complex and contentious. Rather than resolving Morty and Jack's conflict, litigation drives the parties further apart.

In an episode titled *The Ticket*,⁸⁰ Newman⁸¹ concocts a plan with Kramer to avoid a speeding ticket fine. Under the plan, Kramer testifies that numerous failed attempts to become a banker pushed him to the brink of suicide and Newman had been rushing to his aid when pulled over for speeding. Newman acts as his own attorney and engages in a Perry Mason-like direct examination of Kramer. Kramer's entire testimony, however, is fabricated and the legal profession is shown as a dishonest practice dominated by corrupt counsel willing to say whatever it takes to win a case. Even though Newman's defense ultimately fails, *Seinfeld* represents the legal system as inefficient—wasting time and resources by permitting Newman to indulge the court with his frivolous defense.

In addition to critiquing litigants and the merits of their claims, *Seinfeld* critiques the professionals who operate within the legal system. In *The Library*,⁸² the New York Public Library alleges Jerry failed to return a book he borrowed in 1971. Due to the long-standing delinquency, Jerry's book return is turned over to the Library's investigator, Lieutenant Bookman.⁸³ Despite being only a "library cop," Bookman exhibits extreme zeal for his duties and embodies popular culture stereotypes of crime investigators.⁸⁴ When Jerry offers his account of the overdue library book, Bookman continually interrupts and never provides Jerry with an opportunity to furnish a full explanation.⁸⁵ Instead, Bookman depicts investigators as callous, intense, and more interested in developing

My nephew Larry could do it. He's a brilliant lawyer. He says Jack has no case . . . and I spoke to Arnie and he says that according to the bylaws of the condo constitution, they need six votes to throw you out for unruly behavior, not five. Doctor Churnov is the one you'll have to suck up to.

She later instructs Morty Seinfeld, "Arnold says they need six votes to throw you out." *The Pen*, *supra* note 75.

⁸⁰ *Seinfeld: The Ticket* (NBC television broadcast Sept. 16, 1992).

⁸¹ Played by Wayne Knight. "Seinfeld" The Finale (1998), <http://www.imdb.com/title/tt0697695/>.

⁸² *Seinfeld: The Library* (NBC television broadcast Oct. 16, 1991) [hereinafter *The Library*].

⁸³ Played by Philip Baker Hall. "Seinfeld" The Library (1991), <http://www.imdb.com/title/tt0697721/>.

⁸⁴ See Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229 (1987).

⁸⁵ For example, Jerry attempts to resolve the dispute but Bookman treats the experience as an interrogation instead:

narratives to support theories of guilt than ascertaining all relevant facts.

Another prominently featured legal character is Jackie Chiles. Chiles' character appears in five episodes⁸⁶ wearing expensive suits, discharging grandiose vocabulary, and constantly obsessing over money.⁸⁷ Chiles represents Kramer in three lawsuits, each absurd and each seeking to exploit the foolishness of the plaintiff (Kramer) for substantial sums of money. In each dispute, Chiles' sole goal is financial gain.

Each time Kramer visits Chiles' office, Chiles instructs his secretary, "Suzie, call Dr. Bison. Set up an appointment . . . [t]ell him it's for me."⁸⁸ The obvious implication is that Dr. Bison serves as Chiles' expert witness who has some sort of arrangement with Chiles whereby the doctor will provide the testimony necessary to establish injury for Chiles' clients. In this way, the law's greed has tainted other professions and turned honest doctors into shallow enablers looking for their cut.

You took this book out in 1971? . . . Yeah '71, that was my first year on the job. Bad year for libraries, bad year for America, hippies burning library cards, Abbie Hoffman telling everybody to steal books. I don't judge a man by the length of his hair or the kind of music he listens to, rock was never my bag. But you put on a pair of shoes when you walk into the New York Public Library fella. . . . You're a comedian, you make people laugh. . . . You think this is all a big joke don't you? . . . I saw you on TV once, I remembered your name from my list. I looked it up, sure enough it checked out. You think that because you're a celebrity that somehow the law doesn't apply to you? That you're above the law? . . . Well let me tell you something funny boy, you know that little stamp? The one that says 'New York Public Library?' Well that may not mean anything to you, but that means a lot to me, one whole hell of a lot. Sure, go ahead, laugh if you want to. I've seen your type before: flashy, making the scene, flaunting convention. Yeah, I know what you're thinking: what's this guy making such a big stink about old library books? Well let me give you a hint junior. Maybe we can live without libraries, people like you and me. Maybe. Sure, we're too old to change the world. But what about that kid? Sitting down, opening a book right now, in a branch at the local library and finding drawings of pee-pees and wee-wees in *The Cat in the Hat* and *The Five Chinese Brothers*? Doesn't he deserve better? Look, if you think this is about overdue fines and missing books, you better think again. This is about that kid's right to read a book without getting his mind warped. Maybe that turns you on Seinfeld. Maybe that's how you get your kicks. You and your good time buddies. I got a flash for you, joy boy. Party time is over. You got seven days, Seinfeld, that is one week!

The Library, *supra* note 82.

⁸⁶ *Seinfeld: The Maestro* (NBC television broadcast Oct. 5, 1995) [hereinafter *The Maestro*]; *Seinfeld: The Caddy* (NBC television broadcast Jan. 25, 1996) [hereinafter *The Caddy*]; *Seinfeld: The Friars Club* (NBC television broadcast Mar. 7, 1996); *The Abstinence*, *supra* note 68; *The Finale*, *supra* note 73.

⁸⁷ In *The Abstinence*, Chiles declares to Kramer, "You better believe it. Jackie's cashing in on your wretched disfigurement." *The Abstinence*, *supra* note 68.

⁸⁸ *The Maestro*, *supra* note 86; *The Caddy*, *supra* note 86.

Through Chiles' character, *Seinfeld* critiques the legal system's preoccupation with money damages and the incentives that it creates. An obvious parody of *Liebeck v. McDonald's Corporation*,⁸⁹ *The Maestro*⁹⁰ revolves around Kramer's lawsuit against Java World after Kramer burns himself trying to sneak a cup of coffee into a movie theater. Chiles promises, "You get me one coffee-drinker on that jury, and you're going to walk out of there a rich man."⁹¹ Chiles stereotypes lawyers as little more than greedy opportunists who play off the naivety and shortcomings of juries.

Perverse monetary incentives are further magnified when Chiles reprimands Kramer for using a Chinese balm that cures Kramer's burns. Chiles becomes even more irate after Kramer settles with Java World for free coffee for life. Despite Kramer's satisfaction with the settlement, Chiles chastises Kramer for failing to secure any money. Through Chiles, *Seinfeld* characterizes attorneys as smooth talkers only interested in profits. This episode exemplifies attorneys as driven by their own self-interests and indifferent to whether their clients obtain relief that is satisfactory from the client's perspective.

Juries too become the subject of ridicule in *The Suicide*,⁹² where Jerry's neighbor attempts suicide and Jerry begins an intimate relationship with the comatose neighbor's girlfriend. When the girlfriend expresses her desire to "pull the plug," Jerry advises, "I know how you feel, but juries today, you never know how they're going to look at a thing like this."⁹³

Jerry's distrust for juries proves warranted in *The Finale*,⁹⁴ where Jerry, George, Elaine, and Kramer are convicted for violating Latham County's Good Samaritan law after watching an auto theft but offering no assistance. The arresting officer instructs, "The law requires you to help or assist anyone in danger as long as it is reasonable to do so."⁹⁵

While the Good Samaritan law appears well-intended, scenes showing the county prosecutor strategizing with aides expose the law as little more than a public relations stunt. Cognizant that a trial would draw national media attention, the prosecutor declares, "[W]e got to do whatever it takes to win it. No matter what the

⁸⁹ *Liebeck v. McDonald's Rests. P.T.S., Inc.*, CV-93-02419, 1995 WL 360309 (D. N.M. 1994).

⁹⁰ *The Maestro*, *supra* note 86.

⁹¹ *Id.*

⁹² *Seinfeld: The Suicide* (NBC television broadcast Jan. 29, 1992).

⁹³ *Id.*

⁹⁴ *The Finale*, *supra* note 73.

⁹⁵ *Id.*

costs.”⁹⁶ Thus, prosecutors are depicted not as guardians of law and order, but as vindictive litigators more interested in exploiting a trial for media attention than in achieving a just result. Defense counsel, Jackie Chiles, then reinforces distrust for juries and perceptions of jury capriciousness when he criticizes George for not wearing a cardigan and Jerry for selecting an unattractive tie.

Both the prosecution and the defense provide theatrical opening statements indicating that the trial’s outcome is more dependent upon each attorney’s ability to entertain rather than present legal arguments. Newman, who watches the trial in the courtroom with a large bucket of popcorn, obviates this point.

As the trial progresses, the prosecution presents character witness after character witness to prove its case. In fact, the prosecution relies exclusively on character witnesses and ignores the legal standard articulated by the arresting officer—i.e., failure to assist an individual in danger when reasonable to do so. Moreover, Jerry, George, Elaine, and Kramer never present a defense. At trial, Chiles shows less concern for his clients than for one of Jerry’s ex-girlfriends, Sidra.⁹⁷ As the jury deliberates Chiles is shown in bed with Sidra wholly disinterested in the verdict. Overall, the trial insinuates a legal system where outcomes are predetermined and guilty verdicts are easily secured by attacking one’s character.

Perhaps the greatest injustice is that the auto thief is never arrested. Thus, the legal system fails to protect society against those who pose the greatest dangers while arresting harmless bystanders. In this way, the legal system’s failures are two-fold. Not only does the law fail to keep a dangerous criminal off the street, it actually provides society with a false sense of security by ensuring that Jerry, George, Elaine, and Kramer are punished for their “involvement” in the crime. While these accounts illustrate particular instances of *Seinfeld*’s criticism of formal legal processes, such accounts are by no means exhaustive.

V. A WORLD WITHOUT MEDIATION

Perhaps the utility of mediation is no more apparent than in *The Parking Space*,⁹⁸ where George and Mike Moffit,⁹⁹ one of

⁹⁶ *Id.*

⁹⁷ Played by Teri Hatcher. “Seinfeld” The Finale (1998), <http://www.imdb.com/title/tt0697696/>.

⁹⁸ *The Parking Space*, *supra* note 15.

Kramer's friends, reach an impasse over proper parking etiquette.¹⁰⁰ On their way to watch a boxing match at Jerry's, George and Moffit attempt to park in the same place but neither can fit into the parking space unless the other's vehicle is moved, and both cars obstruct the street. George maintains that a driver backing into a parking space is entitled to priority over a driver attempting to park front-first. Moffit rejects this maxim and promises, "Hey pal, you're not getting that space. I mean, I'll sleep in my car if I have to."¹⁰¹ George then counters, "I'll die out here."¹⁰²

Before long, this dispute consumes Jerry's entire neighborhood in a heated debate. As this debate ensues, George and Moffit refuse to listen to one another and no one in the neighborhood attempts to mediate. After the dispute has carried on into the night, several concerned neighbors begin to offer their views of parking etiquette, but George and Moffit simply reject unfavorable opinions. Newman seeks to diffuse the situation by explaining that allowing drivers to park front-first would lead to a breakdown in the social order, chaos would ensue and mankind would be reduced to "jungle law."¹⁰³ Predictably, George applauds Newman's analysis, but Moffit rejects Newman's authority to act as a mediator or impose a solution.

Finally, two police officers arrive at the scene and threaten George and Moffit with parking tickets. In response, George and Moffit present their conflict to the officers. The first officer informs the parties that a driver backing into a parking space is entitled to the parking space. But just as George celebrates, the second officer interrupts saying there is nothing wrong with front-first parking. The officers then dispute parking rights and the episode ends with everyone missing the boxing match and the conflict unresolved. George and Moffit's failure to reach a compromise is reflective of several well-recognized shortcomings common to unsuccessful mediation attempts.

⁹⁹ Played by Lee Arenberg. "Seinfeld" The Parking Space (1992), <http://www.imdb.com/title/tt0697748/>.

¹⁰⁰ This dispute mirrors the first maxim taught to every first-year property student: "First in time, first in right." See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543 (1823). The issue between George and Mr. Moffit is precisely how "first in time" is determined.

¹⁰¹ *The Parking Space*, *supra* note 15.

¹⁰² *Id.*

¹⁰³ *Id.*

VI. GENERAL MEDIATION DOCTRINE

When a dispute arises, parties may seek to negotiate a quick compromise to their differences.¹⁰⁴ But when negotiations between parties grind to a standstill, mediation is a preferred method of alternative dispute resolution insofar as mediation really just amounts to facilitated negotiation.¹⁰⁵ Mediation differs from negotiation in that it calls for intervention by a third party, and thus a fresh perspective, to break the stalemate between the parties.¹⁰⁶

Mediation is the process in which an impartial third party, although lacking authority to impose a solution, seeks to assist others in planning a transaction or resolving a dispute.¹⁰⁷ Deeply engrained in the practice of mediation is the idea that a mediator should be neutral or impartial, both in fact and in appearance.¹⁰⁸ Mediation seeks to inject fresh viewpoints into negotiations through neutral, independent, and trusted professional opinions.¹⁰⁹ Mediations are often informal meetings between parties where the parties discuss essential elements of their conflict.¹¹⁰ Further, because the neutral mediator lacks the authority to issue a decision or impose a settlement upon the parties, the mediator focuses parties' attention on their needs and best interests rather than their rights.¹¹¹

¹⁰⁴ See generally Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 7 (1984).

¹⁰⁵ Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13 (1996).

¹⁰⁶ Greg Herman, *ADR and Family Law*, DISP. RESOL. MAG., Spring 2008, at 37.

¹⁰⁷ Riskin, *supra* note 105, at 8. Typically, a mediator will explain to the parties that the mediator does not represent either party; rather, the mediator plays the role of a neutral third party throughout the mediation process. A mediator should also explain to the parties that they are free to seek independent legal advice from legal counsel at any time during the mediation process. For instance, the mediator should encourage the parties to engage legal assistance when reviewing any mediation agreement. As a neutral third party, however, the mediator may discuss a mediation agreement with each party and/or the party's legal counsel separately or in the company of the other party. The mediator should also notify the parties that any mediation agreement entered into by the parties will affect each party's future legal rights. Paula M. Young, *A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies*, 49 S. TEX. L. REV. 1047, 1232-33 (2008).

¹⁰⁸ Riskin, *supra* note 105, at 47. Accordingly, as Riskin correctly notes, "[t]he greater the mediator's direct influence on the substantive outcome of the mediation, the greater the risk that one side will suffer [due to] the mediator's biases." *Id.* at 48.

¹⁰⁹ Herman, *supra* note 106, at 37.

¹¹⁰ Meruelo, *supra* note 7, at 292.

¹¹¹ Young, *supra* note 107, at 1208.

Unlike an attorney, who seeks to provide legal advice and protect the legal rights of his or her clients, a mediator occupies an entirely different role.¹¹² Rather than pitting parties against one another, successful mediations typically emphasize communication and understanding between opposing parties.¹¹³ A mediator's tasks may include: gathering background information; facilitating communication; communicating information to others; analyzing information; facilitating agreement; managing cases; and helping document any agreement by the parties.¹¹⁴

While scholars have noted substantial differences in opinion as to the basic processes defining mediation,¹¹⁵ academics, lawyers, and mediators typically have a generalized conception of what mediation is.¹¹⁶ Mediation seeks to provide parties with the opportunity to define and clarify issues, understand different perspectives, identify interests, explore and critique possible solutions, and reach mutually-satisfactory agreements.¹¹⁷ Accordingly, mediation offers an honest, candid, and confidential mechanism through which parties may resolve their disputes.¹¹⁸

A mediator's inability to impose a settlement upon parties is often perceived as one of mediation's greatest advantages.¹¹⁹ Other advantages to mediation include less expensive and quicker resolution of disputes,¹²⁰ the ability to bring adversaries face-to-face to address aspects of a claim that may not be considered in typical litigation, the potential to repair a broken relationship by encouraging parties to listen to and understand one another's perspective,¹²¹ and the ability of parties to directly control the out-

¹¹² *Id.* at 1194–95.

¹¹³ *Id.* at 1175.

¹¹⁴ CHRISTOPHER HONEYMAN, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY, FOR USE IN SELECTING, TRAINING AND EVALUATING MEDIATORS 16–17 (Nat'l Inst. for Disp. Resol. 1995), <http://www.convenor.com/madison/method.pdf>.

¹¹⁵ John W. Cooley, *Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR*, 55 DISP. RESOL. J. 72, 77 (2000).

¹¹⁶ Riskin, *supra* note 105, at 8.

¹¹⁷ MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmbl. (2005).

¹¹⁸ Meruelo, *supra* note 7, at 286.

¹¹⁹ Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539, 579 (2008).

¹²⁰ See Cyril Tuohy, *It Pays to Be Polite: Disclosure and Apology Slash Legal Costs*, 11 RISK & INS. 17 (2006), available at <http://www.riskandinsurance.com/story.jsp?storyId=13406648>; see also Christopher Guadagnino, *Malpractice Mediation Poised to Expand*, PHYSICIAN'S NEWS DIGEST, Apr. 2004, available at <http://www.physiciansnews.com/cover/404.html>.

¹²¹ Gary Friedman & Jack Himmelstein, *The Understanding-Based Model of Mediation*, CTR. FOR MEDIATION IN LAW (2008), available at <http://www.mediationinlaw.org/about.html>; CARRIE MENKEL-MEADOW ET AL., MEDIATION: PRACTICE, POLICY, AND ETHICS 119 (2006).

come of their conflict.¹²² Since the mediation process places parties in control, issues that the parties deem to be important will be dealt with rather than issues that are exclusively of legal concern.¹²³ In this respect, mediation provides a forum in which both parties can express the emotional aspects of a claim,¹²⁴ whereas formal litigation practices offer no such opportunity.¹²⁵ Thus, mediation's popularity is owed to its ability to deal with specific disputes while bringing about a more harmonious relationship between the parties involved.¹²⁶

The flexible nature of mediation also provides parties with the ability to select a mediator ideally suited for their particular dispute. Although mediation has obtained mainstream legal acceptance, the general consensus in alternative dispute resolution rejects the notion that an individual's ability to serve as a "good mediator" is predicated upon possession of formal academic or legal degrees.¹²⁷ Instead, studies have indicated that training, knowledge, and experience are the strongest indicators of mediator competency.¹²⁸ While mediators generally are not required to possess any specific educational or work experience,¹²⁹ parties often select

¹²² CARRIE MENKEL-MEADOW ET AL., *supra* note 121, at 93.

¹²³ Rita Lowery Gitchell & Andrew Plattner, *Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases*, 2 DEPAUL J. HEALTH CARE L. 421, 424 (1999).

¹²⁴ Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 L. & POL'Y 7, 19–20 (1986); see also Eric Galton, *Mediation of Medical Negligence Claims*, 28 CAP. U. L. REV. 321, 325 (2000). Galton provides an ideal illustration in the context of a medical malpractice claim in which the physician was sued after the patient's child died in the delivery room. The mediation had been conducted with the parties in separate rooms. As the mediation was approaching a settlement, the mediator asked the parties if they wished to meet each other and both parties agreed. The mediator then observed:

[F]or several minutes, no words are exchanged. No one even moves. Suddenly, the mother gets up, tears begin to flow, and she holds out her arms. The physician goes over to the mother. As they embrace, the physician says, "I'm sorry. I'm so sorry." The mother, patting the physician's back responds, "It's okay, we forgive you." The husband comes over and joins the embrace. The lawyers, standing on the opposite end of the room, appear mystified. The physician, father, and mother sit together and talk for ten minutes.

¹²⁵ "One unfortunate effect of litigation is that, because of its adversarial nature, it turns parties against each other and consequently alienates them from each other." Meruelo, *supra* note 7, at 292.

¹²⁶ Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307–09 (1971).

¹²⁷ *In re* Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, No. SC05-998, at 3 (Fla. 2005), available at <http://www.floridasupremecourt.org/clerk/comments/2005/index.shtml>.

¹²⁸ ACR TASK FORCE ON MEDIATOR CERTIFICATION, REPORT AND RECOMMENDATIONS TO THE BOARD OF DIRECTORS 9 (2004), <http://www.acrnet.org/pdfs/certificationreport2004.pdf>.

¹²⁹ Young, *supra* note 107, at 1195.

mediators based upon subject-matter expertise.¹³⁰ For instance, where a dispute involves a particularly technical issue, the parties may opt for mediation rather than entrust their dispute to a court knowing relatively little about the specific area of expertise.¹³¹ This particular use of mediation is highly favored in business transactions where the parties wish to maintain healthy business relations but also want ideas about how to structure future dealings.¹³²

Revisiting the parking space dispute between George and Moffit under the general mediation framework described above demonstrates why George and Moffit failed to reach a compromise. As George and Moffit's conflict drew the neighborhood's attention, community members interacted with either George or Moffit but none made an effort to discuss the issue between both parties. Even though there were an abundance of third parties, no one made an effort to bring George and Moffit into discussions with one another whereby each could fully understand the perspective of the other.

Only when Newman arrives does a third party draw the attention of both George and Moffit. Newman attempts to act as a mediator but fails to allow either party to share his perspective with the other. Instead of engaging George and Moffit into discussions, Newman simply provides his own prescription for resolving the conflict, which turns out to be an inflexible rule. Because Newman failed to engage the parties, there was no opportunity for him to gain both George and Moffit's trust.¹³³ Although George knows Newman, the relationship or degree of trust between Newman and Moffit is unclear.¹³⁴ Since trust is seemingly lacking between Newman and Moffit, Newman's ability to serve as an impartial intermediary is severely undermined.

¹³⁰ Riskin, *supra* note 105, at 46–47.

¹³¹ *Id.*

¹³² *Id.* at 46. Riskin argues that subject-matter expertise is most necessary in situations where the parties seek an evaluation of their claims or defenses. Typically, parties will seek a mediator with a strong background in related litigation (i.e., subject-matter expertise) where the parties wish to know the probable outcome of a dispute if the dispute were brought before a court. In contrast, where the parties have a firm grasp of the circumstances behind their dispute, the parties may prefer a mediator with a wealth of experience and mediation skills even though the mediator is lacking in subject-matter expertise. Ultimately, the complexity and importance of a technical issue between the parties will dictate the nature and extent of subject-matter expertise required by a mediator. *Id.* at 46–47.

¹³³ Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 *MEDIATION Q.* 61 (1984); Young, *supra* note 107, at 1181–82.

¹³⁴ Moffit is Kramer's friend, and Moffit refers to Newman as "this guy." *The Parking Space*, *supra* note 15.

Moreover, Newman fails to prove himself an expert and competent authority on parking etiquette. When Kramer asks, “When can you park head-first?”¹³⁵ Newman initially says never but after Moffit presses the issue concedes, “Well, I suppose if you’ve got ten car lengths.”¹³⁶ By wavering in his assessment, Newman undercuts his ability to serve as a mediator with legitimate expertise regarding the issue. Unsurprisingly, Moffit rejects Newman’s decree that a driver backing into a parking spot is entitled to the space.

When the police officers arrive, they threaten George and Moffit with tickets if they fail to move their vehicles. Immediately thereafter, both George and Moffit explain their positions to the officers. This suggests both parties have accepted the officers as experts with respect to parking laws, something they failed to recognize with respect to Newman. The parties also appear to believe that the officers are sufficiently disinterested to serve as impartial mediators. Most importantly, George and Moffit’s reliance upon the officers’ opinion reveals that when faced with the legal consequences of their actions or the possibility of “voluntarily”¹³⁷ resolving their conflict through a mediator, the parties find the latter approach to be more sensible.

Alas, the officers’ attempt at mediation fails when the officers themselves offer differing opinions—this removes the threat of either George or Moffit receiving a parking ticket and reduces the urgency to reach a resolution. This failure to achieve a mutually acceptable solution proves the point that sometimes too many mediators may actually undermine the effectiveness of the mediation process.¹³⁸

Reexamining this conflict not only reinforces general mediation principles but also demonstrates that the willingness of a third party to serve as an intermediary, although necessary, is not a sufficient condition for successful mediation. Hence, this example illustrates the importance of the mediation approach selected for a specific situation.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ To the extent one’s desire to avoid a parking ticket can be considered voluntary.

¹³⁸ Michael R. Fowler, *The Increasingly Complicated World of International Mediation*, 18 OHIO ST. J. ON DISP. RESOL. 977, 982 (2003) (reviewing HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD (Chester A. Crocker et al. eds., 1999)).

VII. DIFFERING MODELS OF MEDIATION

In real mediations, the goals and methods preferred by parties vary greatly.¹³⁹ As a result, three methods of mediation have emerged as the predominant schools of thought.¹⁴⁰ These approaches are commonly referred to as facilitative, evaluative,¹⁴¹ and transformative¹⁴² mediation.¹⁴³ Precisely which model of mediation is ideal to resolve a dispute will be contingent upon the origin and nature of the dispute, the relationship between concerned individuals and organizations, the parties' goals and levels of competence¹⁴⁴ as well as each party's legal strengths, interests, and interpersonal and emotional factors.¹⁴⁵

Whether intentional or not, mediators carry out mediations with a presumptive orientation,¹⁴⁶ which Riskin asserts is grounded in the mediator's personality, education, training, and experience.¹⁴⁷ Nonetheless, some mediators will purposely emphasize a

¹³⁹ Riskin, *supra* note 105, at 12.

¹⁴⁰ Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE.COM, Sept. 2000, <http://www.mediate.com/articles/zumeta.cfm>.

¹⁴¹ Riskin is often credited for establishing the basic foundation of the "facilitative" and "evaluative" approaches. See Riskin, *supra* note 105.

¹⁴² Origin of the "transformative" model has been credited to Bush and Folger. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 84 (1994) [hereinafter BUSH & FOLGER I].

¹⁴³ Zumeta, *supra* note 140. *But see* Young, *supra* note 107, at 1176. Young argues that evaluative, facilitative, and transformative distinctions are now outdated. Instead, Young rejects the notion of strict mediation characterizations in favor of a broad definition that seeks to focus upon the goals of mediation such as improving communication between the parties, restoring relationships, and meeting the important emotional and psychological needs of parties. These overall objectives mirror Cloke's depiction of mediation, and dispute resolution in general, as encompassing five levels: (1) stopping the fighting; (2) settling the issues; (3) resolving underlying issues that generated the issues; (4) finding forgiveness; and (5) reconciling. See KENNETH CLOKE, *THE CROSSROADS OF CONFLICT: A JOURNEY INTO THE HEART OF DISPUTE RESOLUTION* 78–84 (2006). For purposes of this Note, only the facilitative, evaluative, and transformative models of mediation will be explored.

¹⁴⁴ Riskin, *supra* note 105, at 42.

¹⁴⁵ Stephen B. Goldberg & Frank A. E. Sanders, *Selecting a Mediator: An Alternative (Sometimes) to a Former Judge*, 33 *LITIG.* 40, 44 (2007). For instance, Goldberg and Sanders argue that where one party has a particularly strong legal case against the other, the parties' interests would usually be best served through the evaluative mediation process. In contrast, where a client is interested in resolving the dispute while maintaining the relationship with the other party, a facilitative or transformative approach would be better suited. *Id.*

¹⁴⁶ See Kenneth Kressel et al., *The Settlement-Oriented vs. The Problem-Solving Style in Custody Mediation*, *J. SOC. ISSUES* 67, 72–73 (1994).

¹⁴⁷ Riskin, *supra* note 105, at 35. For instance, a mediator with past background as a judge may be more inclined to assess the legal merits of each party's position and therefore adopt an evaluative approach.

flexible approach that adjusts to the unique circumstances of a dispute and avoids strict adherence to particular mediation orientations.¹⁴⁸ This “in-between” approach recasts mediation processes along a continuum rather than as fixed doctrinal concepts.¹⁴⁹

By reformulating the theoretical framework, mediators are forced to train in a variety of different mediation styles.¹⁵⁰ Mediators possessing an understanding of various mediation orientations are able to blend specific approaches in light of the predilection and needs of a particular case.¹⁵¹ This has ultimately strengthened the practice of mediation insofar as it serves to reinforce the notion that mediators are capable of adopting flexible and therapeutic methods for resolving disputes in ways that judges and the legal system never could.¹⁵² By offering tailored approaches to parties’ disputes, mediation remains an attractive non-binding and low risk alternative to formal judicial processes.¹⁵³

As the practice of mediation has gained popularity with parties, mediators have grown more cognizant of parties’ desires, which has led highly skilled and experienced mediators to utilize a combination of the three key approaches to mediation.¹⁵⁴ Still, a complete understanding of mediation requires an in-depth examination of the evaluative, facilitative, and transformative models.

A. Evaluative Mediation¹⁵⁵

The theme of mediation features prominently in *The Seven*,¹⁵⁶ an episode revolving around Elaine’s neck injury and a bicycle. Frustrated by the pain, Elaine declares, “[T]his is killing me. Right now I would give that bike to the first person who could make this pain go away.”¹⁵⁷ Enticed by Elaine’s offer, Kramer firmly grips

¹⁴⁸ *Id.* at 36.

¹⁴⁹ Zumeta, *supra* note 140. Specifically, this approach stipulates a continuum from evaluative to facilitative to transformative mediation. *Id.*

¹⁵⁰ Meruelo, *supra* note 7, at 293.

¹⁵¹ Zumeta, *supra* note 140.

¹⁵² Meruelo, *supra* note 7, at 293.

¹⁵³ Guadagnino, *supra* note 120.

¹⁵⁴ Goldberg & Sanders, *supra* note 145, at 44.

¹⁵⁵ Riskin distinguishes between “evaluative-narrow” and “evaluative-broad” approaches. For purposes of this Note, no distinction will be made between these two conceptions of evaluative mediation. If you wish to follow up on Riskin’s division between “narrow” and “broad” evaluative mediation, see Riskin, *supra* note 105, at 26–32.

¹⁵⁶ *Seinfeld: The Seven* (NBC television broadcast Feb. 1, 1996) [hereinafter *The Seven*].

¹⁵⁷ *Id.*

Elaine's head and yanks violently. Miraculously, Elaine's pain is eliminated and Kramer calmly instructs, as he walks out the door, "Yeah, you can send that bike over any time."¹⁵⁸ Elaine then turns to Jerry and asserts that her offer was not intended to be taken seriously. Subsequently, Jerry notifies Kramer that Elaine was not serious when she offered the bike, to which Kramer responds, "We had a verbal contract. If we can't take each other at our word, all is lost."¹⁵⁹

Face-to-face Elaine tells Kramer, "I don't even know why you want [the bike] . . . it's a girl's bike."¹⁶⁰ Kramer responds by reiterating the presence of a verbal contract and protesting, "We had a deal."¹⁶¹ But Elaine counters, "No we didn't. You take these things too literally. It's like saying you're hungry enough to eat a horse."¹⁶² Kramer then asserts, "[M]y friend Jay Reimenschneider eats horse all the time."¹⁶³ Although Elaine still refutes Kramer's claim to the bike, she finally agrees to give it to Kramer out of a sense of guilt.

The conflict renews itself the following day after Elaine's neck pain returns in the middle of the night, this time even more severe. After Elaine demands that Kramer return the bike, both parties ask Jerry to settle their dispute because he "knows the whole story."¹⁶⁴ But Jerry resists involvement, "[U]nfortunately, my friendship to each of you precludes my getting involved. What you need is an impartial mediator."¹⁶⁵ After Elaine and Kramer agree to mediate their dispute, Jerry details the necessary qualities of a mediator: "Of course, it would have to be someone who hasn't heard the story before. Someone who is unencumbered by any emotional attachment. Someone whose heart is so dark, it cannot be swayed by pity, emotion, or human compassion of any kind."¹⁶⁶

Jerry's suggestion indicates utilizing an evaluative mediator to settle Kramer and Elaine's disagreement. Evaluative mediation is unique insofar as it is the only model of mediation in which the mediator engages in a predictive analysis of the parties' posi-

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *The Seven*, *supra* note 156.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

tions.¹⁶⁷ The notion of evaluative mediation materialized from court-ordered or court-referred mediation and is modeled after settlement conferences held by judges.¹⁶⁸ Evaluative mediation has gained popularity due to the fact that it approximates the result that would likely be produced at trial but avoids the delays and financial costs often associated with trials.¹⁶⁹

More than any other method of mediation, the evaluative technique focuses upon the substance of a dispute.¹⁷⁰ Rather than focusing upon the interests and needs of parties, the evaluative method is interested in determining the legal rights of each party and administering a settlement based upon legal concepts of fairness.¹⁷¹ Accordingly, a mediator will review legal documents, assess the law or facts underlying a dispute, and provide a prediction of outcomes¹⁷² from which the parties seek to achieve a resolution.¹⁷³

Instead of occupying a passive role, an evaluative mediator serves as a “dealmaker” that offers solutions to both parties while attempting to achieve an equitable result.¹⁷⁴ In order to reach this result, the mediator assists the parties by articulating the strengths and weaknesses of each party’s claims and hypothesizing the probable outcome if a judge or jury were to decide the dispute.¹⁷⁵ An evaluative mediator may also discuss the interests of the parties and suggest how such interests will be adversely impacted if the parties fail to reach a mutually acceptable settlement.¹⁷⁶

The next scene shows Elaine and Kramer in Newman’s apartment with Newman performing the functions of an evaluative me-

¹⁶⁷ Empirical data suggests that parties prefer the evaluative style precisely because of this distinctive feature. See AM. BAR ASS’N SECTION ON DISP. RESOL.: TASK FORCE ON IMPROVING THE QUALITY OF MEDIATION, FINAL REPORT 14 (2007), <http://www.abanet.org/dch/committee.cfm?com=DR020600> [hereinafter AM. BAR ASS’N SECTION ON DISP. RESOL.].

¹⁶⁸ Zumeta, *supra* note 140.

¹⁶⁹ Riskin, *supra* note 105, at 19.

¹⁷⁰ Young, *supra* note 107, at 1180.

¹⁷¹ Zumeta, *supra* note 140.

¹⁷² Often referred to as a “range of outcomes.” Young, *supra* note 107, at 1214.

¹⁷³ *Id.* at 1180; Riskin, *supra* note 105, at 26–28.

¹⁷⁴ Young, *supra* note 107, at 1180–81.

¹⁷⁵ See, e.g., James Alfini & Gerald S. Clay, *Should Lawyer-Mediators Be Prohibited from Providing Legal Advice or Evaluations?*, DISP. RESOL. MAG., Spring 1994, at 8; Zumeta, *supra* note 140 (asserting that an evaluative mediator will typically discuss the risks, costs, and benefits of resolving a dispute through formal legal processes versus the risks, costs, and benefits of reaching a settlement through mediation processes); Riskin, *supra* note 105, at 9–10.

¹⁷⁶ Riskin, *supra* note 105, at 19.

diator.¹⁷⁷ “Each of you seemingly has a legitimate claim to the bicycle. And yet, the bicycle can have only one rightful owner I believe the law is all we have, it is all that separates us from the savages”¹⁷⁸ Newman points out, “On the one hand Elaine, your promise was given in haste but was it still not a promise? And Kramer, you did exchange a service in exchange for compensation but does the fee, once paid, not entitle the buyer to some assurance of reliability?”¹⁷⁹

Because an evaluative mediator is responsible for communication between the parties as well as each party’s perception of its legal position, the evaluative mediator directly influences the outcome of the mediation.¹⁸⁰ Further, parties frequently call upon evaluative mediators to construct proposed agreements.¹⁸¹ Due to the influence that mediators exert, parties participating in evaluative mediation often obtain mediators with expert knowledge relevant to the dispute.¹⁸²

As a result of the intricate role and influence of an evaluative mediator, many commentators have condemned the evaluative approach as contrary to mediation’s fundamental principles such as reluctance to set parties against one another, a desire to settle disputes beyond the level of parties’ legal rights, and uncompromised honesty and neutrality.¹⁸³ Since the opposing parties know that the mediator will provide an assessment, critics argue, parties are less likely to share candid information with the mediator for fear that complete honesty will disclose weaknesses in their case and influence the mediator’s recommendation.¹⁸⁴ Consequently, the process may remain adversarial and any conclusion reached by the mediator will lack a complete understanding of the interests and positions between the parties.¹⁸⁵

¹⁷⁷ Arguably, the scene may serve as a better analogy to arbitration but Newman’s role provides various representations emulating both evaluative mediation and arbitration. The overlap in evaluative mediation and arbitration techniques is not particularly surprising in light of the fact that evaluative mediation and arbitration often mirror formal legal processes. In fact, authors have noted the similarities between evaluative mediation and non-binding arbitration. Young, *supra* note 107, at 1181.

¹⁷⁸ *The Seven*, *supra* note 156.

¹⁷⁹ *Id.*

¹⁸⁰ Zumeta, *supra* note 140.

¹⁸¹ Riskin, *supra* note 105, at 31.

¹⁸² Meruelo, *supra* note 7, at 300.

¹⁸³ Lowery Gitchell & Plattner, *supra* note 123, at 431–32; Goldberg & Sanders, *supra* note 145, at 41–42.

¹⁸⁴ Riskin, *supra* note 105, at 45.

¹⁸⁵ *Id.*

Ultimately, Newman invokes King Solomon's splitting-of-the-baby by proposing to settle the dispute by cutting the bike down the middle and giving each party half. After Kramer and Elaine protest, Kramer agrees to give the bike to Elaine, unharmed. Newman then concludes, "Only the bike's true owner would rather give it away than see it come to harm. Kramer, the bike is yours."¹⁸⁶ Kramer praises Newman for his wisdom while Elaine complains that the process was unfair, especially in light of the fact that her neck is still in pain.

Elaine's displeasure with the evaluative process clearly illustrates common shortcomings of the evaluative model: the mediator may be incorrect in his or her assessment,¹⁸⁷ or the party determined to have the weaker case may reject the mediator's evaluation.¹⁸⁸ Parties may reject a mediator's recommendation for any number of reasons. For instance, a party may feel the mediator failed to afford proper weight to "compelling" facts, violated obligations of neutrality,¹⁸⁹ or simply believe that a full trial would lead to a different result.¹⁹⁰

A common problem is that the party receiving the more negative appraisal will feel threatened and lose faith in the mediation process on account of the mediator's having "chosen" a side.¹⁹¹ Chaykin has noted:

Parties often feel [an evaluation] is what they want, until they get it. Once the "opinion" is given, the parties often feel that the mediator betrayed them. They will feel that the mediator's decision on the merits may have been influenced by perceptions of what they would be willing to swallow, not on the "merits" of the case.¹⁹²

Chaykin then cautions, "the parties should understand that once they involve a third party, and allow that 'neutral' to give an opinion on the merits, that determination will almost always have a powerful impact on all further negotiations."¹⁹³ When a party, separately or collectively, rejects a mediator's analysis, the mediation's progress toward a mutually acceptable settlement can be para-

¹⁸⁶ *The Seven*, *supra* note 156.

¹⁸⁷ Zumeta, *supra* note 140.

¹⁸⁸ Goldberg & Sanders, *supra* note 145, at 41.

¹⁸⁹ See Alan Alhadeff, *What is Mediation?*, in *THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE* § 23:9 (Bette J. Roth et al. eds., 1993).

¹⁹⁰ Goldberg & Sanders, *supra* note 145, at 41.

¹⁹¹ Meruelo, *supra* note 7, at 300-01.

¹⁹² Arthur A. Chaykin, *Selecting the Right Mediator*, 49 *DISP. RESOL. J.* 58, 65 n.5 (1994).

¹⁹³ *Id.*

lyzed.¹⁹⁴ Under this scenario, the parties will be back in the positions they occupied before the mediation began, and the entire mediation process will have been for naught.¹⁹⁵

Beyond the mediation strategies deployed by Newman, evaluative mediators typically assess the probable outcomes of litigation by providing parties with percentages of the likelihood each would prevail before a court.¹⁹⁶ This technique is known as litigation risk analysis and plays an important role in a mediator's ability to convince parties to modify their positions toward reaching a settlement.¹⁹⁷ Litigation risk analysis utilizes decision theory¹⁹⁸ as an apparatus for legal decision-making.¹⁹⁹ By taking account of various probabilities of outcome,²⁰⁰ the evaluative mediator is able to provide an estimated value of the dispute to each party.²⁰¹ This estimated value is then used to induce parties toward reaching a settlement.²⁰²

Another *Seinfeld* episode exemplifying evaluative mediation principles is *The Good Samaritan*,²⁰³ where Jerry observes a hit-

¹⁹⁴ Gitchell & Plattner, *supra* note 123, at 431.

¹⁹⁵ Goldberg & Sanders, *supra* note 145, at 42.

¹⁹⁶ *Id.* at 41–42.

¹⁹⁷ *Id.* at 41.

¹⁹⁸ Decision theory holds that in making important choices, one needs to consider all available knowledge and possible alternatives before deciding upon a course of action intended to maximize the objectives or gains of the decision-maker. See DAVID BRAYBROOKE & CHARLES E. LINDBLOM, *A STRATEGY OF DECISION* 37–40 (1963).

¹⁹⁹ Goldberg & Sanders, *supra* note 145, at 41.

²⁰⁰ This, of course, requires that a mediator be familiar with the awards made in a given type of case and in a particular location based upon empirical evidence. Young, *supra* note 107, at 1214.

²⁰¹ For instance, a client with a fifty to eighty percent chance of prevailing at trial would look at the likely award that would follow if successful at trial, say a seventy percent chance of recovering an award of \$2 million. Under these figures, the range of outcomes in the event of a settlement would vary from \$700,000 (50% x 70% x \$2 million) to \$1.12 million (80% x 70% x \$2 million). Assuming that both parties accepted these figures, the mediator would engage in discussions with the parties to produce a settlement between \$700,000 and \$1.12 million. A criticism of litigation risk analysis, however, is that the client who is a potential plaintiff may consider the above evaluation and interpret the figures to mean that the likelihood of losing before a court is no more than twenty percent. If the client who is a potential defendant perceives the likelihood of losing and being forced to pay a \$2 million award will only be twenty percent, this client's bottom line exposure will be \$400,000 plus whatever added legal costs may accrue during litigation. Under this possibility, but not accounting for additional legal costs, the client's desirability for settlement will vary between \$400,000 to \$1.12 million. Because of the significant range between the upper and lower limitations, critics argue, the litigation risk analysis fails to bring the parties close enough such that settlement is to be preferred over litigation. For a more in-depth analysis, see Goldberg & Sanders, *supra* note 145, at 41.

²⁰² *Id.*

²⁰³ *Seinfeld: The Good Samaritan* (NBC television broadcast Mar. 4, 1992).

and-run accident involving a parked car and decides to follow the culpable driver. As he approaches the driver's window, Jerry notices that the driver is an attractive redhead named Angela²⁰⁴ and temporarily forgets about the hit-and-run accident. Later in the episode, Jerry discovers that the damaged vehicle belongs to an even more attractive woman, a blonde in his building named Becky Gelke.²⁰⁵ Jerry then begins to serve as an intermediary between Angela and Becky, conducting discussions analogous to separate "caucuses."

Caucuses are a technique commonly used in mediations, especially under the evaluative model, to reach a compromise between the parties.²⁰⁶ During a caucus, the mediator will meet privately with one party and/or that party's legal counsel to discuss the dispute, any progress made during the mediation process, as well as how a party would respond to a contemplated demand or offer.²⁰⁷

Because evaluative mediation endeavors to furnish parties with accurate appraisals of their legal rights relative to their disputes, lawyers are drawn to this model of mediation.²⁰⁸ Thus, lawyers and former judges are often selected, and highly sought, by parties to serve as mediators under this approach.²⁰⁹ A significant problem that arises under the evaluative model is that parties desiring a thorough assessment of their dispute commonly seek legal advice from the mediator.²¹⁰

Most ethics codes, however, prohibit a mediator from dispensing legal advice²¹¹ unless the mediator is also a lawyer. These restrictions are rooted in concern that the mediator will engage in the unauthorized practice of law and thereby restrict party autonomy, fail to maintain neutrality, or render the meditation process adversarial.²¹² Cooley criticizes such concerns as baseless and expresses fear that such restrictions will "muzzle mediators, discourage tal-

²⁰⁴ Played by Melinda McGraw. "Seinfeld" The Good Samaritan (1992), <http://www.imdb.com/title/tt0697704/>.

²⁰⁵ Played by Helen Slater. "Seinfeld" The Good Samaritan (1992), <http://www.imdb.com/title/tt0697704/fullcredits#cast>.

²⁰⁶ Meruelo, *supra* note 7, at 301.

²⁰⁷ Jeff Kichaven, *Evaluating the Marketplace View on the Need for Mediator Evaluation*, 26 ALTERNATIVES TO HIGH COST LITIG. 129, 135 (2008).

²⁰⁸ Goldberg & Sanders, *supra* note 145, at 41.

²⁰⁹ A party often seeks a retired judge where the party's attorney believes that a retired judge will provide a more accurate forecast of a court outcome. Such a prediction is then used to provide a sensible basis for further negotiations between the parties to the dispute. *See id.* at 40.

²¹⁰ *See generally* Young, *supra* note 107.

²¹¹ *See id.* at 1197 n.691.

²¹² *Id.* at 1211.

ented non-lawyers from entering the ADR profession, [and] reduce the mediation process to a mechanical, word-precise, self-conscious, inflexible, content-void exercise.”²¹³

Overall, proponents of the evaluative technique are quick to point to overwhelming party support for the process.²¹⁴ In furnishing assessments and predictions, mediators remove some of the decision-making from the parties.²¹⁵ In having the mediator assume such responsibilities, it becomes easier for the parties to reach an agreement since the mediator’s perspective provides a reality check that magnifies each party’s strengths and weaknesses.²¹⁶ Most importantly, the evaluative approach provides a method of alternative dispute resolution for parties unable to reach an agreement but desiring a clear answer.²¹⁷

B. Facilitative Mediation

In *The Andrea Doria*,²¹⁸ Jerry subleases his storage space to Kramer, who in turn subleases the storage space to Newman. A conflict arises after Jerry discovers that Newman has filled the storage space with bags of undelivered mail. Kramer serves as a mediator by promising to speak with Newman.

This technique mirrors facilitative mediation under which the mediator plays a more passive role than in evaluative mediation and seeks to achieve a settlement between the parties without any consideration as to which party was “right” and which party was “wrong.”²¹⁹ Where a party’s legal position is not particularly strong, the facilitative method offers an alternative to evaluative mediation.²²⁰ This method of mediation mirrors the interest-based negotiation approach.²²¹

²¹³ Cooley, *supra* note 115, at 74.

²¹⁴ See AM. BAR ASS’N SECTION ON DISP. RESOL., *supra* note 167, at 14.

²¹⁵ Riskin, *supra* note 105, at 44.

²¹⁶ *Id.* at 26; Meruelo, *supra* note 7, at 300.

²¹⁷ Zumeta, *supra* note 140.

²¹⁸ *Seinfeld: The Andrea Doria* (NBC television broadcast Dec. 19, 1996) [hereinafter *The Andrea Doria*].

²¹⁹ Goldberg & Sanders, *supra* note 145, at 42.

²²⁰ *Id.* at 44.

²²¹ A classic demonstration of the facilitative approach is the story of two sisters who only have one orange. Each sister wants the orange but neither is willing to share it. The mediator asks the younger sister why she wants the orange and she responds, “To make orange juice.” The mediator then asks the older sister why she wants the orange and she indicates that she would use the rind to flavor a cake. Thus, the mediator has placed the sisters in a position to

Similar to the evaluative approach, facilitative mediation utilizes processes to assist parties in reaching mutually acceptable settlements, but the settlement methods of the two approaches differ. Rather than provide a judgment or prediction of each party's position, the mediator asks questions,²²² clarifies each party's point of view to the other, searches for common underlying interests in the positions taken by each party, and assists the parties in developing and analyzing resolution options.²²³ Unlike the evaluative approach, which relies heavily upon caucusing, the facilitative style operates predominately through the use of joint sessions, bringing all parties together.²²⁴ In so doing, the mediator occupies a less authoritative position and assumes that the parties are intelligent actors capable of working together and possessing a better understanding of their positions than the mediator.²²⁵

When Kramer informs Jerry that he was unable to persuade Newman by himself, Jerry approaches Newman directly to resolve the dispute. Jerry discovers that Newman is terribly depressed because he did not receive a work transfer to his dream location, Hawaii. Consequently, Newman has stopped delivering mail. Although initially uninterested in compromise, Newman later discloses that the post office employee originally assigned the transfer was caught hoarding *Victoria's Secret* catalogs, which reopens the potential for Newman's transfer to Hawaii. This prompts Jerry and Newman to realize both their interests may be served through cooperation.²²⁶ Newman reasserts that his dream is to leave the building and move to Hawaii and Jerry reveals, "You moving away is my dream too."²²⁷

reach a mutually beneficial resolution to their conflict. This illustration is taken to demonstrate that, unlike the evaluative approach, which would have simply split the orange into two pieces and given each sister a piece, the facilitative approach actually allowed both parties to obtain their desired use for the orange without adversely affecting the interests of the other. As a result, proponents argue, the facilitative approach is better able to serve the interests of the parties. The facilitative technique does not merely divide the pie between the parties, but actually increases the size of the pie. *Id.* at 42–43.

²²² Often these questions are asked to help the parties weigh the costs and benefits of each proposal against the likely consequences of the failure to reach a settlement. See Riskin, *supra* note 105, at 29.

²²³ Zumeta, *supra* note 140.

²²⁴ Zumeta, *supra* note 140.

²²⁵ Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059, 1099–1108 (1991).

²²⁶ Or in their own words, "an alliance." *The Andrea Doria*, *supra* note 218.

²²⁷ *Id.*

While facilitative mediation places the mediator in charge of the process, the parties are responsible for the ultimate outcome.²²⁸ This approach places the burden of resolution upon the parties because parties are often in a better position to develop creative and agreeable solutions than the mediator.²²⁹ Accordingly, the mediator's primary obligation is to provide clarity and enhanced communication between the parties.²³⁰ By establishing a channel of communication between the parties, facilitative mediation presents a greater likelihood of preserving the reputation and relationship between the parties,²³¹ even where the parties' legal positions cannot be reconciled.²³²

In *The Andrea Doria*, Jerry and Newman decide to shift their focus away from the merits of their legal claims and reach a compromise under which Jerry agrees to help Newman fulfill his mail delivery obligations. This is a classic example of increasing the size of the pie.²³³ Instead of merely expelling Newman's mailbags from the storage unit, facilitative mediation techniques actually allow both parties to seek an exponentially beneficial resolution.²³⁴

By playing a passive role and encouraging Jerry to approach Newman, Kramer avoids forcing a judgment or solution upon the parties. Because Kramer's role is passive, Jerry and Newman are forced to communicate directly, which allows them to expand their discussions beyond the simple issue of the storage space. In actively pursuing a resolution, Jerry and Newman are able to tailor an arrangement that serves both of their interests far better than if Kramer had merely sought to settle the issue of whether Newman could keep his mail in Jerry's storage space.

Advocates of the facilitative approach emphasize that it furnishes party self-determination and mediator impartiality.²³⁵ Party

²²⁸ Zumeta, *supra* note 140.

²²⁹ Riskin, *supra* note 105, at 24.

²³⁰ *Id.*

²³¹ Goldberg & Sanders, *supra* note 145, at 40; Riskin, *supra* note 105, at 19.

²³² Riskin, *supra* note 105, at 28.

²³³ See discussion, *supra* note 221.

²³⁴ *Le.*, Newman's mailbags will be removed from Jerry's storage space, Newman will receive a transfer to his dream post, Jerry will finally be rid of Newman, and everyone's mail will be delivered. Newman, however, is injured when Kramer bites him, and Jerry is forced to execute Newman's duties. Unfortunately, Newman fails to secure the transfer to Hawaii when it is discovered that he has not been making the deliveries along his designated route. Newman explains, "They knew it wasn't me doing my route . . . Too many people got their mail! Close to eighty percent. Nobody from the post office has ever cracked the fifty percent barrier. It's like the three-minute mile!" *The Andrea Doria*, *supra* note 218.

²³⁵ Young, *supra* note 107, at 1230.

self-determination encourages claimants to take responsibility for their disputes and empowers parties to achieve solutions.²³⁶ As a result, parties have a greater feeling of participation and control over the mediation process.²³⁷ This permits parties to fine tune the dispute and reach a settlement in accordance with the parties' interests.²³⁸ Moreover, because the parties play a more active role under the facilitative perspective, the parties educate themselves as to their counterpart's position, interests, and situation while learning to understand and resolve conflicts by themselves.²³⁹

In contrast, criticisms of the facilitative approach are fairly mild. Detractors often complain that the facilitative process is too time consuming and ends without agreement too frequently.²⁴⁰ Another criticism is that facilitative mediation seeks to place decision-making and conflict resolution in the hands of parties even where the parties are not sufficiently knowledgeable or capable of developing settlements with one another.²⁴¹ The concern here is that insufficiently knowledgeable parties will fail to identify and address mutual interests, waste time, and fail to reach agreements.²⁴²

Nonetheless, *Seinfeld's* use of the facilitative model to settle Jerry and Newman's conflict clearly demonstrates the utility of such an approach. *The Andrea Doria* demonstrates that disputes between parties may be solved creatively where the parties are open to direct and honest communications. Instead of erecting barriers and preparing to invoke formal legal processes, facilitative mediation resolves disputes by bringing parties together.²⁴³

C. Transformative Mediation

Where a dispute involves a significant emotional component, the transformative approach may take on the qualities of a therapeutic session seeking to serve the parties far beyond the scope of their legal positions.²⁴⁴ Frequently, disputes leave parties feeling

²³⁶ Zumeta, *supra* note 140.

²³⁷ Riskin, *supra* note 105, at 45.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Zumeta, *supra* note 140.

²⁴¹ Riskin, *supra* note 105, at 46.

²⁴² *Id.*

²⁴³ *Id.* at 45.

²⁴⁴ Meruelo, *supra* note 7, at 294; Herman, *supra* note 106, at 38.

wronged, humiliated, angry, and disrespected.²⁴⁵ Since emotionally charged disputes feature two components—the emotions of the parties and their underlying dispute²⁴⁶—the transformative approach endeavors to resolve the emotional barriers that may impede, or ultimately compromise, a settlement if left unresolved.²⁴⁷

More so than the evaluative and facilitative models, transformative mediation empowers parties to reach their own resolutions and stresses communication.²⁴⁸ Typically, the role of a transformative mediator, although still impartial, is limited to asking questions and establishing a direct dialog between the parties to allow them to express their emotions authentically.²⁴⁹ By promoting direct and honest contact between the parties as well as release for emotional frustrations, transformative mediation concentrates parties' attention upon the needs, interests, values, and perspectives of opposing parties.²⁵⁰ The mediation session seeks to obtain parties' mutual recognition²⁵¹ of one another rather than assess their underlying legal dispute.²⁵² In so doing, transformative mediation attempts to subdue the parties' emotions so that practicality and rationality may prevail.²⁵³

In *The Boyfriend*,²⁵⁴ Newman and Kramer reveal a long-standing dispute with Jerry's newest friend, Keith Hernandez.²⁵⁵ While meeting with Jerry in what is analogous to a caucus, Newman explains that on June 14, 1987, while enjoying a beautiful day in the bleachers, Hernandez committed a crucial error causing the New York Mets to lose to the Philadelphia Phillies. Outside in the players' parking lot Newman and Kramer cross paths with Hernandez where Newman facetiously remarks, "Nice game, pretty boy."²⁵⁶ As Newman recounts the story to Jerry, he stresses, "[S]omething happened that changed us in a very deep and profound way from

²⁴⁵ Goldberg & Sanders, *supra* note 145, at 43.

²⁴⁶ MENKEL-MEADOW ET AL., *supra* note 121, at 119.

²⁴⁷ Goldberg & Sanders, *supra* note 145, at 43.

²⁴⁸ Zumeta, *supra* note 140; MENKEL-MEADOW ET AL., *supra* note 121, at 119.

²⁴⁹ CLOKE, *supra* note 143, at 312–13; Meruelo, *supra* note 7, at 293.

²⁵⁰ Zumeta, *supra* note 140.

²⁵¹ Recognition has been described as a party's ability to acknowledge or empathize with the situations of others. See BUSH & FOLGER I, *supra* note 142.

²⁵² Goldberg & Sanders, *supra* note 145, at 44.

²⁵³ Herman, *supra* note 106, at 37–39.

²⁵⁴ *Seinfeld: The Boyfriend* (NBC television broadcast Feb. 12, 1992) [hereinafter *The Boyfriend*].

²⁵⁵ When Jerry discloses his intentions to meet Keith Hernandez for dinner Kramer declares, "I hate Keith Hernandez, hate him." Newman then interjects, "I despise him." *Id.*

²⁵⁶ *Id.*

that day forward.”²⁵⁷ Kramer then tells Jerry that Hernandez spat on him and Newman elaborates that the spit ricocheted off Kramer and hit him as well.

This specific illustration provides insight into both the evaluative and transformative models of mediation. Immediately after Newman and Kramer finish their account, Jerry takes on the role of an evaluative mediator and seeks to demonstrate the story’s weaknesses.²⁵⁸ Using a golf club, Jerry acts as a forensic expert to clear Hernandez of culpability since, to have hit Newman precisely as alleged, the spit would have had to “paus[e] in midair.”²⁵⁹ Instead, Jerry hypothesizes that there was a second “spitter.” Disturbed by Jerry’s evaluation, Newman and Kramer storm out of the room with Newman shouting, “Jerry’s a nut!”²⁶⁰

Jerry’s assessment illustrates several concerns with the evaluative approach often voiced by transformative mediators. While Jerry acts as a forensic expert in challenging Newman and Kramer’s account, there is no basis for believing Jerry possesses the expertise required to provide an accurate appraisal of the dispute. Moreover, Newman and Kramer instantly reject Jerry’s evaluation,²⁶¹ which seems to have displaced Newman and Kramer’s trust in Jerry. After having lost faith in the mediation process, Newman and Kramer rush out of the room and the dispute with Hernandez is actually intensified.

Proponents of the transformative approach criticize the evaluative and facilitative models as putting too much pressure on clients to reach a resolution.²⁶² Instead, transformative mediators believe that parties should take responsibility for their own disputes, structure their own mediation outcomes, and only reach a resolution where the parties, and not the mediator, truly desire a settlement.²⁶³ Moreover, by adopting a passive role, the likelihood that a transformative mediator will be found to have engaged in the unauthorized practice of law is lessened since transformative

²⁵⁷ *Id.*

²⁵⁸ “The immutable laws of physics contradict the whole premise of your account,” Jerry declares. *Id.*

²⁵⁹ *Id.*

²⁶⁰ *The Boyfriend*, *supra* note 254.

²⁶¹ See discussion *supra* Part VII.A.

²⁶² Zumeta, *supra* note 140.

²⁶³ *Id.*

mediators avoid offering evaluative advice and allow the parties to reach their own solutions.²⁶⁴

Later in the episode, Kramer comes face-to-face with Hernandez, and Hernandez initially denies the existence of a dispute.²⁶⁵ Newman then enters Jerry's apartment and the parties begin to retrace the events of June 14, 1987. After Newman and Kramer voice their complaint, Hernandez is then given the opportunity to explain his recollection of the events. Given the chance to offer his account, Hernandez reveals that Roger McDowell, a teammate, had been responsible for spitting on Newman and Kramer.

Because transformative mediation seeks to empower parties by substantially reducing the mediator's role, it is the parties, and not the mediator, that are charged with developing an understanding, weighing their options, offering proposals, forgiving one another, realizing their dependence on one another, releasing their anger or desire for revenge, and ultimately agreeing to a settlement.²⁶⁶ Advocates of the transformative model contend that because parties are encouraged to work together in reaching a settlement, parties are much more likely to fulfill the terms of their mediation agreement.²⁶⁷ In addition to initiating conversation between parties, a transformative mediator will draw parties' attention to their dependence on one another and need to maintain an amicable relationship.²⁶⁸

Realizing that mediation framework could be applied beyond the simplistic goal of resolving disputes on an ad hoc basis, Folger and Bush saw mediation as a method for strengthening parties' relationships.²⁶⁹ Resolutions reached through transformative mediation are more likely to present creative solutions that better address the parties' emotional concerns rather than focus exclu-

²⁶⁴ Jacqueline M. Nolan-Haley, *Lawyers, Non-lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 281 (2002); Young, *supra* note 107, at 1230.

²⁶⁵ Kramer says, "Oh you don't remember me?" Hernandez responds, "No. Should I?" Kramer then says, "Yeah, yeah, yeah. You should because I certainly remember you." *The Boyfriend*, *supra* note 254.

²⁶⁶ Riskin, *supra* note 105, at 20–21.

²⁶⁷ *Id.* at 20.

²⁶⁸ *Id.* at 19; Goldberg & Sanders, *supra* note 145, at 40. Although often overlooked, this is a particularly important role in the context of commercial disputes where damaging a business relationship could result in adverse consequences for all parties involved. *Id.*

²⁶⁹ See ROBERT A.B. BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) [hereinafter BUSH & FOLGER II]; Goldberg & Sanders, *supra* note 145, at 40; Riskin, *supra* note 105, at 19–20.

sively upon monetary interests.²⁷⁰ Detractors complain that the transformative approach is too idealistic, unfocused, and impractical for business purposes since it relies heavily upon party participation.²⁷¹ Yet, advocates of transformative mediation advertise such participation as essential to truly serve parties' particular interests and issues.²⁷²

After allowing Hernandez to express his perspective, Kramer recalls cursing at McDowell while he warmed up in the bullpen and Newman acknowledges pouring a beer on his head. Newman and Kramer then apologize to Hernandez for holding a five-year grudge. Hernandez accepts the apology and Newman and Kramer even offer to help Hernandez move his furniture into a new apartment.

Newman, Kramer, and Hernandez reach an understanding on their own terms, as opposed to having a resolution forced upon them. As a result, the relationship between the parties is actually strengthened through the transformative process. Despite previously harboring bitter resentment toward Hernandez, Newman and Kramer's attitudes toward Hernandez change almost instantly once they have been afforded the opportunity to express their emotions and relay their perspectives to Hernandez.

Where parties are able to reach a mutually satisfactory result after accepting proactive roles in the mediation process, the relationship between the parties may emerge much stronger than the pre-dispute relationship.²⁷³ In this respect, the ultimate goal of transformative mediation is to provide participants with an opportunity to learn and change.²⁷⁴

The resolution between Kramer, Newman, and Hernandez is reached almost exclusively between the parties and epitomizes the transformative process. Thus, even though Jerry's theory of a second "spitter" proved to be true, his initial application of evaluative mediation drove the parties away. In exercising the transformative approach, rather than taking an active role in negotiating a compromise, Jerry sits to the side saying almost nothing. The discussion between Newman, Kramer, and Hernandez is a therapeutic

²⁷⁰ See Meruelo, *supra* note 7, at 304; Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, 60 L. & CONTEMP. PROBS. 185, 207–10 (1997).

²⁷¹ Zumeta, *supra* note 140.

²⁷² Riskin, *supra* note 105, at 20.

²⁷³ BUSH & FOLGER II, *supra* note 269; Goldberg & Sanders, *supra* note 145, at 40.

²⁷⁴ THOMAS CRUM, *THE MAGIC OF CONFLICT: TURNING A LIFE OF WORK INTO A WORK OF ART* 174–75 (1987).

experience with each party listening to the other and mutually recognizing the values and perspectives of the other party. Instead of resulting in a heated and emotional argument, the parties discuss their dispute and rationality prevails.²⁷⁵

VIII. CONCLUSION

This Note has shown that *Seinfeld's* egocentric characters and exaggerated conflicts influence the perceptions and opinions of its viewers. Cultivation theory clearly articulates how *Seinfeld's* views and opinions transcend entertainment and shape the views, opinions, and decisions of its audience. The scope of *Seinfeld's* impact upon society's perception of the law is apparent from judicial decisions that have utilized *Seinfeld* as a practical method for illustrating legal doctrines and judicial attitudes.

Yet, the legal profession's fondness for *Seinfeld* is hardly reciprocated throughout the show. By subtly working legal themes and characters into its plots, *Seinfeld* has reflected and reinforced many of society's pejorative legal stereotypes. Instead of representing judges, lawyers, or the laws as problematic, *Seinfeld* portrays the entire system of formal law as clumsy and ineffective. In so doing, *Seinfeld* has artfully contrasted the failings of formal legal processes with the benefits of mediation. Mediation, in its various permutations, is presented as an alternative dispute resolution mechanism that emphasizes party autonomy in resolving conflict.

In light of television's ability to impact its viewers, this Note has demonstrated that *Seinfeld* goes beyond simply critiquing formal law and offering novel approaches to mediation. Rather, *Seinfeld* advocates the use of mediation techniques as a preferred method for individual members of society to resolve their own disputes.

Although frequently fictional, our favorite television programs influence and reinforce our perceptions of the world, even when such programs are designated as comedy. While we may be tempted to dismiss the notion that "a show about nothing" could have such a profound impact upon our perceptions of formal law and the efficacy of mediation techniques, cultivation theory clearly demonstrates that we are hardly immune to *Seinfeld's* influences.

²⁷⁵ Herman, *supra* note 106, at 37-39.