Mediating Disputes That Divide Communities: What Constitutes "Success"?

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I. ABSTRACT

Some events trigger intense divisions within a community. Examples include controversies involving police practices, school shootings, immigration policies, political speakers at a university campus, or situations unmasked by the #MeToo movement. There is a resurgent interest in using "third-party interveners" such as mediators and facilitators to help community leaders and citizens address such matters. If a person were to mediate such a situation, what does – or would – a "successful mediation intervention" look like?

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II. BACKGROUND

Polarizing social and political events have occurred throughout our nation's history. We cannot wish them away; they occur in every generation and in many different settings. Recent examples abound: the shooting of Trayvon Martin (2012) [1] and the subsequent decisions regarding whether and how to prosecute George Zimmerman, the identified shooter; the fatal shooting of 49 persons at the Pulse Club (2016);[2] the student protest at Middlebury College of Charles Murray, an invited speaker well-known for his controversial claims regarding the intelligence capacity of different racial groups (2017);[3] and the parade and demonstration by Neo-Nazi, Ku Klux Klan, and other "Alt-Right" citizen groups in Charlottesville, Virginia protesting the decision to relocate various Confederate memorials.[4] Community leaders across multiple stakeholder groups try—and have the responsibility—to address such challenges consistent with our constitutional traditions and our commitments to human liberty.

We hope that we have learned from our experiences.[5] In the spirited albeit controversial 1960s, social action displayed in civil rights marches, anti-war protests, and university-student campus demonstrations exposed community divisions. Political and civic leaders deployed both traditional and innovative efforts to "resolve" such matters, including (1) law enforcement officers monitoring various protestors and making arrests; (2) judges and relevant participants conducting criminal or civil trials to adjudicate

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1. Nancy H. Rogers, *When Conflicts Polarize Communities: Designing Local Offices That Intervene Collaboratively,* 30 OHIO ST. J. ON DISP. RESOL. 173, 180-86 (2015); *Trayvon Martin Shooting Fast Facts*, CNN, https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html (last visited February 28, 2020) (outlining the chronology of events that occurred surrounding the death of Trayvon Martin).

2. Alyson Hurt & Ariel Zambelich, *3 Hours In Orlando: Piecing Together an Attack and Its Aftermath*, NAT'L PUB. RADIO (June 26, 2016, 5:09 PM ET), https://www.npr.org/2016/06/16/482322488/orlando-shooting-what-happened-update (describing an account of the shooting events in Orlando, FL).

3. *See The Charles Murray Event at Middlebury College,* MIDDLEBURY NEWSROOM, http://www.middlebury.edu/newsroom/information-on-charles-murray-visit (last visited Feb. 28, 2020). Murray, a Fellow at the American Enterprise Institute, was invited to speak on March 2, 2017 at Middlebury College. Approximately 400 students engaged in protest activity, disrupting the program. The event garnered national publicity; the College ultimately disciplined some students involved in the protest activity.

4. For an account of the various events that occurred before, during, and after the August 2017 events, *see* Timothy J. Heaphy, FINAL REPORT, INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA, HUNTON & WILLIAMS LLP (2017).

5. *See generally* JAMES J. ALFINI, SHARON B. PRESS & JOSEPH B. STULBERG, MEDIATION THEORY AND PRACTICE 1-26 (3d ed. 2013).

allegations of criminal conduct or individual harms; and (3) legislators passing legislation, and protestors conducting "teach-ins."

Regrettably, using these democratic procedures triggered somewhat predictable outcomes viz. further acts of violence, protest, and discord: the police monitoring of the march from Selma to Montgomery resulted in "Bloody Sunday" in 1965;[6] the arrests of the protestors at the Democratic convention led to the "circus" atmosphere of the criminal trial of Abbie Hoffman, Tom Hayden and the Chicago Seven;[7] and law enforcement efforts to resolve the student disruptions at Columbia University resulted in front-page newspaper pictures of injured, battered students.[8] These and comparable experiences prompted many people of good will to question whether securing community engagement and peace required law enforcement practices to trump rather than reinforce the principles of our constitutional rights and scheme of ordered liberty.[9]

One experimental approach initiated at this time to address these piercing controversies was identified as Alternative Dispute Resolution ("ADR"). ADR referenced procedures for resolving conflicts, including negotiation, mediation and arbitration, which were alternatives to the traditional trial system. Those proposing their use were explicit in their comparative model, often making the

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6. On March 7, 1965, Alabama police officers confronted approximately 600 civil rights marchers leaving Selma, Alabama heading towards Montgomery, Alabama; the marchers got as far as the Edmund Pettus Bridge when police officers, using tear gas and billy clubs, deterred their march, prompting their return to Selma. Given the physical confrontations and ensuing injuries to marchers, the event nationally became known as "Bloody Sunday." For a historical account from interviews with marchers, *see Confrontations for Justice: John Lewis - March from Selma to Montgomery, "Bloody Sunday," 1965,* EYEWITNESS: AMERICAN ORIGINALS FROM THE NAT'L ARCHIVE, https://www.archives.gov/exhibits/eyewitness/html.php?section=2 (last visited Feb. 28, 2020).

7. *The Chicago Seven go on trial*, HISTORY.COM (Sept. 19, 2019), https://www.history.com/this-day-in-history/the-chicago-seven-go-on-trial (providing a summary of the Chicago Seven trial stemming from the arrests made at the 1968 Democratic Convention); Douglas O. Linder, *The Chicago Eight Conspiracy Trial,* http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/Account.html (last visited Feb. 28, 2020) (analysis of the trial, which originally involved eight defendants).

8. Frank da Cruz, *Columbia University 1968*, COLUM. U., http://www.columbia.edu/cu/computinghistory/1968/ (last visited Feb. 28, 2020) (providing a first-person account and recollection of the May 1968 student protest).

9. *See, e.g.*, Helene Whitson, *STRIKE!... Concerning the 1968-69 Strike at San Francisco State College*, FOUND SF, http://www.foundsf.org/index.php?title=STRIKE!..._Concerning_the_1968-69_Strike_at_San_Francisco_State_College (describing the 1968-69 student protest at San Francisco State College and response of President S.I. Hayakawa).

following type of statement in grant applications or conference rhetoric: [10] "We want to experiment using the processes of negotiation and mediation used in resolving labor-management impasses to the controversies impacting various communities."[11]

Fifty years later, that initiative has developed into today's scholarly and practitioner "field of conflict resolution." [12] ADR processes, particularly mediation, are regularly used to address multiple disputes involving: parents and school districts developing mutually acceptable individualized educational plans for a student with special needs; home owners and financial institutions negotiating mortgage debt reduction schemes to avoid foreclosure; and litigants involved in lawsuits filed in state or federal courts.

ADR practitioners regularly assess and measure whether using mediation has been effective in those contexts. How, if at all, might we evaluate whether mediating efforts to address polarizing group disputes are "successful"? Evaluating mediating success—and such cognate concepts as "being effective," "making progress," or "making improvements"—in these situations has been understandably but misleadingly skewed by viewing such mediator interventions as constituting the civic counterpart to mediating union-management conflicts, institution-based, or litigation-based claims. Assessing "what success looks like" when mediating a polarizing social dispute requires a broader framework than suggested by these important comparative contexts.

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10. I became of a member of "that group" in 1973.

11. *See generally*, Roundtable Justice: Case Studies in Conflict Resolution: Reports to the Ford Foundation (Robert B. Goldmann ed., West View Press 1980) (showing that the primary private sector philanthropic foundations at that time supporting the experimental use of ADR in these polarizing community confrontations were The Ford Foundation and, a bit later, the William and Flora Hewlett Foundation. The examples of conflicts at that time for which ADR efforts were marshaled, much like today, tended to emphasize "group conflicts,", rather than individual controversies: e.g. "the community"—often referenced a racial or religious grouping, such as the African American community or the Jewish community— "against" "law enforcement." Today's examples would importantly include members of various immigrant groups, the LBGTQ community, and the like "against" whomever.

12. There are multiple organizations to which third-party neutrals belong, including the American Arbitration Association, the Section of Dispute Resolution of the American Bar Association (as well as related "Dispute Resolution sections" of various state and local bar associations), the Association for Conflict Resolution, the International Academy of Mediators, and the American College of Civil Trial Mediators. There are multiple journals reflecting scholarly work and the US News & World Reports includes national rankings of "Dispute Resolution specialty programs" at U.S. law schools. Additionally, multiple universities offer dispute resolution courses in curriculum across such units as business, city planning, and environmental studies.

III. ASSESSING "MEDIATING" SUCCESS: COMPARATIVE SETTINGS AND THEIR METRICS

What constitutes appropriate elements—or "metrics"—for assessing whether one's mediating efforts are successful? Without immersing ourselves in the complex debates surrounding philosophical accounts of measurement,[13] one can comfortably recognize that each of us in various roles often measure our efforts as they relate to promoting or advancing some stated goals or purposes*;* that is, we measure activities and conduct within a means/ends framework: has the enactment of a particular tax cut stimulated increased employment opportunities? Does requiring a student to perform multiple iterations of "addition" problems (in class or as homework) increase her ability to perform that form of mathematical computation? The challenge becomes significantly more complex when we try to develop metrics to measure other activities: how much does a father love his daughter? Was John Gielgud a better actor than either Richard Burton or Tom Hanks?

Three features stand out regarding the means-ends framework noted above: first, we can quantify certain behaviors or features of our conduct; second, our having quantified behaviors enables us, in principle, to envision that an independent (non-partisan) observer could accurately record performance behaviors and outcomes using these metrics; and third, quantification enables an independent observer or evaluator both to tabulate multiple iterations of an individual or group's performance of the measured activity as well as tabulate the same measures across different players performing the same activity.[14]

How do these general observations apply to assessing mediating activities? I consider three sources from which to draw guidance: an annual report of mediating activities for the Federal Mediation and Conciliation Service of the U.S. Department of Labor;[15] comparable reports describing activities for state court mediation

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13. *See generally*, INTERPERSONAL COMPARISON OF WELL-BEING (Jon Elster & John E. Roemer eds., 1993).

14. Annual reports, for example, showcase disposition results of trial court caseloads across multiple trial courts within a given state or federal judicial district. *See, e.g*, Robert LaFountain, Richard Schauffler, Shauna Strickland & Kathryn Holt, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads*, NAT'L CTR. FOR ST. CTS. (2012), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx.

15. FED. MEDIATION & CONCILIATION SERV. OF THE U.S. DEP'T OF LABOR ANN. REP. (2018).

initiatives; [16] and marketing materials of private mediation practitioners, including both print and social media based.[17]

Each of these reports of mediating activity organize their metrics using three central dispute resolution concepts. First, each report presumes the existence of a "case." If we know what constitutes a "case," we can measure multiple features, such as the number of cases mediated; the time elapsed from the filing of the case to its disposition; the number of persons who mediated the "caseload"; the outcome of the mediation effort; the cost to mediate each case; the number of people who were involved or impacted by the mediation services; and how each of these elements compare across multiple reporting periods.

Second, a "case" requires that there be appropriate "parties" involved and that these "parties" are central to its resolution. Framing a matter as a "case" enables us to identify who is entitled to participate. A case involving a medical malpractice claim, for instance, involves a presumptively injured person and the medical personnel who provided the treatment that in some way led to the injury. It does not include those who might be financially dependent on that injured party's continuing ability to remain in the workforce. Similarly, a divorce action involves legally married partners who would be appropriate parties in a "case," whereas children or grandparents who may be financially dependent on the couple would not be considered appropriate parties.

Third, the process being evaluated – a facilitated negotiation process[18] – conceptually consists of identifiable negotiable issues. Negotiating parties develop and propose solutions to those issues. If the proposed solutions are accepted by all negotiating parties, the negotiation is concluded; if parties fail to develop and embrace settlement terms, the case lingers or is closed without an agreement.

Negotiable issues constitute the architecture of the parties' engagement. What are some examples? In labor-management relations, party representatives try to resolve issues such as wages, health-care insurance, retirement compensation, vacation time, and procedures governing promotions and layoffs. In court-annexed disputes, divorcing parents with minor children negotiate financial allocations, parenting arrangements, and child-rearing practices, such as the children's religious training or summer activities. Disputing neighbors might negotiate guidelines to govern the frequency, timing, and duration of social events ("parties") or the

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16.   AM. ARB. ASS'N ANN. REP. & FIN. STATEMENTS (2018).

17.   *See generally* Mediation, Arbitration, ADR Services: *Local Solutions. Global Reach.*, JAMS, https://www.jamsadr.com/. *See also* INTERNATIONAL CHAMBER OF COMMERCE ANNUAL REPORT (2018).

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

ways in which they communicate with one another. Furthermore, parties to a civil litigation case, such as a sexual harassment claim, might try to settle the case by negotiating such matters as the plaintiff's employment status (e.g. reinstatement), written entries to a personnel file, prospective supervisory practices, or financial compensation.

All this data, and their presumed concepts of "case," "relevant parties," and "negotiable issues," constitute valuable information. The data measures critical elements that provide credible information for assessing a program's financial efficiency or performance integrity. Gathering such data enables an independent assessor, be it a monitoring public agency or independent consultant, to measure these elements and thereby confirm or question an individual or agency's self-assessment.

The data also supports our evaluation of whether a mediation intervention was successful. For example, for each mediation case with identifiable parties, one can ask the formulaic question: did the mediator's services help the parties' negotiating efforts achieve settlement of each negotiating issue?[19] The Federal Mediation and Conciliation Service (FMCS), in its Fiscal Year (FY) 2015-2016 annual report, noted that it assigned 2,435 new private sector collective bargaining mediation cases to its staff; closed 2,941 cases,[20] of which 2,516 cases were settled, thereby producing a 85.5% settlement rate.[21] In 2017, the New York State's Office of Court Administration reported that its state-wide Community Dispute Resolution Centers Program (CDRCP) served 67,118 persons by administering 27,072 cases, 75% of which were resolved.[22] In its FY 2014-15 report, CDRCP reported that the average time elapsed between the intake process and the completion of an ADR process was 25 calendar days. CDRCP also noted that 1,470 persons throughout the state had served as volunteer mediators. Additionally, overall volunteer services, including those of mediators, exceeded 38,725 hours, reflecting more than $2,290,000 in donated services.

Practicing mediators use comparable metrics. The appointment announcement of the current FMCS acting director reads: "In his capacity as FMCS mediator [before being appointed Acting Director], Mr. Giacolone mediated thousands of domestic labor and

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19. Or, perhaps, in some other recognizable way serve the parties, such as referring them to a more appropriate support service?

20. Includes active mediation cases carried over from prior year.

21. FED. MEDIATION & CONCILIATION SERV. ANN. REP. 23 (2016), https://www.fmcs.gov/wp-content/uploads/2017/01/AnnualReport2017Jan13.pdf.

22. N.Y. UNIFIED CT. SYS. ANN. REP. 31 (2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-09/17_UCS-Annual_Report.pdf.

employment cases during his 23-year tenure."[23] The website of a distinguished private sector mediator reports: "Since 1989 he has mediated over seven thousand cases…involving anywhere from two to 125 parties."[24] A comparably eminent Judicial Arbitration and Mediation Services (JAMS) mediator cites the outcomes of representative matters that he has mediated, including "[c]lass action business disputes in Missouri, $100 million settlement; Mass medical malpractice claims in Illinois and New York, $2 million settlement; . . .and a Case involving gas pipeline explosion in California, $100 million settlement"[25] while another reports more generally that she ". . . has successfully mediated thousands of disputes ranging in type and complexity."[26]

Conclusion: explicit metrics, particularly those requiring quantitative information, are necessary to assessing the success or failure of mediation program efforts and individual mediator performances. But they are not sufficient.

IV.   ASSESSING MEDIATOR PERFORMANCE

The types of metric elements described in Section I focus on process measures that serve client or program goals. They do not assess the quality of the mediator's performance, at least directly. One can make reasonable inferences: if a person has been hired to serve as a mediator in many cases, one might reasonably conclude that many persons have been satisfied with the professionalism of the mediating services the mediator offered. If someone reports financial settlement figures involving significant money sums, one might conclude that persons with substantial resources at stake trusted this individual to assist them to work out their controversy. However, those conclusions might be seriously inaccurate: perhaps a party felt disrespected, but agreed to settlement terms simply to move forward and minimize further aggravation and expense, or a "repeat player," such as an insurance company, regularly uses a particular mediator because of that mediator's physical proximity, compensation rate, and focused area of substantive expertise rather than their interpersonal skill-set.

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23.   *Federal Mediation & Conciliation Service, Office of the Director: Deputy Director at Richard Giacolone*, FMCS, https://www.fmcs.gov/aboutus/agency-departments/office-of-the-director/ (last visited Feb. 1, 2020).

24.   *Lakeside Mediation Center, Eric Galton*, http://lakesidemediation.com/mediators/eric-galton (last visited Dec. 9, 2019).

25.   *Neutrals: John Bates at Representative Matters*, JAMS, https://www.jamsadr.com/bates/ (last visited Dec. 9, 2019).

26.   *Neutrals: Ronnie Bernon Gallina at General Biography*, JAMS, https://www.jamsadr.com/gallina/ (last visited Dec. 9, 2019).

Independent of the above-noted metrics, and even those reasonable inferences from them regarding mediator competency, it is possible to assess a mediator's performance. It is true that we can say about a mediator that she performed her tasks skillfully and consistently, yet the parties did not settle; and the reverse: that the parties settled their controversy but that the mediator's conduct was inept or unprofessional in significant ways. On what basis can an observer make such an evaluation?

One can identify the major mediator tasks and required skills for a person to execute the mediator's job effectively.[27] These measures are of keen interest to institutions that have required mediation programs (e.g. courts or institutions such as a business or university) and to professional and trade groups of mediators hoping to sustain mediation's public integrity and reputation. Such players properly assume responsibility for ensuring that the persons they appoint to serve as a mediator in a mandated procedure can capably perform that role; they want to make certain that no one incurs costs in a mandated procedure that ends up being a waste of time and resources.

Various institutions have developed minimum requirements for persons seeking to be a mediator in their respective program or professional organization. Multiple court-related programs, for instance, require individuals seeking appointment to its mediator roster to participate in a "court-approved" mediator skill-building training program – often 40 hours in length;[28] the more proactive, and, I believe, responsible Court systems who invite private providers to submit proposed mediator training programs for approval often stipulate comprehensive though not burdensome elements of a required program, including mandatory training topics, time allocation per segment, required pedagogical mix (simulation, role plays, lectures), and the trainer/student ratio for various program components.[29] Professional organizations develop member requirements that range from attending a required number of continuing mediator education programs to undergoing a performance test for accreditation.[30]

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27. *See, e.g.,* JOSEPH STULBERG & LELA LOVE, THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY 25–35 (3rd ed. 2019).

28. Supreme Court of Florida, Administrative Order No. AOSC13-41 6 (2013), https://www.floridasupremecourt.org/content/download/240933/2130429/AOSC 13-41.pdf, (To become eligible for appointment to a court roster for appointment to mediate cases filed in Florida's circuit court (the trial court of original jurisdiction), a person must have completed an approved training program of at least 40 hours in length.).

29. *Id.*

30. *See, e.g.*, *Competency Criteria*, INT'L MEDIATION INST., https://www.imimediation.org/practitioners/competency-criteria/ (last visited Mar. 26, 2020).

Though mediator performance features differ from the quantifiable program data outcomes referenced in Section 1, one can identify them and then observe and record a mediator's conduct that displays or fails to display the required behaviors. Examples are readily apparent: in assessing whether the individual can competently execute an opening statement, one can record whether the mediator addressed all of the recommended topics in a thoughtful sequence, executed it in time-efficient manner, used non-partisan language, displayed balanced eye contact and engagement, and spoke at a pace and with a vocabulary that would make a mediation participant informed about the process and confident in its procedural integrity. In a comparable way, a mediation trainer can teach and thereafter assess whether the participant asked questions in a form that elicited conversation, listened attentively, recorded information non-intrusively, crystallized negotiating issues, strategically sequenced discussion of negotiating issues, deployed identifiable strategies to generate movement, and honored commitments to respect confidentiality.

These "metrics" are objective and standards-based, even if not quantifiable. They are akin to evaluating a musician who auditions to become a member of the cello section of her community orchestra: was the intonation of her audition piece accurate? Vibrato sustained? Tempo appropriate? Evaluating a mediator can be done similarly.

Does this combination of metrics that assess program goals and mediator performance standards enable us to gain a shared understanding of what it might mean to say someone has successfully mediated a dispute that divided a community? No. These metrics constrain our vision of the mediation process. To move in a more robust direction, we must do two things: (1) Revisit and revise our understanding and application of the governing dispute resolution concepts of "case, parties, and negotiating issues;" and (2) Revise our framework to include a narrative dimension that provides meaning to the collective undertaking. What do I mean?

V. OF COURSE, IT IS MORE THAN NUMBERS – BUT THAT DOES NOT MAKE IT SUBJECTIVE.

A. Variety of Assessment Perspectives: A Narrative

We can properly measure some activities exclusively by numbers: Was a particular movie a box-office financial success? Did our University's College of Business operate within its budget this year? How long did it take for a case to be resolved through the legal system? Has a company or town's waste disposal practices

resulted in a river or lake whose water quality exceeds particularly EPA safety standards? Information counts – and it should.

But often there is more to the conflict than what is captured or reported by such metrics. Many annual reports of organizations or businesses contain narrative accounts in addition to quantitative data. Why? A narrative advances multiple goals: (1) It can highlight particular challenges that confront the organization, such as the task of hiring employees with particular technical or professional training; (2) It can portray the significance of a particular activity , such as a different "meaning" of the event in terms of its intrinsic value or its impact on others. A narrative can make salient certain features of the activity that numbers ignore or for which they seem inadequate; for example, rather than, or in addition to, reporting that the storm destroyed eighty homes valued at $14.3 million, a narrative can provide an account of how various family members experienced their agony and sense of loss upon first seeing their home and personal belongings of a lifetime destroyed by a tornado or a flood. On the happier side, a narrative might describe the experience of a child immersed in childhood glee and engagement as she makes her "Make a Wish" Foundation trip to Disneyland.[31] A writer can engage with her audience and prompt responses from them through narrative: empathy, joy, heartbreak, pride in people's generosity, a raging sense of injustice. These responses might/may/could prompt renewed reflection and discussion of possible action.

So, authors of reports of mediation agencies and programs include brief statements, together with statistics; the following are illustrative:

> **Detroit Casinos and United Auto Workers Local 7777, Unite Here Local 24, Teamsters Local 372, and the International Union of Operating Engineers Local 324.** With assistance from FMCS and Michigan state mediators, three Detroit casinos and union representatives for approximately 6,000 casino employees reached a new, five-year collective bargaining agreement for the Greektown Casino, the MGM Grand Detroit, and the Motor City Casino, ending highly contentious negotiations and providing relief to thousands of workers in the Detroit metropolitan area.[32]

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31. Such narratives appear regularly as a feature on its NBC news, with Lester Holt, entitled *Inspiring America.*

32. FED. MEDIATION & CONCILIATION SERV. 2016 ANN. REP. 4 (2017).

Southern California Supermarket Negotiations. With help from FMCS mediators over many months, southern California grocery workers represented by local unions of the United Food and Commercial Workers (UFCW) and the Ralphs and Albertsons supermarket chains averted a possibly damaging work stoppage, affecting approximately 50,000 supermarket employees in the region and countless supermarket customers. A previous strike by the UFCW locals in 2003-2004 had lasted four-and-a-half months.[33]

Joffrey Ballet and Dancers. With FMCS assistance, the Joffrey Ballet reached a new five-year contract for its company of 41 dancers, represented by the American Guild of Musical Artists (AGMA). The labor agreement for one of the country's premier artistic institutions preserved the company's ballet performance seasons through 2020-2021.[34]

What do these short accounts of mediating activity convey that numbers do not? They inform the reader how people's lives were affected because FMCS mediators, and their state counterparts, worked constructively with union and management bargaining representatives to secure agreements and avoid work stoppages. In Detroit, casino owners and their union counterparts secured employment stability for 6,000 employees. In California, FMCS helped grocery store owners and their employee representatives sustain continuous employment and service coverage to 50,000 employees and customers, thereby averting a strike reminiscent of the four- and one-half month work stoppage of a prior bargaining impasse. In the performing arts world, FMCS helped parties reach agreement, thereby stabilizing for multiple years the ballet experience and enjoyment for producers, artists, and audience members alike. In these ways, using a narrative is helpful to assessing whether the mediator's services were valuable.

B. *The Narrative in the Dispute Resolution/Mediation Context*

Narrative accounts appear in reports of mediating activities that focus on public policy conflicts. In its 2016 annual report, the Community Relations Service (CRS) of the U.S. Department of Justice stated:[35]

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33. *Id.* at 6.
34. *Id.*
35. COMMUNITY RELATIONS SERVICE, U.S. DEP'T OF JUSTICE 2016 ANN. REP. 17-18 (2017).

Administration of Justice cases are defined as those that derive from the actions of law enforcement and fuel community tension. In fiscal year 2016, CRS completed 225 Administration of Justice cases. The largest number … resulted from tension related to allegations of excessive use of force by law enforcement, poor police-community relations, and allegations of bias-based policing and racial-profiling by law enforcement.

…[I]n fiscal year 2016, CRS completed a total of 80 Education cases. The highest number … resulted from racial conflicts and tensions between students in secondary schools, as well as hate or bias-motivated incidents in elementary, middle, and high schools.

These accounts clearly reference quantifiable matters, including 225 Administration of Justice cases and 80 education cases.[36] The narrative elaborates only briefly, describing the context in which such matters are set: "Cases resulted from tension related to allegations of excessive use of force by law enforcement…and allegations of bias-based policing and racial-profiling by law enforcement."[37] That is valuable, but it presumes that the reader can readily imagine actual settings that illustrate what the phrase "excessive use of force" references. So, the narrative moves, at some point, to provide the reader, in summary form a "case study:"

The Police Shooting of Philando Castile in Falcon Heights, Minnesota

On July 6, 2016, a St. Anthony, Minnesota, police officer fatally shot Philando Castile, a 36-year-old African American male, during a traffic stop in the St. Paul suburb of Falcon Heights. The victim's girlfriend live-streamed the incident on social media.

The shooting and video exacerbated community tensions and led to numerous protests. Multiple community groups led street marches in St. Paul, Falcon Heights, Minneapolis, and St. Anthony. A vigil was held for several days in the front of the home of the Minnesota governor…. Throughout…days and weeks of protests, members from CRS' Midwestern Regional Office met with

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36. *Id.*
37. *Id.* at 17.

officials from various state and local law enforcement and government agencies, as well as local community leaders…and helped develop contingency and operational plans including minimal show of force, bike escort for protesters, and de-escalation strategies for law enforcement.[38]

From a different program initiative, the authors portrayed the attack on the Pulse Club in Orlando, Florida in its "case study" summary as follows:[39]

On June 12, 2016, Omar Mir Seddique Mateen shot and killed forty-nine people and injured at least fifty more. Mateen targeted the Pulse Nightclub, a well-known gay nightclub in Orlando, Florida. At the time, it was the worst mass shooting in United States history.

That evening of Saturday, June 11, 2016 was a special night at the Pulse Night Club. The club was hosting a Latin-inspired event full of salsa and merengue inspired music. Attendees were dancing and partying with zest, laughter, and energy into the early hours of June 12th. Suddenly, everything changed.

Club attendees started hearing loud, shot-like noises. Initially, some thought the noises were firecrackers. The nightclub's DJ, Ray Rivera, even lowered the music thinking that someone was playing a prank.[40] The reality, though, was different. Mateen was firing gunshots toward the crowd.

According to the FBI, the incident started at two o'clock in the morning.[41] Two minutes later, the Orlando Police Department (OPD) received their first call indicating that shots had been fired at the nightclub. A police officer arrived at Pulse

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38. *Id.* at 20-21.

39. *Divided Community Project*, COMMUNITY RESILIENCY INITIATIVE (2017).

40. Hansi Lo Wang, *Survivors Describe Time Of Events Leading Up to Orlando Shooting*, NPR (June 13, 2016), http://www.npr.org/2016/06/13/481914409/survivors-describe- timeline-of-events-leading-up-to-orlando-shooting

41. Special Agent Dave Couvertier, *Investigative Update Regarding Pulse Nightclub Shooting*, FBI (June 20, 2016), https://www.fbi.gov/contact- us/field-offices/tampa/news/press-releases/investigative-update- regarding-pulse-nightclub-shooting.

approximately two minutes later and entered the premises of the nightclub. Even though police arrived and increased their presence, Mateen stayed in the nightclub and kept firing. Matten held the nightclub hostage. On its official Facebook webpage, Pulse posted at 2:09 a.m., "[e]veryone get out of [P]ulse and keep running."[42]

At 2:35 a.m., Mateen dialed 911 from inside the nightclub and pledged to do more shootings in Orlando. Mateen had three phone conversations with OPD's Crisis Negotiation Team between 2:48 a.m. and 3:24 a.m. Throughout these conversations, Mateen threatened to ignite a car bomb if any police officers tried "to do anything stupid." He identified himself as an Islamic soldier and requested the United States to cease bombing Syria and Iraq, citing this as the motives driving his actions that night.

By 4:21 a.m., police officers were able to remove an air condition unit and evacuate victims from a Pulse dressing room window. With limited access, police officers found no bomb or explosive materials; therefore, carrying explosive charges and using armored vehicles, the police entered the nightclub. At 5:14 a.m., shots again sounded. A minute later, OPD reported that Marteen was dead.

The writers then reported how multiple actors responded: local political leadership immediately assumed and shaped the primary public communication role. [43] Public and private organizations rapidly organized and delivered urgently required medical, food and housing services; civic philanthropic organizations, together with public officials, designed and financed longer-term assistance, including substantial financial support for housing, professional counseling, and community reconciliation efforts. Citizen leaders

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42. *Pulse Orlando,* FACEBOOK, https://www.facebook.com/pulseorlando/posts/10154938990430031.

43. According to statements made by various leaders of the philanthropic and LBGTQ communities at a gathering in Columbus, Ohio on November 1, 2017, the significance of the mayor's having assumed the initial and primary spokesperson role rather than a state or federal official was crucial to their immediate, favorable reaction to the city's response to the horrific event. It demonstrated to them, they reported, that "… the person who was in charge was their mayor who had their back;" that trust had significant implications for how subsequent services were delivered and the public framing of the event was shaped.

reported that the long, slow path to recovery emanated from a spirit of inclusiveness and a focus on problem solving, not revenge.

Such narratives help us understand the dispute resolution architecture of "intervening" in a "case" that divides communities. In what ways?

C. Dispute Resolution Concepts in Divisive Community Conflicts

Narrative accounts and "case studies" prompt us to revisit and enrich our understanding and application of three central dispute resolution concepts: an intervener; a case; and negotiating issues.

1. Who is an *Intervener?*

A narrative confirms what statistics alone do not, specifically that the mediator provides catalytic and crucial services to the parties. A mediator offers a neutral meeting space not owned by the parties in conflict; her agenda is to help stabilize interactions and expand party engagement. Governed by her professional role and standards, she seeks no public credit for contributions made. That combination enables disputing parties to trust, at least tentatively, a mediator's initial engagement because they do not see her acting to implement a "hidden agenda" that might embarrass or harm them.

These narratives also display, indirectly but persuasively, that a local leadership group must emerge in the midst of a divisive community conflict with the capacity to stimulate and engage in intensive discussions with representatives from diverse stakeholder groups. That group must include local elected officials as well as representatives from such other stakeholder groups such as civil rights activists, business executives, or religious leaders. To the extent possible, each stakeholder group member must be an individual who has broad-based respect and credibility within their community. Examples of credibility include: (1) the capacity to have his or her telephone calls answered; (2) the ability to communicate candidly, directly, and with integrity; (3) a commitment to focus on addressing matters at hand; and (4) a knowledge of local needs and interests. That group, whether on-going or newly constituted, must be viewed by its constituents and the public at large as impartial and committed to welcoming and examining new information. In short, to be effective, the group must institutionally share the characteristics of a mediator's posture of intervention.

Finally, the stories affirm that developing and sustaining engagement and discussion is a time-consuming commitment by all participants. There must be leadership to advance dialogue and resources to support that effort. Sometimes that leadership is provided by a neutral mediator who has office or organizational capacity to sustain her engagement and sometimes that role can be

effectively assumed by a leader from a local organization whose integrity is widely respected and whose commitment to the community's broad-based welfare is unquestioned. Examples of leadership personnel in respected local organizations include the editor of the local newspaper, a local college president, or leaders from such local organizations as a Bar Association, United Way, or a business owner. Significantly sometimes political leadership—e.g. the mayor's office—assumes that role and responsibility and is effective to the extent that it enjoys broad-based citizen confidence.[44] What experience regularly affirms is that the neutral intervener and leadership group must, quickly, be locally based; while the FMCS or CRS model suggests that a mediator can be present for a targeted time period and then move on, that intervener approach is not viable for servicing disputes that divide communities.[45] Not only do financial resources make it unlikely for CRS, FMCS, or other such interveners to provide sustained service in a local municipality but also, and more significantly, the capacity and resiliency of local residents, at some point, to address and resolve their concerns must take center stage. The genius and value of democratic governance celebrates and requires that individual citizens assume responsibility for their destiny. Strengthening local capacity is a shared value.

2. What Constitutes a "*Case"?*

A case consists of distinctive features: a time dimension; the appropriate participants; the interveners; and the identification of the matters or concerns ("issues") that must be addressed and resolved.[46]

a. Time Dimensions

A case "starts" when an identifiable individual, group or organization commits an act or actions that adversely and tangibly affects the interests of identifiable parties. The parties to the case are particular and stable; they are distinguishable from affected family members or concerned citizens. The case is "closed" when relevant

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44.   DIVIDED COMMUNITY PROJECT, COMMUNITY RESILIENCE INITIATIVE, https://moritzlaw.osu.edu/dividedcommunityproject/community-resiliency-initiative/ (last visited Mar. 29, 2020).

45.   See Community Resilience Initiative - Case Study 4, COMMUNITY RESILIENCE   INITIATIVE https://moritzlaw.osu.edu/dividedcommunityproject/community-resiliency-initiative/ (last visited Mar. 29, 2020).

46.   STULBERG & LOVE, *supra* note 27, at ch. 6–9.

parties agree to perform particular actions that the other party finds acceptable to resolve their concern.[47]

Does this analytical framework advance our understanding of addressing a divisive community conflict? Not perfectly. Why? Recall what occurred in Ferguson, Missouri in August 2014: Michael Brown, an 18-year old African American male, was fatally shot by a white police officer, Darren Wilson.[48] Brown was a suspect for the robbery of a convenience store. Wilson saw Brown and his companion walking on the street a short distance from the robbery site. He ordered Brown to stop but Brown wrestled with Wilson, who was still in his car, to dislodge Wilson's gun. Brown did not succeed. He started running down the street; Wilson pursued. Brown stopped, reversed direction, and started coming towards Wilson. Wilson, using his pistol, fatally shot Brown. In the 70 seconds of their total interaction, Wilson had fired 12 shots; Brown died of multiple gunshot wounds, 6 in his chest. Protests, both peaceful and violent, erupted and lasted for more than a week. The police established a nightly curfew; it used significant military weapons to subdue the protestors. The state's Governor, concerned with public safety, transferred local police jurisdiction to the State Highway Patrol. In November 2014, a grand jury affirmatively decided that there was no probable cause to indict Officer Wilson. Six months later, the U.S. Department of Justice released its report which, in sharply critical language, admonished Ferguson to overhaul its criminal justice system, asserting that Ferguson's multiple constitutional violations could be corrected only by abandoning its entire approach to policing, retraining its employees, and establishing new oversight; the police chief stepped down shortly after the report was issued.

Can we answer the question: when did this matter start? One might state that Officer Wilson's fatally shooting Brown started the eruptions. That theory competes, though, with the Justice Department's finding that indicts the city for engaging in what it portrayed as long-term, systematic misconduct by relevant personnel that created the divisive elements. That leads us to consider the next significant matter: who are the "parties" to this matter?

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47. *Id.*

48. U.S. DEP'T OF JUSTICE, *Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson* (Mar. 4, 2015) https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

b. Participants

i. Parties

Who are the parties to the case? Brown's family and the city? City government officials and community leaders? County, state, or federal political leaders or law enforcement representatives? The demonstrators in the streets? All of the above? It is important and fair to ask: "what is the problem we are trying to address?" as the answer to that significantly shapes who the stakeholders and parties must be.[49]

What may appear obvious is often not so, namely, the parties to the discussion may change over time, with some participants joining the discussions as others exit. Sustaining that dialogue and promoting a shared understanding of participant goals and efforts often constitutes the mediator's significant responsibility and contribution.

ii. Intervenors

Who intervenes, and for what purposes, in a situation such as the shooting of Michael Brown? There are multiple participants: law enforcement personnel, who may be deployed in an attempt to secure stability; institutional representatives; the central communicators who report on the status of matters; community and faith leaders, who may assume significant roles in connecting constituents; and political leaders.

Mediators also participate. They are persons whose posture of intervention is that of a neutral intervener, their goal being to assist contending parties to identify matters of concern and promote dialogue to resolve them.[50] Given this melee of participants, does their interaction differ from their conventional mediation intervention? Yes.

First, entry issues differ. In conventional settings, the identifiable parties elect to use a mediator and then proceed to select one. Here, a mediator sees trouble and explores his or her usefulness to community members in helping them to secure progress. Second, acceptability of the particular individuals serving as mediators is always a "game-time" decision.

In conventional settings, parties might select a mediator based on her reputation; if party preferences differ, they identify other

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49. The significant practice challenge is how one promotes that "sorting process" while actually intervening on the street between angry protestors and law enforcement officials. Matters, both practical and conceptual, become blended, and the actual chronology of events becomes significant in shaping the sorting answer.

50. STULBERG & LOVE, *supra* note 27, at 5.

mediator candidates. In the public sector, the established institution—e.g., the Federal Mediation and Conciliation Service or a court's roster of mediators—is the entity that vouches for the training and credibility of its individual staff members serving as mediators. But in a divisive community controversy, the credibility that supports an individual's acceptability must be established and earned from the participating parties by the individual mediator as the controversy is in progress. And that decision-making process by the parties—will we participate in discussions with this mediator?—in and of itself presents challenging issues to the mediator, the most significant of which is: should a mediator proceed to organize and promote discussions if some but not all parties find the mediator's presence acceptable?

c. Nature and focus of Negotiable Topics

In the paradigm case, the intervenor assists negotiating parties identify negotiable topics and then promotes discussion to resolve those matters. It is a problem-solving process.

By contrast, there are other forms and settings for communicating that advance educating and informing persons about public matters. For instance, an elected official might conduct an open constituent forum; citizens might make comments at a city council meeting; or community members might participate in a "community forum" hosted by a local media station to share perspectives regarding such matters as gun use or border control procedures. Such forums invite participants to share viewpoints and information but are not designed to secure agreement among them on a proposed action plan. Is a mediator's intervening in a polarizing community dispute more aptly framed as a problem-solving process or as an education and communication process? I believe the answer is the former, but with important adjustments. What does this involve?

Let's revisit the shooting of Michael Brown in Ferguson and the events in its wake: what is the "matter" or "issue(s)" we are presuming the focal point of attention and "negotiation": The shooting involving Wilson and Brown? The subsequent activities in the streets? The various elements identified in the report of the U.S. Department of Justice?[51] All of the above? Something else? I believe these questions suggest the nature of the required approach.

First, the agenda of negotiable issues, hence, appropriate participants, may change over time. For instance, if the mediator and parties focus on developing protocols that ensure both the safety of people in the streets and protestors' constitutionally protected rights to protest, then they develop negotiating proposals regarding the

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51.   *See supra* note 49.

location, timing, and entrance/exit of the protestors' planned actions. If the needs identified in the discussions shift to discussing the delivery of short-term or long-term medical and social services, then the negotiable topics must also shift, and that transition might require participation by other stakeholders not previously involved in the conversations.

With this potential shift of negotiable topics, a second feature emerges. Participant rhetoric regularly asserts that in order to resolve our community tensions, parties must effectively and thoroughly examine the "underlying causes" of division: economic inequalities, racism, educational prospects, health care services, or recreational opportunities. This is an important plea from a social justice perspective. From a problem solving, negotiating perspective, however, the call is too broad.

Community stakeholders, perhaps with the valued assistance of a neutral third-party, must crystallize *negotiable* issues that address aspects of those social challenges so that parties can propose and possibly agree to tangible conduct responsive to those practices.[52] For instance, it might significantly advance a community's shared understanding of the city's health care service delivery system if advocates forcefully highlighted that neonatal services in hospitals serving Neighborhood X lacked services that were readily available for Neighborhood Y, or that mobile hyperbaric services to treat diabetes were available in Neighborhood Z but not X.

This type of social reporting and exposure often prompts desirable change. It is certainly possible that an accurate explanation for such disparate treatment of health services in the example above is straightforwardly racist. For example, a hospital administered and funded by a certain community may not want to make resources available to persons of a certain race or religious background.[53] It's possible that a hospital administrator's implicit biases explain her budget decisions.[54] Nonetheless, the "problem-solving" approach goes a step further, and in a slightly different direction, to examine

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52.   *See* STULBERG & LOVE, *supra* note 27, at 78.

53.   Practices restricting hospital admissions on race—and therefore access to certain medical services—certainly have been part of our history. *See* SPENCIE LOVE, ONE BLOOD: THE DEATH AND RESURRECTION OF CHARLES R. DREW (Univ. of N.C. Press 1996).

54.   Criticisms of widespread policing practices often charge that the arresting officer's "implicit biases" explain a significant component of the practice problems. The broad claim of the psychologists, of course, is that everyone has implicit biases—none of us can escape them so it is our challenge to work to shape their impact. That assumes, quite brashly, that one can identify the bias, be made to understand how it shapes conduct, identify alternative behaviors that either reduce its impact or constitutes a more desirable form of conduct, and motivate persons to change. More broadly, it presumes that one can set forth a coherent, comprehensive theory of value that enables us to know what it means to say that a "bias" is "bad."

what particular practices or policies can be developed and implemented by the negotiating stakeholders to acceptably address the negotiable issues relating to treatment services that they have identified.[55]

Finally, we consider the matter of the timing of a mediator's entry because negotiation topics that address civil unrest change over time and involve varying but connected participants and stakeholders. A mediator's intervention can be a continuing activity as both addressing a current challenge and developing plans to address a future challenge. Mediation is not time limited. Intervention is more helpfully framed as constituting a sustained activity of shared community engagement and governance, rather than a case to be resolved or concluded.

Political leadership, with institutional responsibilities for continually promoting a community's welfare, could embrace discussion and dialogue regarding planning for civil unrest as part of their on-going responsibilities. But, of course, such action is not legally mandated; these leaders are not required to do any more than respond episodically to disruptive events. While local leaders often plan for their community's economic development, housing patterns, cultural life, or responses to natural disasters, most do not plan for civil unrest.

Given these observations, what emerges as relevant indices for assessing the success of intervening in a dispute that divides communities?

VI.   ELEMENTS FOR ASSESSING SUCCESS

Given the discussion above, one can draw the following three inferences regarding the success of a mediator's intervention in a polarizing community dispute.

First, a mediator who assists parties to address matters that create civil unrest must be prepared to assist them to identify and examine a range of social events as opposed to focusing only on one time-constrained and party-restricted matter. For instance, a mediator's engagement on a university campus to assist parties address allegations of sexual harassment and their accompanying

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55.   Inequitable treatment properly upset many of us. While there may be multiple ways to address attitudes of pervasive racism, ranging from citizen groups initiating community dialogues or shared recreational events to political leaders developing policies and law that could transform housing patterns and educational opportunities. Significant time might elapse before determining whether these various initiatives were effective. While all these possibilities may be undertaken, they advance a different initiative than what might be possible from supporting a negotiating/mediating perspective in dealing with or planning for divisive community actions.

challenges and harms, may require sustained service.[56] In contrast, a mediator's engagement to help prepare university stakeholders for the appearance of a controversial public speaker on campus may be appropriately time-targeted.[57] A mediator must be flexible in order not to be unduly captured by a "case" mentality.

Second, engaging the appropriate stakeholders to the negotiation is not a fixed matter. This fact raises significant practice challenges. First, the mediator and participants must continually monitor whether the negotiating group includes the relevant stakeholders. Second, the mediator must anticipate that individual negotiating participants will change over time. This makes it important to develop practices and procedures to ensure that the person who assumes that stakeholder representation role can become quickly informed about the substantive issues and accustomed to the negotiations' tempo.

Third, the mediator's service should shift in focus over time. First, she will address the initial intervention phase. Here, the mediator's distinctive contribution and responsibility may be to engage stakeholder discussion to prevent or restore stability that sustains stakeholder communications and preserves public safety.

But second, a mediator views her engagement in mediating controversies that divide communities as a continuing, shared responsibility of citizenship. A mediator's neutrality may be necessary, but perhaps not sufficient, to sustain discussions that target community needs and long-term plans to maintain community resiliency. Such a task may require local leaders with broad-based community credibility to take on the role as convener and discussion leader. Often this role is assumed to be the responsibility of a community's political leadership, such as a mayor or city manager. The drawback is that such leaders may have a partisan agenda to advance or be perceived as addressing the well-being of some constituents more consistently than others. One way to minimize this partisanship risk is to have a mediator serve as a resource to the leadership group. Here, the mediator's tasks might include sustaining communications among participants between their regularly scheduled gatherings or conduct and present research for task force members to review at their regular meetings. Such a role, presuming the mediator's stature is that of a reliable source of independent information and perspective, clarifies her status and helpfulness to the group.

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56. See Andrew Marantz, *Fighting Words: When Far-Right Provocateurs Descend on Campus, How Should a University Respond?*, THE NEW YORKER, July 2, 2018, at 34.

57. *Id.*

VII.   CONCLUSION

Perhaps it takes time and effort reflecting on these matters – with both progress and setbacks - before one can step back to explore whether we are even asking the right question when inquiring as to whether a person successfully mediated a matter that divides a community.

Mediators must be held accountable for their conduct. We should not hesitate to acknowledge that not all mediator efforts are useful or constructive. We must stay attuned to examine how to assess a mediator's intervention. This can be accomplished by asking whether the mediator is helpful in assisting parties to restore order. Another way to stay attuned is to inquire whether the mediator's intervention was helpful in gaining commitment and participation among stakeholders to identify concerns. To the extent we view our efforts to address situations that divide communities as a continuing responsibility of shared citizen engagement and governance, we must reflect on and adjust our understanding of what constitutes helpfully addressing them. This can be accomplished by inquiring whether the mediator's efforts advanced progress to strengthen community alliances or strengthened citizens' ability to identify and address divisive matters.

Perhaps, the best question is not whether the mediator's intervention was successful, but whether the mediator's service was valued.

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