

Using Insights About Perception and Judgment from the Myers-Briggs Type Indicator Instrument as an Aid to Mediation

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INTRODUCTION: SOLVING THE “PEOPLE PROBLEM” TO RESOLVE DISPUTES

The influential work *Getting to Yes* argues that “you need to separate the people from the problem” to resolve disputes.¹ But what if the people are part of the problem to be solved?² This article argues that mediators can be more effective if they understand how people differ in how they perceive information and judge what to do about it.³ These differences are illuminated by examining the responses of

1. ROGER FISHER ET. AL., *GETTING TO YES* 17 (2d ed. 1991).

2. “The personality of the other party . . . may itself become a problem to be solved.” Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 837 (1984).

3. Mediation is a process where the parties use a neutral third party to reach agreement. How does a mediation work? Usually, a third-party neutral mediator asks the disputants (or their counsel if the parties are represented) to tell their respective “stories,” and if possible, to listen to each other as well as to have the mediator listen to them in joint sessions. Then, either through private meetings or “caucuses” and later joint sessions, the mediator attempts to learn what else is going on, as well as to help the disputants move toward reflecting about how the dispute might be resolved. See generally JAMES J. ALFINI ET. AL., *MEDIATION THEORY AND*

samples of mediators and others involved in dispute resolution to questions posed by the Myers-Briggs Type Indicator® instrument (MBTI® or “Indicator”), a widely used psychological questionnaire designed to help individuals learn more about their cognitive preferences.⁴

As a way to begin to explore these differences, consider the following hypothetical dispute. Smith and Jones are business partners who have come to mediation to help resolve a dispute with the help of Mediator Clark. In an initial joint session, Mediator Clark begins by asking each partner to state their concerns. Smith begins by talking in detail about who did what to whom, where, and how – essentially laying out the sequential history of their difficulty. Smith comments on how Jones would not change their business plan to meet changing market conditions. Jones interrupts to disagree, indicating that he found Smith unwilling to commit to action, and moreover, that the past is irrelevant. Jones impatiently wants to discuss the future of a severed business relationship in general terms. Jones seems eager to move on, while Smith seems to want to stay focused on their current difficulties.

Mediator Clark, gathering that the business relationship is not easy to repair, asks each partner to describe how the partnership assets might be divided. Jones quickly responds that the dispute should be decided by the applicable law and the terms of the partnership agreement. Smith does not respond at first, and Jones again becomes impatient. Finally, Smith disagrees, contending that the dispute should be resolved by looking at relative impacts on the lives

PRACTICE (2001). One argument in favor of mediation is that such mediated disputes produce a better outcome, in terms of compliance, than conventional adjudication. See Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997).

4. The Myers-Briggs Type Indicator®, Myers-Briggs®, and MBTI® are registered trademarks of the Myers-Briggs Type Indicator Trust in the United States and other countries. For typographic reasons the registration mark will be omitted hereinafter. Form G of the Indicator, used in the research in this article, was published by CPP, Inc. (formerly Consulting Psychologist Press), 3803 East Bayshore Road, PO Box 10096, Palo Alto, CA 94303, <http://www.cpp.com> (last visited Feb. 21 2004), mail to: custserv@cpp-db.com; phone: 800/624-1765; and also distributed by the Center for the Applications of Psychological Type (CAPT), 2815 NW 13th Street, Suite 401, Gainesville, FL 32609, phone: 800/877-2278, <http://www.capt.org> (last visited Feb. 21 2004). For additional information, see also Myers & Briggs Foundation, <http://www.myersbriggs.org> (last visited March 11, 2004). The Author wishes to acknowledge the assistance and staff of Sylvia Castañeda of CPP, Inc. and Jamie Johnson of CAPT, as well as Laura Genovese Miller, Esq., counsel to the Trust, for helping obtain the reproduction permissions needed for this article.

of each partner, as well as those of the employees that have worked for them. Despite some limited further conversation individually and together about how a mediated agreement might meet their interests better than the litigation alternative, Mediator Clark makes no headway with Smith and Jones, and they go to court to let a judge decide their dispute.

Could Mediator Clark have done more to help the parties resolve their differences? Some disputes are intractable, even with the best of mediator efforts. On the other hand, Smith and Jones disagreed both about the nature of the problem and what to do about it. They also differed in their preferred pace and willingness to talk. Could Clark have done better with greater insight into the mediator's own – and possibly into the disputants' – different cognitive approaches to the dispute and the conduct of the mediation?

If disputants in a mediation, or even the mediator, mistakenly assume that the others involved gain information or make decisions in the same way they do, the parties may come into conflict over differences in perception or judgment, independent of the substance of the dispute.⁵ Learning about cognitive preferences can help mediators understand such preferences as possible sources of conflict as well as possible resources for resolution. Such understanding can help mediators be more self-aware,⁶ as well as minimize the risk of

5. That we speak the same words does not assure that we mean the same thing. G.B. Shaw quipped that “England and America are two countries divided by a common language.” OXFORD CONCISE DICTIONARY OF QUOTATIONS 292 (Elizabeth Knowles ed., 4th ed. 2001).

6. To better aid others, it may be helpful for mediators to better understand themselves. “[O]nce we have learned the basic principles and skills of mediation, and practiced them to the point where they feel natural, the next frontier of learning and development is within ourselves.” Daniel Bowling & David Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, 16 NEGOT. J. Jan. 2000 at 5, 20. “Reflection occurs both during the performance of professional practice (reflection in action) and after the experience (reflection on action).” MICHAEL D. LANG & ALISON TAYLOR, *THE MAKING OF A MEDIATOR* 19 (2000). While framed more in terms of dispute avoidance rather than dispute resolution, the value of self-awareness is an old idea: “[C]ast out first the beam out of thine own eye, and then shalt thou see clearly to pull out the mote that is in thy brother's eye.” *Luke* 6:42. Also, “self-awareness . . . is the gold standard of emotional intelligence, the foundation element on which all the other emotional competencies are built.” Larry Richard, *Hiring Emotionally Intelligent Associates*, 26 VT. B.J. Mar. 2000 at 23, 24. See generally DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* 43-44 (1995) (self-awareness is a critical component of emotional intelligence because it allows for the exercise of self-control). Finally, “[w]hile [typological] knowledge . . . is useful in dealing with others, its greatest value is for the lawyer's self-awareness When the lawyer is clear on her own process it is easier to adapt when the client or environment require different methods than those preferred by the lawyer.” Robert F. Cochran et. al., *Lawyers, Clients and Psychological Type Theory*,

unconscious bias for or against disputants.⁷ Finally, such learning can enhance the parties' understanding of what will happen if the disputants turn to court as an alternative to a mediated resolution.

How can mediators develop an understanding of cognitive preferences? One way is to use the insights derived from the Myers-Briggs Type Indicator instrument⁸ and the psychological theories of Swiss psychologist Carl Jung,⁹ upon which the Indicator questionnaire¹⁰ is

in THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 232 (1999).

7. "A Mediator Shall Conduct the Mediation in an Impartial Manner." MODEL STANDARDS OF CONDUCT FOR MEDIATORS § 2 (1994). See also UNIF. MEDIATION ACT § 9(g) (Nat'l Conf. of Comm'rs on Unif. State Laws, Final Styled Draft, 2001). "A mediator must be impartial. . . ." *Id.* at 8. "This provision is bracketed to signal that it is suggested a model provision and need not be part of a Uniform Act While few would argue that it is almost always best for mediators to be impartial as a matter of practice . . . [a] concern was over the workability of such a statutory requirement. Scholarly research in cognitive psychology has confirmed many hidden but common biases that affect judgment" *Id.* See also discussion *infra* at note 125.

8. *Supra* note 4.

9. Jung's work provided the foundation for what has come to be known as "Type" theory in the field of psychology, and led to the development of the MBTI instrument by Isabel Briggs Myers and her mother, Katharine Briggs. For discussion of the use of psychological Type theory in the negotiation context, however, see generally TOM ANASTASI, PERSONALITY NEGOTIATING (1st ed. 1993); Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1 (1993); SANDRA S. VANSANT, WIRED FOR CONFLICT — THE ROLE OF PERSONALITY IN RESOLVING DIFFERENCES (2003); and John Barkai, Psychological Types and Negotiations: Conflicts and Solutions as Suggested by the Myers-Briggs Classification (Nov. 1989) (unpublished manuscript). For other insights from psychology in dispute resolution, see DOUGLAS STONE ET. AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (1998); Dwight Golann & Helaine S. Golann, *Psychological Issues*, in MEDIATING LEGAL DISPUTES 187 (Dwight Golann ed., 1996); Richard Birke and Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999); Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to Relationship Conflict*, 8 OHIO ST. L. J. 1513 (1993).

10. Lawyers are often uncomfortable with questions demanding "either/or" answers as opposed to "it depends," but the MBTI instrument attempts to illuminate usual preferences rather than absolutes. While the Indicator asks over one hundred simple questions, there are no wrong answers — only choices to be made. For example, one section of the Indicator contains a series of questions that have to do with how an individual usually feels or acts in a given situation most of the time. The Indicator results show clarity of preferences, but not a linear or bell curve distribution, which attorneys may remember from such instruments as the Law School Aptitude Test. Also, the Indicator is not a method of determining intelligence or mental health. Ideally, the MBTI results should be validated by each individual, if possible with the assistance of an experienced counselor, since the Indicator is just as its name suggests — it is an indicator of insights to be explored, not a conclusive test. (The MBTI instrument may not always indicate an individual's preference accurately since people can respond as they believe they should, or as they might act, for example, at work, even though neither response would represent their true preferences.) Follow-up conversations and self reflection also help people sort themselves out more accurately than the Indicator can do by itself. When conducting research on large groups, however, not all

based. The author recognizes that many readers may be unfamiliar with or even skeptical about relying on insights derived from a psychological instrument or psychological theory when working with disputants.¹¹ The premise of this article, however, is that illuminating issues of perception and judgment transcend such sources and can provide useful insights even if one does not accept the theory or application from which they are derived. Nonetheless, the author has administered the Indicator to law students in his mediation course and it has proved valuable in helping the students become more aware of their own preferences for perception and judgment, as well as enhanced the author's self-awareness as a teacher and mediator.¹²

members of the group are available to be debriefed individually and have their Indicator results validated. Thus group results provide a general picture, but not one that is as clear as it would be if each Indicator's results had been individually verified with each respondent. For sample questions from the Indicator, see *infra* Appendix A (reproduced by special permission of the Publisher, CPP, Inc., Palo Alto, CA 94303 from Myers-Briggs Type Indicator® Form-G by Katharine C. Briggs and Isabel Briggs Myers. Copyright 1977 by Peter B. Myers and Katharine D. Myers. All rights reserved. Further reproduction is prohibited without the Publisher's written consent).

11. "Jung's theory of psychological types provided the assumptions . . . for the . . . MBTI . . ." Among these assumptions are that "[t]rue preferences' actually exist," "[p]ersons can give an indication of the preferences . . . on a self-report inventory," and these "preferences are dichotomized." ISABEL BRIGGS MYERS, ET AL., MBTI MANUAL: A GUIDE TO THE DEVELOPMENT AND USE OF THE MYERS-BRIGGS TYPE INDICATOR (3rd ed. 1998), modified and reproduced by special permission of the Publisher, CPP, Inc., Palo Alto, CA 94303 from MBTI® Manual 3rd Edition by Isabel Briggs Myers, Mary H. McCaulley, Naomi L. Quenk, Allen L. Hammer. Copyright 1998 by Peter B. Myers and Katharine D. Myers. All rights reserved. Further reproduction is prohibited without the Publisher's written consent, *supra* note 4. Hereinafter cited as the MBTI MANUAL.

12. In 1988, the Law Practice Management Section of the American Bar Association offered about a dozen law professors around the country the resources to become qualified to administer the MBTI instrument to their students, and the author of this article participated. The author has since used the Indicator to help law students in his courses better understand themselves in hope that this self-knowledge would be helpful to them in the legal education and later professional lives. The Indicator has also been helpful to the author directly in making him aware of how valuable it is to have able colleagues, research assistants, and secretaries whose cognitive preferences complement his own.

For an examination of the MBTI instrument in the context of legal education, see Paul Van R. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460 (1967) (discussing law student drop-out rate and insights from the MBTI instrument); Don Peters & Martha Peters, *Maybe That's Why I Do That: Psychological Type Theory, The Myers-Briggs Type Indicator & Learning Legal Interviewing*, 35 N.Y.L. SCH. L. REV. 169 (1990) (examining how psychological Type theory may be useful in negotiation, and the obstacles in the teaching and implementation of Type theory in legal interviewing); Vernellia R. Randall, *The Myers-Briggs Type Indicator: First Year Law Students and Performance* 26 CUMB. L. REV. 63 (1993) (asserting that law schools are not doing their best at educating first-year law students of all personality types). *But see* M.H. Sam Jacobson, *Using Myers-Briggs Type Indicator to*

More specifically, the Indicator helps identify an individual's mental preferences with regard to four dichotomies. These cognitive preferences are analogous to the physical preference for left- or right-handedness. Two of the dichotomies refer to preferences relating to mental functions of perception and judgment, and the two other dichotomies refer to preferences for how the energy of those primary mental functions are oriented – inwardly or outwardly.¹³ The interaction of these four differing preferences gives the individual taking the Indicator one of sixteen possible general profiles, referred to as psychological “Type.” The hope is that individuals who take the Indicator can use the insights it provides to understand what their particular cognitive strengths may be as well as what might be challenging for them. Since its introduction in 1957, the Indicator has become one of the most widely used psychological instruments in the world.¹⁴

To assist mediators in understanding more about the insights offered by the Indicator, this article will report the author's findings about the Indicator profile of almost 150 mediators from the New England area.¹⁵ To put that data into perspective, this article begins

Assess Learning Style: Type or Stereotype? 31 WILLAMETTE L. REV 101 (1997) (criticizing the instrument in favor of the Learning Styles Inventory without adequate discussion of the cognitive insights that the MBTI instrument can provide).

13. MBTI MANUAL, *supra* note 11, at 3, 5-6.

14. The Indicator is administered two million times each year, and has been revised and updated over time, with over 4,000 research studies, journal articles, and dissertations written about it since the first edition of the MBTI Manual was published in 1962. MBTI MANUAL, *supra* note 11, at 9-10.

15. With the assistance of Suffolk University Law School, from 1995 to 2000 the author gave a brief questionnaire and Form G of the MBTI Instrument, the most widely-used version at the time of the survey, to over 200 New England professional dispute resolvers (except where Type preference was already known to the respondent). Respondent dispute resolvers included members of the New England Chapter of Society of Professionals in Dispute Resolution (now the Association for Conflict Resolution after a merger with other organizations), the Alternative Dispute Resolution Committee of the Boston Bar Association, members of the Massachusetts Conciliation and Mediation Service, and members of the panel of mediators maintained by the Massachusetts Office of Dispute Resolution. Of this sample, over 147 responded that they preferred mediation to arbitration and had more than five experiences in mediating or facilitating the consensual resolution of a dispute. This subset of the respondents will be referred to as “Mediator Respondents.” The author recognizes that, though those who elected to respond may not be typical of all professionals in the field, the data can provide mediators, and those with whom they work to resolve disputes, with food for thought about how a dispute resolver might work best. While small by comparison to the samples of lawyers, judges, or the general population discussed in this article below, it is so far the largest survey regarding the cognitive preferences of experienced mediators yet available. See *infra* Appendix B and Appendix C for the Mediator Respondent data. See also Linda Fisher, *Mediation and the Myers-Briggs Type Indicator*, Myers-Briggs Type Indicator: Australian Perspectives: papers selected from those offered for the Myers-Briggs Type Indicator: Australian

with a nutshell explanation of Jungian cognitive insights in the context of the hypothetical mediated business dispute, supplementing the discussion with the results of research of other authors on the differing preferences of mediators, lawyers, judges, and the general public – all of whom may potentially be involved in a dispute.¹⁶ The article then discusses in more detail how mediators might take advantage of this information, including its uses for maintaining impartiality. The article will conclude with some discussion about how insights about preferences for perceiving and judgment and how they are used might be relevant to the public's choice of dispute resolution arrangements.

Before elaborating on these ideas, however, it is important to understand more about the Jungian psychology on which the MBTI instrument is based, as well as to understand a sense of how to “decode” the way MBTI results are reported. Readers who are unfamiliar with the Indicator may find it helpful to ask how they see themselves in light of these ideas as they are presented. Readers are invited to ask themselves how well certain cognitive activities discussed describe their preferences, since one of the premises of administering the Indicator is that its results need to be verified by those who take it.

I. AN OVERVIEW OF JUNGIAN INSIGHTS FOR BOTH MEDIATORS AND DISPUTANTS

A. *Preferences for Gaining Information (Perception) and Making Decisions About It (Judgment)*

We are constantly receiving and evaluating information. These processes are largely automatic, like breathing. Jung's psychology¹⁷ takes this distinction a step further by inquiring whether we also have similarly automatic but differing preferences for the way we perceive and the way we judge information, like the physical preference for left- and right-handedness, which act as filters for incoming

Perspectives Conference 60 (1991) (reporting results for 62 respondents who were mediators in training and mediators in the training organization); A. L. Pesacou, *Personality Type and Primary Profession of the Mediator: A Comparative Study of Strategies and Success* (1994) (unpublished Ph.D. dissertation, The Union Institute) (reporting results of survey of 101 Florida family mediators).

16. Note that when figures are given in this article, they represent percentages derived from MBTI data for various groups, even though they may be temporarily translated into Jungian terms or other forms to lay an appropriate foundation for understanding the Indicator itself. Also, all results have been rounded up or down to whole numbers.

17. See generally ANGELO SPOTO, *JUNG'S TYPOLOGY IN PERSPECTIVE* (rev. ed., Chronion Publications 1995).

stimuli (whether from inside or outside us). According to the Myers-Briggs Type Indicator Manual, “*perception* means all ways of becoming aware of things, people, events, or ideas. It includes information gathering, the seeking of sensation or inspiration, and the selection of a stimulus to attend to,” whereas “*judgment* means all the ways of coming to conclusions about what has been perceived. It includes evaluation, choice, decision-making, and the selection of a response after receiving a stimulus.”¹⁸ Like using the non-dominant hand, we can focus and concentrate on how we do this mental activity, but most of the time it occurs beyond conscious awareness. These cognitive preferences are not the same as intelligence. For example, signing a letter is easy with your dominant hand, but is awkward and time consuming with the non-dominant hand. Yet we do not think of one hand as inherently “better” than the other, just easier to use.¹⁹ The same is true of these cognitive preferences, which the MBTI instrument helps illuminate.

B. *Mediating Differing Preferences for Gaining Information: The “Perceiving” Mental Functions – Sensing or Intuition (S or N in MBTI Results)*

In the partnership dispute between Smith and Jones, Smith wanted to talk in concrete detail about who did what to whom, where, and how, essentially laying out the history of their difficulty. In contrast, Jones felt that the past was irrelevant and wanted to discuss their future relationship in general terms. In short, Smith preferred to talk about the trees while Jones wanted to talk about the forest.

These patterns find an echo in Jungian psychology which posits that individuals prefer to perceive experiences in one of two different ways. Some prefer to focus on the concrete, the current, and the tangible, absorbing information sequentially. Others prefer to find the patterns, to see the implications, and to focus on the ideas behind the realities. For example, one person with the former preference might describe an apple in terms of its physical reality, e.g., red, juicy, or

18. MBTI MANUAL, *supra* note 11, at 24.

19. Some scholars have argued that we should broaden the conventional measures of intelligence to include multiple versions of it. See generally HOWARD GARDNER, *FRAMES OF MIND* (BasicBooks 1993). (providing a comprehensive examination of the theory of multiple intelligences, including linguistic, musical, logical-mathematical, spatial, bodily-kinesthetic, and personal). But while those insights may be helpful to the individual trying to sort out his or her special talents, they are still ideas that imply measures of degree: the higher the intelligence (of whatever form), the better. Preferences, however, are simply different. If you are right-handed, you don't consider your right hand more “intelligent” than your left.

crisp, and another person with the latter preference in terms of what it reminds them of or represents, e.g., “an apple a day keeps the doctor away.”²⁰ This distinction is referred to as a preference for using either “Sensing” or “Intuition” to perceive the information received. Sensing or Intuition are different ways of gaining information (perceiving), separate from deciding what to do with it (judging).²¹

Note that these terms, as in the case of other terms involved in Jungian psychology or the MBTI instrument, are terms of art that have a meaning independent of their conventional meaning, requiring some concentration to allow them to serve as “shorthand” for the ideas that they represent. Also, MBTI results are reported in letter abbreviations for the concepts they represent. For example, Sensing is shortened to “S” and Intuition is abbreviated with an “N” (not an “I,” which is used for Introversion, as discussed below).²² Each perceiving preference is equally valid and important, and we can and do perceive in both ways, but we generally prefer one to the other, just as each of us will write most often with either our left or right hand.²³ If you are unfamiliar with the MBTI instrument, you might ask which is your own perceiving preference most of the time, so that you might better understand the results and issues discussed in this article.

20. See MBTI MANUAL, *supra* note 11, at 24.

21. For example, in responding to those dreaded holiday words “some assembly required,” those who prefer Intuition tend to read the directions only after spreading the parts on the floor and seeing how they might fit together, whereas those who prefer Sensing appear more willing to start with the directions and then try to put the parts together in the recommended order.

22. For those not yet familiar with these ideas, it is customary to describe individuals as having only one preference at a time, like “he’s an S” – meaning Sensing type, or someone whose perceiving preference is for Sensing rather than Intuition. Such conventions, however, should not obscure the fact that it is the combination of cognitive preferences that make up the whole person.

23. Neither approach to perception is inherently superior. Each represents significantly different attitudes about and approaches to the same perceiving tasks, however. Persons behaving consistently with these dichotomous preferences may see the same data and report it entirely differently. A sensor-perceiver walking through a clinical suite at a law school, for example, may report seeing sixteen people, some of whom were talking loudly, six faculty offices, four secretarial work stations, four personal computers, four laser jet printers, and one copy machine. An intuitive walking through the same space, in contrast, may report seeing a busy place that looks like a law office where students are vibrantly engaged.

Peters, *supra* note 9, at 14. Professor Peters also noted that “[b]oth reports are equally accurate. Neither is right or wrong, and a more complete description of this office incorporates both. The sensor has seen the specifics and the intuitive has recorded the meanings.” *Id.* at 14.

But whatever your own perceiving preference, how are people like Jones and Smith represented in the general population? Approximately 73% of U.S. adults have a perceiving preference for Sensing as compared with 27% for Intuition.²⁴ While there is no data yet on the psychological types of disputants as a subset of the general population, to the extent that disputants are representative of it, mediators can expect to find more Sensing types than Intuitive types among them.

Suppose Smith and Jones each consult a lawyer. What perceiving preference are they likely to encounter? Attorney and psychologist Dr. Larry Richard conducted a survey of over 1200 lawyers for his doctoral dissertation at Temple University²⁵ and summarized his research in an article in 1993,²⁶ on which he further elaborated in 2002.²⁷ In his sample, 44% of the attorneys were Sensing types, compared to 56% who preferred Intuition as their mode of perception.²⁸

If the disputants were to come to court as an alternative to the mediation, what is the perceiving preference of the judge who might hear the case? John W. Kennedy, Jr., Presiding Justice of the San Bernardino County Trial Courts in California, studied the cognitive preferences of more than 1300 judges.²⁹ While he drew his sample

24. MBTI MANUAL, *supra* note 11, at 298. *See also* the Center for the Application of Psychological Type (CAPT), *supra* note 4, which offers a composite of data from eight major studies. This data involves 914,219 people in the various studies and is hereinafter referred to as CAPT National Data. This CAPT national data is derived from Charles R. Martin and Allen L. Hammer, Estimated Frequencies of the Types in the United States Population (2003) provided by CAPT to the author. For the Sensing-Intuition dichotomy, the CAPT National Data indicated percentages ranging from 66-74% for Sensing and 26-34% for Intuition.

25. Lawrence Roy Richard, Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States (1994) (unpublished Ph.D. dissertation, Temple University) (on file with the Suffolk University Law Library). Dr. Richard analyzed a sample of 1220 U.S. lawyers, selected at random from an American Bar Association membership list that was pre-sorted geographically. He mailed the attorneys sampled a packet which included the Myers-Briggs Type Indicator instrument and a questionnaire he constructed.

26. *See* Larry Richard, *How Your Personality Affects Your Practice*, A.B.A.J., July 1993, at 74; *see also* Raymond B. Marcin, *Psychological Type Theory in the Legal Profession*, 24 TOLEDO L. REV. 103 (1992) (noting the value of insights from the MBTI instrument in counseling and conflict resolution, but cautioning about the risk of misuse of the insights to screen candidates for the legal profession rather than to include them).

27. Larry Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States*, 29 CAP. U. L. REV. 979 (2002). While some statistical information from Dr. Richard's survey is quoted here, readers are encouraged to read his article to get the full sense of his research.

28. *Id.* at 1078 tbl. 37.

29. John W. Kennedy, Jr., *Personality Type and Judicial Decision Making*, 37 No. 3 Judges' J. 4, (1998) (discussing results of work with 1302 trial judges in judicial

from only those who took his continuing education courses, his results provide a glimpse into the judicial mind.³⁰ About 55% of the judges surveyed had a Sensing preference for receiving information, a percentage somewhat midway between clients within the general population and the attorneys who may represent them.³¹ Judge Kennedy indicated that he obtained different results, however, for male and female judges, with more Intuitive types than Sensing types among female judges. He attributed the difference to the importance of change for women coming into the legal profession and now moving into positions of leadership, including the judiciary.³²

What if the disputants were to try mediation first? What is the perceiving preference of a mediator who might be involved? Of the Mediator Respondents, 20% were Sensing types, whereas the other 80% preferred Intuition as their perceiving function.³³ This proportion is almost the reverse of the national norm where a strong majority of U.S. adults prefer Sensing. It is also far more than lawyers, even though a majority, or 60%, of the Mediator Respondents, are lawyers themselves.

In summary, using these data, here are the relative distributions of likely participants in a dispute or its resolution in terms of their preferred mode of perceiving:

training courses taught primarily in California, as well as three other western and three southeastern states over a ten-year period). As with the Richard research, this article will cite Judge Kennedy's research, but his article is important to read independently.

30. *Id.*, at 6 n.3.

31. MBTI MANUAL, *supra* note 11, at 298; Kennedy *supra* note 29, at 6-8; Richard, *supra* note 26, at 75. Judge Kennedy reports that Sensing judges value rules and stability and disapprove of their Intuitive colleagues who frequently want to change traditions and procedures.

To intuitives, sensing judges can be seen as dogmatic, unimaginative, and preoccupied with rules and details. To sensing judges, intuitives can be seen as impractical rebels who refuse to follow the rules. In addition, intuitives tend to resist authority, whereas sensing judges are . . . deferential to those who exercise it . . .

In the court management and collegiality programs I have conducted, the most common form of inter-judge contention relates to the sensing-intuitive difference.

Kennedy, *supra* note 29, at 7.

32. Judge Kennedy reported updated data for male and female judges as follows:

Male Judges (n=1242):	Sensing: 59%	Intuition: 41%
Female Judges (n=481):	Sensing: 44%	Intuition: 56%

Telephone Interview with Judge John W. Kennedy, Jr., Presiding Justice, San Bernardino County Trial Courts (Jan. 10, 2003).

33. See overall data on Mediator Respondents, *infra* Appendix B.

	U.S. Adults ³⁴	Richard's Lawyers ³⁵	Kennedy's Judges ³⁶	Mediator Respondents ³⁷
Prefer Sensing	73%	44%	55%	20%
Prefer Intuition	27%	56%	45%	80%

What are the implications of this difference? If mediators generally have a preference for Intuition and such a preference often includes imagining solutions outside the original focus of a dispute, they may be able to ask questions of disputants (especially those who have a Sensing preference, which includes focusing on the history or current aspects of a dispute), to help the parties explore possibilities that might help them resolve a conflict, as discussed below.³⁸ On the other hand, if a trial judge needs to be focused on understanding and deciding a dispute based on evidence of past conduct, then such a Sensing preference is important.³⁹ Such perceiving differences between the third party dispute resolvers may help a mediator illuminate for the parties the difference between resolving a dispute themselves and leaving it to the court to decide. For example, a mediator can point out that if the parties do not agree to a mediated solution whereby they can shape their own futures, their judicial alternative may be much less flexible.⁴⁰

34. See also discussion about MBTI MANUAL, *supra* note 24.

35. Richard, *supra* note 27, at 1078 tbl. 37.

36. Kennedy, *supra* note 31.

37. See overall data on Mediator Respondents, *infra* Appendix B.

38. Roger Fisher et. al. also provide a useful example of this process in the case of a married couple's dispute over what type of house to build. An architect helped resolve their differences by focusing on their underlying interests rather than the specific architectural solution each had in mind to meet them. One spouse is thinking of a two story house with a chimney and a bay window. The other is thinking of a modern ranch style house, with a den and a garage with a lot of storage space. To get away from "positional bargaining," the architect directs the discussion to interests and other options for satisfying those interests. FISHER ET. AL., *supra* note 1, at 112-115. Since in mediation it is often helpful if the parties devise the solutions, the mediator can sometimes use artful questions to help them do so.

39. "Sensing judges pay attention to detail and give careful consideration to the facts of a case." Kennedy, *supra* note 29, at 6.

40. Judge Kennedy indicated that making lists for both parties of specific reasons why they might want to avoid going to court in favor of resolving a matter themselves can appeal to disputants with a Sensing preference. See *infra* note 53. He reported that those with an Intuitive preference are more comfortable understanding that a judicial resolution offers a much less certain outcome than a negotiated resolution. Judge Kennedy also indicated that in his experience, disputants with a Sensing preference find it difficult to see ambiguity in terms, e.g., whether a deed restriction preventing an adjoining space from being used as a convenience store might be ambiguous enough to allow grocery store on the site. Kennedy, *supra* note 32.

But how about Smith and Jones? Their dispute can indicate a substantive disagreement as well as a cognitive one.⁴¹ How can a mediator like Clark assess whether differences in perception are important in this dispute? Disputants rarely, if ever, come to mediation having taken the MBTI instrument, so it would be unusual that their mediator would be aware of their preferences in advance. Mediators who are, however, aware of their own cognitive preferences are better equipped to look for clues from the disputants, often found in how they communicate.⁴² According to Professor Donald Peters, disputants with a Sensing preference may be identifiable because they tend to ask more questions when gathering information and may “phrase questions in a closed fashion by directing them at specific pieces of information”⁴³ Similarly, an Intuitive type party may “be less inclined to gather information through questioning in negotiations,” and may make “justifications and arguments that are contradicted by undisputed facts.”⁴⁴ For example, Thomas Penderghast, a

41. If the conflict is perceptual, however:

[t]wo conflicts that frequently develop related to differences in this dichotomy are (1) agreement on what the problem is and (2) a focus on experience versus a focus on theories. For Sensing types, the problem or conflict is defined by what actually happened, usually concrete events: “John is late for our meetings 90% of the time.” Intuitive types are more likely to see specific behavior as part of a pattern that they think is the real problem: “John has difficulty dealing with authority figures.” For Intuitive types, taking some action to ensure that John arrives on time to meetings doesn’t deal with the “real” problem. For Sensing types, “difficulty with authority figures” has little meaning and no solution.

MBTI MANUAL, *supra* note 11, at 336.

42. The MBTI MANUAL offers the following behavioral cues (among others) during communication, building on the work of S. A. Brock, “Sensing preference: Ask ‘what’ and ‘how’ questions Intuitive preference: Ask ‘why’ questions.” MBTI MANUAL, *supra* note 11, at 336 tbl. 13.6 (from S.A. BROCK, FOUR PART FRAMEWORK (rev. ed. 1995)). The value of this awareness includes not just the perceiving preference for Sensing or Intuition, but the other cognitive preferences discussed below. Mediators interested in learning more about developing their typological awareness of others, as well as themselves, should see generally PAUL D. TIEGER & BARBARA BARRON-TIEGER, THE ART OF SPEEDREADING PEOPLE: HARNESS THE POWER OF PERSONALITY TYPE AND CREATE WHAT YOU WANT (1998).

43. Peters, *supra* note 9, at 39.

44. *Id.* at 48-49. An instructor who knows the preferences of the law students he teaches can help them be aware of how they act or interact. Professor Peters reported one intuitive student in a problem read projected future expenses as present unpaid expenses. The student reported that he made the error because he had been thinking about his argument before attempting to understand the facts, and when he went to the facts, “[he] was looking at them in light of how they could support [his] arguments.” *Id.* at 48 n.234. Professor Peters also reported this experience with two students negotiating a particular exercise:

The intuitive student, naturally perceiving future possibilities, repeatedly asked questions seeking information about potential solutions related to but

management consultant and professor at Pepperdine University School of Business and Management, studied the application of type to the resolution of workplace conflicts. Professor Penderghast noted that Sensing types look for hard data and collect specific examples to use when dealing with the conflict, while Intuitive types focus first on what the future might bring, i.e., the possibilities.⁴⁵

Note that this difference in the disputants' perceptual frameworks is independent of the merits of their dispute. But where present, such a difference can represent some of the most intractable issues to mediate since these perceptual frameworks involve how disputants like Jones and Smith each see the problem in a different way – the way that seems natural to each of them.⁴⁶ Unlike judging, where differences in criteria for a decision may be more explicit, differences in perception can be difficult for disputants (or the mediator) to see occurring in any way other than the one to which they are most accustomed.⁴⁷

What can a mediator do in a situation where the disputants have apparent differing modes of perceiving, like the dispute between Smith and Jones? Four basic strategies may be of help. First, Clark might establish ground rules to allow Jones and Smith each to tell their stories in their own ways, providing a procedural framework that respects any cognitive (as well as non-cognitive) differences that might exist between the disputants before they emerge in the stories themselves. The chance for parties to tell their stories as they prefer is a part of mediation's value because disputants may not have the

slightly beyond the four corners of the simulation's text. The sensing student, naturally perceiving facts, refused to answer these questions and repeatedly objected to their relevance. The intuitive student was annoyed by these responses. The sensing student was frustrated by the questions. The language grew testy, and ultimately the negotiation deadlocked with both lawyers blaming the other's behavior for the outcome.

Id. at 50 n.244.

45. See Thomas F. Penderghast, *Resolving Conflict with Type*, BULL. PSYCHOL. TYPE, Autumn 1996, at 29, 29. See also *Type and Conflict: A Natural Pair*, TYPEWORKS, Feb. 1998, at 5-6.

46. The author is indebted to then doctoral candidate Leona Haas for this insight (Conference on Conflict Management Through the Jungian Functions, Oct. 16, 1998).

47. Late night television viewers may recall the celebrated Saturday Night Live commercial where Gilda Radner and Dan Aykroyd argued over whether a product called "New Shimmer" was a floor wax or a dessert topping, only to have Chevy Chase enter to opine grandly that they were both right: "New Shimmer is both a floor wax and a dessert topping!" Saturday Night Live® (NBC television broadcast, 1976) available at <http://snltranscripts.jt.org/75/75i.phtml> (last visited Feb. 21, 2004). If mediation were only this easy.

same chance in court. Often, until these stories are told, it will be challenging for a party to move beyond them toward resolution.⁴⁸

Second, when the stories emerge, Clark can be attuned to whether there is a significant difference in perception about the nature of the problem (as opposed to what to do about it), which might indicate that the parties could use some help in seeing the alternative perspective as legitimate within each individual's perceiving frame of reference. The conventional mediation technique in this regard is active listening, where the mediator restates the comments heard in the mediator's own terms.⁴⁹ But if the mediator has a different way of perceiving than the disputant, as may be the case if, as the above data suggest, a majority of mediators are indeed Intuitive types and a majority of disputants are Sensing types, then the mediator's restatement may miss the mark of helping that party feel heard if, for example, Smith has a Sensing preference and Clark has an Intuitive one. In this situation, the Golden Rule of doing unto others as you would have them do unto you may not be sufficient. The mediator should try to do unto those disputants as the disputants would have done unto themselves.⁵⁰ One of the values of mediation is the capacity to help disputing parties feel their differing views are respected. A heightened awareness by a mediator of cognitive preferences differing from the mediator's own can add to that feeling of respect, and make communication more effective.⁵¹

48. See Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEGOT. J. 245 (1993).

49. See LEONARD L. RISKIN & JAMES I. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS, 93-94 (1997). Active listening can also help the Intuitive mediator as well as the disputants. For example, mediators who have an Intuitive preference may find it challenging to listen carefully simply because one idea usually sparks another, which makes taking notes an aid to staying focused on what the participants are saying. One of the advantages of typological insights is that they can help mediators focus in advance on building ways of coping that help support their particular cognitive preferences which are more challenging.

50. See generally TONY ALESSANDRA & MICHAEL J. O'CONNOR, THE PLATINUM RULE (1996). "When negotiating with a sensing person . . . [d]ocument your argument; thoroughly work out all the details in advance . . . [When negotiating with an intuitive person] [u]se metaphors and analogies . . . [l]et them fill in the details through their own brainstorming because that is the part of the process that they like the best." Barkai, *supra* note 9, at 23.

51. For example, Mediator Ann Gosline reported mediating a dispute in which an educator was fired for not getting lesson plans in on time. She said that after a protracted mediation, the school agreed to allow the educator to come back on the job, subject to certain conditions. Ms. Gosline said that in presenting the conditions to the educator, she framed the issue as one of the employer needing to assert authority and the teacher needing to comply. She said that her statement resulted in "the blankest look you could imagine" from the teacher who appeared to have a Sensing preference. She said she was saved by the attorney who said "they will take you back, but you've

Third, beyond helping a disputant feel heard in the disputant's own terms, the mediator may also want to see if he or she can help each party at least acknowledge, or even better, show empathy (if not sympathy) for the other party's perspective.⁵² For example, as disputants like Smith and Jones begin to manifest differing perceiving preferences, a mediator like Clark may directly "translate" one party's perspective into the "type dialect" of the other disputant, or may even encourage the other party to try it. If this poses a challenge for the parties, it may be possible for Clark to affirm something in the cognitive preference of both Smith and Jones. For example, when introducing a topic, Clark might refer to practical issues to appeal to Smith as a Sensing type while offering suggestions of new possibilities to appeal to Jones as an Intuitive type.⁵³ On the other hand, if Jones is an Intuitive type, Jones may use abstract or symbolic language, which can mislead Smith, and even Clark, into thinking that they understand the source of the conflict, when in fact the meaning they associate with the terms used does not necessarily match Jones'

got to get your lesson plans in on time," to which the teacher said "OK," and then moved on. Her general advice to mediators who have an Intuitive preference is that if you are "waxing eloquent," using what you consider to be "persuasive metaphors, and you're getting what we call the 'trout look,' you're probably . . . not saying what you mean. Consider being more concrete and specific." Ann Gosline, Remarks at Meeting of the ADR Committee of the Boston Bar Association (Oct. 18, 1995) (supplemented by letter Apr. 23, 2003) (hereinafter cited as "Gosline Remarks"). Ms. Gosline also gave the following advice about proposing solutions to parties with different preferences: "[P]eople who prefer Intuition are very drawn to the experimental or new solutions. The fact that [a solution] is something that no one has ever tried can be a real selling point for people who prefer Intuition . . . [This is] 'a red flag to people who prefer Sensing[,]'" who generally like solutions which have been shown to work." *Id.*

52. See ROBERT MNOOKIN, ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 46-47 (2000). Mnookin uses the term "empathy" to mean a "value-neutral mode of observation," as opposed to "sympathy," which is "feeling the pain" of the other person. *Id.*

53. Judge Kennedy indicated that in his experience in mediation, Intuitive types are much better than Sensing types in appreciating the possibility that a judicial resolution may not be favorable to them and that a mediated solution offers a way to shape their future in a more positive direction than leaving it to a court to do. For example, he indicated that in one case a plaintiff, who he deemed to be Sensing type, had fixed upon a value of \$1,000,000 and was hard to move off that number because it was a specific amount. In such cases, he said he again found it useful to use a flip chart to make a large numeric list of common goals of the parties, e.g., (1) Get the dispute over, (2) Avoid paying more attorney fees, (3) Avoid having a stranger decide the facts of the case, etc. Then later, when the disputants are looking at possible solutions, he said he again finds it helpful again to list the options for resolution on a chart. That makes them more concrete for the Sensing type disputants to relate to and also makes them more neutral rather than heard as coming directly from the other disputant. Judge Kennedy indicated that this technique was also helpful in expanding the scope of issues from the initial specific dollar amount in the mind of the Sensing type plaintiff. Kennedy, *supra* note 32.

meaning.⁵⁴ In this situation, it is important for Clark to clarify the terms being used.

Such translation or restatement, however, might be a challenge for the parties, because each perceptual framework seems so natural to the person who prefers it. In such cases, the mediator can help reframe an issue that emerges in one perceptual perspective in a way that honors the alternative perspective of the other disputant. For example, if Mediator Clark perceives that it is difficult for Smith to conceive of options for future resolution because Smith is focusing on the past, Clark might suggest Smith recall times when both Smith and Jones got along in the past as a way to help Smith shape a future resolution. This recollection may be especially useful if it involves a reminder and then a recognition by each of the disputants that the individual but different perspectives Smith and Jones each brought to their partnership were valuable to both of them in the joint conduct of their business.⁵⁵

Finally, if a perceptual difference remains intractable, then it may be necessary for the mediator simply to make sure each party's perspective is honored, if not at the time it is expressed, at least over time as the mediation proceeds. For example, in a private caucus, Clark might ask Jones to allocate some time to consider current circumstances and defer considering possibilities until later.⁵⁶

In summary, here is an example of how the Sensing-Intuition dichotomy might be useful to a mediator:

Perceiving Dichotomy	Disputants (Smith/Jones)	Mediator (Clark)
S: Sensing: Prefers to gain information concretely <i>(Preferring facts and linear order)</i>	What is this mediation about? Here's what happened.	What are the facts of this dispute?
N: Intuition: Prefers to gain information conceptually <i>(Preferring metaphors and patterns)</i>	What's the big picture here? And where are we going?	What are the possibilities for resolving this dispute?

54. See Peters & Peters, *supra* note 12, at 176.

55. Indeed, while not all disputes will have a prior relationship to recall, "[c]lashes between the types arise out of the very fact that . . . each sees the side of the problem which the other naturally overlooks. For instance, the intuitive is by nature a thinker-upper; the sensing type a getter-doner." Isabel Briggs Myers, *Type and Human Relations*, in 1962 MANUAL OF THE MYERS-BRIGGS TYPE INDICATOR (Consulting Psychologists Press, 1975), reprinted in GORDON LAWRENCE, PEOPLE TYPES AND TIGER STRIPES 85 (Center for Applications of Psychological Type 3rd ed. 1993).

56. See MBTI MANUAL, *supra* note 11, at 336.

Perceiving is only half the mental task. After we obtain information, how do we decide what to do with it? The issue of judging what we perceive is the second cognitive dichotomy which the MBTI instrument can help illuminate.

C. *Mediating Differing Preferences for Making Decisions: The “Judging” Mental Functions – Thinking or Feeling (T or F in MBTI Results)*

When we make decisions about what we perceive, on what do we base those decisions? In the case of the hypothetical partnership, Jones had a preference for using legal rules or the partnership agreement external to the dispute, while Smith wanted to consider the impact of the resolution on the affected people, including the employees. Or consider partners in a law firm facing a downsizing decision where everyone being considered for termination has been a useful and productive contributor – who should the partners let go? Legal issues aside, what criteria should be used for making that decision? Should a decision be based on criteria such as longevity of service or billable hours worked? Should it be based on criteria such as who has been more difficult to work with, or who is least able to withstand a layoff?⁵⁷ Whatever the substantive merits of the issues, Jungian psychology argues that some people prefer to make decisions on the basis of general standards, while others consider issues of values, such as how the decision affects them or someone they care about.⁵⁸ This difference in decision-making is referred to as having a preference for “judging” primarily by “Thinking” or “Feeling,”⁵⁹ which in terms of decoding the MBTI results are “T” and “F.”

Here the Jungian terminology can get in the way since everyone both thinks and feels, and in typological terms, individuals with a

57. See generally MBTI MANUAL, *supra* note 11, at 25. If the firm is composed of attorneys similar to those reported by Dr. Richard, *supra* note 27, a Thinking rather than a Feeling preference may influence most, but not all of the partners involved, leading to some interesting challenges in resolving those different views.

58. Another illustration involves two individuals in a car on a clear day who encounter a speed limit sign on a good road. One may prefer to abide by the limit since it provides an objective standard by which to measure an appropriate speed. The other individual might choose to abide by or even to ignore the limit, legal consequences aside, because of a belief that such a speed was important for that driver or someone the driver cared about at that moment. Each of these drivers might take into account the same standards for decision if enough time elapsed; it is only that each would have a different first preference for determining the appropriate driving speed, though each might also use the alternative criterion at another time, just as each might write with the less preferred hand, given certain circumstances.

59. MBTI MANUAL, *supra* note 11, at 24-25.

Thinking preference feel and those with a Feeling preference think. What is being described, however, is not an array of differing levels of emotional involvement. Rather, these are terms of art which describe Jung's conception that each person prefers one of two different but still rational ways of coming to conclusions or "judging" information⁶⁰ that has been previously "perceived," in either a Sensing or Intuitive way.⁶¹ Again, readers who are unfamiliar with the MBTI instrument are invited to reflect on which of these two decision-making styles they think they prefer to use most of the time.

Most U.S. adults appear to have a preference for Feeling over Thinking in how they prefer to make decisions, with roughly 60% preferring Feeling and 40% preferring Thinking.⁶² This is the one area in which men and women appear to be significantly different in their

60. "For the Feeling type, disharmony is difficult. Frequently this type will avoid stating what the real concern is for fear of creating ill will . . . For the Thinking type . . . conflicts may arise more frequently over principles [and] . . . issues of fairness are more important than how people feel." Sondra VanSant, *Using Type in Conflict Management* (Conference Materials, Aug. 27, 1999), adapted from SONDRA VANSANT & DIANE PAYNE, *PSYCHOLOGICAL TYPE IN SCHOOLS: APPLICATIONS FOR EDUCATORS* (Center for Applications of Psychological Type 1995). Note that one scholar in this field has argued that the primary distinction between Thinking and Feeling is less in the criteria selected than the intention involved: the primary drive for individuals with a Thinking preference is to improve something, whereas the primary drive of those with a Feeling preference is to preserve and enhance interpersonal relationships. For example, in providing feedback on a report, the Thinking type will first talk about how it can be enhanced, whereas the Feeling type will emphasize its strong points. If the feedback is received by someone of the same preference, it will be accepted. If the opposite preference is on the other end of the conversation, then it will not be received well. Charles Pratt, *Remarks at Conference on Type and Conflict*, Raymond, NH (Sept. 28, 2002).

61. MBTI MANUAL, *supra* note 11 at 24. In some ways the preference for Thinking or Feeling has an historical analogue in the distinction between law, with its emphasis on objective rules external to the dispute, and equity, with its emphasis on doing justice in the particular situation where the application of a rigid legal rule can lead to injustice. In other words, the Thinking-Feeling dichotomy echoes the ancient argument in the law between the equal justice of the law and the personal justice of equity. See generally JAMES M. FISCHER, *UNDERSTANDING REMEDIES* (1999). Some even argue that the use of "[p]recedent and objective standards" is a Thinking function type of decision-making, while clients who prefer the Feeling judgment may find mediation to be especially effective "because it can enable the parties to create a solution that meets the needs of both parties, irrespective of what the law might have provided them." Cochran, *supra* note 6, at 238. While that assertion has some truth to it, a mediation which involves parties, or even their counsel, who have either a knowledge of the applicable law which represents the alternative to a negotiated agreement, or have a Thinking preference which itself must be honored as something that "works" for that party, means that mediation often involves a tension between both the Feeling and Thinking functions rather than exemplifying just one of them.

62. MBTI MANUAL, *supra* note 11, at 298 tbl. 12.3. For Thinking-Feeling, the CAPT National Data, *supra* note 25, indicate 40-50% for Thinking and 50-60% for Feeling, a much more even balance than the data reported in the Manual.

responses. In judging, roughly 57% of men prefer to use the Thinking function and about 76% of women prefer the Feeling function.⁶³

Dr. Richard found that about 80% of male and 66% of female attorneys strongly preferred Thinking over Feeling, suggesting that law is a career in which the Thinking preference female has found a professional home.⁶⁴ Judge Kennedy found that in his group of judges, while female judges accounted for a minority in absolute numbers, 72% preferred to rely on the Thinking function, and the results for male judges was even higher, at 84%.⁶⁵ Judge Kennedy also noted the risk of unconscious bias for Thinking judgment and how it may interact with attorneys or clients in disfavoring those whose preference is different.⁶⁶ (Mediators may face a similar risk, as discussed below.)

For Mediator Respondents, 58% preferred Thinking and 42% favored Feeling in making judgments. The percentage of the Mediator Respondents who preferred Feeling is almost the same when the Mediator Respondents sample is limited only to lawyers, so the lawyer-mediators within the Respondents are much more like their mediator peers than other lawyers, much less judges. At the same time, the male mediators preferred Thinking by almost 70% compared to a little over 40% for their female counterparts, meaning a majority of the female Mediator Respondents preferred the Feeling function. In

63. MBTI MANUAL, *supra* note 11, Ts. 7.14, 7.15, at 157-58. This is the only data where men and women differ significantly from the sample as a whole. The CAPT National Data, *supra* note 24, for the Thinking-Feeling dichotomy, indicate men ranging from 55-67% for Thinking and 33-45% for Feeling and women 24-35% for Thinking and 65-76% for Feeling.

64. Richard, *supra* note 27, at 1017, 1030-31 discussing the data in the context of the theory that "people are more likely to choose an occupation in which the regular tasks demanded of them most closely meet their individual needs." *Id.* at 1030. Indeed, the attitude of some law students in a psychological context different from psychological type is discussed in Melissa L. Nelken, *Negotiation & Psychoanalysis: If I'd Wanted To Learn About Feelings, I Wouldn't Have Gone To Law School*, 46 J. LEGAL EDUC. 420, 422-23 (1996).

65. Kennedy, *supra* note 29, at 7. "It appears that judges generally are more comfortable functioning in a system of uniform rules, applied objectively One of the consequences of our thinking-centered system is that 'feeling' issues tend to be devalued. For instance, juvenile and family court assignments . . . are routinely disfavored by judges In addition, the court system is notoriously user-unfriendly; litigants and jurors routinely report being treated with rudeness and impatience by the legal system." *Id.*

66. "Thinking judges disapprove of feeling parties, who in their minds act emotionally and illogically." *Id.* at 9. While Judge Kennedy may be accurate in his report, note that Jung referred to thinking and feeling as both rational mental functions which were equally valid and useful, but which involved different criteria in the exercise of that rational mental process, rather than as one being dispassionate and the other emotional. MBTI MANUAL, *supra* note 11, at 24.

short, unlike Judge Kennedy's female judges, a strong majority of whom prefer Thinking to Feeling in making decisions, female Mediator Respondents favoring Feeling seem more like the general public from which the disputants before them are drawn.⁶⁷

In summary, here is the breakdown of all four groups:

	U.S. Adults ⁶⁸	Richard's Lawyers ⁶⁹	Kennedy's Judges ⁷⁰	Mediator Respondents ⁷¹
Prefer Thinking: All	40%	76%	81%	58%
Prefer Feeling: All	60%	24%	19%	42%

At the same time, when the groups are divided between men and women, here are the results:

	U.S. Adults ⁷²	Richard's Lawyers ⁷³	Kennedy's Judges ⁷⁴	Mediator Respondents ⁷⁵
Prefer Thinking: Men	57%	80%	84%	70%
Prefer Feeling: Men	43%	20%	16%	30%
Prefer Thinking: Women	24%	66%	72%	43%
Prefer Feeling: Women	76%	34%	28%	57%

An implication of this data is that, simply on a statistical basis, women who prefer using the Feeling mental function in making decisions are likely to find themselves more at home with mediation than adjudication since three-fourths of female U.S. adults prefer Feeling compared with less than one-fifth of Judge Kennedy's judges. On the other hand, again on a statistical basis, men may be more comfortable with adjudication, but a majority of the Mediator Respondents prefer Thinking as well, though that may reflect the number of male attorneys in the mediator sample.⁷⁶

67. The data indicate that in contrast to other participants in the dispute resolution profession, dispute resolvers with a Feeling preference, especially females, find more colleagues "of like mind" among mediators than among lawyers or judges.

68. See discussion of a more even split from the CAPT National Data, *supra* notes 62, 63.

69. Richard, *supra* note 27, at 1078 tbl. 37.

70. Kennedy, *supra* note 29, at 8.

71. See overall data on Mediator Respondents, *infra* Appendix B.

72. MBTI MANUAL, *supra* note 11, at 298.

73. Richard, *supra* note 27, at 1068 tbl. 28.

74. Kennedy, *supra* note 29, at 7.

75. See overall data on Mediator Respondents, *infra* Appendix B.

76. About 60% of the 87 attorneys among the Mediator Respondents had a Thinking preference and about 40% had a Feeling preference, close to the same ratio as

But what about the decision-making preferences involved in the dispute between Smith and Jones? Recall that Clark asked each partner to describe how the partnership assets might be divided. Jones wanted to follow the applicable law and the prior partnership agreement. Smith instead wanted it to be determined by the relative impacts on the partners and those that work for them.⁷⁷ These substantive issues themselves may provide a clue when also reinforced by the language they use. If Jones used language which sounds more objective and analytical, Jones may indicate a Thinking preference.⁷⁸ If Smith, on the other hand, used language that was more subjective and representative of personal values, it would indicate a Feeling preference.⁷⁹ (At the same time, it is important to acknowledge that

Mediator Respondents as a whole. See data on attorney mediator respondents, *infra* Appendix C.

77. Note that in negotiations, as well as in litigated disputes, people or parties might, because of their respective economic or other interests, have differing views independent of their psychological type. Their judging preferences can, however, amplify or moderate how vigorously they may assert these underlying interests. When these cognitive preferences are allied with underlying interests, resolving disputes can be especially challenging, but when they differ, then they may open opportunities for resolution not apparent from an understanding of the underlying interests alone.

78. MBTI MANUAL, *supra* note 11, at 336. "In any disagreement . . . he tends to state his position bluntly, without concern for the feelings of the other people involved." Myers, in LAWRENCE, *supra* note 55, at 85. Professor Peters suggests that strong and impersonal language resulting from a Thinking preference is often insensitive rather than a deliberate attempt to attack, though it will sometimes be perceived as such. In a recitation of the other party's point of view, an individual with a preference for Feeling will use language that will seem more cooperative. "Feelers are naturally more inclined to use polite, reasonable language when characterizing other negotiators' positions and arguments." A mediator may be able to identify these preferences based on how each disputant characterizes the other's perspective. Peters, *supra* note 9, at 57, 64-65.

79. Two frequent conflicts related to this dichotomy are (1) searching for the "right" answer versus exploration of people's ideas and (2) choosing the logical alternative and applying it to everyone versus finding individual solutions that work for people. Thinking types tend to believe that if the problem can be defined accurately and the relevant evidence gathered, there will be a correct solution and that's what people should do. Feeling types are much more likely to think that "truth" is not cut and dried: What's right for one may be wrong for another. The "solution" will be found by gathering many perspectives and finding the answer that fits best for everyone.

MBTI MANUAL, *supra* note 11, at 336.

[P]eople who prefer Thinking tend to be a little more removed from conflict, or at least take conflict as being something that happens. For people who prefer Feeling it is often a much more personal experience. As a mediator if you prefer Thinking, you may find you jump into "fixing" the conflict without acknowledging the pain and anger of the parties . . . [I]f you prefer Feeling, responding to the emotional aspects of the conflict will probably come easily while moving to solutions will require energy and concentration.

Gosline Remarks, *supra* note 51.

while language may help indicate an underlying Feeling preference, such as when an important personal value is at issue, individuals with a Thinking preference may also have issues of personal value to assert at that moment.) As between individuals with a Thinking or a Feeling preference, a conflict can focus on their differing sense of the “right” answer, even if they agree about their perception of the problem.⁸⁰ People like Jones who prefer Thinking seek an answer that is supported by logic, whereas personal considerations shape the solution for those like Smith who prefer Feeling.⁸¹

80. See MBTI MANUAL, *supra* note 11, at 335. “I began to define Thinkers as always keeping their eye on what’s good for society as a whole . . . to defend ‘The People’. . . . I began to think of Feeling types as always keeping their eye on what’s good for the individual . . . to defend ‘The Person.’” *Is it Wrong? Is it Right? Is it Type?* 86 TYPE REPORTER 2 (S. Scanlon, ed. Nov. 2002). For example, in a 2003 mediation involving the discharge of a school teacher, the teacher took more than an hour to go through the history of her dispute, and was irritated by the school system representative who wanted instead to discuss settlement of the case. Recognizing that the differences in perception about the problem were hard to reconcile (indicating a preference for Sensing in the teacher and Intuition in the school system representative), the mediators decided to focus on possible solutions. What became clear was that the teacher wanted an opportunity to be heard, to vindicate the teacher’s personal values to the School Committee, in line with an apparent Feeling preference on the teacher’s part. The school system representative was concerned with not creating an exception to the general rule that might displace other teachers, indicating to the mediators a preference for Thinking. What ultimately worked was the teacher writing a letter to the School Committee stating her case so as to clear her name without having the teacher rehired, allowing in effect a trade-off between two differing judging preferences on the part of the disputants. Interview with Heather Leavitt-Soni, intern at the Equal Employment Opportunity Commission and co-mediator (summer of 2003).

81. In research on the correlation between Type and conflict management strategies, Thinking types tend to favor competition in conflict situations while Feeling types favor accommodation. Alan Johnson, *Conflict-Handling Intentions and the MBTI: A Construct Validity Study*, 43 J. PSYCHOL. TYPE 29, 30 (1997). Professor Peters found an echo of this research in one of his negotiation simulations involving two students, one two-person team with one student with a Feeling preference and another with a Thinking preference negotiating with a second team, one of whom was a friend of both students on the first team and the other of whom was noted for his adversarial and competitive style. In debriefing the exercise, the Feeling student described how many decisions of that student were shaped by a concern for the grade likely to be awarded the friend on the opposing team because of having to be paired with an unreasonable partner, including the Feeling student’s decision to pay the maximum limit of the student’s authority, a move strenuously opposed by the Thinking student teammate. Peters, *supra* note 9, at 292. He also reported, however, that the Feeling student can be pushed too far, as in the case of one Feeling student who participated in a walkout and deadlock of an ongoing exercise and said: “It’s just as well that we let two total jerks know that they can’t always expect to walk all over people and be successful.” *Id.*, at 74, n.357.

Note that in the case of relationships, like partnerships, one individual may often value having the perspective of another way of making decisions as informing better judgments. But when a dispute arises between individuals of differing judging preferences, that alternative preference may be devalued in the other person just as it is less preferred for this individual. Thus, a Thinking type like Jones, who may find that using the Feeling mental function is difficult like using the non-dominant hand, might view Smith as irrational, inconsistent, and illogical. In turn, a Feeling type like Smith in this conflict might find Jones cold and uncaring. In short, each may be attributing to the other individual what is really their own personal reaction to their respective preferences for making decisions. They are relying on their own sense of those mental functions rather than valuing the alternative frame of reference for what it can contribute to the solution of the problem as a whole.

Note also, however, that the same issues that can contribute to the origin of a conflict can help shape its resolution. While differences in ways of making decisions can make communication more challenging, they can also create asymmetries between disputants in what they value, thereby aiding resolution.⁸² A mediator may therefore seek ways to honor differing cognitive preferences if the issues can be reframed to help disputants see them in a more favorable light.⁸³

But what if a central issue divides disputants, making tradeoffs among several issues more difficult? If this was the dynamic between parties like Jones and Smith, a mediator like Clark might ask Jones,

82. Recall the old nursery rhyme: "Jack Sprat could eat no fat, his wife could eat no lean; and so betwixt them both, they licked the platter clean." Anonymous, *quoted in* JOHN BARTLET, *FAMILIAR QUOTATIONS* 788 (Justin Kaplan ed., 16th ed. 1992). *See also* FISHER ET. AL., *supra* note 1, at 73 (discussing a hypothetical dispute over an orange being resolved by giving the orange peel to one disputant and the orange core to the other); and at 112-115 (discussing a conflict over house design, *supra* note 38).

83. Judge Kennedy indicated that when mediating one wrongful death case he was able to help a particular plaintiff understand the value of a potential settlement for an occupational injury by focusing on his Feeling preference. Judge Kennedy said he took time to learn more about the plaintiff, including his family. When the discussion turned to the settlement proposed, he helped the plaintiff move off of his focus on the wrongdoing of the defendant by noting that if accepted, the settlement would guarantee the plaintiff's children a chance to go to college and find work not in a dangerous occupation, a choice the plaintiff did not have for lack of his own education. Kennedy, *supra* note 32. "Acknowledging feelings first when discussing a conflict with Feeling types will allow for the validation of the values underlying the feelings and permit Feeling types to believe the other person understands something important to them. Allowing Thinking types to express what is on their minds first and to explain how they have analyzed the situation will result in Thinking types believing their ideas are valued." VANSANT, *supra* note 9, at 23.

who appears to prefer Thinking, to reflect objectively about the people in the dispute, while asking Smith, who appears to prefer Feeling, to consider ways to generalize the particular criteria used beyond the effect on the individuals involved. While this may be challenging for the disputants on their own, it may be easier for them to do when the request comes from a neutral rather than appearing to be a demand from the other party. A mediator might enhance the chances of doing so by raising the idea in a confidential caucus with each party. In a meeting out of earshot of the other side,⁸⁴ a mediator can be more candid and a disputant more forthcoming so that the parties can at least privately acknowledge to the mediator the legitimacy of a differing decision-making preference, even if they are not yet ready to acknowledge it in the other disputant.⁸⁵

Finally, note that when interacting with the parties, if the mediator prefers Thinking to Feeling, the mediator will need to take special care to validate the Feeling preferences of parties like Smith and to not appear to unwittingly favor parties like Jones, with whom the mediator shares a Thinking preference. (The same is true if Mediator Clark had a Feeling preference and risked aligning with a Feeling type like Jones).⁸⁶ While judges may need to be focused on the facts and the law to render a decision, the mediator's challenge is different in that the mediator needs to create a sense of trust in the parties without the trappings of office available to a judge. Put another way, the task of the parties in court is to persuade the judge. The task of

84. Indeed, one of the functions mediators can serve is to help disputants avoid the negotiator's dilemma where a party has difficulty choosing whether to offer information that creates opportunities for resolution or to withhold information to minimize the risk of giving away a perceived advantage. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* (Free Press 1986), reprinted in GOLDBERG, ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 51, 54 (3d ed. 1999).

85. When compromise between opposite types is necessary, the best compromise is that which preserves to each party the advantage he considers most important. The sensing type wants the solution to be workable, the thinker wants it systematic, the feeling type wants it humanly agreeable, and the intuitive wants a door left open for growth and improvement. People often go to the mat for the scheme as a whole, when what they really care about is one particular merit that could as well be incorporated into another plan. Myers, in LAWRENCE, *supra* note 55, at 86.

86. See discussion of impartiality *supra* note 7 and *infra* note 125.

Someone with a preference for Thinking is likely to look for a principle that can be applied to any number of similar situations. A Feeling type will want to be more situation specific. Feeling types also like decisions made by consensus and generally have more patience with the longer discussions required to satisfy all parties.

VAN SANT, *supra* note 9, at 77-78.

the mediator is to persuade the parties, or rather, to help the parties persuade each other.

In summary, here is an example of how the Thinking-Feeling distinction might be useful to a mediator:

Judging Dichotomy	Disputants (Smith/Jones)	Mediator (Clark)
T: Thinking: Prefers to use Thinking mental function. <i>(Preferring standards of general application and logical organization)</i>	What standards and criteria should be used to justify my position?	How can I help these disputants come to a conclusion that respects principles of general application?
F: Feeling: Prefers to use the Feeling mental function <i>(Preferring criteria that express personal values)</i>	Why does this dispute or its resolution affect my core values?	How can I help these disputants come to a conclusion that can respect their personal values?

To sum up so far, each individual has available a preferred way of gaining information (Perceiving) by Sensing (S) or Intuition (N), and a preferred way of making decisions (Judging) by Thinking (T) or Feeling (F), though each of these mental activities is available to us even if not preferred. In Jung’s words: “Sensation establishes what is actually present, [T]hinking enables us to recognize its meaning, [F]eeling tells us its value, and [I]ntuition points to possibilities as to whence it came and whither it is going in a particular situation.”⁸⁷ As Isabel Briggs Myers, co-author of the MBTI instrument, put it, “Sensing types like facts; intuitives like possibilities; thinkers like logical principles; feeling types a human angle. A good sound idea can be presented in any or all of these forms”⁸⁸ Again, readers

87. C.G. JUNG, *PSYCHOLOGICAL TYPES* para. 958 (1923, 1977), *quoted in SPOTO, supra* note 17, at 48.

As the authors of the Manual wrote:

The four functions direct conscious mental activity toward different goals: Sensing (S) seeks the fullest possible experience of what is immediate and real; Intuition (N) seeks the furthest reaches of the possible and imaginative; Thinking (T) seeks rational order in accord with the nonpersonal logic of cause and effect; Feeling (F) seeks rational order in accordance with the creation and maintenance of harmony among important subjective values.

MBTI MANUAL, *supra* note 11, at 25.

88. Myers, *in* LAWRENCE, *supra* note 55, at 84. In the counseling context, which has some analogues to mediation:

Clients best understand counseling interventions couched in their own type language. Sensing language is more concrete; Intuitive language is more abstract and symbolic. Thinking language is more objective and analytical;

are invited to reflect on your assessment of your own preferences so far. Do you prefer Sensing or Intuition when perceiving? Do you prefer Thinking or Feeling when judging?

Even if a mediator is unfamiliar with the MBTI instrument, the basic idea of four mental functions can be useful to a mediator seeking to cover the four bases of a mediated conflict:

-
- Sensing:** What are the *facts* of the dispute?
Intuition: What are the *possibilities* for its resolution?
Thinking: What are the *standards* for evaluating those options?
Feeling: What are the likely *impacts* on the people involved?
-

In addition to the four basic mental functions, the MBTI instrument also assesses two other personality dimensions which may affect the conduct of a mediation. Unlike the first two dichotomies, which relate to how people prefer to perceive and then judge matters, the next two dichotomies involve the ways people undertake both mental functions. In other words, the perceiving and judging mental functions discussed above are more about the “substance” of cognitive issues that can play a role in a dispute or its resolution. The next two sets of mental preferences are more about the “procedure” of how a dispute is exacerbated or resolved. They can influence both the pace and attitude of a mediator, as well as the disputants, toward how a mediation might be conducted.

More specifically, the third of these pairs of mental preferences relates to an individual’s preference for focusing energy either inward or outward, and the fourth relates to whether an individual’s outward focus is oriented more toward gaining information or making decisions.

Feeling language is more personal When introducing a topic to a group, a reference to practical issues (Sensing), new possibilities (Intuition), long range consequences (Thinking), and help for people (Feeling) will provide motivation for each of the functions.

MBTI MANUAL, *supra* note 11, at 233. Also, while apparently created without benefit of the typological insights, the original characters of the Star Trek® TV series and their interactions illustrated differing perceiving or judging preferences, which in the following illustration will be [bracketed]. For example, Mr. Scott (the Engineer) was acutely aware of the conditions of his engines and the stress being put on them [Sensing]; Science Officer Mr. Spock was analytical and often critical of something said or done as “not logical” [Thinking]; Doctor McCoy was often in conflict with Mr. Spock and expressed concern about the impact of actions on the ship’s crew [Feeling]; and Captain Kirk had to invent solutions to respond to threats as well as pilot the Enterprise where “no man had gone before” [Intuition]. (The author is indebted to Fritz Bell of Raymond, New Hampshire, for suggesting this example.)

D. *Mediating Differing Preferences for Focusing Energy Inside or Outside One's Self: Extraversion or Introversion (E or I in MBTI Results)*

A third element in the MBTI reported results refers to whether an individual is primarily "Extraverted" or "Introverted," or in MBTI terms, "E" or "I."⁸⁹ People who are Extraverts are oriented to, or energized more outwardly by, people, experience, and activity.⁹⁰ People with the Introversion preference are oriented to, or energized more inwardly by, memories and ideas.⁹¹ Jung believed these differing orientations reflected a preferred direction of an individual's energy.⁹²

For example, in the partnership dispute, Smith took time to reflect before responding to Jones, indicating that Smith may have an Introversion preference. Jones, on the other hand, was eager to state his views, indicating an Extraversion preference, one literally for "thinking out loud."⁹³ Thus, independent of how Jones and Smith

89. Jung's attempt to explain individual differences in personality initially stemmed from his observation that there were two types of people, *extraverts* and *introverts*. He described extraverts as those whose energies are primarily oriented toward people and events in their external environment, and introverts as those whose energies are directed inwardly toward thoughts and experiences in their inner environment.

MBTI MANUAL, *supra* note 11, at 22. See also ISABEL BRIGGS MYERS, INTRODUCTION TO TYPE: A GUIDE TO UNDERSTANDING 5 (6th ed. 1993).

90. Persons habitually taking the Extraverted attitude may develop some or all of the characteristics associated with Extraversion: awareness of and reliance on the environment for stimulation and guidance, an eagerness to interact with the outer world, an action-oriented, sometimes impulsive way of meeting life, openness to new experiences, ease of communication and sociability, and a desire to "talk things out."

MBTI MANUAL, *supra* note 11 at 26.

91. Persons habitually taking the Introverted attitude may develop some or all of the characteristics associated with Introversion: interest in the clarity of concepts, ideas and recollected experience, reliance on enduring concepts and experiences more than on transitory external events or fleeting ideas; a thoughtful, contemplative detachment, an enjoyment of solitude and privacy, and a desire to "think things out" before talking about them.

Id. at 26.

92. *Id.* at 5.

93. Again, these are terms of art and not to be confused with the conventional meaning of the terms "extrovert" and "introvert," both of which have acquired connotations relating to overall personal style rather than orientation of a specific mental function. For example, as a law teacher, the author has found that some students rush to respond to a question because it gives them a chance to talk it through. Other students need time to ponder the inquiry before offering an answer which they have shaped carefully before speaking. Another example involves the author's mediation seminar where students present a rough draft of their papers and then revise them based on feedback they receive. The presentation is helpful to students who have a preference for Extraversion because it gives them a chance to talk through their

preferred to gain information, these differing orientations can shape how the conversation is itself conducted, not just what the conversation is about. If the reader is unfamiliar with the MBTI instrument, reflect on which of these two orientations – external or internal – you believe you prefer most of the time.

What are the likely Extraversion-Introversion orientations of the possible participants in a mediation? A small majority, about 51% of U.S. adults, prefer Introversion to Extraversion, though some data indicate a slight preponderance in favor of Extraversion.⁹⁴ A mediator, therefore, statistically has about an even chance of encountering an Extraverted type as an Introverted type if disputants are representative of the population as a whole. The same distinction in orientations may be the case with the disputants in the mediation, Jones and Smith. Clark may have to observe how both Jones and Smith respond to opportunities to talk in order to get a sense of their likely preferred orientations as either Introverted or Extraverted,⁹⁵ though Clark might get a clue in Jones's willingness to interrupt and Smith's taking time to reflect before responding.⁹⁶

thoughts with a group. Oral presentation is also helpful to students who have a preference for Introversion because it gives them time to reflect afterwards and revise their work.

94. MBTI MANUAL, *supra* note 11, at 298 tbl. 12.13. Note that this data, which indicates a slight overall national preference for Introversion, differs from some studies which were part of the CAPT National Data, which found a national preference for Extraversion. See CAPT National Data *infra* note 104.

95. "It is said that when you are talking to Extraverts, if you do not know what they think, you were not listening . . . [and] when you are talking with Introverts, if you do not know what they think, you did not ask." Cochran, *supra* note 6, at 239 (attributed to Isabel Briggs Myers). In listening to disputants, a mediator might keep in mind the following behavioral cues during communication, building on the work of S. A. Brock: Extraverts talk it out: they speak rapidly, interrupt, use louder voice volume, and appear to think aloud. While Introverts think it through: they pause in answering or giving information, use quieter voice volume, and speak in shorter sentences that do not run on. See MBTI MANUAL, *supra* note 11, at 336 tbl. 13.6.

96. "Introverts prefer to . . . reflect inwardly before they share their concerns . . . Extraverts often assume silence means agreement. For Introverts, silence may simply indicate an unwillingness to reveal what they are thinking or feeling." VANSANT, *supra* note 60.

"E's are the type who often leave a meeting saying to themselves, 'Me and my big mouth. I should never have said that . . . ' I's . . . leave meetings saying to themselves, 'I should have told him . . . I wish I had thought of that earlier.'" Barkai, *supra* note 9, at 11.

Since Extraverts want to settle their differences by talking about them, Introverts who may refuse to discuss the conflict or may stop talking before the conflict has been resolved often confound them. Extraverts frequently then assume silence means agreement or disengagement. For Introverts, silence may simply indicate they are not yet ready to reveal what they are thinking

Professor Penderghast noted that Introverted types quietly collect data about the conflict and dwell on it, trying to put it into perspective, while Extraverted types actively seek information about the conflict through questions. To the Extraverted type, the Introverted type is close-lipped and broods over the conflict, while to the Introverted type, the Extraverted type perpetuates the conflict by constantly talking about it.⁹⁷

What about disputants' counsel? Dr. Richard's sample of attorneys revealed about 44% Extraverted types and about 56% Introverted types.⁹⁸ Attorneys favoring Introversion may be more at ease with listening but more challenged to provide feedback. Conversely, attorneys who prefer Extraversion may find themselves talking more, and listening less, when counseling their clients.⁹⁹

What if the disputants go to court? According to Judge Kennedy, the judges he encountered resemble Richard's attorneys in many ways, which is not surprising since most judges are lawyers themselves. Thus, for example, Judge Kennedy's statistics show that approximately 60% of the judges he surveyed prefer Introversion,¹⁰⁰

or feeling, particularly if they are not yet certain their perspectives will be treated with respect.

VANSANT, *supra* note 9, at 16-17.

97. See Penderghast, *supra* note 45, at 29. The contrast in orientation can itself introduce a form of conflict: "To [I]ntroverts, [E]xtraverts may seem alternately congenial or intrusive, gregarious or obnoxious, encouraging or pushy, as the case may be. They may also appear as 'busy-bodies' or 'always wanting center-stage,' and their action-oriented lifestyle can make an [I]ntrovert cringe." SPOTO, *supra* note 17, at 30.

Conflicts here frequently relate to two areas: (1) quick versus more measured pacing and (2) breadth/changeability of topics versus focus.

The natural pace of those who prefer Extraversion is rapid. They develop their ideas by talking about them . . . Those who prefer Introversion usually want to process internally and need some talk-free time and space to do so. The thinking-out-loud process of those preferring Extraversion can interfere with their thinking-inside process.

MBTI MANUAL, *supra* note 11, at 336. See also Johnson, *supra* note 81, at 31 (finding that Extraverted types preferred collaboration while Introverted types preferred to avoid conflict altogether). See also VANSANT, *supra*, note 9, at 17: "Extraverts are inclined toward fight and Introverts toward flight, both behaviors that exacerbate the conflict, often producing a kind of two-step dance. One party will move in on the other who moves back, leading the first party to move in again and the other to move back, and so on."

98. Richard, *supra* note 27, at 1059 tbl. 16.

99. See Cochran, *supra* note 6, at 228.

100. See Kennedy, *supra* note 29, at 9 tbl. 1. Judge Kennedy also said that he believes that his sample may actually understate the Introversion preference of judges since he found a much higher percentage when he worked with all of the judges in one state. *Id.* at 6 n.3.

though he found female judges prefer Extraversion in greater proportion to their male colleagues.¹⁰¹

What if Jones and Smith encountered, for example, an Introverted judge? Judge Kennedy found that Introverted judges prefer written presentations to oral, are likely to make their decisions based on private reflection in advance of a hearing, and are less likely to be swayed by oral argument or public opinion.¹⁰²

What about Mediators? In contrast with the judges, almost 60% of the Mediator Respondents preferred Extraversion, with 65% of female respondents and 55% of male respondents preferring Extraversion, compared to about 40% of Judge Kennedy's male judges.¹⁰³

In summary, here are the approximate relative distributions of likely participants in a dispute or its resolution:

	U.S. Adults ¹⁰⁴	Richard's Lawyers ¹⁰⁵	Kennedy's Judges ¹⁰⁶	Mediator Respondents ¹⁰⁷
Prefer Extraversion	49%	44%	45%	59%
Prefer Introversion	51%	56%	55%	41%

Note that if a mediator is an Extraverted type, as were a majority of the Mediator Respondents, such a mediator may need to be

101. Kennedy, *supra* note 29, at 6. Judge Kennedy reported updated data for male and female judges as follows, almost the reverse of each other:

Male Judges (n=1242): Prefer Extraversion: 40% Prefer Introversion: 60%
 Female Judges (n=481): Prefer Extraversion: 54% Prefer Introversion: 46%

Kennedy, *supra* note 32.

102. See Kennedy, *supra* note 29, at 6. On the other hand, Extroverted judges can be characterized as the diplomats of the judiciary. These judges go to meetings and join groups . . . They tend to think out loud and can be the bane of appellate justices who frequently wish they hadn't cluttered the record with meanderings and confused musings. Extroverts . . . can be keenly aware of public opinion – often to the point of becoming stressed when charged with making unpopular decisions . . . They manage the court's business by meeting with others and getting everyone's input . . .

Id. at 5-6.

103. The distinction is even greater if Judge Kennedy is correct that his sample was skewed toward Extraverted types because he anticipated Introverted type judges were under-represented in his course. In a sample of all appellate justices in Florida, about three-fourths were indicated to be Introverts. *Id.* at 6 n.3.

104. MBTI MANUAL, *supra* note 11, at 298. For Extraversion-Introversion dichotomy, the CAPT national data indicates 45-53% for Extraversion and 47-55% for Introversion. CAPT, *supra* note 24.

105. Richard, *supra* note 27, at 1078 tbl. 37.

106. Kennedy, *supra* note 29, at 8 tbl. 1.

107. See overall data on Mediator Respondents, *infra* Appendix B.

more conscious of the need to listen, rather than to speak.¹⁰⁸ As discussed above, active listening – or repeating back what the mediator understood the disputant to have said in the disputant’s own terms¹⁰⁹ – is an important mediation skill, as is allowing for silences at appropriate times.¹¹⁰ In a mediation, disputants not only need to be able to tell their story, they also need to feel they have been heard.¹¹¹ At the same time, if a mediator has a preference for Introversion, as do a minority of the Mediator Respondents, the mediator may need to take extra care to focus on what the parties are saying, rather than on the mediator’s own thoughts.

How might the Extraversion-Introversion preferences of the disputants play out in the hypothetical dispute between Smith and Jones? For example, if Smith appears more Introverted in orientation, Clark might provide Smith time to process the information before responding, as well as caucus privately with Smith to provide him a forum to air concerns one-on-one, rather than in a joint session.¹¹² If Jones appears to prefer Extraversion, Clark might also

108. “In interviewing, when we ask questions and reflectively respond to the client’s story, we are extraverting. When we listen and attend to the client, pondering and considering rapport, information or opinions, we are introverting It just takes greater effort to use the nonpreferred tendency.” Cochran, *supra* note 6, at 228.

109. See discussion *supra* note 49.

110. “Extraverts may be challenged by silences, particularly emotional pauses. . . . Learning to stay with open-ended questions . . . is a skill Extraverts may need to learn.” Cochran, *supra* note 6, at 238.

111. See generally Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

112. Introverts . . . prefer to think about the situation in their inner worlds that provides them with energy before they share their concerns with others If this need for reflection is not accommodated, their thinking process is curtailed and their best thoughts related to the conflict will be lost to the process.

VANSANT, *supra* note 9, at 16.

Mediator Ann Gosline reported mediating a dispute between two educational administrators, one of whom was an Extroverted type and the other an Introverted type. The situation was unusual in that they were both familiar with Type and Ms. Gosline knew their types. At the end of a day of intense negotiations, the party with the Introversion preference said “I have to go, I know it seems like we just settled all of this – that we worked it all through, but I have to go home and process this.” Ms. Gosline reported that the other party, who preferred Extraversion, initially got very nervous about this response and questioned whether the other party was negotiating in good faith. She said she was able to say to the Extraverted party, “[Y]ou know this person prefers Introversion, you know they need time to process it. Don’t take it as being a pull-back, just take it as being an honest expression of that need.” Ms. Gosline said that this “both defused the feeling of the person who was an Extravert, plus it gave room for the person who preferred Introversion to go home, process it and she came back with some very important concepts the next morning. But, she couldn’t do it in the rapid fire Extraversion situation that the intensive mediations often are.” Gosline Remarks, *supra* note 51. See also VANSANT, *supra* note 9, at 18 (“Extraverts

use a private caucus to caution Jones that statements made as a way of sorting through the problem may be heard as definite by an Introvert like Smith, even when not so intended, because Smith is used to having ideas more fully formed before expressing them.¹¹³

In summary, here is an example of how the Extraversion-Introversion distinction might be useful to a mediator in the process of a mediation:

Orientation Dichotomy	Disputants (Smith/Jones)	Mediator (Clark)
E: Prefers Extraversion <i>(Energized from outside)</i>	Let me talk this out.	How should I respond to the fast pace and provisional nature of these comments?
I: Prefers Introversion <i>(Energized by internal ideas)</i>	Let me think this through. . . .	How can I provide time and space for reflection?

E. *Mediating Differing Preferences for Using the Judging or Perceiving Function in Coping With the External World (J or P in MBTI Results)*

The final dimension measured by the MBTI instrument refers to whether an individual relies more on the perceiving or judging functions in coping with the external world, which again can have implications for the mediation process.

For example, in the dispute between Smith and Jones, Smith wanted to take time to lay out the dispute while Jones was impatient to discuss how it might be resolved. In short, one wanted to dwell on

and Introverts require various amounts of ‘conversation.’ Develop the habit of ‘rounds’ of discussion. Negotiate before beginning a talk how long that particular round will last and stick to it, agreeing on another time for the next round.”)

113. MBTI MANUAL, *supra* note 11, at 336. Note also that if one of the disputants is an Extravert, the mediator may find that a private caucus which allows a disputant the opportunity to talk it out may allow a change of direction.

Extraverts . . . often want to work out differences by talking about them The first thoughts they voice are just that — their preliminary thoughts. *Interaction* takes them deeper into their thinking process, and if interaction does not occur, their thinking process may be curtailed. Further, Extraverts often do not end up where they began because new information and perspective gained through dialogue or experience is an important part of the process they use to arrive at their best opinions.

VANSANT, *supra* note 9, at 16.

“If a negotiation with an Extravert appears to be headed towards an impasse, change the energy level somehow. Extraverts are strongly effected [sic] by the energy level. Adding new people, new input, and even new issues, may break an impasse with an Extravert.” Barkai, *supra* note 9, at 22.

the background of the dispute while the other wanted to move forward to how it might be decided. They also disagreed on whether to stay the course with their business plan or to change it to meet market conditions. While these disagreements can have a substantive basis, they may also indicate another cognitive difference assessed by the MBTI instrument – a preference between one of the two primary cognitive functions, either perceiving or judging, when relating to the outer world.

Highlighting this preference for perceiving or judging is a major contribution made by the authors of the MBTI instrument to Jungian psychology. The authors recognized that the mental function each individual preferred to use in coping with the outside world, as opposed to that function preferred for the internal world, would be apparent to outside observers. In effect, each individual has another preference for the MBTI instrument to sort out, namely, whether that individual relies primarily on that individual's perceiving function, either Sensing or Intuition, or the judging function, either Thinking or Feeling, in relating to people and experiences in the outer world.¹¹⁴

The distinction between individuals who prefer using their judging or perceiving mental function externally, called Judging types ("J") or Perceiving types ("P") in MBTI parlance, relates to an individual's need for structure and desire for closure compared with an individual's need for flexibility and desire to explore options.¹¹⁵ An individual like Jones, with an apparent Judging preference, may aggressively push for closure out of a sincere desire to resolve an issue,

114. In any new activity, it is appropriate first to use a perceiving function . . . to observe or take in the situation; then . . . to use a judging function . . . to decide on the appropriate action. Perceiving types typically remain longer in the observing attitude . . . Judging types move more quickly through perception in order to reach conclusions and achieve closure . . .

MBTI MANUAL, *supra* note 11, at 26.

115. When looking at conflicts between Judging and Perceiving types, Professor Penderghast observed that Judging types take "what is presented and . . . use it to arrive at some conclusion regarding the conflict" as directly as possible. Penderghast, *supra* note 45, at 300. Perceiving types, on the other hand, like to "hold the proposed solution in abeyance in order to be open to other [or better] possible solutions" that may present themselves in the future. "Judging Types value closure and may resist attempts at negotiation." VANSANT, *supra* note 60, at 6. Perceiving types usually consider decisions provisional, "and may appear indecisive . . . when . . . exploring better" options. *Id.* "Because J's need structure and P's need to leave options open, J's accuse P's of being flaky and not having their act together; P's accuse J's of being rigid, uptight and overly controlling." Barkai, *supra*, note 9, at 17. Also, "J's feel stress until a decision is made; P's feel stress once a decision has been made because their options are cut off." *Id.* at 18.

rather than obnoxiousness. On the other hand, an individual with a Perceiving preference, as Smith appears to be, may be reluctant to reach closure because of a desire to gather more information, not simply to be difficult.¹¹⁶ Also, an individual with a Perceiving preference may frame his / her assertions as questions.¹¹⁷ Again, if the reader is unfamiliar with the MBTI instrument, reflect which is your own preferred way of coping with the world outside — Judging or Perceiving?

Here are the relative distributions of likely Judging or Perceiving participants in a dispute or its resolution:

	U.S. Adults ¹¹⁸	Richard's Lawyers ¹¹⁹	Kennedy's Judges ¹²⁰	Mediator Respondents ¹²¹
Prefer to use the Perceiving mental function in the outer world	46%	37%	28%	46%
Prefer to use the Judging mental function in the outer world	54%	63%	72%	54%

116. MBTI MANUAL, *supra* note 11, at 337.

Two of the normal conflicts related to this dichotomy are (1) the need for structure versus the need for flexibility and (2) the desire for closure versus the desire for openness (waiting). . . .

Judging types want decisions and closure. Ambiguity, delayed decisions, reopening decisions, and changing goals are extremely uncomfortable to them. Perceiving types . . . have faith in their own internal sense of timing and trust that when the right time comes, they will know

Judging types often have trouble trusting that Perceiving types will come through in a timely way, that decisions will be made and action will be taken. Perceiving types often feel hemmed in, limited, and restricted by judging types.

Id.

They [judging types] tend to be organized, deliberate and capable of making decisions with a minimum of stress. Preferring to create an ordered lifestyle, they are naturally inclined in interpersonal interactions to behave in ways that may be seen as controlling, such as scheduling, developing fixed ideas of how things should be done, and pushing strongly for closure.

Peters, *supra* note 9, at 19-20.

117. Telephone Interview with Carol Liebman, Professor of Law, Columbia Law School (Jan. 27, 2003).

118. MBTI MANUAL, *supra* note 11 at 298. For the Judging-Perceiving dichotomy, the CAPT National Data indicate a 54-60% Judging and 40-46% Perceiving. CAPT, *supra* note 24.

119. Richard, *supra* note 27, at 1068 tbl. 28.

120. Kennedy, *supra* note 29, at 8.

121. See overall data on Mediator Respondents, *infra* Appendix B.

These MBTI data indicate those who prefer to use their judging function externally (“Js”) are more numerous among lawyers and judges who are asked to make judgments, whether it is about a client’s problems or a case in court, than among mediators or people in the general population. The Mediator Respondents have a higher proportion of those who prefer to use their perceiving functions (“Ps”). That, too, makes sense because their role is not to decide anything themselves, but rather, to assist the parties (and their counsel) to reach a consensual resolution.

For example, according to Judge Kennedy, Judging type judges are generally punctual and decisive, effective with time management, and often impatient with rambling lawyers and witnesses.¹²² However, such rambling is sometimes a necessary part of the mediation process, as disputants need to also understand each other, rather than just have the judge understand them.¹²³

If a mediator has a Perceiving preference, as do almost half of the Mediator respondents, it may be a challenge for such mediators to avoid staying too long in the early stage of gathering information from the parties about the dispute before moving on to working with them to achieve a resolution. Note that whether the mediator prefers perceiving to judging in coping with the outer world may be one of the reasons the mediator prefers to mediate rather than to adjudicate in the first place. Perceiving type mediators, whose preference in coping with the outer world is for gathering information rather than making decisions on it, may need to expend extra effort to move the parties forward toward resolution of their dispute and not just making sure they as mediators understand it well.

On the other hand, mediators who prefer to use their judging preference in relating to the world outside themselves, as do a slight

122. Some common characteristics of “judging” judges are punctuality (and a demand that all court users be equally punctual), decisiveness (sometimes to the point of close-mindedness), effective time management (sometimes to the point of unbending rigidity), and impatience with lawyers or witnesses who are nonresponsive or take too long to get to the point.

Perceptive judges . . . can be extremely patient with lawyers’ arguments, tolerant of rambling witnesses, and open to reconsideration of rulings. They can be perceived as indecisive, and often prefer to take matters under submission in order to give them more time for thought and research.

Kennedy, *supra* note 29, at 8.

123. Judge Kennedy also pointed out how this distinction played out with criminal defendants: “[P]erceptives . . . tend to take unreasonable risks and may leave behind a trail of clues “Judging” judges assume that if they can provide structure to a perceptive defendant’s lifestyle, he or she will discontinue [his or her] life of crime . . . [but] generally [these efforts are met] with no discernable effect.” *Id.*

majority of the Mediator Respondents, may need to allow the parties like Smith time to arrive at their own conclusions instead of pressing them prematurely toward a resolution. In short, those mediators or disputants who rely on their perceiving function in coping with the outer world are likely to prefer staying open to more information. Those who rely on their judging function externally, however, are likely to prefer coming to a conclusion and may need to be aware of the other preference to conduct the mediation successfully.

A mediator who hypothesizes he is talking with Judging type disputants should recognize that such disputants may have come into the mediation with their minds made up; the parties will need time to rethink their views and to make the necessary mental adjustments. In other words, with Judging disputants, mediators should leave some time to allow disputants to change their minds. On the other hand, if working with Perceiving disputants, a mediator should recognize that any agreement may be provisional in the disputants' minds, even if heard as firm agreements. If faced with parties with differing Perceiving-Judging preferences, a mediator could recommend that the Judging disputant stay open to new options, while suggesting that a Perceiving disputant focus on deciding about a proposed solution rather than holding off in order to consider all possible alternatives. A mediator should recognize that each course may be challenging for someone with those differing preferences.¹²⁴

In summary, here is an example of how the Perceiving-Judging dichotomy might be useful to a mediator in the process of a mediation:

124. Judge Kennedy indicated that he found that disputants with a Judging preference in a mediation often had trouble relating to the opposing party's point of view, in effect mentally preparing their own rebuttal rather than genuinely listening to what the other party said. In those cases, he said he often asked such disputants to restate the argument of the other side as a way of getting them to acknowledge it, even if they disagreed with it. Kennedy, *supra* note 32. "An image that's been used . . . is that each idea or option [is] a balloon If you prefer Judging[,] the challenge is to make sure you let enough balloons in the air to have a good set of options and that you work with people to generate the options. If you prefer Perceiving[,] the challenge is to . . . remember to get to the resolution and [not to be] seduced by that wonderful colorful balloon that . . . [comes] up at the last minute." Gosline Remarks, *supra* note 51.

Outer World Orientation Dichotomy	Disputants (Smith/Jones)	Mediator (Clark)
J: Judging: Prefers to use the judging mental function in the outer world (<i>Preferring plans & conclusions</i>)	Why should I change my position and when will this mediation be over?	How can I help this disputant come to a conclusion that also may involve a change of mind?
P: Perceiving: Prefers to use the perceiving mental function in the outer world (<i>Preferring opportunity and information</i>)	Why should I agree to this resolution? Aren't we just getting started?	How can I help this disputant come to a conclusion that includes enough relevant information that it will be durable and adhered to?

F. A Mediator's Checklist

In summary, here is a checklist of Type related issues which it might be useful for a mediator to keep in mind during the mediation process, with the understanding that these ideas may be useful even if not related to the MBTI instrument.

Mediation "Substance"		Mediation "Process"	
Perceiving Information:		Energy Orientation:	
Sensing:	What are the facts of the dispute?	Extraversion:	Does someone need time to talk it through?
Intuition:	What are the disputants' underlying interests and options for resolution?	Introversion:	Does someone need time to think it through?
Judging What to Do:		Orientation to Outer World:	
Thinking:	What uniform criteria exist to help decide among options?	Judging:	Does someone need time to change one's mind?
Feeling:	What values are affected and what is the impact on the people involved?	Perceiving:	Does someone need time to commit to a resolution?

Readers who are unfamiliar with the MBTI instrument but who have made provisional assessments about which of these dichotomies they believe fits them most of the time will now have a total of four: Sensing or Intuition, Thinking or Feeling, Extraversion or Introversion, and Judging or Perceiving. Short of taking the MBTI instrument under the guidance of an experienced counselor, the above questions may still be valuable to keep in mind, especially in helping a mediator be more self-aware and therefore more impartial.

G. *Implication of Typological Preferences for Mediator Impartiality*

Throughout the foregoing discussion of various mediation strategies designed to take different cognitive preferences into account, the mediator has been assumed as neutral. But one of the values of the self-awareness enhanced by taking the Indicator is a better appreciation for not only how disputants may differ from each other but also how the mediator may differ from them. If Mediator Clark in the hypothetical example is, as the data indicate, an Intuitive type, like Jones, but Smith is not, then Clark may have a challenge in remaining impartial. To the extent that a mediator like Clark, as a neutral party, unconsciously identifies with one of these preferences of the parties or their counsel, the mediator may unwittingly favor a similar preference or disfavor an alternative one.¹²⁵ Just as the parties may conflict with each other in their cognitive preferences, so could the mediator come into conflict with the disputants' preferences unless the mediator is aware of the issue.

The mediator may also want to keep in mind that if a disputant tells a story in a way that manifests a cognitive preference different from the mediator, the mediator will need to monitor the mediator's own reaction to it. This self-awareness will be especially important if, for example, the mediator is an Intuitive type, like the majority of Mediator Respondents, and the disputants are Sensing types, like a majority of U.S. adults.¹²⁶ For instance, when Smith wants to talk in detail of the facts about his experience, indicating a Sensing preference, Clark as an Intuitive type may need to make an extra effort to be patient in order to help Smith feel respected.¹²⁷ A mediator

125. Note that the professionalism that leads mediators of one gender to mediate with disputants of differing genders without favoring the mediator's own gender is almost self-evident. But gender is obvious. Cognitive preferences are not, and mediators should also seek to be sufficiently aware of this issue to avoid allying themselves with disputants of a similar preference. *See supra* note 7 for a discussion of the impartiality standard for mediators. Also, it is a tenet of judicial ethics that, "A Judge Shall Perform the Duties of Office Impartially and Diligently." MODEL CODE OF JUDICIAL CONDUCT Canon 3 (Aug. 1990), available at <http://www.law.sc.edu/freeman/cjc51.htm> (last modified Oct. 17, 2002). *See also* Kennedy *supra* note 29, at 8 (arguing that judges need to be self-aware to avoid an unconscious bias through affinity for one or another cognitive preference).

126. MBTI MANUAL, *supra* note 11, at 298.

127. As a humorous example of how Intuitive types sometimes want to finish sentences for Sensing types if they believe they know where the Sensing type is going, see Bob and Ray's fictitious radio interview with an officer of the S.T.O.A.: "The. . .Slow. . .Talk-ers. . . of. . .A-mer-i-ca." *See* BOB ELLIOTT & RAY GOULDING, BOB AND RAY: A NIGHT OF TWO STARS (RADIOART 2000); *see generally* <http://www.BobandRay.com> (last visited Feb. 21, 2004).

should also be aware of the mediator's own Perceiving-Judging preference since it may lead to a conflict in style with a disputant who may not share that same Perceiving-Judging preference, as well as an unwitting rapport with the disputant who does. Thus, if possible, a mediator should be aware of the mediator's own preferences and how they may interact with the preferences of the parties, in order to mediate both more effectively and impartially. One way to do that without appearing to lose impartiality with the other disputant is for a mediator to use the private caucus as a time and place to honor more directly a perceived alternative preference of the disputants.

Note also the risks to impartiality where all preferences are put together. For example, in the Jones-Smith hypothetical dispute with Clark as the mediator, Jones and Smith appear to have the following cognitive preferences assessed by the MBTI instrument: Jones: Intuition, Thinking, Extraverting, and Judging; and Smith: Sensing, Feeling, Introverting, and Perceiving. In the way the MBTI instrument is scored and reported for each individual who takes it, the Extraversion-Introversion preference is reported first as either E or I, so that Jones would be reported to be an ENTJ, and Smith would be an ISFP. If Clark, however, were to manifest the preferences of a majority of Mediator Respondents in each preference indicated by the data, Clark would prefer Intuition, Thinking, Extraverting, and Judging, or ENTJ, since the E-I preference is reported first. If that were the case, then Clark would have the same typological profile as Jones, and would have to take special care not to appear to Smith, who has a different profile, to be aligned with Jones.

H. *Putting the Four Pairs of MBTI Results Together: The Sixteen Types of Those Involved in Dispute Resolution*

It is the preferences for either Sensing or Intuition, for Thinking or Feeling, for Extraversion or Introversion, and for Judging or Perceiving which help shape human personality and result in one of sixteen allied, but very different typological profiles for each individual. While sixteen combinations or types seem numerous, each type is composed of building blocks of these mental preferences which produce an individual who is more than the sum of these parts because of interaction, rather than simply the combination, of these preferences in daily life. But because we can use our non-preferred mental functions, though rarely all non-preferred functions at once, one commentator has said that the preferences might be best understood like a "home room" with visits to other rooms in the Type House as

needed.¹²⁸ In other words, these typological combinations that are indicated by the MBTI instrument represent a set of primary mental preferences, not pigeonholes.

Again, readers who are unfamiliar with the MBTI instrument are invited to reflect on which of the four preferences they use most to see what their own apparent psychological type might be: Sensing-Intuition, Thinking-Feeling, Extraversion-Introversion, Judging-Perceiving. For example, if you believe you prefer Intuition, Thinking, Introversion, and Judging, the MBTI instrument would report that preference combination by using the abbreviation INTJ. As an aid to helping understand these combinations, what follows is a description of each of the sixteen types.¹²⁹ If you are trying to sort out your own type informally, it is probably useful to look at only the one description you believe fits your type, or if you are uncertain on one dichotomy, such as Extraversion-Introversion, consider looking at those two, e.g., INFP or ENFP, and choosing between them to see which profile appears to fit you best. Avoid reading them all, because as indicated earlier, we all do some of these things some of the time and it's easy to get lost in too many profiles. The value of the Indicator is to help decide which things we do most of the time without concentration, just as we write with one hand without making a conscious choice to do so. Once you have made provisional assessment of your own preferences, you can compare yourself to the profiles of others set out below.¹³⁰

ISTJ¹³¹

For ISTJs the dominant quality in their lives is an abiding sense of responsibility for doing what needs to be done in the here-and-now. Their realism, organizing abilities, and command of the facts lead to their completing tasks thoroughly and with great attention to detail. Logical pragmatists at heart, ISTJs make decisions

ISFJ¹³²

For ISFJs the dominant quality in their lives is an abiding respect and sense of personal responsibility for doing what needs to be done in the here-and-now. Actions that are of practical help to others are of particular importance to ISFJs. Their realism, organizing abilities, and command of the facts lead to their thorough attention in

128. The author is indebted to Jerry Macdaid for this idea.

129. See generally CHARLES R. MARTIN, *LOOKING AT TYPE: THE FUNDAMENTALS* (Center for Applications of Psychological Type 1997); the following excerpts are reproduced with permission from CAPT.

130. As mentioned before, the best way for readers to assess their own preferences, however, is to take the Indicator under the guidance of someone qualified to administer it and debrief them individually. For example, many law schools, like the one at which the author teaches, have career services and counseling offices with qualified staff who can provide this service to law students, law faculty, or even occasional law school alumni.

131. MARTIN, *supra* note 129, at 14.

132. *Id.*

based on their experience and with an eye to efficiency in all things. ISTJs are intensely committed to people and to the organizations of which they are a part; they take their work seriously and believe others should do so as well.

ISTP¹³³

For ISTPs the driving force in their lives is to understand how things and phenomena in the real world work so they can make the best and most effective use of them. They are logical and realistic people, and they are natural troubleshooters. When not actively solving a problem, ISTPs are quiet and analytical observers of their environment and they naturally look for the underlying sense to any facts they have gathered. ISTPs often pursue variety and even excitement in their hands-on experiences. Although they do have a spontaneous even playful side, what people often first encounter with them is their detached pragmatism.

ESTP¹³⁵

For ESTPs the dominant quality in their lives is their enthusiastic attention to the outer world of hands-on and real-life experiences. ESTPs are excited by continuous involvement in new activities and in the pursuit of new challenges. They tend to be logical and analytical in their approach to life, and have an acute sense of how objects, events, and people in the world work. ESTPs are typically energetic and adaptable realists who prefer to experience and accept life rather than to judge or organize it.

ESTJ¹³⁷

For ESTJs the driving force in their lives is their need to analyze and bring into logical order the outer world of events, people, and things. ESTJs like to organize anything that comes into their domain, and they will work energetically to complete tasks so they can quickly move on from one to the next. Sensing orients their thinking to current facts and realities, and thus gives their thinking a pragmatic quality. ESTJs take their responsibilities seriously and believe others should do so as well.

completing tasks. ISFJs bring an aura of quiet warmth, caring, and dependability to all that they do, they take their work seriously and believe others should do so as well.

ISFP¹³⁴

For ISFPs the dominant quality in their lives is a deep felt caring for living things, combined with a quietly playful and sometimes adventurous approach to life and all its experiences. ISFPs typically show their caring in very practical ways, since they often prefer action to words. Their warmth and concern are generally not expressed openly and what people often first encounter with ISFPs is their quiet adaptability, realism, and "free spirit" spontaneity.

ESFP¹³⁶

For ESFPs the dominant quality in their lives is their enthusiastic attention to the outer world of hands-on and real-life experiences. ESFPs are excited by continuous involvement in new activities and new relationships. They also have a deep concern for people, and they show their caring in warm and pragmatic gestures of helping. ESFPs are typically energetic and adaptable realists who prefer to experience and accept life rather than to judge or organize it.

ESFJ¹³⁸

For ESFJs the dominant quality in their lives is an active and intense caring about people and a strong desire to bring harmony into their relationships. ESFJs bring an aura of warmth to all that they do, and they naturally move into action to help others, to organize the world around them and to get things done. Sensing orients their thinking to current facts and realities, and thus gives their feeling a hands-on pragmatic quality. ESFJs take their work seriously and believe others should do so as well.

133. *Id.*

134. *Id.*

135. MARTIN, *supra* note 129, at 14.

136. *Id.*

137. *Id.*

138. *Id.*

INFJ¹³⁹

For INFJs the dominant quality in their lives is their attention to the inner world of possibilities, ideas, and symbols. Knowing by way of insight is paramount for them, and they often manifest a deep concern for people and relationships as well. INFJs often have deep interests in creative expression as well as issues of spirituality and human development. While their energy and attention are naturally drawn to the inner world of ideas and insights, what people often first encounter with INFJs is their drive for closure and for the application of their ideas to people's concerns.

INFP¹⁴¹

For INFPs the dominant quality in their lives is a deep-felt caring and idealism about people. They experience this intense caring most often in their relationships with others, but they may also experience it around ideas, projects, or any involvement they see as important. INFPs are often skilled communicators, and they are naturally drawn to ideas that embody a concern for human potential. INFPs live in the inner world of values and ideals, but what people often first encounter with them in the outer world is their adaptability and concern for possibilities.

ENFP¹⁴³

For ENFPs the dominant quality in their lives is their attention to the outer world of possibilities, they are excited by continuous involvement in anything new, whether it be new ideas, new people or new activities. Though ENFPs thrive on what is possible and what is new, they also experience a deep concern for people as well. Thus, they are especially interested in possibilities for people. ENFPs are typically energetic, enthusiastic people who lead spontaneous and adaptable lives.

INTJ¹⁴⁰

For INTJs the dominant force in their lives is their attention to the inner world of possibilities, symbols, abstractions, images, and thoughts. Insight in conjunction with logical analysis is the essence of their approach to the world; they think systematically. Ideas are the substance of life for INTJs and they have a driving need to understand, to know, and to demonstrate competence in their areas of interest. INTJs inherently trust their insights, and with their task-orientation will work intensely to make their visions into realities.

INTP¹⁴²

For INTPs the driving force in their lives is to understand whatever phenomenon is the focus of their attention. They want to make sense of the world as a concept and they often enjoy opportunities to be creative. INTPs are logical, analytical, and detached in their approach to the world; they naturally question and critique ideas and events as they strive for understanding. INTPs usually have little need to control the outer world or bring order to it, and they often appear very flexible and adaptable in their lifestyle.

ENTP¹⁴⁴

For ENTPs the dominant quality in their lives is their attention to the outer world of possibilities, they are excited by continuous involvement in anything new, whether it be new ideas, new people or new activities. They look for patterns and meaning in the world, and they often have a deep need to analyze, to understand, and to know the nature of things. ENTPs are typically energetic, enthusiastic people who lead spontaneous and adaptable lives.

139. MARTIN, *supra* note 129, at 15.

140. *Id.*

141. *Id.*

142. *Id.*

143. MARTIN, *supra* note 129, at 15.

144. *Id.*

ENFJ¹⁴⁵

For ENFJs the dominant quality in their lives is an active and intense caring about people and a strong desire to bring harmony into their relationships. ENFJs are openly expressive and empathic people who bring an aura of warmth to all that they do. Intuition orients their feeling to the new and to the possible, thus they often enjoy working to manifest a humanitarian vision, or helping others develop their potential. ENFJs naturally and conscientiously move into action to care for others, to organize the world around them, and to get things done.

ENTJ¹⁴⁶

For ENTJs the driving force in their lives is their need to analyze and bring into logical order the outer world of events, people, and things. ENTJs are natural leaders who build conceptual models that serve as plans for strategic action. Intuition orients their thinking to the future and gives their thinking an abstract quality. ENTJs will actively pursue and direct others in the pursuit of the goals they have set, and they prefer a world that is structured and organized.

With that background, here are the results in terms of these sixteen types for those people potentially involved in a dispute or its resolution:

	U.S. Adults ¹⁴⁷ N=3009	Richard's Lawyers ¹⁴⁸ N=1202	Kennedy's Judges ¹⁴⁹ N=1302	Mediator Respondents ¹⁵⁰ N=147
ISTJ	12%	18%	23%	5%
ISFJ	14%	4%	3%	2%
INFJ	2%	3%	2%	6%
INTJ	2%	13%	11%	9%
ISTP	5%	4%	5%	1%
ISFP	9%	1%	1%	1%
INFP	4%	4%	3%	8%
INTP	3%	9%	7%	8%
ESTP	4%	3%	2%	1%
ESFP	8%	1%	1%	1%
ENFP	8%	5%	4%	14%
ENTP	3%	10%	5%	12%
ESTJ	9%	10%	17%	6%
ESFJ	12%	3%	2%	2%
ENFJ	3%	3%	3%	7%
ENTJ	2%	9%	10%	16%

Among U.S. adults, ISFJ is the “modal” or most common type at 14%, compared with only 3% of the judges in Judge Kennedy’s sample. The judges’ modal type was ISTJ at 23%, a profile of preferences

145. *Id.*

146. *Id.*

147. MBTI MANUAL, *supra* note 11, at 298.

148. Richard, *supra* note 27, at 1061 tbl. 20. Note that for ENFJ type, the distinction between male and female lawyers was great, constituting only 1% of the male attorneys sampled versus 7% for the female lawyers. *Id.* at 1063 tbl. 22.

149. Kennedy, *supra* note 29, at 8 tbl. 1.

150. See overall data on Mediator Respondents, *infra* Appendix B.

useful for running a trial, where judges have to listen carefully to the evidence in order to make decisions about it quickly. Note also that the ISTJ profile constituted only 5% of the Mediator Respondents. Judge Kennedy's data also revealed that 11% of judges reported INTJ as their preferred types. This result may indicate where appellate judges fit in, since these individuals typically are less concerned with the application of the law than what law has been applied.¹⁵¹ The top three categories of Judge Kennedy's judges: ISTJ (23%), ESTJ (17%), INTJ (11%), mean that more than half are TJ preferences, which is associated with "seeking to bring order to one's external environment, which is accomplished through expressing thoughts and judgments with directness and clarity."¹⁵² Disputants therefore have a better than even chance of having a judge who is eager to come to a conclusion on the basis of logical analysis more than the impact on the individuals involved. Therefore, when the parties "bargain in the shadow of the law,"¹⁵³ or consider their best litigated alternative to

151. "Intuitive judges like change . . ." Kennedy, *supra* note 29, at 4. Consultant Martey Rhine reported a conflict between two museum staff, one an ISTJ who managed careful restoration work and the other an ENTP who scheduled the volunteers who did the work. The manager's main concern was "that the workshop rules . . . needed to be followed to the letter." The scheduler "wanted to provide a fun experience for the volunteers . . . and was always trying to create new ways for people to do things." Mr. Rhine reported that while the employees shared a Thinking function, their interaction had broken down because in extraverting his Intuition, the scheduler was constantly coming up with ideas that the manager would shoot down using her Extraverted Thinking function. Mr. Rhine gave them both their MBTI profiles and asked them to reflect on how their preferences might affect their interaction and their respective concerns. The manager was concerned that flexibility in the volunteer work schedule placed great responsibility on the volunteers when the artwork needed to be swiftly and safely repaired, and the scheduler desired to vary the experiences of the volunteers by moving the volunteers around. Mr. Rhine later recalled a discussion he had with the parties:

[A]s we talked through these concerns, I emphasized reflective listening. One would say something and the other would reflect it, so they knew they were being heard. Each had the experience of walking in the other's shoes, gaining a greater appreciation of how the other person operated and why The final step was to unload the emotional baggage they were carrying around, such as not trusting one another. They got that out on the table and were again able to hear each other, reflect back what they heard, and make commitments to operate differently [Using personality type in a conflict situation] . . . took away the adversarial sting, and provided tremendous insight about differences and strengths. On this foundation, [the museum staff] were able to learn to interact effectively with each other, despite opposite preferences.

Martey Rhine, *A Case of Conflicting Types*, TYPEWORKS, Feb. 1995, at 4-5.

152. MBTI MANUAL, *supra* note 11, at 52.

153. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

be a negotiated agreement, a mediator may want to help them consider how a judge might respond to their dispute.

By contrast, the three largest mediator categories were ENTJ (16% — like Mediator Clark in the hypothetical), ENFP (14%), and ENTP (12%), all Extraverted Intuitives, which is characterized by focusing outward toward the parties and the possibilities their conflict represents.¹⁵⁴ The 63 female Mediator Respondents resembled their male counterparts, except for ENFP where they constituted a full 25% of the female Respondents, five times the frequency of their male counterparts in that one type.¹⁵⁵ ESTJ male Mediator Respondents were in turn five times as frequent as their female counterparts, though the total for both men and women still was only 6% of Mediator Respondents, far lower than the total of almost 14% of men and women who were ENFP.¹⁵⁶ Among the Mediator Respondents, female mediators constituted almost half (46%) the Mediator Respondents, whereas Judge Kennedy's data indicated that female judges

154. "Extraverts with Intuition (ENs) are change agents; they see possibilities as challenges to make something happen." See MBTI MANUAL, *supra* note 11, at 57. For a profile, however, of an INFP lawyer who changed careers to become a mediator, see the profile of attorney Frank Vargas in *Help! I'm in the Wrong Profession*, TYPE REPORTER: 59 (1995) ("When I come back from a mediation or training session, I know people have greater skills than when they met me, and will be more effective in all their relationships, and for an INFP, that's the difference that makes all the difference.")

155. See overall data on Mediator Respondents, *infra* Appendix B.

156. Note that the high percentage of ISTJ judges found by Judge Kennedy and the ENFP mediators among Mediator Respondents is echoed in Professor Peters, *supra* note 9, at 31-32. In connecting type-influenced behaviors with negotiation strategy and style, Peters analyzed Type theory to determine why students either used or failed to use specific negotiation behaviors. He found, for example, that negotiators acting consistently with Introverted, Sensing, Thinking, Judging preferences (ISTJ's) were "naturally inclined" to:

- "seek clear ideas of the issue before acting" (Introversion)
- "proceed by identifying concrete facts and practical approaches" (Sensing)
- "use logical, impersonal arguments" (Thinking)
- "and feel compelled to reach closure quickly and [be] committed to what [the] outcomes should be" (Judging).

He felt that these components fit more neatly into an adversarial strategy.

"In contrast, negotiators acting consistently with Extraverted, Intuitive, Feeling and Perceiving preferences (ENFP's) [were] naturally inclined" to:

- "seek verbal . . . exchanges" (Extraversion)
- "identify numerous possibilities" (Intuition)
- "emphasize interpersonal [relationships]" (Feeling)
- "and enjoy developing alternatives and flexibly [adapt] to new information" (Perceiving).

He felt that these components fit more neatly into a problem-solving strategy. Also, his article contains a number of statements by law students of specific psychological types which are too extensive to reproduce but can offer those seeking more information about law student profiles a good place to begin.

accounted for less than one-tenth his sample, a distributional difference that may now be different as more women enter the judiciary, like they have in other areas of the law.

By contrast, with both Judge Kennedy's judges and the Mediator Respondents, the SPs (ISTP, ISFP, ESTP, and ESFP) constituted only 4% of the Mediator Respondents (and 9% of Judge Kennedy's Judges) but over 25% of the population as a whole. These types, which are associated with a need to be free to act and see results from action are therefore under-represented in dispute resolvers they may encounter.¹⁵⁷

While each of the letters in the MBTI report – E-I, S-N, T-F and P-J – represent different underlying preferences for each individual, and can still be confusing, mediators can take some comfort in the idea that they have 15 chances out of 16 in having at least one preference in common with a disputant. This idea is the reverse of the risk of over-identifying with a disputant discussed above. It is likely a mediator will have at least one preference in common with a disputant on which to build rapport.¹⁵⁸ For example, if a mediator has the ENTJ profile and encounters an ESFP, both are Extraverts and may find some basis for relating on that basis alone.

II. USING TYPOLOGICAL INSIGHTS IN MORE ADVANCED WAYS: UNDERSTANDING PREFERENCES ABOUT PREFERENCES

The discussion so far has treated all these mental preferences as equal, but to move to the next level of utility, it is important to understand how the preferences interrelate. At the same time, mediators who are becoming familiar with psychological type for the first time may find it sufficiently helpful to keep in mind during a mediation their specific preferences and also what preferences they see in the disputants, to the extent they are observable. Judge Kennedy, for example, reports using these basic typological insights in hundreds of mediations he himself has conducted.¹⁵⁹ On the other hand, typological insights can be even more useful if a mediator understands something about how these preferences for Sensing-Intuition, Thinking-Feeling, Introversion-Extraversion, and Judging-Perceiving relate to each other. Some of these preferences are more equal than others. In

157. MBTI MANUAL, *supra* note 11, at 60.

158. Interview with Jerry Macdaid in Raleigh, N.C. at "Bringing Individual Personality Types to Life in Professional Practice: The Myers-Briggs Type Indicator in Law and Divinity Schools and Practices" (June 18-20, 2001).

159. Kennedy, *supra* note 32.

other words, we have preferences about our preferences. What follows therefore is an explanation of this interrelationship in more detail.

A. *Mediating Differing Preferences for the Perceiving or Judging Mental Functions: The Dominant Function*

For some individuals, gaining information is easier than deciding what to do about information, and for others making decisions is easier than gaining information. This preference for one mental function over the other – a preference for a preference – means that one of the two cognitive activities, either perceiving or judging, will be the lead cognitive function.

In typological terms, this preferred mental activity is called the “dominant” cognitive function and the other is referred to as the “auxiliary” function since it supports and balances the dominant. In simple terms, the dominant function is the individual’s strong suit, that perceiving or judging cognitive function which the individual most prefers.¹⁶⁰ In Type theory, the dominant function provides an individual a sense of direction and makes the largest claim on one’s mental energy.¹⁶¹ Just as it is important for mediators sometimes to

160. “The term *dominant function* refers to the function – Sensing, Intuition, Thinking, or Feeling – that is likely to be used most enthusiastically, most often, and with greatest confidence. The dominant function can be viewed as directing, or ‘dominating,’ the personality.” MBTI MANUAL, *supra* note 11, at 22. After the auxiliary function, the third most preferred function is called the “tertiary” and is the opposite of the auxiliary, e.g., if an individual’s auxiliary is Feeling, then the tertiary function would be Thinking. The fourth and least preferred function is the opposite of the dominant function and referred to as the “fourth” or “inferior” function because as the dominant function is in use so much, its reciprocal is the least well developed mental function. For example, if an individual’s dominant function is Sensing, the inferior function would be Intuition. *See id.* at 29-30.

161. *Id.* at 25.

The key to the dynamics of the theory lies in the assumption that the four functions have different areas of specialization and therefore pull in different directions, toward different domains of mental activity. If all functions exerted equal weight, the personality would be at cross-purposes, lacking in consistent direction.

Id. at 25.

People usually prefer to spend more time on activities that use their dominant function. For example, a person whose dominant function is . . . [perceiving] may invest more time gathering information . . . while a person whose dominant is . . . [judging] may use more time on the evaluative and decision making processes

Cochran, *supra* note 6, at 241. For example, an

ENTP is Extravert with Intuition (N) as the dominant, extraverted function and Thinking (T) the auxiliary, introverted function. In theory, therefore, ENTPs trust Intuition . . . most . . . Being oriented to the challenges of new

talk with the principals in a dispute and not just their counsel, mediators who understand their own dominant preference, the dominant preferences of the disputants in a mediation, and how they may all interact, may find themselves better equipped to help resolve the disputes before them.

Again, readers who are unfamiliar with the MBTI instrument are invited to reflect on which of the two primary mental functions – Sensing or Intuition for perceiving, or Thinking or Feeling for judging – is the one upon which they most rely.

Note that the dominant function can, but need not, be the same function that the individual uses in coping with the outer world, the Judging-Perceiving preference discussed earlier. For example, if Mediator Clark is an ENTJ, as are many in the sample of Mediator Respondents, the mental function used in the outer world will be the judging function (J preference), or in this case, Thinking. Thinking will also be Clark's dominant mental function since as an ENTJ, Clark's dominant function is extraverted, making it more readily apparent to an observer. On the other hand, if Clark was an Introvert, or INTJ, what will be displayed is Clark's auxiliary function, in this case Intuition.¹⁶² Thus in one mediator (or any individual), the dominant function might be Extraverted, and in another individual, Introverted.¹⁶³ So, for example, in observing Smith and Jones, Mediator Clark will be more aware of whichever of their cognitive

possibilities (N) in the outer world (E), they may often find themselves committed to . . . many projects When the ENTP decides there are too many activities for the available time. . . the Thinking . . . function is needed The ENTP withdraws into the inner world . . . and makes a logical judgment about which projects to drop

MBTI MANUAL, *supra* note 11, at 31-32.

162. The P-J distinction can help clarify the dominant function between perceiving and judging for an individual. First, if an individual is an Extraverted type, it means that the dominant function is displayed to the outer world and the P or J indicates which of the perceiving or judging functions is so displayed. If the mediator is an Introverted type, then the Auxiliary function will be displayed to the outer world. For example, if Mediator Clark were indicated to be an ENTJ, then his MBTI results would show the following:

E (indicating that the dominant function is Extraverted)
 N (indicating that the perceiving preference is Intuition)
 T (indicating that the judging preference is Thinking)
 J (indicating that the judging function is Extraverted).

Therefore, since both the dominant and judging functions here are Extraverted, and Clark's judging function is Thinking, then Clark's dominant function is Extraverted Thinking. It takes a step or two, but it is possible to decode the dominant function from the four letter MBTI results.

163. For example, "some [extraverted] thinkers seem directive while others [who are introverted] seem content with their inside order and seldom try to influence the outside world." *Type and Conflict: A Natural Pair*, *supra* note 45, at 5-6.

functions is Extraverted rather than Introverted because it is easier to see that function which is outwardly oriented. Because at least the perceiving or judging mental function is Introverted as either the dominant or the auxiliary function, it requires care to avoid focusing only on the function which is being used most easily in the outer world and, therefore, most apparent.¹⁶⁴

In other words, the idea of Introversion and Extraversion can be thought of as ways of helping or “flavoring” all the underlying mental activities, rather than a stand-alone preference by itself.¹⁶⁵ Or to put it in grammatical terms, the perceiving and judging mental functions are the equivalent of nouns, while Extraversion-Introversion and Judging-Perceiving are like adjectives applied to those nouns.¹⁶⁶ Thus while MBTI results report Extraversion and Introversion as a separate characteristic, it is a way of describing the orientation of the dominant mental function, and by implication, the auxiliary function.

In summary, the dominant function is that favorite mental function used in the favorite orientation – Introverted or Extraverted.¹⁶⁷ So, for example, if Mediator Clark were indeed an ENTJ, Clark would be profiled as a dominant Extraverted Thinking type with an Introverted Intuitive auxiliary, or **NiTe**, with boldfaced letters illustrating the dominant function and its orientation.¹⁶⁸ But if Mediator Clark were an INTJ, Clark would be profiled as dominant Introverted Thinking type with an Extraverted Intuitive auxiliary, or **NeTi**, extraverting his intuition but orienting his decision-making internally.

164. “Extraverts show their first, or best, function to the outside world; Introverts show their second-best function to the outside world, saving their best function for the inner world of ideas. It follows, therefore, that Introverts are more likely to be underestimated in casual contacts.” MBTI MANUAL, *supra* note 11, at 29.

165. “[S]een as complementary attitudes or different orientations of energy[:] . . . In the Extraverted attitude, energy and attention flow out, or are drawn out, to the objects and people in the environment In the Introverted attitude, energy is drawn from the environment toward inner experience and reflection.” *Id.* at 25-26.

166. The author is indebted to Paula Spizziri, a member of the Boston Area Chapter, Association for Psychological Type, for this insight.

167. *Id.*

168. Also, as indicated earlier, the tertiary function is opposite to the auxiliary and the inferior function to the dominant. In the example of Mediator Clark, the tertiary function would be Sensing and the inferior, Feeling. It is generally agreed that the inferior function has the opposite orientation to the dominant function, so in the example of Mediator Clark, it would be Introverted Feeling, or Fi. What is less clear is the orientation of the tertiary function. Some view it as also opposite in orientation to the dominant function, so that in Clark it would be Introverted Sensing, or Si. Others see it as balancing the auxiliary as the inferior function balances the dominant, so in Clark it would be Extraverted Sensing, or Se. *See* MBTI MANUAL, *supra* note 11, at 30.

For mediators, the idea of the dominant function helps to clarify that (a) some mental functions will be easier to use, and (b) cognitive functions can be either Introverted or Extraverted in orientation.

What is the significance for mediators of the dominant function? It is important because it will be the mental function upon which the mediator and the disputants will emphasize most of the time, shaping which of the issues may be most important for the mediator or the parties, as well as marking areas of emphasis in the mediation process. It also means that whatever the orientation of the dominant function – Introverted or Extraverted – it will have a complementary mental function to aid it in the opposite orientation, Extraverted or Introverted.

Since individuals – including mediators, the disputants, or their counsel – will tend to rely most on their own dominant function, it will require special attention, effort and concentration for them to use the other functions. In other words, all of these cognitive functions in their different orientations are available to each individual, but they are not as easily accessible or usable when they are not the dominant function.¹⁶⁹ To understand how that may play out in a dispute, the following table provides the distribution of the dominant functions of the likely participants in a mediation whether Extraverted or Introverted in orientation:

169. Note, however, that while the dominant function is usually the lead mental function, under high stress, people may find that their usual preferences do not serve them, and their less favored mental functions get called into play. For example, someone whose dominant function is Extraverted Feeling, meaning that ordinarily decisions are made with interpersonal harmony in mind, may under stress be “in the grip” of the fourth or Inferior Introverted Thinking function, thereby acting out of character or “beside themselves.” See generally NAOMI QUENK, *IN THE GRIP* (Jill L. Anderson-Wilson ed., 1996) (discussing what happens when an individual falls into the “grip” of the less-developed perceiving or judging cognitive function); see also EVE DELUNAS, *SURVIVAL GAMES PEOPLE PLAY* (1992) (discussing type-related dysfunctional behavior and how to respond to it). Finally, while it is beyond the scope of this article, the concept of type is important to understanding stages of adult development which may themselves play out in a mediation. See generally ELEANOR S. CORLETT & NANCY B. MILLNER, *NAVIGATING MIDLIFE – USING TYPOLOGY AS A GUIDE* (1993); and NANCY B. MILLNER, *CREATIVE AGING – DISCOVERING THE UNEXPECTED JOYS OF LATER LIFE THROUGH PERSONALITY TYPE* (1998).

Dominant Functions	U.S. Adults¹⁷⁰	Richard's Lawyers¹⁷¹	Kennedy's Judges¹⁷²	Mediator Respondents¹⁷³
Total dominant Sensing:	37%	26%	29%	9%
Total dominant Intuition:	15%	31%	22%	41%
Total dominant Thinking:	28%	33%	39%	31%
Total dominant Feeling:	22%	11%	9%	18%

Note that the strongest proportion of dominant function for judges is Thinking followed by Sensing. Both of these make sense in that judges have to remember much of what they hear, and apply external rules to it. Note also, however, that while the general population's highest dominant function is Sensing, its lowest proportion is Intuition, which is the highest for Mediator Respondents. This contrast illustrates, as discussed earlier, some of the value many mediators can add to the disputants' perspectives. Finally, note also that the lowest dominant function for judges was Feeling, which is far less frequent than in the population at large. Since Feeling is uniquely personal in nature, it may be hard for many judges with a different preference to understand, much less acknowledge as legitimate, the values and concerns of individuals with those Feeling preferences as their dominant function. The proportion of Mediator Respondents whose dominant function is Feeling, however, is higher than that for judges or lawyers, indicating a greater ability, at least on a statistical basis, to empathize with such disputants.

Whether mediators extravert or introvert their dominant function is also important for mediators to know since it affects how their dominant function is used. Readers who have made a preliminary assessment of their own dominant function are invited to reflect on whether it is used primarily in their external or internal world, which should correspond to their earlier assessment of whether they preferred Introversion or Extraversion. Mediators who recognize their own dominant function and its orientation can then play to those preferences. For example, here might be strengths of mediators with the following dominant functions, with the addition now of the Introverted or Extraverted orientation of the dominant function, rather than just the cognitive function itself.

170. MBTI MANUAL, *supra* note 11, at 298.

171. Richard, *supra* note 27, at 1061 tbl. 20.

172. Kennedy, *supra* note 29, at 7.

173. See overall data on Mediator Respondents, *infra* Appendix B.

If the Mediator's Dominant Function and Orientation is:	Then the Mediator may have an Enhanced Capacity to:
Introverted Sensing (Si) ¹⁷⁴	resonate with the party who ties the present conflict back into personal past experience.
Extraverted Sensing (Se) ¹⁷⁵	observe well how the parties talk as well as hearing what they say, being sensitive to cues such as body language, tonal inflection, etc.
Introverted Intuitive (Ni) ¹⁷⁶	ask what is really going on rather than rely on what the parties report.
Extraverted Intuitive (Ne) ¹⁷⁷	see the possibilities for resolution in the positions the parties articulate.
Extraverted Thinking (Te) ¹⁷⁸	help disputants evaluate possible options for resolution against their litigation alternatives.
Introverted Thinking (Ti) ¹⁷⁹	help disputants prioritize their options and think through the process in which they are engaged.
Extraverted Feeling (Fe) ¹⁸⁰	see the dispute in context of personal relationships.
Introverted Feeling (Fi) ¹⁸¹	see that the values of the parties are met by the resolutions considered.

At the same time, when an alternative perspective is useful, a mediator's awareness of these issues may be aided by co-mediation. According to Judith Miller, "[t]o be most effective, the co-mediation relationship should be synergistic; the strength of the team should be

174. "Sensing in its introverted form gathers, orders, and files away internally information from what is already known and retrieves this data as needed for decision-making." VANSANT, *supra* note 9, at 10.

175. "Sensing in its extraverted form gathers data from immediate experience with the outer environment as a basis for decision making affecting the present." *Id.*

176. "Intuition in its introverted form is experienced as a hunch, insight, inspiration, or premonition — that sense of 'I just know' without immediate awareness of how you know." *Id.*

177. "Intuition in its extraverted form sees interesting possibilities in events and things in the outer world as it forms an overall impression of what could be." *Id.*

178. At the same time, such mediators can be aware of their style in action. "[Extraverts with Thinking] will sometimes push and pursue others' positions with pointed questions to surface the truth, even though this approach is found to be upsetting to others. [They] are often surprised that questions they think are probing are experienced as blunt or attacking." Jerry Macdaid, Psychological Types Workshop for Law and Divinity Faculty, Lawleader, Special Report on the LAWLEAD conference held June 19-21, 2001, in Raleigh, NC by the National Institute to Enhance Leadership and Law Practice.

179. "[Introverts with Thinking see] conflict as . . . a problem to be solved." *Id.*

180. "When conflict arrives, [Extraverts with Feeling] said they wanted to resolve it quickly . . . and bring peace back to the situation by any constructive means." *Id.*

181. "Introverts with Feeling . . . [saw] conflict as an opportunity for growth, a potentially positive experience." *Id.* at 4.

greater than that of the individual mediators added together.”¹⁸² Ms. Miller suggests that to be most successful, co-mediators should use the common language suggested by the MBTI instrument to share their expectations for the mediation session and to explore how to support each other during the process.¹⁸³ At the same time, co-mediation may be easier for Extraverts than for Introverts.¹⁸⁴ If so, it may be even more valuable for an Extraverted mediator to consider teaming with an Introverted one to help provide an alternative and, if possible, complementary way of approaching the parties and the dispute, as discussed earlier in the article.

B. *Using Less Favored Cognitive Functions — Those Other Than the Dominant Function*

It may be sufficient if a mediator can keep the mediator’s own dominant function and orientation in mind, while perhaps getting a sense of the possible dominant functions of the disputants. But it is some of the less favored mental functions which can provide a key to help unlock a particularly difficult mediation. To understand how, it is important to look at how all the various mental functions are available to us but in differing degrees of ease, not just the dominant and auxiliary functions, and in which orientation — internal or external — they are most easily used.

Mediators should be aware that disputants can share the same mental preference, but one may prefer to use it in an Extraverted orientation while the other prefers to use it in an Introverted one. For example, disputants Gray and Blue might both be Sensing types, but if Gray introverts the mental function and Blue extraverts it, Gray may want to talk about the history of the dispute and Blue the current status of it, and still be at odds. Their common basic preference for Sensing may cause them to seem very similar but be very different in what they prefer to discuss. At the same time, for mediators it is important to remember that there is a greater difference between someone who prefers Sensing, whether Introverted or Extraverted, from someone who prefers Intuition, than there is between two Sensing types, one of whom prefers to extravert the Sensing function and one who prefers to introvert it.¹⁸⁵ The subtle

182. Judith Miller, *Co-Mediating: The Essential Partnership*, SOC’Y. OF PROF’LS IN DISP. RESOL. NEWSL., Winter 1991, at 6.

183. *Id.*

184. “Students who indicate they enjoy working with a teammate are invariably Extraverts.” Peters, *supra* note 9, at 85.

185. See MBTI MANUAL, *supra* note 11, at 298.

distinctions may play a role in a dispute or its resolution, as discussed below, but they should not impede mediators from being aware of and even using the clearer distinctions in perspectives that Sensing and Intuition may represent.

With that clarification, each of these two preferences for Perceiving and Judging and their two orientations, a total of eight in all, (e.g., Se, Si, Ne, Ni, Te, Ti, Fe, Fi) are available to each individual (though not in the same degree of ease of use) and potentially relevant for helping the process of mediation. Set out below are the resulting eight functions/orientations recast as the parties to a mediated dispute might verbalize them, referencing a way that a mediator might use a knowledge of a function and its orientation to aid in the mediator’s conduct of the mediation. Each of these four Jungian mental functions of Sensing and Perceiving, Thinking and Feeling, in their two Introversion or Extraversion orientations, may be involved in a mediation as part of the solution to the “people problem.” Not all, however, will be equally important, nor will the parties and the mediator have equal facility with each since by definition, some functions are preferred, and therefore easier to use, than others. Moreover, as indicated earlier, those mental functions which are Introverted may be more difficult for a mediator to understand because they are less apparent. But if a mediator wants to take advantage of these insights at a deeper level than the four dichotomies reported by the MBTI instrument, the following table illustrates how some of these ideas might be useful:¹⁸⁶

Perceiving or Judging Mental Function and its Orientation	Disputants (Smith/Jones)	Mediator (Clark)
<p>Se: Extraverted Sensing: Focusing outward with the senses (principally sight and hearing) to capture accurate current data, e.g., keen observer, noticing nonverbal language and details of conversation. <i>(Witnessing external reality)</i></p>	<p>What is happening right now?</p>	<p>What is this dispute about and who are the disputants?</p>
<p>Si: Introverted Sensing: Focusing inwardly to store facts and details of external reality and internal thoughts and experiences; recalling who said what to whom and when. <i>(Recalling the remembered past)</i></p>	<p>Here’s what happened.</p>	<p>How does this dispute resemble others mediated?</p>

186. The author is indebted to then doctoral candidate Leona Haas for some of the insights on which this chart is based, along with *Eight Functions? I Thought There were Four!*, 18 TYPEWORKS 1997, at 1-3. (Sue Dutton, ed.).

<p>Ne: Extraverted Intuition: Focusing outward to scan for new ideas, interesting patterns, and future possibilities; brainstorming. (<i>Imagining from external reality</i>)</p>	<p>What might happen?</p>	<p>What are possible options for resolution, or no agreement alternatives?</p>
<p>Ni: Introverted Intuition: Focusing inwardly on hunches, unconscious images, connections, and patterns that create vision and insight; what is the meaning beyond the words? (<i>Envisioning without limits</i>)</p>	<p>What's the meaning?</p>	<p>What are the disputants' interests behind their positions?</p>
<p>Te: Extraverted Thinking: Seeking organization, clarity, structure, and order in the external environment; using objective criteria for deciding. (<i>Evaluating matters objectively</i>)</p>	<p>What's the applicable law?</p>	<p>How to structure an orderly outcome in the "shadow of the law"?¹⁸⁷</p>
<p>Ti: Introverted Thinking: Seeking a logical system for understanding internal thoughts; helping find a process for making a decision and principles to guide it. (<i>Organizing ideas subjectively</i>)</p>	<p>How do I understand how mediation works?</p>	<p>How to shape a successful process for this mediation?</p>
<p>Fe: Extraverted Feeling: Seeking interpersonal harmony to meet cultural norms and other people's needs and values; satisfying the people in the process. (<i>Harmonizing with others</i>)</p>	<p>How will this dispute or its resolution affect those people I care about?</p>	<p>How to empathize with the disputants (without judging what should happen to them)?</p>
<p>Fi: Introverted Feeling: Seeking meaning and consistency with inner values; consistency with personal ideals (<i>Valuing inner harmony</i>)</p>	<p>Will I like the mediated outcome when it is done?</p>	<p>Will the resolution be worthwhile for the disputants?</p>

This summary also highlights some issues that a mediator may want to keep in mind to assure that the mediation process touches all the cognitive bases that may be relevant for both the mediators and the disputants, though the order in which they are addressed may vary.¹⁸⁸ How they vary requires an understanding of how the individuals prefer not only to extravert or introvert a mental perceiving or judging function, but also how individuals prefer to rely more on one than another.

187. Mnookin, *supra* note 153, at 950.

188. Note that in the earlier discussion, the issues were framed around the four functions as issues of fact, options, criteria, and people. *See* discussion *supra* note 88. What the discussion of the "dominant" and the "eight" functions adds is to recognize that these more general categories can be expanded to eight with addition of the Extraversion-Introversion orientation. Also, because a dominant function is preferred by each mediator, it is the one of these eight to which the mediator may turn first, requiring some conscious attention to attend to the less favored mental functions/orientations.

Also, keeping in mind these eight differing preferences/orientations may help in resolving the dispute. To understand how, return to the hypothetical business dispute between Jones and Smith. In the hypothetical, Jones focused on resolving the partnership dispute by looking to the applicable law and the partnership agreement, using the Thinking mental function in the External world. Smith, on the other hand, wanted to dwell on the origin of the dispute, evidence of using the Sensing mental function in an Introverted mode. If these were their respective dominant functions and orientations, then Jones would be an Extraverted Thinking type and Smith an Introverted Sensing type, balanced by complementary auxiliary functions. In shorthand, Jones and Clark are **niTe** and Smith is **Sife**. Jones therefore has a dominant preference for evaluating matters objectively and Smith a dominant preference for recalling the remembered past. Thus, Jones may find it challenging to hear Smith dwell on the origins of the dispute, and Smith may find it challenging to hear Jones's desire to resolve the dispute by focusing on the applicable law. To make an analogy, it is as if one of them was left-handed and the other right-handed, making it hard for them to shake hands, if they could be persuaded to shake hands at all. In this case, their dominant functions both involve perceiving in one case and judging in the other, and each in a different orientation, so both Smith and Jones may find it difficult to relate to each other's points of view, making the conflict between them hard to bridge. On the other hand, it may be possible for the mediator to approach them through their non-dominant mental functions as a way into the dispute, especially if some of these functions are extraverted and therefore more accessible for the mediator to observe.

More specifically, while the MBTI results report the dominant and auxiliary functions, each of us has all eight functions/orientations open to us, as indicated in the above chart,¹⁸⁹ though our capacity to use them will not be as advanced as our capacity to use the dominant function. For example, suppose that disputants Jones and Smith have the following personal hierarchy of ease of use of their

189. See discussion accompanying *supra* notes 174-81.

respective functions / orientations,¹⁹⁰ assuming that the functions alternate Introverted and Extraverted orientations:¹⁹¹

<u>Jones</u>	<u>Smith</u>
Te (Extraverted Thinking)	Si (Introverted Sensing)
Ni (Introverted Intuition)	Fe (Extraverted Feeling)
Se (Extraverted Sensing)	Ti (Introverted Thinking)
Fi (Introverted Feeling)	Ne (Extraverted Intuition)
Ti (Introverted Thinking)	Se (Extraverted Sensing)
Ne (Extraverted Intuition)	Fi (Introverted Feeling)
Fe (Extraverted Feeling)	Te (Extraverted Thinking)
Si (Introverted Sensing)	Ni (Introverted Intuition)

Assuming that each of the functions is available to them in each of the orientations, but in differing degrees of ease, note that what is cognitively easy for Jones will be challenging for Smith and vice-versa.

Leona Haas has suggested a strategy to get around the conflicting functions in different orientations. She suggests having the mediator look for a cognitive preference which is challenging for *both* Jones and Smith.¹⁹² For example, in this hypothetical, both Smith and Jones may be almost equally challenged by using their Extraverted Sensing to focus on what is happening at that moment, or witnessing external reality, providing a middle ground for the mediator between Smith's desire to recall the remembered past and Jones's desire to focus on the future. This tactic also has the benefit of involving Extraverted functions which Clark as the mediator may observe. Again, however, if Clark's indicated type is the same as

190. The author is indebted to then doctoral candidate Leona Haas for this idea, which the author has modified and adapted to this purpose. See *Type and Conflict: A Natural Pair*, *supra* note 45, at 5-6.

Note that earlier in the article Smith was hypothesized to be an ISFP and Jones an ENTJ to help illustrate the different preferences. For purposes of illustration of the impact of the dominant function and the use of less preferred mental functions, however, the hypothetical example has been modified at this point to assume that Smith preferred to introvert his sensing function, which would in fact make Smith an ISFJ rather than an ISFP.

191. Recall that that the MBTI Manual views the tertiary and inferior mental functions, like the auxiliary, as opposite in orientation to the dominant. On the other hand, some scholars view the tertiary function as opposite in orientation to the auxiliary, just as the inferior function is opposite in orientation to the dominant. MBTI MANUAL, *supra* note 11, at 30; see also *supra* note 169. The author is not qualified to resolve this question, but for purposes of clarifying differing ways of thinking, the discussion in the article will assume alternating Introversion or Extraversion orientations for the various functions, as discussed by other authors in evaluation type and conflict. See, e.g., TYPEWORKS, *supra* note 45, at 5-6.

192. *Type and Conflict: A Natural Pair*, *supra* note 45, at 5-6.

Jones's (ENTJ in this example), this task will also require some effort on the part of Clark as the mediator since Extraverted Sensing is not his strong suit either.

In other words, the mediator may help the disputants find some cognitive common ground that is not the "home court" of either of them, and where the mental playing field is relatively uneven for each of them, in the hope that it will help the disputants get on the same page to start their discussion.¹⁹³ Also, because the use of the Introverted functions will be more challenging for the mediator to observe, it may be easiest to seek a function which both parties extravert to focus on. Since a mediator like Clark may not be able to assess the situation that easily with parties like Smith and Jones, the mediator may take a cue from what the parties do not seem to want to talk about, using the table set forth above for some ideas of where to proceed, focusing on Extraverted Sensing, Intuition, Feeling, or Judging, as may appear absent from the conversation of the disputants.

Finally, the mediator should again be aware of the importance of maintaining impartiality throughout this process. Hence, it is important for Clark to recognize the difference in empathy with the disputants.¹⁹⁴ To the extent that a mediator like Clark, as a neutral party, unconsciously identifies with one of these preferences of the parties, the mediator may unwittingly favor the individual with a similar preference or disfavor someone with an alternative one.¹⁹⁵ Also, just as the parties may conflict with each other in their cognitive preferences, so could the mediator come into conflict with them, as noted above, unless the mediator is aware of the issue. Thus, if possible, a mediator should be aware of the mediator's own preferences, especially the dominant preference and the one used in relating to the outer world (which may be the same or different, as discussed above), and how they may interact with the preferences of the parties, in order to mediate both more effectively and impartially.

193. The mediator may find it harder to work with the judging functions in this example since they are more imbalanced in how they are preferred, but in other disputants it may be the reverse. The key is to look for a cognitive middle ground where neither disputant has a natural advantage.

194. At the same time, the mediator's empathy for Smith may be able, at least in caucus, to note for Smith that if Smith and Jones cannot agree, that the judge they may go before is likely to prefer Thinking, with the benefits and burdens of that style of decision-making. See Kennedy, *supra* note 29, at 7 (finding in his surveys that 81–84 percent of judges express a thinking preference).

195. "[M]ediators need to be aware of the feelings evoked in them by their clients" Bowling & Hoffman, *supra* note 6, at 11; see also discussion *supra*, note 125.

Note that since individuals, including mediators, the disputants, or their counsel will tend to rely most on their own dominant function, to use the other non-dominant functions will require special attention, effort, and concentration. In other words, all of these cognitive functions in their different orientations are available to each person, but they are not as easily accessible or usable when they are not the dominant function. To understand how that may play out in a dispute, the table provides the distribution of the dominant functions of the likely participants in a mediation, but now with the Extraversion-Introversion orientation included:¹⁹⁶

Dominant Functions (and MBTI Profile)	U.S. Adults	Richard's Lawyers	Kennedy's Judges	Mediator Respondents
Se: Extraverted Sensing (<i>Witnessing external reality</i>) (ESTP, ESFP)	13%	4%	3%	2%
Si: Introverted Sensing (<i>Recalling the remembered past</i>) (ISTJ, ISFJ)	24%	22%	26%	7%
Ne: Extraverted Intuition (<i>Imagining from external reality</i>) (ENTP, ENFP)	11%	15%	9%	26%
Ni: Introverted Intuition (<i>Envisioning without limits</i>) (INFJ, INTJ)	4%	16%	13%	15%
Te: Extraverted Thinking (<i>Evaluating Matters Objectively</i>) (ESTJ, ENTJ)	14%	19%	27%	22%
Ti: Introverted Thinking (<i>Organizing ideas subjectively</i>) (ISTP, INTP)	14%	13%	12%	9%
Fe: Extraverted Feeling (<i>Harmonizing with Others</i>) (ESFJ, ENFJ)	10%	6%	5%	9%
Fi: Introverted Feeling (<i>Valuing Inner Harmony</i>) (ISFP, INFP)	12%	5%	4%	9%

196. While it duplicates the data in the chart shown earlier, *supra* notes 146-159, the following chart depicts the distribution of participants in a dispute with the addition of the dominant function in bold-faced type.

Note that the strongest proportion of dominant functions for judges — 27% — was Extraverted Thinking, followed closely by Introverted Sensing at 26%. Here, Thinking outranked Sensing by a small margin, but both dominant functions accounted for more than half of Judge Kennedy's judges. The implication is that disputants are statistically likely to encounter judges who relate to precedent (Si) and apply external rules (Te) to reach a decision. Note also, however, that while the general population's highest dominant function at 26% is also Introverted Sensing, its lowest proportion is Introverted Intuition at 4%. Extraverted Intuition is the highest at 26% for Mediator Respondents, compared with 9% for Judge Kennedy's judges, again implying that some mediators may be more easily able than some judges to help disputants look beyond the four corners of a dispute they hear. Finally, note also that the lowest dominant function for judges was Introverted Feeling at 4%, which is three times more frequent in the population at 12%.

C. *Implications of Typological Insights for the Choice of Dispute Resolution Options by Attorneys and Clients*

Finally, consider the wider implications of these insights for dispute resolution at large, looking at some combinations of preferences. For example, in a class of law students, Jerry Macdaid divided the students along the following lines and asked whether they preferred adjudication to mediation and why.

The Sensing Thinking (ST) law students preferred adjudication, viewing mediation as not appropriate for principled disputes and also as likely to produce a compromise benefiting an undeserving party. The Intuition Feeling (NF) law students preferred mediation, viewing it as a way to have an outcome beneficial to both sides rather than the win-lose result of adjudication. The Intuition Thinking (NT) students appeared to prefer mediation, seeing trials as often producing outcomes shaped by chance. They also saw mediation as recognizing that in many disputes there is something right and wrong on both sides. The Sensing Feeling (SF) students saw adjudication as adversarial, with a risk of getting nothing at trial, while they saw mediation as providing a way of possibly getting something without running that risk.¹⁹⁷ If this information is representative of the lawyers they will become, it is possible to see why those litigants or attorneys with a Sensing Thinking (ST) preference, which constitutes over

197. Videotape: First Year Professionalism Lecture Series: Intersession Simulation (Professors Leary Davis & Catherine Dunham, at Campbell University Norman

two-fifths of U.S. Adults and over a third of Richard's attorneys¹⁹⁸, might prefer adjudication to mediation.

An even more interesting result occurs if preference combinations are examined for Sensing and Judging, compared with Intuition and Perceiving. Here is the relative distribution of participants in a dispute or its resolution.

	U.S. Adults ¹⁹⁹	Richard's Lawyers ²⁰⁰	Kennedy's Judges ²⁰¹	Mediator Respondents ²⁰²
Sensing Judging SJ	43%	35%	46%	16%
Intuition Perceiving NP	19%	28%	19%	42%

What is interesting about these two comparisons is that the general public and judges here are much more alike and almost the reverse of the mediator respondents. Harvard Law School Professor Frank Sander has spoken of the progress that mediation has made in moving into the mainstream of dispute resolution but also of the distance it still has to go until it reaches some sort of "tipping point" of widespread acceptance.²⁰³ While many disputes are not appropriate for mediation, this difference in preference patterns may provide a clue for why clients still prefer to litigate as much as they do. The SJ (Sensing Judging) combination is indicative of those who like to come to definite conclusions on the facts.²⁰⁴ The NP (Intuition Perceiving)

Adrian Wiggins School of Law, Jan. 4, 2001), team taught by Professors Leary Davis and Catherine Dunham.

198. When the various cognitive functions are combined, this is the outcome for the participants in the dispute resolution process or its resolution:

	U.S. Adults	Richard's Lawyers	Kennedy's Judges	Mediator Respondents
ST (Sensing Thinking)	42%	35%	48%	14%
SF (Sensing Feeling)	30%	9%	7%	6%
NF (Intuition Feeling)	13%	15%	12%	36%
NT (Intuition Thinking)	15%	41%	33%	45%

See MBTI MANUAL, *supra* note 11, at 298; Richard, *supra* note 27, at 1061; Kennedy, *supra* note 29, at 8; overall data on Mediator Respondents, *infra* Appendix B.

199. MBTI Manual, *supra* note 11, at 298.

200. See Richard, *supra* note 27, at 1061 tbl. 20.

201. Kennedy, *supra* note 29, at 8.

202. See overall data on Mediator Respondents, *infra* Appendix B.

203. MALCOLM GLADWELL, *THE TIPPING POINT* (2002); Frank E.A. Sander, The Earl F. Nelson Memorial Lecture on "The Future of ADR" at the University of Missouri-Columbia School of Law (Apr. 16, 1999), in 2000 J. DISP. RESOL. 3, 8.

204. Persons with Sensing and Judging orientations "trust hierarchy and authority . . ." MBTI MANUAL, *supra* note 11, at 59.

combination is indicative of those who prefer to stay open to opportunities perhaps not yet even considered.²⁰⁵ Therefore, the former group is more likely to be comfortable with the process of adjudication, while the latter group, which among U.S. adults is outnumbered two-to-one, is likely to prefer mediation. If this ratio is generally accurate, it indicates that mediation proponents may need to do a better job of making the benefits of mediation clear to the Sensing Judging public in terms which the public can understand – that mediation, like adjudication, can offer a definitive resolution to conflicts (and perhaps even more durable resolutions because they are consensual).

Finally, aside from the conduct of a mediation itself, in which typological insights may be of help to a mediator in expanding the mediator's self-knowledge, it is also important for attorneys to keep in mind their own preferences. Attorneys are the gatekeepers to a choice of dispute resolution options. If their own cognitive preferences lead them to favor one form of dispute resolution over another, they may not advise their clients as well as they might if they were more aware of whether and how their cognitive preferences can influence their recommendations, or how the cognitive preferences of clients can influence their choices of the dispute resolution options considered.²⁰⁶

CONCLUSION

Mediators can benefit from typological insights in a variety of ways. First, if they can understand themselves better, they can perhaps understand others better as well. Second, with typological insight they can look for clues as to how and whether differences in cognitive styles are affecting the disputes. If so, the mediator may use such an awareness to improve their exchanges of information in a way that tends to depersonalize disagreements.

Perhaps they can even use typological insights to help each disputant see the issue through the eyes of the other, so that parties may shift from seeing each other as wrong or combative to recognizing that each is working out of a valid personal perspective that needs to be heard and respected in the process of resolving conflict. Disputants whose preferences differ from each other can also be a

205. "Intuitive Perceiving (NP) types extravert Intuition The process of extraverting Intuition involves scanning the outer world for whatever is new . . . with an aim of changing and reshaping the environment." *Id.* at 50.

206. The author is indebted to Jerry Macdaid for this insight, *supra* note 158.

resource for the mediator if the mediator is able to shape the discussion of some issues to appeal to those differing preferences.

The essence of Jungian typological awareness, which the MBTI instrument helps illustrate, is that variations in behavior are often influenced by the differences in the ways people prefer to perceive information and make decisions. With that awareness, mediators can gain greater clarity about themselves as well as better understand disputants, though self-awareness may be all that a mediator can gain in many situations, and even then it is hard to apply in the midst of a mediation. But beginning to untangle the type-related aspects of a mediated conflict can offer a way to focus on “people problems” as well as substantive problems.

Finally, one of the most important insights from the MBTI instrument and Jungian psychology is that each mediator has “Gifts Differing”²⁰⁷ which are hopefully enhanced by the self-awareness that the Indicator can help provide. While the data reported in this article shows different patterns of preferences among mediators, as well as other participants in the dispute resolution process, it is important to remember that there is no one best “type” for mediation, but that “the personal qualities that will assist us in becoming better mediators will not be the same for each of us, nor will our paths achieving those qualities be the same.”²⁰⁸ Jungian typology is only one of many psychological insights available to mediators.²⁰⁹ Human nature is a vast ocean upon which to sail, and the MBTI instrument is but one chart available to help mediators navigate to solve the “people problem” in disputes which can be influenced by many factors. As this discussion illustrates, insights from the MBTI instrument can be helpful at a variety of levels of understanding, but, like the diverse human nature they reflect, they continually challenge (and humble) a mediator to learn more.²¹⁰ With an awareness of the

207. ISABEL BRIGGS MYERS, WITH PETER B. MYERS, *GIFTS DIFFERING* (1980) (classic text written by one of the two authors of the MBTI instrument. The title comes from *Romans* 12:4-8: “For as we have many members in one body, and all members have not the same office: So we, being many, are one body. . . and every one members one of another. Having then gifts differing . . .”).

208. Bowling & Hoffman, *supra* note 6, at 24.

209. Peters, *supra* note 9.

210. Jungian psychological Type is a deceivingly complex system. On the face of it, one gets the impression that if “I just master the alphabet soup, what each type preference means, I will have it.” Just when it seems that mastery is gained with the peeling away of this first layer, another is revealed in the form of type dynamics (the interplay of different preferences, the functions and the attitudes). One next confronts the myriad expressions of behavior that can come from these psychological preferences, the impact of the nature and quality (i.e., good and bad) of one’s development of one’s preferences.

Indicator's limitations, even with appropriate skepticism about it, its cognitive insights may still help mediators, who may in turn help disputants and their counsel reach better resolutions than they might otherwise have achieved.

Learning and using Type constructively is a journey requiring an openness to understand someone else's world view and the vigilance to use that knowledge wisely.

Macdaid, *supra* note 178.

APPENDIX A

SAMPLE ITEMS FOR THE MYERS-BRIGGS TYPE INDICATOR FORM — G

by **Katharine C. Briggs and Isabel Briggs Myers**

There are no “right” and “wrong” answers to these questions. Your answers will help show you how you like to look at things and how you like to go about deciding things. Knowing your own preferences and learning about other people’s can help you understand where your special strengths are, what kinds of work you might enjoy, and how people with different preferences can relate to each other and be valuable to society.

Part I: Which Answer Comes Closer to Telling How You Usually Feel or Act?

4. Do you prefer to
 - (A) arrange dates, parties, etc., well in advance, or
 - (B) be free to do whatever looks like fun when the time comes?
21. Do you usually
 - (A) value sentiment more than logic, or
 - (B) value logic more than sentiment?

Part II: Which Word in Each Pair Appeals to You More?

Think about what the words mean, not about how they look or sound.

39. (A) systematic
(B) casual
64. (A) quick
(B) careful

Part III: Which Answer Comes Closer to Telling How You Usually Feel or Act?

79. Are you
 - (A) easy to get to know, or
 - (B) hard to get to know?
84. When you start a big project that is due in a week, do you
 - (A) take time to list the separate things to be done and the order of doing them, or
 - (B) plunge in?

From the Myers-Briggs Type Indicator Form — G by Katharine C. Briggs and Isabel Briggs Myers. Copyright 1977 by Peter B. Myers and Katherine D. Myers. All rights reserved. Further reproduction is prohibited without the Publisher’s written consent.

APPENDIX B

Mediator Respondents MBTI Type Table

Legend: % = percent of total choosing this group who falls into this type.

N Total = 147

<u>SENSING types</u>		<u>INTUITIVE types</u>	
with	with	with	with
THINKING	FEELING	FEELING	THINKING
ISTJ N= 8 %= 5.44	ISFJ N= 3 %= 2.04	INFJ N= 9 %= 6.12	INTJ N= 13 %= 8.84
ISTP N= 1 %= 0.68	ISFP N= 2 %= 1.36	INFP N= 12 %= 8.16	INTP N= 12 %= 8.16
ESTP N= 2 %= 1.36	ESFP N= 1 %= 0.68	ENFP N= 20 %= 13.61	ENTP N= 17 %= 11.56
ESTJ N= 9 %= 6.12	ESFJ N= 3 %= 2.04	ENFJ N= 11 %= 7.48	ENTJ N= 24 %= 16.33

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	N	%
E	87	59.18
I	60	40.82
S	29	19.73
N	118	80.27
T	86	58.50
F	61	41.50
J	80	54.42
P	67	45.58
IJ	33	22.45
IP	27	18.37
EP	40	27.21
EJ	47	31.97
ST	20	13.61
SF	9	6.12
NF	52	35.37
NT	66	44.90
SJ	23	15.65
SP	6	4.08
NP	61	41.50
NJ	57	38.73
TJ	54	36.73
TP	32	21.77
FP	35	23.81
FJ	26	17.69
IN	46	31.29
EN	72	48.98
IS	14	9.52
ES	15	10.20

	% Total, N = 147	% Female, N = 63	% Male, N = 79
ISTJ	5	3	5
ISFJ	2	2	3
INFJ	6	6	5
INTJ	9	6	10
ISTP	1	0	1
ISFP	1	3	0
INFP	8	8	9
INTP	9	6	10
ESTP	1	0	1
ESFP	1	0	1
ENFP	14	25	5
ENTP	12	10	13
ESTJ	6	2	10
ESFJ	2	2	3
ENFJ	7	11	5
ENTJ	16	16	18

APPENDIX C

Mediator Respondents who are lawyers

MBTI Type Table

Legend: % = percent of total choosing this group who falls into this type.

N = 87

SENSING types		INTUITIVE types	
with	with	with	with
THINKING	FEELING	FEELING	THINKING
ISTJ N= 4 %= 4.60	ISFJ N= 1 %= 1.15	INFJ N= 7 %= 8.05	INTJ N= 7 %= 8.05
ISTP N= 0 %= 0.0	ISFP N= 0 %= 0.0	INFP N= 8 %= 9.20	INTP N= 7 %= 8.05
ESTP N= 2 %= 2.3	ESFP N= 1 %= 1.15	ENFP N= 7 %= 8.05	ENTP N= 9 %= 10.34
ESTJ N= 7 %= 8.05	ESFJ N= 2 %= 2.3	ENFJ N= 8 %= 9.20	ENTJ N= 17 %= 19.54

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	N	%
E	53	60.92
I	34	39.08
S	17	19.54
N	70	80.46
T	53	60.92
F	34	39.08
J	53	60.92
P	34	39.08
IJ	19	21.84
IP	15	17.24
EP	19	21.84
EJ	34	39.08
ST	13	14.94
SF	4	4.60
NF	30	34.48
NT	40	45.98
SJ	14	16.09
SP	3	3.45
NP	31	35.63
NJ	39	44.83
TJ	35	40.23
TP	18	20.69
FP	16	18.39
FJ	18	20.69
IN	29	33.33
EN	41	47.13
IS	5	5.75
ES	12	13.79