

# On the Role of a Mediator: A Behavioural Law and Economics Perspective

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## Abstract

There are conflicting views about the proper role of a mediator. One view emphasizes party autonomy and argues that the mediator should play a passive role, facilitating communication among the parties. The other view emphasizes a rather active role of a mediator, sometimes proposing a solution to the parties. This article tries to bridge the gap between these two views and argues that the mediator may need to take an active role but in a different way than that which the conventional model of active mediators would suggest. The mediator's role advocated in this article is mainly to correct biases that a party may have in assessing a given situation. It is argued that this role of the mediator is important, since the parties to a dispute are often exposed to various psychological and cognitive biases.

## I. Introduction

What is the proper role of a mediator? Should a mediator mainly function as a conduit, facilitating communication between the disputing parties? Or, is the mediator allowed to assume a more active role, rendering interpretations of a given situation or even suggesting a solution?<sup>1</sup> The former approach is often

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<sup>1</sup> See, for discussions on different approaches to the mediator's role, Leonard Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* pp 7-51.