

# THE PSYCHOLOGY OF MEDIATION

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## I. INTRODUCTION

The purpose of this article is to provide an overview and summary of a broad range of psychological phenomena and examine their application to mediation. Our goal is to provide mediators—as well as the lawyers and disputants who use mediation—with a guide to navigating the powerful psychological and emotional currents that flow through the mediation process.

### *A. Psychology is the Study of People: How They Think, Feel, and Behave*

Mediation involves helping individuals, businesses, and other entities resolve conflict when they have differing needs, perspectives, belief systems, and personality styles.<sup>1</sup> However, even when it is used in conflicts involving corporations, educational institutions, or large family trusts, mediation involves individuals—the people responsible for making the decisions for those organizations.

Questions and decisions in mediation are as much about people as they are about problems. Decisions about how much money a spouse should receive in alimony, whether a boss should pay a settlement to an employee about to be fired due to disagreement over company policy, or how to divide a business' assets and liabili-

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<sup>1</sup> For a general introduction to mediation, see CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (3d ed. 2003).

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ties among its three partners after they have had a falling out are as much about the people involved as any of the objective problems.

Conversations during mediation often focus on dollar amounts or settlement terms and, therefore, appear reasoned and objective. But successful mediation requires knowledge about, and an understanding of, psychodynamics.<sup>2</sup>

Mediation would be a relatively simple process if the parties could be relied on to act in their own best interests, or in the interest of those they love, such as their children. Rational and thoughtful conversations would then yield rational and thoughtful agreements, in which the parties' interests would be maximized.<sup>3</sup>

If we could rely on this rationalist model, it would suffice to use solely an "interest-based" model of mediation, considered by many negotiation professionals the most useful strategy to shift the focus of conflict from personal hostilities to "the problem."<sup>4</sup> But this strategy assumes that individuals will not be distracted from the pursuit of rationality by emotion, expectations, bias, distorted thinking, or deeply held beliefs.

Every time we encounter the view that the "interest-based model"<sup>5</sup> alone can succeed, we are reminded of a particularly challenging divorce mediation in which all issues were hotly contested—income, assets, children, and more. After several mediation sessions, the husband and wife were getting nowhere. In order to encourage the parties to focus on the problem (the issues of self-interest) and not on the people, the mediator (Richard Wolman) interrupted one notably vitriolic exchange and stated, as authoritatively as possible, "Folks, let's try to focus on the problem here, not the people. It will take us further and be more constructive." The husband stopped Richard in mid-sentence and said with complete conviction, "Buddy, you don't get it. She *is* the problem!"

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<sup>2</sup> The dictionary defines psychodynamics as the "systematized study and theory of the psychological forces that underlie human behavior, emphasizing the interplay between unconscious and conscious motivation and the functional significance of emotion." See *Medical Dictionary*, WEBMD, available at <http://dictionary.webmd.com/terms/psychodynamics> (last visited Feb 10, 2013).

<sup>3</sup> For a useful discussion of the theory and practice of maximizing the parties' interests, and in particular the tension between creating value and claiming value, see ROBERT MNOOKIN, SCOTT PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2004).

<sup>4</sup> The pioneering text espousing this view of interest-based bargaining, first published in 1981, is ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

<sup>5</sup> See *id.* at 40–55 (recommending a focus on interests instead of positions).

Statements like “she is the problem” are commonplace in the world of mediation. The power of emotion and the explosive expression of long-standing frustrations at such moments can often take mediators by surprise. Unless a mediator is sensitive to the nuances of clients’ personalities and aware of his or her own emotional reactions to “difficult” clients, the mediation will likely reach an impasse or even collapse altogether.

Some mediators are comfortable with this level of emotional energy, while others are not. There is no escape, however, from the fact that successful mediation requires sensitivity to the psychological dynamics that underlie how people think, feel, and, ultimately, behave and make decisions.

### B. *How People Think*

#### 1. Information Processing

Cognitive neuroscience explores the areas and chemicals in the brain oriented to decision-making. Jonah Lehrer for example, in his book *How We Decide*,<sup>6</sup> highlights the neurotransmitter dopamine, which is associated with pleasure centers in the brain, and argues that decisions are often based on what provides pleasure to the individual. This sounds like a simple hypothesis until we enter the arena of mediation and the interaction of two diametrically opposed personalities and belief systems. For example, what if one of the parties derives pleasure or satisfaction from inflicting the pain of retribution for perceived injustices? Dopamine is a morally neutral chemical. Neuroscience can take us only to the edges of the functioning brain, leaving the symbolic and value-laden activity of the mind to be unraveled by the mediator.

What cognitive neuroscience also tells us is that the way in which we process information is remarkable in its speed and precision. The human brain processes more than 10,000 bits of information per second – a bit being defined as the amount of information necessary to tilt a decision one way or the other in a fifty-fifty situation.<sup>7</sup> However, the brain’s capacity to process information tells only a small part of the story. After all, Google can tell us the average rainfall in Patagonia in .47 seconds,<sup>8</sup> but it cannot tell us

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<sup>6</sup> JONAH LEHRER, *HOW WE DECIDE* 15 (2009).

<sup>7</sup> See WILLIAM LEWIS, *WHY PEOPLE CHANGE* 34 (1972).

<sup>8</sup> GOOGLE, [www.google.com](http://www.google.com) (search “average rainfall in Patagonia”) (last visited Dec. 17, 2012).

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what that means, or how to decide anything on the basis of the information.

The degree to which *unconscious* processes drive and shape our perception, information processing, and decisions is the crucial point here, and these processes have been documented in studies by Ivan Pavlov,<sup>9</sup> Joseph Kepecs, and Richard Wolman,<sup>10</sup> and in Mahzarin Benaji's laboratory on prejudice at Harvard,<sup>11</sup> and are made particularly accessible in *Blink* by Malcolm Gladwell.<sup>12</sup> This research has taught us how, when faced with new situations, our minds are on ready alert and instantaneously pick up cues and clues from our environment.<sup>13</sup>

A recent study of the phenomenon of unconscious "priming"<sup>14</sup> asked participants to rate their political beliefs and attitudes pertaining to the 2008 elections, using a standard political attitude-rating scale for measurement.<sup>15</sup> For one group, the printed scale form had a small American flag on the top left corner, while nothing of the sort was present for the other group. The results showed that the group that was primed by the presence of the flag demonstrated a shift in their political preferences toward the Republican point of view that lasted up to eight months.<sup>16</sup> This research demonstrates that humans import information at a high speed and unwittingly react to stimulation from many sources. After the data reaches our brains, circuits etched by our experience and predisposition shape what happens to that information, how it is interpreted and put into action.

"Priming" occurs all the time in mediation—sometimes knowingly, sometimes unconsciously.<sup>17</sup> One group of mediators decided that naming their conference rooms in honor of famous peacemakers—e.g., Mandela, Carter, Gandhi—would foster productive ne-

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<sup>9</sup> I.P. PAVLOV, *CONDITIONED REFLEXES: THE PSYCHOLOGY OF INFLUENCE* (1927).

<sup>10</sup> Joseph Kepecs & Richard Wolman, *Preconscious Perception of the Transference*, 41 *PSYCHOANALYTIC QUARTERLY* 172 (1972).

<sup>11</sup> Sally Lehrman, *The Implicit Prejudice*, *SCIENTIFIC AMERICAN*, May 22, 2006.

<sup>12</sup> MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

<sup>13</sup> *Id.* at 44.

<sup>14</sup> For a useful discussion of priming effects, see generally Jane Juliano, *Primed for Resolution? What mediators can learn from the new research on priming and the unconscious activation of mental processes*, *ACRESOLUTION* 20 (Summer 2011).

<sup>15</sup> Travis J. Carter, Melissa J. Ferguson & Ran R. Hassin, *A Single Exposure to the American Flag Shifts Support Toward Republicanism up to 8 Months Later*, *PSYCHOLOGICAL SCIENCE* (July 8, 2011), available at <http://labconscious.huji.ac.il/wp-content/uploads/2011/03/Carter-et-al-Long-term-effects-of-American-flag.pdf>.

<sup>16</sup> *Id.* at 14.

<sup>17</sup> Juliano, *supra* note 14, at 20.

gotiations.<sup>18</sup> Perhaps the most powerful form of priming in mediation comes from the description of mediation by the mediator at the very beginning of the process. It has been customary for mediators, in an opening statement, to describe the ground rules and principles of mediation.<sup>19</sup> Priming studies suggest that mediators should consider adding to this discussion an emphasis on the value of being “flexible” and “open-minded,” the goal of reaching “a fair and reasonable resolution,” and the need for “creativity” and “thinking outside the box.”

While some might balk at the potential for manipulation in making these suggestions (perhaps out of concern that it seems too much like subliminal advertising),<sup>20</sup> alternatively one might note that the mediator is simply being transparent about what he or she will be promoting as an advocate for settlement if it becomes clear in the mediation that a settlement would serve the parties’ best interests.

## 2. “Small Things Tell Big Stories.”

Our experience as mediators has shown that in high-stakes mediations, such as the potential loss of child custody or the dissolution of a family business, heightened anxiety and fear usually create a climate of hyper-attention and increased emotional reactivity. As a result, initial interactions between the mediator and clients are both fraught with potential minefields and filled with the possibility of creating opportunities for resolving long-standing disputes. This state of heightened awareness can disrupt communication (for example, even an eye-roll by one of the parties at a sensitive moment can threaten the entire process) or allow parties to see events from a new perspective, particularly in response to insightful interventions by the mediator. At these moments of intense sensitivity, the mediator can suggest alternative interpretations of deep-seated points of view by “reframing” a communication.<sup>21</sup>

“Reframing” is critical to the process of mediation.<sup>22</sup> When, for example, a husband continually perceives his wife’s critique of his parenting style as an emasculating attempt to discredit him, the

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<sup>18</sup> Personal communication with Eric Green, Co-Founder, JAMS/Endispute (on file with authors).

<sup>19</sup> See JENNIFER E. BEER, CAROLINE C. PACKARD & EILEEN STIEF, *THE MEDIATOR’S HANDBOOK* 31-35 (rev. 4th ed. 2012).

<sup>20</sup> See Juliano, *supra* note 14, at 21.

<sup>21</sup> For a useful discussion of reframing, see BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE* (2000).

<sup>22</sup> *Id.* at 139.

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wife, in turn, may argue that she was actually trying to be helpful and did not have a mean-spirited motivation. The mediator's reframing of the wife's comments to her husband may help the husband see a different meaning in them. It is as if a military ship captain is watching her radar screen and sees a series of blips coming across at rapid speed. Before she decides whether to fire a surface-to-air missile at the object, she must quickly determine whether she is seeing a missile coming in to destroy her ship or a returning fighter jet from her own forces.<sup>23</sup> It is the mediator's job to step into the rapid-fire, information-processing moment, make his or her best evaluation as to the meaning of the communication or behavior and, if there is a mismatch, correct the interpretation by "reframing" the event for the parties. As the famous (and fictionalized) Chinese detective, Charlie Chan, used to tell his eldest son, "small things tell big stories."<sup>24</sup> The mediator must be alert to these small clues, which may contain the essence of a conflict and can be articulated by either "reframing" or helping parties clearly state their interests and needs rather than be continually influenced by distorted perceptions of the other party.

[In the discussion below on cognitive biases,<sup>25</sup> we discuss with more specificity some of these distortions and methods for counter-acting them.]

### 3. Verbal Overshadowing and the "Third Story"

As noted below in the section discussing selective memory (Section II, Part C, §11), we all have an incomplete recall of events. Even worse, however, we have a tendency to 'mis-remember' events as a result of retelling them.

Our perceptions of events are encoded in our minds as raw data, but when we are asked to recall that data and put it into words, distortions can result even when we are trying to be accurate.<sup>26</sup> To use the analogy of a computer, it is as if the raw data on the hard drive in our brain gets over-written by organizing that data into the story of what happened (akin to a word-processing document) and then "saving" that story. Each time we tell the

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<sup>23</sup> LEHRER, *supra* note 6, at 28-34.

<sup>24</sup> CHARLIE CHAN IN LONDON (Fox Film Corp. 1934).

<sup>25</sup> See *infra* at Section II, Part C.

<sup>26</sup> Henry L. Roediger III, J. Derek Jacoby & Kathleen B. McDermott, *Misinformation Effects in Recall: Creating False Memories through Repeated Retrieval*, 35 J. OF MEMORY & LANGUAGE 300 (1996); see also Donna J. Bridge & Ken A. Paller, *Neural Correlates of Reactivation and Retrieval-Induced Distortion*, 32 J. OF NEUROSCIENCE 12144 (2012) (retrieval of data from memory introduces distortion and the retrieval process consolidates the distortion).

story, slight changes may occur and become further engraved in our mind. Distortions can occur because of a misinterpretation of events (*e.g.*, fundamental attribution error, discussed below)<sup>27</sup> or selective recall (*e.g.*, because of confirmation bias, also discussed below).<sup>28</sup> Eventually, as a result of repeatedly over-writing the data through retelling, the original data is no longer available to us.<sup>29</sup>

Psychologists call this phenomenon “verbal overshadowing.”<sup>30</sup> The psychologist credited with discovering verbal overshadowing, Professor Jonathan Schooler, defines it as “situations in which one tries to describe difficult-to-describe perceptions, thoughts or feelings, and as a result of that, loses access to the very information they’re trying to describe.”<sup>31</sup>

In mediation, the parties come to the table with deeply engraved memories of what happened, encoded in “documents” we call stories. These stories do not, of course, contain every detail of what the teller experienced—stories are *selective* accounts in which the teller transmits the meaningful data and omits the rest. Meaning, however, is subjective—shaped by values, opinions, beliefs, and loyalties that may vary from one person to the next.<sup>32</sup>

In our experience, the most common theme related by the parties in mediation is an account of having been wronged. The plaintiff tells of having been victimized by a personal injury, breach of contract, slander, or betrayal. The defendant tells a story of being wrongly accused or having to fend off an exorbitant demand. Each party insists that his or her own recollection and interpretation of the data are correct. The parties often feel that the other side’s story is a lie. Mediators can sometimes blunt what each side receives as an assault on his integrity by reframing intense disagreement about what happened as simply differing perceptions, recollections, or interpretations—all entirely normal—rather than the product of mendacity.

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<sup>27</sup> See *infra* at Section II, Part C, §1.

<sup>28</sup> See *infra* at Section II, Part C, §3.

<sup>29</sup> Roediger, *supra* note 26, at 300.

<sup>30</sup> Chad S. Dodson, Marcia K. Johnson & Jonathan W. Schooler, *The Verbal Overshadowing Effect: Why Descriptions Impair Face Recognition*, 25 MEMORY & COGNITION 129 (1997).

<sup>31</sup> Carey Goldberg, *Brain Has a Way of Distorting Memories*, BOSTON GLOBE, May 13, 2003, at C3.

<sup>32</sup> For an excellent discussion of the selective process of deriving stories from experience, see KENNETH CLOKE & JOAN GOLDSMITH, *RESOLVING PERSONAL AND ORGANIZATIONAL CONFLICT* 1-10 (2000).

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However, the force that mediators are up against is sometimes immense. In a recent lecture, author Isabel Allende asked, “What is truer than truth?” The answer, she says, is “the story.”<sup>33</sup> The reason that our stories seem so true is that they connect points of raw data in a way that has particular meaning for us.<sup>34</sup> Stories represent our effort to make sense of the world, and we often infuse them with moral significance.<sup>35</sup> One side is blameworthy and the other is not.

We are all psychologically energized by stories of right and wrong. Psychotherapist Michael Elkin asks, “What is our deepest need?” and provides the following answer: “innocence.”<sup>36</sup> By that he means the desire to feel that we are right, we are blameless, we are good.

If that hypothesis is correct, the stories that each party tells us in mediation hold enormous emotional power—each person is seeking to claim the moral high ground and thereby rob the other of what they most want: a feeling of blamelessness. For example, the terminated minority employee believes that the boss was bigoted, and no amount of data or “evidence” will dislodge that view, because the slights and indignities inflicted by the boss may be consistent with a pattern of discrimination that the employee has experienced throughout his life. Meanwhile, the boss believes that her intentions were pure, that her hiring and firing statistics are demonstrably race-neutral, and that she *recruited* the minority employee—why would she do that if she were a bigot?

Mediators cannot fully reconcile the stories they are told, but they need to understand them. Ken Cloke suggests that each party in mediation brings three stories to the table, but tells only one of them.<sup>37</sup> The story that the parties tell is familiar to us—a story of being wronged. They seek to recruit us to this version of the truth and make us, as mediators, their rescuers.<sup>38</sup>

The second story (never told because it induces a feeling of shame and might diminish the mediator’s motivation to “rescue”

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<sup>33</sup> *Isabelle Allende: Tales of Passion*, TED TALKS (March 2007), [http://www.ted.com/talks/isabel\\_allende\\_tells\\_tales\\_of\\_passion.html](http://www.ted.com/talks/isabel_allende_tells_tales_of_passion.html).

<sup>34</sup> For an excellent discussion of the reasons why stories are so powerful and so infused with moral content, see Peter Guber, *The Inside Story*, 2011 *PSYCHOLOGY TODAY* 79 (March 15, 2011).

<sup>35</sup> CLOKE, *supra* note 32.

<sup>36</sup> Michael Elkin, Presentation at Annual Conference of the Center for Self-Leadership (October 2011).

<sup>37</sup> See CLOKE, *supra* note 32, at 7.

<sup>38</sup> *Id.* at 27.



the teller) is the one in which the individuals themselves are to blame for their own suffering—perhaps because they were foolish, careless, too trusting, or contributory to the conflict in some other way.<sup>39</sup>

The third story, says Cloke, is the “*core story* that explains why the storyteller found it necessary to invent the other two stories.”<sup>40</sup> One can find in the third story the personal history that led the teller to have parts of his or her psyche feel unworthy and ashamed, as well as parts that rise up in anger when the teller is attacked in vulnerable places.<sup>41</sup> In our experience, the flipside of anger is fear, and the mediator’s best tool for a party’s anger is curiosity about the fear rather than resistance to the anger.<sup>42</sup>

Part of our job as mediators is to discern the third story. That story, if it can be understood, may give the mediator the tools she or he needs to help the tellers make peace with those contradictory parts of themselves and walk the path between claimed innocence and secret shame concerning resolution.

#### 4. The Power of Belief and Expectations

Cognition and emotion are the two pillars of human consciousness and the two aspects of human interaction that affect the way people behave. Taken together, cognition and emotion create beliefs.

##### i. Core Beliefs

Core beliefs are personal pieces of faith that lie deep at the core of human experience and resist change.<sup>43</sup> It is a statement of core belief when a man says about his business partner, “I can no longer trust him. He has lied to me and tried to take more of the business than was his share.” It is a core belief when a mother says, “He thinks he’s a good dad, but he constantly uses the children to hurt and manipulate me. He has been poisoning them against me ever since our divorce.” These, and countless similar beliefs, are the currency of communication in the mediator’s office.

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<sup>39</sup> *Id.* at 7.

<sup>40</sup> *Id.* (emphasis in original).

<sup>41</sup> See David Hoffman, *Mediation, Multiple Minds, and the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297 (2011).

<sup>42</sup> *Id.* at 300, 316, 318, 322.

<sup>43</sup> For a discussion of core beliefs, see generally LAWRENCE P. RISO, COGNITIVE SCHEMAS AND CORE BELIEFS IN PSYCHOLOGICAL PROBLEMS: A SCIENTIST-PRACTITIONER GUIDE (2007).

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The mediator must be aware of the power of beliefs and their imperviousness to a simple reframing.

The following are three strategies that mediators can employ when dealing with such refractory beliefs (i.e., beliefs that stubbornly resist change).

First, reality testing can be used to “complexify”<sup>44</sup> each party’s understanding of the past.<sup>45</sup> For example, using the example of the mother described above, a report from a child specialist or guardian *ad litem* might help her see that the children have complex, balanced, and reasonably accurate views of both parents. Or, using the example of the business partner, an accountant or business appraiser might be able to provide a balanced view of each party’s position.

Second, structured face-to-face communication about intentions and perspectives can sometimes soften hardened beliefs. A common technique for doing this is to ask each party to describe his or her perspective. Then the mediator asks the other party to describe, without judgment, what she or he just heard. The mediator then asks the first party if the other party “got it”—i.e., accurately described his/her perspective. The process is repeated until the other party receives acknowledgement that she or he got it. Then the process is reversed. In some cases, the parties are in such fragile shape that they cannot engage in this exercise—articulating the other person’s perspective is too threatening. In those cases, it may help for the parties to hear the mediator explain, in a non-judgmental manner, each party’s perspectives. The mere act of hearing the mediator explain, with compassion and understanding, each party’s experience, fears, intentions, and beliefs can sometimes help the parties open their minds and hearts to another perspective.

Third, the mediator can help the parties develop options that address the parties’ core beliefs—even if those beliefs are antagonistic. For example, for the business partner who believes that he cannot trust his partner, one of the terms of an agreement could be the use of an accountant or other professional to provide oversight of the business operations.

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<sup>44</sup> The term “complexify” comes from the discussion of “identity” in DOUGLAS STONE, SHEILA HEEN & BRUCE PATTON, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* ch. 6 (2d ed. 2010).

<sup>45</sup> For a discussion of reality testing in psychotherapy and mediation, see Joan B. Kelly, *Mediation and Psychotherapy: Distinguishing the Differences*, 1983 *CONFLICT RESOL. Q.* 33 (1983).

## ii. Expectations of Clients and Attorneys

With beliefs come expectations. The expectation that mediation is useful – or not – can shape the entire process. In one mediation that involved the authors—a dispute within a large family over the disposition of assets held in a family trust—one of the parties (a litigator by trade) announced at the first moment of the first meeting, “Everyone knows that mediation fails 75% of the time, so I don’t know what we are even doing here.” Because this party expressed this view with all the other parties, we needed to address his expectations head-on and in a manner that did not trivialize them. We simply, and non-defensively, described data showing that the vast majority of mediations, in fact, do result in settlements. In the ensuing discussion, it became clear that this party was pessimistic about the odds of *this* mediation being successful because of his belief that he could not trust the other members of his family with whom he was trying to negotiate. With the issue of trust in the open, the expectation about mediation was reframed, and we were able to move to an ultimately successful resolution of the dispute.

## iii. Expectations of Mediators

The parties in mediation are not the only ones who have beliefs and expectations. Mediators’ beliefs and expectations can be general (such as the notion that litigation creates more proverbial bloodshed than it could ever be worth) or more specific (such as the view that they need to settle the dispute that they are mediating in order to impress the parties and counsel). It is, of course, naïve to think that mediators can free themselves of all expectations before embarking on a new mediation. The education, prestige, or pedigree of the clients, the cultural background of one of the parties, or the mediator’s repugnance at the contemptuous of one party’s treatment of the other are all fertile grounds for creating expectations on the part of the mediator. The point is not so much to rid oneself of all expectations (an impossible task) but to be aware of them and manage their impact on the process.

One of the powerful tools that mediators can use in counteracting their own beliefs and expectations is co-mediation (discussed more fully below),<sup>46</sup> which provides an opportunity for a mediator to share and explore his or her reactions to clients with a colleague who witnesses the same events, but with a potentially dif-

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<sup>46</sup> See *infra* at Section II, Part A, §1.

ferent interpretation. The authors have frequently encountered situations as co-mediators in which one of us might say, for example, “It’s troublesome the way that the son interacts with his mother,” and the other might reply, “But did you see the way she manipulates and infantilizes him?”

But whether co-mediating or not, many mediators harbor a fundamental expectation that people will act in their own best interests. This expectation may derive from the central role that “interest-based” bargaining plays in the modern understanding of negotiation.<sup>47</sup> Yet the behavior of the parties in mediation—particularly in high-conflict cases—often contradicts this expectation. Personal feelings of rage toward a disloyal spouse override parental judgment, and the parents expose their children to vitriolic exchanges that harm those they want to protect. An angry business partner will spend hundreds of thousands of dollars to prove a point—costing the very company she or he is trying to save the profit margin that could rescue the business from bankruptcy. When plunged into this cauldron of emotion, the mediator needs to find ways to bring calm to troubled waters, replacing insanity and self-destruction with rational decision-making. By offering new points of view, the mediator is sometimes even able to begin the process of healing relationships torn apart by the conscious and latent psychological forces of the parties. To do so, however, mediators may need to abandon, or at least complexify, their expectation that the parties will always act in their own best interest.

## B. *How People Feel*

### 1. The Emotional Climate of Mediation

The counterpart to the exquisite capacity of the human brain to process information that is both externally and internally derived is the emotional and subjective experience that also guides perception and the interpretation of events. Humans are not computers and automatons; we think, process information, and make decisions. But the feelings that accompany these cognitive activities are what colors life and shapes our understanding. The well-known neurologist Antonio Damasio and renowned educator Mary Yang, aptly make this point:

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<sup>47</sup> See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING WITHOUT GIVING IN* (Rev. ed. 2011).

The neurobiological evidence suggests that the aspects of cognition that we recruit most heavily in schools, namely learning, attention, memory, decision making, and social functioning, are both profoundly affected by and subsumed within the processes of emotion; we call these aspects emotional thought.<sup>48</sup>

As demonstrated by the research described by Lehrer, human emotion fuels decision-making.<sup>49</sup> In one of the early findings on this subject, doctors were treating a patient whose capacity for experiencing emotion was destroyed by a brain tumor.<sup>50</sup> One of the surprising effects of this unusual condition was that the patient had difficulty making the simplest decisions, while his intellectual functioning remained fully intact. For example, he continued to score at the same high level on IQ tests, but he “endlessly deliberated over irrelevant details, like whether to use a blue or black pen, what radio station to listen to, and where to park his car.”<sup>51</sup> The doctors concluded that “emotions are a crucial part of the decision-making process. . . . A brain that can’t feel can’t make up its mind.”<sup>52</sup> The lesson here for mediators is that suppressing emotion is not only impossible, but also counterproductive.

## 2. Expression of Affect Generated in the Crucible of Mediation

The emotional power of mediation is the force that can be harnessed to help parties solve their disputes. Although “reframing” provides a cognitive structure for new perceptions, it is the emotional quality of the “reframing” that makes it “stick.” The mediator must be prepared for the emotional heat that is generated by the combination of parties’ often-incompatible personalities. The individuals involved in a mediation drama often come with a history of relationship, respect, and hope having been transformed into mistrust, rejection, and betrayal. This is an extraordinarily complex set of emotions that the mediator must untangle to understand—and help the parties understand—not only what their true points of contention are, but also how their emotional attachment to rigid positions and beliefs obstruct achievement of their goals.

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<sup>48</sup> Mary Helen Immordino-Yang & Antonio Damasio, *We Feel Therefore We Learn: The Relevance of Affective and Social Neuroscience to Education*, 1 MIND, BRAIN AND EDUCATION 3 (2007).

<sup>49</sup> LEHRER, *supra* note 6, at 15.

<sup>50</sup> Hoffman, *supra* note 41, at 303.

<sup>51</sup> LEHRER, *supra* note 6, at 14.

<sup>52</sup> *Id.* at 15.

### 3. Concerns Underlying Emotions: Affiliation, Appreciation, Autonomy, Role, and Status

In their book *Beyond Reason: Using Emotions as You Negotiate*, psychologist Daniel Shapiro teamed with *Getting to Yes* author Roger Fisher to develop a taxonomy of concerns that, from their perspective, underlies many of the emotions that mediators encounter.<sup>53</sup> They contend that our core concerns are affiliation, appreciation, autonomy, role, and status.<sup>54</sup> Some of these concerns are in tension with each other—for example, affiliation and autonomy. However, this delineation of concerns reflects the complexity of human emotion, as we do sometimes want contradictory things. The method that Fisher and Shapiro recommend for dealing with emotions in negotiation is to explore the underlying concern and try to address it through interest-based bargaining.<sup>55</sup> Imagine an employment mediation session, for example, in which a senior manager is passed over and a major promotion is given instead to a junior member of the management team. The ensuing mediation might focus on whether the company could take steps to ensure that company employees are aware of the more senior manager's role, status, and contributions to the company, as well as the company's appreciation for those contributions. The stance that Fisher and Shapiro bring to the subject of emotions works particularly well in mediations in which the parties will have an ongoing relationship.

#### D. *How People Behave*

One of the familiar axioms of law practice is that, when working with clients, criminal defense lawyers get to see bad people at their best, and family law attorneys get to see good people at their worst.<sup>56</sup> The same might be said of mediators, who sometimes see people at their best and their worst in the same mediation. In fact, the corollary axiom for mediators might be that if we spend enough

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<sup>53</sup> See generally ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2006).

<sup>54</sup> *Id.* at 15.

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., Greg Tasker, *Talking the Walk*, *SUPER LAWYERS* (Sept. 2009), <http://www.superlawyers.com/michigan/article/Talking-the-Walk/80fab968-fdd8-4b1e-8eaa-072e4a1779a7.html> ("The difference between a criminal defense attorney and a divorce attorney: We represent good people on their worst behavior and they represent bad people on their best behavior.").

time with people in a mediation session, we get to see them reproduce the behaviors—for better or worse, but usually the latter—that propelled them into their dispute in the first place. An additional corollary is that clients tend to pick lawyers who match their conflict style—i.e., highly confrontational parties often pick highly confrontational lawyers—rather than lawyers whose style differs from, and therefore complements, their own.

Thus, a brief primer can hardly do justice to the full variety of behaviors, ranging from angry outbursts to moody withdrawal, that mediators see in the parties and counsel. In the sections that follow, however, we describe a few of the more common patterns that we have observed.

### 1. Venting and Anger Management<sup>57</sup>

In some cases, the simple release of emotion—letting the steam out of the kettle, so to speak—is an essential step toward settlement. Mediators are trained to manage the venting process, so that it does not derail the mediation. For example, mediators sometimes use separate “caucus” sessions to create a safe place for venting, thereby avoiding a situation in which the other party’s reactions to the venting escalate the conflict. For some parties, it is enough to do their venting in a caucus session with only the mediator present. In other cases, venting will only be productive if it is done in a joint session with all parties present.

One of the drawbacks of the venting process, however, is that the effect is not entirely palliative. Psychologists tell us that venting can produce the opposite of the intended effect – for example, deepening the anger of the person who is venting or distorting that person’s decision-making.<sup>58</sup> According to psychologist Daniel Goleman, “[v]entilating anger is one of the worst ways to cool down: outbursts of rage typically pump up the emotional brain’s arousal, leaving people feeling more angry, not less.”<sup>59</sup> Experience

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<sup>57</sup> Hoffman, *supra* note 41, at 304-05.

<sup>58</sup> Collaborative law colleague Nancy Cameron alerted us to this phenomenon. See generally Brad J. Bushman, *Does Venting Anger Feed or Extinguish the Flame? Catharsis, Rumination, Distraction, Anger, and Aggressive Responding*, 28 J. OF PERSONALITY AND SOC. PSYCH. 724 (2002); Jennifer S. Lerner & Katherine Shonk, *How Anger Poisons Decision Making*, HARV. BUS. REV. (Sept. 2010), available at <http://hbr.org/2010/09/how-anger-poisons-decision-making/ar/1>.

<sup>59</sup> See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 64-65 (1996). See also Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 175, 181 (1997) (when people are angry, they become even less likely to know what other parties want).

suggests that creating opportunities for managed venting may be useful, but it is seldom sufficient, by itself, to overcome the parties' resistance to settlement.

Mediation is sometimes described as making a safe place for a difficult conversation. The expression of anger can cause fear and anxiety in the target of that anger, and mediators frequently need to make judgment calls as to when angry words or angry gestures will advance the process of resolution or retard it. If the latter, the mediator should enforce ground rules that prohibit raised voices, obscene language, angry physical gestures, and other intimidating behavior, while creating an avenue for more constructive expression of the emotions that led to hostile behavior.

## 2. The "Fight-or-Flight" Response

Perceived threats trigger a cascade of complex and almost instantaneous reactions in the body, including our brains, which have served us well as a species from an evolutionary standpoint. Now that we are at less risk of being devoured by predators, however, humankind has had to learn techniques for managing these reactions so that they do not subvert other goals.

To understand the "fight-or-flight" response (sometimes referred to as "hyper-arousal" or the "fight-flight-or-freeze" response) requires an understanding of how different parts of our brain process stimuli. As explained by psychologist Daniel Goleman:

The emotional brain responds to an event more quickly than the thinking brain. The amygdala in the emotional center sees and hears everything that occurs to us instantaneously and is the trigger point for the fight or flight response. It is the most primitive survival response. If it perceives an emotional emergency, it can take over the rest of the brain before the neo-cortex (the thinking brain) has had time to analyze the signals coming in and decide what to do. That takes a long time in brain time. The amygdala in the meantime has decided, "Oh no, I've got to do something!" It can hijack the rest of the brain if it thinks there is an emergency, and it is designed to be a hair trigger. In other words, better safe than sorry.<sup>60</sup>

The responses in our brain also trigger responses in the rest of our body: respiration, pulse, and adrenaline levels rise instantly. Faces look flushed, muscles tense.

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<sup>60</sup> Dennis Hughes, *Interview with Daniel Goleman*, SHARE GUIDE, <http://www.shareguide.com/Goleman.html> (last visited Feb. 25, 2013).



Mediators need to be alert to these changes, and call for a break when needed to reduce the perceived “threat level.” Just as important are the measures that mediators can use to prevent the fight-or-flight response. Reframing and caucusing can help dampen the level of arousal. When the parties are meeting in a joint session, mediators need to be attuned to the emotional level in the room, and decide when candor has crossed the line to confrontation. Interrupting a heated exchange and asking everyone to return to their proverbial corners for a few minutes may give the neo-cortex enough time to reassert control.

### 3. Flooding

Professor John Gottman, who has studied couples and conflict for more than thirty years, has identified an emotional pattern he calls “flooding,” in which we are so filled with negative emotion that the rational functioning in our brains is blocked.<sup>61</sup> Flooding is not just a metaphor – according to Gottman’s research, it is a physiological response involving increased adrenaline, increased blood pressure, and elevated heart rate – similar to the “fight-or-flight” response.<sup>62</sup> The cure for flooding, according to Gottman, is taking a break of at least twenty minutes so that the emotions can subside.<sup>63</sup> In the mediation setting, this arrangement can be achieved by meeting with the parties separately in a caucus session, or simply by taking a break within the joint session. The important thing for mediators is to be aware of the emotional state of the parties and interrupt the discussion, if necessary, so that parties who are flooded do not escalate their conflict.

### 4. Trust and Neurotransmitters<sup>64</sup>

Neuroscientists have identified specific chemicals in the brain that foster trust, chief among them oxytocin.<sup>65</sup> Oxytocin is released in women during breast-feeding,<sup>66</sup> and men and women experience

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<sup>61</sup> See JOHN M. GOTTMAN, *THE SCIENCE OF TRUST: EMOTIONAL ATTUNEMENT FOR COUPLES* 119–25 (2011).

<sup>62</sup> *Id.* at 125–26.

<sup>63</sup> *Id.*

<sup>64</sup> The following discussion is adapted from Hoffman, *supra* note 41, at 308–09.

<sup>65</sup> See Michael Kosfeld, Markus Heinrichs, Paul J. Zak, Urs Fischbacher & Ernst Fehr, *Oxytocin Increases Trust in Humans*, 435 *NATURE* 673 (2005).

<sup>66</sup> See R. F. Drewett, A. Bowen-Jones & J. Dogterom, *Oxytocin Levels During Breast-feeding in Established Lactation*, 16 *HORMONES AND BEHAVIOR* 245 (1982).

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increases in oxytocin levels during sexual arousal.<sup>67</sup> Many scientists believe that oxytocin plays a role in forming romantic attachments.<sup>68</sup> According to one researcher, “oxytocin makes both men and women calmer and more sensitive to the feelings of others.”<sup>69</sup> Another study found that physical touch, in the form of a relaxation massage, produces higher levels of oxytocin in women.<sup>70</sup> Research in Sweden showed that:

Oxytocin can induce anti-stress-like effects such as reduction of blood pressure and cortisol levels. [It reduces anxiety] and stimulates various types of positive social interaction. Oxytocin can be released by . . . touch and warmth. Ingestion of food triggers oxytocin release. . . . In addition, purely psychological mechanisms may trigger the release of oxytocin. This means that positive interaction involving touch and psychological support may be health-promoting. The social interaction of daily life, as well as a positive environment, continuously activate this system.<sup>71</sup>

Experiments involving the use of functional MRI scans have shown that people who were given oxytocin nasally were more trusting in games involving risky investments and more generous in games that involved sharing a fixed amount of money.<sup>72</sup>

The applicability of these findings to mediation remains to be seen, but many mediators make a point of serving food, or at least having it available in the room. “Breaking bread” together may turn out to be a ritual that lends not only social significance, but also biochemical benefits. At a minimum, studies of neurochemicals underscore the importance of creating an emotionally safe environment for the parties in mediation in order to promote trust.

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<sup>67</sup> See M.S. Carmichael, R. Humbert, J. Dixen, G. Palmisano, W. Greenleaf & J.M. Davidson, *Plasma Oxytocin Increases in the Human Sexual Response*, 64 J. CLIN. ENDOCRINOL. METAB. 27 (1987).

<sup>68</sup> See HELEN FISHER, *WHY WE LOVE: THE NATURE AND CHEMISTRY OF ROMANTIC LOVE* 89 (2004).

<sup>69</sup> See Linda Dopierala, *Love, Neurochemistry, and Chocolate: A Word from Cupid*, Ph.D., CYBERHEALTH 21 (Feb. 1999), available at [http://www.antiaging.com/cyberhealth/CyberHealth\\_21.html](http://www.antiaging.com/cyberhealth/CyberHealth_21.html).

<sup>70</sup> See R.A. Turner, M. Altemus, T. Enos, B. Cooper & T. McGuinness, *Preliminary Research on Plasma Oxytocin in Healthy, Normal Cycling Women: Investigating Emotion and Interpersonal Distress*, 62 PSYCHIATRY 97 (1999).

<sup>71</sup> See K. Uvnas-Moberg & M. Petersson, *Oxytocin, A Mediator of Anti-stress, Well-being, Social Interaction, Growth and Healing*, 51 PSYCHOSOM. MED. PSYCHOTHER. 57 (2005), abstract available at <http://www.ncbi.nlm.nih.gov/pubmed/15834840>.

<sup>72</sup> See John J. Medina, *Oxytocin and the Bottom Line*, PSYCHIATRIC TIMES 24 (2008). For a useful discussion of the trust-enhancing properties of oxytocin and how they can be elicited in psychotherapy sessions, see Linda Graham, *A Warm Bath for the Brain: Understanding Oxytocin's Role in Therapeutic Change*, PSYCHOTHERAPY NETWORKER 23 (2009).

## 5. Decision Fatigue

The attitudes and behaviors that we have described in this article are not static. One phenomenon in particular warrants consideration whenever lengthy mediation sessions are held—a process known as “decision fatigue.” In a recent article in the *New York Times*, journalist John Tierney summarizes research showing that people respond differently to mental fatigue, as compared with physical fatigue.<sup>73</sup> The signs of physical fatigue are obvious. People are often not aware of mental fatigue, but the more choices we make throughout the day, “the harder each one becomes for your brain, and eventually it looks for shortcuts.”<sup>74</sup> Tierney describes two very different, but typical, shortcuts: (a) becoming reckless and making impulsive decisions because there is insufficient energy to think through the consequences, and (b) making no decision at all, though this, too, could lead to problems that we lack the energy to consider fully.<sup>75</sup>

Social psychologist Roy Baumeister describes the process of decision fatigue as a form of “ego depletion”:

When the brain’s regulatory powers weaken, frustrations seem more irritating than usual. Impulses to . . . say stupid things feel more powerful. . . . [E]go-depleted humans become more likely to get into needless fights over turf. In making decisions, they take illogical shortcuts and tend to favor short-term gains and delayed costs.<sup>76</sup>

One of the causes of this depletion is low glucose levels.<sup>77</sup> Although the human brain constitutes only 2% of our body weight, it consumes 25% of the body’s glucose.<sup>78</sup> For mediators and the parties we work with, this depletion is highly problematic because “[o]nce you’re mentally depleted, you become reluctant to make trade-offs, which involve a particularly advanced and taxing form of decision making.”<sup>79</sup>

This phenomenon may be less of a problem in divorce mediation, which typically is scheduled in blocks of two or three hours,

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<sup>73</sup> John Tierney, *Do You Suffer from Decision Fatigue?* NEW YORK TIMES, Aug. 21, 2011, at MM33.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Pierre J. Magistretti, Luc Pellerin & Jean-Luc Martin, *Brain Energy Metabolism: An Integrated Cellular Perspective*, PSYCHOPHARMACOLOGY, THE FOURTH GENERATION OF PROGRESS (2000), available at <http://www.acnp.org/g4/gn401000064/default.html>.

<sup>79</sup> Tierney, *supra* note 73, at MM33.

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several weeks apart. The parties have time to recover and reflect. In commercial mediation, however, the sessions tend to be scheduled for a full day, and, as is often the case, work tends to fill the time available. Thus, it is not uncommon for mediations to go all day, with vital decision-making occurring in the final hour of mediation, just as the parties, counsel, and mediator need to leave.

Mediators can offset, to some extent, the effect of glucose and mental depletion by providing food – in particular, foods such as energy bars and fruit, which do not produce the types of sharp energy peaks and valleys the way candy does, for example. Even more important, however, is vigilance on the part of the mediator—paying attention to the ability of the parties and counsel throughout the day to manage complex decisions.

## II. THE PSYCHOLOGICALLY MINDED MEDIATOR

### A. *Setting the Stage*

The psychologically minded and informed mediator will begin each mediation session with the understanding of the principles articulated above. He or she will begin the interaction with careful attention to the verbal and non-verbal behavior of the clients: Have they arrived on time? If not, who was late? Have any of the parties been informed about mediation through reading or discussion, or has either been involved in mediation before? If so, what are the conscious expectations being expressed, and how might that expression be correlated with other indicia of the party's expectations and beliefs, such as sarcastic tone or conciliatory gestures. How are the parties dressed? Are they expecting a formal or informal meeting? Do they address the mediators by first name, and is that acceptable to the mediators? Are there hidden agendas that are revealed through subtle and fleeting cues?

These and the myriad other cues that make up even the first moments of the social interaction of mediation are potentially relevant to the mediators. The mediators should consult with the parties (and, in co-mediation, with each other) prior to any new mediation and clarify their own expectations for promptness, formality and financial considerations. They should also review the factual background of the case carefully and share with each other the possible hypotheses about areas of difficulty or smooth sailing they can anticipate.

### 1. Solo vs. Co-mediation

When the word “mediators” is used in this article, it indicates the mode of co-mediation, which is used in almost all community mediation programs in Massachusetts and is also used in a wide variety of other cases. Because of the added cost of having two (or more) mediators, a “blended rate” is sometimes used to make co-mediation more affordable. The advantages of co-mediation include the following: (a) balancing the mediator’s differing, but equally valid perspectives and observations (as described above); (b) providing complementary expertise (e.g., in a corporate transaction, mediators who have legal and accounting experience, respectively); and (c) enhancing the parties’ feeling of being heard.

### 2. Setting Ground Rules for the Players

Mediators establish “rules of engagement”—guidelines for the parties’ interactions in the mediation—indicating, for example, that sarcasm, contemptuous statements (such as the kind researcher John Gottman found so destructive),<sup>80</sup> insults, outright swearing, and name-calling cannot be tolerated if the mediation is to have any hope of success.

These rules are important for several psychological reasons. First, they establish standards of discourse that the parties may have known and once lived by, but have eroded under the emotional and financial pressure of their recent life experiences. Second, they let the parties know that the mediators are in control of the situation and that the mediators’ experience and expertise will be deployed to help them be successful in their mediation. Third, the terms of the mediation establish a safe emotional place (in addition to the safe legal place, since the mediation is confidential and cannot be used in a litigation) for the parties to express their deepest anxieties and fondest hopes without fear of reprisal or ridicule.

### 3. Difficult Personalities

The parties’ and mediators’ personalities must always be considered principal components of mediation. Invariably, the question comes up about dealing with individuals whose personalities are so difficult that they are seemingly impossible to influence. Attempts at understanding, rational explanation of ground rules, or

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<sup>80</sup> See JOHN GOTTMAN & NAN SILVER, *THE SEVEN PRINCIPLES FOR MAKING MARRIAGE WORK* (1999).

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management of expectations simply do not work. These individuals may be beyond the pale of mediated resolutions to their disputes and can only respond to a litigated decision imposed from an external third party.

If, as in the case of the present authors, one of the mediators is a psychologist, then the diagnostic process for the presence of psychopathology can be accomplished efficiently. In the case of solo mediation, it is often worthwhile to have a mental health professional available for consultation.

After many attempts at thoughtful intervention and repeated explanation, one or both of the parties in a mediation session may remain intractable and incapable of considerate conversation or entertaining new models of change to resolve their disputes. Such obstinacy would prevent the parties from enjoying a settlement that comes from the parties themselves, with only assistance from the mediators – the main goal of mediation. There is a taxonomy of personality types that, in extreme form, represents this kind of situation. For example, an individual who is suspicious of the other party's motives and needs reassurance in order to enter into any kind of trusting agreement may not be so mistrustful as to be unworkable. Another individual, however, who, for one reason or another, is so suspicious as to be paranoid and see in every attempt at communication a hidden and threatening agenda; or who believes nothing the other party says, no matter how compelling the evidence, is far enough from the standard of "reasonable" or "normal" to be an inappropriate candidate for mediation.

Mediator Bill Eddy (who is a lawyer as well as a mental health professional) has written extensively about what he calls "high conflict people."<sup>81</sup> Such people may fit the diagnostic criteria of one or more of the Axis II personality disorders described in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (such as borderline personality disorder or narcissistic personality disorder).<sup>82</sup> What they have in common is that they often find themselves in intractable conflict with others.<sup>83</sup>

Eddy offers a methodology for working with such people that involve four clusters of skills: (a) bonding, (b) structure, (c) reality testing, and (d) consequences.<sup>84</sup> Bonding is important because, for many high conflict people, abandonment is a deep fear, and there-

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<sup>81</sup> BILL EDDY, *HIGH CONFLICT PEOPLE IN LEGAL DISPUTES* (2006).

<sup>82</sup> *Id.* at 29.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 177.

fore the mediator's relationship with the party is meaningful in and of itself.<sup>85</sup> Structure is also vital to define and defend appropriate professional boundaries. For example, the person may try to enlist the mediator as an ally, and so the mediator may need to remind the person about the mediator's impartiality.<sup>86</sup> Reality testing, done with as much detachment and objectivity as possible by the mediator, sometimes helps such people recognize that their own view of reality is not the only way of looking at their situation. And finally, the term "consequences" means helping the person think through what the likely outcome is with respect to each of the person's available options. (For example, if a parent says angrily that she or he will tell everyone in town what an evil person the other parent is, a mediator might explore with that parent what the likely impact on the children might be, and whether such a tactic might actually harm that person's relationship with the children.)

#### 4. Releasing Attachment to the Outcome

The goal that any settlement needs to come from the parties themselves is the hallmark of successful mediation.<sup>87</sup> It is well known that agreements that the parties have played a major role in constructing have a higher probability of success and longevity compared with an externally imposed decision.<sup>88</sup> Furthermore, the post-agreement relationships between and among the parties will also show a higher probability of being preserved when the parties have crafted the agreement themselves, guided by their mediators.<sup>89</sup>

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<sup>85</sup> *Id.* at 179-94.

<sup>86</sup> *Id.* at 216-17.

<sup>87</sup> The principle of "self-determination" is the first standard listed in the Standards of Practice for Mediators, adopted by the American Arbitration Association, American Bar Association, and the Association for Conflict Resolution.

<sup>88</sup> See Craig A. McEwen, *Note on Mediation Research in* STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 156 (5th ed. 2007) ("Disputants and their attorneys engaged in mediation are very likely to be satisfied with the process and to find it fair. Such judgments about mediation tend to be comparable to or more favorable than judgments about other processes like trial or negotiation; similar comparisons hold for disputant satisfaction with, and sense of fairness of, the outcomes of mediation, although disputants tend to be less happy with outcomes than with process; where compliance with mediated outcomes has been studied, it appears to be as high or higher than compliance with adjudicated outcomes.").

<sup>89</sup> Jeanne M. Brett, Zoe I. Barsness & Stephen B. Goldberg, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 *NEG. J.* 259 (1996) in GOLDBERG, SANDER, ROGERS & COLE, *supra* note 88, at 154 (Parties whose disputes were mediated were overwhelmingly pleased with the process, the neutral, the outcome, and the

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Such an outcome is particularly important in the case of divorce when young children are involved, since it is necessary for the children's benefit that the parents continue to be able to talk with each other and cooperate on the myriad of issues surrounding childrearing that invariably arise for many years after the judgment of divorce is entered in the Court. A useful technique in this situation is to ask the parties to describe their "5-year plan" for the children. This exercise builds on the expectation that the parents will have to consider not only the agreement of the moment, but its implications for the future as well.

This same technique can be used in business and employment cases, in which ongoing relationships need to be preserved. Even in cases where there will be no ongoing relationship, however, the value of self-determined solutions coming from the parties themselves is well established by research.<sup>90</sup>

In order for agreement to emerge from the thought, experiences and creativity of the parties, the mediators must adopt a psychological stance that is difficult to achieve. The mediator must learn to detach himself or herself from the outcome of the mediation. In a recent mediation training, one of the authors (Richard Wolman) was the "coach" in a mock mediation. The students were seasoned lawyers and mental health professionals. After the participants chose who would play the role of the mediators, and had a chance to review the fact pattern of the case we had constructed for them, Wolman asked the mediators if they already had an idea in their minds about how the dispute we were addressing might turn out or how it should be resolved. Each one nodded "yes." They had reflexively, based on years of training and experience, engaged in "thin slicing," to use Malcolm Gladwell's term.<sup>91</sup> Thin slicing refers to the rapid calculus we engage in when making decisions based on initial, and very limited, data.<sup>92</sup> Gladwell documents instances in which such decisions are surprisingly accurate. For example, an experienced physician can hear the facts of a new case and arrive at a high-speed diagnosis if one is needed. Not

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implementation – more so than participants whose cases were arbitrated. This study provides support for the view that mediation is more likely to improve relationships than is adjudication.).

<sup>90</sup> See GOLDBERG, SANDER, ROGERS & COLE, *supra* note 88, at 54.

<sup>91</sup> See generally GLADWELL, *supra* note 12, at 18–47.

<sup>92</sup> *Id.*



always 100% correct, to be sure, but thin slicing, particularly with individuals who have expertise, is often reliable.<sup>93</sup>

When the students told the group that they had an outcome in mind, even before the mediation began, Wolman asked the students to “forget about it.” He explained that if they, as mediators, were going to be guided by or influenced with their own ideas and expectations for the result, they would, in essence, be doing the thinking for the parties, thereby depriving the parties of the opportunity to create their own, possibly unique solution to their dilemma, a solution for which they could take ownership. This principle is the same even if the parties’ final agreement is similar to the outcome the mediator would have picked for them. The important point is that one must take personal responsibility for future actions, and, in doing so, increase the chances that any decision or agreement will stick.

Releasing attachment to the outcome includes the outcome of “getting to yes,” to use Roger Fisher and William Ury’s famous phrase.<sup>94</sup> In our experience, most people—whether parties or lawyers—come to a mediation session with an outcome in mind. Mediation, if successful, helps people give up rigid positional thinking and achieve more open-minded creative thinking. In this sense, getting to “yes,” or getting to “no,” are equally acceptable results, so long as the mediation has helped the parties achieve clarity about their goals and the options available for achieving them. And a very successful mediation session is often one in which thinking in a creative fashion about what the best outcome might be leads the parties to a positive result that neither of them had contemplated at the outset of the mediation.

##### 5. Paradigm Shift for Lawyers and the Parties: From “Should” to “Could”

In order to release one’s grip on the outcome of mediation, the mediator must undergo, to use Thomas Kuhn’s excellent term, a “paradigm shift” in thinking.<sup>95</sup> The shorthand for this shift is changing one’s approach to any mediation from “should” to “could.” Customarily, one retains counsel or seeks legal advice from a lawyer and expects to be told an answer: “Given the facts of

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<sup>93</sup> *Id.* at 3–8. The example with which Gladwell opens the book *Blink* provides a vivid example – the assessment of the authenticity of a marble statue alleged to be of classical Greek origin.

<sup>94</sup> FISHER, URY & PATTON, *supra* note 4.

<sup>95</sup> THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

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your case, here is what you *should* do.” This is a familiar pattern, and we expect nothing less from any experienced professional from whom we need advice. We look to authority to tell us what to do when we either don’t know or are too insecure to decide for ourselves.

But this kind of authoritative thinking is toxic for mediation. It is particularly counter-productive because it imposes a decision or course of action from the outside and does not recognize the subjective experience of those who will have to live with the settlement long after the mediation has become a distant memory. In structure, it is no different than a litigated outcome from the Court, only without all of the legal machinery involved. In our view, the mediator must embrace a different mindset. He or she must tell the parties:

I don’t know what you *should* do in your situation. I will, however, do everything in my power to help you think about what you *could* do. Once you have examined the options and possibilities of what you could do, or might do, I will help you explore the pros and cons so that together you can come up with your final choice.

This egalitarian approach can be difficult for lawyers and mental health professionals learning mediation because such individuals’ training and expectations of their clients is diametrically opposed to the clients’ assuming personal and individual responsibility for dispute resolution. Once achieved, however, this radical way of thinking can be liberating for the lawyer or mental health professional turned mediator because it relieves him or her of having to come up with solutions of varying success. The mediator can then be released from the assumption that one can control the outcome of someone else’s life.

Ultimately, this approach also opens the parties’ minds to new and creative forms of problem solving together (and with the mediator) that can help determine whether the mediator is involved in their future decision-making and dispute resolution. In short, this approach of changing from “should” to “could” can be transformative for the parties and provide the mediators with the satisfaction of having fostered cooperation between disputing parties—cooperation that opens the door to the prospect of healing and growth.

B. *The Psychology of Influence: Application of Cialdini's Principles to Mediation*

The field of social psychology provides mediators with insight about how, in both routine and challenging mediations, they can influence the parties in the way they think about the conflict and their options for settlement. Social psychologist Robert Cialdini has identified six components of influence,<sup>96</sup> all of which can be useful for mediators.

1. Rule of Reciprocity

When one party in a conflict makes an offer of settlement, she expects the other party to reciprocate with a counter-offer. If asked to make a better offer, the first party will usually decline to “bid against herself,” feeling that she is entitled to a counter-offer first. The request to “bid against yourself” violates the “rule of reciprocity,” and most parties will decline to do it. According to Cialdini, the expectation that any gift, offer, or act of consideration will be reciprocated is not specific to culture, class, or gender—it is found throughout the world.<sup>97</sup> In mediation, the rule of reciprocity can also be violated by responding to a generous offer with a stingy one—or at least one that is not considered comparable. Therefore, mediators often need to coach the parties’ negotiations, helping them see how an insufficiently generous—or, for that matter, an overly generous—offer can disrupt the flow of proposals, while the parties test each other’s willingness to move in a reciprocal manner toward a resolution.

2. Authority

In one of Professor Cialdini’s experiments, physical therapists found that their patients were substantially more compliant with assigned home exercise regimens if the therapists posted their diplomas on their office walls.<sup>98</sup> (This effect is also an example of priming, which is discussed above in this article.) Mediators bring to the table a certain measure of authority based on our experience in similar cases, and our websites now replace diplomas on the

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<sup>96</sup> See generally ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (2007).

<sup>97</sup> *Id.* at 18.

<sup>98</sup> See Robert B. Cialdini, Roselle L. Wissler & Nicholas J. Schweitzer, *The Science of Influence: Using Six Principles of Persuasion to Negotiate and Mediate More Effectively*, 9 DISPUTE RESOLUTION MAGAZINE 21 (Fall 2002).

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walls. Therefore, reminding the parties of our experience as mediators must be done with subtlety and tact, but doing so can often act as reassurance to nervous parties.

## 3. Liking

We are more likely to accept the influence of people we like,<sup>99</sup> and initial impressions often tell us whether we will like someone.<sup>100</sup> (This is an example of “thin slicing,” discussed above.<sup>101</sup>) While it may be difficult to catalog all the behaviors and traits that promote “liking,” attentive listening and sincere compassion are surely high on the list. Among the factors that produce the opposite effect are self-involvement and self-importance. Cialdini’s research showed that people who have something in common tend to like each other more,<sup>102</sup> and so mediators can begin to establish rapport by identifying commonalities (e.g., growing up in the same city, or going to the same school, or having had an experience similar to the one that led to the mediation). Of course, it is essential that the mediator maintain balance when possible and use sensitivity in forming these connections in order to avoid the appearance of partiality.

## 4. Commitment and Consistency

In another of Cialdini’s experiments, two groups of restaurants that relied on reservations were studied to see if they could reduce their “no-shows.”<sup>103</sup> In the first group, callers were told, “Please call if you need to cancel your reservation.” In the second group, callers were asked, “Are you willing to call us if you need to cancel your reservation?” All of the responses to that question were affirmative, and that group of restaurants experienced a 30% reduction in “no-shows.”<sup>104</sup> This phenomenon (of people acting consistently with prior commitments) sometimes appears in mediation as an obstacle to settlement, because the parties may have often made commitments to themselves or others not to settle above or below certain amounts, even before hearing the other

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<sup>99</sup> CIALDINI, *supra* note 96, at 167.

<sup>100</sup> See generally Lauren J. Human, Gillian M. Sandstrom, Jeremy C. Biesanz & Elizabeth W. Dunn, *Accurate first impressions leave a lasting impression: The Long-term Effects of Distinctive Self-other Agreement on Relationship Development*, *SOCIAL PSYCHOLOGICAL AND PERSONALITY SCIENCE* (2012), available at <http://spp.sagepub.com/content/early/2012/10/18/1948550612463735>.

<sup>101</sup> See *supra* at Section II, Part A, §4.

<sup>102</sup> See CIALDINI, *supra* note 96, at 173-74.

<sup>103</sup> See Cialdini, Wissler & Schweitzer, *supra* note 98 at 21.

<sup>104</sup> *Id.*

side's case. Mediators can sometimes, with delicacy, elicit counter-acting commitments. Some mediators, for example, ask at the beginning of mediation if they can count on the parties to enter the discussion of issues with an open mind, or at least a willingness to try to understand each other's perspectives. Getting an affirmative response to that question can be a subtle influence when the bargaining becomes more difficult.

### 5. Social Proof

If you discovered one day that several of your neighbors had purchased hybrid vehicles and liked them, Cialdini's research suggests that you are more likely to buy one, too.<sup>105</sup> If 93% of the people on the Yelp.com website liked a restaurant, we are more likely to go there. In mediation, the parties often ask, "What do most people do?" "What do the courts do with situations like this?" Unfortunately, these questions are sometimes difficult to answer. The parties are usually considering settlement terms that are difficult to compare to what others do, because each case is unique. If the parties are represented by counsel, the attorneys' job is to educate the clients about their BATNA (their "best alternative to a negotiated agreement") or MLATNA ("most likely alternative to a negotiated agreement").<sup>106</sup> The prediction of what a court will do, according to Oliver Wendell Holmes, is the very essence of the practice of law,<sup>107</sup> and mediators are ethically prohibited from such practice even if they carry a bar card.<sup>108</sup> But mediators can tell parties stories of outcomes in other cases they have mediated,<sup>109</sup> and those stories, if well chosen, can provide the

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<sup>105</sup> See CIALDINI, *supra* note 96, at 114–66.

<sup>106</sup> For a discussion of these two terms, see MATTHEW GUASCO & PETER ROBINSON, *PRINCIPLES OF NEGOTIATION: STRATEGIES, TACTICS, TECHNIQUES TO REACH AGREEMENT* 108-12 (2007).

<sup>107</sup> See generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>108</sup> See, e.g., SUPREME COURT OF VIRGINIA, *GUIDELINES ON MEDIATION AND UPL*, ch. 2, available at [http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl\\_guidelines.pdf](http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf). See also STANDARD VI(A)(5) OF THE STANDARDS OF PRACTICE FOR MEDIATORS, adopted by the American Arbitration Association, American Bar Association, and the Association for Conflict Resolution ("The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles.").

<sup>109</sup> See SUPREME COURT OF VIRGINIA, *GUIDELINES ON MEDIATION AND UPL*, ch. 2, § 4 available at [http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl\\_guidelines.pdf](http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf) ("Occasionally, mediators find it helpful to relate their experiences with case outcomes to disputants in an effort to assist them in reaching a settlement.").

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needed “social proof” that the terms under consideration are reasonable.

## 6. Scarcity

In 2003, the automobile that exceeded sales projections by the widest margin was the Oldsmobile due to its announcement that production of the Oldsmobile was about to end.<sup>110</sup> In most cases in mediation, the parties are willing to try mediation once. Mediation is a rare opportunity to have an impartial and experienced person help the parties broker a deal. After a failed mediation session and subsequent investment in litigation, parties are often less willing to be flexible on economic issues because of the additional money they have spent on legal fees and related costs (see discussion below of “sunk costs”<sup>111</sup>). Even if a settlement is not reached in an initial mediation session, a subsequent phone conference or follow-up meeting can be arranged. Sometimes the parties need additional time to think about their options and alternatives. The lesson of experience, however, is that when mediations grind to a halt, an opportunity for settlement is often lost and difficult to retrieve. Scarcity, in terms of a second chance, can thereby motivate resolution.

## C. Cognitive Biases

Our mind’s eye sees the world through a lens that unavoidably distorts our interpretation in ways that can affect the mediation process. Mediators can counteract the effect of these distortions to some degree if we understand them. Fortunately, cognitive psychology can help us identify the lenses and filters that prevent all of us—parties, counsel, and mediators alike—from seeing the world with greater objectivity.

These distortions in our perception, memory, and analysis are surprisingly predictable.<sup>112</sup> The sections that follow describe some

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<sup>110</sup> See NOAH J. GOLDSTEIN, STEVE J. MARTIN & ROBERT B. CIALDINI, *YES!: 50 SCIENTIFICALLY PROVEN WAYS TO BE PERSUASIVE* 141 (2008).

<sup>111</sup> See *infra* at Section II, Part C, § 9.

<sup>112</sup> See generally DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008) (describing numerous examples of these distortions). See also BARRY GOLDMAN, *THE SCIENCE OF SETTLEMENT: IDEAS FOR NEGOTIATORS* (2008); see generally CORDELIA FINE, *A MIND OF ITS OWN: HOW YOUR BRAIN DISTORTS AND DECEIVES* (2006).

of the cognitive biases that mediators encounter and suggest techniques for counteracting them.

### 1. Fundamental Attribution Error and Negativity Bias

Imagine that Party A has just arrived twenty minutes late to a mediation session. She explains to Party B (and to herself) that the problem was unexpectedly severe traffic. What is Party B thinking? He attributes her tardiness to a character flaw or lack of commitment to the mediation. We are quick to ascribe our own weaknesses to circumstance and our successes to character, while we often do the exact opposite with others (i.e., attribute their successes to circumstance and their failures to character.) And if someone has harmed us in some manner, we often assume that this was his intent. Even when we are able to acknowledge our flaws, we often consider them minor when compared to those of others. This phenomenon is known as “fundamental attribution error.”<sup>113</sup>

A similar phenomenon is known as “negativity bias,” which can take a number of forms. First, people tend to notice negative events (such as a criticism) more than positive events (such as praise), and negative events are engraved more indelibly in our memories.<sup>114</sup> Second, people tend to attribute negative motives to others who disagree with their opinions more readily than positive motives, especially when people feel very involved in the issue at stake.<sup>115</sup> Third, negative acts have more impact on relationship quality than positive acts.<sup>116</sup> The research regarding negativity bias explains why, in mediation or any type of negotiation, even mild instances of conflict or hostility can set off a downward spiral of adversarial behavior.

Mediators can mitigate these effects by trying to help each side understand the other side’s actions and intentions and help each side see that there is often a disparity between impact and intent.<sup>117</sup> Sometimes it can be helpful to show the parties the sym-

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<sup>113</sup> The leading study of this phenomenon is Edward E. Jones & V.A. Harris, *The Attribution of Attitudes*, 3 J. OF EXPERIMENTAL SOC. PSYCHOL. 1 (1967).

<sup>114</sup> See Hara Estroff Marano, *Our Brain’s Negative Bias*, PSYCHOLOGY TODAY (June 20, 2003), available at <http://www.psychologytoday.com/articles/200306/our-brains-negative-bias>.

<sup>115</sup> Glenn D. Reeder et al., *On Attributing Negative Motives to Others Who Disagree with Our Opinions*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1498, 1507–08 (2005).

<sup>116</sup> See Roy F. Baumeister et al., *Bad is Stronger Than Good*, 5 REV. OF GEN. PSYCHOL. 323, 328 (2001).

<sup>117</sup> For an extensive discussion of this distinction, see DOUGLAS STONE, SHEILA HEEN & BRUCE PATTON, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* ch. 3 (2010).

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metry of their interpretations—in other words, if Party A can see how she or he is misunderstood by Party B, Party A might also be able to see how she or he could be misinterpreting Party B's actions.

In addition, using priming, reframing, and well-chosen narratives, mediators can counteract negativity with positive emotion. Fostering positive emotion has been shown in experimental studies to enhance the openness and flexibility that are needed in mediation.<sup>118</sup> “Participants were randomly assigned to watch films that induce positive emotions such as amusement and contentment, negative emotions such as fear and sadness, or no emotions. Compared to people in the other conditions, participants who experience positive emotions show heightened levels of creativity, inventiveness, and ‘big picture’ perceptual focus.”<sup>119</sup>

## 2. Reactive Devaluation

Imagine that the Plaintiff has arrived at the mediation privately seeking to obtain \$100,000 as a settlement. He proposes, as an initial demand, \$300,000. Imagine that the Defendant's response is to offer \$200,000. Does the Plaintiff accept on the spot? Or does he immediately conclude that \$200,000 must be a low-ball figure because it's coming from a party that the Plaintiff views as the enemy.<sup>120</sup> Mediators can buffer the effects of reactive devaluation in three ways.

First, mediators can encourage the parties to explain the rationale for their proposal by reference to objective criteria (e.g., “\$300,000 is the average jury verdict for injuries of this kind”).

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<sup>118</sup> Fredrike P. Bannink, *Building Positive Emotions In Mediation*, MEDIATE.COM (July 2009), available at <http://www.mediate.com/articles/banninkF4.cfm> (citing Barbara L. Fredrickson, *Cultivating Positive Emotions to Optimize Health and Well-Being*, 3 PREVENTION & TREATMENT (March 7, 2000), <http://www.rickhanson.net/wp-content/files/papers/CultPosEmot.pdf>).

<sup>119</sup> *Id.*

<sup>120</sup> See Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow, Robert Mnookin, Lee Ross, Amos Tversky & Robert Wilson eds. 1995). Ross describes reactive devaluation with this illustration: “Initial evidence for the reactive devaluation barrier was provided in a 1986 sidewalk survey of opinions regarding possible arms reductions by the U.S. and the U.S.S.R. [citation omitted]. Respondents were asked to evaluate the terms of a simple but sweeping nuclear disarmament proposal – one calling for an immediate 50 percent reduction of long-range strategic weapons . . . . The results of this survey showed, as predicted, that the proposal's putative authorship determined its attractiveness. When the proposal was attributed to [President Reagan], 90 percent of respondents thought it either favorable to the U.S. or evenhanded; and when it was attributed to the (presumably neutral) [strategy analysts], 80 percent thought it either favorable to the U.S. or evenhanded; but when the same proposal was attributed to the Soviet leader [Gorbachev], only 44 percent of respondents expressed a similarly positive reaction.”



Second, mediators can normalize (and help the parties choreograph) the back-and-forth bargaining that mediator Michael Keating terms “the dance for dollars.”<sup>121</sup> “It’s perfectly normal and expected,” says the mediator—invoking the principle known as “social proof,” discussed above<sup>122</sup>—“for each party to experience some ‘sticker shock’ when initial offers, and even subsequent offers, are made.” By expressing confidence in the process, the mediator can moderate each side’s tendency to devalue the other side’s proposals.

Third, when the parties are very close to a settlement, but each is looking for the other to make the final move, the parties will sometimes ask the mediator to make a “mediator’s proposal” (or sometimes the mediator will suggest such a step), which reduces both the problem of reactive devaluation and the phenomenon known as “buyer’s remorse”<sup>123</sup> or the “curse of the accepted offer”—i.e., the tendency for the party making the last offer to feel that she gave too much if the offer is accepted.

### 3. Confirmation Bias

Just as we discount the value of an offer based on its source, we have a hard time accepting the truth of information that is inconsistent with firmly held views. The most familiar varieties of confirmation bias<sup>124</sup> can be seen in politics: the phrases “yellow dog Democrat” and “dyed-in-the-wool Republican” describe a person whose mind is made up, impervious to perspectives of the opposing party. In mediation, each party tends to question the credibility of information presented by the other side. Imagine that one party in a divorce mediation is told by her spouse, who has for two decades owned a consistently successful software business, that revenues are suddenly off and he’s losing money for the first time in twenty years. What amount of evidence would it take for the wife to be-

<sup>121</sup> See J. Michael Keating, Jr., *Mediating in the Dance for Dollars*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 93 (1996).

<sup>122</sup> See *supra* at Section II, Part B, §5.

<sup>123</sup> See generally Emily Rosenzweig & Thomas Gilovich, *Buyer’s Remorse or Missed Opportunity? Differential Regrets for Material and Experiential Purchases*, 102 J. OF PERSONALITY AND SOCIAL PSYCHOL. 215–223 (2012).

<sup>124</sup> See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. OF GEN. PSYCHOL. 175 (1998). This phenomenon is different from cognitive dissonance, a phenomenon first described by Prof. Leon Festinger. For a useful discussion of these phenomena, see Sam McNery, *Psychology’s Treacherous Trio: Confirmation Bias, Cognitive Dissonance, and Motivated Reasoning*, WHY WE REASON BLOG, (September 7, 2011), available at <http://whywereason.com/2011/09/07/psychologys-treacherous-trio-confirmation-bias-cognitive-dissonance-and-motivated-reasoning/>.

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lieve that her husband is not hiding money or intentionally slowing down his business?

Mediators can blunt the impact of confirmation bias by normalizing it and facilitating an exchange of information—sometimes encouraging the parties to jointly hire an independent expert to assess the facts. In our experience, the mediator’s mere restating of a party’s perspective can sometimes help overcome the other party’s confirmation bias.

#### 4. Self-Serving Bias and Overconfidence Bias

We all have a tendency to think that we are fairer, smarter, and more capable than we are. When truck drivers were asked if they drive more safely than the average truck driver, nearly 84% of them said yes.<sup>125</sup> Ninety-four percent of college professors profess to be better than average.<sup>126</sup> (Some call this phenomenon the “Lake Wobegon effect,”<sup>127</sup> because in that mythical town made famous by Garrison Keillor, “all the children are above average.”) Each party in a mediation tends to believe that it has a more objective and reasonable view of the case than the other side. Sometimes, mediators can counteract this tendency to be overconfident by describing the following study, which has been reproduced numerous times in law schools, business schools, and elsewhere:<sup>128</sup> a large group of people is given a written description of a personal injury case, each person with the same set of facts, except half of the participants are told that they represent the plaintiff, and the other half are told that they represent the defendant. When asked to predict what a court would do or what a reasonable settlement would be, each group gives the answer one would predict – much higher figures from the plaintiff group and much lower numbers from the defendant group.<sup>129</sup> Of course, mediators encounter par-

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<sup>125</sup> See Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 287 (2006).

<sup>126</sup> *Id.*

<sup>127</sup> See ELIOT ARONSON, TIMOTHY D. WILSON & ROBIN M. AKERT, *SOCIAL PSYCHOLOGY* 150 (7th ed. 2009) (“Most of us have moderate to high self-esteem. Like the mythical residents of Garrison Keillor’s Lake Wobegon, we need to believe that we are above average. For example, in a survey of a million high school students, only 2 percent stated that they were below average in their leadership ability.”) (citing THOMAS GILOVICH, *HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* 77 (1993)). See also David Dunning, Chip Heath & Jerry M. Suls, *Flawed Self-Assessment: Implications for Health, Education, and the Workplace*, 5 *PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST* 69, 72 (2004).

<sup>128</sup> See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 *J. OF ECON. PERSPECTIVES* 109-126 (1997).

<sup>129</sup> *Id.* at 113.

ties who have been thinking about – and living – their cases for far longer than the few minutes spent by these experimental groups and, as a result, the parties are far more optimistic about their likelihood of success if the mediation fails.<sup>130</sup>

Another mediator strategy for deflating optimistic overconfidence is to ask a party, after she explains her certainty of prevailing in trial, why she agreed to participate in mediation.

### 5. Anchoring Effects and Contrast Effects

Numerous studies of bargaining behavior have shown that initial offers have a substantial impact on the eventual outcome of settlement negotiations.<sup>131</sup> Those offers become “anchors” against which progress is measured. In the settlement of most conflicts, however, initial proposals have at least some arbitrary element. Who is to say, for example, that a discrimination plaintiff’s emotional distress should be compensated at \$100,000, or double or triple that amount? Anchoring effects have been shown to be so powerful that even totally random numbers affect us. In one particularly illuminating experiment, Dan Ariely asked students to write on a piece of paper the last two digits of their Social Security numbers and then bid on a series of items (such as a bottle of wine, etc.). The students with higher numbers in the last two digits of their Social Security number bid more than the students with lower numbers.<sup>132</sup>

Negotiators can make mistakes, however, by trying to anchor the bargaining too high or too low, because their offers may lose credibility and thus diminish the anchoring effect. In fact, mediators sometimes see parties getting more upset with the other side’s bargaining behavior than they were with the conduct that led them to the mediation. Mediators can overcome the effects of counterproductive anchors by helping the parties create new

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<sup>130</sup> A recent study of attorneys preparing for trial showed that 44% were overconfident in their predictions of the eventual outcome. See Jane Goodman-Delahunty et. al, *Insightful Or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 *PSYCHOLOGY, PUBLIC POLICY, AND LAW* 133 (2010). The study showed that men were significantly more over-confident than women, and that there was no significant difference in the accuracy of outcomes based on years of experience. One particularly interesting correlation: the more overconfident the lawyer, the less accurate the prediction.

<sup>131</sup> See generally Henrik Kristensen & Tommy Gärling, *The Effects of Anchor Points and Reference Points on Negotiation Processes and Outcomes*, 7 *ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES* 85 (1997); Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 *OHIO ST. J. ON DISP. RESOL.* 1 (1994).

<sup>132</sup> See ARIELY, *supra* note 112, at 28-31.

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anchors. For example, a mediator who believes that a defendant's extremely low offer is causing the plaintiff to lose confidence in the mediation process, or to be infuriated with the defendant, might make a list on a flip-chart of the direct, out-of-pocket damages that the plaintiff is seeking to recover, thus creating a new mental anchor around that number. Or the mediator might ask what some of the damage awards have been in recently reported cases of the same kind—more anchors.

A similar phenomenon, known as the contrast effect, can also stymie negotiations.<sup>133</sup> Imagine that you are about to purchase a \$100 item, such as a microwave oven. Just before you pay for it, a friend walks by and tells you that the same item is available two blocks away for \$25 less. Most people in this experiment opt to walk the two blocks and pay \$75, instead of \$100. Then imagine that you are about to purchase a \$2,000 item – say, a sofa. Your friend comes by with the same news: the couch is available two blocks away for \$25 less. Almost no one is willing to walk the two blocks to pay \$1,975. Why the difference? In each case, walking two blocks yields a \$25 pay-off. In mediations, the parties often measure the validity or credibility of offers – especially after the initial rounds—by comparing them to previous offers. For example, an initial demand from a plaintiff for \$290,000 might be accepted by the defendant as a reasonable starting point for negotiations, and the defendant will respond with a counter-proposal. But imagine the plaintiff began the negotiation with a demand of \$300,000 and then, after an offer from the defendant moved to \$290,000. The negotiation might grind to a halt because, in contrast to the first offer of \$300,000, the \$290,000 proposal suggests inflexibility by the plaintiff. It may do no good at all to remind the parties that the initial offers were at least somewhat arbitrary. The rule of reciprocity<sup>134</sup> kicks in, and each side seeks to avoid moving more—as measured in dollars or percentage change from the previous offer—than the other side has moved.

To counteract these effects, mediators need to coach the parties on their negotiating behavior. One way to do this is to ask each party in each round of negotiation how they think the other side will react to their next proposal. If the parties are being candid and realistic, they will be receptive to the mediator's input and

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<sup>133</sup> *Id.* at 20; see also SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 44 (1993).

<sup>134</sup> See *supra* at Section II, Part B, §1.

possibly consider moderating an unreasonable or unproductive proposal.

## 6. Competitive Arousal

A favorite *New Yorker* cartoon shows two dogs, dressed in suits, standing at a bar. “It’s not enough that dogs succeed,” says one. “Cats must also fail.”<sup>135</sup> How many times have mediators seen this behavior? Neuroscientists using fMRI’s have shown that pleasure circuits light up in our brains when we get a better score in a game than our opponent.<sup>136</sup> (This may be culturally specific, as it is said that in some cultures, a tie score is considered best because no one loses face.<sup>137</sup>) In mediations, competitive arousal can occur when one side or the other seeks to “win” the mediation by extracting the maximum in concessions. Mediators can mitigate these effects by reminding the parties of their own underlying interests, and encourage the parties to focus on whether a proposed settlement meets those needs. Mediators can also remind each party that the other side might be feeling the same way and that both parties, despite their respective desires to win, might be better served by arriving at a settlement. (As Lincoln said in the quote with which this book began, “the nominal winner is often the real loser – in fees, expenses, and a waste of time.”)<sup>138</sup>

## 7. Fairness and the Problem of Bounded Self-Interest

If someone offered you a dollar, no strings attached, would you take it? What if it were five dollars, or fifteen dollars? In experimental settings, where people engage in what game theorists call the “Ultimatum Game,”<sup>139</sup> people routinely turn down free money. In the game, one person (called the Proposer) is given \$100, but only on the following conditions: (a) the Proposer has to offer a portion of it to the person sitting next to her (called the Responder), and (b) the Responder (who knows about the \$100

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<sup>135</sup> NEW YORKER, Jan. 13, 1997.

<sup>136</sup> See Laura Blue, *Success Depends on Others Failing*, TIME (Nov. 26, 2007), available at <http://www.time.com/time/health/article/0,8599,1687725,00.html>.

<sup>137</sup> See JULIA T. WOOD, INTERPERSONAL COMMUNICATION: EVERYDAY ENCOUNTERS 225 (7th ed. 2012) (“In Japanese sports, the ideal is not for one team to win but for a tie to occur so that neither team loses face.”).

<sup>138</sup> Abraham Lincoln, *Notes for a Law Lecture*, July 1, 1850, in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 81 (Roy Basler et al., eds. 1953).

<sup>139</sup> See generally Alan G. Sanfey, James K. Rilling, Jessica A. Aronson, Leigh E. Nystrom, & Jonathan D. Cohen, *The Neural Basis of Economic Decision-Making in the Ultimatum Game*, 300 SCIENCE 1755 (2003).

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and the ground rules) has to accept the proposed division of the \$100. In theory, the Responder should accept any proposed amount, no matter how small, because she would be better off with even a penny—even if that meant the Proposer kept \$99.99. In fact, most people in the role of Proposer offer between \$40 and \$50, and their proposals are almost always accepted. But some Proposers offer very little, and the majority of Responders reject any amount that's less than \$20,<sup>140</sup> even though turning down the money is not in their best interest from a purely economic standpoint.

In mediation, the parties often turn down offers that would make them objectively better off than their alternatives (such as going to court) because the proposed division of available resources seems unfair, as measured by what the other party is getting. In the Ultimatum Game, Responders punish ungenerous Proposers but, in doing so, unavoidably punish themselves.<sup>141</sup> In short, people are not ruled entirely by economic self-interest. When one of the parties in mediation refuses a reasonable offer “on principle,” this innate sense of fairness may be at work. (Interestingly, this phenomenon is not limited to humans; in experiments in which two dogs could see that one was receiving significantly more doggie treats as a reward for performing a task, the short-changed dog stopped performing.)<sup>142</sup>

Fortunately, neuroscientists have found that there are other circuits in our brains that light up with pleasure when we cooperate (coexisting with the circuits that indicate pleasure when we best our opponents).<sup>143</sup>

Mediators can reinforce the cooperative impulses by asking the parties whether they would feel good about a settlement in which each party had been equally accommodating. Mediators can also reinforce the view that fairness is unavoidably subjective, and the other side has its own quite different view of what would be fair.

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See Friederike Range, et al., *The Absence of Reward Induces Inequity Aversion in Dogs*, 106 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 340 (2009).

<sup>143</sup> See Louise Knapp, *Study: Brains Want to Cooperate*, WIRED (July 24, 2002), available at <http://www.wired.com/medtech/health/news/2002/07/53945?currentPage=all>.

## 8. Endowment Effects

A classic experiment involving coffee mugs illustrates the endowment effect.<sup>144</sup> In a roomful of people, half are given identical mugs as a gift, and the other half nothing. The latter group is asked to write down on a piece of paper the most they would be willing to pay for one of the mugs, and the other group is asked to write down the lowest price they would be willing to accept to sell their mug. The results: buyers were willing to pay, on average, \$2.87, and sellers demanded, on average \$7.12.<sup>145</sup> In other words, the sellers developed a feeling of attachment (one could call the feeling an entitlement or “endowment”) after owning the mugs for only a brief time. These results have been found across cultures but are somewhat stronger in some cultures.

What is the relevance to mediation? In settlement negotiations, plaintiffs are, in effect, sellers—they are relinquishing their claims for a price. Plaintiffs tend to value their claims more highly than the “buyers” (i.e., the defendants), and the Plaintiffs’ feelings of entitlement or “endowment” probably grow stronger with time.

Experiments involving our tendencies for risk preference and risk aversion also show that plaintiffs and defendants are situated differently—the party that is asked to pay money (usually the defendant) will often accept more risk, so as to postpone the day of reckoning.<sup>146</sup> Thus, like the “buyers,” they are averse to paying the “sellers’” higher price, and willing to take more risk that the case will go to trial.

In addition, both plaintiffs and defendants experience the related phenomenon known as “status quo” bias, a reluctance to change the status quo that makes settlement, which intrinsically involves change, more disconcerting.<sup>147</sup>

What can mediators do? One useful technique is reframing. Mediators can emphasize what is gained, aside from money, when plaintiffs “sell” their claim: the savings of time, trading in hope for certainty, and moving on from the emotional turmoil of the lawsuit. Likewise, defendants, who usually feel that they are overpaying for the claims that they “buy,” may find it helpful to hear from the mediator the intangible benefits of settlement, in order to de-

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<sup>144</sup> See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 296 (2011).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 319–21.

<sup>147</sup> See generally Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 JOURNAL OF ECONOMIC PERSPECTIVES 193 (1991).

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velop a more balanced understanding of what they are getting for their money.

## 9. “Sunk Cost” Bias

Imagine you’re the plaintiff in a simple contract case that’s ready for trial. If you win, the defendant will pay you \$100,000. Assume that the court has no authority to award attorney’s fees, and so there are only two outcomes: \$100,000 or nothing. Both sides agree that you have a good chance of winning and so the defendant offers a settlement (final offer) of \$80,000. Will you accept the offer? Experimental data suggest that there is a much better chance that you will accept the offer if your trial preparation costs have been \$10,000, and a much lower chance if those costs have been \$70,000.<sup>148</sup> Why the difference? The economist in you says that, going forward, the two situations are identical. But an emotional part inside us looks back in time, and wants to recover the “sunk costs.” This emotional reaction tends to overpower the economist inside us. In mediations, both parties often have “sunk costs” that they would like to recover. It is worth noting that in personal injury, employment, and certain other cases, plaintiffs may be situated differently than defendants because they may have a contingent fee arrangement with their lawyers. But even those plaintiffs have invested time and effort, and perhaps some out-of-pocket costs for depositions and experts. To counteract the “sunk cost” bias, mediators can use decision tree analysis to show on a flip chart how each side is likely to fare, using the parties’ own estimates of the various likely outcomes. It is often helpful for each side to know the other side’s “sunk costs,” if that information will help each side see that they are similarly situated.

## 10. Loss Aversion and Risk Preference

Psychologists Daniel Kahneman and Amos Tversky have posed the following question to large numbers of test subjects: if you had the choice of taking a bet in which you had a fifty/fifty chance of winning \$150 or losing \$100, would you take it?<sup>149</sup> The answer for most people is no. From a psychological perspective, “the response to losses is stronger than the response to corresponding gains.”<sup>150</sup> This aversion to losses means that most people in the

<sup>148</sup> See John S. Hammond, Ralph L. Keeney, and Howard Raiffa, *The Hidden Traps in Decision Making*, HARV. BUS. REV. (reprint no. 98505) (1998).

<sup>149</sup> KAHNEMAN, *supra* note 144, at 282-83.

<sup>150</sup> *Id.*



experiment would have to be paid somewhere between \$150 and \$250 in order to accept a 50% risk of losing \$100.<sup>151</sup>

In the world of economics, the concept of loss aversion has significantly altered the rationalist perspective that economists previously brought to such situations. The rational actor of classical economics would need a prospective gain of only \$101 to make the bet described above worthwhile. Kahneman describes the concept of loss aversion as “certainly the most significant contribution of psychology to behavioral economics.”<sup>152</sup>

This concept is also useful for mediators. Take, for example, a commercial case in which liability is uncertain, but the potential recovery of damages by the plaintiff (if successful) is a fixed amount—say, \$1,000,000. Kahneman’s and Tversky’s research shows that the average defendant would be reluctant to settle such a case for \$500,000, even if she or he were told by an authoritative source that she or he has a 50% chance of losing.

The two principles articulated by Kahneman from this research are the following:

- a. In mixed gambles, where both a gain and a loss are possible, loss aversion causes extremely risk-averse choices.
- b. In bad choices, where a sure loss is compared to a larger loss that is merely probable, diminishing sensitivity causes risk seeking.<sup>153</sup>

For defendants, the choice of paying a settlement typically seems like the “bad choice” situation, and may cause them to prefer the risk of trial. The psychological pain of paying \$500,000 is far greater, for most people, than the pain of taking a 50% risk of losing \$1,000,000.

An important related finding in Kahneman’s research is that the loss aversion effect is reduced in people who manage risks and gains for a living—for example, professional stock traders.<sup>154</sup> Thus, defendants who are repeat players—such as insurers, manufacturers, and employers—may be able to see their risk of loss in the broader perspective of a large docket of cases in which the defendants are more like “traders.” Mediators can also help those defendants who are not repeat players achieve that broader perspective by reminding them that, even though the case at hand

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 300.

<sup>153</sup> *Id.* at 285.

<sup>154</sup> *Id.* at 339.

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presents what seems like a “bad choice,” life presents each of us with a “portfolio” of potential gains and losses, and the case at hand is part of that broader array of risks and opportunities.

Kahneman and Tversky’s research also shows that loss aversion and risk preference are affected by probability assessments.<sup>155</sup> To see how this works, imagine the following two scenarios: (a) the plaintiff’s chance of winning the \$1,000,000 lawsuit is only 5%, or (b) the plaintiff’s chance is 95%. The research shows that in the first example, the plaintiff would insist on *more* than \$50,000 as the price for settling his or her case (i.e., a risk-seeking behavior), but in the second example, would accept a settlement of *less* than \$950,000 (i.e., a risk-averse behavior). This latter behavior is a function of loss aversion because a 95% probability is nearly a sure thing, and the fear of losing a nearly certain gain has a greater psychological impact than the pain of giving up some of the potential value of the lawsuit.

According to Kahneman, the same asymmetry holds true with defendants.<sup>156</sup> In other words, faced with a 5% risk of losing \$1,000,000, a defendant might be willing to pay *more* than \$50,000 because the fear of such a large loss outweighs the pain of the payment. But even in the face of a 95% risk of loss, a defendant might insist on a settlement of *less* than \$950,000 because the sure loss of \$950,000 looms larger than the only marginally worse risk of a \$1,000,000 verdict.

It is worth noting that the non-linear shape of this curve presents at least a theoretical opportunity for mediators. In other words, at the low end of the probability scale (say 5%), plaintiffs are looking to achieve a settlement that is *better* than the expected value of their claim (i.e., \$50,000), and defendants may be willing to pay a settlement that is *worse* than the expected value. And, at the other end of the probability scale (say 95%), plaintiffs, hoping to lock in a sure thing, will accept a settlement of less than \$950,000, which is the result that defendants, because of loss aversion, will likely insist on.

The problem for mediators is that parties seldom agree about the probability of success on a claim and often disagree about the potential damages. If the parties did agree on these points, they would rarely need mediation. Their differing assessments of liability and potential damages (because of such factors as overconfidence bias, status quo bias, and endowment effects) cause them to

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<sup>155</sup> KAHNEMAN, *supra* note 144, at 317.

<sup>156</sup> *Id.* at 317–20.

disagree about the expected value of the case. However, if a mediator can help the parties achieve greater alignment about the expected value, the phenomena of loss aversion and risk preference may align in such a way as to foster settlement.

### 11. Selective Perception and Selective Memory

It is no secret that our perceptions and memories are selective. Thus, in addition to the various cognitive biases and distortions described above, the parties in mediation come to the table with different data, confirming their respective views of the case. Try this experiment: Look around the room you are in and notice where you see anything red. Now close your eyes and think about where in the room you noticed something green. A famous experiment confirming the phenomenon of selective perception can be found in a YouTube video: <http://www.youtube.com/watch?v=vJG698U2Mvo>.<sup>157</sup> Abundant literature also documents what we know from common experience—namely, that we remember only a portion of what we experience, and there are predictable, and, to some extent, self-serving, filters that suppress certain memories.<sup>158</sup>

One mediator strategy for confronting radically different accounts of the same events is the identification of documents and other independent indicia of what happened. Mediators can also remind the parties that it is normal and natural for people to have differing recollections, and that settlements can be reached when we (quoting Jack Kornfield) “give up all hope of a better past” and focus instead on the future.<sup>159</sup>

### 12. Strategies for Dealing with Cognitive Biases

An overall strategy for dealing with the various cognitive biases described above can be found in medical research on the effectiveness of placebos. It is well established that placebos can produce healing effects. In addition, the placebo effect can be influenced by framing effects. For example, experiments have shown that purported pain killers (actually Vitamin C) were more effec-

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<sup>157</sup> Daniel Simons, *Selective Attention Test* (March 10, 2010), available at <http://www.youtube.com/watch?v=vJG698U2Mvo>.

<sup>158</sup> One of the leading studies in this area is Fergus I. M. Craik & Robert S. Lockhart, *Levels of Processing: A Framework for Memory Research*, 11 J. OF VERBAL LEARNING & VERBAL BEHAVIOR 671 (1972), [http://www.numospace.co.uk/~unn\\_tsmc4/prac/labs/depth/craiklock.pdf](http://www.numospace.co.uk/~unn_tsmc4/prac/labs/depth/craiklock.pdf).

<sup>159</sup> JACK KORNFIELD, *THE ART OF FORGIVENESS, LOVINGKINDNESS, AND PEACE* 25 (2002).

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tive when the experimental subjects thought they cost \$2.50 per pill as opposed to \$0.50.

But there are related findings that may help mediators understand how to counteract the distortions caused by our mental processing. Researchers have found that these effects are diminished when the subjects are told about them.<sup>160</sup> However, lest we be too optimistic about the potential for rationality to trump emotion and our often-unconscious biases, researchers also found that placebo effects work even if the subjects are told they are getting a placebo.<sup>161</sup>

What this means for mediators is that it is important for us to know as much as possible about how the mind works, and it may be occasionally and contextually useful to share with parties what we have learned. To take one example, according to Jonah Lehrer, “the only way to avoid loss aversion is to know about the concept.”<sup>162</sup>

Mediators should readily acknowledge that our own minds are just as prone as the parties’ minds to experience the phenomena that we are describing. And these ideas need to be offered as a tentative hypothesis. It is also easier for each side to believe that the other side is prone to distorted thinking than to believe that they are, and so sometimes a discussion of these biases may be more appropriate in a caucus session than in a joint session.

The bottom line is that any discussion of these issues is not intended as diagnosis or treatment and must be presented in a non-blaming way with the recognition that they pertain to both parties and mediators.

#### D. *Emotional Intelligence*

Psychologist Daniel Goleman broke new ground with the publication of his book, *Emotional Intelligence: Why It Can Matter More Than IQ*, in 1995. Building on a foundation laid by Howard Gardner in his study of “multiple intelligences,”<sup>163</sup> Goleman pro-

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<sup>160</sup> See DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 239 (Rev. ed. 2009).

<sup>161</sup> See Karen Hopkin, *Placebos Work Even When You Know*, *SCIENTIFIC AMERICAN* (DEC. 23, 2010), available at <http://www.scientificamerican.com/podcast/episode.cfm?id=placebos-work-even-when-you-know-10-12-23>.

<sup>162</sup> See LEHRER, *supra* note 6, at 81 (2009).

<sup>163</sup> See HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (1983).

vided evidence that emotional competencies are “twice as important in contributing to excellence as . . . pure intellect and expertise.”<sup>164</sup>

Goleman defined emotional intelligence as “the capacity for recognizing our own feelings and those of others, for motivating ourselves, and for managing emotions well in ourselves and in our relationships.”<sup>165</sup>

In our experience, the most successful mediators typically have a high degree of emotional intelligence. Goleman identifies twenty component skills that make up emotional intelligence, organizing them into four clusters: (a) self-awareness, (b) self-control, (c) social awareness, and (d) social skills. All of these can be learned. These skills enable mediators to empathize with and understand the parties, while managing their own reactions to sometimes challenging personalities.

In an article on the subject of mediation and emotional intelligence, Marvin Johnson, Stewart Levine, and Lawrence Richard, quote a mediation workshop participant: “Emotions are present like an elephant in the room. As mediators, it is vital for us to acknowledge the elephant and invite it to be present. Emotions are a very powerful mediating tool because the conflict is really about emotions.”<sup>166</sup> One of the ways in which mediators can harness the power of emotion as a tool for settlement is when we have a personal reaction to one or more of the parties. Our own emotions can serve as a Geiger counter, guiding us to the emotional toxins in the conflict.

#### *E. Spiritual Intelligence and Managing the Negotiation Within*

In *Thinking with Your Soul: Spiritual Intelligence and Why It Matters*, Richard Wolman examines another vital dimension of the “multiple intelligences” described by Howard Gardner.<sup>167</sup> Gardner postulated eight different intelligences and added a fraction of one called “Existential Intelligence” associated with asking ques-

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<sup>164</sup> See GOLEMAN, *supra* note 59, at 320 (1998).

<sup>165</sup> *Id.* at 317.

<sup>166</sup> Marvin Johnson, Stewart Levine & Lawrence Richard, *Emotionally Intelligent Mediation: Four Key Competencies*, in BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 151 (Daniel Bowling & David Hoffman, eds. 2003).

<sup>167</sup> RICHARD N. WOLMAN, *THINKING WITH YOUR SOUL: SPIRITUAL INTELLIGENCE AND WHY IT MATTERS* (2001).

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tions about the meaning of life.<sup>168</sup> Wolman's work pushed the number to nine, incorporating existential intelligence into an encompassing "Spiritual Intelligence."<sup>169</sup> Spiritual intelligence often has nothing to do with religion, but rather concerns the deepest sources of meaning, value and human connection in an individual's life. For mediators, spiritual intelligence matters because the parties are often struggling in their dispute with issues that cut to the core of what they most care about in the world. It could be their connection with their children or parents, or with their life's work.

In a recent article, we have suggested that mediation itself is a spiritual practice because it enables us, as mediators, to grow into self-understanding and self-acceptance.<sup>170</sup> Spiritual intelligence fosters a greater level of curiosity and compassion for the parties with whom we work, but just as importantly it enables us to bring those same qualities to our own shortcomings.

It is not uncommon for mediators to "lose their cool" in the heat of conflict. Inside each one of us there is a negotiation among our various parts, each sometimes seeking hegemony in our internal system. Like other people, mediators have reactive parts of their psyche that get stirred up when the parties are recalcitrant or, worse, direct their bitterness at us. Getting in touch with our own deepest sources of meaning and value helps us stay centered, focused, open-minded, and open-hearted, so that we do not become consumed by the flames of the parties' conflict.

### III. MEDIATION AND PSYCHOTHERAPY: DISTINGUISHING THE DIFFERENCES

Understanding the psychological dimensions of the mediation process is important for at least three reasons.

First, because mediation is based on the principles of self-determination and informed consent, mediators must be reasonably confident that each of the parties is psychologically competent to participate in the process. Statistics compiled by the National Institute of Mental Health for 2010 show that 26.2 % of adults in the U.S. have a diagnosable mental illness, and according to the U.S.

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<sup>168</sup> See GARDNER, *supra* note 163, at xiv, 282.

<sup>169</sup> WOLMAN, *supra* note, 167.

<sup>170</sup> See David A. Hoffman & Richard N. Wolman, *Mediation as a Spiritual Practice*, MEDIATE.COM (Jan. 2011), available at <http://www.mediate.com/articles/hoffmanwolman.cfm>.

Center for Disease Control, “nearly 50% of U.S. adults will develop at least one mental illness during their lifetime.”<sup>171</sup>

No one knows what percentage of the people who come to mediation suffers from mental illness, but it stands to reason that they are over-represented among the people who find themselves in serious conflicts. Of course, suffering from depression or some other mental illness does not by itself mean that a person is legally incompetent or unable to participate fully in mediation. But these statistics suggest that mediators need to be cautious about assuming that the people in any given mediation are operating at full capacity and in a fully rational manner. It is not the role of a mediator to diagnose or treat mental illness, and it is often wise to consult or co-mediate with a mental health professional when psychological issues seem to be impeding progress in mediation.

Second, when parties in mediation behave in a manner that disrupts the process, frustrates progress, and may even seem self-defeating, mediators need to consider whether psychological factors are at work and, if so, how to address them. There is, of course, no easy way to answer these questions. A mediator’s involvement with the parties is usually quite brief—possibly only a few hours, or just one day—and therefore it may be difficult if not impossible to determine even some of the relevant psychological factors at work, much less develop a comprehensive understanding of them. This is true even in those mediations that consist of multiple sessions over many months—in part because the parties are coming to mediation for settlement, not therapy, and therefore the type and extent of their self-disclosures are geared toward a resolution of their conflict as opposed to insight about the internal dimensions of their difficulties. For the mediator, however, conflict presents a three-dimensional problem whose solution often requires a three-dimensional examination of its origins. Once again, consultation with a mental health professional or co-mediation, in which, one of the mediators is a mental health professional may be advisable in seemingly intractable cases where psychological issues are evident.

Third, although mediation is not psychotherapy,<sup>172</sup> it can have therapeutic effects, as well as counter-therapeutic effects. In other

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<sup>171</sup> See National Institute of Mental Health, *CDC Mental Illness Surveillance*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2010), available at [http://www.cdc.gov/mentalhealthsurveillance/fact\\_sheet.html](http://www.cdc.gov/mentalhealthsurveillance/fact_sheet.html).

<sup>172</sup> See Joan B. Kelly, *Mediation and Psychotherapy: Distinguishing the Differences*, *MEDIATION Q.* 33 (1983).

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words, the parties in mediation may be seeking such intangible benefits as an apology, or forgiveness, or simply greater understanding from the other party. Sometimes an unsought, but nevertheless valuable benefit is greater insight as the reasons for the conflict or an enhanced sense of empowerment. While the ostensible goal of virtually all mediations is a written settlement agreement, once the parties enter the process, the possibility of intangible benefits may become more apparent. The study of psychology can benefit mediators not only because it sensitizes us to the possible presence of psychopathology and teaches us methods of managing difficult personalities, but also because the insights of positive psychology (a recent branch of the field of psychology that focuses on the enhancement of mental well-being) can alert us to the techniques that enable people to fulfill their potential and achieve a happier life. In the service of those ends, mediation can be a healing and life-enhancing process.<sup>173</sup>

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<sup>173</sup> See Lois Gold, *Mediation and the Culture of Healing*, in *BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION* 183 (Daniel Bowling & David Hoffman, eds. 2003).