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THE PSYCHOLOGY OF MEDIATION

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The Psychology of Mediation

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Introduction

The purpose of this article is to provide an overview and summary of some well-understood psychological phenomena as they apply to mediation. Our goal is not to break new ground, but rather to survey territory that is familiar to psychologists but perhaps less to mediators who do not have professional training in social psychology or one of the mental health disciplines.

I. Psychology is the Study of People: How They Think, Feel, and Behave

Mediation involves helping individuals, businesses, and other entities find common ground when they have differing needs, perspectives, belief systems, and personality styles. 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, or how often a non-custodial parent should see his children, or whether a boss should pay a settlement to an employee about to be fired because of a disagreement over company policy, or how to divide a business’s assets and liabilities among its three partners after they have had a falling out – all of these are as much about the people involved as any of the “objective” problems.

Conversations during a mediation can often drift toward dollar amounts or settlement terms and, therefore, contain the appearance of reason and objectivity. But successful mediation requires knowledge and understanding of psychodynamics.

Mediation would be a relatively simple process if only the parties acted in their own best interest, or in the interest of those they love, such as their children. Rational and thoughtful conversations would then yield rational results. Agreements could be drawn up to everyone’s satisfaction.

If we could rely on this rationalist model, using solely an “interest-based” model of mediation – considered by some negotiation professionals as the most useful strategy to avoid personal conflict and focus instead on “the problem” – would suffice. But this strategy assumes that individuals will act in their own best interest during mediation and not be distracted by presuppositions or by personal feelings of fear or animosity.

Every time we encounter the view that the “interest based model” alone can succeed, we are reminded of a 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 particularly vitriolic
exchange of personal attacks between husband and wife 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!”

Statements like “She is the problem” or “If it weren’t for his attitude of having to be in control, this never would have happened” 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. If a mediator is not sensitive to the nuances of the personalities of clients and aware of his or her own emotional reactions to “difficult” clients, the mediation will likely hit an impasse or collapse.

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

A. How People Think

1. Information Processing. Cognitive neuroscience describes the areas and chemicals in the brain oriented to decision-making. Jonah Lehrer for example, in his book “How We Decide,”¹ highlights the neurotransmitter dopamine, which is associated with pleasure centers, making the argument that decisions are often made 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 neutral chemical. Neuroscience can take us only to the edges of the functioning brain, leaving the symbolic and value-laden activity of the mind in the hands of the mediator to unravel.

What cognitive neuroscience also tells us is that the way in which we humans process information is remarkable in its speed and precision. We know that 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 50-50 situation. And Google can tell us the average rainfall in Patagonia in .02 seconds, but it cannot tell us 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, our world, and the people in it is the crucial point here, and these processes have been documented in the studies of Pavlov, Kepecs and Wolman, and Professor Mahzarin Banaji’s laboratory on prejudice at Harvard, and are made particularly accessible in Blink by Malcolm Gladwell. The result of this area of research is to underscore how, when faced with new situations, our minds are on ready alert and instantaneously pick up cues and clues from the environment around us.

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4 J. Kepecs & R. Wolman, Preconscious Perception of the Transference, 41 PSYCHOANALYTIC QUARTERLY 172 (1972).

5 Mahzarin Banaji, The Implicit Prejudice, SCIENTIFIC AMERICAN (June 2006).

A recent article studying the concept of “priming” asked participants to rate their political beliefs and attitudes pertaining to the 2008 elections, using a standard political attitude rating scale for a measurement. 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 in the direction of the Republican point of view that lasted up to eight months. All of this research demonstrates that humans import information at high speed and react to stimulation from many sources without even being aware that we are doing so. After the data reaches our brains, our hearts, and beliefs 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. One group of mediators decided that naming their conference rooms in honor of famous peacemakers – e.g., Mandela, Carter, Gandhi – would foster productive negotiations. 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. Priming studies suggest that mediators can promote settlement by 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), another way of

7 Travis Carter, Melissa Ferguson & Ran Hassin, A Single Exposure to the American Flag Shifts Support Toward Republicanism up to 8 Months Later, PSYCHOLOGICAL SCIENCE (July 8, 2011).
looking at it is that the mediator is simply being transparent about what s/he 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 Clues Tell Big Stories.” The mediator must acknowledge that in mediations with big stakes, such as the potential loss of children or the dissolution of a family business, heightened anxiety and fear create a climate of hyper-attention and psychological responsiveness. As a result, initial interactions between the mediator and clients are fraught with potential minefields, but are also filled with the hope of creating new opportunities for resolving long-standing disputes. This state of heightened awareness can signal danger or create the potential to see events from a new perspective, particularly in response to insightful interventions by the mediator. It is the mediator who, at these moments of intense susceptibility, can suggest alternative interpretations to entrenched points of view by “reframing” a communication or highlighting some non-verbal behavior on the part of one of the parties. Even an eye-roll at a sensitive moment can threaten the entire process.

“Reframing” is critical to the process of mediation. When, for example, a husband continually perceives his wife’s critique of his parenting style as an emasculation and attempt to discredit him, she may argue that she was in fact only trying to be helpful and did not have a mean-spirited motivation. With the help of the mediator, “reframing” the wife’s behavior toward her husband essentially means to reinterpret her behavior and help the husband see that it may have a different meaning. It is as if a radar operator for the Air Force is watching his radar screen and sees a series of blips coming across at rapid speed. He must determine whether he is seeing a group of ICBMs coming in to destroy American cities, or if the radar signals are a flock of geese heading south for the winter. It is the mediator’s job to step into the rapid fire
information processing moment, make his or her best objective guess as to the meaning of the communication or behavior and, if there is a mis-match, 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 clues tell big stories.” The mediator must be alert to these small clues, which may contain the essence of a conflict and can be articulated by “reframing,” or by helping parties to clearly state their interests and their needs, rather than be continually influenced by distorted perceptions of the other side.

[In the section on cognitive biases, later in this article, we discuss with more specificity some of these distortions and methods for counteracting them.]

3. **Verbal Overshadowing and the “Third Story”**

As noted below in the section discussing selective memory, we all have incomplete memories 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 occur even when we are trying to be accurate. 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 story, slight changes may occur and become further engraved in our mind. Distortions can occur because of a

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misinterpretation of events (such as fundamental attribution error, discussed below) or selective recall (e.g., because of confirmation bias, also discussed below). Eventually, as a result of repeatedly over-writing the data through retelling, the original data is no longer available to us.

Psychologists call this phenomenon “verbal overshadowing.” 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.”

In mediations, the parties come to the table with deeply engraved memories of what happened encoded in ‘word’ documents we call stories. Each party’s story is usually an account of having been wronged. The plaintiff tells of his or her injury, and the defendant tells a story of being wrongly accused or having to fend off an exorbitant demand. Each party insists that their own recollection and interpretation of the data are correct. The parties often feel that the other side’s opposite story is a lie. Mediators can sometimes blunt what each side feels is an assault on their integrity by reframing intense disagreement about what happened as simply differing perceptions, differing recollections, or differing interpretations – all entirely normal – rather than the product of mendacity.

However, the force that mediators are up against here is formidable. In a recent lecture, author Isabel Allende asks: “what is truer than truth?” The answer, she says, is “the story.”

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The reason that our stories seem so true is that they connect points of raw data in a way that has meaning. Stories represent our effort to make sense of the world, and we often infuse them with moral significance. One side is blameworthy and the other is not.

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

If that is correct, the stories that each party tells us hold enormous emotional power – each is seeking to claim the moral high ground and thereby, of necessity, rob the other of what they most want: a feeling of being blameless. For example, the terminated minority employee believes that the boss was bigoted, and no amount of data will dislodge that view, because the slights and indignities inflicted by the boss are consistent with a pattern of discrimination that the employee has experienced as a youth and throughout his entire adult life. Meanwhile, the boss believes that her intentions were pure, that her hiring and firing statistics are demonstrably race-neutral, and she points out that she recruited the minority employee – why would she do that if she were a bigot?

Mediators cannot fully harmonize the stories they are told, but they need to understand them. Ken Cloke suggests that each party in a mediation brings three stories to the table, but tells only one of them. The story they 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.

The second story (never told because it induces a feeling of shame and might diminish the mediator’s motivation to ‘rescue’ the teller) is the one in which they themselves are to blame.
for their suffering – perhaps because they were foolish, careless, too trusting, or contributed to the conflict in some other way.

“The third story,” says Cloke, “explains why they made up the other two stories.” One can find in the third story the personal history that led the teller to have parts of his/her psyche that feel vulnerable and ashamed, as well as those parts that rise up in anger when we are attacked in vulnerable places. The flip side of anger is fear, and the mediator’s best tool when met with a party’s anger is curiosity about the fear, rather than resistance to the rage.

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 s/he needs to help the tellers make peace with those contradictory parts of themselves, and walk the path between claimed innocence and secret shame toward resolution.

B. How People Feel

1. The Emotional Climate of Mediation. The counterpart to the exquisite capacity of the human brain to process information, both from within and from without, 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, to be sure. But the feeling that accompanies these cognitive activities is what gives life its color, and shapes what we know. The well-known neurologist Antonio Damasio and renowned educator Mary Yang, make this point well:

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.\textsuperscript{12}

As demonstrated by the research described by Lehrer, human emotion provides the fuel for the engine of decision-making. 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.\textsuperscript{13} One of the surprising effects of this unusual condition was that the patient had difficulty making the simplest decisions. The patient’s 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.”\textsuperscript{14} 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.”\textsuperscript{15} 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

\textsuperscript{12} We Feel Therefore We Learn: The Relevance of Affective and Social Neuroscience to Education, 1 MIND, BRAIN AND EDUCATION 3 (2007).

\textsuperscript{13} This discussion is from D. Hoffman, Mediation, Multiple Minds, and the Negotiation Within, 16 HARV. NEGOT. L. REV. 297, 303 (2011).

\textsuperscript{14} See supra note 1.

\textsuperscript{15} Id.
the emotional heat that is generated by the combination of (often) incompatible personalities of the parties. The individuals involved in a mediation drama often come with a history of relationship, respect and hope that has been transformed into mistrust, rejection and betrayal. This is an extraordinarily complex set of emotions that the mediator must untangle sufficiently 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 stands in the way of achieving their objectives.

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. They contend that our core concerns are affiliation, appreciation, autonomy, role, and status. 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. Imagine an employment mediation in which a more 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 lens that Fisher and Shapiro bring to the subject of emotions works particularly well in mediations in which the parties will have an ongoing relationship.
C. 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. 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 time with people in a mediation, we get to see them reproduce the behaviors – for better or worse, but usually the latter – that led 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 that mediators see in the parties and counsel – ranging from angry outbursts to moody withdrawal. In the sections that follow, however, we describe a few of the more common patterns that we have observed.

1. **Venting and Anger Management.** 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

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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. 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.” Experience 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

17 Collaborative law colleague Nancy Cameron alerted us to this phenomenon. See 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),

18 Daniel Goleman, EMOTIONAL INTELLIGENCE 64-65 (2006). 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).
prohibit raised voices, obscene language, angry physical gestures, and other intimidating behavior.

2. **The “Fight or Flight” Response.** Perceived threats trigger a cascade of complex and almost instantaneous reactions in the human body, including our brains, that 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 “hyperarousal” 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.\(^\text{19}\)

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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.

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 corners, so to speak, 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. Gottman identified criticism, stonewalling, defensiveness, and contempt as some of the triggers that cause emotional flooding in his research subjects. 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. The cure for flooding, according to Gottman, is taking a break of at least twenty minutes so that the emotions can subside. In the setting of mediation, this can be accomplished by meeting with the parties separately in a caucus session, or simply taking a break in 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.

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4. **Trust and Neurotransmitters.** Neuroscientists have identified specific chemicals in the brain that foster trust – chief among them is oxytocin. Oxytocin is released in women during breast feeding, and men and women experience increases in oxytocin levels during sexual arousal. Many scientists believe that oxytocin plays a role in forming romantic attachments. According to one researcher, “oxytocin makes both men and women calmer and more sensitive to the feelings of others.” Another study found that physical touch, in the form of a relaxation massage, produces higher levels of oxytocin in women. Research in Sweden showed that

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21 See supra note 13 at 308-09.

22 See Michael Kosfeld, Markus Heinrichs, Paul J. Zak, Urs Fischbacher & Ernst Fehr, Oxytocin increases trust in humans, 435 NATURE 673 (2005).


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.28

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.29

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 has 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.


5. **Decision Fatigue.**

The attitudes and behaviors that we have described in this article are not static over time. 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. 30 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.” 31 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, or (b) making no decision at all, though this too could lead to problems that we lack the energy to consider fully.

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

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31 *Id.*
making decisions, they take illogical shortcuts and tend to favor short-term gains and delayed costs.\textsuperscript{32}

One of the causes of this depletion is low glucose levels. Although the human brain constitutes only 2\% of our body weight, it consumes 25\% of the body’s glucose.\textsuperscript{33} 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.”\textsuperscript{34}

This phenomenon may be less of a problem in divorce mediation, which typically is scheduled in blocks of two or three hours, 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 the mediation, just as the parties, counsel, and the 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, for example, that candy does. Even more

\textsuperscript{32} Id.


\textsuperscript{34} Id.
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.

D. 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.

1. Core Beliefs. Core beliefs are personal articles of faith that lie deep at the core of human experience and resist change. 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. 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” each party’s understanding of the past. 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/her perspective and then the mediator asks the other party to describe, without judgment, what s/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 s/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 construct an agreement that addresses 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.

2. 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, one of the parties (a litigator by trade) announced at the first moment of the first meeting, “Everyone knows that mediations fail 75% of the time, so I don’t know what we are even doing here.” With this expectation in the background of every interaction with this individual, the mediators were challenged to either ignore the claim or prove that it was false. The view of the mediation process that this party expressed was also shared with all the
other parties, and so to have trivialized or ignored it could have been the death knell of the mediation. Consequently, we faced the belief/expectation head-on (by describing data showing that the vast majority of mediations, in fact, do result in settlements), and in so doing revealed that it was driven by this man’s belief that he could not trust the other members of his family with whom he was trying to negotiate, and some of his reasons why. 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.

3. **Expectations of Mediators.** The parties in a mediation are not the only ones who have beliefs and expectations. Each mediator has his or her own personal set of beliefs and expectations. These expectations can be general, such as the notion that litigation creates more bloodshed than it could ever be worth. The expectations can also be personal, for example, “I hope I can get a good outcome in this case because this is a high profile case, my business is slow and I want to impress my colleagues.” It is, of course, naïve to think that any mediator can free himself or herself of all expectations before embarking on a new mediation. The education, prestige, or pedigree of the clients, the personal (even sexual) appeal of one of the parties, or the mediator’s repugnance at the contemptuous way that one of the parties treats the other – all are fertile ground 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 rather 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), 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 (possibly) a different 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 son interacts with his mother,” and the other replies, “But did you see the way she manipulates and infantilizes him?”

But whether co-mediating or not, the important underlying concept of mediation is that often people do not act in (what would seem to be) their own best interests. Personal feelings of rage toward a disloyal spouse override parental judgment, and children are made the unwilling messengers between parents who don’t talk. An angry business partner will spend hundreds of thousands of dollars to prove a point – costing the very company s/he is trying to save the margin of profit that could save the business from bankruptcy. Thrust into this cauldron of heat and emotion, the mediator needs to find ways to bring calm to troubled waters, replacing literal 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 the fabric of relationships torn apart by the conscious and unconscious psychological forces of the parties.

II. The Psychologically Minded Mediator

B. Setting the Stage

The psychologically minded and informed mediator will begin each mediation 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 countless other cues that make up even the first moments of the social interaction of mediation are of potential relevance 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.** The plural of the word mediator in this article means co-mediation, a powerful modality that 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 to be so destructive35), insults, outright swearing and name-calling cannot be tolerated if the mediation is to have any hope of success.

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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; and 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.** As noted, the personalities of the parties and also those of the mediators 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 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 may remain intractable and incapable of considerate conversation or entertaining new models of change to resolve their disputes. They have thereby failed the key test of a mediated settlement – namely, a settlement that comes from the parties themselves, with
the assistance of the mediators. 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.”36 Such people may fit the diagnostic criteria of one or more of the Axis II personality disorders described in the American Psychiatric Institute’s Diagnostic and Statistical Manual of Mental Disorders (such as borderline personality disorder or narcissistic personality disorder). What they have in common is that they often find themselves in intractable conflict with others.

Eddy offers a methodology for working with such people that involves four clusters of skills: (a) bonding, (b) structure, (c) reality testing, and (d) consequences. Bonding is important because, for many high conflict people, abandonment is a fear, and therefore the mediator’s relationship with the party is meaningful in and of itself. 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. Reality testing, done with as much detachment and objectivity as possible by the

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36 Bill Eddy, HIGH CONFLICT PEOPLE IN LEGAL DISPUTES (2006).
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 s/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 a settlement come from the parties themselves is the hallmark of successful mediation. 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. Further, 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.

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 issues of 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 in 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 where 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.\footnote{See Frank Sander, Stephen Goldberg, Nancy Rogers & Sarah Cole, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 54 (5th ed. 2007)}

In order for agreement to emerge from the thought, experiences and creativity of the parties, the mediators must achieve 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 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, I 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.\footnote{Malcolm Gladwell, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).} Thin slicing refers to the rapid calculus we engage in when making decisions based on initial, and very limited, data. 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 always one hundred percent correct to be sure, but thin slicing, particularly with individuals who have expertise, is more often right than wrong, and we base many of our professional judgments on it.

When the students told the group that they had an outcome in mind, even before the mediation began, I told them to “forget about it.” I 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 one of taking personal responsibility for future actions, and in so doing increasing 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’s famous phrase. Most people – whether parties or lawyers – come to a mediation with an outcome in mind. The 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 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 achieve the ability to release one’s grip on the outcome of mediation, the mediator must undergo, to use Thomas Kuhn’s (1966) excellent term, a “paradigm shift” in thinking. 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 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

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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 mediations. It is
particularly counter-productive because it imposes a decision or course of action from the
outside and does not include in the equation or recognize the subjective experience of the people
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. 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 their training and the expectations of their clients is diametrically
opposed to the clients’ assuming personal and individual responsibility for resolution of disputes.
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 that may or may not work. The mediator can then be released from the assumption that
one can control the nuanced needs of someone else’s life. Ultimately this approach also opens
the minds of the parties to new and creative forms of problem solving together (and with the
mediator) that can set the stage for their future decision-making and dispute resolution whether
the mediator is involved or not. 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 – a cooperation that opens the door to the prospect of healing and growth.


The field of social psychology provides mediators with insight about how, in both ordinary 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 – all of which can be useful for mediators.40

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. In mediations, 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. Accordingly, mediators often need to coach the parties’ negotiations, helping them to 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. (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 substitute for diplomas on the walls. Therefore, reminding the parties of our experience as mediators must be done with subtlety and tact, but can often act as reassurance to nervous parties.

3. **Liking.** We are more likely to accept the influence of people we like, and initial impressions often tell us whether we will like someone. (This is an example of “thin slicing,” discussed above.) 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, 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.” 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.” 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 side’s case. Mediators can sometimes, with delicacy, elicit counteracting commitments. Some mediators, for example, ask at the beginning of the 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 operate as 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, social psychologists predict that you are more likely to buy one too. If 93% of the people on the Yelp.com website liked a restaurant, we are more likely to go there. In mediations, the parties often want to know “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”). Predicting what a court will do, according to Oliver Wendell Holmes, is the very essence of the practice of law, and mediators are ethically prohibited from such practice even if they carry a bar card. But mediators can tell the parties stories of outcomes in other cases they have mediated, and those stories, if well chosen, can provide the 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. Why? Because General Motors announced that year that
production of the Oldsmobile was about to end. How does this principle apply to mediation? In most cases, the parties are willing to try mediation once, if at all. Mediation is a rare opportunity to have an impartial and experienced person help the parties broker a deal. After a failed mediation and subsequent investment in litigation, the 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”). To be sure, 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 vision 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.

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41 See Noah J. Goldstein, Steve J. Martin, Robert B. Cialdini, YES!: 50 SCIENTIFICALLY PROVEN WAYS TO BE PERSUASIVE (2008).
These distortions in our perception, memory, and thinking are surprisingly predictable. The sections that follow describe some 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 lapses 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 their intent. Even when we are able to acknowledge our flaws, we often consider them minor when compared to those of others.

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. Second, people tend to attribute negative motives to others who disagree with their opinions more readily than

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positive motives, especially when people feel very involved in the issue at stake.  

Third, negative acts have more impact on relationship quality than positive acts. 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. Sometimes it can be helpful to show the parties the symmetry of their interpretations – in other words, if Party A can see how s/he is misunderstood by Party B, Party A might also be able to see how s/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. “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.”


45 See Roy Baumeister et al., *Bad is Stronger Than Good*, 5 REV. OF GEN. PSYCHOL. 323, 328 (2001).

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 $120,000. Does the Plaintiff accept on the spot? Or does he immediately conclude that $120,000 must be a low-ball figure because it’s coming from a party that the Plaintiff views as the enemy. 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”). Second, mediators can normalize (and help the parties choreograph) the back-and-forth bargaining that mediator Michael Keating calls “the dance for dollars.” “It’s perfectly normal and expected,” says the mediator – invoking the principle known as “social proof,” discussed above – “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” 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

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*Emotions to Optimize Health and Well-Being, 3 Prevention & Treatment* (March 7, 2000)

held views. The most familiar varieties of confirmation bias\textsuperscript{47} 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 mediations, 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 believe 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.

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, 80% of them said yes. 94% of college professors profess to be better than average. (Some call this phenomenon the “Lake Wobegon effect,” because in that mythical town made famous by Garrison Keilor, “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

\textsuperscript{47} See generally R. Nickerson, “Confirmation Bias: A Ubiquitous Phenomenon in Many Guises,” 2 REV. OF GEN. PSYCH. 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 McNerny, “Psychology’s Treacherous Trio: Confirmation Bias, Cognitive Dissonance, and Motivated Reasoning,” Why We Reason Blog, September 7, 2011 (http://whywereason.com/2011/09/07/psychologys-treacherous-trio-confirmation-bias-cognitive-dissonance-and-motivated-reasoning/).
numerous times in law schools, business schools, and elsewhere: 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 fact sheets begin with the words, “you represent the plaintiff” and other half say, “you 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. Of course, mediators encounter parties 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.48

Another mediator strategy for deflating optimistic overconfidence: after a party tells you why they are certain they will prevail if the case is tried, ask them why they chose to bring their case to 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. 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’s to say, for example, that a discrimination plaintiff’s emotional distress should be

48 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.
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 telling 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.  

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 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.

Imagine that you are about to purchase a $100 item – say, 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

49 See Dan Ariely, PREDICTABLY IRRATIONAL, at 28-31.
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 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 your input and 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.” 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. (This may be culturally specific, as it is said that in some cultures, a tie score is
considered best because no one loses face.) 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 may be feeling the same way, and two parties, bent on winning, can find themselves worse off, by the end of the battle, than they would be in 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.”)\(^{50}\)

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 was five dollars, or fifteen dollars? In experimental settings, where people engage in what game theorists call the “Ultimatum Game,” 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 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, even though turning down the money is not in their best interest from a purely economic standpoint.

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\(^{50}\) Abraham Lincoln, “Notes for a Law Lecture,” July 1, 1850, in 2 **COLLECTED WORKS OF ABRAHAM LINCOLN** 81 (Roy Basler et al., eds. 1953).
In mediations, 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. In short, people are not ruled entirely by economic self-interest. When one of the parties in a 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.)

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). 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.

8. **Endowment Effects.** A classic experiment involving coffee mugs illustrates the endowment effect. 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

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to pay, on average, $2.87, and sellers demanded, on average $7.12.\textsuperscript{52} In other words, the sellers developed a feeling of attachment (one could call the feeling an entitlement or “endowment”) with regard to the mugs after owning them only for a brief time. These results have been found across cultures, but are somewhat stronger, it appears, in some cultures than others.

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. 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 – we are measurably reluctant to change the status quo, and a settlement involves such a change.\textsuperscript{53}

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,

\textsuperscript{52} Daniel Kahneman, THINKING, FAST AND SLOW 296 (2011).

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 develop 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. 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 50/50 chance of winning $150 or losing $100, would you take it? The answer for most people is no. From a psychological perspective, “the response to losses is stronger than the response to corresponding gains.”54 This aversion to losses means that most people in the experiment would have to be paid somewhere between $150 and $250 in order to accept a 50% risk of losing $100.

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.”55

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 s/he were told by an authoritative source that s/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.


55 Id. at 300.
b. In bad choices, where a sure loss is compared to a larger loss that is merely probable, diminishing sensitivity causes risk seeking.\textsuperscript{56}

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. 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 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. 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/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

\textsuperscript{56} Id. at 285.
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 law suit.

According to Kahneman, the same asymmetry holds true with defendants. 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 the 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 seldom need mediation. Their differing assessments of liability and potential damages (because of such factors as overconfidence bias, status quo bais, and endowment effects) cause them to 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 a mediation come to the table with different data, confirming their respective views of the case. Try this experiment. Look around the room that you are in and notice where in the room 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. An 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. One of the strategies that mediators can use when confronting radically different accounts of the same events is to identify 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 occur when we (quoting Jack Kornfield) “give up all hope of a better past” and focus instead on the future.57

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 effective when the experimental subjects thought they cost $2.50 per pill as opposed to 50 cents.

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.\textsuperscript{58} 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.\textsuperscript{59}

What this means for mediators is that it’s important for us to know as much as possible about how the mind works, and it may be useful on occasion to share with the parties what we have learned if it seems directly applicable to their situation. In doing so, finesse is required. 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 – “perhaps what we are seeing here is some variety of . . . [describe the bias or effect].” 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, must be presented in a non-blaming way, and needs to be embraced by mediators as pertaining not only to the parties but also to their own human endowment of finite, and occasionally biased, rationality.

\textsuperscript{58} See Dan Ariely, \textit{PREDICTABLY IRRATIONAL} 239 (rev. ed. 2009).

\textsuperscript{59} See \textit{SCIENTIFIC AMERICAN}, http://www.scientificamerican.com/podcast/episode.cfm?id=placebos-work-even-when-you-know-10-12-23.
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,” Goleman provided evidence that emotional competencies are “twice as important in contributing to excellence as . . . pure intellect and expertise.”

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.”

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, and he organizes them in 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 at the same time 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:

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62 Id. at 317.
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.  

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 (2001), Richard Wolman examines another vital dimension of the “multiple intelligences” described by Howard Gardner (1983). Gardner postulated eight different intelligences and added a fraction of one called “Existential Intelligence,” associated with asking questions about the meaning of life. Wolman’s work pushed the number to nine, incorporating existential intelligence into an encompassing “Spiritual Intelligence.” 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.  

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In a recent article, we have suggested that mediation itself is a spiritual practice because it enables us, as mediators, to grow in self-understanding and self-acceptance.\textsuperscript{64} Spiritual intelligence fosters a greater level of curiosity and compassion for the parties with whom we work, but just as important 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. Center for Disease Control, 50% of U.S. adults will develop at least one mental illness during their lifetime.\textsuperscript{65}

No one knows what percentage of the people who come to mediation are mentally ill, 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 a 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 with, or co-mediate with, a mental health professional when psychological issues seem to be impeding progress in a mediation.

Second, when the parties in a 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 not 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, it can have therapeutic effects, as well as counter-therapeutic effects. In other 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. Although the ostensible goal of virtually all mediations is a written agreement spelling out enforceable settlement terms, once the parties enter into 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.67


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