

Paradoxes of Mediation

By David A. Hoffman

According to Zen Buddhism, one way enlightenment can be achieved is by holding two contradictory thoughts in the mind simultaneously. This, I have found, is more easily said than done. Perhaps I am handicapped in this endeavor by virtue of professional training: as a lawyer (or, as the joke goes, recovering lawyer), my mental functioning has shifted decidedly to the left brain. In fact, I know one lawyer-turned-mediator who describes law school as a process in which the left brain circles around the right brain and eats it.

If that is the case, learning to practice mediation has presented me with the task of recovering the right-brain function – the place where creativity and non-linear thinking flourish. Indeed, restoring the balance between the two hemispheres may be necessary to succeed at mediation because the work is inherently difficult, multi-dimensional, and requires not only logic but also inventiveness and a tolerance for ambiguity.

Managing complexity

As mediators, we must hold in the mind simultaneously the perspective of each of the parties – perspectives that often have little in common with each other and are usually contradictory or mutually exclusive. As we manage the interactions of these parties, we find ourselves enmeshed in a breathtakingly intricate matrix of psychological issues, negotiation dynamics, communication problems, subtleties of inflection and body language, barriers of gender, culture, race, and class, and disagreements about legal issues and the facts that gave rise to the dispute. The very complexity of the work is one of the things that make it so appealing: no matter how much experience we have, no matter how skilled we may become, mastery will always elude us.

For people who love challenges, mediation is a natural calling. The division of labor between left brain and right brain is a good metaphor for considering the paradoxes of mediation because it exemplifies the way in which, as mediators, we often need to be engaged in multiple – often mutually exclusive – activities simultaneously.

I am also struck by the similarity in these paradoxes to those identified by psychotherapist and scholar Sophie Freud in her article, “The Paradoxes of Parenthood: On the Impossibility of Being a Perfect Parent.”¹ Freud’s article describes the missteps that we make as parents as inevitable because of the conflicting responsibilities involved in raising children. For example, we must

protect them, while at the same time letting them make their own mistakes. We must praise and encourage them, but without overdoing it, so that they will learn how to manage criticism.

Freud also identifies the dilemma of “fostering simultaneous attachment and separation” as “perhaps the most difficult parental task”:

It involves promoting individuation and autonomy, essential life goals, while also offering the child an experience of attachment profound and meaningful enough to evoke a lifelong capacity to love, feel, and care. . . . [This is a] paradox of parenthood: disenchantment with and rebelliousness against parents is a necessary part of the relationship; a [parent-child] relationship is flawed if it remains conflict free and apparently totally harmonious. (Freud, p. 183.)

The moral of Dr. Freud’s article is that perfection in parenting is unattainable because there is no perfect balance of these conflicting duties. Certainly, this is true from the standpoint of our children who, as silent critics or noisy detractors, often tell us we’re doing our work as parents wrong if we’re doing it right. And it is unattainable in our own eyes as well. Our children are mortal and therefore fallible – in a word, imperfect. Likewise, our efforts as parents are inherently imperfect.

Similarities to mediation

Is our work as mediators different? It seems to me that mediators try to balance some of the same tensions and deal with some of the same paradoxes that parents encounter. For example, if the parties in a mediation leave the process annoyed with us but reconnected with each other, have we succeeded or failed? Do we not have to manage the tension in mediation between attachment and separation, relationship and autonomy?

I have had occasion over the years to observe some gifted mediators at work and to talk with lawyers about their experience with these same mediators. And I have been astonished to hear mixed reviews on mediators whom I regard as some of the most skilled practitioners in the field. “Perhaps the mediator had a bad day,” I thought. But more often, I suspect, the mediator’s style did not fit the particular people or circumstances of the case – the techniques they used were a mismatch for one or more of the parties or their lawyers. Or perhaps the inherent tensions in the perspectives or negotiation styles of the parties made success impossible. In short, the mediators may have found themselves in a situation where no amount of skill would have sufficed.

Striving for perfection

I do not underestimate the difficulty of getting it all right – indeed, the complexity of the work is one of the premises of this article. What I am suggesting is that by exploring the fundamental and to some extent irreconcilable tensions in what we do, we mediators will gain a fuller understanding of how very difficult – indeed, sometimes impossible – our work is, thus enabling us to do a better job while relinquishing the ambition of doing a perfect one. We all know the saying about the perfect being the enemy of the good. So it is with mediation.

So what are these irreconcilable tensions – these paradoxes, if you will? First, I outline a group of micro-level paradoxes, describing tensions in the practice of mediation, and next a group of macro-level paradoxes for the field of mediation as a whole.

Micro-Level Paradoxes

Mediator “pressure” vs. party autonomy

Robert Baruch Bush and Joseph Folger have pointed out the ways in which mediators unavoidably affect or steer the process of mediation, even when they believe that their exclusive role is to carry out the parties’ intentions.² Their solution to this dilemma is to participate in the process in such a way as to promote empowerment and recognition.

For other mediators, the solution is to promote settlement. Their dilemma is different: how to manage the tension between parties, each of whom wants the mediator to apply settlement pressure to their *opponents* (through reason, appeals to emotion, and other means) but not to them.

In his article “Mediator Pressure and Party Autonomy: Are They Consistent with Each Other,” mediator and professor David Matz notes that “for a mediator to encourage the free expression of a party’s will, the mediator may (and in some circumstances must) . . . pressure a party to enable that party to achieve autonomy.”³ For some mediators, there is a paradox within this paradox, because often the most effective “pressure” is simply agreeing with the parties. As mediator Robert Benjamin has noted in his pair of article on mediators as “tricksters,” mediators sometimes use what are known among psychotherapists as “paradoxical interventions” to move the process along; that is, suggesting one thing while meaning another.⁴ For example, when we talk with a party who is hell-bent on proving her case in court, we might discuss all the advantages of a

trial because discussing the disadvantages would simply deepen her resistance to settlement:

Only by first exploring and supporting the parties' thinking and encouraging them to hold on to their entrenched positions can the mediator move them to allow themselves to consider other options. Thus is the paradox: intensifying the commitment to a stated course of action allows for the lessening of that commitment. Conversely, [disagreeing with the parties' views] will only serve to bolster the resistance.⁵

As a mediator, I have found that in the final, hard-bargaining stage of a mediation in which the dispute often boils down to money and a zero-sum negotiation (after full consideration of the possibilities for mutual gains, integrative bargaining, and "expanding the pie"), I am often skating a fine line between the parties' desire to get the deal done and their annoyance with me for extracting yet another concession from them. This situation presents an equally paradoxical dilemma for the parties, because they must skate the line, in their communications with me, between resisting concessions firmly enough to achieve their bargaining objectives without overdoing it and sabotaging the opportunity for a settlement.⁶

Mediator "presence" vs. party control

Another paradox can be found in a phenomenon noted by a number of mediators: the positive impact that a mediator's "presence" can have as a factor in promoting resolution.⁷ The reasons for the effectiveness of a mediator's presence are not only difficult to define, but they also vary from one mediator to the next. Some mediators seek, by their demeanor, to "bring peace into the room."⁸ Other mediators may, by virtue of their charisma, credibility, or charm, create an environment in which the parties find themselves motivated to achieve settlement.

And yet, as mediator Gary Gill-Austern has pointed out, the very effectiveness of the mediator's presence is problematic:

The mediator's role is complex, even paradoxical. A mediator must be remarkably and uniquely present – a full participant. At the same time, and more fundamentally, the mediator must be present in a manner that embodies an understanding that she or he has no significance at all to the dispute and its resolution. . . . The mediator must function within a paradox: how to be central and matter not at all.⁹

There is the further paradox of mediator "presence" that mediators try to be present in the moment (putting to one side any concern about the future) while, at

the same time trying to attend to the strategic direction and effectiveness of their interventions – that is, seeking to influence the future while simultaneously ignoring it.

Mediator knowledge vs. party expertise

One of the most frustrating paradoxes for mediation clients is that they look for mediators who are knowledgeable, only to find that mediators are often reluctant to share with them what they know. Divorce mediators, for example, acquire a good deal of knowledge over the years about the various arrangements that lawyers and the courts consider customary with regard to asset division, custody, alimony, and child support. The parties often prefer mediators who have such knowledge, but we mediators send the parties off to lawyers to get answers to their questions because, when serving as mediators, we are not permitted to give legal advice or engage in the practice of law. (Even if we are lawyers, ethical principles prohibit us from mixing the two roles, and those mediators who are not lawyers are also prohibited by statute from practicing law.) Thus, parties who came to us in order to minimize the role of lawyers in the resolution of their dispute are being sent to the law offices they sought to avoid. The hoped-for result of these referrals is better informed parties. But often the result is to inject a higher degree of contentiousness into the process – thus undermining one of the reasons the parties chose mediation.

Confidentiality: keeping secrets vs. “noisy” communication

Mediators usually begin a mediation session by assuring the parties that their communications will be confidential – not only from outsiders but also from each other, if the mediator meets with the parties separately and they disclose information they do not wish the other party or parties to know. The conventional wisdom is that confidentiality fosters candor, which in turn fosters settlement.¹⁰ Ethical rules for mediators also require confidentiality.¹¹ And yet some commentators have noted that the mediator's success in settling cases may depend, at least in part, on her ability to make indirect disclosures to each of the parties concerning their opponent's position.¹² Mediators make such disclosures (assertedly without violating ethical rules) by cloaking the disclosures in what Jennifer Brown and Ian Ayres describe as “noise” – a smoke screen of hemming, hawing, and “what-if”-ing – that allows the parties to discern more effectively each other's perspectives and bargaining positions, while at the same time protecting them from being asked to make bargaining concessions that are not likely to be reciprocated.

The paradox here is that the parties are counting on the mediator to keep their confidences while at the same time disclosing them – albeit “noisily” – to the other side. “Mediators,” write Brown and Ayres, “can productively control the flow of information between the parties by filtering or inserting noise into their private disclosure.”¹³ Mediators learn to manage this tension with time and experience, and the parties learn, during the course of the mediation, whether they can trust the mediator to manage it successfully. The parties gauge, to some degree, what the mediator is doing in meetings with the opposing party by what she does with them. Although the mediator can bargain with the parties for leeway in making disclosures, there is usually a need, even without such bargaining, for noisy, filtered, indirect communications by the mediator that will enable the parties to navigate their way to a settlement.¹⁴

Empathy vs. candor

Ken Cloke has described empathy and honesty as two of the principal attributes of effective mediators.¹⁵ And while it is possible for a mediator to be both empathic and honest at the same time, the effort calls for exquisite balance. For example, in a recent mediation in which such balance was not achieved, I suggested to divorced parents who were engaged in a tug-of-war over their kids that each of them might be feeling a personal stake – beyond the best interests of the children – in winning. Unready to hear this, both denied caring which of them “won,” and I came away with the feeling that I had perhaps tipped the balance too hard in the direction of honesty.

Empathy requires engagement; honesty requires objectivity and detachment. Engagement fosters safety, while candor may create difficulty. The paradox is to be both engaged and detached at the same time.

A number of mediators describe mediation as “making a safe place for a difficult conversation.”¹⁶ Thus, the mediator’s job is to strike a balance between the difficult and the safe in a way that motivates change and the taking of fresh perspectives, while at the same time creating a level of comfort that fosters resolution.

Impartiality vs. bias toward problem-solvers

Mediators aspire to be impartial. Indeed, impartiality is an ethical requirement. And most mediators are able to act in ways that appear to the parties to be impartial. Yet even the most experienced mediators will admit to feelings of bias that begin to develop shortly after the mediation has begun – often within minutes. Perhaps the most common bias is in favor of the party or parties who, like the mediator, embrace a principled, interest-based style of negotiation. Mediators

generally do not like belligerent, positional bargainers who are uninterested in expanding the pie, and who focus instead on seizing the largest obtainable piece of it. Mediator and author Ken Cloke describes the mediator's role as being "omnipartial."¹⁷

The paradoxical element is the mediator's need to identify with, and support, people whose positional bargaining seeks to undermine, and in some cases, take advantage of the mediator's problem-solving, interest-based orientation. Mediators are bargainers in the mediation process, seeking cooperation, disclosure, and concessions, just as the parties do. Moreover, mediators pursue ends of their own – principally, a successful outcome. The meaning of success may vary from case to case and may not always require a settlement of the underlying dispute. But it is naïve to assume that mediators are indifferent as to outcome, and thus it is remarkable that mediators succeed in remaining "omnipartial" to those who stand in the way of success.

A related paradox arises when the parties begin to trust the mediator (perhaps because of her omnipartiality) and share with her secret information about themselves – perhaps an admission of culpability -- that causes the mediator to feel less omnipartial. To earn the parties' trust is an important mediator skill, requiring a good deal of empathy. The fruit of that trust, however, can sometimes leave a bitter taste in the mediator's mouth and cause her to question whether the empathy was misplaced.

Trust vs. transparency

One of the mediator's principal tasks is to win the trust of the parties. From the first moments of her involvement with the parties or their counsel, the mediator seeks to convince them that she will be fair and even-handed. In theory, transparency – candor by the mediator about the process and the mediator's role in it – enhances such trust.¹⁸ And yet there are aspects of the mediator's work that, according to some, involve deception and manipulation. In his articles about the mediator as "trickster," Robert Benjamin describes one aspect of the mediator's role – playing the part of the wise fool (a role not unlike that of Peter Falk's character, Lt. Columbo).¹⁹ Playing such a part successfully, of course, cannot be done transparently. Does the mediator seek to win the parties' trust only to take advantage of it, in the way that Lt. Columbo lulls his suspects into complacency? And if the mediator is truly transparent, might such a stance not only undermine her effectiveness but also cause the parties to question their ability to trust such a mediator? Transparency is hardly the norm in our dealings with others, who tend to keep their agendas and methods to themselves. Thus, the effort to win trust may have the opposite effect.

Honesty vs. protection from fraud

Mediators occasionally learn more than they want to know. When one side or the other shares with the mediator confidential information that might affect the other party's willingness to settle, the mediator must decide whether disclosure of that information to the other side is necessary to avoid perpetrating a fraud. For example, in a recent case, three brothers and their father were in a real estate dispute with their elderly neighbor, who did not know that title to the land in question had been completely transferred from the father to the sons. From the standpoint of the settlement terms, it did not seem to matter who owned the land. But to the elderly neighbor, it did: after signing a settlement agreement, he sought to revoke the deal when he learned of the change of ownership. The mediator had been given the information, on a confidential basis early in the mediation, by the father and his sons, who rejected the mediator's advice that they disclose the change in ownership. The mediator, of course, could not find out from their neighbor whether the change of ownership would matter to him because the inquiry itself would amount to an impermissible disclosure.

The paradoxical aspect of this situation is three-fold. First, the mediator has conflicting ethical duties (honesty to the parties, confidentiality, and refraining from perpetrating a fraud), all of which must be honored. Second, the mediator's participation in the process may have enhanced the parties' level of confidence that they were receiving honest treatment, when in fact the mediation may have lulled one of them (the elderly neighbor) into a false sense of security, while at the same time satisfying the need of the others (the father and sons) to confess the true state of affairs. Finally, while the parties may have believed that the mediator's involvement would enhance the likelihood of achieving an enforceable agreement, the mediator's non-disclosure gave the neighbor grounds for challenging the enforceability of the settlement terms. (The case, by the way, settled, but only after a second round of mediation – and new settlement terms, more favorable to the elderly neighbor – when the title issue came to light.)

Emotion: encouraging expression by the parties while suppressing our own

A seasoned plaintiff's employment lawyer once told me that her cases usually do not settle in mediation until her client cries. To be sure, venting emotion is an essential part of most mediations. No matter how dry a business dispute may be, it probably arose because of decisions by people who in all likelihood have strong feelings about the matter. Likewise, as noted above, mediators cannot avoid having an emotional reaction to the parties, but must avoid letting such reactions create an appearance of partiality. The paradoxical element is that part of our job as mediators is to encourage the parties to vent their emotions while we must suppress our own.

Providing normative data vs. promoting party self-determination

Mediators are frequently asked, “What do *you* think is fair? What do *you* think is reasonable? What do most people do? What do the courts do? What do *you* think we should do?” The parties seek benchmarks – norms against which they can measure their own sense of fairness or reasonableness. Yet the mediator will ordinarily resist these efforts to drag her into the fray, because party autonomy (including letting the parties apply their own standards of fairness) is a vital principle of mediation. The paradoxical element here is that, notwithstanding the mediator’s efforts to avoid injecting her own normative views, her influence is unavoidable.

Social scientists have demonstrated that observation produces change in the behavior of the observed. Known as the “Hawthorne effect,” this phenomenon is at work whenever a mediator sits at the table with the parties.²⁰ Most often, the effect is to improve the parties’ ability to negotiate effectively, as they seek to impress the mediator with their reasonableness. Occasionally, however, mediators observe what can be described as reverse Hawthorne effects – that is, parties who seem to negotiate *less* productively if a third party is present. For example, in some cases, explosive personal issues (such as the emotional distress caused by an abrupt termination of employment, or the discovery of infidelity in a marriage) cannot be discussed productively without a third party present, and the seemingly unproductive discussions that take place in the mediator’s presence are nevertheless more productive than they would be without the mediator.

Either way, the parties are affected by the norms that the mediator brings to the table either explicitly or implicitly, because they are keenly aware of the mediator’s reactions to the stories, positions and interests that they articulate at the bargaining table.²¹

Some mediators consider this type of normative impact on the parties not only inevitable but also desirable. Sara Cobb describes this aspect of the mediator’s presence as “witnessing,” which is not a passive activity:

[O]n the contrary, this “witnessing” involves very active participation in the evolution of narrative content. [Notwithstanding the injunction to be neutral] mediation is thus a very moral practice, and mediators are deeply implicated in the nature of the moral worlds that emerge in [mediation] sessions.²²

Thus, no matter how strenuously we may assert that the only norm we bring to the table is a commitment to assisting the parties in reaching their own self-determined solutions, our reactions to them as people, and to their stories, will unavoidably shape those solutions.

Macro-level Paradoxes

At a more general level, the growing use of mediation has created a number of macro-level paradoxes – that is, tensions within the field of mediation that are difficult if not impossible to resolve completely.

Voluntariness vs. effectiveness of non-voluntary systems

We value the voluntariness of the mediation process and consider it an important ingredient in mediation's success, and yet we know from empirical research that mandatory mediation is often just as successful from the standpoint of settlement and party satisfaction with the process.²³ We also know that mediation has taken root most firmly (and most widely) in those areas of the country where it is mandatory. As two researchers have noted, "paradoxically, mediation appears to be particularly powerful and effective in resolving conflicts when parties are most reluctant to enter the process voluntarily."²⁴ The success of mandatory mediation may cause some to conclude that voluntariness is a desirable but non-essential feature of the mediation process. It is important, of course, to distinguish between coercion (whether by statute, court rule, or the urging of an individual judge) to participate in mediation versus coercion to settle, which is universally condemned. There will continue to be a tension, however, in those jurisdictions that adopt mandatory mediation, between theory (mediation as enhancing the parties' autonomy) and practice (mediation as an externally imposed requirement).

Training: weakening the field by overpopulating it

People often sign up for mediation training knowing that the glut of trained mediators in some parts of this country makes it difficult for people to find work and develop the skills they have begun to learn in their training. The paradox here is that the very attractiveness of the field to would-be mediators causes it to become unattractive for those who join it. Perhaps this tension can be resolved by reconceptualizing the role of mediation training – for example, seeking to make it more universal (something akin to, say, CPR or water-safety) rather than a form of professional training. Many litigators now study mediation in order to become more effective advocates when they represent clients in mediation, rather than becoming mediators themselves. For people who seek to practice mediation as a career, advanced forms of training or graduate study may – and perhaps should – become the path.

With maturity, the field of mediation is beginning to develop forms of credentialing. For the moment, however, the ease of entry into the field, combined with its attractiveness, is causing an overpopulation that threatens to weaken it.

A related problem is that volunteerism in the field – exemplified by the pioneering efforts of community mediation programs that serve low-income individuals and families – can, in some ways, undermine the professionalism of the field. Mediating on a pro bono basis – often with a co-mediator – is, for some new mediators, the only way to acquire experience. Promoting volunteerism, a valuable goal in and of itself, enables mediation programs to use “many hands to make light work,” and thus serve woefully underserved communities. Promoting professionalism, also viewed by many as a worthy goal, means giving practitioners a sufficiently steady means of earning a livelihood to enable them to enhance their skills by day-to-day immersion in the field. There is a risk, however, that the greater the availability of volunteer services in a community, the more difficult it will be for practitioners to develop professional practices.

Calling vs. business

In their candid moments, many mediators will acknowledge that they see their work as a “calling” as much as it is a business. Such a description reflects the idealism that mediators bring to their work – idealism that may have germinated in the civil rights or antiwar movements and has now found a home in a different form of peace work. Even for such mediators, however, the business aspects of a mediation practice need attention. The supply of mediators continues to outrun the demand, and even in those parts of the country where mediation is mandatory, there are easier ways to make a living. Moreover, as mediators become more business-like – adopting marketing strategies and the other trappings of commerce, and seeking to achieve settlements that will bring them more cases – they encounter the paradox that such efforts may tarnish or diminish those idealistic aspects of the work that drew them to it in the first place.²⁵

Ubiquity vs. effectiveness

Mediation is becoming well accepted in the world of litigation. Most state and federal courts have an ADR program of some kind, and in most jurisdictions it is now common for litigators at least to consider engaging a mediator at some point in the litigation process. Twenty-five years ago, when mediation was in its infancy as a tool for resolving civil litigation matters, its very uniqueness contributed to its effectiveness. There is a risk, however, that if mediation is used in every case, it may soon come to be seen as just another step in the litigation process – an opportunity for informal discovery, participatory case management, or simply a court-mandated hoop to jump through on the way to trial – rather than a radical departure from that process.²⁶ In short, the more universal mediation becomes in the world of litigation, the greater the risk that its ubiquity will undermine its effectiveness.²⁷

Need for government funding vs. resistance to government control.

Most mediators believe that mediation should be available to all who need it. And yet we know that this is unlikely to occur without a high degree of governmental support. If there is one thing that the hundreds of community mediation programs around the United States have in common, it is their need for greater resources to serve low- and moderate-income populations. Private funding through foundations and the collection of fees for services have proven to be inadequate to address the enormous unmet need for dispute resolution services. And yet we should be careful about what we wish for, because it is difficult to imagine massive public funding of mediation without massive governmental control of mediation services. To say that mediators would be ambivalent about such control is probably a considerable understatement.²⁸

Conclusion

What are the implications of these tensions and paradoxes for practice? Several come to mind.

First, the macro-level paradoxes suggest that there is no obviously correct way to grow the field. Life, as they say, is a series of trade-offs; growing the field of mediation involves trade-offs as well – whether or not we conclude, for example, that mediation should be mandatory. Each of us might resolve these trade-offs differently, and the success of the field may depend on our ability to address them with frankness, with respect for the differing ways in which thoughtful people might resolve them, and with a recognition that they are, to some degree, fundamentally irreconcilable.

Second, the micro-level paradoxes suggest that there is no obviously correct way to practice mediation. Perhaps we already knew that, but I believe that examining the inherent tensions in our work underscores this point, which should give us some degree of humility as we consider such issues as credentialing and regulation.

Finally, a detailed examination of the paradoxes of mediation should give us a renewed appreciation of not only the difficulty of this important work but also the value of reflective practice. Reflection will likely persuade us that the very complexity of mediation – and the paradoxical nature of its goals and methods – cause success to be an elusive horizon that (like enlightenment) we seek, and perhaps with many years of practice approach, but never fully reach.

[David A. Hoffman is a mediator, arbitrator, and attorney at The New Law Center, which is located in Newton and Boston, Massachusetts. He is vice chair of the ABA Section of Dispute Resolution and former president of the New England chapter of the Association for Conflict Resolution. He wishes to thank Prof. Frank Sander, Beth Andrews, Diane DiLeo, Melissa Filgerleski, and Lily Hoffman-Andrews for their comments on a prior version of this article, and Bhavani Murugesan for research assistance. David welcomes comments about the article at DHoffman@TheNewLawCenter.com.]

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- ¹ S. Freud, *The Paradoxes of Parenthood: On the Impossibility of Being a Perfect Parent*, in MY THREE MOTHERS AND OTHER PASSIONS 178 (1988).
- ² R. Bush & J. Folger, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 75 (1994).
- ³ D. Matz, *Mediator Pressure and Party Autonomy: Are They Consistent with Each Other*, 10 NEGOT. J. 359, 362 (1994).
- ⁴ R. Benjamin, *The Constructive Uses of Deception: Skills, Strategies and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 MEDIATION Q. 3 (1995); R. Benjamin, *The Mediator as Trickster: The Folkloric Figure as Professional Role Model*, 13 MEDIATION Q. 131 (1995).
- ⁵ R. Benjamin, *The Constructive Uses of Deception: Skills, Strategies and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 MEDITATION Q. 3, 10 (1995).
- ⁶ Prof. Frank Sander has also noted the risk that mediators may feel pressured by the tyranny of “settlement rate” statistics as a form of market pressure on mediators to promote settlement at the expense of other values. F. Sander, *The Obsession with Settlement Rates*, 11 NEGOT. J. 329 (Oct. 1995).
- ⁷ D. Bowling & D. Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, NEGOT. J. 5 (2000); L. Gold, *Influencing Unconscious Influences*, 11 MEDIATION Q. 55 (1993); G. Gill-Austern, *Faithful*, J. OF DISP. RESOL. 343 (2000).
- ⁸ D. Bowling & D. Hoffman, *supra*.
- ⁹ G. Gill-Austern, *supra*, at 353.
- ¹⁰ For a dissenting opinion, taking issue with the conventional wisdom, see E. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO STATE J. OF DISP. RESOL. 1 (1986).

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- ¹¹ See, e.g., MASS. UNIF. R. OF DISP. RESOL. 9(h); AAA-ABA-SPIDR MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD V.
- ¹² J. Brown & I. Ayres, *Economic Rationales for Mediation*, 80 VIRGINIA L. REV. 323 (1994).
- ¹³ J. Brown & I. Ayres, *supra*, at 330.
- ¹⁴ See C. Honeyman, *Confidential, more or less*, 5 DISP. RESOL. MAG. 12 (Jan. 1999).
- ¹⁵ K. Cloke, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 25 (2001).
- ¹⁶ See, e.g., D. Stone, B. Patton & S. Heen, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (1999).
- ¹⁷ K. Cloke, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 13 (2001).
- ¹⁸ M. Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1 (1997).
- ¹⁹ R. Benjamin, *The Constructive Uses of Deception: Skills, Strategies and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 MEDIATION Q. 3, 11 (1995)
- ²⁰ D. Bowling & D. Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, NEGOT. J. 5, 10 (2000).
- ²¹ For a useful summary of the scientific research on the ways in which human emotion is expressed, in a largely involuntary manner, by facial expressions, see M. Gladwell, *The Naked Face*, THE NEW YORKER 38 (Aug. 5, 2002).
- ²² S. Cobb, *Creating Sacred Space in ADR*, 28 FORDHAM L. REV. 1017, 1031 (2001).
- ²³ C. McEwen & T. Milburn, *Explaining a Paradox of Mediation*, NEGOT. J. 23 (Jan. 1993); R. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997). For a summary of research on this subject, see S. Goldberg, F. Sander & N. Rogers, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 394 (3d ed. 2000).
- ²⁴ C. McEwen & T. Milburn, *supra*, at 34.

- ²⁵ N. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2002).
- ²⁶ See E. Galton, *The Preventable Death of Mediation*, 8 DISP. RESOL. MAG. 23 (Summer 2002).
- ²⁷ The extent of this risk may depend, of course, on the type of case; for example, in divorce cases, or other cases where an on-going relationship of some kind may be at issue, there are greater opportunities for mediation to add value beyond what is possible in a single-issue, zero-sum dispute.
- ²⁸ This dilemma is not unique, of course, to mediation and faces many of society's under-funded activities, such as the arts.