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# *In Practice*

## Mediation and the Art of Shuttle Diplomacy

*David A. Hoffman*

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*Mediation caucusing — that is, separate meetings conducted by the mediator with some, but not all, of the parties — is widely used, but it has become increasingly controversial, as some mediators advocate for a no-caucus form of mediation using only joint sessions with all parties present. The rationale for the no-caucus model is that caucuses give the mediator too much power at the expense of the parties, and joint sessions improve the parties' understanding of each other's views.*

*But caucusing adds value to mediation in several ways. First, from the standpoint of economic theory, caucusing provides mediators with an important tool for overcoming two impediments to settlement — the “prisoner’s dilemma” (caused by the parties’ fear of mutual exploitation) and “adverse selection” (caused by the failure to disclose information). Second, caucusing can help the mediator overcome a variety of negotiation problems, such as communication barriers, unrealistic expectations, emotional barriers, intraparty conflict, and fear of losing face. Third, caucusing provides a more private setting in which the mediator can develop a deeper and more personal understanding of the parties’ needs and interests.*

*Although the no-caucus model may be appropriate for certain types of mediation (particularly those cases in which the parties will have an ongoing relationship), some parties may prefer the efficiency that can be achieved with caucusing, even if that means sacrificing certain other values — such as greater understanding — or giving the*

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*mediator more information than the parties have, thus creating the risk of manipulation by the mediator. Moreover, the choice is not binary — numerous variations and hybrid formats can be useful, such as sessions in which the mediator meets with only the parties' lawyers or with only the parties.*

*Choosing the best format for a mediation is more of an art than a science, and mediators should consider, with the parties, whether the parties' objectives would be best served using only joint sessions, extensive caucusing, or a combination of these approaches.*

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**Key words:** mediation, caucusing, communication, confidentiality, prisoner's dilemma, BATNA, adverse selection.

Within the mediation world, caucusing is controversial.

—Gary Friedman and Jack Himmelstein

Controversy is never a bad thing.

—Brandon Flowers

## Introduction

Several years ago, mediator Tim White, a former gang member on Chicago's West Side, met with the leaders of two rival gangs on a street corner in an effort to dissuade the gangs from going to war. White had served time in prison, had embraced Christianity there, and returned to the streets in a new role; he was hired to be a "violence interrupter" by Project CeaseFire, a program sponsored by the University of Illinois at Chicago School of Public Health.

On the street corner, White talked with the two gang leaders, but he could not control the situation. Other gang members joined the discussion, taunts were exchanged, then guns were drawn, until White finally convinced the gang members to get in their cars and leave before the police showed up. A few days later, after tempers had cooled a bit, White met separately with the gang leaders — first one and then the other — and he brokered a truce. In those separate meetings, he helped them see that their conflict stemmed from a drunken brawl, and that both men would be better off if they dropped their fight. "Y'all was both drunk that night," he said. "You got a black eye. People get black eyes when they get into fights." He later brought the two together to discuss and confirm their deal.

As White described this mediation in an interview for the radio program, "This American Life," host Ira Glass asked him what he thought these two gang leaders told their respective crews (WBEZ Alliance and Glass 2008). Each of them, he said, told the others that he let the conflict go

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because of White. "I let it go 'cause of Tim, man. You know Tim — he stands for peace now, man. And he caught up with me, man, so I told him I'd do it for him. I gave dude a pass." Each was able to save face by attributing their decision to their relationship with the mediator.<sup>1</sup>

White's story about the value of shuttle diplomacy and the power of relationships that mediators forge with people enmeshed in conflict is hardly unique. President Jimmy Carter used similar techniques when he brokered a deal between Egyptian President Anwar El Sadat and Israeli Prime Minister Menachem Begin at Camp David in 1977. Carter's efforts to conduct joint sessions failed because Begin and Sadat could not stand each other. As Carter put it, Sadat and Begin had "no compatibility at all," and therefore he met with them separately (Carter 1982: 335). In those separate meetings, Carter created a relationship with each one of the parties that they could not establish with each other.

Across the world, in a wide variety of settings, mediators use caucus sessions to resolve conflict.<sup>2</sup> In Turkey, tribal mediators engage in shuttle diplomacy (Shishkin 2007), as do tribal mediators in, the Caucasus (Garb 1996). In Sri Lanka, Quaker mediators used shuttle diplomacy to quell violence in the civil war there (Pricen 1994).

In the world of commercial and other types of mediation in the United States and many other countries, mediators often use private caucus sessions, in which the mediator shuttles between or among the parties in conflict, using these separate meetings to discuss the conflict and to advance the negotiation.<sup>3</sup> Eric Galton, one of the most experienced mediators in the United States, handles a wide range of commercial and personal injury cases and has concluded that "the separate caucus is the essence of mediation" (Galton 1995: 25). Scholar and mediator Dwight Golann agrees; in his book *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators*, Golann described private caucuses as "the distinctive aspect of mediation and the setting in which much of the most important work is done" (Golann 1996: 68). In litigated cases that go to mediation, "the parties invariably separate into private sessions or caucuses," according to mediator John Van Winkle. "The core of the mediation, the negotiation process, begins in earnest at this stage" (Van Winkle 2001: 99).

Caucusing is an established element in the teaching of mediation. Virtually all mediation practice manuals discuss the value of caucuses in appropriate circumstances (Folberg and Milne 1988; Golann 1996; Moore 1996; Beer and Stief 1997). The ethical codes regulating the practice of mediation include caucusing as a routine feature of mediation practice and address the question of the parties' expectations with regard to confidentiality in caucus sessions.<sup>4</sup>

Research on the effect of private caucusing on mediation outcomes has been sparse, but one study in the Netherlands involving 540

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employment mediations showed that when mediators used premediation caucuses, the cases “were much more likely to settle” (Swaab 2009: 28). This effect was pronounced when these premediation caucuses focused on saving face and building trust but not when the caucus focused on substantive issues.

Although the use of caucuses in the mediation process is well established, it has become controversial in recent years as some mediators have begun to advocate for a no-caucus model of mediation in which the mediator never meets with the parties separately but instead uses only joint sessions, seeking to help the parties reach a deeper level of understanding of the conflict, the other parties’ interests, and their own interests (Friedman and Himmelstein 2008). Meanwhile, other mediators, particularly those who handle commercial and personal injury cases, have reported that they are spending a majority of their time in caucus sessions, with few, if any, joint sessions (Sharp 2009).

Despite this growing polarization between no-caucus and all-caucus (or nearly all-caucus) models of mediation, the theories on which these divergent practices are based had received little attention in the mediation literature. This began to change with the publication of Gary Friedman and Jack Himmelstein’s (2008) pioneering book *Challenging Conflict: Mediation through Understanding*, in which the authors explain the rationale for their no-caucus model of mediation. Friedman and Himmelstein argue that mediation can be much more than just a way to resolve a conflict. By working together to resolve their conflict in each other’s presence, the parties can use the mediation process to enhance their understanding, and thus their empowerment, regarding the conflict.<sup>5</sup>

Friedman and Himmelstein (2008) are not alone in advocating for greater use of joint sessions. For example, New Zealand mediator Geoff Sharp has expressed concern about the growing number of mediators who insist that “a purely caucus model saves time and is what the market now requires” (Sharp 2009: 1). Sharp suggests that one major reason commercial mediation has moved decisively in the direction of more caucusing is fear — “fear by lawyers, parties and even mediators . . . of the uncertainty and lack of control that comes with people in dispute being in the same room at the same time” (Sharp 2009: 4–5).

The purpose of this article is to articulate the rationale for using caucuses and to advocate for a more eclectic — and more common — model of mediation, in which caucusing is used, where appropriate, not only to resolve conflicts as efficiently as possible but also to achieve many of the same objectives that the Friedman–Himmelstein model seeks to advance.

I note that in several of the mediations described in this article, I served as mediator or counsel. The first person is used in these accounts, but identifying information about the parties has been changed to protect their confidentiality.

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## Surveying the Landscape of Mediation

Mediation has been described as similar to jazz: it requires improvisation and group effort, and with so many varieties of practice, the boundaries of the form are hard to define (Belman 2006). Thus, generalizations about mediation risk oversimplification. Even so, certain patterns with respect to caucusing can be discerned.

### *Commercial and Family Mediation*

In a survey of commercial and family mediators in the United States, attorney Roberta Horton found that the majority of commercial mediators make extensive use of caucusing, while family mediators (whose predominant practice is divorce mediation) seldom caucus (Horton 2009). She found that some family mediators do not use caucuses at all, and “among family mediators who do caucus, . . . 58 percent reported that they spend 30 percent or less of their time caucusing. In stark contrast, 88 percent of the commercial mediators reported spending more than 50 percent of their time caucusing” (Horton 2009: 13).

Exceptions, of course, abound. Bea Larsen, an experienced family mediator in Ohio, meets with the parties separately at the beginning of every case and sometimes as the case proceeds. And the no-caucus model described earlier has been regularly used in commercial cases by Gary Friedman, Jack Himmelstein, and Robert Mnookin.

Nevertheless, by and large, commercial mediation in the United States involves extensive caucusing, while divorce mediations are more likely to involve joint meetings. Why the difference? Some commentators look to the subject matter of the dispute as bearing on the decision to use primarily joint sessions or instead extensive caucusing. For example, John Cooley contrasts insurance claim mediation, in which “multiple caucusing is the primary technique,” with family law mediation in which some mediators “as a matter of practice never caucus separately with the parties” (Cooley 2006: 28).

My discussions with mediators who have been practicing twenty years or more suggest that the most powerful factor in determining whether mediators use primarily joint sessions or caucus sessions is whether the disputants will likely have a relationship of some kind in the future. For example, for a divorcing couple with children, joint sessions provide an opportunity for the parties to transform their soured relationship into a successful co-parenting arrangement. Likewise, in workplace conflicts involving ongoing relationships between employees and/or managers, or commercial conflicts involving companies tied to each other contractually (e.g., contractors and subcontractors in an ongoing construction project), joint sessions may be needed to repair these relationships.

On the other hand, caucusing may be the preferred mode for the parties or counsel in a personal injury case (such as a car accident)

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where the parties never had a relationship and will probably have no relationship in the future. In employment termination cases, particularly those involving discrimination claims, where a relationship has been severed, the parties often opt for caucusing because the accusations each side is likely to hurl at the other (e.g., the employee alleging bigotry and the employer alleging poor performance) will add fuel to the fire of conflict.

The discussion thus far suggests a bimodal pattern of behavior — that is, caucusing or not. Even though commercial mediation (with extensive caucusing) and family mediation (with substantially less use of caucusing) define two poles of practice, mediators have created numerous variations and hybrids.

For example, in multiparty environmental and public policy mediations, mediators typically meet separately with parties during an initial assessment stage of the mediation. This stage may last for weeks or months, during which time the mediators gather data and insight about the conflict and form relationships with the parties. Then, once the joint sessions begin, the mediators often consult separately with each of the parties between sessions. Moreover, even in commercial and family mediation, most mediators, according to Horton's study, use a mix of styles.

### ***Shuttle Diplomacy***

In the arena of international diplomacy, caucusing is often used extensively but sometimes in combination with joint sessions. The term “shuttle diplomacy” was coined to describe then U.S. Secretary of State Henry Kissinger's efforts to broker peace in the Middle East following the Yom Kippur War in 1973, “shuttling” back and forth between nations and leaders to produce cease-fires and peace agreements. While the term shuttle diplomacy is most often used to describe situations in which the negotiator travels long distances to meet with the parties involved, the strategy of meeting with world leaders separately is often used even when they are in the same place, in so-called “proximity talks.”

In some conflicts, shuttle diplomacy is the *only* option. Leaders at war are often unwilling to meet face-to-face or even to acknowledge each other formally. In the case of Kissinger's Middle East shuttle diplomacy, the Arab nations were unwilling to recognize the legitimacy of Israel as a state, much less to meet with its leaders. While these are not the best circumstances in which to begin a negotiation, meeting separately with the parties when there is no other option can help resolve urgent problems — such as armed conflict — and lay the groundwork for further negotiations.

At the Camp David meetings in 1977, described briefly earlier, tensions were so high that for the last ten days of the thirteen-day conference, Begin and Sadat “never spoke to one another, although their cottages were only about a hundred yards apart” (Carter 1982: 333). After early meetings

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resulted only in heated argument, Carter decided to use shuttle diplomacy, going back and forth between the two leaders, drafting, and revising proposals.

Carter found that, along with avoiding the tension that arose in the face-to-face meetings, these private meetings afforded him many opportunities he would not have had in direct talks. Meeting privately with the leaders allowed him to build his relationships with them and, in turn, to try to get them to respect the perspective and motivations of the other side. He tried to convince Begin that Sadat had made a courageous step in initiating the peace process and to respect the enormous personal sacrifice Sadat was making politically. Carter also attempted to persuade Sadat to see that Begin — whom Sadat found to be “difficult to approach or understand” — was a man of conviction and honor (Carter 1982: 338). Such personal insights were unlikely to be achieved in direct talks with the two of them locked in argument and continually antagonizing each other. In addition, Carter found that private meetings with other members of the Israeli delegation besides Begin could be useful. According to Carter, Israeli Foreign Minister Moshe Dayan and Attorney General Aharon Barak both tended to be more reasonable and straightforward than Begin himself and provided Carter with useful insights.

The separate meetings also proved to be important strategically. By meeting with the parties separately before a joint meeting in which Sadat was to present an extremely one-sided and harsh proposal, Carter was able to warn Begin of what was to come and assure him that it was merely an opening gambit, thus moderating the emotional impact of a proposal that might otherwise have infuriated Begin and caused a major setback. Additionally, Carter found that the different negotiating styles of the two parties were fundamentally incompatible; while Sadat preferred to articulate a few key points on which he could not budge and otherwise give Carter a free hand, the Israelis were intensely focused on semantics and quibbled over every word. By meeting with the Egyptians and the Israelis separately, Carter was able to make a few revisions with Sadat and then spend as much time as needed poring over the thesaurus with the Israelis, rather than getting bogged down with these details in joint sessions.

While a tense face-to-face meeting between Dayan and Sadat toward the end of talks almost resulted in the sudden departure of Sadat — showing how destructive the direct interactions between the two parties could be — Carter was able to salvage the talks through further shuttle diplomacy. The negotiations finally resulted in the Camp David Accords, bringing peace to Egypt and Israel and winning Begin and Sadat the Nobel Peace Prize in 1978.

The literature of international diplomacy provides numerous additional examples of mediators making extensive use of caucuses, such as George Mitchell's proximity talks in Northern Ireland (Durkan 1999) and

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Richard Holbrooke's shuttles in Bosnia and the Dayton Accords (Chollet 2005). Some forms of caucusing can play an important role even in mediations in which the talks are mainly direct. Dennis Ross notes the importance of "back channels" in a mediation: the ability for parties to speak confidentially in private with the mediator (Ross 2007). In such meetings, the mediator can explore with each of the parties various options, with the assurance that none of what is said will be repeated or represents a binding commitment.

We can learn important lessons from the use of shuttle diplomacy and caucusing in international disputes. While the parties in a family or commercial mediation may not have hundreds of years of conflict behind them, they may have just as hard a time being in the same room as do Arab and Israeli leaders and could be subject to the same issues of clashing personality as heads of state. Likewise, their pride may get in the way of letting their guard down in front of the other party.

The use of caucuses to resolve international conflict also suggests that even when the parties are likely to have ongoing relationships (e.g., by virtue of their common borders), separate meetings in a mediation may be needed — and indeed may be the only workable method of achieving a resolution.

### **A Study in Contrasts: Mediation in Hawaii**

Two forms of mediation used in Hawaii provide useful models and a useful contrast (Shook and Kwan 1987). In the traditional form of Hawaiian mediation called *Ho'oponopono*, the parties stay together for the entire mediation. A *Ho'oponopono* is convened by a community member of high status who, after an opening prayer, directs the discussion regarding the problem or conflict to be addressed. Periods of silence "promote self-reflection and cool tempers" (Wall and Callister 1995: 50). The goal of *Ho'oponopono* is to restore family and community harmony, an important priority for an island (i.e., no-exit) society. The process includes a confession of responsibility by those involved in the conflict and expressions of mutual forgiveness just before a closing prayer and a shared meal. With repair of relationships as the objective, caucuses have no place in this process. Today, *Ho'oponopono* is used primarily in family law cases and has recently been proposed for use in restorative justice situations, criminal cases in which offenders are willing to take responsibility for their conduct, and the negotiations and discussion focus on the form of restitution that the offender will commit to (Hosmanek 2005).

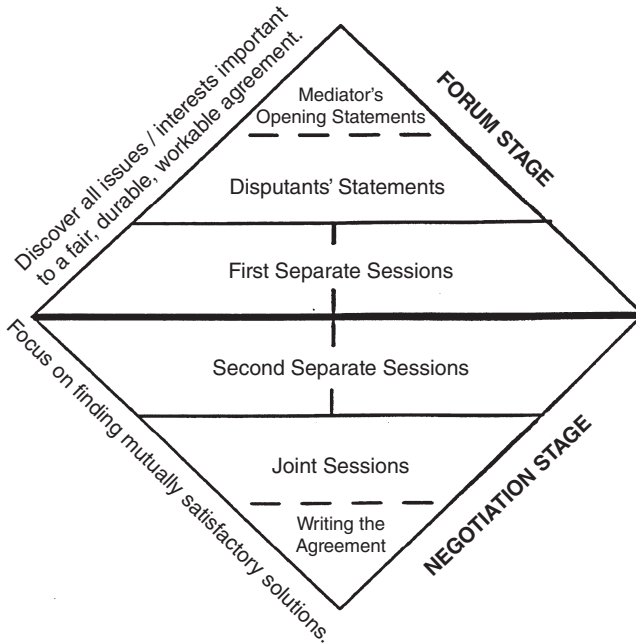
As Hawaii has become more modern and less isolated, forms of mediation have developed in which joint sessions and caucus sessions are used in a structured process that draws on the advantages of both formats. The most prominent model, developed by the Neighborhood Justice Center (NJC) of Honolulu in 1979, has two phases: the *forum stage*, which begins



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**Figure One**  
**The Neighborhood Justice Center Mediation Model**

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with the mediator's statement, followed by the parties' statements, and then *caucus sessions* with the parties, and the negotiation stage, which begins with caucuses, followed by a joint session and then the drafting of an agreement (Ogawa 1999: 13-15). A study of this model found that the caucuses allow the parties to articulate their negative emotions — for example, anger toward the other party — without shaming the other party and causing the other party to lose face. “The significant role of the mediators in the separate sessions for preventing disputants’ loss of face is essential in the Hawaii mediation model. Also, this system helps the mediators identify problems and better understand each disputant’s perspective without interruption, thus moving smoothly through all the stages of the mediation” (Ogawa 1999: 16). The diagram above illustrates the NJC model (Barkai 1992) (Figure One):

The NJC model takes advantage of both joint sessions and caucuses, but it too may be too rigid a model to adapt to all circumstances. The decision to use, or not use, shuttle diplomacy can turn on a complex assessment of the emotional tenor of the conflict, the goals of the parties,

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their intentions and skills, the culture and expectations of the disputants, and, when there are multiple players on each side, the internal dynamics within each group — whether those players are members of a street gang in Chicago or foreign diplomats from countries on the brink of war. In each case, the choice of format for discussion needs to be tailored to the circumstances of the conflict.

## **Economic Rationales for Mediation Caucusing**

### ***Avoiding Adverse Selection***

Jennifer Gerarda Brown and Ian Ayres (1994) used economic theory to make their case for caucusing in their article “Economic Rationales for Mediation”. They argued that sequential caucusing is the *only* way unique to mediation that value can be added to the negotiated resolution of a dispute. Using economic models and game theory, they show how a mediator selectively transmitting information gleaned in private meetings with each party creates more value in settlement negotiations than can be achieved with other approaches, with or without a mediator.

The specific problem that Brown and Ayres have argued caucusing is best equipped to address is “adverse selection.” Adverse selection is usually a product of informational asymmetry and can result in contracts advantaging the party keeping hidden information — for example, unhealthy people buying life insurance without disclosing their health status. In negotiations, informational asymmetries can lead to suboptimal agreements.

Adverse selection also occurs when the lack of information is symmetrical. The classic example of this problem is the conflict of two children over an orange, in which the children agree to cut the orange in half, but each child could have had the functional equivalent of a whole orange because one wanted the pulp for juice, and the other wanted the rind for a cake. Absent communication about underlying interests (i.e., what each wants to do with the orange), as opposed to positions (“I want the whole orange”), a suboptimal deal is made (Fisher, Ury, and Patton 1991).

In mediations, the adverse selection problem common to both symmetrical and asymmetrical information gaps is that the parties may have a “zone of possible agreement” but do not know that they do. One might ask, why parties in a conflict would not simply disclose to each other their underlying interests and bottom-line positions? Negotiation theory and practice indicate that parties often hide this information for fear that their candor will be exploited if the other party is unwilling to be equally transparent about underlying interests. A classic example illustrates the dilemma: a person with an overabundance of oranges (but who prefers apples) proposes a trade of some of the oranges with someone who has an overabundance of apples (but who prefers oranges); the latter agrees to a

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trade but feigns a lack of interest in oranges so as to secure more advantageous trading terms (such as two oranges for each apple).

Mediators could overcome adverse selection by sharing what they learn in caucus sessions with the other party. The flaw in this strategy, however, is easy to see. If a party knows that the mediator will share what she learns with the other party, why would they share private information that could disadvantage them? On the other hand, if a mediator keeps what she hears in caucus completely confidential, she cannot use that information to improve the outcome of the mediation. The solution to this tension is a compromise strategy in which the mediator commits to engaging in “noisy translation” (Brown and Ayres 1994: 356) of private communications with each party — that is, sharing information about the other side’s views that suggests, without precisely stating, that party’s perspectives.<sup>6</sup> “Value creation through mediation turns crucially on the way the mediator translates private reports,” wrote Brown and Ayres. “Imprecision is a necessary element. If the mediator precisely restates what was revealed during a caucus, the mediator accomplishes nothing that could not be accomplished by unmediated communication between the parties” (Brown and Ayres 1994: 364–365).

Although the economic models that Brown and Ayres used to prove their thesis are complex, the principles at work are relatively straightforward. If parties know that their information is not going to be directly relayed to the other side, they are more likely to be truthful with the mediator; meanwhile, even partial information is beneficial for the other side in moving toward the best possible agreement. While the idea of conveying only partial information may seem strange or even unethical, the authors stress that transparency is an important factor. For this strategy to work, both parties must know how the mediator plans to use the information gained in caucus. In practice, mediators use “noisy translation” by refusing to disclose explicitly anything that they have committed to keeping confidential while at the same time using body language, tone of voice, and other inexplicit methods of communication to provide signals that guide the parties toward productive negotiations.<sup>7</sup>

The Horton survey of mediators described earlier showed that a high percentage of commercial mediators (83 percent) use the noisy translation method, and that most of the parties in their mediations expect them to use it (Horton 2009: 17). Mediator Eric Green, known for his successful resolution of such high-stakes disputes as the antitrust litigation involving Microsoft and the U.S. Justice Department, and the Enron/Arthur Anderson case, has described the noisy translation method as “essential” to his work. (Green 2008). The commercial mediators surveyed by Horton concluded that this technique was effective in the vast majority of their cases, although the family mediators made less use of the technique and were more equivocal about its usefulness in divorce cases (Horton 2009).

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## ***Overcoming the Prisoner's Dilemma***

Even if a mediator does not use the noisy translation technique for communicating about possible exchanges, caucusing can add value by enabling the mediator to become a broker and, in effect, a “bonding agent” for the deal. In order to understand this role for the mediator, consider the problem known in game theory as the prisoner’s dilemma.<sup>8</sup>

The prisoner’s dilemma concept has been used to describe why two people (or companies or other entities) often fail to cooperate even when it is in their best interest to do so.<sup>9</sup> The *Stanford Encyclopedia of Philosophy* (Kuhn 2009) describes the dilemma as follows:

Tanya and Cinque have been arrested for robbing the Hibernia Savings Bank and placed in separate isolation cells. Both care much more about their personal freedom than about the welfare of their accomplice. A clever prosecutor makes the following offer to each. “You may choose to confess or remain silent. If you confess and your accomplice remains silent, I will drop all charges against you and use your testimony to ensure that your accomplice does serious time. Likewise, if your accomplice confesses while you remain silent, they [sic] will go free while you do the time. If you both confess, I get two convictions, but I’ll see to it that you both get early parole. If you both remain silent, I’ll have to settle for token sentences on firearms possession charges. If you wish to confess, you must leave a note with the jailer before my return tomorrow morning.

In this model, the prisoners are stymied by their inability to communicate with each other. Thus, the only sure way to avoid doing “serious time” is to confess, and accordingly, the prosecutor is likely to obtain two robbery convictions. Unless both parties can credibly commit to cooperation (i.e., silence), there is a powerful incentive to defect because by defecting, each will always do at least as well as the other party. Thus, defection often becomes the default strategy.

Negotiations sometimes create a prisoner’s dilemma for the parties as they try to decide whether their cooperation will be reciprocated or exploited. When a mediator enters a negotiation, he or she has the ability, through the use of caucuses, to secure, on a confidential basis, a commitment from Party A to cooperate on an issue if (but only if) the mediator can secure a reciprocal commitment from Party B. Thus, the mediator will communicate to the parties their willingness to cooperate on that issue only when each party has privately made such a commitment. The parties’ ability to trust the mediator (and, likewise, the mediator’s ability to trust the parties) thus plays a crucial role in overcoming the prisoner’s dilemma.

One of the principles at work in securing these reciprocal commitments from the parties is the psychological principle of reciprocation

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described by social psychologist Robert Cialdini (1993) in his book *Influence: The Power of Persuasion*. Cialdini pointed out that when one person does a favor for another, the second person incurs a social obligation to reciprocate that favor in some manner. So too in bargaining, a concession or proposal from one party creates an expectation that the other party will respond in kind. In this way, sequential bargaining creates an additional opportunity for overcoming the original version of the prisoner's dilemma, in which the parties must decide simultaneously whether to cooperate or defect. In both sequential and simultaneous bargaining, the mediator can add value by meeting separately with each of the parties, obtaining a commitment from the parties to reciprocate flexibility on essential bargaining terms, and then, with those commitments in hand, brokering a deal.

Both Brown and Ayres' analysis and the prisoner's dilemma heuristic have limits — like most economic models, they are highly simplified and rely on many assumptions, one of which is the common assumption that the parties are fully rational actors. Another limit of these approaches is that they focus solely on *economic* rationales for mediation. While these models support caucusing for its ability to add economic value to mediation, the analysis becomes more complicated if the parties want to achieve nonmonetary goals (such as obtaining an apology or restoring a broken relationship). Even those goals can be advanced, however, using the mediator-as-broker model under circumstances in which each party is reluctant to explore such options in joint sessions of the mediation.

## **Caucuses as a Tool for Overcoming Barriers to Settlement**

Just as caucusing can overcome structural barriers to settlement, it can also overcome a variety of tactical and strategic barriers that would be difficult, if not impossible, to surmount in joint sessions. I next consider each of these problems.

### ***Screening for Domestic Violence and Other Forms of Intimidation***

One of the cardinal principles of mediation is that the parties choose freely whether to settle and, if so, on what terms. Coercive relationships rob the parties of self-determination. Putting to one side the debate over whether such relationships make mediation inappropriate in *all* cases involving domestic violence or intimidation or only in the most egregious ones, professional responsibility standards for mediators require screening for abuse, and such screening can only be done responsibly by talking with the parties separately (American Bar Association Section of Family Law 2001). Mediators need to be alert to these issues not just at the beginning of the case but also throughout the mediation. Thus, conducting caucuses at various stages of any case in which coercion might be a factor is a sound precaution.

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## ***Communication Barriers***

In some mediations, particularly high-conflict cases, one or more of the parties communicates so abrasively that the other party cannot stand being in the same room. Accusations, recriminations, condescension, personal attacks, bickering, and incessant interruption are common in such cases.

During a joint session of one recent high-conflict divorce that I mediated in which the parties had nothing but contempt for each other, the ex-husband calmly discussed the valuation of certain business interests, but his former wife could no longer tolerate the sound of his voice. She squirmed in her chair, a pained look crossed her face, and it became clear that she was unable to hear what he was saying. As mediator, part of my job was to foster communication, and it became apparent to me that separate meetings would be needed so that the wife could hear from someone other than her husband what needed to be discussed on the subject of business valuation. The case ultimately settled, with only sparing use of joint sessions.

Meeting separately with the parties, at least for a portion of the time, gives the mediator an opportunity to translate and, if necessary, reframe the messages from the other side — messages that are sometimes easier to hear from the mediator than from the other party.

## ***Emotional Barriers***

Mediations often arouse intense emotion, especially when the conflict is highly personal or one party believes that the other party is not bargaining in good faith. For example, in the mediation of a business partnership breakup, the partners (let us call them Sam and Sue) had been romantically involved with each other, but their romance collapsed, thus complicating their business relationship. Sam (unwisely) showed up at the mediation with his new girlfriend. Sue told the mediator that even if the new girlfriend left, Sue could not stand being in the same room with Sam because of her anger over the romantic betrayal, and at that point she left the room. The mediation was successful, but all of it — even my initial explanation of the principles of mediation — was done by shuttle diplomacy.

Psychologists have identified hormonal changes that occur when people are under stress and feel “flooded” with emotion. Adrenaline production rises, and we experience a “fight or flight” reaction, making it difficult to continue a discussion productively (Gottman 1995). As mediator Paula James has written, “if your anger makes it impossible to think straight, caucusing may give you an opportunity to calm down” (James 1997: 96). Psychologist Daniel Shapiro recommends the use of caucuses, particularly in a premediation setting, as a means of identifying and addressing the emotions bubbling beneath the surface of conflict (Shapiro 2006). Caucuses also create a space for safe venting of intense emotion in a setting where the intensity will not poison the atmosphere of the joint session.

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### ***Information Barriers***

In cases where the parties are headed for trial if the mediation fails to resolve the matter, the mediator is sometimes given, on a confidential basis in a caucus session, critical information unknown to the other side. For example, in a personal injury case, the defense might have a secret video of the plaintiff playing baseball with his children at a time when he was supposedly incapacitated. Or an employment discrimination plaintiff may privately tell the mediator that she has incriminating evidence about her former employer's discriminatory practices that the defense does not know about. According to mediator J. Anderson Little (2007), litigants typically withhold critical information from the other side.

When the mediator is told such secret information, the parties usually insist that the information remain secret so that it can be used more effectively if the case goes to trial. In other words, if the information is shared in advance of trial, the other side will have time to prepare a response to blunt the impact of the damaging evidence. Mediator Eric Green calls this type of information "one-trip-ticket evidence" because it can only be used effectively once (Green 2008). If the party holding the secret information believes that the information will dramatically alter the outcome at trial, that party's assessment of its best alternative to a negotiated agreement (BATNA) will understandably differ from the other party's assessment.

Despite the parties' reluctance to share this type of information, mediators often receive permission to share it if there seems to be a good chance that the information will close a settlement gap, but they are unlikely to uncover such information unless they meet separately with the parties.

### ***Cultural Barriers***

In some mediations, the very thing that divides the parties, and causes their conflict, prevents them from negotiating productively face-to-face. Racial, cultural, gender, class, and other differences often stand in the way of understanding. All the more so when the conflict arises from disagreement about how those differences should be addressed and, when disparate treatment is involved, remedied. A classic case in point was a 1996 mediation at Columbia University, in which protesting students had taken over Hamilton Hall, and the health of several students was at risk because of a hunger strike then in its twelfth day (Liebman 2000). The students were seeking a commitment from the university to create an ethnic studies department. The anger and mistrust on both sides of the conflict made joint meetings problematic, and therefore much of the mediation was conducted in caucus sessions. The protesters were represented by six students: two African-American, two Latino, and two Asian-American. Four of the five university representatives were white. Law school professor Carol Liebman, who is white, and politics professor Carlton Long, who is African-American, served as co-mediators.

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During the course of this mediation, “[t]he teams needed frequent caucuses during which they worked through issues within the team” (Liebman 2000: 168). The level of mistrust on the part of the students was so high that they frequently excluded the mediators from their separate deliberations. In one instance, they sought to include Long but exclude Liebman. When Long met with the students, he explained that the two co-mediators would not keep secrets from each other, at which point “they kicked him out too” (Liebman 2000: 169).

Both in joint sessions and in caucus sessions, Liebman and Long conducted what she described as “parallel seminars.” In joint sessions, the students were invited by the mediators to explain to the university administrators the importance of ethnic studies as part of the university curriculum, and the university representatives were invited to explain the ins and outs of university governance and decision making. Meanwhile, the mediators taught both sides about interest-based negotiation and the mediation process. These “seminars” continued in the caucus sessions.

The mediators found that caucuses were particularly needed to build trust with the student representatives. In one such session, a student representative confronted Liebman about how she had handled a portion of the mediation, and the two of them had an exchange — focusing on the student’s reputation for being “controversial” as a result of an anti-Semitic article he had published in the campus newspaper — that might not have occurred in the presence of university representatives. According to Liebman, the students used caucus sessions to decide what the group’s position was going to be on various issues and who was going to speak for the group. They also used caucuses to practice their statements, getting feedback from the other members of their team.

One can imagine at least two reasons why racial, cultural, class, and other similar differences could lead the party that perceives itself to be less powerful to prefer private caucuses in a mediation. First, when one’s identity is a central element in the mediation — and particularly when the aggrieved party perceives (accurately or inaccurately) a lack of respect from the other party because of that identity — meeting face-to-face with an unrepentant opposing party may feel like rubbing salt into the wound that brought the parties to mediation.

Second, caucuses may feel like a safer setting for the aggrieved party because of a phenomenon known as “stereotype threat,” which can undermine the performance of people who are members of groups that are negatively stereotyped (Walton and Spencer 2009). This phenomenon occurs even if there is no overt stereotyping taking place. According to several studies, stereotype threat “undermines performance by creating distraction” and produces this effect in both laboratory and real-life settings. An example of this phenomenon was found when measuring the



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performance of women in chess matches in which the identity of the opponent was hidden from the players (Maass, D'ettolo, and Cadinu 2008). In comparison with their rated strength, the women played worse when told that their opponents were men and that men are better chess players than women. When women players were told that they were playing against women, their performance improved, regardless of whether their actual opponents were men or women.

For all these reasons, caucus sessions should be an option whenever racial, cultural, gender, and other differences cause one of the parties to resist joint sessions. While the mediator might prefer joint sessions as an opportunity to enhance mutual understanding, mediators need to be sensitive to perceived power imbalances arising from cultural and other differences and accordingly should avoid stigmatizing requests for caucuses.<sup>10</sup>

### ***Strategic Barriers***

One of the critical tasks in many mediations is to determine whether there is a zone of possible agreement and thus to avoid the “adverse-selection” problem discussed earlier. Most parties, however, are reluctant to share with the mediator or the opposing party their true bottom line (or “reserve price”) out of fear that this information will be exploited by the opposing party. For example, if a plaintiff is demanding \$1 million but willing to settle for \$250,000, and the defendant is offering \$100,000 but willing to pay \$300,000, plaintiff’s disclosure of her bottom line will eliminate any realistic possibility of settling for a greater amount, which would otherwise have been available, and she will end up with \$50,000 less than she might have received had the defendants never found out her reservation price.

The parties’ mutual fear of exploitation can lead them to dissemble regarding their true goals and interests, while seeking as much information as possible about the other side’s goals and interests (Arrow et al. 1995). Moreover, mediators generally refrain from asking the parties what their bottom line is because they fear that the answer will not only be less than candid but also may psychologically reinforce the party’s commitment to an unattainable settlement term. Even when the parties *volunteer* their bottom line — in a conversation that almost invariably takes place in a caucus session — experienced mediators know that bottom-line figures often change over time, as the parties reassess what is achievable at the bargaining table.

The problem, then, for mediators is how to determine whether a zone of possible agreement exists. Two techniques, which are difficult to use except in caucus sessions can be helpful. One is to ask each party (or the party’s counsel) what they believe the *other* side might be willing to offer to settle the case. Using the example discussed earlier, the plaintiff is asked

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how much he or she thinks the defendant, having offered \$100,000, will ultimately be willing to pay. Let us say the answer is \$350,000 (these answers are sometimes overly optimistic or even possibly a strategic distortion). Then, the defendant is asked the same question about the plaintiff: how little do you think the plaintiff (having demanded \$1 million) would be willing to accept? Let us say the answer is \$150,000. The two answers often tend to describe a range within which the case will settle. By their answers, each side has, in most cases, articulated a number that would be a discussable figure and suggests to the mediator how far apart the parties actually are.

A second technique — also typically done in caucus sessions — is known as “range bargaining.” Using the same example, the mediator might ask the plaintiff to suggest a range that he or she might be willing to bargain in — for example, would she be willing to reduce her demand to \$600,000 if the defendant would offer \$300,000? The defendant might respond to such a proposed range by saying that it would be willing to offer \$150,000 if the plaintiff would come down to \$400,000. These two “range offers” might seem to be unproductive because neither party is willing to accept the other party’s gambit. However, such offers communicate a willingness to be flexible and begin defining the parameters of a zone of possible agreement. In this example, the plaintiff is indicating a willingness to move to \$600,000 and the defendant to \$150,000 — steps in the right direction.

### ***Unrealistic Expectations***

Some negotiation theorists suggest that the parties should consider, before they begin a negotiation, their own BATNA as well as the BATNAs of the others with whom they are negotiating (Fisher, Ury, and Patton 1991). For example, in many mediations, assessing a party’s BATNA means predicting what will happen in court if the dispute is not settled. The parties often have overly optimistic assessments of their BATNAs. Overconfidence is one of the many cognitive miscalibrations to which the human mind is prone; others include self-serving bias and *status quo* bias, which likewise can skew a party’s assessment of his/her BATNA. Perhaps the most common mental distortion that mediators encounter is cognitive dissonance, which interferes with our ability to take in data that are inconsistent with deeply held beliefs (in this case, deeply held beliefs about the parties’ respective BATNAs).

Mediators can add value by gently testing the inferences that led each party to their conclusions about their respective BATNAs. In joint sessions, the parties tend to posture about their BATNAs, with each side exaggerating their likelihood of success if the case goes to trial and minimizing the other party’s likelihood of winning. In caucus sessions, however, confidentiality begets a higher degree of candor from the parties about each side’s BATNA.

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And, candor can be a two-way street. As Deborah Kolb has commented, some mediators use caucuses for “a little reality testing,” to speak openly or even bluntly, but without appearing to take sides (Kolb 1994: 218). Indeed, it has become common for lawyers to seek mediation for those cases in which they believe the other side — or even their own clients — have an overly optimistic view of the case because they are counting on the mediator to persuade each side to be more realistic.

### ***Obstacles to Generating Options***

Mediations usually involve consideration of the parties’ options, and when the parties feel stuck, a brainstorming session may be needed. Brainstorming in a joint session, however, may inhibit creativity because no matter how skillfully the mediator frames the brainstorming exercise and explains the ground rules (such as thinking “outside the box” and suspending judgment about the ideas that are offered), mistrust often infects the process. The parties may fear that advancing an idea in a joint session could reveal their openness to solutions that they wish to keep private. Or, the spontaneity of the discussion could reveal more about a party’s positions, interests, and preferences than they wish to disclose.

Some mediators encourage brainstorming first in caucus sessions and then in joint session after the initial ideas have been vetted in a separate setting that feels safer. To the extent that a mediator participates in brainstorming by offering his or her own ideas, doing so in a caucus session reduces the risk that any idea suggested by the mediator could be viewed as indicating a bias of some kind.

### ***Need for Negotiation Coaching***

Disparities in negotiating skill and mediation experience can create an unlevel playing field. While reasonable minds may differ on whether and to what extent a mediator should try to level the playing field, it is common for mediators to engage in some form of negotiation coaching. This may involve encouraging a party to explore each side’s underlying interests instead of focusing solely on positions, or helping a party generate options, or discussing how the elements of a deal might be structured. Negotiation coaching may also involve tactics, such as helping the party decide how to manage the flow of offers and counteroffers to achieve a trajectory of proposals that leads to settlement. Mediator Michael Keating has called this type of distributive bargaining “the dance for dollars” (Keating 2009).

Coaching of this kind is sometimes essential with inexperienced bargainers. Even experienced bargainers, however, need coaching at times — particularly those negotiators who tell the mediator that they do not want to haggle, and therefore their initial offer will be their “bottom line” — an approach that seldom works. Coaching of this kind is virtually impossible to do in joint sessions, in part, because it could give the appearance of partiality, and in part because, at least in joint sessions (and

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sometimes in caucus sessions), the parties are seldom candid about bargaining strategies.

### ***Need for Process Management***

Joint sessions are sometimes unmanageable because of a disruptive person in the mediation — sometimes one of the parties, sometimes one of the parties' lawyers. Even when the individuals involved in the mediation are well-adapted and high-functioning people, the unique chemistry of their interactions can make process management a challenge. Under such circumstances, separating the participants into caucus sessions may be essential to conducting the mediation.

A vivid example of this problem occurred in a commercial case that I mediated in which one of the lawyers (let us call her Jane) was not only quite talkative but also highly emotional, argumentative, and unreasonable. The case screener for the mediation program that referred the case to me warned me about Jane: "She has got to be one of the most difficult lawyers I have ever met and, believe me, I have met some doozies," she said. "She literally can't stop talking."

As I began to explain the mediation process to the parties and counsel, Jane leaped into the conversation, interrupting several times as I tried to explain basic mediation principles. "This is going to be a long day," I said to myself. I explained that, in the interest of giving each party equal airtime, I was going to meet with each side for twenty minutes and that I would end each session promptly, even if it meant leaving in the middle of a sentence. Because Jane represented the plaintiff, I met first with her and her client.

During the course of that first caucus meeting, Jane told me in a more or less uninterrupted — and uninterruptible — monologue all the reasons why her client was right, and the other side was wrong. There was no ambiguity in the facts, said Jane, and no ambiguity in the law. There was no room for any other result: her client deserved to win the case, and the other side deserved to lose.

After about fifteen minutes of listening to Jane, I commented that I would be leaving in five minutes to talk with the other side, and Jane continued her monologue. She seemed not the least bit curious as to my reaction to any of the points that she was making. At nineteen minutes into the caucus with Jane and her client, I told her that I would be leaving in a minute, but that did not slow her down. When the twenty-minute point arrived, I stood up and said to Jane, "I'm sorry that I have to go now." Jane paused briefly to hear what I was saying, and then she started talking some more. I walked toward the door, keeping my eye on Jane to see whether she would react in any way to my pending departure, but she did not change her tone, manner, or for that matter, the subject matter; she simply continued with her explanation of why she was right and the other side was wrong. After walking out the door and closing it behind

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me, I could hear Jane going on just as if I was still sitting there in the room with her.

My caucus session with the other side was productive. They responded to the plaintiff's demand, which had been communicated before the mediation session. After exploring some of the other side's perspectives, I explained that twenty minutes had elapsed, and I needed to return to the other conference room, where I resumed meeting with Jane and her client.

Jane then picked up approximately where we had left off, with further explanations as to why she was right, and the other side was wrong. I jumped into the conversation to let her know that the other side had made an offer. That slowed her down just long enough for her to respond to the proposal and, after conferring with her client for a few minutes, formulating a counterproposal that represented only a modest reduction of their demand. I asked her how she thought the other side would respond to a settlement proposal that represented such a small departure from the original demand, and she said that she did not care how they responded, and if what they wanted was a trial, she would be happy to oblige them. She said that because her positions on the issues in the case had merit and those of the other side did not, there was no reason for her and her client to depart in any material way from their original demands.

It was a long day, as I shuttled from one conference room to the other, but one thing remained a constant. Every time I left my twenty-minute meetings with Jane and her client, Jane was still talking as the door closed behind me on the way out. Jane simply had no control over her impulse to talk and argue.

The case resulted in a settlement, but as I think back on it, I am not sure exactly how we got there. Each move from Jane's side was small and grudging. The animosity that I felt from Jane toward the other side and the other side's lawyer was palpable. Jane's client played a passive role in the mediation and let Jane (who was a very experienced lawyer) run the show.

One thing is quite clear, however: joint meetings would have been unmanageable because Jane appeared to be incapable of picking up on social cues and unable to control the impulse to talk throughout the mediation. Some negotiators may believe that as long as they have the floor, they are making headway against the other side. Experience teaches us, however, that successful negotiators are genuinely curious about the other side's perspective and make plenty of room in the conversation for other parties to articulate their views, positions, and interests. It also became clear to me that without an explicit twenty-minute restriction (or some kind of time restriction), working with Jane would have been impossible.

Fortunately, very few lawyers or clients are as unmanageable as Jane. But where such problem personalities are found, managing the mediation properly may require not only separating the parties but also creating a

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time structure to manage talkative parties so that each side has equal, or approximately equal, time with the mediator.

### ***Internal Conflicts***

Mediators often find that the parties need internal mediation between or among members of their own team. A party and his/her counsel may have differing assessments of the value of the case or differing ideas about the best negotiation strategy. Or, there may be an uneasy alliance within a group of defendants or plaintiffs. The parties typically want to project a united front in joint sessions so as not to jeopardize their bargaining leverage, and they may welcome the mediator's help in achieving unity. Such sidebar mediations require separate caucus sessions because the parties seldom want to be transparent about internal disagreements.

In some cases, there may be no internal dissension, but the parties may want to involve the mediator in communications with principals who are not present at the mediation. For example, in cases where an insurer sends its lawyer but not its adjuster to the mediation, the mediator may be asked to participate in a conference call — during a caucus with the defense — in which the adjuster can hear, in confidence, the perspectives of the mediator, defendant, and defense counsel.

Caucuses are also often needed in cases in which a defendant asserts that the claims against him/her are covered by insurance. The insurance company will often provide legal representation but proceed under a “reservation of rights” — that is, the insurer contends that one or more of the claims might not be covered by the insurance. In those cases, the defendant will sometimes bring to the mediation his or her own personal counsel to negotiate the issue of coverage. In those circumstances, conflict of interest rules prohibit lawyers appointed by the insurer from discussing coverage issues because the lawyers are being paid by the insurer while at the same time, they have a fiduciary duty to their client, the insured. Accordingly, the vital issue of coverage needs to be discussed outside the presence of the defendant's lawyer, in a caucus session.

Similar concerns arise in any case in which a potential conflict of interest emerges during the course of the mediation, and separate meetings are needed to determine whether one or more of the parties needs to hire separate counsel. For example, in the mediation of “noncompete” cases, Company A may be suing both its former employee and Company B, which hired the employee. Both the employee and the Company B may be represented by the same lawyer because the clients' interests are aligned — they both are seeking to show that the employee did not violate the noncompete agreement. During the course of the mediation, however, Company A could make a proposal that causes those interests to diverge — for example, waiving its claim for injunctive relief against Company B, in exchange for a substantial payment of asserted damages by the employee. Company B and

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the employee may want the mediator's help in negotiating a possible contribution from Company B to the settlement, and both will want that portion of the mediation to be conducted with Company A's representatives out of the room. Moreover, the lawyer who represents both Company B and the employee will often prefer to be absent from those discussions because of conflicting interests. If the mediator takes the position that she will only proceed with everyone in the room, she will lose an opportunity to help the parties negotiate critical elements of the case.

### ***Fear of Losing Face***

In the Tim White story with which this article began, saving face was arguably the gang leaders' primary interest. In business disputes, executives have the same interest, both with respect to such outside constituencies as shareholders, suppliers, and customers, and with such internal constituencies as the company's officers, employees, and board of directors. Even in family mediations, the parties may have a circle of supporters (family, friends, and consulting professionals) to whom they feel accountable. In such circumstances, neither side wants to believe or have their constituents believe that they "caved," or "left money on the table," or capitulated in some manner. Even when the stakes are modest, as they often are in the final rounds of bargaining, neither side wants to be the one that "blinked." All of these terms signify weakness.

An effective mediator can help the parties structure trades that maximize everyone's interests, sometimes expanding the proverbial pie to enable each of the parties to take a larger slice. Often, however, the most successful way to bring the parties to closure and foster a stable resolution, regardless of the size of the slices, is for the final proposal regarding the distributive shares of the pie to come from the mediator. A mediator's proposal often produces a more envy-free outcome because if the parties trust the mediator and believe that he or she is fair, their operating assumption will be that the proposal will strike a fair balance between or among the competing claims and competing interests and will equitably divide any surplus value that lies within their zone of possible agreement.

The conventional ground rules for such a mediator's proposal are simple: the mediator makes the same proposal to each party, and each responds confidentially only to the mediator with either a "yes" or a "no." The mediator then reports to the parties either a settlement (because each side said "yes") or no settlement (because one or more parties said "no"). Using this mediator's proposal process, each side can take the risk of saying "yes" without the other party or parties knowing, unless they too said "yes." Because a procedure of this kind relies on confidential responses, it cannot be easily engineered without caucusing.<sup>11</sup>

The "mediator's proposal" procedure often succeeds in bringing about a settlement for two reasons. First, because of the phenomenon of "reactive

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devaluation,” the parties are less likely to dismiss or discount a proposal from the mediator as compared to a proposal from an opposing party.<sup>12</sup> Second, because of the caucus format, the mediator is able to discuss the proposal confidentially with the parties. These discussions often yield valuable data about the extent of the parties’ flexibility, and, if the mediator’s proposal is not accepted by all parties, whether there is nevertheless a zone of possible agreement. Thus, even when a mediator’s proposal is not accepted by one or more of the parties, these separate conversations can lead the way to resolution.

## **Caucuses as a Tool for Enhancing the Mediation Process**

In addition to overcoming specific barriers to settlement, caucuses can enhance the mediation process by helping the parties understand some of the deeper dimensions that the conflict has for them, by promoting engagement on such delicate topics as apology and forgiveness, and by enabling the mediator to obtain candid feedback and coaching from the parties about the mediation.

### ***Up Close and Personal: Four Stories***

*Whistleblower:* Several years ago, I served as mediator in a case that arose from the firing of a middle manager in a large company. The manager (let us call him Harry) sued his employer, alleging wrongful termination. Harry claimed he was a whistleblower who was being unlawfully terminated for complaining about business practices that he considered unethical and illegal. Harry had been sending e-mails and memos to his superiors about these practices, and each time his superiors passed the complaints along to the officers of the company. On two occasions, the board of directors convened an ethics committee to review the assertions of unethical behavior by the company, and each time the company concluded that its practices were sound, both legally and ethically.

Despite these conclusions by people at the highest levels within the company, Harry continued to complain. He was convinced that he was right, they were wrong, and that the company could get in trouble if it refused to change its business practices. The seemingly unending stream of memos from Harry continued, and so the company put Harry on notice that if he did not stop, he would be fired. Harry strenuously objected, sent another round of e-mails, and was promptly terminated.

In the mediation, it quickly became clear to all that Harry was not going to be rehired, and therefore the primary issue was what amount the company would pay to settle the claim. The gap between Harry’s proposed settlement and company’s was substantial. In separate caucus sessions, the parties appeared to be dug in. In a meeting with Harry and



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his counsel, I looked over Harry's resume and noticed his twenty years of military service, including service in Vietnam, prior to his employment at the company. I asked him about it: "Were you in combat?" I asked. "Oh yeah, our unit saw a lot of combat." He described his service in the Army with intensity. "The thing I liked about the Army," he said, "is that everybody turns square corners. You can count on your buddies to watch your back. You know what the rules are, and people obey them, because your life depends on it."

Then he compared the Army with his former employer. "When I retired from the Army and went into the private sector, I felt like I was entering a foreign territory. There was no code to follow — it seemed to me like 'anything goes.' You know, whatever you can get away with. It's just wrong." Harry got more animated as he spoke, and then he became calmer. I could see the proverbial light bulb switching on over his head. "I think I wound up in the wrong place," he said. "I shoulda stuck with the Army."

We turned to the subject of settlement offers. Harry moderated his demand and authorized me to communicate an offer that was likely to be viewed as reasonable by the other side, and the case quickly settled.

I think Harry came away with insight that he found in the caucus session, when his strongly held ideas were considered from several different angles, including the perspective he gained when he compared his private sector employment with his military service. He left the mediation with a settlement agreement under which he received a payment of a portion of his legal fees and a portion of his back wages. More importantly, however, he left with greater insight about what went wrong when his experience in the business world collided with expectations he had developed after twenty years of military service.

As we wrapped up the paperwork from the mediation, he said to me, "I am much clearer now about the kind of job I'm going to look for."

Mediations do not always result in such satisfying settlements. Harry's case has stuck with me over the years because I do not think he and I could have engaged in the personal exploration of his military service in a joint session. Harry and I, with his lawyer participating at times, got up close and personal in a way that the glare of joint sessions makes far more challenging.

*Company Founder and Protégé.* By way of contrast, two business executives, the chief executive officer (CEO) and the chief operating officer (COO) of a software development firm came for a mediation in which almost all of the work was done in joint session. The goal was to repair a badly fractured professional relationship. The two executives had

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differing views about the company's plans and priorities. In addition, their work styles and communication styles differed. The CEO was a planner, reticent in his communications, and, according to the COO, sometimes slow to make decisions. The COO was action-oriented, brash, and even a bit blunt in his communications, and, according to the CEO, unwilling to let decisions percolate before announcing them.

A co-mediator, clinical psychologist Dr. Richard Wolman, and I tried to assess the source of the executives' difficulties. We noticed that the CEO, who founded the company, had carved out a parental role for himself in the company. But despite advancing age, he was not quite ready to transfer responsibility to the much younger COO, who (according to the CEO) was acting out the role of a rebellious son.

Much of our mediation work with these two executives involved coaching them on basic communication skills and how to achieve greater transparency with each other about their respective goals and interests. Even in this case, however, with its intense focus on the parties' relationship, caucuses were needed to help us determine whether the process was working and the extent to which each of them was being candid with the other in joint sessions.

In those private caucuses, my co-mediator and I gained valuable insight into what had been left unsaid in the joint sessions. For example, each of the parties was finding it difficult to believe that the other would change in any way as a result of their discussions. Each saw the other as so set in his ways that discussion was pointless. With permission from each of them, we brought that concern to the table during joint sessions and discussed it fruitfully — an essential subject that might not have been aired if the parties had not been given a private space in which to discuss it initially.

After two all-day sessions, with a few breaks for private caucuses, the case was resolved. It became apparent to both mediators, however, that the private caucuses provided each of the parties with some welcome "breathing room" — a space in which they could each articulate more candidly their deepest fears, concerns, and hopes, without the fear that their words would be misinterpreted and quoted back to them by the other party. By refining the messages they wanted to communicate to each other — using the mediators as sounding boards in the caucus sessions — the parties found the courage to speak more honestly to each other in the joint sessions and, ultimately, in their day-to-day interactions.

*Legal Malpractice.* Through the Worcester County (Massachusetts) Multi-Door Courthouse Program, I was assigned to mediate a dispute between an elderly lawyer (let us call him Howard) and his clients. Howard had sold stock traded on a foreign stock exchange to his clients,

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believing that the stock was a terrific investment. He had purchased some himself. When the stock became worthless, his clients sued him for malpractice, negligence, and violation of state and federal securities laws. Howard had not realized that he needed to be a registered securities dealer to sell such stock and was deeply saddened by the lawsuit. He was a lawyer from a generation that deeply believed in service to clients as a calling, not a business. He had not tried in any way to take advantage of his clients and had not profited from the stock sales — he simply wanted to include his clients in what he thought was an extraordinary financial opportunity.

The mediation began in the customary way, with a joint meeting of the parties and counsel, and then I began to meet separately with each side. The clients were seeking to be made whole for their losses, but they were not vindictive. After several rounds of meetings with each side, there was still a significant settlement gap between the parties. At that point, I met with Howard and his lawyer to find out whether they had any additional flexibility to settle the case because the clients were holding fast to their settlement proposal.

In our meeting, Howard's lawyer (much younger than his client) sat to one side while Howard turned to face me directly. Howard slowly, painfully, and in quiet tones told me how distressing this process was, in part, because his wife did not know about the lawsuit. "It would kill her to find out about this," he said, and then acknowledged this was hyperbole. "It would definitely upset her very much." He said that he hoped he could settle the case without having to tell her. "You don't know me," he said, "but I have been practicing law for forty-five years. I have never been sued by a client. I have never had a complaint filed against me with the Board of Bar Overseers. But my life has not been a bed of roses. I was a drinker. I have been a recovering alcoholic for thirty years now. Every day of those thirty years, I wake up in the morning and fall to my knees, praying to God for the strength not to take another drink."

I glanced at Howard's lawyer, who was sitting beside him, and I noticed the young man's eyes rolling slightly. He seemed bored by Howard's comments and slightly embarrassed that his client was going on at such length about the details of his personal life — details that were (from his standpoint) not legally relevant to the outcome of the lawsuit.

Howard told me more about his wife, his alcoholism, and his small law practice in Worcester. Suddenly, he stood up and, with a weary look on his face, held out his hand to me. I was a relatively new mediator at the time, and I had no idea what was going on. I thought the mediation must be over because he wanted to shake my hand and leave. Not knowing precisely how to respond, I decided that the most appropriate thing would be to stand up and hold out my hand as well. As we shook hands,

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he said to me, “This mediation thing you’re doing is really terrific. Please tell the other side that I’ll accept their offer, and we can settle this.”

I was stunned. I had not talked with him during our caucus session about the value of settlement, the potential problems with the case if it went to trial — I had applied no pressure of any kind. I simply listened to a story about his life. As he told me this story, I had a feeling that it was relevant to the mediation in ways that perhaps I could not entirely see. After reflecting on this case for a number of years, I have concluded that simply listening in an empathic way to this gentleman opened him to the idea of settling the case for a reasonable value because the mediation process itself had restored a bit of self-esteem that was damaged by being sued by his own clients.

I have often wondered whether I could have had this same conversation with Howard in a joint session with the other side present. But I am convinced that he would not have been willing to reveal his vulnerability with regard to his wife’s lack of knowledge of the case or his alcoholism, both for personal and professional reasons. Yet both of these revelations — and my willingness to listen to them in a nonjudgmental and supportive way — were essential to his openness to settlement.

*Marriage and Money.* The first thing I noticed when I met Ed and Sally on day one of their divorce mediation was that both of them looked like magazine models. Ed was impeccably dressed, with a tanned face, perfectly cut hair, and a briefcase that must have cost three times what they were paying for their mediation session. Sally was tall, blond, attractive, and had the engaging manner of the actor Geena Davis. The second thing I noticed was that they seemed entirely comfortable with each other, joking occasionally, and clearly fond of each other.

Why were these people getting divorced? Neither one was having an affair, or at least so I was told. They described each other as good parents, and their kids were doing well. They mentioned that they were both recovering alcoholics and frequently went to Alcoholics Anonymous meetings. They also had been seeing couples counselors for many years. “What are the issues that you’ve been working on in counseling?” I asked. “Well, we have communication issues,” Ed said.

When I explored the communication issues with them, no particular theme emerged. “We bicker over the usual things,” said Sally. “We’re a tough case — we really love each other and yet we get on each other’s nerves constantly.”

We met in joint session several times, working our way through a checklist of divorce-related issues: who gets the house? what will the parenting schedule be? how much life insurance do they need? Ed, who had been the breadwinner throughout the marriage while Sally raised the

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kids, was remarkably generous. He quickly agreed not only to a fifty/fifty split of the parties' assets, which is customary in long-term marriages in Massachusetts, but also to share his future earned income equally with Sally (which is almost unheard of in divorce cases). Sally, however, was uncomfortable with such a deal. "Why?" I asked. "What feels unfair to you?"

Sally explained that Ed was leaving the marriage with a great career in business, and she felt left behind, with nothing to show for the years in which they had been married. "Does your close relationship with your kids feel like compensation for that time?" I asked. "Yes," she said, "but it still feels like he's getting a better deal than I am."

I suggested that we meet separately. I wanted to understand what underlying feelings were holding Sally back from making a deal that most family law attorneys would have recommended to her without hesitation. I sensed that our joint sessions had only scratched the surface, and some subterranean issue lurked in the shadows of this marriage.

"Money has been the big problem in our marriage," Sally said when we met in a caucus session. "Ed watches every penny that I spend." Sally was obviously bright — an honors graduate of an excellent college — but had nonetheless allowed Ed to manage all of their finances. She was given a meager allowance, she told me, and he inquired where every dollar went. "I feel very ashamed about being on an allowance, it feels completely infantilizing." When she had tried to change things, Ed had dug in his heels — according to Sally, Ed insisted that she could not be trusted with money.

When I met separately with Ed, he told the opposite side of the story. "Sally has a thing about money, she simply can't stay within a budget." He said that they had tried various techniques — for example, putting credit limits on their credit cards and creating separate bank accounts — but Sally would write checks that bounced and overrun the credit limits on the cards. "I feel awful acting like a scolding parent with her, but what else can I do?" he asked. "We only have so much money each month, and we haven't been able to save a dime through the entire marriage because of her spending."

It became apparent that Sally's belief that the deal was unfair was driven, at least in part, by her long-standing anger about money issues. I asked her whether there was some alternative set of terms that would work better for her. She could think of none. I encouraged her to talk with a family law attorney about Ed's proposed settlement terms, which she did.

Over time, Sally became comfortable enough with the deal to accept it. Intellectually, she knew that she could do no better in court and that, despite her resentment over her husband's success in the workplace and her lack of a career, she was getting 50 percent of the economic benefit of his

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career. The turning point in the mediation came when she admitted her feelings of shame about the couple's money issues. Once her secret was out, she relaxed a bit.

When we tried to discuss the spending issues in a joint session, both parties shut down. "We'll never get this issue resolved," Ed said emphatically. "We've worked with the best therapists around, and we've gotten nowhere." Divorce, they both agreed, was the answer, even though it made Sally nervous to imagine being on her own financially. "I don't like these terms," she said to me in a caucus session, "but I know they're the best that I can do. I probably need to take the rest of my issues about this deal to my shrink."

As I have looked back on this mediation, I have come to realize that it is probably not atypical. Hidden issues and feelings of shame probably lurk in most divorce cases. The question is whether those issues will come out in the open, where they can be discussed, or instead remain in the shadows, where they can undermine progress. Sally's secret was not so shocking to me — I have seen her situation in many other cases — and she could tell by my manner that I was just as accepting of her after she shared her secret. In such cases, caucuses create an opportunity for relationship and validation that can be harder to manage in joint sessions.

### ***Building Relationships***

The discussion of caucusing in mediation handbooks often emphasizes building trust as one of the reasons for meeting in a caucus session. "Trust building runs through the mediation process like a river," writes Eric Galton, "[and] the first private caucus is the most intimate, direct interaction between the mediator and a party" (Galton 2006: 30). Fostering trust requires having a relationship, and caucus sessions allow mediators to accelerate the relationship-building process (Golann 2009: 24).

In a survey of experienced mediators, mediation parties, and their counsel, professor Stephen Goldberg and mediator Margaret Shaw found that "an empathic trusting relationship between the mediator and the parties may be the most important factor in creating an environment for settlement" (Goldberg and Shaw 2008: 88). These findings are consistent with research on psychotherapists, which found that a clinician's ability to form relationships with a wide variety of people is a major factor in the success of psychotherapy (Norcross 2001).

Recall, if you will, the Tim White mediation in which the parties affirmed their relationship with the mediator ("I told him I'd do it for him") as the bridge that enabled them to resolve their conflict. White was able to "bond" the deal because even if the parties' relationship with each other was frayed, their relationship with White was good, and they trusted him.

Mediators seek to build trust in separate meetings using initial caucuses to acquire insight about each party's perspectives and then later using caucus sessions to generate options and test assumptions. Only when

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the parties feel comfortable with the mediator will they begin to disclose — as in the four cases discussed earlier — their deepest fears, concerns, and hopes.

It is possible to build strong relationships with the parties in joint sessions; caucusing is not the only way to do it. But as illustrated in the stories above, the parties are often more willing to access the deeper sources of identity and meaning in their lives in the more intimate setting of a caucus session.

In many cases, the relationship that the parties have with the mediator is at least as important as their relationship with each other as a factor in resolving the case. This conclusion challenges the model of mediation widely taught in the United States, in which the mediator's role is considered to be primarily facilitative — with a goal of restoring the *parties'* relationship. In many cases, however, the parties' relationship is over, or, as in most tort cases, never existed. And even in those cases in which repairing the parties' relationship is the central task, a trusting relationship between the mediator and the parties enables the mediator to access vital information that might otherwise be inaccessible.

Not only is the creation of strong relationships between the mediator and the parties useful because of the mediator's role as a bonding agent, there is inherent value in the empathic relationships that mediators form with the parties. For example, in the "legal malpractice" case described earlier, empathic listening was emotionally restorative for a party whose self-esteem had been shattered and who felt deeply ashamed about being sued by his clients.

A powerful tool in building relationships is positivity. Research in the workplace and with couples establishes that a five-to-one ratio of positive to negative interactions strengthens relationships and a lower ratio tends to weaken them (Hoffman and Ash 2010). In the protected setting of a caucus, the mediator can provide validation and positive interactions without fear of the appearance of partiality. Thus, caucusing can accelerate the process of forming relationships in a mediation.

Another vital tool in building relationships is the unique set of personal qualities of the mediator (Bowling and Hoffman 2000). Authenticity, congruence, centeredness, curiosity, among others, open the door to connection, communication, and trust. These tools are essential in joint sessions, where walking the tightrope of impartiality requires exquisite balance, and they are no less essential in the more intimate setting of a caucus, in which a lack of authenticity may be more easily discernible and can stand in the way of connection.

Proponents of "transformative mediation," such as Robert A. Baruch Bush and Joseph Folger, point to the opportunity for empowerment and recognition as the hallmark of mediation (Bush and Folger 1994). The proponents of "understanding-based" mediation, such as Gary Friedman and

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Jack Himmelstein, point to the opportunity for clarity about the conflict and parties' interests as the hallmark of a no-caucus form of mediation. As can be seen in the stories in the previous section of this article, mediation caucusing can help the parties achieve empowerment, clarity, and recognition (albeit sometimes from the mediator as opposed to the other party), as well as a deeper sense of what provides their lives with meaning and value.

### ***Apology and Forgiveness***

The literature of mediation is replete with cases in which obtaining an apology satisfied all or nearly all of a party's objectives in the case and thus paved the way to resolution (Levi 1997; Cohen 1999; Schneider 2000; Goldberg et al. 2007). Mediation creates a unique opportunity for apologies because of the confidentiality of the process.<sup>13</sup> An apology presented in a joint session, spontaneously and unrehearsed, can dramatically shift the negotiation in the direction of settlement.

I witnessed a vivid example of such an apology in a mediation between a doctor and a nurse who had worked together for several years in the sorely underfunded medical clinic of a homeless shelter. The conflict arose when the nurse, bursting with frustration at the poor quality of the clinic's medical equipment and a dangerous lack of medications, which she had repeatedly brought to the attention of the clinic's management, left her shift in protest. She felt that providing medical treatment under those circumstances was unconscionable. The doctor believed that her walking off the job was equally unconscionable, and he fired her. The two parties entered mediation when the nurse threatened to sue the shelter for unlawful termination of her employment. Walking off the job in protest, she claimed, was a legally protected act of whistle blowing. The clinic disagreed, arguing that no protest can justify leaving a medical shift and thus potentially endangering the lives of patients.

During the mediation, each party expressed appreciation for the other as a professional and as a principled person. In the initial joint session, the nurse took responsibility for leaving the doctor in the lurch. "I am sorry," she said, "that I put you in an awful spot, but I hope you realize that I did it for a good reason." She expressed her admiration for the doctor, who, she pointed out, could have been earning far more in private practice. The doctor too was sorry. "I felt horrible about firing you," he said. "You're an amazingly talented nurse and totally dedicated to the patients. I hope you realize that I had no choice."

These apologies were unconventional, in the sense that neither party was suggesting that they should have behaved differently, but each expressed heartfelt regret about the impact of their decision on the other. Shortly after this exchange — spontaneous, and thus more powerful than if the apologies had been rehearsed in caucus sessions — the doctor agreed, on behalf of the clinic, to pay the nurse's lost wages for a period of time,



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and she in turn donated much of the settlement to the community mediation center where the mediation took place, to express her appreciation for the process.

I had a contrasting experience — in which apologies were spontaneously given in a joint session but with a less satisfactory result — during a conflict between a dean and the headmaster of a private school. The parties sought to resolve tensions arising from an incident in which each felt mistreated by the other. I asked the headmaster: if he could roll back the videotape of what had transpired, would he have done anything differently in his interactions with the dean? “Absolutely,” he said, looking directly at the dean. “I am sorry about what I did, and I didn’t mean to offend you or disrespect you.” I looked at the dean, who turned and looked at me. In my mind, a debate was quickly unfolding: if I say nothing, I thought, she might reciprocate the apology, or not. If I say something that sounds like a request for a reciprocal apology, the dean may feel pressured. But, I thought, if I now call for a caucus session (to ask her about her willingness to apologize), any reciprocal apology may sound staged. I chose the second of these three options. “Is there anything you would like to say in response?” I asked her. She quickly gave what sounded like a heartfelt apology. “I too am truly sorry that I hurt your feelings,” she said. “That was not my intention at all.”

All the tension in the room seemed to abate. The two parties hugged at the end of the mediation session, and I felt a profound sense of accomplishment until I checked in with each of the parties separately on the phone. The headmaster was very pleased with the mediation session, but the dean was deeply upset. She said that she had felt coerced by my question to her — her heartfelt apology, she said, was a sham. “What else could I do?” she asked. “He’s my boss.” I learned a lesson: if I had sensed more accurately her reluctance, I would have met with her separately.

This case illustrates the need, in some cases, for the parties to explore with the mediator separately, in a caucus session, whether an apology is appropriate. In some settings, an apology would be meaningful and in others, not so much. Indeed, in some settings, an apology would be rejected. Caucuses enable a mediator to ascertain what role, if any, an apology might play in the mediation. In these separate discussions, the mediator can also encourage the parties to consider whether an apology would be privileged and therefore inadmissible if the mediation fails, and the case goes to trial.

These caucus deliberations may result in face-to-face discussions, sometimes without counsel and sometimes without the mediator, in which heartfelt apologies and forgiveness can be exchanged. For example, in a case I mediated involving alleged negligence by a lawyer in handling his late sister’s estate, one of the lawyer’s major concerns was whether his niece would forgive him. Theirs was a small family, and the breakdown in his relationship with his niece, caused by his lapses as executor, pained him.

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They had not spoken for more than two years. In the joint sessions of the mediation, the lawyer's insurer was careful not to admit fault or wrongdoing of any kind. After the terms of a financial settlement were reached, the lawyer requested an opportunity to speak privately with me, and he asked me to find out from his niece whether a face-to-face apology would be welcomed and appreciated. The answer was yes, which in turn led to a meeting involving only those two parties and me so that the lawyer could apologize in a more personal way than he felt was appropriate in a room full of insurance representatives and other people.

"I am truly sorry that I was so slow in handling your mom's estate," he said to her, "and I hope that one day you can forgive me, so that we can be family again. . . ." She cut him off by lifting her hand, palm facing him, and said softly, "I have already forgiven you." With that comment, she rose and reached out her arms to him. He stood, and they hugged for the first time in years. The preparation for that reconciliation was laid in separate meetings.

In cases in which an apology would be useful but is not forthcoming in a joint session, caucus sessions may lead the mediator to conclude that there is no point in seeking an apology. In one case I mediated, a personal injury plaintiff claimed that she had injured her leg in a hotel lobby. I asked the hotel's representatives in a caucus session if they would be willing to apologize. They declined. "I don't think we could do it authentically," one of them said and then perceptively noted, "and an insincere apology would be worse than none at all."

This story suggests that apologies will not always serve as a magic elixir in mediations. In many cases, both parties feel aggrieved in ways that are not conducive to apologies — mutual or otherwise. Plaintiffs are angry about the wrong that caused them to pursue a claim against the defendants, and the defendants are often equally angry because they feel wrongly accused. Regardless of whether one or more apologies are forthcoming, however, caucuses provide mediators with an option — needed in some cases and not in others — to determine whether apology and forgiveness might foster settlement, understanding, and a deeper resolution of the conflict.

### ***Coaching the Mediator***

Just as mediation caucuses create an opportunity for the mediator to coach the parties on how to negotiate more effectively, caucuses also permit the mediator to obtain valuable feedback from the parties as to what it could take to settle the case.

For example, I was plaintiff's counsel during a mediation involving a landowner seeking recovery from three defendants. In a caucus session, I explained to the mediator why recovery of damages at trial was certain (the landowner was the innocent victim of a scheme), and the only

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question was how much each of the defendants would pay. Against my advice, my client gave the mediator a bottom-line figure of \$185,000 and said that she did not care how that amount was allocated among the three defendants. The mediator spent the rest of the day shuttling among the various conference rooms in which each of the defendants sat with their respective counsel. By mid-afternoon, the mediator returned to meet with the plaintiff and me and said, "I have some good news and some bad news." The plaintiff said, "Let's hear the bad news first." "OK," said the mediator, "I was not able to get \$185,000 from any combination of defendants, and they are adamant about that. But," he said, "the good news is that I have a combined offer of \$180,000." The plaintiff looked at me and nodded. "We have a deal," she said.

Of course, one could imagine achieving the same result in a mediation involving only joint sessions. But it was apparent to the participants in this mediation that caucusing provided the most efficient means of reaching resolution because the caucuses gave the mediator (1) unambiguous (albeit confidential) guidance from the plaintiff as to how much money it would take to settle the case and (2) a series of confidential opportunities to find out how much of a contribution each defendant was willing to make to a settlement pool.

Another form of valuable coaching for the mediator consists of feedback on the mediator's performance. In a recent workplace discrimination case, for example, the plaintiff told me in a caucus session that she believed that I was being less than fully impartial. "Why?" I asked. "What did I say that made you feel that way?" "Well," said the plaintiff, "you suggested that I could resolve the case by accepting the company's offer to get some remedial training while I continue working there. And I have told you from the beginning that it's the company that needs fixing, not me."

I apologized for conveying the impression that I thought the plaintiff "needed fixing." "That's not my opinion," I said. "I was simply trying to communicate that the company has drawn a line in the sand about changing its policies and practices. They would rather go to trial than make the changes you are proposing." Of course, one can imagine the plaintiff in this case expressing those views even in a joint session, but many parties would be unwilling to take the risk of expressing hurt feelings or any vulnerability at all in a joint session. Likewise, the parties may fear that criticizing the mediator in a joint session would embarrass the mediator in ways that would affect his/her impartiality.

Another example of feedback comes from the case I described earlier involving the headmaster and dean. I learned a lesson from that experience about how direct or indirect to be when the delicate subject of apologies is raised. More importantly, the feedback from the dean, which was communicated to me in a caucus session phone conference, gave me crucial

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data about how vulnerable she felt in the mediation and how I could be more sensitive to that vulnerability in subsequent sessions.

A mediator may also receive valuable guidance from the parties in those cases in which one party has useful but embarrassing information about the other party, information that is unlikely to be shared in joint session. In a divorce mediation, for example, in which I served as counsel for the husband, my client told the mediator privately that his soon-to-be ex-wife had recently been involuntarily admitted to a mental hospital for treatment of bipolar disorder, and that after ten days of hospitalization, she had signed herself out against medical advice. "She can be very unpredictable," the husband said to the mediator in a caucus session at the beginning of the mediation. "And some of her demands may appear to be irrational."

The husband could have provided this information in a joint session, but only at the risk of shaming the wife about her hospitalization and diagnosis. Information about the wife's mental illness helped the mediator throughout the mediation and, in particular, at the very end of the negotiations, the wife suddenly insisted on having both of the family dogs. The parties had been living separately for several years, each with their own dog, and the husband was quite attached to his golden retriever. The mediator, armed with information about the wife's mental illness, was well prepared to deal with this issue and brokered a compromise under which the wife has visitation rights, once a year, to see the husband's dog.

## **The Critique of Caucusing**

In *Challenging Conflict: Mediation through Understanding*, Friedman and Himmelstein (2008) have taken a strong position against caucusing. Their central argument is that mediation can be much more than just a way to resolve a conflict on the surface level. Their goal is to allow the parties to reach a fuller understanding of themselves, each other, and the conflict, and, using this understanding, come to a resolution that fulfills the parties' needs, both emotional and practical. The authors contend that the only way to reach this point is to have the parties work together, in each other's presence, to resolve their conflict, and that separate meetings run counter to this goal.

Understanding and emotional connection are particularly important to Friedman and Himmelstein, and they believe that even in cases in which emotions run high and it may be extremely difficult for parties to communicate or even be in the same room, caucusing is counterproductive to achieving understanding. In one particularly contentious case discussed in their book, the sister of a man who had passed away was locked in conflict with the man's romantic partner over his will. The mediation brought up painful feelings for both of them because of their anger at each other's behavior during the man's long illness, and they found it nearly impossible to communicate. Nonetheless, with the mediator's help, they were able to

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express their feelings to each other in a way that helped them understand each other better, and the authors believe that caucusing would have interfered with this:

It certainly would have been possible to have a private conversation with Jamie and then with Stephen and try to transmit their views back and forth between them. I could even have had those separate conversations and then brought the parties together to try to restate their views and listen to one another's. However, doing this with everyone together had some noticeable impact . . . Both of [the parties'] efforts [to express themselves] had an unmistakable genuineness that could easily have been lost if they remained private or even if they had taken place with everyone together after private rehearsals (2008: 180).

Because of the emotional understanding created in exchanges like this, the parties were able to reach an agreement that not only resolved their conflict but also helped them reach closure about their loved one's death and the circumstances surrounding it.

One of Friedman and Himmelstein's main objections to caucusing is that the mediator ends up with more information than the parties, which puts the mediator in a position of power. One of the primary tenets of understanding-based mediation is that the parties are in the best position to resolve their own conflict, and thus one of its goals, is to place primary responsibility for resolving the conflict in their hands. Caucusing could get in the way of this goal by turning the mediator into more of a judge or an arbitrator because of her informational advantage and by leading the parties to relinquish control of resolving their conflict to the mediator. Another danger is that the mediator could manipulate the parties or vice versa. Moreover, even absent any real manipulation, the parties may *feel* manipulated when they do not have all the information. Transparency is central to Friedman and Himmelstein's vision of what makes a fair resolution to a conflict, and they believe that transparency is best achieved when the parties "see and hear everything that is going on."

Friedman and Himmelstein argue that the market for commercial mediators, which is driven largely by lawyers, has shifted in the direction of caucusing because the lawyers often prefer caucusing — it gives them more control over the mediator, and it permits them to describe their view of the case without contradiction from opposing counsel. In other words, some lawyers may find transparency threatening. Mediators too sometimes yield to the temptation to split the parties into caucus sessions because such sessions are less challenging, less raucous, and less risky.

Friedman and Himmelstein's vision of mediation also goes beyond the needs of the parties who are in conflict to a wider view of the treatment of conflict in society. They see part of their role as educational — teaching through their actions in mediation how people can resolve conflicts on

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their own. In one case study in the book, the mediator (Friedman) remarked to the parties that his goal as a mediator is to put himself out of business. While caucusing is a service that only a third party could provide, guiding the parties through their conflict together equips them better to resolve future conflicts in their lives without the need for a mediator, the authors argue.

Based on this analysis, the authors would likely dispute the views espoused by Brown and Ayres (discussed earlier) that caucusing is the only way to add *economic* value to mediation. In one case study involving two large corporations, Friedman and Himmelstein describe the techniques the mediator used in a major corporate conflict to build a working relationship between the parties. Those techniques were so successful, according to the authors, that technical teams from both sides were able to work together during the course of the mediation to come up with new ideas for the companies to collaborate on projects. The value of these projects totaled \$200 million, over and above the \$300 million already at stake in the dispute and further motivated the companies to resolve their conflict so they could continue to work together on these new ventures. Friedman and Himmelstein believe that the caucus-free approach to mediation enabled the parties to repair their relationship and thus add value to their settlement in an unexpected way.

### ***Responding to the Critique***

Given the many advantages claimed for a no-caucus model, one might wonder why it is not more widely used. One answer could be that Friedman and Himmelstein's description of the model has not yet reached a wider audience. But because Friedman and Himmelstein are influential mediators with considerable visibility in the field and their views have been well known in the mediation world for more than a decade, this seems to me to be an inadequate explanation.

Another possible explanation is that mediators and lawyers fear the rigors of the no-caucus model because it brings them more directly into contact with both the parties' *and* the lawyers' intense emotions and convictions about the case. They may fear that these emotions will boil over in a joint session and derail the mediation.<sup>14</sup> However, for reasons discussed earlier, mediators should welcome the expression of emotion — indeed, it is vital to the mediation process. By their thoughtful use of caucuses and joint sessions, mediators can elicit and harness emotion in a constructive manner that promotes settlement as well as a deeper understanding of the conflict.

Perhaps the most persuasive explanation for the limited acceptance thus far of the no-caucus model is that the disadvantages of caucusing that Friedman and Himmelstein identify — empowering the mediator at the expense of the parties and the potential for manipulation by the mediator — are viewed by the consumers of mediation services as outweighed by

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the value of caucusing in overcoming strategic and tactical barriers to settlement, such as those discussed in this article.

Moreover, for some parties and their counsel, empowering the mediator, even at the expense of disempowering the parties, may be viewed as advantageous. Why would they believe this when the cardinal principles of mediation are supposed to include self-determination and informed consent? The answer can be found in those cases in which conflict is intense and the parties' positions seem to be intractable. In such cases, it is common for Party A to seek an authoritative figure such as the mediator — someone who will command the respect of Party B. Naturally, Party A is not seeking its own disempowerment, but in these circumstances, that is a risk Party A may be willing to bear in exchange for addressing Party B's seeming intransigence. Scholar David Matz (1994) has discussed this aspect of mediation in his article "Mediator Pressure and Party Autonomy: Are They Consistent with Each Other?", in which he argues that one of the qualities that the parties often seek in mediators is their ability to apply the right amount of pressure to elicit flexibility from each party:

I believe that parties come to mediators to reach an agreement they cannot reach themselves; that one approach we have is to apply pressure to the parties to help them move toward settlement; that we respect parties most clearly when we assume that they expect such pressure, and are capable of accepting it as part of the work; that we must be alert to the possibility of applying too much pressure; and that we must make room for parties to repulse our pressure to be sure they do not find it to be too much.

As to the risk of manipulation, it is worth considering the potential for both egregious and nonegregious versions of the problem. Perhaps the worst-case scenario would involve blatant lying by the mediator. For example, a mediator could, after caucusing with each party, suggest to Party A that it should lower its settlement demand from \$1 million because Party B has said it would abandon the mediation rather than pay a nickel more than \$200,000. Assume that Party B has actually authorized the mediator to offer \$400,000, and the purpose of the mediator's lie is to alter Party A's perception of what is attainable in the negotiation and thus to motivate enough flexibility on Party A's part get the case settled. "We would never drop our demand to \$200,000," says Party A to the mediator, "but we might be willing to go to \$400,000 if that would settle the case."

In the scenario described earlier, Party A might or might not have believed the mediator's assertion about Party B's position. Even if Party A believes the mediator, however, Party A is likely to assume that Party B is trying to "spin" the mediator. Either way, there is an element of shadowboxing — expected and now customary in many commercial

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mediations — when the parties are negotiating over distributive shares of what the parties may perceive to be a fixed pie.<sup>15</sup>

Blatant lying by mediators appears to be rare, however, because many of the parties in commercial mediation, or at least their lawyers, are repeat players who are likely to discuss the mediator's work. The market can detect blatant lying. More subtle forms of manipulation, however, may be more common. In the more subtle version, the mediator meets in caucus session with Party A and, by a combination of inquiry and assertion, communicates his skepticism about Party A's view of the case (Party A's perception of its BATNA) or perhaps focuses the discussion on the strengths of Party B's case. Then, the mediator meets separately with Party B and has the opposite conversation.

In this scenario, the parties understand that the mediator is likely having very different conversations in each room, and they are usually well prepared for this exercise in reality testing. If the mediator has developed a rapport with each side, these caucus conversations can be conducted in a nonadversarial manner, with the mediator trying to look at the strengths and weaknesses of each side's case from the vantage point of the party with whom the mediator is meeting and trying to develop a trusting relationship. Such conversations can also explore nonmonetary interests and integrative, "expand the pie" solutions — perhaps exploring options that would not be shared in a joint session. The fundamental point, however, is that the parties and their counsel generally prefer to engage in both reality testing and the exploration of broader interests in private sessions in which they can be more candid with the mediator, and the mediator can be more candid with them.<sup>16</sup>

One final point about the market for mediation: for many parties, the efficiency of the process is its most compelling feature. In business, employment, construction, personal injury, insurance, intellectual property, real estate, discrimination, landlord-tenant, product liability, professional malpractice, and other similar cases, the parties seeking mediation typically expect the mediation to take no longer than a day, unless the issues are exceedingly complex. In the more typical cases, the parties and their lawyers are less concerned about empowerment and understanding than they are about efficiency. For the most part, their goal in mediation is determining whether there is a zone of possible agreement and, if so, reaching a final and enforceable settlement within that zone, quickly and at a modest cost. The lawyers who bring these cases to mediation generally believe that these two objectives can be accomplished more efficiently with shuttle diplomacy.

Of course, even if the market seeks trusted mediators who use caucuses to help choreograph the negotiation and thus guide the parties to a settlement, one still might be concerned about whether existing safeguards are adequate to protect the parties from deception and exploitation.



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Although the current lack of any meaningful regulation of mediation practice gives this question added urgency, experience to date suggests that mediators adhere to the principles of mediation ethics that require honesty:

Honesty . . . means telling the truth when meeting separately with the parties. . . . When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position; she must not abuse the trust the parties place in her even if she believes that bending the truth will further the cause of settlement (Hoffman 2000: 169).

Moreover, market competition puts mediators under the microscope — at least with respect to repeat players, such as counsel — notwithstanding the legally protected confidentiality of the process.

Nonetheless, the argument articulated so clearly and forcefully by Friedman and Himmelstein provides a useful antidote to an unthinking drift toward caucus sessions. However, fully embracing their model and eschewing caucuses altogether means foregoing the efficiency advantages achievable in caucuses, as well as opportunities for insight and connection that are sometimes achievable only in the more intimate setting of caucus meetings.

## **Variations and Hybrids**

One of the hallmarks of mediation is its flexibility, and therefore the decisions that mediators and parties make regarding caucuses versus joint sessions do not have to be binary. Choosing mediation formats creatively can add value if the parties make informed choices about the advantages and disadvantages of the format they choose, regardless of whether that format involves extensive caucusing, some caucusing, or none at all.

In addition to the traditional joint session in which all participants meet with the mediator, it can also be useful for the mediator to conduct a joint session with just the attorneys (in those cases in which lawyers are participating). Outside the presence of their clients, the lawyers tend to be more candid, and the conversation can proceed more efficiently because the lawyers do not feel as much need to impress the clients or the opposing party.

Another useful variation in those cases in which extensive caucusing is used is for the mediator to bring, at the conclusion of a caucus session with Party A, a representative of Party A into the room with Party B for the purpose of presenting a proposal, answering any questions about it, and then leaving the people in Party B's room to consider the offer and formulate a response. Then the same procedure can be repeated when Party B is ready to present a proposal. These back-and-forth exchanges keep the parties more in touch with each other throughout a daylong mediation, even if most of the time is spent in caucuses.

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Other variations include meetings of just the parties without counsel, with or without the mediator. Obviously, such meetings can and should be held only when everyone — including the parties' lawyers — is comfortable with such face-to-face meetings.

Often in complex, multiparty cases, subgroups will form within the mediation — each with the potential of unlocking a piece of the settlement puzzle. For example, in a construction dispute involving multiple defendants (e.g., an architect, an engineer, a general contractor, and several subcontractors), a subgroup (e.g., the contractors, as opposed to the architect and engineer) may decide that their interests are in alignment, perhaps because they believe that a construction problem is due to design defects rather than workmanship. In such cases, caucuses involving a subgroup of defendants may be needed.

Even in the simplest of two-party family cases, resolution may require the inclusion of others for separate meetings. For example, in a recent marital mediation, everyone agreed that I should meet with the wife's mother and the husband (but without the wife) to iron out *their* differences, which had been affecting the marriage.

Mediation has no formal rules of procedure such as those that pertain to trial. The most effective use of mediation involves deployment of that flexibility to match the needs of the case. Any assumptions on the part of the mediator regarding the appropriate format should be considered merely a working hypothesis to be discussed with the parties and to be tested by experience.

Even the assumption that mediations involving ongoing relationships should be conducted primarily in joint sessions is open to question. For example, in the marital mediation described earlier, in which the parties were seeking to find a way to stay together, I needed to conduct numerous separate meetings with the parties because the husband needed coaching to moderate his belligerent tone, and the wife wanted to discuss her ambivalence about staying married to her husband. Joint meetings were more successful as a result of these private sessions.

On the other hand, even in cases in which the parties have never had a relationship and will likely never have one (such as an auto-accident case), joint sessions may provide a more powerful opportunity for the parties to feel heard and understood than caucus sessions, regardless of how empathic and effective a listener the mediator may be. For example, in a motor vehicle accident case in which a young man died when his motorcycle was accidentally forced over a bridge guard rail by a car driven by a government employee, the government representatives realized that they needed to talk directly to the young man's parents and apologize. (The driver had been terminated and refused to attend the mediation.) Such an apology had to be delivered face-to-face to have any meaning whatsoever.

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Thus, even if one disagrees with the Friedman-Himmelstein critique of caucusing and rejects the no-caucus model, their concerns underscore the importance — all too often lost in the market-driven quest for efficiency — of some of the other needs and values that mediation can serve. The fundamental lesson for mediators is that the parties should participate fully in making choices about how best to structure the mediation process.

## Conclusion

This article describes the value of caucusing, while recognizing the value of joint sessions and other arrangements of the parties, mediator, counsel, and other participants. Each format has its place in appropriate circumstances.

No single model of mediation is right for every mediator or every mediation. A defining feature of mediation is its improvisational quality. In the mediations by President Jimmy Carter and Tim White that I described earlier, the mediators' initial efforts at joint sessions failed, and each needed to take a new tack. Any form of mediation in which caucusing is either *prohibited* or *required* robs the process of flexibility and essential tools for empowerment, understanding, and the efficient resolution of conflict.

An eclectic model of mediation, in which the mediator decides in each individual case, in consultation with the parties, whether and to what extent caucuses will be used, has become the norm in the United States because it matches the needs of the parties. In some cases, caucusing will be useful because it overcomes structural barriers to settlement (such as those described by economists as “adverse selection” and the “prisoner’s dilemma”) or tactical barriers (such as communication problems or the need to bargain for an exchange of information). In other cases, caucusing creates opportunities for a more personal connection with the parties and can propel the parties and the mediators into deeper realms of meaning, value, and relationship that can help mediation achieve broader goals than simply settlement.

Recent critiques of caucusing helpfully warn mediators against an overreliance on it and identify what could be lost when mediators, the parties, and counsel shy away from joint sessions — primarily, opportunities for deeper understanding of each other. These critiques also provide an important reminder that mediators must include the parties and their counsel in the decisions that are made about how to structure the mediation process.

The world of mediation is broad and has a place for even those negotiations in which the parties and counsel are less concerned about understanding and more concerned about achieving the most efficient, deal-focused format that they can find — regardless of whether that format involves extensive caucusing, none at all, or an *ad hoc* combination of these

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approaches. Above all, mediation requires responsiveness to the parties' needs, interests, abilities, and unique circumstances. Tailoring the mediation process involves more art than science, and the use of shuttle diplomacy can play a vital role in that work.

## NOTES

I wish to thank Lily Hoffman-Andrews, an intern at Boston Law Collaborative, LLC (BLC), who provided substantial assistance with research, writing, and editing. The perspectives expressed in this essay have grown out of valuable discussions with Nicole DiPentima, a mediator and ADR Case Manager at BLC, and Vicki L. Shemin who is of counsel at BLC. Nicole, Vicki, and I have co-led workshops on the subject of caucusing and those workshops contributed substantially to the ideas expressed in this essay. Mediators and friends Daniel Bowling, Marvin Johnson, and Homer La Rue also contributed valuable comments and suggestions, as did BLC colleague and paralegal Karen Richards. I also wish to thank the American Bar Association Section of Dispute Resolution, Massachusetts Council on Family Mediation, where a previous version of this article was presented, and the Harvard Mediation Program, which invited me to do a workshop on this subject — their comments of participants were quite useful. I am grateful for all of these contributions and also wish to absolve these contributors from any responsibility for errors in which I may have persisted despite their excellent advice.

1. I would like to thank Beth Andrews for pointing out the usefulness of Tim White's story.

2. The term "caucus" has at least three meanings in the world of mediation. First, the term is used most commonly to mean a portion of a mediation in which the mediator meets separately with one of the parties (including their counsel, if lawyers are participating in the mediation) or, in multiple-party cases, with some subset of all the parties. Second, in labor negotiations and in some mediations in which there is a group of individuals on each side of the conflict, a caucus may mean a separate meeting of the individuals representing one side of the conflict, with or without the mediator. Third, in cases where two or more mediators are involved, a "mediator's caucus" means a private meeting of just the mediators and no one else. In this article, the first of these three meanings is intended when the term "caucus" is used.

3. This article does not address such practical considerations as determining whether/when a caucus would be useful, how long caucus sessions should last, and what are appropriate ground rules concerning confidentiality in caucuses because these are covered in a variety of practice manuals. Sound practice requires the mediator to discuss the issue of confidentiality with the parties before they embark on substantive discussions in a caucus session.

4. See, for example, American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution, Model Standards of Conduct for Mediators, section 5 ("If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.") and Massachusetts Uniform Rules on Dispute Resolution, Rule 9(h)(iii) ("A neutral shall respect the confidentiality of information received in a private session or discussion with one or more of the parties in a dispute resolution process, and shall not reveal this information to any other party in the mediation without prior permission from the party from whom the information was received.")

5. The goals that Freidman and Himmelstein articulate for mediation have much in common with those described in Bush and Folger (1994).

6. Mediator Eric Green calls this "fuzzy confidentiality" (Green 2010).

7. In the study by Roberta Horton (2009: 13) cited earlier, she found, "Most family and commercial mediators (71.4 percent and 80.4 percent, respectively) do employ the noisy translation method at some time in their practice, but among those who do, commercial mediators use the method more than 1.7 times as often as family mediators do: the method is used in 29 percent of all family caucuses but in 49 percent of commercial caucuses."

8. The following discussion of the prisoner's dilemma is adapted from Hoffman and Ash (2010).

9. Although originally described and discussed by researchers Merrill Flood and Melvin Dresher at the RAND Corporation and pursued for possible applications to global nuclear strategy, the "game" was first given the name "Prisoner's Dilemma" and the story first told in the context of

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police interrogation by mathematician Albert W. Tucker, who wanted to make the concept more accessible (Kuhn 2009).

10. An additional mediator strategy in such situations is to explore whether joint sessions would be more acceptable to the party that feels less powerful if that party brought other people to the table in a supportive role.

11. One can imagine making a mediator's proposal in a joint session with the parties and then asking them to write their response on a piece of paper, showing it only to the mediator. But some parties will find it difficult to mask their reaction to the proposal — or indeed they might wish to signal, via body language or facial expressions, their disapproval of such a proposal as a bargaining tactic. Mediators thus can create a safer environment for making a mediator's proposal by describing their proposal in caucus sessions so that the parties can react to it without showing their hand to the other side. In addition, presenting the proposal in caucus sessions enables the mediator to learn more about a party's genuine views about the proposal.

12. Lee Ross (1995: 29) describes reactive devaluation with this illustration: "Initial evidence for the reactive devaluation barrier was provided in a 1986 sidewalk survey of opinions regarding possible arms reductions by the U.S. and the U.S.S.R. [citation omitted]. Respondents were asked to evaluate the terms of a simple but sweeping nuclear disarmament proposal — one calling for an immediate 50 percent reduction of long-range strategic weapons. . . . The results of this survey showed, as predicted, that the proposal's putative authorship determined its attractiveness. When the proposal was attributed to [President Reagan], 90 percent of respondents thought it either favorable to the U.S. or evenhanded; and when it was attributed to the (presumably neutral) [strategy analysts], 80 percent thought it either favorable to the U.S. or evenhanded; but when the same proposal was attributed to the Soviet leader [Gorbachev], only 44 percent of respondents expressed a similarly positive reaction."

13. Without the protection of confidentiality created by the parties' agreement to mediate and/or by statute, an apology could be deemed an admission and therefore admissible as evidence. See, for example, *Federal Rules of Evidence* 801(d)(2) (admission by a party is not considered hearsay — that is, an out-of-court statement offered to prove the truth of the matter asserted).

14. A number of mediators have speculated that mediators are, to a surprising degree, uncomfortable with conflict. See, for example, commentary by mediator Gini Nelson in the blog *The Complete Lawyer*: "[I]n my personal life, and in dealing with professional colleagues outside of the specifics of a case, I'm a conflict avoider." (Copy on file with author.). My hypothesis is that conflict avoidant mediators (such as Nelson and myself) may have chosen this work to overcome their fear of conflict. Such discomfort may reinforce the impulse to move from joint session to caucus.

15. One of the reasons why such "puffing" is customary in mediations is that the ethical rules governing the conduct of lawyers explicitly permit this practice. See ABA Model Code of Professional Conduct, Rule 4.1 (prohibiting making a false statement of material fact); *id.*, comment 2 ("Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category. . . .")

16. The discussion of mediator "pressure" requires the following caveat, however. In cases where the parties are not represented by counsel, mediators need to tread carefully in order to respect the parties' self-determination.

## REFERENCES

- American Bar Association Section of Family Law. 2001. *Model standards of practice for family and divorce mediation, Standard X*. Washington, DC: American Bar Association.
- Arrow, K., R. Mnookin, A. Tversky, and R. Wilson (eds). 1995. *Barriers to conflict resolution*. New York: Norton.
- Barkai, J. 1992. Applying the Hawaiian mediation model to disputes and conflicts. *Interperspectives* 11(40): 1-5.
- Beer, J. and E. Stief. 1997. *The mediator's handbook*. Stony Creek, CT: New Society Publishers.
- Belman, H. 2006. Improvisation, mediation, and all that jazz. *Negotiation Journal* 22(3): 325-330.
- Bowling, D. and D. Hoffman. 2000. Bringing peace into the room: The personal qualities of the mediator and their impact on the mediation. *Negotiation Journal* 16(1): 5-28.

- 
- Brown, J. G. and I. Ayres. 1994. Economic rationales for mediation. *Virginia Law Review* 80(2): 323-402.
- Bush, R. A. B. and J. Folger. 1994. *The promise of mediation: Responding to conflict through empowerment and recognition*. San Francisco: Jossey-Bass.
- Carter, J. 1982. *Keeping faith: Memoirs of a president*. New York: HarperCollins.
- Chollet, D. 2005. *The road to the Dayton accords: A study of American statecraft*. New York: Palgrave Macmillan.
- Cialdini, R. 1993. *Influence: The psychology of persuasion*. New York: Quill.
- Cohen, J. R. 1999. Advising clients to apologize. *Southern California Law Review* 72(4): 1009-1069.
- Cooley, J. W. 2006. *The mediator's handbook*. Louisville, CO: National Institute for Trial Advocacy.
- Durkan, M. 1999. The negotiations in practice. In *Accord: Striking a balance: The Northern Ireland peace process*, edited by C. McCartney. London: Conciliation Resources. Available from <http://www.c-r.org/our-work/accord/northern-ireland/negotiations-practice.php>.
- Fisher, R., W. Ury, and B. Patton. 1991. *Getting to yes: Negotiating agreement without giving in*, 2nd edn. Boston: Houghton-Mifflin.
- Folberg, J. and A. L. Milne (eds). 1988. *Divorce mediation: Theory and practice*. New York: Guilford Press.
- Friedman, G. and J. Himmelstein. 2008. *Challenging conflict: Mediation through understanding*. Chicago: American Bar Association.
- Galton, E. 1995. *Representing clients in mediation*. Dallas: American Lawyer Media/Texas Lawyer Press.
- — —. 2006. *Ripples from Peace Lake: Essays for mediators and peacemakers*. Bloomington, IN: Trafford.
- Garb, P. 1996. Mediation in the Caucasus. In *Anthropological contributions to conflict resolution*, edited by A. Wolfe and H. Yang. Athens, GA: University of Georgia Press.
- Golann, D. 1996. *Mediating legal disputes: Effective strategies for lawyers and mediators*. New York: Little Brown.
- — —. 2009. *Mediating legal disputes: Effective strategies for lawyers and mediators*. New York: Little Brown.
- Goldberg, S., F. Sander, N. Rogers, and S. Cole (eds). 2007. *Dispute resolution: Negotiation, mediation, and other processes*, 5th edn. New York: Aspen.
- Goldberg, S. and M. Shaw. 2008. Further investigation into the secrets of successful and unsuccessful mediators. *Alternatives to the High Cost of Litigation* 26(8): 149-160.
- Gottman, J. 1995. *Why marriages succeed or fail and how you can make yours last*. New York: Simon & Schuster.
- Green, E. 2008. *Lecture delivered to Harvard Law School's mediation class*. Cambridge, MA: Harvard University.
- — —. 2010. Private e-mail communication with the author. October 26.
- Hoffman, D. 2000. Ten principles of mediation ethics. *Alternatives to the High Cost of Litigation* 18(8): 147-169.
- Hoffman, D. and D. Ash. 2010. Building bridges to resolve conflict and overcome the "prisoner's dilemma": The vital role of professional relationships in the collaborative law process. *Journal of Dispute Resolution* 2010(2): 271-296.
- Horton, R. 2009. Noisy disclosures in caucusing: Practical and ethical issues. Unpublished manuscript.
- Hosmanek, A. 2005. Cutting the cord: Ho'oponopono and Hawaiian restorative justice in the criminal law context. *Pepperdine Dispute Resolution Law Journal* 5(2): 359-376.
- James, P. 1997. *The divorce mediation handbook: Everything you need to know*. San Francisco: Jossey-Bass.
- Keating, M. 2009. Mediating in the dance for dollars. *Alternatives to the High Cost of Litigation* 14(8): 93-104.
- Kolb, D. 1994. *When talk works: Profiles of mediators*. San Francisco: Jossey-Bass.
- Kuhn, S. 2009. Prisoner's dilemma. In *The Stanford encyclopedia of philosophy* (Spring 2009 edition), edited by E. N. Zalta. Stanford, CA: The Metaphysics Research Lab Center for the Study of Language and Information at Stanford University. Available from <http://plato.stanford.edu/archives/spr2009/entries/prisoner-dilemma>.
- Levi, D. 1997. The role of apology in mediation. *New York University Law Review* 72(5): 1165-1210.

- 
- Liebman, C. 2000. Mediation as parallel seminars: Lessons from the student takeover of Columbia University's Hamilton Hall. *Negotiation Journal* 16(2): 157-182.
- Little, J. A. 2007. *Making money talk: How to mediate insured claims and other monetary disputes*. Chicago: American Bar Association.
- Maass, A., C. D'ettole, and M. Cadinu. 2008. Checkmate? The role of gender stereotypes in the ultimate intellectual sport. *European Journal of Social Psychology* 38(2): 231-245.
- Matz, D. 1994. Mediator pressure and party autonomy: Are they consistent with each other? *Negotiation Journal* 10(4): 359-365.
- Moore, C. W. 1996. *The mediation process: Practical strategies for resolving conflict*. San Francisco: Jossey-Bass.
- Norcross, J. 2001. Purposes, processes, and products of the task force on empirically supported therapy relationships. *Psychotherapy* 38(4): 345-356.
- Ogawa, N. 1999. The concept of facework: Its functions in the Hawaii model of mediation. *Mediation Quarterly* 17(1): 5-20.
- Pricen, T. 1994. Joseph Elder: Quiet peacemaking in a civil war. In *When talk works: Profiles of mediators*, edited by D. Kolb. San Francisco: Jossey-Bass.
- Ross, D. 2007. *Statecraft: And how to restore America's standing in the world*. New York: Farrar, Straus, and Giroux.
- Ross, L. 1995. Reactive devaluation in negotiation and conflict resolution. In *Barriers to conflict resolution*, edited by K. Arrow, R. Mnookin, L. Ross, A. Tversky, and R. Wilson. New York: Norton.
- Schneider, C. D. 2000. What it means to be sorry: The power of apology in mediation. *Mediation Quarterly* 17(3): 265-280.
- Shapiro, D. 2006. Preempting disaster: Pre-mediation strategies for dealing with strong emotion. In *The Blackwell handbook of mediation: Bridging theory, research and practice*, edited by M. Herrman. Hoboken, NJ: Wiley-Blackwell.
- Sharp, G. 2009. In praise of joint sessions. Paper presented at 1st Asian Mediation Association Conference, June 4-5, 2009. Available from <http://www.geoffsharp.co.nz/articles/in-praise-of-joint-sessions-2>.
- Shishkin, P. 2007. Angry neighbors? In Turkey, people call on Mr. Sanli. *Wall Street Journal* July 16; A1-A10.
- Shook, E. V. and L. K. Kwan. 1987. Straightening relationships and settling disputes in Hawai'i: Ho'oponopono and mediation. University of Hawai'i at Manoa, Matsunaga Institute for Peace, Program on Conflict Resolution Working Paper Series. 1987: 10: 1-56. Available from <http://tinyurl.com/Mediation-Hawaii>.
- Swaab, R. 2009. Face first: Pre-mediation caucus and face in employment disputes. Paper presented at the 22nd Annual International Association of Conflict Management Conference, June 15-18, 2009. Available from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1493514](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1493514).
- Van Winkle, J. R. 2001. *Mediation: A path back for the lost lawyer*. Chicago: American Bar Association.
- Wall, J. and R. Callister. 1995. Ho'oponopono: Some lessons from Hawaiian mediation. *Negotiation Journal* 11(1): 45-54.
- Walton, G. M. and S. J. Spencer. 2009. Latent ability: Grades and test scores systematically underestimate the intellectual ability of negatively stereotyped students. *Psychological Science* 20(9): 1132-1139.
- WBEZ Alliance and I. Glass 2008. This American life, episode 358: Social engineering (radio broadcast). Aired June 27. Available from <http://www.ThisAmericanLife.org>.