

Hosting Mediations as a Representative of the System of Civil Justice¹

WAYNE D. BRAZIL*

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* United States Magistrate Judge, Northern District of California

¹ This article is dedicated to Paige Kiyoko Kathleen Gleeson (1996–2006), a loving friend whose spirit informs the truest of the pages that follow.

The substance of this Essay represents an elaboration of ideas I first presented in remarks to lawyers who serve as volunteer neutrals in the mediation and ENE programs that are sponsored by the United States District Court for the Northern District of Ohio.

During the process of converting my oral presentation into this article I have received very helpful comments and suggestions from Howard Herman, Director of the ADR Program in the United States District Court for the Northern District of California; Daniel Bowling, who recently joined the professional staff of that Program; and David Lombardi, Chief Circuit Mediator for the United States Court of Appeals for the Ninth Circuit. None of these thoughtful people is responsible for the views expressed in this article.

I would also like to express my gratitude to my law clerks, Michelle Sicula and Sarah Weinstein, and to judicial extern Jon Landis, for their research help and their careful proof-reading.

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I. INTRODUCTION

This Essay presents ideas about how to serve “appropriately” as a neutral in a court-sponsored mediation program.² My goal is to suggest a set of perspectives or considerations that I hope lawyers and others will take into account when they are trying to determine how to handle their roles—and how to respond to specific dilemmas and pressures—when they are serving as neutrals in a court-sponsored alternative dispute resolution (ADR) program.

² As I worked to develop the material on this topic it became less and less clear to me that there was a difference, at least when serving in a court sponsored ADR program, between performing “appropriately” and performing “effectively.” The hypothesis that kept pushing itself at me was this: even if one measures “effectiveness” crudely, by nothing more than the incidence or timing of settlements achieved, isn’t there likely to be a substantial correlation between how “effective” a court-sponsored neutral is and how carefully or fully that neutral honors the norms under which the “appropriateness” of his or her conduct would be assessed?

As a sitting judge, I am in no position to test this hypothesis empirically, so it remains more of a hopeful hunch than anything else.

A. *Predicate Assumptions About the Nature of “Mediation” in Court Programs and About Identifying the Mediator with the Court*

Daniel Bowling,³ who was kind enough to read this Essay in a couple of its earlier iterations, commented that it is a “radical” version of “mediation” that underlies the views I express in this article. That observation caught me by surprise, but I am grateful because it exposed two important sets of assumptions that I need to explicitly acknowledge at the outset.

1. *A Process with an Evaluative Dimension*

The first set of assumptions is about characteristics of the mediation process as I believe it is commonly encountered in many court-sponsored programs. I recognize that the term “mediation” may be attached to a wide variety of processes in a host of different kinds of court programs around the country. Even in a court like ours, which attempts to regulate and monitor fairly closely how its neutrals perform their tasks, the range of processes and approaches used by mediators is considerable. In some of our mediations, the course that is followed is fairly close to the facilitative end of the spectrum, while in others the process may have more in common with “evaluative” models.⁴

Our data and experience indicate that most of the mediations hosted by our neutrals involve both group sessions and private caucuses, and that most include both facilitative and evaluative pieces.⁵ Most of our mediations likely

³ Daniel Bowling is the co-editor and co-author with David A. Hoffman of *BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION* (2003), and former CEO of the Association for Conflict Resolution (ACR). Mr. Bowling is now one of the professionals responsible for the ADR Program in the United States District Court for the Northern District of California.

⁴ See Leonard Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 *NOTRE DAME L. REV.* 1, 30–34 (2003) [hereinafter *New New Grid System*].

⁵ The professional staff that monitors the ADR Program of the United States District Court for the Northern District of California has developed several mechanisms for gathering information about what occurs in our court-sponsored ADR sessions and about the participants’ assessments of the ADR proceedings. One such mechanism has consisted of a series of debriefing sessions and seminars with lawyers who have served for many years as neutrals in our program, many of whom also have represented clients in mediations, early neutral evaluations, or non-binding arbitrations that were conducted under the auspices of our rules. On a regular basis, the professional staff of the ADR program in our court also offers counsel to our mediators, and responds to their questions

are blurred or hybrid undertakings⁶ in which the mediator emphasizes a facilitative approach for some portion of the proceedings, but also, in appropriate circumstances and in measured ways, engages—at least in private caucus—in some dialogue with parties about substantive aspects of the case. Our training teaches our mediators that it is generally wise to give the process considerable facilitative play before venturing into any evaluative waters, but acknowledges that parties often really want and really appreciate careful and appropriately qualified evaluative feedback about some aspect of the case.

It is likely that most of the mediations that occur in our program are

when they confront new or challenging circumstances or have had an experience that is unusual or could be a source of learning for others. In these and other ways, there is a constant flow of information about what is occurring—procedurally, not substantively—in our mediations from our neutrals to our professional staff.

In addition, after each mediation that occurs in our ADR Program, the court's staff submits a questionnaire to the mediator and to each party and lawyer who participated in the session. By the late spring of 2006, after having sought feedback in this way for many years, the court's ADR data bank included some 1,150 completed questionnaires from mediators, just fewer than 1,100 completed questionnaires from lawyers who have represented parties during our mediations, and just over 700 completed questionnaires from parties who have attended mediations we have sponsored. The data bank also includes many additional completed questionnaires that have been returned by participants in ENE sessions or non-binding arbitrations. While the survey instruments for the three different groups of participants in our mediations are not identical, some questions are the same in all three instruments and some questions probe the same subject with enough overlap, in central thrust, to permit at least guarded comparisons of views on some important matters. While one must be careful when trying to draw inferences from data like these, they constitute a significant source of information about the perceptions of participants in our mediations.

Particularly relevant here are the following data: 66% of our lawyer respondents report that during the mediation the "strengths and weaknesses of the respective legal positions was discussed," and 30% report that the mediator "gave an overall evaluation of the likely outcome of the case." Moreover, when asked to rate the mediator's style in expressing his or her views on the parties' legal positions, using a scale of 1 to 5,—one being the least evaluative style and five being the most evaluative—the lawyers' responses arrange themselves into what is essentially a bell-shaped curve, with 10% reporting that their mediator's style was on the least evaluative end of the spectrum, 12% reporting that their mediator's style was on the most evaluative end of the spectrum, and the vast majority falling in the middle zones (14% choosing "2" on the scale of 1 to 5, 32% choosing "3" on that scale, and 26% choosing "4").

These data are maintained by the staff of the Northern District's ADR Program in the San Francisco courthouse.

⁶ See Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247 (discussing the development of hybrid forms of mediation in other settings).

stylistically nonlinear events in which there is some ebb and flow between facilitative and evaluative approaches over the course of the proceedings. This ebb and flow occurs as our neutrals try to be responsive to the often mobile and evolving needs and wishes of the parties. In some mediations there is no occasion for evaluative input by the mediator, and in some instances when the neutral offers some input on the merits, she does so obliquely (e.g., through questions), or with very substantial qualifiers, or only on some limited part of the case. Often, the evaluative feedback is given in private caucuses. In one form or another, however, there probably is some element of evaluation in a substantial percentage of our mediations.

It is important to emphasize that the parties are likely to feel that at least some evaluative pieces are welcome and natural ingredients of the soup in which they find themselves swimming.⁷ That feeling is an organic outgrowth

⁷ Bearing in mind the data described in footnote 5, *supra*, which sheds light on lawyers' perceptions about the incidence and character of some evaluative inputs during the court-sponsored mediations, it is noteworthy that our lawyer-respondents give such high marks to the fairness of the mediation proceedings and to the appropriateness of the mediators' conduct. For example, 81% of our lawyer-respondents report that the procedures used in the mediation were "very fair" and another 11% report that they were "somewhat fair." Only 3% describe the mediation procedure as they experienced it as "very unfair." While not as lopsided, the responses from the litigants themselves form a similar pattern; with 64% describing the procedures used during the mediation as "very fair," and another 23% describing those procedures as "somewhat fair." Only 5% of the party-respondents report feeling that the mediation procedures were "very unfair."

We also ask the lawyers who have represented parties in our mediations to rate the level or degree of forcefulness exhibited by the mediator. Using a scale of 1 to 5, with "1" being at the "Wasn't sufficiently forceful" end of the spectrum and "5" being at the "Applied too much pressure" end of the spectrum, only 2% of our lawyer-respondents report that their mediator applied too much pressure, while 10% feel that the mediator was not sufficiently forceful. Most significantly, by far the most common response fell right at the mid-line of our spectrum, with 63% of the lawyers indicating that their mediator neither applied too much pressure nor was too passive. Responses to the same question by the litigants themselves fall into a very similar pattern: 3% reporting that the mediator applied too much pressure, 9% feeling that the mediator was not sufficiently forceful, and 63% expressing the view that the mediator was neither too forceful nor too passive.

One additional set of responses warrants comment here. As noted in footnote 5, *supra*, 30% of our lawyer-respondents reported that the mediator "gave an overall evaluation of the likely outcome of the case." The follow-up question asked the lawyers whose mediators had provided such an evaluation to assess its impact on the settlement discussions. Only 6% of our lawyer-respondents have indicated that the provision of the overall evaluation by the mediator "made it less likely that the case would settle." While 33% felt that the provision of the evaluation had no impact on settlement, 60% reported that the overall evaluation by the mediator "made it more likely the case would settle."

of the setting in which our mediations occur—lawsuits. The outcome in lawsuits turns on law and evidence—on what evidence is mustered, on what factual inferences that evidence could rationally support, on what law applies, and on what relationship is likely to be found between the pertinent legal principles and the factual findings that might be made. These are the kinds of matters that are at the center of litigation, and these kinds of matters beg for analysis.

Another important piece of this picture is that many lawyers and litigants want to use the mediation process to learn whether their evidence and arguments are persuasive—and if they are not, why. Good lawyers understand that they do not know everything and that they do not understand everything perfectly. They also know that there is a risk that they are not being fully objective about their client's cause, and that an outsider to the dispute might have a very different take on it. A good lawyer wants to give her client the most reliable advice possible, and many good lawyers look to the mediation process to help them assess their own analyses and positions. Similarly, some lawyers hope the mediation process will provide their client with more confidence in the lawyer's competence and advice. For example, some lawyers hope mediation will teach or persuade their client that he needs to adjust his view of the merits of the case or of what is realistic to expect in settlement.

All of these potential contributions of our mediations depend, at least in some measure, on the process having an evaluative dimension. While the parties may get some evaluative mileage out of dialogue and debate between one another directly across party lines, the distrust and the instinct for self-protection that infect so much of litigation can limit the parties' ability to learn from one another. What many parties really want, and what they are much more likely to find useful, is input from the neutral host of their mediation.⁸

These data are on file in the office of the ADR Program, Northern District of California, San Francisco.

⁸ We cannot simply assume that the views of lawyers and litigants are the same about the roles neutrals should play in mediation. We also must recognize that both groups—lawyers and litigants—might expect court-appointed volunteer neutrals who are hosting mediations to play a different role than the role they would be comfortable being played by *judges* hosting *settlement* conferences. Nonetheless, it may be instructive to note that data collected in the mid-1980s reflected a substantial preference among lawyers for settlement judges who actively offered suggestions and observations over settlement judges who limited their role to facilitating communication between the parties. See, e.g., Wayne D. Brazil, *What Lawyers Want from Judges in the Settlement Arena*, 106 F.R.D. 85, at 97 (1985) (summarizing views expressed in response to a questionnaire that was presented to lawyers in four different geographic areas). The data

There are cases, of course, in which considerations external to the lawsuit are the primary decision-drivers. And there are cases in which the parties recognize that they will be better off if they focus virtually all of their mediation attention on underlying interests, larger values, and longer-range visions, devoting little or no time to wrestling with issues of law and evidence. But more commonly the parties seek some evaluative feedback about the evidence or law—a fact that can create issues and spawn ethical duties that might not arise when mediators are working in a purely private setting, playing a purely facilitative role, or both.

2. *Identifying the Mediator with the Court*

I have used the pronouns “we” and “us” in this Essay in part to make it easier to read. But my use of these pronouns has roots in something more fundamental. The second assumption that informs the views I express in the pages that follow is that there is considerable parallelism in responsibilities, even if not in kinds of processes used, between lawyers serving as mediators in a court-sponsored program and judges serving as hosts of settlement conferences.⁹

That assumption is challengeable, especially in court programs that do not require party participation in ADR, do not regulate the provision of ADR services, and do not train the mediators or assign neutrals to specific cases. The looser the connection between the court and the mediations and mediators, the less obvious the parallelism between the responsibilities of

generated by this study is described in much greater detail in Wayne D. Brazil, *SETTLING CIVIL LAWSUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* (ABA Press 1985).

⁹ There are important differences between the procedures I generally follow when I am conducting settlement conferences and the procedures we teach our mediators to follow when they are hosting mediations in our court program. I begin my settlement conferences with a ‘speech’ in which I describe goals we might pursue, explain the procedures we will follow and the rationale for them, and set forth the rules that apply—primarily about confidentiality. Thereafter, I usually move directly into private caucusing—skipping the group session at the outset that is central to much mediation theory. I also talk too much and am more analytically active than at least some mediation theory would endorse. For an overview of various theories about how mediations should be conducted and roles mediators can play, see LEONARD RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 286–393 (3d ed. 2005). See also Kenneth Kressel, *Mediation*, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 522, 522–545 (Morton Deutsch & Peter T. Coleman eds., 2005); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (Jossey-Bass, 3d ed. 2003).

lawyers who host mediations in court programs and judges who host settlement conferences.

The ADR Act of 1998, however, imposes on federal trial courts considerable responsibility for designing, implementing, overseeing, and evaluating ADR programs.¹⁰ Consistent with the mandates of that federal statute, the judges of the Northern District of California have adopted an ADR program with the following key features: the parties are presumptively¹¹ required to participate in some form of ADR; the court has adopted a substantial set of rules that govern the proceedings and how the neutrals are to handle their roles; in most cases, administrators of the court's ADR program assign the mediator or other neutral to the case; the neutral's services are provided for free as an integral component of our standard approach to civil case management; and the court devotes considerable resources to selecting, training, guiding, and evaluating the performance of the lawyers who serve as mediators in our cases.¹²

This level of involvement by the court in the provision of mediation and other ADR services increases the likelihood that parties who participate in court-sponsored mediations will view the mediator as an agent and representative of the court. In the pages that follow, I proceed on the assumption that, at least to some extent, the participants in our court-sponsored mediations are likely to make judgments about the court as an institution based on their judgments about the mediator's conduct. This likelihood has profound implications for how the mediators perform their tasks and the character of their ethical obligations. It also may account, in part, for the differences between the vision of mediation that emerges in this Essay and the vision of mediation that emerges from the literature that describes the transformative¹³ and the facilitative approaches to this craft.¹⁴

¹⁰ 28 U.S.C. § 651 (2000).

¹¹ Parties may petition the assigned judge to remove their case from the ADR program. ADR Loc. Rule 3-3(c) of the United States District Court for the Northern District of California (2006).

¹² See ADR Loc. Rules 1-3, and 6 for the United States District Court for the Northern District of California (2006).

¹³ See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2005).

¹⁴ For a framework for understanding the range of approaches to or models for the mediator's role, see *New Grid System*, *supra* note 4, at 23-24; and Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). For compact efforts to distinguish "facilitative" from "evaluative" mediation, see CPR Inst. for Dispute Resolution, *Model Rule for the Lawyer as Third-Party Neutral* 7 (2002); and Samuel J. Imperatie, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33

My use of the pronouns “we” and “us” raises one additional set of questions.¹⁵ Have I slid into assuming that court-appointed mediators are judges? Are some of my suggestions about how court-appointed mediators should think and act unconsciously rooted in norms or standards that appropriately apply only to judges? Have I assumed that parties to mediations are likely to view court-appointed mediators as judges?

I hope the answer to these questions is “no.” Certainly, lawyers are well aware of the difference between a mediator and a judge. It should follow that litigants who are represented by lawyers are not likely to conflate a mediator with a judge. I also understand that mediators commonly describe the limitations of their role and their responsibilities at the beginning of mediation sessions, emphasizing the facilitative dimension of their work and assuring the participants in the session that, as mediators, they have no power over the merits of the case and will not communicate with anyone who might have such power—most obviously, the judge assigned to preside at trial.¹⁶ In the pages that follow, I assume that at least represented parties will understand and accept these messages. Thus, I assume that lawyers and clients will not have the same kinds of expectations of court-appointed mediators that they would have of judges performing judicial duties, e.g., considering formally presented evidence and argument, then engaging in thorough research and analysis en route to forming reliable and binding judgments about the merits of parties’ disputes.

On the other hand, it does not follow that court-appointed mediators are not likely to be viewed as representatives of the court simply because the litigants are not likely to conflate mediators with judges. The court’s staff mediators are very likely to be viewed as agents and representatives of our court, and the court imposes duties on them that are rooted in that understanding.¹⁷ Because our court selects, trains, regulates, monitors, and

WILLAMETTE L. REV. 703, 709–714 (1997). For spirited defenses of the position that the term “mediation” should attach only to the facilitative model, see Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); and Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COSTS LITIG. 31 (1996).

¹⁵ I am indebted to David Lombardi, Chief Circuit Mediator for the United States Court of Appeals for the Ninth Circuit, for alerting me to these questions.

¹⁶ See ADR Local Rule 6-11 of the United States District Court for the Northern District of California (2006).

¹⁷ When it selects its staff mediators, the court makes it clear that they are to abide scrupulously by the procedural and ethical prescriptions in the ADR Local Rules of the United States District Court for the Northern District of California. We also emphasize that our staff neutrals are to honor the commitments to process integrity and public service that have animated the court’s ADR program since it was launched in 1978 by the

assigns the private lawyers who host the bulk of the mediations we sponsor, these mediators also are likely to be perceived as agents and representatives of the court. The court's rules reinforce this perception by conferring on the mediators we appoint the kind of immunity that protects both judges and other non-judge agents of the court, such as special masters.¹⁸

So it is not the risk that parties will conflate mediators with judges that gives rise to the obligations that I describe in the pages that follow, but the fact that parties are likely to connect our court-appointed mediators with the court, with the institution. That connection may not be complete because parties likely understand that there is some space between these agents and their principal. However, when the principal is the public institution charged with primary responsibility for process integrity, I believe that even an incomplete or partially diluted equation of court-appointed mediators with the court itself must play a commanding role in our thinking about how we handle our roles as mediators in court programs.

B. The Sources of My Normative Prescriptions

Before launching my prescriptive enterprise, I need to acknowledge that my ideas about what kind of conduct by neutrals in court programs is appropriate and effective are rooted primarily in three sources. One is personal values about how people should treat one another and assumptions about how people respond to being treated in various ways. The second is a set of assertions sounding in public policy about the mission of courts in our democracy. The third is a loose aggregation of personal instincts and intuitions about dynamics in negotiations. While these instincts and intuitions feel to me like they have emerged "naturally" from my experience hosting some 1,500 settlement conferences over the past two decades, they are in no sense the product of any scientific or systematic study.

One additional prefatory note is in order. I spend most of my time in most of the settlement conferences that I host in private caucuses, where I am interacting, *ex parte*, with one lawyer or one side—lawyer and litigant—at a time. When I think about the behavior of a neutral, I tend to assume that the neutral is working in a private caucus outside the presence of parties with adverse interests. So, for example, my views about transparency and honesty need to be understood as arising out of and applying primarily in the context of a private caucus. Of course, court-appointed mediators often spend a great

late Chief Judge Robert F. Peckham.

¹⁸ See ADR Loc. Rules. 2-5(c)–(e) of the United States District Court for the Northern District of California (2006).

deal of time working with all parties and lawyers in the same room. While some of my ideas about appropriate and effective conduct by a neutral clearly are transportable into that different mediation setting, some may not be. The task of making that judgment I must leave to others.

II. BEING MINDFUL OF THE IMPLICATIONS OF THE CONTEXT IN WHICH WE SERVE

I would like to begin by encouraging lawyers working as mediators in court programs and judges hosting settlement conferences to be mindful of the implications of the context in which we serve as neutrals. Mediators are supposed to be context-sensitive. They are supposed to try to understand, holistically, not only the dispute that is before them, but also the parties' real-world situations beyond the dispute. Those larger contexts often shape needs, goals, and other decision-drivers that a mediator must show the parties she understands, and within which she should search for ways to help the parties find bases for solutions. More specifically, mediation theory requires mediators to attend with special care to the values and objectives of the parties for whom they are providing neutral services. After all, it is party self-determination that is supposed to be the primary driver in much mediation theory.¹⁹

A. Sources of Process Prescriptions When Mediating in a Purely Private Setting

If, in a purely private setting, all of the parties to a mediation share the same values and objectives and ask the mediator to adopt those values and objectives while mediating their case, presumably the mediator would find it difficult to rationalize using some other set of values and objectives to guide her handling of the proceedings.

It is unclear how often the parties to private mediation share the same objectives and the same notions about how process choices should be made. The likelihood of this kind of tidy convergence presumably is appreciably less in some kinds of cases, such as disputes between employees and employers, than in others, such as commercial matters in which all parties are large, publicly traded corporations. When the parties are primarily economic actors, however, and when they agree to pay a mediator \$10,000 a day (or

¹⁹ See, e.g., Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996).

more), they are likely to have one overriding goal: to get the dispute settled. They are paying for mediation, at least in part, because they have tired of paying for litigation. Given the dominance of the goal of getting the case settled and the thickness of “process skin” that big-time economic actors are presumed to acquire, it would not be surprising if the parties to mediation in these kinds of cases were much more concerned about ends than means and were not inclined to worry a great deal about abstract purity of process. In short, they are not likely to mind a little “process roughness” if they sense that it increases the odds that they will get a deal.²⁰

The point is this: when we mediate in a purely private setting, and are paid substantial sums for our work, the parties who pay us have some say about how we approach our task and about the hierarchy of values we use when we make process or tactical choices within the mediation. In purely private settings, we have a fair amount of freedom to agree to play by process rules or to pursue agendas in accordance with the parties’ wishes. If sophisticated, comparably empowered parties clearly want us to elevate the goal of settlement above any concerns about what the parties would consider process niceties, there may be no insurmountable external barriers to accommodating their desires, at least within certain bounds.²¹

²⁰ I do not want to be misunderstood as endorsing the notion that some roughness in mediation procedure actually increases the likelihood of getting a deal in commercial cases that pit seasoned, thick-skinned players against one another. A strong argument can be made that the approach that carries the most promise of productivity, across all kinds of cases and situations, and independent of levels of cynicism, is strict adherence to the kind of process integrity I will describe in this Essay. What I do mean to suggest is that in some cases the parties and lawyers self-consciously elevate ends over means and are inclined to believe that the mediation process will not yield a deal unless the mediator is willing to be analytically and emotionally aggressive, to tolerate negotiation tactics that might raise ethical eyebrows, and to abandon any pretense of transparency.

²¹ Efforts by states to regulate the private provision of mediation services vary considerably. Many states, for example, have adopted rules governing the confidentiality of mediation communications that apply not only to court-sponsored mediations, but also to mediations that take place wholly outside the context of litigation. *See, e.g.*, CAL. EVID. CODE § 1115 (West 2003). The Uniform Mediation Act, which primarily regulates use of mediation communications, has been adopted in eight states and the District of Columbia (Illinois, Iowa, Nebraska, New Jersey, Ohio, Utah, Vermont, and Washington). For updated information about adoption of the Act, see The National Conference of Commissioners on Uniform State Laws, www.nccusl.org (last visited Oct. 24, 2006).

I am not aware, however, of any governmentally adopted norms that would strictly cabin the process paths that private mediators may follow, at least when two comparably empowered and sophisticated parties jointly specify how they want the mediator to proceed.

*B. Sources of Process Prescriptions When Mediating for the Court:
Being Clear About Our Primary Objective*

Our situation changes when we mediate or host settlement negotiations in a court program. Many of the parties we encounter when we are serving in this capacity may want and expect us to elevate the goal of getting a deal above other concerns, but even when they speak with one clear voice we cannot simply acquiesce. There is a significant change in context when we work for the court. We turn now to explore the implications of that context.

What is the single most important objective of our service in a court-sponsored mediation program? Is it to settle as many cases as possible, or to accelerate the timing of settlement? Is it to improve communication across party lines, or to enhance the reliability of the parties' analyses of the relevant law and evidence? Is it to help the parties identify more accurately what separates them and to teach them why they disagree? Is it to help the parties identify more reliably the best terms they could achieve through settlement, so they will understand accurately what their best alternative to trial is, and thus, if they proceed to trial, to better understand why?²²

Or should we conceive of our primary task as helping the parties reduce the risk of false negotiation failure? When I host settlement conferences, I typically tell the parties that one of my goals is to help them reduce the risk of "false failure." As I explain it, false failure could be the product of one or more of three different kinds of errors. One might be a social or interpersonal error, e.g., a participant saying something insensitive or incendiary that leads other participants to shut down or counterattack. The second kind of possible error that I mention is analytical, e.g., a participant missing or misunderstanding some important evidence or law, a significant implication of some possible term of an agreement, or some component of a possible outcome of the litigation. The third kind of error may be the most common; it is the one I often work hardest to avoid. It consists of guessing incorrectly about what terms might be achievable through settlement. This kind of error

²² Helping parties feel more confident that they have accurately identified the best terms that they could achieve through settlement can be an important achievement of a mediation or settlement conference. It is only when a party has reliably identified the best deal he could hope for through settlement, that he is positioned to make a fully informed decision about whether to go to trial. If he decides to go to trial it will be because he has concluded that the best available settlement terms just aren't good enough. Knowing that, he is less likely to feel resentful over the expenses and strains that proceeding to trial entail, assuming he has been accurately advised about what those expenses and strains will be. Lawyers who want to reduce client resentment over paying trial bills should appreciate this potential benefit of a well-run mediation.

can have many different sources, e.g., posturing that persists too long, hiding real bottom lines or top dollars too tenaciously, mistaken tactical gambles, or a party inadvertently painting itself into a “face corner”²³ that it feels it cannot escape without paying too high a price.

Another purpose that we might consider most important when we host mediations for a court is to provide the parties, on behalf of the court, with as much useful service as possible. Our primary goal might be to have the parties and counsel emerge from our mediations feeling that they have received a valuable service—or at least that we really have tried to be helpful to them.

Why might we identify this goal as our principal objective? The answer emerges when we consider how important it is, in a democracy, for the people to feel well-served by their public institutions, and when we understand that a significant percentage of civil cases actually receive little service of value from the courts. While comparable figures for state courts are more elusive and variable, a few statistics from federal trial courts suffice to make the point. Federal district courts host trials in less than 2% of the civil cases. Less than 8% are resolved by summary judgment, and it appears that an even smaller percentage of the cases are terminated by rulings on motions filed under Federal Rule of Civil Procedure 12.²⁴ Nor do motions on other grounds account for a significant percentage of civil case dispositions. Thus, it appears that no more than 20% to 25% of the civil cases filed in federal trial courts are resolved through the direct exercise of power by the judicial system.²⁵

What service from the federal trial courts do the remaining civil cases receive? Some go through a case management conference or two; some receive rulings on non-dispositive motions, primarily in discovery disputes; some receive rulings of varying degrees of utility on motions that, in theory, might have been dispositive but that, in the end, fail to yield a disposition. While by no means always inconsequential, it seems fair to guess that, in the grand scheme of things, most of this kind of activity by the courts is of relatively modest value to the parties. Taking all the data into account, it appears that federal trial courts provide meaningful service to less than half

²³ As I explain in a subsequent section, a party paints itself into a “face corner” when it feels that, because of the way (e.g., with great adamancy) it has announced what purports to be its “real” bottom line, it cannot make any change in that position without an unacceptable loss of face.

²⁴ See Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 243–44 n.5–8 (2006) (describing sources of the data and the analyses of federal district court dockets that support these statements).

²⁵ *Id.*

of the civil cases brought to them—unless they provide substantial help in the settlement arena.

These facts of civil litigation life make court provision of mediation services potentially very significant. We need to do what we can to encourage people to feel that their public institutions are useful to them. We also need to do what we can to encourage people to feel that the courts *want* to be just as accessible to them in economic fact as they are in political theory. By providing parties with useful settlement services, or at least by visibly trying to do so, we can demonstrate to litigants and lawyers that we really want to be of service and that we understand how difficult it can be, financially, to proceed through the federal court system. By trying to help in an arena that matters to the parties, and by demonstrating that we understand the economic strains that most litigants face, we can encourage a sense of gratitude in the people. If we earn their gratitude, we are more likely to enjoy their respect.

While all of the kinds of contributions or achievements that are described in the preceding paragraphs are potentially valuable—sometimes very valuable—none of these should be our primary objective when we host mediations in court-sponsored ADR programs. When we are working as a neutral for the court, we represent the court. We are an agent of a public institution that is an essential component of our democratic form of government. Most significantly, it is a public institution whose central imperative is process integrity. That central imperative means that the dominant concern of the institution we represent must be to promote and preserve public confidence in the integrity of the processes that the institution sponsors. It follows that when we are serving as a neutral in a court-sponsored ADR program, our primary objective must be to promote the participants' confidence in the integrity of the proceedings we host.

One way of bringing this crucial point into appropriate focus is to ask ourselves what we most want to feel, and more importantly, what we most want the participants to feel, *after* the mediation or the settlement conference is over. Of the many different kinds of feelings that we and the participants might have after the event, which is most important?

What *we* most want to feel is pride. We want to feel proud of the way we handled the proceedings and represented the court. What we do not want to feel are tinctures of shame, embarrassment, or awkwardness about the way we carried out our responsibilities. We want to feel that we could describe our conduct in full detail without hesitation, blush, or worry, to people whose opinions matter to us, but who are not steeped in the rationalizations of litigation practice.

When we focus on what we want *the participants* to feel, we need to

broaden our vision. What the participants feel in the first hour after the mediation is important, but what they feel the next day, the next week, even the next year is more important. We need to care what the participants think after they have had time to digest and reflect, and after the passage of time teaches them whatever it has to teach about both the consequences of their decisions and the reality of the facts and law that were at play in their dispute. What we most want the participants to feel at each of these junctures is respect for the process we hosted.

III. SOURCES OF PERIL IN OUR QUEST FOR RESPECT FOR OUR PROCESS

In this section, I describe sources of potentially role-distorting pressures and temptations that can jeopardize achieving the kind of enduring respect for the processes we host that must be our primary goal when we serve as agents of the court. We can readily identify—as I do in the next paragraphs—the kinds of feelings that we do *not* want participants to have after the mediation is over, the kinds of feelings that are fundamentally incompatible with the respect we pursue. It is more challenging to understand the sources of pressures and temptations that are most likely to lead us into behaviors that could unintentionally provoke the kinds of feelings about our work that we most want to avoid.

The parties will not feel respect for the process we hosted if they look back on it and feel that they were *pressured* to get off the court's docket, that our primary goal—even if disguised—was to show them the courthouse door, and thereby to reduce the court's workload. We cannot expect to engender feelings of respect for our work as mediators if the parties feel, when all is said and done, that we elevated the court's interest in getting cases settled over the parties' interest in justice. We win no friends if we are perceived merely as instruments of a court's institutional selfishness or self-absorption.

Nor, obviously, can we expect respect if the parties emerge feeling morally unclean. The parties will not respect us if they feel that the methods we used to get from point A to point B were not really kosher, that our methods involve deceptions, manipulations, theatrics, or any other underhanded stratagems.

We need to acknowledge one other kind of feeling that could drive participants into disrespect for our process. This is a litigant's feeling that the deal to which he agreed in our mediation was profoundly unfair—that it amounted to a “manifest injustice”²⁶—because it was far outside the

²⁶ I am indebted to Daniel Bowling for suggesting this phrase to capture the notion I

boundaries of terms that could be rationalized under the evidence and law or by considerations external to the litigation that could play legitimate roles in the settlement calculus.²⁷ Whether our mediators should feel any responsibility related to the “fairness” of substantive terms of settlements, and if so, under what circumstances, is a very complicated matter that I hope to address in a separate essay. It is important to emphasize here, however, that the concept of “fairness” is so imprecise and elastic, and lends itself so often to *sui generis* and self-serving definitions, that we encounter considerable ethical danger and risk great role distortion as mediators if we slip unselfconsciously into assuming that we bear some generalized responsibility for the appropriateness of the terms of agreements that emerge from the mediations we host.

Mediators are well advised to encourage parties to keep separate their judgments about process, on the one hand, and product, on the other. If we steer clear of the dangers described in this section and adhere to the process norms described in the next, it should be appreciably easier for the participants to distinguish process from outcome—and appreciably less likely that they will blame the former for deficiencies in the latter. In addition, there is less likelihood that a truly unfair deal will emerge if we follow the procedural paths described in this Essay.

It also is important to emphasize that the source of perceived unfairness often will be substantive law or real-world circumstances that we have no ability to affect. As I will suggest below, slipping into feeling responsible for circumstances or developments that we are powerless to affect is one of the perils that could push us into conduct that would directly undermine the parties’ respect for the ethical quality of the process we host.

We turn now to identifying sources of pressure and temptation that could jeopardize the integrity of our mediation processes. Our concern in these paragraphs will not be with corruption, bias, dereliction of duty, or any of the other obvious and venal threats to integrity. The neutrals to whom we speak in the pages that follow are the good people—the people who come to service with unassailable motives and who strive to perform their roles conscientiously. Our focus will be on the pressures and temptations that pose threats to these kinds of neutrals—pressures and temptations that are both

have in mind here.

²⁷ This kind of feeling could be most threatening to a party’s respect for our process if it were based on the party learning something really important about his case (e.g., a controlling point of law) *after* the deal has been struck—something the party believes the mediator probably knew, but did not disclose. I suspect that this rarely occurs, although clients, driven in part by some form of ‘buyer’s remorse,’ may be inclined to ascribe more significance to information acquired after the fact than we might think is justified.

ubiquitous and subtle.

The organizing question is this: are there assumptions that we might make, or approaches that we might take, that increase the risk that participants will emerge from our mediations with one or more of the kinds of negative feelings that I described in the beginning of this section? My short answer, of course, is yes. Stated simply, we must take care not to exaggerate our responsibility, our ability, or our contribution.

A. *Exaggerating Our Responsibility*

What is the primary object of my concern when I warn against exaggerating our sense of responsibility? The danger on which I focus here is exaggerating our sense of responsibility “to get the case settled.”

We will feel pressure to achieve settlements. Some judges, some court administrators, some legislators, some parties, some researchers and commentators, and even some of our colleagues may assess the value of our work and pass judgment on how good we are as mediators primarily, or even solely, on the basis of whether our mediations produce settlements.²⁸ We will want to please those who send us work, who evaluate our performance, or who have power whose exercise could affect us or our clients. Knowing that judges feel burdened by their caseloads and are likely to feel quite grateful to anyone who can relieve some of the pressure they feel, each time we mediate

²⁸ While a range of criteria have been suggested for measuring or assessing the value of court ADR programs, from the outset some commentators have assumed or asserted that a primary purpose of such programs was to *benefit the courts* by improving settlement rates or reducing time to disposition—thus relieving docket pressures. See, e.g., Kathy L. Stuart, Sandra Smith & Michael D. Planet, *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program*, 8 JUST. SYS. J. 307 (1983) (“[M]any courts have focused on ways either to enhance or to hasten the settlement process.”); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 914 (1991) (“These advocates view ADR as a settlement ‘facilitator’ rather than merely as a settlement ‘event.’”); Jay Folberg, Joshua Rosenberg & Robert Barrett, *Use of ADR in California Courts: Finding & Proposals*, 26 U. OF SAN FRANCISCO L. REV. 343, 365 (1992) (“[Judges] had no doubts that ADR could significantly help to bring about more, quicker, and fairer settlements, thereby easing the burden on the courts and increasing citizen access to justice.”); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 374 (1996) (“ADR had been ‘sold’ (or oversold) as a means of reducing court costs”—but might not deliver the savings promised.); Edmund V. Ludwig, *A Judge's View: The Trial/ADR Interface*, DISP. RESOL. MAG., Summer 2004, at 11 (“Both the Civil Justice Reform Act of 1991 and the Alternative Dispute Resolution Act of 1998 were aimed at judicial cost and delay reduction.”).

we will want to be able to report to the assigned judge or her administrative agents that a case that was on her docket is gone. And we will worry, each time we mediate, that if the parties do not reach agreement and the case remains on the judge's docket, she will think less of us—and that she may compare us unfavorably to mediators who “get better results.”

But even if there were no such external pressures, we would be tempted to measure ourselves by “our settlement rate.” We will hear others talk about their settlement rates—maybe even advertise them—and we will be tempted to think that there is such a thing. With distressing frequency, I hear other judges say “I settled case X.” Similarly, I often hear one judge say to another: “Thank you for settling that case for me.” Comments like these encourage us to feel responsible to get each case settled; they also reflect a fundamental misapprehension about what happens when settlement occurs.

No judge or mediator ever settled a case. Neutrals don't make the binding commitments that constitute the settlement agreements; they don't pay or receive settlement money; they don't become parties to the settlement contract. Parties, and only parties, settle cases. Of course judges know this, but the ego-blur that is reflected in asserting that “I settled that case” is not just a product of semantic carelessness. It also evidences and reinforces a fundamentally misplaced sense of responsibility, i.e., of both credit and duty.

Even those of us who try not to slip into these kinds of ego-blurs, and who fully understand where the power rests to make the decisions that will determine whether a settlement is reached, are likely to feel some temptation to assess the quality of our mediation work by whether or not the case settled—or at least to feel some pressure to work hard toward the goal of getting an agreement. We who do this kind of work value resolution by agreement, and we dislike conflict. We want peace and progress. We feel really good when a case we mediated settles, and we are left feeling at least a little hollow, and with nagging self-doubts, when a case we mediate does not settle. We want to have the really good feeling. We do not want to have the hollow feeling. And we do not want to be haunted by worries that it was something we did that caused the “failure.”²⁹ Thus, we are perennially at risk

²⁹ When we work in a court program, we err badly if we assume that a mediation is a “failure” simply because it did not yield a settlement. Through our court-sponsored mediations the judiciary is reaching out to litigants and providing them with an important service. We make a valuable contribution to the health of our society by being the medium through which the courts demonstrate their desire to be helpful and through which they commit substantial time and energy to working with the parties toward constructive ends.

Moreover, every mediation teaches the parties something. At a minimum, a mediation that does not yield a settlement can teach the parties why they are going to

of slipping into the feeling that the main chance is to get a deal—that our job is to get a deal—and that anything short of achieving that goal subtracts from our sense of professional and personal fulfillment.

Why are these kinds of emotional drifts dangerous? There are three principal answers. One is essentially empirical: the reality is that we, as mediators, do not have the power to settle cases. If we slip into thinking we have the responsibility when, in fact, we do not have the power, we are courting falsely-premised feelings of failure and early burnout. I would estimate that a settlement is reached in fewer than half of the settlement conferences I host.³⁰ The incidence of settlements that occur during the mediations our court sponsors might be a little higher, but the percentage of cases in which a settlement is not reached until appreciably later is quite substantial.³¹

trial. As David Lombardi, the Chief Circuit Mediator for the United States Court of Appeals for the Ninth Circuit, explained to me:

A failed mediation can be very valuable to the participants. I learned this in spades when I was a practicing lawyer. If a mediation failed, I automatically had a more trusting client and both of us benefited from the sense that we knew what we were up against. In other words, we were more confident that we were justified in continuing litigation and we were a bit smarter about the case, ourselves, and the other parties and lawyers. This is something we can offer the participants regardless of the outcome, and is consistent with our institutional principles.

David Lombardi to the author, May 10, 2006.

³⁰ This estimate does not include settlements that are reached in follow-up settlement conferences in the same case or as a result of efforts by other means, after the initial settlement conference, to facilitate communication or advance the negotiation ball. Nor does this estimate try to capture the cases in which the settlement conference was the principal catalyst to a settlement the parties later reached on their own.

³¹ In early 1997, the Federal Judicial Center completed a broad study of both the mediation and ENE programs in the Northern District of California and reported that “[j]ust over 60% of [responding] attorneys indicated that the entire case about which they responded settled as a result of ADR . . . and 4% said part, but not all, of the case settled as a result of ADR.” DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 194 (Federal Judicial Center, 1997).

In the spring of 2006, the staff of the ADR program in the Northern District of California collated questionnaire responses that had been received over a number of years from lawyers, litigants, and neutrals who had participated in mediations sponsored by our court. Each group was asked, among many other questions, whether their case had settled “at” or “during” the mediation. The reported perceptions were very similar from group to group, with 48% of the lawyers, 49% of the parties, and 43% of the mediators informing us that their case had settled during the ADR proceedings. We did not ask a separate

Statistics from the ADR program in the United States District Court for the Northern District of Ohio disclose a similar pattern. The incidence of settlement achieved during the mediations sponsored by that court ranges from a little under 30% to just over 50%, depending on case type.³² As these figures suggest, there is a very real chance, in any given mediation, that the parties will not reach a settlement agreement during the hosted negotiations. Given these real-world facts, we would be condemned to judge ourselves failures more than half the time we undertake mediations if the criterion we used to identify success was simply whether or not the parties reached a settlement during the mediation we hosted.

Assuming responsibility to get the cases settled also is dangerous because it can pressure us to elevate ends over means. It can tempt us to cut process corners, brush past real ethical dilemmas, and resort to pressure or manipulation to bridge gaps and close deals. Pressure to get the deal done also can put severe strains on our ability to retain our emotional composure—a fact to which I will attest, by painful personal experience, in the following paragraphs.

During the first year or two that I was a magistrate judge, I was short not only on experience, but also on perspective. Among other things, I thought it was my job to get cases settled when I hosted settlement conferences. I felt that I had failed when a settlement conference ended without a settlement. It was during this period that I hosted an unusually structured settlement conference in a case that pitted a union against management. All of the parties' lawyers jointly requested that I conduct the negotiations directly with the principals and that the lawyers not participate at all. After being reassured by everyone that they thought this way of proceeding maximized the likelihood of success, I jumped energetically into what turned out to be a long series of private caucuses.

After a lot of work, I felt that "we" (wrong pronoun—should have been "they") had made considerable progress. Finally, the representatives of management indicated in a private caucus with me that they were prepared to make the concession that I thought would and should get the deal done. Excited at the prospect of success, I hurried over to the room where I had been meeting separately with the union representative (other members of the union had been excused earlier and had vested the one remaining representative with full authority). When I explained what I thought were

question about whether the case settled sometime later but primarily as a result of the mediation. These data are on file in the office of the ADR Program in the United States District Court for the Northern District of California (San Francisco) and with the author.

³² The Clerk's Office for the United States District Court for the Northern District of Ohio maintains these data.

generous and appropriate terms to which management would agree, the reward I received from the union representative was a stony rejection that was followed, icily, by a counterproposal that I thought was transparently infected by overreaching and unfairness.

I felt rejected. My work felt rejected. Most critically, I was sure that the union's response was going to kill any chance "we" had of getting a deal. Swept away by a surge of disappointment and anger, I lost my moorings as a representative of the court. In our private room, I literally yelled at the union representative in an unpublishable outburst, condemning the position he was taking as nakedly selfish.

My steaming words had not been out of my mouth more than a second before I realized that I had committed a huge personal and professional wrong. I quickly backtracked and apologized. But there was no remedy for the harm I had caused. The "settlement conference" was over. The parties were separated by more anger than had separated them before the conference began, and I had brought shame upon myself and the judiciary.

After the conference was over, the acuteness of my shame made me try hard to understand why I had reacted as intensely and as inappropriately as I had. How had I gotten so explosively out of character and role? As I replayed the hours of the negotiations, I realized that the more time and effort I invested in the process, and the more "we" seemed to be making progress, the more I had let my sense of self become one with the substance and success of the negotiations. Emotionally, I had become the center. To make the "I" that was at the center feel fulfilled and successful, the "I" needed to get a deal done. When, after so much work, I felt that "we" were close, I got very excited—my reward in self-esteem and self-congratulation was at hand. Then, abruptly and shockingly, all this momentum toward success was dashed by one player's seemingly unjustifiable position. His stance had shattered not only the negotiations, but also my hungry and fragile professional ego.

Described less pretentiously, I felt that the representative of the union had prevented me from doing my job. I had assumed that it was my job to get the case settled. He, alone and selfishly, had made me fail. That was what made me so angry.

In all of this I was wrong. Obviously, I was wrong to lose my temper and to yell at anyone. But I also had been wrong to let myself slide into center stage in the proceedings, to permit my sense of professional-self to be determined by whether the parties reached an agreement, and most fundamentally, to assume that I had the power and the responsibility to get the case settled. I did not have the power. I did not have the responsibility. The proceedings were not about me. They were about the parties—their

circumstances, their values, their needs, and their decisions. When progress was made, it was “they” who made it, not “we.” If a deal could not be reached, it was “they” who could not reach it, not “we,” and certainly not “me.”

By gradually coming to accept these fundamental facts about my role as a host of settlement negotiations, I have in substantial measure freed myself from the pressure that so distorted me and my conduct. I have been able to replace my misplaced sense of responsibility for outcomes with a much more constructive focus on integrity of process.

In part to keep myself properly focused and on the right process track, I now always begin my settlement conferences by explaining to the parties what my role is and what its limits are. I emphasize that the primary purpose of the conference is to give the parties an opportunity to see if *they* can find a consensual basis for resolving their dispute. I also emphasize that in pursuing this objective, the parties will occupy center stage, play all the important roles, and make all the decisions. I explain that my primary task is to help the parties communicate, to help them share their perspectives and analyses, and to help them search for common ground. I emphasize that when I host a settlement conference, I have no power and no responsibility to make judgments. In addition, I point out that what I know about the evidence in the case is limited, and that I am at least as vulnerable to error as anyone else.

To help clarify the parties’ understanding of my role, I often add that my primary focus will not be on trying to help the parties determine which arguments or positions are the strongest, but on what I call the “sociology” of the situation. I explain that this means my principal job will be trying to help the parties figure out what terms of settlement might be possible, not what terms would be right or fair for them. The judgments about rightness and fairness are for the parties to make. By shuttling back and forth between the parties and speaking with each side privately, I hope to improve the odds that each side will learn what the best terms are that they might expect the other side to offer or accept, and thus, to provide each party with a clearer understanding of what its options are.

Basic principles of mediation theory expose the third reason that it is dangerous for a mediator to drift into a misplaced sense of responsibility for whether the parties reach a settlement. An exaggerated sense of responsibility for the outcome of negotiations is deeply inconsistent with two of the animating purposes of mediation: to empower the parties and to honor and facilitate their self-determination.³³ There is considerable risk that a mediator

³³ Rules of court and/or statutes in many states expressly declare that mediators must honor the principles of self-determination and take care to assure that the power to make

who feels that his primary mission is to get the case settled will make forced intrusions into the parties' decisionmaking and will be tempted, in order to push the parties to change their settlement positions, to color or distort the views he expresses to them in private caucus about the merits of the matter and about what settlement terms might be offered or accepted.

B. *Exaggerating Our Ability*

Another source of peril to performing our roles appropriately is the temptation to exaggerate our ability. We must avoid teasing or torturing ourselves with the following vanity-based illusion: that if we are good enough, we can pull off some minor psychological miracle and engineer the best possible outcome by manipulating the parties past their own barriers and baggage into a deal that they are incapable of accessing on their own.

Stated differently, we create dangers for ourselves if we permit ourselves to assume that there are tricks, devices, techniques, stratagems, or psychological ploys that we need to discover and use in order to be "successful" and perform our role at a high level of sophistication. I am deeply skeptical that there are tricks or manipulations whose use is essential to being effective as a mediator, even if one defines "effectiveness" in the narrow sense of getting the parties to agree to a deal. If that skepticism is well placed, spending a lot of time trying to discover and use supposedly subtle devices will yield for us only an increase in frustration and a false sense of failure. We will needlessly accelerate our own burnout.

Perhaps I am just rationalizing my own limitations, but I believe that none of us are smart enough, know enough, or have enough time in these settings to determine what agendas the parties are hiding from themselves, from us, and from one another. We simply cannot analyze the parties psychologically and then use that analysis to manipulate them in some

settlement decisions during mediations remains fully in the hands of the parties. *See, e.g.*, CAL. R. CT. 1620.3 (2006) (Conduct for Mediators in Court Connected Mediation Programs for Civil Cases, stating that: "A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties."); FLA. R. CIV. P. 10.370(c) (2006) ("A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue."); FLA. R. CT., 10.230 (2006) ("Mediation is based on concepts of communication, negotiation, facilitation, and problem-solving that emphasize: (a) self determination (b) the needs and interests of the parties."); FLA. R. CT., 10.310 (2006) (Self-determination); GA. ADR R. V, App. C (2002) ("Competencies for mediators include . . . honoring the self-determination of the parties. . ."); MINN. GEN. R. PRAC. 114 (2005) ("A mediator shall recognize that mediation is based on the principle of self-determination by the parties.").

direction that we think is in their best interests.

I also believe that there is considerable instinctive or intuitive intelligence spread widely among human beings, and that among other things, this intelligence provides people with sophisticated sensors that enable them to detect, even if subconsciously, efforts to manipulate or use them. If I am right about this, there is a considerable risk that the parties would detect or sense what we were up to if we attempted to psychologically engineer them toward a particular place that might be more conducive to settlement. If they detect or sense such an effort, they will become more cynical about our motives, and their suspicion of the courts and the legal system will grow.

There is something deeply arrogant about assuming that we can understand other people and their circumstances more subtly or more reliably than they can, and that we can lead them to places they otherwise could not find. That arrogance is detectable not only by the well-educated or the visibly sophisticated, but also by a very large percentage of people. Once detected, it is not at all likely to inspire respect and gratitude.

As these comments suggest, I believe there is a fundamental tension between the criteria we must use to define what “works” for the courts and an approach to serving as a neutral that emphasizes tactics, devices, and psychological indirection. What “works” for the system of justice is what promotes respect for integrity of process. End of sentence; end of story.

C. *Exaggerating Our Contribution*

“The fundamental reason[] we are successful is that they want us to be.”³⁴ These words from Kenneth Cloke should serve as a great source of liberation for us. They should help liberate us from the pressures we can impose on ourselves by exaggerating our responsibility, exaggerating our ability, and as I describe in this section, exaggerating how much our efforts and the processes we host accomplish.

Is there reason to worry that we might exaggerate how much we contribute when we serve as neutrals in court programs? Data generated by surveys of parties, lawyers, and neutrals who have participated in mediations in the ADR program sponsored by the United States District Court for the Northern District of California suggest that there is.

In 2006, we collated responses we received over a period of many years

³⁴ Kenneth Cloke, *What Are the Personal Qualities of the Mediator?*, in BRINGING PEACE INTO THE ROOM 52 (Daniel Bowling & David Hoffman eds., 2003); see also Peter S. Adler, *Unintentional Excellence: An Exploration of Mastery and Incompetence*, in BRINGING PEACE INTO THE ROOM 57–78 (Daniel Bowling & David Hoffman eds., 2003).

from parties, lawyers, and mediators to questions about what occurred during our court-sponsored mediations. In part because the surveys were not designed with social science research in mind, not all the same questions were asked of each category of respondent, and in some subject areas there were differences in the framing of the questions that disabled us from making squared up comparisons in those subtopics. Moreover, there were sizeable differences in the response rates between the three groups.³⁵ Our ability to mine our data electronically was limited, so what I report below are only aggregate figures and do not include systematic comparisons of responses by the participants in the same sessions.

Despite these substantial shortcomings, we were surprised, and a bit unnerved, by the clarity and extent of the patterns that emerged—patterns that suggest considerable differences between the perceptions³⁶ of our neutrals and the perceptions of the other participants about what occurred or was accomplished during our mediations.

When asked whether the parties had “bridged a communication gap” during the mediation, only 21% of the litigants and 22% of their lawyers responded in the affirmative. But when we asked the mediators whether they had “helped the parties bridge a communication gap,” more than twice that percentage (51%) said yes.

Forty percent of the parties reported that they had gained a better understanding of the strengths and weaknesses of the litigants’ respective cases during the mediation. According to the responses from counsel, however, the strengths and weaknesses of the parties’ respective legal positions were discussed in 66% of the sessions. Meanwhile, our mediators informed us that they had “pointed out strengths and weaknesses to each side” in 81% of the mediations. Some of these differences may be attributable to an important difference between the question that we asked the parties (did your understanding improve) and the questions we asked the lawyers and the neutrals (were strengths and weaknesses discussed or pointed out), but we strongly suspect that this difference fails to fully account for the pattern we see.

³⁵ The mediators were about twice as likely as the lawyers to complete and return our survey: roughly two-thirds of the mediators and one-third of the lawyers returned completed instruments. The lowest response rate was from the parties; we received completed questionnaires from only about one-quarter of the litigants themselves. That low rate is attributable in part to the difficulty we had getting the survey instruments to the parties in the first place.

³⁶ We make no claim that the survey responses, which record perceptions and opinions, accurately reflect the reality of what occurred in the mediations. The data are of interest here because of the differences in perceptions they suggest.

In other subject areas we were only able to compare the responses of counsel with those of the mediators. These comparisons remain significant, however, and cannot be explained away by assumed differences in the understanding of concepts or vocabulary. For example, when asked whether the mediation had helped the parties identify their underlying interests, needs, and priorities beyond their legal positions, 62% of the lawyers said yes, but the percentage of mediators who reported this accomplishment jumped to 87%. Similarly, only 38% of the lawyers reported that the mediation had clarified, narrowed, or eliminated issues, while 65% of the mediators felt they had accomplished this goal. Finally, 31% of the litigators reported that during the mediation the parties had explored resolutions of a type that the court could not order, but among our mediator respondents, 50% asserted that the mediation had included an exploration of this kind.

It is possible that the patterns that emerge from these responses are for some reason aberrational, or are attributable to something unique about the program in the Northern District of California. We should feel much less comfortable not heeding their potential implications, however, when we see the uncanny parallelism between these results and those reported by the RAND Corporation when it completed its study of emerging ADR programs in six federal district courts, (the Northern District of California was not among this group).³⁷ When they sought opinions about the effects of the ADR processes they studied, the researchers from RAND found that the percentage of respondents who reported positive contributions from mediation or early neutral evaluation was consistently and appreciably higher among the neutrals than it was among the lawyers. This pattern persisted across all six districts. In some instances, the neutrals were twice as likely as the litigators to report that the ADR process had a particular positive effect on the proceedings, such as narrowing liability issues, narrowing non-monetary issues, or improving relationships between the parties.³⁸

While the "truth" about what actually occurred at the ADR events that produced these statistics remains illusive, the consistent difference between what neutrals think they accomplished and what the other participants believe was accomplished should give us considerable pause. Perhaps the other players are just not as sophisticated as we are at detecting what is occurring during the sessions, but these data suggest there is a real risk that

³⁷ JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 24, 44, 47-48 (1996). The response rate for the parties themselves was too low (11%) to justify even reporting their views. Paralleling the pattern in the Northern District of California surveys, higher percentages of neutrals (67%) than lawyers (45%) completed the RAND questionnaires. *Id.* at 24.

³⁸ *Id.* at 47.

we will exaggerate how much the processes we host achieve, and more dangerously, how important we are to the success of our ADR events.

That distinct possibility troubles me because it could lead mediators to exaggerate how much they should be accomplishing every time they serve. Such exaggerated expectations can lead us to impose on ourselves the same kinds of role-distorting pressures that arise when we assume too much responsibility for getting the cases settled. Exaggerated expectations could tempt us to pressure litigants and lawyers to achieve at least some objectively measurable gain or benefit during the mediation. Succumbing to that temptation jeopardizes the participants' respect for the process we host and for how we play our role.

What is our best source of protection against these kinds of risks? It is a full embrace of the notion that the only thing that really matters is that we host a process that deserves respect. Perhaps the only thing that can free us from process temptation is an overriding commitment to process integrity.

IV. THE KEYS TO EARNING THE PARTIES' RESPECT FOR OUR PROCESS

If our achievement as mediators in a court-sponsored program is not to be measured by "outcome" or "technique," but by how well we earn the respect of the parties for the integrity of the process we host, what are the keys to our success? I contend that the keys are not in any subtlety of psychology or any nuance of process, but in ways of being and behaving as human beings that are fundamental to healthy interpersonal dynamics in our culture.³⁹

I believe that the keys to earning the parties' respect are trust, genuineness, honesty, transparency, and inclusiveness in process decisions. Trust is both a means and an end; it is something that can inform our process and something our process should pursue. Genuineness, honesty, transparency, and inclusiveness in process decisions are closely related

³⁹ I am in no position to suggest how generalizable to other cultures the views I describe in this section might be. Moreover, because we live in a multi-cultural society, there may be circumstances even in cases filed in *our* courts where my normative prescriptions are way off target.

Lawyers who serve occasionally as neutrals in court programs may find some reassurance that the suggestions made in this section are worthy of serious consideration from the fact that some experienced mediators who work primarily in the private sector also believe in the importance of trust, genuineness, honesty and transparency. See BRINGING PEACE INTO THE ROOM (Daniel Bowling & David A. Hoffman eds., 2003); see also Stephen B. Goldberg, *The Secrets of Successful Mediators*, 21 NEGOT. J. 365 (2005).

means. For many of us, they also are ends.

Distilled, my message here is simple: never underestimate the power of sincerity; the importance, as they say, of being earnest.

A. Trust

Why should encouraging trust be one of our primary goals?

We begin our answer by acknowledging that distrust is a huge factor in many lawsuits and in the real-world circumstances that give rise to lawsuits. In many of our cases, the parties will come to our mediations with considerable distrust of one another. Distrust breeds not only anger, but also fear. Fear can be a major barrier to resolving disputes: fear of being “taken,” fear of the unknown, fear of missing something that is potentially significant, fear of consequences, fear of losing self-respect or the respect of others, fear of leaving something on the table, or fear of agreeing to an unfair deal. In many of its forms, fear can impair clarity of thinking and block decisionmaking. So one purpose of encouraging trust is to reduce the power of fear, and thus help clear the way for parties to understand more clearly what their situation is and to consider more openly what their options are.

But we would be seduced by a dangerous vanity if we were to assume that we could greatly reduce distrust across party lines in our ADR sessions. Instead, we must be content to try to chip away at that distrust, or to encourage the parties to reexamine the bases for it, while we work hard to build trust in the process we are hosting and in the role we are playing.

Putting the concept of “trust” at the center of this discussion creates a risk that we will not understand what we are talking about or that our message will not be accurately communicated. We must be careful to distinguish between trust of our process and trust of us. As important, we must define the trust we pursue so that it will not be dismissed by cynics simply as an empty or naïve form of spiritualism or as a disguise for shallowness. Moreover, using the word “trust” imprecisely could cause us to expect too much of ourselves when we serve as mediators—to exaggerate the profundity or depth of the kind of connection we should try to develop with the parties in our mediations.

Before turning to the task of giving the concept of “trust” clear and useful meanings for our purposes, we must pause to recognize one very important consequence of choosing to pursue trust as one of our goals. We acquire responsibility when we cultivate trust. That responsibility is to be true to the kind of trust we have cultivated—to be deserving of it, to handle it and the people who give it with appropriate care. We must recognize that the character or content of the responsibility we acquire is a function of the

specific kind of trust we invite. It follows that we must be careful to build a type of trust that gives rise to a type of responsibility that does not extend beyond the role that is appropriate for us and that is not inconsistent with our core ethical obligations.

While we need to be mindful of this challenge, we need not be intimidated by it. We can steer the right course by adhering to a few core principles—principles I try to describe in subsequent sections of this Essay.

We also must bear in mind that the trust we should be interested in building has two distinguishable but overlapping and intertwined objects: the mediation process and the mediator.

1. *Encouraging Appropriate Kinds of Trust in the Mediator*

We will first explore the kind of trust that we want the parties to feel in the mediator. It is instructive to begin this exploration by identifying the kind of trust that we should *not* invite and that we *cannot* build in a mediation. Trust in its most ambitious and elusive form is essentially an emotional condition. It is a feeling of connection with, or attachment and attraction to, another human being. This sense of connection may be premised on a feeling of being completely or unconditionally accepted—that the person we trust knows us so well and has such an attachment to us, such concern and love for us, that we are perfectly safe in that person's heart and mind. When we feel this kind of trust, we have no fear of negative judgments or adverse actions by the other person.

A mediator cannot build anything like this kind of trust during her limited interactions with the parties. Nor should she try. In the context of a lawsuit, this kind of trust could be pursued only with one party and only by sacrificing any pretense of impartiality. If we encouraged a party to have this kind of trust in us, we would, at least implicitly, be making promises that our ethical duties as neutrals would prohibit us from keeping. Honoring such an emotionally rooted and expansive form of trust would force us way out of role—transforming us from a neutral process helper into an ally, mother, and therapist—roles we could not possibly play for any one party, let alone simultaneously for opposing parties.

There is another kind of trust that we must eschew. We cannot ask the parties to “trust” our predictions or our analyses, or to put unqualified stock in our wisdom. We must forsake the temptation to say: “Trust me; I know how this is going to play out,” or “I know that you would be better off if you . . .” I do not mean to suggest that we should exaggerate our fallibility, denigrate our experience, or intentionally understate our knowledge—false modesty is false, and we need to take great care not to be false in any form.

Nor do I mean to suggest that we should never offer evaluative comments or respond to requests for our reactions to arguments or evidence.

I do mean to suggest that we must take great care not to overstate what we know, or the reliability of our assessments, or our ability to predict how any part of the litigation might turn out. We must forthrightly acknowledge that litigation is a thoroughly social process (not remotely akin to pre-Heisenberg physics) and that its course is notoriously nonlinear and unpredictable. We must never encourage a party to invest more trust in our inputs than their precariousness in the real-world would permit. To do otherwise would not only be dishonest, but also would expand the zone of our responsibility to the parties far beyond its appropriate boundaries—into the arena of assurances about “outcomes.”

What kind of trust is appropriate for us to pursue? I think it has four principal dimensions: that we will be honest (a topic explored at length in another section); that we will be respectful; that we will be careful in the way we think, in how we speak, and with the feelings of others; and that we will not be an independent source of harm. The last of these four dimensions warrants prompt amplification.

It may be important to remind the parties that we, as mediators, are not sources of law or evidence. We have no power to determine what the law is and no power to locate evidence or to impose judgments. These potential sources of harm or benefit are completely beyond our control. Nor can we control or even reliably predict what arguments and evidence opposing parties might present, or what strategies they might pursue in the litigation. So we must take care to limit our promises to things we can control. What we can promise is not to shade our views, color our words, or manipulate our process for any purpose or for any party. We can promise to treat all parties equally, with the same sensitivity and the same intellectual and moral integrity, and to lend no part of ourselves or our work to unfairly advance any party’s cause at the expense of another. It is in these fundamental ways that we promise not to be a source of harm. And these fundamentals form the core of the kind of trust that is appropriate for us to invite.

2. Encouraging Appropriate Kinds of Trust in the Mediation Process

What kind of trust may we encourage in the mediation process that we host?

We begin, again, with negatives. We certainly cannot invite parties to trust that the mediation process guarantees them the best “result” or “outcome,” or that it will deliver an outcome that is “better” or “fairer” than

they could hope to achieve through litigation. Nor can we promise that our mediation process will provide the parties with more reliable information about their case, or that it will equip them to make more soundly premised judgments about the power of particular lines of argument or sets of evidence. We cannot even promise that the mediation will improve communication across party lines, help repair damaged relationships, or provide a risk-free forum for expressing emotions or for trying to repair a sense of self. Before a mediation is underway, we cannot know what it will accomplish or even how long it will last. We cannot know how the parties will act during the proceedings—whether they will take full and appropriate advantage of the opportunities the mediation presents or whether they will refuse to abandon even a fraction of their litigious ways.

So what can we promise? First, we can promise that we will try to help the parties use the mediation to serve their ends. We can explain that the mediation process is designed to create opportunities for the parties to achieve many different kinds of goals, and that it provides procedural tools that litigation does not offer. Second, we can promise that our process will be balanced—that it will provide all parties with equal opportunities to speak, to learn, and to search for solutions. Third, we can promise the parties that we will bring a positive and constructive spirit to the process, and that we will encourage all the participants to approach the session in that same spirit. We also can promise that while the court hopes the session is productive, the court fully understands that mediation is a purely voluntary process with no guaranteed results. So, we can promise that the court will not harbor ill will or impose penalties or sanctions on any party just because the mediation did not yield identifiable benefits. These are process-based promises that we can keep, and making them does not expand beyond appropriate bounds the scope of our responsibility for what happens at the mediation.

There is one additional aspect of the role of “trust” that warrants emphasis here. We miss an important dimension of the mediation dynamic if we think of “trust” simply as an end. It also can be a powerful means. Trust can beget trust. If we present ourselves to others as trusting, they are more likely to trust the process we host. Because distrust is so ubiquitous in litigation, we should not be surprised if there is an element of distrust in the way lawyers and clients initially interact with us. We can turn that fact to our advantage, however, by making it clear that we greet the parties with a strong presumption of trust. We can tell the parties that we come to the mediation without preconceived views about the merits of the case or the players in the litigation. We can remind the parties that we are not judges, and that passing judgment is neither our purpose nor our responsibility. Instead, we can emphasize, at the outset, that we want to learn from the parties—we want to

understand the events underlying the case as the parties have experienced those events. Then, in ways I describe in the next section, we can listen. We can be open to their stories. We can do all this before we even flirt with the idea of moving to another stage or shifting to a more analytically active gear.

This is not to suggest, of course, that we are somehow bound to accept as accurate everything that every participant in the process tells us. What I am suggesting, however, is that accuracy is not what the first important phase of our mediation is about. There will be plenty of time to worry about accuracy later. What the first part of our mediation is about—the goal here—is to begin the process of encouraging the parties to be less distrustful, less defensive, more confident, and more open. So we go first. We start the trusting. We hope it is perceived for what it is and, perhaps gradually, reciprocated.

Besides displaying trust in others in these ways, what are the primary means for encouraging trust in the mediation process as we intend to host it? As I have suggested, I believe they are: (1) genuineness, (2) honesty, (3) transparency about ourselves and our process, and (4) including the other participants in decisions about which process routes to follow. Among these, the least self-defining may be genuineness, so I will explain first what I mean to embrace by that term in this setting.

B. *Genuineness*

As I use the term here, “genuineness” has three principal dimensions: one is rooted in naturalness, the second derives from the character and visibility of what we commit of ourselves to trying to help the participants in the mediation, and the third is a particular kind of listening.

1. *“Naturalness”: Being Oneself, Comfortably*

By “naturalness” I mean to suggest the importance of not pretending to be someone we are not. A good mediator is not a performer. She is not an imitator. She is not following a behavioral script. She is not a player in a drama. She does not feel the need to be smarter, more clever, more insightful, more worldly, or more lovable than she is—or than the other people in the room are. She is centered in herself, which means that she has a realistic notion of what her abilities and limitations are and has come to accept them. She has come to understand that she has a right to be on the planet and in this role—even with her imperfections. So she plays her role not as a player, but simply as who she is. And in doing so, she is good.

2. *Caring Visibly by Putting a Lot of Ourselves into the Process*

A closely related aspect of being “genuine” in these settings consists of committing a lot of ourselves to the process—a lot of our energy and spirit and time—so that the parties can see in our conduct, and feel from the fullness of our engagement, that we really want to help them use the mediation session to deliver as much benefit to them as possible. By giving a lot of ourselves to the process, we become and remain really present in it. The reality of that presence in the process makes us feel real to the participants. Moreover, when we give a lot of ourselves to the process, the participants are likely to feel that we are giving a lot to them. In these ways we can encourage them to see that we care, and when we are perceived as caring, we are more likely to be appreciated and trusted.⁴⁰

3. *Listening to Hear*⁴¹

The kind of “listening” that is critical to genuineness is what I call “listening to hear.” It is listening with only one purpose: to understand. It is listening wholly to the speaker—not to our reactions to what the speaker is saying. To engage in this kind of listening, we must resist the temptation to devote a piece of our brain (while the speaker is talking) to developing our responses, our parries, our comparisons, our analyses, or our rebuttals. We must listen without agenda; without plan; and without the need to dilute, “re-frame,” place the words in some context, or fit them into some psychological construct. We must listen solely to learn.

To be genuine, it is essential that we be visibly committed to learning from and about each participant, and that we demonstrate that the spirit in which we work, at the beginning and throughout, is the spirit of the student, not the teacher. This kind of listening communicates our respect for the speaker. That feeling of being respected can beget respect for us. It also encourages the kind of trust that can help the speaker feel freer to share more of her thoughts and feelings.

To achieve the kind of listening I have in mind here, we must give parties more freedom to speak than we might otherwise be inclined to give. We must permit them to address subjects that are important to them, even if

⁴⁰ These kinds of themes emerge from the views of some thirty experienced and successful mediators who were surveyed by Professor Stephen Goldberg in 2004. See Goldberg, *supra* note 39.

⁴¹ I have previously described the kind of listening envisioned here. See Wayne D. Brazil, *The Center of the Center for Alternative Dispute Resolution*, 6 PEPP. DISP. RESOL. L.J. 313, 320–321 (2006).

we feel that the subjects are in some sense irrelevant, or even if we fear that focusing on them might be counterproductive. There will be time later, after a party has been heard, to try to head the ship into more “relevant” or less dangerous waters. When a party is talking about something that is important or sensitive, we must listen in full engagement, without interruption, and without editorial—whether communicated by comment, question, facial expression, or body language.

If we are to listen to hear, we also must firmly resist the temptation to show off, e.g., by interjecting little facts we know about the case, by finishing people’s sentences for them, or by gratuitously offering some observation or analysis that we think is especially insightful or especially likely to be perceived as insightful. We must strive to leave our always undernourished egos at the door.

To be understood as really listening, it also is essential to suspend or suppress our relentless instinct to judge. We must wait, and wait some more, before even beginning to ask questions informed by an analytical purpose or before offering comments or reactions with analytical or evaluative roots. We must recognize that a huge percentage of our questions really do have analytical or evaluative sources—or are likely to be perceived as having evaluative overtones or implications.

The questions we ask during mediations can be categorized in an ascending hierarchy by level of analytical assertiveness. The trust we are trying to build can be damaged if we move up through that hierarchy too quickly. At the bottom of the hierarchy are questions whose sole purpose is to help the listener understand, questions that really are open-ended. After we have listened the first time just to learn, it is with these kinds of questions that we should begin. Next in the hierarchy are questions whose purpose is to clarify—initially in the mind of the listener, then, perhaps, in the mind of the speaker. The third category consists of questions whose purpose is to probe—to dig below surfaces, to expose context and comparisons, and to analyze. The purpose of the fourth and most assertive category of questions is to teach—to shed new analytical light, or to help the speaker appreciate a new line of reasoning or see the possibility of a different outcome. A genuine listener must understand the differences between these kinds of questions and must take considerable care before moving into the third or fourth category.

Our duty to manage our instinct to judge has one additional dimension that should be obvious, but that we must be sure not to forget. This dimension can be understood as a species of intellectual honesty, which is the subject of the next section.

C. *Honesty*

The kind of suspension of judgment that is essential to “listening to hear” is closely related to the kind of intellectual honesty that also is essential to respect-worthy representation of the system of justice. I give the phrase “intellectual honesty” an expansive meaning here. It encompasses: (1) acknowledging the impossibility of not having at least incipient evaluative reactions to some of the arguments or evidence the parties describe during mediations, and the concomitant impossibility of not sending at least some signals that are rooted in those reactions; (2) being forthcoming (open) about the content of our reasoning and its limitations if we engage in dialogue about the merits; (3) being analytically careful; and (4) being analytically balanced.

1. *The Inevitability of Evaluative Reactions and of Signals Rooted in Them*

Before discussing issues that arise when we consider whether or how to explicitly share some evaluative feedback about some matter in dispute, we must take a moment to be honest with ourselves about how difficult it is, over the course of a mediation, not to develop at least embryonic or incipient assessments of or reactions to the merits of some of the parties’ arguments and positions.⁴² Because we work in an environment that is so saturated with analysis and judging, it is virtually impossible for us—at least for those of us trained in the law—to resist the impulse to form at least tentative impressions of the persuasive power of some arguments or evidence. The act of assessing is ubiquitous, especially in the settings in which we work, so the notion that we can root out of our human nature such basic instincts while we are playing our role as a mediator is delusional and, therefore, dangerous to our integrity.

Honesty requires us to avoid pretending with others or with ourselves. Our honesty with ourselves must begin by acknowledging that we will have evaluative feelings or notions, no matter how hard we might try not to. Our ethical challenge is not to root out such feelings or notions (that being impossible), but to handle them honestly. Handling them honestly means not denying their existence, trying to limit their growth to appropriate proportions, and doing our best to keep them loose and flexible so that they remain changeable as our information base broadens. Handling our incipient

⁴² I am indebted to Howard Herman for sensitizing me to this important fact of a mediator’s life.

evaluative notions honestly means not pretending to the parties that we remain evaluative *tabula rasae* throughout the mediation, but it also means not permitting our precariously premised notions to gain a power or even a presence to which they are not entitled.

Self-aware honesty about our process also requires us to acknowledge how unlikely it is that we will not inadvertently send signals to the parties that have roots in our incipient evaluative reactions to matters in dispute. Ironically, the risk that we will send such signals probably increases with how emotionally natural and relaxed we are. Being natural and relaxed can be important parts of building trust and creating an environment that feels safe to the parties. Regardless of either how natural or how self-constrained we might be, however, it is a virtual certainty that we will send some reactive signals as we listen to the parties and discuss their procedural and substantive options. These signals can be transmitted in subtle or barely perceptible forms. They might be sent through slight changes in body language or facial expression (e.g., changes in eyebrow elevation or speed of blinking), or they might be more obviously communicated by changes in emotions that pass through us (e.g., if we become cooler or more distant). Parties also might find signals in the presence or absence of eye contact, in silence, or in the speed or slowness of our response to something they have said. Signals also can travel through tones of voice, or our choice of words, or the structure of our sentences (e.g., when we retreat into the passive voice, elevate our level of abstraction, or in some other way shift into an impersonal or third person form). More obviously, questions we ask can be vehicles for sending potent signals.

In sum, if we are to be honest, we must acknowledge that we will have reactions to people and to their pitches, and that it is most unlikely that we will not send at least some signals that are rooted in those reactions. While we should cultivate some awareness of our signaling and try to bring some restraint to the process, we also must recognize that reactions and signals are an inevitable part of human interaction. They also are components of genuineness. We should not permit concern about them to distort us into robots or to distract us from our principal tasks. However, we also should not deny these realities and ignore their potential play in our dynamics with the parties. When we are in private caucus and we sense that a party is reacting to a signal that we did not intend to send, or seems to be misreading us, it might be wise to raise our concern about this openly with the party so we can understand what communications are occurring and what inferences are being drawn. Too much attention to such matters, however, could interject a counterproductive and precious formality to our work.

2. Analytical Openness and Visible Balance

At this juncture, we shift our focus to issues that arise when we consider offering explicit evaluative inputs, i.e., comments on, or assessments of, the merits of matters in dispute. Mediation theory teaches us the importance of permitting the parties to express, form, and re-form *their own* views about the substance of their dispute and about possible terms of settlement—unencumbered and uninfluenced by premature expressions of the mediators' opinions.⁴³ Many mediation theorists would advise that if our substantive views are to be expressed at all, they should surface only after the mediation process is well advanced—after a thorough explication and exploration *by the parties* of the information and perspectives they bring to the session. It can kill our credibility with the parties, or even invite them to worry that we are biased, if we are perceived as too quick to judge, too interested in passing judgment, or as committing ourselves to opinions or conclusions on an insufficient information base.

It also is important to bear in mind that the requirement that we be honest does not mean that it is necessary that we form and express views on the merits of the case or on any particular aspect of it. To put it baldly, being honest in our work does not mean saying everything that goes through our minds. In some circumstances, the appropriate course might be to decline to offer any substantive feedback or evaluative input.⁴⁴ Obviously, if the parties have asked us, or simply expect us, to play a purely facilitative role, it would be inappropriate to offer substantive assessments. But even when the parties' expectations do not limit our role to facilitation, there may be circumstances in which it would be most productive for the parties if we said nothing about the merits. In such circumstances, there is nothing dishonest about refraining from offering our substantive views.

⁴³ This notion has been emphasized by proponents of transformative and facilitative mediation for decades. For a recent re-endorsement of these basic premises, see Ryan P. Hatch, Note, *Coming Together to Resolve Police Misconduct: The Emergence of Mediation as a New Solution*, 21 OHIO ST. J. ON DISP. RESOL. 447 (2006). "Mediation can achieve empowerment because the parties, in essence, 'own their own conflict.' . . . [the parties] control the conflict resolution process and craft resolutions that are mutually agreeable." *Id.* at 463 (citing EDWARD W. SCHWERIN, *MEDIATION, CITIZEN EMPOWERMENT, AND TRANSFORMATIONAL POLITICS* 7 (1995)).

⁴⁴ Occasionally, when hosting settlement conferences, I feel pressured by a lawyer that is speaking to me in private caucus to express my views on the merits to his opponent. Sometimes I sense in these situations that the lawyer who is pressuring me is trying to use me to leverage more movement out of his opponent. I don't particularly like the feeling of being used. I make up my own mind about whether and when to share my substantive views with the parties.

Similarly, in some cases the appropriate course might be to agree to discuss the merits only of some discrete piece of the litigation puzzle or only at some later juncture in the process. We always need to consider carefully both the timing of our inputs and the manner and circumstances in which they are delivered. Often, for example, the most appropriate setting for offering feedback to a party is during a private caucus—and not until well into the mediation. There is nothing dishonest, however, about having an opinion and not sharing it, or waiting to share it until the most constructive moment. What is dishonest is denying that we have a view when we in fact have one. If we have an opinion about something and we feel pressed by a party or the circumstances to share it, we can fully preserve our honesty by saying that we think the process would be healthier and more likely productive if we did not interject our opinion at this juncture.

If the process that we fashion with the participants takes us to a point where it is appropriate to offer evaluative comments, it is very important that we do so with visible care and balance. Before offering anything in the nature of an assessment, even of some limited part of a dispute, we must demonstrate how careful and systematic our reasoning is by setting forth, step by step, the process by which we have arrived at our evaluative comment. We must identify our starting point, and acknowledge any assumptions or unknowns that are at play in it. If other starting points might be viable, we must acknowledge them and explain why we have chosen the one we have. We must preface our comments with qualifiers and conditions, and we must squarely admit that we could well be wrong. We must point out that the judge or jury could reason along different lines or react differently to key people or evidence. We must try to explain each significant step that we have taken along our analytical route, acknowledging as we go any potentially viable alternative findings or lines of reasoning. Our goal is to be, and to appear to be, balanced, thoughtful, and really open-minded.

What if our careful and honest analysis leads to an assessment that is very supportive of only one side? How we handle this situation may well depend on whether the format we are using involves meeting with only one side at a time in private caucus, or meeting with all parties simultaneously in one group setting. The group setting presents the greatest challenge. It is in that especially sensitive setting that the risk is greatest that either the substance of what we say or how we say it will drive the party on the losing end of our analysis to conclude that we are biased, thus destroying any trust we have been able to build with that party. Heightened sensitivities and greater risks should make us more careful about what we say in the group setting—and more reluctant to purport to assess the merits of any significant part of the case.

When I have concluded that it is appropriate to share some of my substantive views with the parties, I prefer to do so in private caucus. Speaking to the parties separately, however, creates its own risks and temptations. In some ways, it is more difficult to be honest with the parties when we address the same subject with them in separate private caucuses. We will be tempted to emphasize risks differently in each session—perhaps even to reshape our analysis in anticipation of its effect on the particular listener.⁴⁵ Even when we are purporting to address the same issue, we may be tempted to include some elements in our discussion with one side that we omit from our separate discussion with the other side. We may be tempted to soften our message in one setting and to harden it in another. To feel these temptations may be inevitable. To be pushed around at least a little by them may be understandable. But to resist permitting them to distort in any substantial measure the views we express is essential.

If our careful analysis leads to an assessment of some issue or claim that is very supportive of only one party, should we worry that by being honest with that party in private caucus we will intensify that party's commitment to its position and make settlement more difficult to achieve? While we cannot escape this worry, I do not believe it should drive us into a disingenuous equivocation or persuade us to make a tactical "adjustment" in our assessment (assuming that assessment has been honestly reached and is carefully reasoned).

It is not at all clear from my experience that the most likely effect of being honest with a party about the apparent strength of her position will be to increase her intransigence. Being open and forthcoming can have the effect of loosening up a litigant, and making her less worried that we might resort to artfulness and stratagem to secure an agreement that could not be justified under the evidence and law. I have felt lawyers and clients relax in their sessions with me when they hear me say something positive about their side. They sense that they are not going to have to fight and argue for every point. They see that I am not gaming. They become less worried that they are going to need to protect themselves from me, and less concerned that I am going to try to manipulate them into some unwarranted concession.

I suspect that there is a greater risk that we will do harm to the process if we retreat into obviously unsupported equivocation, or appear to shave or recast our analysis, because we are afraid of the effect an honest exposure of our views might have on a party's settlement position. Appearing to pull our

⁴⁵ For a description of sometimes extreme examples of "mediators" appearing to endorse different views in private caucuses with different parties, and an account of the dangers it generates, see Deborah M. Kolb, *To Be a Mediator: Expressive Tactics in Mediation*, 41 J. SOC. ISSUES 11 (1985).

analytical punches is likely to reinforce the lawyers' suspicion that the settlement conference dynamic really is a game, and that we have accepted a role as a "player." The name of the game, as many lawyers will understand it, is to "capitalize on risk aversion." We neutrals degenerate into mere players in the minds of the other participants if they perceive us as being self-conscious and calculating about how our conduct or words might affect their estimates of the level of risk they face. If it appears to a party that we are knowingly understating his strengths or overstating his weaknesses (e.g., by ignoring or trying to slide past some relevant evidence or law), he will distrust us. He will infer that our overriding motive is to get him to settle, and he will worry that we want so much to get him to settle that he cannot trust us to be objective. Thus, we risk artificially reinforcing a party's rigidity if he senses that we are not being forthright in acknowledging the strengths of his position, or that we are trying to artificially intensify his fear of risk.

But this utilitarian worry is not the principal reason that we must resist the temptation to try to "play" on the parties' risk aversion in order to move them closer to settlement. As representatives of the system of justice, we are under a strict ethical obligation not to mislead or deceive or manipulate anyone. If we exaggerate the risk a party faces, we engage in a form of deception. Similarly, but more subtly, if we believe that a party has a clearly and unjustifiably exaggerated view of the risk he faces, there is an element of deception in our approach if we shape the way we express or hide our views in order to encourage that party to continue to exaggerate his risk. As the host of the mediation, we want the parties to move. We assume that the more risk a party perceives, the more likely he is to move. But we betray our calling and abandon our only true client—the system of justice—if we yield to the temptation to use even indirect dishonesty to try to increase the odds that the parties will reach an agreement.

We also need to appreciate that intellectual dishonesty and bias can be closely related—at least in the mind of a party or lawyer who is listening to us. So if we are "caught" being disingenuous about a party's strengths or weaknesses, we risk being perceived not only as a game-player, but also, and more ominously, as biased in favor of an opposing party. A perception of bias is a dagger in the heart of process integrity.

3. Taking Care in How We Express Ourselves

We also must never lose sight of the importance of the manner and spirit in which we share our views with the parties. Just as carefulness and balance must inform our thinking, they also must shape the way we present our thoughts. Especially when our messages have a negative dimension, we must

deliver them gently. Taking care to be gentle increases the likelihood that we will take care to be balanced and thoughtful. Messages gently delivered are less likely to be rejected, less likely to provoke an instinctive desire to counter and parry, and more likely to be perceived as rooted in thoughtful analysis. Gentleness also reduces the risk that the content of the message will cause the listener to feel betrayed by the messenger—to feel that there has been a breach of trust between the party and the mediator. All these are good reasons to be gentle, but the most important reason is that gentleness bespeaks and communicates both sensitivity and respect, and communicating our respect for the parties is essential to earning their respect for the system of justice.

It can be especially challenging to maintain a gentle and composed tone when a lawyer or a party is relentlessly obnoxious, aggressive, disrespectful, derisive, thoroughly cynical, or just plain hard-nosed and uninterested in the feelings of others or the emotional dynamic of a negotiation. It is important *not* to respond in kind to such attitudes and the behaviors that accompany them. We must resist the temptation or invitation to take personally the way others treat us. Similarly, we must resist the temptation to change the fundamentals of our approach in an attempt to build a sense of connection by seeming to have more in common with a lawyer or a party than we really do. Pursuing a connection by manipulating ourselves is likely to be seen for what it is, thus intensifying cynicism. A false connection is worse than no connection. A disingenuous style is not likely to inspire genuineness in response.

The central message here is this: we must not resort to self-distortion or dishonesty in pursuit of any end. Our means are our end. And regardless of how anyone else behaves, we must remain centered in a gentle, respectful, composed approach that offers no reason for anyone to think less of our system of justice.

D. Transparency and Inclusiveness

I will discuss transparency and inclusiveness together because they are so tightly intertwined in the mediation setting. The transparency I urge has two, sometimes overlapping, objects: ourselves and our process. When we turn to focus on process, we will see that transparency, by itself, is not sufficient. As I will try to explain, transparency about process can acquire its full constructive power only when we include all the participants in the mediation in the key decisions about which process routes we should follow. In short, inclusiveness is essential to maximizing both the reality and the potential of process transparency.

1. *Transparency About Ourselves*

First let us explore the role in this setting of transparency about ourselves. I am not suggesting, of course, that it is appropriate or useful to disclose every fact or truth about ourselves during the mediation. The mediation is not about us. No one wants us to treat it as a confessional. What I am suggesting is that having the courage and honesty to expose relevant parts of ourselves, in limited doses and at appropriate junctures, can have positive effects.

An example or two will help clarify my point. Sometimes a party will ask me in a private caucus what I think the likelihood is that she will prevail on some contested issue or in the case overall. If I think it is appropriate to offer any view at all, I almost always begin my response by saying, "I don't know; it is very difficult, if not impossible, to predict these kinds of things reliably." Then I will identify some of the variables that seem most significant and some of the factors about which it would be useful to have more information. After setting forth the appropriate caveats, but before offering any view, I sometimes identify one or two facts about myself that I think the party should know because they might be affecting my views about the case or settlement positions. I might point out, for example, that I am a risk-averse person, and that I am cautious by nature. I also might say that I often lack confidence in my reasoning about particular matters. I would add that I am saying these things because they are true, and because I do not want the party to ascribe more significance or weight to my answer to her question than that answer deserves—which often is not very much.

Less often, but occasionally, I find myself admitting to a party in private caucus something about my general political leanings or sympathies. I might tell a party—plaintiff or defendant—in a civil rights case, for example, that in assessing anything I might say about the case, he needs to know that I have left-leaning political views, and there is some possibility that my generic sympathy for the underdog might be affecting the objectivity of my judgment. In a similar spirit, I might warn a party that in considering any thoughts I offer about the damages or value of the case, she should take into account the fact that I have conservative instincts about money and an arguably inflated view of the scope of our responsibility for ourselves.

I should emphasize that it is not often that I find myself feeling that disclosures like these are relevant or appropriate, but there are occasionally circumstances in which judiciously making a disclosure of this kind is an important component of honesty and can demonstrate our commitment to intellectual integrity. Admitting our own limitations can help others relax, and can help them feel that we have more in common with them. A party

who is more relaxed and who feels that he shares something in common with us is more likely to feel a sense of connection with us—and more likely to trust us.

2. Transparency About Our Process and Including the Parties in Making Important Process Choices

While an occasion to be transparent about some part of ourselves will not arise in every mediation we host, transparency about our process is essential every time we serve. Process transparency is a basic building block for earning the participants' trust and for deserving their respect. It can go a long way toward assuring process integrity.

By "process transparency," I mean being open, in advance, about what we are doing procedurally and why. At a minimum, before we launch the session, we must explain clearly what the mediation process will consist of and what rules will apply during it. We need to explain the role we anticipate playing and its limitations. We should describe, at least at a general level, our goals for the session, and we should explicitly identify the values and concerns that will drive how we approach our assignment. This kind of introduction can be an important first demonstration of the transparency we hope to both display and encourage.

We needlessly fall short of maximizing the parties' trust of, and investment in, our process if we are content simply to explain that a procedure we have selected in advance is appropriate. We can do much better if we invite the participants to help us decide what general process model to adopt, and when we get to a fork in the procedural road, which of the alternative routes to follow.

How much flexibility we and the parties have in fixing the general structure of the mediations we host will vary from court program to court program, but the rules in many courts leave considerable "play" in the procedural joints. It can be important for us to make the parties aware of this play, and to ask for their input in choosing between structural options. In the Northern District of California, our mediators try to do this a couple of weeks before the mediation session is scheduled to take place—in a phone conference with counsel (parties also may participate) during which the mediator describes the most commonly used procedure and solicits input from the participants about the mode of proceeding that would best fit their circumstances.

In such a discussion, our mediators might ask the parties to consider, for example, whether it would be best for the mediation to begin with a group session that would include presentations on the merits by both sides. They

might discuss whether any such presentations should be limited to certain issues or claims, or how the presentations might most appropriately be made.⁴⁶ In the same conversations, the mediator may give the parties an opportunity to consider whether it would be preferable to limit the group session to an introduction of the process by the mediator and then to go directly to the private caucus format for discussion of the merits.

The point is that the more clearly the parties understand in advance how the process will be structured, and the more that structure squares with and reflects their judgments about what is appropriate, the more confidence they will have in it. Getting the parties to participate in making decisions about how to structure the process can increase their sense of involvement and their investment in making the process work.

For similar reasons, over the course of a long mediation, we should continue to give parties an opportunity to participate in the decisionmaking each time we see a potentially significant process choice. Instead of deciding on our own which process path to follow, we should give the parties a chance to consider the pros and cons of each possible route, so that they know both what we are doing and why.⁴⁷

One example will suffice here. In the settlement conferences I host, we often devote the first rounds of private caucuses to discussing the evidence and law. We intentionally avoid discussing offers or demands. At some point, however, we need to begin working with numbers. At that point, I often ask the parties whether they think the most useful way to proceed would be simply to exchange figures or whether it might be better, at least for a while, if each party discussed possible financial terms only with me, in confidence. In essence, we discuss whether the offers and demands should be on the table or whether I should be the only one who knows what each side's figures are. Which approach best fits a given case can vary with a number of circumstances or factors, which I discuss with the parties, seriatim, in private caucus. It is only after we have considered the pros and cons of each

⁴⁶ For example, it might be wise to discuss the extent to which the parties themselves, as opposed to their lawyers, will participate in the initial presentations, or whether it might be useful to have a key witness or two (e.g., experts) attend the session and offer input.

⁴⁷ Sometimes parties may want process suggestions from us, or they will ask us to choose the path or the mode of proceeding that we think, based on our experience and on what we know from all the private caucus sessions, holds the most promise. It is perfectly appropriate to suggest which process option seems to fit the situation best when a party asks for our help in this way—as long as the party knows there are alternatives and that we are not dictating the route without giving the party a chance to express his views on the matter.

approach that a decision is made.⁴⁸ Involving the parties in this way reduces their anxiety about unknowns and increases their comfort level with the implications of their choice.

Another dimension of transparency involves sharing honestly with the parties our thoughts about a tactic they propose, or a move they want to make, that we fear might needlessly cause harm to prospects for making the mediation productive. This situation could arise, for example, in a private caucus early in the mediation if one side says it wants to cut to the chase and put its real bottom line on the table. In most instances it is wise to discourage the parties from rushing to the numbers. We should be especially energetic in discouraging parties from prematurely articulating to the other side, or even just to us, a number they call their "bottom line." But it is important to tell the parties why.

In doing so, we might make some of the following kinds of points:

I have found that this process is healthiest, and most likely to teach us reliably whether the case can be settled, if the negotiations have a viscera and if the parties feel that that viscera is composed primarily of reasoning about evidence and law.

Generally, parties are likely to have the most confidence in the process when it is rooted in analysis—when analysis comes first—then the numbers emerge, later and naturally, from that analysis.

Among other things, analysis helps build a sense of fairness. Numbers that are rooted in analysis are more likely to seem fair, and to seem to be "fairly" derived.

People can be moved by fairness.

To make negotiations seem fair, people are also likely to need a sense of reciprocity and balance. If you go to your bottom line too soon, you will not leave room for the reciprocity of movement and the sense of balance that the other side is likely to need.

Moreover, even if the analysis that leads you to your bottom line is very solid, we would risk cutting off the negotiations prematurely if you put that bottom line figure on the table too early. It is likely that the people on the other side would need to work through some things before they could get to the place you have identified, and we need to give them an opportunity to do that.

On a different level, we also need to take into account the risk that announcing a bottom line too early will be construed by the other side as a sign that you feel that you have nothing to learn from this process, from

⁴⁸ If the parties cannot get on the same page about this, I ask if I may make the decision. If one party seems anxious about proceeding by way of secret offers and demands, we use the conventional process in which the figures are exchanged across party lines.

them, or from me; and that there is no chance that any new information or new perspectives could be developed in this process that might affect what it makes most sense for you folks to do.

I know you don't mean to suggest that, but if we inadvertently send a signal like this, it can shut down the other side's openness to learning from this process, from you, or from me; it also could make your side seem arrogant.

Moreover, we don't want anyone to paint himself into a "face corner"—a position from which he feels he cannot move without losing too much face. If we get into a corner like that too early, we can lose a chance to get a sensible deal just because of our pride, or fear of harm to our reputation and credibility. We want to protect our credibility, and not put ourselves prematurely in a position that forces us to choose between protecting that credibility and getting a good deal.

Obviously, we don't want to create any avoidable barriers to getting home. If we fail, we want to be sure that it is only because failure was the only accessible outcome.

The example just offered addresses only one circumstance, but it reflects a spirit and tone that mediators might use when they want to be helpful by making sure that a party or lawyer has considered the full range of possible effects or implications of using a particular tactic or taking a particular position. It is important to emphasize, however, that this kind of prophylactically-motivated intervention must be made gently and explained carefully, and it must be accompanied by a message that makes it clear that, in the end, it is the parties—not the mediator—who are empowered to make these kinds of process decisions. After trying to ensure that they are aware of the alternatives and the risks, it is our role, at least within broad boundaries, to honor the parties' decisions.

With respect to the major process path choices, however, the preferred course is to avoid this circumstance altogether. To reduce the risk that we may feel constrained to intervene *after* a party has proposed a step that we think would be counterproductive, we should initiate discussion of the major process paths as soon as we sense that the parties are approaching a point where they will confront an important process choice. In such discussions, we can identify downsides to steps or moves that we fear would be counterproductive, but that given our experience, we think a lawyer or litigant might be tempted to make.

By talking openly about process considerations and options in the ways I have suggested in this section, and by including the parties in decisions about which process routes to follow, we can use our transparency to attack the cynicism about the legal system that seems so widespread.

V. KNOW THYSELF

Mediators Daniel Bowling and David Hoffman have taught us to appreciate that the mediation process is a dynamic and organic whole in which each participant affects how the others feel and act.⁴⁹ As neutrals, we need to understand that we will react, at some level, to the people and the circumstances in the mediation, and that how we react can affect the way the other participants perceive and react to us.

Because reactions by us are inevitable, and because our reactions could color the character of the mediation, we must heed the admonition to “know thyself.” We need to try to understand ourselves emotionally and psychologically. We need to acknowledge the values that resonate most with us. We need to acknowledge our political leanings and our social sympathies. We need to understand our assumptions, biases, and theories about people, groups, and social dynamics. We need to know what baggage we bring to the process and to our role. We need to understand what kinds of behaviors push our buttons and how we react when our buttons are pushed. We need to know which kinds of situations intensify our sense of stress and how we react when stressed.

I am a moralist and a populist. I deeply believe that there is virtually nothing more important than how people treat one another, so I feel surges of anger when I perceive arrogance, selfishness, or insensitivity. I am insecure intellectually, so I feel surges of panic when I realize that I do not understand something that seems important. I need to acknowledge these things (and many others) about myself so that my reactions do not discolor my conduct as a host of negotiations.

If we know ourselves, we can reduce the risk of reacting in inappropriate or counterproductive ways. We may be able to anticipate and channel our reactions—maybe even harness the energy that accompanies those reactions for some productive purpose.

More importantly, it is only when we know ourselves that we can open ourselves to others, and being transparent about who we are may be as important as anything to earning the parties’ trust and respect.

⁴⁹ See Daniel Bowling & David Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, in BRINGING PEACE INTO THE ROOM 13–47 (Daniel Bowling & David Hoffman eds., 2003).

VI. THE PERFECT IS THE ENEMY OF THE BEST

There is considerable abstract moralizing in the preceding pages. The aspirational standards that might be drawn from this Essay are not only daunting, but clearly beyond our full reach. Mediators are people too. They are imperfect, fallible, limited, complicated, and probably unusually inclined to self-flagellation. Fortunately, what is essential to our role is to be real, not to be perfect. In fact, pursuing perfection by trying to shape our performance into strict conformance with all of the ideals suggested in the preceding pages (or in any others), is likely to distract us from ourselves, and thus, compromise what we can most valuably bring to mediations. Because we can feel centered in the fact that we really want to help, that we really care about being constructive and about following an ethical course, our best resource for the tasks we undertake is being ourselves. We need not perform, and we should not perform. We need only be who we are.

If we remain centered in our own respect-worthy values and in our own natural respect for others, and if we try to honor our most fundamental ethical instincts, we need have no fear of failure. We will have no failures. Our success rate will be 100%, because our success as mediators for court programs is not measured by settlement rates, which are far beyond our poor power to add or detract anyway, but by how much of ourselves we give to the process and by the integrity the process reflects when it is in our hands.

