

2008

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Recommended Citation

Wayne D. Brazil, *Thoughts about Spiritual Fatigue: Sustaining Our Energy by Staying Centered*, 2008 J. Disp. Resol. (2008)

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Thoughts About Spiritual Fatigue: Sustaining Our Energy by Staying Centered

Wayne D. Brazil*

I. SETTING THE STAGE

Spiritual fatigue can afflict seasoned mediators and judges who have hosted many settlement conferences.¹ It can sap the energy we need to do our work well. It can reduce our patience, shorten our anger fuses, and impair our ability to listen to and to connect with the people we are trying to help. Worse, it can lead us into procedural or ethical temptation—inviting us to cut corners and compromise values we hold dear. If it persists too long, it can drive us away from this field. Thus, for those of us who experience it,² spiritual fatigue can pose a serious threat.

The purposes of this essay, which is based on a presentation first given to a gathering of senior mediators,³ are to acknowledge the reality of spiritual fatigue, to identify some of its sources, and to suggest some ways to reduce it—and thus to help us re-charge our spiritual batteries. Along the way, I will suggest some ways to encourage participants in our mediations to move more fully into the spirit that we want the mediation process to reflect.

My principal thesis is this: staying centered (emotionally and behaviorally) in core purposes and principles of mediation can lower the level of psychic strain that this work can impose on us and can serve as a significant source of renewable professional energy.

A few context-setting comments are in order at the outset. First, it is important to acknowledge that this is a subject to which other people have devoted considerable work and for which others have developed a wide range of responsive proposals.⁴ Unlike some other contributors to this field, I have no professional

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1. I do not equate “mediations” and “settlement conferences.” There are huge ranges of practices and procedures under both of these umbrellas, and even if we were to identify a type of process that was typical of each of these kinds of events we would encounter substantial differences between them. There can be sufficient pertinent commonalities between the circumstances of mediators and of settlement judges, however, to make it rational to discuss their circumstances together for the limited purposes of this essay.

2. I do not assume that all mediators experience spiritual fatigue. There apparently are some personality types that are energized (rather than temporarily depleted) by intense social interaction, and for some such people, at least, spiritual fatigue may be a wholly foreign concept. Nor do I assume that spiritual fatigue is experienced in the same ways or to the same extent by the mediators in whom it occurs. I do assume, however, that a constant diet of fully engaged mediation work leaves some mediators feeling drained and looking for ways to renew their energy for and excitement about doing this kind of work. It is to these mediators that I try to speak.

3. The occasion for which I developed these thoughts was the 14th Annual ADR Policy Conference of the California Dispute Resolution Council, which was held on Oct. 19, 2007.

4. *See, e.g.*, the Spring 2002 volume of the Harvard Negotiation Law Review, which features six articles organized around the theme of “Mindfulness in the Law and ADR.” 7 HARV. NEGOT. L. REV.

training or expertise in psychological sciences or other disciplines whose ken is emotional health. Thus, I am not qualified to discuss many of the means for reducing stress or regaining professional energy that might come to mind, e.g., psychotherapy, meditation, medication, massage therapy, long holidays, sinecures, exercise regimens, etc.

As one might expect from a judge, my discussion of this topic will be almost entirely rationalistic. The suggestions I offer are in the nature of “cognitive rearrangements”—uninformed by any therapeutic subtlety.

Moreover, all the mediations from which I generalize occur in the context of *litigation* that has been filed in a *federal* court; so, significantly, none of the mediations that inform my views have been centered in disputes between neighbors or that arise out of domestic relations or probate. It would not be surprising if emotions and interpersonal dynamics in mediations involving neighbors, family matters, and personal estates played different roles than in many of the kinds of civil litigation most commonly encountered in federal courts. The sources and character of spiritual fatigue for mediators who work primarily in one of these other arenas may be different from those I have experienced. So, for mediators who work in these other fields, my suggestions about ways to reduce spiritual fatigue may be well off-target.

One additional caveat is necessary. My thinking about these matters is informed by a specific perspective and set of experiences. I work for a public institution, an agency of government in our democracy. Given the fact that the mediations about which I write are sponsored by a federal court, the values that must dominate my thinking are rooted in certain fundamental notions about the role of courts in our society and about the primacy of integrity of process in our judicial system. Many mediators, however, work primarily in the private sector for private clients. I cannot simply assume that the same principles operate with the same force in these two different settings. And I have no way of knowing whether the ideas that I have developed in a court program might be transportable into these different settings.

Despite these limitations, I have a strong suspicion that there is not as much difference as we might at first assume between the dynamics that typify mediations in the public sector and those that typify mediations in the private sector. More specifically, I suspect that integrity of process often is as important to “success” in private sector mediations as it is to “success” in mediations sponsored by courts.⁵ The theory that supports this hunch runs along the following lines. As a general proposition, the more confidence the parties have in the integrity of the process, the more confident they are likely to feel that the process: (1) has yielded important information about the parties’ circumstances, (2) has produced an analysis that is as reliable as possible, and (3) has accurately identified what terms of settlement might be available. Confidence about these matters might contribute more to the likelihood of a productive mediation than any other single factor.

1-141 (Spring 2002). From different perspectives, these essays consider the role that meditation can play in the lives and work of mediators.

5. See generally Stephen B. Goldberg, *The Secrets of Successful Mediators*, 21 NEGOTIATION J. 365 (July 2005); Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 23 NEGOTIATION J. 393 (Oct. 2007); see also Janice Nadler, *Rapport in Negotiation and Conflict Resolution*, 87 MARQ. L. REV. 875 (Special Issue) (2004).

II. SOME THOUGHTS ABOUT SOURCES OF SPIRITUAL FATIGUE AND STRATEGIES FOR REDUCING THEIR SWAY

Mediators' spiritual (or psychic) fatigue no doubt can have many sources, at least some of which likely lie far beyond my layman's ability to identify. But I choose to proceed from two working hypotheses: (1) some of the fatigue we experience is unnecessary (avoidable or reducible), and (2) one way to reduce fatigue is to identify as many of its multiple sources as possible and devise a strategy for each specific source that is specially tailored to reduce its potency. I launch this process here.

A. Denial

Ironically, one source of our fatigue may be our fear of admitting that it exists. For some of us, it is difficult to admit that we are tired of trying to do good. As mediators, we see ourselves as forces for creating, for constructing, for connecting, and for equipping others to move on. Being a "force" for good is central to our sense of professional self. But we threaten that sense of self if we admit that we are running low on "force" or that we are less interested in being a "force" than we think our job description requires.⁶

It takes energy, however, to suppress or deny something that is real—and spiritual fatigue, at least for some of us, is real. It follows that we might begin the process of renewing our spiritual energy by acknowledging the reality of spiritual fatigue and accepting it as a natural by-product of our work. In fact, perhaps we should view spiritual fatigue as evidence of our conscientiousness, of how much of ourselves we put into our work as mediators.

Such modest rearrangements of our mind-sets, however, are not likely to significantly reduce, over time, the impact of strains from other sources. So we need to identify at least several additional sources of fatigue that we might be able to root out.

B. Repetition of Process

An obvious second source of fatigue might simply be repetition of process—in essence, a form of boredom. When we were new to mediation, our energy was stimulated in part by the challenges of trying to master new skills, by the novelty and liberation of forsaking adversarial roles and responsibilities, and by all the learning that attended our work. After hundreds or thousands of mediations, these sources are likely to provide much less stimulation. The process that I use in most of my settlement work has taken on a predictable pattern, so that the process itself, at least as I contemplate it before a settlement conference begins, can feel stale and uninspiring.

How might we attack this source of fatigue? One obvious tactic could be to change the pattern or process we use in our mediations, on the theory that undertaking something new requires more attention and engagement, more thought

6. As an aside, we might ask ourselves whether the notion of mediator as "force" is consistent with core mediation theory.

about what we are doing and why. But if we change the process that we have found most productive, and in which we feel most comfortable and are most genuine, we risk delivering poorer service to the parties. We risk making procedural mistakes and ethical errors that can compromise parties' confidence in us and reduce what we learn from them. As we increase the risk of procedural stumbling, we also reduce the likelihood that we and our work will seem "natural." The less natural we and our process feel, the less helpful we are likely to be.

A less risky and perhaps more effective response to this source of fatigue might be to shift the center of our attention from process to people. Even if the process tends to repeat itself, the people, as individual human beings, do not. I find that when I focus on the individual human beings with whom I am meeting, and when I try to "enter" their situations, their stresses, and their dilemmas, my energy returns. This energy renewal may be in part a by-product of shifting my emotional attention away from myself and my circumstances (e.g., boredom) and toward other people and their circumstances, which are infinitely variable and often engagingly complex. So one way to "unlock" our energy is to "lock in" on others.

But is it risky to shift our attention away from process and toward persons? Isn't "process" the center of mediation? Perhaps, but we may be learning that the center of mediation is authenticity, and that focusing on persons, instead of fixating on process, is critical to authenticity.⁷

C. *The Psychic Strain of Being at the Center of the Vortex*

A very different source of spiritual fatigue might be the relentless and intense psychic demands that remaining at the center of the mediation process can impose on us. From a simple-minded perspective, the way to attack this problem is obvious: remove ourselves from the center—analytically, socially, emotionally, and physically. While this "solution" would be consistent with some schools of mediation theory,⁸ it is inconsistent with others⁹ and is much more easily said than done. But even though this suggestion might seem naive, and, to some mediators, irresponsible, I think it would be a mistake to dismiss it summarily.

We might take significant steps, simultaneously, toward conforming our conduct to core mediation values and toward reducing unnecessary sources of strain in our work if we could teach ourselves to stop *feeling* that we are at the center, or, stated differently, to stop *seeing ourselves* (in our unarticulated, internalized sense of the process) at the center. We know, of course, that in theory it is the parties who are supposed to be at the center of the mediation process. In our heart of hearts, however, we also know that over the course of any given mediation, we may be tempted to reduce the roles of the parties and to enlarge our own—

7. See *supra*, note 5.

8. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (John Wiley & Sons, Inc. 2005); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (Summer 1997).

9. For an example of a form of "mediation" in which evaluative inputs by the "mediators" played a pivotal role, see Kathy L. Stuart et al., *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program*, 8 JUST. SYS. J. 307 (Winter 1983).

especially in the latter stages of the process, as we approach and enter “crunch time.”

I suspect that this tension—for some of us—between the theory to which we subscribe and the way we act is a subtle source of strain. Perhaps we should consider reducing this source of strain by reducing this tension. Are we really that much wiser and more competent than the parties? Are they really that dependent on us (even after we have been working with them for hours and “modeling” productive ways of interacting for them)? How can we reconcile such assumptions about dependency with our professed commitment to the parties’ “self” determination?

D. Infection by the Parties’ Fatigue

Let’s shift gears and consider another possible source of our fatigue: infection by the fatigue felt by other players in the process. Might our fatigue be a product, in part, of their fatigue? When mediation was a new experience, at least some lawyers and clients brought a special kind of energy to it—inspired in part by fear of the unknown, by a sense of process adventure, and by anticipation of learning. But in many parts of our country, mediation is no longer new. Many participants in mediation today are repeat players. And just as real familiarity can breed contempt, assumed familiarity can breed complacency.

Thus, some experienced mediators complain that lawyers and their clients now seem to take mediations less seriously than they did when the “movement” was fresher and that lawyers and clients prepare less thoroughly for and expect to accomplish less during individual mediation sessions. In a variation on this theme, some neutrals complain that lawyers and parties increasingly assume that one mediation session will not be sufficient to determine whether a settlement can be reached.¹⁰ Too often, counsel appear to assume that they will not be able to coax the best possible terms out of opposing parties during the first session—that those terms will emerge only through substantial follow-up negotiations or subsequent mediations. This set of assumptions tends to deprive the first mediation of the crucial effect it might otherwise have—converting it, needlessly, into a ritualized preface to the main event.

I also have heard some experienced mediators complain that there has been an increase in the “gaming” of mediation—that mediation too often is viewed by lawyers and institutional litigants as just another arena for manipulative, postured, or other disingenuous behaviors, and that lawyers and parties more than occasionally use mediation for ulterior purposes (for cheap discovery, to cause delay, to harass or impose expense burdens on an opponent, etc.).

What antibodies might we try to develop to combat these kinds of infections? One possible remedy is to use the form of transparency that I call “name it and explain it.” In the pre-session phone conference, for example, we might explicitly describe our worry that, recently, some parties and their lawyers seem to take mediation opportunities less seriously, to prepare less for mediation sessions, and to “game” the mediation process more, especially in court mandated mediations.

10. Our Court recently hosted meetings with our mediators for the purpose of assessing the health of our ADR program. Some of our neutrals voiced these kinds of concerns during these meetings.

We can tell the parties¹¹ that we have seen how lack of preparation compromises their ability to use the mediation to its full advantage. We can remind them that there is no reason that two or more sessions should be necessary, and that by assuming that the mediation process will take two sessions, the participants may well needlessly increase time to disposition and their transaction costs. It might also be beneficial to tell the parties (really their lawyers, for the most part) that over the years gaming tactics in mediations have become increasingly easier to spot (both by us and by the other parties) and that, in our experience, they usually backfire, causing resentment and increasing distrust—driving up transaction costs and making it more difficult and expensive to reach a settlement.

If you are concerned that the lawyers who participate in your pre-session phone conference might not be taking your admonitions to heart, consider holding a second pre-session phone conference in which the clients are required to be present, so you can share your concerns directly with the people who pay the bills and make the ultimate settlement decisions.

An alternative might be to decide in advance, with the explicit concurrence of the lawyers who participate in the phone conference, that the first mediation session will be a compact event for exploratory purposes only, e.g., to identify the principal barriers to making a deal or the tasks needed to prepare the parties for the serious negotiations that will occur in a planned second session.

E. Exaggerated Expectations of the Participants and the Process

Among sources of unnecessary spiritual fatigue, misplaced or exaggerated expectations might be most significant. We may be artificially sapping our own energy by expecting too much of the parties and lawyers, expecting too much of the mediation process, and, most dangerously, expecting too much of ourselves.

We invite disappointment (and disappointment breeds fatigue) if we expect all the participants in our mediations to shed all their adversarial instincts and behaviors when they begin a mediation. While the “adversary system” might intensify self-protective or gaming instincts, or might help lawyers and clients rationalize other forms of self-serving conduct, the roots of these kinds of behaviors are likely engrained in our human nature. Competition appears to be a fundamental fact of our existence—a product of a survival instinct that may be as ineradicable as breathing. In other words, it is likely that the adversary system is a reflection, rather than the ultimate source, of drives that are in some sense intrinsic to the human condition.

If this is true, we could save ourselves—and others—some unnecessary heartache by aligning our expectations with a more realistic and mature understanding of human nature. Remaining realistic (and charitable) can help us be better mediators by reducing artificial barriers to connecting and communicating with the parties and lawyers. When we are judgmental, we create distance between ourselves and those whom we judge—distance that the persons being judged are likely to feel and to return in kind.

11. Often only lawyers, not clients, participate in pre-session phone conferences. A mediator who wants to reach clients directly with the kinds of messages described in the text should take steps to assure that the parties themselves attend these phone conferences.

We also unnecessarily invite disappointment if we exaggerate the transformative power of mediation as a process. When the mediation movement was young, some of its most visible proponents sincerely made ambitious promises about its potential not only to transform the process of disputing and the relationship between the disputants, but also to change (at a fundamental level) the parties themselves.¹² The beauty and moral power of these visions were among the great sources of energy in the mediation community—and likely were among the principal reasons for its rapid expansion.

But while these kinds of promises may be kept more than occasionally in some settings (perhaps in family law cases, or in efforts to promote restorative justice in neighborhood disputes or less serious criminal matters), they often elude us in general civil cases. In mainstream litigation, the less than laudatory aspects of human nature often seem to be distressingly resilient; they demonstrate a remarkable ability to resist even the most alluring invitations to positive change. Quixotic assaults on these realities are bound to leave us feeling depleted.

We also are likely to experience strain and frustration if we sense that lawyers or their clients are not permitting themselves even to be open to the constructive powers that we believe are latent in the mediation process. We are likely to resent people who we believe will not give the process a chance to do its good. And resentment is a form of anger that consumes energy.

As we consider this form of disappointment, it might be useful to ask ourselves whether our considerable expectations of the process are rooted in a form of vanity. When we tell ourselves about the process' potential to do good, are we really telling ourselves how much power to do good we have? In the next section I will explore some of the threats that this kind of vanity can pose to our ability to sustain our positive spirit in this work.

At this juncture it is sufficient to remind ourselves that there are real limitations on what the process, standing alone, can deliver. Mediation is not an independent source of information, evidence, legal precedent, or analytical breakthrough. While it can enhance our ability to uncover and digest data that the parties already have, and while it can help us identify what the parties do not yet know, the process itself cannot supply missing information.

In sum, we might reduce one source of strain and fatigue if we could make ourselves comfortable with more realistic expectations of the people and the process—or, to frame the matter more positively, if we could be more forgiving of others by attempting to understand the circumstances in which they find themselves and the social and psychological forces to which all of us are vulnerable.

F. Exaggerated Expectations of Ourselves

Expecting too much of ourselves might be an even more potent source of our spiritual fatigue. My focus here is not on whether we host too many mediations, but on how, in the mediations that we do host, we tend to burden ourselves with

12. See Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Interventions: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263 (1996); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 *J. CONTEMP. LEGAL ISSUES* 1, 12-21 (1989).

sometimes misplaced expectations. As I have suggested in other settings, I fear that we sometimes exaggerate our ability, our contribution, and our responsibility.¹³

One source of this concern is data from questionnaires that litigants, lawyers, and mediators have completed about their experiences in my Court's ADR program. These returned surveys reveal that there are, systematically, substantial differences between what our mediators report was accomplished during the mediations and what the lawyers and litigants report was accomplished.¹⁴ In a pattern that is as undeniable as it is unsettling, our mediators have tended to report positive accomplishments in appreciably higher percentages of our mediations than are reported by either the lawyers or their clients.¹⁵ Even in such fundamental arenas as clarifying issues or bridging communication gaps, our mediators are appreciably more likely than the other participants to believe that the mediations they hosted have made significant contributions.¹⁶

While we cannot be sure which sets of perceptions are the most accurate, I worry that if our mediators are exaggerating how much they have contributed in the past, they might be putting unrealistic pressure on themselves to contribute at the same (exaggerated) levels in the future. Pressure to achieve, especially unrealistic pressure, can be a source of real strain.

Ironically, the fact that we collect data about what our mediators believe happened during our mediations can exacerbate this problem. After each mediation in our program, we ask our mediators to complete a survey form that begins with a set of ten separate questions about what was accomplished during the session. We ask, for example, whether the mediator "helped the parties identify underlying interests," helped the parties "clarify or narrow issues," "pointed out strengths and weaknesses to each side," or "gave [an] opinion about settlement value."¹⁷ In this same set of questions, we also ask whether the parties "engaged in case planning," "reached agreement on one or more stipulations of fact," or whether the "case settled."¹⁸

By asking our mediators, after every session, to report this kind of information, and by putting these questions right at the beginning of the survey instrument, we have, unintentionally, invited our mediators to measure the value of their work, the level of their success and the quality of their performance, by these particular forms of "accomplishment." The fact that we collect this information, both from them and from the other participants, encourages our mediators to infer not only that the Court monitors these kinds of "results," but also that the Court uses them to assess the mediators' ability. Thus, quite unintentionally, we add to the "accomplishment" pressure our mediators feel. Falling short of "accomplishment expectations" can be very demoralizing.

13. For a discussion of these concerns and some of the data that inform them in, see Wayne D. Brazil, *Hosting Mediations as a Representative of the System of Civil Justice*, 22 OHIO ST. J. ON DISP. RESOL. 227 (2007).

14. *Id.* at 252.

15. *Id.*

16. *Id.*

17. See *infra* Appendix, Northern District of California "Questionnaire for Mediators and Report of Payment" Form. Each mediator who hosts a mediation in the program sponsored by this Court is asked to complete and return this form.

18. *Id.*

We also may inadvertently encourage our mediators to slip into conceiving of their role as that of a “performer.” It would not be surprising if our mediators blurred the distinction between “accomplishment” and “performance.” In other words, by asking them whether they accomplished so many specific things, we seem to be asking them how well they “performed.” The difficulty, of course, is that mediators who conceive of themselves as “performers” are more likely to be perceived as “performers” by the other participants in their mediations. And while a few mediators might be sufficiently talented and imaginative to remain effective even though everyone understands that they are putting on a performance, for most of us, being perceived as “acting” (“performing”) is a real liability. A mediator who is perceived as acting is likely to have considerable difficulty establishing rapport with and being perceived as genuine by the parties and their counsel. And there is substantial reason to believe that genuineness and rapport often are crucial to healthy, productive mediations.¹⁹

Moreover, “performing” consumes extra energy. To “perform” is, by definition, to “act.” When we are “acting” we are manipulating ourselves into a form of behavior that is in some sense artificial, a “conduct construct” that we superimpose on what our unshaped behavior would otherwise be. Pressing our personalities and conduct into an externally prescribed mold consumes energy. Needlessly. In fact, counter-productively.

Of all the targets of potential exaggeration, however, the one that may pose the greatest threat to our psychic health (and to maintaining the integrity of the processes we host) is exaggerating our responsibility to “get the case settled.” As much as we might try to resist the temptation, most of us are likely to have felt, during more than one mediation, some version of the following: “I’ve got to get this case settled. That’s what they hired me for. That’s what the Court expects from me. So, to earn my money, and to prove (again) that I am good at this job, that I am not a fake who has no business being in this business, I’ve got to get this case settled.”

When we exaggerate our responsibility for the ultimate outcome of a mediation, we impose potentially role-distorting pressures on ourselves. We will be tempted to push or manipulate in order to forge a deal, and we violate core purposes of mediation—purposes that include freeing parties from disabling dependencies and encouraging them to accept responsibility for comprehending their circumstances and determining their own course. In addition, exaggerating our responsibility for the outcome of the mediation sets us up for a false sense of failure—a potentially debilitating (even though misplaced) feeling that we have fallen short where it matters most.

We can reduce the magnitude of the inevitable feeling of disappointment when the parties fail to resolve their disputes by consistently reminding ourselves that the ultimate owners of the process are the parties and that, as its ultimate owners, they are responsible for its success or its “failure.” That is how it should be—at the center of the philosophy of mediation—and that is how it is. “Failure” will affect us less if we can own the truism that we have responsibility only when we have power, and in mediation, by process-definition, all the ultimate power is vested in the parties, not in us.

19. See *supra*, note 5.

We also can reduce the strain that being “outcome-oriented” can impose by reminding ourselves that our highest duty is not to secure a settlement, but to host a process that the participants respect. Our deepest obligation is to integrity of process, and by focusing on and honoring this obligation, we can protect ourselves from some of the debilitating disappointment that we invite when we are too concerned about “outcome.”

What else might we do to reduce the demoralization that is likely to follow a mediation that yields no settlement? For starters, we can remind ourselves that, in most mediations, even when no settlement was achieved, the parties feel that the process delivered net value to them. The data our Court collects about the mediations it sponsors, for example, indicate that, while about 60% of the cases settle through our mediations, some 80% of the parties and lawyers believe that “overall, . . . the benefits of being involved in the mediation process outweigh the costs.”

One such benefit, which can be highly valued by both lawyers and litigants, but which is not captured in any of our questions about “accomplishments,” is feeling centered in the decision to proceed with the litigation. A well-handled mediation teaches the parties a lot about how the two sides view the merits of the case and exposes, more reliably than any other mechanism, what the best terms are that could be achieved in a settlement agreement. A party who reliably knows her best alternative to going forward with the litigation, and which line of reasoning supports her opponent’s position, is much more likely to feel well-grounded in a decision to litigate and much less likely to blame either her lawyer or the legal system for her fate. Understanding why she feels constrained to proceed with the litigation, she also is less likely to resent and more likely to pay the bills her lawyer sends her.

There also are a couple of process steps that might reduce the fatigue that is rooted in exaggerating our sense of responsibility to reach a deal. These steps are exercises in process transparency. They involve talking openly with the lawyers and litigants about spiritual fatigue and about the locus of responsibility for the outcome of a mediation. The goals of these kinds of conversations are to raise party consciousness about mediation dynamics, to invite full party participation in determining the specific form the mediation will take and the role each participant will play, and to encourage the parties to accept their roles as owners of the process.

The first occasion for an open conversation about this subject could arise during a pre-session phone call (with counsel and, as appropriate, parties) or during our opening statement at the mediation. We signal respect by speaking candidly and gently in these settings. We can admit to the other participants that we have been feeling some spiritual fatigue recently and we can explain some of its potential sources. More specifically, we can explain that we have caught ourselves exaggerating our personal responsibility for making the mediations we host “successful” and that we have slipped into equating success with achieving settlement. We can express our concern that a mediator who proceeds on the theory that it is her responsibility to get the case settled turns the basic principles of mediation upside down and, in so doing, threatens to rob the process of its potential. We can point out that a mediator who shoulders the responsibility for the success of a mediation is likely to push herself into the middle of the process and thus to reduce the room for participation by others. Reducing the participatory roles of the

parties, in turn, can cut off access to useful information (about the case or about parties' circumstances outside the case), decrease the group's ability to identify the full range of possible solutions, and compromise the parties' inclination to honor the terms of any agreement that the mediation might yield. After describing this set of concerns, we can ask the parties to bring a full complement of energy and commitment to the process—and thus maximize its capacity to deliver value to them.

A second occasion to discuss similar concerns might arise during a mediation if we sense that there has been some slippage in the level of parties' participation or that they seem to be afraid of making decisions about how to respond to proposals or about which process paths to follow. If it feels appropriate, we might talk to the parties (jointly or in private caucus) about why some litigants, or even some lawyers, seem to want the mediator to assume responsibility for analyzing the parties' situations and identifying sensible terms of settlement. We could acknowledge that, because litigation is riddled with informational and predictive uncertainty, it is quite rational for parties to look for sources of certainty, or at least for ways to reduce their feelings of uncertainty. We could note that in some of our mediations in the past we have seen parties, understandably, look to the mediator to serve as a source of greater certainty by offering guidance or reassurance. Then we could remind the parties that it is they, not us, who will live out the results of the mediation—either the terms of an agreement or the playing out of the litigation. Thus it is they, not us, who need to feel centered in the mediation decisions.

We also might acknowledge that sometimes parties fear that they will be diminished by a settlement, that a compromise agreement will feel like (or be perceived by others as) a failure, or an abandonment of principles, or a partial or oblique admission of fault. We could point out that it is understandable that parties with these fears might want to place the responsibility or blame for agreeing to a proposed settlement on someone else. We might add that, in order to reduce the risk of loss of self-regard, parties sometimes even seem to want to turn over to the mediator the responsibility for deciding whether proposed terms should be accepted. We could then describe our worry that such parties sense (perhaps only partially consciously) that they are surrendering to someone else a responsibility that only they should assume—and that knowledge reduces their self-regard even more.

At least in some circumstances, openly discussing these kinds of concerns with the parties might encourage them to play the central roles in the process that we want them to play. We will feel less drained by the mediation process when the parties play those central roles both because the principal energy that runs the process will come from the parties, not us, and because we will experience less tension between the process we actually host and the theory of mediation to which we purportedly subscribe.

G. Some Sources of Sustaining Energy: Self-Awareness, Self-Acceptance, Genuineness, Transparency and Inclusiveness

Transparency and inclusiveness are themes that underlie and connect many of the suggestions made in the preceding pages. I have posited that we can reduce the stress that our work involves by being transparent about ourselves and our

process, and by actively soliciting the participation of the parties and lawyers, as our peers, in decisions about how to structure their mediations and what steps to take at important junctures in the proceedings. In addition to communicating an essential respect for the other participants, these are important tools for re-distributing the sense of responsibility for the character and the value of a mediation.

Being transparent about the character of the process we are hosting and the theories or ideas that inform our process suggestions is relatively straightforward. Being transparent about ourselves can be more challenging. We cannot be transparent about ourselves unless we know ourselves—and accurate self-knowledge can be difficult to acquire. But because we are likely to find the subject of self-study so interesting, the task need not be wholly unpleasant.

As mediators, we need to understand the kinds of situations or behaviors that are likely to cause us stress or to provoke in us an intense emotional reaction (negative or positive). For example, I have learned that I am vulnerable to feeling acute anxiety when I realize that I do not understand something or do not know something that I feel I “should” understand or know. Apparently rooted in long-standing insecurities about my competence, and in an elevated need to maintain a sense [always an illusion] of “control,” this kind of anxiety saps my energy and distracts my attention. Ironically, it is the anxiety itself, and my reactions to it, rather than my lack of understanding or knowledge, that most threatens to compromise the quality of my work as a settlement judge. As I have come to appreciate these facts—and come to accept the radical notion that it is okay for me to exist even though there are infirmities in my mind—I have been able to relax more and focus better on the other participants and their circumstances.

I also have learned, by reflecting on the course of my emotions during mediations, that I am inclined to respond to arrogance with intense anger. I also have learned that my antennae are almost always on hyper-alert for evidence of arrogance. In fact, my sensitivity to arrogance is so vigilant that I am inclined to detect it even when it does not exist. Quick to judge. Too quick. Too judgmental. Not exactly what the mediation-doctor ordered. If I let my anger show, I lose the balance and independence that I should bring to my interactions with the other participants. Moreover, my anger, and my effort to control it, consume energy and distract me.

So what should we do with our self-knowledge? One goal is to use it to reduce the influence that our unchecked emotions might otherwise enjoy. If we can identify our emotional triggers, we may be able to develop devices for nipping counterproductive (and sometimes unjustified and unfair) reactions in the bud. But there also may be occasions when, by sharing our knowledge of ourselves (being transparent), we can, simultaneously, reduce the stress we feel and enhance other participants’ engagement in the mediation process.

For example, if we find ourselves beginning to feel anxious because there is something we do not understand or know, we can openly describe our reaction (and our concern about our reaction) to the parties. This act is likely to defuse the power of the anxiety. It also invites the parties to give us more information—to clarify for us, to teach us. Asking others to be our teachers signals our respect for them. Moreover, being so open about our limitations will likely humanize us in the eyes of the parties, and when we humanize ourselves, we give the parties “permission” to be human. We encourage and enable the parties to relax a little,

to be a little more forthcoming, a little more forgiving. These reactions by the parties, in turn, can facilitate the mediation process and open doors to more information and solution options.

While self-knowledge may be valuable, self-acceptance may be even more important. As noted above, there is growing evidence that the attribute that litigants and lawyers appreciate the most in a mediator is genuineness, and that the ability to establish rapport with the parties is most essential to a mediator's effectiveness.²⁰ While "genuineness" is hardly a self-defining concept, one element of it likely is naturalness. By "naturalness" I mean behaving in ways that are consonant with the instincts and values that feel most central to our sense of self. Behaving naturally is, by definition, easier (consumes less energy) than manipulating ourselves into behaviors that do not come naturally, i.e., performing a role. So naturalness can be a stress-reducer, as well as a prerequisite to full effectiveness.

But a sense of "naturalness" will elude us if, at some fundamental level, we have not come to accept as legitimate the instincts and feelings that seem to be central to who we are. And who we are, naturally, is imperfect. Our fallibilities and limitations are real, just as our highest aspirations and most noble virtues are real. To be natural and genuine, we probably need to be peaceful with the whole reality of ourselves. It follows that we can help ourselves be less stressed, and better at our work, by accepting the whole self that our self-knowledge discloses.

Stated differently, we will find more energy for our work if we renounce the pursuit of perfection. Perhaps we would do well to treat the pursuit of perfection as a form of vanity, a form of vanity that can make us inflexible and can serve as a barrier between us and others. It is acknowledging and accepting our imperfection that will help us and the parties relax; that, in turn, will open portals to real interpersonal connection (otherwise known as rapport).

I have wasted a lot of energy over the years punishing myself for mistakes I have made while hosting settlement conferences. This form of self-focus operates as a serious distraction when I indulge in it while the settlement process is still underway. I would have been healthier and would have had more energy if I could have persuaded myself to view my mistakes as opportunities—opportunities to liberate the parties from the imprisonment and rigidity that can be caused by excessive fear of error.

H. Accessing the Energy that is in the Values and Purposes that Animate our Commitment to this Work

Most of us came to this field infused with an energy that emanated from lofty values and grand purposes. Those values and purposes remain a potentially rich source of energy renewal. We need to tap into that source—again and again and again. To do so, we need to re-connect, regularly, with three animating truths about our work.

The first of these is that the process we use and the spirit we encourage are beautiful and important.

20. See *supra*, note 5.

The second is that the vast majority of the time, the vast majority of the people we serve respect and are grateful for what we do and believe that they have benefitted from the process we have hosted.²¹

The third animating truth about our work is that it does in fact teach. Sometimes the teaching is not fully effective; sometimes the lessons are only partially understood or not entirely accepted. But there is always teaching in our work. We teach listening, acknowledging, and engaging. Listening, acknowledging, and engaging communicate respect and foster connection. The essence of the message we deliver is that “how we treat one another” is what defines most critically who we are as human beings.

These are the truths that are at the center of our work. It is by staying centered in them that we can best sustain the energy to continue to do our work well.

21. *See, e.g.*, 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 (Federal Judicial Center 1997). For example, even though participation is presumptively mandatory in my Court’s ADR program, more than 90% of the people who have participated in mediation or ENE report that the process was fair and about 80% report that the benefits they derived outweighed the burdens entailed.

APPENDIX

Alternative Dispute Resolution Program
United States District Court
Northern District of CaliforniaQUESTIONNAIRE FOR MEDIATORS
AND REPORT OF PAYMENT

Mediator: Please return within 10 days after completion of the mediation process. Feel free to use additional paper. This form will *not* be placed in the court file.

Case Name:

Case No.:

Name of Neutral:

Session Date:

1. Please indicate which, if any, of the following occurred at the mediation: (check all that apply)

- I conveyed settlement demands/offers from one side to another.
- I helped the parties identify their underlying interests, needs, and priorities (beyond their positions).
- The parties explored resolutions that the court could not order.
- The case settled.
- I helped the parties bridge a communication gap.
- I helped the parties clarify or narrow issues.
- The parties engaged in case planning (i.e. discovery, motions).
- The parties reached agreement on one or more stipulations of fact.
- I pointed out strengths and weaknesses to each side.
- I gave my opinion about settlement value.
- Other _____

2. Approximately what percent of the time in mediation did you spend:

in joint sessions? _____% in separate caucuses? _____%

did the lawyers speak (rather than the clients)? _____%

3. Sometimes mediators are more “evaluative” than others. On a scale of 1 to 5, with 1 being the *least* evaluative and 5 being the *most*, how would you characterize your style in expressing your views on the following issues in this mediation?

- | | 1 | 2 | 3 | 4 | 5 |
|---|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| 3a. My view of the parties’ legal positions | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 3b. My view of the costs of litigating this case | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 3c. My view of an appropriate settlement value | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

4. Were the parties’ mediation statements useful?

Yes No

If no, why not?

- 5. How many hours did you spend:**
___ In pre-session phone conference?
___ Otherwise preparing for the session?
___ In the actual session?
___ In other contact (i.e. correspondence, follow-up calls)?
- 6. Are you billing the parties for any of your time**
(under ADR L.R. 6-3(b))?
 Yes No
If yes, for how many hours? ___ hours (at \$200) & ___ hours (at \$___)
- 7. On balance, do you believe that the Mediation procedure resulted in benefits to the parties sufficient to justify the resources that the parties and you devoted to the Mediation process?**
 Yes No
If yes, what were the principal benefits?
If no, please indicate why not.
- 8. Did you confront a situation you considered to pose an ethical problem or dilemma?**
 Yes No
If yes, please explain the problem and how you handled it.
- 9. In hindsight, is there anything you would have done differently in handling this case?**
 Yes No
If yes, please explain.
- 10. What, if anything, could the ADR program have done to better prepared you for the session or to increase the value of ADR in this case?**
- 11. We welcome your ideas for court-sponsored training programs and comments about the court's ADR programs in general (e.g., suggested modifications of the various court forms and outlines). Use the space below, attach your comments, or call us at (415) 522-2199.**