

Mediation and the Art of Shuttle Diplomacy

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Introduction

Several years ago mediator Tim White, a former gang member on Chicago's South Side, met with the leaders of two rival gangs on a street corner trying to dissuade the gangs from going to war. White had served time in prison, found religion there, and returned to the streets in a new role – he was hired to be an “Interrupter” by Project CeaseFire, a program sponsored by the University of Illinois at Chicago School of Public Health.

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

As White described this mediation in an interview for the radio program “This American Life,”³ host Ira Glass asked him what he thought these two gang leaders told their respective crews. Each of them, he said, told the others that he let the conflict go because of White. “I let it go cause of Tim, man. You know Tim – he stands for peace now, man. And he caught up

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³ www.ThisAmericanLife.org, Episode #358 (June 27, 2008).

with me, man, so I told him I'd do it for him. I gave dude a pass." Each was able to save face by attributing their decision to their relationship with the mediator.

White's story – about the value of shuttle diplomacy and the power of relationships that mediators forge with people enmeshed in conflict – is hardly unique. President Jimmy Carter used similar techniques when he brokered a deal between Egyptian President Anwar El Sadat and Israeli Prime Minister Menachem Begin at Camp David in 1977. Carter's efforts to conduct joint sessions failed because Begin and Sadat could not stand each other. As Carter put it, Sadat and Begin had "no compatibility at all" and therefore he met with them separately and in those separate meetings created a relationship with each one of them that the parties could not establish together.⁴

In the world of commercial and other types of mediation in the United States and elsewhere, mediators often use private caucus sessions, in which the mediator shuttles between or among the parties in conflict, using these separate meetings to discuss the conflict and advance the negotiation.⁵ Eric Galton, one of the most experienced mediators in the United States, handles a wide range of commercial and personal injury cases and has concluded that "the separate caucus is the essence of mediation."⁶ Scholar and mediator Prof. Dwight Golann agrees; in his book *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS*, Golann describes private caucuses as the distinctive aspect of mediation and the setting in which the most important work is done.⁷

Caucusing is an established element in the teaching and practice of mediation. Virtually all mediation practice manuals discuss the value of caucuses in appropriate circumstances.⁸ The ethical codes regulating the practice of mediation also include caucusing as a routine feature of mediation practice and address the question of the parties' expectations with regard to confidentiality.⁹ Of course, the ubiquity of caucusing as a feature of mediation practice does

⁴ Carter describes this mediation in *KEEPING FAITH: MEMOIRS OF A PRESIDENT* (1982).

⁵ This article does not address such practical considerations as determining whether/when a caucus would be useful, how long caucus sessions should last, and appropriate ground rules concerning confidentiality in caucuses, since these are covered in a variety of practice manuals. These manuals also address the important question of ground rules regarding confidentiality – namely, whether the mediator is to keep confidential from the other parties the substance of these separate discussions. Sound practice requires the mediator to discuss this issue with the parties before they embark on substantive discussions in a caucus session.

⁶ Eric Galton, *REPRESENTING CLIENTS IN MEDIATION* 25 (1995).

⁷ Dwight Golann, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 68 (1996).

⁸ See, e.g., Jay Folberg and Anne L. Milne, *DIVORCE MEDIATION: THEORY AND PRACTICE* 335 (1988) ("Separate caucusing is a powerful technique for breaking an impasse and reaching agreement."); Christopher W. Moore, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 319 (1996) (discussing the use of caucuses); Dwight Golann, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 68-72 (1996) (same).

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

not by itself establish the value or propriety of caucusing, but it does suggest that both mediation practitioners and mediation clients have found caucusing to be useful.

Moreover, although there is little research on this question, there is some empirical evidence supporting the utility of private caucusing. In a study in the Netherlands involving 540 employment mediations, researchers found that when mediators used pre-mediation caucuses, the cases “were much more likely to settle.”¹⁰ This effect was pronounced when caucuses focused on saving face and building trust but not when that caucus focused on substantive issues.

Throughout the world, in a wide variety of settings, mediators use caucus sessions to resolve conflict. In Turkey, tribal mediators engage in shuttle diplomacy,¹¹ as do tribal mediators in – of all places – the Caucasus.¹² In Sri Lanka, Quaker mediators used shuttle diplomacy to quell violence in the civil war there.¹³

Despite the widespread use of caucuses in the mediation process, however, the practice has become controversial as some mediators have begun to advocate for a no-caucus model of mediation in which the mediator never meets with the parties separately but instead uses only joint sessions, seeking to help the parties reach a deeper level of understanding of the conflict, the other parties’ interests, and their own interests.

During the last ten years, the no-caucus model of mediation and the more common model in which shuttle diplomacy is used extensively have each attracted impassioned adherents but until recently there has been little discussion of the theory on which these divergent practices are based. This changed with the publication of Gary Friedman and Jack Himmelstein’s pioneering book *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2008), in which the authors explain the rationale for their no-caucus model of mediation. Friedman and Himmelstein argue that mediation can be much more than just a way to resolve a conflict. By working together to resolve their conflict in each other’s presence, the parties can use the mediation process to enhance their understanding, and thus their empowerment, regarding the conflict.

Friedman and Himmelstein are not alone in advocating for greater use of joint sessions. For example, New Zealand mediator Geoff Sharp has expressed concern about the growing number of mediators who argue that “a purely caucus model saves time and is what the market now requires.”¹⁴ Sharp suggests that one major reason why commercial mediation has moved decisively in the direction of more caucusing is fear – “fear by lawyers, parties and even

¹⁰ Roderick Swaab, *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (paper presented at the 22nd Annual International Association of Conflict Management Conference, June 15-18, 2009) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1493514), at 28.

¹¹ See Phillip Shishkin, *Angry Neighbors? In Turkey, People Call on Mr. Sanli*, WALL ST. J. (July 16, 2007) at A1.

¹² <http://www.socsci.uci.edu/~cpb/istudies/abkhazia/tradition.html>.

¹³ See Thomas Pricen, *Joseph Elder: Quiet Peacemaking in a Civil War*, in Deborah Kolb, ed. *WHEN TALK WORKS: PROFILES OF MEDIATORS* (1997)

¹⁴ Geoff Sharpe, *In Praise of Joint Sessions* (paper presented at 1st Asian Mediation Association Conference, June 4-5, 2009) (available at <http://geoffsharp.atomicrobot.co.nz/wp-content/uploads/2010/03/IN-PRAISE-OF-JOINT-SESSIONS.pdf>), at 1.

mediators . . . of the uncertainty and lack of control that comes with people in dispute being in the same room at the same time.”¹⁵

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

Overview

Part I explores the broad landscape of mediation, identifying those forms of practice in which caucusing is used extensively, as well as some forms in which it is hardly used at all, and examining the reasons for these differences.

Part II considers two economic rationales for mediation caucusing: first, avoiding “adverse selection,” a phenomenon in which parties who have overlapping ranges of settlement authority nevertheless fail to make an agreement because of hidden information about their positions and interests, and second, overcoming the “prisoner’s dilemma,” a phenomenon in which bargainers fail to cooperate because they fear exploitation or defection by the other party.

Part III examines barriers to settlement – such as cognitive barriers (e.g., reactive devaluation and cognitive dissonance), communication problems, and emotional obstacles – and discusses the ways in which caucusing helps the mediator and the parties overcome those barriers.

Part IV focuses on human relationships in the mediation process and how those relationships – particularly the relationships that the mediator and the parties forge during caucus sessions – can help to bridge settlement gaps. Part IV argues that these relationships can also, in the caucus sessions, foster a deeper exploration of the meaning that the conflict has for the parties and thus help them achieve more than simply settlement.

Part V discusses the Friedman-Himmelstein critique of caucusing and considers whether the primary disadvantages of caucusing – empowering the mediator instead of the parties and the risk of manipulation by the mediator – are aspects of the mediation process that the market has chosen, or is at least willing to accept, because caucusing makes mediation more efficient or effective.

Part VI describes some variations on the practice of caucusing, such as meetings involving only the parties’ representatives and the mediator, or only the parties and the mediator, and the reasons for using such variations. Part VI also discusses the value of caucusing even in those cases where the parties seek to heal or enhance an existing relationship, and the converse – namely, the value of joint sessions even when (as in most tort cases, for example) the parties never had a relationship in the past and will probably not have one in the future.

The Conclusion states the fundamental point of this article – namely, that any form of mediation in which caucusing is either prohibited or required robs the process of flexibility and vital tools for understanding, empowerment, and the resolution of conflict, and that an eclectic model should, in most cases, continue to be the predominant form of mediation practice.

¹⁵ *Id.* At 4-5.

I. Surveying the Landscape of Mediation

Mediation has been described as similar to jazz¹⁶ – it requires improvisation and group effort, and with so many varieties of practice, the boundaries of the form are hard to define. Thus, generalizations about mediation risk oversimplification. Even so, certain patterns can be discerned.

A. *Commercial and Family Mediation*

In a survey of commercial and family mediators in the United States, attorney Roberta Horton found that the majority of commercial mediators make extensive use of caucusing, while family mediators (whose predominant practice is divorce mediation) seldom caucus.¹⁷ She found that some family mediators do not use caucuses at all, and “among family mediators who do caucus, . . . 58% reported that they spend 30% or less of their time caucusing. In stark contrast, 88% of caucusing commercial mediators reported spending more than 50% of their time caucusing.”¹⁸

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

Nevertheless, by and large, commercial mediations, as practiced in the United States, involve extensive caucusing, while divorce mediations are more likely to involve joint meetings. Why the difference? Initially, one might think that the subject matter of the dispute influences the form of mediation. Experience suggests a more likely hypothesis – namely, that joint sessions are used more often where the parties have had a relationship of some kind, and will likely have a relationship of some kind in the future.

For divorcing parties with children, joint sessions provide the most effective method of transforming their soured relationship to a successful co-parenting arrangement. Likewise, in-house conflicts involving employees or managers in a company, or involving companies tied to each other contractually (for example, contractors in an ongoing construction project), may find joint sessions essential to repairing their relationships.

Caucusing may be the preferred mode for the parties or counsel in a personal injury case (such as a car accident) where the parties never had a relationship and will probably have no relationship in the future. In employment discrimination cases, where a relationship has been severed, the parties often opt for caucusing because the accusations each side is likely to hurl at the other (for example, the employee alleging bigotry, and the employer alleging incompetence) will only add fuel to fire of conflict.

The discussion thus far suggests a bi-modal pattern of behavior – i.e., caucusing, or not. However, even though commercial mediation (with extensive caucusing) and family mediation (with substantially less use of caucusing) define two poles of practice, mediators have created numerous variations and hybrids.

For example, in multi-party environmental and public policy mediations, mediators typically meet separately with parties during an initial assessment stage of the mediation. This

¹⁶ See Howard Belman, *Improvisation, Mediation, and All that Jazz*, 22 *NEG. J.* 325 (2006).

¹⁷ Roberta Horton, *Noisy Disclosures in Caucusing: Practical and Ethical Issues* (unpublished manuscript, May 15, 2009).

¹⁸ *Id.* At 13.

stage may last for weeks or months, during which time the mediators are gathering data and insight about the conflict, and forming relationships with the parties. Then, once the joint sessions of the mediation begin, the mediators often consult separately with each of the parties between sessions. And the majority of mediators, according to Horton's study, use a mix of styles.

B. *Shuttle Diplomacy*

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

In some conflicts, shuttle diplomacy is the *only* option. Leaders at war are often unwilling to meet face-to-face, or even to formally acknowledge each other. In the case of Kissinger's Middle East shuttle diplomacy, the Arab nations were unwilling to recognize the legitimacy of Israel as a state, much less to meet with its leaders. This may not be an optimal starting point for a negotiation, but meeting separately with the parties when there is no other option can help resolve urgent problems – such as violence – and lay the groundwork for further negotiations.

In the Camp David meetings in 1977, described briefly above, tensions were so high that for the last ten days of the 13-day conference, Begin and Sadat "never spoke to one another, although their cottages were only about a hundred yards apart." After that difficult meeting, Carter decided to perform shuttle diplomacy, going back and forth between meetings with the two leaders, drafting and revising proposals.

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

The separate meetings also proved to be important strategically. By meeting with the parties separately before a joint meeting in which Sadat was to present an extremely one-sided and harsh proposal, Carter was able to warn Begin of what was to come and assure him that it was merely an opening gambit, thus modulating the emotional impact of a proposal that might otherwise have infuriated Begin and caused a major setback. Additionally, Carter found that the different negotiating styles of the two parties were fundamentally incompatible; while Sadat preferred to articulate a few key points on which he could not budge and otherwise give Carter a

free hand, the Israelis were intensely focused on semantics and quibbled over every word. By meeting with the Egyptians and the Israelis separately, Carter was able to make a few revisions with Sadat and then spend as much time as needed poring over the thesaurus with the Israelis, rather than getting bogged down with these details in joint sessions.

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

The literature of international diplomacy provides numerous other examples of mediators making extensive use of caucuses, such as George Mitchell's proximity talks in Northern Ireland and Richard Holbrooke's shuttles in the Bosnia and the Dayton Accords. Some forms of caucusing can play an important role even in mediations where the talks are mainly direct. Dennis Ross notes the importance of "back channels" in a mediation: the ability for parties to speak confidentially in private with the mediator. In such meetings, the mediator and the party can explore possibilities and attitudes, with the assurance that none of what is said will be repeated or represents a binding commitment.

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

Moreover, the use of caucuses to resolve international conflict shows that, even when the parties are likely to have ongoing relationships (for example, by virtue of their common borders), separate meetings in a mediation may be needed – and indeed may be the only workable methods of achieving a resolution.

C. *Ho'oponopono*

It is also worth contrasting mediations of the kind described above with a traditional form of Hawaiian mediation called *Ho'oponopono*, in which the parties stay together for the entire mediation. A *Ho'oponopono* is convened by a community member of high status, who, after an opening prayer, directs the discussion regarding the problem or conflict to be addressed. Periods of silence "promote self-reflection and cool tempers."¹⁹ The goal of *Ho'oponopono* is to restore family and community harmony – an important priority for an island (i.e., no-exit) society. The process includes a confession of responsibility by those involved in the conflict and expressions of mutual forgiveness just before a closing prayer and a shared meal. With repair of relationships as the objective, caucuses have no place in this process.

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The decision to use, or not use, shuttle diplomacy turns on a complex assessment of the emotional tenor of the conflict, the goals of the parties, their intentions and skills, the culture and expectations of the disputants, and, when there are multiple players on each side, the internal

¹⁹ James Wall and R.Callister, *Ho'oponopono: Some Lessons from Hawaiian Mediation*. 11 NEG. J. 45-54 (1995).

dynamics within each group – whether those players are members of street gang in Chicago or government officials in countries on the brink of war. In each case, the choice of format for discussion needs to be tailored to the circumstances of the conflict.

II. Economic Rationales for Mediation Caucusing

A. *Adverse Selection.*

Jennifer Gerarda Brown and Ian Ayres use economic theory to make their case for caucusing in their article *Economic Rationales for Mediation*.²⁰ They argue that sequential caucusing is the *only* way unique to mediation that value can be added to the negotiation. Using economic models and game theory, they show how a mediator selectively transmitting information gleaned in private meetings with each party creates more value in settlement negotiations than can be achieved with other approaches, with or without a mediator.

The specific problem that Brown and Ayres believe caucusing is best equipped to address is “adverse selection.” Adverse selection is usually a product of informational asymmetry and can result in contracts advantaging the party keeping hidden information – for example, an unhealthy person buying life insurance without disclosing her health status. In negotiations, informational asymmetries can lead to sub-optimal agreements.

Adverse selection also occurs when the lack of information is symmetrical. The classic example of this problem is the conflict of two children over an orange, in which the children agree to cut the orange in half, but each child could have had the functional equivalent of a whole orange, because one wanted the pulp for juice and the other wanted the rind for a cake. Absent communication about underlying interests (i.e., what each wants to do with the orange) as opposed to positions (“I want the whole orange”), a sub-optimal deal was made.²¹

The adverse selection problem common to both symmetrical and asymmetrical information gaps is that the parties have a “zone of possible agreement” but do not know that they do. One might ask: why wouldn’t parties in a conflict simply disclose to each other their underlying interests? But negotiation theory and practice show that parties often hide this information because of fear that their candor will be exploited if the other party is not willing to be equally transparent about underlying interests.

Mediators can overcome adverse selection by sharing what they learn in caucus sessions with the other party. However, the problem with this strategy is easy to see. If a party knows that the mediator is going to share what they learn with the other party, why would they share private information that could disadvantage them? On the other hand, if a mediator keeps what she hears in caucus completely confidential, she cannot use that information to improve the outcome of the mediation. The solution to this tension is a compromise strategy in which the mediator commits to giving “noisy” or incomplete information to the other party.

The way this works out in the economic models is complex and technical, but the principles at work are simple enough. If parties know that their information is not going to be directly relayed to the other side, they will be more likely to be truthful with the mediator; meanwhile, even partial information is beneficial for the other side in moving towards the best possible agreement. While the idea of conveying only partial information may seem strange or

²⁰ 80 VA. L. REV. 323 (1994).

²¹ This dilemma and its solution are described in Roger Fisher, William Ury and Bruce Patton, GETTING TO YES 56-57 (2nd ed. 1991).

even unethical, the authors stress that transparency is an important factor. For this strategy to work, both parties must know how the mediator plans to use the information gained in caucus. In practice, mediators use “noisy communication” when they fail to disclose explicitly anything that they have committed to keeping confidential while at the same time using body language, tone of voice, and other inexplicit methods of communication to provide signals that guide the parties toward productive negotiations.²²

B. *The Prisoner’s Dilemma*

Even if a mediator does not use the “noisy communication” technique for communicating about possible exchanges, the caucus model of mediation can overcome the problem of exploitation by enabling the mediator to become a broker and, in effect, a “bonding agent” for the deal.

In order to understand this role for the mediator, consider the problem known in game theory as the “prisoner’s dilemma.”²³ The prisoner’s dilemma concept has been used to describe why two people (or companies or other entities) often fail to cooperate even when it is in their best interest to do so. Although originally described and discussed by researchers Merrill Flood and Melvin Dresher at the RAND Corporation and pursued for possible applications to global nuclear strategy, the “game” was first given the name “Prisoner’s Dilemma,” and the story first told in the context of police interrogation, by mathematician Albert W. Tucker, who wanted to make the concept more accessible.²⁴ The Stanford Encyclopedia of Philosophy describes the dilemma as follows:

Tanya and Cinque have been arrested for robbing the Hibernia Savings Bank and placed in separate isolation cells. Both care much more about their personal freedom than about the welfare of their accomplice. A clever prosecutor makes the following offer to each. “You may choose to confess or remain silent. If you confess and your accomplice remains silent, I will drop all charges against you and use your testimony to ensure that your accomplice does serious time. Likewise, if your accomplice confesses while you remain silent, they [sic] will go free while you do the time. If you both confess, I get two convictions, but I’ll see to it that you both get early parole. If you both remain silent, I’ll have to settle for token sentences on firearms possession charges. If you wish to confess, you must leave a note with the jailer before my return tomorrow morning.”²⁵

In this model, the prisoners are stymied by their inability to communicate with each other. Thus, the only sure way to avoid doing “serious time” is to confess, and thus the prosecutor is likely to get two robbery convictions. Unless both parties can credibly commit to cooperation, there is a

²² In the study by Roberta Horton cited above, she found that “Most family and commercial mediators (71.4% and 80.4%, respectively) do employ the noisy disclosure method at some time in their practice, but among those who do, commercial mediators use the method more than 1.7 times as often as family mediators do: the method is used in 29% of all family caucuses but in 49% of commercial caucuses.” Roberta Horton, *Noisy Disclosures in Caucusing: Practical and Ethical Issues* (unpublished manuscript, May 15, 2009), at 13.

²³ The following discussion of the prisoner’s dilemma is adapted from David Hoffman and Dawn Ash, *Building Bridges to Resolve Conflict and Overcome the “Prisoner’s Dilemma”*: The Vital Role of Professional Relationships in the Collaborative Law Process, (forthcoming, *JOURNAL OF DISPUTE RESOLUTION*, Fall 2010).

²⁴ *Id.*

²⁵ *Id.*

powerful incentive to defect, because by defecting, one will always do at least as well as the other party. Thus, defection often becomes the default strategy.

Negotiations sometimes create a prisoner's dilemma for the parties as they try to decide whether their cooperation will be reciprocated or exploited. When a mediator enters the negotiation, she has the ability – through the use of caucuses – to secure, on a confidential basis, a commitment from Party A to cooperate on an issue if (but only if) the mediator can secure a reciprocal commitment from Party B. Thus, the mediator will communicate to the parties their willingness to cooperate on that issue only when each party has privately made such a commitment.²⁶ The parties' ability to trust the mediator thus plays a crucial role in overcoming the prisoner's dilemma.

Both the Brown and Ayres' analysis and the prisoner's dilemma heuristic have limits – like most economic models, they are highly simplified and contain many assumptions, one of which is the commonly-used assumption of the parties being fully rational actors. Another limit of these approaches is that they focus solely on *economic* rationales for mediation. While they support caucusing for its ability to add economic value to mediation, if the parties are more concerned about other aspects of the mediation, they might reach a different conclusion about the value of caucusing for their case.²⁷

III. Caucuses Can Overcome Barriers to Settlement and Enhance the Mediation Process

A. *Barriers to Settlement*

The leading texts and teachers of mediation for the most part agree that caucuses promote settlement because they enable the parties and the mediator to overcome a variety of practical problems that would be difficult, if not impossible, to solve in joint sessions. This section considers each of these problems.

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

2. *Communication barriers.* In some mediations, particularly high-conflict cases, one or more of the parties communicates so abrasively that the other party cannot stand being in the same room. Accusations, recriminations, condescension, personal attacks, bickering, and incessant interruption are common in such cases. In one recent divorce mediation, the husband was talking calmly about how certain business interests should be

²⁶ The process described here is similar to what negotiators sometimes refer to as a “mediator’s proposal,” which is discussed below in Section III.

²⁷ It is worth noting, however, that the mediator-as-broker model can be used to facilitate exchanges of non-monetary exchanges, such as mutual apologies or commitments to restore a broken relationship, under circumstances where each party is reluctant to explore such an exchange in joint sessions of the mediation.

valued, but the wife could no longer tolerate the sound of his voice; she squirmed in her chair, a pained look swept over her face, and it became clear that she was unable to hear what he was saying. Even the most skilled mediators sometimes throw up their hands when trying to overcome such obstacles to communication. Meeting separately with the mediator, at least for a portion of the time, gives the mediator an opportunity to translate and, if necessary, reframe the messages from the other side – messages that are sometimes easier to hear from the mediator than from the other party.

3. *Emotional barriers.* In the mediation of a business partnership break-up, the partners had been romantically involved with each other. Partner A showed up at the mediation with his new girlfriend. Partner B told the mediator that, even if the new girlfriend left, Partner B could not stand being in the same room with him. The mediation was successful – all of it done by shuttle diplomacy. Sometimes the course of bargaining arouses intense emotion – especially when one party feels that the other party is not bargaining in good faith. Psychologist Daniel Shapiro recommends the use of caucuses – particularly in a pre-mediation setting – as a means of identifying and addressing the emotions bubbling beneath the surface of conflict.²⁸ Neuroscientists have identified hormonal changes when people feel emotional flooded as adrenaline production rises and we experience a “fight or flight” reaction. As mediator Paula James has written, “if your anger makes it impossible to think straight, caucusing may give you an opportunity to calm down.”²⁹ Caucuses also create a space for safe venting of intense emotion in a setting where the intensity will not poison the atmosphere of the joint session.

4. *Obstacles to brainstorming and option generating.* When the parties are stuck, a brainstorming session may be needed. Brainstorming in a joint session, however, may inhibit creativity, because no matter how skillfully the mediator frames the brainstorming exercise, mistrust often infects the process. The parties may fear that advancing an idea could reveal their openness to solutions that they wish to keep private. Some mediators encourage brainstorming first in caucus sessions, and then in joint session after the initial ideas have been vetted in a separate setting that feels safer.

5. *Unrealistic expectations.* Negotiation theory and practice teach that, going into a mediation, the parties should consider their BATNA (best alternative to a negotiated agreement). In many mediations, assessing a party’s BATNA means predicting what will happen in court if the dispute is not settled. The parties often have overly optimistic assessments of their BATNAs. The human mind is prone to dozens of cognitive miscalibrations: self-serving bias, hindsight bias, fundamental attribution error, overconfidence, and endowment effects are only the tip of the iceberg. Perhaps the most common bias is cognitive dissonance, which interferes with our ability to take in data that is inconsistent with deeply held beliefs. Mediators can add value by gently testing assumptions through questions about the inferences that led each party to their conclusions about their respective BATNA’s. In joint sessions, each party tends to posture about the party’s BATNA. In caucus sessions, confidentiality begets a higher degree of candor about each side’s BATNA. Moreover, candor can be a two-way street. As Deborah Kolb has commented, some mediators use caucuses for “a little reality testing,” in order to say something direct without appearing to take sides.³⁰

²⁸ Daniel Shapiro, *Preempting Disaster: Pre-Mediation Strategies for Dealing with Strong Emotion*, in Margaret Herrman, ed. *THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH AND PRACTICE* 316 (2006).

²⁹ Paula James, *THE DIVORCE MEDIATION HANDBOOK: EVERYTHING YOU NEED TO KNOW* 96 (1997).

³⁰ Deborah Kolb, *WHEN TALK WORKS: PROFILES OF MEDIATORS* 218 (1994).

Indeed, it has become common for counsel to seek mediation for their cases with the explicit goal of seeking reality testing by the mediator of the parties' respective arguments.

6. *Information barriers.* In cases where the parties are headed for trial if the mediation fails to resolve the matter, the mediator is sometimes told, in a caucus session with one of the parties, that the party has information that the other side does not know about. For example, in a personal injury case, the defense might have a secret video of the plaintiff raking leaves when he is supposedly incapacitated. Or the plaintiff may tell the mediator that he has incriminating evidence about the defense that the defense counsel does not know about. An exchange of such information might increase the chances of settlement. However, the mediator will never find out about such information unless she meets separately with the parties. While the parties may be initially reluctant to share this information with the other side, mediators often can get permission to share it if there seems to be a good chance that the information would close the existing settlement gap.

7. *Need for negotiation coaching.* Disparities in negotiating skill and mediation experience can create an unlevel playing field. While reasonable minds may differ on whether, and to what extent, a mediator should try to level the playing field, it is not uncommon for mediators to engage in some form of negotiation coaching. This may involve such strategic considerations as exploring the party's interests, or helping the party generate options, or considering how a deal might be structured. Negotiating coaching may also involve tactics, such as helping the party decide how to structure offers and counter-offers so as to achieve a trajectory of proposals that leads to settlement. Coaching of this kind is sometimes essential with inexperienced bargainers, such as those who tell the mediator that they do not want to haggle and so their initial offer will be their "bottom line" – an approach that seldom works. Moreover, coaching of this kind is virtually impossible to do with any specificity in joint sessions, in part because it could give the appearance of partiality, and in part because candor is rare when the parties mistrust each other.

8. *Internal conflicts.* Mediators often find that the parties need internal mediation between or among members of their own team. A party and his/her counsel may have differing assessments of the value of the case. Or, there may be an uneasy alliance of a group of defendants or plaintiffs. The parties typically want to project a united front to enhance their bargaining position but they may welcome the mediator's help in achieving unity. Such sidebar mediations require separate caucus sessions. In addition, the parties may want to involve the mediator in communications with principals who are not present at the mediation, even if there is no internal conflict. For example, in cases where an insurer sends its lawyer but not its adjuster to the mediation, the mediator may be asked to participate in a conference call – during a caucus with the defense – in which the adjuster can hear, in confidence, the perspectives of the mediator, defendant and defense counsel.

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

the parties structure trades that maximize everyone's interests. It is often the case, however, that the most successful way to bring the parties to closure and foster a stable denouement is for the final proposal, accepted by both sides, to come from the mediator. The ground rules for such a mediator's proposal are simple: the mediator makes the same proposal to each party, and each responds in confidence only to the mediator either a "yes" or a "no." The mediator then reports to the parties either a settlement (because each side said "yes") or no settlement (because one or more parties said "no." Each side can take the risk of saying "yes" without the other party or parties knowing, unless they too said "yes." A procedure of this kind cannot be easily engineered without caucusing. There are two reasons why the "mediator's proposal" procedure often succeeds in bringing about a settlement. First, because of the phenomenon of "reactive devaluation" the parties are less likely to dismiss or discount a proposal from the mediator, as compared to a proposal from an opposing party.³¹ Second, because of the caucus format, the mediator is able to discuss the proposal confidentially with the parties, and those discussions often yield valuable data about the extent of the parties' flexibility, and, if the mediator's proposal is not accepted by all parties, whether there is a zone of possible agreement. Even when a mediator's proposal is not accepted by all, these separate conversations often lead the way to resolution.

B. *Enhancing the Mediation Process*

In addition to overcoming specific barriers to settlement, caucuses can enhance the mediation process by promoting engagement on such delicate topics as apology and forgiveness, and also enabling the mediator to obtain candid feedback from the parties about the mediation.

1. *Apology and forgiveness.* Mediation creates a unique opportunity for apologies because of the confidentiality of the process. Moreover, an apology presented spontaneously and unrehearsed in a joint session can dramatically shift the negotiation in the direction of settlement. The literature of mediation is replete with cases in which obtaining an apology satisfied all or nearly all of a party's objectives in the case. However, the parties often need to explore with the mediator whether an apology would be meaningful or would likely be rejected. Often, the parties want to discuss with the mediator and their counsel the question of

³¹ For a description of reactive devaluation, see Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 29 (Robert Mnookin, et al. eds., 1995): "Initial evidence for the reactive devaluation barrier was provided in a 1986 sidewalk survey of opinions regarding possible arms reductions by the U.S. and the U.S.S.R. (Stillinger et al. 1991). Respondents were asked to evaluate the terms of a simple but sweeping nuclear disarmament proposal—one calling for an immediate 50 percent reduction of long-range strategic weapons, to be followed over the next decade and a half by further reduction in both strategic and short-range tactical weapons until, very early in the next century, all such weapons would have disappeared from the two nations' arsenals. As a matter of history, this proposal had actually been made slightly earlier, with little fanfare or impact, by the Soviet leader Gorbachev. In the Stillinger et al. survey, however, the proposal's putative source was *manipulated*—that is, depending on experimental condition, it was ascribed by the survey instrument either to the Soviet leader, to President Reagan, or to a group of unknown strategy analysts—and only the responses of subjects who claimed to be hearing of the proposal for the first time were included in subsequent analyses. The results of this survey showed, as predicted, that the proposal's putative authorship determined its attractiveness. When the proposal was attributed to the U.S. leader, 90 percent of respondents thought it either favorable to the U.S. or evenhanded; and when it was attributed to the (presumably neutral) third party, 80 percent thought it either favorable to the U.S. or evenhanded; but when the same proposal was attributed to the Soviet leader, only 44 percent of respondents expressed a similarly positive reaction."

whether an apology would be privileged and therefore inadmissible if the mediation failed and the case went to trial. Caucusing also creates an opportunity to discuss with the parties whether they wish to meet with each other for face-to-face discussions – sometimes without counsel and sometimes without the mediator – to have the type of heart-to-heart talk in which apologies and forgiveness can be exchanged.

2. *Feedback from the parties.* Mediation caucuses create an opportunity to get feedback from the parties, in real time, as to how the mediation is going. Of course, a mediator could ask the parties in a joint session, but one runs the risk of missing vital information. In one mediation between a dean and the headmaster of a private school, the parties were seeking to resolve tensions arising from an incident at school in which each felt mistreated by the other. Spontaneously, without coaching from the mediator, the headmaster apologized to the dean for what he had done. The mediator looked at the dean and paused; she sensed that it was her turn to apologize. “Is there anything you would like to say in response?” the mediator asked her. She quickly gave what sounded like a heart-felt apology. The two parties hugged at the end of the mediation session, and the mediator felt a profound sense of accomplishment – until he checked in with each of the parties separately. The headmaster was very pleased with the mediation session, but the dean was deeply upset. She has felt coerced by the mediator’s question to her – her heart-felt apology was a sham. The mediator learned a lesson from this experience about how direct or indirect to be when the delicate subject of apologies is raised. More importantly, the feedback from the dean gave the mediator crucial data about how vulnerable she felt in the mediation and how the mediator could be more sensitive to that vulnerability in subsequent sessions.

IV. Caucuses as a Tool for Reaching the Deeper Meaning of Conflict for the Parties

Proponents of “transformative mediation,” such as Robert A. Baruch Bush and Joseph Folger, point to the opportunity for empowerment and recognition as the hallmark of mediation.³² The proponents of “understanding based” mediation, such as Gary Friedman and Jack Himmelstein, point to the opportunity for clarity about the conflict and parties’ interests as the hallmark of a no-caucus form of mediation. The purpose of this section of the article is to identify the ways in which mediation caucusing can help the parties achieve empowerment, recognition, and clarity, as well as a deeper sense of what provides their lives with meaning and value. Before this discussion, however, three stories involving one of the authors (David Hoffman) will illustrate the theme.

A. *Whistleblower*

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

³² See THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).

Despite these conclusions by people at the highest levels within the company, Sam continued to complain. He was convinced that he was right, they were wrong, and that the company could get in trouble if it continued to do business as it was then doing. The seemingly unending stream of memos continued, and so the company put Sam on notice that if he did not stop, he would be fired. Sam strenuously objected, sent another rounds of emails, and was promptly terminated.

In the mediation both sides were represented by counsel. It quickly became clear that Sam was not going to be rehired, and therefore the primary issue was what amount the company would pay to settle the claim. The gap between Sam's proposed settlement and company's was substantial. In separate caucus sessions the parties appeared to be rather dug in. In the meeting with Sam and his counsel, I looked over Sam's resume and noticed 20 years of military service. I asked him about it. He had served in Vietnam. "Were you in combat?" I asked. "Oh yeah, our unit saw a lot of combat." He described his service in the Army with intensity. "The thing I liked about the Army," he said, "is that everybody turns square corners. You can count on your buddies to watch your back. You know what the rules are, and people obey them, because your life depends on it."

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

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

My impression of this case is that Sam came away with insight that he found in the caucus session, when his strongly held ideas were considered from several different angles – including a new perspective that he found when he compared his private sector employment to his military service. He left the mediation with a settlement agreement under which he received a payment of a portion of his legal fees and a portion of back wages. More importantly, however, he left with greater insight about what went wrong when his expectations about the company collided with the norms that 20 years of military service had instilled in him.

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

Mediations do not always result in such satisfying settlements. Sam's case has stuck with me over the years, because I don't think he and I could have done the personal exploration of his military service in a joint-session setting. Sam and I, with his lawyer participating at times, got up close and personal in a way that the glare of joint sessions makes far more challenging. If commercial and employment mediations took place over the course of several days, or if the parties were collectively comfortable with deeply personal discussions, perhaps caucuses would not be needed in order to have the conversation that led to Sam's settlement. But the legal marketplace typically allocates a day for cases like Sam's, and achieving comfort with personal disclosures in joint sessions rarely happens in such a limited span of time.

B. *CEO and COO*

By way of contrast, two business executives – the CEO and the COO of a consulting firm – came for mediation in which almost all of the work was done in joint session. The goal of the mediation was to repair a badly fractured professional relationship. A co-mediator, clinical psychologist Dr. Richard Wolman, helped assess the source of the executives' difficulties. The CEO, who founded the company, had carved out a parental role for himself in the company. But despite advancing age, the CEO was not ready to transition responsibility to the much younger COO, who embraced the role of rebellious son.

Much of the mediation work with these two executives involved coaching them on basic communications skills and achieving greater transparency with each other about their respective goals and interests. Even in this case, with its intense focus on the parties' relationship, brief caucuses were needed in order to find out whether the process was working. And in those private caucuses, we learned that each of them was finding it difficult to believe that the other would change. With permission from each of them, we brought that concern to the table, and discussed it fruitfully – an essential subject that might not have been aired if the parties had not had a private space in which to discuss it initially.

After two all-day sessions, with just a few breaks for brief private caucuses, the case was resolved. It became apparent to both mediators, however, that the private caucuses provided each of the parties with some welcome “breathing room” – a space in which they could each articulate more candidly, and without the fear that their words would be quoted back to them by the other party, their deepest fears, concerns, and hopes.

C. *Legal Malpractice*

In the Middlesex Multi-Door Courthouse, I was assigned to mediate a dispute between an elderly lawyer (let's call him Howard) and his clients. Howard had sold stock, traded on the Mexican Stock Exchange, to his clients, believing that the stock was a terrific investment. He had purchased some of the stock himself. When the stock became worthless, his clients sued him for malpractice, negligence, and violation of state and federal securities laws. Howard had not realized that he needed to be a registered securities dealer in order to sell such stock, and was deeply saddened by the lawsuit. He was a lawyer of that generation that deeply believed in service to clients as a calling, not a business. He had not tried in any way to take advantage of the clients, he had not profited from selling stock to them – he simply wanted to include them in what he thought was an extraordinary financial opportunity.

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

In our meeting, Howard's lawyer (much younger than he) sat to one side while I faced Howard directly. Howard told me how painful this process was, in part because his wife did not know about the lawsuit. “It would kill her to find out about this,” he said, and then acknowledged this was hyperbole. “It would definitely upset her very much.” He said that he hoped he could settle the case without having to tell her. Then he looked at me and said, “You don't know me but I have been practicing law for 45 years. I have never been sued by a client. I have never had a complaint filed against me with the Board of Bar Overseers. But life has not been a bed of roses. I was a drinker. I have been a recovering alcoholic for 30 years now. Every day of

those 30 years, I wake up in the morning and fall to my knees, praying to God for the strength not to take another drink.” I glanced at Howard’s lawyer, who was sitting beside him, and I noticed the young man’s eyes rolling slightly. He seemed bored by Howard’s comments and slightly embarrassed that his client was going on at such length about the details of his personal life – details that were (from his standpoint) not legally relevant to the outcome of the lawsuit.

Howard told me more about his wife, his alcoholism, and his small law practice in Cambridge. Suddenly he stood up and with a weary look on his face, held out his hand to me. I was a relatively new mediator at the time, and I had no idea what was going on. I thought the mediation must be over, because he wanted to shake my hand and leave. Not knowing precisely how to respond, I decided that the most appropriate thing would be to stand up and hold out my hand as well. As we shook hands, he said to me, “This mediation thing you’re doing is really terrific. Please tell the other side that I’ll accept their offer and we can settle this.”

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

I have often wondered whether I could have had this same conversation with Howard in a joint session with the other side present. But I am convinced that he would not have been willing to reveal his vulnerability with regard to his wife’s lack of knowledge of the case. Nor would he have been willing to admit his alcoholism – both for personal and professional reasons. Yet both of these revelations – and my willingness to listen to them in a non-judgmental and supportive way – were essential to his openness to settlement.

D. *Relationships*

Mediators and psychotherapists have at least one thing in common: they are in the business of forming relationships with a wide variety of people. Research by psychologist John Norcross confirms that a clinician’s ability to form relationships with a wide variety of clients is a major factor in the success of psychotherapy.³³ Likewise in mediation, relationship skills are essential. Mediators Steve Goldberg and Margaret Shaw found, in a survey of mediators, mediation parties, and counsel, that “an empathic trusting relationship between the mediator and the parties may be the most important factor in creating an environment for settlement.”³⁴

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

Mediators seek to build trust in separate meetings by using initial caucuses to acquire insight about each party’s perspectives, and only later using those sessions to generate options

³³ John Norcross, *Purposes, Processes, and Products of the Task Force on Empirically Supported Therapy Relationships*, 38 *PSYCHOTHERAPY* 345 (2001).

³⁴ Steve Goldberg and Margaret Shaw, *The Secrets of Successful and Unsuccessful Mediators*, 26 *ALTERNATIVES TO HIGH COST LITIG.* 149 (2008).

and test assumptions. Only when the parties feel comfortable with the mediator will they begin to disclose – as in the CEO and COO case – their deepest fears, concerns, and hopes.

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

In many cases, the relationship that the parties have with the mediator is at least as important as their relationship with each other as a factor in resolving the case. This conclusion is contrary to the mental model of mediation widely taught in the United States, in which the mediator's role is considered to be primarily facilitative – with a goal of restoring the *parties'* relationship. However, in many cases, the *parties'* relationship is over, or, as in tort cases, never existed. And even if those cases where repairing the parties' relationship is the central task (as in the "CEO and COO" case described above), a trusting relationship between the mediator and the parties enables the mediator to access vital information that might otherwise be inaccessible.

Not only is the creation of strong relationships between the mediator and the parties useful in achieving settlements because of the mediator's role as a bonding agent, there is inherent value in the empathic relationships that mediators form with the parties. In the "legal malpractice" case described above, empathic listening was emotionally restorative for a party whose self-esteem had been shattered.

One of the most powerful tools in building relationships is positivity. Research in the workplace and with couples establishes that a ratio of approximately 5 to 1 of positive to negative interactions strengthens relationships and a lower ratio weakens them.³⁵ Caucusing provides a protected setting in which the mediator provide validation and positive interactions without fear of the appearance of partiality. Thus caucusing can accelerate the process of forming relationships.

V. Disadvantages of Caucusing

In *Challenging Conflict: Mediation through Understanding*, Friedman and Himmelstein take a strong position against caucusing, which they believe has no place in their understanding-based approach to mediation. Their central argument is that mediation can be much more than just a way to resolve a conflict on the surface level. Their goal is to allow the parties to reach a fuller understanding of themselves, each other, and the conflict – and, using this understanding, to come to a resolution that fulfills both parties' needs, both emotional and practical. The authors feel that the only way to reach this point is to have the parties work together, in each other's presence, to resolve their conflict, and that separate meetings run counter to this goal.

Understanding and emotional connection are particularly important to Friedman and Himmelstein, and they believe that even in cases where emotions run high and it may be extremely difficult for parties to communicate or even be in the same room, caucusing is

³⁵ See David Hoffman and Dawn Ash, *Building Bridges to Resolve Conflict and Overcome the "Prisoner's Dilemma": The Vital Role of Professional Relationships in the Collaborative Law Process*, section III(F) (forthcoming, JOURNAL OF DISPUTE RESOLUTION, Fall 2010)

counterproductive to achieving understanding. In one particularly contentious case discussed in the book, the sister and partner of a man who had passed away were fighting over his will. The mediation brought up painful feelings for both of them due to their anger at each other's behavior during the man's long illness, and they found it nearly impossible to communicate. Nonetheless, with the mediator's help, they were able to express their feelings to each other in a way that helped them understand each other better, and the authors believe that caucusing would have interfered with this:

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

It was on the basis of the emotional understanding built in exchanges like this that the parties were able to reach an agreement that not only resolved the conflict that had brought them to mediation, but helped them reach closure about their loved one's death and the circumstances surrounding it.

One of Friedman and Himmelstein's main objections to caucusing lies in the fact that the mediator ends up with more information than the parties, which puts him or her in a position of power. One of the primary tenets of understanding-based mediation is that the parties are in the best position to resolve their own conflict, and thus, one of its goals is to place primary responsibility for resolving the conflict their hands. Caucusing could get in the way of this goal by turning the mediator into more of a judge or an arbitrator due to her informational advantage, and leading the parties to relinquish control of resolving their conflict to the mediator. There is also a danger of manipulation of the parties by the mediator, or even of the mediators by the parties, and even if there is no manipulation going on, the parties may *feel* manipulated when they don't have all the information. Transparency is central to Friedman and Himmelstein's vision of what makes a fair resolution to a conflict, and they believe transparency is best achieved when the parties "see and hear everything that is going on."

Friedman and Himmelstein's vision of mediation also goes beyond the needs of the parties who are in conflict to a wider view of the treatment of conflict in society. They see part of their role as educational – teaching through their actions in mediation how people can resolve conflicts on their own: "Since almost all our work takes place with the parties together, and because the parties participate actively in that work, the mediation process readily becomes an education in going through conflict, and valuably so." In one case study, the mediator (Friedman) remarks to the parties that his goal as a mediator is to put himself out of business. While caucusing is a service that only a third party could provide, guiding the parties through their conflict together equips them better to resolve future conflicts in their lives without the need for a mediator.

The authors might even dispute that caucusing is the only way to add *economic* value to mediation. In one case study involving two large corporations, the techniques the mediator used to build a working relationship between the parties were so successful, technical teams from both sides were able to work together during the course of the mediation to come up with new ideas for the companies to collaborate on projects. These projects totaled \$200 million over the \$300 million already at stake in the dispute, and further motivated the companies to resolve their

conflict so they could continue to work together on these new ventures. Friedman and Himmelstein believe that the caucus-free approach to mediation was what allowed the parties to repair their relationship to the point where they could add value to the mediation in a completely unexpected way.

Given the many advantages claimed for a no-caucus model, one might wonder why it is not more widely used. One answer might be that Friedman's and Himmelstein's description of the model has not yet reached a wider audience. A more likely explanation, however, is that the disadvantages of caucusing that Friedman and Himmelstein identify – empowering the mediator at the expense of the parties and the potential for manipulation by the mediator – are viewed by the consumers of mediation services as either (1) outweighed by the value of caucusing in overcoming barriers to settlement (such as those discussed in section III of this article), or (2) positive advantages.

In what sense could disempowering the parties be advantageous, especially when the cardinal principals of mediation include self-determination and informed consent? The answer can be found in those cases where conflict is intense and the parties' positions seem to be intractable. In such cases, it is not uncommon for Party A to seek an authoritative figure as the mediator – someone who will command the respect of Party B. Naturally, Party A is not seeking its own disempowerment, but in these circumstances, that is a cost Party A is willing to bear in exchange for addressing Party B's seeming intransigence. Prof. David Matz has discussed this aspect of mediation in his article *Mediator Pressure and Party Autonomy: Are They Consistent With Each Other?* in which he argues that one of the qualities that the parties often seek in mediators is their ability not only to obtain concessions from the other party but also to pressure, as needed, the party seeking mediation.³⁶

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

In the scenario described above, Party A might, or might not, have believed the mediator's assertion about Party B's position. Even if the mediator is believed, however, Party A is likely to assume that Party B is trying to "spin" the mediator. Either way, there is an element of shadow boxing – expected and now customary in many commercial mediations – when the parties are negotiating over distributive shares of what the parties may perceive to be a fixed pie.

Blatant lying by mediators appears to be rare, however, because many of the parties in commercial mediation – or at least their lawyers – are repeat players who are likely to discuss

³⁶ 10 NEG. J. 359, 364 (1994) ("I believe that parties come to mediators to reach an agreement they cannot reach themselves; that one approach we have is to apply pressure to the parties to help them move toward settlement; that we respect parties most clearly when we assume that they expect such pressure, and are capable of accepting it as part of the work; that we must be alert to the possibility of applying too much pressure; and that we must make room for parties to repulse our pressure to be sure they do not find it to be too much.").

the mediator's work. The market can detect blatant lying. More subtle forms of manipulation are more common. In the more subtle version, the mediator meets in caucus session with Party A and, by a combination of inquiry and assertion, communicates skepticism about Party A's view of the case (Party A's BATNA), or perhaps focuses the discussion on the strengths of Party B's case. Then, the mediator meets separately with Party B and has the opposite conversation.

In this scenario, the parties understand that the mediator is likely having very different conversations in each room, and they are usually well prepared to resist this exercise in reality testing. If the mediator has developed a rapport with each side, however, these conversations can be conducted in a non-adversarial manner, with the mediator trying to look at the strengths and weaknesses of each side's case from the vantage point of the party with whom the mediator is caucusing. Such conversations can also explore non-monetary interests and integrative, "expand the pie" solutions – perhaps exploring options that would not be shared in a joint session.

One final point about the market for mediation: for many parties, the efficiency of the process is its most compelling feature. In business, employment, construction, personal injury, insurance, intellectual property, real estate, discrimination, landlord-tenant, product liability, professional malpractice, and other similar cases, the parties seeking mediation typically expect the mediation to take no longer than a day. They are less concerned about empowerment and understanding than they are about (a) determining whether there is a zone of possible agreement, and, if so, (b) reaching a settlement – final and enforceable – within that zone.

Of course, even if the market seeks trusted mediators who "manipulate" the parties in ways that lead them to a settlement, one still might question whether there are safeguards that protect the parties from deception and exploitation. Although the current lack of any meaningful regulation of mediation practice gives this question added urgency, experience to date suggests that mediators are willing to adhere to those ethical principles that require honesty,³⁷ because the market competition puts mediators under the microscope – at least with respect to repeat players – notwithstanding the legally protected confidentiality of the process.

VI. Variations and Hybrids

The argument articulated so clearly and forcefully by Friedman and Himmelstein is persuasive. There is enormous value in their approach. Yet fully embracing their model and eschewing caucuses altogether means foregoing some of the advantages achievable in the more intimate setting of caucus meetings.

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

³⁷ See David Hoffman, *Ten Principles of Mediation Ethics*, 18 *Alternatives* 147 (2000) ("Honesty also means telling the truth when meeting separately with the parties. . . .When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position; she must not abuse the trust the parties place in her even if she believes that bending the truth will further the cause of settlement.").

The choice is not binary, however. One of the most useful formats for a joint session is a meeting of all counsel (in those cases where lawyers are participating) and the mediator. Outside the presence of their clients, the lawyers tend to be more candid and the conversation can proceed more efficiently because the lawyers do not feel the need to impress the clients or, for that matter, the opposing party.

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

Other variations include meetings of just the parties or just the lawyers, with or without the mediator. Often, in complex, multiparty cases, subgroups will form within the mediation – each with the potential of unlocking a piece of the settlement puzzle. And even in the simplest of two-party family cases, resolution may require the inclusion of others; for example in a recent marital mediation, the wife's mother met with the mediator and the husband to iron out *their* differences which had been affecting the marriage.

Mediation is a flexible process with no formal rules of procedure such as those that pertain to trial. The most effective use of mediation involves deployment of that flexibility to match the needs of the case. All assumptions on the part of the mediator regarding the appropriate format should be considered merely working hypotheses, to be tested by experience.

Even the assumption that mediations involving ongoing relationships should be conducted primarily in joint sessions is open to question. For example, in the marital mediation described above, in which the parties were seeking to negotiate terms for remaining married, numerous separate meetings with the parties were necessary because (a) the husband needed coaching on moderating his belligerent tone, and (b) the wife needed a safe place in which to express her ambivalence about staying married to her husband. Joint meetings were more successful as a result of these private sessions.

Likewise, even in cases where there was never a relationship of the parties and will likely never be a relationship (such as an auto accident case), joint sessions provide an even more powerful opportunity for the parties to feel heard and understood than caucus sessions, regardless of how empathic and effective a listener the mediator may be.

Thus, even if one disagrees with the Friedman-Himmelstein critique of caucusing and rejects the no-caucus model, their critique underscores the importance – all too often lost in the market-driven quest for efficiency – of other values that mediation can serve, and the ways in which the parties' interests can be more fully served when we discuss those values with the parties. A valuable lesson for mediators is that the parties should participate fully in the choices about how best to structure the mediation process.

Conclusion

There is no single model of mediation that is right for every mediator or every mediation. One of the defining features of mediation is its improvisational quality. In mediations by President Carter and Tim White, described at the outset of this article, the mediator's initial efforts at joint sessions failed, and a new tack was needed. Any form of mediation in which

caucusing is either prohibited or required robs the process of flexibility and essential tools for empowerment, understanding, and the resolution of conflict.

An eclectic model of mediation, in which the mediator decides in each individual case (in consultation with the parties) has become widely used because it matches the needs of the parties. It is almost always impossible to predict what mix of joint sessions and caucus sessions will best serve the goal of resolution.

This article has attempted to point out the value of caucusing, but not to the exclusion of joint sessions and other arrangements of the parties, mediator, counsel, and other participants. Each format has its place in appropriate circumstances. Moreover, while caucusing has sometimes been viewed as an expedient solely for settlement, caucusing also has the potential to propel the parties and the mediator into deeper realms of meaning, value, and relationship that can help mediation achieve broader goals than simply settlement.