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## THINKING ABOUT FAIRNESS & ACHIEVING BALANCE IN MEDIATION

*Sarah E. Burns\**

Commentators and practitioners have questioned the possibility of achieving social justice through alternative dispute resolution (“ADR”). If fairness, particularly to an underrepresented group, is elusive where the outcome is leveraged by legal rights and decision-making is open to scrutiny, the prospect of fairness without those features seems doubly dim.<sup>1</sup> While increasing sophistication of alternative dispute problem-solving has proven its importance to achieving social justice,<sup>2</sup> the concern in each ADR situation remains that the supposed neutral third party<sup>3</sup> may not be neutral, and that the power dynamics among parties operate to disadvantage the already-disempowered.<sup>4</sup>

The aim of this Article is to help guide mediators’ efforts to achieve real fairness and balance in practice. The thinking offered here is rooted in extensive cognitive research in the public domain, and my more than thirty years of professional practice and training as a teacher, lawyer, discrimination law litigator,<sup>5</sup> and social scien-

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1. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1367-76 (1985) (noting that procedural protections of formal justice tend to suppress bias, whereas informal dispute processes increase the possibility of it operating unfettered).

2. For example, mediation/ADR has been essential to dialogue among a wide range of communities whose members’ diverse interests are significantly affected by land use decisions. See, e.g., James B. Dworkin & G. Logan Jordan, *Midwest Energy Utilities*, in *MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE* 61, 62-63 (J. Walton Blackburn & Willa Marie Bruce eds., 1995).

3. Whether neutrality is a condition to which we can reasonably aspire is doubtful. Other conceptions such as balance, fairness, or even-handedness may more realistically describe what we can reasonably expect of the mediator.

4. See Delgado et al., *supra* note 1, at 1391.

5. As chief counsel in *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991), I applied many of the principles that ground the discussion here. In the early 1980s, I worked with Dr. Susan Tufts Fiske to understand the full range of social science explanations for discrimination; this work culminated in Dr. Fiske’s expert testimony in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and in the *Jacksonville Shipyards* case, explaining to the courts the nature of stereotyping and discrimination as it was evidenced in those cases. *Id.*

tist<sup>6</sup> devoted to answering why we discriminate unfairly and what we can do about it.

Most recently, I have considered these questions in training law students how to mediate employment cases. New York University School of Law has been fortunate to team with New York City's Office of Administrative Trials and Hearings ("OATH"),<sup>7</sup> which established the Center for Mediation Services<sup>8</sup> (the "Center") to mediate employment disputes arising in New York City agencies. City agencies have the option of referring employment disputes to the Center for voluntary mediation.<sup>9</sup> These disputes include disciplinary matters, co-worker conflicts, and claims of discrimination or harassment that have not culminated in the loss of tangible employment benefits.<sup>10</sup> Students in NYU Law School's Mediation Clinic co-mediate with Center mediators.<sup>11</sup>

The strategies proposed in this Article are a work in progress. I first developed the guidelines discussed here to give law students, and other Center mediators, ideas for balanced mediation. Mediating in any urban setting, but most particularly New York City, requires that the mediator have methods to work productively within a wide variety of group differences. This is doubly important when the mediation involves charges of discrimination or harassment, because the mediator needs to understand dynamics of difference and must help the parties channel those dynamics constructively.<sup>12</sup>

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6. My training as a social scientist includes related work at two universities. I completed three years of coursework and research toward a Ph.D. in sociology, with an emphasis in social psychology, at Stanford University before I took a leave to attend law school. Before Stanford, I finished a practitioner's terminal masters degree training in human relations at the University of Oklahoma where I focused on inter-group relations and group dynamics.

7. See City of New York Office of Administrative Trials and Hearings, <http://www.nyc.gov/html/oath/home.html> (last visited Nov. 17, 2007).

8. See City of New York Center for Mediation Services, <http://www.nyc.gov/html/oath/html/mediation.html> (last visited Nov. 17, 2007).

9. See *id.*

10. See *id.*

11. See City of New York Center for Mediation Services, New York University Law School Mediation Clinic, [http://www.nyc.gov/html/oath/html/med\\_clinic.html](http://www.nyc.gov/html/oath/html/med_clinic.html) (last visited Nov. 17, 2007).

12. One may be able to achieve balance consistently without such guidelines when the client base repeatedly presents the same few issues of group difference in the same context. For example, by studying the critiques of inequality specific to the divorce setting, a motivated divorce mediator could become well versed enough regarding symptoms of bias in addressing recurring divorce issues to function fairly without reference to the principles discussed here. Relying on critiques of inequality specific to each setting and each combination of group differences becomes an increasingly

Drawing from research in social psychology, linguistics, and cognition, I outline sources of bias and some strategies that a facilitator might use to manage his or her own bias and that of mediation participants. The discussion concentrates on dynamics related to categorization, attribution, use of metaphor, norming, and framing, which I refer to collectively as “cognitive efficiencies.” As to each of these, the facilitator must first understand how such a process factors in to his or her own thought and communication and then how the same process influences the thought and behavior of mediation participants. Accordingly, Part I discusses strategies to manage cognitive efficiencies in one’s own thought and communication, and proposes a few strategies for addressing similar sources of bias as they might be presented by mediation participants. Part II concerns handling of the emotional dynamics of discrimination.

This Article should be read as a proposal for further thought and inquiry. Any one of the five sources of bias, as well as others not discussed here, could be the basis of intensive research and training. This Article is meant to mark the beginning of such inquiry.

### I. MANAGING COGNITIVE EFFICIENCIES

The approaches outlined in this Section could be characterized as helpful to managing our cognitive efficiencies.<sup>13</sup> This Section describes some key cognitive efficiencies, illustrates how they operate to produce bias in thought processes, and shows how, if not managed thoughtfully, they can result in unfair behavior. The goal is to help the mediator observe and manage his or her own cognition in order to produce a more balanced and fair facilitation. The advice offered would apply to any decision-maker, including judges or teachers, but this Section focuses only on the facilitative role of mediator to simplify the discussion.

As a culture, we value and reward positive knowledge and decisiveness.<sup>14</sup> Positive knowledge refers to the application of substantive content to a problem. Generally, our education is focused on acquiring positive knowledge and related skills. In doing this, we

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ineffective strategy, however, as group membership diversity and issue variety increase.

13. The term “cognitive efficiencies” derives from discussion by Professors Susan Tufts Fiske and Shelley Taylor in which they label us “cognitive misers” to capture the idea that many essential cognitive processes reduce the volume of information we must use to make decisions and take action. See *SUSAN TUFTS FISKE & SHELLEY TAYLOR, SOCIAL COGNITION* 13, 176 n.2 (2d ed. 1991).

14. See generally, e.g., R.G.H. SIU, *THE TAO OF SCIENCE* (1957).

employ a complex set of cognitive efficiencies—mental processes of simplifying, organizing, and processing information.

But positive knowledge is only part of human intelligence. The other, often more difficult intelligence, at which we are seldom formally trained, depends upon skill in managing our cognition, emotion, and interpersonal relations.<sup>15</sup> These skills require us, among other things, to recognize that cognitive efficiencies are but one set of thinking tools that can, if deployed thoughtlessly, impede creativity, understanding, and communication. Essentially, the cognitive management discussed in this Article involves momentarily suspending action in response to input so that we can mitigate tendencies of bias that are built into cognitive efficiencies. Because cognitive researchers have identified patterns inherent to certain cognitive efficiencies we can, to some extent, anticipate and compensate for their normal operation.

The mediator's job is to observe communication processes and to assist the parties in identifying obstacles and making informed choices about how to respond. Facilitation is the helping role that most emphasizes skills of executive management, and most deemphasizes applying positive knowledge to the problem presented. Executive management in this context refers to overseeing and directing the dynamics of a process,<sup>16</sup> which may be internal to the person or external to personal interaction. For example, identifying, planning, and reflecting upon the stages of a project would be executive management; implementing the steps of the project would not. It is easier to concentrate upon acquiring and applying the cognitive management learning when one is *not also* playing the roles of information source, expert, ultimate decision-maker, or actor in charge of implementation. Accordingly, the facilitative

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15. See HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 237-76 (2d ed. 1993) (discussing interpersonal and intrapersonal intelligence); DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 46-55 (1995) (discussing emotional awareness as an essential and commonly under-rated capacity). See generally ELLEN LANGER, *MINDFULNESS* (1989) (discussing managing cognition and its effects in relating to self and others).

16. See, e.g., EDWARD DEBONO, *SIX THINKING HATS* 190-96 (1985) (discussing "blue hat" thinking managing the other thinking styles); HOWARD GARDNER, *INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCE FOR THE 21ST CENTURY* 105-06 (1999) (discussing "executive intelligence"). Cf., e.g., ROBERT LOUIS FLOOD, *RETHINKING THE FIFTH DISCIPLINE: LEARNING WITHIN THE UNKNOWABLE* (2002) (finding that the "fifth discipline" is how an organization learns how to learn); PETER M. SENGE, *THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION* 3-13 (1990) ("fifth discipline" first described).

mediator's role is an excellent context for learning and practicing cognitive management.

This review will cover five general aspects of cognition. The first is categorization—essentially, naming our world. The second is attribution—explaining our world. The third is metaphor—orienting our world. The fourth is normative—prescribing behaviors. The fifth is framing.

Narrative, or story-telling, is also an essential cognitive process that separately organizes our thinking and functions in tandem with each of the other cognitive strategies. It deserves separate attention and, as a fundamental cognitive organizing source, has received an excellent initial examination in other works by mediation practitioners.<sup>17</sup> The stories that we tell ourselves and each other about “how the world is” or “what human nature is” fashion our own lives and the lives of others.<sup>18</sup> To the extent that a mediator's or a party's thinking is based upon one or more stories whereby inequality is justified or necessary, narrative will be a prime source of bias in the mediation process and would need to be addressed for fairness to be achieved.<sup>19</sup> Narrative is only covered in this Article, however, as it relates to the five other cognitive efficiencies. It is discussed on the premise that many dynamics of inequality and unfairness can be addressed by managing cognitive efficiencies without substantively addressing inequality narratives.

Each cognitive efficiency topic is the subject of vast bodies of research and writing. This Article offers a simple introduction coupled with some thoughts about practical application. Professional practice of mediation, as well as many other fields, could be improved by systematic application of deeper learning about each of these subjects. That said, I have found that even the simple introduction and considered application of the principles discussed here improves practice.<sup>20</sup>

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17. See generally JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2001).

18. See, e.g., LANGER, *supra* note 15, at 46-55.

19. That critically important topic deserves study unto itself. As a practical matter, narratives that justify inequality have been deprivileged by law in most of the public life contexts addressed in this Article. Of course, the struggle to reclaim privilege for such narratives continues and finds overt expression, for example, in arguments against “political correctness,” a theme that may be invoked in a mediation context to silence claims of inequality or to protest being silenced by claims of inequality, or both.

20. This discussion is not meant to deny the importance of construal differences. As Solomon Asch's research on social conformity dramatically demonstrated, even demographically very similar people can differ dramatically in their construal of any

The information resulting from discussion of the five cognition mechanisms has two related uses. The first use is to improve one's own skill at recognizing bias arising from one's own cognitive efficiencies. Developing this awareness will also promote the second use, that of helping others overcome the obstacles to communication that cognitive efficiency creates. Part I is divided into two subsections based upon the two uses. Section A outlines some key features and dynamics of the five cognitive processes; the purpose is to help the reader monitor and manage the biases inherent in their use. Each subpart of Section A includes a key practice recommendation and a discussion of the cognition features to watch for in implementing that recommendation. Section B illustrates facilitation tools that the mediator might use to assist others in getting beyond the obstacles that arise from cognitive efficiencies in operation. The purpose is to demonstrate the utility of this cognitive management approach. It is not to suggest that other factors—individual interpretation, cultural differences, and social values, for example—are not relevant or important to interpersonal problem-solving.

#### **A. Mediator: Managing One's Own Cognition**

This Section will discuss the cognitive efficiencies and strategies to manage them. None of the guidance offered here will be useful if the mediator is not committed to fairness and non-discrimination. Accordingly, the first and most fundamental practice recommendation concerns that goal.

*Practice Recommendation 1: Affirm that your goal is to be fair and non-discriminatory; always look for and listen to feedback to improve your efforts to achieve that goal.*

To be effective in helping, it is important to have the correct intention. The intention at the center of this discussion is being fair—that is our goal. We can never presume that we have achieved fairness because doing so signals the end of our efforts. Striving for the goal will require that we try, reflect upon the effort, and revise the effort according to what we learn from trying. This is a continuous iterative process.

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meaning source—categories, stories, and metaphors, for example—and many situational factors can alter construal. See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION* 69-72 (1991) (discussing Asch's construal research). Construal differences between and among people are significant and subject to an array of influences, not necessarily unique to differing circumstances of racial, ethnic, cultural, religious, or gender identity, sexual preference, or physical or mental ability.

We may try many different approaches. Some will succeed, some may be ineffectual, and some may fail, perhaps utterly. Failure and ineffectuality are only significant if we stop striving for the goal. Openly acknowledging shortfalls and modifying our approach reaffirms our commitment to the goal, and illustrates to those we are trying to help the most important skill of problem-solving: attentive, iterative learning. If we do not impart that learning, our other efforts, however skillful, will have only a temporary benefit.

Intention is critical to managing our cognitive efficiencies because it focuses our effort. It is not possible to think without using categories, attributions, metaphors, prescriptions, or frames. The key to effective cognitive management lies in identifying *which* of the specific cognitive efficiency mechanisms we choose *not* to guide our thinking and under what circumstances. But first it is necessary to identify how each of these cognitive efficiencies functions so that we can identify management strategies.

### 1. *Categorization: Naming the World*

*Practice Recommendation 2: Assume that distinction-making, also referred to as discriminating, is a regular feature of thinking. Identify distinction-making that is important to stop. (1) Watch your own thought, speech, and action to identify when and how these distinctions arise; (2) Check those thoughts before they become part of your words and deeds; (3) Assume that you are biased in favor of members of your own group and against persons in other groups.*

As a background matter, we must recognize that making distinctions, and thus paying attention to apparent difference is fundamental, normal, and useful to our thought processes. It is so common and essential to our day-to-day functioning that we are usually not aware of doing it.

Having created or applied a category and then assigned individual items to the category, we attribute to members of the categories characteristics of the category—whether the individual exhibits those characteristics or not. Thinking in this way is unavoidable; it is a device our brains use to simplify and organize the information that we must process in perception, memory, and inference.<sup>21</sup>

Categorization involves some interesting features. The first is that we use prototypes,<sup>22</sup> what we might call colloquially “repre-

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21. See HOWARD GARDNER, *THE MIND'S NEW SCIENCE* 340-59 (1987).

22. The term “prototype” was used by Eleanor Rosch, who initially developed prototype theory. Because of the term's centrality to the research literature, I use it



sentative” or “ideal” types, to define our categories, which cue us to the representative defining properties of the category. For example, we all have an idea of the category “chair” and what it represents. We understand a chair to be something upon which to sit and probably share a sort of ideal chair, against which all other chairs are judged. It certainly would have legs, a seat, and a back able to support a sitting person. For example, a prototypical chair is probably the simple straight-backed, hardy, and functional wooden school, office, or kitchen chair. If we were asked to think of a chair, we likely would not think first of an antique Chippendale or a beanbag chair. Similarly, if we were told that someone used a chair, without any other information,<sup>23</sup> we would likely envision our prototypical chair and thus remember the scenario as involving that particular style of chair. The Chippendale and beanbag are subcategories of chair that depart in some way from the typical chair, although they do share the defining basic function.

Once a category comes into existence in a language culture, it is enriched with meanings,<sup>24</sup> which are rarely altered significantly. If the category is challenged by the existence of members that do not fit its typical properties—for example, the beanbag chair—we create subcategories to account for the deviation.<sup>25</sup>

Categories not only denote properties of a group member, but also group members’ functions. Applying a category label makes a

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here even though it is not a term of everyday language. For an introduction to the technical development and testing of prototype theory, see GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS* 39-76 (1987) [hereinafter LAKOFF, *DANGEROUS THINGS*]. See also GARDNER, *supra* note 21, at 340-48 (discussing cognitive theory development, including prototype theory). As researchers applied prototype theory to social categorization, the idea of “schema,” defined as “a cognitive structure that represents knowledge about a concept or type of stimulus including both its attributes and the relations among those attributes,” developed to better describe the array of relevant cognitive processes at work in social categorization. See FISKE & TAYLOR, *supra* note 13, at 98, 139, 96-179. While the now extensive research on prototypes and schemas has mapped a complex terrain of cognitive structuring, *id.*, and distinctions made in this research may become relevant to mediation strategies, the basic observations about categorization and its simplest cognitive effects is sufficient, and arguably preferable, to guide the current discussion.

23. In this example, cuing information might be knowledge that the sitter was visiting a child’s recreation room, in which case a beanbag chair might come to mind, or a fancy full-course dinner at a wealthy person’s home, in which case antique or fine furniture chair might come to mind.

24. Category meanings with social significance are referred to as “schemas.” See FISKE & TAYLOR, *supra* note 13, at 96-179.

25. See *id.* at 105-09 (discussing schema categorization processes and sub-categorization as a response to various stimuli).

category's relevant properties and functions salient about the item (or person) referenced and excludes irrelevant properties and functions from our thinking. If we hear that someone used a chair, we are most likely to assume that the use was sitting. Without more information, we would likely not think of atypical chair uses like standing on the chair to change a light bulb, using a chair to block a door or to build a child's play fort, even though we are aware that these are also possible uses of a chair. We are unlikely to think of these uses unless we are in a situation where we need to perform such a task and do not have objects at hand more identified with those functions.

We categorize people for the same reasons that we categorize objects—cognitive efficiency. Some categorization of people is necessary to living our daily lives, particularly sorting into functional categories such as “boss,” “the person who delivers fuel,” or “my child.” Other categorization occurs because of observable differences and related socially-constructed meanings, even if the categorization has no necessary functional utility in our daily lives, for example, the categories “African American,” “Asian American,” “Caucasian,” “female,” “Jewish,” or “Christian.”<sup>26</sup>

Unlike inanimate objects, which have a limited range of uses and meanings, people do a myriad of things, fulfill multiple functions, have thoughts, attitudes, emotions, motivations, and attachments. As a consequence, people are much less predefined or predictable than objects. On the one hand, this makes the efficiency of categorizing people much more important. On the other hand, the information that we lose as we categorize people is greater and more consequential, particularly when we influence the resources and opportunities of those we categorize.

When we categorize someone or something, we assign them or it the qualities and features typical of the category, and ignore the individual's other characteristics. We tend to see category members as more similar to those within their category, and more different from those outside their category, than they really are. This occurs on the superficial level where a teacher may confuse one blond male with another blond male, but not confuse a blond male with an African American male, and vice versa. It also operates on a much deeper level, whereby we ascribe to individuals the charac-

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26. What we now identify in discrimination law as protected group membership categories—race, gender, religion, ethnicity, age—acquired meaning because membership played a role in functional assignments. The modern civil rights era has, to a large extent, been devoted to uncoupling group membership from functional roles.

teristics and abilities stereotypically associated with the group, and tacitly assume that the individual does not possess other relevant, and possibly stereotype inconsistent, characteristics. For example, a manager might presume that a new female employee is not good at math although her school transcript shows that she was a math major while presuming that the new male employee is better at math than his female counterpart even though that employee majored in history. Given the powerful effects of stereotypes like “men are good at math and women are not,” the manager would likely be surprised, and a bit chagrined, if after assigning the male to the “math” job, he or she was confronted with the math/history major information. In my experience, during this kind of confrontation, some managers are so convinced of their impression, perhaps unconsciously based upon a stereotype, that they will come up with stories about why they *know* that the male employee is better at math than the female, notwithstanding contrary information. Sometimes, individuals will cling to such impressions, which may feel quite powerful, in the face of substantial contrary evidence.

Categorization interacts with perception, memory and inference and it is important to understand how to counteract the effects of categorization. Once our mental processes have assigned an individual by stereotypic group membership, even our ability to perceive characteristics that diverge from the group stereotype is impaired.<sup>27</sup> Thus, the straw-grasping manager in the last paragraph. At the same time, at least with respect to some group memberships, when an individual possesses characteristics that dramatically defy their group’s stereotypes—the woman bodybuilder, for example—we may react to the divergence by judging that individual member poorly for her failure to conform.<sup>28</sup> This bad fit can have a Catch-22 effect. For example, if the stereotype of women is that females are physically weak or poor at analytical work, each female worker is tacitly presumed inadequate, as compared with males, in a job calling for physical strength or analytic acumen. At the same time, if a particular female demonstrates extraordinary physical strength or analytic ability, she may be devalued or discounted because she does not fit the iconic female “type”<sup>29</sup> and accordingly may be deprived of important workplace benefits.

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27. See FISKE & TAYLOR, *supra* note 13, at 121-39.

28. *Id.* at 133.

29. This bad fit figured significantly in *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985). Ann Hopkins, the sole female out of eighty-eight candidates for

As people, we find ourselves being members of some categories, and not of others. This fact introduces the dimension of in-group bias—the tendency to favor one’s own group, and its members, over other groups and their members.<sup>30</sup> At least in American culture and psyche, where one has the opportunity to distribute resources and opportunities, the instinctive act is to give more to groups to which we belong at the expense of groups to which we do not belong. Research has shown that even in a short-term situation, the simple act of randomly dividing participants into identified groups will have the effect of group members favoring their own over members of the other group.<sup>31</sup> Accordingly, in long term situations where members of one group hold the vast majority of decision-making positions, this tendency alone could account for much of the unequal distribution of resources and opportunities, as members of the privileged group cumulate proportionately more opportunities and resources over time. Of course, even those not historically in decision-making positions may be vulnerable to in-group bias. Knowing that we all possess this tendency means that in any helping role we must be alert not to disfavor persons whose group membership we do not share.

While categorizing is largely an unconscious process, what matters most is not what any of us thinks in the first instance so much as what we say and do. Of course, what we say and do naturally flow from how our minds function, particularly when we do not scrutinize our thinking before acting. In the process of overcoming our tendencies to make decisions based upon certain categories that we associate with illegal discrimination, we need to watch for the unobtrusive indicators of categorizing, such as confusing blond males with each other, or assuming that girls can’t do math. By being alert to such indicators and welcoming them, even as we strive to stop them, we become more mindful and less discriminatory. If we hope *not* to base our actions upon biased thinking, we

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partnership, was passed over even though she had brought in more clients and money than any other candidate. *Id.* at 1112-13. When her supporters explained the partnership’s decision and urged her to try the following year, they told her to walk and talk more femininely and wear more jewelry. *Id.* at 1117. We can see from this advice that there was not only a badness of fit, but also a strong normative rejection of a female who did not conform to femininity norms.

30. See FISKE & TAYLOR, *supra* note 13, at 133-35. The research and writing of Professor Kay Deaux explicates schemas at work in relation to gender. See, e.g., Kay Deaux, *Sex and Gender*, 36 ANN. REV. PSYCHOL. 49, 49-81 (1985).

31. See, e.g., MUZAFER SHERIF, O.J. HARVEY, B.J. WHITE, W.R. HOOD & CAROLYN SHERIF, INTERGROUP CONFLICT AND COOPERATION: THE ROBBER’S CAVE EXPERIMENT 117-50 (1961).

must identify and challenge our thinking when it involves socially-biased categories.

It is self-deceptive to assume that somehow protected group memberships do not influence our thinking. Such social categories are too pervasive, obvious, and richly meaningful for us to escape them. But even if one somehow has been consciously oblivious to the presence of key social differences, failing to consider the effects of social difference is the strategy most likely to perpetuate historic patterns of bias.<sup>32</sup>

A genuine commitment to equality and nondiscrimination requires that everyone actively engage in monitoring and undoing our discriminatory thoughts and actions. By promoting this active engagement, mediation brings a solution of real value to anti-discrimination.

## 2. Attribution: Explaining Our World

*Practice Recommendation 3: If attributing cause or motivation to a person's actions, assume that the explanation can be found in the situation of the group or individual; framing explanations as resulting from properties or characteristics of a group or an individual signals categorical thinking and potential bias.*

To understand discrimination, its dynamics and effects, we must take into account that historically certain groups have been devalued and oppressed. With this history, our culture has accreted associations based upon the conditions of devaluation and oppression that we now see as characteristics of the group, rather than situations in which the group finds or found itself. This observation leads us to a key strategy for avoiding discrimination: situational analysis.

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32. Accordingly, basing a finding of discrimination on a requirement that we discriminate intentionally is perverse. The requirement of intention implies that so long as we are oblivious to our discriminations, we are not actually doing harm. However, we are all mostly oblivious to our discriminations, particularly our discriminations rooted in historic bias. Some worry that this fact means that all decisions involving persons in protected groups necessarily will be found unlawfully discriminatory. To the contrary, even in the absence of an "intent" test, U.S. law retains the formidable requirement of "causation." The trier of fact must examine whether indicators of protected group bias are present and whether the evidence indicates that such bias actually caused, or played a significant role in, the decision.

We will also more likely find discrimination when the fact pattern is atypical. For example, discrimination against a white male will be more noticeable and more likely judged to be conscious or intentional than discrimination against an African American, even though historic bias is more pervasive and cumulatively harmful.

Under the rubric of attribution theory, the social sciences have generated a vast amount of research on the manner in which we explain the causes of behaviors.<sup>33</sup> The most important observation is called the “fundamental” or false attribution error,<sup>34</sup> which concerns the tendency of North Americans<sup>35</sup> to explain another person’s behavior by reference to that person’s presumed dispositions or personality. This is not to say that individuals have no characteristics or differences from others that might carry consistently across time and space. It is only to say that North American thinkers tend to explain others’ behavior with reference to the supposed disposition, excluding their situation.

One explanation for the false attribution error is that dispositional explanations are cognitively efficient and do not require us to identify or think about situational factors.<sup>36</sup> In other words, while we automatically know the situations in which we find ourselves,<sup>37</sup> we have to examine others’ situations to understand them, and our access to information about those situations is limited. Accordingly, it is simpler to explain others’ behaviors by assuming disposition as the cause.

In many aspects of life, dispositional explanations, while not particularly charitable, may be good enough for an individual to function. Once a dispositional or trait explanation has been applied, however, the cognitive dynamics associated with categorization take over.<sup>38</sup> To promote situation-based explanations, it may be necessary to acquire additional information. It is also important to develop a fertile imagination about possible situational influences on behavior and a talent for considering many alternative explanations at the same time. Imagining alternative explanations will aid the information-gathering process. At the same time, always pos-

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33. See FISKE & TAYLOR, *supra* note 13, at 22-92; ROSS & NISBETT, *supra* note 20, at 69-72.

34. See FISKE & TAYLOR, *supra* note 13, at 67-75; ROSS & NISBETT, *supra* note 20, at 125-44.

35. The vast majority of this research has been done in the United States on North American subjects. Ross and Nisbett acknowledge that attributional biases identified in North American actors may not be present or as powerful in actors from other, particularly Eastern, cultures. ROSS & NISBETT, *supra* note 20, at 78-82.

36. See FISKE & TAYLOR, *supra* note 13, at 72-75; ROSS & NISBETT, *supra* note 20, at 139-41.

37. This explanation in particular has been applied to explain why we might explain our own success as the result of hard work and skill and others’ successes as the result of luck. See FISKE & TAYLOR, *supra* note 13, at 78-82.

38. A dispositional attribution functions as a person schema. *See id.* at 118.

ing why, when, what, where, and how questions to generate information and attending to the resulting answers is crucial.

Attribution interacts with categorization in another important way. Where a subgroup of visibly different individuals constitutes fifteen to twenty percent or less of a group, the visible difference has a heightened perceptual salience such that the attention of group participants becomes focused on individuals in the minority category.<sup>39</sup> This is sometimes referred to as the token, or solo, effect. As a perceptual phenomenon, this effect can occur for members of any group so long as the different group membership is obvious and visible.<sup>40</sup> For instance, a male in a predominantly female nursing school will likely be the object of such observation. Similarly, a person of Western European descent in Harlem will be the object of solo effect observation. Of course, the harm of solo status increases the longer and the more consistently one is in the particular token situation. Situations of nontraditional employment for women and for members of historic minorities on the vanguard of desegregating a workplace will likely show both acute and chronic evidence of this effect.<sup>41</sup>

The solo effect has some important results. First, as the objects of special attention, members of the minority become objects of story-telling and attribution, organized around the salient group difference in ways that majority members are never talked about. Their behaviors will likely be explained by reference to their group membership, because attention to group membership has been heightened or “primed.”<sup>42</sup> One woman may be labeled the cheerleader, another the mother, a third the femme fatale—all categories having reference to femaleness.<sup>43</sup>

Second, the salience will make ordinary behavior remarkable. If token women or an ethnic minority socialize with each other, it will likely be observed by majority members as a rebellion in the mak-

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39. See Shelley E. Taylor et al., *Categorical Basis of Person Memory and Stereotyping*, 36 J. PERS. & SOC. PSYCHOL. 778, 788 (1978); see also FISKE & TAYLOR, *supra* note 13, at 247-66 (discussing research on what captures our attention, including salience, vividness, accessibility, and priming as factors that draw attention to some social actors and not others).

40. See Taylor et al., *supra* note 40, at 790-93.

41. See FISKE & TAYLOR, *supra* note 13, at 83-84 (discussing the experience of solo status receiving heightened attention, resulting in anxiety and discomfort).

42. *Id.* at 186, 231-33 (referencing the role of “priming” in relation to attention, solo status, and salience).

43. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 233-35 (1977).

ing, where similar socialization by men or majority ethnic group members goes unnoticed or is thought to be irrelevant.

A third, related effect is that aspects of minority members' behavior will be perceived and remembered where the same behavior by a majority group member goes entirely unobserved.<sup>44</sup> For example, the result may be that lateness of the only Asian-American worker will be remarked while lateness by the majority European-Americans is not even noticed. Supervisors, then, are more likely to discipline the token for lateness unfairly, oblivious to the fact that similarly late majority members are going unpunished. Of course, the heightened attention creates stress for the minority members that majority group members in the same setting never suffer. Moreover, the resulting unfairness can engender resentment, despondency, or other dysfunctional, but entirely understandable, reactions in token group members. The stress of attention and sense of being unfairly treated may isolate the token members and impede their performance.

A final attribution topic worth considering is a defensive attribution referred to by social psychologists as the "just world" belief.<sup>45</sup> This is the tacit, and typically unexamined, assumption that good things happen to good people and bad things happen to bad people, such that the world is "just." It is thought that this assumption derives from the psychological need to feel safe. As a result we tend to explain what happens to people by reference to something they have done, rather than attributing it to chance or causes external to the person.<sup>46</sup> This mindset can result in what sociologists have labeled "blaming the victim." In a management or problem-solving situation, this mindset can manifest in the manager's or problem-solver's implicit assumption that a person experiencing difficulty caused the problem and would be free from it if only that person had done something different. The psychological pressure to operate under this assumption increases where the harm is greater than the manager's or problem-solver's power to change things.<sup>47</sup>

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44. See generally FISKE & TAYLOR, *supra* note 13, at 184-99.

45. *Id.* at 129-30.

46. *Id.* at 129 (citing research on the "just world" belief by Melvin Lerner and associates).

47. See *id.* at 83-86 (discussing factors related to attribution of blame).



### 3. *Metaphor: Embodying the World*

*Practice Recommendation 4: Be aware of the metaphors that you use for two reasons: (1) to achieve and maintain openness and flexibility of thought, and (2) to avoid excluding others.*

It has been argued that the primary mode of human cognition is metaphoric.<sup>48</sup> If this is true, we face a formidable task in taking into account metaphor's impact on our thinking. Metaphors, like categories, are pervasive in our thinking and, ultimately, it is not possible to think without them. As with categories, accounting for the cognitive distortion of metaphors is not a matter of purging ourselves of them, but of identifying the role that they play in organizing our cognition. We need to manage our use of particular metaphors where the resulting cognitive organization has undesirable results.

Two features of metaphors should concern us. First, the use of metaphors can have the effect of alienating, excluding, or seeming to disregard certain groups. A prime example is using the color black as a negative referent: "they were dark times" or "he was one of the guys in a black hat." Who among us has not used this metaphor, or its opposite—white or bright? And who has not experienced the awkwardness of having used or heard a version of the dark/light metaphor in a racially mixed group only to have its double meaning create at least momentary awkwardness in the room? Although it is not clear that there is a direct association, the pervasive negative association with black correlates to the negative treatment of African-Americans in our culture. It is not surprising, then, that use of such a metaphor engenders embarrassment for the user and discomfort for others.

Other common metaphors, arguably "mere figures of speech," have similar potential for creating awkwardness. The common metaphor for goodness—uprightness or upstandingness and related images—certainly poses awkwardness where mobility impairment may be an issue. Similarly, the use of vision metaphors for understanding—"I see what you mean" or "the blind leading the blind"—may be insensitive when persons in the setting have vision impairment. Many associations, particularly of that which is incon-

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48. See generally GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH* (1999); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1979) [hereinafter LAKOFF & JOHNSON, *METAPHORS*].

sequential with femaleness play a significant role in our explanations and descriptions of the world.<sup>49</sup>

Such metaphors are so much a part of our thinking that it would be unusual to always anticipate the problematic connotations and avoid their use altogether. Moreover, an unusual presence—a person of different ethnicity, a female in a non-traditional setting, or the presence of a person with an unusual characteristic (mobility or vision impairment, for example)—primes references to the unusual characteristic; increases the probability that related metaphors may come to mind and be used; and, of course, poses heightened embarrassment if the reference is made. We must be prepared for those awkward moments and not ignore them when they happen. If indeed discomfort arises, it is better to note aloud to oneself and those around that the double meaning may be problematic, apologize, if called for, and choose a different metaphor or expression, or at least initiate a process of trying to find an alternative. This models the proactive approach to overcoming discrimination and avoids burdening the minority group members with the dual difficulties of either remaining silent or of speaking up.

The second, more dramatic, feature of metaphors is that a metaphor, like a story, can literally organize how we see the world. George Lakoff offered perhaps the most dramatic example of social organization as a social effect when he discussed the role of metaphor in politics.<sup>50</sup> He concluded that conservatives operated out of a family metaphor of the “strict father,” around the assumption that social organization best operates along hierarchical authoritarian lines and that people do their best when their

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49. See, e.g., ROBIN TOLMACH LAKOFF, *LANGUAGE AND WOMEN'S PLACE: TEXT AND COMMENTARIES* (Mary Bucholtz, ed., 2004) (discussing associations of inconsequentiality with women and women's language).

50. See generally GEORGE LAKOFF, *MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON'T* (1996) [hereinafter LAKOFF, *MORAL POLITICS*]. Lakoff has been a professor of cognitive linguistics at the University of California, Berkeley since 1972. See University of California-Berkeley Faculty Profile, <http://linguistics.berkeley.edu/people/fac/lakoff.html> (last visited Nov. 18, 2007). Lakoff explains that he undertook to write *Moral Politics* after listening to Dan Quayle's speech accepting the Republican nomination for Vice President. He found that he could not follow the logic of Quayle's speech while the audience obviously found it meaningful and compelling. He found it puzzling that conservatives could oppose abortion yet support the death penalty and liberals support abortion and oppose the death penalty, without finding themselves self-contradictory. The seeming inconsistency and incoherence prompted him to look for an explanation in organizing metaphors. See George Lakoff, Speech to Theatre Communications Group National Conference, (June 18, 2005), <http://www.tcg.org/events/conference/2005/Lakoff.cfm> (last visited Nov. 18, 2007).

governments, like strict fathers, discipline them and force them to stand on their own two feet.<sup>51</sup> Liberals, by contrast, operate according to a “nurturant parent” model.<sup>52</sup> That model assumes that people thrive when given the support and resources necessary to function well.<sup>53</sup> He also explains that many people may not fall into one particular political camp but nonetheless implicitly understand the metaphors and apply one metaphor or another depending upon the situation they are judging.<sup>54</sup> For example, when in a crisis, many people use the strict father model to determine what needs to be done, even though the individual would not ordinarily think and act out of a strict father metaphor.

With his *Moral Politics* examples, Lakoff has outlined the metaphors that may most powerfully organize U.S. social values and dynamics. Other pervasive metaphors may organize our thinking, however. Many metaphors derive from our experience of the physical world and being, according to Lakoff, such that we describe more, bigger or higher as “better,” and anger as a building of steam-like pressure, for example.<sup>55</sup> These and other examples only scratch the surface on metaphors that may very well dominate our thought processes, creating tacit conclusions, especially in our evaluative systems.<sup>56</sup>

#### 4. *Prescribing and Proscribing*

*Practice Recommendation 5: Be aware of the prescriptions and proscriptions that govern your thinking: (1) to achieve and maintain openness and flexibility of thought, and (2) to avoid inappropriately sanctioning others who do not share your norms.*

Prescriptions and proscriptions operate as mechanisms of cognitive efficiency to the extent that they dictate modes of action or relation in which the holder, or object of judgment, *must* or *should not* engage. Once adopted, they can simplify, sometimes significantly, matters about which the person must think. We label the

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51. See LAKOFF, *MORAL POLITICS*, *supra* note 50, at 32-35.

52. See *id.*

53. *Id.* Lakoff believes that conservatives disdain liberals’ “nurturant parent” model as spineless lenience. See *id.* at 318-20.

54. See *id.*

55. See LAKOFF & JOHNSON, *METAPHORS*, *supra* note 48, at 22-24 (discussing metaphors in which more is better, better is up, etc.); LAKOFF, *DANGEROUS THINGS*, *supra* note 22, at 380-415 (discussing metaphors for anger, building on research by Kovecses).

56. A search of the internet reveals numerous resources regarding metaphors. A particularly fruitful source is a site entitled “Metaphors in English” at <http://www.sil.org/lingualinks/lexicon/metaphorsinenglish> (last visited Nov. 18, 2007).

most significant of these morals or norms. Socially, morals and norms may have a boundary-setting function dictating persons, actions, and social arrangements that the individual or group will accept or reject.

In part because of their boundary-setting function, morals and norms can be extremely powerful. Groups keep their norms in place by taking opportunities to reaffirm them through the ritual of boundary maintenance.<sup>57</sup> In other words, norms are communicated and maintained primarily by reference to what happens to those who do not comply.<sup>58</sup> Compliance and its enforcement are essential to a norm's existence.

Many of our most intractable controversies are set in moral terms. One example is the U.S. public conflict over the right to choose.<sup>59</sup> If the conflict is situated outside the normative boundary for one or more parties, the resistance to resolution will likely be greater and the mediator must find ways to redefine some or all of the controversy as not implicating key norms. Mediating such disputes is a skill in itself and the subject of an important growing body of literature. Accordingly, this Article does not address such mediation. The important point is that the mediator be alert to his or her own norms such that they do not impede his or her communication with and understanding of each party.

Not all prescriptive or proscriptive cognitive barriers involve morals or norms of great consequence. Most people, often at an early age, acquire behavioral norms that will produce behavior that is 'correct' in their respective cultures. This is best illustrated by an example. In my early upbringing, I was taught, as many other people are, that it is impolite to point. Of course, the primary concern of this norm is the potential adult embarrassment when a child of a certain age points and announces indelicately, "Look mommy, that man . . . ." But many adults, including myself, probably because of the age and stage at which this norm was introduced to us, experience a visceral reaction that "pointing is bad" when confronted with someone who is pointing. I might have lived my life cringing whenever someone pointed, had my partner of many years not been Jewish.

On many routine occasions, my partner, and many of our Jewish friends, would point without any apparent awkwardness or embar-

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57. See generally HOWARD BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963); TROY DUSTER, *THE LEGISLATION OF MORALITY* (1970).

58. See generally BECKER, *supra* note 57; DUSTER, *supra* note 57.

59. See LAKOFF, *MORAL POLITICS*, *supra* note 50, at 263-70.

rassment—as if pointing were an acceptable thing to do. This posed a puzzle; I was not prepared to label my Jewish partner and friends rude, but they were pointing in what I was taught to believe was a rude way. The explanation came to me during a family Seder. As we began the Seder meal, a Haggadah, the Seder prayer book, was handed to the attendees and we each opened ours to follow a group reading of the Passover story and Seder ritual. The answer to the pointing cultural difference sat right in front of my eyes. On many pages of the book, the text and pictures were embellished with pictures of a pointing finger. An image came to my mind of a Rabbi reading the Torah with his pointing finger moving along at the place in the text being read. In other words, pointing was normal for my partner, while disfavored in my culture.

Many other norms regarding gestures and expression give rise to conflict, often *sub rosa*, in mixed culture situations. Looking or not looking others in the eyes may be regarded as desirable in some cultures and offensive in others. Gesticulating while talking is acceptable in some cultures and not in others. Eating with one's hands, or not, and even elbows on the table, may prompt a visceral, and possibly subconscious, negative reaction. The possibilities are endless and it is unlikely that we will know enough in diverse situations or with diverse peoples to avoid judging or being judged badly on the basis of these differences.

We do not always have the answer handed to us as the Haggadah was handed to me at the Seder table. More commonly, the only clue that a normative difference has been triggered may be the visceral reaction or impulse to label another negatively. That reaction or impulse is the moment at which we can decide to suspend the norm's operation. If it goes unheeded, as I suspect happens with most of us most of the time, and social proximity does not offer further opportunities for reevaluation, as in my pointing example, the likely end result is that the person or reference group is stamped with a negative reference. If the moment goes unnoticed, we will be less likely to know how or why we have a negative impression.

This is not to suggest that we should, or can, suspend all our norms and values. The pointing example is useful because, as best I can tell, pointing has no necessary risk to health or safety for one's self or others. But even where our morals or norms have some important relation to the welfare of the self, the group or its members, suspending reaction can still be useful in cross cultural situations. Sometimes with a moment's thought, a solution can be

found to serve the norm's ultimate aims without relying on, prescribing, or proscribing the particular specific behavior addressed by the norm.

At other times, certain values deserve to take precedence even if they conflict with cultural differences. In my years of problem-solving I have encountered many such instances. A common example, is when a woman, suffering physical or emotional abuse from her husband or partner, seeks counsel from a church elder, a senior community member, or a family member, typically, although not invariably, male. Instead of constructive intervention with the two parties to redirect the conflict away from violence or coercion, the woman seeking help receives advice to the effect that she owes a duty of obedience to her husband or partner, implying he has some reason for abusing her and it was her responsibility to know the cause and change her behavior so he would stop. The norm for this advice is that the husband is the head of the household and the absolute boss.<sup>60</sup> It often carries with it cultural assumptions that there can be only one head and that people go astray if not subject to strict discipline and so forth.

Leaving aside the other cognitive efficiencies at work in this example, (gender categories, possible in-group bias, erroneous causal attribution, and narrative bias), the value system, however sacrosanct it may be in that community, must give way to the value of the safety and health of all of its members. In my view, any other approach in the context of mediation violates the fundamental rule that the mediator not participate in harming the parties. Regardless of how strongly held the norm may be, normative advice that puts individuals at risk or allows risk to go unchecked should be rejected in favor of solutions that protect the health and safety of everyone involved and, if possible, still respect other important norms.

## 5. *Frame*

*Practice Recommendation 6: Identify and suspend cognitive frames that interfere with your openness in communication; experiment with framing to help parties see things differently.*

Most mediators are familiar with the concept of "frame" through their use of the technique "reframing." Generally, framing is a process whereby our attention is directed in certain ways, to the

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60. George Lakoff describes this as a "metaphor." See *id.* at 3-4. I find it more useful to label this as a norm or value system.

exclusion of others. Framing, used in this way, is also sometimes referred to as norming, establishing a norm, or establishing a baseline where the norm or “baseline” can be any steady state<sup>61</sup> or accepted reality.

Almost anything can function as a frame. If it serves the attention-directing function, a category is a frame. A story is a frame. A question, by the manner in which it directs attention, and thus presumes importance of the answer, is a frame. A causal attribution is a frame telling us the important source of causation. A metaphor is a frame. If we can identify a framing mechanism as fitting under one of these more specific cognitive mechanisms, examining it first through the more particular mechanism is probably more useful because we have more specific guidance about how it operates. But not all frames fall into one of these more specific mechanisms. I include “framing” as a process of cognitive efficiency to encompass additional mental processes not otherwise specifically characterized.

A person’s individual history and experience is a frame. For example, a poor person will consider a \$25,000 prize an enormous boon; in contrast, a billionaire would not even notice. Experience-as-frame may be the most important frame for us to monitor in ourselves and others. Systematically applied, situational thinking may be the most effective tool to contradict the framing of our own and others’ experience.

Framing is also used by decision theorists in a more technical way. In these terms, framing directs attention such that evaluative comparisons are specifically influenced. People will judge costs and benefits of various actions, and experience various degrees of regret about choices, not with respect to final outcomes, but with respect to comparisons that are implicit or explicit in the presentation of the problem.<sup>62</sup> Specific framing effects likely to bias our thinking include loss aversion, the phenomenon where individuals “are more motivated to avoid a loss of a given size than to gain an

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61. A term used in discussing narrative, “steady state” refers to routinely existing circumstances, as in a story where the norm or status quo is peace and the disrupting influence is the outbreak of conflict. *See, e.g.*, Anthony G. Amsterdam & Jerome Bruner, *Minding the Law*, 46, 120 (2002) (using the term “steady state” to describe conditions before precipitating events to which conditions return, or from which circumstances transform into a new status quo). For a useful discussion of framing as it guides policy, see DONALD A. SCHON & MARTIN REIN, *FRAME REFLECTION: TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES* (1994).

62. *See* ROSS & NISBETT, *supra* note 20, at 63.

equivalent amount.”<sup>63</sup> Similarly, we resist departure from what we see as “the status quo.” Often we can blunt the operation of such decision biases by describing a problem or circumstance differently.

### B. Managing Cognitive Efficiencies of Parties

Once managing one’s own cognitive efficiencies mindfully becomes a habit, that most interpersonal difficulties occur, in part, because the parties deploy different categories, attributions, metaphors, prescriptions, and frames becomes obvious. Of course, the conflict will remain if the parties have no openness to the other person’s perspective, which almost always involves suspending one’s own circumstantial awareness, at least momentarily, to appreciate the circumstances of another. Even with some openness, the ability to achieve resolution will range from truce, uneasy peace, cooperation, to accord, depending upon the denseness<sup>64</sup> of the cognitive and circumstantial difference, the ability of each party to appreciate the source and extent of the differences, and the willingness of each party to suspend efficiencies in favor of understanding. To achieve resolution of a specific conflict, the parties need not necessarily appreciate how patterns of cognition contribute to conflict generally, so long as they understand the source of the particular conflict and how to overcome it. The more extensive, pervasive, or long-lasting the conflict and relationship, the more important it becomes for the parties to apprehend the role of cognitive efficiencies in the conflict and to learn to manage those processes.

Just as the facilitator comes to the table with intention, so do the parties. Whether or not those intentions are explicit is another matter. Ultimately, it may neither be possible nor desirable to change the party’s intentions. The only essential element is to engage each party’s positive intention toward understanding the other party’s situation. A lasting resolution will only happen if the

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63. *Id.* at 63-64. These observations derive from the research of Kahneman and Tversky. See, e.g., Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263-91 (1979).

64. In many instances, people in a shared culture share the same patterns of efficiency, with differences arising in one or two areas. I would characterize a situation where the sharing of patterns is extensive as shallow difference. Cognitive difference is dense, where the patterns of efficiency differ across more categories of efficiency and also within each category.



outcome is grounded in understanding and respects each party's core interests.<sup>65</sup>

The practice rules for the mediator can be operationalized into mediation strategies and techniques to use with the parties. The power of the facilitative mediator lies in the authority to direct attention and effort in one direction rather than another. Using knowledge of cognitive efficiencies, it is possible to channel each participant's attention and efforts in a manner that counteracts or balances the natural tendency to employ efficiencies. Whether, or under what conditions, to use these techniques must be left to the mediator's judgment, which will be informed by the problem and its context.

A few general considerations are relevant to all the cognitive efficiencies.

*Practice Recommendation 7: Direct participants' behavior by describing positive behavior; avoid proscriptions and "don't" statements as these are likely to trigger the behavior the mediator is trying to avoid.*

To counteract bias introduced with cognitive efficiencies, strategies of positive conduct are needed. It is rarely useful for the mediator to tell a party *not* to do something as in "please don't call names or use labels;" that direction draws attention to the very behavior the mediator wants to avoid and is more likely to increase instances of the rejected behavior.<sup>66</sup> It is more useful to fashion direction in the form of "please do . . . ."

*Practice Recommendation 8: Encourage listening and discourage "explanations" on a topic about which a party is defensive.*

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65. In some facilitative mediation training, mediators are taught the distinction between issues and interests. Issues are defined as things the parties are fighting over. These are usually manifested when the parties state the source of the conflict. Interests are those factors implicated in the conflict that are non-negotiable for that party. This includes such things as safety for oneself and family, job security, health, income, reputation, and moral values. At this writing, I believe that a party's ultimate *intention* with respect to the conflict will lie with that party's interests. By showing how a party's interests are served and preserved, the facilitator engages the party's positive intention.

66. In effect, the proscribed behavior is "primed" by the reference to it. See Fiske & Taylor, *supra* note 13, at 146-47, 177-78, 257-64, 293 (discussing the phenomenon of "priming" and how it occurs). People, like other creatures, don't know what to do when told not to do or think something. But they can be very eager and resourceful if their efforts are redirected into an activity other than the one they should not be doing. KAREN PRYOR, *DON'T SHOOT THE DOG: THE NEW ART OF TEACHING AND TRAINING* 109-112 (1985). See also GEORGE LAKOFF, *DON'T THINK OF AN ELEPHANT* 3 (2004).

Particularly in the context of alleged discrimination, it is possible, and quite common, for a responding party to reenact the cognitive fallacies at the heart of a conflict by explaining what they meant or what their motives were or were not.<sup>67</sup> This is not helpful either to the respondent or the complainant, and is likely to derail the mediation process. These explanations frequently illustrate the very biases underlying the complained-of behavior. While it is important for the mediator to understand these biases in order to help the parties reach an understanding, explanations, particularly the naïve ones that parties typically offer, can do more harm than good. It is presumed that the mediator and other party will listen respectfully as the telling proceeds if the explanation being offered was solicited by the mediator. But the ritual of solemn listening dignifies the very thought processes that ought to be rechanneled, not reenacted. This is likely to aggravate the complainant and, if the mediator appears to remain neutral or approving, prompt the complainant to believe or feel that the mediation is unbalanced or a farce.

Avoiding such a circumstance is difficult because it may arise as soon as the mediator asks the respondent to “tell her side” of the story. It also commonly arises when a respondent undertakes to “apologize,” which may effectively be an effort to excuse bias rather than cure it.<sup>68</sup>

The question is how to elicit information necessary for the mediator to understand the dispute and grasp possible bias without also regenerating the process that caused the dispute in the first place. The potential problem can be managed through questions focused first on factual reporting. Asking the party to “describe what happened,” and keeping a party on that topic, invites discussion of events and actions most likely to inform the mediator while avoiding aggravation to the other party. Even-handedness dictates that similar questions and directions be made to each party. The Part II discussion of the emotional dimensions of discrimination addresses

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67. In fact, it is probable that the person, who is not in the habit of actively monitoring his or her thought processes, will do just that. In the context of litigation, a deposition that explores the allegedly discriminatory party’s “explanations” can be a very rich source of information concerning the deponent’s biased thinking.

68. While apology is an essential tool in many resolutions, it is only effective if made appropriately and to the relevant points. Parties may offer an apology to avoid conflict, but rarely do they have the skill to promote understanding through its use. The mediator must actively assist parties to use apology to achieve understanding and accord.

the necessary additional step of helping parties work through the emotional dynamics without reenacting harm.

### 1. *Categorization*

*Practice Recommendation 9: Unpack labels and characterizations.*

Parties who tell their side of the story using labels to describe the other party or to characterize the other party's behavior are both categorizing and attributing dispositionally rather than situationally.<sup>69</sup> Fortunately, such labels are rarely informative enough that any of us would mediate without seeking explanation and then reframing in more neutral, descriptive, and situation-based terminology. Once the party has had some appropriate amount of air time, the mediator can ask the party to clarify. Appropriate questions might be: "What was [other party] doing that prompted you to label [other party] as 'racist'?" or "What was [other party] doing when she or he was what you called 'being mean'?" Specific behavioral explanations may provide a narrow list upon which the parties can focus in reaching understanding and finding common ground.

Sometimes parties characterize each other's behavior in summary terms. Explanations such as "he was messing with me" or "she disrespected me" may have obvious meaning to one party, and remain completely opaque to the mediator and the opposite party. Moreover, specific terms as used in one context or by one group of people may have a different meaning or connotation in a different context or with different persons. The mediator's skill of drawing out the meanings is an essential one. As this process occurs, the mediator will be assessing what other cognitive efficiencies are in play.

Categorization frequently occurs even when negative labels are not being applied. It is important to listen for special explanations or stories that may indicate the presence of categories or stereotypes. In every instance in which a mediator is working to clarify a label or summary, the mediator will need to reassure the opposing party that her concerns will receive attention.

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69. See *supra* Part I.A.2.

## 2. Attribution

*Practice Recommendation 10: Encourage parties to describe behavior specifically and discuss the context in which the behavior occurred.*

The most direct contradiction to dispositional attribution occurs when a party describes in detail the context or circumstance as they saw it, imagines the other party's situation, and listens when the other party describes the situation as that party saw it. This is not to say that we should encourage a rambling narrative of self-justification. If the opening stages of the process signaled a likelihood of rambling, the mediator can exercise the prerogative to ask questions and direct the process. The purpose is to get circumstantial or situational factors that logically relate to the source of the complaint and response to the complaint on the table. For example, if the complainant sees her new boss as too rigid and demanding, hearing that the deadlines are imposed by the need for quick turn-around on a major contract might help the employee see the deadlines as reasonable under the circumstances. Similarly, if a boss attributes an employee's shortcomings to laziness, the employee's discussion of the factors relating to the supposed "laziness" might help. It might be necessary first to ask the boss to describe the behaviors the boss has in mind in reference to the supposed laziness, since that word is a summary judgment. While these explorations may not change the reality—the nature and effectiveness of management style or job performance—they may point to elements of a possible solution to be explored.

Many times one party's response to the other's perception is not necessarily to deny, but to respond that the perception unfairly criticizes her for behavior that others equally engage in. The simplest approach to such a dispute is to explore, with the parties, instances of comparable behavior on the part of others. In discrimination law, this is the classic disparate treatment analysis,<sup>70</sup> wherein a targeted individual illustrates unfairness by citing specific instances in which similar others engaged in the same behaviors, exhibited the same shortcomings, and so forth, without becoming the object of the opponent's criticism.

The special case of the token calls for some additional intervention because the problem arises from perception bias in addition to a lack of situational information. Thus, a token singled out for fail-

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70. See BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 11-14 (C. Geoffrey Weirich ed., 4th ed. 2007).

ing to file time sheets on time, would point to other late filers who belong to the majority group. Of course, the token may not have access to enough information about other's behaviors to be persuasive. In that instance, it is typically the complainant's "feeling" of unfairness, possibly punctuated with anecdotes, that grounds the complaint. This "feeling" might derive from issues unrelated to group membership. While the absence of evidence, discoverable or otherwise, may be fatal in litigation, the fact that the token has a feeling or perception of unfairness despite the lack of concrete evidence should not be fatal in mediated solutions.

Several strategies, beyond disparate treatment examples, might be useful. First, ask the party to describe the experience of being the only woman, black, or white person in the disputed situation. The mediator will need to assess carefully whether, or perhaps more accurately, to what extent, this discourse asks that person "to bleed in front of sharks,"—exhibit weakness that will only invite vicious attack rather than move the parties toward a solution. The answer may lie in two assessments. The first is, for the token, how acute the particular harms, and their emotional manifestations, might be. The second assessment is to what extent the other party is genuinely interested in seeking a mediated solution. If the mediator concludes that the token party is emotionally ready and willing to undertake the discussion and the other party is sensitive enough not to humiliate her and is not exploiting mediation for other ends, asking the token to describe the unique situation of being one of a kind in the dispute setting may make sense. This is not to say that it will not be frustrating to the individual who, especially working in a token situation, may continually be in the role of educating majority group members. The mediator will need to proceed tactfully and change the subject if the process of describing the experience is apparently unhelpful or too stressful.

Second, it may be useful, possibly in caucus, for the mediator to talk with the non-token party about the problem of heightened attention, its typical invisibility to the majority, and acute stress to the token. The mediator might also ask the respondent whether it is possible to develop methods to detect majority members' shortcomings. If, for example, lateness is the issue, a mechanism whereby everyone's arrival time is routinely recorded, without exception, might either reveal the problem or stop lax practices. The efficacy of any such solution depends upon a sound plan and good faith implementation.

Such brainstorming might be buttressed by a joint session discussion, either before or after caucus, of the particular kinds of behaviors for which the token party has been singled out and what evidence might exist to check that reality.

### 3. *Metaphor*

*Practice Recommendation 11: Take responsibility for using metaphors that are awkward to others and also for feeling awkward around such uses; invite yourself and others to generate alternate forms of expression.*

An object of metaphor is most likely to come up at the mediation table when an insensitive use of a metaphor is part of the complained of behavior. In such circumstances, the complainant may feel indignant and unheard and the respondent may be defensive and angry—being blamed for a “mere slip of the tongue.” Both parties are right, in a sense, and no amount of dwelling on the appropriateness of the metaphor’s use will solve anything.

The mediator might model a new solution for the respondent by owning up to having used similar metaphors and since then having struggled to anticipate the problem and find alternative expressions. Acknowledge the ordinariness of such usages while legitimizing the complainant’s desire to stop such usage. On the strength of that admission, the mediator might invite each party to generate a list of metaphors having possible negative connotations for that party. If both parties generate a sizeable list, exploring some items on each list might reinforce for each party the problem that the other faces. Of course, societal denigration tends to be asymmetrical. If, for example, a European-American party has difficulty generating much of a list, that fact in itself could be examined. While it is not a substitute for recognizing one’s own feelings under similar circumstances, it does dramatize that the two people effectively live in very different worlds even while working side by side.

Addressing a metaphor becomes more complicated and consequential when it is cited by the complainant as one example of words and deeds giving rise to a hostile work environment. In that instance, the metaphor is part of a cumulative pattern and the complainant may be saying that any single act or deed would not itself have prompted a complaint where the combination did. Under these circumstances, discussing each individual word or deed misses the point; it is more useful for the mediator to direct attention to the cumulative effect. Whether the complainant either did

or did not complain about the individual words or deeds at the time that they occurred may be an ancillary problem. This inquiry automatically puts the complainant on the defensive and in a lose-lose position. If the complainant did not complain at the time, the respondent may argue that the conduct was not sufficiently important, that the respondent had no opportunity to fix it, or both, and is therefore not something for which the respondent should be held accountable. If the complainant did complain when the individual instances occurred, the situation at the time of the mediation is probably more difficult because the complainant may already have been labeled and dismissed as a crank who takes offense at minor things. Whichever avenue was pursued, it may be useful for the mediator to identify these dual horns of the complainant's dilemma and the lose-lose position that the complainant faced regarding complaint-making. Similarly, the respondent's possible responses can also be described as potentially reasonable, even if not endorsed as an effective solution. With that as a frame of reference, both parties can turn to discussing solutions that would avoid the situation in the future.

Occasionally it may become apparent that one party's approach to the core problem can be described as guided by a particular metaphor. To borrow George Lakoff's example, the "Strict Father" or the "Nurturant Parent" models are metaphors that an employer might implicitly apply as a model for supervision.<sup>71</sup> It is unlikely that a mediator could effectively eliminate a party's organizing metaphor. Moreover, the metaphor may have important positive uses. Rather than try to eliminate the metaphor, the mediator might accept its core function and mitigate its negative effects. The employer who thinks that employees are being given a great opportunity to thrive and, if left to their own devices, will do so, as per the nurturant parent style, may experience dismay with the employee who has not responded well to that leadership style. Similarly, the employer who keeps strict protocols and believes that criticism is the road to improvement may have difficulty with the independent employee who rebels or feels stifled.

Without necessarily discussing the metaphor and its role, the mediator can use it, although this must be done thoughtfully so as not to annoy the other party, or leave the other party feeling criticized by the facilitator. The facilitator might say to the "nurturant parent" employer, "I understand that you want to create an environ-

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71. See LAKOFF, *MORAL POLITICS*, *supra* note 50, at 32-35.

ment in which your employees can thrive and grow. What I am hearing from you and [other party] is that there are aspects of the situation or work on which, right now, [other party] needs your specific guidance before she can take over. Why don't we talk about those in more detail so we can think about particular strategies." In metaphorical terms, with reference to the complained-of job performance, it is being suggested without being said that the employee party is at a stage of growth, such as a child, at which autonomy is not yet appropriate. Of course, it could be offensive to talk expressly in those terms (e.g., parent-child), so the reframing must avoid invoking them even while being informed by them.

Similarly, the mediator might say to the "strict father" employer, "I understand that the work is such that your team needs strong discipline and close guidance. At the same time, I am hearing that [opposite party] has been on the team a long time, and understands your needs and demands. Is it possible to organize/define the work so that your needs are met while [opposite party] has a little more freedom to bring the insights she might have to offer?" In family metaphor terms, the employer or "parent" is being told that the other party is at a stage of growth, "teenager" or "young adult," at which guided autonomy may benefit the team, and where strict discipline might get rebellion rather than effective performance.

While metaphors that guide a subordinate may not enjoy the same power to define the situation outside the mediation room, these metaphors may nonetheless play a major role in that room. I once had a complainant who kept calling the other party "the devil." I am sure this label embodied a rich cultural reference that I and the other party did not understand and the mediation was unlikely to progress very far until its meaning became clearer. The first obvious strategy was to move discussion from label to described conduct, and to elicit information concerning the circumstances. But it also seemed highly likely that the term invokes a kind of metaphor that determined the party's interpretation of the problem and thus circumscribed possible solutions. My strategy in the first instance when faced with such categorization, is to ask for explanation: "What do you mean by 'devil'?" or "What does a devil do or say?"

Organizing metaphors are extremely powerful and tricky to work with. As illustrated in the discussion of the "family" metaphor, recognizing the metaphor gives the mediator a powerful tool. At the same time, the mediator has to use the metaphor sensitively. It is not easy to recognize an organizing metaphor and employ it



thoughtfully on the spot. Accordingly, research into and elaboration upon possible metaphoric frames of reference in a party's problems is important if mediation is to achieve richer problem-solving. Luckily, linguists and cognitive researchers have described in detail a vast number of metaphors, and how they work, in common usage.<sup>72</sup> The task for the mediation researcher is to identify those metaphors most likely to appear in the mediation context and develop reframing strategies so that mediators can be thoughtfully trained in working with the metaphor productively.

#### 4. *Prescriptions/Proscriptions*

*Practice Recommendation 12: Develop skills and strategies to quickly address when (1) the party's norms are fundamentally in conflict; (2) parties share a norm but disagree as to whether it has been breached; (3) parties are unaware that one or more norms figure in the conflict; and (4) a norm has unnecessarily been used to solve a problem where less burdensome strategies may be available.*

Normative standards can figure in conflicts in a host of different ways. It is useful to outline a few of them. The first and most dramatic, a topic not being examined here, occurs when the conflict arises from the parties' distinctly different norms, values, or beliefs. A second occurs when the parties share beliefs or norms but differ as to whether one party has violated the norm. A third occurs when a party is unaware that her beliefs or norms play a significant role in her side of the conflict. A fourth occurs when one party seeks to impose norms to resolve the conflict and the norms imposed are more burdensome to the other party. The third and fourth circumstances are discussed in this Section.

In my experience, the key to working with prescriptions or proscriptions as obstacles to communication or understanding is determining that they are in play and identifying their relevance. Just as I experienced an irrationally strong negative reaction to pointing, many parties come to the mediation table with, in at least some part, a similar proscriptive reaction. Even where the prescription or proscription is not irrational, it can be worked with if identified.

A common example worth discussing is where supervisors or co-workers object to or are offended by co-workers speaking a native language other than English. The objection is often strong and stated with self-righteous indignation; it might also be coupled with an ad hoc "rule" that "only English" may be spoken in the work-

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72. See *supra* notes 48-56 and accompanying text.

place. The co-workers whose native language is not English may experience the objection as pure discrimination, and feel hurt at being chided for enjoying their momentary relief from having to communicate in a second language.

Let's start first with the non-English speaking employees, since their non-English communication has become the focus of the conflict. Simple relief at speaking in one's native language is certainly a sufficient motivation. The fact that speaking one's first language enables one to communicate better is a further benign explanation for the behavior, and one at which the reasonable person would not take offense. No surprise then if the non-English speakers experience the criticism as pure discrimination.

But these reasons are rarely the ones attributed to the events by the objectors. The objectors may find it "rude to talk behind our backs" or feel that they are being ridiculed. If they were in fact being ridiculed, their offense is justified and they likely can identify other behaviors that reflect this disrespect. For example, if the non-English communication took place on the heels of a conflict or if the participants are glancing, laughing, or glaring in the direction of the objectors, the inference that criticism or backtalking is going on is not unfounded. In that case, the core offense is not language per se but the original conflict and its lack of meaningful resolution. Language use might be a factor addressed in the resolution to the extent that it was a tool to further the conflict or hide disruptive or disrespectful behavior. The discussion can then turn to respect in the workplace, and perhaps the event or conflict provoking the offensive non-English discussion. The call for a draconian English-only rule can then be put on the back burner eventually to be abandoned when other resolutions are accomplished.

If the non-English discussion was indeed benign and not targeted, the facilitation takes a different turn. The feelings of the objectors are still relevant, if not factually grounded in the confab, but the direction of solution is somewhat different. How does one proceed? The first step in both scenarios is understanding what was going on when the non-English communication occurred. Asking the objectors to reconstruct the experience might yield information that better explains their reaction. If the explanation emerges, the solution again heads toward a solution other than a language bar.

It may be that the feelings of paranoia have no origin in the actual workplace situation. Perhaps they arise from the fear, perhaps based in early life events, of "being talked about behind one's

back.” Equally likely is that they originate, like my reaction to pointing, from another politeness norm, of “not whispering in the presence of others.” Thus, we have come full circle. If the mediation reaches this insight, the objector now recognizes that her feelings arise in his or her past experience and upbringing, and the perception of being disrespected is overcome. Moreover, the non-English speaker may have both explained the sheer relief at being allowed to speak her native tongue such that the self-conscious objector can appreciate and respect it, and also come to appreciate the awkwardness that it posed to the other party.

In the foregoing example, unstated proscriptions were only one possible source of the conflict yet a new and highly burdensome proscription of English-only communication was being pursued as the sole solution, whatever the source of the problem. The simple solution, which promised to be exceedingly burdensome to one party, called out for richer understanding that would then become the avenue to alternative, more reasonable and fair, solutions.

### 5. Framing

*Practice Recommendation 13: Preempt party’s frames by presenting alternative frames early in the discussion.*

Once a frame has become the basis of discussion, it is very difficult to change it. Accordingly, if the mediator can orient discussion of topics and issues within a balanced frame, significant communication and problem-solving barriers will be removed.

As one framing strategy to achieve balance without reenacting and dignifying bias, the mediator might start the mediation by asking each party to adopt an assumption temporarily. The complainant may be asked to assume, for the sake of discussion, that the respondent did not intend to do harm and had legitimate reasons for her actions. Correspondingly, the respondent may be asked to assume that the behaviors complained of and the resulting harm alleged by the complainant are real in their effect, regardless of their motivation. The mediator can assure both parties that each may reject the assumption any time during the mediation while proposing these assumptions as a useful strategy for positive problem-solving. The benefit of this intervention is twofold. First, it lessens the impulse of each party to persuade the mediator, or the other party, that she is right. Second, if the parties attempt these assumptions in good faith, they will approach the discussion in a

constructive frame.<sup>73</sup> If one or both parties object then, a discussion of the reasons may prove useful.

Anticipating and shifting cognitive frames, such as loss aversion and status quo bias, can similarly remove resistance to problem-solving. For example, if the workplace is a place where “Joe” and his cronies pretty much interact how they want, then any change to accommodate newcomers is disfavored by “the status quo.” If the workplace is a place where all workers adhere to a norm of mutual respect and professionalism, then accommodating newcomers is the norm and not disfavored by the status quo. The bias of the status quo is probably the strongest argument for standardizing workplace interactions along “professional” lines. Manipulating language alone is not enough to shift a status quo frame of this sort. The facilitator would need “Joe” to adopt the norm of professionalism as his own and vouch for others in the workplace that are not present at the mediation. Moreover, no mediation based upon such strategy can legitimately be seen as complete and durable until mechanisms whereby the affected group will buy in have been mapped out.

## II. PERSPECTIVE AND THE SUBJECTIVE EXPERIENCE

While examining bias inherent in cognitive efficiencies is a good discipline to change bias and unfairness in behavior, no mediator can work sensitively without understanding the role of perspective in all communication and problem-solving. The most dramatic factor in perspective is that arising from being a member of some groups and interacting with members of other groups.

The mediator can never forget that she, like each party, brings her own perspectives to the process. The mediator is a member of some groups and not others. This fact in itself points to a potent source of bias—that of the in-group.<sup>74</sup> Not only do we in the United States possess an instinct to feather our own nests, and the nests of those with whom we identify, but we also are more likely to share experiences with those who are more similar to us or who are identified with groups of which we are members. For that reason, our imaginations are much richer about situational factors af-

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73. PHILLIP G. ZIMBARDO & MICHAEL R. LEIPPE, *THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE* 79-83, 101-07 (1991) (discussing foot-in-the-door and role-playing techniques to promote attitude change, which must be read together with remaining text to understand interaction with self-justification effects likely operating in mediation).

74. See *supra* notes 30-31 and accompanying text.

fecting the behaviors of those like us or who share our circumstances. Accordingly, we are likely to be biased even in our ability to apply situational thinking to understand other parties. The potency of these factors, and the benefits of having different perspectives at the mediation table, lead to another practice recommendation.

*Practice Recommendation 14: To manage issues of difference effectively, co-mediate with partners whose group membership is different than your own, and preferably relevant to the difference issues among parties and their situations.*

As a threshold matter, it is the mediator's obligation to determine whether she is an appropriate person to mediate a particular problem with particular parties. The answer to this question depends upon the mediator's skill, experience, and training, and her assessment of whether a particular problem or party presents issues that the mediator is able to address or will find problematic. This is a complex assessment that this Article does not address. That said, it is important to recognize that one's own group membership is not necessarily a bar to mediating particular problems or with particular parties, but may be a significant obstacle. We must each train ourselves to mediate successfully with individuals who are members of our own groups as well as members of other groups. Co-mediation, with attention to diversity between mediators, is a useful strategy to address this constant problem.

A related problem of potential unbalance is the relative influence that each party wields. In any mediation context, a host of factors may contribute to asymmetry of power, information, status, and resources among the parties. It is natural in our day-to-day dealings for us to defer to persons who possess more of these resources relevant to a given situation. Moreover, indicia of power, status, and resources induce deference in situations to which they are not particularly relevant. In my experience, mediators, regardless of their own group affiliations, can easily fall into such deference. The mediator should not be swayed in one party's favor because that party possesses more, or less, of any resources. Nor should the mediator be more favorably disposed to one party because that party's demeanor commands authority or sympathy. Achieving balance in the face of just these influences is a daunting task. Co-mediation, coupled with active feedback among mediators, is one device to help ensure balance is achieved and maintained.

While striving for balance, we cannot ignore that certain situational imbalances are nonetheless relevant for certain purposes in mediation. The fact, for example, that one party is boss and the other employee cannot be left outside the mediation room door if meaningful durable workplace solutions are to be crafted in the room. Acknowledging such situational realities does not mean that the mediator defers to one party. Such deference would not help either party. The sensible approach is to acknowledge the role differences and test in small progressive steps the pertinence of role difference to any potential solution.

*Practice Recommendation 15: Avoid reenacting the harms of discrimination by keeping the mediation process focused on changes that would benefit the parties and improve the situation regardless of fault; leave exploration of who was at fault for the courtroom.*

Whether “discrimination” has occurred or not, is not a subject for the facilitative mediation, even if the dispute concerns charges of discrimination.<sup>75</sup> The facilitative mediator must mediate as if it is equally likely that (1) discrimination did and did not occur; (2) reasons other than bias account for behavior complained of, and; (3) shortcomings of performance on the part of each party may or may not be a factor. Mediating as if all of these are simultaneously true is not an unrealistic stance. To the contrary, legalities aside, elements of almost every situation are likely to include bias, other causes and consequences of behavior, and shortcomings of performance on the part of all participants.

Assume for the moment that the mediator, with respect to her own cognition, is successfully implementing the guidance outlined in this Article.<sup>76</sup> She has the foundation upon which to effectively manage interpersonal dynamics in the ADR context. She must apprehend the damage caused by discriminatory targeting and how it

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75. There exists a difference between a facilitated resolution and an evaluative settlement process. In the latter, the third-party neutral is expected to evaluate key aspects of the problem, which could include the occurrence of discrimination. In general, I favor a facilitative process as an early intervention where lines of communication are still somewhat open between the parties and loss of tangible job benefits has not been significant. The target of alleged discrimination is at a substantial disadvantage where communication is substantially or completely impaired and significant economic loss has occurred. In many cases, balance in facilitation or evaluation depends upon factors beyond the mere skill of the neutral and is unlikely unless the target has had counsel and the benefit of discovery.

76. This assumption is framed as an ongoing process. We cannot know whether we have indeed achieved full mastery over our discriminatory tendencies such that we can be certain that we ourselves or other well-meaning persons are not, at the least, perpetuating discrimination.

might manifest itself in interpersonal problem-solving. She must also appreciate the dilemma of the respondent, who is likely uneducated regarding the biases of cognitive efficiencies and in a defensive position and state of mind. To achieve a successful resolution, the mediator must manage each party's emotions and see through their presentation of the problems to identify the core issues. One can easily be distracted by the manner in which each party expresses her or his concerns and miscalculate the attention needed.

A person responding to a charge of possible discrimination, or to any claim of wrongdoing, however minor, is understandably defensive. Defensiveness can manifest in many different ways, including indignation, denial, and aggressiveness. All of these responses are normal and appropriate; being accused of wrongdoing is painful and difficult. Moreover, the consequences are potentially devastating. The mediator's task is to move the respondent's attention from fear and defensiveness to constructive action.

As to a respondent who is alleged to have discriminated, the first and foremost question should be how the perceiver or judge was being guided. For mediation purposes, if the relevant perception or judgment was even in part influenced negatively or stereotypically by the target's group membership, both parties can gain by changing that.<sup>77</sup> At the outset, a respondent is unlikely to have, much less share, insight that bias guided his or her judgment. By unpacking categories, metaphors, norms, and frames, and pursuing situational analysis, the mediator may tease out information that might lead to revisiting a conclusion incorporating possible bias. These efforts are not guaranteed to be fruitful, however, it is better to proceed in this manner than to preside over a process whereby the respondent redignifies or reenacts discrimination complained of.

If legally actionable discrimination has occurred, only those who discriminated can change it. We perpetuate an erroneous model if we proceed as if behavior on the part of the target accounts for the discrimination. In short, no one ever deserves discrimination. In discrimination litigation, much attention is paid to whether the target of the alleged discrimination did something to justify the action

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77. If there is no indication of active vigilance against such discrimination on the perceiver/judge's part, we know from the research on categorization and stereotyping that it is likely that the perceptions and judgments were stereotypical and discriminatory in some part. At this point, the law recognizes that discrimination might be a partial cause. If discrimination is shown, then the question left is not liability but damages. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

of the alleged perpetrator of discrimination.<sup>78</sup> While this approach may be necessary in the context of proving or disproving discrimination, it focuses attention on the wrong subject for solving the problem of discrimination.

To mediate in a balanced manner that does not reenact the harm of discrimination if it has occurred, the mediator must *not* pursue discussion or explanation framed as if the target's behavior explains the alleged discrimination. An alleged perpetrator may be convinced that something about the target warrants the discriminatory treatment and there is little, if anything, the object of discrimination can do to change that perception. These topics—the behaviors of the alleged discriminator and of the complainant—must be discussed as distinctly different. The framing suggestion of Practice Recommendation 13—asking each party to assume *arguendo* the truth of the other's perception—is one technique to achieve this.<sup>79</sup> It may not be necessary, however, to make this explicit; simply steering discussion in such a manner that the topics are pursued as distinct and unrelated may be equally or more effective.

Being the object of discrimination is an experience of profound disempowerment. People respond to it in a wide variety of ways—with anger and indignation, with resignation, by shutting down altogether, or with acceptance, to name only a few possible responses.<sup>80</sup> Every response is natural and warranted, and an individual's responses may change over time. We must not indulge the notion that there is a right way to be the target of, or manage, discrimination. The harms of discrimination can be cumulative with the result that a single, seemingly isolated act of discrimination can trigger a strong response. Moreover, while anyone can be the target of discrimination, undeniably members of some groups rather than others are more likely to have encountered unfair discrimination repeatedly and in various contexts. Ironically, the one-

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78. In the context of an employment discrimination claim, this happens when the employer alleges a legitimate nondiscriminatory reason for the adverse employment action. What typically ensues is defendant's extensive proof concerning the plaintiff's alleged performance shortfalls. The plaintiff then tries to counter with proof that the alleged reason is a pretext, which if proven leaves the inference that the adverse action was due to discrimination. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) (explaining plaintiff's burden of proof in federal employment discrimination actions).

79. *See supra* Part I.B.5.

80. *See generally* PREJUDICE: THE TARGET'S PERSPECTIVE (Janet K. Swim & Charles Stangor eds., 1998) (reporting research on the experience of being the target of discrimination).



time target of discrimination may feel the harm more acutely and others may see the discrimination as more wrongful, precisely because it is an unusual event, and thus more salient. Chronic discrimination more easily goes unnoticed or gets explained away even when it is more extreme and damaging either in the discrete occurrences or cumulating harm over time. A corollary to this is that the chronic target may tolerate more unfairness longer and in greater silence while bystanders are less alert to the damage being done. The mediator may need to assist the parties to address the impact of chronic, cumulative, and pervasive effects that may lie in the background.

For those who suffer repeated and chronic discrimination, the experience may not be attributable to a single actor and certainly would not be attributable to a single event or moment in time. This explains why some chronic targets are slow to complain, even about acute events, and why they may experience difficulty parsing and assigning harms to particular acts at particular times. It may also partially explain why a target's reaction to a single event may appear out of proportion to the particular action.<sup>81</sup> It is important that the mediator give context to such reactions and not dismiss them because they appear out of proportion. Exploring deeper context may bring both parties to appreciate the source and strength of the harm without either diminishing it or wrongly laying all of the blame on the responding party at the table.

Claims of discrimination evoke strong emotions in all participants. The mediator must not let strength of emotion, or its manner of expression, induce an unbalanced response. Mediators, as peace-makers and promoters of compromise, are likely to prefer some party's possible responses over other possible responses. The angry party is harder to manage than the resigned party. Moreover, when the one party is expressing anger, the responding party may react more defensively, which poses an added problem for the mediator. Calm in the face of emotional expression, and an even-

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81. The other partial explanation is that where discrimination is the norm objecting to it will seem extreme. At this writing, GEICO auto insurance company is airing its "So Easy a Caveman Could Do It" ads. The premise—that cavemen still exist—gives rise to a series of vignettes in which a caveman is outraged at the GEICO ads. In one such ad, a GEICO representative is apologizing for the ad, and in another a therapist is asking a caveman patient why the ad is so upsetting. In a third GEICO ad, a news anchor has two talking heads—a caveman's, to articulate his complaint, and a responder who ridicules the complaint. The ads are a clever presentation of iconic cultural moments but are troubling because the common thread is the experience of a disfavored group's efforts to lay bare, and stop, discrimination.

handed response to that emotion and its expression are essential skills for the mediator.

*Practice Recommendation 16: Use the novelty of mediation to establish new patterns of behavior, but also help the parties return to the familiar context with a plan for successful change.*

Another related matter of perspective is important for the mediator to appreciate. When a key actor changes the status quo from chronic discrimination against members of some groups to even-handedness, members of the audience, both non-targets and targets, may see the change as favoritism toward members of the group previously targeted. This poses difficulties for those seeking to achieve even-handedness. It is no surprise then that even those dedicated to even-handedness experience considerable difficulty in implementing it.

Fortunately, neither the mediation context nor the mediator is known to the parties. Accordingly, the parties do not have a settled expectation regarding either and, for the context of mediation, a status quo does not yet exist. The mediator who brings self-aware even-handedness to the table at the outset is less likely to encounter the entrenched perception that imbalance is fair than, for example, the manager returning to the workplace from fairness training. Moreover, where ADR efforts occur early, in circumstances where the stakes for the parties are lower,<sup>82</sup> and when the remedies do not involve zero-sum outcomes, the resistance to change will be less. This alone is a strong argument for early intervention both for ADR purposes, but also for workplace management generally.

The mediator must not forget that, however successfully the parties resolve difficulties in the mediation room, the durability of mediation depends upon translating the balance achieved in mediation back to the original site of the dispute. As a result, the mediator must anticipate the status quo to which the parties will return and help them plan how to ensure that it incorporates fairness. It may not be enough, for example, for the male co-worker to apologize to the female for telling sexist jokes in the lunchroom. While they are the only parties in the mediation room, they will not be alone in the lunchroom. Exploring in mediation the unbalanced

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82. See Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 513-24 (2003) (advocating early intervention in employment discrimination to improve the chances of successful, continued workplace attachment of the target).

circumstances present at work and developing some mutual strategies to cope with these would certainly be a richer result.

*Practice Recommendation 17: Use a party's charges that the mediator is being unfair as an opportunity to model receiving and giving constructive criticism.*

Finally, despite our best efforts, mediators may sometimes face charges of imbalance or unfairness from one or both parties. How should the mediator manage complaints by a party concerning the mediator's management of the process? It is critical that the mediator not be spooked by criticism from one party into unfair treatment of another party. A consistent attitude that the mediator is committed to balance and fairness dictates that she or he listen to, but not necessarily agree with, such claims of mediator unfairness.

While nettlesome at first, such charges are actually a valuable opportunity for the mediator to model the process of receiving and giving constructive criticism. Asking the disgruntled party to describe specific mediator behaviors that she considers unfair or unbalanced channels the protesting party's energy away from acting out and into analysis of process. An ensuing colloquy in which concrete actions are examined for unfairness may variously convince the mediator that she was in some measure unfair, the disgruntled party that the feeling or thought of unfairness is or is not supported, and, at the least, give that party the feeling of being listened to.

If the disgruntled party resists specifying the behaviors that were allegedly unfair, the mediator need only insist, "You seem to be saying that I am doing something wrong [or unfair]. I am willing to hear you but I won't be able to change my behavior unless you describe it to me and tell me how it is unfair." Once the specific behaviors are on the table, the mediator and the parties can work together to craft a solution, if a solution appears justified. Whatever the outcome, this process will model for both parties a way of receiving feedback, listening, and problem-solving. Outrage by any party should not, however, take over the mediation process as that becomes an evasion of solution-seeking.

### CONCLUSION

This Article briefly reviewed how five fundamental aspects of our thinking systematically contribute to our own and other's biases and discussed how a mediator might apply this knowledge to improve fairness and balance in mediation. Each of these topics—categorization, attribution, metaphorical expression, norming, and

framing—have been the subject of extensive scientific research. Strategic application of any one of these research areas could improve fairness of mediators dramatically. Systematic practice applying the guidelines outlined in this Article would be a good first step toward better mediation. A long-term program of research and study to improve upon these guidelines and their application could mark an important new stage of mediation practice.

