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Mediation and Emotions: Perception and Regulation

Charlie Irvine* and Laurel Farrington†

Information... has no meaning until its significance is evaluated by a person.¹

Feeling – emotionality – is the sixth sense, the sixth critical human filter through which we make sense of the universe.²

I. INTRODUCTION

Mediation and more formal legal processes have much in common: their subject matter is disputes; their participants are disputants; and an independent third party plays a key part in their resolution. Yet there are significant differences. In adjudicative processes that third party is the decision-maker; her perception of the facts and evaluation of what is just are definitive. The parties' perceptions of facts and justice are secondary, and can quite reasonably be biased and self-serving. In mediation the parties are the decision-makers. Their perceptions of the facts and evaluations of justice carry the day.

We argue that it is the necessity of this context (rather than personal inclination) that drives mediators to focus on the emotional realm. As this chapter sets out, there are clear links between emotion and perception. If parties are emotionally aroused by anger, fear or a sense of injustice it will influence their perceptions and thus their

* Charlie Irvine is a Senior Teaching Fellow at University of Strathclyde and a doctoral student at Queen Margaret University

† Laurel Farrington is a doctoral student at University of Strathclyde

¹ RS Lazarus, *Fifty Years of the Research and Theory of R. S. Lazarus: An Analysis of Historical and Perennial Issues* (London, Lawrence Erlbaum Associates, 2014) xx.

² E Ryan, 'The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation' (2005) 10 *Harvard Negotiation Law Review* 231, 232

judgements about what is true or false, right or wrong.³ Formal adjudication sidesteps this phenomenon by delegating decision-making power to the third party, although some question the capacity of judges to immunise themselves against ‘catching’ the emotions of others.⁴ Mediation imposes a different discipline: the job is not done until first and second party decision-makers agree. If emotions affect their perceptions, mediators have little choice but to work with those emotions until the parties’ perceptions of facts and justice overlap sufficiently for them to reach consensus.⁵

Some years ago one of the authors of this chapter conducted a workplace mediation between two senior colleagues, a man and a woman with longstanding enmity. The woman set out a litany of slights, offences and outrageous behaviour by the man, who had ‘risen through the ranks’ of the organisation. In her eyes he was aggressive, loud and thoughtless. He responded by cataloguing her many failings (in his eyes) as a senior manager. She retorted that another senior colleague supported her view. The man seemed temporarily silenced; then shook his head and stood up, leaving the room. He was clearly close to tears.

The woman was astonished. She said ‘That’s not Bob.⁶ I’ve known him eighteen years and I’ve never seen him like that’. Although the man was considerably embarrassed by the episode it transformed the atmosphere of the mediation. There followed a period of mutual problem-solving for which both parties took responsibility. Ultimately they wrote an agreement about how they would work together in future. This episode illustrates both the significance of emotions and their ‘recursive’ quality: while the environment may trigger the emotion, ‘emotions can and often do change the environment’.⁷

Mediation provides a useful lens through which to consider the place of emotion in disputes. Its multi-disciplinary roots embrace law, psychology, economics,

³ See, for example, JS and D Keltner ‘Fear, Anger, and Risk’ (2001) 81 *Journal of Personality and Social Psychology* 146; F Gino and M E Schweitzer, ‘Blinded by Anger or Feeling the Love: How Emotions Influence Advice Taking’ (2008) 93 *Journal of Applied Psychology* 1165.

⁴ TA Maroney, ‘Angry Judges’ (2012) 65 *Vanderbilt Law Review* 1205

⁵ The mediator has been characterised as ‘the self-limiting intervenor’- C Irvine, (2006) ‘Mediation’s Values: An Examination of the Values Behind Five Mediation Texts’ unpublished Masters dissertation, Birkbeck College, University of London, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1686195, 27

⁶ Not his real name.

⁷ JJ Gross, ‘Emotion Regulation’ in M Lewis, J M Haviland-Jones and L Feldman Barrett (eds), *Handbook of Emotions*, 3rd edn, (London, Guilford Press, 2008) 499.

international relations and, more recently, neuroscience.⁸ Mediators themselves have shown ambivalence about emotions, with practice lurching between fascination⁹ and denial. Indeed, one prominent pioneer even questioned the usefulness of emotional information.¹⁰ Commercial mediators have tended to stress pragmatic solutions and efficiency. As the chapter by Clare Huntington shows,¹¹ other domains, such as family law, favour mediation precisely because of its capacity to deal with emotional concerns.

This chapter starts with an overview of the approach to emotion within the mediation ‘canon’¹² before considering two domains that hold promise: empathy and emotion regulation. Our perspective is shaped by findings from neuroscience and psychology suggesting that the distinction between emotion and rationality is a false dichotomy.¹³ In this view emotions play a key role in perception (how we receive data from the outside world) and judgement (how we evaluate those data). Both are central to the legal system, playing critical roles in establishing truth and justice. The chapter has three sections:

- the developing understanding of emotion in mediation
- the nature of empathy and its significance in mediation practice
- the way in which emotional self-regulation is harnessed and supported by mediators.¹⁴

We conclude that mediation offers the justice system a setting in which emotions are integrated into decision-making. For mediators, emotions are not just an unfortunate by-product of disputes but a key factor in their resolution, providing both information and motivation. We describe in some detail the operation of empathy and emotion regulation in mediation; this should prove useful both for mediators and others such as lawyers, judges and arbitrators who become enmeshed in other people’s conflict.

⁸ Cloke identifies 40 disciplinary sources- see K Cloke ‘Let a Thousand Flowers Bloom: A Holistic, Pluralistic and Eclectic Approach to Mediation’ (Winter, 2007) *ACResolution* 26.

⁹ Menkel-Meadow describes ‘a peculiarly intrusive (but healthy, I would argue) focus on feelings’ - C Menkel-Meadow, ‘The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices’ (1995) *Negotiation Journal* 217, 223.

¹⁰ J Haynes and G Haynes, *Mediating Divorce: Casebook of Strategies for Successful Family Mediation* (San Francisco, Jossey-Bass, 1989).

¹¹ See Huntington, Ch 2 of this volume.

¹² Irvine (n 5).

¹³ A Damasio, *Descartes’ Error*, revised edn, (London, Vintage Books, 1994)

¹⁴ JJ Gross, ‘The Emerging Field of Emotion Regulation: An Integrative Review’ (1998) 2 *Review of General Psychology* 271.

II. MEDIATION AND EMOTION

Law has long been wary of emotion. ‘Blind justice’ portrays the ideal judge as unaffected by human influence. Maroney recognises ‘the traditional view of emotion – a view strongly reflected in legal theory – as a savage force that unseats rationality, distorts judgment, manifests in impulsive aggression, and imperils social bonds’.¹⁵ This view chimes with older notions of the passions’ rightful place as slave to reason,¹⁶ and serves to position law as the heir of Enlightenment ideas opposing rationality to emotion and superstition. As MacIntyre claims, ‘the lawyers, not the philosophers, are the clergy of liberalism’.¹⁷

Mediation and its close relation, negotiation, have been influenced by this history. Many mediators are lawyers; after all, lawyers and the courts are gatekeepers to and consumers of their work. This position ‘in the shadow of the law’¹⁸ may explain why mediators have adopted significant elements of the law’s approach: ideas like ‘neutrality’, ‘without prejudice’ and the goal of a legally binding outcome.¹⁹ It may also account for their ambivalence about emotion: as Mayer says, ‘folk wisdom suggests that a negotiator (1) should avoid getting emotional and (2) is a passive recipient of the whims of emotion’.²⁰ Meanwhile, Riskin states that:

Negotiators – especially those trained in law – commonly address this problem by trying to exclude emotions from negotiation and to focus solely on so-called objective, rational factors, such as money.²¹

¹⁵ Maroney (n 4), 1209. Maroney also revisits these themes in the current collection: see Chapter 12 of this volume.

¹⁶ R Solomon, ‘The Philosophy of Emotions’ in M Lewis, JM Haviland-Jones and L Feldman Barrett (eds), *Handbook of Emotions*, 3rd edn (London, Guilford Press, 2008).

¹⁷ A MacIntyre, *Whose Justice? Which Rationality?* (London, Duckworth, 1988) 344.

¹⁸ R Mnookin and L Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 *Yale Law Journal* 950.

¹⁹ See JM Sabatino, ‘ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded within Alternative Dispute Resolution’ (1998) 47 *Emory Law Journal* 1289.

²⁰ B Mayer, *The Dynamics of Conflict Resolution: A Practitioner’s Guide* (San Francisco, Jossey-Bass, 2000) 43; see also D Shapiro, ‘Negotiating Emotions’ (2002) 20 *Conflict Resolution Quarterly* 67, TZ Reeves, ‘Practicing with the Heart as Metaphor’ (Spring, 2010) *ACResolution* and Irvine (n 5).

²¹ L Riskin, ‘Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation’ (2010) 10 *Nevada Law Journal* 290, 294.

Moore suggests mediators ‘neutralize’ anger;²² Strasser and Randolph assert that ‘to remain in conflict with another defies rational scrutiny’;²³ Roberts claims mediators transform interactions by ‘embodying the principles of objectivity and reasonableness’.²⁴ In a similar vein, Haynes sought to limit the reach of mediation on this ground: ‘Conflict over issues is resolvable in mediation: conflict over behaviour is resolvable in therapy’.²⁵

Reviewing mediation’s approach to emotion, we acknowledge different models of practice. Some, such as Bush and Folger’s ‘Transformative Mediation’²⁶ and Winslade and Monk’s ‘Narrative Mediation’²⁷ are explained in a single volume. The ‘mainstream model’²⁸ is more diffuse, drawing inspiration from several sources, as we shall see below.

A. The Mainstream Model

Also known as the facilitative or problem-solving approach, this model is pervasive in the Western world. Most mediation training uses it, although practitioners have adapted it to a range of contexts.²⁹ One canonical document is *The Mediator’s Handbook*, first published in 1982.³⁰ Evoking Quaker principles of consensual decision-making, its seven-step structure³¹ is surely one of the field’s most influential

²² CW Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd ed. (San Francisco, Jossey-Bass, 1996) cited in R Friedman, J M Brett, C Anderson, M Olekalns, N Goates and CC Lisco, ‘The Positive and Negative Effects of Anger on Dispute Resolution: Evidence From Electronically Mediated Disputes’ (2004) 89 *Journal of Applied Psychology* 369, 369.

²³ F Strasser and P Randolph, *Mediation: A Psychological Insight into Conflict Resolution* (London, Continuum, 2004) 23.

²⁴ M Roberts, *A-Z of Mediation* (Basingstoke, Hants, Palgrave MacMillan, 2014) 66.

²⁵ Haynes and Haynes (n 10) 2.

²⁶ RAB Bush and JP Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (San Francisco, Jossey-Bass, 1994); RAB Bush and JP Folger, *The Promise of Mediation: The Transformative Approach to Conflict*, 2nd edn (San Francisco, Jossey-Bass, 2005).

²⁷ J Winslade and G Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (San Francisco, Jossey-Bass, 2001)

²⁸ Irvine (n 5) 17.

²⁹ The ‘facilitative/evaluative’ debate, while significant, does not propose a new model; rather it is descriptive of variations within mainstream practice- see LL Riskin, ‘Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed’ (1996) 1 *Harvard Negotiation Law Review* 7; LL Riskin, ‘Decision Making in Mediation: The New Old Grid and the New New Grid System’ (2003) 79 *Notre Dame Law Review* 1.

³⁰ JE Beer with E Stief, *The Mediator’s Handbook*, 3rd edn (Gabriola Island, BC, New Society Publishers, 1997).

³¹ 1) Opening statement; 2) Uninterrupted time; 3) The exchange; 4) Setting the Agenda; 5) Building the Agreement; 6 and 7) Writing the Agreement and Closing: *ibid*, 4-5.

ideas. The *Handbook* abounds with references to individual emotions,³² reflecting our observation above that, when clients are decision-makers, mediators must take them as they are:

The mediator provides a structure for parties to increase honest communication, air emotions, and solve problems. In effect mediation gives angry people a chance to bring out the best in themselves.³³

Unsurprisingly, among the characteristics and skills of a good mediator the *Handbook* lists ‘comfortable with high emotion, arguments, interruptions, tears’.³⁴ Its ‘conflict core’ includes emotions such as annoyance and disagreement.³⁵ Regarding goals, the *Handbook* reflects a common mediator aspiration to go beyond mere settlement. Its hope is for conflict to be ‘transformed’,³⁶ and among the characteristics of conflict transformation is ‘easing their emotional state’.³⁷ Three pages are devoted to emotionally difficult situations, including ‘extreme anger’, ‘anguish, crying’ and ‘the silent one’.³⁸

It seems, then, that this founding document of mainstream mediation is at ease with emotion, treading a ‘via media’ between intrusion and suppression: ‘Accept but don’t press for emotions.’³⁹ High or negative emotion is viewed as a manifestation of conflict; resolve the conflict and the emotion will reduce. Mediators should condition themselves neither to over-react to, nor to ignore, emotional displays.

Another keystone of mainstream mediation is a negotiation text: Fisher, Ury and Patton’s *Getting to Yes*.⁴⁰ Its core idea, ‘principled negotiation’, has been widely adopted by mediators. However, its first principle may have created an impression of discomfort with emotions. The injunction to ‘separate the people from the problem’⁴¹ bears a surface resemblance to legal negotiators’ conventional wisdom, described

³² For example, ‘angry and hopeless’, 3, ‘stubborn, angry’; ‘friendly’, 4, ‘upset’, 5, ‘uneasy’, 8, ‘anxiety’, 10, ‘annoyance’, 11, ‘anxiety, anger, hostility, depression, and even vengeance’, 12, ‘resentment, hatred, frustration, jealousy, fear, outrage, grief’, 39. Page references are to Beer and Stief (n 30).

³³ *Ibid*, 9.

³⁴ *Ibid*, 23.

³⁵ *Ibid*, 11.

³⁶ A hope shared by the Transformative Mediation model- see Section IIB below.

³⁷ Beer and Stief (n 30) 15.

³⁸ *Ibid*, 84-86.

³⁹ *Ibid*, 39.

⁴⁰ R Fisher, W Ury and B Patton, *Getting to Yes: Negotiating Agreements without Giving In* (London, Random House Business Books, 1991)

⁴¹ *Ibid*, 17.

above, to exclude emotion and focus on facts.⁴² Its intention, however, is the opposite: ‘separate the relationship from the substance; deal directly with the people problem’.⁴³ Emotion is a key concern: ‘In a negotiation, particularly a bitter personal dispute, feelings may be more important than talk’.⁴⁴ Subsequent guidance resembles emotion regulation:⁴⁵ ‘First recognise and understand emotions, theirs and yours’; ‘Make emotions explicit and acknowledge them as legitimate’.⁴⁶

Despite the success of *Getting to Yes*, its authors have been accused of naiveté and idealism.⁴⁷ Possibly as a result they have developed and expanded their ideas. Ury’s *Getting Past No* includes advice resonant with emotion regulation: ‘You obviously can’t eliminate your feelings, nor do you need to do so. You need only to disconnect the automatic link between emotion and action.’⁴⁸ Strategies for disarming one’s negotiation counterparts⁴⁹ include acknowledging their emotions and helping them save face. In 2005 Fisher and Shapiro’s *Beyond Reason* dealt explicitly with emotions.⁵⁰ This book offers practical tools enabling negotiators to work with their own and their counterparts’ emotions via five ‘core concerns’: appreciation, affiliation, autonomy, status and roles. Praised as a ‘structured, portable methodology’⁵¹ it teaches negotiators to attend to these five concerns so as to understand and influence emotion.

Another ‘mainstream’ text, Mayer’s *The Dynamics of Conflict Resolution*, both acknowledges and integrates emotion.⁵² His ‘three dimensional’ model of conflict

⁴² See text above, nn 15-17.

⁴³ Fisher, Ury and Patton (n 40) 21.

⁴⁴ *Ibid*, 30.

⁴⁵ See below, Section IV

⁴⁶ Fisher, Ury and Patton (n 40) 30, 31. The injunction to ‘allow the other side to let off steam’ (*ibid*, 32) seems dated, however, and the notion of ‘venting’ has been criticised; see K G Allred, ‘Anger and Retaliation in Conflict: The Role of Attribution’ in M Deutsch and P Coleman (eds), *The Handbook of Conflict Resolution: Theory and Practice* (San Francisco, Jossey-Bass, 2000) 249.

⁴⁷ See, for example, J White (with response by R Fisher) ‘The Pros and Cons of “Getting to Yes”’ (1984) 34 *Journal of Legal Education* 115; JC Freund, *Smart Negotiating: How to Make Good Deals in the Real World* (New York, Simon and Schuster, 1992); JL Graham, L Lawrence and WH Requejo, *Inventive Negotiation: Getting Beyond Yes* (New York, Palgrave Macmillan, 2014).

⁴⁸ W Ury, *Getting Past No: Negotiating with Difficult People* (London, Century Business, 1991) 29.

⁴⁹ The term ‘counterpart’ is commonly used in the negotiation literature to convey the idea that negotiation is best understood as a co-operative venture where the result depends on the other party’s consent. Later we use the term ‘disputants’ to refer to those whose negotiations are sufficiently unsuccessful to require the intervention of a third party such as a mediator, arbitrator or judge.

⁵⁰ R Fisher and D Shapiro, *Beyond Reason: Using Emotions As You Negotiate* (New York, Viking Press, 2005).

⁵¹ E Ryan, ‘Building the Emotionally Learned Negotiator’ (2006) *Negotiation Journal* 209, 218.

⁵² Mayer (n 20).

sees resolution proceeding along cognitive, emotional and behavioural dimensions.⁵³ If people feel less strongly about the dispute, emotional resolution is achieved. Emotions are volatile and mercurial, however, and it can feel like ‘one step forward: one step back’. Examples of ‘emotional resolution’ include:

- Feeling they are accepted as individuals and their personalities and values are not under attack...
- Feeling they can maintain dignity or ‘face’...
- Having their core needs respected and addressed
- Having enough time to gain perspective and experience healing
- Having others accept their feelings as valid and values as legitimate
- Feeling genuinely and nonjudgmentally heard.⁵⁴

Mayer mentions apology and forgiveness,⁵⁵ and suggests true resolution of conflict must occur on all three dimensions: behavioural, emotional and cognitive.⁵⁶

B. Transformative Mediation

In 1994 two critics of mainstream mediation practice, Bush and Folger, launched what they claimed was a radical alternative in *The Promise of Mediation*.⁵⁷ Substantially re-written in 2005⁵⁸ this book is a stinging rebuke to the traditional approach, which they accused of ‘squandering’ mediation’s potential in order to ‘shore up institutional processes that operate to control, contain and settle conflict’.⁵⁹ Instead, they propose a different model, that of ‘transformative mediation’. This rejects the notion of achieving resolution by solving problems and settling disputes. The promise of mediation is fulfilled instead by focusing on the parties’ relationship, with mediators supporting ‘empowerment’ and ‘recognition’. Thus ‘parties can recapture their sense of competence and connection, reverse the negative conflict

⁵³ Ibid, 98.

⁵⁴ Ibid, 103,104

⁵⁵ Ibid, 104.

⁵⁶ Ibid, 99, 108. Mayer considers cognitive resolution the hardest to achieve.

⁵⁷ Bush and Folger (1994, n 26). The idea of conflict transformation is not original to these authors- see for example Beer and Stief (n 30); JP Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse, NY, Syracuse University Press, 1995).

⁵⁸ Bush and Folger (2005, n 26), further re-stated in JP Folger, RAB Bush and D Della Noce (eds), *Transformative Mediation: A Sourcebook* (New York, Institute for the Study of Conflict Transformation, 2010).

⁵⁹ Bush and Folger (2005, n 26) 1.

cycle, re-establish a constructive (or at least neutral) interaction, and move forward on a positive footing'.⁶⁰

The overarching theory of transformative mediation⁶¹ holds that conflict renders people weak and self-absorbed. The by-products of weakness include 'confusion, doubt, uncertainty, and indecisiveness',⁶² while self-absorption makes them 'suspicious, hostile, closed...'⁶³ The authors rarely explicitly mention emotions although they acknowledge that fear, blame and anger contribute to conflict escalation.⁶⁴ Transformative mediation aims to deal with this weakness and self-absorption by restoring human agency and social connectedness.⁶⁵ This is manifest in the twin notions of 'empowerment shift... from weakness to greater strength' and 'recognition shift... from self-absorption to greater understanding of the other.'⁶⁶ To these phenomena Bush and Folger attribute many of mediation's benefits such as restored relationships and improved 'sense of competence and connection'.⁶⁷ 'Weak and self-absorbed' parties are thus transformed to become 'strong and responsive'.⁶⁸ Words like 'positive' and 'constructive' pepper the text.⁶⁹ Any emotional dimension to these benefits is not spelled out. 'Empathy' is defined as 'the capacity to understand the situations and perspectives of others',⁷⁰ entirely omitting affective components.⁷¹ One might conclude that transformative mediation shares Enlightenment prejudices favouring rationality over emotion.

However, the authors later went on to legitimise the expression of emotion and voice criticism of those who don't follow suit: 'To ignore, sidestep, or stifle expressions of emotion is ... to squander the opportunities for empowerment and

⁶⁰ Ibid, 53.

⁶¹ C Irvine, 'Transformative Mediation: A Critique' Unpublished Masters assignment, available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691847

⁶² Bush and Folger (2005, n 26) 49.

⁶³ Ibid, 49.

⁶⁴ Ibid, 51 citing JZ Rubin, DG Pruitt, and SH Kim, *Social Conflict: Escalation, Stalemate, and Settlement*, 2nd edn (New York, McGraw-Hill, 1994).

⁶⁵ Citing the communitarian philosophy of A Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* (London, Profile Books, 1996) and the social psychology of JZ Rubin, DG Pruitt, and SH Kim, *Social Conflict: Escalation, Stalemate, and Settlement*, 2nd edn (New York, McGraw-Hill, 1994).

⁶⁶ Bush and Folger (2005, n 26) 75

⁶⁷ Ibid, 52, 53.

⁶⁸ Ibid, 55. For a critique of empowerment see S Cobb, 'Empowerment and Mediation: A Narrative Perspective' (1993) 9 *Negotiation Journal* 245.

⁶⁹ See, for example, Bush and Folger (2005, n 26) 53, 54 and 56

⁷⁰ Cobb (n 68) 250.

⁷¹ See Section III below

recognition that these expressions present.’⁷² This sentence illustrates the ‘single track’ nature of transformative mediation. Emotions are useful insofar as they support the model’s intellectual architecture.

Transformative mediation is used by the US Postal Service, claiming some credit for improving that organisation’s famously combative employment culture.⁷³ However, it has been criticised for its authors’ early claim that the model could not be combined with others,⁷⁴ and also because of its rejection of settlement,⁷⁵ the shortcomings in its underlying theory of moral development⁷⁶ and for being ‘grandiose, intransigent, and exclusivist’.⁷⁷

C. Narrative Mediation

Another approach is seen in *Narrative Mediation*, by Winslade and Monk. Stories are central: ‘the narrative metaphor draws attention to the ways in which we use stories to make sense of our lives and relationships’.⁷⁸ Although not the first to apply a narrative lens to mediation,⁷⁹ the book elevates it into a coherent model. Steeped in social constructionist philosophy, its authors view stories as creating rather than reporting reality.⁸⁰ Stories of disputes both describe and contribute to conflict, typically preventing consideration of alternative explanations. The mediator’s job is to create space for alternative storylines. While, as with transformative mediation, the main thrust of the activity seems cognitive,⁸¹ emotions are recognised insofar as they inform people’s narratives. One of the book’s case studies mentions ‘hurt’; ‘injustice,

⁷² Cobb (n 68) 271, and see LB Bingham, ‘Transformative Mediation at the United States Postal Service’ (2012) 5 *Negotiation and Conflict Management Research* 354, 360 (mediators inhibited or supported recognition depending on their tolerance for strong emotions).

⁷³ Bingham (n 72).

⁷⁴ J Lande, ‘How Will Lawyering and Mediation Practices Transform Each Other?’ (1997) 24 *Florida State University Law Review* 839, 856.

⁷⁵ M Williams ‘Can’t I Get No Satisfaction? Thoughts on the Promise of Mediation’ (1997) 15 *Mediation Quarterly* 143.

⁷⁶ J Seul, ‘How Transformative Is Transformative Mediation? A Constructive Developmental Assessment’ (1999) 15 *Ohio State Journal on Dispute Resolution* 135; L Gaynier, ‘Transformative Mediation: In Search of a Theory of Practice’ (2005) 22 *Conflict Resolution Quarterly* 397.

⁷⁷ R Condlin, ‘The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype’ (2014) 14 *Cardozo Journal of Dispute Resolution* 621.

⁷⁸ Winslade and Monk (n 27) 3.

⁷⁹ See Cobb (n 68).

⁸⁰ V Burr, *An Introduction to Social Constructionism* (London, Routledge, 1995).

⁸¹ A similar phenomenon has been noted in relation to negotiation scholarship- see, for example, IS Fulmer and B Barry, ‘The Smart Negotiator: Cognitive Ability and Emotional Intelligence in Negotiation’ (2004) 15 *International Journal of Conflict Management* 245.

betrayal'; and 'guilt and self-blame'.⁸² The mediator's goal is to 'deconstruct'⁸³ such stories and work with parties to construct an 'alternative' or 'preferred' narrative.⁸⁴

The emphasis on building a trusting relationship draws heavily on the model's therapeutic roots⁸⁵ reflecting Rogerian ideas of 'unconditional positive regard'.⁸⁶ The authors cite Gergen's claim that we are 'born into relatedness',⁸⁷ an approach aligning with social baseline theory, which holds that social connection, not isolation, is the human norm.⁸⁸ They reject, however, suggestions that emotions are inherent or 'essential', viewing them along with other aspects of experience as constructed in discourse:

It does not make sense to say that people have thoughts or feelings on the inside that precede their expression. It makes more sense to speak about how discourses and linguistic formulations make up our subjective experience.⁸⁹

There is therefore much to play for in mediation, where individuals can construct and reconstruct their emotional world.

Notwithstanding scant reference to emotions, narrative mediation offers much to the emotional domain. Its recognition that culture influences how we construct reality raises the possibility of dialogue about the emotional expressions legitimised within particular cultures. Its relational practices create conditions for building empathy between mediator and parties.⁹⁰ And instead of locating conflict within individuals it lifts the mediator's gaze to the wider system: 'The person is not the problem; the problem is the problem.'⁹¹

⁸² Winslade and Monk (n 27) 6, 13, 18.

⁸³ *Ibid*, 72.

⁸⁴ *Ibid*, 82.

⁸⁵ The authors acknowledge in particular M White and D Epston, *Narrative Means to Therapeutic Ends* (New York, Norton, 1991).

⁸⁶ Carl Rogers, pioneer of client centred therapy, regarded 'unconditional positive regard' as one of the key conditions for therapists to promote growth- C Rogers, *On Becoming a Person* (Boston, Houghton Mifflin, 1961).

⁸⁷ Winslade and Monk (n 27) 40 citing K J Gergen, *The Saturated Self: Dilemmas of Identity in Contemporary Life* (New York, Basic Books, 1991) 243.

⁸⁸ '[S]ocial relatedness and its psychological correlates constitute the normal, baseline ecology of the functional human brain'- JA Coan and EL Maresh, 'Social Baseline Theory and the Social Regulation of Emotion' in JJ Gross, ed, *The Handbook of Emotion Regulation*, 2nd edn (New York, The Guilford Press, 2014).

⁸⁹ *Ibid*, 39.

⁹⁰ See IIIA below, 'Empathy'.

⁹¹ Winslade and Monk (n 27) 131 citing M White, 'The Externalizing of the Problem and the Re-authoring of Lives and Relationships' in M White, *Selected Papers* (Adelaide, Australia, Dulwich Centre Publications, 1989).

D. Further Developments

Mediation has not been immune from wider and more recent developments in psychology and neuroscience. While in 2000 it could be said that ‘lack of detailed attention to emotions and relationships is the biggest gap in our understanding of conflict’,⁹² the influence of neuroscience, cognitive psychology, and perhaps the maturing of the field have yielded contributions from a range of writers. Below, we provide an overview of some of the more interesting and relevant connections.

In 2001 Jones and Bodtger argued for the centrality of emotion in conflict, challenging the ‘false duality of rationality vs. emotionality...’⁹³ They urged mediators not to see emotion as a ‘side effect’ but rather as a ‘framer... a social construction through which the disputant defines the conflict reality.’⁹⁴ Their prescription for emotionally-confident mediators includes advice on dealing with ‘emotional flooding... being swamped by emotion to the extent that one cannot function or think effectively’⁹⁵ and ‘emotional contagion’, the tendency to ‘catch’ others’ emotions.⁹⁶ They suggest that cognitive reappraisal⁹⁷ holds promise when emotions are triggered by conflict, but caution that this requires skill on the part of the mediator. Their emotion-eliciting and reappraising questions are similar to the ‘externalising conversation’ techniques of narrative mediation:⁹⁸ the approach could be characterised as ‘externalising emotions’.⁹⁹ In effect the mediator invites someone experiencing an emotion to step a little distance away from it; observe, describe and reflect on it; then decide how to respond.¹⁰⁰

In 2006 Jones presented a model explaining how individuals experience emotions. A triggering event is followed by appraisal (interpretation of the triggering event) leading to an emotion (appropriate to that interpretation). The emotion

⁹² S Retzinger and T Scheff, ‘Emotion, Alienation, and Narratives: Resolving Intractable Conflict’ (2000) 18 *Mediation Quarterly* 71, 71; although see LS Schreier, ‘Emotional Intelligence and Mediation Training’ (2002) 20 *Conflict Resolution Quarterly* 99, 100 (claiming by 2002 that there was a surge of interest in emotions in mediation).

⁹³ TS Jones and A Bodtger, ‘Mediation With Heart in Mind: Addressing Emotion in Mediation Practice’ (2001) 19 *Negotiation Journal* 217, 224.

⁹⁴ *Ibid*, 223.

⁹⁵ *Ibid*, 228-232.

⁹⁶ *Ibid*, 232-233. For a further discussion of emotion contagion as a component of empathy see III E below.

⁹⁷ For an explanation of cognitive reappraisal see III A below.

⁹⁸ Winslade and Monk (n 27) 79

⁹⁹ A technique associated with drama therapy- i.e. ‘externalising the internal’ in P McFarlane, *Drama Therapy: Developing Emotional Stability* (London, David Fulton Publishers, 2005) 92.

¹⁰⁰ Similar to self-empathy- see III E below.

produces somatic reactions (physiological changes preparing us for the action we need to take) which in turn lead to action tendencies (the disposition to behave in keeping with all of the foregoing).¹⁰¹ Sometimes known as the ‘path to action’¹⁰² this model reflects research by ‘appraisal theorists’ such as Lazarus.¹⁰³ Damasio states: ‘Emotion and feeling, along with the covert physiological machinery underlying them, assist us with the daunting task of predicting an uncertain future and planning our actions accordingly.’¹⁰⁴ Emotion and thinking are intimately linked, and each requires the other for accurate perception. Damasio also links mind and body; emotions work by comparing new perceptual data to a ‘background feeling’, the ‘image of the body landscape when it is not shaken by emotion.’¹⁰⁵

The implications for law and mediation are clear: if accurate perception is important we must attend to the emotional domain. Jones challenges mediators to become emotionally literate because working with conflict inevitably means working with emotions. First mediators should learn to decode emotions;¹⁰⁶ second, they should use elicitive questioning to help parties identify their emotional experience; and finally they should help parties reappraise their emotions.¹⁰⁷ Barker also calls for emotional literacy, suggesting that mediators should ‘stay with the heat’ because emotions ‘often hold the key to unlocking conflict at a profound level’.¹⁰⁸

Schreier’s 2002 survey of 36 mediation training organisations¹⁰⁹ confirmed her hypothesis that insufficient attention was given to teaching mediators to deal skilfully with emotions.¹¹⁰ Attitudes appeared to be changing with trainers calling for mediators to develop skills in both handling emotions and in emotional self-

¹⁰¹ TS Jones, ‘Emotion in Mediation: Implications, Applications, Opportunities, and Challenges’ in MS Herrman (ed), *The Blackwell Handbook of Mediation: Bridging Theory, Research, and Practice* (Oxford, Blackwell Publishing, 2006) 277, 278-279.

¹⁰² K Patterson, J Grenny, R McMillan and A Switzler, *Crucial Conversations: Tools for Talking When Stakes are High* (New York, McGraw-Hill, 2002) 99.

¹⁰³ Lazarus (n 1).

¹⁰⁴ Damasio (n 13) xxiii.

¹⁰⁵ Ibid, 151. See also C Irvine, ‘Building Emotional Intelligence: A Grid for Practitioners’ in M LeBaron, C MacLeod and AF Acland (eds), *The Choreography of Resolution: Conflict, Movement, and Neuroscience* (Chicago, American Bar Association, 2013) 107.

¹⁰⁶ Jones provides detailed guidance for the identity-based emotions of anger, shame and contempt; Jones (n 101) 287-293.

¹⁰⁷ Ibid.

¹⁰⁸ E Barker, ‘Tips for Dealing with Emotion in Mediation’ (2003) Available from <http://www.mediate.com/articles/ebarker2.cfm>

¹⁰⁹ This involved 34 organisations from the USA, and one each from Canada and the Netherlands.

¹¹⁰ Schreier (n 92).

regulation. One spoke of the ‘old way (repressing emotion in the room) and the new way (allowing it in).’¹¹¹

Bowling and Hoffman’s influential 2003 collection *Bringing Peace into the Room* proposed a systemic conception of the mediator’s role.¹¹² Questioning the conventional view of mediators as neutral, they suggest they are ‘being influenced by the process as much as influencing it’.¹¹³ Thus ‘the feelings the mediator experiences may be vital material that the mediator can use – albeit judiciously – in helping the parties reach a resolution.’¹¹⁴ The authors champion reflective practice because mediation requires head and heart. Similarly, Johnson and others challenge mediators to develop emotional intelligence, focused on four areas: ‘Self-Awareness’, ‘Self-Management’, ‘Social Awareness’ and ‘Social Skills’.¹¹⁵ And Gehris warns against ignoring emotion, suggesting mediators learn to recognise emotions via facial expressions,¹¹⁶ speech, body language and discussion.¹¹⁷ Techniques include acknowledgement, active listening, expressing empathy and drawing on the mediator’s own emotional response.¹¹⁸

Negotiation research has also highlighted the importance of emotions. Potworowski and Kopelman distinguished between ‘Emotional Intelligence’ (a trait) and their proposed model of ‘Negotiation Expertise in Emotion Management’ (NEEM) (which can be learned).¹¹⁹ The capacity for NEEM requires ‘*sensitivity, ability, and inclination*’¹²⁰ so that the negotiator learns to distinguish the other party’s helpful, unhelpful and irrelevant emotions. Gaspar and Schweitzer noticed the importance of emotion in deception and developed a model taking account of ‘incidental’ and ‘integral’ emotions en route to the ‘anticipated emotion’ that the

¹¹¹ Ibid, 109.

¹¹² D Bowling and DA Hoffman (eds), *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (San Francisco, Jossey-Bass, 2003).

¹¹³ D Bowling and DA Hoffman, ‘Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation’ in Bowling and Hoffman (n 112) 13, 23.

¹¹⁴ Ibid, 24.

¹¹⁵ ME Johnson, S Levine and LR Richard, ‘Emotionally Intelligent Mediation: Four Key Competencies’ in Bowling and Hoffman (n 112) 151, 153.

¹¹⁶ Drawing on Paul Ekman’s approach- see P Ekman, *Emotions Revealed: Understanding Faces and Feelings* (London, Phoenix, 2003).

¹¹⁷ MS Gehris, ‘Good Mediators Don’t Ignore Emotion’ (2005) 46 *New Hampshire Bar Journal* 28.

¹¹⁸ Ibid, 32, 33.

¹¹⁹ G Potworowski and S Kopelman, ‘Strategic Display and Response to Emotions: Developing Evidence-based Negotiation Expertise in Emotion Management (NEEM)’ (2008) 1 *Negotiation and Conflict Management Research* 333.

¹²⁰ Ibid, 336.

deception is designed to achieve.¹²¹ Decision-making by negotiators is affected by both incidental emotions (such as feeling annoyed because of a difficult journey or grateful because a stranger held open a lift door) and integral emotions (such as being stressed by a deadline or irked by the counterpart's demeanour). Intriguingly they cite Ruedy et al's research on the 'cheater's high,' a recently detected phenomenon where 'undetected dishonesty can induce feelings of elation'.¹²²

Picard and Siltanen noticed the significance of both positive and negative emotions to learning in their 'insight model' of mediation.¹²³ They are critical of Fisher and Shapiro's¹²⁴ proposal that negative emotions be blocked or suppressed during negotiation: 'to block negative emotions is to inhibit significant moments in the learning that are hoped for in any model of mediation.'¹²⁵

In 2006 Maiese urged mediators to re-think 'the reason-emotion dichotomy'.¹²⁶ She contended that emotions are central to the emergence and escalation of conflict and that cognitive reappraisal holds significant promise for resolution. She proposed that mediators supplement standard techniques of 'active or empathic listening, appreciative inquiry, and dialogue' with 'ritual, art and joking',¹²⁷ though she conceded that such emotional appraisal techniques might be too 'touchy-feely' for some.¹²⁸

This work prefigured a project conceived by LeBaron exploring the potential of dance for conflict resolution, resulting in an international conference in 2011 and, in 2013, an edited collection re-emphasising the mind-body connection in conflict work.¹²⁹ One of the present authors attended the conference and the bodywork alerted him to the tradition in which he had been trained, caricatured as 'mediating from the

¹²¹ JP Gaspar and ME Schweitzer, 'The Emotion Deception Model: A Review of Deception in Negotiation and the Role of Emotion in Deception' (2013) 6 *Negotiation and Conflict Management Research* 160.

¹²² Ibid, 171 citing N Ruedy, C Moore, F Gino and M Schweitzer, 'The Cheater's High: The Unexpected Affective Benefits of Unethical Behaviour' (2013) 105 *Journal of Personality and Social Psychology* 531.

¹²³ C Picard and J Siltanen, 'Exploring the Significance of Emotion for Mediation Practice' (2013) 31 *Conflict Resolution Quarterly* 31.

¹²⁴ Fisher and Shapiro (n 50).

¹²⁵ Picard and Siltanen (n 123) 46.

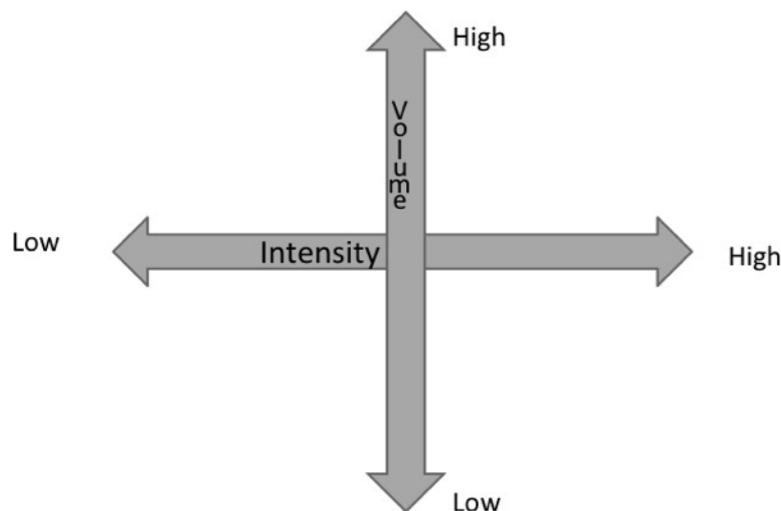
¹²⁶ M Maiese, 'Engaging the Emotions in Conflict Resolution' (2006) 24 *Conflict Resolution Quarterly* 187, 188.

¹²⁷ Ibid, 189.

¹²⁸ Ibid, 194.

¹²⁹ M LeBaron, C MacLeod and AF Acland (eds), *The Choreography of Resolution: Conflict, Movement, and Neuroscience* (Chicago, American Bar Association, 2013).

neck up’, meaning to ignore the physical, and thereby emotional realm.¹³⁰ He proposed a grid capturing two dimensions of conflict: intensity and volume.¹³¹ ‘Intensity’ describes the force of an emotion for the person experiencing it; ‘volume’ to the force with which it is transmitted. The latter dimension is related to ‘strategic display’: instrumental reasons for displaying a particular emotion at a particular volume.¹³²



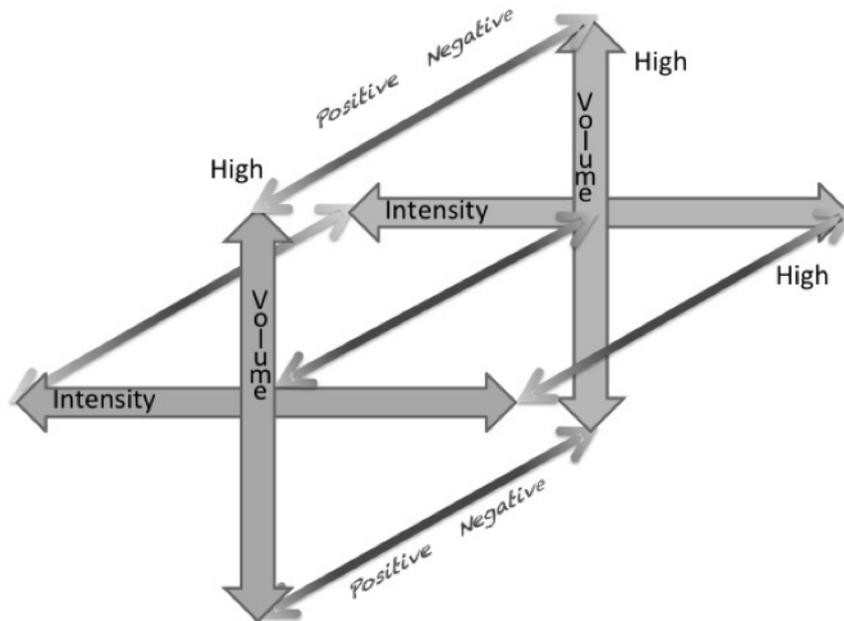
Recently, we updated the grid with a third dimension: valence, the positivity or negativity with which an emotion is experienced. Research suggests that a central driver of behaviour is the attempt to reduce negative emotion and increase positive.¹³³

¹³⁰ Irvine (n 105) 108. See also E Beausoleil and M LeBaron, ‘What Moves Us: Dance and Neuroscience Implications for Conflict Approaches’ (2013) 31 *Conflict Resolution Quarterly* 133.

¹³¹ Irvine (n 105) 114.

¹³² Potworowski and Kopelman (n 119).

¹³³ BL Frederickson and MA Cohn, ‘Positive Emotions’ in M Lewis, J M Haviland-Jones and L Feldman Barrett (eds), *Handbook of Emotions*, 3rd edn (London, Guilford Press, 2008) 777



The grid conceptualises mediators' work by drawing attention to the split between the emotionally private and public realms. Mediators know the intensity and valence of their own emotions; they can choose (to an extent) how much they display and how much is kept private. Disputants also choose (effortfully or automatically) how much emotion to display (the 'volume'). So mediators must make judgements about what and how much disputants are making public. There is a sense of co-authoring, reflecting the view that emotions are socially constructed¹³⁴ and that mediators may usefully have a hand in that construction.

The upshot of these developments is to put emotions firmly at the theoretical core of mediation. As a 2011 student text asserts: 'Both mediators and lawyers can contribute greatly to the process of settlement by dealing with emotional forces.'¹³⁵ We now consider the mechanisms by which mediators may do so, examining the role of empathy before considering how mediators and mediation may contribute to the regulation of emotion.

¹³⁴ See Winslade and Monk, n 27. See also DW Augsburger, *Conflict Mediation Across Cultures: Pathways and Patterns* (Louisville, Kentucky, Westminster/John Knox Press, 1992).

¹³⁵ D Golann and J Folberg, *Mediation: The Roles of Advocate and Neutral*, 2nd edn (New York: Aspen Publishers, 2011) 177.

III. THE SIGNIFICANCE OF EMPATHY

A. Introduction

Empathy is a key ingredient in mediation, both in its use by the mediator and the manner in which the process offers disputants opportunities to give and receive it. We outline empathy as a concept, including background, definition and components, suggesting that empathy is a synergy of emotion and reason. We then explain how the mediator works with emotion and emotion regulation to facilitate empathic understandings and agreement.

B. The Nature of Empathy

In the words of Simon Baron-Cohen: ‘Empathy is the ability to identify what someone is thinking or feeling and to respond to their thoughts and feelings with an appropriate emotion’.¹³⁶ When we empathise, we imagine what it feels like to be in that person’s mental state. Importantly, we are motivated to respond to another’s distress with empathic concern.¹³⁷

Empathy has been described as a process, attitude, behaviour, event, trait, skill and capacity.¹³⁸ Coined as *Einfühlung* by nineteenth century German philosophers of aesthetics, it originally described the attempt to understand art from a dual perspective by mirroring and projecting self in the work.¹³⁹ It is generally measured as dispositional (trait) yet can also be described as situational (context-dependent). In other words, empathy can be measured as a feature of personality which is more or less stable across time,¹⁴⁰ or it can be conceptualised as an individual response to a specific other or situation, which may vary depending, for example, on the degree of shared values and preferences.¹⁴¹ Empathy is usually measured through physiological tests, brain scans and self-reporting questionnaires. Scores vary across the population:

¹³⁶ S Baron-Cohen, *Zero Degrees* (London, Allen Lane, 2011) 12.

¹³⁷ See below, Section III E.

¹³⁸ V Lucas, ‘The Art and Science of Empathy’ (2014) 21 *European Journal of Palliative Care* 69.

¹³⁹ R Vischer, ‘On the Optical Sense of Form: A Contribution to Aesthetics’ cited in D Howe, *Empathy: What It Is and Why It Matters* (London, Palgrave Macmillan, 2013).

¹⁴⁰ M H Davis, *Empathy: A Social Psychological Approach* (Boulder CO Westview Press 1994).

¹⁴¹ L Cameron, *Metaphor and Reconciliation: The Discourse Dynamics of Empathy in Post-Conflict Situations* (London, Taylor and Francis, 2010). Cameron’s viewpoint is that the decision whether or not to engage in empathy is often situation-specific and involves choice.

those with traits associated with personality disorder and some with autistic spectrum difficulties (ASD) show lower levels and such people have been described as having low or ‘zero degrees of empathy’ or even an ‘empathy disorder’.¹⁴² Additionally, empathy fluctuates within individuals in the short term and across the life span. It is influenced by early experience, gender, education, occupation and wealth. People empathise more with those familiar and similar and where there is shared experience.¹⁴³ They are less empathic when tired, stressed, unwell, suppressing emotion or highly aroused as in conflict situations.¹⁴⁴ These latter two circumstances are highly relevant in mediation.

C. The Origins of Empathy: Evolution and Attachment

Empathy is a requirement for co-operation and is as important to survival as the practical skills involved in the acquisition of food and shelter.¹⁴⁵ We seem hard-wired to give and receive empathy, and social connections can be considered a basic human need.¹⁴⁶ In the same way, loneliness may be as detrimental to physical health as smoking.¹⁴⁷

Dependence on others for our sense of identity and self-worth may explain why shared understandings are so valued and, conversely, why it is felt so distressing when these are fractured by conflict.¹⁴⁸ Relis found that disputants engaged in mediation for medical negligence valued communication, having a voice and the opportunity to express themselves and receive acknowledgment of harm. These non-legal, human concerns contrasted with lawyers’ preoccupation with financial settlement.¹⁴⁹

The need for connection is mirrored by the urge to achieve it: as Beausoleil and LeBaron put it, ‘we are neurologically wired for mutual understanding and feeling.’¹⁵⁰ Bowlby’s Attachment Theory posits that an attentive, empathic caregiver creates a

¹⁴² Baron-Cohen (n 136) 111.

¹⁴³ SD Preston and FBM de Waal, ‘Empathy: its ultimate and proximate bases’ (2002) 25 *Behavioural and Brain Sciences* 1.

¹⁴⁴ This may explain Bush and Folger’s insight at Section IIB, above, that conflict brings about weakness and self-absorption.

¹⁴⁵ C Darwin, *The Descent of Man and Selection in Relation to Sex* (London, John Murray, 1871) 80.

¹⁴⁶ This view aligns with ‘social baseline theory’; see Section IIC and n 88.

¹⁴⁷ J Holt-Lunstad, TB Smith and JB Layton, ‘Social relationships and mortality risk: a meta-analytic review’ (2010) July 27, 7 *PLoS Med*; <<http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1000316>

¹⁴⁸ See Ury (n 48) and Jones (n 101).

¹⁴⁹ T Relis, *Perceptions in Litigation Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge, Cambridge University Press, 2011); and see also Riskin, n 21.

¹⁵⁰ Beausoleil and LeBaron (n 130) 144.

physically and emotionally secure environment, helping regulate a child's emotions and, crucially, reduce stress. The child can then develop into an emotionally secure adult, able to regulate her emotions, and become an emotionally attuned parent in turn.¹⁵¹ Secure adult attachment bonds, based on empathy, are mutually supportive as well as emotionally regulating, as in successful couple relationships. Indeed, Baron-Cohen has described the capacity for empathy as 'the internal pot of gold'.¹⁵²

However, those whose caregivers were unresponsive, erratically or under-responsive or behaved inappropriately often lack empathy and have difficulty managing emotion.¹⁵³ Learned expectations of how others will meet one's needs tend to determine the choice of emotion regulation strategies. While powerful predictors of behaviour, these strategies can be challenged and altered by experience: emotional events and encounters including situations encouraging self/other-reflection such as therapy¹⁵⁴ and perhaps also mediation.

D. Empathy and Neuroscience

We begin with the child-parent bond. Empathic attunement involves the release of powerful bonding hormones in both parent and child. Situations of fear and distress activate the attachment system and the child seeks out his caregiver. Exploratory behaviour ceases until a sense of security is restored. Then the attachment system is de-activated and, as the child's emotions become regulated, the exploratory system is re-activated. Cognitive activity is again possible and the child resumes play and learning.¹⁵⁵ Importantly, in this two-way process the caregiver experiences automatic activation of the caregiving system and an overriding need to respond. This is both a physical and psychological phenomenon; separation is painful to both, and children can even die as a result of being emotionally abandoned.¹⁵⁶ This need for attachment figures (and the need to respond as caregiver) continues into adulthood and is particularly apparent at times of perceived stress and threat, as it is in situations of

¹⁵¹ EJM Bowlby, *Attachment and Loss: Attachment* (vol 1) (London, Hogarth Press, 1969).

¹⁵² Baron-Cohen (n 136) 105.

¹⁵³ Bowlby (n 151).

¹⁵⁴ LA Travis, NJ Bliwise, JL Binder and HL Horne-Moyer, 'Changes in Clients' Attachments Styles Over the Course of Time-limited Dynamic Psychotherapy' (2001) 38 *Psychotherapy* 149.

¹⁵⁵ Bowlby (n 151).

¹⁵⁶ J Rifkin, *The Empathic Civilisation* (Cambridge, Polity, 2010).

conflict. Similar physiological responses are activated by loss through divorce or bereavement.¹⁵⁷

Both giving and receiving empathy appear to increase its potential. Volunteering and certain kinds of meditation¹⁵⁸ seem to improve the capacity for empathy. Feeling understood by another through receiving empathy can assist emotion regulation: such relationships can change and improve growth, development and the formation of neural connections in the brain. From infancy onwards as the partly-formed brain develops through experience and learning the child is enabled to manage and make sense of self and world. This plasticity of the brain continues throughout life.¹⁵⁹

Something similar can occur in adult therapeutic and other helping relationships; in the words of Cozolino:

By activating processes involved in attachment and bonding, as well as moderating stress in therapy, empathic attunement may create an optimal biochemical environment for enhancing neural plasticity.¹⁶⁰

Again, as Howe puts it:

Empathic relationships help clients to tolerate and regulate arousal and affect. Emotional regulation is key to successful therapy. Under conditions of increased safety and lowered stress, brains and their neural circuits can grow. ...When brains are able to process information without distortion, cognitive flexibility rises, reflections improve, behavioural options increase and responses become more creative.¹⁶¹

While mediation is not therapy, there is sufficient overlap in their forms and functions to suggest that these observations apply here too. This is supported by Relis' research into litigants' perceptions, which indicated that disputants judged the effectiveness and acceptability of mediators according to their '...human attributes, including

¹⁵⁷ EJM Bowlby, *Attachment and Loss: Separation, Anxiety and Anger* (vol 2) (London, Hogarth Press, 1973) and *Attachment and Loss: Loss, Sadness and Depression* (vol 3) (London, Hogarth Press, 1980).

¹⁵⁸ CA Hutcherson, EM Seppala and JJ Gross, 'Loving-kindness Meditation Increases Social Connection' (2008) 8 *Emotion* 720.

¹⁵⁹ RJ Davidson and BS McEwan, 'Social Influences on neuroplasticity: stress and interventions to promote wellbeing' (2012) 15 *Nature Neuroscience* 689.

¹⁶⁰ L Cozolino, *The Neuroscience of Psychotherapy: Healing the Social Brain* (London, Norton 2002) cited in Howe (n 139) 145.

¹⁶¹ *Ibid.*

warmth, caring and protectiveness'.¹⁶² They were valued for being '...fair, fatherly, very understanding and respectful...', with some clients quoted as saying that the mediator was '...calming and trustworthy...' and '...not going to let anything *happen* or let anyone say anything.'¹⁶³

E. The Components of Empathy

Empathy can be divided into two main categories: 'affective' and 'cognitive' empathy. Affective empathy, also called 'emotional', 'mirrored' or 'primitive' empathy, refers to automatic components involving reflex responses rather than reflection and cognition.¹⁶⁴ An example is 'emotion contagion'¹⁶⁵ where, through loss or absence of self-other boundary, one catches others' emotions. This can result in 'personal distress', in the sense of an emotional, aversive response to another's real or imagined upset in a self-preoccupied manner.¹⁶⁶ An example would be a hysterical reaction to the sight of another's blood loss at the scene of an accident. Affective empathy is enhanced the by closeness and quality of relationship between giver and receiver, leading to 'the blurring of self and other'.¹⁶⁷

'Sympathy', from the Greek, 'feeling with', has been used synonymously with affective empathy.¹⁶⁸ However, it is now more commonly described as spontaneous concern for another's distress as opposed to an understanding of the experience causing the upset.¹⁶⁹ Further, it overlaps with 'empathic concern':¹⁷⁰ a spontaneous desire that motivates towards helping another in need. Unlike personal distress it is often the springboard for altruistic behaviour; in our hypothetical accident this person responds by calling an ambulance and comforting the injured.

Whereas affective empathy is reactive and immediate, cognitive empathy requires reflection, effort and control and clear self-other differentiation. It requires

¹⁶² Relis (n 149) 12.

¹⁶³ Ibid, 203.

¹⁶⁴ Baron-Cohen (n 136).

¹⁶⁵ See n 96.

¹⁶⁶ This appears to be the sense in which Jones and Bodtger use the term- see n 92.

¹⁶⁷ L Beckes, J Coan and K Hasselmo, 'Familiarity Promotes the Blurring of Self and Other in the Neural Representation of Threat' (2013) 8 *Social Cognitive and Affective Neuroscience* 670.

¹⁶⁸ J Duffy, 'Empathy, Neutrality and Emotional Intelligence: a Balancing Act for the Emotional Einstein' (2010) 10 *Queensland University of Technology Law and Justice Journal* 44-61

¹⁶⁹ L Wispe, 'The Distinction between Sympathy and Empathy: To Call Forth a Concept a Word is Needed' (1986) 50 *Journal of Personality and Social Psychology* 314.

¹⁷⁰ CD Batson, J Fultz and PA Schoenrade, 'Distress and Empathy: Two Qualitatively Distinct Vicarious Emotions with Different Motivational Consequences' (1987) 55 *Journal of Personality* 19.

the capacity for ‘self-awareness’ and ‘self-empathy’: an ability to recognise, observe and evaluate personal thoughts and feelings non-judgementally and, importantly for mediation, to identify personal triggers and self-other boundaries.¹⁷¹ It includes the key capacity for ‘emotion regulation’, which as we shall see¹⁷² denotes a range of strategies for appropriately managing, containing and expressing emotion. Another cognitive empathy component is perspective taking, which, crucially, enables thinking about what the world might look like from another’s stance. Perspective taking is an effortful, imaginative and comparative process of shifting back and forth between self-perspective (thinking about one’s own past experiences, inclination and responses) and other-perspective (using knowledge about the person’s characteristics and context). It also draws on general information to inform the particular situation.¹⁷³

There is much debate about what should and should not be included in a definition of empathy. In our view, it requires an integration and congruence of head, heart and good intention. This ‘head-heart’ or ‘gut-brain’ continuum is clear in empathic communication, which is automatic yet potentially enhanced by conscious learning. People can be taught to improve the listening skills and ‘rapport’ which are essential for relating to others.¹⁷⁴ Cognitive empathy is reflected in the ability to verbalise, check and question the accuracy of one’s understanding of another’s experience and to use non-verbal communication in a considered, deliberate and targeted way.

In the health sector empathy as a blend of reason and emotion has been termed ‘intelligent kindness’.¹⁷⁵ It is offered for people with Autistic Spectrum Disorder¹⁷⁶ and may also help people with personality-disordered traits.¹⁷⁷ It is implicit in diversity training and anti-bullying initiatives. These skills can be also be practised by mediators and supported and developed within disputants as we discuss later.

¹⁷¹ GG Gallup and SM Platek, ‘Cognitive Empathy Presupposes Self-Awareness: Evidence from Phylogeny, Ontogeny, Neuropsychology and Mental Illness’ (2002) 25 *Behavioral and Brain Sciences* 36-39.

¹⁷² See below, Section IV.

¹⁷³ A Gerace, A Day, S Casey and P Mohr, ‘An Exploratory Investigation of the Process of Perspective Taking in Interpersonal Situations’ (2013) 4 *Journal of Relationships Research* 6.

¹⁷⁴ And significant in negotiation success: see K Kilm, NLA Cundiff and SB Choi, ‘The Influence of Emotional Intelligence on Negotiation Outcomes and the Mediating Effect of Rapport: A Structural Equation Modeling Approach’ (2014) 30 *Negotiation Journal* 49.

¹⁷⁵ J Ballatt and P Campling, *Intelligent Kindness: Reforming the Culture of Healthcare* (London, RCPsych Publications, 2011).

¹⁷⁶ Baron-Cohen (n 136) 104.

¹⁷⁷ E Hepper, C Hart and C Sedikides ‘Moving Narcissus: Can Narcissists be Empathic?’ (2014) 40 *Personality and Social Psychology Bulletin* 1079.

F. Motivation and the Effort of Empathy

Whereas affective empathy is automatic, the components of cognitive empathy are demanding and often subject to failure. Preston argues that, whilst we may attempt to imagine another's experience based on our own, we can only be sure of accuracy if the other gives feedback.¹⁷⁸ We often make mistakes: there is a tendency to stereotype individuals who are different from ourselves and, conversely, the risk of false assumption that someone perceived as similar to ourselves will respond as perhaps we think we might. As Coplan says, 'To stay focused on the target individual and move us beyond our own experiences, perspective taking requires mental flexibility and relies on regulatory mechanisms to modulate our level of affective arousal and suppress our own perspectives'.¹⁷⁹

G. Empathy in Mediation and the Role of Emotion Regulation

While mediation is often seen as part of the justice system, it can also be viewed as a psychological intervention that enables disputants to give and receive empathy. We now argue that this is linked to emotion regulation provided by both process and mediator. Emotion and cognition are inseparable and down-regulation of negative emotion increases the ability for perspective-taking. Disputants then become motivated and enabled to develop empathy. The resultant connections and mutual understandings will then help lead to sustainable agreements.

IV EMOTION REGULATION

A. Emotion Regulation in Theory

The recent and 'slippery concept of 'emotion regulation'¹⁸⁰ recognises that individuals need to manage, adapt and express emotions in an appropriate and

¹⁷⁸ SD Preston, 'A Perception Action Model for Empathy' in TFD Farrow and PWR Woodruff (eds), *Empathy in Mental Illness* (Cambridge, Cambridge University Press 2007) 428.

¹⁷⁹ A Coplan, 'Will the Real Empathy Please Stand Up? A Case for Narrow Conceptualisation' (2011) 49 *Spindel Supplement Southern Journal of Philosophy* 40, 58.

¹⁸⁰ Gross (n 7), 499.

acceptable way, by ‘...shaping which emotions one has, when one has them, and how one experiences or expresses these emotions’.¹⁸¹ Emotion regulation can be intrinsic, as when the individual regulates his own emotion, or extrinsic, as in seeking to influence another’s emotional state: for example, a parent calming a tearful child. Frequently it is both, as where the emotional landscape of the parent is altered by the change in the child.¹⁸²

Gross also describes emotion regulation’s ‘impact on emotion dynamics’.¹⁸³ This affects various aspects of emotion, including both how an emotion is experienced in mind and body and how it is communicated. There are differences in the time taken for emotion to surface and in development, duration, intensity and expression. Different processes may be engaged to alter ‘the emotional trajectory’.¹⁸⁴ These can be automatic or controlled or both: ‘... a continuum of emotion regulation possibilities that range from explicit, conscious, effortful, and controlled regulation to implicit, unconscious, effortless and automatic regulation’.¹⁸⁵

In this connection, Gross proposes five ‘families’ of emotion regulation processes, categorised according to the point at which the emotion is generated. Early processes anticipate emotions; then come real-time reactions to current emotions; these are followed by responses after emotion is experienced. Briefly, the groups work as follows, with examples from a workplace setting:

- *Situation selection*: anticipatory avoidance of situations likely to arouse negative emotions and seeking out others which might bring relief (for instance by delaying meeting a difficult colleague or by offloading to workmates around the water cooler).
- *Situation modification*: changing an aspect of the situation itself (for instance having to attend and bringing along a friendly workmate for moral support).
- *Attentional deployment*: thinking about something else (for instance by lingering over agenda items to avoid controversial ones; or by considering something pleasant like a good dinner and bottle of wine waiting at home).

¹⁸¹ JJ Gross, ‘Conceptual and Empirical Foundations’ in JJ Gross (ed), *Handbook of Emotion Regulation*, 2nd edn (New York, The Guilford Press, 2014) 6.

¹⁸² Gross (2008, n 7) 500.

¹⁸³ Gross (2014, n 181) 7.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

- *Cognitive change*: altering one's thinking about one's own thoughts and feelings or about a situation through reappraisal, distancing or use of humour in order to change its emotional significance. These strategies can be employed to help down-regulate negative emotion ('the meeting is only half an hour'; 'she's more nervous than I am').¹⁸⁶
- *Response modulation*: engaging in behavioural techniques such as relaxation and breathing exercises or, more negatively, the use of drugs and alcohol. It also includes emotional suppression. Examples include smiling although feeling angry and upset, and back home, pouring a glass of wine.

Observations about the value of emotion regulation for judges¹⁸⁷ seem doubly apposite for mediators and their clients. To return to our introduction, if it is important for a sole judicial decision-maker to notice, manage, learn from and regulate her emotions, how much more so for mediators working with non-judicial decision-makers in conflict? While to those with legal training this may seem unachievable,¹⁸⁸ mediation abounds with examples of settlement or, better, transformation. That suggests that achieving emotion regulation is an essential part of the mediation process, albeit that mediators may not always conceptualise their role in these terms. In the pages which follow we shall investigate how this may be achieved.

B. Emotion Regulation in Mediation Practice

We now describe a standard mediation process through the lens of the above research on empathy and emotion regulation.¹⁸⁹

¹⁸⁶ Cognitive reappraisal describes a phenomenon whereby an individual alters an emotion, not by suppression, but by thinking differently about the original stimulus. For example, if I see a threatening shape in the street on a dark night I may experience fear. If I discover it is in fact the shadow of a tree I no longer need feel that emotion. Rather than suppressing my fear the reappraisal allows me to feel an emotion appropriate to the new situation. Research on cognitive reappraisal has confirmed its help in regulating emotion, while suppression can increase blood pressure. However, evidence is accumulating that no strategy is always effective. Much depends on context with the idea emerging of a flexible repertoire of emotion regulation strategies: see AS Troy, AJ Shallcross and IB Mauss, 'A Person-by-Situation Approach to Emotion Regulation: Cognitive Reappraisal Can Either Help or Hurt, Depending on the Context' (2013) 24 *Association for Psychological Science* 2505.

¹⁸⁷ TA Maroney, 'Emotion Regulation and Judicial Behavior' (2011) 99 *California Law Review* 1485, 1517-1521.

¹⁸⁸ For a summary of the deficits in legal education see J Lande and J R Sternlight, 'The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering' (2010) 25 *Ohio State Journal on Dispute Resolution* 247.

¹⁸⁹ We should acknowledge that here we have idealised and simplified the mediation process in the interests of clarity. Later we discuss mediations that are unusually challenging- see Section IVC below.

i. Pre-mediation

Mediators commonly start by meeting disputants individually.¹⁹⁰ Each party may have constructed and become locked into an emotional narrative and mythology, oft-rehearsed and ‘tightly woven’¹⁹¹ through repetition. This may be the first opportunity for disputants to have their story heard. They are likely to be experiencing negative emotions such as anger, rage, fear, sadness and disappointment. In this meeting they should experience empathy: a self-aware mediator will listen non-judgmentally with an attitude of acceptance and respect.¹⁹² In this way, rapport and trust are achieved and a sense of emotional safety created. The pre-mediation meeting provides a forum for disclosure and reappraisal, which promotes the process of perspective taking as described above.¹⁹³ This is achieved through the mediator’s use of open and exploratory questions.

When a disputant offers an observation accompanied by an evaluation, the mediator can invite reflection on alternative explanations. Raising questions in a factual yet empathic manner, from a position of curiosity rather than challenge, can sow seeds of uncertainty that may lead a person to review their opening position. Explaining the mediation process alerts parties to the fact that they may discover previously unknown information. This in itself can be viewed as ‘anticipatory reappraisal’.¹⁹⁴ Appropriate questions may also assist the rehearsal of strategy: for example the mediator may ask, ‘If the other party says this ..., how do you think you will react?’ The answer may prompt discussion on the choice of emotion regulation strategy and, crucially, include reassurances that the mediator will manage the process so as to prevent harm.

By the end of this meeting, a skilful mediator will have established rapport through empathic attunement and communication; and will be perceived by the

¹⁹⁰ Although less common in commercial and court-annexed mediation, this practice is typical in the fields of family, employment and community mediation. See C Irvine ‘Intake Interviews in Family Mediation: Some Thoughts from Scotland’ (April 2003) *Mediation in Practice* 12 and available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1823327

¹⁹¹ See IIC and Winslade and Monk (n 27) above

¹⁹² Described as ‘The Mediator’s “Presence”’ Bowling and Hoffman (n 112) 21.

¹⁹³ See Jones and Bodtker (n 93) and the discussion of perspective taking at Section IIIIE above.

¹⁹⁴ Maroney (n 187) 1517-1521 explains how doctors prepare to cope with emotionally challenging situations, such as informing relatives of a patient’s death, by telling themselves that they are professionals doing a job. She calls this ‘anticipatory reappraisal’ because it usually occurs in advance of the encounter and reduces the prospect of experiencing distressing emotions. In the same way parties can be prepared for mediation by viewing it as a necessary step on the path to resolution.

disputant as trustworthy and capable of steering him or her safely through difficult emotional waters. Akin to early life attachment described above,¹⁹⁵ the disputant can start to experience curiosity rather than fear, and may come to realise that the other party too has a ‘story’, that ‘right and wrong’ may not be the issue, that the currency and language are of feeling as much as fact, and that the mediator can display empathy without taking sides. This creates the conditions for problem-solving and negotiation, key goals of the mediation process.

The meeting usually ends with the decision to go ahead with mediation. This can be described as a form of ‘situation selection’,¹⁹⁶ where disputants agree to meet in a controlled environment. The mediation environment can also be considered ‘situation modification’,¹⁹⁷ in that the participants are regulating potentially negative emotions by choosing a prescribed process made secure by the presence of an empathic third party.

ii. Joint session

When the parties finally meet up, the introduction is critical.¹⁹⁸ It can be understood as a form of ‘priming’: proposing that disputants listen without interruption and use respectful language, or alerting them to the possibility of ‘time out’ (a simple situation modification). The mediator reassures angry and fearful disputants that they will be heard but remain emotionally unharmed; implicit is the assurance that if either party is unable to regulate their emotions the mediator can be trusted to manage the situation. Some mediators talk of ‘modelling’ calmness by their tone of voice and posture, suggesting an important role for the physical dimensions of mediation practice.¹⁹⁹

The session continues with each person hearing the other. Listening without interrupting resembles an act of empathy and helps regulate the speaker’s emotions. True, the listening party is engaging in emotion suppression; in the long run this can be detrimental to wellbeing, cognitive capacity and memory.²⁰⁰ However, here it is short-term and the listener can anticipate their own opportunity to speak.

¹⁹⁵ See above at Section IIID.

¹⁹⁶ See above at Section IVA.

¹⁹⁷ Ibid.

¹⁹⁸ JP Folger and RAB Bush, ‘Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice’ (1996) 13 *Mediation Quarterly* 263, 266.

¹⁹⁹ See Beausoleil and LeBaron (n 130).

²⁰⁰ Gross (n 181) 10-11.

At this initial stage disputants are often invited to address the mediator rather than engage directly with the other party. This can reinforce the sense of being empathised with; as Johnson says, ‘Without agreeing with a party’s story or appearing to take sides, an emotionally competent mediator can acknowledge the fundamental need to be heard.’²⁰¹ In addition, eye contact between parties can be confrontational and this strategy may help regulate anger and fear.

The mediator then summarises what the disputants have said, reflecting events and feelings as accurately as possible while simultaneously reframing and defusing provocative language.²⁰² By the end of this phase those involved will have had the opportunity, perhaps for the first time, to engage with the other’s perspective in an emotionally-regulated environment. This brings new emotional and factual data into play.

As mediation progresses, parties may begin to address each other directly. Concessions made or reciprocated are examples of ‘situation modification’ where people contribute to each other’s emotion regulation.²⁰³ At this stage the mediator continues to provide extrinsic support, down-regulating negative and up-regulating positive emotion by giving and modelling empathy, asking relevant questions and deploying attention.

In short, mediation offers disputants opportunities to appreciate both events and emotions behind each other’s perspective: in other words, to experience empathy. New data can be used to reassess judgements and reappraise stories, leading to a novel, mutually acceptable narrative. Mediation is rarely linear in progress. It can feel like ‘one step forward, one step back’. The hope is for emotion regulation gradually to become intrinsic to the parties, accompanying a move into sustained empathy.

As parties give and receive empathy there may come a point where one party says: ‘so what can we do?’ and the other makes a positive response. While each wants a solution for herself it starts to make sense to accommodate the other. We see evidence of empathic concern and the surfacing of what Rosenberg describes as ‘giving from the heart’.²⁰⁴ There can be a tangible generation of positive emotions. The energy in the room may change dramatically, accompanied by a sense of

²⁰¹ Johnson et al (n 115) 160.

²⁰² Depending on the mediation tradition. Bush and Folger (n 26) view re-framing as disempowering to disputants, robbing them of the agency implicit in choosing their own words.

²⁰³ Part of Mayer’s ‘emotional dimension’ of conflict resolution- Mayer (n 19).

²⁰⁴ MB Rosenberg, *Nonviolent Communication: A Language of Life* (Encinitas, CA, Puddledancer Press, 2005) 1.

gratitude, relief, release and even humour. With new emotional and cognitive understandings, the disputants are poised to reach agreement.

C. Emotion Regulation with ‘High Conflict People’²⁰⁵

So far we have described a successful mediation experience. Most mediators, however, encounter situations in which one or both parties have little or no degree of empathy.²⁰⁶ In spite of the support offered some disputants seem unable to adopt successful emotional regulation strategies or grasp the other’s perspective. Such people struggle with emotion regulation.²⁰⁷ This also applies to people with insecure attachment styles: who are either worried that an attachment figure will be unresponsive in times of need (anxious attachment) or distrusting of an attachment figure’s goodwill and capacity to respond (attachment-related avoidance).²⁰⁸

In this connection Eddy proposes various techniques for dealing with what he terms ‘high conflict people’, including the EAR (Empathy, Attention and Respect) strategy.²⁰⁹ Broadly, EAR affirms the need to make a conscious effort to communicate empathically with such people, who can often be extremely irritating and unpleasant. Attending through respectful listening is an important component of empathic communication. These techniques assist mediators to support emotion regulation in volatile circumstances and to secure agreement where perspective taking is unlikely to occur. Furthermore, they underline the fact that mediation can be challenging and that empathy is at the core of practice. Mediators must regulate their own emotions in order to relate empathically to these clients. We explain this more fully in the next section.

²⁰⁵ For a fuller explanation of this term see www.highconflictinstitute.com.

²⁰⁶ Baron-Cohen (n 136).

²⁰⁷ M Schipper and F Petermann, ‘Relating empathy and emotion regulation: do deficits in empathy trigger emotion dysregulation?’ (2013) 8 *Social Neuroscience* 101

²⁰⁸ Anxious attachment is related to ‘distress intensification’: on the emotion grid (see Section IID above, Figures 1 and 2) we hypothesise that anxiously-attached people will be placed in the high volume and high intensity quadrant. Conversely, attachment-related avoidance is linked with ‘emotional inhibition’ (P Shaver and M Mikulincer, ‘Adult Attachment and Emotion Regulation’ in JJ Gross (ed) *Handbook of Emotion Regulation*, 2nd edn, (New York, The Guilford Press 2014)); such people will probably present at low volume, masking suppressed emotional intensity.

²⁰⁹ See www.highconflictinstitute.com. See also W Eddy, *What’s Your Proposal? Shifting High Conflict People from Blaming to Problem Solving in 30 Seconds* (Scottsdale, AZ, Unhooked Books, 2014)

Eddy's approach offers mediators an opportunity to engage in their own anticipatory reappraisal.²¹⁰ They can reflect on what is likely to be their default response to a high conflict individual and prepare a more helpful alternative: essentially not taking it personally and focusing on problem-solving.²¹¹ He highlights the need for both empathy and emotion regulation with High Conflict People. Yet sometimes mediation can be successful even in cases of low mediator empathy and emotion regulation; for instance, some disputants may fortuitously possess sufficient resilience and emotional intelligence to achieve resolution for themselves within the parameters of the process. Nonetheless we argue for the utility of both mediator empathy and emotion regulation in all conflict situations, even when their lack is masked in this way, and should be aspired to as a standard of good practice.

D. Emotion Regulation and Mediators

Emotion regulation is equally important for mediators, who must find ways of recognising and managing internal personal triggers alongside extrinsically challenging scenarios. Mediation organisations often support this process, for example by providing training in aspects of self-development. A key aim is to improve the ability for self-reflection, enabling the mediator to understand her own response tendencies and develop skills for connecting with clients. Supervision sessions encourage cognitive reappraisal through disclosure; mindfulness practice has been found particularly useful by some mediators.²¹²

In some professions, especially those where the culture of supervision and support is largely absent, professionalism can be used as a form of anticipatory cognitive reappraisal; effectively saying to oneself 'I am a professional carrying out my job' and thereby not experiencing distress.²¹³ However, over-reliance on this strategy risks a level of detachment akin to avoidance or suppression, which is ultimately counter-productive for professional and client. The same would apply to mediation.

McCluskey suggests that professional relationships with clients subject to stress and fear can result in potentially powerful dynamics in which the professional

²¹⁰ See Maroney (n 194).

²¹¹ As expressed by the title 'What's Your Proposal?' - Eddy (n 209).

²¹² T Fisher, 'Who's Minding the Mediator? Mindfulness in Mediation' (2003) 5 *ADR Bulletin* 1 and available at: <http://epublications.bond.edu.au/adr/vol5/iss10/1>.

²¹³ Maroney (n 187) 1517,

becomes the attachment figure. In this role, if she shows empathy, she supports emotion regulation to the point where the client's attachment needs are met, allowing the client to reconnect with cognitive problem-solving abilities and inner resourcefulness. McCluskey calls this 'goal corrected empathic attunement'.²¹⁴ Awareness of this dynamic may be helpful in mediation. It also underlines further the need for self-awareness and recognition of the 'pull' exerted by distressed clients.

V. CONCLUSION

Like lawyers, mediators faced with emotions have a range of options. On the one hand, they can ignore emotions in the hope that they will go away.²¹⁵ On the other hand, they can acknowledge them; they can enquire further about them (opening up emotion as a topic for discussion); and they can display empathy.

In our review of the mediation literature we find strong support for the latter option. A growing chorus of writers has called for mediators to become more emotionally literate, some drawing on the appraisal theorists²¹⁶ for useful models. In this chapter we have focussed on the related concepts of empathy and emotion regulation, viewing mediation as a valuable opportunity to assist parties with both. Empathy could be seen as the oil in the machine of emotion regulation. Happily empathy is woven into everyday life. Humans seem programmed both to experience and generate it. This may be one reason for the common mediation training injunction to 'be yourself'.

A number of commentators have drawn attention to a growing urge for mediation to professionalise on legal lines.²¹⁷ Yet the wish for intellectual and commercial credibility can work against empathy and emotional literacy. The notion of professional distance; the commitment to neutrality; the privileging of rationality over emotion; all may lead mediators (like lawyers before them) to eschew emotions.

²¹⁴ U McCluskey, *To Be Met as a Person* (London, Karnac Books, 2005) 2.

²¹⁵ 'If [behavioural expressions of emotion] are inhibited, the emotion itself will be muted' - Gross (n 7) 504.

²¹⁶ See text at IID and accompanying footnotes.

²¹⁷ E Lieberman, Y Foux-Levy and P Segal, 'Beyond Basic Training: A Model for Developing Mediator Competence' (2005) 23 *Conflict Resolution Quarterly* 237, 240; Lande, 'Lawyering and Mediation' (1997, n 74) 854.

Some do.²¹⁸ We counsel against this approach. To do so is potentially to lose a rich source of data; Lazarus calls emotions ‘the wisdom of the ages’.²¹⁹

Rather, we propose the opposite direction of travel, where those involved in the justice system ‘peek over the fence’ at mediation. While mediation is still at a relatively early stage in its understanding of emotion, many mediation practitioners have developed practical skills in the area; what Schon might describe as ‘knowing in action’.²²⁰ This may explain the popularity of mediation training among lawyers. Here is a world in which their clients’ (and their own) emotions are accepted, worked with, learned from and regulated. A course in mediation is likely to enhance their tolerance for and comfort with emotional information, surely of value both in the courtroom and in face to face work with clients.

In this way, lawyers may come to view mediation as a key resource in developing their own emotional skills. This will enhance, not diminish the cause of justice. As Benjamin Disraeli said: ‘Never apologise for showing feeling; when you do so, you apologise for the truth’.²²¹

²¹⁸ See Section IIA above

²¹⁹ RS Lazarus, ‘Progress on a Cognitive-Motivational-Relational Theory of Emotion’ (1991) 46 *American Psychologist* 819, 820.

²²⁰ D Schon, *The Reflective Practitioner: How Professionals Think in Action* (Aldershot, Hants, Basic Books, 1983) 54.

²²¹ Quoted in B Curtis, *Classic Wisdom for the Good Life* (Nashville, TN, Thomas Nelson, 2006) 39.