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### Improving Lawyers' Judgment: Is Mediation Training De-Biasing?

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# Improving Lawyers' Judgment: Is Mediation Training De-Biasing?

Douglas N. Frenkel\* & James H. Stark\*\*

## ABSTRACT

*When people are placed in a partisan role or otherwise have an objective they seek to accomplish, they are prone to pervasive cognitive and motivational biases. These judgmental distortions can affect what people believe and wish to find out, the predictions they make, the strategic decisions they employ, and what they think is fair. A classic example is confirmation bias, which can cause its victims to seek and interpret information in ways that are consistent with their pre-existing views or the goals they aim to achieve. Studies consistently show that experts as well as laypeople are prone to such biases, and that they are highly resistant to change, in large part because people are generally unaware that they are operating.*

*When they affect lawyers, egocentric, partisan and role biases can hinder the ability to provide objective advice to clients, lead to overly optimistic forecasts about the probability of future events, and promote “we-they” thinking that can exacerbate and prolong conflicts, imposing substantial costs on both clients and society.*

*There is reason to believe that by placing people in a meditative stance—one in which people impartially try to help disputants resolve a conflict—they can develop habits of objectivity crucial to much of what lawyers are called upon to do. That this is so is supported by social science research on two specific strategies for de-biasing judgment—considering alternative scenarios and taking another’s perspective—both core mediator mindsets. Research also shows that active engagement in such de-biasing*

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*activity is more effective in achieving objectivity than is mere instruction about the existence of cognitive biases. The authors consider the implications of this research for law school clinical programming and legal education in general.*

CONTENTS

- I. Introduction . . . . . 2
- II. Biases Affecting Lawyers’ Judgment When Acting in a Representative Role . . . . . 8
- III. How Mediators are Trained to Think and Act, and What is Unique About Their Role . . . . . 17
- IV. De-Biasing by “Considering the Opposite” . . . . . 22
  - A. “Consider the Opposite” and Legal Disputing . . . . . 28
  - B. Mediation Questions and Applications . . . . . 31
- V. De-Biasing Through Perspective-Taking . . . . . 34
  - A. Perspective-Taking and Lawyering: Negotiation Studies . . . . . 40
  - B. Perspective-Taking and the Anchoring Bias . . . . . 40
  - C. Perspective-Taking and the “Fixed Pie” Bias . . . . . 41
  - D. Mediation Questions and Applications . . . . . 43
- VI. General Discussion . . . . . 46
  - A. Limitations of Current Research and Possible Topics for Future Study . . . . . 46
  - B. Will Mediation Training Transfer to Representational Lawyering? . . . . . 49
  - C. Curricular Implications for Law Schools and Clinical Programming . . . . . 53

I. INTRODUCTION

The two of us are experienced clinical law teachers who for many years have taught students to work as mediators. We each made the transition to teaching mediation after first careers teaching and supervising law students in traditional public interest advocacy roles.<sup>1</sup>

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1. Doug Frenkel began his lawyering career as a legal services litigator and entered clinical teaching in 1978 as an instructor in the University of Pennsylvania’s original litigation-based clinical course. From 1980 to 2008, he served as the Director of Penn’s clinical education program, overseeing the design and expansion of a curriculum that came to include seven courses set in diverse lawyering roles. In 1986 he founded Penn’s Mediation Clinic, a course he has led and taught ever since. Jim Stark has been a clinical law teacher since 1974. For the first half of his career, he primarily did civil rights advocacy work, in fields ranging from prisoners’ rights, to special education and disability rights, to housing and employment discrimination litigation. He made the transition to mediation teaching in 1994, and wrote about his

Over the years, skeptical colleagues (especially clinicians) have asked, "Why train students in mediation, when most of them will become representative lawyers?" Taking stock of our choices, we decided to articulate what we think may be uniquely valuable about this work.

Early on in our research efforts, we came across a provocative finding. A 2008 large-scale empirical study<sup>2</sup> of settlement decision making in cases involving more than 5000 California litigators in more than 2000 actual contested cases found, consistent with other, earlier studies,<sup>3</sup> that parties to litigation commonly make erroneous settlement decisions, rejecting settlement offers that are better than the results that they ultimately achieve at trial.<sup>4</sup> According to the 2008 study, neither case type nor the number of years of their lawyers' litigation experience, nor the ranking of the law school from which their attorneys graduated had an appreciable effect on these error rates.<sup>5</sup> What did matter was whether a party's lawyer self-identified as having had mediation training and experience. In most of the cases in which one or both of the litigants was represented by an

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experience two years later. James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457 (1996).

We are grateful for helpful feedback received on drafts of this paper in its various stages of development from participants at the 2013 Clinical Teachers' Conference, the New York Law School Clinical Theory Workshop, the UNLV Law School Psychology and Lawyering Conference, the Cardozo Law School Works-in Progress Conference, the University of Connecticut Law School Faculty Workshop Program, the American Bar Association Section on Dispute Resolution Webinar and the Quinnipiac-Yale Dispute Resolution Workshop. In addition, we wish to express our thanks to Jon Bauer, Robert Condlin, Art Hinshaw, Jon Hyman, John Lande, Elliott Milstein and Sean Nolan for their helpful comments along the way.

2. Randall L. Kiser, Martin A. Asher & Blakely B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiation*, 5 J. EMPIRICAL LEGAL STUD. 551 (2008) (hereinafter, "California study" or "Kiser et al.") For a later, expanded discussion of this study, see RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS 32-86 (2010) (hereinafter, "BEYOND RIGHT AND WRONG.")

3. Kiser et al, *supra* note 2, at 566-67.

4. *Id.* at 563, defining a "decision error" as occurring when a plaintiff or defendant rejects an adversary's settlement offer, proceeds to trial, and finds that the trial result is substantially the same as, or worse than, the rejected settlement offer—"the 'oops' phenomenon." Overall, plaintiffs made decision errors in 61.2% of their cases, while defendants made errors in 24.3% of theirs. However, when defendants made errors, they tended to be "whoppers," with a mean error size of \$1,140,000. The mean error size for plaintiffs was \$43,100. *Id.* at 566-67.

5. *Id.* at 570-71.

“attorney-mediator,”<sup>6</sup> both rates and magnitude of decision error were reduced—in some classes of cases quite significantly.<sup>7</sup>

This data—which the authors spend little time attempting to explain and which raises more questions than it answers—resonated with our intuitions: that placing law students in a dispassionate stance—in a neutral, impartial role vis-à-vis competing parties—can produce distinctive educational advantages in preparing them for client representation. To test our intuitions, we decided to examine what social science research might teach us about the value of distance, dispassion or neutrality in professional education generally.

We began to look at the extensive behavioral economics literature on heuristics and cognitive biases and their effects on judgment under uncertainty, as well as the (less extensive, but still considerable) social science literature on techniques of de-biasing. Might it really be the case that lawyers trained and working as mediators develop mindsets that are less subject to cognitive and motivational bias than lawyers without such training? If so, are such habits of mind lasting? Do they transfer to other professional roles which a mediation-trained lawyer might assume? If so (and it is a big “if”), this would be a finding with potentially significant implications for legal education.

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6. This term was defined, somewhat vaguely, to include lawyers serving on court-annexed mediation panels, affiliated with private dispute resolution companies, or designated as members of the Southern California Mediation Association. *Id.* at 586. Kiser later elaborated on this description, noting that all the attorney-mediators in his sample had received at least 30 hours of mediation training and that most were active neutrals with mixed litigation/mediation practices. *BEYOND RIGHT AND WRONG*, *supra* note 2, at 49, 52.

7. For example, in personal injury cases, plaintiffs’ decision error rate was 53.2% in the overall sample, but 45.2% in the attorney-mediator sample. Defendant’s error rate in personal injury cases was 26.3% overall, but only 16.8% when defendants were represented by attorney-mediators. Kiser et al, *supra* note 2, at 589.

There are many questions one can raise about the meaning and significance of these findings. While lawyers are in a position to exert more or less influence on their clients’ settlement decisions, it is, of course, clients who ultimately make them. Moreover, not all decisions to reject a settlement offer can be fairly said to constitute a “decision error.” Litigants often choose to pursue or forgo their claims for personal or business reasons having little to do with their lawyer’s assessment of the claim’s legal merits, including for example the desire to vindicate a principle, reduce or impose costs, or seek or avoid the publicity of a trial. While it is impossible to know how such factors play out in specific cases, it is the *differential* in the overall rate of “decision error” between clients of lawyers with and without mediation training on which Kiser and his colleagues focus. This differential is not easily explainable, except perhaps by reference to something unique in lawyer-mediators’ training and experience. We revisit this theme and consider possible alternative explanations *infra* Part V.

It is widely assumed that the case method of instruction used in U.S. law schools inculcates habits of objectivity and dispassionate judgment in law students that, when internalized, translate into effective lawyer counseling and decision making. In his well-known book, *The Lost Lawyer*,<sup>8</sup> for example, former Yale Law School Dean Anthony Kronman argues that the case method is a way to develop in law students “powers of sympathetic understanding” about a client’s objectives, needs and constraints, while simultaneously instilling the ability to “suppress all sympathies in favor of a judge’s scrupulous neutrality.”<sup>9</sup> Under this view, by forcing students to reflect on “whether the case at hand was rightly decided,”<sup>10</sup> the case method develops habits of mind that enable attorneys to be able to make objective and accurate predictions about judicial decisions<sup>11</sup> and other uncertain future legal events.<sup>12</sup>

The difficulty with these arguments is that there is little evidence that they are true. Kronman fails to account for the powerful, unconscious effects that cognitive biases have on human beings’ judgment when they are placed in a partisan role, or for the fact that these biases affect both laypersons and those with specialized training and knowledge. A substantial number of empirical studies show, for example, that despite having been trained to adopt a judicial vantage point, litigators are, in general, poorly “calibrated”—i.e., more confident than accurate—in their predictions of trial verdicts.<sup>13</sup>

Moreover, lawyers’ biases are not only cognitive, but emotional and motivational as well, affecting more than just predictive accuracy. In general, when people (including lawyers) are placed in competitive roles or settings involving conflict, their views of fairness are tinged with self-interest.<sup>14</sup> They tend to believe that their own positions and decisions are “fair” and their opponents’ decisions are “unfair.” They are the victims of a “bias blind spot” that causes them to

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8. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

9. *Id.* at 113.

10. *Id.* at 117.

11. *Id.* at 134.

12. *Id.* at 122-28, 138 and *passim*.

13. See generally *BEYOND RIGHT AND WRONG*, *supra* note 2, at 20-28 (summarizing research). See also *infra* notes 121-34. In one study of the effect of self-serving biases in predicting trial results, law students were no more accurate than undergraduate students in their predictions about the trial outcome of a motorcycle accident case. George Loewenstein et al, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 149 (1993).

14. See *infra* notes 58-65.

think, falsely, that they are able to assess conflict situations with objectivity.<sup>15</sup> They suffer from egocentric biases that cause them to rate their own performance and worth more highly than that of their peers and to be overly optimistic about their ability to control future events in which they are engaged.<sup>16</sup> In addition, qualitative research suggests that many sectors of legal practice (criminal, personal injury, environmental and employment law, to name just a few) are polarized, with lawyers on one side too often demonizing lawyers who regularly practice on the other as “enemies of the good.”<sup>17</sup>

If traditional lecture hall case analysis does not necessarily produce detached role judgment in lawyers, it is also not clear that clinical legal education does better. For example, one might expect law school clinical texts on legal interviewing and counseling to highlight the many important findings of the last 30 or 40 years on the unconscious effects of cognitive and motivational distortions on lawyers’ judgments, and to attempt to provide students with exercises or strategies for overcoming their own biases. But coverage of these topics in the standard legal counseling texts is spotty.<sup>18</sup> And when one superimposes on this landscape the explicit ideological and social justice goals that drive a good many law school clinics, one wonders whether the training being imparted is not as likely to exacerbate students’ partisan biases as it is to reduce them.<sup>19</sup>

Our article proceeds in five parts. In Part One, we provide a brief overview of research findings on the cognitive and motivational biases that are our focus and explain how they are thought to work and how they affect human decision making. The research on cognitive and motivational bias is vast and we make no effort to canvas it all

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15. See *infra* notes 78-79.

16. See *infra* notes 70-72.

17. See, e.g., Douglas Frenkel, Robert Nelson & Austin Sarat, *Introduction: Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 *FORDHAM L. REV.* 697, 703-04 (1998).

18. A few law school client counseling texts do devote brief attention to cognitive and motivational biases, their potential effects on lawyers, and what lawyers can do to mitigate the effects of bias. See, e.g., STEPHEN ELLMANN, ROBERT D. DINERSTEIN & ISABELLE R. GUNNING, *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 368-73 (2009); and DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS* 428-40 (2012); STEFAN H. KRIEGER & RICHARD K. NEUMANN, *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 48-43 (5th ed. 2015) (brief discussion of lawyers’ need to avoid “cognitive illusions” and think “divergently”). *But compare*, e.g., G. NICHOLAS HERMAN & JEAN M. CARY, *LEGAL COUNSELING, NEGOTIATING AND MEDIATING: A PRACTICAL APPROACH* (2009) (no discussion of biases); ROGER S. HAYDOCK & PETER B. KNAPP, *LAWYERING: PRACTICE AND PLANNING* (3rd ed. 2011) (same).

19. We return to this theme in *infra* Part V(c).

here.<sup>20</sup> We focus on five broad categories of bias—some of which include a number of more specific biases—that might affect lawyers' judgments when they act as representatives for a client.

In Part Two, we offer a very basic primer on how mediators are trained to think and act, and how their mindset may differ from that of most representative lawyers when it comes to resolving disputes. This primer will provide a framework for evaluating the relevance of the de-biasing studies on which we then focus.

In Parts Three and Four, we summarize in detail empirical research findings relating to two methods of de-biasing judgment—inducing people to “consider the opposite” (Part Three) and to engage in perspective-taking (Part Four)—that have been employed successfully in the laboratory and are beginning to be tested in the field.<sup>21</sup> Both of these areas of research are part of a broader social science inquiry into the use of “mental simulations” or “counterfactuals” to improve human decision making.

For each area of research, we consider how the empirical findings on de-biasing relate to the training that mediators receive and the work that they do. Can the findings from the de-biasing research fairly be extrapolated to the work of mediators? If so, is there reason to believe that mediation training and experience reduces the biases of those who engage in the work?

In Part Five, we identify a variety of research questions that would benefit from further study. We then discuss the transfer of habits of thought and behavior from one domain to another. Even if it is true that mediation training renders students less subject to cognitive and motivational biases than their peers, is there any reason to believe that this greater objectivity will transfer when they take on traditional representational tasks as a lawyer? We conclude Part Five by considering some possible implications of this research for clinical education programming and for law school curricula more generally.

The arguments presented in this article are both preliminary and speculative. As we discuss later in this paper, there are gaps in the de-biasing research, and it is fair to say that it has not yet caught

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20. There also seems to be no overarching or agreed-upon theory of bias, and similar biases are often described by researchers using different names. *See infra* notes 34-35.

21. DAN SIMON, *IN DOUBT* 45 (2012) (discussing de-biasing efforts in police investigations).



up to research on biases themselves.<sup>22</sup> Certain biases seem to be readily amenable to de-biasing interventions, while others may be more resistant. In some areas, the research findings themselves are equivocal,<sup>23</sup> raising questions as to whether and how they can be extrapolated to the field of mediation. Indeed, given our own commitment to mediation teaching and scholarship, we cheerfully acknowledge that we may be laboring under a confirmation bias ourselves in our efforts to draw any lessons from this research.

Nonetheless, most observers believe that research into de-biasing is an important and promising area of empirical inquiry, with the potential to help us understand how human judgment might be improved.<sup>24</sup> As the authors of one study have put it, if bias reduction could be achieved in the general realm of legal decision making, it would be a matter of “high public interest.”<sup>25</sup> Given the central role that they play in our justice system, the same, we submit, goes for lawyers.

## II. BIASES AFFECTING LAWYERS’ JUDGMENT WHEN ACTING IN A REPRESENTATIVE ROLE

Biases that are likely to affect lawyers’ decision making in a representative role tend to fall into two broad categories. *Cognitive biases* refer to the many tendencies and limitations human beings face in processing complex information, especially under conditions of uncertainty.<sup>26</sup> For example, even when they know that the best decisions will be produced by open-mindedly considering all sides of a

22. Scott O. Lilienfeld et al., *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 PERSP. ON PSYCH SCI. 390, 391 (2009); Derek J. Koehler, *Explanation, Imagination, and Confidence in Judgment*, 100 PSYCH. BULL. 499, 514-15 (1991).

23. See *infra* notes 119, 134.

24. See, e.g., Lilienfeld et al., *supra* note 22, at 393.

25. Christoph Engel & Andreas Glöckner, *Role-Induced Bias in Court: An Experimental Analysis*, 26 J. BEHAV. DEC. MAKING 272, 273 (2012).

26. The seminal work is Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) and the edited collection of the same name that followed it, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman, Paul Slovic & Amos Tversky, eds., 1982) (hereinafter “*JUDGMENT UNDER UNCERTAINTY*”). Other useful general sources we have consulted include JONATHAN BARON, *THINKING AND DECIDING* (2007); ROLF DOBELLI, *THE ART OF THINKING CLEARLY* (2013); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); THOMAS GILOVICH, *HOW WE KNOW WHAT ISN’T SO* (1991); and GERD GIGERENZER & CHRISTOPH ENGEL, *HEURISTICS AND THE LAW* (2006). Among the many scholarly articles we have consulted, Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in*

question or argument, people tend to engage in single-minded thinking.<sup>27</sup> They tend to focus on one or two plausible arguments or hypotheses that are “good enough,” due to limitations in their ability to process more complex data or to a kind of mental “fixedness” or inertia that sets in.<sup>28</sup> People use mental shortcuts, or heuristics, to guide their decision making.<sup>29</sup> Sometimes, as when speed is required, these heuristics are adaptive. Often, however, they lead to systematic and predictable error.<sup>30</sup>

*Motivational biases*, by contrast, are distortions in thinking caused by a desire to believe something because of ideological commitment, ego investment or a stake in the outcome.<sup>31</sup> For example, when people with strong commitments to a social theory are confronted with evidence that contradicts their position, they tend to discount or ignore that evidence, even when it is overwhelming in nature—the “irrational belief persistence effect.”<sup>32</sup> When they are confronted with information that is threatening, they tend to discount it, due to egocentric biases, such as the desire people have to feel good about their own attributes and behaviors. Motivational biases are sometimes conscious and strategic, as when a legal advocate or politician deliberately spins harmful evidence or polling data to support a client’s position or a favored policy objective. But motivational biases, like cognitive biases, often operate wholly unconsciously, making people blind to the weaknesses in their arguments and positions or the unfairness of their own actions.<sup>33</sup>

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*Many Guises*, 2 REV. GEN. PSYCH. 175 (1998) and Daniel Kahneman & Jonathan Renshon, *Hawkish Biases* (2009), <https://www.princeton.edu/~kahneman/docs/Publications/Hawkish%20Biases.pdf>, are, in particular, essential reading.

27. BARON, *supra* note 26, at 54-55.

28. See, e.g., Derek J. Koehler, *Explanation, Imagination and Confidence in Judgment*, 110 PSYCH. BULL. 499, 503 (1991); Michael R.P. Dougherty et al, *The Role of Mental Simulation in Judgments of Likelihood*, 70 ORG. BEHAV. & HUM. DECISION PROCESSES 135, 138-40 (1997); Laurence Sanna, Norbert Schwartz & Lindsay Kennedy, *It's Hard to Imagine: Mental Simulation, Metacognitive Experiences, and the Success of Debiasing*, in HANDBOOK OF IMAGINATION AND SIMULATION 205-06 (Keith D. Markman et al., eds. 2009) (When people are left to their own devices, they tend to truncate the search process early.).

29. See, e.g., Callia Piperides et al., *Group Report: What is the Role of Heuristics in Litigation?*, in GIGERENZER & ENGEL, *supra* note 26, at 374 (2004).

30. Tversky & Kahneman, *supra* note 26, at 1124; Kahneman & Renshon, *supra* note 26.

31. BARON, *supra* note 26, at 55, 58.

32. *Id.* at 203-11 (summarizing sources and discussing effects on prosecutors and police).

33. See, e.g., Vasco Correia, *Biases and Fallacies: The Role of Motivated Irrationality in Fallacious Reasoning*, 3 COGENCY 107, 111 (2011) (People’s judgments can be consciously or unconsciously biased. When a lawyer produces a biased account of her

For over 30 years, social science research has produced a continually expanding list of cognitive and motivational biases, without a single, overarching classification system or even a universally agreed-upon vocabulary to describe them.<sup>34</sup> Importantly, whether particular observed biases are primarily cognitive or motivational, and under what circumstances, is a source of some controversy; social scientists seem to know more about the effects of certain biases than the psychological processes that produce them.<sup>35</sup> Biases are often caused by cognitive and motivational factors acting in concert; when this occurs, a bias may be strengthened in effect.<sup>36</sup>

Our emphasis here is a selective one, limited by two primary factors. First, of the myriad cognitive and motivational biases that have been the subject of social science research, we focus on those that have been empirically demonstrated to affect lawyers acting in a representational role, or for which there is reason to believe that such effects may occur. In the past twenty years or so, legal academics have devoted considerable scholarly attention to the psychology of decision making as it affects various aspects of law, legal theory and lawyering.<sup>37</sup> Much of this work has focused on the fields of

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client's actions before a court, it is often "impossible to determine whether the lawyer is deliberately trying to manipulate the audience, or whether the desire to win the case (or sympathy towards the client, etc.) unconsciously affects her judgment . . .").

34. BARON, *supra* note 26, at 54. The author has constructed his own classification table, listing 53 biases, organized into five categories. Compare *id.* at 56-7, with Joachim I. Krueger & David C. Funder, *Toward a Balanced Social Psychology: Causes, Consequences and Cures for the Problem-Seeking Approach to Social Behavior and Cognition*, 27 BEHAV. & BRAIN SCI. 313 (2004) (listing 42 biases). Confusing matters further is the fact that when focusing on the effects of bias on lawyering activities such as negotiation, legal scholars sometimes lump together what appear to be different biases under the general category of "self-serving" bias. See, e.g., Linda Babcock, George Lowenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 915-16 (1997) (using the term to include both partisan role bias and egocentric bias).

35. See, e.g., Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inferences: A Biased Hypothesis Testing Model*, in 20 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOL. 297 (1987) (noting that there "is very little agreement about the psychological mechanisms that produce cognitive bias"). This has obvious implications for understanding how and when de-biasing can be effective. On the "cognition-motivation debate" in the research, see generally Correia, *supra* note 33, at 110-11.

36. Nickerson, *supra* note 26, at 177; Frank Kardes et al, *On the Conditions under Which Experience and Motivation Accentuate Bias in Intuitive Judgment*, in THE ROUTINES OF DECISION MAKING 139 (Tilmann Betsch & Susanne Haberstroh eds., 2005).

37. For an early review, see, e.g., Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998). For a more recent one, see GIGERENZER & ENGEL, *supra* note 26.

negotiation and conflict resolution, in which many useful articles have been produced applying the empirical findings of behavioral economists and social and cognitive psychologists to help us better understand the dynamics of bargaining and the reasons why negotiations fail.<sup>38</sup> As noted earlier, outcome prediction in litigated disputes is another aspect of lawyering as to which a good deal of empirical work has been conducted.<sup>39</sup> For these reasons, the research on biases that arise in negotiation and case prediction comprised the starting point for our analysis.<sup>40</sup>

A second limiting factor is that we examined only those biases and heuristics for which there is empirical evidence of the efficacy of *some* de-biasing strategy. As stated in our introduction, at present the empirical literature on de-biasing has not caught up to the work

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38. The scholarship is legion. *See, e.g.*, Richard Birke & Craig Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999) (hereinafter, Birke & Fox); KENNETH ARROW, DANIEL KAHNEMAN & AMOS TVERSKY, *Conflict Resolution: A Cognitive Perspective*, in BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et al. eds., 1995) (hereinafter ARROW ET AL.); Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in ARROW ET AL.; MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING (5th ed. 2001); MARGARET A. NEALE & MAX H. BAZERMAN, COGNITION AND RATIONALITY IN NEGOTIATION (1991); Leigh Thompson & Janice Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, in HANDBOOK OF CONFLICT RESOLUTION (Morton Deutsch & Peter T. Coleman eds., 2000); LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR (2d. ed. 2001); Linda Babcock & George Lowenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997).

39. *See, e.g.*, Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993); Jane Goodman-Delahunty et al., *Insightful or Wishful? Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133 (2010); Elizabeth Loftus & Willem Wagenaar, *Lawyers' Predictions of Success*, 28 JURIMETRICS J. 437 (1988); Kiser et al., *supra* note 2; Samuel Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases to go to Trial*, 90 MICH. L. REV. 319 (1991); Jeffrey Rachlinski, *Gains, Losses and the Psychology of Litigation*, 70 S. CAL L. REV. 113 (1996).

40. By contrast to these areas of research, there has been very little study of cognitive bias as it affects lawyers in their initial client counseling and advising functions. For example, empirical studies of the *primacy effect* suggest that data acquired early is both hard to dislodge and resistant to change. *See, e.g.*, E. Allan Lind et al., *Primacy Effects in Justice Judgments: Testing Predictions from Fairness Heuristic Theory*, 85 ORG. BEHAV. & HUM. DEC. PROC. 189 (2001) (primacy as affecting judgments of fairness); Nickerson, *supra* note 26, at 187. It seems highly likely that attorneys are prone to this bias, because their frame of reference about any client matter is apt to be set by the first interview with the client. We assume this to be the case in some of the discussion that follows, but more research in this area would be useful.

on the biases themselves.<sup>41</sup> For example, cognitive psychologists have demonstrated that people will often pay an unwarranted, irrational premium to convert a strong possibility into a certainty.<sup>42</sup> Dispute resolution scholars have posited that this “certainty effect” may lead lawyers to engage in chronic over-investigation and too much formal discovery, to the economic detriment of their clients.<sup>43</sup> This bias is excluded from our analysis, however, because we found no research evidence of any de-biasing strategy that reduces it.

A similar limitation applies to the selection of de-biasing strategies on which we focus in Parts III and IV. For example, it has been suggested that “directing people to listen in a non-counterarguing way” and with an “open ear and mind” may be effective in reducing certain biases.<sup>44</sup> While this strikes us as a plausible hypothesis, it has not yet been tested empirically.

This reasoning led us to consider five general categories of bias<sup>45</sup> that can be organized as follows:

*Confirmation bias*: the tendency, when one has a pre-existing hypothesis, to pursue<sup>46</sup> and/or assimilate<sup>47</sup> information in ways that are partial to that hypothesis.<sup>48</sup> Confirmation bias is a cognitive bias, affecting people even when they have no personal commitment to an issue or stake in any outcome.<sup>49</sup> But confirmation bias comes in stronger, *motivated* forms as well, as when people are motivated to

41. See Lilienfeld et al., *supra* note 22, at 391 (“It seems fair to say that psychologists have made far more progress in cataloging cognitive biases than in finding ways to correct or prevent them.”) (internal citations omitted).

42. See, e.g., ARROW ET AL. *supra* note 38, at 51.

43. Birke & Fox, *supra* note 38, at 21-23.

44. Kathleen A. Kennedy & Emily Pronin, *Bias Perception and the Spiral of Conflict*, in IDEOLOGY, PSYCHOLOGY AND LAW 434-44 (John Hanson ed, 2012).

45. Each of these groupings is thought to include, or be associated with, more specific biases within that grouping. As previously suggested, how exactly to classify these biases is a subject of dispute and is, in some sense, arbitrary.

46. This bias has been variously called *biased hypothesis testing* and *selective exposure* to evidence. Compare, e.g., Charles G. Lord, Mark R. Lepper & Elizabeth Preston, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1237 (1984) (experiment 2), with BARON, *supra* note 26, at 57.

47. This bias has been called *biased assimilation* of evidence. See, e.g., Charles Lord, Lee Ross & Marc Lepper, *Biased Assimilation and Attitude Polarization: The Effect of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098 (1979).

48. Nickerson, *supra* note 26, at 175.

49. *Id.* at 176.

defend their social theories or beliefs, have allegiances to a “side,”<sup>50</sup> or an interest in achieving a particular result.<sup>51</sup>

Confirmation bias appears in many guises and produces a wide variety of effects that have been tested empirically. These include seeking and preferentially evaluating evidence supporting one's existing hypotheses or beliefs, avoiding information that challenges one's hypotheses or beliefs, restricting one's attention to favored hypotheses, seeing (and remembering) “what one is looking for” and persisting in one's beliefs despite contradictory evidence.<sup>52</sup> The more complex and ambiguous the data that is subject to interpretation, the stronger the likely effects of confirmation bias.<sup>53</sup> The more a person generates<sup>54</sup> and reiterates<sup>55</sup> arguments in support of a given belief or hypothesis, the more convinced he or she is likely to become of its truth.

For obvious reasons, confirmation bias is an occupational hazard for lawyers. Because they serve as agents for their clients and are highly motivated (if not ethically bound) to achieve their clients' goals, lawyers are highly susceptible to the influence of their clients' viewpoints and narratives. They are called upon to weigh complex data and make difficult predictions on their clients' behalf. From the first interview on, lawyers actively seek and marshal information, then construct and elaborate arguments in support of their clients' goals and positions.<sup>56</sup> In a litigation setting, the built-in pressures of the adversary system—to win the case, satisfy the client, appear confident, etc.—may also contribute to lawyers' tendency to engage in “my side” thinking.<sup>57</sup>

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50. This is sometimes called “myside bias” (hereinafter “my side bias”) in the literature. See, e.g., BARON, *supra* note 26, at 199, 212.

51. Nickerson, *supra* note 26, at 176.

52. *Id.* at 187, citing sources. See also Keith Findlay & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2 WISCONSIN L. REV. 291 (2006).

53. Nickerson, *supra* note 26, at 180.

54. Derek Koehler, *Explanation, Imagination, and Confidence in Judgment*, 110 PSYCH. BULL. 499, 500 (1991) (reviewing studies demonstrating that “explaining is believing”).

55. Ralph Hertwig, Gerd Gigerenzer & Ulrich Hoffrage, *The Reiteration Effect in Hindsight Bias*, 104 PSYCH. REV. 194 (1997) (research study finding that repetition of an assertion increases the degree of belief in it).

56. This may be especially the case for litigators. See, e.g., Laura Steinberg, *A Path to Successful Early Mediation*, 32 (4) ALTERNATIVES TO THE HIGH COST OF LITIGATION 55 (April 2014). (In the early stages of litigation, having heard only their client's side of the story, lawyers work hard to construct a “compelling narrative” in support of their client's claims or defenses.)

57. Findlay & Scott, *supra* note 52, at 323-25.

*The Fundamental Attribution Error (FAE)*: this bias, perhaps the most studied in the field of social cognition,<sup>58</sup> is a systematic error in the way human beings evaluate the behavior or performance of others, based upon incomplete data.<sup>59</sup> When we lack information about other people's motives, we tend to assume that the negative behaviors of the people we *like* are caused by situational pressures rather than personal shortcomings. Conversely, we tend to assume that the negative behaviors of people we *dislike* or *don't know* are caused by personal character flaws rather than by external constraints.<sup>60</sup>

FAE tends to cause us to attribute hostile meanings to other people's motives when those people are in conflict with us, their actions hurt us, or they are members of opposing (or out-) groups.<sup>61</sup> Rumination about another person's conduct (common in conflict settings) appears to increase the strength of this bias.<sup>62</sup> Overall, the fundamental attribution error has been called a 'hawkish' bias.<sup>63</sup> In dispute settings, it can lead to aggressive behaviors, reactive devaluation of opponents' offers,<sup>64</sup> and escalation of conflict.<sup>65</sup>

58. Kahneman & Renshon, *supra* note 26, at 6.

59. *Id.* at 6-7. For an important early study, see Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 *ADVANCES IN EXP. SOC. PSYCH.* 173 (L. Berkowitz ed., 1977).

60. Kahneman & Renshon, *supra* note 26, at 7. We also tend to justify our *own* negative behaviors as justified by situational pressures and constraints. This is sometimes also called the *actor-observer effect*. For a recent study, see, e.g., Emily Pronin & Lee Ross, *Temporal Differences in Trait Self-Ascription: When the Self is Seen as an Other*, 90 *J. PERSONALITY & SOC. PSYCH.* 197 (2006).

61. See, e.g., Volkan Topalli & Edgar C. O'Neal, *Retaliatory Motivation Enhances Attributions of Hostility When People Process Ambiguous Social Stimuli*, 29 *AGGRESSIVE BEHAV.* 155 (2003). Regarding negative attributions attaching to others by virtue of their being members of ethnic out-groups, see, e.g., Donald M. Taylor & Vaishna Jaggi, *Ethnocentrism and Causal Attribution in a South Indian Context*, 15 *J. CROSS-CULTURAL PSYCHOL.* 162 (1974).

62. Roderick Kramer, *The Sinister Attribution Error: Paranoid Cognition and Collective Distrust in Organizations*, 18 *MOTIVATION AND EMOTION* 199 (1994); Timothy Wilson & Delores Kraft, *Why Do I Love Thee?: Effects of Repeated Introspections about a Dating Relationship on Attitudes toward the Relationship*, 19 *PERSP. & SOC. PSYCH. BULL.* 409 (1993).

63. Kahneman & Renshon, *supra* note 26. The authors write: "When hostility and suspicion already exist, actors will tend to attribute moderate behavior of antagonists to situational constraints ('they *had* to do that') while attributing more hostile actions to dispositions. Bad behavior by adversaries will reinforce prior beliefs, while good behavior will be disregarded as 'forced.' The hawkish position is justified both when the opponents yield and when they do not." *Id.* at 9.

64. Reactive devaluation is the tendency to discount an offer in negotiation because of the source of its authorship—i.e., it comes from the other side. See, e.g., Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *ARROW ET AL*, *supra* note 38.

FAE is a robust human phenomenon,<sup>66</sup> and there is little reason to think that lawyers are immune from its influence.<sup>67</sup> The rules of engagement are of little help: At the stage of a dispute when lawyers have been retained but formal litigation might still be averted, professional ethics rules prohibit attorneys—unless granted permission by counsel—from directly communicating with an opposing party to learn more about the reasons for his or her past conduct, current positions or demands.<sup>68</sup> If a lawsuit is initiated, the formality of the pleadings and discovery process will likely further stunt communication between the participants, with the lawyers retreating instead to a strategic and highly stylized exchange of legal claims, denials and justifications.<sup>69</sup>

*Egocentric and self-serving biases:* Also known as *positive illusions*, this grouping includes inappropriate levels of confidence in our own abilities, including our judgment and decision making abilities, our own contributions to past outcomes, and our ability to predict or positively control future ones.<sup>70</sup> Stress has been shown to increase people's preference for strategies fostering a sense of control, even when that sense is illusory and the strategies are likely to produce sub-optimal results.<sup>71</sup> Egocentric biases also include our general tendency to adopt self-serving norms of fairness, often as a way of protecting our egos.<sup>72</sup>

Agents such as lawyers—who are accorded great responsibility for client matters and often are subject to stress—are not immune

65. Kahneman & Renshon, *supra* note 26, at 9 and *passim*.

66. *Id.* at 7.

67. A search of the PsychInfo database conducted on June 22, 2014 uncovered no study directly on FAE and lawyers, or for that matter on FAE and agents more generally.

68. AMERICAN BAR ASS'N MODEL RULES OF PROF'L CONDUCT, RULE 4.2 (2013). The rule applies to both litigation and non-litigation matters.

69. See generally Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727 (2005).

70. See Kahneman & Renshon, *supra* note 26, at 4-6; Shelley Taylor & Jonathan Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 PSYCHOL. BULL. 193 (1988). *Hindsight bias*, the tendency once people learn the outcome of an event to believe that it could have been foreseen at the time it occurred, contributes to this overconfidence. See JENNIFER ROBBENOLT & JEAN STERNLIGHT, PSYCHOLOGY FOR LAWYERS 231 (2012). Thus, for example, to the injured plaintiff and her lawyer, a slip and fall is likely to seem "reasonably foreseeable," and therefore avoidable by the defendant, after it occurs.

71. Nehemia Friedland et al., *Controlling the Uncontrollable: Effects of Stress on Illusory Perceptions of Controllability*, 63 J. PERSONALITY & SOC. PSYCH. 923 (1992).

72. See, e.g., Paul Paese & Robert Yonker, *Toward a Better Understanding of Egocentric Fairness Judgments in Negotiation*, 12 INT'L J. CONFLICT MANAGEMENT 114 (2001).



from such biases.<sup>73</sup> In the litigation and negotiation context, distortions about the fairness of their own and their clients' actions and positions, and over-confident expectations regarding likely success, can lead to more aggressive behaviors, fewer concessions and a greater chance of bargaining impasse.<sup>74</sup>

We also briefly mention two other biases because of how consistently they have been shown to affect negotiators<sup>75</sup> : a) the *fixed pie* or *zero-sum* bias, a false or exaggerated assumption that mutually beneficial solutions are unavailable<sup>76</sup>; and b) *anchoring* bias, the tendency to be influenced in assessing subsequent negotiation offers by an initial (and often extreme) offer, or anchor.<sup>77</sup>

As noted, all of these cognitive and motivational biases may be compounded by a pervasive "*bias blind spot*" that causes people to believe that their own actions are fair and dispassionate, while others' acts are tainted with bias.<sup>78</sup> Studies show that people tend to believe that they are less prone to cognitive and motivational biases than the "average person."<sup>79</sup> In part for this reason, merely instructing people about different kinds of biases and how they can

73. See, e.g., Markus Glaser, et al., *Overconfidence of Professionals and Lay People: Individual Differences Within and Between Tasks?*, <http://www.wiwi.uni-frankfurt.de/professoren/schlag/dgf2009/Contribution168.pdf> (financial advisors). For a discussion of how positive illusions may affect legal negotiators, see Birke & Fox, *supra* note 38, at 15-20.

74. See, e.g., Margaret Neale & Max Bazerman, *The Effects of Framing and Negotiator Overconfidence on Bargaining Behaviors and Outcomes*, 28 ACADEMY OF MGMT J. 34 (1985).

75. See *infra* Part IV(A).

76. See, e.g., Max Bazerman & Margaret Neale, *Heuristics in Negotiation: Limitations to Effective Dispute Resolution*, in NEGOTIATING IN ORGANIZATIONS 51 (Max Bazerman & Roy Lewicki eds., 1983); Leigh Thompson & Janine Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, in HANDBOOK OF CONFLICT RESOLUTION (Morton Deutsch & Peter Colman eds., 2000); Leigh Thompson, "They Saw a Negotiation": *Partisanship and Involvement*, 68 J. PERSONAL & SOCIAL PSYCHOL. 839 (1995).

77. See, e.g., Margaret Neale & Max Bazerman, COGNITION AND RATIONALITY IN NEGOTIATION 48-50 (1991).

78. See, e.g., Emily Pronin, Daniel Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369 (2002); Emily Pronin, Thomas Gilovich & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781 (2004); Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37 (2007) (literature review).

79. Pronin, Lin & Ross, *supra* note 78 (experiments showing that participants believe themselves less biased than the "average American" (survey 1), the "average fellow classmate" (survey 2) and the "average international traveler" (survey 3)).

distort human decision making is thought to be largely ineffective in reducing their effects.<sup>80</sup>

Importantly (and not coincidental to our thesis), these biases are among those that mediators most often encounter in their work. Their presence often creates impediments to resolution that the disputants and their lawyers cannot overcome on their own. Diagnosing and remediating such distortions comprise a large part of what successful neutrals do.

### III. HOW MEDIATORS ARE TRAINED TO THINK AND ACT, AND WHAT IS UNIQUE ABOUT THEIR ROLE

Mediators are trained to employ a range of interventions in order to bring about a reduction and, ideally, a resolution of a conflict. To master this role, law school mediation trainees need both to demonstrate generic lawyering abilities and to learn and apply specialized skills.

Like judges and representative lawyers, mediators of legal disputes are regularly called upon to use traditional skills of legal analysis. When negotiating over rights and responsibilities, most disputants expect that mediators will have sufficient familiarity with the applicable law to be able to ask legally relevant questions and provide legally accurate feedback where desired and appropriate.<sup>81</sup> Mediation trainees likewise need to become adept in other generically important lawyering activities, such as listening, questioning, explaining, framing and assessing options and persuading. In other words, much of what they are taught is no different from “thinking (and acting) like a lawyer.”

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80. *Id.* at 378 (bias blind spot persists even after subjects read and learn about it).

81. *See, e.g.*, AMERICAN BAR ASS'N TASK FORCE ON IMPROVING MEDIATION QUALITY, FINAL REPORT at 14 (2008) (study showing that 95% of attorney consumers of mediation wanted their mediators to provide an analysis of the case, including strengths and weaknesses.) Legal feedback of this sort may be especially important in situations in which participants' stances are so unreasonable or so uninformed by legal norms that the integrity of the mediation process might otherwise be called into question. *See, e.g.*, Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice through Law*, 74 WASH. U. L.Q. 47, 51, 100 (1996); Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991). *See also* THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARDS II AND VI (American Arbitration Association, ABA Section of Dispute Resolution, Association for Conflict Resolution, Sept. 2005) (hereinafter, “MODEL STANDARDS”) (allowing mediators discretion to withdraw from or terminate mediation in case of serious party imbalance or criminality). *But see, e.g.*, Robert A. Baruch Bush, *Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989) (arguing that mediators cannot adopt a “protection-of-rights” approach to their role without compromising their effectiveness).

But unlike judges (looking for the *right* result) or advocates (seeking a *desired* result), mediators work toward conflict reduction and, where possible, resolution *regardless* of the result.<sup>82</sup> Put differently, mediators are *change agents*, called in to assist disputants in finding satisfying, or at the very least acceptable, solutions that might otherwise elude them.<sup>83</sup> This goal requires a mindset and skill set that, if not entirely unique to the mediator's role, are at least uniquely important to achieving success in it.

To change how people perceive their conflict and each other, how they assess their options, and how they negotiate toward a potential resolution, mediators need to be effective *diagnosticians* of the roots of conflicts and the many reasons why unassisted negotiations fail.<sup>84</sup> Mediation trainees need to understand various strategic, structural, cultural, psychological and cognitive barriers to resolution, and to devise appropriate interventions for overcoming them when they are presented. Such metacognition requires training and knowledge on how disputants contribute to and experience conflict, what matters to them in disputing, and how strong conflict and pervasive cognitive and motivational biases affect parties' negotiating behaviors and decision making—training that is beyond what most law students or lawyers receive.

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82. Most practicing mediators subscribe to this very pragmatic goal for the process, but not all do. See generally ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2d. ed. 2005) (eschewing a problem-solving orientation to mediation in favor of attempting to achieve party empowerment and improved relationships). The Model Standards do make clear that mediators may not pursue "higher settlement rates" for their own sake if this compromises the goal of working towards voluntary, un-coerced decisions. MODEL STANDARDS, STANDARD I. B., *supra* note 81. They also authorize termination of mediations being used to "further criminal conduct." MODEL STANDARDS, STANDARD VI. A (9). Some state ethics codes for mediators provide similar treatment for agreements that are inherently unfair or unconscionable. See Susan N. Exon, *How Can a Mediator be Both Impartial and Fair? Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387, 403-05, collecting sources. And in certain mediation contexts, programmatic objectives or industry/ethical norms limit the agreements that neutrals can facilitate. See, e.g., NANCY N. DUBLER & CAROL B. LIEBMAN, *BIOETHICS MEDIATION: A GUIDE TO SHAPING SHARED SOLUTIONS*, 23-26 (REVISED ED. 2011) (agreements in mediations over hospital treatment plans constrained by medical ethics and state law requirements).

83. See, e.g., Robert A. Baruch Bush, *What Do We Need a Mediator For?: Mediator's "Value Added" for Negotiators*, 12 OHIO ST. J. DISPUTE RESOL. 1 (1996).

84. See generally DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT* 21-61 (2d. ed. 2012).

Put another way, as Jon Hyman has argued,<sup>85</sup> people entering disputes generally tell three kinds of stories: “*I want mine*,” “*How could you do that to me?*” and “*Why don’t you understand me?*” The traditional law school classroom predominantly prepares students for the “*I want mine*” aspects of disputing. The mindset of the representative lawyer or judge—at least as presented in most law school classrooms—is an analytic one: fitting facts, data and evidence into appropriate legal categories in order to justify a decision, advise a client about his or her options, make predictions about the outcome of future events, or persuade others to take actions that favor a client’s interests.

The mediator’s role is more expansive and, in many ways, more complex. First, there is the distinctive nature of the mediator’s stance: the mediator works with two (or more) parties in an attempt to achieve some voluntary convergence of positions or reconciliation of interests that can lead to a workable solution, but without taking sides. This is in stark and obvious contrast to the role of an advocate, whose sole responsibility is to his or her client.

“Without taking sides” requires conscious and sustained effort by the mediator. Throughout the process, in order to maintain the appearance of impartiality, the mediator must treat the parties in all ways as evenhandedly as possible. In addition, preferences regarding possible outcomes (including but not limited to the tendency to favor the “right” legal result) must be carefully monitored and suppressed by the mediator lest he or she override the parties’ own views of a fair or desired result.

The mediator’s role is further complicated by the strong feelings that human conflicts often evoke. As we have suggested, for many disputants the emotional contents of a dispute—the “*How could you. . .?*” or “*Why don’t you. . .?*” feelings of being wronged, disrespected, or misunderstood—are far more salient than the “who’s (legally) right and wrong” aspects of a problem on which lawyers and judges traditionally focus. The emotionality of disputing requires that mediators be trained to detect, and work through, *ripeness problems* (the parties are not ready to let go of their conflict and negotiate), *communication distortions* (the parties repeatedly mishear

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85. Jon Hyman at the 2013 AALS Conference on Clinical Legal Education, Session in San Juan, Puerto Rico: “Mediation First, or Last?: A Conversation” (April 29, 2013). A slightly different and expanded version of this formulation appears in Jonathan M. Hyman, “The Roots of Impasse in the Mind of the Mediator,” in DEFINITIVE CREATIVE IMPASSE-BREAKING TECHNIQUES IN MEDIATION 41 (Molly Klapper, ed. 2011).

what each other is saying), and *hostile attributions* (the parties unfairly demonize, or hold distorted views about, the other side or its viewpoint). Mediators must learn to manage “hot” and potentially contagious emotions and be able to enter the disputants’ conversation in a way that demonstrates empathy as well as an understanding of competing perspectives.

To deal with the strong emotions frequently triggered by conflict, mediators learn how to reduce the sting of angry statements through “productive reframing”—for example, reframing a highly judgmental statement (“*She already stiffed me once! Why should I trust anything this woman promises?*”) into a statement of an interest to be satisfied (“*So any acceptable resolution would have to contain some ‘teeth’ in the event of non-payment?*”).<sup>86</sup> They learn how to coach disputants to express their anger productively, for example by making “I” statements (“*When you raise your voice, I get upset and am unable to process what you are saying*”) rather than accusatory “you” statements (“*Will you please stop being such a jerk!*”).<sup>87</sup> They learn how to question not just for legally relevant facts and evidence, but also for empathy,<sup>88</sup> inquiring—sometimes at the risk of exposing vulnerable parties or of escalating tensions—about the constraints under which parties operate and the non-legal effects of their actions on one another. (“*Ms. Wilson, can you tell Mr. DiLorenzo how the three-month delay in getting your kitchen completed and having your repeated phone calls ignored affected you?*”) They learn how, in appropriate cases, to orchestrate effective apologies. And through role reversal interventions, by which each party is asked to step into the other’s shoes and consider—in their own words if possible—how the situation might look if viewed from the other side, the mediator seeks to make each party’s psychological point of view more understandable to the other.<sup>89</sup> Each of these interventions (and others) require the mediator to identify and accept a party’s emotional needs.

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86. See, e.g., MARK D. BENNETT & SCOTT H. HUGHES, *THE ART OF MEDIATION* 101-03 (2d ed. 2005) for useful examples of reframing. However, some mediators—especially those who adopt the transformative approach—oppose softening or diluting conflict in this way. To them, this form of intervention serves to deprive disputants of the determination over how they wish to express the conflict. See, e.g., BUSH & FOLGER, *supra* note 82, at 153-54.

87. “I” statements avoid blame by emphasizing what is important to the speaker, as in “*For me, what this is really about is. . .*” or “*What I am feeling is. . .*” See generally DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 185-200 (1999).

88. FRENKEL & STARK, *supra* note 84, at 183-84.

89. There are many variations in how this can be done: for example, the mediator can ask each party to articulate the other party’s best legal arguments, identify their

Mediators seeking convergence of positions or reconciliation of interests must also learn to deal effectively with cognitive barriers to resolution, including attribution biases, confirmation bias and (perhaps especially) egocentric overconfidence. In negotiation, these barriers can cause disputants too readily, and inaccurately, to attribute bad motives to opposing parties; to assume that their positions are diametrically opposed, when in fact they may agree about many things; and persistently to overvalue the strength of their positions and the fairness of their settlement offers, while unrealistically denigrating those of the other side. Where extreme adversarial bargaining or other problematic behavior of a participant poses strategic barriers to convergence, the mediator is trained to recognize and confront such tactics as well.

Importantly, in contrast to the desire for predictability and certainty (the right or favored outcome) that characterizes the objective of most arbiters and partisans, effective mediators “question for doubt,” actively seeking out what’s unclear or ambiguous about any situation, in order to create legitimate uncertainty in the minds of overconfident disputants.<sup>90</sup> In appropriate contexts, mediators learn to confront unreasonable or short-sighted participants with the risks they may face by persisting in their stance.<sup>91</sup>

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strongest pieces of evidence, or consider and state how their past actions and statements might have been experienced by the other side. (“Put yourself in Ms. Wilson’s shoes. Try to put into words what she was thinking when she made 7-8 telephone calls over a period of two weeks inquiring about the status of her kitchen and when work would resume, and none of her calls was answered?”) See generally *id.* at 238-39.

90. *Id.* at 193-95. See also Robert Benjamin, *The Natural Mediator*, 18 (1) *Mediation News* 8-9 (1998) (good mediators are “confused” in that they understand there are no easy answers, readily see validity in each person’s perspective, and work to “confuse” parties who presume otherwise.)

91. These sorts of doubt-sowing interventions may be equated by some with directive or evaluative conduct by mediators—a hotly contested issue in a field that holds self-determined participant decision making to be a fundamental norm. The mindset we are discussing includes, but is by no means limited to, evaluative forms of mediation. For example, in our view, neutrals who through their questions or statements encourage participants to consider alternative perspectives, consequences or possible outcomes—i.e., mediators who endeavor to serve as “agents of reality”—engage in “consider-the-opposite” behavior. Such interventions are widely employed by most resolution-oriented mediators. See, e.g., Leonard Riskin, *Mediator Orientations, Strategies and Techniques*, 12 *ALTERNATIVES TO THE HIGH COST OF LITIGATION* 111 (1994); James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 *OHIO ST. J. DISPUTE RESOL.* 263, 268 (2013). But such mediator persuasion has its limits: it must stop short of coercion and requires the neutral to refrain from acting on pro-settlement motives (such as the desire for high settlement rates) under which he may be such operating. See *supra* note 82.

In short, succeeding at their task requires mediators to look at a dispute through a “bifocal”<sup>92</sup> or “external”<sup>93</sup> lens, listening for opportunities to help the parties to see the conflict, their objectives, their risks and each other in new (and de-biased) ways. Mediators are aided in this effort by the distinctive nature of the mediation process which, in most<sup>94</sup> settings, includes the ability to conduct both face-to-face participant talks (“joint” or “plenary” sessions) and private, party-mediator discussions (“caucuses”), timed to serve the needs of the dispute. The caucus—unique to mediation in the landscape of dispute resolution processes—affords the mediator a confidential space in which to give voice to “alternative” or oppositional thinking, with less danger of compromising his or her perceived neutrality.

What impact might repeated experience with this kind of thinking and acting have on the mediator? Might this mindset or any of the interventions mediators commonly utilize to induce change in disputing parties reduce the biases of mediators themselves?

#### IV. DE-BIASING BY “CONSIDERING THE OPPOSITE”

Over the past thirty years or so, in addition to cataloging different types of cognitive and motivational biases and analyzing how they function, social scientists have begun to investigate a variety of “mental simulation”<sup>95</sup> prompts that may help to reduce human bias. Mental simulation prompts are interventions that ask subjects to generate or explain alternatives to beliefs, hypotheses, explanations or predictions on which they have focused. The potential de-biasing

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92. “Bifocalism” is the ability to see the same situation from multiple perspectives. David Brooks, *Why Elders Smile* (Dec. 4, 2014), <http://www.nytimes.com/2014/12/05/opinion/david-brooks-why-elders-smile.html?smid=nytcore-ipad-share&smprod=nytcore-ipad>.

93. An “external” vantage point allows switching among viewpoints, including those with which one may disagree. Adam D. Galinsky et al., *Using Both Your Head and Your Heart: The Role of Perspective Taking and Empathy in Resolving Social Conflict*, in *THE PSYCHOLOGY OF SOCIAL CONFLICT AND AGGRESSION* 106 (Joseph P. Forgas, Arie W. Kruglanski & Kipling D. Williams, eds. 2011).

94. Not all mediation practitioners recommend this model of mediation and not all programs utilize it. See, e.g., GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT* (2009) (advocating no-caucus model of mediation). But see, e.g., Christopher W. Moore, *The Caucus: Private Meetings That Promote Settlement*, 16 *MEDIATION Q.* 87 (1987).

95. The term of art “mental simulation” was originally coined by noted psychologists Daniel Kahneman and Amos Tversky to denote the mental processes by which people construct scenarios, make predictions, assess probabilities and evaluate causal statements, resembling the running of a simulation model. See Daniel Kahneman & Amos Tversky, *The Simulation Heuristic*, in *JUDGMENT UNDER UNCERTAINTY*, *supra* note 26, at 201-08.

effect of such prompts has been the subject of investigation in a variety of domains, including beliefs about contested social theories, predictions of future events, explanations about past events and their causes, levels of confidence in one's own abilities or judgment, and attributions concerning other people's attitudes, character or conduct.

One such method of de-biasing that has drawn a good deal of research attention involves "consider the opposite" prompts—interventions that ask subjects to generate, list, explain or imagine in detail reasons why their answer, their hypothesis, their prediction of future events, or their proposed decisions might be wrong. Do such prompts reduce "my side" thinking, and make people more open-minded, flexible thinkers and decision-makers? This question has been studied empirically in a variety of domains.

Take, for example, the domain of social theories. A considerable body of research evidence demonstrates that, once formed, human beliefs about complex social theories and contested historical events are highly resistant to change.<sup>96</sup> On balance, does taxing the wealthy at a higher marginal rate help or hurt the economy? Who was the first aggressor: Trayvon Martin or George Zimmerman? When people develop theories about such questions, they tend to seek information supporting them, and to assimilate it in a way that ignores or explains away contrary information.

In an early study demonstrating these effects, Charles Lord and his research colleagues asked 48 Stanford University undergraduate student subjects, identified as proponents or opponents of capital punishment and divided into "pro" and "con" groups, to read two empirical studies (consisting of short methodology descriptions and conclusion summaries), one study supporting its effectiveness as a deterrent to crime, the other showing no deterrent effect at all.<sup>97</sup> After reading the two opposing studies, each group, on average, thought that the study supporting its preexisting views was logically superior to one opposing its views. Not only that, but after reading the *contradictory* evidence from the two studies, each group felt more committed to its original position—and more polarized in its beliefs—than

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96. See, e.g., Craig A. Anderson, *Inoculation and Counterexplanation: Debiasing Techniques in the Perseverance Social Theories*, 1 *SOCIAL COGNITION* 126 (1982).

97. Lord, Ross & Lepper, *supra* note 47.



before.<sup>98</sup> This is a classic example of *assimilation bias* in action—interpreting mixed evidence in a way that supports one’s pre-existing convictions.<sup>99</sup>

In a follow-up study five years later, however, it was found that “consider the opposite” (CTO) instructions can mitigate this bias.<sup>100</sup> Again, researchers gave subjects who had earlier indicated support or opposition to capital punishment two opposing study summaries to read. Respondents were then divided into three groups, consisting of 20 opponents and 20 supporters each. As in the 1979 study, the first group was given no special instructions before reading the material, and the attitudes of that group’s members became more polarized after reading both studies. Respondents in a second group were instructed (as a judge would a jury) “*to be as objective and unbiased as possible in evaluating the studies you read.*”<sup>101</sup> This prompt was wholly ineffective in reducing bias; the attitudes of the respondents in this second group were just as polarized after reading the studies as that of those in the first group.<sup>102</sup>

Only respondents in the third group—instructed to consider the opposite, specifically to “*ask yourself at each step whether you would have made the same high or low evaluation had exactly the same study produced results on the other side of the issue*”—experienced significantly less polarization of beliefs than the other two groups. The authors conclude that CTO prompts may overcome biased assimilation of new information.<sup>103</sup>

Researchers have also studied the effects of CTO instructions on a related cognitive bias: *biased hypothesis testing*, the tendency to seek out evidence that confirms one’s preexisting hypotheses. In criminal investigations, for example, once investigators focus their attention on a prime suspect, biased hypothesis testing may cause them to look for evidence that supports, and disregard evidence that

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98. *Id.* at 2102-08.

99. As one scholar puts it, people tend to use biased criteria to evaluate new information, with the nature of the bias depending on whether the information supports or contradicts their existing viewpoints. New data is readily accepted if it at all *supports* one’s existing opinions, but not accepted unless it *compels* an opposing view. See GILOVICH, *supra* note 26, at 55-56.

100. Lord, Lepper & Preston, *supra* note 46 (experiment 1).

101. *Id.* at 1233.

102. *Id.* at 1233-36.

103. *Id.*

challenges, their theory of the case, increasing the risk of false convictions. Previous studies have shown that biased hypothesis testing is difficult to overcome.<sup>104</sup>

A recent two-part study illustrates how CTO instructions may reduce this bias.<sup>105</sup> In Study 1, college student subjects were asked to read the first half of a police file that described the early stages of an investigation of a home invasion and shooting and raised weak circumstantial inference that a particular suspect ("Bill Briggs") was guilty of the crime. Subjects were then randomly assigned to one of two groups. The first (hypothesis-forming) group was told, "*It's early in the investigation and there's a lot more work to do, but based on what you know now, who do you think is most likely the person who shot Marks?*" and then to explain the reasons for, and rate their degree of confidence in, their choice. The second (control) group was not given these instructions.<sup>106</sup>

Both groups then read the second half of the file, which contained more evidence against the prime suspect, but also provided new evidence raising substantial doubts about his guilt. After reading the entire file, both groups still favored Briggs as the probable shooter, but the group that had been asked to articulate and explain its initial hypotheses did so to a significantly greater extent than the second group. Its respondents "remembered the facts as more consistent with Briggs's guilt, advocated more lines of investigation focused on him, and subtly shifted their opinions about matters relevant to determining guilt in a way that supported initial suspicions. Thus, the simple act of naming a suspect and generating reasons for suspicion—something investigators often do—worsened bias on several measures."<sup>107</sup>

Study 2 largely replicated study 1, with the following change: some subjects (called the "counter-hypothesis" group) were asked not only to articulate who they thought committed the crime and why, but also to explain why their hypothesis might be wrong and why that person might be innocent. This instruction was effective at reducing bias. This counter-hypothesis group was less biased than the comparable hypothesis-forming group in study 1 and no more biased in its judgments about guilt than the non-hypothesis-forming

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104. *Id.* at 1237.

105. Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 *PSYCHOL. PUB. POL'Y & L.* 315 (2009).

106. *Id.* at 319-320.

107. *Id.* at 324.

group,<sup>108</sup> including its willingness to seek information inconsistent with the prime suspect's guilt.<sup>109</sup>

Surveying the field as a whole, CTO prompts have been shown to reduce cognitive biases and improve decision making in many domains not involving strong motivational investment. They have been found to reduce subjects' overconfidence in the accuracy of their answers to general knowledge questions,<sup>110</sup> to reduce belief persistence in the face of disconfirming evidence,<sup>111</sup> and to reduce anchoring bias in experts' judgment of value.<sup>112</sup> They have been shown to improve evaluation of complex data in decision-making,<sup>113</sup> as well as to improve flexibility in thinking causally about why past events may have occurred.<sup>114</sup> Several researchers have suggested that CTO prompts improve flexibility and open-mindedness in thinking by breaking people's natural resistance to the consideration of alternatives once they have settled on a focal hypothesis.<sup>115</sup>

Perhaps surprisingly, CTO prompts have also been shown to be de-biasing in situations involving subjects' strong motivational or ego

108. *Id.* at 327-29.

109. *Id.* at 325.

110. Asher Koriat, Sarah Lichtenstein & Baruch Fischhoff, *Reasons for Confidence*, 6 J. EXP. PSYCHOL.: HUM. LEARNING & MEMORY 107, 107-118 (1980) (experiment 1: a prompt requiring subjects to "specify all reasons favoring or opposing each of your answers" improved calibration between the predicted and actual number of correct answers chosen).

111. Anderson, *supra* note 96, at 126.

112. Thomas Mussweiler, Fritz Strack & Tim Pfeiffer, *Overcoming the Inevitable Anchoring Effect: Considering the Opposite Compensates for Selective Accessibility*, 26 PERSP. SOC. PSYCHOL. BULL. 1142 (2000) (small effect; article notes that anchoring is a particularly robust cognitive bias, one that is hard to dislodge); see also Jessica Wildermuth, *The Application of Federal and Texas State Sentence Ranges in a Consider-The-Opposite Paradigm: Can the Magnitude of Bias in Sentencing Decisions be Reduced?* (Dec. 2008) (Unpublished Ph.D dissertation, The University of Texas at El Paso) (CTO partially supported: the more reasons given to support or refute sentence anchor, the less punitive sentences subjects gave, but only where sentence anchor was high.).

113. Laura J. Kray & Adam D. Galinsky, *The De-biasing Effects of Counterfactual Mind-sets: Increasing the Search for Disconfirmatory Information in Group Decisions*, 91 ORG. BEHAV. & HUM. DEC. PROCESSES 69 (2003) (simulated decision whether or not to fly Space Shuttle Challenger mission under specified weather conditions).

114. See Michael R. P. Dougherty et al., *The Role of Mental Simulation in Judgments of Likelihood*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 135 (1997).

115. Derek Koehler, *Explanation, Imagination, and Confidence in Judgment*, 110 PSYCHOL. BULL. 499, 503 (1991); Edward R. Hirt & Keith D. Markman, *Multiple Explanations: A Consider-an-Alternative Strategy for Debiasing Judgments*, 69 J. PERSONALITY & SOC. PSYCHOL. 1069, 1071 (1995).

investment—at least sometimes. In one study, for example, CTO instructions reduced college football fans' overconfident predictions, owing to allegiance bias, about the likely success of their home teams in upcoming games.<sup>116</sup> In another, they mitigated the effects of partisan political bias on subjects' predictions about the outcome of the 1976 presidential election.<sup>117</sup> In a third study, MBA student-subjects asked to predict the timing and number of job offers they would receive upon graduation, and their projected starting salaries, were much more accurate in their predictions when asked to list reasons why their optimistic scenarios might not be achieved.<sup>118</sup> In other experiments involving both cognitive and motivational bias, however, this effect has not always been replicated.<sup>119</sup>

One factor that seems to affect the efficacy of CTO prompts is the depth of processing required of the subject. It has been shown that the more elaborate the causal connections that a subject is asked to create when explaining an alternate hypothesis, or the more vividly the subject is asked to imagine a future outcome, the more available that hypothesis will seem to the subject and the more effective a CTO prompt is likely to be.<sup>120</sup>

116. Keith D. Markman & Edward R. Hirt, *Social Prediction and the 'Allegiance Bias,'* 20 SOC. COGNITION 58 (2002) (As de-biasing intervention, subjects required to explain and justify their predictions to persons with unknown rooting allegiances.).

117. See John S. Carroll, *The Effect of Imagining an Event on Expectations for That Event: An Interpretation in Terms of the Availability Heuristic,* 14 J. EXP. SOC. PSYCHOL. 88 (1978).

118. Stephen J. Hoch, *Counterfactual Reasoning and Accuracy in Predicting Personal Events,* 11 J. EXP. PSYCHOL.: LEARNING, MEMORY AND COGNITION 719 (1985).

119. For example, the CTO de-biasing effect that Lord and his colleagues found in their capital punishment experiment was not replicated in a follow-up dissertation study. Daniel Laughlin, *Consider the Opposite: An Application of Scientific Thinking to Mitigate Assimilation Bias,* (Nov. 21, 2001) (Unpublished Ph.D dissertation, American University) (CTO only partially supported: significant effects of CTO instruction on views about technology in education; some effects, but not reaching statistical significance, on views about capital punishment). Similarly, in some studies of egocentric overconfidence, CTO prompts have been shown to reduce subjects' overly optimistic predictions concerning other people's future conduct, but not their own. See, e.g., Ian R. Newby-Clark et al., *People Focus on Optimistic Scenarios and Disregard Pessimistic Scenarios When Predicting Task Prediction Times,* 6 J. EXP. PSYCH.: APPLIED 171 (2000).

120. Koehler, *supra* note 115, at 506-07, citing sources; Derek J. Koehler, *Hypothesis Generation and Confidence in Judgment,* 20 J. EXP. PSYCHOL.: LEARNING, MEMORY & COGNITION 461, 467 (1994) (Subjects who generate their own alternative hypotheses show less optimistic overconfidence than those who are presented the same alternative hypotheses for evaluation.). Other factors found to affect the efficacy of CTO prompts include the subject's ease or difficulty in generating alternative hypotheses after prompting. Lawrence J. Sanna, Norbert Schwarz & Shevaun L. Stocker, *When Debiasing Backfires: Accessible Content and Accessibility Experiences in Debiasing Hindsight,* 28 J. EXP. PSYCHOL.: LEARNING, MEMORY & COGNITION 497 (2002) (Study

## A. “Consider the Opposite” and Legal Disputing

It has repeatedly been demonstrated that even random assignment to “pretend” adversary lawyering roles leads to significant bias in the way that subjects assess evidence, make predictions, and behave. The effects of such role assignments appear to take hold immediately. In one simulated negotiation study,<sup>121</sup> for example, George Loewenstein and his research colleagues gave a group of 160 undergraduate and law students identical case file materials from a recently litigated, factually ambiguous motorcycle accident case, tried by a judge without a jury, in which the plaintiff had requested \$100,000 in damages. Students were randomly assigned to the role of “plaintiff” or “defendant” and asked to predict, based on the file, what monetary award the judge would order and what award would be “fair.” They were then paired off and instructed to negotiate in an effort to reach a settlement.

The researchers found, on average, that students assigned to the role of plaintiff predicted an award by the judge that was more than \$14,500 higher than that predicted by students assigned to the defendant role.<sup>122</sup> They found that role assignment caused a bias in both recall and weighting of arguments: each side recalled more arguments favoring their side’s position than those favoring the other side, and believed that a judge or jury would find “their” arguments superior to opposing ones.<sup>123</sup> Finally, the researchers found that the larger the difference in predicted judicial awards within each negotiating pair, the greater the likelihood of bargaining impasse.<sup>124</sup> A number of other studies have reported similar findings, irrespective

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showing that de-biasing efforts backfired when subjects asked to generate as many as ten alternative possible outcomes—a task they experienced as difficult). In addition, it has been hypothesized that the inherent plausibility or implausibility of alternatives under consideration may influence whether particular CTO prompts will work. Craig A. Anderson, *Inoculation and Counter-Explanation: Debiasing Techniques in the Perseverance of Social Theories*, 1 Soc. COGNITION 126 (1982); Koehler, *supra* note 115, at 507.

121. Loewenstein et al, *supra* note 13.

122. *Id.* at 150, 153. This difference in monetary prediction was approximately one-half of the judge’s actual total award, causing the researchers to characterize the magnitude of the bias as “large.”

123. *Id.* at 154.

124. *Id.* at 153.

of whether subjects were assigned to a party<sup>125</sup> or party representative<sup>126</sup> role.

Given that “my side” bias occurs so readily in simulated cases involving no real clients or stakes, it is hardly surprising that research evidence also suggests that lawyers are not very good at evaluating evidence and making predictions about *actual* case outcomes. In one early study containing three separate experiments, civil and criminal litigators were asked to think about a case of theirs that was going to trial soon, specify a minimum goal they would like to achieve in the case in order to feel “successful,” and estimate their chances of obtaining that goal. Later, subjects were asked to report the results that they actually achieved in their case. The results of the study showed that lawyers tended to be overconfident in their predictions of future success.<sup>127</sup>

Can “consider the opposite” prompts reduce overconfidence bias and promote settlements in a dispute resolution context? In one simulation study,<sup>128</sup> the answer was decidedly “yes.” In 1997, Loewenstein and his research associates replicated and expanded on their earlier motorcycle accident experiment demonstrating the correlation between overconfident predictions of trial outcomes and bargaining impasse.<sup>129</sup> They divided 98 MBA students from the University of Chicago and the University of Pennsylvania into a control group and

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125. See, e.g., Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness in Interpersonal Conflict*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISIONAL PROCESSES 176, 183-4 (experiment 1: assignment of student negotiators to union or management role in simulated labor dispute); Paul W. Paese & Robert D. Yonker, *Toward a Better Understanding of Egocentric Fairness Judgments in Negotiation*, 12 INT'L J. CONFLICT MGMT. 114 (2001) (estimate of fair wages in a simulated union-management dispute).

126. See, e.g., Engel & Glöckner, *supra*, note 25 (assignment to defense counsel or prosecutor role led to role-induced bias in predicting outcome in criminal case, and in subsequent plea-bargaining discussions); Dan Simon, Doug Stenstrom & Stephen Read, *Adversarial and Non-Adversarial Investigations: An Experiment*, SOCIAL SCIENCE RESEARCH NETWORK (May 15, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1401723](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401723) (academic misconduct case involving ambiguous allegation of cheating; assignment of subjects to investigator roles representing either the student or the university led to biased assessment of evidence in the direction of the party assignment).

127. Elizabeth F. Loftus & Willem A. Wagenaar, *Lawyers' Prediction of Success*, 28 JURIMETRICS J. 437 (1988). This finding was recently replicated in a study with a larger sample (481 civil and criminal attorneys). See, Jane Goodman-Delahunty, et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133 (2010).

128. Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913 (1997) (hereinafter “Babcock, et al.”).

129. Loewenstein et al, *supra* note 13, at 145.

“de-biasing condition” group, each containing plaintiff and defendant representatives. All students were given financial or grade incentives for making verdict predictions close to the actual verdict awarded by the judge in the case (\$30,560, on the claim for \$100,000), as well as for achieving a favorable settlement efficiently. Before negotiating, students in the de-biasing condition group were given a “*think carefully about the weaknesses in your case*” prompt,<sup>130</sup> not given to the control group.

The researchers found that this CTO prompt was highly effective at reducing bias and promoting settlement. 35% of paired negotiators in the control group were unable to reach any settlement within the assigned 30-minute negotiating period (in which simultaneous sealed bid offers had to be made every five minutes), whereas only 4% of negotiators in the de-biasing group failed to reach agreement. In the control condition, there was more than a \$20,000 difference, on average, in the predicted awards of plaintiff and defendant representatives; in the de-biasing condition, the difference was on average less than \$5,000.<sup>131</sup>

However, in a subsequent study of overconfidence bias on the part of practicing lawyers in *actual* cases, researchers were unable to replicate this result.<sup>132</sup> 481 civil and criminal trial lawyers were asked to think about a case of theirs in litigation, specify a minimum desired goal for that case, and predict their chances (from 0 to 100%) of achieving that goal. Half of the subjects were asked to list reasons

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130. In its entirety, the de-biasing prompt read as follows:

In experiments based on this case we have found evidence of “self-serving interpretations of fairness.” When we ask plaintiffs and defendants to predict the ruling of the judge, and to tell us what they think is a fair settlement of the case, plaintiffs’ answers to both questions are typically \$20,000 greater than defendants’. Furthermore, when the difference between the plaintiff and the defendant is large—when the plaintiff thinks a much higher settlement is fair than does the defendant—the parties are much less likely to settle the case and more likely to “go to court” and incur legal expenses. This occurs because each side is “holding out” for what they legitimately think is a fair settlement.

Disputants don’t always think carefully about the weaknesses in their own case and are therefore surprised when the judge’s ruling is worse than their expectations. For plaintiffs, this means that the judge’s award is worse than their expectations. For defendants, this means that the judge’s award is often greater than their expectations. Therefore, please think carefully about the weaknesses in your case. In the space below, please list the weaknesses in your own case.

Babcock et al., *supra* note 128, at 917-18. Original casefile materials on file with authors.

131. *Id.* at 818.

132. Goodman-Delahunty et al., *supra* note 127.

on a written questionnaire for why they might not achieve their goals *before* making a prediction of their chances of success. The remaining subjects (the control group) were also asked to specify reasons why they might not achieve their goals, but only *after* they had provided an estimate of their chances of success. Later, researchers compared actual litigation or negotiation case results with the attorneys' earlier predictions. The lawyers given a CTO prompt before making an outcome prediction were not significantly more accurate in their predictions than the lawyers in the control group.<sup>133</sup> Commenting on the discrepancy between these research findings and those reported in the earlier Lowenstein simulation study, the authors conclude: "[a] more profound investment in the outcome of real-life cases may increase resistance to de-biasing interventions."<sup>134</sup>

### B. *Mediation Questions and Applications*

How might this research pertain to the work of mediators? Is there something about the mediator's role that may suggest a de-biasing effect of mediation training and practice? Two fundamental components of the neutral's role inform our discussion.

First, because the goal of most<sup>135</sup> mediators is conflict reduction and, if possible, resolution by agreement, they seek to ensure that the parties' perceptions and predictions are informed by realistic considerations where warranted and thus brought into closer alignment with each other.

Second is the mediator's fealty to the norms of neutrality and impartiality. While seeking such convergence, the mediator should have no investment in any specific substantive outcome reached at the bargaining table and should treat all parties as evenhandedly as possible.<sup>136</sup> Mediator Kenneth Cloke has argued that "impartiality" is really a kind of "omni-partiality;" the mediator is on the "side" of

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133. *Id.* at 150-51.

134. *Id.* at 151. However, we note that attorneys in *both* groups were given CTO prompts, the only difference being their timing. Although the authors did not comment on this feature of the research design, it is possible that it also contributed to the outcome. We also note that the specific de-biasing prompt given in the Babcock et al. study, *supra* note 130, was highly suggestive in content, which may have contributed to its effectiveness.

135. *But see supra* note 82.

136. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, § II.A ("A Mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.") (Am. Arbitration Ass'n, Am. Bar Ass'n Section of Dispute Resolution, Ass'n for Conflict Resolution, 2005).



both of the parties, trying to help each find a resolution that meets his or her needs.<sup>137</sup>

At a cognitive level, honoring these norms requires a serious effort by the mediator to listen to each party open-mindedly, with a deep focus on that individual's views, perspectives and concerns. Mediators are placed in a position that requires them to suspend (and, ideally, suppress) any judgments they may make in order to flesh out and momentarily "accept" each disputant's competing version of contested events, their contrasting views about what's "fair," their differing interests and priorities, and their differing predictions about the future. Active mediators often go a step further, pointing out alternative perspectives regarding the dispute that both sides may have overlooked. In effect, as the mediation unfolds, the neutral is, of necessity, engaged in an ongoing process of "considering the opposite."

In order to achieve his objective, the neutral works to insure that disputants engage in such a process as well. At a behavioral level, mediators interact with disputants in different ways, depending on their mediation philosophy, and contextual variables presented in particular disputes. Less directive mediators are likely to ask the parties *questions* to try to encourage suspension of their focal beliefs and hypotheses and prod them to consider alternative viewpoints and potential outcomes. ("*Have you thought about [this piece of evidence?] [. . . Mrs. Robbins' argument that . . .]*" [*. . . how your behavior on that day might look to a judge?*"] "*While you clearly want to limit your husband's visits to every other weekend, have you considered how your daughter might feel not seeing him for two weeks at a time?*")

More directive mediators (or those working with participants who seem unreasonably "dug in") are apt to make *statements* designed to prompt less biased thinking, by pointing out possible case weaknesses, other people's viewpoints, or even different ways they might frame their own decisions. (e.g., "*While it's possible that a judge might exclude that piece of evidence, because of [x], it strikes me as more likely that she will admit the evidence because of [y]*" "*Mrs. Robbins, you've argued that [A] outcome is likely. Mr. Campbell has argued that [B] outcome is more likely. It seems to me that [C] outcome—which neither of you desire—is also quite possible. Have you thought of that?*" "*Having custody every Saturday night gives you lots*

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137. KENNETH CLOKE, MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION 13 (2001).

*of quality time with your daughter. But it's certainly not an ideal arrangement if you want to have an adult social life again.*"

To achieve the desired convergence, mediators are thus compelled to think about disputes in a "bipolar" if not "multi-polar" way that partisan lawyers do not have to. The job of the partisan lawyer, traditionally defined, is to achieve the lawful objectives of her client to the maximum extent possible. The partisan lawyer *is* invested in particular substantive outcomes and charged with the task of preferring her client's goals over the goals of others. If the research on cognitive bias is valid, then from the initial lawyer-client interview on, the partisan lawyer is likely to assume—consciously or not—a *confirmatory* strategy in seeking and evaluating evidence related to the client matter.

The most effective lawyers do of course bring a measure of dispassion, objectivity and even "oppositional thinking" to client representation tasks. Empirical evidence suggests that, across the spectrum of lawyers, there may be substantial variation in individual lawyers' ability to achieve such objectivity.<sup>138</sup> But the assumption built into the Model Rules of Professional Conduct<sup>139</sup> that all—or even most—partisan lawyers can in one moment represent their clients with zeal and in the next moment counsel their clients with objectivity, seems utopian, and at odds with social science evidence about confirmation bias.

Is the nonpartisan stance, by itself, enough to produce more dispassionate or better calibrated lawyers? Or, as seems likely to us, is repeated exposure to this kind of "alternative" thinking, as well as actual practice in associated "oppositional" behaviors, needed for a more flexible mindset to become habitual? If so, this research might suggest that a more directive style of mediation—characterized by interventions aimed at challenging participants' overconfident or unquestioning views of their non-resolution alternatives, and often criticized in mediation writings<sup>140</sup>—should be given as much instructional exposure as more facilitative models, and certainly not ruled out of bounds, as it is in certain schools and trainings.

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138. See *infra* notes 192-94.

139. Compare, MODEL RULES OF PROF'L CONDUCT, PREAMBLE AND SCOPE § 2 (AM BAR ASS'N 2013) with Model Rules of Prof'l Conduct, Rule 2.1 (2013).

140. See, e.g., Lela Porter Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA ST. U. L. REV. 937 (1996). Facilitative and evaluative approaches to the mediator's role are points along a continuum rather than dichotomous choices. Mediators from both schools see aiding the parties in reaching a resolution as their principal objective. Although most facilitators claim to focus on managing the proceedings rather than influencing outcomes, they, like evaluators, will often engage in

Up until now, we have focused on the link between “greater dispassion and objectivity” and improved accuracy in the prediction of judicial decisions. But in fact, skilled forecasting of case outcomes is only one measure of the objectivity demanded of lawyers. Are there other types of cognitive distortion that may be reduced by training or working as a mediator? For this, we turn to the research on perspective-taking, and its role in improving judgment.

## V. DE-BIASING THROUGH PERSPECTIVE-TAKING

One means of reducing egocentric biases, hostile attributions, and other motivated and unconscious perceptual distortions is the development of the capacity and propensity for perspective-taking—placing oneself in another’s shoes and actively imagining, if not adopting, that person’s point of view.

This definition of perspective-taking has been in a state of flux since becoming the subject of research inquiry. Although it has sometimes been used interchangeably with the term “empathy” in the literature,<sup>141</sup> the two concepts have more recently been seen as related yet distinct.<sup>142</sup> In contrast to the (empathic) ability to *feel* what another is experiencing emotionally, perspective-taking is seen as a cognitive process of attempting to understand (or “mentalize”<sup>143</sup>) how the world looks to another person. In short, one is a response of the heart and the other of the head.

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“agent of reality” behaviors designed to help disputants consider the possible consequences of continuing with their dispute rather than resolving it, as well as asking the parties questions about possible alternative outcomes or different ways that another person might look at the problem. Directive or evaluative mediators are apt to go further, making statements as well as asking questions, and suggesting possible alternative viewpoints themselves by providing feedback on the strength of a party’s case or the reasonableness of his or her stance, and trying actively to persuade reluctant parties to consider these views. Although more research on this point would be useful, active and reflective engagement in such behaviors would seem to yield deeper engagement of CTO-type thinking.

141. See, e.g., Mark H. Davis et al., *Emotional Reactions to Dramatic Film Stimuli: The Influence of Cognitive and Emotional Empathy*, 52 J. PERSONALITY & SOC. PSYCHOL. 126 (1987).

142. See Adam D. Galinsky et al., *Why It Pays to Get Inside The Head of Your Opponent*, 19 PSYCHOL. SCI. 378 (2008).

143. Andrew R. Todd, et al., *When Focusing on Differences Leads to Similar Perspectives*, 22 PSYCHOL. SCI. 134 (2010).

Research into the de-biasing effect of perspective-taking has been ongoing for more than three decades. Some studies have considered the impact of perspective-taking on social goals, such as encouraging altruism or improving intergroup relations.<sup>144</sup> Others have sought to measure its more general effects in improving people's accuracy in perceiving others and eliminating egocentric and other cognitive biases.<sup>145</sup> Overall, the research suggests that deliberate efforts at considering the perspective of others can enhance objectivity in thought.<sup>146</sup> Several of the major research strands can be summarized as follows:

First, the perceptually distorting and socially problematic cognitive bias<sup>147</sup> inherent in out-group stereotyping has been the focus of considerable experimentation. An example of this research is a 2000 study comparing the effects of attempts to suppress unwanted thoughts about members of stereotyped groups with efforts to imagine those persons' actual life experiences.<sup>148</sup> Subjects were all shown a photograph of an older man sitting on a chair near a newspaper stand and then told to write a short essay about a typical day in his life. Before commencing this writing assignment, one-third of the participants (called "suppressors") were instructed to "actively avoid" thinking about the photographed target in ways that are influenced by "stereotyped preconceptions." Another third ("perspective-takers") were told to write the essay "as if you were that person, looking at the

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144. See, e.g., C. Daniel Batson, et al, *Perspective Taking: Imagining How Another Feels Versus Imagining How You Would Feel*, 23 PERSONALITY & SOCIAL PSYCHOL. BULL. 751, 757 (1997); John F. Dovidio et al., *Perspective and Prejudice: Antecedents and Mediating Mechanisms*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1537 (2004).

145. See, e.g., Kenneth Savitsky et al., *The Unpacking Effect in Allocations of Responsibility for Group Tasks*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 447 (2004); Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, 37 J. PERSONALITY & SOC. PSYCHOL. 322, 330-32 (1979).

146. Adam D. Galinsky, Debra Gilin & William W. Maddox, *Using Both Your Head and Your Heart: The Role of Perspective Taking*, in RESOLVING SOCIAL CONFLICT IN THE PSYCHOLOGY OF SOCIAL CONFLICT AND AGGRESSION 103-18 (Joseph P. Forgas et al., eds. 2011).

147. Attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner are termed implicit biases. Such biases, which encompass both favorable and unfavorable assessments, are activated involuntarily, are outside an individual's awareness or intentional control, and undergird attitudes about people based on characteristics such as race, ethnicity, and age. For a recent discussion of implicit bias in the litigation context, see Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

148. Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 J. PERSONALITY & SOC. PSYCHOL. 708 (2000).

world through his eyes and walking through the world in his shoes.” The final third, the control group, received no special instructions.

Subjects in the first two groups—perspective-takers and suppressors—both produced less stereotypic content in their essays. The researchers cited this as evidence of those subjects’ enhanced conscious efforts at controlling their stereotypic thoughts compared to those in the control group. But perspective-takers showed stronger evidence of *unconscious* stereotype reduction than did suppressors: when shown a series of words that contained both stereotype-consistent (e.g., lonely, dependent, forgetful) and stereotype-irrelevant (e.g., scheming, envious, deceptive) words, the perspective-takers were significantly slower than the suppressors in responding to the stereotype-consistent words. (Speed is a function of the accessibility of stereotypic thoughts.<sup>149</sup>)

A second part of this study demonstrated how this form of de-biasing works. To a greater extent than the other groups, perspective-takers saw the “self in others”: they used the same traits to describe themselves and the target (both the individual and the group that he was thought to represent).<sup>150</sup> Perspective-taking also seemed to produce more positive evaluation of out-group members.<sup>151</sup>

Other studies using a similar perspective-taking methodology (photo or video viewing, plus essay writing) have produced de-biasing results that include a reduction in automatic negative evaluations based on race<sup>152</sup> and, relatedly, in subjects’ denial of discrimination as a causal factor in the employment, housing and other disadvantages encountered by ethnic and racial minorities.<sup>153</sup>

Indeed, perspective-taking seems to correct for attribution errors generally. Errors in explaining the successes and shortcomings of others can spawn deep conflict. As described in Part I, research has demonstrated that humans are prone to explaining their own achievements (or those of people they like) on the basis of their own positive traits, while blaming external or situational factors for their failures—and to reversing those attributions when assessing other

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149. *Id.* at 713.

150. *Id.* at 716.

151. *Id.* at 719.

152. See Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011).

153. See Andrew R. Todd, Galen V. Bodenhausen, & Adam D. Galinsky, *Perspective Taking Combats the Denial of Intergroup Discrimination*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 739 (2012).

people, especially those in out-groups.<sup>154</sup> But when observers are prompted to engage in perspective-taking, they have been shown to explain the successes of others more on the basis of their personal traits and dispositions, while also producing more charitable, situational explanations for negative behaviors or consequences—much as they do in evaluating their own successes and failures.<sup>155</sup>

Perspective-taking can also moderate self-centeredness in perceptions about what is just or fair in social, relational and competitive settings.<sup>156</sup> Illustrations of such egocentric distortions are numerous. In one classic study, for example, subjects who were asked to determine a fair allocation of pay for seven hours of identical work that they and another person performed felt that they deserved nearly \$5 more than their colleague.<sup>157</sup> Views propelled by such egocentric bias are not only inaccurate, but they can also trigger significant conflict if seen as overly aggressive or immoral by others who hold differing (and often similarly egocentric) perceptions.<sup>158</sup>

Research on individuals' assessments of their own contributions to a group task has revealed how egocentric bias operates and the effect of a deliberate effort at perspective-taking in overcoming it. In one illustrative study,<sup>159</sup> students ranging from elementary school to college were assigned to complete a group project with three classmates their age and then to estimate their own individual contribution to the task. When aggregated, the sum of the four collaborators' self-assessments of the proportion of the project they performed routinely exceeded 100%, by a large margin. In the process, subjects also

154. See *supra* note 60 and accompanying text, describing the actor-observer effect.

155. See, e.g., Theresa K. Vescio, Gretchen B. Sechrist, & Matthew P. Paolucci, *Perspective Taking and Prejudice Reduction: The Medial Role of Empathy Arousal and Situational Attributions*, 33 EUR. J. SOC. PSYCHOL. 455 (2003); Robert Gould & Harold Sigall, *The Effects of Empathy and Outcome on Attribution: An Examination of the Divergent-Perspectives Hypothesis*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 480 (1976).

156. It may also be effective in tempering unwarranted optimism, a bias rooted in an egocentric worldview. See, e.g., Neil D. Weinstein & Elizabeth Lachendro, *Egocentrism as a Source of Unrealistic Optimism*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 195 (1982).

157. David M. Messick & Keith P. Sentis, *Fairness, Preference and Fairness Biases*, in EQUITY THEORY: PSYCHOLOGICAL AND SOCIOLOGICAL PERSPECTIVES 61, 70 (David M. Messick & Linda S. Cook eds., 1983).

158. Nicholas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 SOC. JUST. RES. 171, 172 (2004). Those who think their distorted worldview is objectively correct have been dubbed "naïve realists."

159. Savitsky et al., *supra* note 145, at 449.

routinely underestimated the collective contributions of their collaborators. But when students were asked both to apportion shares of responsibility to themselves and also to “unpack” the collective contributions of their teammates by assigning them each individual shares of responsibility, the extent of egocentric over-claiming of personal credit, while not eliminated altogether, was reduced significantly.<sup>160</sup>

What accounts for this tendency to overestimate one’s own contributions to a group task? In competitive situations, self-serving motives may be at work: egocentric allocations of credit or responsibility to oneself can lead to psychic, social, and tangible rewards. But this tendency is not only produced by deliberate or strategic self-aggrandizement: the same results obtain in situations where subjects are asked to estimate their role in an activity that reflects poorly on them. In one study, for example, spouses overestimated not only the share of housework they performed but also the proportion of arguments they started.<sup>161</sup>

In view of such findings, researchers have settled on a cognitive rather than a motivational explanation for the bias that occurs when one compares oneself to others: information about one’s own contributions to a group experience is more readily accessible—both in quantity and ease of retrieval—than is information about others, especially, but not only, when they are part of a group. And this is used as a heuristic or shortcut, in which data that is more accessible or available is deemed more likely or frequent.<sup>162</sup>

By contrast, compelling subjects to consider others’ contributions to a group effort reduces this bias by inducing them to think about things they would otherwise have ignored. Put another way, one’s own immediately available experience is the default basis for judgment unless one is required to engage in a deliberate (and slower) process of considering or inferring the perspectives of others.

But perspective-taking can produce ironic consequences. While this de-biasing technique can yield more accurate thinking and objective assessment of what is fair, more cooperative *behavior* does not

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160. The sum dropped from (a logically-impossible) 154.6% to 106.8%. *Id.* at 450.

161. Ross and Sicoly, *supra* note 145, at 326.

162. *Id.* at 322. This is known as the *availability heuristic*. See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207 (1973); N. Schwartz et al., *Ease of Retrieval as Information: Another Look at the Availability Heuristic*, 61 *J. PERSONALITY & SOC. PSYCHOL.* 195 (1991).

necessarily follow. At least in settings viewed as competitive, the process of contemplating another person's perspective can also trigger predictions that the other person will behave in a self-interested or selfish manner. These cynical beliefs, in turn, can lead the perspective-taker to engage in aggressive conduct ("reactive egoism"<sup>163</sup>) as a form of self-defense against the other's (presumed or anticipated) aggression. This consequence of perspective-taking has been verified experimentally.

For example, in one study,<sup>164</sup> subjects, assigned to one of four commercial groups that fished a certain overharvested body of water, were asked to state the percentage of the stock they thought was fair for them to harvest and the portion that they would actually take. Half of the groups, however, were first asked to consider the other groups and what those groups would believe was their fair share, while the remaining subjects received no such instructions. The perspective-taking groups showed a significantly less egocentric assessment of what was fair for them to take. But those same groups reported an actual intention to fish more of the shared resource than subjects who had not engaged in perspective-taking. In competitive settings, actual behavior seems to be determined less by beliefs about what is objectively fair than by predictions about how others may act.

In a similar twist, while, as already noted, perspective-takers are likely to engage in less stereotyped thinking, this process may also cause them to behave more like the stereotype of out-group targets they are contemplating. According to one study, this is because perspective-taking also yields an "other-self" overlap, in which the subject begins to see aspects of the target in him- or herself and to mimic the target's stereotypic mannerisms. Thus, for example, those who actively took the perspective of a (stereotypically smart) professor achieved higher scores on standardized tests than control group members, while those who contemplated cheerleaders did worse. Similarly, those who took the perspective of an elderly person tended to cooperate on a prisoner's dilemma game, while their counterparts who had thought about life as an African-American male were more likely to play the game aggressively.<sup>165</sup>

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163. Nicholas Epley, Eugene M. Caruso & Max H. Bazerman, *When Perspective Taking Increases Taking: Reactive Egoism in Social Interaction*, 91 J. PERSONALITY & SOC. PSYCHOL. 872 (2006).

164. *Id.* at 875.

165. Adam D. Galinsky, Cynthia S. Wang & Gillian Ku, *Perspective-Takers Behave More Stereotypically*, 95 J. PERSONALITY & SOC. PSYCHOL. 404 (2008).



### A. *Perspective-Taking and Lawyering: Negotiation Studies*

Few, if any, studies of perspective-taking have involved lawyers or law students as subjects. But perspective-taking—both as an ability or disposition and as a strategy—has been shown to yield significant de-biasing effects when harnessed in negotiation, a pervasive area of lawyer activity across all practice specialties.

The two cognitive distortions arguably most prevalent in negotiations—the biasing influence of (usually extreme) initial offers or “anchors,” and the “fixed pie” bias, which leads bargainers to hold erroneous beliefs about the extent to which their own priorities are diametrically opposed to those of people with whom they negotiate—have been well documented in the empirical literature.<sup>166</sup> So, too, has the potential curative effect of perspective-taking on both of these biases.

### B. *Perspective-Taking and the Anchoring Bias*

Negotiations, by definition, take place against the backdrop of uncertainty and, almost always, imperfect information for the participants. By making initial offers that are deliberately pegged at some distance from their reservation price, negotiators can draw (or “anchor”) the other side’s subconscious focus toward that stance and thus gain an advantage in the bargaining. Anchoring bias can cause affected negotiators to reach sub-optimal agreements, due to unnecessary concessions they may make. In extreme cases, this bias can lead to an avoidable impasse if it leads the bargainer to perceive, incorrectly, that there is no hope of achieving an acceptable agreement.

Several studies have demonstrated the role of perspective-taking in neutralizing the impact of anchoring bias. In one representative set of experiments,<sup>167</sup> 76 MBA students negotiated the potential sale

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166. See, e.g., Daniel Kahneman & Amos Tversky, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (anchoring effect); Gregory B. Northcraft & Margaret Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84 (1987) (same); Max Bazerman & Margaret A. Neale, *Heuristics in Negotiation: Limitations to Effective Dispute Resolution*, in NEGOTIATING IN ORGANIZATIONS 51 (Max H. Bazerman & Roy J. Lewicki eds., 1983) (fixed pie bias); Leigh Thompson & Dennis Hrebec, *Lose-Lose Agreements in Interdependent Decision Making*, 120 PSYCHOL. BULL. 396 (1996) (same).

167. Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCHOL. 657, 660 (2001).

of a pharmaceutical plant in buyer-seller pairings. All students, regardless of role, received the same background facts and data on recent comparable transactions and the uncertainty of the real estate market. Each received a confidential reservation price that was pegged to information in the shared background memo. Half of the sellers and half of the buyers became the offerors, being told to make the first offer. Half of the students in each offeree role were given explicit perspective-taking instructions (consider the other person's alternatives, i.e., BATNA<sup>168</sup>) prior to negotiating; the other half (the control group) received no instructions.

As measured by final price, negotiators (both buyers and sellers) who made the first offer in the control condition reached, on average, substantially better outcomes for themselves, capturing almost two-thirds of the available bargaining range. In the pairings in which offerees received perspective-taking instructions, however, the advantage of making the first offer disappeared: final prices were similar for all such offerees (buyers and sellers). The same results were obtained in a second study in which subjects were told to think about and focus on the opponent's reservation price before negotiating.<sup>169</sup> In short, the tendency or ability to think about information that is inconsistent with the implications of the opponent's first offer is a major asset for negotiators.

### C. *Perspective-Taking and the "Fixed Pie" Bias*

Experimental research has also demonstrated the impact that perspective-taking can have in overcoming bargaining inefficiencies posed by a zero-sum or "fixed pie" view of a negotiation problem. One such study involved MBA student subjects negotiating the potential sale of a gas station by a retiring station owner.<sup>170</sup> Buyers were instructed that if the sale was consummated, they would need to hire managers to run the station. Sellers were instructed (unbeknownst to buyers) that they needed to finance the cost of a planned vacation, and they would need to continue working after returning from their travels. Although no deal was possible based solely on the buyers'

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168. One's best alternative to a negotiated agreement or "BATNA" represents the negotiator's bargaining boundary— i.e., the point (in cases of "sellers") below or (in cases of "buyers") above which he should not settle. The term was first coined in ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 101-11 (1983).

169. Galinsky & Mussweiler, *supra* note 167, at 662.

170. Galinsky et al., *supra* note 142, at 379.

and sellers' reservation prices, the instructions allowed for an agreement if it included a future contract to keep the seller on as station manager after completion of the sale.

Two parts of the study—one based on perspective-taking dispositions as measured on personality tests, and the other based on the effects on buyer-subjects of a perspective-taking instruction (“[t]ry to understand what they are *thinking*”)—showed that perspective-takers were better able to find hidden agreements and to create solutions that met both sides' needs than both a control group who received no instructions and subjects who had been told to empathize (“try to understand what [the service-station owner *is*] *feeling*”).<sup>171</sup>

Although this study does not use the term “bias” or “fixed pie,” it underscores the enhanced likelihood that those who are inclined or instructed to understand the interests and purposes of a negotiation opponent will achieve maximum “joint gains” and “creative solutions.”<sup>172</sup>

A similar result was reached in an earlier study based on test-measured perspective-taking ability. In a simulated MBA student negotiation of a multi-issue (wages, health plan, vacation pay, etc.) employment contract where a non-settlement would be submitted to an arbitrator who would choose one of the parties' final offers, higher ability perspective-takers achieved higher value settlements and arbitrator-chosen final awards than those with low perspective-taking ability.<sup>173</sup> Again, while the term “bias” or “fixed pie” was not used in the study, it echoes the now-standard negotiation textbook perspective-taking exhortation to consider the opponent's interests.<sup>174</sup>

Without overstating the lessons of such studies, their results also point to a potentially far-reaching benefit for lawyers with strong perspective-taking skills: the ability to craft presentations that will appeal to the vantage point of a judicial or other audience that must be persuaded. And, importantly for our purposes, the fact that in several of these studies, simple instructions seemed to improve negotiators' natural perspective-taking performance suggests that this skill can be taught.

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171. *Id.* at 381, 383. Perspective-takers also obtained more favorable results on the distributive (price) terms reached than those instructed to empathize; indeed, empathizing was detrimental in that regard.

172. *Id.*

173. Margaret A. Neale & Max H. Bazerman, *The Role of Perspective-Taking Ability in Negotiating Under Different Forms of Arbitration*, 36 *IND. & LAB. REL. REV.* 378, 386 (1983).

174. *See, e.g.*, FISHER & URY, *supra* note 168, at 40-57, 52 (advising negotiators to “[a]cknowledge [the other side's] interests as part of the problem”).

#### D. Mediation Questions and Applications

Perspective-taking—the ability to see things from another person's point of view—is arguably the mental activity most inherent in, and necessary to, the work of mediators across all role orientations. It is standard fare in leading mediation skills texts.<sup>175</sup> While it may be *desirable* for one in a partisan stance to develop this “difference mindset”<sup>176</sup> in order, for example, to understand the motivations and interests of an adversary or a judge, a person in a neutral role seeking to secure an acceptable resolution between competing parties *must* attempt to imagine and ideally understand how each participant in a dispute views and experiences it.

Why is this so? To produce the change needed to resolve a conflict or improve parties' understanding of each other, information must be exposed that counters the parties' existing viewpoints and biases. Unlike partisan representation, no successful outcome is possible in a settlement- (or even transformation-)<sup>177</sup> oriented mediation unless the mediator forms accurate impressions of the participants, eliciting highly individuated (and often concealed) information about them and their perspectives. When a desired task outcome depends on such accuracy, research indicates that people will think more deeply about available information, paying increased attention to information that is inconsistent with their initial impressions.<sup>178</sup>

Mediators continually engage in perspective-taking activities of one kind or another. They must attempt to listen deeply to each side's narrative, with the goal of demonstrating (by, e.g., reflecting back) understanding. They must take into account what underlies these competing narratives in order to diagnose the severity of the conflict and the barriers to resolution that seem to exist. Where needed, they may, without distorting meaning, reframe toxic statements into less

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175. See, e.g., FRENKEL & STARK, *supra* note 84, at 238-39; BUSH & FOLGER, *supra* note 82, at 99-101.

176. Todd et al., *supra* note 143, at 135.

177. Transformative mediators see the main objectives of the process as increasing the participants' mutual level of empathy for or understanding of the other and empowering or educating them to be able to navigate this and other conflicts more successfully. Settling or otherwise resolving the conflict is a potential byproduct of that mission, but one that such mediators will not prioritize unless the participants decide to pursue it. BUSH & FOLGER, *supra* note 82, at 81-112 and *passim*.

178. See Steven L. Neuberg & Susan T. Fiske, *Motivational Influences on Impression Formation: Outcome Dependency, Accuracy-Driven Attention and Individuating Processes*, 53 J. PERSONALITY & SOC. PSYCHOL. 431, 441-42 (1987).

destructive forms, or provide alternative interpretations of statements or motives to enable parties to see their opponents in a different, more intelligible light.

During the negotiation phase of a mediation, often in private caucuses, mediators may speculate and inquire about each side's unstated interests, needs and motivations in order to ease negotiations and seek superior solution ideas; orchestrate attempts to engage the parties in perspective-taking themselves through role reversal interventions; and tailor their own direct persuasion efforts to address each side's individual view of the conflict. The mediation setting thus appears to foster good habits in developing a perspective-taking mindset without presenting the competitive stakes that, according to the research, can spawn negative attributions and aggressive behaviors.<sup>179</sup>

However, it is not clear whether the mediation setting always provides the right conditions for developing objectivity and perceptual accuracy. For example, successful perspective-taking seems to require a minimum duration of observation of the person in question.<sup>180</sup> Might mediations that are too cursory or rushed fail to provide the requisite opportunity to develop perspective-taking capacity? What about stressful mediations, with unlikable participants? Might mediators' emotional engagement in the settlement process color their perceptions of difficult participants in ways that could compromise their ability to read them accurately or treat them fairly? Some research suggests that tough settings can undermine or even negate dispassion.<sup>181</sup>

In addition, are there potentially negative consequences for attorneys who develop their perspective-taking capacities? Put differently, when representing clients, might there be a danger in developing an *overly* mediative mindset? It would certainly seem so.

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179. Epley et al., *supra* note 163, at 886.

180. See William M. Bernstein & Mark H. Davis, *Perspective-Taking, Self-Consciousness, and Accuracy in Person Perception*, 3 BASIC & APPLIED PSYCHOL. 1 (1982).

181. See, e.g., Markus Kemmelmeier & David G. Winter, *Putting Threat into Perspective: Experimental Studies on Perceptual Distortion in International Conflict*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 795, 800, 804 (2000) (American subjects placed in the role of unaligned U.N. mediator seeking to broker peace between U.S. and Saddam Hussein were no more accurate or objective about the hostility of the parties' rhetoric than subjects placed in a partisan (U.S. military officer in the Gulf) role; only historian-subjects looking back at the conflict 500 years into the future overcame their partisan biases enough to be accurate); Cynthia McPherson Frantz & Ronnie Janoff-Bulman, *Considering Both Sides: The Limits of Perspective Taking*, 22 BASIC & APPLIED SOC. PSYCHOL. 31, 36-37 (2000) (variations in liking of others affect evenhandedness of perspective-taking).

In some competitive situations, entertaining negative attributions about an aggressive or exploitative opponent may be prudent and adaptive.<sup>182</sup> Misplaced trust can be as problematic as distorted mistrust. And as a curricular matter, despite its de-biasing potential, it is possible that certain kinds of overly simplistic mediation training—training that, for example, takes a Pollyanna-ish view of conflict or assumes that all disputes have problem-solving potential—may actually prove harmful in developing sound lawyering judgment.

Nonetheless, when applied to the work of lawyers in a representative capacity, the development or strengthening of a perspective-taking ability would seem to be a substantial asset, in ways that are both more and less obvious. In client interviewing and counseling tasks, it can enhance a lawyer's ability to perceive clients and others more accurately, to advise clients more objectively, and, when necessary, to attempt to persuade them more effectively. Perspective-taking can improve interpersonal dealings with others in the system, enhancing, for example, social cohesion in dealings with lawyers, whether they are allies or opponents.<sup>183</sup>

In persuasion and negotiation tasks, perspective-taking is likely to improve predictive accuracy and the quality of outcomes achieved. Those who are adept at perspective-taking can better understand the viewpoints of judges, arbitrators, and jurors and can better create value by identifying the interests of others with whom they negotiate.<sup>184</sup> Perspective-taking may also enhance a lawyer's diligence and commitment, especially when representing difficult individuals or pursuing tough causes that require a degree of selflessness. The appreciation of the perspectives of others can increase the desire to help them.<sup>185</sup>

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182. See Roderick M. Kramer, *Stalking the Sinister: Paranoia Inside the Laboratory and Out*, in 7 RESEARCH ON NEGOTIATION IN ORGANIZATIONS 59, 85 (Robert J. Bies, Roy J. Lewicki & Blair H. Sheppard eds., 1999).

183. See Gillian Ku, Cynthia S. Wang & Adam D. Galinsky, *Perception Through a Perspective-taking Lens: Differential Effects on Judgment and Behavior*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 792, 793, 797 (2010) (perspective taking can produce unconscious mimicry).

184. Galinsky et al., *supra* note 142, at 388; Neale & Bazerman, *supra* note 173.

185. Although there is a debate as to whether the result is motivated by truly altruistic (versus selfish) motives, the empirical literature is clear that perspective-taking yields empathic concern, and that this reaction, in the case of persons in need, produces a desire to help. See, e.g., C. Daniel Batson et al., *Perspective Taking: Imagining How Another Feels Versus Imagining How You Would Feel*, 23 PERSONALITY AND SOC. PSYCH. BULL. 751, 757 (1997); Sara D. Hodges et al., "Better Living Through Perspective Taking," in POSITIVE PSYCHOL. AS SOCIAL CHANGE 193-218 (R. Biswas-Diener ed., 2011) (citing sources).

## VI. GENERAL DISCUSSION

A. *Limitations of Current Research and Possible Topics for Future Study*

While the hypothesis that we have explored in this article is an intriguing one, there are many gaps in the research and additional questions to be answered before one can have confidence in its validity. First (to state the obvious), the only *direct* evidence that mediation-trained lawyers are less prone than lawyers in general to the influence of cognitive or motivational biases comes from a single research study from California (albeit one with a large sample and a statistically significant finding<sup>186</sup>), which deals with only one kind of (narrow, though important) applied task—predicting litigation case results when advising clients about settlement.

The authors of the California study did not attempt to identify, much less disaggregate, the specific cognitive processes that may have enabled lawyer-mediators to perform better<sup>187</sup> than other litigators in predicting case outcomes, or to determine whether better performance in this task might generalize to other judgments that lawyers are regularly called upon to make. They did not try to measure the relative effects of mediation training versus mediation experience on the lawyer-mediators' superior performance, nor attempt to discover why their clients selected litigators with mediation training in the first place, a possibly confounding factor.<sup>188</sup>

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186. In his later book, the lead author of the California study characterized this finding as "noteworthy, but essentially incremental." *BEYOND RIGHT AND WRONG*, *supra* note 2, at 52.

187. It is possible that the Kiser et al. study does not provide evidence of lawyer-mediators having *better* judgment than their non-mediator counterparts, but rather *different* kinds of judgment. The study is limited to studying decisions by litigants to demand more in settlement as plaintiffs, or offer less as defendants, than what was ultimately awarded at trial or arbitration. The fact that clients of lawyer-mediators fared better here may be due to their having received advice (or having utilized bargaining approaches) colored by a pro-resolution or reconciliation bias under which their lawyers were operating. In assessing good judgment, it is important to note that the presence of such a potential bias in lawyers could lead their clients to make a different kind of decision error—one of settling too cheaply (in the case of plaintiffs) or too generously (in the case of defendants.) The Kiser study did not purport to measure this, and in any event it would be difficult to do so. We thank Jon Bauer for this insight.

188. See Kiser et al., *supra* note 2. It is also possible that the lower rates of decision error by those represented by lawyer-mediators in the Kiser et al. study compared to other groups of lawyers may reflect those *clients'* greater decision making skills, rather than (or in addition to) their lawyers' judgment. The lead author of the study himself noted the possibility that clients with better decision making skills

In hypothesizing what might explain this result, we have reasoned by analogy from social science experiments demonstrating the de-biasing effects of two activities in which effective mediators characteristically engage. But even as to these two, our database is limited. As promising as they are, none of the perspective-taking studies we surveyed involved lawyers (or law students) directly, and all used simulated, not real-world events that raise the usual external validity problems associated with social science research.<sup>189</sup> In addition, to the extent that this body of research has examined “lawyer-like” activities, the exclusive focus has been on negotiation and studies on assessments of fairness and blame. It would be useful to expand the research to examine the effects of perspective-taking, if any, on lawyers’ judgment in other contexts, for example, client counseling, an activity in which virtually all practicing attorneys engage.

The results of the “consider-the-opposite” research are mixed, with strong de-biasing effects demonstrated in many different domains that include simulated lawyering activities, but with no statistically significant results in the one major CTO study involving lawyers’ outcome predictions in actual cases. Taken together, these studies may demonstrate that a) as social scientists have suggested, de-biasing in the real world, with real motivations and real stakes, is more difficult to achieve than in the simulated world of the laboratory; and b) a single “consider-the-opposite” instruction (“*list reasons you may not achieve your objective*”) in a social science experiment is insufficient to mitigate partisan biases in the hurly-burly of the real world. On the other hand, the results of the large-scale California study of trial lawyers with which we began may suggest that the effects of mediation training and experience do, in fact, reduce real-world biases.<sup>190</sup>

Throughout this article, we have assumed that the de-biasing effect observed in the California study results from the training that mediators undergo to perform their work and the habits of mind they form from repeatedly doing it. But it is possible that there could be a selection bias at work that complicates, if not negates, this hypothesis. Might the superior case outcome predictions by lawyer-mediators

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might be more likely to choose litigators with mediation training and experience in the first place. BEYOND RIGHT AND WRONG, *supra* note 2, at 52.

189. *External validity* refers to the extent to which research findings (from studies classically involving college student-volunteer or other non-random subjects) can be generalized beyond the particular study at hand to different people and settings. See, e.g., ROBERT M. LAWLESS, JENNIFER ROBBENOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 38 (2009).

190. See Kiser et al., *supra* notes 2-7.



in the California study be attributable to their pre-existing skills or proclivities, in addition to—or instead of—their training and experience as neutrals? Although his findings are not directly relevant to this article, Professor Lisle Baker has found that mediators take in and evaluate information quite differently from both the public-at-large and lawyers in general, as measured on the Myers-Briggs Type Indicator, a widely-used psychological scale.<sup>191</sup> Some of the research we canvassed found that people who were most responsive and accurate when instructed to use their perspective-taking capacities were those who were already predisposed to doing so.<sup>192</sup> Social scientists have demonstrated that individuals vary substantially in the flexibility of their thinking, as measured on such psychometric assessments as the “Need for Cognitive Closure”<sup>193</sup> and “Need for Structure”<sup>194</sup> scales. Are lawyers drawn to mediation naturally better perspective-takers, or less doctrinaire in their thinking, than lawyers in the main? Who seeks to become a mediator (and why) would seem to be fruitful topics for additional research.

A final possible difficulty in drawing meaningful conclusions about mediation from these studies is that they measure de-biasing effects on their research *subjects*, who have been instructed by social science investigators to consider and articulate alternative scenarios, hypotheses or viewpoints. Reasoning by analogy to the setting in which they work, at first blush mediators would seem to stand in the position of investigators rather than subjects, since their primary role is to help reduce the biases of others (the disputants) through their interventions.<sup>195</sup> While it seems likely to us that successful execution

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191. R. Lisle Baker, *Using Insights about Perception and Judgment from the Myers-Briggs Type Indicator Instrument as an Aid to Mediation*, 9 HARV. NEGOT. L. REV. 115, 125-26 (2004) (survey results finding, *inter alia*, that whereas only 27% of U.S. adults and 56% of lawyers are “Intuitive” types, preferring to take in new information by seeing patterns and implications, as opposed to absorbing new information concretely, tangibly and sequentially (“Sensing” types), a full 80% of practicing New England mediators prefer “Intuition” as their mode of perception).

192. See Davis et al, *supra* note 141, at 131; Bernstein & Davis, *supra* note 180.

193. See generally ARIE KRUGLANSKI, *THE PSYCHOLOGY OF CLOSED-MINDEDNESS* (2004).

194. See, e.g., Edward R. Hirt et al, *Activating a Mental Simulation Mind-set Through Generation of Alternative: Implications for Debiasing in Related and Unrelated Domains*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 374, 376, 381-82 (2004) (defining “Need for Structure” (NFS) as a “preference to form and maintain simple knowledge structures” and demonstrating that subjects who are low in NFS are more amenable to CTO prompts).

195. See, e.g., Robert A. Baruch Bush, *What Do We Need a Mediator For?: Mediation’s “Value-Added for Negotiators*, 12 OHIO STATE J. DISP. RESOL. 1, 9-15 (1996) (discussing how the presence of a mediator can overcome strategic and cognitive barriers that might lead to impasse in unassisted negotiations).

of such skills leads (and perhaps even requires) mediators to develop their own perspective-taking and oppositional thinking abilities, more research would be useful on this point.

B. *Will Mediation Training Transfer to Representational Lawyering?*

Finally, assuming that training and practice in mediation helps neutrals develop their *general* perspective-taking and oppositional thinking skills, a critical further question remains: is there reason to think that such learning will “transfer” to representational tasks when they undertake to advise clients and to advocate on their behalf?

The question of whether, and under what conditions, learning in one context will carry over into another has been the subject of considerable research and opining by education theorists.<sup>196</sup> This work has ranged from pre-school-age children to workplace trainees, with overall results that suggest the difficulty of successful transfer.<sup>197</sup> While a comprehensive treatment of the literature on teaching for transfer and its varying viewpoints is beyond the scope of this article, two main factors that appear to influence the likelihood of students applying thinking derived from one learning domain to another are: (a) how closely the teaching and transfer domains resemble or appear connected to each other, and (b) how well the original course of instruction is designed to promote the goal of transfer of learning.<sup>198</sup> One major school of thought thus focuses on the “distance” of transfer: when the two domains are “near” to each other in terms of their

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196. See, e.g., David Billing, *Teaching for Transfer of Core/Key Skills in Higher Education: Cognitive Skills*, 53 HIGHER EDUC. 483 (2007); D.N. Perkins & Gavriel Salomon, *Teaching for Transfer*, 46 EDUC. LEADERSHIP 22 (1988).

197. See Patricia A. Alexander & P. Karen Murphy, *Nurturing the Seeds of Transfer: A Domain-Specific Perspective*, 31 INT'L J. EDUC. RES. 561, 563 (1999).

198. See D.N. Perkins & Gavriel Salomon, *Transfer and Teaching Thinking*, in THINKING: THE SECOND INTERNATIONAL CONFERENCE 285 (D.N. Perkins et al, eds., 1987); Billing, *supra* note 196. While some education specialists cite differences in individual motivation and other student traits in determining the likelihood of transfer, we exclude these from our discussion as being beyond the control of most law school course or curriculum planners. See, e.g., Robert E. Haskell, TRANSFER OF LEARNING: COGNITION, INSTRUCTION AND REASONING 125-126 (2001) (differentiating between students who seek to “master” a subject for the sake of deep learning and those who merely aim to “perform” well in order to succeed in a course). *But see* Richard S. Prawat, *Promoting Access to Knowledge, Strategy, and Disposition in Students: A Research Synthesis*, 59 REV. EDUC. RES. 1, 3-4 (1989) (asserting that such learning dispositions can be cultivated in students by the instructor).

concrete similarities,<sup>199</sup> students will associate one with the other easily,<sup>200</sup> enhancing both the odds and the degree of transferred learning. A frequently cited example is that of applying instruction in driving a car to later trying to drive a truck. By contrast, where the surface elements of performance or knowledge in the earlier and later domains share little obvious resemblance, transfer is deemed “far” and, as a result, less likely.

Related to the perceived overlap between domains is the cognitive process by which transfer appears to take place. In situations where students can intuitively perform in a later domain by virtue of prior practice and experience in an earlier one, the transfer is “low road.” (Examples are car-to-truck driving or playing one video game after learning another with similar strategy or design features.) But where students must engage in deliberate, mindful effort to apply principles from the training setting in order to see the connection with, and master another domain, the transfer is “high road,” i.e., more difficult and less likely. The “low road-high road” contrast has been described as one between earlier learning “popping up” as opposed to having to be “dug out.”<sup>201</sup>

A review of the teaching or training conditions thought to be most conducive to students achieving transfer reveals a number of widely-shared principles. One key principle is making the goal of transfer explicit. Instructors who systematically devote classroom time to providing illustrative or analogous examples of applications of course knowledge beyond the course’s boundaries can greatly enhance the odds of students making connections in those other settings.<sup>202</sup> Where the instruction also includes general principles underlying the specific knowledge or skills taught (ideally by having students arrive at such generalizations themselves<sup>203</sup>), the chances of “high road” transfer increase.<sup>204</sup> Another instructional feature widely

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199. Perkins & Salomon, *supra* note 198, at 287; Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 69 (2010).

200. Kowalski, *supra* note 199, at 69.

201. Billing, *supra* note 196, at 500-01; David N. Perkins, Steven Schwartz, & Rebecca Simmons, *A View from Programming*, in TOWARD A UNIFIED THEORY OF PROBLEM SOLVING: VIEWS FROM THE CONTENT DOMAINS 49 (Mike Smith ed., 1991).

202. This teaching-for transfer mode has been referred to as “hugging” the transfer context target. Perkins & Salomon, *supra* note 196, at 28-29.

203. Billing, *supra* note 196, at 511.

204. Such instruction has been termed “bridging” the training and the transfer domains. Perkins & Salomon, *supra* note 196, at 28-29. Indeed, in the view of some theorists, direct teaching of “mindful decontextualizing” principles and instruction in metacognitive thinking, i.e. developing students’ awareness of their thinking patterns

seen as promoting generalized learning is the opportunity for critical reflection on one's thinking and strategizing, through faculty-overseen journaling or other means.<sup>205</sup> Such pedagogy instills learning at a metacognitive level—i.e., students learn when and why to apply certain skills and develop the ability to monitor their own judgments.

So where does mediation training fit in this analysis? Are there factors unique to this subject matter that would suggest a likelihood of its being retained in law students' long-term memories and recalled at important moments in their work as lawyers?

With respect to instructional conditions conducive to transfer: mediation clinical courses vary greatly in duration, depth, practice opportunities, supervision, opportunity to reflect and other variables, rendering any overall or blanket assessment of this factor impossible. But virtually all mediation courses start with a potential advantage not enjoyed by at least some survey-style experiential offerings: rather than attempting to "cover" a very wide range of skills,<sup>206</sup> mediation courses tend to expose students to multiple, practice-based iterations of a single set of skills, all within a discrete context.<sup>207</sup> Depth that stems from multiple but varied examples in a specific training domain, according to most who study transfer, provides the strongest

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and strategies and knowledge of when and where to use them, are at the heart of creating conditions favorable to later knowledge transfer.

205. Billing, *supra* note 196, at 509.

206. The planned classroom components of some litigation clinics, for example, attempt to cover client interviewing, advising, case planning, witness examination, pleading drafting, discovery, negotiation and even jury selection—often in a single semester. Similarly, one-semester transactional clinics might attempt to teach interviewing, planning, contract drafting, advising, and negotiation. Of course, clinical courses need not be constructed this way, and many are not. Some clinicians prefer to focus their programs' casework and seminar components on multiple iterations of a narrower range of lawyering tasks in order to help students achieve greater competency in those settings, as well as to promote transfer to others. As for the desirability of such depth in promoting skills transfer, *see, e.g.*, Alexander & Murphy, *supra* note 197, at 568-569; David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191 (2000).

207. While there may be variations stemming from differing definitions of role and dispute contexts, there exists a fair degree of consensus as to the process structure, skills and sub-skills needed to function competently as a mediator. An examination of the contents of texts designed for mediation courses and trainings will reveal this. On the particular topics that are the focus of this article, compare FRENKEL & STARK, *supra* note 84, at 193-98, 246-53, 238-39 (questioning for doubt, persuasion using role-reversal and evaluation); JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT 95-97, 100 (1987) (same); DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 207-08, 223-34 (1996) (same).

pedagogical foundation for the importation of that learning to later, different contexts.<sup>208</sup>

As for the “distance” between mediating and representing clients, the two professional settings and roles would, on the surface, seem rather proximate—especially as to tasks likely to trigger biases. Both roles include core skills that, but for the practitioners’ differing duties, appear very similar, if not identical; the ability to seek and interpret information in ways that will yield a complete picture of the problem; the ability to unpack the interests and emotions that may be driving the participants; the ability to assess the overall strengths and weaknesses of competing presentations in order to predict and advise; and the ability to understand competing perspectives in order to negotiate or advocate well.<sup>209</sup>

Related to this, and perhaps more significant for these purposes, is the *nature* of mediator thinking and behavior: in contrast to courses that teach a set of domain-specific, “local knowledge”<sup>210</sup> skills needed to succeed in a particular setting (for example, how to draft a pleading or contract, take a deposition or conduct an effective cross-examination),<sup>211</sup> mediation instruction imparts a core mindset and approach that constitutes more “general” strategic knowledge.<sup>212</sup> This kind of knowledge, according to one major viewpoint in the education literature, is more likely to be transferred (albeit through mindful effort in application) across domains.<sup>213</sup> The two mediation strategies discussed in this article—considering the opposite side of a claim or argument, and exploring and reframing problems in light of competing perspectives and emotional underpinnings—are classic examples of this kind of general knowledge.<sup>214</sup>

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208. Alexander & Murphy, *supra* note 197, at 572-73. When such thoroughness in practice is spread out over time, the odds of long-term retention and transfer are further increased. Ruth Clark & Merlin Wittrock, *Psychological Principles in Training*, in TRAINING AND RETRAINING 60, 79 (Sigmund Tobias & J.D. Fletcher eds., 2000); Binder & Bergman, *supra* note 206, at 201.

209. There are questions as to how to measure or define such “distance.” See Anthony Marini & Randy Genereux, *The Challenge of Teaching for Transfer*, in TEACHING FOR TRANSFER: FOSTERING GENERALIZATION IN LEARNING, 1, 4 (Anne McKeough, Judy Lupart & Anthony Marini eds., 1995); Perkins & Salomon, *supra* note 198, at 288.

210. See Perkins & Salomon, *supra* note 196, at 31.

211. We do not mean to diminish the importance of training in such skills, especially given the employment market challenges facing newly minted lawyers.

212. Perkins & Salomon, *supra* note 196, at 31.

213. *Id.*

214. *Id.*

Some might argue that the ethical obligation (and other incentives) to engage in client-favoring behavior when engaged in a representational capacity negates the “nearness” or ease and resultant likelihood of transferring the lessons of mediation to that context. But are these really different (never mind opposing) skill sets? As suggested earlier, the mediative mindset is not only compatible with effective adversarial representation but, arguably, crucial to a lawyer’s ability to serve clients unencumbered by biased, partisan judgment. The key to effective transfer would seem to lie in a lawyer’s being able to *think* like a mediator but also knowing when (and when not) to *act* in a mediative way in pursuing a client’s goals. Although this required differentiation<sup>215</sup> may render the “road” to applying mediation learning a bit steeper, it need not block it.

Finally, as promising as the mediation-to-representation transfer prospects may seem, these studies raise a number of important questions: How best to design a mediation clinic to promote transfer of learning? How lasting can the lessons of even the best designed mediation clinic be? Is a single course sufficient or is repeated practice required? (The same questions, of course, could be asked about any clinical experience.)

### C. *Curricular Implications for Law Schools and Clinical Programming*

The central thesis of this article is that placing law students in the role of the neutral can improve their professional judgment by reducing cognitive and motivational biases to which lawyers are prone. If this thesis is valid, what are its implications for law school clinical programming and for legal education in general? For schools deciding what kinds of clinical opportunities to make available to their students, one takeaway is that mediation instruction—in which students are nonpartisans aiming to resolve conflict—deserves greater curricular priority than it has historically been given.

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215. This, of course, assumes that the mediation-trained lawyer understands the standard conception of the lawyer’s role and is able to summon “warm zeal” on a client’s behalf when it is appropriate. The importance of making that distinction in action underscores the need for law students to develop comfort in undertaking an advocacy stance and for mediation teachers to clarify the limits of the applicability of the mediative mindset in order to guard against the risk of “negative transfer.” Negative transfer takes place when learning in one context harms performance in another. D.N. Perkins & G. Salomon, *Transfer of Learning*, in 11 INTERNATIONAL HANDBOOK OF EDUCATIONAL RESEARCH 6452, 6453 (T. Husen & T.N. Postelwhite eds., 2d. ed. 1994).

Mediation clinics today constitute a very small percentage of in-house clinical offerings at U.S. law schools.<sup>216</sup> Even with a proliferation of various kinds of transactional, legislative and other policy-oriented clinics in recent years, the great majority of in-house clinics still focus on advocacy, in general civil or criminal litigation or in programs specializing in fields such as immigration or asylum law, children's rights, family law, domestic violence, low income tax representation, civil rights and the like.<sup>217</sup> Despite enormous growth in the use of mediation in the legal system over the past twenty or thirty years, law school instruction in this area is still very much "training against the dominant paradigm."<sup>218</sup>

There are many reasons—historical, economic, practical and political—for clinical education's continued focus on litigation and public interest lawyering, a detailed exploration of which is beyond the scope of this article. Suffice it to say that the early impetus for the development of clinical legal education programs was strongly influenced by the Supreme Court's landmark decision in *Gideon v. Wainwright*,<sup>219</sup> the Great Society programs of the 1960's and early '70's and the desire to enlist the help of law schools in serving the unmet civil and criminal legal needs of the poor.<sup>220</sup> Outside pressures to improve law school instruction in practical lawyering skills, especially trial advocacy skills, also played a role.<sup>221</sup> Supported by early seed

216. Exact statistics are hard to come by, but the best and most available source is The Center for the Study of Applied Legal Education (CSALE) 2013-14 SURVEY OF APPLIED LEGAL EDUCATION 7, [HTTP://WWW.CSALE.ORG/FILES/REPORT\\_ON\\_2013-14\\_CSALÉ\\_SURVEY.PDF](http://www.csale.org/files/REPORT_ON_2013-14_CSALÉ_SURVEY.PDF). The CSALE study indicates that of 178 responding law schools reporting a total of 1322 distinct real case clinics, only 4.9% of all offerings are "Mediation/ADR" clinics, a decline from the last CSALE study, conducted in 2011. At least a few of these, we know from our own experience, are not programs in which students assume the role of neutral, but rather ones in which students represent clients in mediation or arbitration proceedings.

217. *Id.* To be sure the clinical "tent" has gotten larger and more diverse in recent years, with many clinics sprouting up that focus on additional transactional/planning subject matter specialties such as community development, intellectual property and entrepreneurship, and land use and environmental law. But the CSALE study suggests that these sorts of programs are still to some degree outliers in the clinical landscape, at least as compared to litigation-oriented advocacy programs for poor people. *See id.* at 7-8.

218. Stark, *supra* note 1, at 501.

219. 372 U.S. 335 (1963) (establishing a Sixth Amendment right to free legal counsel for indigent criminal defendants charged with felonies.)

220. *See generally* Frank S. Bloch & Mary Anne Noone, *Legal Aid Origins of Clinical Legal Education*, in THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE (Frank S. Bloch ed., 2010).

221. *See, e.g.*, FINAL REPORT OF THE COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, reprinted in 83 F.R.D. 215 (1979); Edward J. Devitt, *Why Don't Law*

money provided by the Ford Foundation to select law schools,<sup>222</sup> early clinical programs attracted to the academy progressive litigators from the legal services, criminal defense and public interest bars,<sup>223</sup> many of whom were later able to hire like-minded colleagues to help them expand the enterprise.<sup>224</sup> The influence of these early pioneers is still strongly felt in the overall landscape of clinical programming today.<sup>225</sup>

The quest for social justice by U.S. law schools and law teachers is, of course, important, as our society continues to struggle to meet the legal needs of poor and near-poor people.<sup>226</sup> The desirability of including litigation-oriented advocacy programs among a menu of clinical skills offerings is beyond question. And many social justice and litigation-oriented clinical programs undoubtedly provide their students with an outstanding educational experience.

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*Schools Teach Law Students How to Try Law Suits?*, 29 CLEVELAND ST. L. REV. 631 (1980).

222. For a short history describing how early seed money was made available to fund clinical legal education programs focusing on legal aid and public interest representation, see, e.g., J.P. "Sandy" Ogilvy, *Celebrating CLEPR's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U. S. Law Schools*, 16 CLINICAL L. REV. 1, 9 (2009).

223. For a lively early account from two such lawyers describing their transition from public interest lawyering to clinical legal education, and their attempts to create a curriculum out of whole cloth, see Michael Meltsner & Philip G. Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581 (1976).

224. For a history of one such program, and how the torch was passed from one generation of clinical teachers to the next, see Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Education at Yale Law School*, 49 J. LEGAL ED. 504 (1999).

225. See, e.g., SUSAN BRYANT, ELLIOTT S. MILSTEIN & ANN C. SHALLECK, TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 302 (2014). ("Many of us in clinical education would call advancing social justice for the poor, people of color, the disproportionately incarcerated, and other marginalized groups our life's work."). A recently published empirical survey indicates that the continuing public interest focus of many law school clinics is not lost upon law school graduates, asked to evaluate the helpfulness of clinics and other experiential offerings in easing their transition to law practice. Lawyers in private, transactional and business-oriented practices reported both less participation in, and less value derived from, their clinical experiences, in comparison with their peers in public interest, government and litigation-oriented settings. See generally Margaret Reuter & Joanne M. Ingham, *The Practice Value of Experiential Legal Education: An Examination of Enrollment Patterns, Course Intensity and Career Relevance*, 22 CLINICAL L. REV. 181, 197, 202 and *passim* (2015).

226. See, e.g., Melanie B. Abbott, Leslie C. Levin & Stephen Wizner, REPORT TO THE CONNECTICUT JUDICIAL BRANCH ACCESS TO JUSTICE COMMISSION 1 (Feb. 15, 2013); Matt Apuzzo, *Holder Backs Suit in New York Faulting Legal Service for Poor*, N.Y. TIMES (Sept. 25, 2014), [http://www.nytimes.com/2014/09/25/nyregion/holder-backs-suit-in-new-york-faulting-legal-service-for-poor.html?module=Search&mabReward=relbias%3Ar%2C{%22%22%3A%22R1%3A16%22}&\\_r=0](http://www.nytimes.com/2014/09/25/nyregion/holder-backs-suit-in-new-york-faulting-legal-service-for-poor.html?module=Search&mabReward=relbias%3Ar%2C{%22%22%3A%22R1%3A16%22}&_r=0)



Nonetheless, to the extent that law school clinics continue to maintain a top-heavy emphasis on litigation,<sup>227</sup> they replicate the (unintended, but nonetheless pervasive, powerful and culturally-reinforced) message resulting from legal education's extensive use of the case method: that trials and appeals are what law "is." By focusing predominantly on partisan representation of individuals or groups, the majority of law clinics reinforce the "traditional conception of the role of the lawyer as an advocate of his client and as someone else's adversary . . . a crabbed and incomplete conception . . . [that begs] the question of what is at the core of lawyers' work."<sup>228</sup> And when particular clinics or clinicians strongly prioritize a social justice agenda, the partisan—and potentially biasing—pull on student-trainees' thinking may be especially magnified.

Intense engagement in a client's cause is, of course, energizing, and it can produce the kind of commitment and performance we want to inculcate in all our graduates. But as important as passion and zeal may be for the modern advocate, objectivity and dispassion are also critically important—for all lawyers. As important as it is for our students to be able to empathize with those who are different from them culturally or socio-economically,<sup>229</sup> fostering understanding of the viewpoints that motivate those who may differ with one's clients is a universal professional demand.

No one clinic can teach all skills, and the choice of specific clinical offerings as part of an overall program involves a series of educational trade-offs. Nonetheless, if improving our students' strategic

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227. There is a redundancy in the clinical choices offered by many law schools that may be masked by the way that the CSALE study, *supra* note 215, lists programs by narrow subject matter area (e.g., Criminal Defense Clinic, Innocence Clinic, Criminal Prosecution Clinic, Prisoners' Rights Clinic, Death Penalty Clinic, etc.). *Id.* at 7-8. A hypothetical law school that, for example, includes among its clinical listings a criminal defense clinic, a civil rights clinic, a juvenile justice clinic, a veterans' benefits clinic and an asylum clinic would seem to offer its students a wide array of choices. But closer examination reveals that these courses teach substantially overlapping skills—most notably interviewing, counseling, investigation, case planning and trial/hearing skills—in different substantive law settings, to be sure, but all settings that emphasize advocacy through litigation. Several highly regarded clinical programs are, in fact, largely organized this way.

228. Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 *TEMPLE L. REV.* 785, 785 (1999). We would note that as practiced today, law is such a highly diversified profession that it is hard to identify any one "core" of it.

229. See, e.g., Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in *RACE, CULTURE, PSYCHOLOGY AND LAW* 47 (Kimberly Barrett & William George eds., 2005). Teaching for cross-cultural competence is a persistent theme in clinical scholarship and list serve exchanges.

thinking skills and decision making judgment is an overarching pedagogical goal for most clinicians (and we believe that it is),<sup>230</sup> the research canvassed in this article suggests that a well-designed mediation clinic—in which students can learn to identify and manage their own cognitive and motivational biases—may provide a pedagogical platform of choice. Common representational clinic assignments such as mooted both sides of an appellate argument, preparing a witness for a hostile cross-examination, or identifying the possible interests of a negotiation opponent, while useful exercises in “seeing the other side,” are no substitutes for assuming a dispassionate role in the middle of a dispute with real, human emotions.<sup>231</sup> Good advocacy is often seen as a process of considering the other side’s arguments for the purpose of rebutting them. As one leading scholar has observed, this is not the same thing as good thinking.<sup>232</sup>

So to return to a theme introduced at the beginning of this article, the primary reason to include a mediation course as part of a diversified array of clinical offerings is neither to train mediators *per se* nor to introduce students to an important subject area in an increasingly settlement-oriented legal culture.<sup>233</sup> It is to train better lawyers. Law school mediation teaching has been likened to a kind of

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230. For an early, seminal article on the value of teaching problem-solving skills in law school, see Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL ED. 612, 612 (1984) (“[C]ritical analysis, planning, and decision making . . . are not themselves practical skills but rather the conceptual foundations for practical skills and for much else, just as case reading and doctrinal analysis are foundations for practical skills and for much else.”). For a more recent treatment, see Mark Neal Aaronson, *Judgment-Based Lawyering: Structuring Seminar Time in a Non-Litigation Clinic*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY, *supra* note 225, at 81. (“I am less concerned about the teaching of specific skills, like interviewing, counseling, fact investigation, advocacy writing, or negotiating, though working on such skills is always part of the mix. For me, the core role of a lawyer is to be a problem solver for others, for which the most crucial attributes are thinking critically and exercising sound professional judgment.”)

231. We assume that many if not most advocacy clinicians attempt to ensure that their students consider the weaknesses in their clients’ cases and the perspectives of litigation opponents or judges. One can see some examples of this in the clinical literature. See, e.g., KREIGER & NEUMANN, *supra* note 18, at 313-26 (urging students to prepare for negotiations by assessing the rights, interests and leverage of both their clients and the opposing party). If the research reported earlier in this article is valid, however, its findings suggest that even the most capable of instructors may be influenced by cognitive or partisan biases that are operating beyond their awareness.

232. BARON, *supra* note 26, at 214.

233. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL L. STUDIES 459 (2004) (tracing “startling” decline in the percentage and number of trials across all categories of cases in both state and federal courts over a 40-year period from 1962 to 2002).

“cross-training”<sup>234</sup>—training in an additional sport in order to improve performance in the main one.<sup>235</sup> The analogy strikes us as apt. Like basketball Hall-of-Famer Kareem Abdul-Jabbar, who perfected his sky hook but also regularly practiced yoga to improve his flexibility on the court,<sup>236</sup> mediation trainees strengthen their traditional legal muscles while building others not typically well developed in law school, all in the service of bringing broader perspective and more dispassionate judgment to their work as representative lawyers.

A similar point can be made about the overall law school curriculum, given its strong emphasis on the development of critical thinking skills. If we want our students to be aware of the potential risk that biases will cloud their judgment when they act in a representative lawyering role, we must make such learning a focus of their law school experience. In addition to teaching traditional legal analysis, we need to further develop students’ powers of perspective-taking and open-minded thinking, through repeated, dispassionate practice in these skills. Dean Kronman’s comments notwithstanding,<sup>237</sup> the overarching mode of instruction—studying legal problems in casebooks largely stripped of their human and interpersonal dimensions—seems neither designed nor well-suited to promoting these habits. As important as it may be, training students to pick apart the reasoning of judges provides little reason for confidence that they will be able to pick apart their own reasoning when they begin to assume responsibilities to clients.

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234. Art Hinshaw at the 2013 AALS Conference on Clinical Legal Education, Plenary Session in San Juan, Puerto Rico: “The Changing Face of Clinical Legal Education: Models, Pedagogies and Opportunities for Transfer” (April 29, 2013).

235. Wikipedia, *Cross-training*, <http://en.wikipedia.org/wiki/Cross-training> (as of Jun. 28, 2015, 3:41 AM).

236. John Morgan & Stephen A. Shoop, M.D., *Kareem Abdul-Jabbar is hot for yoga*, USA TODAY (Sept. 27, 2003, 6:40 AM). [http://usatoday30.usatoday.com/news/health/spotlightthehealth/2003-09-26-jabbar\\_x.htm](http://usatoday30.usatoday.com/news/health/spotlightthehealth/2003-09-26-jabbar_x.htm).

237. KRONMAN, *supra* notes 8-12 and accompanying text.