

Mediation Psychology: Seven Science-based Insights

Looking past rationality

Twenty-first century cognitive science has significantly heightened our understanding of how people think and reason. To call it a paradigm shift would not be an overstatement.¹

This dramatic change has nothing to do with technology. It is about cognitive scientists coming to terms with the imperfect reasoning processes of humans and urging us to abandon the single-minded pursuit of an objectively rational outcome when more than facts or basic arithmetic are at issue. What can be “rationalized” is a function of any one person’s experience, values, and context.

Mediators and legal advisors will have learned from experience, long before now, that clients do not always act “rationally.” Current academic research takes this insight further by focussing on how judgments—conclusions that drive actions—get formed in the first place² within any given context. This research allows professionals to understand and anticipate what influences the thinking of parties to a mediation. Mediators and legal advisors then have the opportunity to manage those influences, rather than react to them, in order to improve the odds of a satisfactory outcome.

In this article I identify seven basic factors that shape people’s judgments. References in the footnotes³ cite scientific research and entertaining examples to support these well-established principles. I encourage readers to explore the references at their convenience because even those experienced in mediation will benefit from being more curious about

the invisible thought bubbles that operate in people’s minds. Private, unstated thoughts blur the process of “interest-based negotiation”—the model preferred by so many mediators. Indeed, the interests that people state out loud to a mediator may be unreliable or incomplete when they are weighed down by unspoken emotions, frustrations or fears.

Settlement is First Prize—What gets in its way?

There is more than one way to measure the success of a mediation. Progress toward an out-of-court resolution or even toward a more focussed court resolution are achievements in their own right on the part of all participants.⁴ For present purposes, however, a collectively satisfactory settlement will be regarded as the ultimate first prize. Attaining that prize is in large part determined by the attitudes and behaviours of the participants, and those are mostly unpredictable and unique to each fact situation. Still, there are opportunities for mediators and legal advisors to take proactive steps to avoid or defuse attitudes and behaviours that undermine a settlement. One need not accept that settlement is the only goal, or even a goal that is always possible to do so. Marking certain psychological factors as ones that either impede or facilitate settlement will help mediators and legal advisors recognize factors as they occur and turn them to advantage.

Spoiler alert: mediators and legal advisors themselves can be the carriers of impediments.

Seven basic factors—what should be done about them?

New directions in cognitive science have broad applications in dispute resolution; harnessing them for success in mediation is one of their more recent applications. Below are seven well-established psychological influences that operate in mediations. (Others that could be enumerated are contained in several of the footnoted references.) The challenge for mediators and aspiring mediators is to determine how to lead the mediation process so that these factors enable, rather than obstruct, the path to settlement.

1. **Role playing is a powerful force.**⁵ Mediation participants—clients, legal advisors, mediators—



RUTH M. CORBIN, PH.D., LL.D

Dr. Ruth M. Corbin, Ph.D., LL.D., is Chair of forensic research firm CorbinPartners Inc., Adjunct Professor at Osgoode Hall Law School, and an accredited mediator specializing in the resolution of expert evidence disputes in litigation and ADR forums. A member of the ADR Committee of the International Trademarks Association, she will lead a seminar on “mediating across cultures” in Singapore in 2020.

are actors for the day, playing out their respective roles. They come to a mediation with a pre-thought interpretation of how their role should be played, and they may even plan certain speech-lines and behaviours in advance. In corporate mediations, role playing is fortified with participants carrying the additional identifier of their job titles. Furthermore, participants relate to the mediator in ways congruent with how the mediator has communicated his/her own role; their relationship may be affected by the extent to which participants feel they know the mediator as a person. For example, maintaining the respect of the mediator may become important to them. For their own part, legal advisors explicitly or implicitly give stage cues that sustain how their clients interpret their role. The bottom line is that as long as people remain on stage, they have difficulty shaking off their role duties.

2. People are wired to be overconfident in their positions and over-optimistic about their chances of winning gambles such as letting a dispute go to court.⁶ Their legal advisors' confidence fortifies their tendency towards optimism.⁷ People filter facts. Positive facts (ones that support their position) carry greater weight in their judgments than negative facts (ones that would lead them to doubt their position). While it may be an error or bias on their part to give some facts more weight than others, people are usually able to justify, in what sounds like rational terms, their preferences for certain facts over others. But note this caveat: overconfidence is more prevalent in situations where people have little or nothing to lose from the *status quo*. When

presented with even modest risks of losing a lot (despite the chance of making gains), people tend to place more weight on avoiding large losses than on the prospect of enjoying gains.

3. People have an instinctive bias toward attributing motive to those who have harmed them (while attributing their own harmful behaviour to outside factors), and they tend to regard opponents as individuals with bad intentions. Psychologists attribute this tendency to our need for an ordered world of cause-and-effect, rather than one that operates on the basis of

random, unpredictable forces.⁸

4. People prefer outcomes that maintain their sense of dignity and self-determination. Dignity is delivered by a demonstration of respect. The likelihood that participants will accept a settlement option increases if they are treated with respect by their adversary, if the mediator's support for it is accompanied by respect for their point of view, and if they have been part of shaping the option. Contrariwise, perceived disrespect or unfair treatment can impede settlement for the very same option. Something other than objective (arithmetic) rationality is



Professional
**LIABILITY
INSURANCE**

Worth the cost of Membership
Greater Coverage,
More Opportunities,
Save On Premiums

ADRIC'S Professional Liability Insurance Program, specially designed for ADRIC Full members. Optional coverages available for commercial liability, cyber liability, property, legal expense insurance and now ID restoration services.

ADR INSTITUTE OF CANADA
INCORPORATED 1974
45th anniversary

[Learn more...](#)

LEADING DISPUTE RESOLUTION IN CANADA

clearly at play.⁹

5. **Non-verbal behaviours are not guaranteed “tells” of what a participant is thinking.** It would be risky for mediators to rely on body language “tells” to guide their coaching to participants.¹⁰ In mediation the effect of non-verbal behaviours on other participants in the room is more significant.
6. **Context and framing are determinative factors,** even “irrationally” so. Context affects people’s perception of both physical objects and ideas.¹¹ People analyze and reason within a framework of the moment and are not inclined to reach into their memories for relevant detail. It’s the “WYSIATI” principle (“what you see is all there is.”)¹² People’s judgments tend to be determined by the immediate context of other

players and information, and what mindset they have brought with them.

7. **People’s thinking is wired to fall back on “heuristics”,** simple paths of analysis or rules of thumb that justify their choices, even when their choices are not mathematically optimal. One of the heuristics most familiar to lawyers is “anchoring and adjustment,” whereby people accept a number as a plausible starting point and adjust up or down to reflect other factors. But note: if a proposed starting point is not seen as plausible (like an offer perceived as ridiculous), then that heuristic will not be applied.

Summary and Application

Psychologists have established that people’s brains are wired to employ certain cognitive biases and analytic

short-cuts. Sometimes those biases and simplified reasoning principles help achieve settlement. But when they impede settlement, mediators and legal advisors have an opportunity to intervene, discreetly or otherwise, to change their influence. Indeed, that is their active responsibility to clients: to recognize and guide the influence of psychological factors that enable, rather than obstruct, the path to settlement.

One final caution is in order. Mediators and legal advisors are also among the group of fallible humans in the room. What they say, do, and express all become part of the context that frames the issues in their clients’ minds. To facilitate a successful outcome, mediators and legal advisors need to stay alert to whether their own role playing, perceptions, and emotional expressions send cues that obstruct the path to settlement. 🏠

- 1 Daniel Kahneman and Amos Tversky (who mentored the author’s Ph.D. research) have been credited with the new-age appreciation of the role of heuristics and biases in people’s thinking. Their research was rewarded with the Nobel Prize in Economics to Dr. Daniel Kahneman, after the death of Tversky, and is documented in his best-selling book *Thinking, Fast and Slow*, 2011.
- 2 A valuable early paper, combining scientific research with practical experience, is found in Russell Korobkin (2006), “Psychological Impediments to Mediation Success: Theory and Practice,” *Ohio State Journal on Dispute Resolution*, 21:2, p.281.
- 3 In addition to footnoted references supra, the following articles add scientific foundation and examples: Elizabeth Bader (2010), *The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle*, 10 Pepp. Disp. Resol. L.J. 183; Dr. Cyril Chern, *The Commercial Mediators Handbook* (London: Informa Law from Routledge, 2014). Hoffman, D. A., y Wolman, R. N. (2013). *The Psychology of Mediation*. *Cardozo Journal of Conflict Resolution*, 14, 759-806.
- 4 Several published articles urge the use of measures that signify progress either towards an ultimate resolution, whether or not achieved at the time of the mediation, or towards improved skills on the part of the mediator. See, for example, Stratemeyer, G. (2017) “Measuring Success in Mediation: An Outline,” published online by *Academia*, at https://www.academia.edu/35440548/Measuring_Success_in_Mediation, last accessed May 15, 2019; Ross, W. H. (2000). Measuring success in mediation. *Mediation Journal*, 1, 1-16.
- 5 Dramatic illustration of how role-playing takes over our thinking and behaviour was provided in the Milgram experiments, in which psychology students asked to play the role of prison guards acted with aggression and even cruelty far beyond the requirements laid out for them. Since those early experiments, psychologists have established more generally that people instinctively adjust their sense of reality and appropriate behaviour to the contexts they find themselves in.
- 6 Overconfidence in turn affects what may be called the “reservation price” with which they come to mediation: the amount of money at which they would be willing to settle. An entertaining account of our innate predisposition to overconfidence was written by Daniel Kahneman for the *New York Times Magazine*, on October 19, 2011, in an article entitled, “Don’t Blink. The Hazards of Confidence,” reproduced at <https://www.nytimes.com/2011/10/23/magazine/dont-blink-the-hazards-of-confidence.html?ref=general&src=me&pagewanted=all>, last accessed May 15, 2019.
- 7 It is sometimes observed that lawyers advising clients at mediation are pulled in two directions: they have enough experience with litigation outcomes to temper their clients’ optimism, yet they themselves have earned their client’s trust by their own displayed confidence in their advocacy skills.
- 8 The operation of an “attribution bias” has been studied by psychologists for at least fifty years. It is only more recently that it has been incorporated into our recognition of cognitive biases as a fundamental quality of human judgment.
- 9 “Facework” is a term coined by some contemporary scholars to describe the efforts people make, conscious or otherwise, to maintain a desired impression with others, and fend off impressions that make them feel devalued. See applications to mediation and other negotiation contexts in, e.g. Ruth Abigail and Dudley Cahn, *Managing Conflict Through Communication*, Boston, MA: Pearson, 2011 and Rosenberg, Sarah. “Face.” *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: February 2004 <<http://www.beyondintractability.org/essay/face>>.
- 10 Published evidence suggests that humans are pretty bad interpreters of body language in dispute resolution settings. Judges, for example, have done no better than chance at detecting liars in simulated trial settings. See, e.g. Zimmerman, L., “Deception Detection,” in *APA Monitor on Psychology*, March 2016, Vol 47, No. 3, p. 46.
- 11 Ruth M. Corbin, “Context effects on validity of response: lessons from focus groups and complacent frogs,” *Vue Magazine*, November 2006.
- 12 Elaborated in Kahneman, *Thinking, Fast and Slow*, 2011 (*supra*).

