

Mediation and Psychological Priming

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Abstract

Experimentation and research in the human sciences area increasingly informs discussion about what drives behaviour and decision making. In the context of this material, it is clear that as marketers have known for many years, unconscious factors influence the way we explore issues, engage and negotiate. This article explores the literature relating to psychological priming and seeks to apply this literature to the field of mediation.

Introduction

Mediation is a process that is used across the justice system and can be court-connected or used without reference to litigation. In Australia, disputants are often required to participate in some form of alternative dispute resolution (ADR) before they can commence civil court proceedings. There is now an extensive literature relating to the process models and skills used in various forms of ADR such as mediation. There are also a number of studies relating to disputant perceptions of processes such as mediation and statistical records of mediation outcomes. However, there is a paucity of literature concerning what works in processes such as mediation and there are very few observational studies that assist in exploring the dynamics within the mediation room. It should be noted that there is also a corresponding lack of literature in relation to other justice processes, such as court hearings, that can support a more informed dialogue about how decisions are made in these various forums and contexts. This article does not seek to explore these anomalies, but focuses on some of the developing literature in the legal, social science, economics and science areas that considers how unconscious factors may influence behaviours and decision making. The article seeks to apply some of these learnings to activities in the mediation setting. Although the article is primarily focussed on the mediation processes, the authors consider that some observations could also be of utility when considering unconscious factors that may influence other justice processes.

In most mediation processes, mediators assist participants through a process of exploring and discussing underlying interests, generating options, and discussing matters that support decision making. A mediator operates at a conscious, intellectual level to deal with facts, economics and power relationships and the 'substantive issues of dispute'. At the same time, a mediator explores some of the 'subconscious, emotional and vaguely felt problems of the participants'³ including the perceptions of participants. It has

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³ William H Knowles, 'Mediation and the Psychology of Small Groups' (1958) 6 *Labor Law Journal* 780.

been said that mediators must ‘resolve two sets of problems, the collective bargaining demands at the objective level and the personal psychological needs of the negotiators at the subjective level.’⁴ As a result of the subtleties and intangibles of the mediation process, practitioners and observers have opined that ‘mediation is more of an art than a science, that there are no blue prints and no two cases alike.’⁵

In exploring the ‘art’ of mediation, one is drawn into a consideration of what is conscious and what is not conscious in the context of mediator activities. The use of experimental research and other social science research provides some insight into individual behaviours and their impact on dispute resolution methods. The research suggests that a great deal of what takes place in mediation is unconscious, although a mediator may have an intuitive response to certain factors or may, through training and experience, be consciously aware of factors that influence behaviour in a mediation setting.⁶ In that regard, this article considers factors that may influence individual behaviour in a mediation process through a focus on a relatively narrow band of research into psychological priming also known ‘the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context’.⁷ Not all forms of priming are considered in this article and, in this regard, it is also important to acknowledge that responses in the studies discussed below may depend entirely on the individual’s idiosyncratic history and personal frame of experience.⁸

It is suggested that priming is a complex phenomenon and, in this article, a selection of priming events that can exert ‘an unintended, passive influence on the interpretation of behaviour’⁹ within the mediation setting are explored.

Part I: Psychological Priming: The Science of the Subconscious Mind

In recent decades, a growing number of social scientists have proposed that individual behaviour is largely guided by the unconscious mental system through a phenomenon known as ‘psychological priming’.¹⁰ A form of procedural memory effect, ‘priming’ occurs where exposure to an external stimulus (words, objects, or pictures) triggers implicit memories or information, which in turn activates particular feelings, thoughts or behaviours.¹¹ Priming refers to the occurrence whereby something a ‘person sees, smells, feels or hears can subconsciously affect that person’s perception of something quite unrelated but

⁴ Ibid.

⁵ Ibid.

⁶ Russell Korobkin, ‘Psychological Impediments to Mediation Success: Theory and Practice’ (2006) 21 *Ohio State Journal on Dispute Resolution* 281.

⁷ John A Bargh, Mark Chen and Lara Burrows, ‘Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action’ (1996) 71(2) *Journal of Personality and Social Psychology* 230, 230.

⁸ Ulrich Ansorge, ‘Priming’ in E Bruce Goldstein (ed), *SAGE Reference: Encyclopedia of Perception* (SAGE Publications Ltd, 2010).

⁹ Bargh, above n 7, 230.

¹⁰ Jane Juliano, ‘Primed for Resolution’ (2012) Mediator.com <<http://www.mediate.com/articles/JulianoJ1.cfm>> (accessed 27 September 2016).

¹¹ Peter T Coleman, ‘It’s the Little Things’ (2011) Mediator.com <<http://www.mediate.com/articles/ColemanPbl20111219.cfm>> (accessed 27 September 2016).

which takes place soon afterwards.¹² The stimuli reside outside of conscious awareness and are stored within the mental structures that are made up of accumulated knowledge about the world built up through experience.¹³ Essentially, when an individual makes a reasoned decision, the brain is in fact making quick evaluations of the most relevant stored mental structures and using those evaluations to interpret an encounter.¹⁴ Priming literature is related to 'a concern with the unintended consequences of an environmental event on subsequent thoughts, feelings, and behaviour.'¹⁵ The residual effect that follows a priming stimulus impacts upon thought processes and behaviour.¹⁶ Importantly the processes are passive in that an individual is not often aware of the process and 'unlikely to control it.'¹⁷ Any of the senses may be involved and priming is often used deliberately to foster consumer behaviour by, for example, ensuring that a scent that triggers happy memories might be used in a store.

It has been suggested that 'the way we think and act . . . are a lot more susceptible to outside influences than realised.'¹⁸ Priming has been linked to the subliminal messages used by advertisers in marketing and consumer campaigns.¹⁹ There, subtle suggestions can trigger a significant impact in a given situation that follows. Priming can also be explained through experimentation. For example, in an experiment conducted by John Bargh, a group of students or 'primed students' was exposed to several words related to the elderly, such as 'grey', 'bald' and 'wrinkle'.²⁰ A group of 'control students' was not conditioned to any priming words. The students were then released into the hallway to complete another task while the experimenters covertly measured the time taken to walk a predetermined distance.²¹ The results revealed that the 'primed students' walked more slowly than the 'control students', even though they were unaware that their behaviour had been affected.²² The experiment demonstrates the effects of priming of the earlier exposure to words related to an elderly state on the students' subsequent behaviour and performance. Interestingly, although the word 'elderly' had not been mentioned in the experiment, the related words appear to have triggered a memory within the students' minds that resulted in their slower

¹² Duncan McLean, 'Strategies and Methods in Mediation and Communication with High Conflict People' (2013), Australian Centre for Justice Innovation, Civil Justice Research Online <<http://www.civiljustice.info/cgi/viewcontent.cgi?article=1000&context=highconflict>> (accessed 27 September 2016).

¹³ Juliano, above n 10.

¹⁴ Ibid.

¹⁵ John A Bargh and Tanya L Chartrand, 'Studying the Mind in the Middle: A Practical Guide to Priming and Automaticity Research' in Harry T Reis and Charles M Judd (eds), *Handbook of Research Methods in Social Psychology* (Cambridge University Press, 2000) 7.

¹⁶ For example, the impact of re-experiencing feelings of pain or fear, after narrating the issues of the dispute, such as in a personal injury case: see Richard Birke, 'Neuroscience and Negotiation: What the New Science of Mind May Offer the Practicing Attorney' (2011) 17(4) *Dispute Resolution Magazine* 4, 5-6.

¹⁷ Bargh and Chartrand, above n 15.

¹⁸ Malcom Gladwell, 'Blink: the Power of Thinking Without Thinking' (Little Brown and Co, 2005).

¹⁹ David A Hoffman 'Mediation, Multiple Minds and Managing the Negotiations Within' (2011) 16 *Harvard Negotiation Law Review* 297.

²⁰ John A Bargh, Mark Chen and Lara Burrows, 'Automaticity of Social Behaviour: Direct Effects of Trait Construct and Stereotype Activation on Action' (1996) 71(2) *Journal of Personality and Social Psychology* 230.

²¹ Ibid.

²² Ibid.

walking. The research suggests that ‘...the mind is on ready alert and instantaneously picks up cues and clues from the environment, especially when faced with new situations’.²³

The concept of priming is relevant in mediation because it may be used by the mediator to manipulate various intangible factors to promote discussions and decision making. Whether the manipulation involves word choices or even the physical setting of the mediation room, priming can influence the outcome and experience of mediation for the participants. In addition, mediators need to be aware of potential priming impacts as those within the mediation room may unconsciously or consciously use priming stimuli. Ideally, mediators should consider the effects of potentially negative priming stimuli and adopt strategies that facilitate robust discussion and support clear thinking and decision making.

Part II: Setting the Scene in Mediation

Mediation preparation occurs before the start of the mediation process. The concept of ‘priming’ requires mediators to consider all pre-mediation activities, negotiation supports and engagement with participants before a face-to-face session takes place. Support literature and other guidance tools can assist to ensure that people are ‘primed’ for the mediation discussions that take place. In addition, the physical surroundings where the mediation will take place are relevant. It is clear that the ‘success of mediation can be strongly influenced by the environment in which the mediation will occur due to its impact on participants’ safety and comfort levels’.²⁴ As noted by Tim McFarlane, a prominent mediator, if the mediation space is lonely and austere, this may ‘have a detrimental effect on the party’s ability to understand and negotiate in good faith and not to succumb to any form of duress or pressure’.²⁵ The creation of a sense of safety and comfort can be vital in terms of facilitating self-disclosure²⁶ and encouraging communication flows, which in turn assists in exploring participant perspectives. Low levels of comfort discourage the flow of communication and conversely, high levels of comfort will ‘sweep the mediation forward’.²⁷

Mediators can strategically moderate the environment to promote the spirit of mediation as an attempt to achieve positive results, such as reaching mutual agreement. In pursuing this goal, mediators must understand that the physical surroundings of the locale for mediation elicit non-verbal messages that can both support or impede the effectiveness of mediation. By understanding the priming effects of the physical surroundings, the mediator can ‘prime’ participants to consider options and also to engage in discussions.

²³ David A Hoffman and Richard N Wolman, ‘The Psychology of Mediation’ (2013) 14 *Cardozo Journal of Conflict Resolution* 759.

²⁴ Barbara G Madonik, ‘Managing the Mediation Environment’ excerpt from Barbara G Madonik, *I Hear What You Say, But What Are You Telling Me? The Strategic Use of Nonverbal Communication in Mediation* (Wiley, 2001).

²⁵ Tim McFarlane, ‘A Healthy Environment’ (2016) 90(04) *Law Institute Journal* 35, 36.

²⁶ David A Hoffman ‘Mediation, Multiple Minds and Managing the Negotiations Within’ (2011) 16 *Harvard Negotiation Law Review* 297.

²⁷ Madonik, above n 24.

A. Room Colour

Mediators should factor in the colour schemes that surround the mediation room because colour can evoke certain emotional or behavioural responses from people. A study known as the ‘Lüscher Colour Test’ supports this view.²⁸ The test suggests that colours induce different emotional responses from people and that colour preferences can disclose people’s personality traits.²⁹ For instance, the colour red appears to emit feelings of uneasiness and aggression more than any other colour. The colour yellow brings out the feelings of diligence or envy while blue and green produce a sense of tranquillity and safety. These colour associations may have a different effect when used as a colour scheme for a room. A study by Podolsky reveals that people have the tendency to feel cold in blue rooms and warm in yellow rooms even though the temperature may be the same in both rooms.³⁰ Accordingly, participants in a mediation may be ‘primed’ partly by the colour schemes used in the mediation setting and even by the colours worn by a mediator.³¹

B. Temperature

Room temperatures and warm or cold beverages may also influence the moods and behaviour of people within a room. A series of experiments conducted by Bargh and Williams found that those who experienced physical warmth, such as by holding a cup of hot coffee, were more inclined to react more positively than those who experienced cold temperatures such as by holding cup of iced water.³² In one study that was more closely linked to room temperature, a select group of university students were asked to examine eight photos of random individuals and were told that the photos were of persons who had committed a crime.³³ Participants were instructed to nominate a crime that the person committed and appropriate sentencing for each person. During this questioning, the researchers adjusted the temperatures of the room unbeknownst to the participants.³⁴ The study found that under low temperatures, the participants more frequently attributed premeditated murder as the crime and also assigned higher amount of time in prison.³⁵ This finding suggests that room temperature may influence the perception of people (with cold temperatures resulting in negative perception and warm temperatures producing a positive assessment of people).³⁶ Moreover, other experiments on temperatures disclosed that subjects who held a

²⁸ Madonik, above n 24.

²⁹ Frank A Donnelly, ‘The Lüscher Colour Test: A Validity Study’ (1977) 44(1) *Perceptual and Motor Skills* 17.

³⁰ Madonik, above n 24.

³¹ Markus Maier, Andrew Elliot and Stephanie Lichtenfeld, ‘Mediation of the Negative Effect of Red on Intellectual Performance’ (2008) 34(11) *Personality & Social Psychology Bulletin* 1530, 1530.

³² Lawrence E Williams and John A Bargh, ‘Experiencing Physical Warmth Promotes Interpersonal Warmth’ (2008) 322(5901) *Science* 606.

³³ Christine Gockel, Peter Kolb and Lioba Werth, ‘[Murder or Not? Cold Temperature Makes Criminals Appear to Be Cold-Blooded and Warm Temperature to Be Hot-Headed](#)’ (2014) 9(4) *PLoS ONE* 1.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

‘chemical hand warmer during the experiment were twice as likely to cooperate with each other compared with those who held an ice pack’.³⁷

The range of studies above indicates that temperatures can affect individuals in their judgment or perception of people and can influence their cooperativeness with others. It could be suggested that practitioners can ‘prime’ parties to behave in a more open manner by simply adjusting the temperature of the room or serving hot beverages during mediation.

C. Ceiling Heights

Ceiling height has also been shown to affect the manner in which an individual processes information, and can influence behaviour. One study, for example, found that high ceilings activate thought-processes related to freedom, while low ceilings induce confinement-related perceptions.³⁸ Other studies have suggested that high ceilings can encourage relational processing rather than restrictive, specific item thought processes.³⁹ Each study suggests that the spatial creation of architecture such as ceiling height can impact of individuals’ thought processes, which is especially important in processes that invoke option generation. The sense of freedom and non-confinement that is fostered by high ceilings can promote open-mindedness.

D. Provision of Food

An emotionally safe and comfortable environment is significant in gaining the trust of the parties involved in a mediation process. Practitioners can foster this sense of trust by considering shared activities, such as the sharing of food items, that may naturally increase the production of oxytocin, a bodily chemical that builds trust.⁴⁰ According to one researcher, ‘oxytocin makes both men and women calmer and more sensitive to the feelings of others’.⁴¹ The research suggests that trust may be fostered between parties when they share food and supports the practice of providing food at mediation.⁴²

Part III: Opening Comments

It has been suggested that the mediator’s opening statement is the ‘most powerful form of priming in mediation’.⁴³ It is customary for mediators to commence the mediation process, especially in interpersonal conflicts such as family or workplace disputes, by making opening remarks. From the

³⁷ Phyllis G Pollack, ‘The Priming Effect of Temperature’ (2015) PGP Mediation Blog < <http://www.pgpmediation.com/articles>> (accessed 27 September 2016).

³⁸ Joan Meyers-Levy and Rui Zhu, ‘The Influence of Ceiling Height: The Effect of Priming on the Type of Processing That People Use’ (2007) 34(2) *Journal of Consumer Research* 174.

³⁹ Ibid.

⁴⁰ Emily Fusting, ‘Making the Brain a Friend Not a Foe: What Interventionists Should Know about Neuroscience’ (2012) 6 *American Journal of Mediation* 41.

⁴¹ Linda Dopierala, ‘Love, Neurochemistry, and Chocolate: A Word from Cupid’ (1999) *Cyberhealth* (Ivy Greenwell) <<http://lovepsychics.com/love-advice/chocolate-love.shtml>> (accessed 27 September 2016).

⁴² Fusting, above n 40.

⁴³ Hoffman and Wolman, above n 23.

outset, a mediator might emphasise a shared goal of making a wise or informed decision about a conflict using a process that is 'flexible' that may support participants finding 'common ground'.⁴⁴ Mediators understand that they do this to 'educate the parties about the process, developing rapport and trust, and setting the tone for a collaborative negotiation'.⁴⁵ However, mediators may not consider that the opening statement also serves as a priming tool to encourage participants to act in a manner consistent with the words used in the opening remarks. In other words, the opening statement plays a role in 'neutralising the way in which parties are negatively primed as they enter the mediation process' and helps to 'establish an atmosphere of cooperation and open dialogue as distinguished from its adversarial alternatives'.⁴⁶

Developments in neuroscience discoveries suggest that there is a predominantly negative perception of the term 'conflict'. This negative connotation has been shaped by past experiences and upbringing dating back to early childhood and reinforced by television and the media.⁴⁷ Consequently, people's responses to conflict are generally poor, leading to poor behaviour and increasing the likelihood of adopting competitive and adversarial approaches to conflict.⁴⁸ Since mediation is predicated on conflict, parties are likely to have been negatively primed and might adopt a combative stance towards mediation from the start particularly if focussed on 'conflict' rather than 'agreement'.

Positive priming can neutralise or minimise the effect of the negative priming that can arise in conflict. The way in which positive priming effects can be achieved from the opening statement is highlighted by a prominent priming study conducted at New York University.⁴⁹ In the study, two groups of undergraduate students were issued with a list of five-word sets and asked to form sentences out of each word list, otherwise known as the 'scrambled sentence test'.⁵⁰ There were two sets of word lists: one included words associated with politeness, and the other contained words associated with being rude. Once the students completed 20 variations of the scrambled sentences, they were instructed to take the completed lists down the hall to the professor's office where they were to be collected and scored.⁵¹ Upon arriving at the professor's office, the students would see that the professor was occupied with another student.⁵² The objective of the test was to observe whether and when the student would interrupt the professor; that is, whether the students would behave in a manner which was consistent with the words with which they were primed.⁵³ The study suggests that 'students who were primed with polite words waited longer on

⁴⁴ Hoffman, above n 26.

⁴⁵ Daniel Weitz, 'The Brains Behind Mediation: Reflections on Neuroscience, Conflict Resolution and Decision-Making' (2011) 12 *Cardozo Journal of Conflict Resolution* 471.

⁴⁶ Ibid.

⁴⁷ Po Bronson and Ashley Merryman, *NatureShock: New Thinking About Children* (Twelve Books, 2009).

⁴⁸ Weitz, above n 45.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

average than the students who were primed to be rude.⁵⁴ Interestingly, the ‘overwhelming majority’ of the students who were primed to be polite did not interrupt the professor at all.⁵⁵

The implications of the priming studies above indicate that the use of positive language in the opening statement may prime the parties to display more positive and polite behaviours.⁵⁶ It is suggested that positive priming by focussing more on agreement and decision making rather than dispute or conflict (or conscious avoidance of negative priming) reduces the existing negativity and hostility of the situation.⁵⁷ Studies in psychological priming suggest that an opening statement that uses language which emphasises the value of being ‘open-minded’ and ‘fair’, the need for ‘creativity’ and ‘outside the box thinking’⁵⁸ may also support more lateral thinking and engaged discussions.

Part IV: Face-to-Face Contact and Reflection

The purpose of a joint session in mediation includes facilitation of face-to-face communication, exploring and discussing issues, supporting perceptual shifts and enabling a deeper conversation that might not otherwise take place. The process can support the building of rapport,⁵⁹ and facial expressions can enable participants to assess the sincerity and genuine intentions of the other party.⁶⁰ In the mediation process, behaviours may passively and unintentionally change to match those of another participant or the mediator. This is because ‘the mere perception of another’s behaviour automatically increases the likelihood of engaging in that behaviour oneself.’⁶¹ This is sometimes referred to as ‘automatic mirroring’, which does not involve an intentional response.⁶²

Facial expressions can also support different responses, and the involvement of a practitioner can assist people to better understand the intent behind facial expressions. The development of mirror neuron theory was the result of a series of experiments with monkeys.⁶³ Early experiments involved providing macaque monkeys with a banana or a peanut.⁶⁴ When researcher Leo Fogassi casually picked up a peanut, it was discovered that the monkey’s brain signature reacted the same way as if the monkey had grasped the peanut itself, even though the monkey had simply observed the act.⁶⁵ It has been suggested that this

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Hoffman and Wolman, above n 23.

⁵⁹ Carol Powell, ‘Alternative Dispute Resolution’ (2015) *New Zealand Law Journal* 257, 258.

⁶⁰ Fusting, above n 40.

⁶¹ Tanya L Chartrand and John A Bargh, ‘The Chameleon Effect: The Perception-Behavior Link and Social Interaction’ (1999) 76(6) *Journal of Personality and Social Psychology* 893.

⁶² Ibid 894.

⁶³ Richard Birke, ‘Neuroscience and Negotiation: What the New Science of Mind May Offer the Practicing Attorney’ (2011) 17(4) *Dispute Resolution Magazine* 4.

⁶⁴ Marco Iacoboni, *Mirroring People, The Science Of Empathy And How We Connect With Others* (Picador, 2009) 59.

⁶⁵ Ibid.

phenomenon also applies in human brains.⁶⁶ The process of brain imitation is said to occur as a result of the production of special ‘mirror’ neurons which are ‘not just about copying, but are also a means of understanding another’s intentions’.⁶⁷ The special mirror neurons signal the limbic system to feel the same emotions associated with the observed facial expressions.⁶⁸ In effect, the mirror neurons help the brain re-enact an experience and assess the intentions of other people and develop a ‘profound understanding of their mental states’.⁶⁹

Consistent with the above findings, mediators may use a joint session as an opportunity for participants to develop mirror neurons. Participants in mediation are asked to retell their story during a joint session in mediation. The other party is encouraged to face the other party and thereby observe their facial expressions and assess their intent. From this, mediators may be subconsciously priming participants to build trust between each other and accept information and offer exchanges.

As part of the mediation process, mediators reflect back the content of each party’s communication. This process of reflection is akin to a process of mirroring whereby each of the participants are compelled to assess their own intent when their own expressions and story have been reflected back to them by the mediator. In other words, each party must ‘come to know itself’.⁷⁰

Part V: Framing and Reframing

As the ‘master of the process’, mediators may have a significant influence over the course of the mediation, especially when priming techniques are employed in order to encourage people to be open, cooperative and accepting. When processes associated with anchoring, framing and heuristics are used, they can amplify the likelihood of outcomes being accepted because the brain is primed to accept them.⁷¹

SEP

‘Framing’ is a featured technique that is well embedded into the practice of being an experienced mediator. Mediator training often refers to framing as an essential skill for mediators. The rationale behind this is because ‘framing’ can be employed as a method to prime parties to consider issues from a range of perspectives. The way in which information is presented in mediation influences the way the brain processes information and may even mitigate anxiety.⁷²

In a study conducted by Beilock, a group of female students were given a series of simple arithmetic

⁶⁶ Birke, above n 63.

⁶⁷ Iacboni, above n 64..

⁶⁸ Birke, above n 63.

⁶⁹ Iacboni, above n 64.

⁷⁰ Bader, E. (2010) *The Psychology of Mediation - Part 1: The Mediator’s Own Issues of Self and Identity*, 10 Pepperdine Dispute Resolution Law Journal 183

⁷¹ Tania Sourdin, ‘Decision Making in ADR: Science, Sense and Sensibility’ (Working Paper, Australian Centre for Justice Innovation, 2012) <<http://www.civiljustice.info/decision/1>> (accessed 27 September 2016).

⁷² Weitz, above n 45.

problems both in vertical form and horizontal equations.⁷³ Half of the students were presented with negative bias by being told that women performed worse at mathematics.⁷⁴ The results demonstrated that the students who were exposed to the 'stereotype threat'⁷⁵ performed worse in the test.⁷⁶ Remarkably, they only performed worse in the problems which were presented horizontally but not in vertical problems.⁷⁷ The discrepancies between the results can be explained by the way that the brain processes information. The left prefrontal cortex of the brain deals with horizontal problems and also experience feelings of anxiety.⁷⁸ Consequently, the activation of the stereotype threat caused an increase in anxiety which resulted in decreased performance.⁷⁹ The vertical problems, however, are treated as a 'visual spatial problem'⁸⁰ and are processed in the right frontal cortex. This part of the brain is not interrupted by feelings anxiety. As a result, its performance is unaffected by the presence of the stereotype threat.⁸¹

For practitioners, such studies suggest that information presentation is critical to the practice of mediation. Using neutral language or other strategies that activate the thinking and more rational brain functions can be useful to encourage meaningful dialogue between parties.⁸² This may in turn foster empathy and cooperation.⁸³ As noted by Lehrer, 'merely changing the presentation of the problem can dramatically alter how the brain processes the information'⁸⁴ and may ultimately influence the course of the mediation process for the participants. The manipulation of information presentation can, it is suggested, prime the brain towards resolution.

A. Liability in Language

In view of the above, mediators should arguably be wary of the words and language used when speaking, framing or even asking questions during the course of mediation. It could be suggested that words used might be meaningfully associated with the motivations and goals sought through the process of mediation.⁸⁵ Some words such as 'fairness, balance, generosity, cooperate, honest, parity or in sync'⁸⁶ are likely to be more conducive to an objective relating to agreement than words such as 'litigation, side, defendant, win, tough and lose'.⁸⁷ Further, certain words may potentially trigger negative emotions or behaviour. In this situation, practitioners might consider analogous new phrases, or using different

⁷³ Sian L Beilock, 'Maths Performance in Stressful Situations' (2008) 17(5) *Current Directions In Psychological Science* 339.

⁷⁴ Sian L Beilock, 'Maths Performance in Stressful Situations' (2008) 17(5) *Current Directions In Psychological Science* 339.

⁷⁵ Jonah Lehrer (2010), The Frontal Cortex, Science Blogs <http://scienceblogs.com/cortex/2010/04/dont_choke.php>.

⁷⁶ Beilock, above n 74.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Weitz, above n 45.

⁸³ Fusting, above n 40.

⁸⁴ Lehrerabove n 75.

⁸⁵ Juliano, above n 10.

⁸⁶ Ibid.

⁸⁷ Ibid.

approaches to describe interests and issues. Priming effects are particularly important when selecting topics for discussions during an agenda-setting stage.

B. Offers of Settlement

Priming effects achieved by way of framing may also be relevant when presenting options that may lead to an agreement. For example, an option that is described as a ‘gain’ may trigger pleasure in the brain and in contrast, a ‘loss’ may be perceived as a fearful event because the pleasure centre becomes suppressed.⁸⁸ As such, it is more likely that the brain can be primed to accept an option when the option is presented as a ‘gain’ as opposed to a ‘loss’.

The theory developed in 1979 by Kalmeman and Tversky suggests that people are more sensitive to losses than to gains.⁸⁹ Essentially, ‘expected losses did not create fear—they suppressed the brain's ability to imagine pleasure’.⁹⁰ This is relevant in mediation because ‘if loss aversion suppresses the ability to imagine reward, it may have additional effects on one's ability to think creatively about how to meet their desire for reward’.⁹¹ The likelihood of an agreed outcome may diminish when the pleasure centre is suppressed due to expectation of a loss.

In the context of a mediation, options can be presented in different ways by participants and a mediator. Take, by way of example, an unfair dismissal dispute between an employer and employee. For example, in a given situation, an employee may have requested \$20,000 (or 20 weeks’ pay) to satisfy all claims the employee had against the employer. The final offer made by the employer may be \$10,000 (or 10 weeks’ pay), where the employer had previously offered \$5000 (5 weeks’ pay). Rather than a party, lawyer or mediator describing the offer as ‘the employer has offered half of what you requested’, positive framing such as ‘the employer has doubled their previous offer’ may impact perception of the option. The framing of the settlement offer can prime participants to accept an option because it becomes a ‘gain’, which may trigger the pleasure centre of their brain.

Part VI: Mind Manipulation by Money

Money priming effects have been deemed to be more ‘durable and larger than classic cognitive priming effects’⁹² and therefore have attracted over 165 experiments to date across 18 countries. When people are reminded of money, studies show people display a tendency to be less interested in interpersonal relationships and may avoid interdependence. It has been suggested that people may shift into ‘professional, business, and work mentality’ with an effort to feel efficacious.⁹³ Essentially, when primed, people may exhibit independence and self-sufficiency and demonstrate behaviours that include

⁸⁸ Fusting, above n 40.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Kathleen D Vohs, ‘Money Priming Can Change People’s Thoughts, Feelings, Motivations, and Behaviors: An Update on 10 Years of Experiments’ (2015) 144(4) *Journal of Experimental Psychology: General* 86.

⁹³ Ibid.

unhelpfulness, stinginess and disinterest in social contact.⁹⁴ Money priming can cause people to be less likely to consider another's perspective, become less compassionate or empathic and ultimately disregard the emotional expressiveness of others.⁹⁵

Experiments suggest that money priming brings about a state of self-sufficiency.⁹⁶ In this context, self-sufficiency is defined as '... an emphasis on behaviours of one's own choosing accomplished without active involvement from others'.⁹⁷ In one experiment, participants were given a difficult 'descrambling task' consisting of 15 sets of five jumbled words referencing money and 15 sets that did not relate to money.⁹⁸ Participants were then allocated a difficult but solvable problem involving arranging 12 disks into a square with five disks per side.⁹⁹ Prior to the task, randomly selected participants were reminded of money and were 'money-primed', and the 'control group' were not conditioned about money.¹⁰⁰ Participants were also advised that the experimenter was available to help where the participants required assistance.¹⁰¹ Those who were money-primed lasted almost twice as long on the task than did the control group before asking for help.¹⁰²

The above hypothesis was also found to be true in circumstances where the subjects were primed in relation to having more money. In one experiment, the primed group were conditioned to have an abundance of money or 'high money', and the other were exposed to the idea of restricted money or 'low money'.¹⁰³ Participants were tasked to solve an impossible problem by 'outlining all segments of a geometric figure once and only once without lifting the pencil or retracing any segments'.¹⁰⁴ All participants were extended the opportunity to ask for help. Again, the results showed that participants with high money priming persevered longer than their low money counterparts.¹⁰⁵

Another study suggested that money primed people have a higher tendency to show unethical intention than those without conditioning. In this experiment, a group of students were money-primed using the same descrambling task as mentioned above.¹⁰⁶ Half the group were only given neutral phrases. Next, participants were instructed to indicate their likelihood to engage in a prescribed behaviour within 13

⁹⁴ Kathleen D Vohs, Nicole L Mead and Miranda R Goode, 'The Psychological Consequences of Money' (2006) 314(5802) *Science* 1154.

⁹⁵ Yuwei Jiang, Zhansheng Chen and Robert S Wyer Jr, 'Impact of Money on Emotional Expression' (2014) 55 *Journal of Experimental Social Psychology* 228.

⁹⁶ Vohs, Mead and Goode, above n 94.

⁹⁷ Kathleen D Vohs, Nicole L Mead and Miranda R Goode, 'Merely Activating the Concept of Money Changes Personal and Interpersonal Behaviour' (2008) 17(3) *Current Perspectives in Psychological Science* 208.

⁹⁸ Vohs, Mead and Goode, above n 94.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Kathleen D Vohs, 'Money Priming Can Change People's Thoughts, Feelings, Motivations, and Behaviors: An Update on 10 Years of Experiments' (2015) 144(4) *Journal of Experimental Psychology: General* 86.

¹⁰³ Vohs, Mead and Goode, above n 94.

¹⁰⁴ Vohs, Mead and Goode, above n 94.

¹⁰⁵ Vohs, Mead and Goode, above n 94.

¹⁰⁶ Maryam Kouchaki, Kristin Smith-Crowe, Arthur P Brief and Carlos Sousa, 'Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes' (2013) 121(1) *Organizational Behavior and Human Decision Processes* 53.

different ethical scenarios.¹⁰⁷ The results of this study revealed that money primed participants displayed high tendency to readily engage in the described unethical behaviour than participants in the control group.¹⁰⁸

The plethora of money priming experiments is relevant in the context of ADR processes. Money, and discussion that is primarily related to money, may result in responses which lead to ‘reduced requests for help and reduced helpfulness toward others’¹⁰⁹ and can even ‘prompt immoral behaviour’.¹¹⁰ In this regard, it seems that ‘mere, subtle exposure to money can be a corrupting influence’¹¹¹ in some ADR processes and the timing of any discussions regarding money may need to be carefully considered together with word use (for example using the word ‘impact’ rather than ‘compensation’).

A. Money Priming and Offers of Settlement

In the course of discussions about options for resolution during mediation, money may be a primary subject of consideration for the parties. As such, discourse about money is often inevitable. When money becomes a consideration, the effects of loss aversion can be intensified. In making a settlement decision, Participants become more attuned to and wary of the nuances and priming effects of the mediator’s presentation of the available options.

Kalmeman and Tversky have noted that people have a tendency to be loss averse compared to their perspective about gains. In studies related to rationalist decision theory, it has been proposed that people have a stronger preference for an option that is certain when the choice is framed as one between ‘gains’ than when the same choice is framed as one between ‘losses’.¹¹² In one experiment, participants were given the choice between a certain \$240 gain and a 25% chance of receiving \$1,000.¹¹³ They were also given a choice between a 75% chance of losing \$1,000 or a certain loss of \$750.¹¹⁴ In the first scenario, a large majority of participants opted for the certain win, despite the chance of receiving a higher amount of money.¹¹⁵ Conversely, in the second scenario, the majority of participants chose the possibility of losing \$1000 over a certain loss of \$750.¹¹⁶ The study shows that when ‘faced with opportunities to gain money, most subjects preferred the riskless option even though it had a slightly lower expected value than the

¹⁰⁷ Maryam Kouchaki, Kristin Smith-Crowe, Arthur P Brief and Carlos Sousa, ‘Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes’ (2013) 121(1) *Organizational Behavior and Human Decision Processes* 53.

¹⁰⁸ Ibid.

¹⁰⁹ Vohs, Mead and Goode, above n 94.

¹¹⁰ Kouchaki, Smith-Crowe, Brief and Sousa, above n 107.

¹¹¹ Ibid.

¹¹² Russell Korobkin, ‘Psychological Impediments to Mediation Success: Theory and Practice’ (2006) 21 *Ohio State Journal on Dispute Resolution* 281.

¹¹³ Daniel Kahneman and Amos Tversky, ‘Prospect Theory: An Analysis of Decision Under Risk’ (1979) 47(2) *Econometrica* 263.

¹¹⁴ Ibid.

¹¹⁵ Korobkin, above n 112..

¹¹⁶ Ibid.

risky option, however when faced with losing money, most subjects preferred a gamble that had the same expected value as the riskless option'.¹¹⁷

The loss aversion theory and riskless option preference suggest that careful framing may reduce impasse in mediation. When options are framed as a gain rather than a loss, the brain may be primed to accept the option rather than the alternative. At the very least, practitioners need to be aware that participants may be framing options, whether consciously or unconsciously. Mediators may also knowingly or unknowingly introduce a reference point which can be presented as an alternative 'loss' option.¹¹⁸ Specifically, the monetary costs of litigation can be used as a comparator of being a 'risky option'. The possibility of losing money may prime participants to consider other options.

Conclusion

Studies suggest that priming can have a significant impact on our day to day activities. It has been shown to influence walking speeds,¹¹⁹ rudeness,¹²⁰ voting,¹²¹ and even assessing whether someone may be a murderer.¹²² As noted in this article, the physical layout of a meeting space can influence perceptions as can what people wear to a meeting.¹²³ Such factors can also influence abstract thinking and power relations.¹²⁴ The skills of a mediator in facilitating a mediation session have been described as artful. This suggestion stems from the perception of mediation as a flexible and informal process compared to the strictly structured and formal system of adjudication by the courts, together with an acceptance that mediators are involved in the choreography of mediation and that there is little that is scientific about this involvement. Mediators are expected to draw upon their training, experience and intuition in the course of the mediation process.

Recent developments and studies in the fields of neuroscience and psychology have uncovered relevant phenomena that can assist us to better understand the practice of mediation. Understanding the role of 'priming', whereby human behaviour is affected by verbal or object triggers, can assist mediators to foster a relationship of cooperation and trust between the participants in mediation. In addition, some research

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ John A Bargh, Mark Chen and Lara Burrows, 'Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action' (1996) 71(2) *Journal of Personality and Social Psychology* 230, 236-238.

¹²⁰ Ibid 233-236.

¹²¹ Janet Takens, Jan Kleinnijenhuis, Anita Van Hoof and Wouter Van Atteveldt, 'Party Leaders in the Media and Voting Behavior: Priming Rather Than Learning or Projection' (2015) 32(2) *Political Communication* 249. See also William Benoit and R Lance Holbert, 'Political Communication' in Charles Berger, Michael Roloff and David Roskos-Ewoldsen (eds), *SAGE Reference: The Handbook of Communication Science* (SAGE Publications Ltd, 2010).

¹²² Christine Gockel, Peter Kolb and Lioba Werth, '[Murder or Not? Cold Temperature Makes Criminals Appear to Be Cold-Blooded and Warm Temperature to Be Hot-Headed](#)' (2014) 9(4) *PLoS ONE* 1.

¹²³ Lawrence Liu, 'Mirror, Mirror on the Wall: How Perception of Personal Attractiveness Affects Negotiation Performance' (2014) 124(2) *Organizational Behavior and Human Decision Processes* 133.

¹²⁴ See the Slepian study outcomes at Michael L Slepian, Simon N Ferber, Joshua M Gold and Abraham M Rutchick, 'The Cognitive Consequences of Formal Clothing' (2015) 6(6) *Social Psychological and Personality Science* 661, 662-667 at 665. Available at http://www.columbia.edu/~ms4992/Publications/2015_Slepian-Ferber-Gold-Rutchick_Clothing-Formality_SPPS.pdf (accessed 29 September 2016).

relating to priming suggests that mediators can influence the experience and even the success of mediation by simply monitoring the room set up and colours, considering food and refreshments and carefully selecting their words and facial expressions.

In many ways, the research in the human sciences area suggests that mediation is not an art form. Understandings about unconscious factors suggest that mediators can make deliberate choices that can influence outcomes and can better understand what might drive behaviours. However, mediation is not only driven by science. There is an intuitive component and behavioural research cannot so readily explain how rapport, trust and dignity are supported. The way in which mediators are engaged in varying choreographies suggests that artistry is also at play, which is not readily measurable using behavioural science measures. In short, mediation is both a science and an art. This article does, however, suggest that many mediators may benefit from placing more focus on the scientific components of mediation practice.