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Addressing Predictable Irrationality: Insights from Practice

Introduction:

This paper aims to use Behavioural Economists' insight into how people make economic choices to identify techniques which a mediator can use to supplement to our traditional mediation-strategies.

Though extensive research has been done to identify circumstances where apparently 'irrational' behaviour is foreseeable or at least identifiable, this work has not adequately been adapted into mediation and negotiation theory¹. This presents an opportunity to fine-tune our mediation practices².

Before identifying these techniques it was important to establish an analytical framework against which these suggested interventions could be assessed. To do this we needed to define what we mean by *rational* behaviour and then identify the considerations constraining mediators' actions in response to behaviour deviating from that standard. Through

¹ See for example, Tversky, A. and Kahneman, D, '*Judgment under uncertainty: Heuristics and biases*' (1973) *Science*, 185:1124--1131

² See for example, Gibson K., Thompson L., Bazerman M.H. '*Biases and Rationality in the Mediation Process*' in Heath L. et al. (eds) '*Applications of Heuristics and Biases to Social Issues. Social Psychological Applications to Social Issues*,' (published under the auspices of the Society for the Psychological Study of Social Issues), vol 3. (Springer, Boston, MA, 1994)

a combination of academic theory and interview data there emerged a fairly coherent approach to the latter question.

Though little academic work has been done to identify appropriate mediator-responses to these behaviours, these theories are descriptive of how people really act. It was posited that mediators would have experienced them and would have had to develop strategic responses accordingly. This knowledge is therefore experiential and difficult to access.

To bridge this gap, a series of interviews were conducted wherein experienced mediators from the family and commercial fields were presented with 4 fictional scenarios where mediation-participants were acting in the manners predicted by various theories of economic behaviour. Thereafter, open-ended discussions were held to determine whether these theories resonated with the mediators' experience, what those mediators would do in response to those behaviours and what the appropriate limits for intervention would be.

Fortunately, these interviews proved fruitful and a number of valuable lessons were learnt.

Structure:

This summary proceeds as follows,

it:

1. Describes the orthodox model of mediation and its reliance on certain expectations of rational negotiator behaviour
2. Notes the constraints on mediators intervening in these circumstances, particularly the fundamental importance of maintaining neutrality and giving effect to the parties' self-determination

3. Identifies an overarching theory detailing the characteristics of desirable intervention in these circumstances.
4. Notes certain considerations to be borne in mind when pursuing these outcomes.
5. Describes the individual theories, their impact within the mediation context and the practical techniques suggested in the interviews

The Orthodoxy:

Generally speaking mediators are taught to follow a fairly consistent structure. In simple terms and with the parties' collaboration we identify the issues which need to be settled, canvas the parties' interests, identify possible outcomes to those issues and then have the parties negotiate their way to a mutually acceptable set of outcomes³.

For the parties to maximise their utility using this approach, their behaviour needs to approximate the *rational* model of decision-making embodied by the theoretical *homo economicus*⁴, the economic actor who can assimilate all information relevant to a decision, ignore irrelevant information, identify their preferences and make coherent, consistent decisions which maximise their own utility, determined according to their own preferences. Acting in this manner, they would be able to determine which solutions properly suit their needs and trade with each other in a way which maximises their respective utility⁵.

The behavioural theories discussed below describe ways in which negotiators commonly deviate from this standard of behaviour. The outcome is that parties do not maximise the fulfillment of their desires and leave possible mutual gains unachieved. The unpredictable nature of these decisions can also make the negotiation tense and uncertain and prevent the

³ See *inter alia*, Ko, H, 'On the Role of a Mediator a Behavioural Law and Economics Perspective', 17 Asia Pac. L. Rev. 195 (2009)

⁴ <https://www.behavioraleconomics.com/homo-economicus/>, accessed 9 June 2018 at 8.32am

⁵ Goodwin et al 'Microeconomics in Context 3rd Edition', (2014, ME Sharpe INC, Armonk, New York), p146

open and constructive engagement necessary for the parties to constructively engage with one another.

Constraints on Mediator Intervention:

Given that we are here determining how a mediator should act to shift a negotiator's behaviour, we must consider the mediator's obligation to remain neutral and ensure that the parties determine the outcome of the negotiation⁶. This imperative is well known and appears foundational to the way in which mediators view themselves and their processes.

Nonetheless, this does not mean that mediators do not intervene in ways which can shape the views and decisions of the negotiators. One situation where mediators are commonly prepared to act is that where a power-imbalance exists between negotiators⁷. In such circumstances, one party's lack of knowledge, experience, assistance or emotional wellbeing can put them at a disadvantage, leaving them unable to communicate and pursue their interests effectively. In many cases this can prevent the mediation from functioning effectively because the party will not feel able to participate and will instead either capitulate or refuse to engage.

Either result will leave at least one party entirely unsatisfied and threatens the value of the mediation process. In such circumstances, mediators are often prepared to intervene to assist that party. The extent to which the mediator will be prepared to do so will vary but many mediators are at least prepared to act to facilitate the party's full ventilation and consideration of the issues and interests underpinning and affected by the potential outcomes of a negotiation.

⁶ See *inter alia* the Model Standards of Conduct for Mediators (2005), Preamble, 2005, accessed 31 January 2018, available at https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf Menkel-Meadow C et al: *'Dispute Resolution: Beyond the Adversarial Model'* (2005, Wolters Kluwer, Netherlands) p266 or Golann D and Folger J: *'Mediation: the Roles of Advocate and Neutral'* (2006, Wolters Kluwer, Netherlands) p95

⁷ Cobb S and Rifkin J, *'Practice and Paradox Deconstructing Neutrality in Mediation,'* (1991) 16(1) Law and Social Inquiry

These interventions are sanctioned in theory and perhaps even more so, as revealed through the interviews, in practice. Susan Douglas' work identifies that in reality mediators are prepared to limit their absolute neutrality in terms of process, i.e. they are prepared to make interventions affecting the parties' views provided those interventions give effect to the parties' own interests rather than substitute in the views of the mediator⁸.

Ko⁹'s *New-Evaluative* approach notes the Behavioural Economists' findings that the kind of 'deviant' decision-making we are concerned with here is generally the result of the brain's desire to minimize the amount of computational energy expended on a decision and that in the circumstances, they are really inhibiting that person from giving proper effect to their own interests. Noting mediators' willingness to intervene to compensate for these bargaining imbalances, she concludes that similar interventions are acceptable in these circumstances. This theoretical view was echoed by the interviewees' common willingness to intervene to counter these cognitive barriers within the restraints of ensuring that the parties' own interests being pursued.

Susskind and Thaler's *Nudge Theory* presents an interesting analytical model for delineating the proper limits of appropriate interventions here. Their work describes a *Libertarian-Paternalist* model of interventions wherein the *choice-making-architecture* of a decision is manipulated to encourage a party to make the decision which is ultimately best for them¹⁰. This approach is libertarian in the sense that it promotes the pursuit of self-determination but it is paternalistic in the sense that the information surrounding the decision is emphasised to encourage a particular choice. Thus, the manipulator (in this case the mediator) is not altering the preferences but is encouraging a more effective pursuit of these preferences¹¹. This appears to accord with the types of interventions suggested the interviewees. Directing the negotiators towards that information which can assist to make

⁸ Douglas, S, 'Neutrality in Mediation: A Study of Mediator Perceptions', QUTLawJJI 7; (2008) 8(1)

⁹ See Note 3

¹⁰ Watkins, D, 'A Nudge to Mediate: How Adjustments in Choice Architecture Can Lead to Better Dispute Resolution Decisions,' (2010) 4 *Am. J. Mediation* 19-38

¹¹ Thaler, RH and Sunstein, CR, 'Nudge: Improving decisions about Health, Wealth, and Happiness', (Yale University Press, New Haven, CT, 2008), pp17-39

more broadly considered, reasoned choices on their own stead appears to be the overarching thrust of the majority of these strategies.

In other cases, the mediators aim to empower the negotiators to improve their decision-making by addressing some of the barriers to their doing so. To this end, the focus again appeared to be on emphasizing and communicating that information which could shift the parties' ability or confidence to act in a more rational manner.

Further Considerations:

Before engaging in a discussion of the deviations themselves we need to properly understand the goal of this paper. It is impossible to prescribe a fool-proof recipe where easily identifiable and delineated behaviours can be met with clearly defined responses. Instead, we are here hoping to broaden the options available to mediators to supplement and fine-tune the standard mediation tools.

A further potential difficulty is that on many occasions the deviations will have similar effects. This means that a mediator may on occasion struggle to identify exactly what is going on with a negotiator, save to note that they appear unable to engage with a negotiation effectively. As we will see, the proposed techniques share common goals and therefore an attempt to address one shortcoming may very well have success in response to another similar behaviour.

The Deviations:

1. Endowment Theory/Loss Aversion/Divestiture Aversion:

First we will look at the well-established principle that economic actors value those assets or rights which they already own, possess or expect to own higher than those that they do not.

The effect within a mediation is that people demand higher compensation for giving something up than they do to forego some benefit that they feel they may attain¹².

In some circumstances, the value of an item may not be clear to a mediator but is of genuine value to a negotiator. Seemingly irrational behaviour may be explained by a rational sentimental or instrumental desire in these circumstances. The mediator must explore this possibility.

Still though, the simple fact of ownership or expected ownership may be causing the overvaluation. That people overvalue those items that they already own or possess has been proved through a number of experiments¹³. Other studies have illustrated that the same forces operate in respect of items not yet owned but expected¹⁴, including those cases where deviations from standard contractual terms or practices are being proposed¹⁵.

A corollary of this work is Kahnemann and Tversky's finding that utility expectations vary more greatly between losses and losses than between gains and gains¹⁶. Thus the difference between a proposed salary of R40 000 and R45 000 will be more keenly felt by a person who earns R50 000 than by someone who earns R35 000.

Perhaps unsurprisingly, it also has been established that a person giving something up rather than foregoing a possible gain will generally be much quicker to anger in respect of that

¹² See *inter alia*, Wolfe, P, 'How a Mediator Enhances the Negotiation Process', (2005) 46 N. H. B. J.p 38 and Chern, C, 'The Commercial Mediator's Handbook', 1st Ed, (Informa Law from Routledge Publications, Oxford, United Kingdom, 2014), p396

¹³ For example, Morewedge and Giblin¹³ used three sample groups to illustrate the point. The first group was simply given the choice between a chocolate bar and a coffee mug. Of the 100 people in that group, 56 chose the mug while 44 chose the chocolate. Groups 2 and 3 were given a coffee mug or chocolate bar respectively. In each group, 89 members elected to keep the item they had, rather than make the trade. The *rational* actor would not be swayed by whether or not they already owned an item and one would expect that groups 2 and 3 would result in a similar distribution to group 1. That this was not the case illustrated showed the overwhelming reluctance to sacrifice those items which we already own - Morewedge, C and Giblin, C, 'Explanations of the Endowment Effect: an Integrative review in Trends in Cognitive Science', (2015) 19(6): 339–348

¹⁴ Mnookin, R, 'Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict', (1993), NIDR Forum Summer/Fall 21–22, p26

¹⁵ Korobkin, R, 'The Status Quo Bias and Contract Default Rules', (1998) 83 Cornell L. Rev. 608

¹⁶ Kahneman, D, and Tversky, A. 'Conflict Resolution A Cognitive Perspective, in Arrow, K, Mnookin, R, Ross, L, Tversky A, and Wilson, R (Eds.), *Barriers to the Negotiated Resolution of Conflict*, (49–67). (Norton Publishers, New York City, New York, 1995), p 755

person's actions. The same is true in respect of the motivation behind the harmer's actions; they will be much more easily forgiven where they are acting to protect their own accrued assets. Thus, a company acting to avoid losses will be more easily forgiven than one acting to protect profits,¹⁷. Of course, a party's anger towards their negotiation partner will inhibit their likelihood of engaging constructively. This effect is discussed in more detail below but it is worth noting this potential overlap at this point.

The ownership of an item is irrelevant to its actual utility. Where someone overvalues an item for this reason, they are may reject utility-enhancing concessions. This fixation can also narrow a parties' focus and preventing them from properly considering the full range of interests and outcomes properly informing their decisions in that mediation. In such circumstances constructive and flexible engagements are unlikely.

Suggested Solutions:

Predictably the interventions proposed by the interviewees aim to encourage the parties to consider the full range of issues and assets under consideration. The proposals included:

1. Asking the parties to 'park' the discussions regarding that particular item, hopefully allowing the parties to negotiate with a problem-solving momentum which, once established, could dislodge the attachment to that item by illustrating the gains to be made through a flexible negotiating approach.
2. It was noted that in some cases the parties' reluctance to sacrifice a particular item is not based on their valuation of their item but on their desire to have their rights over that asset or item vindicated. To assuage this desire, mechanisms which allow those rights to be recognized without final distributive effect can be useful. The specifics of these suggested processes varied but included narrow arbitration considering only that

¹⁷ Ibid p759

issue, obtaining a third party legal opinion or encouraging an acknowledgement of that right by the other party(s) to the mediation. Once their right is acknowledged, the hope is that the parties can then move on to other issues, comfortable that any concession they may make on that point is made fairly recognizing their rights.

3. *Framing*¹⁸ was mentioned here by a number of interviewees. This is a well-known phenomenon. The focus is on ensuring that a proposal including such a loss is viewed as a total package along with the benefits attached to it. Doing so can shift the party's attention towards the expected benefits rather than the known losses.
4. It was suggested that in many cases the real cause may simply be that the parties have not done the work required to properly understand all the issues. Where this is the case, the setting of homework which forces them to confront the potential outcomes and their relative valuations of those outcomes. Perhaps the best mechanism of doing so is to get them to spend time picturing the potential outcomes to a negotiation and then to assign numerical values to those outcomes. By doing so, the person can more easily compare the outcomes.

It is clear then that although the interviewees suggested interventions which could influence the parties' thinking, they are not aimed at encouraging particular outcomes but rather to broadly consider their situation. This has always been a key goal for mediators. The hope is simply that we can do so more effectively.

2. *Overconfidence in Outcomes:*

Here we are referring to our widespread tendency to overestimate our chances of success in uncertain economic activities like litigation or negotiation.

¹⁸ See for example, <https://www.beyondintractability.org/essay/framing>, accessed 6 December 2017 at 18h52

In a negotiation or mediation context the outcome is clear. Where someone holds unrealistic expectations about their likely negotiated settlement or adjudicated award, they will be less likely to accept compromises. In negotiation-lingo their *BATNAs* are overestimated.

As a result, they may decline settlement proposals which are really successful outcomes. Of course, if both or all negotiators are acting in this way, the range of mutually acceptable outcomes will decrease even further.

To identify potential remedies to this issue, we should have a brief understanding of the possible causes or elements of this overconfidence.

The first is the simple finding that people in all lines of work routinely overestimate their ability in that context¹⁹. The cause of this unclear. What did emerge from the interviews was that ego is a crucial consideration here, given that challenges to a person's professional ability inevitably risks an impairment of that person's pride.

The interviewees noted this as particularly prevalent in respect of attorneys who have additional motivations or inclinations to feel or at least present the appearance of confidence²⁰. Maintaining their client's confidence and presenting arguments with conviction both require the appearance of such confidence. Hourly billing can also create a perverse incentive for attorneys to encourage clients to pursue uncertain litigious outcomes rather than quicker settlements and to do so may be encouraged to overstate the client's prospects.

The second group of causes encompasses the particularly selfish way that people consider and use the information surrounding their decisions. We emphasise that information which falls within our own experience²¹ and which accords with our views on how a certain issue should be resolved²². Of course, our views on those issues are determined largely by an

¹⁹ Kahneman, D, and Tversky, A. *'Conflict Resolution A Cognitive Perspective*, in Arrow, K, Mnookin, R, Ross, L, Tversky A, and Wilson, R (Eds.), *Barriers to the Negotiated Resolution of Conflict*, (49–67). (Norton Publishers, New York City, New York, 1995), p58

²⁰ Brenner, LA et al, *On the Evaluation of One-Sided Evidence*, (1996), 9 J. Behavioural Decision Making 59

²¹ Tversky, A and Kahneman, D. *'Availability: A Heuristic for Judging Frequency and Probability'*, (1973), *Cognitive Psychology*, 5, pp207-232

²² Loewenstein, G et al, *'Self-Serving Assessments of Fairness and Pre-Trial Bargaining'*, (1993) 22, *J Legal Stud* pp135-146 where participants in the experiment were assigned the role of either Plaintiff or Defendant in a matter and then given identical facts, when asked to recall these facts the participants overwhelmingly recalled more facts

unconscious self-interest. It has even been found that the values underpinning those views are themselves influenced by self-interest²³. Thus, if we are seeking economic redistribution, we may emphasise *equality* whereas someone avoiding the loss of that redistribution may emphasise *freedom*. We must note that these are subconscious phenomena and that simply pointing them out will not likely correct them²⁴.

As a result, we are often unable to process and properly understand the arguments and strengths of other negotiators. Of course, where both parties act in such a manner, their shared understanding of a conflict is even further disrupted.

Suggested Solutions:

Since we are addressing negotiators' overconfidence in their position, the suggested responses largely amount to *reality-testing* techniques. Of course, this is not a novel concept. The more interesting insights rely on the recognition of the difficulties people face in encountering information running counter to their beliefs and experiences and the potential impact on the pride of those whose professional competence is under question. It was noted that where that occurs, the most common reaction of the negotiator is to disengage and become even more intransigent. Mindful of this risk the following suggestions were made:

1. Focus discussion on those risks and potential costs which are unrelated to the competence, skill or knowledge of the negotiator themselves, including the inevitable cost and delay of litigation. Pointing these out to the party can bring a dose of reality without threatening their ego.

which suited their case than those which did not. A similar result was found in the context of collective bargaining, see Thompson, L and Loewenstein, G '*Egocentric Interpretations of Fairness and Interpersonal Conflict*', 51 *Org. Beh and Hum Dec.Proc.* 176, 189-90 (1992)

²³ Birke, R and Fox, C, '*Psychological Principles in Settlement Negotiation*' (1999), 4 *Harv. Negot. L. Rev.* 1, p35

²⁴ *Ibid*, p46

This does not really address the parties' own overconfidence. It was emphasized that when doing so the mediator should distance themselves from the challenge as far as possible. The methods of doing so were varied but the essence was that the mediator should avoid directly questioning the information underpinning a negotiator's decision or the decision itself. Though the mediator may want to do so, indirect means should be used wherever possible. Various solutions were proposed, including;

2. using 3rd party adjudication or legal opinions. It was suggested that merely preparing for those processes requires the party to confront the weakness of their positions and arguments.
3. For similar reasons the benefit of confronting the views of one's opponent were noted. Forcing the parties to confront the information and arguments emphasized by someone holding an alternate view can problematize some of the beliefs underpinning such overconfidence without threatening the relationship with the mediator. The mode of communication will vary, depending on the relationship and civility of the parties. It can be as informal as asking the parties to casually debate their views or as formal as requiring the drafting of mock heads of argument stating the positions and evidence upon which their argument is based. An interesting variation of this technique was the advice to ask the parties to draft heads of argument from the position of the other party, forcing them to actively seek that information which they have been undervaluing.
4. In certain cases, where the negotiators' characters or relationship prohibit such methods, the mediator may have to become directly involved but would have to be extremely careful in doing so. Rather than straightforwardly informing negotiators how and why they are wrong or how they should think; the mediator must ensure that the parties feel that they are reaching improved conclusions on their own. To that end, the mediator can ask questions leading the person towards confronting certain information

rather than towards a particular conclusion and must do so without betraying any lack of confidence in the person's beliefs or skill.

5. As an aside we should note the repeated references to *narrative* mediation²⁵ techniques here. A complete engagement with this rich source of technique is not possible here, save to note that a focus on the influences on parties' views of each other's actions can be very useful in broadening one's focus from one's own circumstances and experience. This body of work therefore represents a further opportunity to finetune and supplement our techniques.

Again it should be clear that these techniques encourage the parties to understand more of the facts and considerations which should shape their decisions, rather than explicitly favouring a particular outcome.

3. *Social Preference Theory:*

Next we consider two behavioural phenomena which work in tandem. The first is the unsurprising conclusion that peoples' behaviour affects our desires in respect of their welfare; if someone acts unfairly, we do not wish good things for them. This is particularly so where we are or perceive ourselves to be the victims of that bad behaviour²⁶.

If we are angry with someone we are unlikely to negotiate in pursuit of mutually beneficial outcomes. We are also unlikely to engage in the empathetic thinking necessary to generate acceptable to that dispute. In some cases, we may even be prepared to sacrifice our own interests to punish another person²⁷, for example, a negotiator may be willing to sacrifice the

²⁵ Winslade, J and Monk, W, *'Practicing Narrative Mediation: Loosening the Grip of Conflict'*, (Jossey-Bass, San Francisco, 2008)

²⁵ Ibid, pp3-6

²⁶ Allred, K et al, *'The Influence of Anger and Compassion on Negotiation Performance'*, (1997) 70 *Org. Beh & Human Dec/ Proc* 175

²⁷ This conclusion is most regularly tested and proven through *Repeat-Shot, Non-Cooperative* games wherein participants each sequentially get the opportunity to essentially determine the outcome for the other party. The results indicate that we commonly employ a *trigger* strategy in terms of which the level of cooperation and benevolence governing the relationship between the players deteriorates as soon as one party causes harm to another by deviating from the most mutually beneficial strategies. See for example, Friedman, J. *'A non-cooperative equilibrium for Supergames'*, *Review of Economic Studies* 38, (1971), pp 1-12

time and legal costs associated with litigation proceedings, solely to obtain a judgement 'punishing' their opponent.

Of course, retribution and vindication may at times constitute legitimate interests. No matter how counter-productive a mediator may consider this attitude, it is the person's genuine desire and the mediator would have to be wary of frustrating that person's self-determination in frustrating those pursuits.

The second, more interesting behavioural insight illustrates how bad we are at attributing blame in conflict situations, particularly where we are or see ourselves as the victim. We routinely overestimate others' moral culpability and ignore the situational constraints causing those issues. The inverse is true of our own actions. Thus, when we are late we blame the traffic, when we wait for someone we blame their planning²⁸.

Many of the causes of this are similar to those underpinning our overconfidence in our legal positions. We engage with information selfishly and struggle to empathise as a result.

Suggested Solutions

In such cases our interventions can have two aims; addressing the anger motivating a self-destructive strategy or managing the impact of that anger on the person's decision-making.

As ever, the first strategy is to encourage the parties, using standard techniques, to interrogate their own interests and determine whether a vindictive strategy really will best satisfy them, particularly given the risks and costs of pursuing litigation. In some cases, the desire to punish may be so strongly held and possibly even justified. In such cases it can be almost impossible to shift the desires of the person pursuing that punishment.

We are here really considering those cases where a person's anger appears misplaced or exaggerated or where the desire to pursue that agenda is frustrating the potential for effective

²⁸ Korobkin R 'Psychological Impediments to Mediation Success: Theory and Practice' (2005-2006) 21 *Ohio St. J. on Disp. Resol.* 281, pp 287-289

pursuit of their other interests. We are therefore trying to address the misplacement of that anger.

1. the techniques proposed had significant overlap with the responses to negotiators' overconfidence discussed above. The exercises or interventions which force the party to confront the views of the 'guilty' party are useful here. Sometimes, driven by the litigation process and their attorneys, a negotiator may have been too focused on their own arguments and the information supporting those arguments or been entrenched even further in their anger by the frustrations of the litigation experience that they become completely unable to understand the other person's experiences.
2. Here it was routinely recommended that angry parties be made to feel that their rights are being respected or recognized. The most common observation was the simple one recommending that parties be given the chance to vent their frustration by explaining how the other person's actions have affected them. This venting can take place between the mediator and the negotiator or between the negotiator and their antagonist directly. The specifics would depend on the mediator's individual preferences and the nature of the relationship between the parties.
3. Ensuring that a person's rights are recognized can have a similar effect. Where we think that a person may be enabled to engage with a negotiation once they have had their rights recognized, previously discussed techniques like obtaining 3rd party legal opinions, properly constrained arbitration proceedings or even a simple acknowledgement or apology can be very useful.
4. Again, the Narrative Mediation techniques' focus on understanding the way in which people form their views of a conflict and their understanding of the actions of others suggests that that field may provide very useful insights here.

5. It was here too that the most frequent references to Bush and Folger's *Promise of Mediation*²⁹ and their *Transformative* model of mediation were made. A full account of their work is not possible here but very briefly we should note that their focus on addressing conflict itself, rather than immediately addressing the outcome of that conflict addresses the causes and consequences of negotiators' anger more directly than the traditional methods of mediation. We should particularly investigate those techniques aimed at achieving *recognition* shifts³⁰. These are the ways in which mediation can assist negotiators to better acknowledge the motivations, feelings and experiences of the people with whom they are negotiating. A major element of this is the mediator's imperative to focus very intently on the manner in which negotiators communicate with one another both when providing and receiving information. This goal aligns directly with the purpose of the interventions proposed here, even those techniques not directly sourced from *Transformative* techniques. We should again note this as an area of potential³¹.

Bush and Folger regard their techniques as so distinct from the traditional outcomes-based mode of mediating that they advise that mediators wholly embrace one or other model, rather than using the two in conjunction³². We should note that despite this, the interviewees who referenced their work did not appear to follow this advice, instead using those techniques as adjuncts to our standard mediation techniques.

6. One useful further observation should be recorded here. It relied on the understanding that where people have acted out of anger and stated their views in a particularly forceful or aggressive manner, withdrawing from that position can be difficult since doing so involves a tacit admission of having acted unreasonably. This tends to cause parties to be reluctant to retreat from those positions. One therefore needs to offer

²⁹ Bush, R and Folger, J, *The Promise of Mediation: The Transformative Approach to Conflict*, (Jossey Bass Publishers, San Francisco, 2005)

³⁰ Ibid, pp84-85

³¹ Ibid

³² Ibid, p63

such people a route to withdraw their statements without threatening their pride. A mediator who can frame such a retreat as an act of magnanimity, maturity or practicality can offer a negotiator, particularly one who acts on behalf of a constituency, a face-saving route out of a conflict which may otherwise prove intransigent.

Again, the interviewed mediators aimed to indirectly influence negotiators to properly interrogate their anger and its effects by encouraging a more nuanced and empathetic approach to the actions of their counterparts. In doing so, ensuring that the parties themselves reshaped their thinking or at least felt that they were doing so remained a key imperative.

4. *Choice Relativity and the Substitute Question Effect:*

Here we are considering the effect of two related behavioural theories.

The first is Dan Ariely's *Choice-Relativity* theory. His crucial finding is that when humans appraise things we do so by comparing them to other comparable items rather than by giving them an absolute value³³. This theory has been widely tested and really does appear to coincide with our experience of making economic decisions.

His more subtle point is more complicated. Essentially he argues that where an item 'wins' on a comparison with another comparable item, its value relative to other less easily comparable items increases simply by having won on that initial comparison³⁴.

In the negotiation context this means that if someone receives an offer and it is better than some other outcome achieved in similar circumstances, for example a divorce settlement received by a person's sister or an award made in an analogous personal injury case, that offer

³³ Ariely, D *'Truth About Relativity – Why Everything Is Relative – Even When It Shouldn't be'* in *"Predictable Irrationality: The Hidden Forces that Shape our Decisions"*, (Harper Collins, New York, 2008), p2

³⁴ An example from Ariely's work elegantly illustrates this concept, this involved an advertisement for subscriptions to the Economist magazine which included three options: 1) a subscription to the print edition for \$125 2) an online-only subscription for \$59 and 3) a combination of both, also costing \$125. When he presented these options to his MBA class, 84 chose option 3 while 16 chose option 2. When he removed option 1) from the equation with another class, 68 chose option 2 and 32 chose option 3. Since no one chose the print-only option, its removal should not have affected the second round of testing, since the choice in the first round was really only between options 2 and 3 anyway see *Ibid*, pp4-6

becomes attractive, even if the comparator outcome is actually undesirable. The opposite occurs where an offer fails on that comparison. This latter effect can be referred to as the *distortion* effect.

Decision-making by comparison forms part of our common mediation tools. BATNA analysis requires negotiators to appraise any negotiated outcome by comparing it to the expected outcome of not reaching a negotiated settlement³⁵. If the value of proposed offers distorted in the manner described, this comparison will not be made accurately and negotiators may reject or accept offers or proposals just because they are inferior or superior to an outcome which may not be achievable in their circumstances.

One potentially useful study, conducted by Kahnemann and Tversky, noted that this distortionary effect does not operate in circumstances where the goods being compared are what are termed 'trading goods' rather than 'goods for use'³⁶. The former category refers to those items which are commonly used for the purposes of trade specifically, items like money or gold. The latter refers to items which are of use in and of themselves.

This effect is exacerbated by the second theory relevant here. This is the *Substitute-Question Effect*³⁷, describing how people make these kinds of comparisons, noting that the brain is not capable of comprehending every element and impact of most decisions and therefore makes the comparison in a heuristic manner, using a particular issue as a determinant of the total value of a proposal, instead of considering its full range of effects.

As an example, a person contemplating a divorce proposal may be overwhelmed by the various elements of that proposal and will evaluate it by comparing it to a familiar, comparable outcome and will do so along a narrow axis of comparison, possibly the amount of spousal maintenance included in the offer. In commercial context, price very often acts as this determinant. This effect can be termed the *narrowing* effect.

³⁵ Benjamin, R, 'The Natural History of Negotiation and Mediation: The Evolution of Negotiative Behaviors, Rituals, and Approaches' <http://www.mediate.com/articles/naturalhistory.cfm>, accessed 25 April 2017 pp9-10

³⁶ Kahnemann D and Tversky, A, 'Conflict Resolution: A Cognitive Perspective', p9

³⁷ Shah, A and Oppenheimer D, 'Heuristics made Easy: An Effort-Reduction Framework', Psychological Bulletin 2008, Vol. 134, No. 2, pp 207–222

The effect is that many relevant considerations are ignored. When combined with the *Substitute-Question* effect the result is that an inaccurate comparison will often be made which will in turn affect the value of a proposal relative to the more relevant comparator outcome, for example the person's BATNA. They will therefore fail to give proper recognition to relevant interests affected by an offer and then also distort its value.

Suggested Responses:

The solutions proposed aim largely at this *narrowing* effect. Still, encouraging people to broaden the analysis underpinning their comparisons can only help to minimize the distortionary effect of habit of comparison.

1. Again, we are aiming to encourage negotiators broaden their focus to cover all the potential impacts of a proposed outcome. These techniques are discussed above, specifically in reference to negotiators exhibiting *Loss Aversion* bias. Perhaps best among them is the advice to request negotiators to engage in mental activities where they are forced to confront the value of potential outcomes. Relying on Kahnemann and Tversky's findings in respect of *goods-for-use*³⁸, it was suggested that activities where parties are forced to assign an absolute value to potential outcomes are particularly useful since they effectively create a shorthand for the comparison of the items, making them comparable to goods-for-use. To get to that point, they obviously have to actively consider the proposal and assign a value, thereby forcing them to make a more concerted analysis.

The interviewees' understanding of the reasons behind people acting in this manner also points us towards potentially useful solutions:

2. The first was that many negotiators are simply underprepared and for that reason fail to consider the true effect of a full and detailed settlement proposal. In such

³⁸ See note 37

circumstances, a narrow focus on price may make sense. Again, 'homework' of the kinds described above can assist.

3. It was also suggested that in many cases anxiety in a negotiation can motivate negotiators to focus on familiar issues or those which can easily be measured. When confronted with naïve, inexperienced or anxious negotiators, ensuring that the parties recognize that the consequences of their actions within the negotiation are not necessarily final and that they feel free to explore their interests and potential outcomes can assist. Actively listening to the parties and giving them room to speak and express their views without being overly critical can also help.
4. The transformative mediators' techniques seeking *empowerment*³⁹ shifts were again raised here and appear to run congruent with the goals underpinning the interventions proposed in the interviews. Again, we do not have time to address this body of theory in any detail but we should again note this potential source of supplementary techniques.

As ever, mediators confronted with a myopic negotiator must be wary of shifting that person's attention towards their own ideas rather than to maximize their own self-determination. The extent to which one may or should redirect a negotiator's focus will depend on the preferences and views of that mediator but certainly one would think that it would be acceptable to ask questions which would encourage that person to do so themselves.

Conclusion:

We are fortunate that great strides have been made in our understanding of human behaviour, particularly in terms of how people make decisions in economic situations. Mediation theory has not necessarily kept pace with these developments, though some initial

³⁹ See note 30, pp84-85

progress has been made. This presents an opportunity for mediators to better understand the negotiators within their processes and to fine tune their responses to this behaviour.

Although there may be a deficit of academic writing on the topic, the reality is that experienced mediators have long been faced with negotiators acting in this manner and, as a result, have had to develop strategies to deal with it, even where they may be unaware of the academic writing on the topic.

What emerged from the interviews was a clear recognition that negotiators very often do not make economically rational choices and that mediators often need to finetune their standard approaches in response to that behaviour. The approaches suggested by the interviewees appeared to follow a fairly coherent pattern which emphasized the need to remain within the bounds of acceptable mediator intervention, giving effect to the self-determination of the negotiators.

Of course, mediation technique is very often as much a product of the personality of the mediator and their interactions with the personality of the negotiators. The above is not therefore intended to represent a set of concrete instructions, but rather an outline of potential techniques which can be adapted and finetuned towards one's own style.

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