Psychological Traits and their Impact on Mediation

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Mediating is tough. Bringing parties to settlement is no easy matter.

Mediators constantly strive to understand what obstacles are impeding settlement and how to overcome them.

To this end, mediators apply a variety of analyses to what they witness in the mediation room. They might say that the parties are exhibiting conflicts of data, values, interests or relationships. They might analyse the challenges to settlement in gender or cultural terms. They might consider power imbalances to be at the core of the difficulties. And so on. Despite the analyses, the reasons for ongoing difficulties in the course of the mediation may be complex and uncertain.

One thing is clear. The participants in mediation are all human beings who share various psychological traits. These traits impact on the manner in which they negotiate. It is more or less certain that these traits will manifest themselves in each and every mediation.

In order therefore to optimise the prospects of successful outcomes, mediators need to be aware of these human traits and know how to respond to them.

Indeed, one way mediators might think about the path to successful mediation outcomes, is that the path is the inevitably lengthy route by which human psychological traits are progressively addressed. Deal with the psychology and you are a large part there.

It is this process of identifying and appropriately responding to the psychological traits that are common to most of us which may provide some explanation for at least two features of mediation. One feature is the lengthy duration of mediation. This may be attributable to the fact that of necessity, it takes time to overcome human psychological blocks. A second feature is surprise that settlement is achieved. This may be attributable to the fact that once psychological blocks are overcome, people negotiate on a quite different basis to previously.

The common psychological traits are reasonably easy to identify from the mediation and negotiation literature by virtue of the fact that they *are* common and hence repeatedly mentioned.[2]

In the writer's experience however, the traits tend to not be referred to collectively in the literature but in an occasional and piecemeal way.

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2 My sources include: "*The One Minute Manager Prepares for Mediation: A Multi-Disciplinary Approach to Negotiation Preparation*", D R Philbin, Harvard Negotiation Law Review, Vol 13: Winter 2008, page 249. "*Beyond Winning*", *Mnookin, Peppett and Tulumello*, Harvard University Press, 2000. "*Negotiating Rationally*", Bazerman and Neale, The Free Press 1992. "*Negotiation*", Lewicki, Barry and Saunders, McGraw-Hill Irwin 2007. "*Mediating Legal Disputes*", Golann, Wolters Kluwer Law & Business 1996. "*Dispute Resolution in New Zealand*" second edition, Editor Peter Spiller, Oxford University Press 2007.

The purpose of this article therefore is to identify and describe the traits most commonly referred to and to suggest some mediator responses.

Amongst other things knowledge of these traits may prevent the mediator from incorrectly analysing the parties' conduct. It is only too easy for mediators, let alone the parties, to incorrectly consider parties to be stubborn, unreasonable and devious etc, when in fact all the parties are doing is manifesting common human traits.

I will start by describing three closely inter-related phenomena which particularly manifest themselves at the commencement of mediation.

Selective Perception

Mediators are familiar with parties, especially at the commencement of mediation, not taking on board the sensible information being provided to them. Selective perception is the likely reason.

People dislike cognitive dissonance, that is to say, a clash of information. We prefer a consistent picture of the world. We therefore unconsciously screen out data that contradicts our existing view.

Thus there is a tendency for parties in mediation to have genuine difficulty "hearing" the alternative picture which is being painted by their opponent. Subconsciously, they filter out conflicting evidence because it is psychologically uncomfortable to contend with the consequent contradiction and uncertainty.

The solution is for the mediator to encourage and enable the conflicting evidence to be provided with clarity and perseverance, and in a manner and tone which does not cause offence.

Reactive Devaluation

Mediators are familiar with the knee jerk rejection by parties, especially at the commencement of mediation, of anything said by the opponent. The likely reason is reactive devaluation.

People tend to react negatively to information and proposals provided by an adversary. We automatically discount what our opponents say. We believe that if a proposal comes from the other side then *ipso facto* it cannot therefore be worthwhile.

As a result, concessions or proposals made early in a mediation will be discounted and devalued to a greater extent by the opponent than if they are made later, when a degree of trust and goodwill may have been established.

That is why it is of importance in mediation to establish goodwill and trust before engaging in hard bargaining. For this reason "cutting to the chase" (so beloved by some lawyers) can be counter productive.

An important function of the mediator therefore is to nurture goodwill and trust, and control the pace of the mediation so that the bargaining phase does not commence until the reactive devaluation obstacle has been overcome.

Attribution Error

Mediators know that it may be inimicable to ultimate settlement for the parties to commence the mediation by making sweeping and serious judgements about each other. Especially is that so when integrity and decency are impugned. Parties who have been mortally offended will not settle up with

the accuser. A reason that parties have a tendency to angrily accuse each other of bad faith at the commencement of mediation is the trait of attribution error.

People attribute blame to others rather than themselves. We typically believe that our successes are due to our own industry and talent, but that our failures are caused by others.

When we accuse others of doing things to us, we believe those things were *within* the control of those other persons. By contrast, when we are accused of doing things to others, we believe those things were *beyond* our control.

Thus in negotiation, parties seek to avoid blame and liability by attributing their conduct to *external* circumstances beyond their control. On the other hand, the parties doing the blaming attribute *internalised* (deliberate) conduct to the blamed parties.

Take for example, a misrepresentation case. The purchaser of a business which has not prospered as expected may well accuse the vendor of deliberately supplying false accounting information. That may in fact be the case. But equally there may be other explanations. The vendor may have been relying on poor data or poor accounting advice or may have made a genuine error about the profitability of the business. The point is, that in all likelihood the objective truth will not be clear at the commencement of the mediation (if ever). The purchaser may be ill advised therefore to accuse the vendor of dishonesty, at least not unless and until dishonesty is plainly apparent. The purchaser may fall into dangerous attribution error.

On the other side of the coin, the vendor in the above example may have difficulty in facing up to legal responsibility, seeking to justify themselves when error is no real excuse.

The mediator needs to be mindful therefore of the dangers of attribution error and endeavour to pre-empt it before it occurs or ameliorate its impact should it occur.

I now move on to discuss two closely inter-connected traits fundamental to negotiation.

Loss Aversion and Risk Tolerance

Generally, people attach greater weight to prospective losses than prospective gains. It is more important not to lose something than it is to gain something. This is why defendants may have greater difficulty than plaintiffs in reaching a settlement. The pain of forking out money is worse than the pleasure in receiving it.

Those contemplating a possible gain are risk *averse*. They prefer certain gains over larger but riskier gains. A plaintiff considers that a bird in the hand is worth two in the bush. By contrast, those facing a possible loss tend to be risk *tolerant*. They prefer the risk of a bad outcome to the certainty of lesser loss. A defendant is more inclined to run their chances in court because they find the prospect of paying out so unpalatable. When facing a possible loss we tend to become bloody-minded. When facing a possible gain, we tend to play things more cautiously.

The task for mediators therefore, is to assist parties re-conceptualise the settlement options available to them as involving gain rather than loss.

Such re-conceptualisation, commonly referred to as reframing, is a fundamental ingredient of successful mediation.

It is to framing therefore, that we should now turn.

Framing

We are powerfully influenced by the way we frame our experiences. Framing is not a psychological slight of hand divorced from objective reality. It determines the way we think and act.

We have choice about how we think about the world around us and our place in it. Should for example we make an error, we might frame that as part of a useful learning curve. Our response to the error is thus positive and constructive. Equally, we are capable of framing the same error as evidence of our lack of ability and potential. Our response to the same error may therefore be a negative and unhelpful one.

If parties in mediation perceive a possible outcome as a loss they are inclined to reject it, but if they are able to perceive the same possible outcome as a gain, they are inclined to accept it.

For example, employees are typically reluctant to give up established benefits in exchange for an equivalent wage rise because they frame the outcome in terms of loss. They do so, because as mentioned above, people are more concerned about losses (in this case of benefits) than attracted to gains (in this case of wages).

A defendant may well consider paying out a claim to be tantamount to loss, and hence balk at doing so. Reframing may change the defendant's perception and hence preparedness to settle. The prospects of a successful mediation will be enhanced, if not assured, if the defendant comes to view the proposed settlement sum as a gain, because it enables extrication from a difficult situation and the avoidance of risk.

Similarly, a plaintiff will be inclined to settle for less than is claimed if the compromise is not seen as a loss but as a gain. Such a compromise provides the plaintiff with an early, assured payment and a cessation of legal expenses, in contrast to the dangers and disadvantages of continued litigation.

I next discuss a trait familiar to us all.

Anchoring

People have an automatic, unconscious tendency to "anchor" on the first number they encounter when estimating a value. The anchor is their point of reference.

In mediation, a party might unwisely use the first offer they receive to help them assess the favourability of later improved offers. They might decide that a figure 50 – 70% from the opening offer is worth settling for. The initial offer however may be a preposterously unrealistic figure. Such a party is open to exploitation by a savvy opponent who pitched the opening demand accordingly. A settlement of $200,000 in a $500,000 claim may appear attractive to a plaintiff when the defendant's initial offer was $30,000. Conversely, a plaintiff's first offer in a $500,000 claim to settle for $485,000 may result in a later offer to settle for $375,000 appearing attractive to the defendant.

Such is the power of anchoring, that *even when* parties have a clear view of the value of their cases, and know about anchoring, they may still be sub-consciously influenced by an opening offer. The challenge for the targeted party is to remove the case analysis away from the anchor so that it ceases to be a reference point.

It might seem that such is the power of this phenomenon, that all parties (whether for plaintiff or defendant) should play the game of unrealistic first offers in order to exploit it. That can however be a dangerous game to play for at least the following reasons:

- The offer may inject unhelpful negativity into the negotiations, even to the extent of the offeree abandoning the negotiations out of despondency, frustration or anger;
- A likely consequence of an unrealistic first offer, is a long, fraught and exhausting (and thereby risky) process of incremental bargaining whereby the amount on offer is progressively raised by small degrees;
- The offeror loses credibility and the ability to later argue that a much improved offer is reasonable – it can hardly be contended at one moment that $30,000 is fair and then later that $200,000 is fair.

It is important that mediators are mindful of the above three possible pitfalls resulting from the vigorous exploitation of the anchoring trait. It may be wise for the mediator to warn an exploiting party or parties of the resultant risks. One reason that mediators should caucus is in order to pre-empt the tactic of an unrealistic first offer being used.

I now move on to describe five further traits, all of which have some inter-connectedness with those already discussed and with each other.

The Endowment Effect

People ascribe greater value to something they own than do people who do not own that thing. House owners, for example, typically consider their homes to be worth more than non-owners consider them to be worth.

This phenomenon is related to the loss aversion phenomenon previously described. We are reluctant to depart with (lose) anything we own and therefore expect a premium to be paid for it.

In any negotiation involving the sale and purchase of an asset therefore, there will be a genuine mismatch between vendor and purchaser perceptions of the true value of the asset concerned.

Likewise, in a non-personal injury case, the plaintiff owner will typically attribute greater pre-injury value to the asset concerned, than the defendant.

The mediator therefore should be alert to the parties mistakenly attributing the impact of the endowment effect to innate unreasonableness, bluffing or dishonesty. When a party declares an asset to be worth much more than the objective evidence might suggest, the other party has a tendency to attribute negative explanations to that declaration. The party may be doing no more than exhibiting the endowment effect.

The mediator, when observing the endowment effect at play will want to devise means to overcome the effect. For example the mediator might encourage a quiet but thorough examination of the objective information. Or the parties might be encouraged to devise a solution such as the obtaining of an expert valuation, which will side step the endowment effect altogether.

Certainty Attraction

People place a premium on certainty. We will spend more to reduce uncertainty of outcome from say 15% to zero than from 30% to 15%, even although the movement in both cases is 15%.

Parties in mediation will therefore pay extra to achieve a full or final settlement, in contrast to a partial or interim settlement.

For example, a defendant home builder in a defective construction case may prefer to pay $250,000 to settle the claim once and for all, than pay $200,000 on the basis that if further existing problems are

identified in the future he will rectify them, even although he knows that the chance of further problems being detected is remote.

The mediator, when assisting the parties generate and evaluate settlement options should be mindful of the fact that settlement may be more likely if it achieves finality than if it does not. The interplay between a settlement amount and finality is a dynamic which the mediator can utilise to advantage.

A close psychological cousin to certainty attraction is risk familiarity.

Risk Familiarity

People are prepared to take greater familiar risks, than smaller unfamiliar risks. We are more concerned about the unfamiliar than the familiar, even although the latter might hold greater risk than the former.

The house owner in the aforementioned defective construction dispute may prefer that the remedial work utilise a familiar material (wood) than an unfamiliar material (a new composite product) even although the latter is cheaper than the former and arguably more durable and maintenance free.

The mediator needs to be mindful that parties may prefer to choose a solution involving greater risk rather than choose a solution involving lesser risk.

Judgemental Overconfidence

Mediators are familiar with parties who appear to hold untenable views about their prospects of succeeding should the case not settle and go to judicial hearing. It is tempting to think of these parties as arrogant, stupid or bluffing. The reality may be that it is simply judgemental overconfidence at play.

People place unwarranted confidence in their own predictions about future events. We have an unjustified cockiness. We believe on average that we are more intelligent, insightful, and capable than others.

Typically therefore, people over-estimate their chances of winning at trial.

Amongst other things therefore, mediators should encourage and facilitate a thorough and objective examination of the facts, including possible or likely scenarios should the case not settle.

Initial Course Commitment

Disputes sometimes seem to have an unstoppable momentum which serves to prevent settlement in mediation. A likely reason for this is initial course commitment.

People have a tendency to stick to their guns. Once we have adopted a course of action, we like to stay with it even where that is no longer sensible. This partly explains the stubbornness often observed in negotiation.

A type of initial course commitment is *commitment to sunk costs*. Parties tend to frame settling for less than they have already spent in legal expenses, as a loss. Although self-defeating, a weak case might be pursued with mounting transaction costs in the forlorn hope of recovering those costs.

Mediators therefore need to find solutions to this phenomenon.

A very helpful solution is re-framing: “It is best that I cut my losses now and get out of this mess while I can” compared with “I won’t feel good unless I have recouped every cent I have spent on this case.”

Mediators thus needs to assist parties stuck on initial course commitment to either think that to halt the dispute is advantageous (they can *gain* something from settling) or that continuing the dispute is disadvantageous (they might *lose* something if they don't settle).

The traits discussed above are "negatives", being blocks to successful mediated outcomes. Let me conclude therefore with some "positives" namely principles of effective persuasion.

Persuasion Principles

Mediation is a form of negotiation, in which the parties engage in attempted mutual persuasion. Thus the key psychological traits which cause parties to succumb to persuasion are central to successful mediation.

Mediators therefore need to be mindful of these positive traits and orchestrate the process so that they come to the fore.

The following are six principles of persuasion to which people psychologically respond well.

Liking. People will bargain more favourably with those they like than don't like. We prefer to say yes to the requests of people we like. That is why it is seldom an advantage to their clients for lawyers in negotiation to be unpleasant towards the opposition.

Reciprocity. People are more inclined to offer concessions if concessions are offered to them. As marketers who offer free nicknacks know, people like to give something back, even something of greater value. Making a concession in a negotiation, far from being a sign of weakness, can be a smart move, inducing a greater concession from the other side.

Social Proof. People bargain in accordance with what they believe their peers would do. We determine what is correct by finding out what other people think is correct. It is a smart move in mediation therefore for parties to be reassured that the settlement proposed is what like-minded people would have agreed to.

Consistency. People desire to be, and to appear to be, consistent with what they have already done and said. By extracting commitment from a party, they will thereafter act consistently with that commitment, to the advantage of the other party. If a party agrees to explore a mutually acceptable outcome, they will usually find one. In mediation therefore, discuss commitment to settle before discussing possible settlement outcomes.

Authority. People generally respect authority. They are more likely to subscribe to outcomes which are sanctioned or encouraged by judges and respected others. Therefore the likely views of those respected persons should be highlighted. Similarly, people respond favourably to the authority of experts, and so their use should be encouraged.

Scarcity. People want more of what they can have less. They will agree to an outcome which seems elusive. If parties feel that they are on to a good thing they may be inclined to grab the settlement whilst it is on offer.

Summary

Phenomenon	Key Ideas
Selection perception	Blocking out conflicting and contradictory information.
Reactive devaluation	Automatically dismissing an opponent's viewpoint
Attribution error	Believing that an opponent's actions were deliberate and within their control, but one's own actions were unintended and outside one's control.
Loss aversion/risk tolerance	Greater concern with loss than gain. Those facing gain more risk averse; those facing loss more risk tolerant
Framing	How matters are perceived, especially either positively (gain) or negatively (loss).
Anchoring	Using extreme points of reference to assess value.
Endowment effect	Owners of assets ascribe greater value to them than non-owners.
Certainty attraction	Preference for certain outcomes.
Risk familiarity	Willingness for greater familiar risk than lesser unfamiliar risk.
Judgemental overconfidence	Unwarranted confidence in one's predictive accuracy.
Initial course commitment	Not wanting to give up despite (because of) mounting costs.
Persuasion principles	1. People agree with those they *like*. 2. People like to *reciprocate* goodwill. 3. People want *social proof* to do the right thing. 4. People like to display *consistency*, and so will adhere to commitment. 5. People are influenced by what *authority* figures think. 6. People like more of something which is *scarce*.

Conclusion

When faced with something that is not working, tradespeople must first diagnose the fault before they can decide which repair tools to extract from their tool box. Likewise, mediators need to diagnose what underlies parties' conduct before utilising the tools available to them. Understanding and recognising the common psychological traits described provides a very helpful basis for determining the choice and timing of the interventions and techniques which constitute mediators' tools.