

BRIDGING MEDIATION AND PSYCHOLOGY: MEDIATOR'S MINDFULNESS AND RAISING CONSCIOUSNESS OF UNCONSCIOUS BIASES

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ABSTRACT

The role of psychology in mediation has remained relatively unexplored, especially in the Indian context. Mediator training has failed to take into account psychology-based techniques for dealing with parties' negative emotions and assisting in increasing their emotional intelligence during mediation. By reexamining the facts of the dispute with mediator's assistance, parties are more likely to move towards objective reality. To avoid the direct-indirect communication dilemma, mediators have to appreciate the communication styles of both parties, and alter their own style whenever needed to suit parties' needs. A mediator should nudge the parties from competition to cooperation by helping them prevail over their biases in order to take rational decisions. The paper suggests developing a closer relationship between mediation and psychology so that veteran mediators can pass on their experience in understanding people to the younger mediators. This will enable the next generation of mediators to alter parties' choice structure by eliminating their irrational biases which lead to sub-optimal decisions and reduce negative emotional behaviors.

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I. RESOLVING CONFLICTS: THE PSYCHOLOGY OF MEDIATION

A. *Understanding ‘conflict’*

Conflict, in terms of human psychology, refers to the opposing stands or irreconcilable differences between two or more parties, leading to a confrontation. Coleman describes a conflict as an “*anticipated frustration entailed in the choice of either alternative.*”¹ However, a universal definition of the term is not feasible since every individual has a different perception of conflict. Conflicts, irrespective of their nature, cause disturbance in the minds of interested parties which is resolved only when an outcome has been agreed upon. Simply put, a conflict is a clash of contradicting desires, needs, interests or ideologies, with the stronger party dominating the outcome. In such situations, parties sense a threat to their power, status, emotions, or even body.

Though warring parties have contradicting versions of the same dispute, the fundamental difference is the reversal of good and bad characters in their stories. Both parties think that they are right while alleging that the other side has been the unreasonable aggressor. Likelihood of disputes will decrease if people stop judging behavior of other individuals from their point of view- instead, they should put themselves in the other party’s shoes to gain a holistic perspective. After all, what is obvious to one person might not be so obvious to the other.

B. *Mediation: Third-party involvement (Not intervention)*

Mediation—giving primacy to parties’ interests—focuses on a constructive conflict management to assist disputants in thinking ‘out of box,’ wherever necessary. Negotiations in protracted disputes often fail since parties approach the resolution of underlying issues with a limited perspective.² A mediator understands the needs and interests of both parties and assists them in arriving on a mutually satisfactory compromise.

Mediators, through skills such as active listening, try to connect with parties in order to understand their explanation of the conflict. One of the biggest challenges for a mediator is to encourage parties to move away from the deeply-rooted first person perspective and look at the dispute from the other party’s and an independent, third-party perspective. Quite often,

¹ SK Mangal, *Abnormal Psychology* 42 (1987).

² Michael Roberts, *Why Mediation Works When Negotiations Fail*, Mediate.com (Jul. 2002), <https://www.mediate.com/articles/roberts4.cfm>

we hear expressions like ‘stepping into the shoes of other party’ in mediation. However, that is easier said than done since human beings comprehend reality subjectively even though they consider it as the objective reality.

Currently an underrated theme in mediation, the role of psychology in understanding cognitive biases and irrational errors which shape the subjective realities of individuals can be promoted by mediators with grasp over functioning of human mind.³ Since psychology covers aspects of conscious and unconscious decisions taken by an individual, bridging it with mediation can open a whole new array of possibilities for amicable resolution of complex disputes.

C. Cognitive biases: Irrationality in Homo sapiens

Psychology and behavioral economics validate the prevailing irrationality in the ‘rational’ Homo sapiens- with cognitive biases and irrational errors distorting our thought process, we often end up taking catastrophically bad decisions. Daniel Kahneman, Nobel Prize winner in behavioral economics for his breakthrough work on role of cognitive biases in decision-making, described it as the human tendency to reach conclusions based on limited information.⁴ Cognitive biases are psychological blunders in evaluation and reasoning caused by overly simplified information processing strategies, and is extremely difficult to avoid.⁵ One of the most common examples of cognitive bias is the Bandwagon effect, commonly known as herd mentality.

Associated with executive functioning, pre-frontal cortex is the part of the brain which is responsible for controlling our behavior and thought process as well as preventing us from taking impulsive decisions.⁶ However, with all emotional information going directly to the primitive paleo-mammalian brain consisting of the limbic system,⁷ the role of pre-frontal cortex in decision-making is limited to the second-hand, biased information it receives from

³ Alex Azarov, *What color is this dress? – a mediator’s perspective*, Kluwer Mediation Blog (Mar. 9, 2015), <http://kluwermediationblog.com/2015/03/09/what-colour-is-this-dress-a-mediators-perspective/>

⁴ Katherine L. Milkman, Dolly Chugh & Max H. Bazerman, *How Can Decision Making Be Improved?* 1-4 (Harv. Bus. Sch., Working Paper No. 102, 2008), <http://www.hbs.edu/faculty/Publication%20Files/08-102.pdf>

⁵ *What Are Cognitive Biases?*, Cent. Int. Agcy. (July 7, 2008 10:32 AM), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/psychology-of-intelligence-analysis/art12.html>

⁶ Dr. Jim Taylor, *How Do We Humans Ever Make Good Decisions?*, Dr. Jim Taylor (Apr. 24, 2013), <http://www.drjimtaylor.com/4.0/how-do-we-humans-ever-make-good-decisions/>

⁷ Surrounding the core of the human brain (proto-reptilian brain), the paleo-mammalian brain is responsible for enhanced emotion and motivation and is referred to as the seat of emotion.

the seat of emotion.⁸ According to Paul MacLean, who proposed the Triune Brain concept in 1968, the paleo-mammalian brain and not the rational neo-mammalian brain is responsible for perceiving the reality.⁹ This observation has far-reaching implications overall, but we shall, for the purposes of this essay, limit ourselves to its role in mediation.

Influenced by psychological and social factors, we often take decisions which are *prima facie* irrational. The emotional state of an individual also determines his/her decisions. For instance, decisions taken when one feels stressed will be considerably different from when such person is happy, which will further be different from when he/she is in a state of loathing.

Consistent and predictable in nature, cognitive distortions can be attributed to beliefs and preferences of people which they hold on to despite contrary data.¹⁰ For instance, both parties during mediation claim vehemently that they are right and the other side is wrong. Their claims might even be true, but only partially- their perceptions of truth are nothing but emotions from limbic system cloaked as neocortical rationalizations.¹¹

II. PSYCHOLOGICAL APPROACH TO MEDIATION: MAKING THE PROCESS MORE ‘PARTY-FRIENDLY’

Mediation can be described as a ‘rendezvous discipline’, requiring knowledge from various disciplines.¹² Since mediation is not restricted to the four walls of law, a mediator might be called to answer emotional, psychological, economic and even, philosophical questions. However, we shall limit ourselves to studying the role of psychology in mediation.

A closer relationship exists between mediation and psychology than one might think. It is impossible for the parties to arrive on an optimal decision without employing the mental faculties. Veteran mediators attempt to understand parties’ psychology from the moment they

⁸ Id.

⁹Jay E. Gould, *Paul MacLean’s Triune Brain Concept*, University of West Florida (Sep. 10, 2003), <http://uwf.edu/jgould/triunebrain.pdf>

¹⁰ Amy Wenzel, *Modification of Core Beliefs in Cognitive Therapy*, Standard and Innovative Strategies in *Cognitive Behavior Therapy*, InTech (2012), <http://www.intechopen.com/books/standard-and-innovative-strategies-in-cognitive-behaviortherapy/modification-of-core-beliefs-in-cognitive-therapy>

¹¹ Burkey Belser, *Part 2: The Reptilian Brain - Surprising Results from Brain Science*, Greenfield Belser (Aug. 25, 2008), <http://greenfieldbelser.com/big-ideas/part-2-the-reptilian-brain---surprising-results-from-brain-science>

¹² Charlie Irvine, *Breadth or depth? Why mediation should be proud to be a ‘rendezvous discipline’*, Kluwer Mediation Blog (Sep. 8, 2011), <http://kluwermediationblog.com/2011/09/08/in-praise-of-the-rendezvous-discipline/>

enter the room and over the course, as mediation proceeds. Understanding how the parties will react in a given situation, a mediator is better equipped to communicate to parties that bargains have to be made for settlement.

Where the party(s) comes to mediation with a ‘my way or the highway’ approach, a mediator will make them see reason in relying on intellect and avoid emotional decision-making. The mediator, in his role as a facilitator, sets the right tone for bargaining and negotiation dance¹³ between parties. Warring sides thus understand each other’s perspectives, along with their needs and interests, keeping negative emotions aside. Free-flowing conversation between parties enables the mediator to identify their motives and driving forces which is important for a productive mediation session.

The best way to resolve a conflict is to approach the core issues creatively, in order to come up with out-of-the-box solutions. Parties during failed negotiations ponder over various outcomes, all of which are unacceptable to the either party. Involving a neutral third party with a possibly, different understanding of the dispute provides a fresh perspective. This is crucial for exploring innovative solutions, the importance of which cannot be undermined.

Conflicts can also be described as a disagreement blown out of proportion. More often than not, the perceived disagreement is much more exaggerated than the real disagreement. Such exaggeration is attributable to cognitive distortions¹⁴ like personalization¹⁵, assumptions based on mind-reading,¹⁶ cognitive labeling,¹⁷ self-serving bias,¹⁸ cognitive exaggeration¹⁹ and tendency to overestimate.²⁰ By facilitating conversation between parties, a mediator seeks to understand their psychology to anticipate the possible outcomes of the dispute.

For parties, talking to each other is crucial- it helps them in understanding the real issues and exploring outcomes agreeable to both parties. One of the senior most mediators at

¹³ Erik H. Schlie & Mark A. Young, *The Rhythm of the Deal: Negotiation as a Dance*, European School of Management and Technology (Jun. 12, 2008), <https://d-nb.info/1012728048/34>

¹⁴ Alice Boyes, *50 Common Cognitive Distortions*, Psychology Today (Jan. 17, 2013), <https://www.psychologytoday.com/blog/in-practice/201301/50-common-cognitive-distortions>

¹⁵ Personalization refers to an individual taking an incident or event personally that may not be necessarily personal in the first place.

¹⁶ People often presume what is going on in someone’s mind even though they might not be thinking about it.

¹⁷ Once a party labels the other mentally (usually, negative labels), he/she will be prejudiced and reject any subsequent evidence suggesting the contrary.

¹⁸ People often attribute positive events to their character while assigning negative qualities to other individuals.

¹⁹ Parties to a dispute (or humans generally) tend to blow the other side’s faults out of proportion, whether consciously or unconsciously.

²⁰ Human beings have the tendency of overvaluing things belonging to them. In a dispute, this bias is extended to undervalue entities that belong to others.

Samadhan Mediation Centre, Delhi once remarked in one of his sessions- “*Human beings have a chance to be proactive or reactive*”. Made in context of a commercial dispute between two brothers, it encouraged parties to think practically instead of acting instinctively. True success in mediation amounts to the parties’ ability to make intelligent choices from limited options available.

III. OBJECTIVE AND SUBJECTIVE REALITIES: RECOGNIZING THE DIFFERENCES

The underlying assumption of every ‘what happened’ conversation initiated by the mediator in joint sessions and carried on in caucuses is the existence of an objective reality. However it is impossible for the human brain taking in enormous information at any given time, to focus on each and every piece of it. Such information, filtered by the nervous system in terms of relevance,²¹ is affected by cognitive biases- this filtered data constitutes the subjective reality of an individual. No issue arises if subjective realities of two individuals are similar, however that is highly unlikely since their ideas, memories and behavior will be different.

Termed as a distorted shadow of objective reality, subjective realities let people see clearly only parts of the former, while other parts remain inaccessible to the active mind.²² Experience shows that subjective realities of disputants are often quite different from not only the objective reality but also from each other’s- this is precisely why disputes arise. In this light, it is important to understand why these subjective realities—which also influence our behaviors—differ from the objective reality and the implications that they can have.

According to Joel Lee,²³ the real problem lies in the failure to appreciate this difference as it is incorrectly presumed that subjective reality equates objective reality.²⁴ Subjective realities are created by people through an unconscious process of selection of

²¹ Jordan Gaines Lewis, *This Is How the Brain Filters Out Unimportant Details*, Psychology Today (Feb. 11, 2015), <https://www.psychologytoday.com/us/blog/brain-babble/201502/is-how-the-brain-filters-out-unimportant-details>

²² Stephen A. Diamond Ph.D., *Redefining Reality: Psychology, Science and Solipsism*, Psychology Today (Jan. 01, 2010), <https://www.psychologytoday.com/us/blog/evil-deeds/201001/redefining-reality-psychology-science-and-solipsism>

²³ One of the first proponents of mediation in Singapore, Joel Lee is a principal mediator and trainer with the Singapore Mediation Centre.

²⁴ Joel Lee, *Ramblings of A Neuro-Linguist: Dealing with the Problem of Perception*, Kluwer Mediation Blog (Apr. 14, 2013), <http://kluwermediationblog.com/2013/04/14/ramblings-of-a-neuro-linguist-dealing-with-the-problem-of-perception/>

particular aspects of objective reality.²⁵ Misunderstandings prevail between both parties due to varying subjective realities, causing them to attribute blame to each other. Aware that the disputants will have incompatible stories, one of the primary tasks of a mediator is to understand the two versions of objective reality and assist in recreation of a third which is mutually acceptable to both parties.

Once parties understand the inadequacy of their subjective realities, they are more likely to be open to considering other aspects of objective reality which could alter their deductions. After understanding the variance in parties' subjective realities, a mediator can share it along with complete information and underlying reasoning provided by each party with the other side. Both parties will then be in a better position to understand their own conclusions.

Through reframing and rephrasing parties' statements, mediators attempt to effect changes in their behavior and approach to the conflict. Through usage of soft phrases, parties are encouraged to reconsider their subjective realities and realign the same with objective reality to the extent possible. However before doing so, the mediator has to gain the confidence of parties to ensure that they do not feel threatened during this process.

IV. DIRECT OR INDIRECT COMMUNICATION (?): BRIDGING THE COMMUNICATION GAP BETWEEN PARTIES

A mediator can communicate with the parties either directly or indirectly while conveying ideas and opinions. While direct communication refers to stating what a person feels or thinks without mincing his/her words, indirect communication is a more subtle way of communicating the same point which requires the listener(s) to read between the lines.²⁶ Consider the case of a person disappointed with the conduct of other party. While a direct communicator will express his frustration, stating 'I am annoyed with your behavior', an indirect communicator will not only use words but also non-verbal behavior or articulate his displeasure metaphorically.

The manner of communication can provide a great deal of insight into a person's psychology. An indirect communicator might think that acting in the heat of the moment

²⁵ Diamond, *supra* note 22.

²⁶ Cynthia Joyce, *The impact of Direct and Indirect Communication*, *Indep. Voice (Int'l. Omb'n Ass'n.)*, November, 2012 at 1.

hurts the feelings of the other party as well as is detrimental to the settlement process itself. However, that does not mean that direct communicators intend to hurt the listener- their thought process could be to avoid any ambiguities during communication.

Parties' approach in communicating their opinion can play a crucial role in escalation or de-escalation of a conflict. For instance, where the listener prefers direct communication, an indirect communicator might come across as evasive, ambiguous and suspicious²⁷- this makes it hard for such listener to believe in the communicator's offer. Conversely, a direct communicator comes across as rude, uncompromising and inconsiderate to listeners preferring indirect communication. In both cases, negotiations between parties will most likely fail with the conflict escalating into a formal dispute.

Involvement of a mediator facilitating communication between disputants can give rise to numerous possibilities. A mediator should understand not only the parties' preference of communication—from their body language and behavior—but also their own range in order to avoid the direct-indirect communication dilemma. The mediator having the same style of communication as parties is the best case scenario- practically speaking, that does not happen much though. Where parties' approach is distinct from that of the mediator's, the latter is advised to change their communication style accordingly to gain the former's trust and mediate the dispute more effectively. This can be suitably illustrated with the help of two examples:-

Illustration 1: Two parties, sharing a long-standing commercial relationship, are embroiled in a dispute over payment terms. While one party seeks full payment, the other side considers the demand unjustified in light of deficiency in the former's service. Negotiations between them have failed in the past. During mediation, parties prefer to communicate indirectly since their relationship is at stake. Feeling that parties are unable to make any real progress towards settlement, the mediator seeks to encourage direct communication between them. However, parties see it as an insensitive move, and attribute this to mediator's failure to understand the complexities associated with their dispute.

Illustration 2: In a family property dispute, emotional tension prevails amongst the parties. Preferring direct communication with each other, they often engage in taking potshots

²⁷ Joel Lee, *Thoughts on Direct and Indirect Communication*, Kluwer Mediation Blog (May 14, 2012), <http://kluwermediationblog.com/2012/05/14/thoughts-on-direct-and-indirect-communication/>

during the session. The mediator seeks to prevent parties from doing so which, in his opinion, will be detrimental to settlement. Keeping this in mind, he encourages parties to communicate indirectly which will also give them time to think and ponder over their actions. However parties see him as an indecisive, spineless figure who avoids getting to the point, while raising questions on his authority in the whole process. The mediator on the other hand feels that parties' impatience and aggressive nature might wreck the mediation process.

The abovementioned illustrations are limited to cases where conflicting parties share the same communications approach. However, a situation where both parties have opposing styles is equally likely. In such cases, one party may perceive the mediator to be biased in another's favor with similar communication style (since, broadly speaking, there can be only two styles). To avoid such situations, mediators are suggested to find a middle ground and develop their own style of communication, tailored to meet the needs of both parties.

One might ask how mediators can develop their own style when there are only two possible approaches. The answer lies in the mediator's role of a translator²⁸ - he/she often puts his reframing skills into use during mediation. For parties with contrasting approaches, a direct communicator might probably be unable to understand the exact meaning of the statements of the opposite party. In such cases, the mediator can use his reframing and reiteration skills to reduce the communication gap and ensure that there is no information asymmetry.

For mediators, it is equally important to address the biased perception of parties towards one another, based on their divergent communication styles. Most likely to come out in caucus with respective parties, these labels can be done away with through reframing their behaviors. Eliminating these labels is an important step towards countering the irrational biases of a party, and can be achieved with mediator's assistance.

Where a party is open to the possibility of modifying their communication style, the mediator can act as a coach and guide such party (preferably in private sessions) in conversing in a manner more suited to the other party's needs. Obviously, the mediator will have to first illustrate to such party the importance and necessity of arriving on a settlement in mediation, before it can be convinced to change the approach.

²⁸ Lee, *supra* note 27.

V. INTUITIVE AND DELIBERATE (ANALYTICAL) THINKING

Individuals arrive on decisions either through intuitive (rapid) or deliberative (slow) thought processes,²⁹ or in some cases, a fusion of both. According to Gordon Pennycook (Canadian psychologist) and his team, all human beings are primarily intuitive driven by emotional factors during decision-making.³⁰ All individuals however, can think both intuitively and analytically. People with years of experience in deliberate thinking can also rely on intuitive thinking, especially in matters outside the ambit of their specialization. At the same time, highly instinctive people can also think deliberately in certain situations.

Reliance on instincts can be both a good and a bad thing.³¹ Good, because honed over millennia of human evolution, intuitive thinking helps us in taking efficient decisions where rapid response is crucial. In such cases, rational, analytical thinking is likely to cause ‘paralysis by analyses.’³² How many times has it happened that we go to a restaurant for the first time and order an exquisite-sounding dish? Going for analytical decision making in such cases could take a long time since there are numerous options on the menu. Worst to worst, even if we end up hating the dish, we know now what not to order the next time.

Intuitive thinking is bound to let us down in cases—like the ‘bat-ball problem’³³—requiring effortful analytical thinking. Intuition played a crucial role in the life of early hunting groups living closer to nature and often faced with the choice of ‘fight or flight.’ However, modern world is a different story altogether. The quick response associated with it

²⁹ Thea Zander, Michael Öllinger, and Kirsten G. Volz, *Intuition and Insight: Two Processes That Build on Each Other or Fundamentally Differ?*, National Center For Biotechnology Information (Sep. 13, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5020639/>

³⁰David Ludden, *Are You an Intuitive or Analytical Thinker?*, Psychology Today (Feb. 21, 2016), <https://www.psychologytoday.com/blog/talking-apes/201602/are-you-intuitive-or-analytical-thinker>

³¹ Adrian F. Ward, *Scientists Probe Human Nature--and Discover We Are Good, After All*, Scientific American (Nov. 20, 2012), <https://www.scientificamerican.com/article/scientists-probe-human-nature-and-discover-we-are-good-after-all/>

³²John Tauer, *Paralysis by Analysis in Athletes*, Psychology Today (June 1, 2011), <https://www.psychologytoday.com/blog/goal-posts/201106/paralysis-analysis-in-athletes>

³³ The Bat-ball problem is a simple test of reasoning ability given by Pennycook in 2015.

“A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?”
A New Twist on a Classic Puzzle, Ass’n for Psychol. Sci. (May 11, 2015), <https://www.psychologicalscience.org/publications/observer/obsonline/a-new-twist-on-a-classic-puzzle.html#.WSFRnpKGPIU>

might be useful in the social realm; however beyond that, important decisions must be taken through a slower but more efficient analytical process.³⁴

Focusing on one thing at a time, deliberative thinking is brain centered (unlike intuitive, which is heart centered) and lacks perspective, tending to be abstract in nature.³⁵ Deliberative thinking thrives in relatively stable conditions where there is no time pressure. This approach is ideal for dealing with complex issues requiring serious, effortful deliberations. For example, it assists the parties during mediation in pursuing the best available options. Apt in cases where guidelines have been established for analysis, this approach can be taught in classrooms.³⁶

Though intuitive thinking has completely opposite features³⁷, it steps in where deliberative thinking proves to be inadequate- the former contains perspective and helps in understanding the bigger picture. Intuitive thinking relies on an individual's experience in a particular situation to produce rapid action.³⁸ Acting on unexplained intuitions, this thought-process gives up the 'best' option in favor of a 'workable' one, especially where time is of essence.³⁹

Intuitive thinking tends to produce a restricted scope of thought, overlooking new perspectives. Focusing only on what is visible⁴⁰ and often plagued with irrational biases, this approach must be avoided during mediation entailing intense negotiations between parties. Parties should employ deliberative thinking more often in order to consciously analyze all information and arrive on a logically sound conclusion. As of now, there is no clarity on the nature of thought processes that parties implement to take decisions in mediation.⁴¹ Even

³⁴ David Ludden, *Which Is More Important: Intuitive or Analytical Thinking?*, Psychology Today (Oct. 30, 2016), <https://www.psychologytoday.com/blog/talking-apes/201610/which-is-more-important-intuitive-or-analytical-thinking>

³⁵ Charles B. Parselle, *Analytical/Intuitive Thinking*, Mediate.com (Nov. 2005), <http://www.mediate.com/articles/parselle6.cfm>

³⁶ Id.

³⁷ For instance, intuitive thinking lacks focus since it considers many things at once.

³⁸ Jean E Pretz, *Intuition versus Analysis: Strategy and Experience in Complex Everyday Problem Solving*, Semantic Scholar (2008), <https://pdfs.semanticscholar.org/6e30/400ce3e4e913edd8640a02ce3a2d6c99dbf5.pdf>

³⁹ Id.

⁴⁰ Steven Sloman, *The Battle Between Intuition and Deliberation*, American Scientist (2012), <http://www.americanscientist.org/bookshelf/pub/the-battle-between-intuition-and-deliberation>

⁴¹ Diane Levin, *Thinking for ourselves: better decision making at the dispute resolution table*, Kluwer Mediation Blog (Nov. 27, 2011), <http://kluwermediationblog.com/2011/11/27/better-decision-making-dispute-resolution/>

though intuition is seen as an unexplainable force leading to erroneous decisions in tricky situations, it is important to note that deliberate thinking suffers from infirmities too⁴².

Specializing in analytical thinking, lawyers are often dismissive of intuitive skills. The undue importance accorded to analytical thinking in legal profession is arguably one of the reasons for inadequacies in the present legal system. Mediation is an attempt towards recognition of the role of intuitive skills in providing the right context for analytical thinking.⁴³ A combination of intuitive and analytical skills—referred to as Holistic thinking—enables an individual to perceive with a whole eye. Holistic thinking encourages parties to move from their ‘win-lose’ mindset to a ‘mutual gains’ approach, which effects settlements in mediation.

VI. BREAKING AND SUBSEQUENT RE-BUILDING OF TRUST

Any individual might tend to be more favorably inclined towards believing in him/her own self than others. Assuming ourselves to be free of flaws, we have no doubts about our trustworthiness. However when it comes to trusting any other person, the first question that we ask is- ‘Can he/she be trusted?’ This is arguably essential since too less information might be available on their integrity to arrive on an informed decision.

On getting a warm, cozy feeling in respect of an individual, one might say that the threshold for trust is met by him/her. However this feeling is considered to be unreliable, for it is fraught with confirmation bias.⁴⁴ Confirmation bias refers to the human tendency to seek information supporting their preconceived beliefs⁴⁵- surrounded with information that reiterate our beliefs, it causes us to ignore contrary facts. This can be suitably demonstrated with the help of an example:

⁴² The experiments conducted on potential dangers associated with deliberative decision making showed that trumping intuitive thinking will lead to inferior moral outcomes. Deliberate thinkers were seen to be more likely to lie for their personal benefit at the expense of others. This was especially true in cases where monetary payoff was involved. They were also less likely to make charitable donations as compared to people who considered the same as an intuitive reaction. Intuitive thinking performed better than deliberation vis-à-vis morality by deterring immoral behaviors in situations of conflict of interest. For further explication, see Chen-Bo Zhong, *The Ethical Dangers of Deliberative Decision Making*, 56 Admin. Sci. Q. 1,25 (2011).

⁴³ Parselle, *supra* note 35.

⁴⁴ Joel Lee, *More Reflections on Trust*, Kluwer Mediation Blog (Aug. 14, 2015), <http://kluwermediationblog.com/2015/08/14/more-reflections-on-trust/>

⁴⁵ Shahram Heshmat Ph.D., *What Is Confirmation Bias?*, Psychology Today (Apr. 23, 2015), <https://www.psychologytoday.com/us/blog/science-choice/201504/what-is-confirmation-bias>

“‘A’ is of the opinion that ‘B’ cannot be trusted. Any information pointing out the trustworthiness of ‘B’ will be—consciously or unconsciously—ignored by ‘A’. Conversely, where ‘A’ considers ‘B’ to be trustworthy, information suggesting the contrary will be either unconsciously ignored or at best, efforts will be made by the former to seek evidence countering the same.”

When conflicts happen, the prevailing trust between parties goes for a toss. Repairing this broken trust thus gains paramount importance in managing and successfully resolving conflicts. Mediators, while attempting to rebuild trust between parties, should distinguish between emotional and strategic trust.⁴⁶ While emotional trust refers to the aforementioned warm feelings in respect of an individual which assures us about his/her reliability, strategic trust is built subject to our understanding, ability and willingness to meet the other person’s interests.⁴⁷

Re-building emotional trust takes a lot of time and often proves to be extremely challenging for the mediator. However, that is not the case in strategic trust which is context-specific. Mediators focus on the interests of parties to develop strategic trust, and how they can satisfy each other’s concerns. In case a party is unable or unwilling or fails to understand the interests of the other side, there can be no strategic trust between them.

Joint and private sessions with parties enables the mediator to improve their understanding of each other’s needs and interests, develop abilities and create options for them and finally, incentivize parties’ performance of obligations by associating it with their concerns or motivations. Where emotional relationships are involved, building strategic trust in the short run may lead to the revival of lost warmth and amiability between parties in future. Keeping this in mind, a mediator must encourage behavior contributing in the building of strategic trust.

VII. ‘PERCEPTION IS PROJECTION’: IRRATIONAL ERRORS BY ‘RATIONAL’ FORCES

⁴⁶ Lee, *supra* note 44.

⁴⁷ Interview with Paul Haenle, Director, Carnegie-Tsinghua Center for Global Policy, in Beijing (Nov. 6, 2014). Also, Natalie Sambhi, *Indonesia and ‘strategic trust’*, Australian Strategic Policy Institute (Mar. 26, 2013), <https://www.aspistrategist.org.au/indonesia-and-strategic-trust/>

Even though all human beings are fundamentally different, a common misperception prevails that every person sees the world in the same light and reacts to it in the same way as us. As our brain receives a large number of sensory signals, the limbic system is required to filter and prioritize them leading to perception bias (such as, selective perception).⁴⁸ On the basis of filtered signals, basic emotions are generated which cause cognitive biases.⁴⁹

Though intuitive thinking mostly produces these biases, they are equally likely to arise while thinking analytically. These biases cause parties to commit irrational errors like fundamental attribution error,⁵⁰ ego-centric bias,⁵¹ stereotyping, halo effect,⁵² overconfidence, confirmation bias, fixed pie perception⁵³ and irreconcilable differences between the competitive and cooperative approach.⁵⁴

For instance, because B perceives the world as an unsparing place (he might have arrived on this conclusion on the basis of past experiences, cognitive biases etc.), he commits an irrational error by thinking that no person can ever be merciful. Since B has made up his mind that genuinely nice people do not exist, any information pointing to the contrary will be ignored by him.

C is a kind-hearted, honest person who goes out of his way to help fellow human beings in times of need. Suffering from the cognitive distortion of overgeneralization,⁵⁵

⁴⁸ Neil Vidmar & Milton Rokeach, Archie Bunker's Bigotry: A Study in Selective Perception and Exposure, 24(1) J. of Comm. 36,47 (1974)

⁴⁹ GR Norman, SD Monteiro, J Sherbino, JS Ilgen, HG Schmidt & S Mamede, The Causes of Errors in Clinical Reasoning: Cognitive Biases, Knowledge Deficits, and Dual Process Thinking, Academic Medicine (Jan. 2017), https://journals.lww.com/academicmedicine/fulltext/2017/01000/The_Causes_of_Errors_in_Clinical_Reasoning__13.aspx#

⁵⁰ Fundamental Attribution Error refers to the individuals' tendency to exaggerate internal explanations for the behavior of another person while completely underplaying the specifics of the situation.

⁵¹ Thinking from their own point of view way too much, people with egocentric bias overestimate their importance in a particular setting. For instance, people working in teams at workplace often feel that they contribute far more than they really do. Resulting in a distorted view of reality and skewed perception, this bias causes people to re-explain events putting themselves in a favorable position.

⁵² Coined by psychologist Edward Thorndike in 1920, halo effect is a bias in which our overall impression of an individual determines our opinion on his/her character and specific traits. This bias commonly manifests itself as the physical beauty stereotype and people's tendency to rate attractive people more favorably than the lesser attractive ones even though both might be equally good in a given scenario.

⁵³ Fixed-pie bias is the erroneous perception amongst negotiating parties that one party's interests directly contradicts the other. This is due to the underlying assumption that the total pie is fixed. Parties often fail to achieve optimal outcomes during negotiations for failing to look beyond the win-lose mindset.

⁵⁴ John M. Grohol, *15 Common Cognitive Distortions*, Psych Central, <https://psychcentral.com/lib/15-common-cognitive-distortions/>

⁵⁵ Overgeneralization is an irrational error which refers to reaching a general conclusion on the basis of a single incident or piece of information. A one-off horrid event can be seen as the commencement of a never-ending, vicious pattern of setbacks.

Also, Grohol, *supra* note 54.

confirmation bias and delusion,⁵⁶ B will project his world view on C's behavior and ignore his virtues since it goes against the former's pre-conceived notions. Worse, he may even ascribe negative intent to C's good deeds to justify his own irrational biases.

When a dispute comes for mediation, the level of trust between parties is about to or has already hit rock bottom- this is attributable to the communication gap. A mediator's job in this light is to revive the communication channels for rebuilding trust between parties. However, equally important for him/her is to change the perception of parties- mediator's involvement is significant in light of the self-fulfilling prophecy.⁵⁷

The way parties see each other will determine their actions (or inaction) over the course of mediation. Their perception can be reformed through information sharing—facilitated by the mediator—which is likely to force them to think holistically, saving them the harm that irrational errors can cause. Parties should also be encouraged to identify and manage their emotions (emotional intelligence) to ensure that they do not impact the unrelated decisions.⁵⁸

VIII. MEDIATING WITH A PSYCHOLOGICAL PERSPECTIVE: SHIFT FROM 'COMPETITION' TO 'COOPERATION'

Mediation is the only mode of conflict resolution which duly addresses the needs, interests and underlying concerns of parties before arriving on 'mutually-agreed' outcome. Experienced mediators make it a point to understand the psychological implications of conflict at hand for the parties. While some individuals fear conflict, others might try to avoid the same thinking that all disagreements are bound to end badly. Some may even consider it a threat to their existence. Such parties will never be able to sort out the outstanding issues in a healthy atmosphere, with negative emotions such as anger, frustration and disappointment prevailing over common sense.

⁵⁶ Delusion refers to clinging on to an incorrect belief in spite of compelling evidence pointing out the contrary.

⁵⁷ According to the self-fulfilling prophecy, where people perceive the world in a certain manner, their actions would ultimately result in a world that they had projected in the first place.

Joel Lee, *Movie Mediation Musings – Arrival*, Kluwer Mediation Blog (Apr. 12, 2017), <http://kluwermediationblog.com/2017/04/12/movie-mediation-musings-arrival/>

⁵⁸ Amanda L. Chan, *6 Science-Backed Ways To Make Better Decisions*, Huffington Post, June 18, 2014, http://www.huffingtonpost.in/entry/rational-decision-making-strategies_n_5474861

O. Henry's short story "The Ransom of Red Chief" provides a great example of psychological game revolving around action and reaction.⁵⁹ To remove the impending deadlocks, a mediator has to understand the psychological needs of the disputants. A corollary to this observation is the need to establish closer ties between psychology and the practice of mediation. Though mediators—as legal practitioners—develop useful discovery skills over time, there is nothing like listening to both parties' version of the conflict.

Mediator's undivided attention not only encourages parties to vent out their emotions constructively but also helps him/her in understanding the latter's psychological interests. Currently the practice of understanding parties' psychology is limited to a few mediators, who have mastered the art over years of practice. Biases, especially where parties disagree on almost everything, can lead to competition instead of cooperation between them.⁶⁰ Conflicts can be better resolved where mediators understand these biases aggravating the conflict and assist in prevailing over them to take rational decisions.

To disrupt the vicious Bias- conflict cycle, mediators should persuade parties to question their cognitive biases in order to gain a 'complete' perspective of the dispute, overcome their perception biases, adopt a problem-solving conflict resolution approach and finally, avoid emotional decision-making. A mediator, like a fly on the wall, is best situated to understand the perspectives of both parties and recognize their biases. In this light, mediators can raise their awareness vis-à-vis the role of unconscious biases in a conflict to encourage problem solving.

Active listening is considered an essential trait for a mediator; however it is equally important for parties to listen carefully to not only the other side's version but also to their own story during mediator's summarization. Reexamining the specifics of the dispute and the facts leading up to it with mediator's assistance, parties are more likely to take an unbiased view and move towards the objective reality.⁶¹

A closer relationship between mediation and psychology is proposed to be developed so that senior mediators could pass on their experience in understanding people to the

⁵⁹ The Ransom of Red Chief by O. Henry, https://www.gutenberg.org/files/50543/50543-h/50543-h.htm#Page_143 (Pp. 143-158)

⁶⁰ Catherine Brys, *What Can Mediators Do To Help Parties Overcome Their Biases?*, Kluwer Mediation Blog (Feb. 3, 2017), <http://kluwermediationblog.com/2017/02/03/what-can-mediators-do-to-help-parties-overcome-their-biases/>

⁶¹ Brys, *supra* note 60.

younger mediators. This will enable the subsequent generation of mediators to alter parties' choice structure by eliminating their irrational biases and cognitive errors (like, overconfidence) which lead to sub-optimal decisions. For example, mediators can set ground rules to facilitate cooperation between the parties. By setting ground rules and encouraging parties to separate people from the problem, mediators urge them to assume a cooperative problem-solving approach. At the same time, decisional autonomy of parties will be respected and maintained at all times.

In psychology, Kahneman effect postulates that the party perceiving losses during negotiations seeks a higher compensation as compared to the party under the perception of gaining from such negotiations.⁶² Appropriate framing and reframing by mediators will nudge the parties away from suboptimal decision-making through altering the meaning of gain and loss and offering a range of choices to the parties.⁶³

IX. CONCLUSION: ACTIVE LISTENING COMES AT A COST FOR MEDIATORS

As mediators sit listening to parties complain and indulge in negative behavior, they are vulnerable to 'dumbing down' effect.⁶⁴ According to latest research, exposure to negativity over continued periods damage such part of listener's brain used in decision-making.⁶⁵ Quite ironically, mediators seem to be compromising on their issue-resolving and decision-making capabilities while trying to get the parties to settle their conflict amicably.

The mediation process should be structured in a manner providing timely breaks for everyone involved therein and to break the vicious circle of action and reaction between parties. A mediator has to maintain complete detachment from negative emotions and impulsive behavior, especially in intense conflicts.⁶⁶ Such timely breaks will enable the mediator to take a step back from the conflict and collect his/her thoughts. The mental and

⁶² Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47(2) *Econometrica* 263,292 (Mar. 1979)

⁶³ Nadja Alexander, *What's in a frame? (or the power of emotions and subliminal messaging)*, Kluwer Mediation Blog (Aug. 26, 2012), <http://kluwermediationblog.com/2012/08/26/whats-in-a-frame-or-the-power-of-emotions-and-subliminal-messaging/>

⁶⁴ Nadja Alexander, *Hazards of the Job: good listening and mental health*, Kluwer Mediation Blog (Dec. 21, 2015), <http://kluwermediationblog.com/2015/12/21/hazards-of-the-job-good-listening-and-mental-health/>

⁶⁵ Christopher Bergland, *Chronic Stress Can Damage Brain Structure and Connectivity*, *Psychology Today* (Feb. 12, 2014), <https://www.psychologytoday.com/blog/the-athletes-way/201402/chronic-stress-can-damage-brain-structure-and-connectivity>

⁶⁶ Joel Lee, *Mindfulness and Mediation*, Kluwer Mediation Blog (Oct. 14, 2015), <http://kluwermediationblog.com/2015/10/14/mindfulness-and-mediation/>

emotional state of the mediator has a real impact on the process as well as parties. A mediator has to be a calm and composing player amidst forces with a volatile relationship.

However, this is merely a short-term solution. In the longer run, a deeper involvement of psychology in mediation is suggested as mediators should be trained to deal with both human emotions and psychology for making mediation more party-centric. Engaging the discipline of psychology in mediation can have far-reaching effects. For example, a recent psychology study indicated that lighting can intensify both positive and negative emotions of an individual which in turn influences his/her rational decision-making capabilities.⁶⁷ Bright light is likely to aggravate the initial emotional reactions of a person towards people and objects.

Though veteran mediators might already be aware of it, this observation is a food for thought for the younger mediators who struggle to exercise authority while mediating with older parties. Incorporating the discourse of psychology within mediation would bring numerous findings on human nature to mediators' view- this is likely to assist them in understanding parties psychologically and reducing negative emotional behaviors.

⁶⁷ NK Park & CA Farr, The Effects of Lighting on Consumers' Emotions and Behavioral Intentions in a Retail Environment: A Cross-Cultural Comparison, 33 J. of Int. Des'n, 17, 32 (2007).