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Influence in mediation — the experience in Texas

Cialdini's six in mediation

Denise Coggiola

Introduction

Influence is a rapidly expanding field of psychological inquiry devoted to discovering the principles that determine beliefs, create attitudes, and move people to agreement and action.[1] Influence examines the process that causes humans to *change*.[2]

The process of generating compliance, then, refers to the process of getting others to say yes to a request. In other words, it is the science of getting what you ask for.

Cialdini's six principles of influence

Cialdini has examined each of six principles as to its ability to produce a distinct kind of automatic, mindless compliance from people, which is a willingness to say yes without thinking first.[3] This article attempts to apply Cialdini's principles — reciprocation, consistency, social proof, liking, authority and scarcity — to mediations, and specifically to court-ordered family mediations. Due to the nature of court-ordered mediations in the state of Texas the mediator is provided, at most, for just one day to help the parties come to an equitable agreement that complies with what the judicial system will approve. The mere fact that the mediation occurs in a typical eight-hour time period lends to a great application to test Cialdini's theory that all these principles apply in an automatic, mindless compliance — a 'click' and 'whirr' as Cialdini writes in his book, *Influence: Science and Practice*.

This article will discuss each principle, detailing specific techniques and tools a mediator could employ to help foster an environment for effective mediation. The mediator's primary goal is to build trust with the parties and an overall confidence in the mediation process. The nature of these principles as automatic or mindless can create a concern that the mediator is manipulating the parties and the process thus eliminating the most important role of a mediator, that of being an impartial third party. However, when influence is employed correctly, it efficiently moves people in positive directions and helps change beliefs, emotions and behaviours. My hope through this article is to show how influence employed correctly in the mediation process will help the parties make wise decisions in the face of uncertainty.

Reciprocity

People tend to say yes when they feel obligated to a requester who has previously provided them with some service or concession.[4] Reciprocity also obligates people to give back the form of behaviour they received.

> French Anthropologist Marcel Mauss in describing the social pressures surrounding the gift-giving process in human culture says that there is an obligation to give, an obligation to receive, and an obligation to repay.[5]

There are three characteristics of the rule of reciprocity.[6]

- The first is that it is extremely powerful and typically overpowers any other factors that would normally determine compliance with a request.
- Second, the rule applies even to uninvited favours which takes the choice of who we want to owe and puts it into the hands of others. An example is sales campaigns that give a popular business gift in order to obtain the right to meet face-to-face in an appointment. Accudata Systems, a large Texas value-added reseller of IT products, performed a sales campaign offering an iPod to select CIO's of large corporations in return for a one-hour appointment to discuss the company's products and services. This sales campaign produced appointments with 30% of the recipients. Another example is the unsolicited gifts given by non-profit organisations that accompany request envelopes for a donation. St Jude's Hospital and the American Heart Association send return labels in donation request packets in order to obligate the individual to send a donation because of the gift.
- Lastly, the rule can spur unequal values or outcomes of exchanges. Many grocery stores position store displays with free samples of the products they wish to promote. The small token sample of the product makes many people feel guilty about just tasting or sampling the product, which in most cases results in the person buying the product.

Survey researchers have discovered that sending a monetary gift in an envelope with a mailed questionnaire will produce increased results that the survey will be returned. In a study performed by AH Church comparing prepaid monetary and non-monetary rewards for returning a survey, on average the increase was near 20% more when the reward was sent with the survey versus the reward returned after the survey was completed.[7] This tends to imply that the principle of reciprocity is more successful when the reward is something tangible or can be visualised by the party.

Concession

Reciprocal concession is another aspect of the reciprocal principle. A requester makes a request that is extreme and most likely will be rejected. The requester then makes a request that is more likely to be accepted by the receiver of the request. The rejection and retreat tactic causes people to say yes more often. Cialdini in his book cites an example of a Boy Scout who approaches people to buy a ticket to the Annual Boy Scouts Circus. Most people do not have any desire to go to the Boy Scouts Circus so they reject his offer of the $5 ticket. The Boy Scout then asks the person if they would like to buy candy bars at $1 each. Most people believe $1 is a fair

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price for the candy bar so they purchase several of the bars the Boy Scout is holding in his hand. The Boy Scout accomplished his aim for the fund raiser. This example supports the general rule that a person who acts in a certain way towards us is entitled to a similar return action.[8]

Reciprocity in mediation

Mediators in court-ordered family mediations can apply the principles of reciprocity to support the parties to make wise decisions by helping them appreciate the positive and negative future consequences of their negotiating behaviour. A party that uses a more aggressive and inconsiderate approach in negotiation is more likely to receive aggressive and inconsiderate behaviour from the other party, even if the other party is naturally inclined toward cooperation.[9] A mediator provides useful help by intercepting negative negotiation tactics and strategies by encouraging the parties to move in a less rebellious direction.

Example: *Woman whose husband has committed adultery and has filed for divorce. Mediator is in a private session with the woman.*

The woman says: 'That cheating SOB is NEVER going to see his kids again!'

Mediator: 'Susan, I can see that you are very upset about your husband having a relationship outside your marriage. It is important for you to keep in mind that if you are emotional and continue to blame your husband in our open sessions your husband will continue to be emotional and site blame on other issues. This will lead to very little progress in settling …'

By coaching the wife to tame her aggressive behaviour, the mediator assists the husband in turn to modify his aggressive behaviour.

A mediator can also facilitate the use of the reciprocity principle by coaching the parties in the give and take process of reciprocity. Coaching one party, usually the party who is filing for divorce, to make a concession on a particular issue will in turn result in the other party making a concession.

Example: *Husband filing for divorce knows that his wife is very concerned about being able to pay the car payment for the new car she has just purchased.*

Husband could offer the concession that each party keep the car they drive and that he would make payments on the wife's car for the first year. The husband offering the first concession should be recognised by the wife and in turn she should reciprocate with a concession in return.

Lastly, because the principle of reciprocity has proven to be more effective with offers that are tangible or visible to the receiving parties, a mediator could adopt the process of writing offers and counter-offers on a white board visible to all parties of the mediation. The offers being visible to the parties will help remind each party that all parties are making concessions in the process of negotiation.

One concern that a mediator should consider while adopting the principle of reciprocity is whether there is a risk of 'losing face' by either of the parties. A mediating party might feel they have lost face where they have made significant concessions from their original position. A mediator can use face-saving techniques in an attempt to protect or repair self-image[10] if a party demonstrates signs of loss of face. A mediator could use the technique of blaming a third party such as the government or school system to remove the blame and sense of responsibility that the person feels having made the concession.

Example: *Father feels cheated that even though he is paying child support and he is the higher income producer between himself and his wife, he is going to lose the tax exemption for one of his children. He doesn't want to pass any tax exemptions to his wife.*

Mediator says: 'Larry, I understand that it doesn't seem fair to you that, even though you are paying child support and your income is twice what your wife's income is currently, you will lose the tax exemption for Tommy, but the State of Texas in their Family Code has established the right of both parties to receive tax exemptions.'

This statement by the mediator will hope to take the guilt away associated with losing the exemption to blaming the State of Texas for establishing standards in divorce.

A party that uses a more aggressive and inconsiderate approach in negotiation is more likely to receive aggressive and inconsiderate behaviour from the other party, even if the other party is naturally inclined towards cooperation. A mediator provides useful help by intercepting [and] encouraging the parties to move in a less rebellious direction.

Consistency/commitment

Cialdini states, 'After committing oneself to a position, one should be more willing to comply with requests for behaviours that are consistent with that position.'[11] Once a person makes a choice or takes a stand, they will experience personal and interpersonal pressure to act consistently with that commitment. People convince themselves that they have made the right choice in order to feel better about their decision.[12]

Consistency in most circumstances is valued and associated with personal and intellectual strength. It is a desirable societal trait because it is at the root of rational, stable, and honest people. Inconsistency is commonly thought to be an undesirable personality trait.[13]

A technique as a mediator to gain consistency with the parties, is to ask easy yes questions leading up to the important question. This is called the 'start small' procedure.[14] A mediator could use this technique during mediation in order to help a party commit to a bigger decision, such as saying yes to allowing the mother to have primary residence.

Example:

Mediator: 'Larry does your wife love the children?'

Larry: 'Well yes'.

Mediator: 'Does your wife provide the care for the well-being of your children each day while you are at work?'

Larry: 'Well yes'

Mediator: 'Larry are the children used to having their mother care for their daily needs?'

And so on.

Because it is in people's best interest to be consistent, people tend to automatically be consistent even in situations where it is not the sensible way to be. A parent who has made the decision to not allow her 15-year old daughter have friends over on week nights is asked if a friend could come over and study. Even though the benefit of having a friend help tutor her daughter might bring up her grade, the mother continues to automatically say no to the request.

This automatic response is a 'click' and 'whirr' response. Social psychologists think that commitment is the click that activates the whirr. Once a person makes a commitment, the point is set for automatic consistency with the commitment.[15] Research has shown that asking citizens to predict whether they would vote on Election Day has increased the turnout at the polls where voting is not compulsory.[16]

Commitment in mediation

Publicly delivering an opening statement to both parties in mediation is an effective technique to gain commitment to the mediation process from both and take advantage of Cialdini's commitment principle. During the opening statement the mediator should review practical guidelines for the participants in mediation.

Guidelines such as one person speaking at a time, no personal attacks, confidentiality obligations, time constraints and a commitment to begin the mediation, are all examples of commitments that the mediator will need in order to increase the likelihood that the parties will follow them. The mediator should review these guidelines publicly and gain the parties' commitment publicly. Research has shown that people who publicly commit are more apt to abide by their commitments.[17]

Self Magazine has been promoting a campaign of weight loss by offering participants from their magazine to chart the results of their weight loss publicly online through a web portal. Great results are published each month of people who tracked significant weight loss and attributed their commitment to the program with the web portal and the shared messages of the other participants.

Commitments can produce inner change or a change to our self-image.[18] During the process of making concessions in mediation, a person's self-image might change. A good example of this is a husband who has filed for divorce which the wife is fighting. The wife does not want to divorce her husband. She can't visualise herself as a 'divorced woman'. Through the process of the divorce mediation by making decisions (commitments) about property and children, the wife might begin to change her self-image. She might begin to view herself as a divorced woman.

Once a person's self-image is at a different place, the person will begin to comply naturally with many different requests and decisions that are consistent with the new self-view.[19] A mediator who can help to foster the new self-view will help speed the process of many decisions to follow.

Another benefit for commitments that lead to inner change is that they 'grow their own legs'.[20] Due to the pressure for people to appear consistent, people who have accepted a change in their self-image will convince themselves that the image is a correct image and they will begin to pay attention to facts they had not noticed before. Fathers who walk into mediation believing that they should gain primary residence for their children, and then through the mediation process accept the image of a 'weekend father', will naturally begin to make offers in order to come to decisions about visitation schedules, involvement with school, doctors' visits and child support.

One final thought on consistency that is important to a mediator: because consistent people are considered to be more logical, rational and honest, it is important for a mediator to model actions of consistency. Consistent processes in the mediation will foster trust between the parties and the mediator, as well as confirm impartiality of the mediator. Specific areas a mediator can demonstrate consistency are:

- the length and number of times a private session is used;
- keeping control of how much a party is allowed to 'beat up on' the other party;
- deciding which party leads with options or issues.

Social proof

The social proof principle states that one should be more willing to comply with a request or behaviour if it is consistent with what similar others are thinking or doing.[21] 'We view a behaviour as correct in a given situation to the degree that we see others performing it.'[22] The principle assumes that if a lot of people are doing the same thing, they must know something we don't.

Cialdini discusses in his book a story about a long line of people forming outside a bank in Singapore. The bank happens to be on the corner where a bus stop is located. Singapore was experiencing a strike of the bus system so the people standing on the corner were building in size due to the limited number of buses running. People driving by saw the line and assumed that people were waiting to get into the bank. This caused a run on the bank by people removing their money.

This principle can be both a major strength and a major weakness, depending on the circumstances. Another example is bartenders salting their tip jar (by putting a few coins in at the start of their shift) or churches salting their collection baskets. People will be more inclined to tip or to contribute because money is in the

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container which demonstrates that others believe giving is a good idea.

The social proof principle is most influenced under two conditions.

- The first is uncertainty: when people are unsure, they are more likely to accept the actions of others as correct.[23]
- The second condition that most influences social validation is similarity: 'The principle of social proof operates most powerfully when we are observing the behaviour of people just like us.'[24]

The Jonestown Massacre was an example that demonstrates the influence of both similarity and uncertainty. Hundreds of people, following the lead of one person who drank poison, killed themselves and their children. Cialdini believes the key to their ability to comply with the killing was the environment of uncertainty. Jones had led his people out of the US to a remote place in South America. This caused great uncertainty for the people which contributed to their willingness to kill themselves.

A technique called the 'list technique' is often used by sales professionals. In this technique, a sales professional shows a long list of people who are currently using the service. This helps validate to the requested party that others see value in the service and is a motivator to help the requested party see themselves as similar, causing them to purchase the service.

Social proof in mediation

The principle of social validation can apply in mediation. Lawyers and mediators often state what a probable decision by the judge would be if the case went to court. Pointing out what the judge is likely to award in a situation is an example of showing the parties that people in similar situations are receiving similar awards.

Example:

Mediator: 'Susan, the State of Texas Family Code has set standards for divorce. The judges in this county almost always comply with what the state has determined as "standard awards" to parents.'

Divorce creates uncertainty. Mediators and lawyers can help parties believe in the process of mediation by stating that, 'You can NEVER determine in advance what a judge will rule in any case'.

This statement helps to validate the process of mediation and the commitment to settlement.

Lastly, a mediator could use normalising techniques. Parties in mediation are typically convinced that their problems are unique. It is appropriate at times to normalise the situations.

Example: *During the opening statement or an intake meeting the mediator could state, 'I understand that you might be feeling angry and bitter towards your partner through this divorce process. It is normal to have these types of feelings.'*

Another example would be in a private session when all but one issue has been resolved, the mediator would say: 'Susan, it is not unusual to feel like you have made most of the concessions today. Many people during the final negotiations find it difficult to make the final concession.'

The objective of normalising the situation is to open the parties to the notion that other people have been in their situation and that they made similar decisions. This helps shift the party's perception that the situation is hopeless and without remedy to one that has precedence and possibilities.[25]

Social validation may not work for a mediator in cases where there is a strong cultural tie to a group. Certain religions, like Catholicism, do not acknowledge divorce. These situations can make it difficult to find similar people making similar decisions, making it hard for the mediator to validate what the law is stating since the law or beliefs in this case are religion based.

Beliefs are housed and formed in our brains. Functionally, our brains treat beliefs as internal 'maps' of those parts of the world with which we do not have immediate sensory contact. Without our beliefs, we could not know about the world outside our senses or about meanings, reasons or causes. Beliefs are designed to operate independent of sensory data. Beliefs are not supposed to change easily or simply in response to disconfirming evidence.[26] Because of these purposes, the mediator would need to consider using another technique besides social validation in order to help the person view their beliefs with a different frame of reference than their current position.

Liking

'People prefer to say yes to individuals they know and like.'[27] Joe Girard, known as The World's Greatest Car Salesman by the Guinness Book of World Records, said his secret to success is two things: offering a fair price and being someone they liked to buy from.[28]

Premier Designs is a direct sales company that markets high fashion costume jewellery. Independent jewellers provide showings of the jewellery in women's homes, who in return receive free jewellery. This marketing effort is similar to the Tupperware Corporation mentioned in Cialdini's book. The jeweller sells the jewellery because the guests are buying from their friend not the Premier Designs Jeweller. The friends buy because they feel if it is good enough for their friend to invite this unknown sales person into their home then it must be a quality enough product for them to purchase. The attraction, warmth, security and obligation of friendship are brought to bear on the sales setting.[29]

There are several factors that increase the overall attractiveness and likeability of a person. Physical attractiveness, similarity, compliments, contact and cooperation, and association are all components.

Cialdini believes there is a 'click' 'whirr' response to attractive people. Research has shown that we automatically assign to good-looking people favorable traits of talent, kindness, honesty and intelligence.[30] This is called a halo effect by social scientists. As an outcome, attractive people are more persuasive in changing attitudes and in getting what they request.[31]

Liking in mediation

Physical attractiveness

A mediator should make a conscious effort to appear attractive and physically pleasing in appearance to the parties during mediation. Since research has proven a connection between physical appearance and people's attitudes, the mediator can capitalise on the benefit of traits mentioned such as honesty, kindness and intelligence. These traits

help foster trust and impartiality with the parties.

With the likeability principle established, the mediator can introduce a technique called 'reframing':

> Reframing is a translation exercise through which the mediator changes the communication by moving it from one language to another, with the hope that in the second language the comment may be more palatable to the other side or more conducive to collaborative problem solving.[32]

This will help the parties hear the ideas or suggestions in a more positive reference since it is being articulated by the mediator whom the parties see as kind, honest, intelligent.

> ***Example:***
>
> *Wife: 'Larry is always late and doesn't care about the kids. I am left trying to convince the kids that their dad is really coming'.*
>
> *Mediator: 'So you would like to discuss a plan so that Larry can be on time for his weekly visits with the kids.'*
>
> *A mediator needs to be careful with the technique of reframing. At times reframing can cause a party to feel manipulated or can be perceived as favouring one party over another.*

Similarity

Similarity is the next factor that increases likeability. People who are similar like each other. The similarities can involve opinions, personality traits, background, or lifestyle.

As a mediator there is a concern that presenting an image of similarity to one party will show impartiality in the process. Instead, similarity can be demonstrated during communication, both non-verbal and verbal.

Effective communication and compliments

Effective listening can create an environment that demonstrates similarity without actually acknowledging that you agree with a party. Effective listening starts with non-verbal language such as open body language, direct eye contact and consistent facial expressions.[33] Studies show that only 15% of communication is the words or content while 25% is tone of voice and 60% non-verbal.[34]

The role of communication is the exchange of meaning — the giving and receiving of feelings, opinions, ideas or beliefs.[35]

A mediator shows interest and understanding to the party by asking questions that are open ended and can't be answered by a 'yes' or 'no' answer. Open-ended questions have the effect of opening up the discussion, expanding the issues and broadening the perspective of the person. These questions will help uncover additional information which will provide an opportunity for the mediator to express to the parties areas that they have in common.

These common areas foster the principle of liking.

> Another factor that produces liking is *praise*. Although they can sometimes backfire, compliments generally enhance liking and, thus, compliance.[36]

A compliment can backfire in mediation if a mediator compliments one party and creates a feeling of partiality with that party. Compliments can be delivered positively during any stage of the mediation process. A good example of a compliment is, 'I commend both of you for agreeing to come to the mediation. Most mediations lead to a settlement agreement versus the formal process of going to court.'

Contact and cooperation

Attitude is affected by the number of times we have been exposed to something in the past. For example, an experiment that flashed faces of several individuals on a screen proved that the more times they were flashed the more the subjects viewing the faces came to like that person when they met in a subsequent interaction.[37]

A common sales technique is to repeatedly leave messages for their prospect when they are trying to reach them by phone. The act of leaving a message creates a familiarity in that sales person's voice. The familiarity of the voice creates a basis for liking the person. After numerous messages have been left, the prospect, when finally reached by phone, will feel a rapport has been established with the sales professional.

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Cialdini's fourth factor that increases likeability of a person is *contact and cooperation*.

Society has recommended a 'contact' approach to improving race relations. This has been proven to be unsuccessful. After years of school integration, there is little social integration. In fact, continued exposure to a person or object under unpleasant conditions such as frustration, conflict, or competition leads to less liking.[38]

Cialdini points out that the crucial element to successful joint efforts is not just contact but uniting efforts toward common goals. It is the cooperation required to achieve the goals that finally allows rival people to experience one another as reasonable, valued helpers and friends.[39]

One might think it is a stretch to believe that a husband and wife who are participating in divorce mediation could walk away as friends; however, the mediator should focus on the process of dispute resolution in order to foster an outcome of settlement towards the disagreements.

> A mediator is responsible for conducting and managing the process of dispute resolution, while the parties are responsible for making decisions on the concrete content. The mediator is a 'process' expert and their success will be determined by the extent to which there is an effective process in place that is skillfully implemented.[40]

Therefore, if a mediator can bring the parties to align themselves with similar goals, they will be working in cooperation and in a sense as allies. These goals are identified first by defining the problems. 'A problem well defined is a problem half-resolved.'[41] Mediators can make a valuable contribution to the parties' negotiations by assisting them to define the parameters of the conflict objectively, while taking the time to uncover the true concerns, needs and desires of the parties.[42]

It is common for parties to think they agree on nothing when the issues and interests are uncovered. The mediator's role is to point out areas where parties are not in conflict. These agreements may be as simple as they both share an interest in taking care of the children or that they both want to minimise the costs when options are considered. Mediators can then help the parties to resolve each problem. As each party experiences a sense of accomplishment with resolving a problem, the parties will draw closer to cooperation and settlement overall.

A problem well defined is a problem half-resolved. Mediators can make a valuable contribution to the parties' negotiations by assisting them to define the parameters of the conflict objectively, while taking the time to uncover the true concerns, needs and desires of the parties.

Association

A final factor linked to liking is *association*:

> The principle of association is a general one, governing both negative and positive connections. An innocent association with either bad things or good things will influence how people feel about us.[43]

Parents teach their children the negative side of 'guilt by association' by telling their daughter not to be friends with Suzy because Suzy dresses like a slut and boys will think their daughter is willing to give the boys sexual favours if their daughter hangs around Suzy.

Positive association is demonstrated each day in television ads where movie celebrities are advertising specific products. Unconsciously the viewing public feels the product is worth purchasing since a movie celebrity uses it.

Association could be a negative factor for a mediator in displacing stereotype images portrayed towards individuals during and after divorce. Those stereotypes like 'weekend dad', a dad who doesn't care about the day-to-day concerns of the children but is there to only have fun with them, or 'single mother', a mother whose job and social life will continually be interrupted by her children's needs which interferes with job performance and new relationships. Society can view the stereotypes as negative, making it challenging for a party to want to adopt one of these roles. The mediator needs to be empathetic to this association principle in order to help the parties reconcile a new image in order to move forward with options and decisions in divorce mediation.

Authority

> An authority principle for compliance can be worded as follows: One should be more willing to follow the suggestions of someone who is a legitimate authority.[44]

Cialdini states that people's obedience frequently takes a place in a 'click' and 'whirr' fashion with little or no conscious deliberation. Information from a recognised authority can provide people with a valuable shortcut for deciding how to act in a situation.[45] This 'click' and 'whirr' associated with authority can quickly help the mediator gain from the parties' trust and confidence. Associations with authority are not only reflected with the mediator but the lawyers and any third party expert that might be present during mediation.

There are symbols of authority that trigger the mechanical compliance that has been described above. The first is titles.

Titles are the easiest symbol of authority but the hardest to achieve.[46]

A mediator is required in most US states to accomplish a 40-hour course in Mediation. Family Mediators are required to accomplish two additional courses in Family Law and Family Mediation. There are programs, such

as Southern Methodist University, Texas, offers, that provide a Masters Certificate or a Masters in Dispute Resolution. Both of these accomplishments can help earn the title of being a 'Credentialed Mediator'. A mediator's titles or credentials will help trigger authority, providing a source of power for the mediator.

A second authority symbol is clothing. A series of studies by social psychologist Leonard Bickman (1974) revealed that people were more inclined to respond to a request of an individual wearing a security guard uniform versus normal street clothes. The well-tailored business suit has traditionally indicated authority in our culture.

In Texas a research study measured the number of people that were willing to follow an individual into the street with oncoming traffic (jaywalking). The variable for the study was that the individual crossed the street in a suit or in street clothes. Three-and-a-half times as many people crossed into traffic behind the suited jaywalker.[47] Studies such as these validate the need for a mediator to dress in professional business attire.

A second authority symbol is clothing. A series of studies by social psychologist Leonard Bickman (1974) revealed that people were more inclined to respond to a request of an individual wearing a security guard uniform versus normal street clothes.

Authority in mediation

> Mediators have considerable potential power even though they do not possess the authority to impose binding decisions on parties. This power is understood as the ability to affect the perceptions, attitudes and behaviour of the parties and attorneys.[48]

Authority can also create an imbalance of power. A mediator's role is to help balance the power between the parties in order to provide an environment of 'fair' negotiation. An imbalance of power can occur when one of the parties is represented by a lawyer and the other is not. The presence of a lawyer can cause the non-represented party to feel defeated. A mediator can help avoid this situation by performing 'shuttle mediation'.

> Shuttle mediation involves the parties being placed in separate rooms, and the mediator moving continuously between them, shuttling messages back and forth and becoming their sole avenue of communication.[49]

Scarcity

'The way to love anything is to realise that it might be lost,' said GK Chesterton. 'A scarcity principle for compliance can be worded as follows: One should try to secure those opportunities that are scarce or dwindling.'[50]

A mediator who specialises in court-ordered family mediations finds this principle one of the most difficult to overcome. Divorce, in theory, takes all property, possessions, children, and freedoms that married couples share and divides them up. That is the outcome of a divorce settlement. Because the outcome is to divide all elements, the scarcity principle could apply to everything the couple possesses.

There are two sources of power with scarcity.

- The first is that we know that the things that are difficult to get are typically better than those that are easy to get.[51]
- The second power within the scarcity principle is as opportunities become less available, we lose freedoms.

People hate to lose the freedoms they already have.[52] Psychologist Jack Brehm explains the human response to diminishing personal control by stating, 'Whenever free choice is limited or threatened, the need to retain our freedoms makes us want them more than before.'[53] A good example of this is a recent story about parents who forbid their 15-year old daughter from seeing a 17-year old boy. They felt their daughter was too young for a dating

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relationship. Their daughter ran away with the boy and caused a major search by police and the public looking for the teenagers over a week's period of time. When the kids were found the girl stated that even though her parents forbade her to see the boy she wanted to be with him even more so they ran away.

Scarcity in mediation

Scarcity of time is a big issue to deal with in mediation. As time becomes less available with their children, the parents lose freedoms. The mother who has primary custody of the children loses time with her kids every other weekend. She loses the control of what they eat, when they go to bed, and with whom they play. The dad not having primary custody gives up the freedom of input on day-to-day decisions for doctors, sports, teachers and a loss of relationship. Both parties are in competition for the same commodity which is time.

A mediator can help in defence of the scarcity principle by assisting the parties understand what they want from the scarce item for which they are competing. Research has shown that the joy is not in experiencing or acquiring the scarce commodity but in the possessing of it.[54] Asking probing questions to uncover the interest the party has in the commodity will help determine additional options or solutions.

A mediator can also help the parties to understand that a scarce commodity does not taste or feel or sound or ride any better because it is less available.[55]

> ***Example:*** *In the case of a husband and wife who are arguing over who will live in the current home making the home the scarce commodity.*
>
> *Mediator: 'Larry, help me understand what you like about this house?'*
>
> *'… So what you are saying is you would like a house that is close to your work and the kids, as well as one that has very little yard work.'*

The mediator asking probing questions uncovered that the interest was not the house, the scarce commodity, but a preference over location of his home.

Another technique a mediator could use in support of the scarcity rule is emphasising time. Court-ordered family mediations usually occur just before the assigned court date with the judge. During mediation, the mediator could emphasise the limited time to settle that is left before the court date occurs. This limited time frame should encourage the parties to work towards an agreement on the day of mediation instead of waiting for the unknown of what the judge will award on their court date. Establishing a critical deadline helps the mediator to use the scarcity principle to their advantage.

Conclusion

Writing this article comes as a sweet segue for me at a critical time as I begin my new career as a Dispute Resolution Professional. Having been a sales professional for over 25 years, I clearly recognise and can personally validate the theories that Cialdini discusses in his book *Influence: Science and Practice*. After researching Cialdini's six principles of influence related to court-ordered family mediations, I have proved to myself that these principles I used during my sales career selling IT products and services will transfer to Dispute Resolution. ●

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ADR DEVELOPMENTS

Expanding the use of ADR in law

The Attorney-General has asked NADRAC to enquire into and identify strategies to increase the use of ADR in the legal profession, litigants, courts and tribunals. The aim is to provide incentives and remove any barriers to ADR options in order to reduce civil proceedings. NADRAC has also been asked to advise on any initiative the government may be able to take to support their recommendations. NADRAC welcomes contributions on this matter.

For further information go to <www.nadrac.gov.au>. ●

Research shows litigation does not achieve good outcomes

A recent US study published in the *Journal of Empirical Legal Studies* has shown that settling produced better results for clients than going to trial.

Randall Kiser of DecisionSet, a consulting firm that advises clients on litigation decisions, found that although 80–92% of cases settle, a very high percentage of cases that proceeded to trial did not achieve the best outcome for the parties.

The study found that defendants that made a bad choice in taking a case to trial would lose in 24% of instances. Plaintiffs fared much worse with 61% of cases brought by plaintiffs resulted in the plaintiff being unsuccessful. In only 15% of cases, plaintiffs and defendants bringing the action, came out ahead, that is, the plaintiff received more than the defendant had offered; and the defendant paid less than the plaintiff was asking.

The research showed the legal costs for plaintiffs that got it wrong were much less than defendants that made the wrong decision. Plaintiffs making the wrong choice, on average, were left with approximately $US43,000 in legal fees and the losing defendants with approximately $US1.1 million.

The study suggests that either the lawyers may not have been explaining their client's their realistic chances of success or the client is simply not listening. Kiser discovered that it is not so much the lawyers' experience, legal education or law firm size that impacted on the advice that lawyers gave, but it was the type of case that was more significant. ●

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