

THE IMPACT OF PSYCHOLOGICAL PRIMING IN THE CONTEXT OF COMMERCIAL LAW MEDIATION

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I INTRODUCTION

Through hundreds of studies in numerous countries, the impact of psychological priming has been analysed and assessed with different primes, contexts, subjects, groupings, and stress levels. The focus of this article is to consider the impact that priming has in the context of commercial law mediations, particularly where there is a pre-existing imbalance of power between the parties. The intention is to assist experienced commercial lawyers and mediators (already well-versed in the intricacies of mediation) to have a greater understanding of the impact of priming, enabling them to consider what they can incorporate or eschew to enhance the mediation process.

The specific primes considered here are physical appearance (including dress, colour, and mimicry), venue (including aesthetics, tactile elements, and temperature), language and rudeness, and other variables such as stress and references to money. The areas of commercial law which this article may translate to include but are not limited to contractual disputes, small and medium enterprise and franchising disputes, insolvency including directors' duties, trademark disputes, debt litigation, shareholder oppression, and employment law.¹

It is hoped that by closely considering the impact of psychological priming in the commercial law arena, and specifically in the context of mediation, parties and their legal representatives may be enlightened and made more aware of how certain physical, visual, verbal, or tactile cues may nonconsciously drive or alter thought processes, behaviour, and decision-making constructs. By becoming increasingly attuned to priming mediators, legal representatives and parties can seek to identify and address those impacts, and also seek to avoid or positively engage with them.²

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1 To focus the scope of this article on the commercial arena, non-commercial contexts are not directly analysed. It is noted however that there are many worthy areas for exploration of psychological priming in diverse mediation arenas, such as immigration and asylum seeker tribunals, criminal law (including sentencing), stereotype-based priming of race, religion, and gender, family law (including family violence, children's matters, and imbalances of power of a domestic nature), health and medical law (including guardianship orders and medical negligence), and probate and testator family maintenance disputes. These are however unfortunately outside the scope of this article.

2 Writers such as Rachael Field note:

the theoretical ethical imperative of mediator impartiality as the basis for achieving party self-determination has been challenged by practitioners and commentators alike as being unattainable in practice, unreal and unworkable. Realistically, mediators in practice are unable to be completely even-handed and at arm's length from the parties. And if they were to be, then the process would simply support the more powerful party in imposing its interests on the weaker party [and that] a reformed approach to mediation ethics is necessary; one that supports party self-determination, but that also acknowledges the reality of the relational, interactive and engaged nature of mediation practice.

See Rachael Field, 'Rethinking Mediation Ethics: A Contextual Method to Support Party Self-Determination' (2011) 22 *Australasian Dispute Resolution Journal* 8, 8-9.

Anecdotally, it is common to see or even participate in behaviour which may (intentionally or otherwise) be priming parties to react in a particular way. Priming itself relates to the brain “readying” itself to respond in a certain fashion.³ This may be in the medium of language choice (from initial letters of demand, settlement offers, opening statements, and negotiations at mediation), tone, clothing, venue selection, selection of counsel or experts, physical presentation of mediation books, and so forth. All such steps are engaged in, one may infer, to represent the client without fear or favour to the absolute best of the practitioner’s ability. The physical representation elements are deeply ingrained, from the thickness of the letterhead paper through to layout and furnishings in the waiting area.

However, if such factors have in fact caused a chain of reactions within the other party, that priming behaviour may have unintentionally shut down paths of enquiry, options for negotiation and settlement, or willingness to engage at all. This may result in the client ultimately proceeding to trial, or if a result is achieved, it may have been at the expense of a faster, more creative, or superior unexplored solution.

Accordingly, it is hoped that legal representatives and mediators may be empowered to identify that behaviours or thought processes which they engage in (with the intention of improving their client’s position) may be counterproductive and worth altering, with a view to keeping open and engaged dialogue happening in a meaningful way at mediation, to improve the prospect of a successful and sustainable outcome.⁴

By learning about priming and how it occurs within the domain of mediation, it is also anticipated that this knowledge can be applied to the context of imbalances of power. The intention is that while legal representatives maintain and meet the supreme obligation to act as an officer of the court and in the best interests of their client, it may be identified that often their client will actually be best served by keeping dialogue with the other party open and unfettered, to increase the prospects of a prompt, commercial, successful, and lasting resolution.

A Conversations with Peers

In discussing the topic for this article in separate conversations with three fellow legal practitioners, each agreed that various priming stimuli have an impact,

3 Craig Smith, ‘Applying Findings from Neuroscience to Inform and Enhance Mediator Skills’ (2015) 26 *Australasian Dispute Resolution Journal* 249, 254.

4 See Laurence Boulle generally considering the need for mediators to understand factors imposing on a participant’s decision-making framework to maximise prospects of successful outcomes:

Ultimately the best way of managing the intuitive biases may be to empower those affected by them through understanding what they are and appreciating their impacts in judgment, choice and decision-making. This involves bringing some of the powerful motivating factors in the unconscious mind into conscious awareness where the rational and deliberative parts of the brain can factor them into decision-making. This suggests the need for mediators to have deeper understandings of how their clients are thinking and making decisions and why they find it difficult to decide, even where commercial reality is crying out for settlement.

Laurence Boulle, ‘Predictable Irrationality in Mediation: Insights from Behavioural Economics’ (2013) 24 *Australasian Dispute Resolution Journal* 8, 17.

which we unthinkingly adapt to accommodate, without deliberate assessment or acknowledgment of the thought process behind our choices.

One peer noted that he had attended a mediation one Friday, where one of the other lawyers had been in street clothes due to his workplace's 'Casual Friday' policy. His attire had been neat and smart, but patently not a suit or modern approximation. My peer noted that throughout the day, the other lawyers and barristers consistently spoke over and interrupted the lawyer in casual dress, and it was clear that what he was saying was not being attended to meaningfully. My peer later reflected on whether the clothing was the only anomaly with the lawyer's performance. He believed that it was, and that there was no other logical explanation for the conduct of the other practitioners.

Another peer initially disagreed that her attire could or should impact others, and that her clothing choices were simply based on weather and mood. We then had an exchange where I specified a court, a client, a specific application, and noted that her evidence was strong. I asked her to imagine what she would wear, and she stated that she would wear a black suit, red shirt, and high heels. I then altered one fact: she had learned the evidence was much weaker than anticipated, and there was a mea culpa on the part of her client which must be raised at the start of the application. She responded, 'Ah — I get it' and she described a more subdued outfit to wear.

A third peer and I discussed factors we consider when choosing a venue for mediation: when we may host, when we (or occasionally a client) will agree for the opposing lawyers to host, and when a neutral location (or judicial mediation) is most apt. We also discussed times when we visit clients on site, and how that can impact clothing, equipment, and even language choices, as the lexicon between types of clients (and even different courts and tribunals) can vary. We agreed that people are constantly making choices, either due to priming or potentially seeking to prime those around them, whether these behaviours are being examined or not.

II PSYCHOLOGICAL PRIMING

A *Psychological Priming as a Concept*

Psychological priming is 'the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context'.⁵ The stimuli causing the phenomena to arise can be a construct or a specific object or event, and may appear to be unrelated to the priming effect elicited. The stimuli may be unique or repeated, fleeting or over an extended period. Priming can involve any

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

of the senses, and may depend entirely on the observer's idiosyncratic history and personal frame of experience.⁶

The effect of the prime can precede the individual's conscious perception of the priming stimulus,⁷ and can impact both conscious and nonconscious goals.⁸ The priming event often exerts 'an unintended, passive influence on the interpretation of behavior'.⁹

Where a person has been exposed to a relevant priming construct, they will be more likely to process subsequent information (stimuli, behaviours, etc) within the framework of that prime. The more times that the person is exposed to the prime, and the shorter the space of time between the exposure to the prime and the subsequent stimuli, the greater the likelihood is that the person will be influenced by the prime.¹⁰

For example, if, when growing up, your father frequently used a lemon scented cleaner to wipe down the table after dinner, being exposed to the smell of the cleaner may cause you to be more likely to wipe down the area where you ate. Further, a visual prime (such as a bottle of cleaner or a bowl of lemons) may have the same effect. However, if the cleaning of the table was sporadic and a variety of cleaning products was used, the priming effect would be more tenuous.¹¹

While there are different types of priming,¹² their commonality is 'a concern with the unintended consequences of an environmental event on subsequent thoughts, feelings, and behaviour'.¹³ There is a residual effect after the priming stimulus has been experienced, and the resultant behaviour or thought processes occur.¹⁴ The neural processes impact the individual's way of understanding and responding to the world, leaving the primed and associated representations active for a period afterwards, and in 'the time it remains active, it exerts a passive effect on the individual, one that he or she is not aware of and does not intend — and is therefore unlikely to control'.¹⁵

6 Ulrich Ansorge, 'Priming' in E Bruce Goldstein (ed), *Encyclopedia of Perception* (SAGE Publications, 2010) 825.

7 Ibid.

8 Henk Aarts, 'Goals, Motivated Social Cognition, and Behavior' in Susan T Fiske and C Neil Macrae (eds), *The SAGE Handbook of Social Cognition* (SAGE Publications, 2012) 75, 75.

9 Bargh, Chen and Burrows, above n 5, 230.

10 E Tory Higgins, John A Bargh and Wendy Lombardi, 'Nature of Priming Effects on Categorization' (1985) 11 *Journal of Experimental Psychology: Learning, Memory, and Cognition* 59, 64–6.

11 Rob W Holland, Merel Hendriks and Henk Aarts, 'Smells Like Clean Spirit: Nonconscious Effects of Scent on Cognition and Behavior' (2005) 16 *Psychological Science* 689, 689.

12 Including but not limited to conceptual priming, mindset priming, sequential priming, and subliminal priming.

13 John A Bargh and Tanya L Chartrand, 'The Mind in the Middle: A Practical Guide to Priming and Automaticity Research' in Harry T Reis and Charles M Judd (eds), *Handbook of Research Methods in Social and Personality Psychology* (Cambridge University Press, 2000) 253, 259.

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

15 Bargh and Chartrand, above n 13, 259.

The unconscious and unintentional nature of priming warrants investigation and consideration for mediators, legal practitioners, and parties who wish to have a better understanding of the impact of these phenomena in mediation.

B Where and When Priming May Occur

Priming, even in relation to a single social concept or interaction, can affect the observer's perception, motivation, goal, pursuit, judgement, social behaviour, and their evaluation of other stimuli.¹⁶ Priming has been shown to nonconsciously and immediately impact diverse thinking and behavioural activities, such as walking speeds,¹⁷ rudeness,¹⁸ voting,¹⁹ and assessing whether someone may be a murderer,²⁰ and may be impacted by diverse and seemingly unrelated matters, such as what floor the mediation is on, or what number they rolled on a dice earlier.²¹

People are not lumps of clay waiting to be manipulated by any stimuli they come into contact with. Other factors such as situational norms, goals, motivation, and free will have a role in an individual's conscious or nonconscious response to a prime.²² However, the impact of priming in mediation cannot be understated.

While an individual's knowledge and understanding about the world around them is influenced by their experiences and history, it is often assumed that complex behaviours are the product of deliberate, rational thought and intention, rather than being tainted by less tangible influences.²³ However, ongoing research into priming and automaticity increasingly reveals that incidentally activated knowledge and perceptions can impact a person's categorisation, judgement, and interpretation of stimuli, and that this together with behavioural information,

16 John A Bargh, 'What Have We Been Priming All These Years? On the Development, Mechanisms, and Ecology of Nonconscious Social Behavior' (2006) 36 *European Journal of Social Psychology* 147, 147–8.

17 Bargh, Chen and Burrows, above n 5, 236–8.

18 Ibid 233–6.

19 See generally, Janet Takens et al, 'Party Leaders in the Media and Voting Behavior: Priming Rather than Learning or Projection' (2015) 32 *Political Communication* 249. See also William L Benoit and R Lance Holbert, 'Political Communication' in Charles R Berger, Michael E Roloff and David R Roskos-Ewoldsen (eds), *The Handbook of Communication Science* (SAGE Publications, 2010) 437.

20 See generally, Christine Gockel, Peter M Kolb and Lioba Werth, 'Murder or Not? Cold Temperature Makes Criminals Appear to Be Cold-Blooded and Warm Temperature to Be Hot-Headed' (2014) 9(4) *PLOS ONE* 1.

21 Philip N Meyer, 'Psychological Shortcuts: A Behavioral Economist's Work Offers Lessons for Legal Storytellers about Judgment and Decision Making' (2016) 102(1) *ABA Journal* 26. It is to be noted that there is considerable research showing the heavy priming links between numbers (digits, words, and verbal) priming the participant to recognise and attune to further numbers, however such studies are outside the scope of this article. See, eg, Bert Reynvoet, Marc Brysbaert and Wim Fias, 'Semantic Priming in Number Naming' (2002) 55 *Quarterly Journal of Experimental Psychology Section A* 1127; Jamie Campbell and Bert Reynvoet, 'Context-Dependent Semantic Priming in Number Naming' (2009) 35 *Journal of Experimental Psychology: Learning, Memory, and Cognition* 1552.

22 Bargh, above n 16, 159–60.

23 Melissa Ferguson and John Bargh, 'How Social Perception Can Automatically Influence Behavior' (2004) 8 *Trends in Cognitive Sciences* 33.

goal-relevant information, context information, and unrelated recent experiences influence decision-making processes and subsequent behaviour.²⁴

Priming, which occurs from a perceived stimulus, comes about through two mechanisms: repetition and preparation. The gravity of the effect of any such prime on actual behaviour has been linked closely to the strength of neural associations between the prime and the behaviour itself. Where the link is tenuous, less frequently reinforced, or there are several steps between the prime (eg object, colour, social context, personality or physical trait, stereotype) and the outcome (eg anger, withdrawal, fear, thirst), the magnitude of the priming effect is expected to be weaker.²⁵

Priming by repetition relates to the way that the nerve cells within the brain (neurons) respond to and represent a particular stimulus to that individual. Many sight-based neurons only represent one feature (eg colour) and will only fire if that precise input is observed. However, the stimulus input threshold necessary for firing may decrease upon repeated exposure, meaning that sensation can be primed to observe and notice that prime from a lower concentration of stimulation.²⁶

For priming by preparation to occur, ‘an association between two features is necessary and sufficient. The features do not have to resemble one another’.²⁷ Rather, the person has, over time, observed the world around them and can then nonconsciously process that information to prepare and sort associated features to make logical predictions. For example, if you entered a dark room, at night time you may without thinking feel the wall beside the doorway to find a light switch, whereas if it were daytime, you may instead open the curtains to let in the light. Often, ‘preparation can also account for conceptual priming ... based on the more idiosyncratic expectations of the observer’.²⁸

C Priming in the Context of Commercial Mediation

The often unintentional, passive, and unobserved nature of priming causes it to be ubiquitous, unobtrusive, and vulnerable to manipulation or unwanted outcomes.²⁹ Significant research on priming has been conducted by the political sphere, linguists, the legal industry, and marketing and consumer driven entities, in addition to the science and philosophical communities.³⁰ The intentions are

24 Ibid 33–6, 38.

25 Ibid 37.

26 Ansorge, above n 6, 825–7.

27 Ibid 827.

28 Ibid.

29 There can also be highly unexpected and undesirable outcomes from priming. In one study, the concept of ‘power’ was deliberately activated, however this unconsciously spread to the concept of ‘sex’ in participants more likely to be sexually aggressive or sexually harass others: see John A Bargh et al, ‘Attractiveness of the Underling: An Automatic Power-Sex Association and Its Consequences for Sexual Harassment and Aggression’ (1995) 68 *Journal of Personality and Social Psychology* 768.

30 Bargh, above n 16, 164.

diverse: while the legal industry may be seeking to identify vulnerabilities and eliminate bias, political scientists research long term agenda adoption, while marketers seek to increase customer satisfaction and sales.

Here, it is desired that enhancing understanding of how and why priming occurs and how specific stimuli may impact parties to a mediation, bias and reluctance to meaningfully engage may be diminished or eliminated. It is hoped that this in turn will achieve a superior, more satisfying, and long term successful outcome for all parties.

Mediation is inherently a collaborative and relational setting. There is an expectation that information will be exchanged, parties responded to, and a certain degree of interdependence, if parties have attended with a genuine intention to mediate. This means that the parties will be more vulnerable to priming behaviour by others in attendance, as ‘people are more likely to interpret others’ behavior and use it as a behavioral input when focus on the other person is high, whether due to disproportional or situational factors’.³¹ It is also accepted that parties’ recent experiences and repeated exposures may impact their later responses and behaviour, including at mediation.³² While pure ‘neutrality’ may not be achievable (and arguably does not exist) it is expected that by minimising the number and impact of negative primes, parties and legal representatives will have optimal conditions to openly ventilate issues, generate options, and assess clearly whether a good resolution is achievable.

In this vulnerable and collaborative environment, potential priming from the appearance, conduct, words, and the like of other persons present is particularly likely, notwithstanding that they may be intending to be highly self-reliant and independent. The effect can be broad, from low-level and potentially unexamined behaviours such as emotional expressions, through to highly deliberate actions such as economic decisions.³³ This has been established through studies involving resource allocation models and the ‘prisoner’s dilemma’, and exacerbated where anticipated reciprocity has not been given.³⁴

The collaborative nature of mediation is generally positive, and parties may be more inclined to take into account the beliefs and perspectives of the other party. This enables the practitioners involved to avoid an unfair imbalance, particularly if there is a pre-existing imbalance of power, with a view to maximising the potential for a successful outcome.

31 Dirk Smeesters, S Christian Wheeler and Aaron C Kay, ‘The Role of Interpersonal Perceptions in the Prime-to-Behavior Pathway’ (2009) 96 *Journal of Personality and Social Psychology* 395, 397, 410.

32 See Bargh and Chartrand, above n 13.

33 Smeesters, Wheeler and Kay, above n 31, 397, 410.

34 See generally, Sarah Maxwell, Pete Nye and Nicholas Maxwell, ‘The Wrath of the Fairness-Primed Negotiator When the Reciprocity Norm Is Violated’ (2003) 56 *Journal of Business Research* 399.

III COMMON CATEGORIES OF PSYCHOLOGICAL PRIMING WITHIN COMMERCIAL MEDIATION

A *Physical Presentation of Persons in Attendance*

Physical presentation is a significant factor of any first impression. From clothing to the strength of a handshake, physicality has an impact. Here, we consider clothing, colours, and body language. Choices regarding physical presentation (for legal practitioners and also the mediators, who may elect neutral background colours or a strong colour, depending on the parties) also apply to many other facets, such as body language, tone of voice, and even gender.

We will not be delving into discussion regarding gender or ethnicity (or the contemporary or archaic stereotypes created by such factors) here, or how priming may operate cross-culturally, or between two different cultures in the one mediation setting. It must be noted however that such elements independently can have a priming effect, occasioning expectations and framing, and even the divergence from such expectations can have a significant impact, and various factors may have a significantly different priming effect dependent on culture or ethnic origin. The focus for this article is a contemporary Western corporate context, and the research considered is largely from that pool.

Unexpected physical aspects may also have an impact, as many observe during pregnancy, when robed in court, on crutches, in religious robes, unexpectedly dishevelled (such as from being caught in the rain, or falling), and so forth. The examples are diverse and limitless. These elements can dramatically alter an observer's perception, which in turn can cause a stark change in how they are related to. This can be particularly notable if there is a pre-existing relationship, prior to a first face-to-face meeting where an unexpected physical condition becomes known. This impact may alter how they are engaged with and what is expected of them.

It has been identified in some studies that even an individual being primed to consider themselves more attractive can be linked to them feeling (and being perceived by others as being) more powerful, leading to them achieving more favourable outcomes in negotiations, while those primed by considering times when they felt less physically attractive than others had the inverse effect.³⁵

1 *The Impact of Clothing Selection*

It goes without saying that many professionals, and notably commercial lawyers, are intentional about their physical presentation. There are hundreds of articles and blog posts discussing diverse opinions about contemporary notions regarding the importance of first impressions and the role that physical appearance plays:

35 See Peter Belmi and Margaret Neale, 'Mirror, Mirror on the Wall, Who's the Fairest of Them All? Thinking that One Is Attractive Increases the Tendency to Support Inequality' (2014) 124 *Organizational Behavior and Human Decision Processes* 133, 133–5, 143–4.

suits and ties, skirts versus slacks, make-up, earrings for men and women (and number and type thereof), cufflinks, wingtips, tattoos, high heels, facial hair, and the professional morass branded ‘Casual Friday’.

Notwithstanding that physical appearance is one of the first noticed primes forming part of any first impression, many would balk at the suggestion that they may weigh or value someone’s words, position, or worth based on their appearance, as it suggests superficiality or an improper or unfair bias or naiveté.

The nonconscious impact of clothing is likely to be influenced by both the culture of the observer, and the observer’s knowledge about the culture of the wearer (or the clients or other persons the wearer is interacting with, and may have based their attire on). Red is a prime example: a red wedding dress (as an extreme illustration) would give very different cues at a current day Caucasian wedding, vis-à-vis a traditional Indian or Chinese wedding. Colours which may be considered powerful or peaceful or innocent or passionate may change considerably depending on the audience.

Wearing more formal clothing than others in a group may impact thought processes, particularly abstract cognitive processing, facilitating the pursuit of long term rather than immediate goals, vis-à-vis concrete processing, which focuses on smaller but more immediate desired outcomes. It may also negatively impact the sense of approachability and social distance.³⁶ In one study (the ‘Slepian study’) it was anticipated and found that these impacts occurred, without regard to socioeconomic and sociometric status or the novelty of the attire (ie where the subject changed from formal to casual or vice versa) but directly based on the clothing worn.³⁷

The Slepian study ultimately found that wearing formal clothing ‘enhanced abstract processing’ and ‘category inclusiveness’ and ‘favour[ed] global perceptual processing’.³⁸ The fifth experiment in that study also canvassed social distance, measuring perceived ‘social commonality, social closeness, intimacy, [and] power’.³⁹ This identified an asymmetrical social distance in relation to power, and in relation to access and control over resources, specifically that:

the powerless depend on the powerful (for those resources), whereas the powerful are more independent, and thereby more socially distant. Power as a measure of social distance should principally be considered in this relative sense; the powerful do not feel more socially distant from all people, but specifically from low-power counterparts (from whom they are more independent). ... The other measures of social distance did not capture relative differences in social distance; they asked participants to consider social targets broadly, instead of asking participants to consider their motivation to affiliate with low- versus high-power counterparts.⁴⁰

36 Michael L Slepian et al, ‘The Cognitive Consequences of Formal Clothing’ (2015) 6 *Social Psychological and Personality Science* 661, 662–7.

37 Ibid 661–2.

38 Ibid 665–6.

39 Ibid 664–5.

40 Ibid 666 (citations omitted).

This is important to keep in mind when determining appropriate clothing choices in mediation, as there may be times when it is appropriate to forego the power suit, and (as when visiting a client at their home or workplace) consider less formal attire to be more approachable, and potentially also to be more receptive.

2 *The Impact of Colour*

Our everyday environment is impacted by colour: it is a pervasive stimulus, which has various meanings between different contexts, and its impact on mediation is worth considering. It has been posed and demonstrated that colour exerts a powerful influence on test performance, motivation, and behaviour.⁴¹

In one study (the ‘*Maier Study*’) the hypothesis was posed and established that ‘the brief perception of red in achievement settings evokes an attentional process grounded in avoidance motivation — local relative to global processing — and that this in turn has a negative influence on intellectual performance and accounts for the link between red and performance attainment’.⁴²

There are two ways that colour conveys information and meaning. The first is by learned associations from repetition, such as traffic lights, stop signs, and no smoking signs. The second is biologically based. The stimulation evoked by colour can implicitly motivate by positively gearing one towards (appetitive behaviour) or away from (avoidance motivation) the subject. This must be viewed within a contextual framework, as a colour may be viewed as a warning in certain circumstances (eg red on the road) but passion in other circumstances (eg red roses).⁴³

The Maier Study hypothesised that a short exposure to red (versus grey) would occasion a negative impact on performance due to avoidance motivation and consequential reduced global processing, meaning participants were less able to process a visual stimulus holistically.⁴⁴ This hypothesis was made out, and ‘[p]articipants who viewed red solved ... fewer items correctly ... [and] evidenced more local processing than those in the gray condition, and this local processing in turn predicted worse performance’.⁴⁵

Once avoidance-based processes commence, it undermines the achievement desired and individuals tend to ‘focus on more concrete, detailed aspects of the environment and to attend to a narrower, more constrained set of mental

41 Markus A Maier, Andrew J Elliot and Stephanie Lichtenfeld, ‘Mediation of the Negative Effect of Red on Intellectual Performance’ (2008) 34 *Personality and Social Psychology Bulletin* 1530, 1530. See more broadly Max Lüscher, *The Lüscher Colour Test* (Ian A Scott trans, Pan Books, 1972) for a deeper review into specific colours and their respective potential impacts.

42 Maier, Elliot and Lichtenfeld, above n 41, 1531.

43 Ibid 1531, 1538.

44 Ibid 1531.

45 Ibid 1536–7. The writer notes that the link between red and a negative impact on performance has been demonstrated now in Germany and the United States, however given the similarities in terms of ongoing pairings (such as red corrections in school, traffic signals) it would be interesting to see whether similar links are found in other parts of the world, where those links are not reinforced.

constructs'.⁴⁶ By creating a local processing construct, the person becomes more rigid and less able to access a broader range of information and abilities otherwise available to them, or to fluidly change between mental operations, which impairs intellectual performance.⁴⁷ This would patently negatively affect a party during mediation.

3 Body Language, Unintentional Mimicry, and Building Rapport

Physical presentation such as body language, facial expressions, speech patterns, and the like can cause mimicry, or the 'chameleon effect' to occur⁴⁸ which in turn can create or strengthen rapport.⁴⁹

Sometimes, a mediator or legal representatives may wish to track and mirror non-verbal patterns of communication to minimise intervention, focusing only 'on the component that needs adjustment and leav[ing] what is working alone ... [to achieve a] faster, more respectful resolution' such that '[c]lients feel the mediation experience has been a positive one even though they may not consciously know why'.⁵⁰

This effect is where behaviour 'passively and unintentionally changes to match' another individual's, as 'the mere perception of another's behaviour automatically increases the likelihood of engaging in that behaviour oneself'.⁵¹ It relates to automatic, unintended mirroring, rather than an intentional response,⁵² such as when in a warm room one person removes their suit jacket, and others feel comfortable to follow suit. It has been identified that perception 'causes similar behaviour, and the perception of the similar [mirrored] behavior on the part of the other creates shared feelings of empathy and rapport'.⁵³ This in turn can produce 'empathic understanding and even greater liking between people, without their having to intend or try to have this happen'.⁵⁴ This in turn increases the prospects of advanced cohesion and fondness within the group.⁵⁵ This is important at mediation, because if rapport is built and empathy generated, the parties may be more likely to have meaningful discussions, populate options, and achieve a realistic outcome with which the parties can all be satisfied.⁵⁶

46 Ibid 1532.

47 Ibid.

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

49 Carol Powell, 'Alternative Dispute Resolution' (2015) *New Zealand Law Journal* 257, 258.

50 Barbara G Madonik, *I Hear What You Say, But What Are You Telling Me? The Strategic Use of Nonverbal Communication in Mediation* (Jossey-Bass, 2001) xvii.

51 Chartrand and Bargh, above n 48, 893.

52 Ibid 894.

53 Ibid 897.

54 Ibid.

55 Ibid 907.

56 For more on intentional mirroring and matching, see Madonik, above n 50, pt 1 chs 2–3, pt 2 ch 5. Here however, we are looking at unintentional primes.

While the construct of rapport in itself is outside the scope of this article, it is to be noted that the creation and fostering of rapport in mediation (both from physical behaviour, but particularly by verbal interactions) improves the effectiveness of mediation and negotiation, leading to superior outcomes.⁵⁷

In one key study (the ‘*Bargh Interrupting Study*’) subjects were divided into three groups: a control group, and further groups primed with rudeness or politeness.⁵⁸ During the study, they were required to speak with the examiner, who at the time was (deliberately) in conversation. This meant that the participant had to wait, or interrupt. When the results were compared to the control group, significantly more of the ‘rude’ primed subjects interrupted, and significantly fewer of the ‘polite’ primed subjects interrupted.⁵⁹ It was found that when participants were primed with a stereotype or trait construct they were more likely to act in line with the primed stereotype, even in an unrelated task.⁶⁰

Other types of mimicry studies include:

- Synchronisation between speech and body movements;
- Facial mimicry (however it has not yet been established whether the mimicry is limited to the expression itself, or whether the emotion is actually experienced);⁶¹ and
- Behaviour matching (such as posture, where they stand within a group, and body configurations).⁶²

Testing has identified that mimicry of physical behaviour (as isolated as rubbing one’s face or shaking one’s foot) even occurs between strangers, where there was no active goal for the participants to like or get along with one another.⁶³

Nonconscious mimicry may occur at a reduced degree, however, in groups with an exchange (rather than communal) orientation, as they are likely to be less attuned to the needs of the others present. An ‘increased perception of others’ behavior would be expected to produce greater rapport and smoother social interactions’.⁶⁴ Mediators can, and frequently do, facilitate a collaborative and communal goal at the outset of mediations which would facilitate this framework.

B Venue Selection for Mediation

An important element to consider when planning a mediation is where the event should take place. Sometimes, one party or their lawyers will offer to host,

57 Ilan Bronstein et al, ‘Rapport in Negotiation: The Contribution of the Verbal Channel’ (2012) 56 *Journal of Conflict Resolution* 1089, 1089–94, 1105–10.

58 Bargh, Chen and Burrows, above n 5, 233–6.

59 Chartrand and Bargh, above n 48, 894–5. See also *ibid* 234.

60 Chartrand and Bargh, above n 48, 894.

61 *Ibid* 896.

62 *Ibid*.

63 *Ibid* 896–907.

64 *Ibid* 907.

ostensibly to reduce the cost for both parties, and potentially to minimise their inconvenience. This may ultimately be counterproductive, if the grandiose foyer is larger than the other side's office, the painting on the wall costs more than the equity in the other side's home, and the staff member offering coffee and biscuits earns more than what the other side's company netted in the last fiscal year.

It may be expected that formidable and impressive signs of power and resources such as lavish mahogany tables and sweeping panoramic city views position the other side to submit in the way the better-resourced party may desire. However, such displays may create a disconnect and resistance, exacerbating discomfort and isolation, shutting down communication, and limiting their global thought processes.

What may be intended to incite compliance may backfire, limiting the more vulnerable party's ability to openly communicate in mediation, and minimising their willingness or ability to generate discussion about interest-based issues and ideas — all of which ironically make it more difficult to achieve a positive outcome. Alternatively, if the discomfort is sufficiently great, it may cause a party to simply make an unattainable agreement in order to be able to leave.⁶⁵

Modest rooms with lower ceilings, cracked vinyl chairs, and a coffee machine that makes a strange noise may assist in enabling the parties to feel at ease, more in control, and facilitate full participation in the mediation.⁶⁶

In this section, we consider physical aspects of the venue itself and the temperature, reviewing factors which may subconsciously prime (such as temperature) rather than overtly impact (such as thin walls and loud voices).

1 *Physical Aspects of the Venue*

Unsurprisingly, if the mediation space is austere and lonely, this may 'have a detrimental effect on the party's ability to understand and negotiate in good faith and not to succumb to any form of duress or pressure'.⁶⁷ Experienced mediators recommend that the space ought to have natural light, comfortable chairs, a well-sized table, an inviting area for basic refreshments, and the option for a short break or to talk in smaller groups⁶⁸ (whether some outside space, or a communal area with something to look at) as unsurprisingly, '[p]leasant surroundings help to relax people and put them at ease. ... Anything that can be done to make the experience a little more pleasant and a little less stressful will assist the parties'.⁶⁹

65 As floated in relation to the former version of the County Court mediation rooms in Tim McFarlane, 'A Healthy Environment' (2016) 90(4) *Law Institute Journal* 35, 36.

66 Madonik, above n 50, pt 2 ch 5.

67 McFarlane, above n 65, 36.

68 Madonik, above n 50, pt 2 ch 5.

69 McFarlane, above n 65, 36–7.

(a) Ceiling Height

The height of the ceiling has been considered to be among the leading architectural designs which influence the psychological wellbeing of consumers and impacts energy, health, and the ability to think.⁷⁰ This can impact parties, even if the appearance of height is ‘illusory’ (such as in aeroplane cabins)⁷¹ suggesting that it is a psychological prime, rather than a physical response, to the actual height of the ceiling.

In one study (the ‘*Meyers-Levy Study*’) higher ceilings were found to prime subjects to think about freedom, encouraging relational processing (noting that ‘relational elaboration entails elaborating freely or uninhibitedly on multiple pieces of data so as to discern commonalities or higher-order abstract points of intersection that they share’⁷²) while lower ceilings primed subjects to concepts of confinement, with an outcome of more item-specific processing (noting that ‘item-specific elaboration involves confining or restricting one’s focus to each item by itself and concentrating on its precise, context-specific (ie relatively concrete) attributes’).⁷³ It was considered to be relevant, potentially necessary, for the ceiling height to be directly observed.⁷⁴

The Meyers-Levy Study identified that subjects in the high ceiling room ‘emphasized the commonalities among product features (vs the specifics of each individual feature) when rendering their evaluations’,⁷⁵ and demonstrated enhanced relational processing (here, ‘recall clustering’) and resulted in them reporting a greater feeling of freedom, while the low ceiling prime enhanced item-specific elaboration (here, cued-category recall).⁷⁶

In mediation, it is desirable that parties are able to access and maximise ‘high ceiling’ abilities relating to relational elaboration and clustering, including abstract, problem solving, and creative thinking. Further, cluster thinking and recall⁷⁷ may assist in identifying and generating a larger volume of issues to be ventilated, and options to discuss (and ways to do so). Conversely, abilities increased by lower ceilings may in some circumstances be helpful in mediation (such as if a resolution is agreed in principle and the parties are drafting and proofreading a settlement agreement) however the attention to detail and small print magnified by item specific processing⁷⁸ may be counterproductive and seen as ‘nit picking’ or pedantry during the bulk of the mediation. Similarly, primes which engender fear or loss can depress creativity and willingness to participate.⁷⁹

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

71 *Ibid.*

72 *Ibid* 175.

73 *Ibid.*

74 *Ibid* 177.

75 *Ibid* 180.

76 *Ibid* 181–2.

77 *Ibid* 183.

78 *Ibid.*

79 Richard Birke, ‘Neuroscience and Negotiation’ (2012) 29(3) *GPSolo* 62, 62.

(b) Chair Firmness

Tactile sensations can come from the hands or other parts of the body, either as a passive or active touch, and are critical to intrapersonal and interpersonal awareness. One study (the ‘*Ackerman Study*’), through six experiments, reviewed how various dimensions of haptic experiences (specifically, weight, texture, and hardness) ‘nonconsciously influence[d] ... the acquisition and management of information’, and the judgement and decision-making process of subjects.⁸⁰

The Ackerman Study found that weight (a heavier or lighter clipboard) was ‘metaphorically associated with concepts of seriousness and importance’, texture (a rough or smooth puzzle) was ‘metaphorically associated with the concepts of difficulty and harshness’, and both active hardness (touching a hard block or a soft blanket) and passive hardness (sitting on a hard or soft chair) were ‘metaphorically associated with the concepts of stability, rigidity, and strictness’.⁸¹

It was further found that participants who sat in hard chairs perceived the other party in a negotiation to be ‘more stable’ and ‘less emotional’, than what was believed by subjects who had sat in soft chairs.⁸² While there was no remarkable difference between the two groups of subjects in terms of initial offer prices, where parties made a second offer, subjects in hard chairs made an offer closer to their initial offer than those who had been sitting in a soft chair. It was therefore found that ‘hardness produces perceptions of strictness, rigidity, and stability, reducing change from one’s initial decisions, even when the touch experience is passive in nature’.⁸³

In mediation, it may be considered preferable for parties to not be overly rigid, to ensure that a broad spectrum of ideas can be thoroughly discussed, and many different potential outcomes generated.

2 Temperature

(a) Ambient Warmth

Unsurprisingly, ‘dark, gloomy and wet weather over a lengthy period’ can cause parties to experience ‘depression, lethargy and anxiety’.⁸⁴ In addition to short term situations and longer term phenomena such as seasonal affective disorder, factors as localised as the room temperature can prime parties in a mediation.

One relevant study (the ‘*Gockel Study*’) sought to demonstrate that the ambient temperature in a room could affect whether a subject considered a stranger in a line-up photo likely to have committed a ‘cold-blooded’, ‘hot-headed’, or

80 Joshua M Ackerman, Christopher C Nocera and John A Bargh, ‘Incidental Haptic Sensations Influence Social Judgments and Decisions’ (2010) 328 *Science* 1712, 1713.

81 Ibid 1713–14.

82 Ibid 1714.

83 Ibid.

84 McFarlane, above n 65, 35.

other type of crime, and consequently what sentence should be meted out to the criminal.⁸⁵

The rooms were set to temperatures well within comfortable ranges: the low temperature rooms were at 19.9°C, the medium rooms were at 23.8°C, and the high temperature rooms were 26.2°C.⁸⁶

Overall, participants in the cooler rooms made findings involving premeditation and murder and gave longer sentences to the potential criminals than those in the moderate to high temperature rooms.⁸⁷ There was not always a significant difference between the medium and high temperature room subjects, however. The subjects in the high temperature rooms attributed a greater number of impulsive crimes than the low temperature room subjects, however, there was not a considerable difference between the high and medium, or medium and low temperature room participants (though the difference across the scale, from low to high, was material).⁸⁸

The Gockel Study was considered to demonstrate a further interplay between coldness or heat in physical and interpersonal contexts, and that ‘colder temperatures lead to a more negative, ie, colder, evaluation of target persons’ and that ‘[i]n addition to perception and judgment, temperature can impact behavior’.⁸⁹

This needs to be taken into account at mediation, particularly if the selected venue is known to be particularly warm or cool, or if the temperature may be able to be regulated by the parties.

(b) *Warm or Cool Objects*

Another study relating to temperature (the ‘*Williams Study*’) hypothesised that holding a warm (or cold) item would nonconsciously ‘increase feelings of interpersonal warmth (or coldness)’ towards another person, and increase the likelihood of generosity.⁹⁰

Interpersonal warmth is ‘a constellation of traits related to perceived favorability of the other person’s intentions towards us, including friendliness, helpfulness, and trustworthiness’ and is an automatic nonconscious assessment conducted to identify whether a new acquaintance is a potential friend, a potential non-foe, or a potential enemy.⁹¹

It has been identified that the same part of the brain which processes physical warmth also processes psychological warmth, including trust and empathy.⁹² It

85 Gockel, Kolb and Werth, above n 20, 1.

86 Ibid 2.

87 Ibid 5.

88 Ibid 3–5.

89 Ibid 6.

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

91 Ibid.

92 Ibid.

is considered that physical feelings of warmth, such as close physical contact, holding a warm drink, or having a hot bath ‘might activate memories of other feelings associated with warmth (trust and comfort), because of early experiences with caretakers who provide warmth, shelter, safety, and nourishment’ which can create close mental associations.⁹³

In the Williams Study, it was hypothesised that a brief physical encounter with a warm or cool object ‘should activate ... interpersonal warmth’ or coolness, and have the follow-on effect of unintentionally and nonconsciously priming the subject, and influencing ‘judgments of and behavior toward other[s]’.⁹⁴

Under a pretext, the subjects briefly held either a cup of hot coffee or iced coffee, and then completed a questionnaire about a hypothetical individual’s personality traits. As anticipated, subjects ‘who had briefly held the hot coffee cup perceived the target person as being significantly warmer ... than did those who had briefly held the cup of iced coffee’.⁹⁵ It is to be noted that there was no material effect on the ratings of other types of traits, showing the manipulation ‘was specific to feelings of interpersonal warmth and was not a general mood or “halo” effect’.⁹⁶

In the second experiment of the Williams Study, candidates were to hold either a heat pack or cold pack for a short while, then later were able to select a small reward, either for themselves or for a friend. As hypothesised, there was a significant link as a greater number of subjects primed with physical warmth selected a gift for a friend (54 per cent) compared to those primed with physical coldness, 75 per cent of whom chose the gift for themselves.⁹⁷

Other studies have also found that a warm room primes subjects to feel warmer towards the other person in the room,⁹⁸ and priming a subject with physical warmth before an economics trust game produces a greater level of trust, while priming with physical coldness has the inverse effect.⁹⁹ It has even been demonstrated that people nonconsciously tend to seek to ‘self-regulate ... feelings of social warmth’ by using physical endeavours to warm themselves.¹⁰⁰

Such results, demonstrating a link between physical and psychological warmth and coolness being an effective prime impacting perception and behaviour, is to be noted and taken into consideration during mediation. The practical application for utilising awareness and understanding about the priming effect that temperature can have may therefore be unclear. It is not particularly feasible to seek to limit parties to having only warm drinks, or ensuring that all rooms are at

93 Ibid.

94 Ibid 607.

95 Ibid.

96 Ibid.

97 Ibid.

98 See Hans IJzerman and Gün R Semin, ‘The Thermometer of Social Relations: Mapping Social Proximity on Temperature’ (2009) 20 *Psychological Science* 1214.

99 M R Delgado, R H Frank and E A Phelps, ‘Perceptions of Moral Character Modulate the Neural Systems of Reward during the Trust Game’ (2005) 8 *Nature Neuroscience* 1611.

100 John A Bargh and Idit Shalev, ‘The Substitutability of Physical and Social Warmth in Daily Life’ (2012) 12 *Emotion* 154, 154.

a reasonable temperature. Seeking to interfere with such factors may themselves have a negative effect. However, being aware of priming factors which may affect parties and thereby the mediation is worthwhile, so that a mediator or practitioner can seek to identify and counteract any negative or unhelpful priming impact, to avoid the mediation being stymied not due to the parties being unable to facilitate a successful outcome, but from the resolution being unachievable caused by communication breakdown, unnecessarily entrenched positions, or a vulnerable party becoming overwhelmed or intransigent. It is to be expected that there will always be an imbalance of power at mediation to some extent, and it is a matter for the mediator to address, to ‘promote equality in the process in relation to procedural and substantive issues ... to support participant identification of the criteria under which the dispute may be resolved’, among other matters.¹⁰¹

3 Visual Cues at the Mediation Table

Other aspects which a savvy mediator or legal practitioner may wish to consider include the visual cues around the board table during joint sessions.

The seating arrangement for example can impact the responsiveness of the parties both to the mediator and also to the other parties. Ordinarily, a mediator will sit at the head of the table and the parties with their legal representatives will flank each long side of the table. Some legal practitioners ‘recognise the importance of the parties being closer to the mediator and in some instances the mediator requests that the parties sit next to the mediator’,¹⁰² however different legal practitioners and mediators are likely to have their own preferences.

The dynamics and the level of heat between the parties may be considered when determining the optimal seating arrangement. In a commercial dispute, particularly between sophisticated clients such as insolvency practitioners, banks, larger corporations, and government bodies, there may be less aggression in a dispute between closely held small-medium enterprises, employee matters, or trust disputes.

In more adversarial situations, where there are heightened emotions, a greater level of aggression, or more at stake, there needs to be a balance between the parties being able to see and speak to each other without there being any exacerbation of a feeling of animosity or intimidation.

The seating arrangement in separate sessions also needs to be considered, given that often, ‘the detailed exploration of the issues takes place in this private session and it is often where parties show their true emotions. ... [t]he party must be able to freely express their views, frustrations and emotions without being seen or heard by any of the other parties or their lawyers’.¹⁰³

101 Lola Akin Ojelabi and Tania Sourdin, ‘Using a Values-Based Approach in Mediation’ (2011) 22 *Australasian Dispute Resolution Journal* 258, 261.

102 McFarlane, above n 65, 37.

103 *Ibid.*

It is a common occurrence for one party (often the party with the most people present, or the hosting party) to remain in the board room once the joint session is over and to use that space as their break out room. This may give the impression of a 'home team advantage' or the sense that they are summoning and dismissing the other party when joint sessions resume and recess. There is also a certain degree of nuisance present for the party or parties who are in separate rooms. In standard matters where there is not an undue amount of aggression or imbalance of power, this may not be an issue, however if there is a significant amount of heat or inequality at the outset, the mediator may wish to consider the benefit of all parties breaking into other rooms or having the more vulnerable party remain in the board room if it is not too isolating a setting, when they are alone.

There is the potential for the number and seniority of practitioners at the table to create animosity or intimidation, if for instance there are multiple representatives or senior counsel on one side of the table, and an unrepresented party (or a party with a single, or junior legal representative) on the other side. This perception of intimidation may also be conflated by one party bringing a large volume of folders or files, or the like.

Conversely, other visual cues may be given (with resulting priming impact) where, for instance, a legal practitioner brings a basic text book, has a dishevelled file or notes, or even is late — any of which may give the impression that he or she is unprepared or unskilled in relation to the matter or the area of law, which in turn (as with the opening example of the casually dressed lawyer), may prime the other party to give less credence to their words, or treat them less courteously, which may have a second generation effect on other persons present.

The visual cues at the table may hold considerable weight and prime the parties to respond in a balanced, aggressive, reserved, or arrogant way. Mediators and practitioners should be aware of the likely responses these factors may have, so that they may be counterbalanced where necessary and to avoid being unconsciously primed themselves.

C Language Usage and Conduct

Language usage, word choices, and conduct can unintentionally prime a party to feel and behave a certain way, which may ultimately prove unconstructive within the context of mediation. From the use of jargon, Latin, and coined legal terms which may obstruct a clear understanding of the issues or cause a party to feel isolated,¹⁰⁴ through to using parties' preferred names,¹⁰⁵ mediators and legal

104 Self-evidently, if a party cannot understand what is being discussed, there is little prospect of being able to engage in meaningful discussion let alone come to any voluntary agreement.

105 It is noted that 'people often address an unfamiliar person by title, rather than by first name, even when they have the same social status': Slepian et al, above n 36, 662 (citations omitted). If a party is having their name mispronounced, or if they dislike the variation of their name being used, or if they do not readily associate themselves with it (eg 'Mr Brown' in their mind is their father, and they prefer their first name, or they are usually referred to by their middle name or a diminutive version), then a barrier may be created and reinforced every time they are addressed by that name.

practitioners can be deliberate in their choice of words to facilitate a setting where all parties are primed to actively participate in the mediation.

While formal language, like formal dress, increases abstract processing,¹⁰⁶ which can be beneficial in mediation, logic dictates that the language utilised also needs to be accessible so that the parties can readily and meaningfully participate. Here, we will consider loaded (positive, negative, and neutral) words and rudeness.

1 Word Choices

Realistically, the word choices which may impact a mediation are likely to have commenced well prior to the event itself — likely from an initial lawyer’s letter of demand, or earlier. This is particularly so in commercial contexts, where there is frequently a pre-existing relationship which may have broken down before lawyers were involved.

An initial letter of demand is likely to be biased towards the sender, and include robust and loaded wording.¹⁰⁷ This letter, as the first foray into dispute proceedings, may create a perception of unfairness or even anger in the recipient, which can be difficult to overcome. This perception may prime the recipient to respond by shutting down: becoming less creative, cooperative, and willing to engage meaningfully, or even to become vindictive.¹⁰⁸

Studies about priming have long shown that written words can impact both emotions and subsequent behaviour,¹⁰⁹ meaning that not only is it important to consider word usage in mediation, but a mediator also ought to familiarise themselves with the wording previously engaged in between the parties.

By using language associated with fairness, rather than competition, it is anticipated that the parties may ultimately be more cooperative,¹¹⁰ creative, and broad in their thinking, and be more satisfied even if their result is not greatly different.¹¹¹

In a 1974 study (the ‘Loftus Study’), participants were separately shown recordings of car accidents, and were then asked, ‘[a]bout how fast were the cars going when they hit each other?’¹¹² The word ‘hit’ was replaced with various words (‘smashed’, ‘collided’, ‘bumped’, or ‘contacted’) to different participants. The Loftus Study found that in words where the verb used suggested high speed (‘smashed’ or

106 Ibid 666.

107 This is quite separate, however, from the concept of overconfidence as an impediment to mediation success. See further Russell Korobkin, ‘Psychological Impediments to Mediation Success: Theory and Practice’ (2006) 21 *Ohio State Journal on Dispute Resolution* 281, 288–94.

108 Carrie Sperling, ‘Priming Legal Negotiations through Written Demands’ (2010) 60 *Catholic University Law Review* 107, 117–20.

109 See Ferguson and Bargh above n 23.

110 John A Bargh et al, ‘The Automated Will: Nonconscious Activation and Pursuit of Behavioral Goals’ (2001) 81 *Journal of Personality and Social Psychology* 1014, 1017–18.

111 Sarah Maxwell, Pete Nye and Nicholas Maxwell, ‘Less Pain, Same Gain: The Effects of Priming Fairness in Price Negotiations’ (1999) 16 *Psychology and Marketing* 545, 545–61.

112 Elizabeth F Loftus and John C Palmer, ‘Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory’ (1974) 13 *Journal of Verbal Learning and Verbal Behavior* 585, 586.

‘collided’), the participant estimated a higher speed than participants exposed to the lower speed words (‘bumped’ or ‘contacted’). It was found that associating concepts of high speeds activated and influenced the participants’ judgement.¹¹³

While all words inherently have meaning, mediators can endeavour to avoid loaded language, particularly in opening statements, agenda setting, and any reframing. While an experienced and aware mediator will always seek to ensure that they are (and are seen to be) impartial and unbiased, their word choices can impact the perception of impartiality.¹¹⁴

Where the elements of a dispute are inherently loaded (eg retrenchment, sexual harassment, liquidation), if more neutral words can be utilised (eg replace with ‘work’, ‘behaviour’, ‘finances’) it may be possible to avoid negatively priming the parties, or exacerbating animosity. It is hoped that this in turn keeps the channels of communication open, and the parties are more able and willing to engage meaningfully.

Metaphor usage ought to also be carefully considered.¹¹⁵ Sporting metaphors (‘kicking goals’, ‘dropped the ball’, ‘get the ball rolling’) are common and can add to the feeling of shared experience, however if they prime parties to feel competitive rather than collaborative, they may be counterproductive, particularly if the sporting motifs are bleeding into war imagery (such as ‘annihilated’, ‘blew them out of the water’, or ‘found the smoking gun’).¹¹⁶ Where parties are attending mediation with a view to assessing whether a positive collaborative outcome may be achieved, such word usage and imagery is likely to be unhelpful and is best avoided or replaced with a more constructive form of imagery and metaphor, which the whole group can effectively, positively, and collaboratively engage with.¹¹⁷

In addition, words relating to cooperation, collaboration, and fairness or discussing a common goal (even if mundane, such as arranging the room or organising lunch), can predispose the parties to be more amenable to working together at mediation.¹¹⁸ Frequently, a mediator’s opening statement will reinforce such principles.

2 Rudeness

In a recent study (the ‘Foulk Study’), it was identified that rudeness (and more broadly, low intensity negative and antisocial behaviours) can be ‘contagious’ in

113 Ibid 586–7.

114 Carol Izumi, ‘Implicit Bias and the Illusion of Mediator Neutrality’ (2010) 34 *Washington University Journal of Law & Policy* 71, 74–7.

115 Sarah E Burns, ‘Thinking about Fairness & Achieving Balance in Mediation’ (2008) 35 *Fordham Urban Law Journal* 39, 54–6, 67–70.

116 Powell, above n 49, 257.

117 See ibid 257–8, in which Powell offers metaphors and imagery relating to journeys, gardening, weaving, and cooking. Similar examples may be created for building or designing.

118 Jane Juliano, *Primed for Resolution* (26 November 2012) Mediate.com <<http://www.mediate.com/articles/JulianoJ1.cfm>>.

a negotiation context, even from single episodes of exposure to the behaviour.¹¹⁹ Further, the repeated conduct or contagion would continue to affect the flow on persons exposed. The Foulk Study investigated the underlying cognitive mechanisms related to the negative behaviours, and further identified ‘that rudeness activates a semantic network of related concepts in individuals’ minds, and that this activation influences individuals’ hostile behaviors’.¹²⁰

While the Foulk Study is framed in terms of ‘contagion’, it is noted that rudeness is a relevant factor which can prime parties. Specifically, if a person at mediation is displaying rudeness, this is likely to prime other persons present to also engage in rude behaviour.¹²¹ As the study ultimately considered that the contagion was largely nonconscious (primarily involving mimicry and other automatic behaviours), the flow on effect causing the subject to interpret further information with the frame that the other party is rude or unpleasant fits within, or is analogous to, the model of priming discussed in this article.¹²²

The cognitive element of the contagion was considered by the Foulk Study to be automatic: without intention, nonconscious, consuming few (if any) cognitive resources, and quickly occurring.¹²³ The negative behaviour then was considered to be a contagion, meaning ‘that the focal individual is unaware of and does not have the ability to control or stop’ it.¹²⁴ Furthermore, it was hypothesised and found that the subject’s experience of rudeness created a bias by activating parts of the brain associated with rudeness,¹²⁵ which created a negative impression of the person who was rude. This then coloured the way the party interprets further social cues and behaviours, meaning that they perceive (but may not actually have received) further offences, and they are more likely to engage in rude behaviour or hostility in negotiations.¹²⁶ The priming in relation to rudeness may also affect the party’s interpretation of events and conduct in relation to whether further

119 Trevor Foulk, Andrew Woolum and Amir Erez, ‘Catching Rudeness Is Like Catching a Cold: The Contagion Effects of Low-Intensity Negative Behaviors’ (2016) 101 *Journal of Applied Psychology* 50, 50, 55–7.

120 *Ibid* 50.

121 See also Bargh, Chen and Burrows, above n 5, 231–6.

122 Foulk, Woolum and Erez, above n 119, 51–2.

123 *Ibid* 52.

124 *Ibid*.

125 There is some debate about how precisely the processing of primes works, and ‘whether facilitation results from a spread of activation between nodes ... or from an overlap of semantic features shared by prime and target’ or otherwise, however there is little argument that the prime activates a component of the brain which the target then triggers or otherwise represents: Marilyn Chapnik Smith, Nachshon Meiran and Derek Besner, ‘On the Interaction between Linguistic and Pictorial Systems in the Absence of Semantic Mediation: Evidence from a Priming Paradigm’ (2000) 28 *Memory & Cognition* 204, 204.

126 Foulk, Woolum and Erez, above n 119, 52–5.

behaviour is in fact considered polite or rude.¹²⁷ The experience can also trigger a link to the environment or the type of event (such as a mediation), meaning that those nodes of the brain are ‘reactivated’ when the situation recurs.¹²⁸ These are critical points to note in terms of considering the priming effect of rudeness within mediation.

The types of rudeness, which in isolation may not seem critical but which may be considered discourteous and have the above effect, may include low levels of interrupting,¹²⁹ speaking over others, or disparaging remarks or humour.¹³⁰ It is anticipated that most mediators would promptly intervene and encourage the parties to be respectful, particularly if there is a pre-existing imbalance of power.

D Other Factors Which May Unintentionally Prime Parties

The nature and nuance of what may unintentionally prime parties is limitless. The areas which have been explored in relation to priming in settings which can be applied or considered in light of commercial mediation are vast, and the further potentially relevant considerations are infinite.

While verbal, visual, and tactile primes are discussed in this article, other senses have also been found to be linked to priming, including the olfactory system,¹³¹ and a variety of stimulations including stereotypes. In one study (the ‘*Dijksterhuis Study*’) relating to stereotypes, it was demonstrated that a participant primed with stereotypical concepts of intelligence gave a superior performance, and

127 In the first experiment outlined in Bargh, Chen and Burrows, above n 5, 233–6, in relation to the participants’ perspective about whether the experimenter (who was speaking with a confederate for up to 10 minutes while the participant was waiting, without making eye contact with the participant) was rude or polite, it is noted that:

it is possible that rude-primed participants were more likely to perceive the experimenter as rude because he was ignoring them and attending to the confederate, whereas polite-primed participants were more likely to perceive the experimenter as polite because he so patiently dealt with the confederate’s questions. The participants’ own behaviour to the experimenter (ie whether they interrupted him) might have been based on these differential perceptions ... instead of as a direct effect of the priming manipulation.

Bargh, Chen and Burrows, above n 5, 235. It is noted however that it may be considered that whether the opinion was derived from the conduct, or how the conduct was perceived following the priming can both reasonably be linked back to the priming itself.

128 Foulk, Woolum and Erez, above n 119, 55–7, 62. See also Bargh, Chen and Burrows, above n 5, 231–3.

129 See also Bargh, Chen and Burrows, above n 5, 231–5 in relation to interrupting, and the perception of rudeness in others.

130 For example, Russell Korobkin argues:

a disputant’s perception of how his adversary treats him during the mediation process will often affect his willingness to agree to specific settlements and ... [w]hen a disputant believes he has been treated with respect, dignity, and honesty by his adversary and feels he is able to exercise some degree of agency in reaching settlement terms, he is likely to perceive higher levels of interactional justice ... [and] the bargaining zone will be larger and mutually desirable settlement terms will be more likely to exist.

Korobkin, above n 107, 323–4.

131 See generally Holland, Hendriks and Aarts, above n 11.

participants primed with generic concepts of stupidity gave a substandard performance.¹³²

Some arenas which would be worthy of further independent ventilation to afford adequate attention may include the impact of cultural overlay, or the interplay between two different cultures, at the mediation table; the impact of novelty in a first encounter or from the mediation or court process being a new experience altogether; the impact of timing, particularly the length of time allotted for the mediation, and when in the day (in the dispute or court process it is held), among others. Two other factors which will be briefly considered here are the impact of stress and money.

1 *The Impact of Stress*

It has been identified that if a part of your brain is firing hard (eg your emotional centre), then other parts of your brain (eg your thinking and processing centre) cannot fire as strongly to make rational decisions. This has been explored more deeply in studies (such as the *Beilock Study*) where participants were put under stress (either by witnessing or otherwise being exposed to negative stereotypes) prior to solving maths-based problems.¹³³

Similarly, in mediation, there are frequently stressful times or occasions where a party (or occasionally their legal representative) becomes increasingly agitated or behaves in a strongly emotional way. A mediator may find it necessary to take steps to calm the individual down, whether by directly addressing the issue and making a request (eg ‘I can see you are getting angry, please can you speak more quietly so I can understand you?’), by breaking and diffusing the situation (eg ‘This might be a good time for everyone to get a drink — Party, would you like to go first?’), potentially naming the emotion (eg ‘Party, I can see that you’re really worked up and you’re getting very loud — it seems to me like you’re angry, is that how you’re feeling?’), or by summarising and reflecting back. By gently but firmly intervening in such ways, the situation may be decompressed, allowing the party to regroup, as while those emotions are exacerbated, it can overflow and destroy their ability to think.¹³⁴

Mediation can be taxing, however notwithstanding the stakes and the motivation of a party to ‘perform’ well, the inherent stress and any priming factors (potentially exacerbated by elements such as venue, visual cues including the appearance of the other parties or their representatives, significant volumes of case books or evidence, loaded or negative words on the day or earlier, or an actual or perceived

132 Ad Dijksterhuis and Ad van Knippenberg, ‘The Relation between Perception and Behavior, or How to Win a Game of Trivial Pursuit’ (1998) 74 *Journal of Personality and Social Psychology* 865, 873.

133 Sian L Beilock, ‘Math Performance in Stressful Situations’ (2008) 17 *Current Directions in Psychological Science* 339.

134 In extreme circumstances, an amygdala hijack may be experienced, where an overwhelming and disproportionate emotional response is experienced and the party becomes unable to engage.

imbalance of power) may cause a party to ‘choke’ and perform worse than they may otherwise be capable of due to the ‘stress-laden’ scenario.¹³⁵

In the Beilock Study, it was confirmed that high stress events cause a participant to worry, and this neural activity (ie the stress) takes up working memory, meaning that less working memory is available for the participant to undertake the task which they were worrying about. Ironically, the stress competes with the participant’s desire to perform well, and consequently occasions a substandard performance in individuals performing tasks which they would generally rely heavily on working memory.¹³⁶

Interestingly, participants who did not rely as heavily on working memory (ie individuals who did not have as sophisticated neural ‘short cuts’ and who performed tasks in a more pedestrian fashion) did not experience the same dramatic decline in performance. Their initial results were lower than the higher functioning participants, but the additional stress did not have a particularly significant impact.¹³⁷ Those who had the greatest capacity for optimal performance however (and who may be used to, and expected to, perform well) were the most affected.¹³⁸

2 The Priming Impact of Discussing Money Prematurely

In mediation, while some parties may come in wanting to negotiate a set payout figure and leave as quickly as possible, discussing specific amounts of money (or the concept of money at all) prematurely can have a powerful and unhelpful priming effect.

Priming in relation to money has been linked to selfish or self-focused behaviour and reliance (including being less likely to ask for or offer help,¹³⁹ being less caring and warm, and less interpersonally attuned¹⁴⁰), utilising a business rather than relational framework (shifting into a professional, work, or ‘exchange mentality’)¹⁴¹ and unethical behaviour, which may be counterproductive in a mediation context.

Furthermore, once money is introduced into the discussion, other agenda items or interests (or the generation thereof) can be muffled or ignored. This is also unhelpful in mediation, when it is desirable to ensure that all key issues and

135 Beilock, above n 133, 339.

136 Ibid 339–40.

137 Ibid 341–2. The principles identified in the Beilock Study have been applied in other studies to a range of other types of performance, including in the sporting arena.

138 Ibid 342.

139 Kathleen D Vohs, Nicole L Mead and Miranda R Goode, ‘The Psychological Consequences of Money’ (2006) 314 *Science* 1154, 1155.

140 Kathleen D Vohs, Nicole L Mead and Miranda R Goode, ‘Merely Activating the Concept of Money Changes Personal and Interpersonal Behavior’ (2008) 17 *Current Directions in Psychological Science* 208, 208–10.

141 Kathleen D Vohs, ‘Money Priming Can Change People’s Thoughts, Feelings, Motivations and Behaviors: An Update on 10 Years of Experiments’ (2015) 144 *Journal of Experimental Psychology* e86, e86.

concerns are given ample time to be ventilated, well prior to the option generation period, or discussions of specific proposed outcomes or strategies, let alone any specific settlement offers.

Discussing money prematurely may in fact shut down other channels of discussion and debate, meaning that any outcome ultimately achieved may not be sustainable, potentially because deeper seated issues have not been discussed or resolved, or because settlement has been reached in an unachievable or short-sighted way (or potentially has been abandoned). The prime of money, triggering the construct of business relationships, can cause parties to feel that discussion of non-financial interests is inappropriate or weak, and can shut down other channels of discussion, or dispose parties to respond negatively to other parties expressing emotional or other agenda items.¹⁴²

In one study (the '*Kouchaki Study*') it was found that there was a direct tie between priming participants with money and unethical behaviour, ranging from views on pilfering, breaching confidentiality, lying, cheating, and stealing.¹⁴³ The Kouchaki Study confirmed that there are links between a money prime (including a symbolic representation) and a business decision framework, but that the money prime, not the framework alone, was linked to the increased unethical conduct.¹⁴⁴

It was hypothesised that:

a business decision frame entails objectification of social relationships (either those who stand to be directly harmed, or others more broadly construed) in a cost-benefit calculus in which self-interest is pursued over others' interests (ie it entails a focus on one's gains and losses largely to the exclusion of benefits and costs to others); as such, it weakens social bonds and thus the pull of morality. Even in instances when there is not a particular social relationship at stake, such objectification means that one does not think about others in general; rather, one thinks about self-interest in maximizing one's outcomes even if it means violating the moral rules that constitute the fabric of society.¹⁴⁵

The Kouchaki Study persuasively establishes a nexus between the prime of money and unethical conduct in negotiations and decision-making processes, with clear implications for commercial mediation. Money primes influence the inclination towards, and participation in, unethical conduct.¹⁴⁶

While it is not always feasible in commercial mediations for mediators to avoid discussing money, mediators can seek to avoid a premature or overt focus on money. Mediators may avoid writing dollar signs or figures on any written agenda, or prominently on notepads (if any are used during separate sessions), and they can seek to proactively encourage the parties to ventilate all relevant areas of

142 Yuwei Jiang, Zhansheng Chen and Robert S Wyer Jr, 'Impact of Money on Emotional Expression' (2014) 55 *Journal of Experimental Social Psychology* 228, 228–31.

143 Maryam Kouchaki et al, 'Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes' (2013) 121 *Organizational Behavior and Human Decision Processes* 53.

144 Ibid 59.

145 Ibid 54.

146 Ibid 53–9.

interest and issues, to ensure that the non-financial concerns are discussed, prior to engaging or encouraging negotiation of specific figures.

More globally, it is desirable for parties in mediation to at least be receptive to working collaboratively to discuss the issues at hand, talk about the core matters deeply and openly, and being committed to the mediation process and the prospect of a satisfactory outcome. The studies regarding the prime of money (which total over 165 as at 2015)¹⁴⁷ suggest that discussing finances prematurely would render these outcomes less achievable,¹⁴⁸ which would cause a detriment to all parties.

IV POTENTIAL EXACERBATION OF IMBALANCES OF POWER

Power in and of itself can be negatively associated with concepts of coercion, abuse, and uncooperativeness, and creates barriers to constructive communication.¹⁴⁹ If there is a lack of balance of power between the parties, that can create an immediate and dominating negative prime. Critically, it must be noted that the primed response to actual power and advantage is largely identical to the response to the perception of power and advantage — even if the perception is false.¹⁵⁰

Many factors can create an imbalance of power or other type of inequality within the scope of corporate litigation. One party may be unrepresented or underrepresented in comparison to the other party. One may have access to a significantly greater amount of resources. One may be unacquainted with legal processes, or new to the relevant industry, company ownership, or business in general. There may be a significant difference in education levels, or one may be facing language barriers. The parties may have a parent-subsidiary relationship, or an employer-employee relationship. Categories of power may include ‘formal authority’, ‘expert-information power’, ‘associational’ (referent) power, ‘resource power’, ‘procedural power’, ‘sanction power’, ‘nuisance power’, ‘habitual power’, ‘moral power’, or ‘personal power’.¹⁵¹

Such diverse circumstances can inherently create an inequality, which can in and of itself prime a party to feel and become isolated, or less able or inclined to participate in problem solving cooperatively.¹⁵²

147 Vohs, above n 141, e86.

148 See also Jiang, Chen and Wyer, above n 142, 229, 231–2.

149 Bernard Mayer, ‘The Dynamics of Power in Mediation and Negotiation’ [1987] (16) *Mediation Quarterly* 75, 75. See also Elizabeth Seeley Howard, Wendi L Gardner and Leigh Thompson, ‘The Role of the Self-Concept and the Social Context in Determining the Behavior of Power Holders: Self-Construal in Intergroup versus Dyadic Dispute Resolution Negotiations’ (2007) 93 *Journal of Personality and Social Psychology* 614, 615–16.

150 Madonik, above n 50, pt 2 ch 3.

151 Mayer, above n 149, 78.

152 For example, it has been found that anger can help higher powered parties in a negotiation to feel and become more assertive and focused and to claim a higher value. However, the inverse effect can be identified in lower powered parties: see Lindred Greer and Corinne Bendersky, ‘Power and Status in Conflict and Negotiation Research: Introduction to the Special Issue’ (2013) 6 *Negotiation and Conflict Management Research* 239, 242.

In such scenarios, a mediator may need to take steps to redress the imbalance, to ensure that the parties feel safe, comfortable, and heard, so that a meaningful and productive mediation is able to occur. This may be by empowering parties, referring to the ‘innate qualities’ of mediation as a vehicle to resolve issues cooperatively in a dignified manner, and encouraging the parties to genuinely listen to and reflect on each other, in a confidential context.¹⁵³

In light of priming conduct however, it is hypothesised that visual or verbal stimuli innocuously suggesting or blatantly displaying power or money may exacerbate the gulf which may already exist between the parties.

By being attuned to the potential imbalances, and the resultant priming effect which may be occasioned, the mediator can seek to minimise the effect, or to address it directly, to avoid the outcome progressing unexamined and unimpeded. Similarly, an astute party or practitioner can consider ahead of time what may have a negative impact (not solely on the other side, but also on their client and themselves, if the outcome is that the mediation is unfruitful) and avoid such factors.

Avoiding stimuli which may prime a party to disengage or become hostile may facilitate an environment where all interests, particularly non-financial interests, are more readily ventilated. If this broader range of issues is discussed, it is more realistic that such factors will be taken into account in any negotiated outcome, rather than only superficial or financial elements being resolved.

It is expected that where parties achieve this deeper level of issue discussion, all parties are better positioned to achieve a satisfactory (or ‘the best’) outcome achievable, with the core issues being addressed and factored into any resolution. Furthermore, by ensuring that the mediation process is thoroughly and appropriately participated in, the parties have the best prospect of achieving a commercial alternative, without proceeding to a contested trial, and are more likely to have a sense of closure or resolution.

This is particularly relevant for the less vulnerable party to consider, as the improvement to their position by seeking to limit or avoid primes may not be ultimately apparent. Conversely, it may be felt that such displays of power may increase the prospect of achieving a prompt and strong outcome in their favour. However, if non-financial interests and concerns have not been ventilated, and the other party has not had an opportunity to air grievances or state their position, any outcome achieved may not be the best outcome for the less vulnerable party. It may be short-sighted and unachievable, it may not address underlying issues, and it may remove the potential benefit of a repaired or improved business relationship. Any such outcome may cause the issue to recur, duplicating the frustration and cost of the dispute.

By facilitating a more balanced mediation, limiting negative and unhelpful primes, and encouraging parties to meaningfully engage, it is expected that the parties will enjoy increased prospects of a successful and lasting resolution.

153 Albie M Davis and Richard A Salem, ‘Dealing with Power Imbalances in the Mediation of Interpersonal Disputes’ [1984] (6) *Mediation Quarterly* 17, 18–21.

V CONCLUSION

Knowledge can be empowering. By being aware of stimuli which can cause priming behaviour and thought processes, we can seek to avoid, mitigate, or minimise their impact, to benefit parties to mediation, clients, and ourselves. A broader question must also be asked of legal practitioners, regarding primes. Are legal practitioners to become aware of these issues as a matter of good practice, or is that vulnerable to manipulation and abuse? Should the aim be to create a balanced field, ensuring fairness and equity, or ought lawyers ensure that every measure is taken to advance their client's position?

It is posed that creating an equal field and avoiding overt primes of strength, power, and money will improve both parties' positions, and that both clients are best served by removing barriers to open and frank discussion and issue generation. This is not simply a matter for mediators and practitioners representing vulnerable parties; all parties are benefited by maximising the prospect of a robust and transparent mediation.

Many questions regarding priming remain outstanding, such as whether priming is actually controllable,¹⁵⁴ or able to be avoided entirely, to maximise the prospect of parties being unbiased and free to mediate and negotiate unhampered by intervening prejudices or obfuscation. Other questions relate to whether there is a priority ranking between multiple priming elements, whether they may counteract (or exacerbate) one another, or whether a party's brain can only attend to a small number of cues (and if so, whether the brain attends more keenly to the most obvious, or the most reinforced, or if there may be a primacy or recency effect, or otherwise).

Further, while it has been seen that the behavioural outcomes of a prime impact, but are not necessarily carried forward by, the 'second generation' participant,¹⁵⁵ it is not known whether this principle applies in other instances. In the Foulk Study however, the core prime was rudeness,¹⁵⁶ which it may be anticipated the average participant would eschew — however if the prime was something positive or desirable (such as smiling or being helpful), there may be a longer series of generations of the behaviour. It does not appear that such questions have been examined at this time.

Doubtless, just as mediation processes will continue to be rigorously investigated, critiqued, and improved, the science community's knowledge of priming will also continue to grow and deepen, and it is hoped that the legal community will continue to take note, for the benefit of clients globally.

154 Bargh, above n 16, 148–9.

155 Foulk, Woolum and Erez, above n 119, 55.

156 Ibid.