

**Mediation and the study of behavioural ethics: Equipping lawyer-
mediators with self-correction methodologies.**

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Submitted in partial fulfilment of the requirements for the degree:

Magister Legum

in the

FACULTY OF LAW

at the

UNIVERSITY OF PRETORIA

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10 December 2017

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I. CHAPTER 1. INTRODUCTION

(a) Background to the Topic

In the legal domain, numerous actors—including mediators, lawyers, clients, and judges—are routinely faced with decision-making where challenging ethical elements are present.¹ Often, in so many real-world situations, individual actors unconsciously engage in unethical acts while being completely ignorant to / or oblivious of such unethical behaviour.²

Behavioural ethics, which is a body of research focused on understanding how and why people make the decisions that they do in the ethical realm³ - provides a theoretical framework for understanding such unethical behaviour. The quality of ethical decision-making can then be considered from the perspective of the theory of bounded ethicality, which is a subfield within behavioural ethics, which determines that unethical decision-making is the systematic and predictable result of a lack of self-awareness.⁴

One of the primary purposes of legal ethics courses and similar forms of training is to assist individuals in strengthening a consciously ethical approach to decision-making and behaviour.⁵ However, empirical insights from behavioural ethics suggest that, in the majority of real-world cases, the problem is unconsciously unethical behaviour and not consciously unethical behaviour.⁶ Behavioural ethicists in the field of law have therefore argued that, in addition to inculcating consciously ethical behaviour, ethics courses and similar training interventions ought to teach individuals in legal fields how to reduce unconsciously unethical behaviour, which is the result of bounded ethicality.

The concept of bounded ethicality is a deliberate echo of the concept of bounded rationality. Bounded rationality is a theory of cognitive decision-making that emphasises the limits of cognition, which is bounded by factors such as the unavailability of key information or the processing limitations on the human brain.⁷ Bounded ethicality emphasises the boundaries on ethical decision-making, boundaries that are due not only to (a) the intrinsic

¹ Willem H Gravett 'The myth of rationality: cognitive biases and heuristics in judicial decision-making' (2017) 134 *SALJ* 53 at 59.

² Ovu Seser, Francesca Gino & Max H Bazerman 'Ethical blind spots: Explaining unintentional unethical behaviour' (2015) 6 *Current Opinion in Psychology* 77.

³ Robert Prentice 'Teaching Behavioral Ethics' (2004) 31:2 *Journal of Legal Studies Education* 325.

⁴ Erik Dane & Scott Sonenshein 'On the role of experience in ethical decision-making at work: An ethical expertise perspective' (2014) 5 *Organizational Psychology Rev* 74 at 75 & 80.

⁵ Mahzarin R Banaji, Max H Bazerman, & Dolly Chugh 'How (un) ethical are you?' (2003) 81 *Harvard Business Rev* 56 at 62.

⁶ *Ibid* at 56.

⁷ Herbert A Simon 'Bounded Rationality' in J Eatwell et al (eds) *Utility and Probability* (1990) 15-18.

difficulty of ensuring compliance between ethical preferences and actual behaviours but also to (b) the manner in which systems, institutions, and the overall environmental setting can make it difficult for individuals to judge, or even perceive, the ethicality of their own behaviour.

There is a substantial body of literature designed to assist mediators in how to work through ethical challenges that they routinely face. There is, however, an important gap in this body of literature as the majority of the literature is addressed to traditional ethicality rather than bounded ethicality. One of the assumptions of traditional ethicality training is that ethical actors such as mediators can be equipped with ethical heuristics that allow them to think their way through ethical dilemmas and identify appropriate behaviours.⁸ Although such training is of great value, the individuals receiving such training are not always readily susceptible to the insight that such training may offer.⁹ This is due to the fact that mediators will often only become aware of their own lack of skill and self-awareness upon reflecting on an unethical decision, which they have already made.¹⁰ Dunning argues that we cannot expect people who are performing poorly to recognise their own ineptitude as they often lack the metacognitive skills to recognise their own incompetence and adapt their performance accordingly.¹¹

Although traditional, theoretical ethics teachings play a crucial role in assisting mediators to acquire the necessary information and tools to address their lack of metacognitive skills, the author hereof argues that this training should be supplemented by a combination of theoretical and experiential training that is designed to address the challenge of bounded ethicality. Dunning encapsulates the envisaged outcome of training aimed at improving self-awareness in mediators in the following statement:

‘The best test of our “metacognitive deficit” explanation for the lack of self-awareness among the incompetent is easy: If deficits in metacognitive skills are responsible for this lack of awareness, then giving the poor performers an

⁸ RA Prentice ‘Behavioral Ethics: Can it Help Lawyers (And Others) Be Their Best Selves?’ (2015) 29 *Notre Dame Journal of Law, Ethics and Public Policy* 35 at 36; CG O’ Grady ‘Behavioral Legal Ethics, Decision Making, and the New Attorney’s Unique Professional Perspective’ (2015) *Nevada Law Journal* 671 at 672.

⁹ Erik Dane & Scott Sonenshein ‘On the role of experience in ethical decision-making at work: An ethical expertise perspective’ (2014) 5 *Organizational Psychology Rev* 74.

¹⁰ David Dunning *Self-Insight: Roadblocks and Detours on the Path to Knowing Thyself* (2005) at 13.

¹¹ *Ibid.*

*adequate amount of metacognitive skill should cause them to recognise just how unskilled they are.*¹²

In a traditional ethical training approach, the goal is to make decision-makers consciously aware of theory and supporting strategies that will allow them to solve ethical dilemmas and makes ethically appropriate decisions in a variety of settings and scenarios. However, as behaviour ethicists have discovered, a common problem for decision-makers in the field of law, is not an absence of conscious knowledge of ethical rules and standards, but rather an absence of conscious knowledge concerning their own ethical vulnerabilities.¹³

(b) Problem Statement

The main problem addressed in the study is the prevalence of bounded ethicality among lawyer-mediators. Bounded ethicality among mediators is a problem that needs to be addressed as mediation is by its very nature, intended as an ethical approach to problem solving.¹⁴ Thus, to the extent that mediators possess bounded ethicality, they are compromised in their ability to perform successful mediations—resulting in tangible losses to the parties intended to be served by mediation, and to society as a whole.¹⁵ Arguably, bounded ethicality will never be eliminated entirely but it can be reduced, with reduction taking place through (1) illuminating ethical blind spots and bringing them into the realm of the mediator’s ethical self-awareness and (2) reducing external, systemic pressures that can facilitate bounded rationality at the level of the individual ethical decision-maker.

(c) Purpose of the Study

The main purpose of this study is concerned with: (1) the identification of specific elements of bounded ethicality that are relevant to South African lawyer-mediators; and (2) the identification and proposing of remedial approaches to reduce bounded ethicality among South African mediators. In order to achieve this purpose, it is necessary to achieve the sub-purposes of (i) defining mediation and the mediator’s role, (ii) examining some of the common ethical problems faced by mediators, and (iii) identifying and discussing remedial

¹² Ibid at 20.

¹³ Linda K. Treviño, Gary R. Weaver & Scott J. Reynolds ‘Behavioral Ethics in Organizations: A Review’ (2006) 32:6 *Journal of Management* 951 at 958.

¹⁴ L. Marlow & S.R. Sauber *The Handbook of Divorce Mediation* (2013) at 11.

¹⁵ Glen Sato ‘The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance - A Proposal for Some Ethical Considerations’ (1986) 34 *UCLA L Rev* 507 at 523.

strategies for both the internal- and external pressures and constraints that keep South African mediators from acting more ethically.

(d) Research Questions

The research questions of the study are as follows:

Research Question 1: What is mediation, and what is the role of the mediator?

Research Question 2: What are some of the common ethical problems faced by mediators with specific reference to bounded ethicality?

Research Question 3: What is behavioural ethics?

Research Question 3 will be answered through an application of the principle of bounded ethicality to a specific cross-section of individuals, that is, South African mediators.

Research Question 3₁: What are some of the internal- and external pressures and constraints that can keep South African mediators from acting more ethically?

Research Question 4: Utilising a behavioural ethics approach, how can the ethicality of mediators be improved?

Research Question 4₁: How can the internal- and external pressures and constraints that keep South African mediators from acting more ethically be remedied?

(e) Methodology

The methodology of the study is based on a comprehensive review of appropriate legal and ethics literature on the topics of mediation, mediators, ethical dilemmas in mediation, bounded ethicality and behavioural ethics — wherever possible, examined from the perspective of South African law and society. The main principle followed in the comprehensive review is the transition from (1) an identification of the basic topics relevant to each research question to (2) a synopsis of the available information in order to answer each research question of the study.

(f) Structure of the Study

In order to better achieve its purpose, the study has been structured so that each of the research questions is answered in a separate chapter of the study (chapters 2-5). The sixth and final chapter of the study, the conclusion, contains a summary of the findings and a synopsis of the suggested remedial strategies.

II. Chapter 2. Mediation and Mediators

(a) Introduction

The purpose of this chapter is to define terms concerning the first research question of the study, which is as follows: What is mediation, and what is the role of the mediator?

(b) Mediation and Mediators

Mediation is a form of alternative dispute resolution (ADR) - the creative and effective resolution of disputes through a broad range of mechanisms and processes as an alternative to litigation or adjudication.¹⁶

In mediation specifically, a third person facilitates the relationship between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute.¹⁷ The mediators' ultimate function is to assist the parties to the dispute in an attempt to resolve the dispute, through the facilitation of discussions between the parties, assisting the identification of issues, clarifying priorities, exploring areas of compromise and generating options.¹⁸ In the landmark case of *MB v NB*,¹⁹ judge AJ Brassey held the following:

*'Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.'*²⁰

(c) Mediators and Ethics

Mediators routinely experience tension between the power afforded to them as mediator of a given situation and their own self-interest on a day-to-day basis.²¹ Macfarlane states that the mediator assumes the primary responsibility for ensuring the realisation of mediation's

¹⁶ South African Law Commission Issue Paper 8 Project 94 Alternative Dispute Resolution (1997) at 3.

¹⁷ 'Mediation' (1984) 35(1) *Juvenile Family Court Journal* at 57.

¹⁸ Court-Annexed Mediation Rules of the Magistrates' Courts in GN 37448 of 18 March 2014 at Rule 73.

¹⁹ *MB v NB* 2010 (3) SA 220 (GSJ).

²⁰ *Ibid* at para 50.

²¹ Gerami A 'Bridging the theory-and-practice gap: Mediator power in practice' (2009) 26 *Conflict Resolution Quarterly* 433 at 434.

benefits without creating or perpetuating unfairness, and the mediator's ethical sensibilities and judgments are critical to this process.²² According to Tetunic, mediation does not succeed because parties resolve their disputes, but because the mediator conducted the mediation within ethical standards, giving the parties an opportunity to meaningfully participate in the process and exercise self-determination.²³ Christopher Moore has noted: '*The ability to control, manipulate, suppress, or enhance data, or to initiate entirely new information, gives the mediator an inordinate level of influence over the parties.*'²⁴ Members of society thus depend on the ethical behaviour of mediators in the more private process of mediation.

In order to determine whether a mediator acts within ethical standards and whether any specific conduct of a mediator qualifies as being unethical, the definition of legal ethics needs to be contemplated. A starting point would be to consider the definition of ethics as defined by Souryal: '*Ethics is a branch of philosophy that is concerned with the study of what is morally right and wrong, good and bad.*'²⁵ If ethics is concerned with what is morally right and wrong, some consideration has to be given to differentiating between morals or morality and ethics. If the theory of right choices and actions is represented by the word, 'ethics' then the word 'morals' signifies their application and practice.²⁶ This supports the supposition that professional norms accommodate lawyers' reliance on personal values.²⁷

Concepts that often become stumbling block in practice for mediators are impartiality and neutrality.²⁸ When we ask the question, where in the mediation process should the impartiality be applied viz. to the content, to the process or to both, then we realise that the answer to this question is not that easy. Cohen, Dattner, and Luxenburg concurred that within organisations neutrality means giving equal attention and focus to both the content and the process. In addition to this, attitudes and behaviours such as respect, fairness, justice and appropriateness defines the quality of neutrality.²⁹ Furthermore, authors such as Jacobs³⁰ and

²² Macfarlane Julie 'Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model' (2002) 40.1 *Osgoode Hall Law Journal* 49 at 50.

²³ Tetunic F 'Demystifying Florida Mediator Ethics: The Good, the Bad, and the Unseemly' (2007) 32:1 *Nova Law Review* 205 at 207.

²⁴ Moore C M *The mediation process: Practical strategies for resolving conflict* (1986) 37.

²⁵ Sam S Souryal *Ethics in Criminal Justice: In Search of the Truth* 6 ed (2014) 2.

²⁶ Bommer M., Gratto C., Gravander J. et al. 'A Behavioral Model of Ethical and Unethical Decision Making' (1987) 6(4) *J Bus Ethics* 265 at 267.

²⁷ Bruce A Green 'The Role Of Personal Values In Professional Decision-Making' (1997) 11 *Geo J Legal Ethics* 19 At 20.

²⁸ McCorkle S 'The murky world of mediation ethics: Neutrality, impartiality, and conflict of interest in state codes of conduct' (2005) 23 *Conflict Resolution Quarterly* 165 at 166.

²⁹ Cohen O, Dattner N & Luxenburg A 'The limits of the mediator's neutrality' (1999) 16 *Mediation Quarterly* 341 at 342.

Astor³¹ argue that the mediator should be neutral to the content and not to the process.³² This means that the mediator should control the process. Due to the vagueness of the term neutrality and the different meanings of this word to different parties, Cohen, Dattner, and Luxenburg proposed that precise terms such as ‘impartiality’ and ‘equidistant’ be used.³³

(d) *Mediation in South Africa*

There are currently approximately 50 pieces of legislation in South Africa which deal with mediation as a dispute resolution process.³⁴ Section 34 of the Constitution of the Republic of South Africa,³⁵ (hereafter referred to as “The Constitution”) which is the supreme law of the Republic, guarantees everyone the right to have any dispute that can be resolved by the application of the law, decided, in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.³⁶

ADR is hardly a new concept in South Africa. In July 1996, the Minister of Justice requested that an investigation initially focusing on international and domestic commercial arbitration only, be broadened to include an investigation into ADR on all levels.³⁷ The purpose of the broadening of the investigation was to consider the possibility of introducing formalised methods of ADR into courts, in order to relieve the overburdened court system.³⁸ ADR was never intended to supersede court adjudication, but rather to supplement it as a way of promoting the accessibility and fairness of justice.³⁹

In 2011, the positive effects of introducing alternative dispute resolutions into the court system were again considered in order to achieve the delivery of accessible and quality justice for all. At an Access-to-Justice Conference, held under the leadership of the Chief Justice during July 2011, it was determined that all steps had to be taken to give effect to the introduction of ADR into the court system in South Africa.⁴⁰ A preference for court-annexed mediation or the Commission for Conciliation, Mediation and Arbitration (CCMA) kind of

³⁰ Scott Jacobs ‘Maintaining neutrality in dispute mediation: managing disagreement while managing not to disagree’ (2002) 34 *Journal of Pragmatics* 1403 at 1405.

³¹ Hilary Astor ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16(2) *Social & Legal Studies* 221 at 222.

³² *Ibid.*

³³ *Ibid* at 342-343.

³⁴ John Brand, Felicity Steadman and Christopher Todd *Commercial Mediation- A users guide* (2012) 92-98.

³⁵ Constitution of the Republic of South Africa, 1996.

³⁶ *Ibid* at s34.

³⁷ South African Law Commission Discussion Paper 87 (Project 94) *Community Dispute Resolution Structures* (1999) para iv.

³⁸ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) para 1.

³⁹ *Ibid* at 3.

⁴⁰ Rules Board For Courts of Law Act 107 of 1985; Rule 70.

ADR, which are considered to be amongst the most common forms of ADR,⁴¹ was established.⁴² The Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts (hereafter referred to as: "Court-Annexed Mediation Rules") came into operation on 1 December 2014 after the publication of the latest "Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa" of the Rules Board for Courts of Law,⁴³ (hereafter referred to as: "the Magistrates' Court Rules").

Chapter two of the Court-Annexed Mediation Rules defines mediation as being the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them.⁴⁴ Instead of deciding which party wins and which party loses based on the facts of the case, this approach seeks to restore harmony between the parties by constructing resolutions which allows the interests of both parties to be met.⁴⁵

As mentioned earlier, certain forms of alternative dispute resolution have been entrenched in either legislation or in regulation of proceedings in South Africa. Some of the forms of alternative dispute resolution that have a similar nature to that of mediation, have also been incorporated into the litigation system.

i) Section 191 of the Labour Relations Act 66 of 1995

In labour law matters, mediation in the form of conciliation is a compulsory step before any claimant can initiate unfair dismissal or unfair labour practice proceedings under the Labour Relations Act.

ii) Mediation in terms of the Children's Act

Previously, where a dispute arose pertaining to parental responsibilities and rights parties would approach a competent court to address the matter. Today, in terms of the Children's Act 38 of 2005, family advocates are appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987. Family advocates and social workers operate in multi-disciplinary teams to ensure a holistic and qualitative approach to the best interests of the child throughout the dispute resolution or the court adjudication process, much like mediation. The process entails that a family advocate will meet with the parents involved in divorce proceedings and establish exactly what issues are in dispute, for example: care, contact and guardianship. The

⁴¹ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) par 2.3.

⁴² Act 107 of 1985; Rule 70.

⁴³ GN 183 in GG 37448 of 18 March 2014.

⁴⁴ Court-Annexed Mediation Rules of the Magistrates' Courts in GN 37448 of 18 March 2014 at Rule 73.

⁴⁵ South African Law Commission Discussion Paper 87 (Project 94) *Community Dispute Resolution Structures* (1999) at 9.

Family Advocate will take in the role of a mediator and try to assist the parents to resolve the issues in dispute. This process is completely voluntary. The Family Advocate does not have the authority to subpoena a party to attend the meeting should one of the parties deny the meeting. If the mediation does proceed and the parents are unable to reach an agreement, the family advocate evaluates their circumstances in light of the best interests of the child and makes a recommendation to the court regarding the issues in dispute.⁴⁶

iii) High Court Rule 37

A pre-trial conference, as contemplated in rule 37 of the Uniform Rules of court, must be held in every matter that is to proceed to trial. The fact that such a pre-trial conference is compulsory is evident from the fact that the party applying for the trial date has to file together with the application for the trial date, either the minutes of the pre-trial conference, or a certificate that states that due to lack of co-operation of the other party it has not been possible to hold such conference. In the matter of *MB v NB*,⁴⁷ the court noted that one of the issues, which attorneys would have had to consider at a Rule 37 Pre-Trial Conference, was whether the matter should be referred to mediation.

iv) South African case law in favour of mediation

South African courts have been directing disputing parties and their legal representatives in the direction of mediation for many years. In 2003 in the matter of *Van den Berg v Le Roux*,⁴⁸ Judge Kgomo ordered that the parties be obliged to mediate the issues between them and that “only subsequent to the conclusion of the mediation process could either party approach a competent court”. This decision was supported in the matter of *Townsend-Tuner and Another v Morrow*,⁴⁹ where the court ordered that the parties were to attend mediation and had to continue with such mediation either for a period of at least 3 months or for at least 4 mediation sessions.

The court, in the case of *MB v NB*⁵⁰ made a profound ruling promoting mediation when it held that the failure by attorneys to send a matter to mediation at an early stage should be visited by the court’s displeasure.”⁵¹ The judge imposed a costs sanction as a direct

⁴⁶ The Department of Justice and Constitutional Development ‘Consult a Family Advocate’ available at <http://www.justice.gov.za/services/consult-fam-adv.html>, accessed on 22 November 2017.

⁴⁷ *MB v NB* 2010 3 SA 220 (GSJ).

⁴⁸ *Van den Berg v Le Roux* 2003 All SA 599 (NC).

⁴⁹ *Townsend-Tuner and Another v Morrow* 2004 All SA 235 (C).

⁵⁰ *MB v NB* 2010 (3) SA 220 (GSJ).

⁵¹ Brand John ‘South African High Court obliges lawyers to recommend mediation’ ADR Bulletin: Vol. 11: No. 5, Article 2, available at <http://epublications.bond.edu.au/adr/vol11/iss5/2>, accessed 4 June 2017.

consequence of failure to mediate. Interestingly, the sanction in this case was imposed not on the parties but on their lawyers as the court limited the costs that the attorneys could recover from their clients.⁵²

In the judgement handed down in the case of *MB v NB*,⁵³ the court quoted the case of *Egan v Motor Services*,⁵⁴ in which it was held that it is sheer commercial folly not to mediate when the costs of mediation would be paltry in comparison with the costs of litigation. This case sets out very clearly that parties who fail to attempt mediation where appropriate, and legal representatives who fail to direct their clients to mediation where appropriate, will receive little sympathy from the courts.

The various judgements handed down in South Africa that are in promotion of mediation have confirmed the notion that mediation is a viable alternative to the conflict intrinsic in matrimonial litigation. Naturally, the advantages of mediation are not only prevalent in matrimonial litigation. The King III Report, which is arguably the world's leading corporate governance standard, notes that ADR is not a reflection on a judicial system of any country, but that it has become an important element of good governance.⁵⁵ The Report endorses mediation as a 'creative and forward-looking solution', particularly where it involves a continuing relationship between the parties, and addresses the fact that mediation is not only being used as a dispute resolution mechanism, but also as a management tool.

(e) Preparation for Mediation

The typical mediation can be divided into three parts: preparation, bargaining, and closing strategies.⁵⁶ As part of the preparation for mediation, there is typically a list of information and data that needs to be assembled and reviewed. Another part of the preparation process, which is perhaps, the most important part about preparing for mediation, is to examine how unconscious biases can, and usually do, negatively impact the roll of the mediator.⁵⁷ Naturally, the steps that can be taken to help control or at least minimise the negative effect of these biases will also have to be considered. Chapter 3 and 5 will address the possible

⁵² Ibid.

⁵³ *MB v NB* 2010 (3) SA 220 (GSJ).

⁵⁴ *Egan v Motor Services* (2007) EWCA CIV 1002 (Bath).

⁵⁵ Institute of Directors in Southern Africa 'King 3 Code of Corporate Governance for South Africa 2009' available at http://www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_fo.pdf, accessed 22 October 2017.

⁵⁶ Hughes H 'How Our Subconscious Bias Impacts Negotiations and the Mediation Process' (2010) 4 *American Journal of Mediation* at 1.

⁵⁷ Ibid.

biases and also look at what steps can be taken to help control or minimise the negative effect of these biases.

(a) Introduction

The purpose of the third chapter of the study is to answer the second research question of the study, which was as follows: What are some of the common ethical problems faced by mediators?

(b) The Problem of Bounded Ethicality

The concept of bounded ethicality is derived from earlier research on the notion of bounded rationality, in which it is argued that people are cognitively limited.⁵⁸ The concept of bounded rationality refers to the limits on the quality of general decision-making, whereas bounded ethicality is a strand that is used to refer to the limits on the quality of decision-making with ethical import.⁵⁹ Bounded ethicality can then be described as the impact of psychological biases which results in an individual's morality being constrained in systematic ways that favour self-serving perceptions – which in turn leads people to engage in unethical behaviour that does not respond to their own normative beliefs.⁶⁰

Mediators may argue that because they are not the ultimate decision makers in mediation, they do not need to be aware or even recognise their biases.⁶¹ However, by not recognising their own biases and acknowledging their susceptibility to biases, they create barriers to resolving conflict. If a mediator is not cognisant that they have biases, the mediator will never become a true neutral⁶² – and justice demands that a mediator must be neutral.⁶³ Mediators thus have the responsibility to form an awareness of their own ethical vulnerabilities and also to be able to identify and address the unethical behaviour of any of the parties which may bring the resolution of a dispute under threat. In order for mediators to be able to do this, they first have to understand how and why individuals make the decisions that they do. Burch suggests also considering the premise that our ethical decision-making

⁵⁸ Simon H A *Models of man; social and rational* (1957).

⁵⁹ Don A Moore, Daylian M Cain & George Loewenstein (eds) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy* (2015) 75.

⁶⁰ Chugh D, Bazerman M & Banaji M 'Bounded ethicality as a psychological barrier to recognizing conflicts of interest' in D Moore, D Cain, G Loewenstein & M Bazerman (Eds) *Conflict of interest: Challenges and solutions in business, law, medicine, and public policy* (2005) 74.

⁶¹ Gravett WH 'The myth of rationality: cognitive biases and heuristics in judicial decision-making' (2017) SALJ 134(1) 53 at 56.

⁶² Jeff Kichaven, 'The Mediators' Role: Tackling the Illusion of Objectivity' available at <https://www.irmi.com/articles/expert-commentary/the-mediators-role-tackling-the-illusion-of-objectivity>, accessed on 22 November 2017.

⁶³ Joseph B. Stulberg *Must a Mediator Be Neutral? You'd Better Believe It!* (2012) at 829.

processes are often bound by factors which may be outside of our own awareness.⁶⁴ Individuals do not always perceive or reflect on the ethical dimensions of their decisions because they are subject to systematic and predictable ethical blind spots.⁶⁵ Perlman confirms the premise of humans having *bounded rationality* when it comes to acting ethically which ultimately causes us to act in a manner that is inconsistent with what is expected in terms of the model of objectivity and rationality.⁶⁶ The social psychology theory called 'situationism'⁶⁷ argues that an individual's behaviour and decision-making is greatly affected in a situation by external environmental or contextual influences.⁶⁸ Research in the field of behavioural ethics also supports the theory that unethical behaviour may increase when certain internal psychological and cognitive factors, which are considered to be enablers of self-deception, are present.⁶⁹ The external and internal factors that this dissertation will focus on due to these factors being most relevant in the realm of mediation are: blind spots, ethical fading and framing, ambiguity of rules, implicit bias, self-serving bias and rationalisations.

i) Ethical Blind Spots

Bazerman and Tenbrunsel define ethical blind spots as a lack of awareness that impairs an individual's ability to identify the ethical implications of a situation.⁷⁰ Essentially, blind spots are the biases, heuristics, and psychological traps which impede our ability to perceive and thoughtfully consider the ethical tensions we inevitably face.⁷¹ The existence of blind spots is explained by the phenomenon where well-intentioned people unintentionally make bad ethical decisions.⁷² In other words, people who believe they know what the ethical choice is and believe they will make that choice if faced with an ethical dilemma, often act counter to their beliefs.⁷³ As human beings, we all want to believe that we are inherently good-natured and that we consciously behave correctly and make good decisions. However, because there is a gap between our actual and desired behaviour, we fail to recognise our own blind spots.

⁶⁴ (2014) 219 *Mil. L. Rev* at 294.

⁶⁵ Mahzarin R Banaji, Max H Bazerman & Dolly Chugh 'How (Un)ethical Are You?' (2003) 81 *Harvard Business Review* 56.

⁶⁶ (2015) 90 *Indiana Law Journal* at 1650.

⁶⁷ John Sabini & Maury Silver 'Lack of Character? Situationism Critiqued' (2005) 115 *Ethics* 535 at 537.

⁶⁸ Prentice RA 'Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves.' (2015) 29 *Notre Dame JL Ethics & Pub Pol'y* 35 at 74.

⁶⁹ Ovul Sezer, Francesca Gino & Max H Bazerman 'Ethical blind spots: explaining unintentional unethical behavior' (2015) 6 *Current Opinion in Psychology* at 77.

⁷⁰ Bazerman, M. H. *The power of noticing: What the best leaders see* (2014).

⁷¹ Sternlight Jean R & Robbenolt Jennifer K 'Behavioral Legal Ethics' (2013) 45 *Ariz. St. L.J.* 1107.

⁷² Max H. Bazerman & Ann E. Tenbrunsel *Blind Spots Why We Fail to Do What's Right and What to Do About It* (2011) 4.

⁷³ *Ibid.*

We believe that we will act ethically when we are faced with an ethical dilemma but often, when we are faced with such an ethical dilemma in reality, we behave in the opposite manner. Traditional models for ethical decision-making do not account for this phenomenon because under such models, it is presumed that people respond to ethical dilemmas knowingly and intentionally.⁷⁴ Research in the field of behavioural ethics and specifically the theory of bounded ethicality acknowledges that people do not always recognise an ethical dilemma when faced with one and people often respond to ethical dilemmas in ways that are inconsistent with their actual beliefs.⁷⁵ This has led to criticism against the prevailing assumption that all ethical misconduct can be explained as the product of intentional behaviour. The behavioural ethics principle of predictable and systematic unconscious biases helps to explain many of the ethical failures that occur.⁷⁶ In addition, because these forces go unnoticed, people often fail to perceive the wide gulf between actual and desired behaviour.

In a nutshell, many people are blind to their own unethical conduct. The starting point for understanding these conclusions is the relationship between conscious and unconscious aspects of human decision-making. It is now generally accepted that humans engage in a *dual-process* of information processing in which both of these processes play a significant role.⁷⁷ Although the subtle differences of these categories are debated, the general distinction between them is well established: unconscious processes which occur without the deliberate intention of the decision maker. Hallmarks of such automatic processes are that they are fast, effortless, involuntary and, importantly, not accessible to introspection.⁷⁸ In other words, the decision maker is unaware of their existence or influence.⁷⁹ In contrast, conscious or controlled processes are slow, effortful, voluntary, and accessible to introspection. They are typified by the common experience of deliberate and rational choice.⁸⁰

Research demonstrates that the types of automatic thinking that pervade other cognitive processes often precede, and have a significant influence over, moral choices. In addition, because automatic processes are not capable of introspection and occur silently, decision makers are unaware of them and thus fail to recognise how they influence ethical

⁷⁴ F Gino 'Understanding ordinary unethical behavior: why people who value morality act immorally' (2015) 3 *Curr Opin Behav Sci* 107.

⁷⁵ Sternlight Jean R & Robbennolt Jennifer K 'Behavioral Legal Ethics' (2013) 45 *Ariz. St. L.J.* 1107 at 1156.

⁷⁶ Mahzarin R Banaji, Max H Bazerman & Dolly Chugh 'How (Un)ethical Are You?' (2003) 81 *Harvard Business Review* 56.

⁷⁷ Evans J S 'In two minds: dual process accounts of reasoning' (2003) 7 *Trends Cogn. Sci.* 454 at 454.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

decisions. The result is that decision makers will be blind to the true reasons for their decisions.

ii) *The Problem of Ethical Fading*

Tenbrunsel and Messick introduced the concept of ‘ethical fading’ and described it as ‘the process by which the moral colours of an ethical decision fade into bleached hues that are void of moral implications’.⁸¹ Ethical fading is thus a psychological mechanism through which people allow the ethical aspects of a decision to fade into the background and cease to perceive them, often resulting in unethical decisions being made.⁸² This allows a person to make a decision without taking into consideration the ethical elements underpinning the situation and disregarding the moral implication of their decision⁸³ – ethics and morals become blurred and start playing a miniscule role in the decision. As the ego role increases and the conscience becomes a void, ethical fading happens. It is suggested that individuals who portray behaviour that is subject to ethical fading may use various forms of self-deception, such as justifications and euphemistic language, to shield themselves from their own ethical transgressions.⁸⁴

iii) *The Problem of Framing*

When the wording of a scenario or situation is changed while all other factors remain the same, and this change in wording encourages a different reasoning or behaviour – this is referred to as framing. In practice, individuals “frame” issues, using language choices to highlight some aspects of an issue, while ignoring others that leads to individuals responding differently to different descriptions of the same problem.⁸⁵ The tool of framing is often used in a dispute situation where mediators use this to objectively assist the parties to find a solution that is beneficial to both parties. Research has shown a positive relationship between frame convergence and frequency of agreements.⁸⁶ Furthermore, the mediators who guided disputant discussion toward frame convergence increased focus, control, positive social attributions, and integrativeness.⁸⁷ The difficulty for mediators, according to Gray, is to help

⁸¹ Tenbrunsel A.E. & Messick D.M. ‘Ethical Fading: The Role of Self-Deception in Unethical Behavior’ (2004) 17 *Social Justice Research* 223 at 224.

⁸² Ibid.

⁸³ Robert Prentice ‘Teaching Behavioral Ethics’ (2014) 31(2) *Journal of Legal Studies Education* 325 at 357.

⁸⁴ Tenbrunsel A.E. & Messick D.M. ‘Sanctioning Systems, Decision Frames, and Cooperation’ (1999) 44(4) *Administrative Science Quarterly* 684.

⁸⁵ Drake L. E. & Donohue W. A. ‘Communicative framing theory in conflict resolution’ (1996) 23 *Communication Research* 297.

⁸⁶ Ibid.

⁸⁷ Ibid.

the parties frame the conflict and its potential resolutions in a way that is perceived to be fair to all parties involved.⁸⁸ It is thus important to understand the effect that the different forms of framing have on the perceptions and thought processes of any given individual.

According to research conducted by Kahneman, Knetsch, & Thaler,⁸⁹ people are loss averse. This means that individuals are generally willing to go to greater lengths to avoid a loss than to obtain a gain of a similar size.⁹⁰ When making decisions, individuals often choose from an array of possible responses, with some choices being more, or less, ethical than others. According to Kern and Chugh,⁹¹ individuals who perceive a potential outcome as a loss will go to greater lengths, and engage in more unethical behaviour, to avert that loss than will individuals who perceive a similarly sized gain.

Furthermore, according to Tigran, an individual's ability to consciously and ethically deliberate can be reduced by the way that a decision is framed.⁹² The framing effect appears to be an example of automaticity as the likelihood of unethical decisions being made is reduced when decision makers are 'cognitively engaged with the problem, have enough time to process the information, and have the cognitive ability to fully process the information'.⁹³ It is of utmost importance that mediators achieve cognitive awareness of their own vulnerabilities in the ethical domain in order to attempt to avoid the effect of automaticity, even while objectively assisting the parties to a dispute to reach a solution. If an individual is faced with having to make a choice between two alternatives, and the decision maker is not aware of the ethical dimensions of the decision to be made, the decision maker is more likely to be deceived into thinking that the decision which was made is ethically correct, or at least socially acceptable, rather than ethically improper.⁹⁴ When unethical behaviour or choices are then framed as errors or oversights, it implies that no real responsibility is assigned to the decision maker. This causes the decision maker to believe through self-biased perception, that the cause of the unethical behaviour lies somewhere else and that the ethical implications are

⁸⁸ Margaret S. Herrman (ed) *The Blackwell Handbook of Mediation: Bridging Theory, Research, and Practice* at 193.

⁸⁹ Kahneman, D, Knetsch J.L. & Thaler, R.H. 'Experimental tests of the endowment effect and the Coase theorem' (1990) 98 *Journal of Political Economy* 1325.

⁹⁰ Mary C. Kern & Dolly Chugh 'Bounded Ethicality: The Perils of Loss Framing' (2009) 20(3) *Psychological Science* 378.

⁹¹ *Ibid* at 379.

⁹² Tigran W. Eldred 'Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases' (2012) 65 *Rutgers Law Review* 333 at 383.

⁹³ Stanovich K. & West R. 'Individual differences in reasoning: Implications for the rationality debate?' (2000) 23(5) *Behavioral and Brain Sciences* 645 at 433.

⁹⁴ Tigran W. Eldred 'Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases' (2012) 65 *Rutgers Law Review* 333 at 383.

not of much importance. These oversights are more easily categorised as ‘ethically acceptable’ as decision-makers will tend to overlook the ethical nature of such failures.

iv) *The Problem of Rule Ambiguity*

Rules in any society are essential. A legal rule has been described to specify some prescribed behaviour or behaviours and where a sanction is to be imposed if there is non-compliance with that legal rule.⁹⁵ However due to the absence of bright line rules, ambiguity in interpreting the rules have surfaced. Individual perceptions of the interpretation of rules have caused confusion in many situations i.e. individuals interpreting the law in one way may believe unconsciously that they are behaving in a responsible manner by upholding the law, when in fact they are not. Research confirms this notion and has shown that ethical failures are most likely to occur in ambiguous settings that refer to settings in which ethical boundaries are blurred.⁹⁶

The ideal environment in which to increasing ethical behaviour is one in which ambiguity is low and transparency high.⁹⁷ When individuals form part of a society in which ambiguous standards exist, they are enabled to rely on their own self-serving interest, confidence in their own morality, competency and deservingness as a measure of ethicality.⁹⁸ Tigran addresses this very notion when stating:

*‘When the standard for measuring the ethicality of a decision is clear and objective, the illusion of objectivity is harder to maintain. In contrast, when the decision maker’s self-assessment is measured against an ambiguous standard – meaning that it is harder to confirm or disconfirm the ethicality of a decision – the illusion of objectivity can flourish’.*⁹⁹

⁹⁵ Martin P. Golding & William A. Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* at 69.

⁹⁶ Andrea Pittarello, Margarita Leib, Tom Gordon-Hecker & Shaul Shalvi ‘Justifications Shape Ethical Blind Spots’ (2015) *Psychological Science* 26(6) 794 at 803.

⁹⁷ Ibid.

⁹⁸ Tigran W. Eldred ‘Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases’ (2012) 65 *Rutgers Law Review* 333 at 379; Ruedy, N.E. & Schweitzer & Schweitzer M.E. ‘In the Moment: The Effect of Mindfulness on Ethical Decision Making’ (2010) 95 *J Bus Ethics* 73 at 74; Christopher Hodges *Law and Corporate Behaviour: Integrating Theories of Regulation* (2015) at 31.

⁹⁹ Tigran W. Eldred ‘Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases’ (2012) 65 *Rutgers Law Review* 333 at 379.

v) *The Problem of Implicit Bias*

Implicit biases can be described as the discriminatory biases based on implicit attitudes or implicit stereotypes.¹⁰⁰ Implicit bias is an aspect of the new science of unconscious mental processes that has substantial bearing on discrimination law.¹⁰¹ People have a tendency to be selfish and we generally display selfish behaviours and attitudes¹⁰² – indicating that we are implicitly biased towards our own needs and desires, often to the detriment of our ethical values.¹⁰³

Furthermore, mankind in general maintains an illusion of objectivity – research shows that we incorrectly view ourselves as more objective than others. This is again illustrated in typical negotiations where we believe that we deserve a better deal, a bigger portion, a greater outcome than typically would be viewed as fair, and when negotiations over scarce resources happens, it becomes evident that we believe we should win, despite the consequences that it may have on other people or next generations.¹⁰⁴ Our behaviours are generally egocentric, self-serving and based on our unique perspective of our own importance. Thus our judgments are affected by our self-interest.¹⁰⁵

People do not always recognise their positive or negative views of others, let alone the fact that these biased views often result in discriminatory behaviour.¹⁰⁶ We may believe that we do not deliberately discriminate against others, but when we offer preferential treatment to those we like or know personally, the outcome may be unconscious discrimination against those who ‘do not qualify’.¹⁰⁷ An examples of the effect of our unconscious attitudes that lead to our actions which are against our moral values, are the many elite U.S and other country universities that give preference to so-called ‘legacy’ candidates – the children of alumni. We

¹⁰⁰ Greenwald A. & Krieger L. ‘Implicit Bias: Scientific Foundations’ (2006) *California Law Review* 94(4) at 951.

¹⁰¹ Ibid at 946.

¹⁰² Ibid at 948.

¹⁰³ O. Sezer, F. Gino & M.H. Bazerman, ‘Ethical blind spots: Explaining unintentional unethical behaviour’ (2015) *Current Opinion in Psychology* 6 at 77-81.

¹⁰⁴ Babcock L & Loewenstein G ‘Explaining bargaining impasse: the role of self-serving biases.’ (1997) *J Econ Perspect* 109.

¹⁰⁵ Shalvi S, Gino F, Barkan R & Ayal S ‘Self-serving justifications: doing wrong and feeling moral.’ (2015) 24 *Curr Direct Psychol Sci* 125.

¹⁰⁶ Chugh D, Bazerman M & Banaji M ‘Bounded ethicality as a psychological barrier to recognizing conflicts of interest’ in D Moore, D Cain, G Loewenstein & M Bazerman (Eds) *Conflict of interest: Challenges and solutions in business, law, medicine, and public policy* (2005) at 95.

¹⁰⁷ Messick DM & Bazerman MH ‘Ethical leadership and the psychology of decision making.’ (1996) 37 *Sloan Manag Rev* 9.

often fail to recognise the harm that preferential treatment or implicit favouritism of ‘in-groups’ cause to ‘out-groups’.

According to Forsyth, a self-serving bias is any cognitive or perceptual process that is distorted by the need to maintain and enhance self-esteem.¹⁰⁸ Practically, the self-serving bias explains the tendency of individuals believing that they perform better than others.¹⁰⁹ While this tendency of people to evaluate ambiguous information in a way that is beneficial to one's own interests' is often harmless, its effects are not benign when it leads each side to self-servingly¹¹⁰ and, at times, irrationally, interpret the facts and law favourably to themselves.

Theoretically, in making ethical judgments, decision makers should be able to suppress their own self-interest. Fortunately, many do. However, behavioural ethicists argue that because self-interested goals are generated automatically, they occur before the effortful and slower process of deliberation gets underway, explaining why more often, human beings will act and behave according to their own self-serving interests.¹¹¹ The challenge lies in that neither law authorities nor professionals can say for certain in what situations, with which individuals and how often self-interest exerts influence over the decision-making interest. Research has shown that the bias is even present when ‘bargainers’ have incentives to evaluate the situation impartially, which implies that the bias does not appear to be deliberate or strategic.¹¹² What is troubling to the process of mediation is the finding of various studies that a high percentage of individuals believe that others are more susceptible to self-serving bias than they are themselves.¹¹³

This starts a cascade reaction, in which the decision that is ultimately reached will often be based on self-interest rather than the dictates of professional responsibility. As a

¹⁰⁸ Forsyth, Donelson R. ‘Self-Serving Bias.’ *International Encyclopedia of the Social Sciences 2nd ed, Vol. 7* (2008) at 429.

¹⁰⁹ Hughes Hunter R. ‘How Our Subconscious Bias Impacts Negotiations and the Mediation Process.’ (2010) 4 *American Journal of Mediation* at 6.

¹¹⁰ Ibid at 7.

¹¹¹ Loewenstein George ‘Behavioral Decision Theory and Business Ethics: Skewed Tradeoffs Between Self and Other’ in Messick D. & A. Tenbrunsel (eds) *Codes of Conduct: Behavioral Research into Business Ethics* (1996) 214.

¹¹² Babcock Linda & George Loewenstein ‘Explaining Bargaining Impasse: The Role of Self-Serving Biases.’ (1997) 11 *The Journal of Economic Perspectives* 109 at 110.

¹¹³ Hughes Hunter R. ‘How Our Subconscious Bias Impacts Negotiations and the Mediation Process.’ (2010) 4 *American Journal of Mediation* at 8.

result, everyone – mediators and lawyers included – tend to be unaware of the ways in which self-interest exerts influence over the decision-making process.¹¹⁴

Another investigation heuristic that is related to the self-serving bias concept and that is important to case evaluations is the false-consensus effect. This is the tendency of individuals to overestimate the consensus for one's own position.¹¹⁵ This can cause parties to misjudge the likelihood of success of their individual case.¹¹⁶ According to Huges, self-serving bias and related heuristics and attitudes pose significant barriers to neutrality and without neutrality, the odds of a negotiation failing or the 'wrong' decision being made increases substantially.¹¹⁷

vi) *The Problem of Rationalisations*

The action of attempting to explain or justify immoral, deviant or unacceptable behaviour with logical reasons, even if these are not appropriate, is referred to as rationalisation. In Freud's classic psychoanalytical theory, rationalisation is a mechanism for defence or an unconscious attempt to avoid addressing many of the underlying reasons for behaviour.¹¹⁸

According to Regan, lawyers are especially creative rationalisers when it comes to justifying unethical behaviour.¹¹⁹ A common form of rationalisation takes place when an individual makes use of euphemistic language when referring to unethical behaviour upon reflection.¹²⁰ A euphemism is defined as: 'A mild or indirect word or expression substituted for one considered to be too harsh or blunt when referring to something unpleasant or embarrassing.'¹²¹ An example of euphemistic language in the context of rationalising unethical behaviour in the mediation realm would be the following: 'I may have nudged the discussion in a direction which favours one of the parties but both parties would have lost a lot more if they did not settle the matter.' This example clearly indicates that a mediator, by

¹¹⁴ Babcock Linda & George Loewenstein 'Explaining Bargaining Impasse: The Role of Self-Serving Biases.' (1997) 11(1) *The Journal of Economic Perspectives* 109 at 111.

¹¹⁵ Lee Ross, David Greene & Pamela House 'The "False Consensus Effect": An Egocentric Bias in Social Perception and Attrition Processes' (1977) 13(3) *Journal Of Experimental Social Psychology* 279.

¹¹⁶ Huges, Hunter R. 'How Our Subconscious Bias Impacts Negotiations and the Mediation Process.' (2010) 4 *American Journal of Mediation* at 9.

¹¹⁷ Ibid.

¹¹⁸ David S. Caudill 'Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis' (1991) 66(3) *Indiana Law Journal* 651 at 665.

¹¹⁹ Milton C. Regan *Eat What You Kill: The Fall Of A Wall Street Lawyer* (2004) 350.

¹²⁰ Max Nisen 'Why Good Employees Sometimes Do Bad Things' available at <http://www.businessinsider.com/why-good-employees-do-bad-things-2012-9>, Accessed 06 September 2017.

¹²¹ English Oxford Living Dictionaries; "Euphemism" available at <https://en.oxforddictionaries.com/definition/euphemism>, accessed 27 September 2017.

way of different uses of language as well as justifications when addressing the unethical behaviour, can rationalise unethical behaviour.

The problem with rationalisation is not only that it provides a tool to justify past unethical behaviour, but it also provides permission to act unethically in future.¹²² This means that we may categorise a specific act as being unethical, but once we have found ourselves engaging in this act and we create some form of rationalisation to justify having engaged in this act, our brains re-categorise this specific act. The specific act is then no longer flagged by our brains as being ‘unethical or ‘wrong’ but instead, when we engage in such specific act again, our brains’ ability to take cognisance of the fact that the act is not ethical is limited.¹²³ Prentice suggests that the monitoring of rationalisations should enable an individual to more readily recognise unethical behaviour that is about to take place as well as to prevent such behaviour from happening.¹²⁴

Having explored what the concept of bounded ethicality entails, together with the psychological and cognitive factors, which may increase the chances of, experiencing bounded ethicality; we have to consider what the implications are to the mediator in the South African context.

¹²² Robert A. Prentice ‘Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves,’ (2015) 29 *Notre Dame Journal of Law, Ethics & Public Policy* 35 at 34.

¹²³ Ibid.

¹²⁴ Ibid at 36.

III. CHAPTER 4. BEHAVIOURAL ETHICS AND BOUNDED ETHICALITY AS APPLIED TO SOUTH AFRICAN MEDIATION

(a) Introduction

The purpose of the fourth chapter of the study is to answer the third research question of the study, which was as follows: What is behavioural ethics? Research Question 3 will be answered through an application of the principle of bounded ethicality to South African mediators and through two specific sub-questions, which are as follows: (1) What are some of the internal and external pressures and constraints that can keep South African mediators from acting more ethically?

(b) Behavioural Ethics: An Introduction

Behavioural ethics has been defined as ‘the study of individual behaviour that is subject to or judged according to generally accepted moral norms of behaviour’.¹²⁵ It is a field that draws upon psychology, sociology, and other related fields and investigates the realities of an individual’s behaviour when such an individual is faced with ethical difficulties.¹²⁶ Prentice has defined behavioural ethics as the research focusing specifically upon how people make both ethical and unethical decisions and can offer insights with regards to our understanding of why we often behave contrary to our best ethical intentions.¹²⁷ Furthermore, behavioural ethics also looks at how people respond to other’s behaviours in terms of what they believe the other should or should not have done.”¹²⁸

According to O’Grady, ‘the study of applying behavioural ethics principles to the practice of law by examining behavioural legal ethics and concepts like bounded ethicality in the legal sphere is still rather unexplored’.¹²⁹ By applying the principles of behavioural ethics to the realm of mediation, a methodology is introduced for assisting mediators to better understand their own behaviour in the ethics domain. Our lack of awareness to our own ethical vulnerabilities means that we sometimes act unethically without it being intentional conduct or a conscious decision. This occurrence supports the need to equip lawyer-

¹²⁵ David De Cremer, David M. Mayer & Marshall Schminke (eds) ‘Introduction: On understanding ethical behaviour and decision Making: A Behavioural Ethics Approach.’ (2010) *Business Ethics Quarterly* 20.

¹²⁶ Max H. Bazerman & Ann E. Tenbrunsel *Blind Spots, Why We Fail to Do What's Right and What to Do about It* (2011) 4.

¹²⁷ Minette Drumwright, Robert Prentice & Cara Biasucci ‘Behavioral Ethics and Teaching Ethical Decision Making’ (2015) 13 *Decision Sciences Journal of Innovative Education* 431.

¹²⁸ Jonathan R Crawshaw, Russell Cropanzano, Chris M Bell & Thierry Nadisic ‘Organizational justice: New insights from behavioural ethics’ (2013) 66(7) *Human Relations* 885 at 887.

¹²⁹ Catherine Gage O’Grady ‘Behavioral Legal Ethics, Decision Making, and The New Attorney's Unique Professional Perspective’ (2015) 15 *Nevada Law Journal* 671 at 673.

mediators with self-correcting methodologies. Lawyer-mediators need to be able to identify their own ethical vulnerabilities and to self-correct their unethical behaviour in a mediation environment whether such behaviour is conscious or not. Bazerman explains that the behavioural ethics model differs from traditional teachings in that it does not prescribe how mediators should behave when facing specific ethical challenges, instead, it allows mediators to compare the reality of their behaviour to how they thought they would behave or would have liked to behave.¹³⁰ An introduction to the principles of moral reasoning may be of pivotal value as most lawyer-mediators have had limited exposure to philosophical training.¹³¹

(c) Bounded Ethicality: A South African Context

Justice Langa is of the opinion that *'we all enter any decision with our own baggage, both on technical legal issues and on broader social issues'*.¹³² He further stated that *'in South Africa, the policy under apartheid legal culture was to deny these influences on decision-making, but today our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions'*.¹³³ Green recons that it is safe to assume that *'a lawyer's religious, cultural and moral understandings will carry some weight in at least some of the decisions that the lawyer makes'*.¹³⁴

This is also the case when it comes to lawyer-mediators and the decision that need to be made as well as the guidance that needs to be given within the mediation realm.¹³⁵ Simply put, this means that the mediator's personal religious, cultural and moral considerations will contribute to how the mediator approaches a conflict resolution challenge within a mediation setting. It is therefore necessary to look into some of the prevalent contextual pressures experienced by South African lawyer-mediators, specifically focussing on how the religious, cultural and moral considerations of a South African lawyer-mediator may influence both their behaviour and decision-making in ethically challenging situations.

¹³⁰ Max H. Bazerman & Francesca Gino 'Behavioral Ethics: Towards a Deeper Understanding of Moral Judgement and Dishonesty' (2012) 8 *Ann Rev L. & Soc Sci.* 85.

¹³¹ Deborah L. Rhode 'Ethics by the Pervasive Method' (1992) 42 *Journal of Legal Education* 31 at 43.

¹³² Langa P. 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 351 at 353.

¹³³ *Ibid.*

¹³⁴ Green, B. 'The Role of Personal Values in Professional Decision making.' (1997) 11(1) *Georgetown Journal of Legal Ethics* 19 at 25.

¹³⁵ Prentice RA, 'Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves.' (2015) 29 *Notre Dame JL Ethics & Pub Pol'y* 35 at 74.

i) *Internal- and External Pressures and Constraints Challenging South African Mediators Today*

South Africa is considered to be a 'plural society'¹³⁶ which is defined as 'a society composed of different ethnic groups or cultural traditions, or in the political structure of which ethnic or cultural differences are reflected'.¹³⁷ Rex explains that in a South African context, official emphasis tends to fall on the 'ethnic' or 'cultural' diversity of its population groups.¹³⁸ In South Africa, two major categories or styles of mediation exist today – traditional African-style mediation and western-style mediation.¹³⁹

Traditional African-style mediation involves 'the non-coercive intervention of a mediator who usually seeks to ensure that peace and harmony reign supreme in the society.'¹⁴⁰ In African culture, mediation in the form of the tradition of family or neighbourhood mediation is compulsory.¹⁴¹ This process entails that mediators are sought from within the communities or societies of the parties concerned,¹⁴² and the mediators' role will depend on traditions, circumstances and personalities accordingly, which is referred to as an intra-cultural mediation style.¹⁴³ In the African culture, elders are respected as trustworthy mediators, because of their accumulated experiences and wisdom.¹⁴⁴

Western-style mediation, on the other hand, is in line with what is understood under the concept of court-recognised mediation. In South Africa, a professional body must accredit the mediator and the mediator can either be chosen by one of the parties to the dispute or by the court.¹⁴⁵ There are recognisable stages that occur during the mediation process and the ultimate objective of Western-style mediation is that the parties find a resolution to their

¹³⁶ John Rex 'The Plural Society: The South African Case' (1971) 12(4) *Race & Class* 401 at 401.

¹³⁷ English Oxford Living Dictionary; "Plural Society" available at https://en.oxforddictionaries.com/definition/plural_society, accessed on 27 November 2017.

¹³⁸ John Rex 'The Plural Society: The South African Case' (1971) 12(4) *Race & Class* 401 at 401.

¹³⁹ AE Boniface 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) *PELJ*, 15(5) 391 at 392.

¹⁴⁰ AT Ajayi, LO Buhari 'Methods of Conflict Resolution in African Traditional Society' (2014) 8(2) *An International Multidisciplinary Journal, Ethiopia* 138 at 149.

¹⁴¹ De Jong; "A pragmatic look at mediation as an alternative to divorce litigation" (2008) *THRHR* 630 at 526.

¹⁴² AT Ajayi, LO Buhari 'Methods of Conflict Resolution in African Traditional Society' (2014) 8(2) *An International Multidisciplinary Journal, Ethiopia* 138 at 150.

¹⁴³ AE Boniface 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) *PELJ*, 15(5) 391 at 392.

¹⁴⁴ AT Ajayi, LO Buhari 'Methods of Conflict Resolution in African Traditional Society' (2014) 8(2) *An International Multidisciplinary Journal, Ethiopia* 138 at 149.

¹⁴⁵ Court-Annexed Mediation Rules of the Magistrates' Courts in GN 37448 of 18 March 2014 at Rule 86(2).

conflict by reaching an agreement of which the terms are included in a settlement agreement, which can be made an order of court.¹⁴⁶

Although the styles of mediation in South Africa may differ, the ethical challenges that mediators are faced with and the religious, cultural and moral influences that may influence a South African mediator's decision-making and behaviour should overlap to some extent. Some of the areas in mediation where South African mediators experience the concept of bounded ethicality due to both the influence of contextual pressures, and the ethicality of the individual, specifically in South African practice are: neutrality and impartiality; incentives and motivations; confidentiality and conformity bias.

ii) Neutrality and Impartiality

Neutrality can be defined as the condition of being inclined neither way in the hearing of arguments, as indifference or the absence of decided views, feelings or expressions about an issue.¹⁴⁷ The notion of neutrality is closely linked with the ideas of freedom from prejudice or bias and is used interchangeably with the term impartiality.¹⁴⁸ Neutrality is of paramount importance as the essence of the lawyer-mediator's service is impartiality.¹⁴⁹ According to Moore, mediators may be vulnerable to a variety of factors that may affect their ability to be neutral and impartial.¹⁵⁰ These factors may differ depending on the country in which the mediation is taking place,¹⁵¹ as well as the norms, values and beliefs that are embedded in the specific society along with the different conceptions of notions such as justice and fairness.¹⁵²

A form of bounded ethicality that challenges South African mediators due to the complex and controversial history where the concept of racial discrimination was pertinent is that of implicit racial bias. According to Gravett, the concept of being racially unbiased is far removed from the reality of things as very few individuals can truly claim to be “non-racial”

¹⁴⁶ AE Boniface 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) *PELJ*, 15(5) 391 at 380.

¹⁴⁷ English Oxford Living Dictionary: "Neutrality" available at <https://en.oxforddictionaries.com/definition/neutrality>, accessed on 28 November 2017.

¹⁴⁸ Linda Mulcahy 'The Possibilities and Desirability of Mediator Neutrality - Towards an Ethic of Partiality?' (2011) 10(4) *Social & Legal Studies* 505 at 506.

¹⁴⁹ Moore, Loretta W. 'Lawyer Mediators: Meeting the Ethical Challenges.' (1996) 30(3) *Family Law Quarterly* 679 at 689.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² Linda Mulcahy 'The Possibilities and Desirability of Mediator Neutrality - Towards an Ethic of Partiality?' (2011) 10(4) *Social & Legal Studies* 505 at 507.

or ‘race-blind’.¹⁵³ Despite South Africa envisioning a society in which the norms and values of ‘Ubuntu’¹⁵⁴ are embedded, the implicit racial biases which form part of our reality, often seep through into our everyday behaviour without us ever being aware of their influence.¹⁵⁵ This is in line with the principles of bounded ethicality which determine that an individual is not necessarily consciously aware of their own true racial attitudes and stereotypes.¹⁵⁶

Even when individuals are aware of their own racial preferences and resentments, the wonderfully inclusive society that South Africans envision, where racial discrimination is a thing of the past and equality reigns true, generates a reluctance in individuals to admit to their shortcomings. This results in South African mediators being reluctant to withdraw from cases where they know their neutrality has been compromised due to racial biases or partiality – creating the possibility that one of the parties may be favoured during the process of mediation. According to Astor, mediators have admitted that although they try to exclude their own personal experiences, thoughts, perspectives and opinions in order to achieve neutrality, these things inevitably accompany the mediator to the mediation.¹⁵⁷ Instead, the mediators referred to by Astor indicate that neutrality is not as important as impartiality – which ensures that parties are treated equally.¹⁵⁸ The reality is that if a mediator does not remain both neutral and impartial, the procedural fairness of the entire mediation process may be compromised.¹⁵⁹

According to the LEAD civil mediation workshop manual, a mediator should decline a mediation if the mediator cannot conduct it in an impartial manner.¹⁶⁰ Gravett suggests that we endeavour to decrease the impact of implicit racial bias by starting a dialogue in which we

¹⁵³ Gravett, Willem H. ‘The myth of objectivity: implicit racial bias and the law (Part 1).’(2017) 20(1) *PELJ* at 4.

¹⁵⁴ Shamin Chibba ‘Brand South Africa: Ubuntu is about relationships’ available at <https://www.brandsouthafrica.com/people-culture/people/ubuntu-is-about-relationships>, accessed on 27 November 2017.

¹⁵⁵ Gravett, Willem H. ‘The myth of objectivity: implicit racial bias and the law (Part 1).’(2017) 20(1) *PELJ* at 4.

¹⁵⁶ *Ibid* at 5.

¹⁵⁷ Hilary Astor ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16(2) *Social & Legal Studies* 221 at 223.

¹⁵⁸ *Ibid*.

¹⁵⁹ Exon, Susan Nauss ‘The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation’ (2008) 42(3) *University of San Francisco Law Review* 577 at 581.

¹⁶⁰ Chandika Singh, ‘Mediator training civil/commercial’ (2017) *LEAD* at 103.

encourage legal professionals, including those in the realm of mediation, to be realistic in terms of their behaviour and to recognise their own ethical vulnerabilities and frailties.¹⁶¹

iii) *Incentives and Motivations*

An incentive can be defined as ‘a thing that motivates or encourages someone to do something.’¹⁶² There are potentially two sides to this stumbling block for mediators in South Africa – the lack of incentives and motivations may cause a mediator to only half-heartedly pursue the possibility of settlement and not truly assist parties to a dispute to consider all possible resolutions; or a mediator can be incentivised and motivated to deviate from procedural fairness during mediation or to coerce parties to a dispute to reach a settlement or even to reach a settlement with specific terms.

A lack of incentives and motivations is problematic due the fact that the rate of settlements reached in dispute resolution situations, directly correlate with the levels of motivation of the commissioner or mediator which is directly influenced by the caseload of the commissioner or mediator; the support that the commissioner or mediator received from management; the administration processes surrounding the ADR; and whether or not there is some form of incentive for the commissioner or mediator to reach a settlement.¹⁶³

According to Eisenstat and Felner, where work settings are low on both motivators and stressors, workers tend to disengage. Ultimately this means that workers are not invested in their work and they are not motivated to reach their professional goals.¹⁶⁴ Bendeman recalls where a group of commissioners and conciliators were questioned about their low settlement rates, where they indicated that skilled commissioners and conciliators who had received good and proper training had a much better chance to assist parties to reach a settlement, even when the parties were extremely difficult and had no prospect of settling. They further added that ‘...the good conciliators do not work for R1500.00 per day and have therefore left the CCMA’.¹⁶⁵ The comments made by the respective commissioners and

¹⁶¹ Gravett, Willem H. ‘The myth of objectivity: implicit racial bias and the law (Part 2).’ (2017) (20) *PELJ* at 16.

¹⁶² English Oxford Living Dictionary: ‘Incentive’ available at <https://en.oxforddictionaries.com/definition/incentive>, accessed on 28 November 2017.

¹⁶³ Hanneli Bendeman ‘African Centre for the Constructive Resolution of Disputes: An Analysis of the Problems of the Labour Dispute Resolution System in South Africa’ 25 June 2016 available at <http://www.accord.org.za/ajcr-issues/%EF%BF%BCan-analysis-of-the-problems-of-the-labour-dispute-resolution-system-in-south-africa/>, accessed on 28 November 2017.

¹⁶⁴ Eisenstat, R.A. & Felner, R.D. ‘Toward a Differentiated View of Burnout: Personal and Organizational Mediators of Job Satisfaction and Stress’ (1984) 12(4) *American Journal of Community Psychology* 411 at 426.

¹⁶⁵ Hanneli Bendeman ‘African Centre for the Constructive Resolution of Disputes: An Analysis of the Problems of the Labour Dispute Resolution System in South Africa’ 25 June 2016 available at

conciliators confirms that monetary compensation may act as an incentive when it comes to retaining skilled mediators and also as a motivator when it comes to the performance, ethicality and success rate of mediators.

In contrast, a mediator that may be incentivised and motivated by anyone or anything to reach a settlement, is naturally just as problematic as such a mediator is more inclined to commit acts of fraud or to start advising parties with regards to their position in the dispute – a lawyer-mediator may never advise the parties with regards to what choice to make.¹⁶⁶ According to Moffitt, a mediator commits fraud ‘*if the mediator knowingly misrepresents a material fact and a mediation party reasonably relies on that misrepresentation to his or her detriment.*’¹⁶⁷ The process of mediation is reliant on an objective third party and thus the mediator should never allow outside influences like incentives or motivations to pressure the mediator into persuading parties to a dispute to reach a settlement by way of threat or force.¹⁶⁸ One of the most pertinent ways in which mediators in South Africa are incentivised to act outside of the ethical scope of what is expected from a mediator, is unfortunately also presented in the form of monetary compensation.¹⁶⁹ An example of this would be where a mediator is incentivised by monetary compensation provided by one of the parties to the dispute, to misrepresent information pertaining to the dispute and ultimately pressuring a party into accepting a settlement agreement that he/she would not naturally have been inclined to accept.

iv) Confidentiality

The concept of confidentiality is defined as: ‘the state of keeping or being kept secret or private.’¹⁷⁰ Mediation ethics dictate that the lawyer-mediator must ensure that confidentiality is maintained both during, and after all mediation sessions to ensure the protection of both mediator and parties to the dispute with specific reference to information that is being

<http://www.accord.org.za/ajcr-issues/%EF%BF%BCan-analysis-of-the-problems-of-the-labour-dispute-resolution-system-in-south-africa/>, accessed on 28 November 2017.

¹⁶⁶ Hilary Astor ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16(2) *Social & Legal Studies* 221 at 223.

¹⁶⁷ Moffitt, Michael ‘Ten Ways to Get Sued: A Guide for Mediators’ (2003) 8 *Harvard Negotiation Law Review* 81 at 122.

¹⁶⁸ Linda Mulcahy ‘The Possibilities and Desirability of Mediator Neutrality - Towards an Ethic of Partiality?’ (2011) 10(4) *Social & Legal Studies* 505 at 507.

¹⁶⁹ Hilary Astor ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16(2) *Social & Legal Studies* 221 at 223.

¹⁷⁰ English Oxford Living Dictionaries: ‘Confidentiality’ available at <https://en.oxforddictionaries.com/definition/confidentiality>, accessed on 29 November 2017.

disclosed in a bona fide trust environment.¹⁷¹ As mediation is a consensual and voluntary exercise during which open communication is encouraged, confidentiality stretches to cover both the conversations and discussions that parties have with the mediator as well as the conversations and discussions that parties have amongst themselves.¹⁷² The mediator also has a dual responsibility when it comes to confidentiality in mediation namely: the mediator's responsibility of confidentiality with regards to conversations and discussions that the mediator has with either one of the parties to a dispute in the absence of the other party; and the mediator's responsibility of confidentiality with regards to the entire case placed before the mediator together with the mediation procedures.

In South African practice, when a party to a dispute desires to submit the dispute to mediation, legislation determines that the clerk or registrar of the court will inform all other parties to the dispute that mediation is being sought.¹⁷³ The clerk or registrar of the court will then call upon all parties to attend a conference during which, amongst other things, the confidentiality and privilege attaching to disclosures at the mediation will be determined and included in a mediation agreement which will be signed by the mediator and the parties to the dispute. From the wording of the legislation governing this process, it would seem that the terms and conditions concerning confidentiality in the mediation process are decided on between the parties to the dispute.

Faris accurately summarises the problem concerning confidentiality in the South African mediation realm when he states that: '*there is limited common-law protection and no direct statutory regulation of confidential information disclosed during the mediation process.*'¹⁷⁴ Although there is no direct statutory regulation of the disclosing of confidential or privileged information during the mediation process, some form of regulation of the disclosing of confidential or privileged information after the process of mediation, conciliation and even arbitration has been applied by the South African courts.

¹⁷¹ Moffitt, Michael 'Ten Ways to Get Sued: A Guide for Mediators' (2003) 8 *Harvard Negotiation Law Review* 81 at 101.

¹⁷² Zerhusen K. A. 'Reflections on the role of the neutral lawyer: The lawyer as mediator.' (1992) 81(4) *Kentucky Law Journal* 1165 at 1170.

¹⁷³ The duty of the court to pass judgment on the suspension or revocation of a driver's license, Proc R327 GG 5804 of 18 November 1977.

¹⁷⁴ Faris JA *An Analysis of the Theory and Principles of Alternative Dispute Resolution* (unpublished LLD Thesis, University of South Africa, 1995).

In the case of *Clover SA (Pty) Limited and Another v Sintwa*,¹⁷⁵ the High Court was approached and a claim for damages was instituted, arising from defamatory statements made by a witness while giving evidence before the CCMA. The witness had argued that the evidence which was lead during the CCMA proceedings were confidential in nature and subject to the principles of privilege as the evidence was lead during proceedings that are quasi-judicial in nature. The appeal court held that in order for a defendant to rely on the protection of privilege in judicial or quasi-judicial proceedings, the defendant bears the onus to prove on a balance of probabilities that the defamatory statements complained of, were relevant to the purpose of the occasion.¹⁷⁶ If this element can be proven and it is accepted that the statement fell within the bounds of a qualified privilege, then the burden of proof shifts to the plaintiff to prove that the defendant was malicious as the statements made, despite relevance, were not supported by reasonable grounds.¹⁷⁷

The findings in the case of *Clover SA (Pty) Limited and Another v Sintwa*¹⁷⁸ was supported by other cases with similar facts such as *Chalom v Wright and Another*¹⁷⁹ and *Naylor and Another v Jansen*.¹⁸⁰

These court case decisions should not threaten the open communication encouraged by the process of mediation, but should rather serve as a reminder to mediators and to any parties to a dispute to take into account the requirements for qualified privilege when making defamatory statements during these types of proceedings.

v) *Conformity Bias*

Conformity bias refers to an ethical vulnerability caused by the unconscious but fundamental need to belong.¹⁸¹ This inherent need to belong, together with the fear of social sanctions such as exclusion, often cause individuals to adapt their decisions and behaviour to that which is accepted as social norm.¹⁸² According to Cialdini and Trost, there are three central motivations that drive an individual's cognitions and behaviour to conform to social norms, namely: a) the need to be accurate; b) the need to affiliate; and c) the need to maintain a

¹⁷⁵ *Clover SA (Pty) Limited and Another v Sintwa* 2017 (38) ILJ 350 (ECG).

¹⁷⁶ *Ibid* at para 16.

¹⁷⁷ *Ibid* at para 17.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Chalom v Wright and Another* [2015] ZAGPJHC 105.

¹⁸⁰ *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA).

¹⁸¹ Baumeister R. F. & Leary M. R. 'The need to belong: Desire for interpersonal attachments as a fundamental human motivation' (1995) 117 *Psychological Bulletin* 497.

¹⁸² Kipling D. Williams 'Ostracism' (2007) 58 *Annu Rev Psychol* 425 at 427.

positive self-concept.¹⁸³ If an individual's need to affiliate is overwhelmingly important, it may diminish the individual's ability to discern good from bad to such an extent that the individual will conform to whatever behaviour or decision is expected, in exchange for social inclusion.¹⁸⁴

In a mediation environment, where the professional norm dictates unethical behaviour – and a mediator's own intrinsic need for acceptance and inclusion plays an underlying role in the mediation process – unethical behaviour by the mediator which may lead to an unjust outcome in terms of procedure or resolution, becomes a risk factor.¹⁸⁵ For example, if the social norm in the mediation environment is to coerce parties into settlement, it will be much easier for the mediator to justify his/her own unethical behaviour should he/she conform to the social norm and coerce parties to settle – even if the mediator's own principles dictate that such behaviour is morally wrong.¹⁸⁶

Behavioural ethics as a field of psychology – which is now being implemented in the legal realm to better understand the cognitions and behaviour of legal practitioners – has been outlined and defined, together with the concept of ethical blindness. Furthermore, the different areas in mediation where South African mediators experience the concept of bounded ethicality due to both the influence of contextual pressures, and the ethicality of the individual, specifically in South African practice, have been explored and addressed. The inevitability that South African lawyer-mediators will experience ethical difficulties in the mediation realm creates a need for the identification and implementation of remedial strategies to reduce ethical blindness and its influence in the mediation process – which will be looked at in Chapter 5.

¹⁸³ Cialdini RB & Trost MR. 'Social influence: social norms, conformity, and compliance' in D. T. Gilbert, S. T. Fiske, & G. Lindzey (eds) *The handbook of social psychology* 4th ed (1998) 151.

¹⁸⁴ Kipling D. Williams 'Ostracism' (2007) *58 Annu Rev Psychol* 425 at 428.

¹⁸⁵ Eldred TW 'Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases.' (2013) *65(2) Rutgers L Rev* 333 at 384-385; Zhang Ting, Pinar O. Fletcher, Francesca Gino & Max H. Bazerman 'Reducing Bounded Ethicality: How to Help Individuals Notice and Avoid Unethical Behavior.' (2015) *44(4) Organizational Dynamics, Special Issue on Bad Behavior* 310 at 311.

¹⁸⁶ Eldred TW 'Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases.' (2013) *65(2) Rutgers L Rev* 333 at 385.

IV. CHAPTER 5. REDUCING BOUNDED ETHICALITY AMONG SOUTH AFRICAN MEDIATORS

(a) Introduction

The purpose of the fifth chapter of the study is to answer the fourth research question of the study, which was as follows: Utilising a behavioural ethics approach, how can the ethicality of mediators be improved? Research Question 4 will be answered through an application of the principle of bounded ethicality to South African mediators and through a specific sub-question, which is as follows: (1) How can the internal- and external pressures and constraints that keep South African mediators from acting more ethically be remedied?

(b) Reducing Ethical Blindness

According to Prentice, moral progress, although difficult, is not impossible.¹⁸⁷ Reducing ethical blindness is necessary in order to accomplish moral progress, although, according to Tigran, the challenge of finding a plausible solution for ethical blindness will be a difficult one.¹⁸⁸

First, the limitations of the possible solutions for ethical blindness have to be considered. These limitations are: a) cognitive dissonance – because these ethical limitations operate at an implicit and unconscious level, common interventions aimed at addressing intentional unethical behaviour will not likely succeed;¹⁸⁹ and b) unconscious biases cannot be eradicated by education only – mere awareness of these vulnerabilities are unlikely to be sufficient to ensure correction.¹⁹⁰ The limitations of the possible solutions for ethical blindness creates a need for a remedy that is broad enough to cover all the possible ways in which ethical blindness may manifest in practice, but focused enough to address the unconscious factors or biases which give rise to unethical behaviour.

¹⁸⁷ Prentice RA, 'Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves.' (2015) 29 *Notre Dame JL Ethics & Pub Pol'y* 35 at 38.

¹⁸⁸ Eldred TW 'Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases.' (2013) 65(2) *Rutgers L Rev* 333 at 388.

¹⁸⁹ Zhang Ting, Pinar O. Fletcher, Francesca Gino & Max H. Bazerman 'Reducing Bounded Ethicality: How to Help Individuals Notice and Avoid Unethical Behavior.' (2015) 44(4) *Organizational Dynamics*, Special Issue on Bad Behavior 310 at 311.

¹⁹⁰ Eldred TW 'Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases.' (2013) 65(2) *Rutgers L Rev* 333 at 388.

Secondly, as Prentice rightfully points out, there is no quick solution for what he calls ‘the human condition’.¹⁹¹ Expectations for remedying ethical blindness should therefore be limited to improvement rather than complete elimination.¹⁹²

Different ethicists in the field of behavioural ethics have identified various possible remedial strategies for ethical blindness. These strategies function in such a way as to limit the influence of unconscious biases in decision making.¹⁹³ The following specific remedial strategies are proposed to reduce bounded ethicality among South African mediators specifically, and may be applied as individual strategies or in combination with other strategies:

i) Understanding Ethical Orientations and Perspectives

Ethical orientation can be defined as ‘the effort to guide one’s conduct by reason, while giving equal weight to the interests of each individual who will be affected by one’s conduct.’¹⁹⁴

It is argued that when these consequences are considered from an ethical perspective, the decision maker should be able to identify the ethical orientation that is influencing the decision-making process¹⁹⁵ – much like a lens through which the decision maker studies and approaches the decision at hand and which may influence the outcome.

One way in which to reduce ethical blindness in mediation is to educate mediators to be able to understand at least some of the various different ethical orientations of which we are aware, and also to assist mediators to identify and understand their own ethical orientations which influence their behaviour. This understanding of ethical orientations, in turn, gives mediators a framework for better understanding and critiquing their own ethical orientations that they apply during the course of mediation.¹⁹⁶

¹⁹¹ Prentice RA, 'Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves.' (2015) 29 *Notre Dame JL Ethics & Pub Pol'y* 35 at 85.

¹⁹² Ibid.

¹⁹³ Eldred TW 'Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases.' (2013) 65(2) *Rutgers L Rev* 333 at 388.

¹⁹⁴ Jon M. Shepard & Linda S. Hartenian 'Egoistic and ethical orientations of university students toward work-related decisions' (1991) 10 *L.S. J Bus Ethics* 303 at 304.

¹⁹⁵ Ibid.

¹⁹⁶ Joan Poliner Shapiro & Jacqueline A. Stefkovich *Ethical Leadership and Decision-making in Education: Applying Theoretical Perspectives to Complex Dilemmas* (2016) ch 1.

One approach that can give mediators better insight into their own ethical orientations is the ethical orientation theory of Eyal, Berkovich and Schwartz.¹⁹⁷ According to this ethical orientation theory, there are six values which have been identified as common considerations in moral decision – which also forms the six basic ethical orientations, namely: care, utilitarianism, fairness, professionalism, critique, and community. Table 1 below contains an overview of these orientations:

Table 1

Overview of Ethical Orientations

Ethical Orientation	Definition and Examples
Care	The ethics perspective of care routes decisions through the decision-maker's concern for the individual who is most affected by the decision.
Utilitarianism	In the ethics perspective of utilitarianism, judges are motivated by the decision-maker's estimation of what creates the most good for the largest number of people.
Fairness	The ethics perspective of fairness is based on applying universal standards consistently.
Professionalism	Eyal, Berkovich and Schwartz defined the ethics perspective of professionalism as taking place 'when [ethical] decisions are informed by proven experience, expertise, and cutting-edge knowledge.' ¹⁹⁸

¹⁹⁷ Ori Eyal, Izhak Berkovich & Talya Schwartz 'Making the right choices: ethical judgments among educational leaders' (2011) 49(4) *Journal of Educational Administration* 396.

¹⁹⁸ Ibid at 403.

Critique	The ethics perspective of critique is based on taking actions that, while violating some other ethical stance (such as those of fairness or community), are deemed necessary to redress some imbalance in society or the socioeconomic structure.
Community	In the ethics perspective of community, a mediator's decisions are influenced partly by the community's wishes, preferences, and morals.

The outcomes of the ethical decision-making may vary depending on the approach that is used, but no one method is 'right' or superior to the others.¹⁹⁹ It is suggested that decision makers may give preference to one ethical consideration over others depending on the given situation, but should still try to maintaining a balance among the other orientations.²⁰⁰

In the case of South Africa, the indigenous tradition of mediation is one that emphasises what Eyal, Berkovich and Schwartz, in another context, referred to as the ethics of community. Boniface described African mediation as follows:

*'In African mediation, conflicts are seen in their social contexts. They are not seen as isolated events and all relevant background information is covered during mediation. During mediation not only are the consequences for the parties looked at but also the consequences for others in their families. The traditional objectives of African mediation are to soothe hurt feelings and to reach a compromise that can improve future relationships.... Amongst the differences between Western mediation and African-style mediation is that the customary process is non-adversarial and the emphasis is on a restorative outcome which benefits the whole community.'*²⁰¹

¹⁹⁹ Joan Poliner Shapiro & Jacqueline A. Stefkovich *Ethical Leadership and Decision-making in Education: Applying Theoretical Perspectives to Complex Dilemmas* (2016) ch 1.

²⁰⁰ Ori Eyal, Izhak Berkovich & Talya Schwartz 'Making the right choices: ethical judgments among educational leaders' (2011) 49(4) *Journal of Educational Administration* 396 at 397.

²⁰¹ AE Boniface 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) 15(5) *PELJ* 391.

Boniface suggests that the ethical orientation of community, with its ideal community-benefitting outcomes, should be adopted by African mediation. This orientation would theoretically be appropriate as South African mediators belong to communities, communities have grievances, and grievances impact the nature of mediation – not only in terms of their influence on the parties in mediation, but also on the mediators themselves.

However, although Boniface argues that it would be appropriate for this approach to once again influence mediation in South Africa, the risk lays therein that the ethical orientation of community can be easily applied by a mediator who is too closely vested in the welfare of one of the parties in the mediation. This principle generalises to other instances of mediation. For example, a female mediator who has been through a painful divorce might, on mediating a case of a married couple considering divorce, identify with the community of female divorcees. Such an orientation is not invalid in and of itself; understood from the framework of ethical blindness, the problem is that mediators might not be aware of which kind of ethical orientation or perspective they are applying, how the application of this ethic influences the process of mediation, and how they might need to adjust their own ethical stances in order to become better mediators.

If mediators are trained to understand and be aware of the different kinds of ethical orientations, then, conceivably, they could reduce their own ethical blindness by recognising and adapting their own approaches as necessary due to their better understanding that their own ethical stances are contingent and limited, not universal.

ii) *Adding an Educational / Training Framework based on the teachings of Behavioural Ethics*

During the Access-to-Justice Conference held during July 2011, due concern was raised regarding the lack of a proper functioning legal ethics education system in South Africa. The traditional ethics teachings to which legal educators resort, has been critiqued heavily for being inadequate. The 'lack of a proper functioning legal ethics education system' in the field of law, refers amongst other things, to the fact that there is a gap between what is being taught as part of the curriculum and what is experienced in practice in terms of ethical challenges.²⁰² Authors like Arce & Gentile note that pedagogic approaches to ethics have begun to shift away from a focus on philosophy towards the ways that moral judgment and

²⁰² Prentice RA 'Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves.' (2015) 29 *Notre Dame JL Ethics & Pub Pol'y* 35 at 83.

decision-making manifest as ethical, or unethical, behaviours.²⁰³ In an interview with Failure Magazine conducted in 2011, Tenbrunsel was asked whether she thought the fact that we have good people making bad decisions, could be addressed with more ethics training. She answered as follows:

*'I don't think so, not with current training. A missing component has been the cognitive and social-psychological aspect to ethics. Organizations are spending millions and universities are devoting core requirements to ethics, but ethics training has failed us because it has focused on: When faced with an ethical dilemma, here's what you should do. What it ignores is that in the real world a supervisor doesn't come to you and say: "Here's an ethical problem: I'd like you to solve it for me." It's integrated with financial aspects, business aspects and sales aspects, and the ethics often get faded.'*²⁰⁴

This gap between taught ethics and the ethical challenges that lawyer-mediators experience in practice emphasises the need to create a platform for the introduction of an unexplored method of teaching in South Africa to assist lawyer-mediators to better understand ethics in both a lawyer- and mediator realm.²⁰⁵

The incorporation of behavioural legal ethics teachings into the training of lawyer-mediators is supported by the views of professional ethicists such as Drumwright, Prentice & Biasucci who indicate that 'the philosophically based traditional approach to teaching ethics should be significantly supplemented with the psychologically and sociologically based learning of behavioural ethics.'²⁰⁶ The teaching of behavioural ethics in law schools, business schools and for the sake of argument, in mediation training, should improve an individuals' recognition of ethical issues, sharpen their ability to reach ethical conclusions, strengthen their desire to act ethically, and improve their ability to act upon those desires.²⁰⁷ According to Prentice, behavioural ethics teachings has a realistic chance of increasing an individual's ability and inclination to live up to their own moral standards²⁰⁸ - thus educating individuals

²⁰³ Arce D.G. & Gentile M.C 'Giving Voice to Values as a leverage point in business ethics education.' (2015) 131(3) *Journal of Business Ethics* 535.

²⁰⁴ Jason Zasky, Failure mag: 'Ethical Blind Spots' 25 June 2011 available at <http://failuremag.com/article/ethical-blind-spots>, accessed on 23 November 2017.

²⁰⁵ Prentice RA 'Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves.' (2015) 29 *Notre Dame JL Ethics & Pub Pol'y* 35 at 83.

²⁰⁶ Drumwright M., Prentice R. and Biasucci C 'Behavioral Ethics and Teaching Ethical Decision Making.' (2015) 13 *Decision Sciences Journal of Innovative Education* 431 at 433.

²⁰⁷ Ibid at 436.

²⁰⁸ Prentice RA 'Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves.' (2015) 29 *Notre Dame JL Ethics & Pub Pol'y* 35 at 37.

regarding their vulnerability to various cognitive shortcomings, should enable the individuals to guard against them.²⁰⁹

iii) *Generating Mindful and Moral Awareness*

Mindful awareness has been described to involve the ability to notice and observe one's own thoughts,²¹⁰ while moral awareness has been described as an awareness of the fact that one's behaviour and choices may affect the interests of others in negative ways.²¹¹

Mindful individuals maintain enough distance from their thoughts to view them impartially. This aspect of mindfulness makes it a metacognitive skill, involving cognition about cognition.²¹² Research has shown that where an individual's attention is prepared for a certain type of information, their chances of noticing that type of information increases significantly. It is therefore proposed that a lawyer-mediator should be trained to establish a mind-set of vigilance prior to making a decision as it might encourage them to identify important ethical dimensions to a situation which the lawyer-mediator may have missed otherwise.²¹³ Mediators also need to be made aware of and trained concerning the biases and other heuristics that can impact the evaluation and negotiation process.²¹⁴

Ruedy and Schweitzer confirm that greater mindfulness can generally be associated with lesser offenses of unethical behaviour.²¹⁵ Mindfulness has been described in terms of three hypotheses: The *access hypothesis*, which states that the content and process of our thinking is knowable...with appropriate training and attention, people can become aware of their own thinking. The *mediation hypothesis*, which states that our thoughts mediate our emotional responses to the various situations in which we find ourselves...The *change hypothesis*...states that because cognitions are knowable and mediate the responses to different situations, we can intentionally modify the way we respond to events around us. We

²⁰⁹ Prentice RA 'Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves.' (2015) 29 *Notre Dame JL Ethics & Pub Pol'y* 35 at 84.

²¹⁰ Ruedy, N.E. & Schweitzer, M.E. *J Bus Ethics* (2010) 95(Suppl 1): 73-87 at 76.

²¹¹ David De Cremer, David M. Mayer & Marshall Schminke (eds) 'Introduction: On understanding ethical behaviour and decision Making: A Behavioural Ethics Approach.' (2010) *Business Ethics Quarterly* 20 at 3.

²¹² Ruedy, N.E. & Schweitzer, M.E. *J Bus Ethics* (2010) 95(Suppl 1): 73-87 at 75.

²¹³ Zhang Ting, Pinar O. Fletcher, Francesca Gino & Max H. Bazerman 'Reducing Bounded Ethicality: How to Help Individuals Notice and Avoid Unethical Behavior.' (2015) 44(4) *Organizational Dynamics*, Special Issue on Bad Behavior 310 at 311.

²¹⁴ Hughes Hunter R. 'How Our Subconscious Bias Impacts Negotiations and the Mediation Process.' (2010) 4 *American Journal of Mediation* at 15.

²¹⁵ Ruedy, N.E. & Schweitzer, M.E. *J Bus Ethics* (2010) 95(Suppl 1): 73-87 at 76.

can become more functional and more adaptive by understanding our emotional and behavioural reactions, as well as using cognitive strategies systematically.²¹⁶

First, in terms of the access hypothesis, there are two aspects of familiarising mediators with their own thinking. The first aspect involves familiarising mediators with the varieties of ethical thought. If mediators believe that ethical behaviour is universal, then they will think of themselves as either ethical or unethical actors; the danger of this approach is that, if mediators think of themselves as acting ethically in a generic fashion, they can be blind to their ethical biases. One means of remediating this kind of barrier to mindfulness is to make mediators aware of the available frameworks for ethical thinking, which, in turn, should make it easier for mediators to apply the right kind of ethics to the right mediation situation.

The second relevant aspect of the access hypothesis involves interpretation rather than familiarity. For example, a mediator could be made aware of the six kinds of ethical approaches noted in the previous section of this chapter, but awareness alone does not mean that mediators are equipped to interpret their own actions correctly. The same kind of thinking could occur in ordinary cases of mediation as well. Working with the access hypothesis, then, the problem becomes how to assist mediators to interpret their ethical stances correctly.

One way of addressing the problem of ethical interpretation is through an analysis of the effects of ethical behaviour on real-world situations. A mediator could, for example, strongly support women's rights and therefore bring an ethic of critique to a mediation situation that involves violence against a woman. There are many basic values that can inform a mediator's stance; the point is for the mediator to try to be aware of these stances.

The special kind of mindfulness that mediators need to develop can emerge from the practice of empathy. It might appear as if empathy is irrelevant to mindfulness, as empathy involves a particular orientation with respect to other people, whereas mindfulness is a self-directed orientation. The point was to achieve the conflict-resolution goal that, according to Boniface, exists in African mediation and that, in the current South African state, exists as part of the officially sanctioned philosophy of mediation. The mediator certainly wishes to see justice done, and there are going to be examples of mediation in which one side is the

²¹⁶ Deborah Dobson & Keith S. Dobson *Evidence-Based Practice of Cognitive-Behavioral Therapy* 2 ed (2016) 45.

unjust one, but, even in such scenarios, the role of the mediator is to facilitate an exchange between the parties, not to become one of the parties. If the mediator is able to empathise with the positions of both parties, the mediator might be more willing to examine their own ethical approaches and perspectives and reframe them in the interest of conflict resolution and harmony-building.

iv) *Nonviolent Communication*

Mediation is, above all, a process. The outcome of mediation is dependent on the process. When mediation involves two parties who are, or have been, in bitter opposition to each other, the purpose of the mediation is to allow the two parties to speak to each other in a manner that can allow a productive consensus to emerge. If the mediator becomes partisan — whether because of design, ethical blindness, or other reasons — then the challenge of allowing the parties to communicate with each other becomes exacerbated.²¹⁷

One means of allowing the parties in mediation to communicate is to follow the framework of non-violent communication. The main components of non-violent communication, which are contained in Table 1 below, are (a) expressing with authenticity and (b) receiving with empathy.²¹⁸ The framework of non-violent communication does not ask the mediator to assume that any party is right or wrong. Rather, the mediator's concern is to allow the parties to speak to each other long enough, and productively enough, for the parties to come to identify compromises on their own.²¹⁹ In this approach, the mediator functions more as a facilitator of appropriate communication than as an expresser of opinions or source of judgments. In addition, the mediator is also asked to follow the framework of non-violent communication when communicating with the parties. In fact, the mediator should be an excellent practitioner of non-violent communication, because the mediator can model non-violent communication for the parties involved in mediation.

In the non-violent communication framework, the point is not to prevent parties (including the mediator) from expressing themselves frankly. The emphasis is on a form of self-expression that is based on personal feelings, needs, and requests.²²⁰ In addition, the non-

²¹⁷ Chandika Singh, 'Mediator training civil/commercial' (2017) *LEAD* at 104.

²¹⁸ Marcianna Nosek 'Nonviolent communication: A dialogical retrieval of the ethic of authenticity' (2012) 19(6) *Nursing Ethics* 829 at 832.

²¹⁹ Marshall Rosenberg, Deepak Chopra *Nonviolent Communication: A Language of Life: Life-Changing Tools for Healthy Relationships* 3 ed (2015).

²²⁰ Marcianna Nosek 'Nonviolent communication: A dialogical retrieval of the ethic of authenticity' (2012) 19(6) *Nursing Ethics* 829 at 833.

violent communication framework requires the party that is listening to receive with empathy rather than censure or judgement.

Table 1

*Non-Violent Communication Model*²²¹

	Expressing with Authenticity	Receiving with Empathy
Observations	Expressing what I am observing (seeing, hearing, remembering, imagining) free of judgment or evaluation. “When I...”	Receiving with empathy what the other person is observing (seeing, hearing, remembering, imagining). “When you...”
Feelings	Expressing honestly by revealing with I’m feeling. “I feel...”	Receiving with empathy what the other person is feeling. “Do you feel...?”
Needs	Expressing with authenticity more core needs and values. “Because I need / value...”	Receiving with empathy the other person’s needs / values. “Because you need...value?”
Requests	Expressing my present request in a concrete, positive, and doable way. “Would you be willing to...”	Receiving with empathy the other person’s concrete, positive, and doable request. “And would you like me to tell you...?”

²²¹ Marshall B. Rosenberg ‘The 4-Part Nonviolent Communication (NVC) Process’ available at <http://www.nonviolentcommunication.com/aboutnvc/4partprocess.htm>, accessed on 17 September 2017.

The non-violent communication model can be used as a guide when structuring mediation. Ideally, it may provide a framework through which hostile parties can express themselves and listen in a manner that could sustain the kind of long, respectful communication out of which compromises naturally emerge in mediation.



V. CHAPTER 6. CONCLUSION

(a) Conclusion

The purpose of the sixth and final chapter of the study is to provide a synopsis of the findings associated with the four research questions of the study, to provide recommendations for future lawyer-mediator education or training and practice, and to acknowledge the limitations of the study.

(b) Discussion of Findings

i) Research Question 1

The first research question of the study was as follows: What is mediation, and what is the role of the mediator? After a review of relevant literature, mediation was defined as the process of facilitating an interaction between two (or more) parties who might otherwise choose the adversarial system of a legal venue to address a dispute or potential dispute. By its nature, mediation assumes the possibility of some kind of settlement or compromise that can be acceptable to, if not optimal for, both sides.

Given this definition of mediation, the mediator was described as the person or institution that facilitates the process of mediation itself. The mediator, in keeping with the ancient Latin etymology of the verb *mediate*, is someone who is in between the disputing parties. The mediator is intended to be impartial, that is, guided by rules and processes rather than by personal bias in favour of, or against, any party. However, the mediator is not merely intended to be a passive, impartial observer; the mediator has a more active role to play in assisting parties to reach an acceptable compromise. The mediator is, in this sense, a communicator, a listener, a negotiator and ultimately, a facilitator.

ii) Research Question 2

The second research question of the study was as follows: What are some of the common ethical problems faced by mediators? The main focus of the study was on ethical blindness; for this reason, the problem of ethical blindness was substantially explored in its context as one of the main ethical problems faced by mediators. Ethical blindness was discussed as a problem because of the importance of a meta-ethical sense in the mediator. The mediator brings ethical positions, procedures, and strategies into various aspects of mediation; however, if mediators fail to understand their own ethics (through the exercise of meta-ethical evaluation) and ethical vulnerabilities, then they can fail to optimally serve all parties in mediation.

iii) Research Question 3

The third research question of the study was as follows: What is behavioural ethics and bounded ethicality? Behavioural ethics was described as the practice of observing and analysing the actual ethical actions undertaken by people. Bounded ethicality was defined in relation to the phenomenon of bounded cognition, whose premise is that human cognition is fundamentally constrained (for example, by limits to mental processing speed and the inability to take all aspects of a decision into consideration). Bounded ethicality suggests that the ethicality of behaviour is limited by numerous factors — including by the existence of ethical blindness, as discussed at length in the paper, but also by other factors.

(c) Recommendations for Practice

The study's main practice recommendation is that behavioural ethics principles be formally embedded into South African mediation training and mediation practice to achieve a reduction in ethical blindness. More specifically, the following recommendations are made:

First, the theory and principles of behavioural ethics should be introduced to South African lawyer-mediators during mediation training. This information could, in turn, be used to familiarise lawyer-mediators to the concept of ethical blindness, which is a sub-division of behavioural ethics – lawyer-mediators should be provided with the tools and skills to identify personal ethical vulnerabilities, which may manifest during practice and influence the mediation process.

Second, South African lawyer-mediators should be trained with case studies of ethical blindness which will allow this phenomenon to be more easily recognised in the practice setting of mediation. Practical skills to recognise and address ethical blindness may be developed by way of experiential learning that integrates theory and practice by combining academic inquiry with actual experience.²²² Through for example, simulations, lawyer-mediators can develop and practice the process of identifying their own ethical vulnerabilities and further explore possible options to limit the influence of such vulnerabilities in the mediation process. This practice-based competence can then be reinforced by way of the lawyer-mediator's interactions with live-clients or in other real-life practice experiences.²²³

Third, South African mediators should be educated with regards to the different kinds of ethical orientations that exist. Making lawyer-mediators aware of multiple types of ethics –

²²² SpearIt & Ledesma S, 'Experiential Education as Critical Pedagogy: Enhancing the Law School Experience' (2014) 38(2) *Nova L Rev* 249 at 254.

²²³ *Ibid* at 259.

Eyal et al.'s six ethical types in this instance²²⁴ – might be an appropriate means of teaching them to be mindful of their own ethical orientations. Lawyer-mediators should furthermore be exposed to mindfulness seminars and coaching in which they are taught techniques for exploring and changing their ethical orientations in response to the specific demands of mediation.

Creating this kind of training structure for South African lawyer-mediators will require collaboration between the legal establishment in South Africa (which is the source of most mediators) and specialists in ethics.

(d) Limitations of the Study

The study was limited to a literature study because of its reliance on secondary sources and interpretation. The study did not draw upon data contributed by South African mediators themselves as all mediation as all mediations are confidential and therefore, case studies are not available and the possibilities for collection of empirical data is limited, and often even restricted. It is therefore not known to what extent South African mediators are aware of the problem of ethical blindness.

(e) Synopsis of Findings

The findings can be summed up into the single observation – that ethical blindness is a major risk for mediation, and that the proper application of behavioural ethics can help to address the problem of ethical blindness. The findings of the study were used to support a series of suggestions to assist South African lawyer-mediators to understand, avoid, and remedy the problem of ethical blindness through the application of mindfulness and targeted training in behavioural ethics, with specific reliance on the typology of ethical orientations. This approach could help to strengthen South African mediation for the many challenges it will face in the years to come.

(f) Recommendations for Further Study

There are numerous recommendations for further study that can be made on the basis of the study's findings. One recommendation is to survey South African mediators themselves. Eyal et al. have created a scale that measures ethical orientations. This scale could be administered to South African mediators in order to determine which of the six types of ethical orientations described by Eyal et al. are most widely represented in the South African

²²⁴ Ori Eyal, Izhak Berkovich & Talya Schwartz 'Making the right choices: ethical judgments among educational leaders' (2011) 49(4) *Journal of Educational Administration* 396 at 397.

mediation community. Another approach for future researchers would be to survey South African mediators about their knowledge of ethical blindness and behavioural ethics in order to determine how widespread knowledge of these phenomena might be.

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