

WHY CAN'T THEY SETTLE? THE PSYCHOLOGY OF RELATIONAL DISPUTES

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Business partners, spouses, and employees all make deals. Whether this means surgeons forming a partnership, spouses dividing child care responsibilities, or prospective workers negotiating terms of employment, everyone negotiates deals. Many of those deals will change by friendly amendment, modified course of dealing, or amicable termination. Some will result in disputes of varying intensity. Our focus is on disputes that not only generate litigation, but lead to the predictably irrational negotiations that resolve most litigated disputes. In other words, we explore what happens when people move from the romance phase of in-group behavior, where they assume the best of others, to stilted conflict between out-groups, where people assume the worst.

I. SCREENING MEDIATION CLIENTS

Mediation works almost all of the time and everyone benefits from the help that a neutral decision architect can offer. Experience shows that a wide range of personalities can benefit from mediation.¹

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¹ DIANE NEUMANN, CHOOSING A DIVORCE MEDIATOR: A GUIDE TO HELP DIVORCING COUPLES FIND A COMPETENT MEDIATOR 15-31 (1996). DIANE NEUMANN & ASSOCIATES, <http://www.divorcemed.com/Books/Divorce-Mediation-for-Everyone.pdf>. Individuals who suffer from a serious mental health issue, substance abuse, or family violence may not be suitable for mediation. Attorneys and mediators can assess the suitability of their clients for mediation by asking themselves a few simple questions: Is my client able to deal with significant stress? Can my

II. HOW HUMANS PROCESS INFORMATION

Skilled mediators can identify and mitigate the personality traits and predictable human reactions to conflict that interfere with people's rational processing of information. This will help clients and their attorneys realistically assess risk and resume productive problem solving. We outline the ways disputants process information under stress and uncertainty to foster patience and understanding in the mediator. Seemingly obnoxious behavior that threatens the progress of mediation can be better understood as a predictable response to recurring conflict by applying concepts from recent cognitive science. Insights from this evolving science will help mediators overcome two of the biggest complaints about the process: patience and perseverance.²

Realizing that clients predictably assume the other side is "not negotiating in good faith" under certain circumstances allows the neutral to forge ahead without becoming discouraged, because she understands the participants cognitive and emotional processes. Knowing there is a sine wave to the mediation process also increases mediator perseverance. If negotiation expands to fit the space available, of course things will look bleak half-way through, even if early data points signal a predictable path to a deal. With these new insights and understandings, mediators can develop tools to probe positions and test assumptions rather than confronting clients in ways that trigger fight-or-flight responses. Mediators, as decision architects, are better positioned to bend the arc toward resolution rather than to an impasse with this new information.

Managing conflict is like herding cats: disputants often do not follow directions, become upset, and can change direction at unexpected times. Even mature people may become irrational when faced with conflict. Uncertainty and stress only magnify their difficult behavior. But mediators can help disputants make better decisions by learning how the brain processes information and meeting

client compromise? Is my client realistic about the likely outcomes of the mediation? Can my client control her anger? Is my client truthful? Is my client mostly free of mental health problems? If the answers to a majority of these questions are "yes," then it is likely that the client will have a successful mediation experience. On the other hand, if many of the answers to these questions are "no," then the attorney should discuss her client with the mediator and jointly decide how to proceed. However, our experience is that almost every client will benefit from interaction with a skilled mediator who understands how humans think and feel during conflict.

² Lisa Brogan & Alex Yaroslavsky, *Should I Quit My Day Job?*, 17 *DISP. RESOL. MAG.* 12, 14 (2011).

parties where they actually are—not where the rational person archetype of law and economics assumes them to be. People do not always act in their own rational self-interest.³

Conflict creates stress, which may trigger latent mental illness, neurotic defensiveness, or childish behavior. In addition, mediation participants may act irrational even when relaxed because inherent and predictable cognitive biases interfere with rational decision making.⁴ In short, the mediator must be an amateur psychologist, a stage director, an insightful leader, an empathetic friend, an expert communicator, a decision architect, and a professional neutral, all at once.

III. THREE TYPES OF INFORMATION PROCESSORS

Cognitive scientists⁵ have identified three distinct types of information processing systems within the human mind: (1) an autonomous (intuitive) system that automatically and quickly processes information using unconscious innate heuristics and overlearned habits to produce a judgment in seconds; (2) a focusing (algorithmic) system that considers the problem to be solved using foresight, attention, and inhibition to direct our thinking toward the information processing system most likely to solve that particular problem effectively; and (3) an analytic (logical) system that uses reflective, linear, language based conscious thought processes to solve complex thinking problems.⁶

³ MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1973).

⁴ DANIEL KAHNEMAN ET AL., *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (1982).

⁵ Cognitive science is the interdisciplinary study of mind and intelligence, embracing philosophy, psychology, artificial intelligence, neuroscience, linguistics, and anthropology. Its intellectual origins are in the mid-1950s when researchers in several fields began to develop theories of mind based on complex representations and computational procedures. Its organizational origins are in the mid-1970s when the Cognitive Science Society was formed and the journal *Cognitive Science* began. Since then, more than ninety universities in North America, Europe, Asia, and Australia have established cognitive science programs, and many others have instituted courses in cognitive science.

Cognitive Science, STAN. ENCYCLOPEDIA PHIL. (July 11, 2014), <http://plato.stanford.edu/entries/cognitive-science/>.

⁶ KEITH STANOVICH, *RATIONALITY AND THE REFLECTIVE MIND* 33–37 (2011).

A. *System 1*

System 1 intuitive processing uses simplifying heuristics to make quick estimates about noncritical situations and produces rapid judgments at low cost. However, because these heuristics may not always be a good fit for a particular problem, System 1 intuitive processes can create errors. Because it is so quick and easy, people make most everyday judgments using intuition.⁷ System 1 judgment is a quick, almost effortless process that produces a fast decision without requiring conscious attention or effort. It is the Homer Simpson processor—see a donut, eat a donut. System 1 intuition uses pre-conscious information processing heuristics to simplify and hasten how we make decisions. System 1 heuristics are unconscious rules acquired by experience or inherited through evolution that allow people to make ordinary everyday decisions with incomplete or uncertain information.

B. *Attentional Focusing*

The human mental focusing system is a more advanced cognitive process that can override System 1 intuitive heuristics by employing foresight and attention to determine how we think about a problem.

C. *System 2*

System 2 deliberative thinking is slow, logical, and conscious. It is our Mr. Spock processor. We use deliberative thinking to solve complex problems and make important decisions. Additionally, if we practice long and hard enough, we can develop expertise over time and create habits that will eventually become autonomous and automatic. In *Outliers*,⁸ Malcolm Gladwell suggested that it takes around 10,000 hours to develop this type of unconscious proficiency. This repetitive and effortful process develops shortcuts and automatic habits that allow us to perform certain tasks quickly and efficiently. Think Olympic athlete or skilled surgeon. Through years of hard practice, they enhance native ability

⁷ DANIEL KAHANEMAN, *THINKING FAST AND SLOW* (2011).

⁸ MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 41 (2008).

with experience and expertise. For example, a professional baseball player starts swinging at an intuitive projection of where a 100 miles per hour fastball will cross the plate long before the ball gets close to him. However, when a decision is critical, people generally opt for deliberative analytic thinking, unless they are under severe emotional stress or time pressure.

Interestingly, effective decision-making does not correlate very well with native intelligence or education.⁹ Even well-trained lawyers are capable of being led astray by preconscious cognitive errors.¹⁰ Studies of decisions to accept a settlement offer or proceed to trial indicated that plaintiffs erred in refusing offers and did worse at trial sixty-one percent of the time compared with twenty-four percent for defendants. But, the cost of error when wrong was much higher for defendants, \$1,140,000 compared to \$43,100 for plaintiffs.¹¹ Mediation training had the effect of reducing decisional errors by advocates evaluating settlement offers.¹²

System 1 intuitive shortcuts allow us to make reasonably accurate judgments quickly, using minimal and often incomplete information. Those snap decisions can get us out of a burning building quickly; for example. Primitive humans who could not instantly distinguish between danger and dinner on the Savanna were soon removed from the gene pool. Those of us who were lucky enough to have ancestors who acquired or inherited System 1 intuitive heuristic processing systems that warned them of dangers survived. However, these intuitive shortcuts can mislead us when we are faced with a complicated decision, particularly when the stress and uncertainty of conflict cloud the process and limit our options.

One example of an unconscious heuristic error is in-group/out-group bias, which produces a pattern of favoring members of one's own group compared with members of other groups. The bias is expressed through positive evaluations of in-group members, allocation of more resources to in-group members, and being more

⁹ ZACHARY SHORE, *BLUNDER: WHY SMART PEOPLE MAKE BAD DECISIONS* (2008).

¹⁰ Nancy B. Rapoport, "Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 *ST. MARY'S J. LEGAL ETHICS & MALPRACTICE* 42 (2014).

¹¹ Randall L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiation*, 5 *J. EMPIRICAL LEGAL STUD.* 551 (2008); RANDALL L. KISER, *BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS* 32–86 (2010).

¹² Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 20 *HARV. NEGOT. L. REV.* 1, 3–4 (2016), citing Kiser et al., *supra* note 11.

easily influenced by in-group peers.¹³ One of the most interesting shifts in relational disputes is when someone goes from in-group to out-group. The partner, employee, or spouse we trusted implicitly, suddenly becomes an enemy when the relationship is fractured. Different cognitive shortcuts kick in for out-group negotiating partners. Things that were settled on a napkin among in-group partners cannot be resolved without twelve lawyers, a mediator, and a fifty-page contract among out-group enemies. During mediation, this in-group/out-group cognitive bias results in the parties overvaluing information from their team and undervaluing information from the other side.

Because we all make most decisions intuitively, mediators should assume that disputants are generally acting at a pre-conscious System 1 processing level using emotional heuristics. The mediator's task is to design a process that helps the disputants challenge their System 1 intuitive feelings, activate their focusing process, and moves them toward System 2 deliberation thinking. For example, using open-ended questions, the mediator can activate the person's focusing system and encourage her to shift from System 1 intuition to System 2 deliberative processing, which is more likely to solve the problem correctly. By stopping, thinking, and applying System 2's deliberative analysis to the problem rather than relying on unconscious System 1 intuitive heuristics, with their inherent biases, the individual is more likely to reach a reasoned perspective on the dispute.

Mediators themselves may slip into System 1 processing and become impatient or defensive when some of these predictable emotional and cognitive problems bubble up in a session. Pacing the mediation (and the mediator) is important. The disputants or the mediator may need a "trip to the balcony" to gain some perspective. Left to fester, emotional reactions or cognitive biases can escalate. But, they will moderate if the disputant feels heard by the mediator and are able to activate their focusing system using foresight, attention, and inhibition to direct their decision making toward System 2 logical information processing. By making the decision process conscious and amenable to facts, logic, and reason, the mediator can minimize errors caused by emotions and System 1 heuristic biases.

¹³ Marilyn Brewer, *The Psychology of Prejudice: Ingroup Love and Outgroup Hate?*, 55 J. Soc. 429, 429-44 (1999).

IV. COGNITIVE BIASES IN MEDIATION

Research scientists have catalogued several heuristic biases that influence choices during negotiation. They roughly divide into three groups—distortions about how we see ourselves (overconfidence, etc.), distortions of how we see others, especially in-group/out-group devaluations and distortions, and distortions of the subject-matter, tilted in our favor. Some of the more common cognitive biases are optimism, anchoring, sunk costs, mental accounting, confirmation bias, herd behavior, loss aversion, contrast effects, and compromise effects.¹⁴

A. *Optimism Bias*

The optimism heuristic helps us believe most things will work out.¹⁵ Under ordinary circumstances, being optimistic is a good thing, it gets us motivated in the morning, helps us imagine a better future, allows us to act purposefully, and reach our goals more effectively. Optimists work longer hours, save more money, take better care of their health, and generally live longer than pessimists. Life would be depressing without a naturally optimistic bent. However, these same rose-colored glasses can inhibit our ability to see a legal dispute through a disinterested lens. When important rights or large sums of money are at stake, being too optimistic about your case and downplaying potential weaknesses can create an inefficient market for the claim and lead to impasse, litigation, and, potentially, an unfavorable outcome in court. This natural heuristic is not bad; it is expected. Even when parties in baseball arbitration have the maximum incentive to avoid bias in their case assessments so they can get closer to the arbitrator's assessment and win, they are still off by approximately fifteen-percent. So, optimism helps us though life, but, unchecked by the attentional focusing process and System 2 deliberation, it can lead to unfavorable outcomes in important cases that could have been settled with more realistic risk assessments.

¹⁴ KAHENMAN ET AL., *supra* note 4.

¹⁵ Robert Lowe, *Recognizing the Role of Optimism Bias in Case Evaluation*, LEGAL INTELLIGENCER (June 1, 2016), <http://www.thelegalintelligencer.com/id=1202758956799/Recognizing-the-Role-of-Optimism-Bias-in-Case-Evaluation>; Jonas Jacobson et al., *Predicting Civil Jury Verdicts: How Attorneys Use (and Misuse) a Second Opinion*, 8 J. EMPIRICAL LEGAL STUD. 99, 113 (2011).

Lawyers can become irrationally convinced that they have a great case and they can ignore both the weaknesses in their position and the strengths of the other side's arguments.¹⁶ If the attorney is able to maintain an objective view of the case he can point out strengths and weaknesses to his client. However, if the attorney becomes an immediate advocate for the client, as he must during trial, he may fall in love with the case he is going to present to the court.¹⁷ This positive belief helps attorneys be persuasive to the judge or jury, but it can interfere with a realistic evaluation of the case during mediation.

If the attorney gets carried away during trial it can damage his credibility. The judge or jury begins evaluating an attorney's credibility from the beginning of a trial. In the opening statement, you tell your story to the court and if it does not fit their expectations about what is likely to be true, then the judge or jury will reject you and your case. When you place witnesses on the stand, you vouch for their truthfulness, and if they are seen as shading the facts you will lose credibility as an attorney. If you fall in love with your case, you will lose the ability to throw out the parts that are not well supported. If you are seen as having something to sell rather than simply telling the facts of your story to the judge and jury, you will lose. Sincerity is the most persuasive argument.

Being less optimistic encourages careful System 2 logical thinking as opposed to rapid System 1 intuitive thinking. A negative mood generates more attention to subtle details that matter when making important judgments. Negative moods may even stimulate you to examine the facts of your case in new and creative ways. You will be more skeptical when you feel pessimistic about the world. In summary, when you are in a negative mood you are able to generate better arguments, persevere longer, recall facts more clearly, and reason more effectively.¹⁸

If the mediator sees that an attorney or her clients has fallen in love with their case and are taking an unrealistic position as a result, he can use open-ended questions to probe outcomes where the other side is likely to win and test how the party may feel if they did not fully examine that possibility before a disaster hap-

¹⁶ Jim McElhaney, *Don't Be Seduced: Falling in Love with Your Case Means You Won't See Its Shortcomings*, ABA J. (July 1, 2012), http://www.abajournal.com/magazine/article/dont_be_seduced_falling_in_love_with_your_case_means_you_wont_see_its_short/.

¹⁷ Ian K. Belton et al., *Lawyer and Nonlawyer Susceptibility to Framing Effects in Out-of-Court Civil Litigation Settlement*, 11 J. EMPIRICAL LEGAL STUD. 578 (2014).

¹⁸ Susan David, *Don't Worry, Be Gloomy: Negative Feelings Have Benefits Too*, HEALTH (Aug. 22, 2016), <http://www.health.com/mind-body/negativity-benefits>.

pens. For example, if one member of a divorcing couple has decided he deserves spousal support and a larger share of the community estate, he will selectively listen to and believe facts and comments that support his beliefs and ignore facts and comments that contradict his desired result. As a result, he will overvalue the likelihood of receiving spousal support and a large share of the estate. *The most effective way to overcome optimism bias is for the mediator to test the client's assumptions about the case through open-ended questions that shift the participant from System 1 to System 2 information processing.*

Telling someone they are wrong risks fight or flight responses. Testing the support for positions with probing questions allows the party to adjust expectations in a face-saving way. We feel less cognitive resistance about changing our own mind to conform to emerging reality than we do when someone simply tells us we are wrong. Mediators can ask probing questions to activate attentional focusing and System 2 deliberative analysis with its accompanying checks and balances. Negotiating a settlement is a lot like playing poker—you need an accurate idea of what is in your hand, you need good estimates of the cards other players likely hold, and you must understand who may be bluffing.

A neutral mediator is well positioned to probe strengths and weaknesses in a way that will activate the party's focusing system, which can then shift their thinking away from the System 1 intuitive process toward the System 2 logical thinking processor. Everyone likes his or her own analyses better than someone else's fiat. Mediators cannot be effective by simply being messengers. On the other hand, a direct attack through bashing-and-trashing positions can trigger fight-or-flight responses on the part of the client. While there is a prominent place for reality checking, mediators can be more effective by framing questions as a decision architect rather than by confronting the participant. And the outcome will be even better if the party claims ownership of the System 2 analysis illuminated by the mediator to reevaluate prior positions with new information. We all like our own ideas better than those suggested by others.

Mediators use a number of tools to accomplish this task, ranging from open-ended questions to directive judgments. A trusted mediator can mitigate optimistic bias and help parties settle their dispute. The mediator may face resistance because the optimism bias is generally unconscious and difficult to overcome. However, if the mediator can gently shift the person from unconscious Sys-

tem 1 intuitive or emotional thinking to more conscious System 2 rational analysis, many of these intuitive biases can be mitigated.

Because we never want to hear about our own mistakes—especially in conflict—the mediator can use someone else’s mistaken assessment that produced an unfavorable outcome as a horrible example to activate reflective System 2 analysis. The groundwater contamination case that became the book and movie, *A Civil Action*,¹⁹ provides a nice example. John Travolta’s character takes an emotional turn from a more conservative case assessment vetted with the bankers toward an opening offer far beyond where even his colleagues thought he should start. Unlike a Grisham thriller, this very aggressive anchor produced a small recovery for the parties and bankruptcy for the attorneys.

Also, the mediator can raise doubts about the parties’ arguments or facts through a series of open-ended questions. If a mediation narrows to a single disputed legal point, it may make sense to design a loop-back process where the parties present the narrow issue to a court on cross-motions or to an arbitrator for a binding or advisory ruling. With that information, the parties can complete a deal within a prior structure (high-low, etc.) or through further negotiation.

B. *Anchoring Biases*

Parties tend to anchor negotiations around expectations formed during the opening stage of negotiations. Opening numbers are important. Studies show amateurs and experts alike being manipulated by changes in real estate listing prices. Anchors are strongest when there are informational disparities. After discovery and expert reports, anchoring effects hold less sway. Because anchoring is part of the social convention of negotiation, it varies by venue. We are expected to put more spin on the numbers in certain venues, and even within a particular geographic bar, there are substantial variations by case type because social conventions vary among segments of the bar. The questions that weigh on everyone’s mind are “Will this thing settle? And, how much will they pay (or how little will they accept)?”

¹⁹ JONATHAN HARR, *A CIVIL ACTION* (1995); *A CIVIL ACTION* (Touchstone Home Ent. 1999).

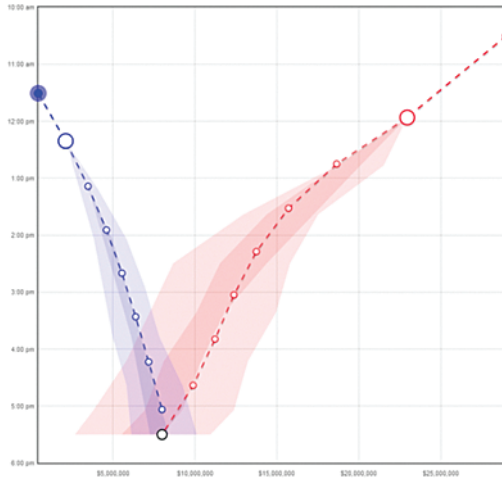


Figure 1

It turns out that in this area, like so many others, humans are predictable. Not only do their early moves telegraph where they are headed when matched to historical patterns, but also their pace of play is predictable from their opening moves. PictureItSettled.com²⁰ has spent years building a system of neural networks and learning algorithms that compare each move in a legal negotiation to tens of thousands of cases containing hundreds of thousands of moves (a much larger data set than a clinical trial). After a few moves, the system graphically predicts an opponent's next move within minutes and dollars.

Armed with that information, an attorney can know within a narrow range where the other side is headed before they get there. Much less guesswork is involved in this process, and one can fine-tune their strategy to subtly affect the pace of concessions and the eventual outcome. Of course, there is no cookie-cutter way to negotiate a case, but the larger the data set, the smaller the likelihood that someone has an untried pattern that works. PictureItSettled.com has studied lawyer negotiating behavior and has drawn some important, and often counter-intuitive, insights from the data.

Taking an extreme position early in a negotiation occasionally pays off, but more often it produces an impasse or requires a large concession by the person taking the extreme position to get a deal. This large late concession to get "back in the game" usually ends up costing the person more than a strategic concession plan inducing mirroring behavior would have required to settle the same case.

²⁰ Don Philbin owns Picture It Settled, LLC.

Holding an extreme position too long and then conceding at the last minute can leave fifteen-percent or more on the table. That is \$150,000 in a \$1 million claim. This insight flies in the face of conventional wisdom about legal negotiation, which suggests that taking extreme positions and holding on to them is the way to win large concessions from the other side.

As we saw, the definition of an extreme negotiating position varies by venue, claim type, and other variables. In the movie *A Civil Action*, for example, John Travolta played a lawyer whose opening offer was so far outside normal conventions for such negotiations in Boston in the early 1980s (over thirty-five times the eventual settlement) that it failed to even draw a response. The plaintiffs' lawyers and their financier had valued the case at \$25 million. Had Travolta's character enjoyed the benefit of modern analytics data from similar cases in the Boston area, he would have known that a 2.5 multiple was more in line with convention for the venue and case type. Had he started around \$62 million, there was a much better chance he could have landed a settlement in the \$25 million range. Instead, his 35 multiple failed to draw a response, and he and his partners lost their homes and went bankrupt pursuing the case for years to an eventual \$8 million settlement.

Interestingly, the 2.5 multiple might not be effective in other venues or case types. Negotiators need local intelligence to fine-tune their concession plans. Ironically, anchoring too low can also cause unnecessary friction and increase impasse odds. If local convention expects a seven multiple and one anchors at three times what they want in the end, the other side is understandably relieved by the more "reasonable" anchor. They expect to follow local convention from that starting point to glide toward a more attractive settlement. But, that relief quickly turns to aggravation when the next move concedes less ground. Because negotiations are an expectations game driven by localized convention, if the two sides have different expectations based on differing in-group behavior, the disruption and necessary adjustment creates friction that can increase the odds of impasse.

Experimental psychology and more recent neural mapping with fMRI machines have shown why mediation is so effective in neutralizing predictable cognitive biases that often impede negotiations. At a practical level, countries rarely allow the generals who are conducting a war to participate in peace negotiations. The reason is that it is hard to lay down weapons without bringing a tendency to discount the other side's intentions into the bargaining

room. Researchers quantified the effect of reactively devaluing an enemy's proposals—a statement attributed to a foe is half as credible (forty-four percent) as the same statement attributed to the home team (ninety percent). This result is similar to findings of in-group and out-group biases discussed earlier. Neutral third-parties (analogous to mediators) enjoy credibility much closer to that of the home team (eighty percent). That is why, when it is necessary to convey information to a client, the message is more effective if it comes from the neutral mediator rather than the opposing side.

Extreme opening anchors do not produce an impasse immediately, but the party making the extreme offer is often forced to make larger concessions later to avert an impasse. So, it is usually more prudent, and will likely produce a better outcome, to start with an offer that is high (or low), but perceived as reasonable under local convention, and then concede less in subsequent rounds. What is acceptable negotiating behavior varies by venue and type of case. And even within a venue, the employment bar might tolerate more extreme anchors than the construction bar. Noneconomic damages may move the line of scrimmage out across demographic markers. It is critical for out-of-town attorneys to have local counsel or a mediator they trust who will tell them what are the local conventions about opening offers.

What works in New Jersey may not play well in Peoria. If aggressive first offers are the local custom and you do not make one, you may frustrate progress by misleading the other side, and then trying to make up lost ground the rest of the day. Conversely, extreme offers that are not customary can have the chilling effect of shutting down negotiations before you get a feel for how high or low the other side will move.

Notice in Figure 1 where final settlement figures (dark center line) are plotted against opening demands and offers (high and low hash marks), interesting patterns emerge. There are venues where the midpoint rule of thumb is close to the mark and there are other locations where parties might compromise their position—and leave money on the table—by not performing the local dance with more extreme anchors. If the expectation in a particular venue is that negotiators demand several times what they are actually willing to settle for—and you do not open with that high demand—it may be hard to make up the difference in subsequent rounds. Conversely, if you make an over-the-top demand in a jurisdiction that does not dance that way, you may find yourself looking at an empty room like Travolta's character. Open too low and you will

have a hard time making it up, but open too high and you will poison the well and risk an early impasse. Local mediators can help out-of-town lawyers adjust their expectations to local custom.

As in chess, the first few moves in a negotiation set the stage. Timing and size of concessions can also make a difference in the likelihood of settlement. Negotiators use concessions at the beginning of the process to build trust and expect similar concessions in return.²¹ Experienced negotiators generally make opening demands tailored to the local venue, offer concessions to build trust, and adjust the size of their concessions to reflect movements by the other side while still playing their own game. During the final stage, negotiators generally make smaller concessions as they overcome growing buyer's remorse and approach agreement. To build trust, concessions should be reciprocal, but not necessarily equal. Whether moves are "large" or "small" depends on which role a negotiator is playing. Plaintiffs naturally prefer to measure with a dollar yardstick because they had more room to start with and can make larger dollar concessions, while defendants usually work in percentages because they are bookended by zero at the low-end unless they have a viable counterclaim.

The law of large and small numbers produces rhetoric like: "We came down \$100,000 and they only moved \$10,000!" and "We doubled our offer from \$5,000 to \$10,000 and they did not even move back to last week's demand." Making a disproportionate concession after the other side makes a generous move can damage trust and generate anger. If the other side makes a large concession, following with one of similar proportion triggers rewarding mirror neurons and facilitates progress.²² If the other side makes small concessions, it is generally a good idea to move in proportionate steps toward a settlement.²³ Whether the dance is a waltz or a tango, it is better to match patterns and avoid stepping on each other's feet. But, neither party has total control over the speed of the dance. They must adjust through mirroring moves and signal their intentions so the other side is not confused or misled.

²¹ ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES* (2d ed. 1991).

²² Deepak Malhotra, *Four Strategies for Making Concessions*, HARV. BUS. SCH. (Mar. 6, 2006), <http://hbswk.hbs.edu/item/four-strategies-for-making-concessions>.

²³ *Id.*

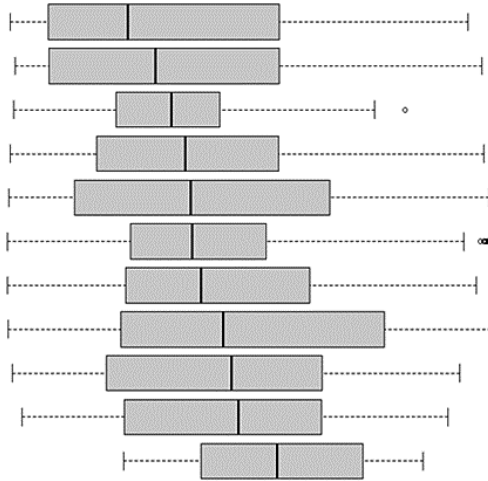


Figure 2

Negotiating conventions not only vary by venue, but also by claim type. The shaded boxes in Figure 2 cover the majority of offers and demands, but notice there is some fairly extreme anchoring across claim types. Even the best general rules may break down in specific cases, so negotiators must attend to and match behavioral patterns in their own case, rather than follow categorical rules that may not apply in this particular situation. To understand what is happening in a particular case, we search the database for an example where a negotiator has acted like your counterparty, rather than misapplying general rules to specific facts.

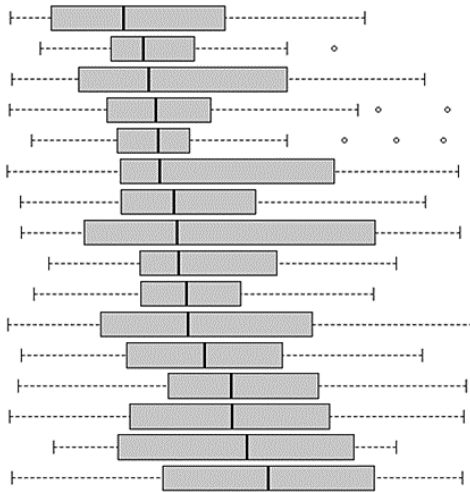


Figure 3

C. *Sunk Cost Bias*

Another cause for impasse occurs when a participant does not understand the concept of sunk costs, which are losses that cannot be recouped. It may help break this type of impasse if the mediator probes how much more money will be spent going to litigation if the case does not settle in mediation. Understandably, defendants resist paying the plaintiff from anticipated expenses for fear of a shark effect—if the defendant rewards one plaintiff—other attorneys will smell blood and begin circling the insurance company. But, the question can be framed differently. Once odds of success are explored, future costs become a natural component—would you spend this much to go to Vegas with these odds? Recouping money that is already lost may be a long shot, but, through framing, the mediator can focus on the prospective question.

Is it better to take what you can get through settlement rather than spending more money to litigate the case? This is particularly relevant when the parties are facing huge litigation costs if they cannot settle. Risk analysis and the proper questions can place the forward costs of litigation in the context of the probability of success. After all, lawyers never give their clients a guarantee of success lest they have to live with that assessment post-verdict and clients are savvy enough to have seen cases they thought would result in a “guilty verdict” produce a different outcome. There was a recent mini-series made about one of those trials, *The People v. O.J. Simpson*.

D. *Mental Accounting Bias*

Another cognitive bias is mental accounting. This refers to the tendency of people to separate assets into different accounts based on psychological factors, such as source of the money, purpose of the account or specific assets like the house, rather than treating all assets as money equivalents. Clients often attribute special importance to their house, even though financially, a house is just another source of funds if it is sold. Many parties find it difficult to separate their emotional attachment to the house from its dollar value during *mediation*. This may not create a serious problem for settlement, but the client may receive fewer total assets because

they have a strong emotional attachment to their family home.²⁴ If the client understands what they are doing and can afford the expense of maintaining the family home, then it may be in the children's best interest to keep the house and receive a slightly smaller total settlement.

E. *Confirmation Bias*

Confirmation bias is the tendency of people to search for and believe facts that support their opinions and ignore facts that contradict their beliefs.²⁵ If there are five expert witnesses in a case and three of them agree with one side, the other side will focus on the two that "got it right" and lampoon the others as unqualified charlatans. Mediation used to come later in the litigation process because of a common belief that we needed discovery—and then more discovery—to intelligently discuss risks. Now we know that the parties simply become more entrenched with more facts. Regardless of the amount of data for or against a proposition, partisans will cling to the facts that support their position even if it empirically represents the minority position. Additional contradicting information does less to pull parties from their positions than it increases sunk costs as they seek to recover the additional expense to put the same spoils in their pocket.

A classic example is the base rate bias where a parent is given statistical information about the likelihood of her son getting into college. Suppose the college is very selective and only accepts six percent of its applicants. The mom may say, "my son is brilliant and he will certainly be accepted." She is ignoring the fact that all the students applying to the college are probably brilliant and the best estimate of her son's chances of being accepted is six percent, not an encouraging prospect. However, because she ignores the statistical base rate of acceptance, she believes her son will be accepted when in fact he has only a small chance of matriculating to that college. She loves her son and takes his side. As we saw, attorneys often love their cases and that naturally distorts expectations.

²⁴ KAHEMMAN ET AL., *supra* note 4.

²⁵ *Id.*

F. Herd Bias

Herd behavior is a tendency to copy the behavior of other in-group members selectively. There are at least two reasons for herd behavior. First is the social pressure to conform because we want to be part of a group rather than an outsider. Second, a large group may know things we do not so it may seem smart to copy them. However, it is often not a good idea to follow the herd. For example, if everyone you know got a litigated divorce, does that mean you should subject your family to the destructive realities of litigation? Or, just because most lawyers prefer to wait until just before trial to mediate their claims, does that mean you should as well? Herd behavior can be distorting because parties choose their own in-group herd rather than adjusting to wider base rates and the result can be counterproductive.

G. Loss Aversion Bias

People value assets they already own more highly than the same asset if it is offered during negotiation. This cognitive bias is called loss aversion and it means people value monetary gains and losses differently. Loss aversion bias creates a stronger negative reaction to a loss compared with the positive feeling created by a similar gain. This means individuals are reluctant to choose settlements that require them to give up a significant asset they already own to gain something of similar value. People dread losing money more than they value receiving the same amount of cash.²⁶ For example, if a pension plan or a savings account has a person's name on it, he or she will be reluctant to give up that asset, even if doing so would gain him or her another asset of similar or even higher value. Psychologically, the fact that the person's name is on the asset makes it more valuable to him or her and he or she will want to keep it, although another asset offered may have a higher dollar value.

²⁶ *Id.*

H. *The Endowment Effect*

A related bias in behavioral finance is the endowment effect, which makes people value things they already own more highly than the same asset if it is for sale. A famous example of the endowment effect was presented by Kahneman.²⁷ The researchers gave participants a mug and then offered them the chance to sell or trade the mug for another item of similar value. They found that the amount of money the participants demanded to sell the mug once they owned it was almost twice what they were willing to pay for the mug before they owned it. In another example, researchers found that participants given a mug were unwilling to trade it for a chocolate bar and if they were given the chocolate bar, they were unwilling to trade it for the mug. Once we own something, we tend to value it higher than the same item in a store. fMRI studies show that the human brain uses more oxygen processing a loss compared to a gain, confirming that losses are more psychologically meaningful for people.²⁸

The endowment effect and loss aversion permeate mediation. Coupled with reactive devaluation, these biases start negotiations in a hole. When we expect the worst from our out-group opponent and we are afraid of loss, the mix can be toxic. But mediators, as decision architects, can help parties see the same data as a gain by changing the frame through open-ended questions. Just as the merchant marks prices down to avoid the loss aversion that sets in when someone gets sticker shock, prices framed against alternatives options increases the appeal of the progressive concessions needed to make a deal.

I. *Contrast Bias*

Contrast effects occur when a person has two options that resemble each other but one is inferior. Contrast with the inferior option increases the attractiveness of the better option. For example, consider a dispute over a piece of land owned by two people. Generally, they will sell the property and split the proceeds, or one

²⁷ Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1325–48 (1990).

²⁸ Katherine R. Luking & Deanna M. Barch, *Candy and the Brain: Neural Response to Candy Gains and Losses*, 13 COGNITIVE AFFECTIVE & BEHAV. NEUROSCIENCE 437, 437–51 (2013).

person will buy out the other owner by paying cash for half the land. However, suppose there is a third option where the money to buy out the other owner is paid over time rather than in a lump sum. Unless the interest rate is high, a payout over time is generally considered inferior to a cash payment. Including a payout over time among the options tends to make people choose the cash payment for the property rather than selling it and splitting the proceeds because the contrast of immediate cash compared with a payout over time makes the immediate cash payment for half the property more attractive.²⁹

J. *Compromise Effect*

The compromise effect occurs when an extreme option is placed among the other alternatives. Because most individuals tend to avoid extreme choices, the middle options appear more attractive. Retailers take advantage of the compromise effect all the time by adding an expensive item to their line of goods so that customers will buy a slightly less expensive item on display. If a range of jury verdicts is presented to different groups, the groups that see extreme verdicts will change their evaluation and judge other verdicts as more moderate.³⁰ Similarly, developing a series of potential case outcomes through questions can have the same effect on participants in mediation. Of course, a defendant does not want to settle for the current demand. However, that System 1 response may evolve when measured against other potential outcomes at trial. Decision architects help parties test their System 1 responses by presenting them with other outcomes. And, the transaction costs required to litigate the case may convince the parties to settle.

V. SELF-DEFEATING EMOTIONAL BEHAVIORS

Attorneys and mediators know that clients have cognitive biases that can mislead them, and clients behave in irrational, self-defeating ways during negotiation because of unique personal

²⁹ Chris Guthrie, *Panacea or Pandora's Box? The Costs of Options in Negotiations*, 88 IOWA L. REV. 601 (2003).

³⁰ Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287 (1996).

traits and emotional stress. Negotiation involves conflict as the parties anchor and adjust to new information. The resulting stress may trigger a latent personality disorder, neurotic defenses or ego regression.³¹ All of these emotional states are damaging to settlement, but personality disorders can be particularly difficult for a mediator to handle.

A. *Personality Disorders*

Litigation is stressful, and even “normal” people will behave in unusual ways when they are subjected to severe stress. Consequently, the mediator must be careful not to attribute a personality disorder to “normal” people simply because they are under stress and appear neurotic, defensive, or childish. However, if a client is consistently irrational, irritable, resistant, and negative, their disruptive behavior may suggest a more serious problem such as antisocial, borderline, or dependent personality. If the mediator suspects one of the participants suffers from a serious personality disorder, she needs to decide whether to discuss the issue with the attorney and perhaps terminate the mediation. Individuals with personality disorders often become defensive if challenged and refuse to listen to rational advice, so that person may not be suitable for mediation. Personality disorders are rare, so a mediator may never have to deal with these serious mental health problems. However, it is helpful to know the signs of a personality disorder so the mediator can recognize the problem if it occurs. Three personality disorders are most common: Antisocial Personality, Borderline Personality, and Dependent Personality.³²

³¹ KAHENMAN ET AL., *supra* note 4.

³² AMERICAN PSYCHIATRIC ASSOCIATION, DSM-IV (1994).

An Antisocial personality shows a pervasive disregard for the right of others. They will break rules, lie, be hostile and not take responsibility for their actions. A borderline Personality is characterized by long-standing unstable interpersonal relationships, poor self-image, and marked impulsivity. A mediation participant with Borderline Personality will be impulsive, have issues of substance abuse, could threaten suicide, may lose trust in mediation, and may become inappropriately angry at their attorney or the mediator for little or no reason. A Dependent Personality is characterized by inordinate submissiveness and fear of abandonment. The person with a Dependent Personality Disorder will be a difficult client during mediation because they cannot make decisions, they avoid responsibility, they acquiesce to demands, and the opposition may overwhelm them if their attorney and the mediator do not protect them. However, protecting a dependent person is difficult for a mediator because she needs to preserve neutrality. The best procedure for the mediator is to take the attorney aside and advise him to become more active in protecting his

B. *Neurotic Defenses*

Mediators will encounter defensive participants much more often than persons with personality disorders. Psychologists classify defense mechanisms as primitive or adaptive. Primitive defense mechanisms include withdrawal, denial, projection, splitting, and acting-out. Primitive defenses often produce self-defeating behaviors. By contrast, adaptive defense mechanisms are more mature ways of dealing with severe emotional stresses.³³ Most mediation participants will use adaptive defense mechanisms during the negotiation process and these defenses rarely disrupt proceedings. However, if a person uses primitive defense mechanisms during mediation, these behaviors can be disruptive.

Whether a person employs primitive or adaptive defense mechanisms depends primarily on their level of personal development. Persons who enjoyed good attachments with their parents and siblings, developed normal social skills and have stable social relationships are likely to employ adaptive defense mechanisms during mediation. However, if a person was neglected or rejected as a child, did not develop normal attachment relationships with their parents and siblings, and is socially shy, he is more likely to use primitive defense mechanisms during mediation.³⁴

1. *Withdrawal*

When a client employs the primitive defense mechanism of withdrawal, they tend to avoid dealing with the stresses of negotiation and often stop interacting. Naturally, when a mediation participant withdraws from the process, negotiation will stop.³⁵ The best tactic for a mediator in this situation is to spend time building trust and making the mediation environment feel safe for the defensive participant. Combined with proactive protection by the withdrawn client's attorney, trust and comfort can go a long way toward mitigating damage from withdrawal. Keeping the clients in different rooms can also mitigate the effects of withdrawal because

client from intimidation. It is the attorney's job to be an advocate for her client and the dependent personality needs plenty of protection.

³³ NANCY McWILLIAMS, *PSYCHOANALYTIC DIAGNOSIS* 100–25 (2d ed. 2011).

³⁴ Elaine Rivas, *A Comparison of Attachment-Related Defenses and Ego Defense Mechanisms*, U. TENN. KNOXVILLE (Dec. 2009), http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1700&context=utk_graddiss.

³⁵ McWILLIAMS, *supra* note 33, at 104.

the stresses are lower. Also, taking a short time-out can help the client calm down and become more rational.

2. Denial

Denial occurs when a person refuses to acknowledge a fact that is apparent to any reasonable person. Denial makes it difficult for the person to acknowledge a fact or an issue and take responsibility for solving it. Denial will delay or destroy the mediation process because the parties cannot agree about the facts so they will argue about what is true rather than attempting to resolve their dispute.³⁶ Again, the best tactic is to gain the client's trust and make them comfortable with the process before trying to convince them about the facts of a case. A client in denial will not face reality until they feel safe enough to lower their defensive shields. It may be necessary to keep the parties in separate rooms during the entire mediation.

3. Projection

Projection happens when one party attributes their own unconscious feelings to another person. For example, if a person is frustrated and angry, but cannot admit these strong negative feelings, he may repress the anger and attribute the unconscious hostile feelings to the other party in the negotiation. A person who uses projection as a major defense mechanism will believe that their problems are the other person's fault. A person who projects their own anger onto the other side will become defensive and feel attacked unless the mediator can build trust and her attorney intervenes to protect her from perceived attacks.³⁷ The person who projects anger may believe the other party is being aggressive and feels justified in becoming angry return. The mediator needs to be sensitive to the perceived threats felt by both clients in a high conflict situation and do what he can to generate trust. Active listening and supportive comments can help calm the client's strong emotions. Keeping the parties in separate rooms will usually help as well.

4. Splitting

Splitting means a person separates the world into black and white, friend or foe, right or wrong, with few areas of compromise.

³⁶ *Id.* at 105.

³⁷ *Id.* at 111–15.

Primitive splitting makes it difficult for the parties to settle because one person sees everything in black and white and also finds it difficult to move from that rigid position to accept a compromise.³⁸ The mediator and the client's attorney can work in conjunction to develop trust, help him see the strengths and weaknesses of both sides, and gently nudge the client away from their extreme System 1 intuitive position toward a more rational System 2 solution amenable to compromise.

5. Acting-out

Acting-out occurs when a person becomes impulsive and acts on his feelings without considering whether the behavior is reasonable, rational, or productive. Acting out in emotional and irrational ways during mediation can confuse the other side and slow settlement.³⁹ The best strategy for the mediator and the attorney in this case is to ask for a time out, try to get the client to move from an emotional toward a more rational thinking process, listen to their arguments, and try to place modest constraints on the worst of the acting out behaviors by reminding them that they agreed to certain expectations of conduct at the beginning of the mediation process.

The next defense mechanism, called regression, is an adaptive defense that occurs when a person moves from a mature Adult Ego state to a more primitive Child Ego state under stress.⁴⁰ During conflict, normal individuals may regress to their Child Ego state and temporarily become upset, irrational, and illogical. Ego state regression can interfere with negotiation because when a person changes from an Adult to a Child ego state, he is generally illogical. The good news is that a short time out will usually solve the problem after the person calms down and shifts back to their Adult Ego state.

C. *Ego State Regression*

Eric Berne⁴¹ proposed that every person has three ego states available to him or her at all times (Parent, Adult, and Child).

³⁸ *Id.* at 116.

³⁹ *Id.* at 119.

⁴⁰ *Id.* at 127.

⁴¹ ERIC BERNE, *GAMES PEOPLE PLAY* 23–28 (1964).

Berne proposed that human behavior can be understood by focusing on which ego state is in control of each party during a social interaction. The Parent state resembles the thoughts, emotions, and behaviors characteristic of a person's own parents. The Adult state contains the person's ability to act autonomously, relate to the world realistically, and think logically. Finally, the Child state represents immature thoughts, feelings, and behaviors that became fixated during childhood. Berne believed that as people interact, they shift from one ego state to another and these shifts have significant implications for the quality and rationality of social interactions.⁴² Some combinations of ego states can generate productive interactions while others are potentially destructive to productive negotiations.

D. *Adult Ego State*

Berne proposed that the Adult state exists to mediate between the Parent and Child states.⁴³ When both parties are operating in their Adult state, there is little likelihood that emotional issues will interfere with mediation. On the other hand, when one party shifts to their Parent or Child state, the interactions can become emotional and the negotiation process may degenerate into name-calling or other self-destructive behaviors.

Mediators can most effectively deal with these self-destructive behaviors by meeting with each attorney before mediation and discuss how their client deals with conflict and severe emotional stress. If the attorney alerts the mediator that their client is emotionally fragile and likely to regress during intervals of severe stress, then the mediator can take steps early in the process to limit the number of direct personal interactions between the parties and minimize the number and severity of emotional stresses experienced by the fragile party. In addition, the mediator can take extra time to develop rapport with the fragile client, to gently nudge him toward a settlement rather than trying to force settlement with logical arguments. Avoiding high levels of stress can also help.

⁴² *Id.*

⁴³ *Id.*

VI. STAGES OF MEDIATION—NEGOTIATIONS FOLLOW PREDICTABLE SOCIAL CONVENTIONS

Negotiation of litigated cases usually involves a dance that divides into roughly three phases. Some are tangos while others are waltzes, but effective negotiators engage in a pattern of reciprocating behavior that tests the settlement price for a deal over multiple rounds. Short-circuiting the negotiation dance often leaves money on the table. The nearby graphs show actual negotiations plotted with dollar moves coming together along the horizontal axis and time running from the start of the mediation down the vertical axis to a deal.

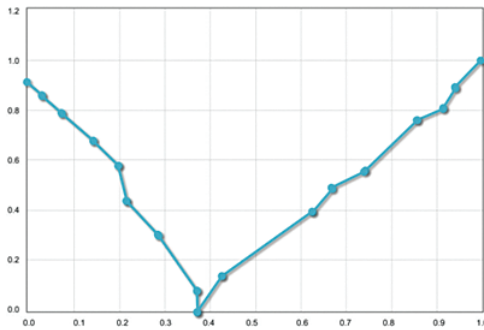


Figure 4

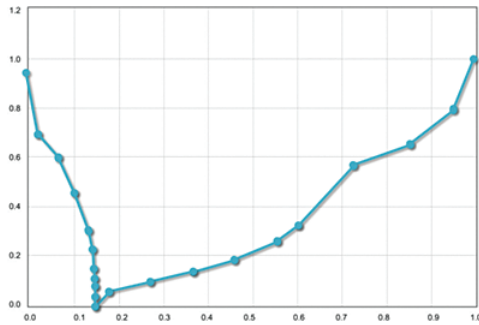


Figure 5

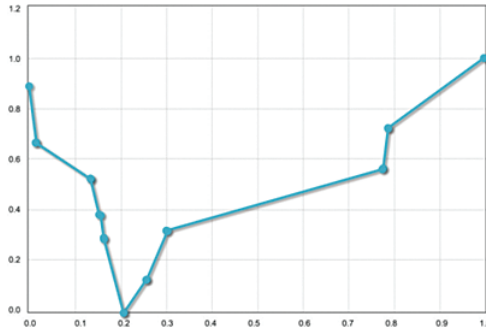


Figure 6

A. *Stage One—Opening*

Whether begun in a joint session or out of the blocks in caucus, parties tend to share information during round one in an attempt to persuade their counterparty, or at least justify their own tough position. Informational asymmetries may be wider in mediations scheduled early in a case compared to those occurring on the eve of trial after extensive discovery, but during the course of the mediation enough information is shared to balance the scales. Damage calculations are often offered to support early demands and offers during the opening phase of the mediation.

B. *Stage Two—Middle Muddle*

The middle muddle usually coincides with lunch in a full-day mediation. There is not much information left to share. One side probably already knows about the smoking gun that should have brought them around to the other side’s case evaluation. They also know how the other side is calculating damages, or lack of them. Although the parties are still divided, the ball is moving toward settlement. Neither side wants to give up until they see how sweet the deal will get, but this middle stage is no fun. To plumb the other side for their best number, they keep moving their offer closer without going to their final demand. Colloquially, they hang the meat low enough that the dog thinks she can get it even though it is generally out of reach. A pattern of reciprocating movement ensues, even if the parties are not thrilled with the responses from each other. Both sides move in rough proportion (not dollar equivalents) toward the other, begrudgingly.

C. Stage Three—Impatience Up, Blood Sugar Down

Late in the afternoon, impatience grows as if an alcoholic needs a drink. As blood sugar drops, decisions become more difficult. What trial lawyers call the breakfast theory—what the judge had for breakfast may affect decisions—has been proven true by empirical researchers. After looking at several simple binary choice models to quantify decisions, researchers settled on criminal parole outcomes because the judge had two choices—parole or not. Figure 6 depicts the parole grant rate by Israeli judges studied throughout a single day. All prisoners were eligible for parole, but the court had wide discretion in granting it.⁴⁴

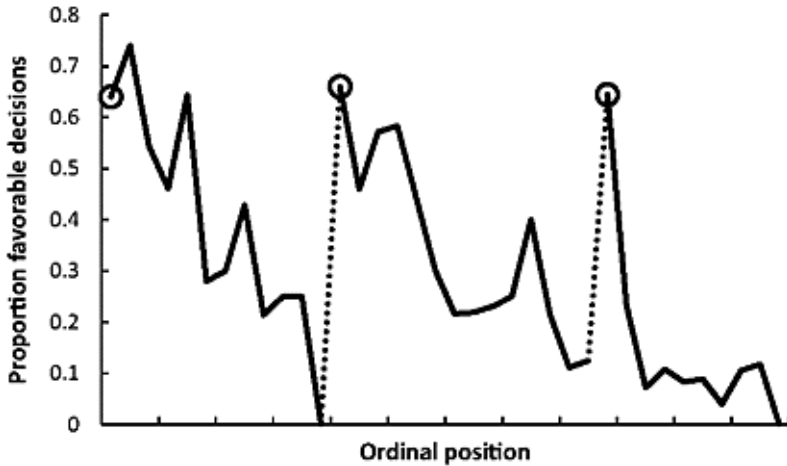


Figure 7

Researchers studied the outcome of hundreds of cases. They found little correlation among behavioral factors, but they did find a startling correlation between the likelihood of parole grants and the time of day a case came on for consideration. The judge's metabolism apparently has more to do with parole outcomes than prisoner performance. For example, suppose your neighbor's case, which is similar to yours, is called early in the morning and he is paroled. Your hopes rise—if he made it, you surely will, too. But the morning drags and the judge appears to become weary and her attention wanders. You notice she is granting fewer paroles as we

⁴⁴ Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PNAS 6889 (2011) (finding that parole decisions were influenced substantially by their timing relative to judges' two daily food breaks).

get closer to lunch. At 11:30 the bailiff calls your case. The state does not contest your good behavior, yet the judge denies your parole. Why could your case not have come up after lunch, when grant rates return to morning levels?

Negotiators are not that different from judges. As the hours tick away, they often express frustration that the other side has taken too long to concede too little, but they still want to get this settled today. They will think, “We have been reasonable but they need to move.” Buyer’s remorse has set in—both sides have moved more than they wanted to already. Everyone still wants to settle the case, but both sides begin to make smaller concessions in quicker succession to signal, “You must come to us.” Closing is hard work that often requires a variety of mediator tools. But the area of agreement was set much earlier during the opening phase of the mediation.

Mediations have predictable cycles and understanding that gives mediators the patience to let parties proceed at their own pace. Mediators know they should work to build trust quickly and manage strong emotions during the early stage of mediation.⁴⁵

If one participant keeps repeating the same points, they do not feel heard so the mediator should make a special effort to actively listen and communicate more clearly with that party to build trust. Of course, the better prepared the mediator, the quicker he or she can encapsulate a parties’ position and make them feel understood. Attorneys can help immensely by providing the mediator with legal and factual background on the dispute and insight into how their client processes information and handles their feelings. This information is best gathered through telephone calls with each counsel prior to mediation. Later, during the cooperative and problem solving stages, the mediator can ask questions that help parties develop options for resolving issues.

VII. RISK ANALYSIS

Conventional wisdom used to be that attorneys should begin a mediation session with a stirring argument supporting their aggressive opening position. The assumption was that if you give the other side a clear preview of coming court attractions, they will see

⁴⁵ JOHN LEDERACH, *BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES* (1997).

the foolishness of their ways and settle the case quickly and reasonably—on your terms. Another early myth was that you should open with an extremely high or low offer to allow for later concessions. The result of these early tactics was a sharp decline in joint sessions because stirring arguments and competitive behaviors made everyone angry and it took time for them to cool down. Mediators noticed this pattern and started avoiding opening statements and recommending reasonable opening offers to avoid the anger and begin effective negotiations more quickly.

A. *Cooling Down Takes Time*

Recent research confirms that after a fight our brains cool down slower than a Microsoft Windows operating system reboots.⁴⁶ It takes about 30–45 minutes for heart rate and blood pressure to calm down and it may take much longer to shift away from fight or flight emotionality and regain the ability to think rationally. When emotions run wild the best strategy is for a mediator to take a time-out and let the parties cool down.

Because mediation is often “let us make a deal against the backdrop of what might happen at the courthouse if you do not,” a serious discussion by the mediator of factual and legal misunderstandings held by both parties can facilitate settlement. A mediator’s discussion of the risks inherent in a trial is very different from a competitive exchange between the parties and can achieve better results because the mediator has more credibility and is sharing information about the costs and benefits of settling and avoiding the lottery of a trial. And, this neutral risk analysis generally makes both sides more interested in settling because the information is not discounted since it comes from the neutral.

Negotiations are more effective if conducted in a problem-solving frame.⁴⁷ Additionally, a mediator must be sensitive to the emotional and strategic stage of the mediation process. The mediator can frame discussions so that problem-solving behavior is not seen as a sign of weakness or inexperience, but rather a sign of strength and sophistication.

⁴⁶ Nathan Cobb, *How an Oxygen Mask Can Help Your Marriage: How to Make a Time-Out Work for Both of You to Defuse Couples Conflict*, COBB & ASSOCIATES, INC., <http://www.nathancobb.com/couple-conflict.html>.

⁴⁷ Timothy Taylor, *The Blurry Line Between Competition and Cooperation*, LIBR. ECON. (Feb. 2, 2015), <http://www.econlib.org/library/Columns/y2015/Taylorcompetition.html>.

B. *Evaluating Risk*

There are a number of ways to evaluate the risk of settlement versus litigation. Mediators often have better luck testing the underlying foundations for an aggressive opening position by asking questions rather than just saying “you are wrong” or “that will not happen.” Declaring that something will not happen leaves room for confirmation bias—because it might happen, the mediator is seen as off-base. Moreover, adults do not like to be told they are wrong. That does not mean they will not come to that same conclusion with help from a decision architect who can help them shift from System 1 intuitive positions to System 2 rational thinking through open-ended questioning. Rather than confronting a participant directly, the mediator needs to lead them to that conclusion through artful questioning and careful feedback.

C. *Estimating Likely Outcome*

Looking at potential outcomes probabilistically can help a client change their stance. Rather than a mediator saying something will not happen, she can ask open-ended questions that test its likelihood. Lowering the power of a microscope to achieve a broader view also provides perspective. Intense focus on the current case triggers self-serving biases. But reframing to a wider view and giving examples from pop culture, such as the O.J. Simpson double murder trial presented through a recent television series, sometimes works. In that case, the prosecutors thought it was a “lead pipe case” with the physical evidence. The fact that it went the other way suggests an alternate paradigm—unlosable cases can actually be lost. Odds makers in Las Vegas can also provide a common reference. Taken together, these techniques make it possible to discuss outcomes along a likelihood continuum rather than focusing on a single option.

Mediators use various techniques to generate a range of potential outcomes rather than allowing a participant to focus on a single System 1 position. For example, new settlement options can be formed through open-ended questions by the mediator or the party’s advocate. One option is a baseball analogy: ask the client what would a single, double, triple, and home run look like at trial? Another tactic is imagining what a high, medium, low, and zero award would look like. The point is to get the parties thinking

about a range of outcomes without telling them their System 1 preference is wrong. The mediator needs to open the range slowly to allow the party and their attorney time to adjust their thinking and move off the single System 1 position.

It is often helpful to start with the party's best case. Of course the party wants to hear their advocate argue how they will hit a homerun. But, by the time mediation rolls around, their advocate usually wants the mediator to probe less favorable outcomes because they want their client to understand that homeruns do not happen every time a batter steps up to bat. So, with caveats and qualification, the advocates will want the mediator to probe less favorable outcomes—not because of the attorney or the case they put on, but because of jury pools, bad evidentiary rulings, and all the other variables that make the courtroom more akin to a lottery. With that cover, they want their client to understand that strikeouts and singles happen in a game as well as home runs. Timing is important. Just as a mediator does not start this discussion without a lot of foundational work, she also allows time for this new information to sink in.

During the early stages of mediation, the party has focused on a single System 1 outcome—the best for them—and nothing else. Do not argue against their best case without first suggesting the possibility of less favorable outcomes. What is interesting is how much agreement often emerges concerning the range of possibilities produced by both sides. Advocates in different rooms will often sketch out roughly the same range of outcomes—high through low—without knowing the other is even doing the exercise. However, differences emerge when the two parties begin to assign expected probabilities to the various outcomes for their case. As you might guess, both parties place too high a likelihood on their best-case outcome and too low a probability on their worst-case outcome. That is why it takes time to settle the dispute because both parties need to adjust their probabilities to reach a zone of agreement.

D. Probabilistic Thinking

Analyzing the likelihood of outcomes is hard work. Simple examples often help. Tossing one coin is analogous to one trial—next to no confidence in our prediction of the result—fifty-fifty chance of heads or tails. But, move the number up to one hundred

coins and our confidence in the prediction increases dramatically—we can be pretty certain of an outcome close to fifty heads and fifty tails. That gives the advocates a way to avoid the client’s unrealistic attachment to their best-case scenario. The lawyers can still assign overly optimistic chances to that outcome to keep peace, but they can also allow some of the one hundred coins or outcomes to fall elsewhere on the baseball diamond. Both parties will no doubt assign too high odds to the homerun. But the possibility of hitting something less than a homerun every time we step up to bat allows for other outcomes and a more reasonable approach to settlement discussions. In time they can reach agreement through this process.

Most lawyers tell their clients that bad outcomes may result from relinquishing a decision to a judge or jury if they cannot settle. With a range of outcomes (high, medium, low, and zero) and probabilities totaling one-hundred percent, some simple arithmetic fills out what economists call the net expected value of a case. Usually the weighted expected value will challenge the client’s System 1 best case. Loading the outcomes with the effects of transaction costs (legal fees, expenses, etc.) will open a zone of agreement in all but the most contentious cases.

While the mechanics of decision trees and other tools are discussed in detail elsewhere, the important concept here is that this probabilistic process tests System 1 intuitive case valuations without directly telling the clients they are wrong. By sketching other possibilities graphically and weighting them with probability estimates, the mediator is implicitly testing the foundations of the client’s aggressive position without telling her “you are wrong” or “that will never happen.” The process of generating probabilistic options brings System 2 analytical thinking online to test the cherished System 1 position. The client often comes to the correct conclusion without having to be told “you are wrong.”

Even assuming the probabilities are skewed toward the party doing the exercise—and we know each side will be off at least fifteen percent in their favor—the party gets to do the analyses themselves. Working at their own pace, rather than being force fed, avoids triggering flight-or-fight responses. The added benefit is that late round offers from the other side will approximate the weighted probabilistic outcome derived from the exercise, and that opens settlement options that will make the party the hero of this story when they decide to settle the case rather than chance lower

outcomes by putting the decision in others' hands. Clients like to control outcomes.

E. *Evaluating Both Sides*

The keys to a successful mediation include helping the parties understand their opponent's positions, fostering trust in the mediator and the process, and perhaps the other side, building confidence by solving an easy issue early in the process, managing expectations, and knowing when to pressure or support.⁴⁸ Of course, there is no settlement until a final written deal emerges from the mediation, but there are incremental understandings that build momentum to a comprehensive settlement. While being explicit that no incremental agreement stands alone, mediations naturally focus on deal points as the day progresses. It is helpful for the mediator, as decision architect, to stay focused on the parties and balance note taking with eye contact and active listening as the deal points emerge.

VIII. NEGOTIATING STYLES

Beyond dealing with strong emotions, irrational choices, cognitive biases, and occasional mental illness, the mediator must be sensitive to the negotiating style of attorneys and clients and build trust among the participants to achieve a successful outcome.⁴⁹ People have different negotiating styles. For example, engineers or financial analysts may think in numbers so they appreciate a sophisticated numerical presentation of the issues and options. By contrast, artistic, and romantic types generally prefer holistic settlement options that contain few numbers; they generally like to negotiate the entire agreement as a single package rather than delving into financial details. Other clients are more flexible and can shift from one style of negotiation to another, depending on the stage of mediation and the style of their opponent.

When an attorney and his client have the same rigid negotiating style, the mediator will have to use additional tools to facilitate

⁴⁸ James A. Baker, III, *Closing the Deal: Six Methods of Negotiation*, TEX. B. J. (June 2016), https://www.texasbar.com/AM/Template.cfm?Section=Table_of_Contents&Template=/CM/ContentDisplay.cfm&ContentID=33547.

⁴⁹ DEUTSCH, *supra* note 3.

settlement. Alert to negotiation styles and patterns, the skilled mediator can frame questions that probe different negotiating strategies. There are often stylistic differences between people in the same room. If an attorney is rigidly competitive while her client is comfortable with a cooperative style or is flexible about negotiation tactics, the mediator may frame questions that appeal to the client and try to match negotiation strategies with the current stage of mediation. The key to settlement is not giving up too soon—keep asking probing questions to bring the two sides closer together.

A. Competitive Negotiators

A rigid competitive negotiator may refuse to compromise, attempt to intimidate his opponent, and attempt to “win” at all costs.⁵⁰ The competitive negotiator usually ignores the needs and interests of the other side, except when he can use them to his advantage. The competitive negotiator will use any strategy he thinks will help him win, including being cooperative if he believes that tactic will maximize his gain. The competitive negotiator is not interested in resolving disputes, only in winning more assets for his client. He tries to control negotiation and manipulate events to his advantage.

Because almost all lawsuits settle, the question is whether hard bargaining improves negotiation outcomes. The conventional wisdom among mediators is that hard bargaining occasionally results in a premium when the other side folds. More often however, hard bargaining keeps parties from dancing through a reciprocal pattern of concessions that minimizes the resistance to a deal. If this happens, the hard bargainer runs the risk of creating an impasse or having to make a big concession without receiving the benefit of a reciprocal concession from the other side during the negotiation dance.

⁵⁰ Wendi Adair & Jeanne Brett, *The Negotiation Dance: Time, Culture, and Behavioral Sequences in Negotiation*, 16 *ORG. SCI.* 33 (2005).

B. *Cooperative Negotiators*

A cooperative problem-solving negotiator limits the tactics he will use, considers everyone's goals and interests, and focuses on maximizing returns for both parties while trying to reach a settlement.⁵¹ The problem-solving negotiator avoids being antagonistic or adversarial during the cooperative and problem solving phases of mediation. He tries to develop and share joint gains rather than "win" at all costs. The problem-solver focuses on the substance of the issues rather than the persons involved and prefers settlement discussions or mediation to litigation.

There are advantages and costs associated with maintaining a single rigid negotiating strategy during mediation. For example, the competitive negotiator will not be concerned about what his tactics will do to any continuing relationship between the parties after the dispute is resolved—she is only interested in winning. This single purpose allows the competitive negotiator to enter mediation with fixed offers and a strong, inflexible negotiating strategy. The needs and tactics of his opponent have little effect on his negotiating strategy because his only goal is to "win." The major problem with using a rigid competitive style is that the negotiation often fails and the parties must litigate the dispute, increasing costs and emotional stress for everyone.

The competitive negotiator feels comfortable in mediation because he feels in control of the situation and this translates into self-confidence and occasional large "wins" at the bargaining table. Moreover, the competitive negotiator always has a clear alternative to a negotiated settlement: she is willing to litigate if she cannot get what he wants through mediation. The competitive negotiator will ignore the legitimate needs and interests of her opponent and focus on winning rather than reaching a "fair" settlement. If the competitive negotiator believes she can do better in court, she will litigate, no matter what the psychological and economic costs to her client or the other side. Finally, the competitive negotiator often enjoys the excitement of competition and joy of battle.

⁵¹ Melvin J. Kimmel et al., *Effects of Trust, Aspiration, and Gender on Negotiation Tactics*, 38 J. PERSONALITY & SOC. PSYCHOL. 9 (1980).

C. *Flexible Negotiators*

By contrast, problem-solving negotiators are flexible about tactics. They will take the lead in trying to resolve problems rather than simply bargaining to “win.” Another trait of the problem-solving negotiator is that she recognizes and considers the goals and interests of both parties and looks for joint gains that resolve issues. Successfully resolving a dispute by discovering win-win solutions is an inherently satisfying activity for the problem-solving practitioner. There are significant risks in using only a competitive or a problem-solving strategy during negotiations. Better to be flexible and match your strategy to the stage of mediation, the style of opposing counsel, the needs of the case, and the clients involved.

The rigid competitive negotiator generally triggers frustration, anger, mistrust, and confusion, which may produce an impasse.⁵² The consistently cooperative negotiator may be forced to make unwarranted concessions and end up with a poor settlement for his client. Effective attorneys understand that there is a proper time and place for competitive, cooperative, and problem-solving negotiating styles during the mediation process. It is all a matter of timing.

IX. TRUST

The mediator must quickly build trust to be effective. Most mediators start with a reservoir of reputational trust. They were selected by the parties for a reason and thus have an advantage going into the mediation. They also have a positional advantage by being a neutral third-party to the dispute. Disputants automatically devalue what the other side says or offers—even if it is advantageous to them. However, neutrals do not suffer that encumbrance. Experimental psychologists and more recent neural mapping with fMRI machines have shown why mediation is so effective in neutralizing predictable cognitive biases that often impede direct negotiations. The mediator is able to communicate the same information in a neutral manner that allows both sides to listen and understand rather than become emotionally defensive, immediately discounting and rejecting the idea because it came from

⁵² Dale Eilerman, *The Use and Misuse of a Competing Style in Conflict Management*, *MEDIATE* (July 2006), <http://www.mediate.com/articles/eilermanD4.cfm?nl=108>.

the other side. Studies show that a neutral mediator is afforded almost the same level of trust as other members of the participant's team. By contrast, suggestions from the other side are discounted as untrustworthy.

A. *Discounting Out-Group Communications*

Governments rarely allow the generals who are fighting a war to sit in on peace negotiations because the direct participants discount everything the other side says. It is hard to lay down weapons and immediately stop discounting the intentions of opposing generals. Researchers have quantified the effect of devaluing an enemy's proposals—a statement attributed to a foe is half as credible (44%) as the same statement attributed to the home team (90%). Interestingly, neutral third-parties enjoy credibility close to that of the home team (80%). But neutral mediators cannot rest on this early lead—they need to continue building trust and momentum if they want to settle the dispute.

B. *How to Build Trust*

Trust is the foundation of mediation.⁵³ Parties who have at least a modicum of trust in the mediator and each other are more likely to share information, communicate honestly, and engage in good-faith negotiation. There are several ways to develop and maintain trust during mediation. First, the mediator, attorneys, and parties should make eye contact and listen actively. Active listening involves acknowledging the other party's feelings, listening to opposing arguments with an open mind, and respecting the other party's positions. It helps if both parties can stay calm in the face of strong emotions and allow each side to express their positions and feelings without becoming defensive or interrupting.

Expressing honest appreciation for the other party's efforts to compromise can build trust. Treating the other party as a problem-solving partner rather than an adversary also fosters trust.⁵⁴ Show-

⁵³ Alexander S. Polsky, *Ability to Earn Parties' Trust is Key to a Mediator's Success*, L.A. DAILY J. (2008), <https://www.jamsadr.com/files/Uploads/Documents/Articles/Polksy-Ability-to-Earn-DJ-2008-07-25.pdf>.

⁵⁴ Brad Spangler, *Integrative or Interest-Based Bargaining*, BEYOND INTRACTABILITY (June 2003), <http://www.beyondintractability.org/essay/interest-based-bargaining>.

ing you understand each party has different priorities and stating you will try to meet everyone's goals by seeking creative settlement solutions fosters trust. Effective mediators and negotiators maintain cooperation by being courteous and ensuring that the negotiation is seen as fair.

X. PERSUASION AND INFLUENCE

Understanding how persuasion and influence work and when they are effective makes better mediators and attorneys of us all. Psychologists believe there are two basic ways people are influenced: one relies on emotion and System 1 intuition while the other is based on facts and System 2 logical analysis. The intuitive approach is pre-conscious, automatic, effortless, and takes almost no time while the logical approach is conscious, deliberate, difficult, and slow.

A. *System 1 Persuasion*

Intuitions rely on superficial cues rather than solid facts or logical arguments and are easily influenced by emotions. System 1 intuitive decisions are often made on the basis of perceived expertise or attractiveness of the presenter rather than the soundness of her facts and logic. By contrast, a System 2 analysis relies on well-reasoned arguments, a conscious weighing of multiple options, a review of factual evidence, and valuation of options in relation to the client's goals and interests.

B. *System 2 Persuasion*

Logical thinking is hard work and takes time, but it is usually more accurate, stable, and enduring. By contrast, System 1 intuitive influences may be ephemeral and fleeting. Some clients are more susceptible to System 2 cognitive persuasion while others are more easily influenced by System 1 intuitive arguments. Mediators are often able to prime a disputant to consider a proposition or choice in either frame. "What are the odds" type questions during risk analysis may bring System 2 thinking online long enough to weigh outcomes. "How will you feel" if a certain outcome were to

occur can prompt System 1 processing. Cognitive persuasion relies on clear, logical arguments, while intuitive influence is based on distraction, confusion, and ambiguity. Emotions also influence the type of persuasion that is most effective. For example, happiness or anger trigger System 1 intuitive processing, while sadness and pessimism triggers System 2 cognitive thinking. The source and content of a message also determine its persuasiveness.⁵⁵

A credible source who provides accurate and useful information will appear knowledgeable and be more persuasive than someone who provides contradictory information and appears self-interested. A neutral mediator who is conversant in the case can be especially influential at critical moments in the settlement process if they probe outcomes and reactions without compromising neutrality.

Easy to understand arguments are more persuasive than complex presentations. Confidently expressed arguments are generally more persuasive than tentative suggestions, even though there is almost no relationship between the confidence of a speaker and the accuracy of her statements.⁵⁶ Several strong logical arguments presented by different people are generally more persuasive than the same arguments presented by a single person. On the other hand, if the arguments are weak, they are more likely to be believed if delivered by one person.⁵⁷

Arguments are most persuasive if an expert presents both the strengths and weaknesses of her position. The expert will increase her credibility if she honestly points out flaws in the argument. However, presenting additional weak arguments will not persuade the other side. Instead, the expert's judgment will appear poor if she presents weak arguments; making her client worse off. Quality arguments and sincerity win the day, not simply the number of statements made.⁵⁸ Additionally, it is important to rebut an opponent's arguments rather than simply ignoring them.

Finally, research shows that arguments presented early in a proceeding are more influential than later statements. Research also shows that the last argument you hear is recalled better than

⁵⁵ Pablo Briñol et al., *Happiness Versus Sadness as a Determinant of Thought Confidence in Persuasion: A Self-Validation Analysis*, 93 *J. PERSONALITY & SOC. PSYCHOL.* 711 (2007).

⁵⁶ Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 *PSYCHOL. PUB. POL'Y & L.* 817 (1995).

⁵⁷ Stephen Harkins & Richard Petty, *Information Utility and the Multiple Source Effect*, 52 *J. PERSONALITY & SOC. PSYCHOL.* 260 (1987).

⁵⁸ ANTONIN SCALIA & BRYAN GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 21–22 (2008).

earlier material. Thus, present your best arguments at the beginning and repeat them again at the end of your presentation to make them maximally persuasive and better recalled.

XI. PUFFING OR FRAUD?

Puffing happens in almost all mediations. Many mediators are told things early in the day that turn out to be untrue later. Many of these statements fall under the title of negotiation strategy and others result from a reevaluation of the case. A party may declare that they will never take less than \$X or pay more than \$Y. As we have seen in the cognitive biases discussion, most of the time participants believe they are telling the truth when they make these statements because cognitive biases operate pre-conscious so they are unaware of the distortions.⁵⁹ Consequently, mediation participants believe their statements are true when they make them, even if they turn out to be false later. Sometimes, however, the parties are consciously puffing. They may know that they will do a deal on worse terms because it beats their best alternative, but they are trying to pressure the other side to gain concessions.

A. *Is it Misrepresentation?*

Legal ethicists have analyzed the distinction between puffing and material misrepresentation in great detail. ABA Model Rule 4.1 on truthfulness states in comments that under generally accepted negotiating conventions, “certain types of statements ordinarily are not taken as statements of material fact.” Of course, parties run the risk of building fraud into a settlement agreement. How mediators handle this delicate ethical issue is the subject of another article.

B. *Detecting Lying*

How can you know someone is lying? Psychologically sensitive professionals believe they can *detect* lying by observing the

⁵⁹ Joseph P. Gaspar & Chao C. Chen, *The Unconscious Conscience: Implicit Processes and Deception in Negot.*, 32 *NEGOT. J.* 213 (2016).

body language and speech patterns of people.⁶⁰ They pay particular attention to pauses or hesitations in speech patterns, such as a stutter, or false start, because these are signs of stress and may indicate the person is lying. Also they pay attention to a voice that is pitched higher than usual, notice unexpected shifts in body posture, and pay attention to words that are inconsistent with body language (for example, saying no and nodding yes). These language and behavioral traits are signs of stress and suggest the person may be lying.

XII. PREPARATION IMPROVES OUTCOMES

Mediators are often criticized for inadequate preparation and persistence. To keep the momentum going, mediators must be well prepared. Of course, they need to read what the parties have submitted about the facts and law of the case. But, the mediator also needs to understand how the people involved process information when they are in conflict and under stress. Some of that understanding involves generalized learning about psychology and brain science. Some of it is dispute and client specific—short calls with the advocates prior to mediation will often provide insight into how each party processes information. By the time mediation rolls around, the attorneys have presented their clients with lots of information and gained perspective on how they process it. Do not try to reinvent that wheel—ask the attorneys how their clients prefer to hear and handle information.

As parties are preparing for direct or mediator assisted negotiation, it is important not only to stake out their positions, but also to do scenario planning about how to get a desired outcome.⁶¹ That includes both traditional case preparation and modeling potential outcomes to test assumptions. Scenario planning helps guide concession strategies. Because we know negotiation occurs over a series of moves, it is helpful to outline what that “dance” might look like and get an early read on whether the opening positions and pace of concessions opens a zone of potential agreement.

⁶⁰ MICHAEL LEWIS & CAROLYN SAAMI, *LYING AND DECEPTION IN EVERYDAY LIFE* 2 (1993).

⁶¹ Donald Philbin, *The One Minute Manager Prepares for Mediation: Multidisciplinary Approach to Negotiation Preparation*, 13 *HARV. NEGOT. L. REV.* 249 (2008).

A. *Zone of Agreement*

An important goal of negotiation is to discover a zone of agreement that meets the important goals and interests of both parties.⁶² Opposing sides cannot reach a settlement unless there is a zone of agreement. If there is no settlement option within the zone of agreement, the parties must change their valuation of existing options or generate additional alternatives that fall within the zone of agreement to reach a settlement. If they cannot, the mediation may reach an impasse. The valuation of options is influenced by each party's goals, interests, motives, and risk analyses. If there is danger of an impasse, the mediator can use open-ended questions to test the parties' assumptions and adjust their valuations of options to create a zone of agreement. Sometimes there is risk of an impasse because of perceived bad faith.

B. *Good and Bad Faith*

Among the most frequently used and misunderstood phrases in mediation are good and bad faith. Parties always state, in an almost *pro forma* way, that they are there to negotiate in good faith—usually just before making an aggressive demand or offer. Parties hearing those aggressive positions almost as frequently respond that the other side is acting in bad faith. Of course, both are positional responses and a matter of perspective. What can be helpful is for the mediator to probe what “good faith” would look like when a party claims bad faith. That may lead to a discussion of what the participant might be willing to do if the other party starts acting in “good faith.” The mediator faces a difficult problem when one or both sides believe the other is acting in bad faith.⁶³ Bad faith means that all things considered, it appears a party is not making a legitimate effort to settle.⁶⁴ In mediation, neither party is legally required to make concessions and hard bargaining is legitimate. It is extremely difficult to know if a party is acting in bad faith because the criteria and definitions vary from state to state.

⁶² Brad Spangler, *Zone of Possible Agreement*, BEYOND INTRACTABILITY (June 2013), <http://www.beyondintractability.org/essay/zopa>.

⁶³ Anthony P. Calisi, *How to Recognize and Defend Against Bad Faith Negotiating*, INJ. CLAIM COACH, <http://www.injuryclaimcoach.com/bad-faith-bargaining.html#>.

⁶⁴ NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953).

XIII. THE EMOTIONAL MEANING OF MONEY

Money is more than a medium of exchange—it has emotional baggage as well. Feelings about money effect how people negotiate.⁶⁵ Money can mean prestige, class, acceptance, security, or power. Attitudes toward money develop early in life as children watch their parents and others deal with finances. As children mature, they merge their early memories about money with later experiences into a general unconscious attitude that governs their financial behavior. Money can shape people's sense of self, their relationship with others, their social status, and determine their place in the world. How we deal with money is governed by powerful unconscious attitudes and beliefs. Surprisingly, attitudes toward money are generally independent of income and net worth: poor individuals can be surprisingly relaxed and generous with their money while wealthy individuals can be anxious and greedy.

Some individuals are moderate optimists who feel certain they can make more money while others are moderate pessimists who fear loss. Clients with opposing attitudes toward money often have conflicting negotiating styles. The moderate optimistic will believe an *account* is half full and growing while the moderate pessimist will believe the assets are few and diminishing. Two moderate optimists will feel they can make more money and will not worry too much about dividing assets. By contrast, two moderate pessimists will both want as much cash as possible because they feel life is uncertain and earning money is difficult. Moderate pessimism may be the better strategy during a negotiation.⁶⁶

Strong emotions are attached to money, including love, envy, survival, power, security, and freedom. People marry for security and, when that security is threatened by divorce, they become anxious, regress to more primitive patterns of thinking, and have difficulty making decisions. During a stressful negotiation, clients may also regress to primitive money attitudes and make irrational choices. Under these conditions, money attitudes can interfere with settlement. The best ways to minimize disputes about money are for the mediator to establish a comfortable atmosphere, keep

⁶⁵ Roy F. Baumeister, *Why Does Money Matter? The Psychological Meaning of Money*, *PSYCHOL. TODAY* (June 18, 2008), <https://www.psychologytoday.com/blog/cultural-animal/2008/06/why-does-money-matter-the-psychological-meaning-money>.

⁶⁶ Michelle Rose, *The Value of Pessimism in Family Law Negotiations*, *SILBERT FAM. L.*, <http://silbertfamilylaw.com/the-value-of-pessimism-in-family-law-negotiations/>.

communications neutral, and develop options that meet the goals and interests of both sides.⁶⁷

XIV. REAL WORLD DECISION MAKING

Mediators need to understand how clients make decisions if they are going to help them settle their dispute. Under ideal conditions when they are not under stress, clients try to collect relevant information, clearly define the issues, develop options, accurately analyze each option according to their personal goals and interests, make trade-offs among the available options, estimate the value of each option, and select the highest valued option.⁶⁸ Mediators strive to maintain this conscious System 2 information processing during most of the mediation process, but they are not always successful because of conflict, stresses, and inherent cognitive biases.

During mediation, a lot of things get in the way of this ideal decision making process and, as a result, participants often slip into unconscious System 1 information processing where they are easily influenced by emotions and cognitive biases. First of all, mediation is inherently stressful because it involves conflict. Second, it is impossible to collect complete information before making a decision because that takes too long, costs too much, and complete data are often not available. For example, during mediation, the attorney and his client must estimate the cost of litigation, the reactions of the other side to different offers, and the probable outcomes from settling or litigating the case. None of these options can be estimated accurately, and the more options we entertain, the more complex the task becomes.

We have already seen that people use System 1 heuristics and inherent cognitive biases unconsciously when making their decisions. These cognitive strategies are helpful in everyday decision making, because without them we might never be able to make a decision. However, System 1 heuristics can mislead because they are easily influenced by emotions and they create irrational distortions. The best we can do is test our options against System 2 logical analysis and discard those positions that seem to be the result of System 1 intuitions and strong emotion. The mediator can help by asking questions that nudge the client toward System 2 rational thinking.

⁶⁷ A.H. Maslow, *A Theory of Human Motivation*, 50 *PSYCHOL. REV.* 370, 370–96 (1943).

⁶⁸ MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* 3–4 (4th ed. 1998).

Once mediators appreciate how parties process information under extreme stress and uncertainty, they can use their skills to help disputants shift from System 1 intuitive emotional processing to System 2 logical analysis so they evaluate crystalized decisions in a more rational light. Mediators do not make decisions for participants, but they can help optimize how clients process information and options. Of course, conflict itself will trigger emotional responses. But, mediators can build trust, develop a comfortable environment, and ask questions that help activate conscious System 2 processing to test unconscious intuitive System 1 gut responses. Clients use a number of strategies to make decisions.

Attorneys and clients use cognitive strategies such as satisficing (choosing a “good enough” option), elimination by factors (rejecting any option that does not meet essential criteria), or maximizing value (choosing the option that has high values on most factors) to help them reach a decision in a reasonable time.⁶⁹ Alternatively, a client may select the option that rates highest on her most valued characteristic, choose the option she selected in earlier disputes, or choose the option she believes the majority of people would select.

A. *Memory Errors*

Even if we ignore the cost of gathering information, we know that people do not collect and recall facts optimally. Instead, they tend to look for and remember items that confirm their own biases and beliefs. Moreover, people do not accurately recall information they already know. And, searching for more information may serve a hidden agenda if it can allow the individual to delay making a choice and at the same time lets them believe they are making a careful decision. Sometimes, it is helpful to collect more information because it may clarify options. Often, however, the person already has sufficient information to make the decision and collecting more tends to confuse rather than clarify. Attorneys help their clients by advising them on what information is relevant, what information is tangential or likely to be confusing, and when the client has adequate information to make the decision.

⁶⁹ Amos Tversky, *Elimination by Aspects: A Theory of Choice*, 79 *PSYCHOL. REV.* 281 (1972).

B. *Evaluating Options*

Options need to be evaluated to determine if they meet the client's goals and interests. As you might expect, how the options are presented can influence a client's evaluation. For example, people's preference for risk varies depending on whether the event likelihood is low or high and whether the person is facing a gain or a loss. Specifically, most people are risk averse in the face of a likely gain but prefer to take risks when there is a high probability of loss.

On the other hand, when the likelihoods of events are low, people tend to reject low probability risks and seek out low probability gains. This means people are not concerned about running a low likelihood risk and they believe they have a good chance to win a low likelihood bet. This cognitive bias explains why many people buy lottery tickets in hopes of winning, even though the likelihood of winning is extremely low. They are willing to make the bet because of cognitive biases that make them misread probabilities.

People also overvalue certainty. We are willing to pay more to increase the odds of a gain from ninety-nine to one hundred percent than we are to increase the odds from seventy-five to eighty percent and we will pay more to reduce the risk of a loss from one to zero percent than we will pay to reduce the risk from six to one percent.⁷⁰ This cognitive bias means that people hate uncertainty and will pay a high price to avoid it.

XV. SETTLER'S REGRET

It is difficult to predict how you will feel once you have made a choice. Psychologists call this the affect-forecasting problem. Studies show that people are fairly accurate about forecasting whether they will be happy, sad, or angry if they make a particular decision, but they are not accurate about forecasting the level of happiness, sadness, or anger associated with a decision.⁷¹ When people are asked whether it is more important to win and not be bullied or make certain the negotiation goes well, most say they

⁷⁰ Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 *AM. PSYCHOL.* 341, 343-44 (1984).

⁷¹ Daniel Gilbert & Jane Ebert, *Decisions and Revisions: The Affective Forecasting of Changeable Outcomes*, 82 *J. PERSONALITY & SOC. PSYCHOL.* 503 (2002).

believe it would be more important to win and not be bullied. The exact opposite actually happens in negotiation.⁷²

Ben Franklin suggested an effective way to make a difficult decision: he pointed out that we have difficulty keeping all the pros and cons of a choice in our mind at the same time. Franklin recommended we divide a sheet of paper down the middle and write the pros in one column and the cons in the other over three or four days. After a few days, no new pros or cons generally suggest themselves so Franklin indicated it is time to make the decision by considering all the pros and cons on the sheet of paper at the same time.⁷³

A. *The 10-10-10 Rule*

Another barrier to making good decisions is short-term emotion. A helpful piece of advice is “to sleep on it” before making a decision. This allows you to cool off and not act from anger, fear, or greed. Another good decision tool, suggested by Suzy Welch, is called 10-10-10.⁷⁴ The basic method is to ask yourself how you will feel about the decision in ten minutes, ten months, and ten years. The 10-10-10 strategy helps us deal with current emotions. You may feel anxious or angry about the decision right now and you are acutely aware of your current feelings. However, the future is uncertain and you do not know how you will feel ten months or ten years from now. This difference between the clarity of present feelings and the fuzziness of future events gives current feelings too much power. By forcing yourself to imagine the decision in ten months and ten years you gain some perspective and allow future feelings to influence the decision. Do not ignore your current feelings, but balance them against a long-term gain or loss to make a better choice. Short-term emotions are not always a problem. But, the 10-10-10 question forces you to give the future some weight and avoids letting short term feelings control the decision.

⁷² Kristina A. Diekmann et al., *From Self-Prediction to Self-Defeat: Behavioral Forecasting, Self-Fulfilling Prophecies, and the Effect of Competitive Expectations*, 85 *J. PERSONALITY & SOC. PSYCHOL.* 672 (2003).

⁷³ *Benjamin Franklin's 1772 Letter to Joseph Priestley*, PROCON.ORG, <http://www.procon.org/view.background-resource.php?resourceID=1474>.

⁷⁴ SUZY WELCH, *TEN-TEN-TEN* (2010).

XVI. PREFERRED DECISION STRATEGIES

The choice we make and how we make it jointly determines how we feel about a decision. Many people feel better about making a rational as opposed to a hasty choice, while others feel ethical decisions are best. Some individuals choose their decision-making strategy based on seeking positive outcomes or avoiding negative ones.⁷⁵ Persons with a positive decision making strategy tend to seek positive options while persons with a negative decision making strategy tend to avoid negative outcomes. Finally, some people make choices by selecting their preferred option from among those presented, while others make the choice by rejecting options until only one remains. An option that has both strong positive and strong negative traits is more likely to be chosen by people who tend to select one option from among several, while people who reject options until there is only one remaining will likely choose an option that has mostly average traits.⁷⁶

A. *Avoiding a Decision*

People often avoid a decision when all the outcomes are unpleasant or the decision requires the client to take responsibility for the choice.⁷⁷ Avoiding a decision often produces compulsive searching for more information. The more difficult the decision, the more likely people are to delay making the choice by searching for more facts, even if the delay is costly.⁷⁸ Sometimes postponing a decision is prudent because additional information is needed to clarify an issue. However, before a client postpones a decision, they should explore their underlying motives and address their fear of making the wrong decision directly rather than simply delaying the decision. If the delay is for a legitimate reason, such as to collect needed information, generate additional options, or clarify goals and interests, it is a good idea to postpone the choice. On the

⁷⁵ Cezar Vasilescu, *Effective Strategic Decision Making*, 2 J. DEF. RESOURCES MGMT. 101 (2011).

⁷⁶ Eldar Shafir, *Choosing Versus Rejecting: Why Some Options Are Both Better and Worse Than Others*, 21 MEMORY & COGNITION 546 (1993).

⁷⁷ Jack Zenger & Joseph Folkman, *9 Habits that Lead to Terrible Decisions*, HBR.ORG (Sept. 1, 2014), <https://hbr.org/2014/09/9-habits-that-lead-to-terrible-decisions>.

⁷⁸ Amos Tversky & Eldar Shafir, *Choice Under Conflict: The Dynamics of Deferred Decision*, 3 PSYCHOL. SCI. 358 (1992).

other hand, if you are reluctant to make a decision simply because it is difficult, that is not a good reason to procrastinate.

One way to force a decision is to set a deadline. Deadlines give people incentives to collect sufficient information and then make a choice. Shorter deadlines generally work better than longer ones when you do not set the deadlines so close that it is impossible to complete the task. Longer deadlines tend to be missed because it is too long between the beginning and the end of the task and people tend to stop thinking about it because they feel they have plenty of time later.⁷⁹

XVII. CONCLUSION

All of us make deals every day. Some negotiations are simple, quick, and easy while others are complex, high risk, and difficult. When the stakes are small and the options simple, we usually make a decision using System 1 intuitions because the cost is low if we make a mistake and it is not worth investing a lot of time and effort to make the choice. On the other hand, when a negotiation involves important rights, large sums of money, and high levels of conflict, we should take the time to collect all the information we need, develop several options for settlement, think carefully about the choices we face, and engage our System 2 logical processing capacities to make the decision. Unfortunately, because these high stake decisions are important, our emotions kick in and we may not be able to think rationally.

There are several reasons for irrational behavior during a stressful mediation: chief among them are the human tendency to regress to earlier stages of behavior under stress, to become emotional, to be defensive, and to engage in unconscious System 1 intuitive processing rather than using our conscious System 2 analytic abilities. All these human factors produce predictable biases that can interfere with negotiating a good settlement.

Happily, a mediator who is aware of the-all-too-human tendency to become irrational when faced with stressful situations can nudge participants away from the tendencies to regress, use System 1 intuitive information processing abilities, become emotional, and fall victim to cognitive biases. Additionally, the mediator can help

⁷⁹ Andrew Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 635–37 (2002).

the participants and their attorneys understand the local norms concerning how the negotiation dance is performed. Some venues and types of cases allow extreme opening bids and tough bargaining is an expected part of the dance toward settlement, while other venues and cases are likely to reach an impasse using those same negotiating tactics.

There are a number of self-defeating behaviors that can damage participants' chances of reaching a reasonable settlement. Most serious are personality disorders that interfere with social interactions. Less serious, but still potentially disruptive, are primitive defenses that protect the person from severe stress. Most frequent and most benign is the tendency of individuals to regress from their Adult ego state to a more primitive, Child ego state when faced with stress. The mediator's best strategy for dealing with these self-defeating behaviors is to ask for a timeout to allow a cooling off period, to build trust in the process, to make the parties comfortable, and to encourage the participants to engage in System 2 information processing.

Mediation occurs in three stages: opening, middle muddle, and impatience up blood sugar down. The opening stage is occupied primarily with information exchange and the beginning of negotiations, the middle muddle stage involves narrowing differences and developing areas of agreement, while the final stage involves the difficult bargaining involved in compromise and settlement.

Another important function of the mediator is helping both sides analyze the risks they face in settling or litigating their case. By acting as advocate and devil's advocate for both sides, the neutral mediator can help each side reach a more realistic assessment of their case and make the difficult decisions needed to settle the case.

Most clients benefit from mediation. However, there are a few individuals who may not be suitable for the process: persons with serious personality disorders, individuals who are dishonest, and cases where there has been severe family violence are not good prospects for mediation. For the most part, however, an experienced mediator can help almost any set of participants settle their dispute.

The foundation of mediation is trust. The mediator begins the process with a modicum of trust because both sides selected her. However, she needs to begin building additional trust among the participants immediately if they want to reach a settlement of the case. There are several things a good mediator can do to facilitate

trust building, including active-listening, eye-contact, supportive encouragement, constructive feedback, and careful attention to the stages of mediation and psychological states of the participants. When a person becomes irrational, the mediator needs to slow the process or call a time out to give everyone time to cool down and gain an adult perspective on the proceedings.

Participants use two types of influence during negotiations: emotional and logical. Emotional influences are more effective when the other side is operating in their System 1 intuitive information processing mode while logical arguments are more persuasive when the other side is operating in their System 2 conscious logical processing mode. A seasoned mediator will work to move participants from System 1 to System 2 information processing so that the negotiations can proceed more smoothly toward a settlement.