AMERICAN BAR ASSOCIATION
Tort Trial and Insurance Practice Section

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COMMITTEE NEWS

Dispute Resolution

Let's Make A Deal: The Psychology Of Mediation

I litigated for over twenty-five years in multiple jurisdictions around the country. I now am a full-time neutral. A big part of mediation training was learning about the psychology of conflicts and how to best serve as a peacemaker. In my advanced family law mediation training we focused on empathy and addressing the emotional aspects of disputes. All things that my litigator friends find to be too "touchy feely." That said, the plaintiffs' bar has embraced psychology, invoking the reptile theory as a way to tap into juries' anger and obtain larger awards. This article underscores that psychology's role in the law is not narrowly limited to understanding the dynamics of conflict resolution or jury dynamics, but also significantly impacts the very essence of what attorney's do on every matter – determine the value of their case. This article discusses a well-known game show to highlight some lessons from psychology and their application to attorney-negotiators and mediators.

When I was in law school, the prevailing wisdom was that people acted rationally to maximize their financial self-interest. Specifically, those who accepted "law and economics" viewed the law as a tool to promote economic efficiency. If people did

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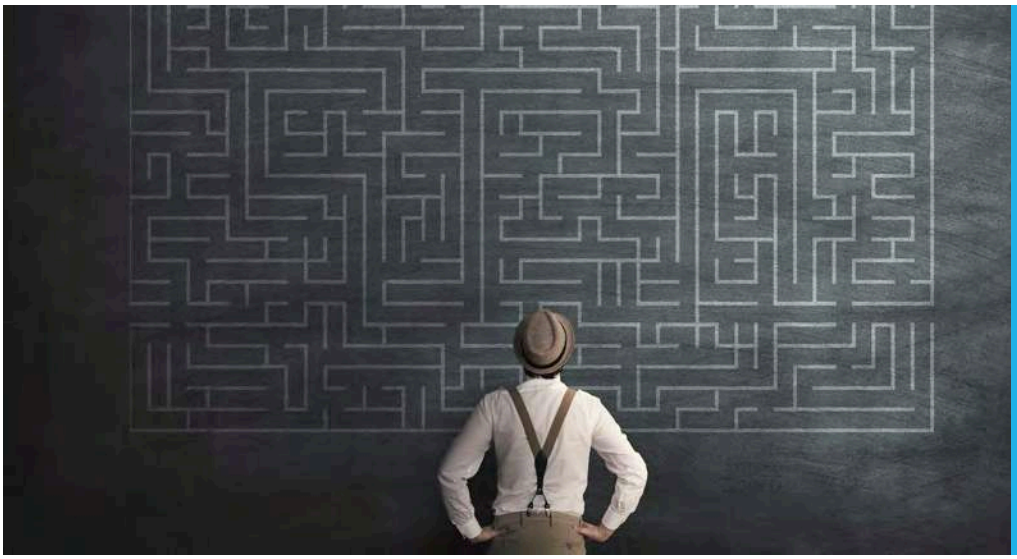
Steven Schulwolf
Schulwolf Mediation

Steve Schulwolf is a full-time mediator and arbitrator with over twenty-five years of experience litigating complex cases in numerous jurisdictions around the country. In 2004 Steve was a founding partner and only managing partner of the Chicago litigation firm Michaels,

Bio Cont...



In This Issue

Chair Message

I am pleased and excited to announce the latest newsletter from the Dispute Resolution Committee! This newsletter features three extremely thought provoking articles about mediation and the mediation process. Steve Schulwolf's article about the psychology of mediation will challenge your math skills and help both neutrals and parties consider how certain factors can affect one's perception of options and procedures. This will surely be a valuable tool for mediators and mediation participants alike. Rick Alimonti's article about the mediator's proposal – when and how it can be effective – even after the apparent conclusion of the mediation similarly provides much food for thought and valuable tips. And Jon Lewis' article about oft repeated complaints about mediation will surely alter your perceptions about the process. This is a terrific issue – with valuable insights applicable in virtually any situation.

As a reminder – the Dispute Resolution Committee meets monthly – generally on the third Thursday of each month for stimulating discussion and thoughtful exchanges. Join us!

Deborah Greenspan
Blank Rome

***Deborah Greenspan** is a leading advisor on mass claims strategy and resolution. Her practice focuses on class actions, mass claims, dispute resolution, insurance recovery, and mass tort bankruptcy. She has extensive experience in mass products liability matters, class actions, analysis of damages and future liability exposure, insurance recovery, alternative dispute resolution ("ADR"), claims evaluation and dispute analysis, settlement distribution design and implementation, claims management and risk analysis. Debby also has substantial experience in private mediation and is currently serving as the Chair of the Dispute Resolution Committee of the Tort Trial & Insurance Practice Section of the American Bar Association.*

Deborah has been appointed several times by judges and government institutions to serve as a Special Master. These appointments include Special Master responsible for developing and implementing a settlement program to distribute funds to more than 100,000 Vietnam veterans; and Deputy Special Master for the September 11th Victim Compensation Fund of 2001, responsible for establishing the policies for and facilitating the distribution of more than $9 billion to victims of the September 11th attacks. She currently serves as the Special Master in the Flint Water Cases *litigation.*

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Editor Message

Steven Schulwolf
Schulwolf Mediation

It is a pleasure working with Rick Alimonti as editors for the ABA-TIPS Dispute Resolution newsletter. We are very pleased with this issue and hope that you enjoy it. All of the articles address issues related to mediation from a different perspective. In Let's Make a Deal: The Psychology of Mediation, Steve Schulwolf discusses scientific studies concerning decision making as well as a game show to demonstrate that even lawyers can fall prey to cognitive illusions that adversely impact their decision-making. Because studies also discuss techniques for avoiding these biases and improving decision-making, Mr. Schulwolf suggests ways for mediators to better assist the parties in appreciating their litigation risks. I hope you find it helpful, but as editor, I might be a little biased.

In The Method, Madness, and Mystique of the Mediator's Proposal, Rick Alimonti discusses his insights concerning a powerful way to resolve cases: the mediator's proposal. Mr. Alimonti's thoughtful article discusses the balance between the evaluative nature of a mediator's proposal and self-determination. Mr. Alimonti also takes on some assumptions about the "rules" for mediator's proposals. Whether you are a mediator or an advocate at mediations, Mr. Alimonti's article is filled with insight and suggestions.

Finally, Jon Lewis tackles the Top Seven Complaints About Mediation. In doing so, Mr. Lewis explains the role of a good mediator and presents some practical insights to both mediators and participants that, hopefully, can assist in the reduction of complaints in future mediations.

The Method, Madness, and Mystique of the Mediator's Proposal

Frederick Alimonti

Frederick ("Rick") Alimonti is a Mediator and Arbitrator with offices in New York. His law practice emphasizes aviation law. His mediation practice areas include torts, insurance coverage, employment discrimination and, of course, aviation. Rick is a member of the Mediation Panel for the U.S. District Court for the Southern District of New York and a Co-Chair of the ADR Committee, TIPS Section, American Bar Association. www.alony.com (law practice); www.aloadr.com (mediation site).

A point may come in mediation in which, unable to come to a negotiated agreement, the parties agree to accept a "proposal" from the mediator or, perhaps, ask for one.

I should state at the onset that I am an overall advocate of the Mediator's Proposal as a [usually] late-in-the day method to move a mediated claim toward resolution. I would estimate that about 75% of the cases I mediate that conclude with a Mediator's proposal, resolve at the proposed amount. The Mediator's Proposal is nonetheless fraught with potential pitfalls and should be employed with all of these in mind.

A few personal thoughts on the subject follow:

A Surrender of Self-Determination?

Self-determination is the cornerstone of mediation. While the Mediator facilitates, he/she is not supposed to take sides, make pronouncements, and predict outcomes. Yet, arguably, in recommending a settlement figure, our Mediator has stepped into a role more akin to a decision-maker.

Even a proposal replete with disclaimers and delivered with all humility is likely to be received as originating from a higher authority. After all, the parties have either agreed on a given Mediator based upon merit, or the Mediator was assigned with the imprimatur of the Court. While self-determination is ostensibly still preserved by the voluntary nature of the proposal, the proposal on its face seems more like an evaluation or ruling than a traditionally bargained-for settlement.

Some "Rules" for the Mediator's Proposal?

Although again, a matter of personal style and preference, these approaches have served me well this far:

1. The Parties Must Jointly Agree to the Proposal. In keeping with the concept of self-determination, I believe the Mediator must approach a proposal with caution and only with informed consent. As an advocate, I have had mediators impose proposals spontaneously, and I did not like it. In one case, the Mediator declared his settlement proposal in a mid-mediation joint session. Neither party accepted the proposal, and all momentum was lost.

Although I favor continued negotiation even after a declined proposal, a proposal injected into a negotiation is entirely lacking in self-determination and is more

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Top Seven Complaints About Mediation

Mediation has grown in popularity since the 1970s – 1980s, and it has become a more accepted method for resolving disputes. However, with popularity comes complaints and criticisms. Below are some of the main criticisms heard by mediators along with a different view to those criticisms.

I. The Other Side Came in Bad Faith

What is "bad faith"? What makes a party say the other side came in bad faith? Mediators hear this assertion all the time in all sorts of contexts, but in reality, what is bad faith when it comes to mediation? Mediators can provide example after example of cases which have settled after one party, if not more, has asserted a claim of bad faith on the part of another party.

As the old saying goes, beauty is in the eye of the beholder. In a monetary dispute, just because one party is high or another party is low is not evidence of bad faith. More likely, an outlandish offer is a form of posturing, and the assertion of "bad faith" by a party could also be a form of posturing.[1]

Most attorneys evaluate cases similarly, and therefore, most attorneys, if objective, will come to comparable conclusions in a civil case. Consequently, if a party focuses more upon their own goals and evaluations as opposed to the other side's moves and offers, they will be less likely to resort to a "bad faith" argument. In the end, in order for a mediation to be successful, both parties must agree to the result.

II. Mediators Just Carry Offers Back and Forth

Mediators do so much more. First and foremost, mediators must prepare for the mediation by having as much knowledge from all parties before the actual mediation. This requires parties to prepare the mediator before the mediation. If parties do not want the mediator simply carrying offers back and forth, parties should help the mediator know the case. The parties must participate in the mediation and not expect the mediator to do it all. After all, mediation is a collaboration.

Mediators have been trained to help parties deal with conflict. In that training, mediators are taught to actively listen. Active listening shows the parties the mediator has heard their concerns and empathized with their positions.[2] Further,

Jon Lewis

After graduating from Tulane in 1989 with a degree in Business and Finance, Jon followed in his father's footsteps and attended Vanderbilt University School of Law. Jon has been practicing law for almost 30 years, and he has spent most of his career representing injured individuals. Currently, Jon works with Danny Feldman at Lewis and Feldman, LLC. The firm focuses on mediation, personal injury, medical malpractice, cycling, worker's compensation, and lemon law claims, among others.

Jon has been a registered mediator since 2017 and is currently the Treasurer of the Alabama State Bar Dispute Resolution Section. Jon currently mediates all cases focused on litigation, personal injury, medical malpractice, commercial, construction and domestic. In his free time, he and his wife, Ashley, love to travel, hike and go to movies. Jon is an avid jogger and participates in several 10Ks a year. He has three grown children–daughter, Leigh, and sons Alec and Zachary.

1 Marc E. Isserles, Esq., "Is Your Adversary Really Mediating in Bad Faith?", New York Law Journal, July 17, 2017, JAMS. https://www.jamsadr.com/files/uploads/documents/articles/isserles-nylj-is-your-adversary-really-mediating-in-bad-faith-2017-07-17.pdf.

2 For a good article on active listening techniques, the U.S. Department of Veterans Affairs has a good list: https://www.va.gov/ADR/ALM.asp.

active listening involves mediator questions which, in turn, helps the parties further evaluate their own case and positions.

Finally, mediators can act as a buffer for parties and insulate parties from hard feelings on the other side. Instead of two parties throwing accusations at each other, a party can throw the accusation at the mediator, who may then help the party reframe the accusation into a more constructive proposal.

In the end, if all a mediator is doing is taking offers back and forth, it might be time to reassess your participation or, perhaps, find a new mediator.

III. It is a Lot of Wasted Time

Is it? Maybe the fact that you are sitting in a room all day waiting on the mediator to return indicates the mediator is having a tough time with the other side. Maybe, the mediator is talking through issues with the other side. Mediation is a process, and the process can take time. In a dispute which has taken years to develop, parties cannot expect it to be resolved in one or two hours.

In addition, if a mediation takes a day and is resolved, isn't that better than more discovery over several months and a multiple day/week trial? In this day and age of instant gratification, parties are less patient, but mediation takes patience. However, when you think about it, mediation takes far less patience than a case which is litigated over many years.

Finally, even if the mediation does not result in a resolution of the dispute, it can still prove to be a valuable process. The participants in mediation have discussed the issues and, hopefully, obtained more clarity in the process. Further, the mediation could continue to resonate with the participants and lead to a resolution down the road. Simply not reaching a settlement is not indicative of an unsuccessful mediation.[3]

IV. Mediators Don't Prepare

If a mediator doesn't prepare, the mediator is not doing her job. However, did the mediator not prepare, or did the parties not prepare the mediator? The mediator is just getting involved in the parties' dispute. Ostensibly, the parties have been involved in the dispute for months or years, and unless the parties properly prepare the mediator with knowledge prior to the mediation, the mediator cannot do much to prepare.

3 Myer J. Sankary, Is Mediation a Waste of Time?, Reprinted from Big News for Small Firms, a publication of the State Bar of California Solo and Small Firm Section (2004), https://sankarymediation.com/articles-conferences/is-mediation-a-waste-of-time/.

Most mediators have been trained in various types of conflict resolution techniques. Mediators are prepared to utilize these skills during the mediation process. But, if the mediator has not received enough information through facts and evidence, the mediator doesn't have anything to prepare. If you want a prepared mediator, prepare her with information.[4]

V. It is just an Attempt at Free Discovery

In mediation, many parties fear disclosing confidential information or 'trial secrets' to the other side; however, as stated, most parties use the same evaluation techniques in valuing a civil case. Is there really a secret? You are better off getting information out in the open so the mediator can further discuss the issues in order to help the parties evaluate their positions.

The mediation process is confidential for this very reason. Usually, there are not many smoking guns in civil cases. The facts and evidence are what they are. If you want the other side to properly evaluate the case, they need the information. If you are concerned about divulging something to the other side, talk it over with the mediator. Maybe the mediator will have ideas on how to use the information.[5]

Whatever the "free discovery" is, it is sure to come out at a trial. It would be better to have it disclosed in a controlled mediation setting so you can address the information with less risk. Parties should disclose information in order for a collaboration and successful mediation to occur.

VI. Opening Statements are Worthless

Sometimes they are, and sometimes they aren't. If a party simply wants to berate another party, an opening session is not going to foster discussion and resolution. Trying to convince the other side you are right is never a good way to attempt to resolve a conflict. But, maybe one party has never seen the other party, and it would soften their position if they met. As long as the parties do not antagonize the other parties during the opening statements, such a beginning can be a good method, but the mediator must decide this on a case-by-case basis.

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4 Hon. Henry Pitman (Ret.), Three Secrets to a Successful Mediation: Preparation, Preparation and More Preparation, New York Law Journal, April 1, 2020 JAMS. https://www.jamsadr.com/files/uploads/documents/articles/pitman-nylawjournal-three-secrets-to-a-successful-mediation-2020-04-01.pdf.

5 Bradley Bostick, When to show your Smoking Gun, Time to Mediate, November 30, 2008. http://timetomediate.blogspot.com/2008/11/when-to-show-your-smoking-gun.html.

Done right, an opening statement can be valuable.[6] The participants have an opportunity to communicate with each other and possibly create a more trusting relationship. Face-to-face, the dispute becomes more personal. The parties can also create impressions to help foster dialogue in future mediation sessions. Using courtesy, respect, and construction discussion during an opening statement can prove to be very effective at promoting a positive resolution.

VII. I Can do Better with a Jury

Overwhelmingly, people regret rejecting the last offer at a mediation.[7] On many occasions, parties, and especially their attorneys, have a confirmation bias towards their case.[8] Attorneys don't typically become involved in litigation if they don't have confidence in their abilities. Litigation attorneys have been trained to believe they can win. They are competitive and thrive on that competition. However, this type of confirmation bias can result in disappointment.

When the case requires a unanimous twelve person jury in order to prevail, it is a huge risk to reject a reasonable settlement. Of course, while that is truer for a plaintiff, the defense has huge risk in rejecting a reasonable offer as well, especially in the era of "nuclear verdicts". Mediation can eliminate these risks by having meaningful conversations about the facts and evidence. As an attorney used to say, any attorney who tells you he has never lost a jury case has never tried a jury case.

Conclusion

While many complaints regarding mediation are legitimate, the overwhelming success of mediations tends to indicate the complaints are minor compared to the benefits of the process. Given the fact that a majority of cases settle before trial, the best course would be to improve upon the mediation process and address these complaints. With that tact, more conflicts may be resolved with less risk and cost.

6 Elliot G. Hicks, The Art of the Opening Statement, Mediation.com, September 9, 2013. https://www.mediation.com/articles/the-art-of-the-opening-statement.aspx.

7 David Nolte, Litigation Settlement Errors are Remarkably Common, HGExperts.com, Fulcrum Inquiry, https://www.hgexperts.com/expert-witness-articles/litigation-settlement-errors-are-remarkably-common-5480.

8 Stacie Feldman Hausner, Cognitive Biases in Mediation, Advocate Magazine (August 2018). https://www.advocatemagazine.com/article/2018-august/cognitive-biases-in-mediation.

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not act in their financial self-interest it was because they lacked perfect information or there was a distortion in the market or applicable legal rules. Being from Chicago, I was familiar with the Chicago school of law and economic thought led by the former Seventh Circuit Justice Posner.[1]

In every case the decision-makers are unique, but they are all human. Psychologists have researched why humans often make poor decisions. We have to make thousands of decisions every day and would drive ourselves crazy if every time we analyzed all possible factors and outcomes. If we did, we would never have time to pick a pair of socks or gas station. For most decisions we employ heuristics, or short-cuts. While it is not the end of the world if we pay $.02 more a gallon or wear socks that are a little too thick, it is important to try to avoid taking short-cuts when making important decisions. Psychologists have studied the numerous cognitive illusions that adversely impact decision-making. The bottom-line is people often make bad decisions even when they possess complete information, not because they are acting irrationally or are stupid, but because the old adage is often correct – to err is human.

In the last two decades inter-disciplinary interest in psychology has increased. According to Keith Law, the seminal book on cognitive psychology and behavioral economics by Daniel Kahneman, *Thinking Fast and Slow*, is now a must read in front offices across Major League Baseball.[2] Doctors are more aware that diagnostic errors while reviewing radiological images are often due to cognitive illusions, such as anchoring or confirmation bias. For example, anchoring can lead a radiologist to fixate on the first sight diagnosis despite inconsistent subsequent data. Likewise, actively searching for confirmatory data rather than an alternate explanation is an example of confirmation bias.[3]

A. News Flash: Lawyers are People, Too!

Many lawyers have yet to embrace psychology, often believing that a rigorous legal analysis of a case insulates them from the pitfalls that plague the average person. However, that assumption is not supported by reality. Several studies of settlement opportunities show that represented parties frequently turn down settlement offers as good if not better than the ultimate trial outcomes. Specifically, between 61% and 65% of plaintiffs rejected such offers while defendants made "mistakes" in 25%

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Steve graduated summa cum laude from the University of Illinois in 1991 and cum laude from the University of Michigan law school in 1994. Steve lectured at the University of Plovdiv law school in Plovdiv, Bulgaria from 1998-2000. Steve now lives in Austin, Texas with his wife and two greyhounds, Ellie and Rider and survived COVID-19 by taking frequent hikes, paddleboarding and playing tennis.

Steve is a Co-Chair of the Dispute Resolution Committee of the Tort Trial & Insurance Practice Section of the American Bar Association.

1 For an example of his theories, *see* Posner, Richard A., *Economic Analysis of Law*, Boston: Little Brown (1973).

2 Law, Keith, *The Inside Game*, New York: Harper Collins (2020) at 2.

3 Busby LP, Courtier JL, Glastonbury CM (2018) *Bias in radiology: the how and why of misses and misinterpretations*. Radiographics 38(1):236–247.

of cases.[4] While the significance of these studies can be debated, at a minimum they demonstrate that lawyers do not always correctly evaluate cases and while there are many potential reasons, one simple explanation is that lawyers, like other humans, occasionally engage in faulty judgment.

For example, studies show that just as anchoring can skew the perception of radiologists, it also impacts lawyers. In a famous study Amos Tversky and Daniel Kahneman used a random wheel to show the impact of anchoring. They asked different groups questions about the number of African countries in the United Nations. One set answered after the wheel landed on ten (10) and the other on sixty-five (65). The first group knew 10 was too low and the second knew 65 was too high, but the group that saw the lower number had lower answers than the group that saw the higher number.[5] It is easy to try to discount anchoring by pigeon-holing it to situations where people are ignorant of the question (most Americans do not know how many African countries are in the U.N.) or generally unsophisticated. So, what about Federal judges? A study demonstrates that they too are the victims of anchoring. Two sets of judges were asked to value a case in which only damages were at issue. All judges received the identical information. However, one set of judges were asked to rule on a motion to dismiss due to the lack of diversity jurisdiction based on a frivolous claim that the multi-million dollar case did not exceed the $75,000 amount in controversy requirement. The group that needed to rule on the jurisdictional motion (which was routinely denied) ultimately valued the case significantly lower than the judges that did not. Just like a random spin of a roulette wheel, the judges were materially impacted by a $75,000 figure that was wholly irrelevant to the case's value.[6] Even impressive legal minds can be tricked by cognitive illusions and they impact numerous cases and settlements, even when not explicitly identified by the court.[7]

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4 Kiser, Randall L., Asher, Martin A. and McShane, Blakely B., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, (Sept. 2008) Journal of Empirical Legal Studies, Vol. 5, Issue 3, 551-591 (Recreating data from two seminal studies from my former law professors including, Samuel R. Gross Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 Mich. L. Rev. 319 (1991) and Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in A System Geared to Settlement*, 44 UCLA L. Rev. 1, 51 (1996)).

5 Tversky, Amos, Kahneman, Daniel. *Judgment under Uncertainty: Heuristics and Biases* (1974). 185 Science 1124–1131.

6 Guthrie, Chris, Rachlinski, Jeffrey and Wistrich, Andrew, *Inside the Judicial Mind* (2001) Cornell Law Faculty Publication Paper 814.

7 For example, a recent 5th Circuit case found an insurer negligently failed to accept a settlement offer because it did not fully appreciate changed circumstances. *Am. Guarantee & Liab. Ins. Co. v. ACE Am. Ins. Co.*, 990 F.3d 842 (5th Cir. 2021). It did so even though the District Court found that the insurer did not improperly reject the identical demand a few months earlier in the case. I have noted that without saying as much the Court found ACE negligent for succumbing to the cognitive biases of anchoring and confirmation bias. Schulwolf, Steven, *AGLIC v. ACE: Anatomy of a Stowers Breach*, Journal of Texas Insurance Law, Vol. 19, No. 1 (Spring/Summer 2021).

While lawyers are reluctant to even consider whether cognitive illusions have impacted their decision making, many have confided with this mediator that they simply do not like math. Mediations involve competing views of the case. Typically there are disagreements concerning the facts, the law and/or what will happen at trial if the case is not settled. Most mediations of commercial disputes devolve into a discussion about numbers. Calculations are often employed to explain why a plaintiff cannot accept less than X and why a defendant will not pay more than Y. While there is some truth to the sentiment that valuing a case is an "art" it does require a basic understanding of probability. Valuing a case involves estimating probabilities of outcomes and often requires an analysis of how the outcome of one issue (say a discovery or venue dispute) impacts the overall evaluation of the case. Trusting one's gut often involves making assumptions that are impacted by cognitive biases.

B. Lessons from a Game Show

Most people are familiar with Let's Make a Deal. In that show Monty Hall showed a contestant three doors. Two of the doors concealed goats and the other a brand new car. The rules were simple. Monty would ask you to choose a door. Then Monty would reveal a goat behind one of the two remaining doors. Afterwards, Monty asks you whether you would like to switch. Contestants looked to the audience who shouted encouragement and advice. Study after study shows that about 90% of people reject the offer to switch doors and remain with their initial selection. However, switching doubles your chances of winning the car.[8]

Wait, what? If your reaction is that there cannot be any advantage to switching, you are not alone. The Monty Hall problem has confounded people for years. In 1990 when Marilyn vos Savant (who purportedly had one of the highest IQs in the world) noted in *Parade Magazine* that there was an advantage to switching doors, thousands of people – including prominent mathematicians – insisted that she was wrong.

There have been numerous books and articles analyzing why the Monty Hall problem is so difficult for people to grasp. The findings from these studies and the techniques employed by math teachers to explain some of the cognitive illusions have practical applications for lawyers and mediators. As an initial matter, let me try to explain why you should always switch. The Monty Hall problem presents a finite set of possibilities for the distribution of the two goats and one car, as follows:

8 Rosenhouse, Jason, *The Monty Hall Problem: The Remarkable Story of Math's Most Contentious Brain Teaser* (Oxford University Press 2009) provides a thorough analysis of the problem, its solution and its history in popular culture.

Door #1	Door #2	Door #3
Goat	Car	Goat
Goat	Goat	Car
Car	Goat	Goat[9]

Under the rules of the game, after you select a door Monty must reveal a goat. Let's assume you select Door Number 1. The highlights below indicate when Monty is forced to reveal a goat:

Door #1	Door #2	Door #3
Goat	Car	Goat
Goat	Goat	Car
Car	Goat	Goat

This demonstrates two crucial facts. First, in selecting Door Number 1, there was a 1 in 3 chance that you initially correctly selected the car and a 2 in 3 chance that your door hid a goat. Second, under the rules of the game, in both situations in which your original selection was one of the goats, after Monty reveals the other goat, the remaining door must now conceal the car. If the player switches in those circumstances, she will win. Thus, in 2 out of 3 scenarios, when you switch you will win the car. Switching doubles the likelihood of winning.[10]

C. All Doors are Equal, But Some Doors are More Equal than Others

As a mediator my job is not to "correct" parties' decision-making processes. Rather, I attempt to ask questions that raise issues in an effort to make sure that each side fully appreciates their litigation risks. The Monty Hall problem is difficult because it taps into many cognitive illusions. Most people quickly note that there are only two outcomes - a car or a goat - and there are only two remaining doors – the one initially chosen and the remaining door - and incorrectly conclude that the door they selected now has a 50% chance of hiding the car. The equiprobability bias demonstrates that humans are hard-wired to judge the probability of random events as equal and make decisions using this heuristic.[11] Interestingly, the older we get the

9 We could include another scenario of Car, Goat, Goat with the order of the two goats reversed (*i.e.*, we could number the goats as Goat 1 and Goat 2). However, both of those scenarios would collectively have a 33% likelihood because initially there is a 1 in 3 chance that the car is behind each of the three doors.

10 Conditional probabilities can be calculated using Bayes Theorum and comparing the odds of switching and not switching. If you stay with your original door you have a 1/3 chance of winning. Switching doubles the likelihood of success and is calculated as follows:

$$P(C/B) = \frac{P(C) \times P(B/C)}{P(B)} = \frac{(1/3) \times (1)}{1/2} = 2/3$$

11 Lecoutre, M., *Cognitive models and problem spaces in "purely random" situations.* Educational Studies in Mathematics, 23, 557-68 (1992).

more impacted we are by the equiprobability bias. A Belgium study of the Monty Hall problem shows that primary school students (about 10 years old) were more likely to act rationally (*i.e.* switch) than secondary school students (about 15 years old) who were more likely to switch than university students (about 19 years old).[12]

When Marilyn Vos Savant was challenged by thousands of *Parade* magazine readers who disputed that there was an advantage to switching, she posed an alternative scenario that is also used by mathematics professors. What if there were more doors? Let's say that there are 1,000,000 doors. You select door #52,783 (because that is, after all, your favorite number). Monty then reveals 999,998 goats and only two doors remain. It is the exact same concept, but virtually everyone switches. Studies (including the Belgium study cited above) show that if you increase the number of doors people more readily understand the advantages of switching. People appreciate that they only had a one in a million chance of being correct initially and do not seem to believe that the fact that there are only two doors left means that they correctly chose the car in the same way they do when there are only three doors. As Orwell understood, some doors are more equal than others.

This underscores a truism of mediation - asking certain questions helps people appreciate their risks and options. With respect to the Monty Hall problem other questions could also force people to reevaluate their assessment that there is no advantage to switching. If someone believes that there is a 50-50 chance that the car is behind the door they initially selected, asking them how a change in the rules would impact their analysis. What if when Monty opens a door he could reveal the car and if he does the game ends? Under those rules, what happens when he reveals a goat and he gives you the opportunity to switch? This wrinkle forces the person to acknowledge that the mere fact that there are only two doors remaining does not necessarily mean that the door you selected (which only had a one in three chance of concealing the door) now has an equiprobability of hiding the car. In fact, it is only under the modified rule change that your chances of having selected the car have increased. Posing this question allows many people to realize the error in their assumptions under the original rules.

These questions force people to test their assumptions and avoid making decisions by employing heuristics or their gut. The questions also force people to think about conditional probability. Specifically, how does the revelation of the goat behind one of the unselected doors impact the likelihood that the car is behind one of the

12 Saenen, L., Heyvaert, M., Grosemans, I., Van Dooren, W. and Onghena, P. The Equiprobability Bias in the Monty Hall Dilemma: A Comparison of Primary School, Secondary School and University Students. https://escholarship.org/content/qt1m13f1pf/qt1m13f1pf_noSplash_4c6c32791545cfbbce8b4814ab8b1a26.pdf?t=op9xu7

other two doors. After Monty reveals the goat, people instinctively exhale, look at the two remaining doors and allow confirmation bias to convince themselves that the chances that their selected door has the car just increased from 33% to 50%. But, as discussed above, we knew Monty was going to reveal a goat so his doing so provides absolutely no new information ***about the door we initially selected***. However, asking questions about rule changes helps people focus on what information we learned about the unselected doors. Switching maximizes your chance of winning because Monty provided us with information ***about the other remaining door.*** Switching becomes apparent once we realize that Monty is being forced to show us where the car is if we have not initially selected it. In footnote 9, the calculation using Bayes theorem demonstrates this. While lawyers do not need to have even ever heard of Bayes theorem to settle cases, being open to a mediator's questions based on probability and psychology can help ensure that decisions are not based on faulty assumptions.

D. It is Not Just What you Ask, It is How you Ask it

Framing impacts people's perception of probability. Take another math riddle: Mr. Smith has two children. At least one of them is a boy. What is the probability that both children are boys? Again, most people succumb to the equiprobability bias and say it is 50-50. In fact, 85% of MBA students with statistical training erroneously believe as much.[13] Most people focus only on the second child, but let's frame the options differently. Assuming the gender of one child has no impact on the other, there are four equally likely outcomes listing the genders of the older and younger children: (1) Girl, Girl; (2) Girl, Boy; (3) Boy, Girl; and (4) Boy, Boy. We know option one is off the table because Mr. Smith has at least one boy. Looking at the other three scenarios, and knowing Mr. Smith has at least one boy, shows that in 2 out the 3 scenarios the other child is a girl. Thus, there is a 67% chance that the other child is a girl. Significantly, when the question is reframed by noting Mr. Smith says, "I have two children and it is not the case that they are both girls" and then people are asked what is the probability that both children are boys, more people answer the question correctly. Reframing the question by introducing groupings helps people fully analyze the problem.

Another study shows the power of framing by asking participants to estimate the probability that "Sunday will be hotter than any other day next week" or that "The hottest day of the week will be Sunday." Participants tend to view the first presentation as 50-50 based on the partition between two possible events (Sunday is the hottest day or Sunday is not the hottest day), whereas respondents to the second presentation

13 Fox, Craig R. and Levav, Jonathan, *Partition-Edit-Count: Naïve Extensional Reasoning in Judgment of Conditional Probability*, Journal of Experimental Psychology: General 2004, Vol. 133, No. 4, 626-642.

more readily understand that there are seven possible events.[14] Framing an issue differently can help people avoid succumbing to the equiprobability bias.

One of the reasons valuing cases is difficult is that not everyone thinks about probability in the same manner. Take a weather forecast. Most Americans interpret a 30% chance of rain to mean under the same factual conditions it will rain 30% of the time. Europeans are much more likely to believe that the forecast means that it will rain in 30% of the geographical area referenced in the forecast.[15] Furthermore, studies show that some people understand probability better when framed as frequency (how many times out of 10) as opposed to probability (what percentage).[16] Sometimes, simply restating the likelihood of an event in a different manner might cause a party to reconsider their position or better understand their opponent's perspective.

Mediators need to be careful with how they frame and ask questions. By bringing up potential rule changes, the questions about additional doors or rules forces the person to compare scenarios. However, under the phenomena of option devaluation, "people tend to find a particular option less attractive when considering among other options than when it is considered in isolation."[17] When used properly, reframing questions and providing other benchmarks can help a mediator explore whether a party's position might be softened, but it is important not to ask questions that further entrench a party's position.

E. Not Just a Math Problem

At the risk of burying the lede, the Monty Hall problem is not just a math teaser. That most people incorrectly fail to see a benefit to switching is one thing, but if most people think that there is no difference between staying and switching, why do studies consistently show that 90% of people stick with their original selection? Why not switch if it does not matter? Something else is going on.

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14 *Id.* at 638.

15 Gigerenzer, Gerd, Hertwig, Ralph, van den Broek, Eva, Fasolo, Barbara and Katsikopoulos, Konstantinos, *"A 30% chance of rain tomorrow": how does the public understand probabilistic weather forecasts?*, Risk. Anal. 2005 June; 25(3):623-9. https://pubmed.ncbi.nlm.nih.gov/16022695/.

16 With respect to the Monty Hall problem, one study concludes that framing the problem in terms of frequency as opposed to by probability "compellingly demonstrates" a higher degree of understanding. Aaron, Eric and Spivey-Knowlton, *Frequency vs. Probability Formats: Framing the Three Doors Problem*. Paper presented at the Twentieth Annual Conference of the Cognitive Science Society (1998).

17 Robbennolt and Sternlight, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation and Decision Making* (2nd Ed. 2021) at p. 113 (discussing impact on eminent domain negotiations).

The Monty Hall game is so difficult because multiple illusions point the player in the wrong direction. We briefly already touched on anchoring in which it becomes difficult to shift from an initial position and there is no question that confirmation bias is also at play.[18] Two strong illusions that contribute to people sticking with their initial selection are the endowment effect and the status quo bias.[19] The endowment effect describes the phenomena in which people demand more to give up something they already possess than they would be willing to pay to acquire the same item.[20] Once people select the door, it is not door number one, it becomes their door. If someone selected door number one because one is their favorite number that did not change after the goat behind another door was revealed. Studies show that the endowment effect is powerful and it helps explain why if people believe that there is no benefit to switching, they likely won't.

Studies show that the endowment effect is very personal and contributes to a related phenomena, the illusion of control. If someone else initially selects the door and then a second person is offered the opportunity to switch, they do so at a higher rate.[21] They lack the same attachment to a choice made by someone else. This raises some delicate issues for a mediator. One of the quickest ways a mediation can go South is if the parties think that a mediator is trying to drive a wedge between the lawyer and the client. Mediation is about self-determination. Parties ultimately make the final decisions and in large commercial matters typically do so with input from their attorneys. That said, as a mediator, I want to know who initially valued the case (sometimes it is the client, sometimes the attorney), when, and if the valuation has been changed. The first question could uncover endowment effect and illusion of control issues, the last one, anchoring.

Finally, the status quo bias is another reason people stick with their initial selection. According to studies, people feel worse if they affirmatively take action and get a bad result than if they passively wind up with the identical bad result. Jason Rosenhouse provides the following example: You have an investment account worth $10 of stock in Company A. You are thinking of selling that stock to buy stock in Stock B.

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18 Keet, Heavin, Lande, *Litigation Interest and Risk Assessment: Helping Your Clients Make Good Litigation Decisions* (2020) at p. 9 ("Lawyers and parties are especially prone to view data as supporting their cases and undermining the other side's cases").

19 An early analysis of these issues can be found in Kahneman, Daniel, Knetsch, Jack L. and Thaler, Richard H., *Anomalies: The Endowment Effect Loss Aversion, and Status Quo Bias, Journal of Economic Perspectives*, Vol. 5, No. 1 (Winter, 1991).

20 Robbennolt and Sternlight, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation and Decision Making* (2nd Ed. 2021) at p. 113 (discussing impact on eminent domain negotiations).

21 Hebranson, Walter T., *Pigeons, Humans and the Monty Hall Dilemma*, Current Direction in Psychological Science, XX(X) I-5 (2012) DOI: 10.1177/0963721412453585, http://cdps.sagepub.com.

There are two scenarios: (1) in which you sell Stock A, buy Stock B and then Stock B becomes worthless and you lose $10; or (2) you never sold Stock A, but then company A goes bankrupt. Either way you lose $10, but studies show you are more upset if you affirmatively took the action of selling Stock A.[22] These emotions clearly contribute to the high percentage of people that are fine with keeping the door they initially selected.

The status quo bias can impact the dynamics of mediation. If parties pessimistically believe that no settlement will be reached, they will be less likely to make any significant move. If the mediation fails, they will have preferred not to have acted affirmatively to break the inevitable impasse. This explains why some mediations move more slowly at the beginning. As the mediator, I try to be optimist (in a pragmatic way) and encourage parties not to fall prey to the status quo bias by reminding them that they are seeking to find a better alternative to the status quo.

CONCLUSION

Lawyers and mediators alike can benefit from a better understanding of psychology and its impact on decision-making. Mediators should think whether reframing issues or presenting alternatives would assist the parties in appreciating their litigation risks and move the negotiations forward. In doing so we might make Monty Hall proud and make more deals.

22 *See* Rosenhouse, Jason, *The Monty Hall Problem, infra.* at p. 136.

The Method... continued from page 4

likely to kill the mediation if rejected. In addition, the mediator may irreparably lose credibility in this situation. Once the mediator unilaterally inserts a proposal into the negotiations, a party being asked to accept a less favorable figure may [understandably] resent the mediator's efforts to push them beyond the number the mediator had recommended minutes before.

2. The Mediator Should Explain the Methodology. I have a particular method to a proposal that I explain to the parties. In essence, it is a figure within a range of a fair settlement that I believe will be equally attractive/equally challenging to both sides. I often describe it as a point of equal pain and a number that I hope is within a "zone of temptation" for both parties. This is more alchemy than science, and as much feel as it is calculation. It is also, of course, fallible, and imperfect.

3. The Proposal Should be Shared Simultaneously. I usually present my proposal in a joint session and then close the mediation for the day. By presenting it jointly, the mediator knows that both parties will be the recipient of precisely identically-worded proposals – right down to the inflections. It is not uncommon for participants to have questions about the proposal, and answering all questions in a joint session prevents misunderstandings. Bringing the parties together also has some symbolic cache and serves as a fitting bookend to the joint session that began the mediation.

4. The Mediator Should Encourage Communication. Very often the parties interpret the Mediator's Proposal as it were a gag order to which the parties have no resource of refuge other than a yay or nay. It need not be so. There is absolutely no reason for the parties to suspend communications while they consider the proposal. If they confer and agree to a settlement – adopting the proposal or not – self-determination has alas won the day, and the proposal has likely served as a catalyst to the settlement.

5. The parties should Consider the Proposal Over Time. The mediator should ask the parties to quietly listen to, but not respond to, the proposal when it is delivered. A Mediator's proposal is intended to allow time for reflection. A party declining it on the spot, or openly responding negatively, undermines the temporal aspect of the process. The idea is for both sides to reflect on the proposal and let the lure of closure work its magic.

More on Proposals: Perks, Peeves, and Process

Blind Results? A common approach to mediation proposals is that a party declining the proposal will not know what position the other side took. While this has some appeal on its face, it can create the impression that the rejected proposal is

the final word. I doubt the party declining the proposal loses much sleep wondering what the other side did, and it would be rather shortsighted for the Mediator to stop negotiations simply to keep one or both parties in the blind as to the other's decision. There is life beyond the rejected proposal.

In two recent mediations that concluded with proposals, one party eventually accepted it, while the other declined. In one instance it was the plaintiff declining, and in the other, the defendant. In both mediations, I procured the consent of the accepting party to tell the declining party that the other had accepted. My hope was that the additional tangible of knowing that an agreement was "one yes away" might make the figure more tempting. Both cases settled at a figure incrementally close to the proposal, one with very little mediator intervention and the other with a lot of it. In both mediations, forging beyond the rejected proposal paid off with a settlement.

Timing and Subtext? In most cases, the Mediator's proposal comes late in the day when things are at or near an impasse. Of course, there are exceptions. Why might a proposal, or more frequently, *a request for a proposal* come sooner? The answer may have more to do with the dynamics on one side of the negotiation. It may be that counsel needs the proposal to bring her client out of their current settlement comfort zone. A request for a proposal may signal a problem with client control, and maybe the mediator should explore this first. Some conferring with client and counsel may be preferable to ramming a proposal down the client's throat.

Even when both parties request a Mediator's proposal, the mediator still has a vote. Early in the mediation, with a large chasm to bridge, the mediator simply may not have enough information [and intuition] to formulate and issue a proposal. Alternatively, with the benefit of submissions, pre-mediation teleconferences, and the mediation itself, a mediator may have a very good idea for the parties' settlement tolerances and believe that there is no proposal he/she could conjure that would settle the case then.

Query: Should the mediator offer a proposal in this situation? Perhaps not. The better solution might well be to simply close the mediation for the day and work with the parties to garner some additional movement from both sides. No proposal at all, is better than a proposal that will do nothing more than aggravate, alienate, and demoralize. If you are in an 11th hour, two-hour mediation, you may not have the flexibility to take a break and confer further. If you are a regular reader of my commentaries, you know I advocate a more thorough, holistic, and immersive mediation process.

In Closing

The Mediator's Proposal is but one of many mediators' tools. It should not be foisted or bullied upon the parties. The parties should know how the Mediator formulates the proposal and should take time to consider it. Even if not initially appealing, time and the hope for closure can work wonders.

Of course, remember, we mediators are imperfect humans, not divine oracles. One or both parties may find the proposal really misses the mark. Settling above or below a proposal is a valid, self-determined settlement that should be pursued and embraced; don't allow a declined proposal to be a stop sign, and, if you are the party accepting a proposal declined by your opponent, don't use your acceptance as a presumption of reasonableness that precludes further negotiation. Continue to look, listen, and apply all of your mediation advocacy skills to try and reach a good faith settlement.

Good luck, and keep negotiating!

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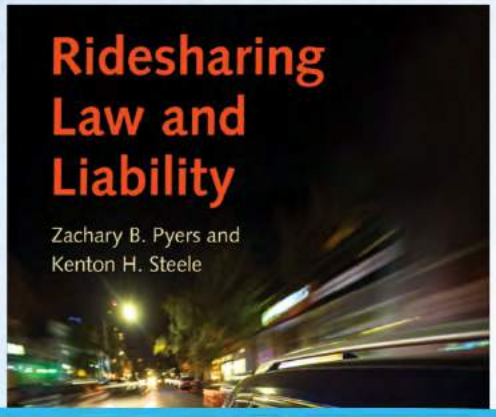

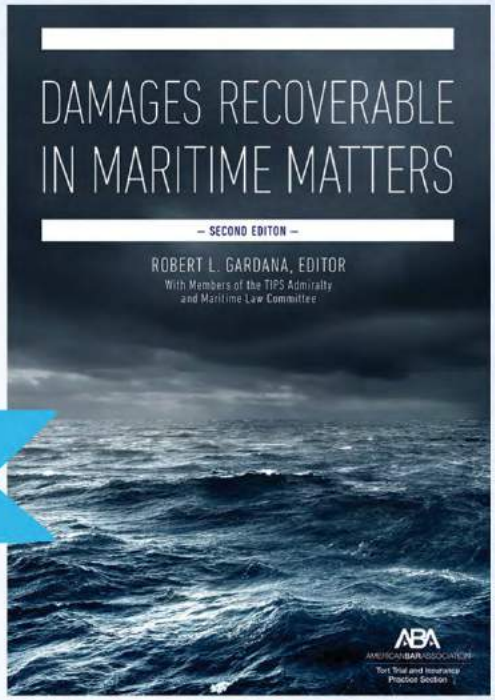

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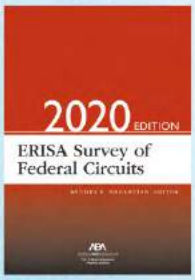

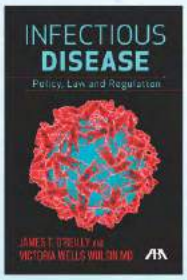

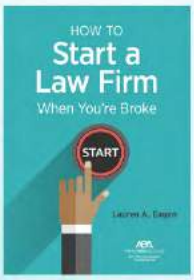

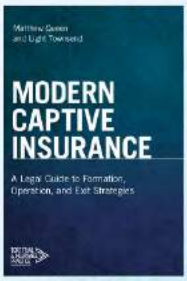

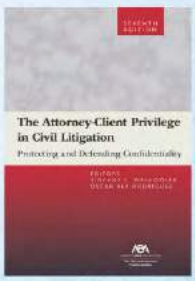

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