



Getting Past the Impasse: Effective Use of Persuasion & Influence in Mediation

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This Presentation Will Cover:

How mediators and negotiators can influence people to move toward settlement

*People often have cognitive biases that interfere with settlement. We will identify those prevalent in mediation and discuss ways to prevent them from disrupting a settlement.

*Mediators use of influence and persuasion techniques

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Heuristics & Cognitive Biases

- + Decades of research by cognitive psychologists & behavioral economists about how we make decisions.
- + **Heuristics: Our Brains process enormous amounts of data each day.** We cannot slow down to analyze each decision, so we take mental shortcuts called **HEURISTICS**
- + Heuristics are great because they allow us to navigate these millions of decisions
- + They are gut reactions



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Cognitive Biases



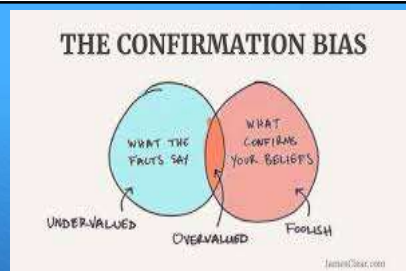
- + **Cognitive Biases occur** when we should slow down our thinking but the heuristics fast thinking prevents us from doing so
- + **Cognitive Biases** are predictable errors in rational decision-making – based on assumptions and inferences common in heuristics rather than a slowed down rational analysis
- + Hundreds of cognitive biases exist that prevent us from analyzing new information necessary for negotiation and settlement – instead, make decisions based on previously held values, preferences and beliefs
- + Particularly strong during settlement discussions

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Types of Cognitive Biases Most Prevalent in Settlement Negotiations


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CONFIRMATION BIAS

- + Negotiators evaluate new information in a way to reinforce their pre-existing beliefs & ignores/devalues information that disconfirms those beliefs (cognitive dissonance – we are uncomfortable to consider contradictory information)
- + Natural in litigation & lawyers taught this in law school
- + *Engage in “selective listening” & only process things to support our pre-conceived views

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Selective Perception/Memory

- + Negotiators only see information that validates what they think they should see & remember
- + Example: Teacher sees only good behavior in favorite student
- + Study: Kids thinking they were drinking alcohol exhibited drunken behavior

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REACTIVE DEVALUATION

- + Negotiators diminish value of the information and proposals because they come from the opponent -

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Fundamental Attribution Error

- + Occurs when someone attributes a decision to the character of the other person, rather than to the external circumstances that drive the decision

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SOLUTIONS Minimize These Biases that Directly Interfere with Analysis of New Information

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Slow down the thinking & analysis

-Ask Open-Ended Questions

*No direct attack of contrary information

(ex. What happened on DOA? How has your life changed since the incident? What are your goals?)



*Ask for summary of positions & evidentiary support for both sides

*People need to be heard – disarms them when you ask about what they need & what do you think other side needs

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Questions That Can Slow Down Thinking

1. Info Gathering Questions: what are main issues in the case for you ? Tell me about that. How has the issue affected your life? What are your main goals/concerns? What do you think the other party is missing in the analysis?
2. Problem Solving Questions: What would happen if we explored an ongoing relationship? What information do you need to move off of that number? Any ideas for a creative settlement?
3. Reality Changing Questions: Regardless of who wins, how long will it take to get a decision from the court and how much will it cost?
4. Hypothetical Questions ("what if"): If the witness does not show up for trial, how will you prove liability? How will you explain those emails? How will you get board approval for settlement?

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Focus on Solutions Not Fault or Blame

*Avoids competitive arousal – can create collaboration which diminishes reactive devaluation & fundamental attribution error

*Can still resolve case if disagree about information as to fault & blame : *Henry Kissinger – “We agree completely on everything, including the fact we don’t see eye to eye.”

*Allows people to stay consistent with their positions



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Find Information That Is More Difficult To Ignore Or Dispute

*Use objective raw data & verifiable facts

*Photographic & video evidence

*Comparative verdicts helpful

*Analogous Situations

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Use Visual Aids to Slow Down Thinking

- ***Objectifies the information** – easier to consider
- ***Numbers on a Board** – damages, values, risks, etc.
They may not agree with our numbers but will consider it. Gets client involved. Slows down thinking to get new numbers and analyze the “why” behind the numbers.
- ***Homework** – look into an issue, get certain documents, attach settlement demand to damage figures

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Prime Parties To Hear New Information At Outset

*From the outset, discourage the parties from entrenching in a position and valuation of the case. Otherwise, it is too difficult to get the to change their minds & to consider new information in a mediation.

*Discuss in Opening

- Difficulty of hearing contrary information.
- Asking for concessions & patience
- Work with me in slow analysis response
- Lawyer in role of collaborator



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Encourage Parties to Share Mediation Briefs

*Allows other side to analyze positions and evaluations of the case in a slow & thoughtful way. Easy to discount if hearing it for first time.



*Allows decision makers not present in the mediation to do a thoughtful analysis

*Can share mid-mediation when notice strong biases present

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USE SKILLS AS A NEUTRAL TO FRAME POSITIVELY

- *Framing Can Neutralize Reactive Devaluation – Ideas Originate From The Mediator
- *Make communications positive
- *Frame to consider different issues
- *Can Slow Down Analysis with Thoughtful Q's –
- *Present it as let's find information to counteract the other side's argument re x

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*Studies showing that attorneys find it to be the most critical factor in moving parties to settlement

*Concept of "Unity" - Behavioral science studies show that people are more influenced by people with whom they connect

Build Trust & Rapport

Makes Cognitively Biased People Less Defensive & Reactive

*Liking – people more influenced by people they like

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Trust & Rapport Building Techniques

Build Empathy to allow for influence by putting yourself in their position.

*"Other side is making a big deal about xxx, we need to respond to that. What evidence can we give him/her. I like that."

Give an audience to their story – active listening

Validate/Understanding – "If I had been fired because of my age, I'd be upset too" - people want to share when they know you care

Active Listening – verbal/nonverbal

Thoughtful questions – choose how intimate you want to get

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Appeal to Emotions When Useful

- *Other side has suffered
- *Tell me what it has been like since the incident.
- *Grief Counselor - So much of mediation is adjusting to loss – people don't always reveal their true emotions (loss, anger) but rather motions related to the dispute. Be there while they process feelings of not getting everything that they had hoped for. Death of a claim.
(ex. Shipwrecked love one)



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Other Cognitive Biases That Impact Settlement Negotiations in Different Ways



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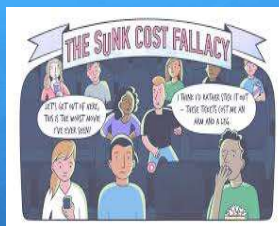
Optimistic/Judgmental Overconfidence

- + Horseracing gamblers think better chance of winning just like litigants.
- + Lawyers are overconfident that they will win at trial or find a different attractive option because they consider themselves experts and have overconfidence in their judgment. Do not accurately consider risks.
- + TOOLS to Combat Bias:
 - + *Ignore
 - + *Trial is risky – decision makers have implicit biases & a headset based upon past experiences
 - + Explain they norm when possible - validate the position AND I worry that most trial lawyers will tell you that they lose some cases they expected to win
 - + Avoid discussion about chances of success at trial. Instead, focus on the facts of the case & solutions

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Sunken Cost Bias

- + People spend more money so that they can justify a prior expenditure
- + Want to include attorney fees/costs in settlement evaluations – t/f, plaintiffs want more and defendants willing to pay less
- + Instead focus on the future probabilities & expenditures – can be worse if go to trial & lose, experts, sj motions, emotional/relationship costs of trial & lost opportunity costs



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RISK AVERSION & LOSS AVERSION

- + Risk Averse: people take a sure thing over a gamble
- + Loss Averse: people rather take a gamble over a sure loss
- + People are 4x more likely to try to avoid a loss than to get a gain.
- + Framing is very important here – to get an agreement frame the agreement as a sure gain and trial as a gamble
- + Brackets can be useful & end of day to show gain. So can patient concessions
- + Look for additional creative terms to make it unclear whether it is a loss or gain – Kissinger says to complicate it so cannot determine whether it's a loss.
- + End of day needs to look like a gain to justify it

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Anchoring Bias



(Ex. Sweater on sale, Not going to ask you for \$100, only \$50)

- + People make decisions and assessments of value based upon earlier numbers used
- + Coach parties to find the sweet spot – not too high that insults other party, but high enough to give room for concessions
- + To prevent impasse, when party demands high anchor, u can ask them to explain why, how other party may react & to attach it to damages
- + Add creative components to muck it all up
- + Explain to recipient of high anchor – don't worry - fixed pie negotiations resolve at the midpoint of the first reasonable offer and demand. Also, can make it up through concessions which also send messages. Advantage to giving first reasonable number. Advantage to first reasonable number.
- + Note: Mediators can use the anchor to our advantage in combatting loss aversion because of "gains" to defense from initial anchor.

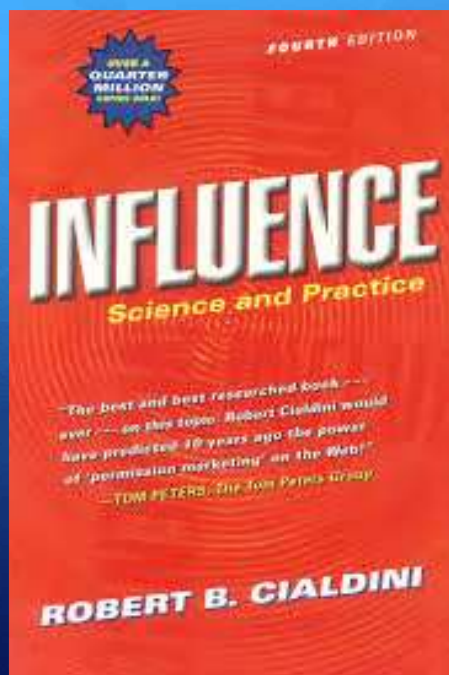
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Use Science of Influence Tactics

*Social Scientific Experiments to determine how people can persuade others to make decisions that they ordinarily would not make

*Marketers use these principle to capitalize on predictable buying patterns of potential customers

*We can use them to help persuade people to engage in productive negotiation behavior and make decisions in our favor



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LIKEABILITY

*Best way to achieve your goals is to play nice – people want to give things to people they “like” (trust, relate to)

*Mediators should make sure to **frame** other side’s perspective as positive & respectful – take out toxicity, share compliments

*Mediators should make the cognitively biased person like you by actively listening/empathy/validating

*Appreciate concessions

*Smile – positive facial expression

*Trust & rapport building

*Combats reactive devaluation & fundamental attribution error



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PROVIDE INFORMATION



*The more information you provide, the more likely you are to gain compliance with your request

*Mediators should ask for concessions after sharing information because people more likely to give the concession. (information management)

*Also, need information to carry back and forth during the negotiation dance – asking for this information is good for combatting cognitive biases because creates a slowed down analysis.

*Coach attorneys to save some information for later in the negotiation because it enhances the power of the trigger & avoids argument dilution.

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SCARCITY EFFECT



*Give value to things in low supply. People believe that they need to grab an offer quickly because it won't be there tomorrow

*Exploding offers are perceived to be more desirable than readily available ones

*Partially explains why cases settle at end of day/before trial

*Use time to our advantage. Offer/mediator proposal explodes after set time

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RULE OF RECIPROCITY



- *Social obligation to repay a favor
- *Mediators can utilize this to generate settlements
 - *Encourage generous negotiating behavior (never backward step – creates reciprocal negative pattern of behavior)
 - *Get one side to trade something of low priority to encourage them to reciprocate a high priority item
- *In joint session: encourage respectful & thoughtful conversations, & slowed down analysis
- *The resulting collaborative, positive negotiation cycle can combat reactive devaluation & fundamental attribution error

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CERTAINTY EFFECT

- *People want certainty! Lawyers will spend 80% of their funds to increase the probability of winning from 95% to 100%
- *Frame language to show settlement as a certainty



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CONSENSUS / SOCIAL PROOF

*People tend to observe what others are doing to decide how to act - they want to do what others are doing

*study: if you put a sign that says majority of guests recycle their towels, increases compliance by 28% (compared to a sign asking for recycling due to environment)

*In Opening or as early as possible, point out areas in which the parties agree because it encourages negotiator to look for further areas of settlement

*Use comparative verdicts and objective data on how other similar cases and people have acted toward settlement to encourage settlement

*Frame what u see in other similar mediations to extract concessions

*Similar to Bandwagon Effect – which is a cognitive bias that causes people to subconsciously make decisions based upon what others are doing

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UNITY



People are more likely influenced when they feel that they have something in common with the person making the request

Find commonalities – geography, religion, schools, sports teams, organizations, mutual friends, etc.

Frame language in terms of “we” “us”

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Commitment/Consistency

People want to act consistent with earlier positions/behavior

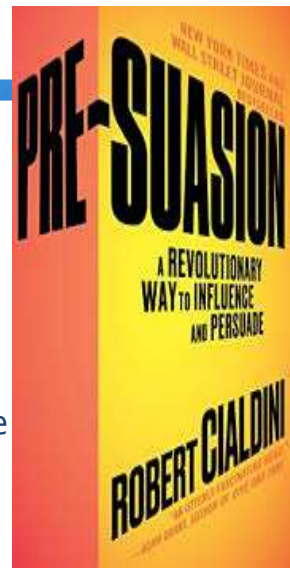
- Don't challenge them to do so or to admit they were incorrect about an earlier position
- Get early areas of agreement
- Get commitment to process

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PRE-SUASION

*Psychological framework of a discussion at outset can carry equal or greater weight than the actual merits of any request

*Essentially you are arranging for recipients to be receptive to a message before they encounter it



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TOOLS OF PRESUASION



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Before asking for a concession by a person, focus on the best argument/issue for getting that concession

*people focus on one thing at a time & give heightened importance to thing they are focusing

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Speak quietly

Heightened importance to things they move toward



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Tether request to a quality they would like to possess

Ex. "You are such a great problem solver", "hardworker", family oriented



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Provide only one option for settlement at a time – more likely to comply when a list is not given



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Pre-load request with positive associations – photographs of handshakes, round table for discussions in room

People like soft cushy chairs – makes them more likely to settle

Uncluttered, calm physical space helps with settlement because physical world helps with mental world

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Make settlement proposal easy to understand – people more inclined to be influenced

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People are more inclined to listen to someone with authority

*In Opening, establish your expertise in mediation & subject matter

*Can refer to an expert attorney who accepted a similar settlement

*Expert in the field

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THANK YOU

If you have any questions, please feel free to contact me at:

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