Contra Costa County Bar Association

2023 MCLE SPECTACULAR

Refresh & Reimagine

CCCBA's Alternative Dispute Resolution Section proudly presents…

Mediation Mastery: Effective Attorney Advocacy for Enhancing Settlement Outcomes

Stacie Feldman Hausner,
ADR Services, Inc., Straus Institute

AGENDA

Mediator Stacie Feldman Hausner shares several of her most effective tactics for maximizing settlement outcomes. Stacie draws information both from her own extensive mediation experiences, as well as the curriculum she developed for her courses on "Mediation" and "Advanced Mediation" at the Straus Institute for Dispute Resolution at Pepperdine Law School. She will explore different strategies you can use before and during mediation to enhance settlement results for your clients.

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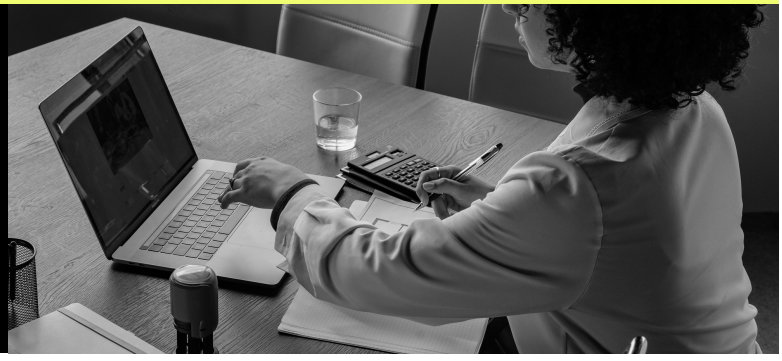
PROGRAM MATERIALS

Tips to Optimize Settlement Outcomes in Online Mediations

STACIE FELDMAN HAUSNER, ESQ.



ABOUT STACIE

Stacie Feldman Hausner, Esq. has been mediating for ADR Services, Inc. for the last 7 years. She has mediated more than 1,000 cases in the areas of employment, business, real estate, civil rights, personal injury, construction defect, insurance coverage and entertainment litigation. For the last seven years, she also teaches "Mediation" each semester as an Adjunct Faculty member at the Straus Institute of Dispute Resolution at Pepperdine

School of Law, where she had previously earned an LLM. Additionally, she trains mediators for the Central District Court federal panel, the Mediating the Litigated Case program at Straus, and various bar and professional organizations. Prior to joining ADR Services, she was an attorney for both plaintiffs and defendants and mediated for the West Division of the Los Angeles Superior Court, the Department of Fair Employment and Housing, the Department for Consumer and Business Affairs, and the Center for Conflict Resolution.

BEFORE THE MEDIATION

Identifying Each Side's Goals	Understand your goals, risks, best alternative to a negotiated agreement ("BATNA") & worst alternative to a negotiated agreement ("WATNA"). Understand other side's goals and interests. This allows you to gain power from information, accurately evaluate your case, and find creative resolutions.
Client Preparation	Prepare your client for the mediation so that your client does not become an obstacle to settlement. Make sure your client is comfortable with the technology and has the ability to participate. Ensure they know that the mediation is not the forum to be "right," that they are permitted to speak to the mediator, and that the mediator, even in a remote setting, is bound by confidentiality rules.

Communications with The Mediator	Speak to your mediator in a pre-mediation conference about obstacles and avenues for settlement, the process, and information that you may not want your client to hear. If it's a remote mediation, determine whether the mediator has an IT expert or assistant that can facilitate the session if the technology collapses, your client does not have state of the art technology, or your client has other concerns, apprehensions or expectations.
Sharing Briefs & Other Information	Share your mediation brief with the other side– this gives you an advantage in the mediation so that the other side comes to the mediation with a more realistic case evaluation (you can hide your smoking guns and confidential information). Often, the actual decision makers are not present and this is likely the best opportunity to get top results. Both sides need to be prepared for the discussion, including having a clear idea of the issues, the stakes and the demands/offers.
Confidentiality Considerations	Be prepared in advance if any participants in a remote mediation are actually situated elsewhere, whether another state or country. The rules of confidentiality may be different in different locations and this information should be addressed in advance.

DURING THE MEDIATION

Making Reasonable Offers/Demands & Negotiating Reasonably	Be appreciative of offers and concessions. Make sure the other side knows they have been heard and that you are trying to accommodate their interests. Even the appearance of collaboration, rather than aggressive tone-deaf bargaining, will produce more favorable results. People are pre-disposed to want to collaborate and likely will not agree without believing they have experienced a gain. Sometimes preexisting relationships exist that can either hurt or help. However, it is critical at all times to keep the flow of the conversation open and not stymied by an insult or attack that does not keep the momentum in a forward motion.
Anticipate Issues Arising From "Online" Nature of Mediation	Ensure that there is clear knowledge of the participants present at the remote session. Have each participant be recognized and confirm their understanding of the confidentiality of the session. Address the problem of distractions and practical issues that may reduce their ability to hear or understand what is being discussed (kids, pets, leaf blowers, loud conversations in adjoining offices, etc.) Also, revisit the issue of the physical location of participants so that the reach (or lack of reach) of confidentiality protections are not

	mistakenly ignored. The location may also bring in the issue of different time zones making some parties limited in their participation by time constraints.
Keep Your Numbers Within The "Sweet Spot"	Anchor (initial offer/demand) wisely - find the sweet spot that is high enough for concessions but not insulting enough to provoke retaliation in kind. Negotiations often resolve at the midpoint of the first "reasonable" offer and demand. There is a tactical advantage to making this first reasonable offer/demand and there is often a disadvantage to starting with an unreasonable demand or offer. As noted above, with remote sessions in particular, it can cause the conversation to implode quickly and spend time wasted trying to change the mindset of the decision makers.
Track Movements and Concessions Carefully	Concession patterns reveal messages, so be careful how much you compromise and what that can mean to the other side.
Consider Creative Solutions	Creative resolutions can bridge the gap (payment plans, structured settlement, accommodating business or reputational interests). Look for a trade-off of interests or mutual interests. If other side wants something of low value to you, let them have it. This often kicks into gear the "rule of reciprocity," a well-studied social obligation that influences people to repay favors/kind acts. Never lose track of the fact that in mediations, anything and everything can be on the table. The restrictions of the "law" do not exist here. Also, participants are able to remain in their space of choice, whether at home or at the office or elsewhere, allowing them safety and the opportunity to maximize their time and being open to a wider variety of potential benefits.
Civility During Negotiations	Place nice with opposing counsel – "Likeability" is the best way to achieve your goal. Show respect and generosity. It will be reciprocated. This is particularly true with respect to the one who will be writing the check. It does not pay to insult or disparage that check-writer.
Mediated In-Person or Not	Carefully analyze the advantages and disadvantages of mediating remotely or in-person. Remote sessions offer tremendous advantages, including financial savings, transportation time savings and the ability to participate from anywhere in the world. If an in-person mediation seems appropriate or necessary, they can be arranged as well as considering hybrid sessions, so the advantages of in-person sessions are not precluded. Solely digital or telephonic negotiations lose the access to rich information that comes from body language, and are often seeded with the pitfalls coming from

	loss of communication and nuance. Ninety-percent of all information is communicated through body language. This remains available both in person and remotely.
Be Mindful of "Power" v. "Force" v. "Control" During the Mediation	Use power to your advantage when you have it. Power can be in the form of information, resources, relationship dynamics, access, etc. Be careful not to intimidate too much such that the other side refuses to negotiate.
Consider joint sessions	If appropriate, such as when a dispute is between business entities or between parties who have had a cordial relationship in the past and the acrimony has not completely destroyed communication, consider a joint session at some point in the mediation. With remote technology, the session will be "safer" for the disputing parties and the mute button can be used to shut down explosions immediately, or can be used to ensure uninterrupted presentations.
Executing Settlement Agreements	Have your client sign the deal before you leave the mediation if at all possible. This is more difficult with remote sessions unless counsel are prepared. It is always helpful to have a draft settlement drafted in advance and shared virtually at the end of a successful session. When people "sleep on it," they often have second thoughts or they have been influenced by persons without the same information not present during the mediation. If a signature cannot be obtained within the session, one option is to send an email to all participants relaying the deal points and to have each respond affirmatively that the characterization is accurate pending the actual execution of an agreement. While this is not legally enforceable, when people affirmatively confirm positions and information, there is a far higher likelihood that the deal will be signed sealed and delivered.
Always Move Towards Resolution of The Case or At Least The Issues	Do not take a backward step when negotiating, unless something drastic has happened, as it almost always engenders poor negotiating behavior from the other side. Also, consider that brackets provide information about midpoints to the participants, while providing some cover.
Focus on Solutions, Not Fault or Blame	You can resolve a case even when the sides disagree about the underlying facts. However, if one side (or both) insist on being "right", the likelihood of settlement is remote. All parties must untether from the need to be right.
Keep Risks and The Risk Takers In Mind	Use contingency agreements to derive value for the risk taker.

Strategically Using Time and Timing	Put time constraints on open offers. People are more likely to accept your offer given the concept of scarcity.
Argument Dilution	Avoid argument dilution when negotiating.
Be Prepared to Provide the Basis for Your Positions	Explain why you want what you want. It is more likely the other side will comply with your request when a reason is provided. However, the numbers will become untethered to legal and factual merit as the participants move closer to settlement. Calm your client and have them expect at some point that the exchange will only be about the numbers and not the merit or "legal justice."
Post-Mediation Settlement Negotiations	Even if the case does not settle at the mediation, use the mediator to help negotiate stipulations, scheduling, and a later settlement. The mediator can also offer a mediator's proposal.
Even a Failed Mediations Can Yield Information and New Insights	Good faith negotiations are rarely a waste of time. Both sides will learn about their case and the other side's case. Pay attention to what the mediator is talking about and what evidence supports the other side's positions. Pay attention to who is present.

THANK YOU

Please feel free to contact me:

Stacie Hausner, Esq.: shausner@adrservices.com

ATTACHMENTS

- **Cognitive Biases in Mediation: What Lawyers Must Know About Biases in Order to Optimize Mediation Outcomes (The Advocate - August 2018) by Stacie Feldman Hausner, Esq.**
- **Influence in settlement negotiations: 15 tips (The Advocate - August 2019) by Stacie Feldman Hausner, Esq.**

Stacie Feldman Hausner
ADR SERVICES, INC.

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Cognitive biases in mediation

WHAT LAWYERS MUST KNOW ABOUT BIASES IN ORDER TO OPTIMIZE MEDIATION OUTCOMES

Whether we realize it or not, we are *all* biased in some way and to some degree when making decisions. Decades of research by cognitive psychologists and behavioral economists have revealed that human beings are significantly influenced in their decision-making by psychological impediments known as cognitive biases. To most readers, many of these biases may feel familiar, intuitive even. But, the impact that they can have in settlement negotiations is substantive and the best ways for dealing with them may not be as intuitive. This article will help explore the most prevalent, and troublesome, cognitive biases in mediation and offer guidance and recommendations for minimizing their impact on settlement outcomes.

What are cognitive biases?

The human brain is a complex and effective machine that processes an enormous amount of sensory data daily for decision-making. But it cheats a little because it lacks the capacity to fully analyze all of this information. The fancy term for this is "heuristics." Perhaps some of the more common terms you may associate with this is "gut instincts," "first impulses," or even "common sense." Essentially, heuristics are mental shortcuts that allow people to make judgments quickly and efficiently with minimal cognitive effort. As you may imagine, the mental shortcuts use little information and fast reasoning to arrive at decisions. Generally speaking, these shortcuts work well in helping people navigate the millions of decisions that they make each day.

However, sometimes heuristics get in the way. When situations are complex, the brain needs to slow down a moment and delve more deeply into an analysis. The brain's failure to do so leads to predictable errors in rational decision-making called cognitive biases. Cognitive biases are troubling because they cause people to make decisions based upon the inferences and assumptions common in heuristics, rather than a slow, rational analysis. Effectively, cognitive biases cause people to make decisions based upon their previously held values, preferences and beliefs, regardless of any new and conflicting ideas and information. Sir Winston Churchill clearly understood this when he stated, "Where you sit depends upon where you stand."

Cognitive biases in mediation

In mediation, cognitive biases frequently corrupt the rational decision-making of the attorneys and their clients because a slower analysis is necessary given the complexity of disputes. Specifically, biases tend to impact how clients and their counsel perceive the character and motivations of their adversaries, the causes of the dispute, the value of their cases, the impact of new evidence, and even chances for success at trial. In fact, the biases may be exaggerated in mediation because the heightened emotions common in conflict often cause people to react impulsively rather than slow down to analytically think and communicate.

Psychologists have identified hundreds of cognitive biases and heuristics that impact rational decision-making. Some of the most common in mediation include confirmation bias, reactive devaluation, fundamental attribution error, selective perception

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and memory, risk aversion, loss aversion, anchoring bias, sunk cost bias and optimistic overconfidence. By recognizing these biases and learning tools to minimize their impact, attorneys can optimize outcomes for their clients.

Biases that prevent accurate assessment of new information

Confirmation Bias

Confirmation bias causes people to evaluate new information in a way that reinforces their pre-existing beliefs and ignores or devalues information that challenges or disconfirms those beliefs. This is similar to the idea of cognitive dissonance, which essentially means that it is psychologically uncomfortable for people to consider data that contradicts their viewpoints.

The parties and their attorneys fall prey to this bias in litigation because of the very nature of litigation. Litigation is designed for each side to work to justify their positions legally and factually, while discounting their opposition's position. In fact, lawyers are trained to take this gladiator-like, competitive approach in litigation, which often enhances confirmation bias. This bias specifically impacts settlement discussions because lawyers and their clients may believe that they are making competent and fair decisions when evaluating their cases for settlement, but in reality, they may be discarding or diminishing contrary data that would help produce a more accurate assessment of the case value.

When confirmation bias is present, contrary information that usually tends to shift an opponent's perspective no longer has that effect. Rather, it can further entrench biased people in their settlement postures because they tend to discount contrary information, making them feel even stronger about their case evaluation. You may recognize this as the impulse to "dig in."

Selective perception and selective memory

Psychological experiments have shown that people with selective perception and selective memory often see and remember what they are preconditioned to believe they will see, and discard events that are inconsistent with these preconceptions. This bias can negatively impact settlement discussions because it impacts how people see and recall information during litigation and settlement discussions. During settlement discussions, depositions, or even when explaining a case informally to an attorney, biased people tend to recall events surrounding the conflict in a way that supports their position. They will not see or remember information that may support the other side, thereby leading to an inaccurate assessment of case value for settlement purposes.

Reactive devaluation

Reactive devaluation occurs when people discount an adversary's ideas simply because of a general distrust for an adversary. This bias can have a significant impact on settlement discussions when a neutral is not present because all of the opposition's ideas and information that could shift perspectives is discounted as originating from the adversary. Mediators can diffuse much of this bias by messaging, asking questions and providing ideas without attachment to a source. But in general, reactive devaluation often has a strong presence in conflict, and accordingly, in settlement discussions.

Fundamental attribution error

Jeffrey Zaslow, a senior writer for the Wall Street Journal warns, "we blame because we lack skills to problem solve… creating hostilities, scapegoats and an avoidance of hard decisions that could actually solve problems."

Fundamental attribution error is just that. It occurs as a rapid, quick-thinking response when people ignore the actual acts, events and conditions that may contribute to litigation, and instead, blame adversaries' ulterior motives for a conflict. This bias is prevalent in mediation. We see it when settlement discussions focus on the presumed motives of the opposition rather than an analysis of the facts of the case. In turn, this is problematic for settlement because it causes parties to unrealistically evaluate a case for settlement. This bias can be particularly problematic for cooperative or collaborative settlements because biased people's general distrust about the motivations of an adversary makes it difficult for them to collaborate with the other side to create win-win settlement outcomes.

Minimizing the impact of the cognitive biases

Attorneys can minimize the impact of these biases on settlement outcomes by recognizing when they exist and developing the skills to minimize their adverse impact.

First, because these cognitive biases are often caused by quick, reactive-thinking heuristics, the best strategy is to try to slow down the thinking and analysis of biased people. Try asking open-ended questions about the case so some slow-thinking analysis is required, rather than "yes" and "no" answers. Essentially, draw things out a bit. It can also be helpful to ask for a summary of positions and evidentiary support because it also triggers a slower analysis of the case. It is important to avoid direct attacks of the biased person's position because that often triggers quick-thinking defensive behavior that may actually strengthen, or reinforce, the bias.

Second, because biased people instinctively discount contrary new information, the type of new information offered will matter. Use objective raw data when possible because there is less subjectivity and room to discount the veracity of the information. Try using comparative verdicts or analogous situations when presenting new information. Biased people, who discount new information that directly conflicts with their preconceived beliefs, may be able to consider it in an analogous situation. Ideally, the analogy will cause a biased person to slow down the thinking and apply the analogy to the evaluation of the case.

Third, attorneys can shift the conversation to a forward focus of problem solving. Conversations about the past, as analyzed when discussing fault and blame, are the exact type of conversations that biased people discount when conflicting with their own beliefs, values and notions about what happened in the

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past. There is no problem settling a case without consensus or mutual understanding as to fault and blame. Henry Kissinger acknowledges the ability to do so when he stated, "We agree completely on everything, including the fact we don't see eye to eye." Therefore, focus on problem solving to avoid the cognitive bias trigger. Besides, problem solving conversations have the added benefit of making both sides view one another as collaborators, rather than adversaries. These collaborative conversations avoid the competitive arousal and the need to win that can lead to these biases.

Fourth, when contrary information is not persuasive at changing a perspective and there are no fruitful discussions about settlement options, try to frame discussions in terms of emotions. Discuss the terrible emotional hardship of the conflict and the psychological benefit in resolving the case at the mediation. However, tread cautiously when discussing suffering because it can trigger a negative and toxic environment when one side feels that they are the only victim to the conflict.

Share the mediation brief

Fifth, attorneys should share their mediation briefs with opposing counsel prior to mediation because of cognitive biases. The sharing of a mediation brief is not a favor to opposing counsel, but rather, an enhancement of an attorney's influence at the mediation. Amongst other things, in mediation, both sides attempt to get the other side to understand their perspective in hopes of evaluating the case more similarly. A mediation brief is an exceptionally effective tool for doing so, because it clearly and persuasively lays out the legal and factual strengths of one's position outside the context of the mediation. It allows for biased readers to slow down, analyze and understand the oppositions' positions in a quiet environment before the conflictive, emotional and reactive environment of the mediation that often emboldens cognitive biases. After all, it is much more difficult for a mediator to change a person's perspective during a mediation when the person is learning of a legal argument, applicable case law, or new evidence for the first time in the mediation. Therefore, use the mediation brief as a tool to optimize your settlement outcome.

Furthermore, a well-written brief can be an opportunity to garner additional settlement authority from ultimate decision makers who are not present at the mediation, such as the senior decision makers for insurance carriers and board members of a company. These people are not privy to the information and positions learned as the mediation unfolds, so these briefs can be strategic for improving client outcome. Oftentimes, attorneys are reluctant to share their briefs because of concern that they will disadvantage their cases by revealing too much of their position to the opposition. However, this need not be a concern because confidential information, "smoking guns" and legal arguments can be removed from the brief and provided privately to the mediator.

Sixth, mediators can be particularly helpful when the cognitive biases of reactive devaluation and fundamental attribution error are strong. Naturally, mediators can combat some of the negative impact of these biases simply because of the fact that they are neutral. Their messaging and presentation of new information is not automatically discounted in the way it may be when communicated by an adversary. Mediators ask questions and propose ideas as though they originated from the mediators themselves, rather than the adversary. In fact, skilled mediators can ask questions in a way that makes biased people believe that an idea originated from them, which is even better, because people tend to favor their own ideas.

Learn from marketers

Finally, attorneys can use some of the tools employed by marketers who are trying to influence behavior. In 1984, Dr. Robert Cialdini wrote a seminal book about influence in marketing, called Influence: The Psychology of Persuasion. Within this book, Dr. Cialdini described several behavioral triggers that induce people to behave in automatic, predictable manners. One of the triggers he describes involves the Rule of Liking. Dr. Cialdini studied women at a Tupperware party and found that the women were more likely to purchase Tupperware when they "liked" their hostess. He further concluded that people tend to like others based upon similarities, contact and cooperation.

This concept can be utilized to induce others to behave in advantageous ways during litigation and settlement. Simply put, they should try to make the opposing side "like" them so that the cognitive biases associated with distrust for an adversary become marginalized. They should treat the other side during litigation with respect and dignity, including during depositions and court hearings. They should have contact with the other side in a respectful manner and act cooperatively when possible. They should offer extensions to the other side and produce informal discovery when requested if its not detrimental to their case. They should also act cooperatively in settlement by taking an attitude of problem solving and resolution, rather than fighting. After all, recognizing the importance of collaboration in settlement is helpful because people are unwilling to settle if they feel like they are losing something by entering an agreement. They should look to create these win-win settlements. Therefore, it is exceptionally helpful to optimizing settlement outcomes if you are "liked" by the other side of the conflict.

Additionally, attorneys can use Dr. Cialdini's Rule of Reciprocity to prevent reactive devaluation from negatively impacting settlement optimization. The Rule of Reciprocity states that when people receive value from someone, they feel the need to return the favor by giving back equal or larger value. That means, if an attorney grants extensions and informal document production to the other side, they are likely to be treated with the same kindness. Similarly, if an attorney makes generous concessions during settlement discussions, it is likely that opposing counsel will do the same.

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Respect begets respect. Kindness begets kindness. Therefore, use this influential tool to minimize the negative impact from reactive devaluation and the lack of trust associated with viewing someone as a true "adversary."

Risk aversion/loss aversion

Behavioral economic studies have revealed that people make different decisions regarding risk depending upon their perception of whether the risk involves a gain or a loss. People tend to be risk averse when they want to protect a sure gain and risk seeking when facing a sure loss. This can negatively impact a mediation, as a defendant may prefer the risk of trial to the sure loss of money from a settlement payment, whereas a plaintiff may prefer the sure gain of a settlement payment, rather than the risk of trial.

Mediators work tenaciously to frame language so that parties perceive settlements as "gains" rather than "losses." They help defendants view concessions made by plaintiffs during settlement negotiations as tangible "gains" to the defense. Brackets also can help because they reenergize stale negotiations that are moving toward an impasse by providing settlement offers and demands within a reasonable range. Once the range is reasonable, both sides view concessions made by the opposition as "gains." This explains why many cases tend to settle at the end of the day, when the settlement range is relatively close. After all of the work, neither party wants to walk away from the "gains" made during the negotiations. Therefore, to prevent risk and loss aversion from creating an impasse to settlement, use language that frames settlement in terms of gains, frames litigation costs in terms of losses, and be open to using brackets to reenergize a stale mediation.

Anchoring bias

The anchoring bias occurs when people make assessments and drive decisions based upon earlier numbers that have been used, despite their accuracy. This appears in mediation when the opening "anchor" number offered in the negotiation is used to drive concessions and serve as a reference point to an acceptable final settlement amount. This anchoring can be problematic because it need not be attached to any real evaluation of the case. Accordingly, some lawyers react strongly when the opposition begins with an outrageous anchoring number in the negotiation.

It is best to take a deep breath when this occurs. The anchoring number usually has very little bearing on the final settlement figure. Cases tend to settle at the midpoint between the first "reasonable" offer and demand, not the midpoint of anchoring numbers. People who make outrageous anchors tend to make equally absurd and large concessions to prevent an impasse in the negotiations. These concessions message as much, if not more, about the ending settlement figure, so it is best for you to just devise your own negotiation strategy and not be overly concerned with the opposition's strategy.

Anchor at a number that is extreme enough to allow you to make concessions but not too extreme as to insult the opposition. When the opposition is insulted, they tend to want to leave the negotiation or reciprocate by negotiating in bad faith. Therefore, it is best to make a reasonable and flexible negotiation plan and not worry too much about the opposition's anchor.

Nonetheless, if you are particularly concerned about the opposition's extreme anchor and its impact on settlement, ask questions. Ask the opposition to explain the basis for the anchor and to attach it to recoverable damages at trial. Even if these questions do not persuade a change in the anchoring number, it will slow down the thinking to perhaps minimize this cognitive bias. Consequently, it may allow you to extract larger future concessions and a more favorable ultimate settlement number.

Sunk-cost bias

Sunk-cost bias occurs when people decide to spend more money in order to justify an earlier unsuccessful decision. In business, it is the common notion of "throwing good money after bad." Logically, people should not consider past money spent when making decisions about the future. Yet people with this bias in mediation may reject a reasonable settlement amount and proceed to trial simply to justify the amount of the money already spent in pursuing the litigation. Intuitively, to prevent this bias from creating an impasse, simply do not speak about past money spent when negotiating settlements. But rather, focus conversations on the future, including settlement options and required future expenditures should the case proceed to trial.

But this can become more complicated when the case allows for the potential recovery of attorney fees because oftentimes plaintiffs want to include them in settlement discussions and valuations of the case. If these discussions are creating an impasse, lawyers can ask to bifurcate the discussions so that a reasonable settlement amount is first negotiated and then, separately, a settlement amount for attorney fees is negotiated. The positive feelings from settling the underlying dispute may then encourage a more expeditious and cooperative settlement of attorney fees.

Optimistic overconfidence

Most psychologists and law professors believe that optimistic overconfidence is the reason for the most significant decision-making failures. It occurs in litigation when one side attributes its litigation skills as the reason for past favorable litigation outcomes, and therefore, overestimates its chances of winning at trial while underestimating the opposing case. This bias tends to become more exaggerated when lawyers have less information about their cases. Unfortunately, the result of this bias in mediation is that people have too extreme of settlement positions based upon an unrealistic analysis of risk at trial. In other words, they think that they are so skilled that they overestimate their chances for success.

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When this bias is present in the opposing side, avoid discussions about likely outcomes at trial and the litigation skills of the biased person. Instead, discuss the facts surrounding the case. Factual discussions help give attorneys more information about the case and slow down the thinking and evaluation, both of which are helpful in combatting this bias. Additionally, contrary factual information can minimize the bias to the extent it causes attorneys to view the case with more pessimism. Pessimism is a great antidote to optimistic overconfidence because it triggers a negative mood that may stimulate an examination of the facts and generate the type of creative thinking that can help resolve cases. Finally, try minimizing the bias by focusing discussions on solutions, rather than the skill of competition at trial. It certainly would be helpful to reaching a settlement if these biased people apply their optimistic overconfidence views to being expert problem solvers.

Conclusion

Over 150 years ago, long before any cognitive studies emerged, famed historian James Harvey Robinson observed that "most of our so-called reasoning consists in finding arguments for going on believing as we already do." He knew then what we have proven now, that cognitive biases exist and can influence the way we make decisions. Identifying them and minimizing their impact on settlement can assist in optimizing client outcomes and the unnecessary difficulty in getting there.

Stacie Feldman Hausner, Esq. joined ADR Services, Inc. *after 20 years of being a lawyer for both plaintiffs and defendants. As a lawyer, Stacie litigated business and commercial cases (including breach of contract and business torts), personal injury cases (including catastrophic injury and wrongful death), construction defect cases, entertainment cases, employment cases, and real estate cases (including commercial and residential landlord/tenant cases). Ms. Hausner received an LL.M. in Dispute Resolution from the Straus Institute for Dispute Resolution at Pepperdine University School of Law and is an Adjunct Professor teaching "Mediation Theory and Practice" and the "Mediation Clinic" there. She has mediated hundreds of cases for ADR Services, the Los Angeles Superior Court, the Central District Court, the Department of Consumer and Business Affairs, and the Center for Conflict Resolution. She specializes in mediations involving business, personal injury, employment, entertainment, construction defect and real estate disputes.*

Stacie Hausner
ADR SERVICES, INC.

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Influence in settlement negotiations: 15 tips

"INFLUENCERS" ARE NOT JUST SOCIAL MEDIA PHENOMS; STRATEGIES TO INFLUENCE OTHERS ARE VITAL IN MEDIATION

Negotiations are a part of our everyday personal and professional lives. Because of this, persuasive negotiation techniques are important. For lawyers, they are particularly important because lawyers typically need to negotiate at some point in litigation, given that 95% of cases settle before trial. Lawyers tend to approach settlement with different negotiation styles. Some find it advantageous to approach these negotiations with distributive fixed-pie bargaining. With this approach, lawyers often engage in a push-and-pull style negotiation in which they take strong positions and try to grab as many settlement dollars as possible for their clients from the opposition. A dollar gained by one side in distributive bargaining is a dollar lost by the other.

Other lawyers will consider a facilitative, integrative bargaining approach in which they attempt, metaphorically, to expand the pie by asking why the other side is asserting particular positions. They then look for overlapping interests or a tradeoff of interests to find creative resolutions. This negotiating style allows for resolutions unavailable through a verdict, such as ribbon-cutting ceremonies, mutual press releases, future business relations, repairs of defective products, performance of contractual obligations, and the like.

Finally, other lawyers engage in a flexible hybrid of strategies, often starting with positional distributive bargaining and moving to integrative bargaining to bridge potential impasses in the negotiations.

Persuading others

Regardless of the negotiation strategy employed, lawyers can enhance their settlement results by better persuading others to accept their proposals. Robert Cialdini, a social and behavioral scientist, has done a remarkable amount of research and analysis in the field of influence, some of which he distilled in his books Influence: Science and Practice; and Pre-Suasion: A Revolutionary Way to Influence and Persuade. Many marketers and business professionals have used his studies to develop strategies to influence

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customers to use their services and purchase their products.

As examples, they may put clouds on the wall of a furniture store to encourage people to buy the most comfortable sofas, offer free desserts at a restaurant because it results in greater tips for the wait staff, provide free samples of food at a grocery store because it makes it more likely the sampler will reciprocate by buying the sampled item, or play German music in a wine store because it results in more customers buying German wine. Clearly, marketers are consistently searching for more effective strategies to influence consumer behavior. The legal profession should utilize these same types of influence techniques when negotiating a settlement because it can enhance the opposition's compliance with your settlement requests. This article will explore various influence techniques and discuss how to best apply them in settlement negotiations.

"Pre-suasion"

Cialdini's elaborate influence work clearly maintains that the psychological frame of a discussion at the outset can carry equal or greater weight than the actual merits of any request. He explains that one should master the art of "pre-suasion," which is "arranging for recipients to be receptive to a message before they encounter it." It would seem that Sun Tzu understood this when he made this famous and historical quote: "Every battle is won before it is fought." Essentially, in the legal context, this means that the best tactic to influence is not arguing the merits of a settlement request alone. Rather, before delivering the merits of your proposal, think about pre-suasion and influence techniques that will increase the likelihood that messages, ideas and proposals will be accepted.

First, focus the attention of the opposition on a strength of the case immediately before making a settlement proposal. Cialdini explains that people can only focus on one thing at a time and, unsurprisingly, they tend to give heightened importance to whatever has their attention. He explains that the factor most likely to determine a person's choice in the situation is the one that has been elevated in attention at the moment of the decision. Use this concept when asking for acceptance of a settlement proposal. Focus the conversation on the strongest points of the case immediately prior to making a settlement proposal. If the case is weak on liability and strong on damages, focus the conversation on damages. Similarly, if there are cross-claims and multiple issues in the dispute, focus attention on the issues that favor the case immediately prior to making a settlement proposal.

Additionally, garner more attention for ideas by speaking quietly, as listeners will need to lean in to hear what is being said. The research shows that people will pay more attention and give heightened importance to things that they move toward. Although these tactics can help bring attention to topics that, when introduced immediately before a settlement proposal, may influence compliance, be mindful to give an audience to the other side's arguments and interests. Failure to do so could anger the other side and make them disinclined to grant requests. Therefore, validate the opposition's feelings and positions, but wait to make a settlement proposal until after turning the opposition's attention to conversations that favor your case.

Second, tether a requested settlement amount to a larger anchoring number so that it seems small in comparison. For example, say "I'm not going to ask for $2,000,000 dollars today." In doing so, when subsequently asking for $400,000, it seems relatively small and reasonable in comparison. Lawyers commonly use this anchoring principle in mediation. They start negotiations with an anchoring number that is extremely high or low so that they can make concessions and then conclude with a settlement request that seems reasonable in relation to the anchoring number. However, be cautious when using extreme numbers due to the potential negative impact it can have on the opposition's negotiating behavior. If the number is perceived as insulting, the other side may terminate the negotiation, present an equally offensive anchor, or engage in poor negotiating behavior – all of which obstructs an ability to influence. It is best to find the sweet spot when establishing an anchoring. It should be large enough to create the influence of an anchor and to allow for concessions, but not so extreme that it insults the opposition and makes them disinclined to satisfy settlement proposals.

Third, tether settlement proposals to a quality that the opposition would like to possess. For example, Cialdini explains that people are more inclined to fill out a survey after being asked if they are "helpful." Similarly, people are more inclined to try a new food after being asked whether they are "adventurous." Use these same tactics in settlement negotiations. To encourage the opposition to work collaboratively to find a creative resolution, try asking them first if they are good at problem-solving or if they are helpful. Similarly, to encourage settlement rather than trial, ask them if they "want to move on" with their lives (rather than spend the next couple of years fighting at trial), or if they are "ready to live without conflict." Finally, ask questions specific to their individual case as a mechanism for influence. For example, in an employment case, ask whether someone considers themselves a hard worker to influence them to consider alternate employment, or in a family dispute, ask if they value family, to influence them to resolve the dispute. Regardless of the specifics in the case, remember that tethering a request to an attribute that the opposition would like to possess is a strong influence technique.

Don't offer options at the outset

Fourth, do not give a list of options for settlement at the outset. Cialdini explained that a consumer is more likely to buy a camera when the salesperson focuses the consumer's attention only on that one camera and avoids discussion of other options. Similarly, provide the opposition with only one settlement option at a time, starting with the most advantageous option for the client. Doing so will make it more likely to

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influence acceptance of that settlement proposal.

Fifth, when possible, frame discussions to focus on "danger" or a "new idea" because these concepts create automatic attention. For example, create attention by discussing that it is "dangerous" to not save money, to eat sugar, to err on a tax form, or to go to trial. Mediators often capitalize on this "danger" concept by talking about the costs and risks of trial as a mechanism to influence settlement. Although people have different propensities for risk-taking, these are generally the very types of dangers that people try to avoid. Similarly, make sure to highlight new settlement proposals and ideas as "new" in order to create heightened attention to it. Obviously, what is portrayed as "dangerous" and "new" will vary depending on the case. However, simply talking about ideas in these terms will create the additional attention and influence that fosters a higher acceptance of settlement proposals.

Sixth, preload a request with positive associations to persuade people to accept the information that is about to be delivered. Cialdini explained how viewing photographs of people winning a race can make people more productive in their work environment and that objects illustrating warmth make people feel more warmly toward others. Similarly, preload associations before making a settlement request to influence its acceptance. For example, photographs of people smiling and interacting, or art work showing a handshake, could preload the association of the importance of settling and resolving conflict. Similarly, a round table during a negotiation may preload people with the association of working together, rather than engaging in a competitive negotiation posture. Alternatively, influence acceptance of a settlement proposal for an extended contract or a future business relationship by using photographs showing achievement, businesses working together, or relationships.

Keep requests simple

Seventh, make a request and settlement proposal easy to understand. Cialdini's research shows that people associate more readily with, and are more influenced by, concepts that they can understand. People tend to avoid exerting effort to decipher complicated arguments and positions. OJ Simpson's criminal defense team did this well. They asked the jury to find OJ not guilty in a lengthy and convoluted trial, after repeatedly peppering their closing argument with a very simple tagline, "if [the glove] doesn't fit, you must acquit." We should apply this same concept of simplicity in settlement negotiations. Influence compliance by simplifying complicated concepts prior to making a settlement proposal.

Eighth, use fatigue and rushed circumstances as an advantage. Cialdini explains that when people are fatigued or particularly rushed, they do not slow down to do a deep analysis of a request. Rather, they give a gut response and are more susceptible to influence manipulations and techniques. Therefore, to push through a resolution and benefit from pre-suasion association and techniques, it may prove advantageous to do it in fatigued or rushed circumstances so that the request is not denied because of the opposition's careful deliberation. Conversely, when a deep analysis of a settlement proposal would be beneficial, then slow down the negotiations, take an extended break, or even pause negotiations until a different day.

Ninth, utilize the very strong social obligation of the rule of reciprocity. Cialdini explains that the rule of reciprocity obligates people to repay a favor with a favor. Interestingly, the reciprocated favor is oftentimes of greater or different value than the initial favor. Use this concept to manipulate your opposition during negotiations. Use positive, respectful and generous negotiating behavior to engender it in return and make it easier to influence the other side into accepting settlement proposals. Express a desire to meet the needs of the opposition so that they can repay the favor by meeting your needs. Grant the opposition's request for something less valuable to trigger an obligation of reciprocation before making a settlement proposal. When negotiating in your law office, be a gracious host that provides food and a comfortable room so that when making a settlement proposal, they are more inclined to want to repay the generosity by accepting the proposition. Similarly, grant discovery extensions and show courtesy to the needs of the opposition in litigation prior to the negotiations, so that the other side reciprocates. Simply stated, generosity begets generosity.

The Rule of "Liking"

Tenth, use the rule of "liking" to influence the other side to accept a request. Cialdini explains that the more that the other side "likes" you, the more they can be influenced. Increase the chance that the opposition "likes" you by treating them respectfully and, when possible, trying to accommodate their scheduling and discovery needs during the litigation. Additionally, during a settlement negotiation, become more "liked" by validating their needs and proposals, showing empathy, listening actively, speaking respectfully, avoiding character attacks, expressing an interest in meeting their needs, and looking for tradeoffs to satisfy their needs on matters that are of low value to a client. It can be particularly valuable to be "liked" to counter-balance some of the dislike that the opposing clients naturally have due to the litigation. Therefore, use positive and "likeable" behavior to make it more likely that the opposition will accept settlement proposals.

Eleventh, use the concept of authority to influence acceptance of a settlement request. Cialdini explains that people are more inclined to listen to people who have expertise in a subject, so long as they trust the expert. When selecting a mediator, pick one who is trustworthy, an expert in the subject matter, or just an expert at mediating, so that they can exert influence over the opposition when trying to shift perspectives and move the parties closer to a resolution. In fact, it is often wise to let the opposition pick the mediator for this very reason. When no mediator is present, consider using a

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well-respected expert in the field to render an opinion about the relevant subject matter, a particular aspect of the case, the law, settlement value, likely trial results, comparable verdicts, and the like. Similarly, consider hiring a prominent lawyer who is an "expert" in the field to represent a client's interests in settlement or at trial because his or her opinions and requests may have additional influence on the opposition.

Twelfth, use the concept of social proof for influence. People are more inclined to feel, believe and act like others, especially comparable others. When others behave in a similar way, people feel that their position is valid and feasible. Therefore, before making a settlement proposal, gain influence by showing comparable statistics and discussing how similarly situated people have accepted and enjoyed the benefits of the same type of proposals.

Thirteenth, use the concept of scarcity to influence people to accept settlement requests. People are more inclined to accept an offer when there are not other offers readily available because we inherently value items that are scarce. This explains why a ticket to a concert is more likely to be bought if it is the last remaining ticket. Negotiators can make exploding settlement offers that expire after a set time. If an offer is only available for a day or for a set time period, the pressure from the scarcity effect may make the opposition more inclined to accept the offer.

Fourteenth, use the concept of "consistency" for influence. People want to act consistently with their previously held views and positions. Cialidini found that people who pray every night for their wife's well-being were less likely to cheat because it would be inconsistent with their daily prayer. Use this need for consistency to create influence by highlighting the opposition's positions that are consistent with a settlement position. However, be aware that this need for "consistency" can also hinder settlement because people do not want to appear inconsistent. Help combat this obstacle to settlement by avoiding steadfast positions. Frame valuations and expectations in the case in a fluid or flexible way so that, as the litigation unfolds and there needs to be compromises for settlement, there is an ability to do so without appearing inconsistent to the client or the opposition. Similarly, if clients have taken a strong position as to fault or blame, avoid these discussions during settlement negotiations so that they will not have to take an inconsistent position that would prevent settlement. Instead, move conversations to solutions so that the strong concept of consistency will not hamper settlement.

Fifteenth, accompany a request with explanations. Studies reveal that people are more inclined to acquiesce to a request when information is provided. This is why mediators often ask for concessions after delivering information. Do the same when negotiating without a mediator because the more explanations given about a request, the more inclined people will be to grant it.

The power of "unity"

Finally, utilize the powerful feeling of "unity" to influence people into accepting settlement requests. Cialdini explains that people are more likely to be influenced when they feel that they have something in common with the person making the request. This includes family members or people with whom they feel connected by geography, political views, religious views, organizations and the like. For example, Warren Buffet's investors bought more shares in his company once he explained that he gave the same investment advice to his own family members. Similarly, if a doctor reveals that he or she gave the same treatment plan to a spouse, a person would be more inclined to follow the prescribed treatment. Try using the same type of tactic in your negotiations.

Also, to better create "unity," be mindful of word selection. Studies have found that using words like "we," "us," "brother" or "sister" can make people more susceptible to influence because it engenders the warm, trusting and positive feelings typically found in familial relationships. The trust component can be key because the studies reveal that people are more influenced by those they trust. Also, consider asking the opposition for advice about settlement because it can create a feeling of collaboration, thereby unifying the parties. Similarly, phrases, such as, "we can get this problem solved" creates the same collaborative and unifying feeling. Finally, small talk designed to create connections and commonality can allow for more influence. Look for commonalities in friends, religious institutions, neighborhoods, children, organizations, and the like. These types of shared experiences allow for more influence when making a settlement proposal.

In conclusion, remember that there are many, many tools that can influence people to accept settlement proposals. Do not rely solely on the merits of an argument. Instead, incorporate these different strategies of influence to deliver settlement requests in a way that makes them more likely to be accepted. In doing so, settlement outcomes and client satisfaction can best be optimized.

Stacie Feldman Hausner, Esq. became a full-time mediator after a 15-year career as a litigator, practicing law at both defense and plaintiff law firms, Ms. Hausner launched her mediation practice because she understood the perspectives and interests of the opposing sides to a dispute, as well as the benefits of alternative dispute resolution. She received an L.L.M. in Dispute Resolution from the Straus Institute at Pepperdine University School of Law, and prior to joining ADR Services, Inc., she successfully mediated over a hundred settlement conferences at the Santa Monica Courthouse. She teaches "Mediation Theory and Practice" every semester at Pepperdine University School of Law (Straus) and teaches the "Mediating the Litigated Case" Straus program to judges and attorneys training to become mediators. She also presents frequent MCLE trainings to lawyers and mediators on various topics (including optimizing settlement and negotiation outcomes), trains women in a yearly Women's Negotiation Academy, coaches business people on effective negotiation strategies, and educates women negotiators in the workplace.