

Psychological Principles in Negotiating Civil Settlements

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I. INTRODUCTION

Fewer than five percent of all civil cases filed will result in a verdict;¹ most of the rest will be resolved by negotiation between attorneys. Even in the fraction of cases that go to trial,² lawyers negotiate such important matters as discovery schedules,³ dates for depositions,⁴ court appearances,⁵ and stipulations that limit the number and complexity of contested issues.⁶

Although lawyers, like most other professionals, typically believe that consistent, reasoned, objective, and rational decisionmaking

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1. Marc A. Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 n.2 (1994), cites a study by Herbert Kritzer that suggests that approximately seven percent of cases filed in federal courts ultimately do not settle. Other commentators focus more closely on the 5% figure—aggregating federal and state rates. See, e.g., Susan C. Del Pesco & Richard K. Herrmann, *The Second Face of Toxic Tort Litigation: Claims for Insurance Coverage*, 2 WIDENER L. SYMP. J. 205, 219 (1997); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, Table 1 at 540 (1989).

2. Many commentators distinguish between “litigators” and “trial attorneys,” suggesting that the former are engaged in pre-trial jockeying to position themselves for an advantageous settlement. See, e.g., Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 484 (1995).

3. See, e.g., Dean Hansell & H. David Henry, *Undertaking and Managing Discovery in a CERCLA Case*, C534 A.L.I.-A.B.A. 805, 814 (1990).

4. See, e.g., Gary Langan Goodenow, *Preliminary Considerations When Responding to an SEC Enforcement Subpoena*, FLA. B.J., Dec. 1996, at 32.

5. See, e.g., Michael Traynor, *Countering the Excessive Subpoena for Scholarly Research*, 59 LAW & CONTEMP. PROBS. 119, 126 (1996) (noting that it is often necessary to negotiate convenient court dates for subpoenaed witnesses).

6. For an extensive discussion on the uses of negotiation to limit the number of contested issues, to smooth the path for trial, and to create stipulations, see Fred Misco Jr. & Frank E. Goodrich, *Managing Complex Litigation: Class Actions and Mass Torts*, 48 BAYLOR L. REV. 1001, 1072 (1996); Amy Shapiro & Sarah A. Edlund, *Shortening Trial Time*, 17 FAM. ADVOC. 28 (1994).

characterizes their negotiations,⁷ an abundance of evidence suggests that this belief is misplaced.⁸ Research in the past few decades has documented pervasive psychological biases in the judgment and decisionmaking of a wide array of professionals and laypersons. For example, people tend to seek information that confirms their prior beliefs, and also tend to ignore or derogate information that refutes those beliefs. In the practice of law, such biases can act as barriers to mutually beneficial settlements.⁹

This article focuses on psychological obstacles to the rational resolution of legal disputes. Our purpose is to alert legal scholars and practitioners to the psychological principles most relevant to legal negotiation, particularly those that apply to civil litigation.¹⁰ In so doing, we adapt a well-established body of psychological literature to

7. John P. Gould describes the "rational model" as it applies to law in *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973). This model incorporates the basic assumptions of classical economics, namely that actors make choices so as to maximize their own utility, and that they are unaffected by such artifacts as framing or reference points.

8. See DANIEL KAHNEMAN ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982); DANIEL KAHNEMAN & AMOS TVERSKY, CHOICES, VALUES AND FRAMES (forthcoming, Cambridge Press).

9. Lawyers stumble over three distinct types of barriers to the negotiated resolution of conflict: (1) strategic barriers, (see generally Robert H. Mnookin & Lee Ross, *Introduction to BARRIERS TO CONFLICT RESOLUTION 3* (Kenneth J. Arrow et al. eds., 1995) (hereinafter "BARRIERS"); see also, Howard Raiffa, *Analytical Barriers*, in BARRIERS at 132; Robert B. Wilson, *Strategic and Informational Barriers to Negotiation*, in BARRIERS at 108); (2) institutional barriers, (see generally Part IV: *Institutional Perspectives*, in BARRIERS at 184-272); and (3) the focus of this article, psychological barriers, (see generally Part II: *Social and Psychological Perspectives*, in BARRIERS at 26-106).

For a few stories about how skilled attorneys have missed negotiating opportunities that would have produced outcomes superior to litigation for both sides, see Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflicts*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993).

In addition, lawyers are often criticized for negotiating inefficiently, settling on the so-called "courthouse steps." See Dick Thornburgh, *America's Civil Justice Dilemma: The Prospects for Reform*, 55 MD. L. REV. 1074, 1088 (1996); John G. Mebane III, *An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in the North Carolina Superior Courts*, 71 N.C. L. REV. 1857, 1892 (1993); Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429, 433 & Illustration 1 at 456 (1992).

10. Although we focus on the context of domestic civil litigation, we believe that the principles we describe are applicable to a variety of other legal contexts as well. We owe thanks to Professor James Nafziger for pointing out the applicability of many of these principles to the realm of international law, and to the students in Professor Birke's seminar, Advanced Topics in Conflict Theory, for pointing out the applicability to transactional bargaining.

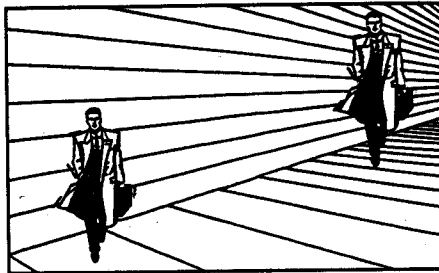
legal negotiations.¹¹ Because there have been few attempts to date to adapt these principles specifically to the realm of legal decisionmaking,¹² our applications of some of these principles to legal negotiations are necessarily speculative. Nonetheless, we believe that awareness of these principles will help practitioners achieve more efficient and desirable settlements.¹³ The psychological principles that we present in this article operate in a similar manner to optical illusions¹⁴ in that they typically involve automatic, subconscious

11. By well-established, we refer to the fact that most of the work upon which we rely has been published in peer-reviewed journals and most of the results have been replicated by other researchers beyond those cited.

12. Fortunately, there are notable exceptions, and the field of psychology is making inroads into the realm of legal decisionmaking. Among the recent works of note are Symposium, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1497 (1998); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994); Mark Kelman et al., *Context Dependence in Legal Judgment*, 25 J. LEGAL STUD. 287 (1996).

13. The applications of psychology to legal decisionmaking contained in this article are intended, in small part, to respond to the demand of such noted academics as Professor Cass Sunstein that there be an increased awareness of the principles of decisionmaking that apply to law. See Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997). Sunstein exhorts academics to study these phenomena both as theory and in empirical studies, so that we may propose changes to lawyering procedure, and thereby minimize ill effects that occur when the nature of human psychology hampers the effective practice of law. "What has been learned about human behavior and choice should be linked, at the theoretical and empirical levels, with analysis of the legal system." *Id.* at 1176. Professor Sunstein promotes advances in psychology as needed refinements of theories of law and economics.

14. To illustrate, take a moment to examine the figure below. Which attorney is larger?



Although most people judge the attorney closer to the top right corner of the illustration to be larger, it is, in fact, the same size as the one closer to the bottom left corner of the illustration. One explanation offered by some cognitive psychologists is that our minds interpret this drawing as a two-dimensional projection of objects in three-dimensional space. Experience teaches that objects with the same size image on our retina that are further away in space tend to be larger than objects that are closer. See R.L. GREGORY, *EYE AND BRAIN* (1973). For other views and explanations,

processes that are difficult to subvert. However, we think that increased awareness of psychological principles will make any lawyer a better negotiator, as awareness can help lawyers identify situations in which they might consciously choose to override or attempt to compensate for their instinctive reactions. Moreover, understanding of these tendencies can help lawyers anticipate bias in the behavior of others.

II. STRUCTURE OF THIS PAPER

This article is organized around a series of questions that lawyers are likely to ask themselves as they guide cases from intake through to settlement.¹⁵ These questions appear in approximately the same order in which attorneys encounter them in processing claims.

Questions One and Two relate to initial intake and preliminary valuations:

1. How much is a case like this worth?
2. How likely am I to prevail?

Questions Three and Four involve the discovery process:

3. How much information do I need to gather?
4. How do I evaluate the strength of the information that I gather?

Questions Five and Six relate to evaluating settlements:

5. What constitutes a good outcome?
6. What is a fair resolution of this matter?

Questions Seven through Ten relate to the actual negotiation of settlements:

7. Should I make the first offer or wait until the other side makes it? If I make it, how extreme should it be?

and for a discussion, see E. BRUCE GOLDSTEIN, *SENSATION AND PERCEPTION*, 259-61 (1989). Hence the top-right attorney is automatically perceived as further away and therefore larger, despite the fact that its apparent distance should be irrelevant to the judgment of its size in the plane of the paper.

15. For purposes of this article, we assume that attorneys are motivated to act in the best interests of their clients. We acknowledge that the attorney-client relationship is rife with potential principal-agency conflicts, as is any business relationship involving representation. Although these problems are fascinating and worthy of exploration, they are beyond the scope of this piece. For more information, see JOHN W. PRATT & RICHARD J. ZECKHAUSER, *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* (1991); Sanford Grossman & Oliver Hart, *An Analysis of the Principal-Agent Problem*, 51 *ECONOMETRICA* 7 (1983).

8. How should I frame or present my offer?
9. How should I evaluate offers from the other side?
10. How can I get people to accept my offers (or counter-offers)?

For each question, we present hypothetical situations in which one or more psychological principles are likely to impact the answer. We then describe the psychological principles that apply and some studies that illustrate and support the principles under discussion. Next we explore the application of psychology to the practice of lawyerly decisionmaking. Finally, to the extent that remediation is suggested by the research literature, we offer appropriate prescriptions.¹⁶ Where there is no such body of work,¹⁷ we suggest directions for empirical research.

III. ANALYSIS OF THE QUESTIONS PRESENTED

Question 1: How much is the case worth?

You check your voicemail to find messages from three potential clients. The first says: "I have a relative who I am sure was murdered. The District Attorney charged her ex-husband, but the criminal prosecution was botched and he was acquitted. I'd like you to pursue the civil wrongful death claim. The ex-husband is quite wealthy and well-known, and the case against him is very strong."

The second message is from a woman who says, "I bought a hot apple pie from a drive-through at a fast food restaurant. At least ten minutes later, when I bit into it, the pie was still scalding hot. I burned my gums and lips badly enough to require oral surgery. My lips were tender for six weeks and I could barely talk for the first two."

The third message is from a woman who says, "I was a legal secretary at a large downtown firm. I've been sexually harassed by my supervisor who is a partner at that firm. I complained to his superior and almost immediately thereafter I was fired. I don't know how long it will take me to find another job paying the \$3,000 per month that I

16. Our primary purpose is to help lawyers defend against, rather than exploit, psychological barriers to effective settlement. Clearly, many of these principles could also be used proactively to gain advantage for one's own side. Questions about the propriety of such uses of knowledge are, in our opinion, better left to legal ethicists. For more specific guidance, see Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997); Michael H. Rubin, *The Ethics of Negotiation: Are There Any?*, 56 LA. L. REV. 447 (1995); Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990); Alvin Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975).

17. Or when we failed to find such work.

was making, and I'd like to get punitive damages because he has a reputation as a womanizer who won't mend his ways. He's done this before, and his partners know it. The firm protects him because he brings in lots of clients."

Assuming that your firm has the right kinds of expertise, should you take the cases? How much is each of these cases worth?

These "cases" may sound familiar. Many people reading these fact patterns think of the O.J. Simpson civil trial,¹⁸ the McDonald's coffee case,¹⁹ and the Baker & McKenzie sexual harassment suit,²⁰ respectively. However, recalling the outcomes of these notorious cases is likely to distort your valuation of the hypotheticals set forth above.

When judging the value of a case, lawyers naturally look for information concerning the past resolution of similar disputes. The greater the number of comparable cases, the more precisely the outcome of the present case can be estimated. Routine tort cases are reported in many jurisdictions,²¹ and it is a relatively simple research matter to determine the expected jury award in a given location for, say, a "slip and fall" at a commercial establishment,²²

18. The criminal trial can be found as *People v. Simpson*, No. BA097211, 1995 WL 704381, with the verdict of acquittal at *2 (Cal. Super. Trans. Oct. 3, 1995). The civil trial is *Brown, Goldman, Rufo v. Simpson*, No. SC036876, SC036340, SC031947, 1996 WL 530984, at *1 (Cal. Super. Doc. Sept. 10, 1996).

19. A jury in Albuquerque, New Mexico awarded \$2.9 million to a customer of the McDonald's restaurant chain who spilled coffee on herself after purchasing the coffee at a drive-through. For more information, see, e.g., *McDonald's Cup of Scalding Coffee: \$2.9 Million Award*, CHI. TRIB., August 18, 1994, at 1. The judge in the case reduced the award to \$480,000, but the reduction received less press coverage than did the award. See, e.g., *Judge Reduces Award in Coffee Scalding Case*, CHI. TRIB., Sept. 14, 1994, at C2.

20. *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 74 Cal. Rptr. 2d 510 (1998) (upholding most of the trial court's findings but reducing the \$6.9 million punitive damages award to \$3.5 million). For more information, see Wendy Kaminer, *Harrassed and Abandoned*, CAL. LAW., May 1995, at 52.

21. A sample database is the listing of Oregon Litigation and Arbitration Reports, *SemiAnnual Index*, January-June 1996, published by Jury Verdicts Northwest, P.O. Box 1165, Seattle, WA 98111. Printed verdicts are captured in publications such as *JURY VERDICTS WEEKLY*, published by JVW, P.O. Box 2468, Santa Rosa, California, 95405-0468. In addition, there are now many electronic databases available on-line through Westlaw and Lexis that provide similar information.

22. Running the query "slip and fall" in the Westlaw database "CA-JV" (California Jury Verdicts) on February 11, 1998, yielded 788 cases. While we did not do the math, the process of determining the expected value of a "slip and fall" would be a relatively simple matter. One would simply add up the number of plaintiffs' verdicts and divide by 788 to determine the chance of winning. The next step would be to find the average amount won by plaintiffs in the cases in which they prevailed. This step would be accomplished by adding together all plaintiff verdicts and dividing by the

assuming there are no unusual circumstances.²³ An insurance dispute over the lost value of a home damaged by fire is similarly easy to determine, because comparable homes can be appraised or the costs of rebuilding can be assessed.²⁴

Of course, there are sometimes unique circumstances that make a given dispute much more difficult to value. For example, if the person who slipped and fell was a member of the Olympic skating team, or if the destroyed home was a rare example of a celebrated architect's work, the values would be much more difficult to estimate with precision. We believe that such unusual cases are, by definition, relatively rare.

Memorable cases will naturally spring to the lawyer's mind when she is considering the value of a case in the same topical area. Likewise, if the case at hand is superficially similar to a high-profile case, the lawyer may use the latter as a basis for judging the former. Trouble arises when these salient, related cases distort the lawyer's appraisal of the case at bar.

1. *Psychology Relating to Preliminary Valuation: The Availability and Anchoring Heuristics*

Consider the following question: are there more male or female lawyers in America? To answer this question with complete accuracy would require demographic professional data. However, people render judgments on such matters all the time based on their own

number of plaintiff verdicts. Finally, the expected value calculation would be the product of the likelihood of winning and the amount won on average.

Of course, the appropriate category for comparison may not always be obvious. For instance, should we compare the present case to the generic category (e.g. "slip and fall") or a more specific category (e.g. "slip and fall at a fast food restaurant" or "slip and fall after business hours")?

23. Colleagues who teach trial practice object strenuously to the notion that one could determine the expected value of a jury verdict, no matter how large the sample. They suggest that every case is sufficiently unique and that the identity of the judge, the jury, and (most importantly) the trial attorneys are "wild cards" that make all jury cases singular—even common tort cases. We do not mean to assert that each individual case can be predicted with precision. We merely point out that there is a simple means for calculating the expected value of a class of similar cases.

In any given case, a verdict may fall far from the expected value of the verdict for that class of cases. Skill at trial may make a difference. Moreover, anecdotal reports from colleagues and acquaintances suggest that the most important factor for a plaintiffs' attorney who expects to return favorable jury verdicts lies in deciding which clients to accept and which to send to other attorneys. Therefore, one's "batting average" is not solely a function of trial skill.

24. See, e.g., AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE* 5-6, 60-72 (1967).

experience and intuition. In this case, for example, most people consult their memory and conclude that because it is easier to recall examples of male lawyers than female lawyers, the former are probably more common than the latter. They are using a mental short cut or *heuristic* to solve the problem. In this case, people automatically assume that when it is easier to recall examples of something, it tends to be more common. In the example of male and female attorneys, such reasoning provides the correct answer.²⁵

Now consider a different question: are there more murders or suicides each year in America? If you answered "murders," you might be surprised to learn that, in fact, suicides are much more common.²⁶ In this second instance, the "availability heuristic"²⁷ fails because one's memories do not reflect a representative sampling of what exists in the world. Memories are often biased by vivid, extreme events that tend to receive extensive media coverage. Movies, television dramas, and news reports tend to make murder seem much more common than suicide.

There are many instances of such distortions. For example, people typically think that there is a higher percentage of African-American citizens in Los Angeles than African-American officers on the L.A. police force, that a higher proportion of top Hollywood actors than U.S. Congressmen are homosexual, and that it rains more in Seattle than it does in Northern Georgia. None of these apparent "facts" is true,²⁸ but because it is easier to conjure images of African-

25. In 1991, twenty-two percent of all working attorneys were female. See John C. Coughenour et al., *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 777 (1994). However, in 1994, approximately forty percent of new entrants into the profession were female. *Id.* at 772.

26. In 1995, there were 30,862 suicides and 22,895 homicides in the United States. See National Center for Health Statistics, *Report of Final Mortality Statistics, 1995*, in 45 MONTHLY VITAL STATISTICS REPORT (June 12, 1997).

27. For a more detailed account of the psychology of the availability heuristic, see Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973). For an accessible introduction to different judgmental heuristics and associated biases, see Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty, Heuristics and Biases*, 185 SCIENCE 1124 (1974).

28. In fact, in each instance the opposite is true. According to *Harper's Magazine*, 15% of the LAPD is black, while only 14% of the city's population is, and 4% of Congress is openly gay, while none of the top 100 Hollywood actors are openly gay. See, respectively, 292 HARPER'S 11 (January 1996) and 293 HARPER'S 17 (November 1996). According to one website <<http://www.beautifulseattle.com/weasea.htm>>, the average rainfall in Seattle is 37.19 inches (visited Mar. 29, 1999). A different website <<http://georgiamagazine.com/chamber/murray/demograp.htm>> lists North Georgia's average rainfall at 53 inches (visited Mar. 29, 1999).

American Los Angelinos than it is to conjure images of African-American L.A. police officers, openly gay actors than openly gay politicians, and rainy scenes of Seattle than rainy scenes of Georgia, most people automatically deem the former more common than the latter.²⁹

Media reporting facilitates availability distortions of legal matters as well. When people think of a tort case in contemporary society, they are likely to think of McDonald's coffee³⁰ or Dow Corning breast implants.³¹ When thinking of a murder trial, O.J. Simpson may come to mind first.³² When thinking of sexual harassment suits, the case involving Paula Jones and President Clinton comes to mind,³³ and then perhaps the cases involving Anita Hill and Clarence Thomas,³⁴ Baker & McKenzie,³⁵ Mitsubishi,³⁶ and former Senator Packwood.³⁷ Although people may be aware that these cases are atypical, their sensational portrayal by the media renders them readily available to memory. In fact, these cases are newsworthy precisely because they are not typical. However, when making predictions, people often fail to compensate for the gap between what is memorable and what is typical. If a lawyer knows that the upper

29. This distortion operates in much the same way that the optical illusion in the introduction makes one of two equal-sized images look larger than the other. See *supra* note 14 and accompanying text.

30. See *supra* note 19.

31. For a description of this controversy and its resolution, see *Dow Corning Corp. v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn.*, 86 F.3d 482 (6th Cir. 1996). This opinion describes the proceedings leading up to the resolution of the class-action tort suit, and it also discusses the financial structuring of the settlement.

32. While writing this article, we sent an email query to the Willamette Law School community and received over 100 responses in one day. The message asked recipients to "[p]lease name the civil case that you think of when asked to think of a civil case and the criminal case you think of when asked to think of a criminal case." More than 80 people responded that in the civil arena they thought of the O.J. case, and almost all of the rest answered McDonald's coffee. In the criminal arena, more than 80 percent of the responses listed O.J., and almost all of the rest named the Louise Woodward au pair case. Responses are on file with the authors.

33. See *Clinton v. Jones*, 520 U.S. 681 (1997).

34. See generally TIMOTHY M. PHELPS & HELEN WINTERITZ, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* (1992) (explaining the events leading up to and including the Senate confirmation hearings of Justice Thomas and the allegations of Anita Hill).

35. See *supra* note 20.

36. See James P. Miller, *Mitsubishi will Pay 34 Million in Sexual Harassment Lawsuit*, WALL ST. J., June 12, 1998, at B4.

37. "After an investigation that lasted close to three years, the six member ethics committee backed up its unanimous recommendation to expel [Packwood] with unusually harsh words and a 40-pound 10-volume set of evidence detailing the allegations of sexual misconduct and abuse of office against the Senator." Jill Zuckman, *Packwood Resigns in Senate*, BOSTON GLOBE, Sept. 8, 1995, at 1.

end of jury awards in sexual harassment claims is 7.2 million dollars, she may realize that her case is worth less, but the fact that it is so easy to recall such notable cases as Baker & McKenzie makes an extreme award seem possible.³⁸

This bias may be reinforced by a second psychological phenomenon: the tendency to anchor on a salient number and make insufficient adjustments in response to individuating details of the case at hand. For example, if a recent court award for a similar case comes to mind, people may be unduly influenced by this value in their assessment of the present case. Research shows that even when a focal number is not particularly relevant, it can exert a bias on judgment under uncertainty. For example, in one study, participants were asked to judge the percentage of African countries that were members of the United Nations.³⁹ Before participants gave their answer, the experimenter spun a wheel to determine a threshold percentage. Despite the fact that the focal number was absolutely irrelevant to the issue, the number had a dramatic influence on respondents' estimates. When the wheel landed on the number ten, the median estimate of African countries in the United Nations was twenty-five percent; however, when the wheel landed on the number sixty-five, the median estimate was forty-five percent.⁴⁰

People are especially susceptible to anchoring bias when they have little relevant experience or knowledge.⁴¹ However, expertise alone fails to provide protection from this tendency. In one study, several experienced real estate brokers were asked to provide information they used to appraise a piece of residential real estate and to estimate how accurately agents could appraise its value when given

38. See 6 EMPLOYMENT DISCRIMINATION REPORTER (BNA) 743-45 (May 29, 1996) (finding that in wrongful discharge cases in California from 1989-1995 those involving sex discrimination had a mean jury verdict of \$94,767, a far cry from the \$7.2 million awarded to Rena Weeks).

39. Daniel Kahneman & Amos Tversky, *Judgement Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

40. The wheel was rigged to provide either 10% or 65% as a "threshold number."

41. See Gregory B. Northcraft & Margaret Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84 (1987) (finding a more pronounced anchoring effect for students than for professional real estate agents); ILANA RITOV, *Anchoring in Simulated Competitive Market Negotiation*, 67 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 16 (1996). But see William F. Wright & Urton Anderson, *Effects of Situation Familiarity and Financial Incentives on Use of the Anchoring and Adjustment Heuristic for Probability Assessment*, 44 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 68 (1989).

that information.⁴² The brokers responded that the information should support an agent's estimate within five percent of the true value. Other groups of agents were given packets of information on a home that included a bogus listing price that was eleven percent above the true listing price or eleven percent below the true listing price. These two groups were asked to estimate the appraised value of the home. Although the agents explicitly denied that listing price affected their appraisals significantly,⁴³ the manipulation of the bogus listing price led to a substantial difference in these values between the groups.⁴⁴

Consider again the cases described at the beginning of this section. If the O.J. Simpson, McDonald's, and Baker & McKenzie cases sprang into your mind, you may also have overestimated the likelihood of a sizable plaintiff's verdict due to the availability heuristic. You might have intentionally or unintentionally anchored on your recollection of the value of the notorious verdicts (\$33.5 million,⁴⁵ \$2.9 million,⁴⁶ and \$7.2 million,⁴⁷ respectively) and made insufficient adjustment for the differences between those cases and the hypothetical cases.

2. Remediation

To guard against bias when valuing a case, attorneys should research compiled statistics on outcomes of similar cases rather than relying exclusively on intuitive judgments which may be skewed by media reports of sensational cases. A thoughtful look at the class of comparable cases provides a reasonable starting point. Of course, the individuating circumstances of the present case are relevant considerations, but that judgment should be anchored on the average award in similar cases rather than on the outcomes of cases that happen to come to mind for idiosyncratic reasons. Psychological research in judgment under uncertainty suggests that people tend to undervalue

42. See Gregory B. Northcraft & Margaret Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84 (1987).

43. *Id.* Fewer than one respondent out of five mentioned "listing price" when asked to list the factors they had considered when making their appraisal.

44. *Id.* When the alleged list price was \$119,900, the average appraised value estimated by the agents was \$114,204. When the alleged list price was \$149,900, the average appraised value was \$128,754.

45. See Mike Barnicle, *Money Can't Buy a Parent's Peace*, BOSTON GLOBE, February 16, 1997, at B1.

46. See *supra* note 19.

47. See *supra* note 20.

base rates in their judgments of the case at hand.⁴⁸ A modest investment of time researching comparable cases can help insulate against costly errors in valuation.

Question 2: How likely am I to win if this case goes to trial?

You accept the case of the secretary who alleges sexual harassment on the part of her boss. She describes inappropriate remarks he made about her appearance, invitations to dinner at his home, lewd cartoons that he had on his bulletin board, and more. She shows you a copy of a letter from the managing partner of the firm to the boss suggesting that he tone down his behavior toward an employee other than your client. Your client tells you that she has a friend in the secretarial pool who will corroborate many of the things that she has told you. She then asks what the chances of a plaintiff's verdict are. What is your response?

Throughout the course of representation, civil litigators devote most of their billable hours to gathering information.⁴⁹ During the early stages, most of this information gathering is aimed at assessing the strength of their clients' cases.⁵⁰ Such information generally includes client interviews, review of documents, depositions, and investigation of additional sources found through the discovery process.⁵¹ It is imperative for those in the business of lawyering to assess a great deal of information of uncertain probative value in order to anticipate what a client might be entitled to if she went to court. These assessments help the lawyer determine what a good settlement goal might be.⁵²

48. See Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 *PSYCHOL. REV.* 237 (1973).

49. See, e.g., Diane Cooley, *Uncivil Discovery*, 41 *N.Y.L. SCH. L. REV.* 459 (1997). Litigator and law teacher Cooley states baldly, "[c]ivil discovery is the worst part of civil litigation, and unfortunately, it is also the biggest part." Cooley suggests that 90% of the life of a young civil litigator is spent doing discovery, and that during her first two years of practice in a large Boston firm, it was 100% of her work life. *Id.*

50. For examples of exhortations on the relative importance of valuing cases early, see, e.g., Dan L. Goldwasser, *Introduction to Claims Analysis and Evaluation*, 550 *PRAC. L. INST./LITIG.* 7 (1996); Abraham Fuchsberg, *Ten Commandments for Successful Evaluation and Settlement*, *TRIAL LAWYER'S Q.*, Fall 1993, at 10; Jerold S. Solovy et al., *Settlement of Complex Civil Cases*, 584 *PRAC. L. INST./CORP.* 393 (1987).

51. These other sources include requests for production of documents, prior recorded testimony, legal research, non-deposition interviews with witnesses, accident reconstruction, other forms of investigation, and the reading of treatises. A wealth of sources can be tapped to help build a case, suggesting that discovery as an information-gathering device can be virtually inexhaustible.

52. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. LEGAL STUD.* 1, 12-17 (1984).

In most arenas there is not an objective means for weighing evidence.⁵³ Reasonable lawyers disagree about the predicted effect that certain testimonial or physical evidence might have on a jury.⁵⁴ Even if opposing attorneys agreed that evidence was favorable to one side, they might disagree about the extent to which it supports that side.⁵⁵

In addition, weight must be assigned to the presentation of evidence. A skillful presenter can highlight nuances and combine strands of evidence in ways that make a finder of fact more likely to reach a favorable conclusion than would be the case were the evidence presented in a random order or in a drab manner. And, of course, a judge may exclude evidence or alter its presentation.⁵⁶

Whenever the attorney evaluates any facet of a case, she does so through the lens of her own biased perspective, which may distort her assessment of the case as a whole. Indeed, this bias may result in a grossly self-interested view that precludes a settlement that might occur if both sides were more objective.

A lawyer is likely to be biased in two related ways. First, despite the fact that she has not yet heard from the other side, she is likely to

53. "Problems of proof" is an emerging area of legal inquiry. For more information, see, e.g., the work of Peter Tillers, Book Review, *Intellectual History, Probability and the Law of Evidence*, 91 MICH. L. REV. 1465, 1466 n.15 (1993) ("proof of facts is frequently or always inconclusive"); *Probability and Inference in the Law of Evidence*, 66 B.U. L. REV. 381 (1986); *Prejudice, Politics and Proof*, 86 MICH. L. REV. 768 (1988). Also see the work of David A. Schum, e.g., *Charting New Territory in Judicial Proof: Beyond Wigmore*, 9 CARDOZO L. REV. 907 (1988) (with Tillers).

For a more complete list of scholars working in this area, see Christopher Finlayson, *Proving your Case: Evidence and Procedure in Action*, 13 CARDOZO L. REV. 257, 301 (1991).

54. Commentators have suggested that judges (who presumably are also lawyers) and practicing lawyers often disagree about whether a case has value at all. See, e.g., Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 78 (1996) ("[M]any cases that lawyers reasonably believed were worth bringing will be held to be baseless by trial judges.")

55. For essays on the difficulty of arriving at fixed values for evidence, see, e.g., S. A. Lloyd, *Situating a Feminist Criticism of John Rawls's Political Liberalism*, 28 LOY. L.A. L. REV. 1319, 1323 (1995) ("The burdens of judgment account for the possibility of reasonable disagreement in terms of differences in how the values relevant to settling a question are weighted, the complexity of the empirical evidence, the vagueness and indeterminacy of our concepts, and so on."); Mark S. Brodin, *Accuracy, Efficiency and Accountability in the Litigation Process: The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15 (1989) (suggesting that jurors often disagree about the value of evidence presented at trial).

Cases in which judges disagreed about the weight to be accorded to evidence abound. See, e.g., *Robinson v. Adams*, 830 F.2d 128, 131 (9th Cir. 1987) (a civil rights case in which the majority and the minority disagreed about the probative value of evidence that a disproportionate number of cannery workers were nonwhite).

56. See, e.g., Yablon, *supra* note 54 (describing judicial approval of Rule 11 motions).

evaluate the strength of the case as more favorable to her client than would a neutral party with access to both sides' information and arguments. Second, she is likely to be overconfident in her assessment of her likelihood of prevailing and likewise overestimate her ability to influence the final outcome.

1. *Psychological Biases*

- a. *Perspective Biases*

In general, people have great difficulty divorcing themselves from their idiosyncratic role sufficiently to take an objective view of disputes in which they are involved. In one study, researchers provided four groups of respondents with summary information pertaining to legal disputes.⁵⁷ In the partisan conditions, respondents were given background information and either the plaintiff's or the defendant's arguments, but not both. In the neutral conditions, respondents were given either background information only or background information and both the plaintiff's and defendant's arguments. Participants in all conditions were asked to predict how many of twenty jurors would find for the plaintiff. Participants in the plaintiff condition predicted that a significantly higher proportion of jurors would find for the plaintiff than did participants in the defendant condition, despite the fact that both sides were aware that they were not provided with the other side's arguments. Participants in the neutral conditions (background only, or background and both sides' arguments) had a more balanced view than did participants in either of the partisan conditions.

Even when negotiators possess complete and shared information, they tend to assess the strength of their case in a self-interested (or "egocentric") manner. In one study, participants were randomly assigned to roles in a negotiation simulation involving a wage dispute between labor and management.⁵⁸ Both groups were given identical background information and asked to negotiate under the threat that a costly strike would occur if they failed to reach an agreement. Prior to negotiating, both groups were asked what they thought was a fair wage from the vantage point of a neutral third party. Despite the fact that both groups had been provided identical information, participants tended to be biased in a self-interested direction; that is,

57. Lyle A. Brenner et al., *On the Evaluation of One-Sided Evidence*, 9 J. BEHAV. DECISION MAKING 59 (1996).

58. Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORG. BEHAV. & HUM. DECISION PROC. 176 (1992).

they tended to think a neutral third party would favor their side. Moreover, when members of a pair were farther apart in their predictions regarding the judgment of a third party, they tended to strike for longer periods of time. A similar pattern has been replicated with real money at stake in a simulated legal dispute negotiated under a regime of escalating legal fees.⁵⁹

b. *Positive Illusions*

Egocentric biases are reinforced by so-called "positive illusions," which include unrealistic optimism, exaggerated perceptions of personal control, and inflated positive views of the self.⁶⁰ For example, people tend to overestimate the probability that their predictions and answers to trivia questions are correct, at least for items of moderate to extreme difficulty.⁶¹ Overconfidence can inhibit negotiated settlements because if parties are overoptimistic about their ability to secure favorable litigated outcomes, they may set extreme reservation points.⁶² Indeed, one study found that overconfident negotiators

59. See Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993). In these studies, participants were assigned at random to roles of defendant or plaintiff in a personal injury suit, and were rewarded for accuracy in predicting the judgment of the court. In each round of negotiation, parties exchanged written settlement offers. If the plaintiff's and defendant's offers overlapped, the case would settle for an amount midway between these offers; if the offers did not overlap, legal fees escalated and another round of offers were exchanged. Subjects received a payment that was proportional either to the amount for which they settled less legal fees (plaintiff) or a fixed amount less the sum for which they settled less legal fees (defendant).

60. See Shelley Taylor & Jonathan D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 PSYCHOL. BULL. 193 (1988).

61. See Sarah Lichtenstein et al., *Calibration of Probabilities: The State of the Art to 1980 in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 306 (Daniel H. Kahneman, et al. eds., 1982).

62. A reservation point is defined as the point at which a negotiator is indifferent between settlement and no settlement. This term is often used synonymously with Roger Fisher and Bill Ury's term BATNA (Best Alternative to a Negotiated Agreement). See, e.g., Eric Talley, *Liability-Based Fee-Shifting Rules and Settlement Mechanisms Under Incomplete Information*, 71 CHI.-KENT L. REV. 461, 475 & n.35 (1995); ROGER FISHER ET AL., *GETTING TO YES* 97 (2nd ed. 1991). However, some people may set their reservation point or "walk-away" at a different price than their BATNA. From the economists' perspective, this is irrational. Ian Ayres and Barry Nalebuff suggest that "ADR theorists might not equate BATNA with a reservation price because they are reluctant to monetize their 'best alternative.' But when a BATNA is easily monetizable, the two concepts are identical." Ian Ayres & Barry J. Nalebuff, *Common Knowledge as a Barrier to Negotiation*, 44 UCLA L. REV. 1631, 1642 n.24 (1997).

were less concessionary and completed fewer deals than well-calibrated negotiators.⁶³ Also, in studies of final-offer arbitration, negotiators on average overestimated the probability that their offers would be favored by the arbitrator.⁶⁴ Presumably, these negotiators would have turned down settlement offers that, *ex post*, would have yielded more on average than did the arbitration.

Overconfidence stems, in part, from pervasive biases in the ways people pursue and evaluate evidence.⁶⁵ Psychological studies have shown that people are more likely to seek information that confirms rather than discredits their hypotheses,⁶⁶ and they tend to assimilate data in ways that are consistent with their prior views.⁶⁷ In discovery, for example, attorneys are more likely to seek information that supports their viewpoint than they are to seek information that supports their opponents' cases.⁶⁸ They work on "their side" of a case, and tend to construe the information that they find in a way that confirms their pre-existing beliefs about their odds of prevailing.

A second positive illusion is people's tendency to overestimate their ability to control outcomes that are determined by factors

63. See Margaret A. Neale & Max H. Bazerman, *The Effects of Framing and Negotiator Overconfidence on Bargaining Behaviors and Outcomes*, 28 *ACAD. MGMT. J.* 34 (1985).

64. See Margaret A. Neale & Max H. Bazerman, *The Role of Perspective-Taking Ability in Negotiations Under Different Forms of Arbitration*, 36 *INDUS. & LAB. REL. REV.* 378 (1983); Max H. Bazerman & Margaret A. Neale, *Improving Negotiation Effectiveness Under Final Offer Arbitration: The Role of Selection and Training*, 67 *J. APPLIED PSYCH.* 543 (1982).

65. The effects of this phenomenon are noted in the work of critical race theory scholars. See, e.g., Mario L. Barnes, *"Each One Pull One": The Inspirational Methodology Behind an Impassioned but Somewhat Flawed Protest*, 1 *AFR.-AM. L. & POL. REP.* 89, 106 & n.49 (1994); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 *MICH. L. REV.* 2479, 2540 (1994).

In critical race theory, the process of confirmation bias results in "exceptionalizing," that is, in viewing a member of the race who defies a pre-existing stereotype as an exception to the stereotype. This spares the viewer from having to reevaluate the validity of the stereotype. In the terms of biased confirmation theory, the stereotype is the pre-existing hypothesis, and the non-conforming individual is data that disconfirms. The "exceptionalizing" ignores the information, in defense of the hypothesis.

66. See Peter C. Wason, *Self-Contradictions*, in *THINKING: READINGS IN COGNITIVE SCIENCE* 114 (P.N. Johnson-Laird & Peter C. Wason eds., 1977). For an example in social cognition, see Mark Snyder & William B. Swann, Jr., *Hypothesis Testing Processes in Social Interaction*, 36 *J. PERSONALITY & SOC. PSYCHOL.* 1202 (1978).

67. See Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 2098 (1979).

68. Practice guides seem to indicate that the first task of the attorney is to locate all the evidence that supports his client's claim. See, e.g., Richard E. Hall & Steven J. Hippler, *Getting Back to the Basics—How to be Prepared for Trial*, 40-*NOV ADVOCATE (IDAHO)* 9 (1997).

outside of their control. In one classic study by psychologist Ellen Langer, subjects bet more on a game of pure chance when they competed against a shy, awkward, poorly dressed individual than when they competed against a confident, outgoing, well-dressed person.⁶⁹ In a second study, subjects were offered one-dollar tickets to an office lottery. Each ticket consisted of two pictures of a famous football player, one of which was put into the box from which the winning ticket would be drawn. When participants were asked later at what price they would be willing to sell their ticket, those who had chosen the ticket for themselves demanded \$6.87 on average, whereas those who had been assigned a ticket at random demanded only \$1.96 on average. On the basis of these studies and other literature, Langer concludes:

Whether it is seen as a need for competence, an instinct to master, a striving for superiority, or a striving for personal causation, most social scientists agree that there is a motivation to master one's environment, and a complete mastery would include the ability to 'beat the odds,' that is, to control chance events.⁷⁰

When lawyers try to anticipate the outcome of a trial or a motion, there are many factors outside of their control. For example, appellate case law may change during the pendency of a case; or, the trial judge may recuse herself, become sick, or be elevated to a higher court. Witnesses may fail to appear or may be distracted by other events in their lives and be unable to prepare effectively or testify forcefully. Nevertheless, the lawyers may overestimate their ability to control a trial's outcome, and in turn, overvalue the claim.

A third variety of positive illusion is the tendency to hold overly positive views of one's own attributes and motives. For example, most people think that they are more intelligent⁷¹ and fair minded⁷² than average. Ninety-four percent of university professors believe that they do a better job than their colleagues.⁷³ More to the point,

69. Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311 (1975).

70. *Id.* at 323 (internal citations omitted).

71. See R.C. Wylie, *The Self-Concept*, in 2 THEORY AND RESEARCH ON SELECTED TOPICS.

72. See W. B. Liebrand et al., *Why We Are Fairer than Others: A Cross-Cultural Replication and Extension*, 22 J. EXPERIMENTAL SOC. PSYCHOL. 590 (1986).

73. See P. Cross, *Not Can But Will Teaching Be Improved?*, 17 NEW DIRECTIONS FOR HIGHER EDUCATION 1 (1977).

most negotiators believe themselves to be more flexible, more purposeful, more fair, more competent, more honest, and more cooperative than their counterparts.⁷⁴

In a negotiation, this self-enhancing bias may lead an attorney to believe that she should hold out for a favorable settlement, because she is a more skilled attorney. Although skill among attorneys varies and it is rational to take skill into account when evaluating the worth of a case, lawyers at all skill levels are very likely to overestimate their abilities relative to those of their peers.⁷⁵ This self-confidence may prove to be an effective bargaining tool to the extent that it sends a signal to her counterpart that the attorney is committed to seeing the case through to trial if necessary.⁷⁶ However, if both sides overestimate their chances of prevailing in court, this bias will lead to excessive and costly discovery and litigation.

In sum, most people tend to make unrealistically optimistic forecasts regarding their own future outcomes.⁷⁷ For example, an attorney may know that only twenty percent of appealed decisions in a particular practice area are overturned⁷⁸ but nevertheless maintain that her odds of overturning an adverse ruling are higher—at least one in four, perhaps one in two. This perspective could eliminate the possibility of settlement in a case in which both sides agree on the *value* of a plaintiff's verdict and differ only in their assessment of the *probability* of a defense verdict. If the plaintiff feels that there is a

74. See Roderick M. Kramer et al., *Self-Enhancement Biases and Negotiator Judgment: Effects of Self-Esteem and Mood*, 56 *ORG. BEHAV. & HUM. DECISION PROCESSES* 110 (1993).

75. Not only skills, but motives. If you are a graduate of law school, ask yourself to what extent intellectual curiosity motivated you to enroll as opposed to a desire for pecuniary gain or public acclaim. Then ask yourself the same question about most other law school graduates. In a recent survey by the Kaplan test preparation company, sixty-four percent of students taking the Law School Admission Test (LSAT) said that they were looking to a career in law because of their intrinsic interest in the topic, and seventy-two percent of respondents said that other people were looking to law careers for more extrinsic reasons such as money and prestige. This survey is described in Amy Stevens, *Is Insider Trading Back at Law Firms?*, *WALL ST. J.*, May 1, 1995, at B1.

76. See ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988).

77. See Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 *MGMT. SCI.* 17 (1993).

78. This is the approximate reversal rate reported in Federal Courts' reviews of administrative decisions (see Russell L. Weaver, *Some Realism about Chevron*, 58 *Mo. L. REV.* 129, 176 n.305 (1993)) and criminal sentencing (see Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 *Nw. U. L. REV.* 1441, 1495 (1997)).

forty percent chance that the verdict will be overturned and the defendant espouses the true base rate of twenty percent, the parties may not achieve a settlement that could have left them both better off than litigating through verdict.⁷⁹

2. Remediation

What can be done to circumvent these biases? Research suggests that egocentric biases may be very difficult to eliminate. It may be useful to actively anticipate arguments in favor of the opponent's case, but at least one study suggests that this tactic is not sufficient—perhaps because advocates easily generate counter arguments.⁸⁰ However, this same study showed that egocentric bias was significantly mitigated when participants were asked to explicitly list weaknesses in their own case.⁸¹ Hence, to achieve a more balanced view of one's prospects, it is essential to make a concerted and sincere effort to play devil's advocate. Many experts recommend the use of test juries to perform this function.⁸²

As for optimistic overconfidence, experts suggest that this bias can be mitigated if lawyers take pains to adopt an outsider's perspective by seeking base rate statistics on cases that are similar in relevant respects to the present case, rather than relying solely on an insider's perspective that typically entails an analysis of plans and scenarios concerning the case at hand.⁸³ For example, a plaintiff's lawyer in a routine tort case might normally form an opinion of the

79. To illustrate, suppose that plaintiff and defendant agree that the damages in the case are \$100,000, and the trial resulted in a defense verdict, defendant's 20% estimate of a reversal yields an expected payout of \$20,000 but plaintiff's 40% estimate yields a \$40,000 demand. Even if defendant offers her estimated value plus defense costs of \$15,000, plaintiff may reject the offer, and as a result of overconfidence in her estimate of reversal rates, miss the opportunity for a settlement that would have produced greater gain than the expected value of the appeal.

80. Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW AND SOC. INQ. 913 (1997).

81. *Id.*

82. See, e.g., Rodney R. Nordstrom, *Developing Effective Case Themes*, 84 ILL. B.J. 479, 480 (1996); Mary A. Bedikian & Jerome D. Hill, *The Ultimate Power of Persuasion: Using the Mock Trial to Enhance Litigation Strategy*, 72 MICH. B.J. 1046 (1993). But cf. Robert Bray & Norbert Kerr, *Use of the Simulation Method in the Study of Jury Behavior*, 3 LAW & HUM. BEHAV. 107 (1979); Wayne Weiten & Shari S. Diamond, *A Critical Review of the Jury Simulation Paradigm*, 3 LAW AND HUM. BEHAV. 71 (1979) (suggesting that jury simulations suffer methodological problems resulting in external validity questions).

83. Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 MGMT. SCI. 17 (1993).

probability of a jury verdict in his client's favor by assessing the credibility of each of his witnesses and the persuasive value of each piece of evidence he intends to offer. We suggest that this estimate would profit from a perusal of the local statistics about plaintiffs winning in similar cases. Of course, some further adjustment might be called for to account for cases that were too weak to withstand pretrial motions to dismiss.

Self-enhancing bias is arguably both a strength and a weakness. Many clients want to be represented by a counselor brimming with confidence—they may find this reassuring and also expect rosy prophecies to be self-fulfilling.⁸⁴ On the other hand, if each attorney believes himself to be more honest, intelligent, and capable than the other, such tendencies can be counterproductive because they undermine incentives to settle. A little defensive humility is in order. Recognition of this pervasive tendency may allow attorneys to temper their expectations slightly and provide clients with more realistic assessments.

Returning to the hypothetical, the attorney may hear the client's rendition of the facts and immediately start to form a mental picture of herself giving a powerful closing argument in a well-crafted hostile work environment case. As the attorney bolsters her self-image, her abilities, the strength of her theory and her client's testimony, she may become so overconfident that she will recommend rejection of a settlement offer that should be accepted.

As a precaution, the attorney should list all possible weaknesses regarding each piece of evidence. For instance: the coworker might not be a credible witness; the letter might not be admissible; the judge might make an evidentiary ruling restricting the complainant's testimony. The lawyer would also be well advised to find out which similar cases in her jurisdiction have resulted in defense verdicts and the dollar value of verdicts in favor of plaintiffs. Finally, she should explicitly recognize that despite her best efforts to be objective, her view of the case will be biased in her own favor because of her overconfidence in her own abilities as a lawyer.

84. However, there is work that suggests that depressed individuals make more realistic assessments about outcomes. See SHELLEY E. TAYLOR, *POSITIVE ILLUSIONS: CREATIVE SELF-DECEPTION AND THE HEALTHY MIND* 214 (1989) ("Psychologists have coined the term 'depressive realism' to refer to the observation that mildly depressed people actually have a somewhat more accurate view of reality. . .").

Question 3: How much information do I need to gather?

Time has passed, and you are in the discovery phase of your "hot pie" case. You've been at it for slightly over a year. The first bits of evidence you uncovered were encouraging. The restaurant's former vice-president in charge of operations will testify on your behalf about the fact that the company was on notice that its pie was hot enough to burn. Two other experts will testify that the pie was served at least twenty percent hotter than any other product on the market. There are significant damages, and your client will be a good witness.

In the intervening year, you've checked almost everywhere you can imagine for evidence. The last three places you can think of are not promising leads, and it would be expensive and time consuming to follow these leads to their ends. These are the deposition of another former VP of the restaurant chain you're suing (now out of the jurisdiction, but possibly corroborative of the VP of Operations), a line of case law in England that might support an emerging and helpful trend in your jurisdiction, and the chain's past litigation settlement records (which might support some aspect of your case, but which the chain is fighting to protect as confidential and irrelevant).

Should you follow these three lines of inquiry to their logical end before you attempt to settle the case?

Most attorneys have every incentive to do maximal discovery and great disincentives against "underdiscovering." As a result, discovery accounts for the bulk of attorney fees. If an attorney is paid on an hourly basis to process a case, lengthy and contentious discovery is lucrative.⁸⁵ If some of the discovery turns out to be of little or no value, the attorney has borne none of the cost (indeed, has profited) and has eliminated the risk attendant to underdiscovery.⁸⁶ The possible embarrassment and risk that might come with failing to find something that could have been discovered and that turns out at trial

85. Discussions and studies which suggest that attorneys may do unnecessary discovery in pursuit of higher fees from their clients include Ronald J. Gilson & Robert H. Mnookin, *Disputing through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 527 (1994); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1304-05 (1978); Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L. J. 352, 358 (1982).

86. For a discussion on the incentives of lawyers to overdiscover, see William G. Ross, *The Ethics of Time-Based Billing by Attorneys*, 58 ALA. L. REV. 40, 40-41 (1997) ("Spurred on by a fervent desire to prove their skill and dedication and to avoid malpractice suits by leaving no stone unturned in their representation of clients, all too many attorneys have deluded themselves into believing that no amount of work is too much. Willfully ignorant of the law of diminishing returns, countless attorneys will

to be relevant and material is a cost borne by both the lawyer (in terms of reputation) and the client (in terms of the reduction in probability of a favorable outcome). Thus, it is easy to understand the application of the maxim "leave no stone unturned" to legal disputes. This attitude may result in the expensive and wasteful search for information that is redundant or of little worth relative to information that has already been discovered.⁸⁷

1. *Psychological Factors*

At least three psychological phenomena may contribute to overdiscovery. The first phenomenon concerns the psychophysics of chance. Studies of decision making have found that increasing the probability of winning a prize by a fixed amount, say .1, has more impact on people when it changes the probability from 0.0 to .1 or .9 to 1.0 than when it changes the probability from .2 to .3 or .6 to .7. Stated another way, people are willing to pay a premium to change an impossibility into a possibility, or to change a possibility to a certainty.⁸⁸ The premium to change an impossibility to a possibility may cause lawyers to overweight the remote chance that additional information may turn up a "smoking gun" that would guarantee a favorable trial outcome. The premium to change a possibility to a certainty may cause lawyers who are virtually certain that they have uncovered all information relevant to the case to overvalue the pursuit of final avenues for discovery that would guarantee all relevant information is in hand. These tendencies can collectively produce an endgame in which attorneys pay more than they should in order to confirm that which they already knew was highly likely to be true.⁸⁹

milk a file to death, billing time long after any marginal utility to the client has vanished.") Professor Ross describes several empirical surveys he conducted that suggested that overdiscovery is a common practice, and that attorneys and clients have vastly different interests in this area of practice.

87. In Oregon, many litigators have referred the authors to an informal rule (more an observation) called the "80/20" rule. It suggests that 80% of the information that is helpful to one's case is found during the first 20% of the discovery process, and vice-versa.

88. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representations of Uncertainty*, 5 *J. RISK & UNCERTAINTY* 297 (1992); Amos Tversky & Craig R. Fox, *Weighing Risk and Uncertainty*, 102 *PSYCHOL. REV.* 269 (1995). See also Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in *BARRIERS*, *supra* note 9, at 44, 50-51 (arguing that when considering alternative agreements, negotiators overweight uncertain outcomes, such as goodwill, relative to certain outcomes codified in a contract).

89. "For quite some time—at least for 100 years, and, if Professor Barbara Shapiro is right, for at least 200 years—the governing assumption of [the Anglo-American

Second, people often seek information that will clarify their reasons for making a particular decision, even when the information will not affect what decision they make. For example, Tversky and Shafir asked respondents to imagine that they had taken a difficult qualifying examination and did not know whether or not they had passed.⁹⁰ These subjects were asked to suppose they had an opportunity to purchase an attractive vacation package or to pay a non-refundable fee to hold the price on the package until after the results of the exam would be announced. Most subjects who did not know the results of the qualifying exam chose to pay the fee in order to defer a decision on the trip; however, most subjects who knew the results of the exam chose to purchase the vacation package regardless of whether they had passed or failed. Tversky and Shafir suggest that this search for irrelevant information is most likely to occur when the reason a person has for acting in a particular way is affected by the information they seek. In the exam/vacation example, the vacation will be viewed as either a reward or a consolation, depending on whether the person passed or failed the exam.

We suggest that some discovery can be eliminated without risk to either the lawyer or the client if the lawyer carefully considers in advance whether information anticipated to be yielded by discovery will affect the case in any significant way. For example, in our hot pie case, asking the former VP if he was aware of prior complaints of excessively hot pies may be a redundant and useless line of inquiry. It will only corroborate the already-existing theory that the company was negligent, either because the company didn't know its own practices or because it was on notice and failed to take remedial action.

A third psychological phenomenon that may contribute to overdiscovery is the tendency to escalate commitment to an initial course of action.⁹¹ This is especially likely to occur in situations in

law of evidence] has been that all or practically all facts are uncertain and that proof of facts is always or almost always a matter of probabilities." Peter Tillers, *Intellectual History, Probability and the Law of Evidence*, 91 MICH. L. REV. 1465, 1466 (1993). We cite this piece to suggest that "proof certain" may be at least part of a lawyer's goal in discovery, but it is unobtainable.

90. Eldar Shafir & Amos Tversky, *Thinking Through Uncertainty: Nonconsequential Reasoning and Choice*, 24 COG. PSYCHOL. 449 (1992).

91. See, e.g., Barry M. Staw, *The Escalation of Commitment to a Course of Action*, 6 ACAD. MGMT. REV. 577 (1981); also see MARGARET A. NEALE & MAX H. BAZERMAN, *COGNITION AND RATIONALITY IN NEGOTIATION* (1991); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960).

which the decisionmaker has not set an initial limit or budget,⁹² as is often the case in litigation.

A striking example of the irrational escalation of commitment is Shubik's dollar auction game.⁹³ In such an auction the top bidder pays his bid and receives the prize — say, a twenty dollar bill — while the second-place bidder pays his bid and receives nothing. The outcome is typically as follows: several bidders join the fray early on, angling to capitalize on an opportunity to obtain twenty dollars at a discount. Bids escalate. As the bids approach ten dollars, the number of bidders usually winnows to two. As the first bids exceed ten dollars, everyone realizes that the auctioneer has made a profit. The remaining bidders continue, until one participant bids twenty dollars, preferring to break even than to lose his prior bid amount (which would have been eighteen dollars assuming bids were restricted to whole dollars), and confident that no rational participant would bid more than twenty dollars for a twenty-dollar-bill. However, the other bidder will usually up the ante to at least \$21, preferring a loss of \$1 to a loss of \$19. Typically the winning bid is significantly more than \$20 (as is the losing second-place bid), and the auctioneer makes a tidy profit.⁹⁴

Shubik's auction is an apt model for some instances of civil litigation with escalating costs. A client who has spent a great deal of money on pretrial motions and discovery may be very reluctant to settle a case for less than costs or to walk away from the case, even when information obtained through the discovery process suggests that the case is worth less than the amount she has spent pursuing it.

2. Remediation

We suggest three means of counteracting the tendency to overdiscover. First, attorneys must accept that most cases are not

92. See Chip Heath, *Escalation and De-escalation of Commitment in Response to Sunk Costs: The Role of Budgeting in Mental Accounting*, 62 *ORG. BEHAV. & HUM. DEC. PROCESSES* 38 (1995). In fact, sometimes setting an initial budget can lead to premature de-escalation of commitment once this budget has been reached. According to economic theory, the rational decision rule is to proceed as long as expected marginal benefits exceed expected marginal costs, ignoring past sunk costs. *Id.*

93. See Martin Shubik, *The Dollar Auction Game: A Paradox in Noncooperative Behavior and Escalation*, 15 *J. CONFLICT RESOL.* 109, 109-10 (1971).

94. These observations come from our experiences. The authors have both been participants in classes in which this auction has been run, and auctioneers themselves. Lest we gain a reputation as ruthless profiteers, we wish to note that we always donate the profits to a class party or other worthwhile charity.

open-and-shut, and even in the rare cases in which there is a "smoking gun" the outcome is almost always uncertain.⁹⁵ Therefore, they should resist the temptation to seek that which is both expensive to look for and very difficult to obtain. Second, attorneys should think through the consequences of further discovery, carefully considering whether or not the information sought is likely to have a major impact on the value of the case. Third, the client should be more involved in the incremental cost/benefit analyses.⁹⁶ Finally, attorneys and their clients might avoid escalation of commitment if they constantly evaluate the marginal utility of further discovery in relation to the marginal costs of continuing. Sunk costs should be ignored. Generally, but not always, these considerations suggest that attorneys should settle earlier and with less information than may be current practice.⁹⁷

95. Examples of "sure things" going awry abound. Some people thought that the criminal case against O.J. Simpson was an impossible one to lose, especially given the DNA evidence linking him to the crime. See, e.g., Peter Aranella, *Explaining the Unexplainable: Analyzing the Simpson Verdict*, 26 N.M. L. REV. 349, 352 (1997) (noting that 75 percent of Americans believe that O.J. was guilty); William C. Thompson, *DNA Evidence in the O.J. Simpson Trial*, 67 U. COLO. L. REV. 827 (1996). For a small catalog of "prosecutorial missteps," see Andrew G.T. Moore, *The O.J. Simpson Trial—Triumph of Justice or Debacle?*, 41 ST. LOUIS U. L.J. 9, 11-17 (1996).

And of course, legal realists believe that decisions made by courts have little to do with the merits of the case. See, e.g., RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 3 (1977) ("Judges actually decide cases according to their own moral or political tastes, and then choose an appropriate legal rule as a rationalization.")

96. With regard to decisions about how much to spend on discovery, the typical client has conflicting interests. Of course, the client wants to keep costs down, but he also wants to do as much discovery as necessary to maximize his chances of winning at trial or achieving a favorable settlement. In contrast, although attorneys have an incentive to represent their clients' interests, they typically have strong incentives to do more discovery rather than less. Among these incentives: discovery is lucrative for the attorney; an attorney's reputation will be harmed more by missing something that should have been found than by purchasing information that is of little or no value; attorneys wish to minimize the possibility of malpractice claims that might arise from failure to discover information that, ex post, might have made a difference in the outcome of the case. Hence, greater client involvement in discovery decisions could serve as a check on an attorney's insensitivity to discovery costs. Of course, increased client involvement may increase the number of cases in which a client refuses to authorize an expenditure which would have, in hindsight, turned a defeat into a victory. However, we suggest that, on average, the benefits of greater client involvement in discovery will outweigh such costs.

97. See Kenneth Arrow, *Information Acquisition and the Resolution of Conflicts*, in BARRIERS, *supra* note 9, at 258-272. Of course, the risks attendant to a strategy that contemplates earlier settlements are not borne equally by all litigants. An important distinction must be drawn between the "one-shot player" and the "repeat player." For example, a client who will only litigate one time in his or her life may care a great deal about ending up at the high end of the bargaining range, almost

Returning to the hypothetical at the beginning of this section, it is clear that the decision whether to seek the three remaining pieces of information should be client-driven.⁹⁸ However, clients typically defer to lawyers who, as was stated above, have incentives to overdiscover. We surmise that most attorneys encourage their clients to pay for continued discovery regardless of its marginal value, and that the cost of the information gained could outweigh its value in either settlement negotiations or at trial.⁹⁹

Question 4: How do I evaluate the strength of the information I gather?

You return your attention to the wrongful death action that you are pursuing. The defense's primary alibi witness said in a police report that at the time of the murder he saw the defendant purchasing gas. The gas station he described is across the street from the witness' newspaper stand—and you know that the gas station is too far from the murder scene for the defendant to have been at the gas station at the time in question and also to have committed the murder.

You remember reading the book Eyewitness Testimony in which Dr. Elizabeth Loftus demonstrates that cross-racial identification tends to be less reliable than same-race identification.¹⁰⁰ In your deposition of the witness, you ask the witness whether the defendant was a different race than the witness is, and he answers affirmatively. You ask whether he has many friends or associates of the defendant's race and he says he doesn't have many, but a few. You ask whether he was conducting much business during the time of the identification, and he says it was "pretty busy, but not packed."

Does your assessment of your likelihood of obtaining a plaintiff's verdict improve significantly upon discovery of this information?

Clients hire attorneys because they are convinced that hiring the attorney will add value to their claim (or lower the payout in a defense case). In the initial interview, the client tells the attorney

irrespective of transaction costs, while a client who litigates frequently (e.g. an insurance company) might prefer to settle earlier in all cases and avoid large legal bills, comfortable in the belief that some cases will settle high and some low, but over the course of time, the settlements will be less costly when extended discovery is avoided.

98. See Ross, *supra* note 86, at 40-41. See also William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991).

99. Ross, *supra* note 86, at 41.

100. See ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979).

about the factual underpinnings of his case. If the attorney is interested in the case, he is highly motivated to construct and communicate a legal theory to the client that would result in an improvement in the client's lot. If he is sufficiently persuasive, he is hired. Often, discovery begins soon thereafter.

When attorneys engage in discovery, they attempt to find all information relevant to their case. Typically, the order of business is to first build the case-in-chief, and then to dismantle the opponent's case. To accomplish either task, the attorney must begin discovery with expectations and hypotheses to test. As discovery brings new facts to light (which may support multiple inferences), the attorney implicitly asks himself "how can I use this information to support my theory?" or "how can I use this information to whittle away at the other side's case?"

1. *Psychology of Biased Assimilation*

As mentioned earlier,¹⁰¹ people generally seek evidence that would confirm initial hypotheses, to a greater extent than they seek "disconfirming" evidence.¹⁰² In addition, we previously reviewed evidence that attorneys tend to predict trial outcomes in an egocentric manner. It is also true that partisans tend to evaluate and assimilate information they receive in a way that is biased in favor of their own position. In one influential experiment, Lord, Ross and Lepper presented proponents and opponents of capital punishment with details of two studies, one supporting its effectiveness as a deterrent and a second providing evidence against its effectiveness as a deterrent.¹⁰³ Participants on average rated the study that supported their view to be logically superior to the study that contradicted their view. Furthermore, after reading both studies, participants felt more strongly about their previously held views. Hence, mixed evidence widened the gap between groups, polarizing rather than reconciling beliefs.

Fox and Babcock found a similar effect in a study that simulated a civil lawsuit over a real-estate transaction.¹⁰⁴ Participants were assigned at random to opposing roles in the dispute, which was

101. See *supra* notes 66-68 and accompanying text.

102. See, e.g., Peter C. Wason, *Self-Contradictions*, in THINKING: READINGS IN COGNITIVE SCIENCE 114 (P. N. Johnson-Laird & Peter C. Wason eds., 1977).

103. Charles Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

104. Craig R. Fox & Linda Babcock, unpublished data (1998) (on file with authors). The case involved a dispute between a builder and a property management

modeled after a real case. After reading identical background information, both sides displayed an egocentric bias, tending to predict that a neutral judge would decide in their favor. Participants in both groups next read identical packets containing discovery information, including letters exchanged between the principals, relevant documents, and deposition excerpts. After reading this packet, both sides became more biased in favor of their own position. The larger the disparity between the predictions for an opposing pair, the longer (and more expensive) the simulated litigation between the pair tended to be. More information caused partisans to become more entrenched, disparities between valuations to grow, and costs of disputing to rise.

2. Remediation

More research is needed to determine effective means of protecting against biased assimilation. Our prescriptions echo those in Question Two of this article: attorneys should try to play devil's advocate, and should enlist a disinterested party as a sounding board. To the extent that such measures are cost-effective, we again recommend hiring a neutral party to portray the opponent and to evaluate new evidence from the opponent's perspective.¹⁰⁵ Test juries also might help deflate any biased views.¹⁰⁶

In our hypothetical, if an attorney accepted uncritically that the cross-racial characteristics of the alibi witness significantly improved her client's case, she may have assimilated the information in a biased manner. Of course the information is helpful, but it may be of marginal help, at best. For instance, while Loftus discovered that identification professionals (e.g. police officers) were better at identifying members of their own race than other races, their ability to identify accurately across racial lines was still quite good.¹⁰⁷ Therefore, the alibi witness may have made an accurate identification, despite the difference in races, in which case the improvement in your case is slight, if it exists at all.

company over the deposit on an apartment complex commissioned by the management company.

105. Of course, in some instances, the cost of retaining such an individual might be outweighed by the savings in discovery she effects. However, in much complex civil litigation, where discovery bills can reach into the hundreds of thousands of dollars, such a neutral might easily produce a net savings.

106. See *supra* note 82.

107. See Loftus, *supra* note 100.

Question 5: What constitutes a "good" outcome?

Your sexual harassment lawsuit is moving forward. The employer, who is very well-known in his industry, says the reason for the firing was related to company downsizing, not retaliation. Nonetheless, the employer has offered a settlement equal to defense costs plus six months of your client's salary. Your client says that if the circumstances of her departure become public knowledge, and she acquires a reputation as someone who is difficult to work with, she'll need a lot more money than the employer has offered. Your client asks how you feel about requesting ten years' worth of her salary. She says that it may take as many as five years before her reputation as a "whistleblower" goes away, and the other five years' worth of salary can count as proxies for punitive damages, search costs for a new job, and retirement and insurance benefits forgone. How do you advise her?

When lawyers negotiate sexual harassment or employment discrimination claims, they tend to place all client interests in monetary terms.¹⁰⁸ Regardless of subject matter, and with the exception of criminal law,¹⁰⁹ there is a strong tendency in the law generally to turn all of a client's various wants and needs into financial units, in large part because the judicial system discriminates strongly in favor of financial remedies and against remedies that might require specific performance on the part of any of the litigants.¹¹⁰ Intangibles

108. See, e.g. Carrie Menkel-Meadow, *What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1620 (1997). Legal scholars have suggested monetizing such commodities as housework, Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J. L. & FEMINISM 81 (1997); the environment, Donald Kennedy, *Valuing Nature*, 16 STANFORD ENVTL. L. J. XI, xvi (1997); and evidential damages, Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1892 (1997).

109. Certain licensing arrangements act as "crime for fee," especially in the realm of environmental law, in which some commentators have noted the establishment of a de facto "right to pollute." See, e.g., Tanya L. Forsheit, *International Emissions Trading: Equity Issues in the Search for Market-Based Solutions to Global Environmental Degradation*, 18 U. PA. J. INT'L ECON. L. 689, 692 (1997); Norman W. Spaulding, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 STAN. ENVTL. L. J. 293, 321 (1997).

110. See, e.g., *American Broadcasting Companies, Inc. v. Wolf*, 420 N.E. 2d 363, 366 (N.Y. 1981) (refusing to order specific performance in a personal service contract not to compete); *First Nat'l State Bank of N. J. v. Commonwealth Fed. Sav. and Loan Assoc. of Norristown*, 610 F.2d 164 (3rd. Cir. 1979)(specific performance in money lending not available if adequate remedy exists at law). See also Thomas L. Hudson, *Immutable Contract Rules, The Bargaining Process, and Inalienable Rights: Why Concerns Over the Bargaining Process Do Not Justify Substantive Contract Limitations*, 34 ARIZ. L. REV. 337, 352 (1992)(“Courts have been reluctant to order specific

such as pain and suffering,¹¹¹ loss of consortium¹¹² or opportunity costs¹¹³ are transformed from amorphous, subjective constructs into dollars and cents.¹¹⁴ This tendency may have the unfortunate effect of turning negotiations into distributive tugs-of-war,¹¹⁵ even for cases in which client interests are served poorly by such positional bargaining.¹¹⁶

1. *Psychology: Fixed Pie Bias*

Studies show that most negotiators make the default assumption that the "pie" of resources is of fixed size; that is, they perceive the other party's interests to be diametrically opposed to their own.¹¹⁷ This faulty perception is present at the outset of most negotiation

performance in personal service contracts. The courts reason that specific performance in personal service contracts crosses the line of acceptable interferences with freedom.") This reluctance extends to construction contracts, long term contracts, and many other areas where judicial oversight is impractical, impossible, or unlikely to be effective.

Of course, in a court without equity jurisdictions, the judge is limited to money damages and does not have the ability to order equitable relief. For a brief discussion of the reluctance on the part of courts to order specific performance, see RESTATEMENT (SECOND) OF CONTRACTS, § 359(1) (1981) For a unique idea about ways to get an adequate negotiated surrogate for specific performance, see Subha Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 YALE L.J. 61 (1987).

111. See, e.g., Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908 (1989).

112. For discussions of various aspects of the questions surrounding the valuation of loss of consortium, see Teresa Stanton Collett, *Marriage, Family and the Positive Law*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 467, 482 & n.54 (1996), citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125 (5th ed. 1984).

113. Neil K. Komesar, *Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465, 468 (1997) (arguing that opportunity costs are one of the most important concepts in economics and should be applied more rigorously to legal questions—in this instance, those regarding institutional choice).

114. For tax purposes, a variety of intangible assets have to be valued, and regularly are. See I.R.S. VALUATION GUIDE FOR INCOME, ESTATE, AND GIFT TAXES (CCH 1994); Philip F. Postlewaite et al., FEDERAL INCOME TAXATION OF INTELLECTUAL PROPERTIES AND INTANGIBLE ASSETS ¶ 1.03[2] (1997).

115. Richard Walton and Robert McKersie used the term "distributive bargaining" to describe situations in which one negotiator's gains are extracted from the other negotiator, and the possibility of variations in total utility are minimal or non-existent. See RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM (1965).

116. See examples contained in FISHER ET AL., *supra* note 62.

117. See Max H. Bazerman & Margaret A. Neale, *Heuristics in Negotiation: Limitations to Effective Dispute Resolution*, in NEGOTIATING IN ORGANIZATIONS 51 (Max H. Bazerman & Roy J. Lewicki eds. 1983).

situations¹¹⁸ and is remarkably resistant to disconfirming information.¹¹⁹ The "fixed pie bias" inhibits the identification of mutually beneficial tradeoffs. It can also inhibit the ability of negotiators to take full advantage of issues on which their interests are congruent so that they instead reach "lose-lose" agreements.¹²⁰ In fact, at least half the time that lose-lose agreements have been reached in laboratory studies, people were unaware that they wasted resources unnecessarily.¹²¹

2. Remediation

Both sides in a negotiation can often be made better off by settling a dispute rather than litigating. Moreover, the first negotiated outcome is often not the best possible negotiated outcome. One way to identify avenues for creating joint value is to focus on underlying interests of the parties rather than overt positions.¹²² One classic illustration is that of two siblings splitting an orange.¹²³ A purely positional bargaining approach leads to both siblings demanding the largest slice of orange they can get, with the likely result that the orange is split in half. However, by investigating the underlying interests of both sides, both siblings can be made better off. If, for example, one sibling is interested in the pulp for making juice and the other is interested in the peel for making marmalade, each can receive everything they seek, rather than letting half the pulp and half the peel go to waste.

In many cases, the parties have shared or congruent interests, in that each side gains as the other side gains.¹²⁴ For example, both parties usually have an interest in reducing the costs associated with

118. See Leigh Thompson & Reid Hastie, *Social Perception in Negotiation*, 47 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 98 (1990).

119. See Leigh Thompson & Terri DeHarpport, *Social Judgment, Feedback, and Interpersonal Learning in Negotiation*, 58 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 327 (1994).

120. See Leigh Thompson & Dennis Hrebec, *Lose-Lose Agreements in Interdependent Decision Making*, 120 PSYCHOL. BULL. 396 (1996).

121. See *id.*

122. See FISHER ET AL., *supra* note 62.

123. See, e.g., John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 NEB. L. REV. 704, 707 (1996). This article also contains a fresh spin on the orange story with Professor Barkai's simulation about the Ugli Orange, and in turn, illustrates further the limitations of the "fixed-pie" mindset. See *id.* at 711-22.

124. See *id.*

resolving the dispute.¹²⁵ To that extent, all parties gain by constructing a resolution mechanism that is as cost- and time-efficient as possible, and by reducing the amount of adversarial posturing.

In addition to congruent interests, negotiating parties are likely to have differing interests and priorities.¹²⁶ In such instances, there exist an integrative dimension,¹²⁷ meaning that total utility can be expanded if the parties can free themselves from a zero-sum mentality.¹²⁸ Consider, for example, a contract negotiation between union and management that is deadlocked on the issue of wages. Suppose the union is concerned primarily with job security and total compensation, while management is concerned with minimizing labor costs and increasing worker productivity. A careful analysis of these interests can facilitate a settlement that both sides can readily accept. For example, autoworkers might agree to accept a flat wage (i.e., no increase) in return for an commitment on the part of management to distribute a percentage of profits to the workers and to develop an employee tenure system. Under such an agreement, management gains by avoiding a straight wage hike and simultaneously creating an incentive for the workers to be more efficient and productive. Meanwhile, workers gain because they achieve job security plus an opportunity to make more money than they would have made if they had been given a fixed salary increase.

Oftentimes, a proposed agreement can be improved for both sides by introducing new issues,¹²⁹ trading off issues that the principals prioritize differently,¹³⁰ or more fully exploiting issues on which the principals have a shared interest.¹³¹ The quality of negotiated outcomes may be assessed in terms of the extent to which this congruent

125. One of the key assumptions underlying the creation of the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 475-82 (West 1998), was to minimize the costs attendant to civil litigation. ANNUAL ASSESSMENT OF THE CIVIL AND CRIMINAL DOCKET PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 (N.D. OH. Feb. 1, 1996).

126. See Gerald B. Wetlauffer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 376 (1996).

127. See RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* (1965).

128. *But cf.* Wetlauffer, *supra* note 126.

129. See Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 226 (July 1995) ("It is often more productive to expand, rather than narrow issues in order to create more issues for trade. . . . Much legal dispute settlement activity is focused on narrowing disputes, which often makes resolution more difficult, rather than easier").

130. See, e.g., the orange example, *supra* note 123 and accompanying text.

131. E.g., minimizing trial costs.

and integrative potential is exploited.¹³² In particular, an agreement is deemed "Pareto efficient" if no party can be made better off without at least one party made worse off.¹³³ Hence, even if a particular agreement is acceptable to both parties, it may be in their best interests to continue to search for a more efficient outcome by negotiating "post settlement-settlements" after a mutually acceptable agreement has been reached.¹³⁴

These principles are applicable to our legal secretary hypothetical. If the parties restrict their bargaining to purely financial terms, it may turn out that there is no dollar figure that both sides find acceptable. However, the parties may be missing shared or complementary interests that could allow settlement to occur. For example, perhaps the employer can offer to assist the employee with getting placed with another firm, write a strong letter of recommendation, offer some money, and invite the employee to instruct the firm about how to avoid such problems in the future. Furthermore, both sides might have an interest in confidentiality of the proceeding and the settlement. In this case, a deal might be struck that makes both sides happier than any purely financial settlement could have.¹³⁵

Question 6: What is "fair?"

Your "hot pie" case is close to settlement. Your client has indicated that she will settle if she can walk away with \$160,000—an amount that the other side has said is reasonable. She wants them to pay attorney's fees, and they have tentatively said they would—so long as they feel that the amount is "fair." They want your offer.

You took the case on a contingent fee of 1/3 if the case went to trial, and 1/4 on a settlement. You rarely work on an hourly rate, but

132. See, e.g., Chulho Jung et al., *The Coase Theorem in a Rent-Seeking Society*, 15 INT'L REV. L. & ECON. 259, 260 (1995).

133. This concept is named after Italian economist Vilfredo Pareto and is meant to suggest a condition in which no change in distribution of value can be made without some party being left worse off. In other words, when all "value" is distributed, in order for one side to do better, it must be at the expense of another party. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 n.4 (2d ed. 1989).

It is important to note that Pareto efficiency does not imply fairness. In a negotiation involving a division of assets, if one side claims all the assets and the other claims none, the result may be Pareto efficient but starkly unfair.

134. See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); Max H. Bazerman et al., *Post-Settlement Settlements in Two-Party Negotiations*, 3 NEGOTIATION J. 283 (1987).

135. This intuition has been noted anecdotally by Carol A. Wittenberg et al., *Why Employment Disputes Mediation Is on the Rise*, 770 PRAC. L. INST./COM. 747, 750 (1998) ("These kinds of [non-monetary] solutions often address the parties' real, underlying interests and thus permit a more satisfactory resolution.").

when you have, the rate has been \$150. When you reviewed your last year's earnings, the contingent fee cases you took netted you an hourly wage of over \$400. In the year before that, it was about 2/3 that much. Their attorney's hourly rate is \$325. If the case went to trial, it would take you approximately 450 hours. As it is, you've spent 60 hours on the case.

How much will you ask for?

Despite the fact that much of law school classroom discussion focuses on notions of justice and equity, there is no consensus in the legal community about what fairness means or how it should be determined. In practice, some of the most arduous legal battles involve competing norms of fairness.¹³⁶ Is equal distribution of rewards fair in a situation in which business partners did an unequal share of the work? What if one partner contributed more physical capital and the other contributed more intellectual capital?

In some practice areas, and in some jurisdictions, precedents exist that favor a particular norm of fairness over others.¹³⁷ However, in the privately ordered world of settlement negotiations and contract interpretation, the norms are no better defined than in the world at large, and lawyers are not trained to be better judges of fairness than are architects, dentists, musicians, or chefs.

1. *Psychology of Fairness*

a. *Self-Interested Choice of Norms*

The most common norms of distribution that are invoked in negotiation include equality,¹³⁸ egalitarianism,¹³⁹ equity,¹⁴⁰ need¹⁴¹,

136. For example, some commentators have argued that fairness from a parental perspective may not comport with fairness from a "best interests" standard in child custody disputes. See Scott Altman, *Should Child Custody Rules Be Fair?*, 35 U. LOUISVILLE J. FAM. L. 325, 326 (1996-97). See also Craig McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995). See also *Ellis County State Bank v. Keever*, 870 S.W.2d 63, 72 (Tex. Ct. App. 1992)(malicious prosecution action in which "the Legislature weighed the same competing equity/fairness considerations as the courts, but came out with a different conclusion. . ."); *Bond v. Serano*, 566 A.2d 47, 54 (D.C. 1989) (auto accident in which the court "balance[s] the competing claims of fairness").

137. See, e.g., *Ellis County State Bank*, 870 S.W.2d at 72.

138. See Orley Ashenfelter & David Bloom, *Models of Arbitrator Behavior: Theory and Evidence*, 74 AM. ECON. REV. 111 (1984).

139. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

140. See J. Stacy Adams, *Toward an Understanding of Inequity*, 67 J. ABNORMAL & SOC. PSYCHOL. 422 (1963); GEORGE C. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (1961).

141. See MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* (1973).

and past practice or precedent.¹⁴² The aforementioned egocentric bias phenomenon suggests that people tend to define what is fair in a self-interested manner.¹⁴³ For example, people in positions of high power tend to favor distributions based on equity norms, whereas those in positions of lower power favor equality norms.¹⁴⁴ In one study, researchers instructed pairs of people to complete a work task in which they received feedback on their performance.¹⁴⁵ When participants outperformed strangers, they were more likely to divide compensation according to an equity norm, giving more to themselves; however, when the stranger outperformed them, participants tended to favor an equality norm, splitting the money evenly.

b. *Relative Versus Absolute Payoffs*

The rational model traditionally assumes that people act as if they are striving to maximize their own outcomes, without regard to the outcomes of others.¹⁴⁶ In reality, negotiators are sensitive not only to their own payoff, but also to the relative payoff to their counterparts. In one study, participants' satisfaction with a negotiated outcome was affected more strongly by their counterparts' relative payoffs than by their own absolute payoffs.¹⁴⁷ For instance, subjects on average reported more satisfaction with an outcome that imposed a loss of \$600 to themselves but a loss of \$900 to their counterparts, compared to an outcome that offered a gain of \$600 to themselves but a gain of \$900 to their counterparts.

Empirical studies suggest that people are neither as selfish nor as forgiving as classical economic theory predicts. In one study, researchers asked subjects to play a so-called "dictator" game in which they could split twenty dollars with an anonymous other person in one of two ways: either keep ten dollars and give ten dollars, or keep

142. See Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AMER. ECON. REV. 728 (1986); see also Max H. Bazerman, *Norms of Distributive Justice in Interest Arbitration*, 38 INDUS. & LAB. REL. REV. 558 (1985).

143. See *supra* notes 57-79 and accompanying text.

144. See S.S. Komorita & Jerome Chertkoff, *A Bargaining Theory of Coalition Formation*, 80 PSYCHOL. REV. 149 (1973); MARVIN E. SHAW, *GROUP DYNAMICS: THE PSYCHOLOGY OF SMALL GROUP BEHAVIOR* (3d ed. 1981).

145. William Austin et al., *Internal Standards Revisited: Effects of Social Comparisons and Expectancies on Judgments of Fairness and Satisfaction*, 16 J. EXPERIMENTAL SOC. PSYCHOL. 426 (1980).

146. See JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944).

147. See George Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. PERSONALITY & SOC. PSYCHOL. 426 (1989).

eighteen dollars and give two dollars.¹⁴⁸ Contrary to the strategy suggested by a purely rational model,¹⁴⁹ seventy-six percent of subjects chose to split the money evenly. Moreover, a second group of subjects were willing to forgo gains in order to punish greedy players: seventy-four percent preferred to receive five dollars and give five dollars to a person who had split the original twenty dollars evenly rather than receive six dollars and give six dollars to a person who had taken eighteen of the original twenty dollars. Another notable study involved an "ultimatum game" in which a first player made an offer to divide \$100, and a second player decided whether to accept or reject that distribution.¹⁵⁰ If the second player accepted, the money was divided according to the first player's suggested split; if the second player rejected, neither player received any money. Contrary to the rational model,¹⁵¹ first players demanded, on average, less than seventy percent of the prize, and as many as twenty percent of second players rejected positive offers that allocated most of the prize to their counterparts.¹⁵² Again, participants in ultimatum games are often willing to hurt themselves in order to punish others who they believe have behaved unfairly. In a particularly dramatic demonstration of this phenomenon, a version of the ultimatum game was designed so that if player two rejected the offer of player one, he or she could make a counterproposal on how to split a smaller prize.¹⁵³ In this game, eighty-one percent of offers that were rejected by player two were followed by counteroffers that gave less money in absolute terms (but more in relative terms) to the rejecter.¹⁵⁴

148. Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS. S285 at Experiment 1 (1986).

149. The rational model suggests that player one would keep as much money as possible—in this case, eighteen dollars.

150. See Werner Guth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982).

151. In this case, the rational model suggests that the offeror would offer the smallest positive amount to the offeree and that the offeree would accept any positive amount.

152. The rational model suggests that player one would offer the smallest possible positive amount (a penny) to player two and that player two would accept any positive offer.

153. Jack Ochs & Alvin E. Roth, *An Experimental Study of Sequential Bargaining*, 79 AM. ECON. REV. 355 (1989).

154. To illustrate this pattern, player one might offer to keep \$70 and give \$30 to player two, who might reject this split and then offer player one half of a \$40 prize. Under these circumstances, each player is worse off than had player two accepted the first, unequal distribution.

c. Entitlements

People are sensitive not only to relative outcomes, but also to past precedent. The past tends to serve as a reference state against which present agreements are framed. In one series of telephone surveys,¹⁵⁵ researchers found that people think it is unfair for a firm to impose a loss on customers, employees, or tenants by raising prices, cutting wages, or raising rents, unless the firm does so in order to protect itself from incurring a loss.¹⁵⁶ For example, most people thought it was unfair for a profitable firm to lower a wage even if prevailing wages in the market had gone down and the employee could be easily replaced. However, most people thought it was acceptable for the firm to lower wages if it had been losing money.¹⁵⁷

These basic sensibilities about fairness are codified in law.¹⁵⁸ Tort law makes a distinction between "loss by way of expenditure" and "failure to make gain."¹⁵⁹ In contract law, if specific enforcement of a contract creates a windfall for one party, courts are more inclined to compensate out-of-pocket expenses than opportunity costs.¹⁶⁰

155. See Kahneman et al., *supra* note 148.

156. See also Victoria Medvec et al., *Concession Aversion: A Tale of Betrayal and Loss* (1995) (unpublished manuscript, Northwestern University) (on file with author).

157. See Kahneman et al., *supra* note 148, problems 9a & 9b.

158. See David Cohen & Jack L. Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, 30 OSGOOD HALL L.J., 737; Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986); F.H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33 (1990).

159. See Cohen & Knetsch, *supra* note 158. This paper is cited in Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991) reprinted in RICHARD H. THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 63 (1992). They trace the phenomenon from Oliver Wendall Holmes through Cohen and Knetsch:

The attitudes of the lay public about fairness. . . also pervade the decisions made by judges in many fields of law. Supreme Court Justice Oliver Wendall Holmes (1897) put the principle this way:

"It is in the nature of a man's mind. A thing which you enjoyed and used as your own for a long time, whether property of opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man."

Cohen and Knetsch showed that this principle, embodied in the old expression "possession is nine tenths of the law," is reflected in many judicial opinions. *Id.* at 77.

160. See, e.g., *Panco v. Rogers*, 87 A.2d 770 (N.J. Super. Ct. Ch. Div. 1952). The Pancos sold their home to Rogers, believing the selling price was \$12,500. The contract, however, specified the selling price as \$5,500. The court concluded that Rogers had acted in good faith, but given that Mr. Panco was elderly and hard of hearing and that Mrs. Panco barely spoke English, specific enforcement of the contract would have violated norms of fairness. *Id.* at 773-74.

2. Remediation

The foregoing studies suggest that most people are more sensitive to how fairly they have been treated than to how they have fared in objective terms, that reasonable people differ on what they see as fair in a given situation, and that people tend to evaluate fairness in a self-interested manner. Moreover, people are often willing to harm themselves in order to punish those who they perceive to be acting unfairly. Hence, in negotiation, it is critical to consider fairness carefully and avoid if at all possible the *perception* that one is acting unfairly. In fact, it may be easier to get one's counterpart to agree to appropriate standards for determining what is fair than it is to get her to agree on specific terms of a settlement.

In the case of a prospective contract,¹⁶¹ it is often helpful to specify fairness criteria (i.e., a method for calculating damages) in advance. In the case of post-dispute negotiations, we suggest that negotiators strive to identify explicit criteria for fairness, and endeavor to create a mutually acceptable compromise definition before negotiating what outcome these criteria yield in practice.¹⁶² Of

For a discussion of the defense of unfairness (or the "fairness defense") in contract cases, see Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 256-61 (1991).

While contract law in America operates nominally on the principle of strict liability for breach, some commentators have suggested that in operation, courts penalize parties who breach opportunistically. See, e.g., George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1232 (1994).

Furthermore, once a defendant has breached a contract, a plaintiff will only get full recovery if he has made every attempt thereafter to minimize his losses. He cannot profit unfairly from the breach. RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) (duty to mitigate damages). However, the defendant may be liable if he could have mitigated losses for the plaintiff but did not. See Michael B. Kelly, *The Defendant's Responsibility to Minimize Plaintiff's Loss: A Curious Exception to the Avoidable Consequences Doctrine*, 47 S.C. L. REV. 391 (1996).

161. See, e.g., the Brown and Root dispute resolution clause described in JOHN T. DUNLOP & ARNOLD ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 75-77 (1997).

162. The widespread acceptance of arbitration in collective bargaining settings is an example of the use of pre-dispute choice of legitimating criteria, or at least of a mechanism by which legitimating criteria will be developed. See, e.g., *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579-80 (1960) ("There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. . . . [The agreement] is, in the words of the late Dean Shulman, 'a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration. . . .'")

course, the shrewd negotiator will determine the implications of multiple legitimating criteria in advance of bargaining, and will advocate criteria that are favorable to his side.¹⁶³

In our hypothetical billing dilemma, the choice of legitimating criteria determines the outcome. A \$150 hourly wage results in a fee of less than \$8,000, and a 1/3 contingency would exceed \$50,000.¹⁶⁴ These criteria are both supported by legitimating norms, yet in application the latter may seem unreasonable. The savvy negotiator chooses a criterion that favors his side, and still comports with standards of equity, past precedent, and other norms described at the beginning of this section. In general, it is important that one's counterpart is not made to feel they are "losing" relative to what you are receiving, what others are receiving, or what they have received in the past.

Question 7: Should I make the first offer, and if so, what should it be?

Your wrongful death case is proceeding. A pre-trial ruling has made the possibility of punitive damages near zero, and given that the heirs are distant relatives, the likelihood of any "loss of consortium" damages is slight. The death came relatively quickly, so you estimate that "pain and suffering" will not yield vast amounts of money from a jury.

Nonetheless, because your case on liability is strong, the other side has offered to settle, upon conditions. They will admit to liability if you can agree to actuarial damages (the amount she would have earned over the rest of her life) plus some token amounts for the other aspects of the case. In preparation for negotiation over the amount of actuarial damages, you have discovered some interesting facts. The deceased had worked as a waitress, earning approximately \$20,000 per year, but she had finished two years of law school at a reasonably

163. See FISHER ET AL., *supra* note 62, at 81-94.

164. Using a contingency-fee based hourly rate and the work done as standards results in a bill of \$19,500, while using this hourly rate and the work that *would* have been done results in a bill more than seven times this amount. Using regular hourly wage and work done results in a bill of \$9,000, while if work needed to prepare for trial were included, this figure would exceed \$63,000.

The same type of calculation can be done with figures such as average hourly wage over all contingency-fee cases this year or last year, or an average of these amounts and your billed hourly rate.

The point of including this broad array of legitimating criteria is to illustrate that in a fairly run-of-the-mill case, many different formulae can be created that are arguably all fair, but lead to a broad spread of results, some of which may be unacceptable to one's opponent.

prestigious school, and was on the "Dean's list" every term. She was enrolled and ready to start her final year of school at the time of her death.

Attorneys in the case have a meeting with you later this week to discuss possible settlement. Will you make the first offer? Will you invite them to make it? If you do, what will it be?

When considering the question of whether to make the first offer or wait for an opponent to make the first offer, the traditional practice has been for the moving party (the plaintiff or the prosecution) to make a proposal that is rejected by the defendant, and the rejection is followed by a counter. Positional bargaining may cause an iterated chain of steps toward a mid-point, and if the mid-point is agreed upon, a settlement occurs. Otherwise, a trial is likely.

The first "offer" is generally the demand stated in the complaint as the request for damages. However, this amount is often an overstated figure that is included to prevent a jurisdictional challenge and to get the attention of the defendant. It is rarely seen by defendants as a credible settlement offer.¹⁶⁵ Similarly, some defendants respond to the complaint with an offer to settle the case for its nuisance value. Again, this figure is so starkly low relative to the ultimate settlement value of most cases that it is not perceived as an offer to settle. It is an announcement of aspiration, not valuation.¹⁶⁶

When the time comes to make sincere offers, someone has to go first, but most attorneys prefer to hold their cards close to their vests. The question looms—how to start?

1. *Psychological Considerations*

There is little empirical research on the question of whether it is best to make the first offer. Two psychological phenomena may be relevant. In situations where one's counterpart has only a vague sense of what is reasonable (e.g., because there is little or no judicial precedent), making the first offer may afford an opportunity to exploit the aforementioned anchoring bias,¹⁶⁷ and draw the counterpart into an order of magnitude that is more favorable to the offeror before the counterpart makes an offer that anchors both parties in a range that favors him. On the other hand, a pervasive norm that governs negotiation behavior is that of reciprocity, according to which one should

165. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 769 (1984).

166. Of course, both the initial demand and the initial response may have anchoring effects. See *supra* notes 39-44 and accompanying text.

167. See *supra* notes 39-44 and accompanying text.

reciprocate concessions made by others.¹⁶⁸ In fact, distributive negotiations typically settle roughly midway between the opening offers to the extent that this midpoint is feasible for both sides.¹⁶⁹ Hence, making the second offer can afford the negotiator an opportunity to define where that midpoint lies. In general, whether one makes the first offer in order to exploit anchoring, or makes the second offer in order to leave room for concessions and exploit reciprocity, it is good strategy to make as extreme an opening offer as can be gotten away with, but not so extreme that the offeror appears to be negotiating in bad faith.¹⁷⁰

In cases where opposing counsel has no clear notion of the value of the claim, she will be more susceptible to anchoring bias. The case of the "waitress/lawyer," for example, might provide an opportunity to anchor opposing counsel to a higher number than she might otherwise have considered. Valuing the career worth of a law student is a highly speculative enterprise, as her chosen career path may have been a lucrative corporate career or a lower-salaried career in public interest law. Furthermore, long-term success in her chosen path is largely a matter of guesswork. Hence, a high first offer might draw opposing counsel into a debate about how successful a law career the deceased would have had, rather than a discussion on whether she would have finished law school at all.

In cases where opposing counsel has a reasonable idea concerning the value of the claim, it may behoove the lawyer to wait for the other side to make the first offer so that the lawyer can respond with a counter-offer that defines a midpoint favorable to him. Had the deceased been an established attorney with a stable income, it might make sense to let opposing counsel make the first offer. In such an instance, if opposing counsel offered four million dollars as a settlement, and the lawyer aspired to settle at eight million, she should counter at twelve.¹⁷¹

168. See ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1993). We discuss reciprocation and other social influence tactics more fully in *infra* Question 10.

169. See RAIFFA, *supra* note 134; but see also Sally Blount-White et al., *Alternative Models of Price Behavior in Dyadic Negotiations: Market Prices, Reservation Prices and Aspirations*, 57 *ORG. BEHAV. & HUM. DECIS. PROC.* 430 (1994).

170. We consider it unfortunate that "starting reasonably" appears to be an ineffective negotiation strategy. Witness the notorious lack of success of Lemuel Boulwar (former vice-president of General Electric), chronicled in HERBERT ROOT NORTHRUP, *BOWLWAREISM* (1964). See also CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 173-75 (2d ed. 1993).

171. The prescriptions in this subsection appear to fly in the face of interest-based bargaining, but they are actually perfectly consistent. Interest-based negotiation

2. Remediation

To protect against being exploited by one's counterpart, we suggest that attorneys gather as much information as possible that might help them assess the value of the claim in question.¹⁷² The more information one has at his fingertips, the less likely he is to be drawn into accepting an inequitable offer due to of an anchoring bias. Furthermore, we suggest that attorneys decide in advance on their reservation price (in consultation with the client, of course), and that they base this price on a carefully researched estimate of what is likely to happen if the case goes to court. Adjustments are appropriate only as relevant new information comes to light. Finally, we suggest that attorneys can use the norm of reciprocity to their advantage by insisting that their own concessions be followed by concessions from their counterpart. In our experience, people tend to be more sensitive to the rate of concessions than they are to the magnitude of those concessions.

Question 8: How should I frame the offer?

The wrongful death case is close to settlement. They've agreed that if you will compromise on the expected wages then they will compensate you for other aspects of the claim—provided that they "feel okay with the offer." The other attorney wants to see your offer in writing.

There are a number of aspects of your demand—loss of consortium, expected wages, medical bills, funeral costs, attorneys fees, etc. Some of the bills are in— e.g., funeral costs—and you are waiting for others—e.g. medical bills. Furthermore, although you can compile some of your attorney's fees, you haven't gotten all the hourly work bills from your associates, and you still have bills coming in from expert consultants and investigators. Do you send the information piecemeal, or wait to collect all the information and send one bill?

techniques are intended to expand utility by allocating resources to the parties who value them the most, and by meeting complementary interests. However, once preferences are known and the negotiation pie has been expanded as much as possible, negotiators face issues about splitting that enlarged pie. Sometimes the negotiators all measure utility in dollars. When the negotiation has reached the value claiming stage, or when each negotiator has the same, single and opposing interest, we stand by the advice to stake out the position that creates a favorable mid-point, provided that the offer is not so outrageous that it alienates the other side.

172. Although this advice may appear to conflict with the admonitions against overdiscovery contained in *supra* Question 3, the information needed to evaluate a claim is very different than information needed to prosecute or defend a case in court. In particular, a review of base rates may be undertaken with thoroughness and still have a minimal impact on the discovery bill.

Traditional economic analysis suggests that people should be sensitive to the impact of offers on final states of wealth, and that the particulars of how those offers are communicated should not matter.¹⁷³ Empirical studies of attorneys suggest that describing an offer in terms of gains versus losses can affect a lawyer's willingness to accept the offer.¹⁷⁴ Certainly, lawyers choose words carefully, and this tendency extends to the crafting and communication of offers. However, for the most part, attorneys use this skill to avoid admitting or denying liability, or to avoid the accidental creation of exploitable weaknesses in their cases. Less thought goes into the question of how to frame an offer so that it is most likely to be accepted.

1. *The Psychology of Value and Framing*

Behavioral decision theorists have documented systematic violations of the standard economic assumption that people evaluate options in terms of their impact on one's final state of wealth.¹⁷⁵ In particular, *prospect theory* assumes that people adapt to their present state of wealth and are sensitive to changes with respect to that endowment.¹⁷⁶

Second, people exhibit diminishing sensitivity to increasing gains and losses. For example, increasing an award from zero to \$1000 is more pleasurable than increasing an award from \$1000 to \$2000; increasing an award from \$2000 to \$3000 is even less pleasurable, and so forth. Similarly, increasing a payment from zero to \$1000 is more painful than increasing a payment from \$1000 to \$2000, and so on. One key implication of this pattern is that people's willingness to take risks differs for losses versus gains. For example, because \$1000 is more than half as attractive as \$2000, people typically prefer to receive \$1,000 for sure than face a fifty-fifty chance of receiving \$2,000 or nothing (i.e., they are "risk-averse" for medium probability gains). In contrast, because losing \$1000 is more than

173. See, e.g., Amos Tversky, *Contrasting Rational and Psychological Principles of Choices*, in WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS 5 (Richard J. Zeckhauser, et al. eds. 1996).

174. See Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 130-58 (1996). In his studies, Professor Rachlinski found evidence that litigants facing potential losses made riskier choices than those facing potential gains. *Id.* at 144.

175. See, e.g., Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341 (1984).

176. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (1992).

half as painful as losing \$2000, people typically prefer to risk a 50-50 chance of losing \$2,000 or losing nothing to losing \$1,000 for sure (i.e., they are "risk-seeking" for medium probability losses).¹⁷⁷

Third, prospect theory asserts that losses have more impact on choices than do equivalent gains. For example, most people do not think that a fifty percent chance of gaining \$100 is sufficient to compensate a fifty percent chance of losing \$100. In fact, people typically require a 50% chance of gaining as much as \$200 or \$300 to offset a 50% chance of losing \$100.¹⁷⁸

Taken together, the way in which a problem is framed in terms of losses or gains can have a substantial impact on behavior in negotiations. First, loss aversion contributes to a bias in favor of the status quo because relative disadvantages of alternative outcomes loom larger than relative advantages. Hence, negotiators are often reluctant to make the tradeoffs necessary for them to achieve joint gains.¹⁷⁹ To illustrate, consider the case of two partners in a failing consulting firm. The joint office space and secretarial support costs are unduly burdensome, and each could operate productively out of their homes with minimal overhead costs. If they could divide their territory and agree not to compete, each could have a profitable career—but each would have to agree to give up half the firm's client base. Each partner may view the territory they retain as a gain that doesn't compensate adequately for the territory they must relinquish.¹⁸⁰ Yet failure to make such a split consigns them to continuation in a losing venture.

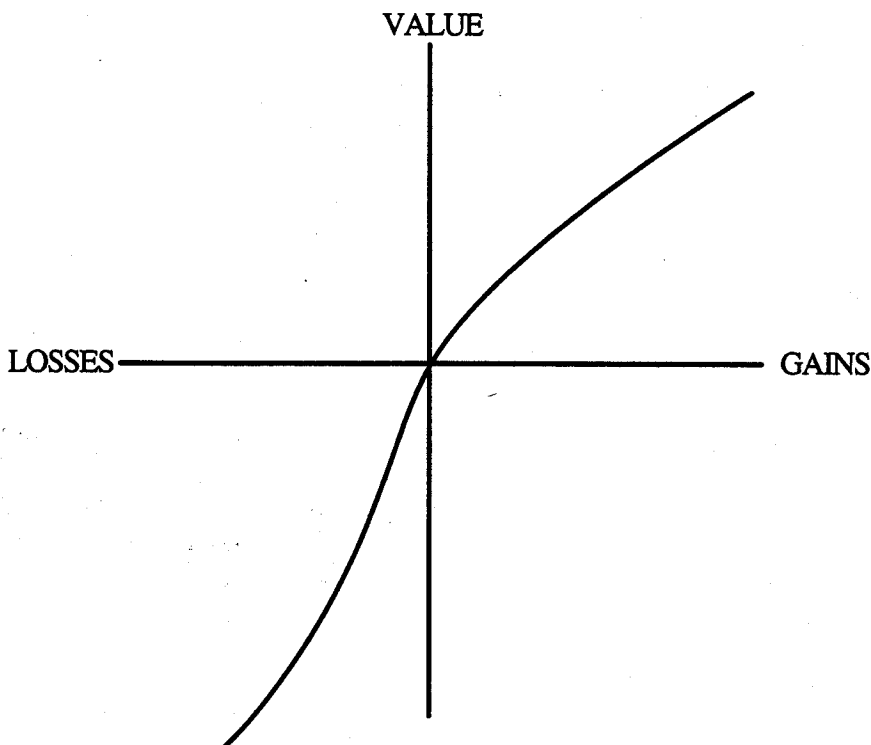
Second, both loss aversion and the pattern of risk seeking for losses may lead to more aggressive bargaining when the task is viewed as minimizing losses rather than maximizing gains. Indeed,

177. A more formal characterization of risk attitudes is as follows: risk-aversion is observed when a person prefers a sure payment to a risky prospect with equal or greater expected value; risk-seeking is observed when a person prefers a risky prospect to a sure payment that is at least as high as the expected value of the prospect; risk neutrality is observed when a person is indifferent between receiving a risky prospect or a sure payment equal to its expected value. Although people are typically risk-averse for moderate to large probability gains and risk-seeking for moderate to large probability losses, this pattern is typically reversed for low probability gains and losses. See Tversky & Kahneman, *supra* note 176.

178. See *id.*

179. See William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988). The authors also attribute status quo bias to psychological commitments motivated by misperceptions of sunk costs, regret avoidance, or a drive for consistency.

180. For other examples of the status quo bias in a legal context, see Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).



AMOS TVERSKY & DANIEL KAHNEMAN, *Loss Aversion Riskless Choice: A Reference-Dependent Model* 106 Q.J. ECON. 1038, (1991).

in laboratory studies, negotiators whose payoffs are framed in terms of gains (e.g., they were instructed to maximize revenues) tended to be more risk-averse than those whose payoffs are framed in terms of losses (e.g., they were instructed to minimize costs): the first group tended to be more concessionary but completed more transactions.¹⁸¹ Recently, Professor Rachlinski documented greater willingness to accept settlement offers in legal contexts when the offer is perceived as a gain compared to when it is perceived as a loss.¹⁸²

181. Although participants whose payoffs are framed in terms of losses tend to complete fewer deals, the terms of these deals tend to be more favorable. See Margaret A. Neale et al., *The Framing of Negotiations: Context Versus Task Frames*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 228 (1987).

182. See Rachlinski, *supra* note 174, at 128.

Third, the attractiveness of potential agreements may be influenced by the way in which gains and losses are packaged and described.¹⁸³ In particular, if a negotiator wants to present a proposal in its best possible light to a counterpart, he or she should attempt to integrate each aspect of the agreement on which the counterpart stands to lose (in order to exploit the fact that people experience diminishing sensitivity to each additional loss) and segregate each aspect of the agreement on which the counterpart stands to gain (in order to avoid the tendency of people to experience diminishing sensitivity to each additional gain). For instance, in the partnership dissolution example, it would be most effective to describe the territory forgone as a single unit (e.g., "everything west of highway 6 is mine") and the territory obtained in component parts (e.g., "and you will have the Heights neighborhood, the eastern section of downtown, everything north of there to the river, South Village, etc."), and least effective to describe the territory foregone in component parts (e.g. "I keep the west side of downtown, the riverfront, North village, and everything between downtown and Ballard Square. . .") and the territory obtained as a single unit (e.g., "everything east of highway 6 is yours").

2. Remediation: Protecting Against Framing Effects

Knowledge of the psychology of value can help a negotiator make offers appear more desirable to her counterpart, as described above. As for defending against inconsistency or manipulations by others, a negotiator should be aware that aspirations, past history, or previous offers may influence the frame of reference against which a negotiator perceives losses and gains; as a result, risk attitudes may be influenced by these transitory perceptions, which in turn influence how aggressively a negotiator bargains. Furthermore, negotiators must consciously overcome their natural reluctance to make concessions in order to exploit opportunities for trades that make both sides better off. Finally, in order to protect against mental accounting manipulations by others, a negotiator might develop a scoring system for each of the issues under consideration or translate everything into a unified dollar metric. By adding up points or dollars across all issues,

183. See Richard Thaler, *Mental Accounting and Consumer Choice*, 4 *MARKETING SCI.* 199 (1985). Thaler's influential article develops a theory of consumer behavior combining insights from cognitive psychology and microeconomics. In particular, Thaler's model incorporates the value function from prospect theory and the notion that transactions are evaluated in comparison to a reference price that is influenced by prevailing norms of fairness.

the negotiator can focus on the value of the aggregate outcome to her client, rather than a piecemeal melange of incremental gains and losses that may have been creatively framed by her counterpart.¹⁸⁴

Returning to our hypothetical question of whether to wait and send one bill or to send the bills as they come in, our advice is to wait and send one bill. If one bill came in for expenses to date and then a second bill came in for medical expenses and so forth, the recipient of the bills would have to endure a series of segregated losses rather than a single, integrated loss.

Question 9: How should I evaluate their offers?

You have been discussing with your client two possible settlement packages in your "hot pie" case. Package A would require the company to pay a cash amount of \$100,000, and Package B would require an agreement by the company to pay all of your client's current and future medical bills, change the temperature at which they serve their pies, and give her a cash payment of \$50,000. Your client has expressed, in confidence, a mild preference for the \$100,000 cash.

While you are out of town on other business and before you could communicate these offers to your counterpart, the opposing counsel leaves you a message offering \$100,000 to settle the case. When you call your client to communicate this news, rather than show elation, she expresses concern and suggests that the other deal now seems more appealing. How do you counsel your client?

When an attorney receives an offer from the other side, he is ethically obligated to transmit that offer to his client.¹⁸⁵ He is not obligated to show the client a letter or play a voice-mail message or recite verbatim the offer with appropriate inflections. As the lawyer communicates the offer, the lawyer inevitably, if unwittingly, introduces a spin on the offer that may influence the client to consider it favorably or unfavorably. Usually the attorney's impression (and indeed, the client's) of the offer will be influenced to some degree by the identity of the offeror. In particular, if the attorney's dealings with the other side have been rancorous, the attorney may view any

184. For more discussion on scoring systems, see RAIFFA, *supra* note 134. The creation of a scoring system can reveal where mutually beneficial tradeoffs and congruent interests exist, and can protect the attorney from being exploited by mental accounting tricks. While we recommend creation of a unified scoring system for evaluation of settlement offers, we caution against the assumption that both sides will agree on scoring systems.

185. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a), 1.4 (1995).

offer with a great deal of suspicion. Sometimes the relationship impedes impartial evaluation of an offer, causing a negotiator to reject an offer from an adversary that he should have accepted.

1. *Psychology of Reactive Devaluation*

Fixed-pie bias (i.e., the assumption that what is good for my counterpart must be bad for me) may contribute to *reactive devaluation*, which is a tendency to evaluate proposals less favorably after they have been offered by one's adversary.¹⁸⁶ In one classic study conducted during the days of Apartheid, researchers solicited students' evaluations of two university plans for divestment from South Africa.¹⁸⁷ The first plan called for partial divestment, and the second increased investments in companies that had left South Africa. Both plans, which fell short of the students' demand for full divestment, were rated before and after the university announced that it would adopt the partial divestment plan. The results were dramatic: students rated the university plan less positively after it was announced by the university and the alternative plan more positively.¹⁸⁸

We hasten to note that the source of an offer may be diagnostic of its quality. It may be reasonable to view an offer more critically when the source is one's opponent, particularly if there is an unpleasant history between the parties. However, evidence from the aforementioned studies suggests that people tend to experience a knee-jerk overreaction to the source of the offer. If negotiators routinely undervalue concessions made their counterparts, it will inhibit their ability to exploit tradeoffs that might result in more valuable agreements.

Consider an example of how reactive devaluation might manifest itself in a negotiation between lawyers. Imagine a simplified environmental cleanup action in which the parties are a governmental enforcement agency (represented by a single person) and a single responsible polluter. There may be two solutions to their problem. In one, the government effectuates the cleanup and sends a bill to the

186. See Lee Ross and Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 394-95 (1991); Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, BARRIERS, *supra* note 9 at 26-43; Mark Lepper et al., *Mechanisms of Reactive Devaluation*, unpublished manuscript, Stanford University (1994) (on file with authors); Constance Stillinger et al., *The Reactive Devaluation Barrier to Conflict Resolution*, unpublished manuscript, Stanford University (1990) (on file with authors).

187. See Stillinger et al., *supra* note 186. For a description of the study, see Mnookin & Ross, *supra* note 9.

188. See Stillinger et al., *supra* note 186.

polluter. In the second, the polluter does the cleanup and the government inspects. Perhaps solution one meets more of the polluters' interests than solution two. One might suppose that the polluter would prefer this solution regardless of how it emerges as the agreed method. However, studies of reactive devaluation suggest that once the government tentatively agrees to that particular solution, the polluter may view the alternative solution more favorably.¹⁸⁹ The apparent thought process is "if they held it back, it must be worse for them and therefore better for me than the one offered." The polluter may irrationally reorder her priorities and reject a deal simply because it was offered freely by an opponent.

2. Remediation

Resisting the destructive effects of reactive devaluation will require negotiators to unlearn a pervasive assumption that most people carry with them. Negotiations are rarely fixed-sum and it is simply not true that what is good for one side is necessarily bad for the other. As mentioned above, both parties often have congruent interests or a mutual interest in exploiting tradeoffs on issues that they prioritize differently. To resist reactive devaluation, one must short-circuit a deeply ingrained habit. It is natural to react against freedom to choose, and when an opponent holds back one offer in favor of another, it is natural to yearn for the alternative option. However, it would be wise to critically examine this natural impulse and ask if this impulse is a rational response to a truly inferior offer or an emotional reaction against the other side's initiative.

Even if a lawyer can restrain herself from reactive devaluation, it may be very difficult to buffer this response in his counterpart. Certainly, it first may help to cultivate a cordial relationship with one's counterpart to the extent that this is possible, so that offers are regarded with less suspicion. Second, it may be helpful to ask a mutually trusted intermediary to convey a proposal. Some commentators have suggested that reactive devaluation can be overcome with the help of a mediator.¹⁹⁰ Finally, if a party crafts a settlement package

189. *See id.*

190. *See Mnookin & Ross, supra note 9, at 15-16.*

In one study conducted during the negotiation of the START II treaty, a nuclear disarmament proposal was labeled, alternatively, the "Reagan" plan, the "Gorbachev" plan, and the "U.N." plan. Predictably, American subjects thought the Reagan plan was acceptable, the Gorbachev plan unacceptable, and the U.N. plan marginally acceptable. Constance Stillinger et al., *The Reactive Devaluation Barrier to Conflict*

that would be mutually beneficial, it may be helpful to work with opposing counsel to make them feel as if the solution was jointly initiated or even that it was the opposing counsel's idea.

Returning to the hypothetical, the client may be experiencing reactive devaluation. It may behoove the attorney to counsel her client to consider whether her change of heart was a result of the fact that her original package was offered by her opponent in the litigation or is a result of other factors. If her reaction was driven by its source, the attorney should make sure she understands that she is rejecting her formerly-preferred deal solely because it was offered by an adversary, and not necessarily because it fails to meet her interests.

Question 10: How can I get people to accept my offers?

You are submitting your offer on the harassment case. To what extent do you think that each of the following might help get your offer accepted by opposing counsel? Why?

- 1) *"Of course, we put a lot of time and energy into crafting this offer, and we've conceded at least five different times on the amount that we are willing to take. We're asking you to concede just once from your initial offer."*
- 2) *"You once told me that money was a secondary issue, that it was confidentiality that mattered most to your client. We've agreed to give you that. Isn't your statement still true?"*
- 3) *"I've run this offer by six other people in this firm, all of whom used to work with you before you took your present job. They all thought that the offer was one that your client should accept."*
- 4) *"We've been friends for a long time, so how about helping me make this one go away? Once we get it done, I'll take you out for a beer."*
- 5) *"And while I don't want to put any pressure on you, you probably know that we hired Justice Brown from the local court where our case is filed. I showed him our offer just to get his feedback, and he thought your client would be foolish not to accept."*
- 6) *"This offer is open for forty-eight hours. After that, all bets are off."*

Negotiation is, in part, a game of mutual influence. Many attorneys are naturally gifted in the art of social influence while others are less comfortable with this dimension of lawyering. We believe that the study of social influence tactics can help attorneys protect themselves against exploitation.

Resolution, unpublished manuscript, Stanford University (1990) (on file with authors). The intuition that this concept applies to legal negotiations needs to be tested empirically.

1. *Psychology of Social Influence*

A vast literature in social psychology examines how individuals persuade others to accede to their requests. Psychologist Robert Cialdini¹⁹¹ organizes the literature into six pervasive principles of social influence that we describe below. Cialdini observed these tactics in his study of salespeople, fund-raisers, advertisers, and other professionals.¹⁹² We believe that these principles apply with equal force to negotiations of civil settlements by attorneys.

a. *Reciprocation*

One should repay, in kind, what another person has provided. Even uninvited favors and gifts leave people with a sense of indebtedness that they feel they must reciprocate. In negotiation, there is a strong norm that a party should respond to each concession that his or her counterpart makes with a concession of his or her own, even if the initial offer was rather extreme.¹⁹³

The tendency to reciprocate is not in itself problematic, but when one side reciprocates relatively trivial concessions with meaningful concessions, such as a significant reduction in what was already a reasonable request, she may be committing a negotiation error. A skillful negotiator knows that people tend to reciprocate acts of kindness, even when the original kindness is uninvited and of no value to the recipient. Lawyers bargain over both substantive and logistical matters, such as discovery schedules, stipulations, deposition schedules, compliance with orders, and the possible settlement of the action. They rarely get everything they want, and the result of these interactions generally involves some degree of compromise from both sides. Occasionally, a logistical concession from one attorney may elicit a substantive concession from opposing counsel.

Two suggestions are in order. First, as noted in Question 7, the lawyer should make an optimistic first offer in order to leave room for concessions that will be expected by the other side (in response to

191. See CIALDINI, *supra* note 168.

192. See *id.*

193. See, e.g., Robert B. Cialdini et al., *Reciprocal Concessions Procedure for Inducing Compliance: The Door-in-the-Face Technique*, 31 J. PERSONALITY & SOC. PSYCHOL. 206 (1975). In this study, college students walking on campus were asked if they would be willing to accompany a group of juvenile delinquents on a day trip to the zoo. Only 17% agreed to do so. A second sample of students were first asked if they would be willing to spend two hours per week for two years as unpaid counselors to juvenile delinquents. After refusing this extreme request, these students were asked if they would be willing to take part in the zoo daytrip—in this case, 50% agreed so to do.

concessions that they will make). Second, it is important to resist the temptation to reciprocate meaningless or negligible concessions.

Returning to our hypothetical, it is easy to see that the first phrase employed by the attorney is an attempt to exploit the reciprocation norm. The speaker draws attention to previous concessions, thereby putting pressure on the respondent to reciprocate.

b. *Commitment and Consistency*

Once a person makes a choice or takes a stand, she encounters personal and interpersonal pressure to behave consistently with that commitment. There are at least three manifestations of this principle in negotiation. First, a public commitment to a statement of principles, an aspiration, or a criterion of fairness is difficult to abnegate at a later time.¹⁹⁴ Second, after a negotiator gets her "foot in the door" by having her counterpart accede to a small initial request, later cooperation becomes more likely.¹⁹⁵ Third, after investing significant time and energy into crafting a tentative agreement, negotiators are more likely to give in to last-minute requests by their counterparts.¹⁹⁶

194. Psychological research suggests that making a commitment publicly rather than privately increases the drive for consistency. In one classic study, students were asked to estimate the length of a line, then received information that the judgment was incorrect. A group of students who has been asked to commit to their first estimate publicly by writing it down, signing it, and turning it in to the experimenter were much more reluctant to later revise their estimate than a group of students that kept these initial estimates to themselves. See Morton Deutsch and Harold B. Gerard, *A Study of Normative and Informational Social Influences upon Individual Judgment*, 51 J. ABNORMAL & SOC. PSYCHOL. 629 (1955). In another study, experimental juries were less likely to reach a consensus if they were asked to publicly display their opinions with a show of hands rather than a secret ballot. See Norbert L. Kerr & Robert J. MacCoun, *The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberation*, 48 J. PERSONALITY & SOC. PSYCHOL. 349 (1985).

195. See, e.g., Jonathan L. Freedman & Scott C. Fraser, *Compliance without Pressure: The Foot-in-the-Door Technique*, 4 J. PERSONALITY & SOC. PSYCH. 195 (1966). In this classic study, a "volunteer" asked homeowners in a San Francisco suburb if they would agree to have a large, unattractive sign reading "DRIVE CAREFULLY" placed in their front lawns. Only 17% acceded to this request. A second group of homeowners in the same neighborhood had been approached two weeks earlier by a different volunteer and asked if they would post a 3-inch sign reading "BE A SAFE DRIVER." Virtually all of the people in this group agreed to post this small sign. More significantly, when asked two weeks later, 76% of them also agreed to have the large sign installed on their front lawns.

196. See Robert B. Cialdini et al., *Low-Ball Procedure for Producing Compliance: Commitment then Cost*, 36 J. PERSONALITY & SOC. PSYCHOL. 463 (1978). In this study, students enrolled in an introductory psychology class were asked if they would be

Sometimes lawyers decrease the possibility of negotiated settlement by publicly committing to an unrealistic aspiration. They often promise an optimistic result before they have all of the relevant facts, typically in an effort to get retain a potential client. For example, a plaintiff's attorney might tell his client that the case should not settle for less than \$100,000. The client and attorney may then become wedded to this aspiration level. Suppose the lawyer later discovers that the objective value of the case is \$50,000. It may be an embarrassment at this point for the attorney to recommend accepting an offer that is even as high as \$80,000.

In addition to commitments made in valuation, commitments made in reaction to offers can be detrimental to the negotiating process. A lawyer often rejects offers made by the other side, or prematurely commits to an unrealistic "walk-away" price. If she later wishes to accept the offer or relax her reservation price, she must either admit that she was wrong or come up with a reason why circumstances have changed. We recommend that lawyers be circumspect in making public commitments, and that they help provide opponents with face-saving reasons to back down from commitments opponents may have made (e.g., provide reasons why circumstances have changed).

It is quite common for negotiators to force endgame concessions. For instance, when a real estate deal is near consummation, it is common for sellers and mortgage companies to reveal myriad small costs that were not discussed earlier. Lawyers may try at the last moment to tack on attorney's fees and court costs to a settlement. Provided that these costs are small relative to settlement amounts, the recipient of such a request may feel that it is better to concede rather than to scuttle the whole deal and "go back to square one." Again, one useful means to defend against such exploitation is to decide in advance on a reservation price and to resist temptations to back off of this value unless additional information justifies doing so.

Returning to the hypothetical, it is easy to see that the use of the phrases "You once told me that. . ." and "Isn't your statement still true?" are attempts to pressure the recipient to remain consistent with prior statements and offers.

willing to participate in a study "on thinking processes" at seven a.m. Only 24% complied. A different group from the same class was asked if they wanted to participate in a study of thinking processes. In this case, 56% agreed, but none reneged when they were told that it started at seven a.m. even though they were given a chance to change their minds.

c. *Social Proof*

People view a behavior as correct in a given situation to the degree that they see others performing it.¹⁹⁷ The reactions of others thus serves as "proof" that the behavior is appropriate. For example, canned laughter has been shown to elicit more laughter in audiences and cause them to rate material as funnier than they do in its absence.¹⁹⁸ In general, people are more likely to follow the behavior of others when the situation is unclear or ambiguous or when people are unsure of themselves.¹⁹⁹ Moreover, people are more likely to follow the example of others whom they perceive to be similar to themselves.²⁰⁰ Senior lawyers in large firms inculcate junior associates into practice, in part, by modeling a great many behavioral characteristics that are not necessarily effective, but which are nonetheless deeply ingrained. When and where to meet for negotiations, how to dress for work, and how to interview clients are all matters that are typically transmitted uncritically from one generation of firm lawyers to the next.

In settlement negotiations, lawyers can exploit past precedents and examples of other litigants who have accepted similar terms in attempts to gain compliance. In order to defend against such tactics, we encourage lawyers to seek out for themselves information concerning comparable cases and values in order to effectively evaluate the case at bar.

Returning to our hypothetical, the reference to the "other six people" who approved the offer is an attempt to influence the recipient to conform to social proof. These former colleagues provide cues for appropriate behavior in a circumstance in which the proper response is unclear.

d. *Liking*

People prefer to say yes to others they know and like. Several factors promote liking: physical attractiveness, similarity, compliments, cooperation, and familiarity.²⁰¹ Contrary to the popular belief

197. See Leon Festinger, *Informal Social Communication*, 57 PSYCHOL. REV. 271 (1950).

198. See M.M. Smythe & R. C. G. Fuller, *Effects of Group Laughter on Response to Humorous Materials*, 30 PSYCHOL. REP. 132 (1972).

199. See Abraham Tesser et al., *The Role of Social Pressure, Attention to the Stimulus, and Self-Doubt in Conformity*, 13 EUR. J. SOC. PSYCHOL. 217 (1983).

200. See, e.g., Harvey A. Hornstein et al., *Influence of a Model's Feeling about His Behavior and His Relevance as a Comparison Other on Observers' Helping Behavior*, 10 J. PERSONALITY & SOC. PSYCHOL. 222 (1968).

201. See CIALDINI, *supra* note 168, for numerous studies supporting this assertion.

that a successful negotiator ruthlessly intimidates and exploits her counterparts, a positive relationship can be more effective for achieving mutually beneficial and equitable outcomes.²⁰² Moreover, leading economists have argued that cooperation²⁰³ and honesty²⁰⁴ tend to promote long-term success in bargaining. And studies of lawyers negotiating prove that those who are cooperative (a trait that engenders liking) are rated as more effective, on average, than lawyers who are not.²⁰⁵

The fourth statement in our hypothetical is a transparent attempt to leverage "liking" in order to influence the recipient to accept the settlement offer. The more the recipient likes the offeror, the more likely she will be to accept.

e. Authority

People are more likely to accede to the request of a perceived authority figure. The best known illustration of this principle is Milgram's work, which demonstrated the willingness of ordinary people to administer what they thought were dangerous levels of electrical shocks to a person with an alleged heart condition merely because an "experimenter" in a white laboratory coat insisted that "the experiment requires that [they] continue."²⁰⁶ Equally sobering is the demonstration by Hofling and his colleagues in which a researcher identified himself over the phone as a hospital physician and asked hospital nurses to administer a dangerous dose of an unauthorized drug to a specific patient; in this case 95 percent of the nurses attempted to comply.²⁰⁷ Not only do titles tend to promote compliance and deference, but so do uniforms²⁰⁸ and other trappings, such as

202. A more detailed account of this important finding is beyond the scope of the present paper. For an overview of some evidence, see Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in *BARRIERS*, *supra* note 9, at 86-107. For a fascinating look at the strategic role of emotions as viewed by an economist, see FRANK, *supra* note 76.

203. See generally ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

204. See FRANK, *supra* note 76.

205. See GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 19 (1983).

206. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* (1974).

207. See Charles K. Hofling et al., *An Experimental Study of Nurse-Physician Relationships*, 143 *J. NERVOUS & MENTAL DISEASE* 171 (1966).

208. See, e.g., Leonard Bickman, *The Social Power of a Uniform*, 4 *J. APPLIED SOC. PSYCHOL.* 47 (1974) (finding that people were more willing to comply with request—such as to pick up litter or give money to stranger at parking meter—when the request was made by individual dressed in security guard uniform and not street clothes).

fancy automobiles.²⁰⁹ Certainly, most trial attorneys will agree that the judge's physically elevated status and somber, traditional robe reinforce a courtroom hierarchy in which the judge enjoys the greatest status. Even a retired judge or a sufficiently senior partner may lend an air of authority to a position or an offer, as might a "home turf" advantage.

In our hypothetical, the reference to Justice Brown is meant to lend an air of authority to the offer. To the extent that the recipient regards the Justice in esteem or believes him to be a figure of authority in the community, the offer may be more readily accepted.

f. Scarcity

Opportunities often seem more valuable when they are less available. According to psychological reactance theory, when people are proscribed from making a certain choice, they desire that choice more and work harder to obtain it.²¹⁰ This is the principle underlying the success of the ubiquitous "limited time offer" in consumer advertising. Threats to freedom can take the form of time limits, supply limits, and competition. In negotiation, these tactics can be a particularly effective means of gaining compliance. Savvy negotiators can dramatize their alternatives by entertaining competing bids, or they can strategically impose artificial time limits for negotiation.

In our hypothetical, the time limit attached to the offer may trigger a response by the other side. They may be more willing to accept the offer in reaction to the threat of its imminent disappearance.

IV. CONCLUSION

We hope to realize three goals with this Article. First, we hope to encourage attorneys and other legal professionals to consider more carefully how psychological factors may prevent them from resolving conflicts efficiently and effectively. The so-called rational model of

For an application of Bickman's theory to the realm of criminal law, see Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 238 (1997).

209. See, e.g., Anthony N. Doob & Alan E. Gross, *Status of Frustrator as an Inhibitor of Horn-Honking Responses*, 76 J. SOC. PSYCHOL. 213 (1968) (drivers stuck behind cars at green traffic light waited longer before honking horn when car in front was newer luxury car as opposed to older economy model).

210. See JACK W. BREHM, *A THEORY OF PSYCHOLOGICAL REACTANCE* (1966); Sharon S. Brehm & Jack W. Brehm, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* (1981); ROBERT A. WICKLUND, *FREEDOM AND REACTANCE* (1974).

conflict resolution may help define what constitutes an efficient outcome, but it fails to inform negotiators how and why they may fall short of this goal. If this Article leads readers to devote more time to pursuing psychological research on negotiation, we will consider it to be a success.

Second, we note that this is a field begging for more empirical research applied to the domain of legal negotiations. We would be pleased if more legal scholars begin to study psychological aspects of legal conflict.

Finally, we hope that our work will find its way into the hands of dispute resolution professionals, such as mediators. As we have noted, knowledge of biases is no guarantee that they can be eliminated. A party's recognition of a bias and a sincere attempt to correct for it may not be sufficient to protect against its tendency to inhibit settlement. Several of the patterns discussed in this paper are produced or exacerbated by partisanship. It is our hope that the educated mediator can learn to anticipate these biases, and thereby deflect them or compensate for them.

We stress that this Article is not intended as an indictment of the economic model of negotiation. To the contrary, we think of the rational model as a compass, pointing the sophisticated negotiator toward more desirable outcomes. However, we believe that the terrain of legal negotiation is strewn with psychological barriers that stand in the way of efficient settlement. It is our firm belief that knowledge of these obstacles provides a road map that will help negotiators avoid or accommodate these barriers so that they will more often reach mutually beneficial settlements.