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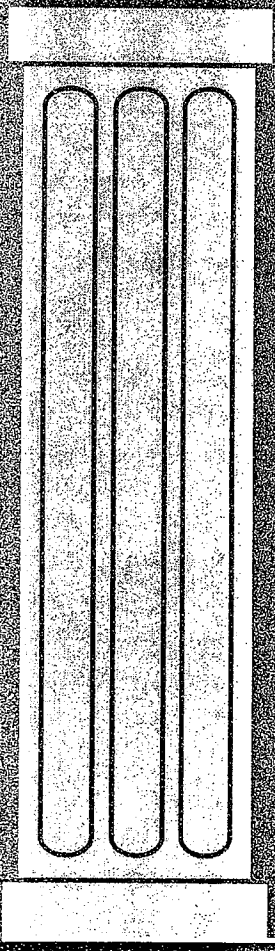

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American College of Civil Trial Mediators

MISSION STATEMENT

The ***American College of Civil Trial Mediators*** is a non-profit organization of dispute resolution professionals who are distinguished by their skill and professional commitment to civil trial mediation.

Membership is limited to active mediators, program administrators, and academics who have achieved substantial experience in their field as well as professional recognition for their accomplishments.

The Fellows of the College are dedicated to improving ethical and professional standards of mediation practice while fostering the growth of alternative dispute resolution systems throughout the country.

In fulfilling its mission, the College conducts advanced ADR education programs, supports ADR research, and encourages the growth of ADR systems. In addition, it is a principal objective of the College to publicly recognize those persons making major contributions to the ADR movement nationwide.

October, 1995

AMERICAN JOURNAL OF MEDIATION
Editorial Board Introduction

This issue of the Journal begins with two intriguing articles delving into some of the subconscious forces motivating parties in settlement negotiations. **Hunter Hughes,** a valued Fellow of the College and a premier mediator from Atlanta, Georgia explores the effects of a range of subconscious preconceptions commonly found in lawyers as they go through a typical case evaluation procedure. "*How Our Subconscious Bias Impacts Negotiations and the Mediation Process*" will trigger an instant recognition among those readers who deal with the trial bar's case evaluations in their day to day practice, and provide helpful tips for dealing with those outcomes. **Daniel Watkins,** an associate in the New York office of Paul, Weiss, Rifkind, Wharton & Garrison LLP and a recent graduate of Cardoza School of Law where he studied mediation theory and technique under Emeritus ACCTM Fellow Professor Lela Love, then presents an excellent article exploring some of the subconscious bias's and cognitive factors parties in dispute display in making fundamental choices between utilizing litigation or mediation to resolve their conflict. For those of us who provide dispute resolution process counseling, "*A Nudge to Mediate: How Adjustments in Choice Architecture Can Lead To Better Dispute Resolution Decisions"* will prove to be an invaluable practice tool.

We then explore two topics having a broader impact on our profession as a whole – mediator accreditation, and the ticklish question of imposing a mediation privilege. **Conrad C. Daly,** a dual degree candidate from Cornel Law School in New York, and Ecole de Droit de la Sorbonne in Paris, has produced a comprehensive examination of both the need and the challenges in developing a nationally based mediator accreditation program. "*Accreditation: Mediation's Path to Professionalism"* succinctly advances the argument that some sort of mediator accreditation program is vital to the future of the profession and certainly worthy of every effort necessary to overcome the known obstacles to that goal. Adding to the array of professional issues facing us today, **Joseph Lipps,** a senior law student at Ohio State University Moritz College of Law and managing editor of the *Ohio State law Journal,* reports on the Federal Court's struggles with adopting a Federal mediation privilege. "*The*

Path Toward a Federal Mediation Privilege; Approaches Toward Creating Consistency for a Mediation Privilege in Federal Courts" sets forth the many problems with balancing the need to protect the sanctity of mediation communications in order to build confidence in the process while at the same time maintaining appropriate standards for imposing privilege standards.

Finally, we once again explore a historical "what if" mediation with a fascinating piece submitted by **Nicola Gelormino,** a senior at the University of Miami School of Law and Editor-In-Chief of the Business Law Review, *"Mediation: The Process that Might Have Saved Face for Two Prominent Figures in American History and the Life of the First Secretary of the Treasury"* which speculates on what might have occurred if mediation had been employed in July of 1804 when Aaron Burr met Alexander Hamilton for their fateful duel. Inserting known elements of the longstanding debate between these two prominent political leaders into the fundamental mediation process, Ms Gelormino presents an entertaining enactment of what might have occurred, and how American history might have differed.

On behalf of the Journal's Editorial Board and all ACCTM Fellows, we'd like to thank you for your continued support and involvement with our publication. Please remember, we are always looking for new materials and are especially interested in hearing from dispute resolution professionals who are always adding new techniques and standards to our practice. Feel free to contact us at any time.

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Articles:

How Our Subconscious Bias Impacts Negotiations and The Mediation Process

Hunter R. Hughes

INTRODUCTION

Like Gaul, the typical mediation can be divided into three parts: preparation, bargaining, and closing strategies. Each plays an essential role in any successful mediation, but if one can be ranked in importance over another, the preparation phase rises to the top in the view of many. This piece considers only one part of the preparation process. Its focus is not the typical list of information and data that needs to be assembled and reviewed in preparing for mediation. Rather, it examines something that may be even more critical to the process but rarely considered -- how subconscious biases can and usually do negatively impact counsels' case evaluations[1] and what steps can be taken to help control or at least minimize the negative effect of these biases.

To illustrate this proposition, the paper first outlines one very basic case evaluation process that is used in some measure by a number of first rate legal counsel. Next, it identifies how that construct can be infected with subconscious bias that impairs the validity of an otherwise appropriate case evaluation process. Finally, it lays out several steps one might take to eliminate or at least minimize the impact of such biases.

CASE EVALUATION PROCESS

One commonly used process for evaluating the settlement value of a case is for counsel to establish, using objective data to the extent reasonably possible, a rational range of defendant's exposure (including fees and costs) on the one hand, and plaintiff's potential recovery (including fees and costs) on the other. In other words, counsel for each side separately use the available objective data to determine their respective probable high and low litigation outcomes.

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1 As used in this paper, the term "case evaluation" refers to the estimated amount of monetary damages, if any, that would be awarded plaintiff if the case were litigated to a final judgment taking into consideration litigation risks. In other words, it refers to the legal analyses of the likely damages through trial and appeal (and attorneys' fees) without regard to factors that impact settlements such as temporal pressures on parties, a desire not to be deposed, or the desire to "send a message to the opposing party." These additional factors play an important role in negotiations, but they reflect different considerations than are the focus of this paper.

For example, in the typical employment wrongful termination case, the core objective data for setting such high-low anchors would be the annual earnings of the plaintiff when terminated, wages earned by the plaintiff following termination, the likely number of years of front pay, fees to date for plaintiff's counsel, and projected additional fees for both plaintiff's and defense counsel through trial and any appeal. With that information, reasonable/probable high and low damages assessments can be developed separately by each side.

Having identified high-low benchmarks, the next step is for counsel to determine the additional risk factors that can reasonably be expected to impact the outcome of the case. These may include, among other items, the credibility of key witnesses, likely evidentiary rulings and rulings on dispositive motions by the court before and at trial, opposing counsel's general litigation and trial skills, the potential jury pool, and possible appeal outcomes. With these and other material data points, counsel for each side can set their respective case evaluation estimates to an amount somewhere between the previously established benchmarks.

The second part of this evaluation process requires counsel for each side to make a number of good faith, but nevertheless subjective assumptions, risk assessments, and judgments. Despite such subjectivity being injected into the process, one might still expect that counsels' respective case evaluations would be fairly close to a case evaluation by a neutral, experienced lawyer not involved in the litigation, but who has access to the salient evaluation information. But experience tells us they are not. Indeed, even where the bulk of issues in a case are undisputed, case evaluations by opposing counsel are far more often than not starkly different from those of neutral counsel using the same information.[2] A number of factors can drive these different outcomes; but a large portion of this case evaluation delta is caused by the subconscious biases and related attitudes of counsel for opposing parties. Those biases and attitudes are discussed below.

2 As noted, the case evaluation definition being used here is the risk adjusted evaluation of how the litigation is expected to be resolved by the court or jury, and is not to be confused with a party's aspiration or reservation points (the former is the best negotiated outcome one can reasonably expect, while the latter is the party's "walk-away" number) that take into consideration a number of factors that impact negotiation but would not be part of the proof at trial. For example, a plaintiff may have an immediate need for monies to cover personal emergencies and that drives his willingness to take a lower payment now; or an employer may be willing to settle at a figure much greater than its case evaluation because of an impending merger or potentially destructive publicity.

Hypothetical Litigation Scenario

To flesh out the case evaluation process a bit more and to show how it is often impaired by subconscious biases, the core facts of a hypothetical employment case are set out below. Assume that a 55-year old female contends that she has been terminated in violation of Title VII. At the time of termination, her annual salary plus benefits had been $100,000. Following her termination, she began to seek comparable work, but was unable to get a job for three years. After an on and off 3-year job search, she finally obtained a new job, but only at an annual salary plus benefits of $50,000. Assume for purposes of this example that she will retire at age 62, and that despite being a "close case," plaintiff's counsel has no hesitation in trying this case.

Using this baseline information, there are four fundamental litigation outcomes that can be predicted for this case: (1) summary judgment for the defendant; (2) defendant wins a defense verdict at trial; (3) plaintiff wins at trial but the decision-maker's award is in a "low to medium" range; or (4) plaintiff wins at trial and the decision-maker awards damages in a "medium to high" range.

Using the assumed objective facts set out above, a range or pair of evaluation benchmarks for each side can be set relative to these four potential outcomes.

1. Defendant wins summary judgment with its own assumed fees and costs being $75,000.[3]
2. Defendant wins at trial with its assumed fees and costs being $250,000.
3. Plaintiff wins a low to medium liability recovery at a $100,000 level[4] with plaintiff's statutory fees and costs awarded at $250,000 and defendant's fees and costs still being $250,000 – a total of $600,000.
4. Plaintiff wins at trial a medium to high liability recovery at a $500,000 level[5]; with plaintiff's statutory fees and costs

3 The fee/cost assumptions used in items 1-4 are likely on the conservative side, depending on the venue of the case. The point here, of course, is not the amount of the cost of defense, but rather, the fact that defense costs and plaintiff's fees must be part of an economic evaluation as this hypothetical case is brought under Title VII, a fee-shifting statute.

4 A $100,000 award might be the outcome where the jury concludes that plaintiff had not properly met her duty to mitigate and she should have found comparable employment within one year of her termination.

5 A $500,000 award might be the outcome where the jury concludes that plaintiff fully met her duty to mitigate for the 3 years she was out of work ($300,000 in damages) plus an additional front pay award of $50,000 per year through age 62, bring the total damages award to $500,000.

award, and defendant's fees and costs each being $250,000 -- a total of $750,000 to plaintiff, with defendant's total outlay being $1 million.

Using this information, defendant's evaluation anchor at the low end is $75,000 – the cost of obtaining summary judgment. The high end defendant evaluation anchor is roughly $1 million (defense fees, plaintiff's fees, and the jury award to plaintiff),[6] with the intermediate evaluation amount being a $250,000 cost to defendant to win at trial, and a $600,000 price tag for a "relatively low end" loss at trial.

For Plaintiff, the range, or high/low anchors, is $0 to roughly $750,000. If plaintiff loses either on summary judgment or at trial, the recovery is zero; whereas at the high end, the number is roughly $500,000 plus $250,000 in fees.

With these reasonably objective anchors identified, each side can then adjust their respective evaluations considering numerous subjective variables (a/k/a risk factors) which, as noted, include factors such as witness credibility, possible evidentiary and dispositive rulings by the court, the jury pool, etc. and use those considerations to refine their evaluations.[7]

In this hypothetical, if one assumed arbitrarily that a skilled neutral would evaluate the case for settlement at $200,000 to $300,000, almost invariably one can expect that counsel litigating the case will come to radically different conclusions – plaintiff's counsel's good-faith case evaluation can be expected to be as high as $500,000 to $550,000 or more, while defense counsel's case evaluation can be expected to fall in the $100,000 to $150,000 range or lower.

The issue we consider here is: Why is there such a large delta between the good faith case evaluations[8] of the respective counsel for the parties and neutral evaluations?

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6 Presumably, compensatory and punitive damages also could be awarded, but as this hypothetical case is assumed to be a "close one," a punitive damages award is unlikely, and absent exceptional circumstances which are not assumed here, compensatory damages are not likely to impact meaningfully the jury's verdict. Thus, this "reasonable" range is based on the direct economic injury to the plaintiff, plus fees.

7 These evaluations are particularly critical to the setting of each side's reservation points – the points at which each side will walk away from the mediation/ negotiation. Thus, to properly advise one's client, case evaluations need to be fair, nonbiased analyses of the known relevant factors. Importantly, once counsel for a party makes a case evaluation, regardless of its actual validity or how carelessly made, it becomes the baseline off which numerous other decisions such as the plaintiff's opening offer and the defendant's counter. Thus, since the actual case evaluation by each side is usually invisible to the other (and the mediator) if significantly flawed, it increases the likelihood that settlement negotiations will come to an impasse.

8 The phrase "good faith case evaluation" is intended here to mean the case evaluation opposing counsel give to their respective clients.

THE IMPACT OF HEURISTICS ON CASE EVALUATIONS

One important reason is heuristics; that is, the instinctual behaviors and related attitudes that subconsciously impact everyone's decision making and particularly that of lawyers and their clients in the case evaluation process.

Heuristics is not a term that is part of most of our everyday vocabularies. While it can have different meanings in different contexts, here it is being used to mean the shortcuts or "rules of thumb" and related attitudes that all of us have and use, and that meaningfully influence our decision-making. Stated differently, heuristics are the "educated guesses" and intuitive judgments we use to make day-to-day decisions. We do this at least in part because of the complexity of our environment. We are all bombarded with information, and to function effectively, we have to focus on some stimuli while tuning out others. Shortcuts or heuristics is one way we do this. Generally, these thought processing short cuts serve us fairly well. However, they do not come without a cost as they can and do result in biased and faulty decisions without our even being aware of the errors we are making.

Let's look at an example of a heuristic that we use in decision-making. Suppose you are sitting at Starbuck's having your morning shot of caramelized macchiato. Next to you is a stranger. I walk in and make the following offer to the two of you: I have $100 in $5 bills. I tell the two of you that I am going to hand these twenty bills to the person sitting next to you, and ask him, without discussion with you, to split the twenty $5 bills with you any way he wants. You will then be allowed either to accept or reject the split he offers. That is your only option. If you accept, you both keep the money as split by him. If you reject his split, I take all the money back. What is the minimum split amount you would accept from this stranger?

How did you reach this conclusion? What rule -- what heuristic -- did you use to make this determination?

The traditional view is that given two choices, one chooses the option which garners him the greatest net dollars – greatest economic benefit.

If we try to predict the results of this experiment using "the greatest economic benefit to me" heuristic, the answer is that so long as the stranger offers you at least one $5 bill, you will accept the offer despite his getting $95 and your getting only $5. Your reason: $5 is better than nothing and that your choice is to accept the offer of $5, or reject it and get nothing.

The premise, that is the model or heuristic that is being used here, is that the rational person will always seek to maximize his economic return and in this case, if you do not accept his split, then you will have lost $5 – irrespective of how much the stranger keeps. You do so under this heuristic because it is in your economic interest to accept his offer. Likewise, he is keeping $95 because that behavior nets the greatest monetary benefit to him.

It turns out, however, if you actually do the experiment, the "stranger" rarely offers a lopsided deal, and when he does, the offeree often rejects it. What the stranger at Starbuck's quite often offers is closer to a 50/50 split, but when the proposed split is lopsided in his favor, it is rejected. The economic theory, *i.e.* the theory that one chooses the option with the greatest dollar benefit to himself, in this context is often wrong. In reality, the proper model likely is not purely economic. The proper model generally is one that considers more than just economics, as individuals also care about being treated fairly. They often will reject an "unfair" deal even if it is in their economic interest to accept it.[9]

Carried over into the mediation context, the party who thinks making a deal is only about the money may be using the wrong model or heuristic and thereby missing an important feature of human judgment and decision-making. People will regularly punish themselves – take nothing rather than something – in order to teach a lesson to the ungenerous. And in the real world, using the wrong model – the wrong rule-of-thumb – in making decisions can be costly.

With that as a background, let's return to the case evaluation process and consider several heuristics (or heuristic-related psychological factors) that tend to pull plaintiffs' case evaluations into unrealistically high territory; and conversely push defendants' case evaluations downward into an unrealistic range.

1. Self-serving Bias and Related Heuristics

Self-serving bias -- the tendency of individuals to believe that

9 This is a modified version of a vignette that appears in BARRY GOLDMAN, MA, JD, THE SCIENCE OF SETTLEMENT (ALI-ABA 2008). The same concept is noted in numerous other discussions of heuristics. For example, the book by MAX H. BAZERMAN, SMART MONEY DECISIONS (John Wiley & Sons 1999) relates a vignette in which a caller to a radio station is told that she has won $15,000, subject to the co-winner's splitting that amount, with her either accepting or rejecting the split. Notably, in that circumstance, if the "co-winner" splits the $15,000 on an extremely lopsided basis, the rate of rejection will typically increase dramatically as the perceived need to be treated "fairly" tends to be the dominant heuristic given the level of perceived "unfairness." This is true despite the fact that even if the split is $14,995 and $5, the $5 payment is still better than nothing.

they perform better than others -- is a heuristic that all too often is a factor in lawyers concluding that their case (simply because it is **their** case) will turn out favorably for them. *See* Jerry Suls, Katherine Lemos, H. Lockett Stewart, 822 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 252-261 (Feb. 2002). This bias results in counsels' case evaluations, which by definition are in significant part subjective and certainly less than precise, being more beneficial to themselves (because they believe they perform better than others) than a neutral assessment will support. The degree to which our thinking is biased in our own favor is hard to overstate – particularly when, as in the case evaluation process, the issue is one for which there is little or no basis upon which to make a precise measurement. For example, in one study, over 80% of college student drivers reported that they drive better than the average driver in the study. J. M. Olsen & A. J. Roesse, Better, Stronger, Faster: Self-Serving Judgment, Affect Regulation, and the Optional Vigilance Hypothesis, PERSPECTIVES ON PSYCHOLOGICAL SCIENCE, 2, 124-141 (2007). Many participants in that study assuredly had an inflated view of their own driving skills. Another study of persons with high blood pressure similarly reflects this concept. These individuals were asked: "Can people tell when their blood pressure is high?" Eighty percent (80%) gave the medically correct answer – "no." But, when asked if they could tell when their own blood pressure is high, eighty-eight percent (88%) said "yes."[10] David Myers, The Power and Perils of Intuition, PSYCHOLOGY TODAY, Nov. 12, 2002.

While this tendency of people to evaluate ambiguous information in a way that is beneficial to one's own interests[11] is often harmless; its effects are not benign when it leads each side to self-servingly (and, at times, irrationally) to interpret the facts and law favorably to themselves, and, accordingly, to make a case evaluation

10 Self-serving bias is associated with the better-than-average effect (or Lake Wobegon effect) where individuals are self-servingly biased in believing that they typically perform better than the average person in areas important to self-esteem. Most lawyers, of course, believe they perform better than the average lawyer.

11 A. V. Dicey in his Lectures on the Relations Between the Law and Public Opinion in England during the Nineteenth Century identified and aptly described this phenomenon, writing:

> A man's interest gives a bias to his judgment far oftener than it corrupts his heart... He overestimates and keeps constantly before his mind the strength of the arguments in favor of, and underestimates, or never considers at all, the force of the arguments against... .

significantly too high (the plaintiff) or low (the defendant).[12]

Perhaps equally troubling to the mediation process is the finding of various studies that a high percentage of individuals believe that others are more susceptible to self-serving bias than they are themselves. CORDELIA FINE, MIND OF ITS OWN: HOW YOUR BRAIN DISTORTS AND DECEIVES (W.W. Norton 2006). That, of course, leads to both sides saying of the other; "their position is simply driven by bias," and not a fair assessment of the facts and law. In fact though, both are driven in opposite directions by their respective self-serving bias in favor of their own view that they "know better" and that *per force* their position is the correct one.

Another aspect of this bias heuristic is each side's view that its conduct is reflective of the norm. But, in truth, this "norm" is really nothing more than saying that something that is different than what **I** do is **not** the norm. What is normal for me is excessive for someone else. For example, several years ago, one of my partners was interviewing a law student for a job in my firm. The student asked my partner the number of hours he worked a week. He told him of his practice of coming in at about 7:30 a.m. and leaving about 7:00 p.m. on most nights but continuing to work at home as needed. He would also work half days on Saturdays and Sundays unless there is an urgent project, and then would work full days on the weekend. My partner ended by saying, "nothing excessive." This "X" generation student looked at him like he had just arrived from Mars! But the point is that we tend to believe that "less than me is not enough, and more than me is too much." More importantly for negotiations, counsel often think that their actions/opinions (and particularly counsel's opinions as to the monetary evaluation of a case) are "just right." This view that the only proper analysis of the matters in dispute is my own, of course, is

12 In a piece published in 2010, the authors studied the litigation outcome forecasts of a large group of lawyers. Not surprisingly, the study found that lawyers were over-confident in their predictions, and also not surprisingly, female lawyers' predictions were somewhat more accurate than those of male lawyers. J. Goodman-Delahuntz; P.A. Gramby; M. Hartwig; E. Hoffner, Insightful or Wishful: Lawyer's Ability to Predict Case Outcomes, 16 PSYCHOLOGY, PUBLIC POLICY, AND LAW 2, 133-157 (2010).

1 For further discussions of the data, please see Appendices D (summaries of comments shared during focus group discussions).

a primary ingredient in a recipe for impasse.[13]

Yet, another heuristic that is related to the self-serving bias concept and that is important to case evaluations is the false-consensus effect. This is the tendency of individuals to overestimate the consensus for one's own position. Lee Ross, David Greene & Pamela House, The "False Consensus Effect": An Egocentric Bias in Social Perception and Attrition Processes, 13 *JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY*, Issue 3, 279-301 (1977). This can cause counsel to misjudge seriously the likelihood of success because of his overestimating the extent to which a judge or other decisionmaker agrees with his position.[14] It is not at all unusual to hear opposing counsel in mediation caucuses report diametrically opposing conclusions based on their own biased interpretation of the ambiguous remarks by a judge. Each counsel may be giving his honest assessment of the court's position, but, in fact, that assessment is driven by counsel's self-serving and biased assumption that the court's pronouncements are in accord with counsel's own position.

In sum, self-serving bias and related heuristics and attitudes pose significant barriers to neutral case evaluations. Without neutral assessments, the odds of a negotiation failing or the "wrong" decision being made increases substantially.[15]

2. Base Rates

Base rate heuristics present a different challenge. Very few individuals, including counsel in negotiations, see their own situation as related to base rates. If you ask a room full of randomly selected high school seniors how many believe they will die before they reach

13 The actor observer effect is a close relative of the self-serving bias factor presents another concern. This is the effect where people tend to attribute their own behavior to situational factors, but to attribute others' behavior to personal factors saying in effect, "If I mess up, it's [the other person's] fault; but if you mess up, it's your fault!" EDWARD E. JONES AND RICHARD E. NISBETT, "THE ACTOR AND THE OBSERVER: DIVERGENT PERCEPTIONS OF THE CAUSES OF BEHAVIOR" N.Y.: (General Learning Press 1971).

14 When confronted with evidence that there is no consensus for counsel's position, counsel often assume that others who do not agree with them are defective in some respect. J. M. Fields & H. Schuman, 40 PUBLIC OPINION QUARTERLY, No. 4, Winter 1976, at 427-448 (1977).

15 The 2008 study discussed by R. L. Kiser, M.A. Asher, and B.B. McShane in Let's Make A Deal: An Empirical Study of Decision-Making in Unsuccessful Negotiations, 5 JOURNAL OF EMPIRICAL LEGAL STUDIES, Issue 3, pp. 552-559 (Sept. 2008), yet again underscores the less than adequate decision-making processes of lawyers and their clients. In that study of 2,054 cases that went to trial from 2002 to 2005, defendants that chose trial over settlement made the wrong decision in 24% of the cases, costing on average $1.1 million. Plaintiffs made the wrong judgment over 60% of the time, costing an average of about $43,000, without considering fees and costs.

age 65, almost no hands will go up. The base rate, of course, tells a different story, as life expectancy tables tell us that roughly 15% of the typical group of seniors will likely die by age 65.[16]

How about asking that same group of high school graduates how many will get divorced. Again, almost no hands will go up; but we know that roughly half of all marriages end in divorce. The obvious point is that individuals often ignore base rates, particularly if that rate is adverse to their own self interest.

Let's look at this issue in the context of employment litigation. If one were to ask a plaintiff's attorney in a mediation what the probability is of his or her winning an individual employment discrimination case, typically plaintiff's counsel will say that the odds of winning are 50% or even upwards of 75% or greater. But the base rate tells us something quite different. Defendants win approximately 80% of all employment discrimination cases that go through trial and appeal. K. M. Clemont & S. J. Schwab, 3 HOWARD LAW & POLICY REVIEW 1-35. Plaintiffs' attorneys typically refuse to accept the fact that the base rates have any relevance to their case. And while the roughly 80% base rate for losses by plaintiffs in employment discrimination cases may or may not be the correct assessment relative to a particular case,[17] most thoughtful observers would agree that plaintiffs' overall base rate for success (or lack thereof) for the claims at issue ought to be thoughtfully considered and factored into any case evaluation.[18]

3. Over-Confidence

The over-confidence heuristic is another factor that leads to less than accurate case evaluations.[19] Lawyers are particularly susceptible to being over-confident in their belief in the correctness of their views – some would even say that as a group, lawyers have an inflated self-

16 I checked my own high school records and found that 21% of my high school class of 1961 had passed away before age 65.

17 Presumably plaintiffs' counsel who took their employment discrimination cases to trial did not think they had an 80% chance of losing, but the base rate statistics tell a different story.

18 Notably, as a general proposition, the success rates of plaintiffs and defendants at trial are a function of the merits of the claims and defenses available to the parties in cases actually tried and not settled. In the end, defendants control whether a case will settle; that is, a defendant makes the decision to pay or reject the plaintiff's final demand. A defendant thus decides the ultimate value of the case in settlement relative to plaintiff's demands and can choose to settle and avoid trial where the risk of an adverse verdict is deemed to be too great relative to the demand. It is thus not particularly surprising that defendants have a high success rate at trial.

19 D. A. Moore & P. Healey *The Trouble With Overconfidence*, PSYCHOLOGICAL REVIEW 115, 502-517 (2008); RICHARD H. THALER & CASS R SUNSTEIN, NUDGE 31, 33 (Penguin Books 2008).

worth that feeds into such overconfidence. But regardless of the origin of the over-confidence, it can and does lead to erroneous case evaluations.

Let's do a test for over-confidence. Listed below are 10 questions.[20] Your challenge is to answer each of the questions in the form of a range. The range, however, needs to be the smallest range you can select but still have a 90% confidence that the true answer to each question lies within the range you selected. If you do this correctly, you will have answered at least 9 out of 10 questions correctly.

1. What is the width of the Amazon River at the widest part of its estuary.
2. What was the age of Alexander the Great at his death?
3. What is the number of books in the Old Testament?
4. What is the diameter of Jupiter?
5. In what year was Johannes Brahms born?
6. What is the gestation period in days of a blue whale?
7. What is the air distance from London to Sydney, Australia?
8. What is the number of countries that were members of the Soviet Union, including Russia?
9. What is the weight of an empty Boeing 747, including engines?
10. What is the average number of inches of rain per year in the rainiest inhabited place on earth?

(See Answers on Exhibit A, attached hereto.)

Most people (including lawyers) fail to get 9 out of 10 of the answers correct. Overwhelmingly, they are over-confident in their ability to make these estimates. But this is not just a harmless anomaly. The problem is that in negotiations, lawyers are often wildly inaccurate in their estimation of their probability of specific future events occurring in the litigation, much less the amount of any damages, assuming a favorable verdict.[21]

The fact that lawyers as a group are even more over-confident than others often distorts their views of a client's case. Part of correctly evaluating a case and properly representing one's client in settlement

20 This set of questions is an adaptation of a section of BARRY GOLDMAN, THE SCIENCE OF SETTLEMENT, *supra*. Max Bazerman's text, "JUDGMENT IN MANAGERIAL DECISION-MAKING" (as well as a number of other writings on this topic) has a comparable set of questions that relates to the finances of various companies.

21 Like the impact of the self-serving bias heuristic, over-confidence leads negotiators to discount the worth or validity of judgments of others and can shut down the opposing party as a source of information, interests, and options that may be needed to validly assess the merits of the opponent's case and reach a settlement.

negotiations includes adjusting for that distortion.[22]

4. The Endowment Effect

Individuals tend to overvalue everything that is perceived to be "mine."[23] And importantly in this context, plaintiffs believe that they "own" the claim, that they are seeking to be paid the value of something that they "own," and that defendants wrongfully took something from them. This overvaluing something that is "mine" is called the "endowment effect." The concept is reflected by the fact that the smallest amount one will accept to sell any object he owns that is of value is virtually always greater than the largest amount that he would be willing to pay to buy it.[24] Because of this endowment effect, one often cannot make a deal even with oneself, much less someone else. The classic endowment effect has been demonstrated by scores of experiments. See, e.g. Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, Experimental Tests of the Endowment Effect and the Coase [sic] Theorem, 98 JOURNAL OF POLITICAL ECONOMY, No. 6, pg. 1325 (December 1990). Typically, these experiments give something of modest value and utility to half a group of individuals. Half of the recipients are then asked to write down the lowest they would accept as a sales price. Then the other half is asked to write down the largest amount they would be willing to pay to buy the object. When you take

22 One study found that negotiators who were not trained to be aware of the over-confidence heuristic tended to be significantly less likely to compromise or reach agreements than trained negotiators. M. A. Neale and M. H. Bazerman, INDUSTRIAL AND LABOR RELATIONS REVIEW 36, 378-388 (1983).

23 D. Kahneman, J. Knetsch, R.H. Thaler, *Anomalies: The Endowment Effect, Loan Aversion, and Status Quo Bias*, 5 JOURNAL OF ECONOMIC PERSPECTIVES, 193-206 (1991).

24 In 1994, an experiment was performed at Duke University which in some measure demonstrates the endowment effect relative to the availability of basketball tickets to Duke students. Duke University has a very small basketball stadium and the number of available tickets for students is much smaller than the demand. Thus, the university developed a selection process for these tickets. Roughly one week before a game, fans begin pitching tents in the grass in front of the stadium. At random intervals a university official sounds an air-horn which requires that the fans check in with the basketball authority. Anyone who doesn't check in within five minutes is cut from the waiting list. At more important games, even those who check in each time can only get a ticket if they are one of the raffle winners.

After a tournament game where the tickets were given only to raffle winners, students on the list who had been in the raffle were called. The callers, posing as ticket scalpers, asked those who had not won a ticket for the highest amount they would pay to buy one and received an average answer of $170. But when they asked the students who had won a ticket for the lowest amount they would sell, they received an average of about $2,400. The students who had won the tickets placed a value on the same tickets roughly fourteen times as high as those who had not won the tickets. While there are obviously a variety of factors affecting the valuations being assigned to the tickets by these students, it is likely that the endowment effect and neither just the time the students spent camping out to receive the tickets, nor the experience of the game itself gave rise to the hugely different valuations placed on these tickets by buyers and sellers. DAN ARIELY, PREDICTABLY IRRATIONAL, Chapter 8 (Harper Perennial 2008).

the average prices demanded by the sellers and compare them to the average prices being offered by the buyers, there is rarely an overlap. The sellers want significantly more than the buyers are willing to pay. That is because the item belongs to the sellers – they own it and per the endowment effect, it is more valuable to the seller than the buyer.[25] In litigation, we see the same thing. Plaintiffs are selling their lawsuit – their release of claims – and defendants are buying this release; typically characterized as "peace." Inevitably, sellers value their lawsuit much more highly than the buyers do and these often inflated (plaintiffs') and deflated (defendants') estimates of value interfere with the making of a deal.

Again, each party needs to be aware of the endowment effect and adjust for it.

5. Availability Heuristic

The availability heuristic, where we make judgments based upon readily available or easily identified information, is yet another trap for the negotiator. This is what sometimes causes a comparison to the wrong thing. Let's look at another experiment.

Ask someone to estimate the percentage of words in the English language that begin with the letter "R" or "K" versus those that have either letter in the third position. Quickly coming to mind are, for example, the words "roar," "rusty," "riot," and "reject," etc., and "kitchen," "kangaroo," "kale," "keep," etc. It takes more effort, though, to think of words where "K" or "R" are the third letter. The quick and easy answer by those who are asked this question is almost always that words that begin with the letter "R" or "K" are more common. In reality, though, they are not. In fact, there are roughly 3 times more words with "K" or "R" as the third letter than words that start with "R" or "K."

Another aspect of this concept also is reflected by some individuals' fear of flying. When we see on television, or today on camcorders or U-Tube, fiery images of a plane that just crashed, we immediately react with a heightened fear of getting on an aircraft. Of course, that is not necessarily consistent with the true risk as on the same day of the airplane crash it is likely that two or three times as many people on average were killed in car accidents. In fact, on average annually at least 80 times as many people die in car accidents

25 This applies not just to tangible things; it also applies to opinions – perhaps even more so.

as do in airplane crashes.[26] Nevertheless, the single plane crash that is implanted in our thinking by media reports becomes representative of the whole, rather than just one point in a field of data that may call for a very different risk analysis.

In negotiations, we see the same thing. Lawyers base their case evaluations on information that is easily retrievable or easy to recall. They often rely on cases they have won or identify recent favorable verdicts and conclude from that very limited sample that these verdicts should be the basis for making a judgment or evaluation. But, that is only the most readily available or memorable information, and very likely not the most relevant information or comparator from which assessments of the case at hand should be made.

6. Pattern Recognition and Emotional Tagging

Another one of the shortcuts the brain uses in making decisions is to look to, and intuitively rely upon, prior experiences and judgments. For example, a chess master can assess a chess game and choose a favorable or advantageous move in 6 seconds or less by drawing on patterns he or she has seen before. A batter can see a pitch for only a fraction of a second and based on prior pitches, recognize the ball's pattern of movement and decide whether to swing or not. Similarly, when dealing with seemingly familiar situations in every day life, our brains can cause us to think we understand them and their effects. In reality, sometimes we do and other times we don't.

Like chess masters and baseball players, seasoned lawyers make judgments and decisions by assessing the current fact pattern based upon assumptions drawn from similarities/patterns seen in other cases. Sometimes this pattern recognition process can be badly misleading.

The pattern recognition heuristic is often combined with emotional tagging – that is the process by which emotional information attaches itself to prior experiences. Emotional tagging information tells us whether to pay attention to something or not and influences what decisions we make. Like other heuristics, emotional tagging typically helps us reach sensible decisions, but it too can mislead. Take a situation where a lawyer has successfully sued a number of defendants for fraud. The lawyer is later approached by a potential new client making fraud claims. He should, of course, make a reasoned evaluation by, among other things, laying out the facts, defining the objectives,

26 According to the National Safety Council, the predictability of dying in a car accident in a particular year is approximately one out of 6,500; whereas those chances are one in 400,000 for an airplane crash. Of course, these are only base rates of risk.

and assessing the quality of the facts relative to the governing law and the client's objectives. Instead, all too often counsel will quickly move forward using pattern recognition and emotional tags to arrive at a decision. Counsel subconsciously sees in the new case the same pattern as the previous ones, quickly leaps to conclusions based on pattern recognition and emotional tagging, and thereafter is reluctant to consider alternatives.

A lawyer's evaluation process in preparing for mediation is also often heavily influenced by subconscious pattern recognition and emotional tagging. Despite objective data and logic strongly pointing to monetary evaluation levels far lower than plaintiffs' counsel's assessments, and far higher than defense counsels' assessments, the pattern recognition and emotional tagging heuristics (in concert with other heuristics) lead counsel down the wrong evaluation path. The result can be a failed mediation, years more of expensive litigation, and for one party at least (and in many instances both parties) a disastrous outcome.[27]

HOW MAY ONE AVOID SUBCONSCIOUSLY INDUCED PITFALLS?

So now we see that all too many decisions are not made via careful analytical processes, but rather in significant part through the less than reliable operation of our subconscious. What can we do in preparing for mediations or other negotiations to safeguard against being subconsciously misled into making erroneous case evaluation judgments?

There is, of course, no single best way to develop an unbiased case evaluation. But there are several steps outlined below that one might use to improve the process. As a baseline proposition, counsel who regularly negotiate (and that is almost all practicing lawyers) need to be made aware of and trained concerning the biases and other heuristics that can impact the evaluation and negotiation process.

27 Of course, another factor that can irrationally impact case evaluation and the negotiations process itself is stereotyping. Defendants often stereotype plaintiffs as "greedy money grubbers." Conversely, plaintiffs stereotype defendants as uncaring and heartless. Neither is necessarily true and both enhance the opportunity for erroneous evaluations.

Hopefully this article is a start.[28] But, turning to a more concrete set of suggestions, one might consider the following approach.

First, lay out the range of reasonable outcomes; that is, set the high-low anchors for the case evaluation and the bases therefore.[29]

Second, list all of the known significant subjective factors that can be expected to impact upon where within those high-low anchors the case is properly valued – e.g. witness credibility issues, effect of motions practice, potentially governing legal principals, and skills of the trial lawyers.

Next, obtain a third-party assessment. If the case is large enough to support the expense, then it can be extremely helpful to have the case presented to one or more focus groups or mock juries and consider their feedback, not only as to the potential ultimate outcome, but also with regard to the various critical subjective issues that drive the case evaluation toward one end of the high-low range or the other. (E.g. if the focus group/mock jury questions the credibility of key witnesses or the validity of the underlying theory of the case, that should, of course, move the case assessment.)

With that information in hand, counsel should do a written point-by-point evaluation of each factor and the estimated dollar impact of each factor on the evaluation. Counsel should then set a dollar value for the entire case.

Next (regardless of whether the case has been tried to a focus group or mock trial), an independent experienced lawyer should be invited to serve as a neutral and to assume the role of devil's advocate. He or she can be provided all the relevant data (including findings of any focus group/mock jury) for use in making an independent assessment of lead counsel's evaluation. The independent evaluator

28 There are a number of worthwhile texts, treatises and articles that explore the impact of heuristics on decision-making. They include: (1) MICHELE GELFORD & JEANNE BRETT, HANDBOOK OF NEGOTIATION AND CULTURE (Stanford U. Press. 2004); (2) R. J. LEWICKI, D. M. SAUNDERS, B. BARRY, J. W. MINTON, ESSENTIALS OF NEGOTIATION (McGraw-Hill, 3d ed. 2004); (3) BARRY GOLDMAN, *THE SCIENCE OF SETTLEMENT* (ALI-ABA, 2008); (4) MAX H. BAZERMAN, *SMART MONEY DECISIONS* (John Wiley & Sons, 1999); (5) MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISIONMAKING (John Wiley & Sons, 2006); (6) DAN ARIELY, PREDICTABLY IRRATIONAL (Harper Perennial 2008); (7) R. H. THALER & C. R. SUNSTEIN, NUDGE (Penguin Books 2008); (8) ORI BRAFMAN & RON BRAFMAN, THE IRRESISTIBLE PULL OF IRRATIONAL BEHAVIOR (Doubleday, 2008). Many of the ideas and concepts included here were adapted from these materials, particularly THE SCIENCE OF SETTLEMENT by Barry Goldman.

29 As reflected by the hypothetical employment case discussed above, because of, among other things, Title VII being a fee-shifting statute, there may well be different evaluation anchors for plaintiffs and defendants in the same case. In addition, while it is not possible to identify all the possible outcomes, it is helpful to identify a few objectively established intermediate potential outcomes.

then makes a second independent evaluation of each factor, giving point-by-point written reasons for his/her conclusions followed by his/her dollar valuation of the case.

Next, lead counsel and the independent evaluator should meet, compare, and test with one another their respective evaluations and bases therefore. Through that back-and-forth dialogue, they can identify and assess their differing conclusions. The experienced neutral will be in a position to challenge conclusions that may have been impacted by self-serving bias, the endowment effect, over-confidence and the other heuristics that so often lead to deficient case evaluations.

Finally, one might consider taking one further step to put the entire process into perspective. The ultimate question here is really very straight-forward – how much economic value does the lawsuit have? For the plaintiff, that translates to this: Assume you are an investor and not the plaintiff. Given all that you know – both the good and the bad -- how much would you pay to purchase this lawsuit?

For the defendant, the question is the inverse. Assume you are a third party who knows what the defendant knows about the litigation -- how much would someone have to pay you to assume the position of defendant in this case with all the liability risks and costs of litigation?[30]

Both lead counsel and the neutral evaluator should separately identify their respective "prices" for buying or selling (depending on whether you are plaintiff or defense counsel) your position. Compare the prices to case evaluations and determine the reason for any significant differences. This does two things. First, it again tests the separate case evaluation conclusions already made by lead counsel and the neutral evaluator. Second, it helps further to squeeze from the evaluation process some of the unconscious biases discussed above.

After going through this process, counsel should have a less biased case evaluation value that can be used as a baseline for setting aspirational and reservation points for the negotiation/mediation.

30 As discussed above, in making any evaluation, various factors are all melded together to arrive at the evaluation number. That number is, of course, artificial and does not reflect reality, should the case be tried. For example, if the plaintiff has a 50/50 chance of winning $100,000 at trial, the case's economic evaluation amount may be roughly $50,000; but that it is not likely reflective of any possible actual outcome. The actual litigation process is more akin to playing craps. When plaintiff's turn comes to roll the dice, he will either win or lose his bet. This concept, as well as the buy/sell concepts, is further discussed in THE SCIENCE OF SETTLEMENT.

Exhibit A
Answers to Questions on p. 11

1. Answer: 202 miles

2. Answer: 33

3. Answer: 39

4. Answer: 88,846 miles

5. Answer: 1833

6. Answer: 320

7. Answer: 10,562

8. Answer: 15. They are: Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldavia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.

9. Answer: 390,000 lbs.

10. Answer: 450 inches in Cherrapunjim, India.

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