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# GOING THROUGH THE FIVE STAGES OF GRIEF TO GET TO SETTLEMENT

# NEGOTIATION SCENARIOS AND STRATEGIES FOR MOVING FROM DENIAL TO DEAL


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Following the observations of Elisabeth Kübler-Ross, the phrase "the five stages of grief" became part of our general lexicon. Although research on loss and bereavement has advanced, the labels that she identified have endured: denial, anger, bargaining, depression, and finally acceptance.

As lawyers navigating disputes and negotiation, we don't often acknowledge the emotional impact of litigation on our clients. We gravitate toward the examination of evidence and elements, strengths and weaknesses, and we calculate odds and sculpt strategy accordingly. But how many cases have you handled where there was *not* denial, anger, bargaining . . . or even some measure of depression? If you think that you have, was it really absent or was it viewed as irrelevant?

Identifying and understanding the cognitive biases in play and the emotional experiences of our clients and the opposing side can be key to achieving a favorable resolution, just as the failure to do so can be fatal to it. If we do not consider the humanity of each of the stakeholders, and that our cognitive biases and emotions drive perceptions and reactions, we are missing opportunities to advance our clients' interests and to overcome obstacles to getting a deal.

## Read the Room: Consider The Other Side's Perspective And Challenge Your Own Evaluation To Formulate Negotiation Positions

> *The other side is wrong, of course. Let's start from there. Yet there they are, still in your case and, unless you get a deal or an early win, they will interject themselves into your client's enterprise and life. Considering their viewpoint does not mean validating it. Rules of evidence generally protect our efforts to resolve disputes and mediators often are forbidden from disclosing any aspect of the mediation of matters unless compelled by court order. Understanding the other side's perspective and emotional experience empowers you to target your negotiation efforts in a way that will not frustrate progress and may facilitate reaching resolution.*

►What "Stage of Grief" or "Thinking Hat" Is Driving Your Opponent? Which Is Driving Your Client?

◊ In *Six Thinking Hats*,[1] Edward De Bono urges organizations to use an iterative decision-making process that requires deliberately specifying a "thinking hat" for each stage:

- ❖ **White** Hat: neutral and objective, concerned with facts and figures
- ❖ **Red** Hat: the emotional view
- ❖ **Black** Hat: careful and cautious, the "devil's advocate" hat
- ❖ Yellow Hat: sunny and positive
- ❖ **Green** Hat: associated with growth and creativity
- ❖ **Blue** Hat: the organizing hat (above everything else, like the sky)

◊ As lawyers, we like to believe that we use the white hat—facts and figures—when evaluating our cases' strengths and weaknesses; and we certainly are trained to do just that. But is that all we are doing? Is that all the other side is doing? We certainly *want* the other side to "think rationally," or focus on the facts and figures. Yet, as a practical matter, all decisions involve more than one hat. And people do not necessarily start with the facts-and-figures white hat. Recognizing which "thinking hat" we are wearing at a given time can help us deliberately examine the other facets that require consideration. Similarly, evaluating which hat the other side is wearing can help us tailor our messages and offers, and bring them along to the other "hats" that may be more conducive to the negotiation process.

[1] *Six Thinking Hats*, Edward De Bono, ©1985, revised and updated 1999.

►Common Unconscious Biases and Behaviors[2]

◊ Lake Wobegon: Are your case strengths really above-average?

❖ Sixty-five percent of Americans surveyed in 2018 believed that they are above-average in intelligence,[3] a mathematical impossibility. A 2021 YouGov survey revealed that 15 percent of Americans believe that they could defeat a king cobra, one of the longest and most venomous snakes on earth.[4] Animal experts, on the other hand, view this to be impossible. Humorist Garrison Keillor captured this over-estimation phenomenon in his description of the fictional town of Lake Wobegon: "where all the women are strong, all the men are good-looking, and all the children are above-average."

❖ Overconfidence in our knowledge and abilities is embedded in each of us as a consequence of evolutionary biology. Self-deception was adaptive in early eras, and can still be effective when we need to appear confident, but it can distort our own evaluation of the risks presented by the other side's case.

❖ When actual measurement is possible, we do not tend to overestimate. Case assessment, however, is not an exclusively empirical exercise. Instead, it falls squarely within the risk of the Wobegon effect—including our assessment of the credibility of witnesses and the strength of evidence.

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[2] *The Science of Settlement Ideas for Negotiators* © 2008, Barry Goldman, MA, JD, pp. 13-33, collects and expounds on these, and other, common unconscious psychological effects.

[3] Heck PR, Simons DJ, Chabris CF (2018). *"65% of Americans believe they are above average in intelligence: Results of two nationally representative surveys*," PLoS ONE 13(7): e0200103, available at https://doi.org/10.1371/journal.pone.0200103

[4] "*A Surprising Number of Americans Think They Could Beat Wild Animals in a Fight*," by Robyn White, *Newsweek*, March 25, 2022, available at www.newsweek.com/surprising-americans-beat-wild-animals-fight-experts-169179

◊ Availability Bias or Heuristic[5]

- ❖ The availability bias (or heuristic) is a cognitive bias that involves relying on information that comes to mind quickly or is most available to us—like our own experiences or frequent news headlines—rather than information that is less available but may be more accurate. We assume that information that is readily available is more probable or involves more frequent events, rather than rare.

- ❖ A recent study examined the availability heuristic in evaluative settings (versus frequency).[6] In the study, 64 students at Duke University were asked to complete a mid-course evaluation. Half of the students were asked to specify two ways to improve the course (an easy task); and the other half were asked to specify ten ways to improve the course (a more difficult task). The students who had been asked to provide ten critical suggestions ultimately rated the course *more favorably* than the student who had been asked for only two critical suggestions. Applying the availability heuristic: that it was more difficult to recall ten suggestions for course improvement (rather than just two critical comments) led the students to view the course as not needing much improvement.

- ❖ The availability bias does not necessarily lead to incorrect conclusions. Reliance on it in everyday life helps us make ordinary decisions quickly. But we can easily reach wrong conclusions relying on the same heuristic that often guides us through the choices we make daily if we are not careful to examine the basis for our position.

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[5] Tversky, A., & Kahneman, D. (1973). *Availability: A heuristic for judging frequency and probability*. *Cognitive Psychology, 5*(2), 207–232. https://doi.org/10.1016/0010-0285(73)90033-9; described in multiple publications including, Goldman, B. *The Science of Settlement Ideas for Negotiators* pp. 27-29.

[6] Fox, C. R. (2006). *The availability heuristic in the classroom: How soliciting more criticism can boost your course ratings*. *Judgment and Decision Making, 1*(1), 86–90. Available at https://doi.org/10.1017/S1930297500000371

◊ Self-serving Bias and Representative Bias

- ❖ Because of self-serving bias and representative bias, we tend to see ourselves as representative of the norm across all people. If something is obvious or believable to us, we tend to think that it will be obvious or believable to everyone else. For example, if we exercise three times a week, we are likely to think that those who exercise more are overdoing it and those who exercise less are falling short.

- ❖ Self-serving bias also tends to skew our views of the value of goods and services. For instance, if you acquired an overgrown lot where old mattresses and junk have been dumped and the vegetation is wildly out of control: what would be a fair price to pay someone to clear it? Now consider, what would someone have to pay *you* to clear it? If there is a difference between how you answer those two questions, it is likely the product of self-serving bias. On the whole, our thinking is biased in our own favor.

- ❖ We also believe that *others are more likely* to suffer from self-serving bias in forming their views than we are in forming our own.

◊ Endowment Effect

- ❖ We tend to assign a higher value something we have in hand and assign a lower value to the same item when it is being offered to us. The endowment effect may be evident when your opponent puts a value on their case that you believe is too high; and it may be evident when you put a value on your case that the other side believes is overly optimistic.

◊ Regret Aversion

- ❖ Regret aversion causes us to avoid taking action or making a decision because of the fear that our affirmative choice may lead to disappointment or bad results, thereby causing us to regret doing

so. It may cause us to dwell more on avoiding a bad decision than making a good decision. Thus, the anticipation of looking back at a later time and regretting the decision is factored into the decision itself. This bias will be stronger in decisions with significant consequences. For instance, deciding whether to accept a settlement offer and forego seeking a jury award is far more impactful than selecting an item from a restaurant menu for dinner.

◊ Managing These and Other Cognitive Biases

- ❖ The cognitive biases and heuristics described above are examples of many. They are not necessarily bad. They have evolved in us for useful reasons. Without relying on these shortcuts for thinking, we would be endlessly mired when faced with any daily choice. But they can lead us to faulty conclusions and missed opportunities when not examined.

- ❖ We can improve our negotiation skills by understanding and identifying the decision-making heuristics and biases that may be affecting our negotiations. Indeed, a central management technique for accounting for cognitive bias and unconscious behaviors is to recognize their role and to deliberately examine their effects.

- ❖ Learning about these cognitive biases and unconscious behaviors helps us recognize when we use them, and when the opposing side may be. Sources of this information are plentiful. For instance, in the popular book *Blink: The power of thinking without thinking*,[7] Malcom Gladwell discusses decision-making neuroscience and psychology, including illustrations of failures resulting from

[7] Gladwell, M. (2005). *Blink: The power of thinking without thinking.*

reliance on thinking shortcuts such as "New Coke" and the 1999 police shooting of Amadou Diallo, an unarmed and innocent twenty-two year-old. In *Thinking Fast and Slow,*[8] behavioral economics expert Daniel Kahneman provides a more scientific—and very engaging—explanation of the influence of intuitive impressions on our thinking and conduct. And there are podcasts that delve into the subject in easily-consumed capsules, including *Hidden Brain (A Conversation About Life's Unseen Patterns)* hosted by Shankar Vedantam.[9]

**Before Coming To The Negotiating Table: Work To Understand Our Assumptions, Prepare Our Clients For The Resolution Roller Coaster, And Understand The Other Side's Vantage Point**

*The goal of negotiating with your opponent is to end the dispute on mutually agreeable terms, not to convert them to your viewpoint. This goal is in tension with our everyday work as an advocate—we ordinarily focus on our clients' cases, building strengths, minimizing weaknesses, and reformulating narratives along the way to increase their persuasive value. As we do this, we work with our clients and assure them of evidence that confirms their suspicion that they have the stronger case, and notify them of the potential problems. When it comes time to negotiate, though, we need to deliberately work to educate ourselves on the obstacles on our own side to reaching a resolution, to reconcile our clients to the risks and expenses, and to consider ways to frame our offers to make them more likely to result in a deal.*

►Understand the Needs and Biases Of Our Side

◊ We must begin discussions with our own clients about settlement position, obstacles, and goals sufficiently in advance to allow for evolution in thinking and, when applicable, layers of corporate approvals. Often this is an ongoing

[8] Kahneman, D. (2011). *Thinking, fast and slow.*

[9] Vedantam, S. (Host). (2015-present). *Hidden brain* [Audio podcast]. NPR. Available at https://www.npr.org/podcasts/510308/hidden-brain and multiple podcast platforms. The list of good available resources is lengthy. Others we recommend include: *De-Escalate, How to Calm an Angry Person in 90 Seconds or Less* by Douglas E. Nall (a California mediator with history of work in conflict resolution in the penal system discusses the need to recognize and acknowledge emotion to move forward to resolution during mediation); *The Body Keeps the Score* by Bessel van Der Kolk, MD (discussing how trauma impacts the person).

process from the beginning of a case. When it is not, beginning this process a week before the moment of mediation may be sufficient to get a ballpark idea of an acceptable settlement but it will not allow for evolution in our side's position, including time to evaluate the impact of cognitive biases and emotional experiences. Additionally, many entities have multiple steps for obtaining settlement authority and each requires its own time. This work, in complex cases and large organizations, can take at least 6 months.

◊ Examine How Our Client Sees Themselves In The Litigation

- ❖ How a party perceives itself will shape its approach to the case, including whether and on what terms they will resolve the matter. What role does each side perceive themselves to be playing in the litigation? The beleaguered and unfairly blamed? The guardian of justice? This role may prove an obstacle to a reasonable resolution unless we are able to help our client recast their role.[10]

- ❖ This does not just happen on the plaintiff's side. For example, consider the client who had become convinced by others in their industry that the client stood the best chance of securing a favorable court judgment about the application of a particular statute to a circumstance that affected them all. When summary judgment did not end the case, the client's role as the guardian angel of their industry meant that they would need to go to trial to pursue the desired result. Their role drove their unwillingness to resolve the case on reasonable terms. Helping them to recast themselves in the role of the caretaker of their own company (including the security of their employees and the well-being of their clients) instead of the industry guardian angel did not change a single fact of the case—but it fundamentally shifted their ability to view the benefits of a resolution on reasonable terms.

[10]*See* Goldman, B., *The Science of Settlement* pp. 35-36.

- ❖ When the other side has cast themselves in a role that will hinder a reasonable resolution, we can seek to persuade them to recast themselves through an emissary that the other side trusts—like their own lawyer or a mediator.

◊ Revisit and Work Through the "Thinking Hats" With Our Client

- ❖ Long before mediation, consider inviting your client (the decision-makers) to express their views about the case without directing them to focus on a particular aspect or outcome. If your client starts with the "white hat" facts-and-figures view, recognize where they are and probe that perspective with questions to elucidate whether the bases are facts, or whether they are beliefs or likelihoods, and which facts are unknown.[11] Then touch on the other ways of viewing the dispute and potential resolution (the thinking hats) with your client by asking questions. In particular, be sure to explore the client's visceral reactions (emotions) to deal points and prepare them for the other side's offers and allegations, which may be offensive to them. If we do not explore the emotional responses our clients have to the other side before a negotiation, we can expect that those reactions will arise during the mediation or at another time when there is limited time to work through them. We can also touch on the "green hat" of creativity—are there things that we can accomplish in a deal that are not simply putting an end to the lawsuit.

- ❖ At the appropriate time, remind the client that the other side will tell their story to strangers who will watch the reactions of everyone in the room. If you have not had the benefit of a mock jury analysis, acquaint your client with the self-representative bias: the strangers who will decide which witnesses to believe and which party will prevail do not

[11] *See* De Bono, E., *Six Thinking Hats* pp. 33-35, 46.

see the world as we see it. They (the decision-maker) may identify aspects of the other side's position that are more familiar and comfortable to them, and that may lead to increased risk of an unwelcome result.

- ❖ When there are ongoing business relationships between the litigating parties, deliberately discussing the facets of those relationships helps shape our pre-negotiation preparation and our negotiation positions and language. When our client has insight into the business partner's typical negotiating style and substantive positions, that information can affect the negotiating style we intend to employ.

►<u>Use Time Before the Negotiation To Learn What Is Meaningful To the Other Side and Retain the Ability To Negotiate Effectively</u>

◊ Learning about your opponent helps you understand what goals and needs they have separate from the litigation. During the moments that you have with the opposing party, whether it is during a deposition day or during the moments before mediation starts or otherwise: *listen*. Be aware of what is discussed—are kids going to college? Is this the deal that went bad and ended a dream or the latest of a string of failed attempts? Is this case the inflection point that will draw new liability allegations against the opponent by others? Is there an elderly parent who needs care? If the moments are conversational, ask about everyone's morning, weekend, holiday in a non-interrogational way. Deliberately consider what are the everyday influences on your opponent's conduct and plans for the future. You will bear it in mind as you work to frame the offers that you make to the other side, which is discussed below.

◊ How we advocate for our side impacts our negotiation efforts. By definition, being in litigation means that the opposing parties disagree actively and competitively. When the other side is strident and derisive during the course

of litigation, it adversely affects our willingness to trust their efforts during negotiation. The converse is true: when we are strident and overly aggressive in our zealous representation of our clients, we cannot expect the other side to view our settlement advances without skepticism or distrust. In contrast, science teaches us that we are hard-wired to ascribe multiple good qualities to people who have qualities that we find likeable on some level or who we believe are like us, even if we do not agree with them. This type of connection does not take much to have a positive effect: it can be the presence of a common experience, common appearance, or even common courtesy. Put simply: you can build rapport without ceding litigation positions and that rapport is useful.

►Zone of Agreement

◊ After we have fully evaluated the case with our clients, including working through the iterative, multi-lensed "thinking hat" process and deliberately examining the potential impact of cognitive biases, we will be in a position to examine with our client what the range of acceptable agreement looks like.

◊ Our side's desired zone of agreement will be a star that guides the negotiation journey. When our client wants to focus on bad behavior or bad faith offers from the other side, we can return our focus to the goal of getting ourselves (and the other side) to this zone where resolution can be reached. We accomplish this through packaging the timing and content of our offers, and paying attention to what is meaningful to the other side.

- ❖ If it is clear that the other side will not move into our acceptable zone of agreement, then we will have an impasse. That's just the way it goes sometimes (though increasingly less often). And, of course, there are the narrow category of zero sum cases that cannot be negotiated to a middle ground or compromise: *e.g.*, either we retain the billion dollar contract with the government, or the other side gets it.

**Framing Offers And Counteroffers: Use Knowledge Of Cognitive Processes When Negotiating**

*As lawyers, we are ever-mindful of how our phrasing, storytelling, and positioning will impact the decision-maker at trial. We workshop themes to find ones that will resonate and we employ jury consultants to help us frame our narratives to make them compelling and credible. We consider the experiences and perspectives of the trial decision-makers to shape our work because we understand they are human and susceptible to cognitive bias of all manner. Negotiations deserve the same level of care to achieve an equally critical goal: we need the other side to agree to settlement terms that we believe are more advantageous to our client than going to trial would be. The other side becomes the audience that we want to come along with us to a place of agreement, if at all possible. We can, and should, use the same care to frame our positions and offers in negotiation that we use in trial to account for and employ the benefit of cognitive biases and emotions that affect us all.*

► Consider Making the First Offer, Even Before Mediation

◊ Anchoring Effect

- ❖ We probably have all encountered the term "anchoring" in the context of jury arguments. Plaintiffs, who always speak to the jury first, will start to introduce the prospect of specific high dollar verdicts to the jury. They want the jurors to start to frame their view and decisions about the case around this reference point. This technique takes advantage of the cognitive bias of the "anchoring effect": reference points or "anchors" influence individual judgments even when the reference point is irrelevant or improper.
  - o An illustration of the effect of anchoring: an early study revealed the anchoring bias at work when study participants were asked to estimate the answer of two multiplication equations that both involved the numbers 1 through 8 without being provided time to calculate the answer: either 1 x 2 x 3 x 4 x 5 x 6 x 7 x 8 *or the reverse* of 8 x 7 x 6 x 5 x 4 x 3 x 2 x 1. The estimated answer of the equation that started with small numbers was lower than the estimated answer for the equation that started with larger

numbers. The larger number anchored the estimate to a higher estimate. Specifically, the "median estimate for the ascending sequence was 512, while the median estimate for the descending sequence was 2,250. The correct answer is 40,320."[12]

- ❖ The anchoring effect can be as impactful in negotiations as it is in trial. When we know that the other side will lead with a number that is not in a realistic realm (in our view) or if the other side does not have the experience to set the benchmark, making the first offer allows us to set a reference point for the negotiation.
- ❖ Similarly, if you are negotiating in a mediation context, talking with the mediator before the mediation to discuss our client's position and our view of the dynamics of the case, can serve multiple purposes. One of them is to inform the mediator's view of the case and make our evaluation one of the reference points for the mediator's work. A skilled and effective mediator will remain neutral, of course. But a mediator who has been educated about the case is more likely to be an effective mediator.

◊ Context and Contrast

- ❖ After we know where we are headed (our desired zone of agreement), we can consider how our first offer will set the stage for our subsequent "concessions." We want the other side to feel that, when they ultimately agree, they are getting a good deal (the contrast from the initial offer we make). Yet we want to position the offer in such a context that it will not provoke outrage and recalcitrance.
- ❖ Whether it is rational or not, we tend to judge value based on circumstances. For example, we are not surprised when a soda that

[12] Tversky, A., & Kahneman, D. (1974). *Judgment under Uncertainty: Heuristics and Biases*. Science, New Series, Vol. 185, No. 4157. (Sep. 27, 1974), pp. 1124-1131 at 1128, available at https://www2.psych.ubc.ca/~schaller/Psyc590Readings/TverskyKahneman1974.pdf

costs $3 in the convenience store costs $10 in the fancy hotel on the same block. The soda remains the same, but its value and our willingness to pay for it shift based on the sliding scale of the contrast of circumstances.[13] In negotiation, we should be mindful to design successive offers so that they will be perceived to have value and will encourage a reciprocal response that moves in our direction.

►Responding To Draconian Demands, Including Preparing Our Clients For the Rocky Road To Resolution

◊ If our client has not been prepared for the possibility or likelihood that the other side will make unrealistic demands, and that a mediation day is often long, our client may be outraged and inclined to walk away without countering even when a counteroffer is a productive next step. We must avoid the assumptions either that our client already knows that this common occurrence is part of the process or that they will be open to mediate after the offensive demand if we do not prepare them before mediation. Although it is possible that the other side will revise its offer without a counteroffer (*i.e.*, bargain against itself), it is not likely to do so in a meaningful or timely way unless it has some extrinsic motivation.

◊ But even if we respond with a counteroffer, we still have a dilemma. We know that negotiation participants often assume that a negotiation will likely end in agreement at the midpoint between the first demand and response. This assumption is backed by research results—many negotiations do end at the midpoint. So, responding to an exaggerated demand by the other side requires early disruption of this technique and belief. The response must be mindful of the power of the anchoring effect: if the response is not decisively clear and quick, the draconian demand grows roots in the other side's mind.

[13] *See* Goldman, B., *The Science of Settlement* pp. 85-88.

◊ If we continue to negotiate, then the next moves in the negotiation necessarily will be challenged by the expectation of reciprocity. We are going to insist that the other side make larger concessions than we make to get to the realm of the reasonable. They will resist and protest the unfairness of it all. We, of course, maintain that it is their own fault for starting with an exaggerated demand. If we are in mediation, we can enlist the help of a mediator to address this problem.

◊ We should consider that over-emphasized dwelling on the ridiculousness of their initial demand as part of the reasoning for our position will provoke a defensive, and relatively unproductive, reaction. That does not mean we should ignore it. Using other techniques or packaging, however, can build gravitational pull to a workable framework, including setting the stage for our side to be the reasonable actor in the process by focusing on our end goal without acceding to their starting point. There are various constructs and techniques that intersect with and use our unconscious cognitive biases that may be employed during a negotiation to aid with this effort, including at the outset when there is a dramatic difference between the two sides and as the negotiation progresses.

- Tit for tat:[14] The negotiation process involves competition but requires cooperation for it to be successful. If we do not cooperate by moving our offer toward a zone of agreement, then the other side is likely to do the same. The result will be an impasse. Continuing to move our position, even slightly, activates the reciprocity norm and makes the other side choose whether they will be the one who defies the societal and internal expectation of a move, which has the heightened risk for them of being the one who ends the negotiation.
- Stickiness: When we send an offer to the other side, we should provide

[14] Goldman, B. *The Science of Settlement* pp.79-85.

a justification for it, a "because."[15] As noted, this narrative need not expressly reference the other side's exaggerated demand though it can acknowledge the posture of the parties. Instead, we know that the way we tell a story makes our clients' positions compelling to jurors. Providing a story to the other side in a negotiation can strengthen your negotiation position, too. The story provides a "stickiness" to the offer that you make; there is a reason for it. Even if the reason is not believed or deemed to be important, research shows that we are more likely to approach compliance with a request when a reason accompanies the demand.

- ❖ Tailor Your Story Framing to The Other Side's Perspective: Behavioral economics researchers have demonstrated that people make choices depending on how they describe the option to themselves, not the choice or information itself.[16] Remember that we have listened and attempted to discover what is meaningful to the other side. We can use that information to present our offer (the choice they have to make) to the other side in a way that will work with, rather than against, their way of processing information. We know that we will not convert them to our perspective; but we can meet them with details that appeal to their ultimate goals or world views. For instance, if the opposing side is a business type, we frame our offer as a smart money move: it fits within the view they have of themselves already.[17] Or if the opposing side is a social activist, we can frame our offer to show how settlement can enable them to pursue what is of greater importance. In short: use the other side's belief and values to bring them into the zone of agreement.
- ❖ Provoke concessions through unsolicited offers or gifts: The reciprocity

[15] *Id.* pp. 48-50.
[16] *Id.* pp. 88-89.
[17] Goldman, B. *The Science of Settlement* pp. 112-113.

norm is so engrained in human conduct that it is possible to elicit concessions by including in your counteroffer a new feature.[18] For instance, when parties are exchanging simple monetary demands and offers, if we add a non-monetary term to seemingly increase the value of the offer, we can evoke a feeling on the other side that it is their turn to make a greater move in our direction.

- ❖ Propose Choices That Require The Other Side To Choose A Path: Research shows that we are more likely to believe an outcome is fair, or a proposal is a good one, if we are involved in designing it.[19] Depending on where we are in the negotiation process, we can look for ways to get the opposing side more connected with the prospect of a case-ending resolution. We can provide the other side with choices that are reasonable to us, and let them select a direction. For instance, we can offer terms for payments that differ between a lump sum up front or payments made over time. Even if rejected, the response may reveal information that helps us better understand the other side's needs and priorities. However, it is important not to offer too many alternatives: too many options makes the process of choosing too difficult and can result in no choice being made at all.

►<u>Do What You Can With What You've Got: When the Other Side Is Uncooperative And Untrustworthy</u>

◊ We can only do so much. When we are dealing with a hardball negotiator known for dirty tricks and baiting-and-switching, we can't be our ordinary problem-solving selves. Thankfully, these instances are relatively rare.

◊ Mediator selection and involvement becomes even more critical in these instances. Unlike us, a mediator is not an opponent. And an effective mediator can act neutrally and consistently with the ethical obligations of a

[18] *Id.* pp. 76-79.
[19] *Id.* pp. 91-92, 97.

mediator, but they can still work to identify and overcome obstacles.

◊ An effective mediator can use techniques that we cannot use as advocates. For instance, a mediator can work to get each side (including the bad guy) to agree to certain principles that override the dispute. For instance, in a dispute about corporate ownership and control, the mediator can seek to elicit agreement with the principle that the employees of the company deserve to have their hard work and service honored by those who are at the top, and that continued corporate limbo jeopardizes those people and company profits. Agreeing on such a principle may not move the needle for determination of the merits of the dispute but it can change the tenor of a discussion and serve as a touchstone during it.

◊ Effective mediators can also serve as favored authority figures. A good mediator will establish a relationship with a party through listening and reflection that will evoke a behavior common to nearly all humans: a desire to be perceived as reasonable and likeable. Mediators can also hold parties accountable to the process and, without changing the terms of a proposal, can help frame offers for the values of the audience.

* * *

We are human. So is everyone else involved in the litigation process. Good lawyers embrace this fact when preparing for trial. When it comes to the negotiation process, we have the opportunity to apply the same attention to emotion and cognition that we do when formulating our trial approach. When we do, we elevate our advocacy.