



Negotiation at the Mediation Table: What's Really Going On?

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Outline

- Task #1 – Opening
 - *Anchoring*
- Task #2 – Exchange
 - *Reciprocity, but . . .*
 - *Loss Aversion*
 - *Reactive Devaluation*
 - *Self-Serving Biases*
- Task #3 – Evaluation
 - *Framing*
 - *Contrast*
- Potential Mediator Tactics

Task #1 – Opening

- Anchoring

Anchoring

Estimates tend to be biased toward the first number we encounter

- Absurd example
- Trial
 - e.g., Plaintiff's lawyer's damage requests
- Negotiation and settlement
 - e.g., Opening offers/demands
 - e.g., Insurance policy limits
 - e.g., Statutory damage caps

Trial Studies

<u>Damage Request</u>	<u>Mean Award</u>
None	\$168,000
\$500,000	\$283,000
\$700,000	\$423,000

- Malouff & Schutte (1989)

<u>Damage Request</u>	<u>Mean Award</u>
\$100	\$992
\$20,000	\$36,000
\$5 million	\$442,000

- Chapman & Bornstein (1996)

The Auto Accident Problem ***Wistrich, Guthrie & Rachlinski (2005)***

Facts

- **P** is a 31-year-old teacher and father
- **D** is a package-delivery company
- **P** loses his arm and breaks three ribs in auto accident
- **D** concedes liability and economic damages, but contests pain and suffering damages
- Unsuccessful settlement conference
 - Control – P's lawyer says P wants a lot
 - Anchor – P's lawyer says P wants \$10 million
- **Question:** What pain and suffering damages will you award?

The Auto Accident Problem

Wistrich, Guthrie & Rachlinski (2005)

Results

Groups	Mean Award	Median Award
Control	\$808,000	\$700,000
Anchor	\$2.2 million	\$1 million

ADR Institute -- Mediators

The Auto Accident Problem

Facts

- Same facts as “Settlement Conference” problem described above:
 - Auto accident between 31-year-old and package-delivery company
 - **P** loses his arm and breaks three ribs in auto accident
 - **D** concedes liability and economic damages, but contests pain and suffering damages
- Mediation at which:
 - Control – **P**’s lawyer says **P** wants a lot
 - Anchor – **P**’s lawyer says **P** wants \$10 million
- **Question:** What would you identify as a fair settlement amount?

ADR Institute -- Mediators The Auto Accident Problem Results

Groups	Mean Award	Median Award
Control	\$1.4 million	\$750,000
Anchor	\$4.5 million	\$4 million

Negotiation “Meta-Analysis” Orr & Guthrie (2006)

- Negotiation simulation studies (n=16)
- Basic result = .5 correlation
 - i.e., Every \$1 increase in an anchor results in a 50 cent increase in settlement amount
- Negotiator experience and presence of additional information mitigate the impact *a bit*

Task #2 -- Exchange

- Reciprocity, but . . .
- Loss Aversion
- Reactive Devaluation
- Self-Serving Biases

Reciprocity Norm

- We feel obligated to repay in kind what we have received from another
 - e.g., Christmas cards
 - e.g., survey researchers
 - e.g., wait staff
- Reciprocity in settlement
 - trades
 - rejection-then-retreat

Loss Aversion

- Losses loom larger than gains
 - Thus, we place a higher value on an item we possess than on an item we are trying to acquire (endowment effect)

Loss Aversion/Endowment Effect Coffee Mugs or Chocolate Bars Knetch (1989)

- **Group 1** – Choose either
 - Mug – 56%
- **Group 2** – Endowed w/ mug but can trade for chocolate bar
 - Mug – 89%
- **Group 3** – Endowed w/ chocolate bar but can trade for mug
 - Mug – 10%

ADR Institute -- Mediators Slip and Fall Problem

Facts

- Paul sues Dave's Grocery due to slip and fall for \$200,000; Dave says \$0 owed.
- **Plaintiff Concession Group:** At mediation, plaintiff offers to settle for \$140,000 (i.e., a \$60,000 concession) [*foregone gain*]
- **Defendant Concession Group:** At mediation, defendant offers to pay \$60,000 to settle (i.e., a \$60,000 concession) [*loss*]
- **Question:** How big a concession is this?

ADR Institute -- Mediators Slip and Fall Problem

Results

- **Plaintiff Concession Group:** 3.4 average score (1-7 scale)
- **Defendant Concession Group:** 5.1 average score (1-7 scale)

Reactive Devaluation

- We devalue offers
 - Identity of the offeror
 - Offered versus withheld

Reactive Devaluation ***Stillinger et al (1988)*** **Identity of Offeror**

American survey respondents were asked to evaluate a nuclear disarmament proposal in 1986.

- Reagan – 90% viewed it “favorable” or “evenhanded”
- Neutral Third Party – 80%
- Gorbachev – 44%

Reactive Devaluation ***Stillinger et al (1988)*** **Offered vs. Withheld**

Stanford survey respondents reviewed two South Africa divestment plans – i.e., “Specific” and “Deadline”

- When told Stanford had offered “Deadline” plan, 85% favored “Specific”
- When told Stanford had offered the “Specific plan, only 40% favored it

Self-Serving Biases

We tend to make judgments about ourselves in egocentric ways:

- Abilities and prospects (the “above average effect”)
- Contributions to collective activities
- Merits of our positions

ADR Institute -- Mediators Skills Assessment

- “Listening”
 - % placing self in top ½ – 96% (60% top ¼)
- “Identifying Options”
 - % placing self in top ½ – 93% (48% top ¼)
- “Providing Advice”
 - % placing self in top ½ – 76% (35% top ¼)

Self-Serving Bias in Settlement Loewenstein et al (1993)

Subjects read about a suit involving a car/ motorcycle accident in which **P** sued **D** for \$100,000. Half assigned to the “plaintiff” condition and half to the “defendant” condition:

- What will judge award?
 - Plaintiff -- \$14,527 more than defendant
- What is a fair settlement value?
 - Plaintiff -- \$17,709 more than defendant

Task #3 -- Evaluation

- Framing
- Contrast

Framing

- We tend to perceive decision options as “gains” or “losses” from the status quo:
 - Risk *averse* when choosing “gains”
 - Risk *seeking* when choosing “losses”

“Asian Disease” Problem **Tversky & Kahneman (1979)**

Scientists expect an outbreak of an Asian disease that will kill 600 people. Two treatment programs are available. Which will you choose:

- Program A** – 200 people will be saved **[72%]**
- Program B** – 1/3 chance that 600 will be saved and a 2/3 chance that 0 will be saved

OR

- Program C** – 400 people will die
- Program D** – 1/3 chance that 0 will die and a 2/3 chance that 600 will die **[78%]**

Framing in Litigation & Settlement

- Plaintiff are risk *averse*
 - Prefer settlement
- Defendant are risk *seeking*
 - More attracted to trial

Litigation Problem

Rachlinski (1996)

Imagine you are the plaintiff **[defendant]** in a copyright infringement lawsuit. You are suing **[being sued]** for the \$400,000 that the defendant allegedly earned by violating the copyright. Trial is in two days and the defendant has offered to pay **[plaintiff has offered to accept]** \$200,000 as a final settlement. If you turn it down, you believe that you will face a trial where you have a 50% chance of winning **[losing]** a \$400,000 award. Will you settle?

- Plaintiff settlement rate – 77%
- Defendant settlement rate – 31%

Framing and Judges

Guthrie, Rachlinski & Wistrich (2001)

- Similar facts involving a copyright dispute
- Also provided information about litigation costs to each side
- Assigned some judges to a plaintiff's frame – Do you believe **P** should settle?
 - 40% said yes
- Assigned some judges to a defendant's frame – Do you believe **D** should settle?
 - Only 25% said yes

Contrast

We often alter our preferences between two options when an additional option is added to the choice set

- “Rational” *only* if the new option provides relevant information
- “Contrast” – Added option is similar but inferior to one of the original options

Simple Decision Problem

Ariely (2008)

Two-Option Group

Select one of the following:

- (1) *Economist* web subscription for \$59 (i.e., web only)
- (2) *Economist* web and print subscription for \$125 (i.e., dual)

Three-Option Group

Select one of the following:

- (1) *Economist* web subscription for \$59 (i.e., web only)
- (2) *Economist* web and print subscription for \$125 (i.e., dual)
- (3) *Economist* print subscription for \$125 (i.e., print only)

Results

Two-Option Group – 32% chose dual (option #2)

Three-Option Group – 84% chose dual (option #2)

“The Painting” Problem *Guthrie (2003)*

Facts

- You are partner in a law firm
- Law partnership is breaking up
- Remaining issue is \$40k painting
- Two-Option Group:
 - Option 1 – Partner keeps; you get \$20k
 - Option 2 – Sell back to artist and split \$40k evenly
- Three-Option Group:
 - Options 1 and 2 above
 - Option 3 – Partner keeps; you get \$5k for 4 years

“The Painting” Problem *Guthrie (2003)*

Results

- Percentage selecting Option 1:
 - Two-Option Group – 35%
 - Three-Option Group – 70%



Potential Mediator Tactics



Potential Mediator Tactics

- Be aware
- Help “reframe” options as gains rather than losses by shifting the reference point
- When communicating losses, bundle; when communicating gains, *unbundle*
- Use contrast to increase attractiveness of a dominant option
- Encourage parties to seek relevant, external information (or provide same)
- Shuttle caucus and communicate offers
- Be wary of “evaluation”?



Recommended Reading

- Dan Ariely, *Predictably Irrational* (2008)
- Robert Cialdini, *Influence* (4th ed. 2001)
- Barry Schwartz, *The Paradox of Choice* (2004)
- G. Richard Shell, *Bargaining for Advantage* (2d ed. 2006)