

# **Reciprocal Coaching to Reduce the Risk of False Failure in Mediation and Support from Social Science for Coaching Ideas**

WAYNE D. BRAZIL<sup>\*</sup>

## I. INTRODUCTION

This essay has two principal and overlapping purposes. The first is to suggest a framework (reciprocal coaching to avoid false failure) for thinking about the roles of mediators and parties that could help maximize their ability to mine the full potential of mediation in civil cases. The second is to present findings from social science research that support or shed light on, and can be used to explain and assess, specific coaching suggestions.

Should mediators "coach" other participants during a mediation? Should our thinking about how to answer this question depend, at least in part, on how, under which circumstances, and for what purposes the coaching is done? What are the "philosophic" and ethical issues that various forms of coaching might raise? Can prospects for improving what a mediation delivers to parties be improved by actively encouraging all participants to view themselves not only as players, but also as coaches, and by asking all participants to participate vigorously in both generating and assessing coaching ideas? Is there reason, supplied by social science research, to believe that such "reciprocal coaching" might improve the health and the productivity of mediated negotiations?

Social scientists have conducted a wide variety of studies of negotiation dynamics and of the psychology of negotiators. One of the goals of this essay is to describe findings from some of this research that could help inform a mediator's coaching suggestions, findings that a mediator could discuss with other participants in a mediation to enhance the level of their engagement in the process and to sophisticate everyone's thinking about the possible effects of specific approaches, behaviors, or kinds of "moves" that might be made during a mediation. The purpose of this foray into social science is neither to critique nor validate specific studies, but to elaborate and enrich the way mediators and lawyers think about negotiation dynamics and to offer them some new ways to conceptualize both their mission and the ways they might contribute.

---

<sup>\*</sup> United States Magistrate Judge (Ret.); mediator and arbitrator with JAMS, Inc.; Professor from Practice, Berkeley Law, University of California, Berkeley.

A mediator who has occasion during a session to mention insights from social science would be well advised to make it clear that the point of pointing to any particular findings is not to direct the parties' course of action along formulaic lines, but only to expand the multiple considerations that litigants might take into account when making their decisions about how to proceed.

A few prefatory clarifications are in order before diving into substance. First, this essay addresses mediations that occur in a specific setting: in civil cases (1) in which all parties are represented by counsel and (2) that have survived (or appear likely to survive) challenges by motions, including motions to dismiss and for summary judgment, i.e., cases that apparently will not need to surmount any significant additional legal or procedural barriers to get to trial.

Second, it is important to point out that while some of the coaching ideas I describe could be discussed during joint sessions, others would be appropriately presented only in private caucus with one side or one group of similarly aligned parties. Coaching during private caucuses can create risks to role and ethics that would not arise, or would be much less intense, in joint sessions. On the other hand, in some circumstances it might be only during private caucuses that a mediator would be able to make some significant coaching-based contributions to the viability of negotiations. My goal, of course, is neither to defend nor condemn private caucusing in mediations of civil cases. In this essay, I simply accept the fact that, at least in many urban areas, private caucusing has become a standard component of mediations in a wide range of civil cases.

The third set of necessary prefatory acknowledgments relate to the social science piece of this essay. Some of the research findings that I will discuss might seem obvious, or equally accessible through intuition. Neither fact, even if true, would make the results of this research useless to mediators. The findings reported here can offer mediators validating external support for behaviors that many mediators, as a matter of personal philosophy, want to encourage. Stated differently, products of social science research can bolster mediators' confidence that they can contribute to the parties' prospects of achieving their ends by encouraging them to follow constructive paths and to proceed with integrity. Moreover, parties might listen a little more openly to a mediator's process suggestions when the mediator can say, in effect: "The specific process suggestion I am asking you to consider is not really my idea. It is the product of several sophisticated studies that strongly suggest that if you take this approach [or make this move], it is likely to have the effect that you would like." While the occasions to explicitly invoke findings from social science research will not be numerous, I believe that judicious, well-

timed use of information of this kind could enhance the value that a mediator adds to a negotiation.

It also is important to note that much of the social science research reported in this essay has been conducted in settings that offer opportunities for "integrative" bargaining,<sup>1</sup> i.e., settings in which there are multiple possible elements or components of a deal and that present parties with opportunities to make trades based on the fact that they might ascribe different valuations to different elements of a deal package. While this fact should make us careful about generalizing from the findings of some of the studies, it is by no means a sufficient ground for ignoring all of the work that has been done in this arena. For one thing, even mediations in lawsuits that are about to go to trial may present more opportunities for integrative bargaining than lawyers and clients might assume. It can be a serious mistake to conclude that negotiations in these settings can be nothing more than exercises in distributive bargaining. Trades in subtle commodities like feelings, time, positions, reputations, or opportunities may be possible much more often than is commonly recognized.

Moreover, while it would not be wise to assume that findings about optimal outcomes can be transported safely from studies of bargaining that takes place in settings with integrative potential to settings in which only distributive bargaining is possible, it would be unwise to assume that we cannot transport from integrative to distributive settings, at least as working hypotheses, some of the insights that social science research has developed about how certain kinds of behaviors by negotiators are likely to affect negotiation behavior by other participants in the process. In other words, we need to be less worried about transporting findings about outcomes than findings about particular process dynamics.

## *2. Exploring the Notions of "Coaching" and "Reciprocal Coaching"*

A thesis of this essay is that in some circumstances a mediator might well be able to help the parties improve the quality and productivity of their mediation by offering "coaching" suggestions and by encouraging all participants in the mediation, lawyers and litigants, to expand their vision of their role from mere player to player/coach. In this vision of things, the mediator is by no means the only source of coaching input or ideas. While it is expected that every player/coach will coach his own team and try to

---

<sup>1</sup> See ROY J. LEWICKI, BRUCE BARRY & DAVID M. SUNDEERS, *NEGOTIATION* 71–75 (McGraw Hill, 6th and Int'l ed. 2010).

advance his own team's interests, each player/coach also is asked, explicitly, to do some coaching that could reach participants that are not on his team (in the immediate sense)<sup>2</sup> and that promotes a broader objective: maximizing the health and productivity of the mediation process as a whole. That end cannot be achieved by a vision of coaching that is limited to one team and to one's own teammates. Instead, each participant is asked to include in his vision of his role an understanding of the mediation as an organic whole, as an organism whose vitality can be either enhanced or threatened by every participant.

What do I have in mind when I use the term "coaching" in this context? Certainly not directing parties or lawyers to proceed in a specified manner or to follow a script written by the mediator.<sup>3</sup> We are not talking about coaching à la Woody Hayes or Bobby Knight – or even John Wooden.<sup>4</sup> Rather, the coaching that I contemplate is rooted in attentive thinking about the quality of the game as it progresses and consists principally of (1) generating ideas about how to improve the quality of the game as a whole (as opposed to how to improve one side's chances of "winning"), (2) asking other participants to generate process ideas with that same shared goal, and (3) encouraging everyone to participate, actively, in assessing the pros and cons of the process ideas that are suggested, regardless of their source. It is "process"—not content or substance—that is the principal target or subject of the coaching I have in mind.<sup>5</sup> Coaching by a mediator directly about "content" or

---

<sup>2</sup> One important concept that the mediator tries to encourage all participants to understand is that in a significant sense every participant is a member of the same team – a team that shares one objective: to identify as reliably as possible what is possible through mediation. I explore this idea in a subsequent section.

<sup>3</sup> As will be discussed in a subsequent section, a mediator can reduce the risk of her "coaching" degenerating into "directing" by encouraging all participants to offer coaching suggestions and by involving all participants in active assessment of every process idea that surfaces, perhaps especially those presented in the first instance by the mediator.

<sup>4</sup> The sports metaphor is potentially misleading and dangerous. As will be clear, I believe that mediators should not encourage parties to view a mediation as a game or as a contest, especially a game or contest out of which one party will emerge as the winner and the other as the loser. Keeping "score" is fundamentally inconsistent with the most productive approaches to mediation, as is a "competitive" approach generally.

<sup>5</sup> It is important to acknowledge that sometimes the line between "process" and "substance" can be thin and difficult to locate. Moreover, as will become clear in some of the discussions of specific coaching challenges, *infra*, coaching whose immediate or direct target is process can have implications for or be rooted in concerns or thoughts about substance. So the distinction is in some measure artificial and in some settings

"substance" could raise different and sometimes more challenging issues about role and ethics.<sup>6</sup>

A good mediator understands that the vehicles for coaching are both explicit and implicit. She appreciates that she is coaching not only when she is asking questions or presenting process ideas or helping assess process alternatives, but also every time she interacts with anyone in the mediation or responds to any of the actions or words of others. She understands that she coaches by example: by how she treats others and their ideas and circumstances, by the respect she shows everyone, by how she listens and engages, and by how hard she tries, visibly and genuinely, to understand—circumstances, emotions, challenges, ideas, lines of argument, positions. Importantly, she coaches by the way she expresses her views, by how she qualifies, conditions and contextualizes what she says. She teaches the ubiquity and magnitude of uncertainty, the roles of unmeasurable (and sometimes unforeseeable) variables, by the way she helps parties identify and work through each component of multi-element analyses.

For purposes of clarity, it also is wise to distinguish coaching from "cheerleading." It would be unwise, however, to dismiss or categorically denigrate the latter—at least when it is not naively exuberant. As Steve Goldberg's and Margaret Shaw's survey data suggest,<sup>7</sup> the mediators whose

breaks down. By trying to maintain our principal focus on process, however, we reduce the risk of over-intrusive interventions and encourage all participants in the mediation to attend to dynamics from a perspective that increases the likelihood that they will consider the circumstances of other players and think about how their behaviors are likely to affect others.

<sup>6</sup> Targets of coaching about "content" or "substance" might include, for example, analysis of claims or defenses, assessments of lines of reasoning or argument, identifying investigative paths to pursue, projections about likely reactions by triers of fact to specific documents or testimony or witnesses, or predictions about likelihoods of rulings on motions or outcomes at trial.

It is not uncommon for lawyers and litigants to ask a mediator to express his or her views about the merits of a case, or to provide assessments (in the mediator's eyes) of the strengths and weaknesses of parties' positions. I do not mean to suggest that responding to such requests by providing what amounts to a second opinion is unethical or inappropriate. In fact, as I discuss, *infra*, at 37–39, mediators may be able to meet real and significant party needs by providing "second opinions" in some circumstances, provided they do so in carefully explained and cabined ways. Such substantive feedback from a mediator, however, falls outside the domain of the type of "process coaching" that I have in mind at most junctures in this essay.

<sup>7</sup> Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 23 NEGOT. J. 393 (2007).

help is likely to be most valued by lawyers and litigants share characteristics with good cheerleaders. Highly regarded mediators demonstrate, by the level of energy they bring to their work and by their active engagement with the parties and the process, that they understand and empathize with the challenges the parties face and really want to help them move forward.<sup>8</sup> Good mediators also understand, intuitively, elemental propositions that are supported by social science: that people, generally, are likely to be responsive to positive reinforcement and often can be motivated by praise.<sup>9</sup>

Good mediation cheerleading should include projecting some optimism (appropriately moderated to fit the participants and their circumstances) about prospects for reaching an agreement. Mediators should cheerlead in this way not only at the beginning of a mediation, but periodically over the course of a session. And to help litigants and their lawyers sustain the level of energetic engagement that will benefit them the most, mediators should explicitly summarize, at several junctures, the progress the parties have made and how it augurs well for the ultimate success of the negotiations.

Before proceeding to consider ideas about how to frame (for parties and ourselves) the objectives of a mediation and how to introduce explicitly the concept of coaching to participants in a mediation, it is important to acknowledge that there are no universally accepted sets of criteria by which the health, the value, or the productivity of mediations should be determined. Given this fact, it is reasonably arguable that the first responsibility of a mediator in any given case should be to try to learn from the parties what criteria they want to use to measure the quality or to assess the level of success of their mediation.

Getting parties to think with any level of sophistication about how to measure the health of a mediation process is likely to be a challenge. More than occasionally all parties will share the view, at least until pressed to think a little harder about it, that there is only one criterion for assessing the productivity of a mediation: whether it generated a settlement. Parties who pay mediators substantial sums sometimes say that what they are paying for

---

<sup>8</sup> *Id.* See also Daniel Bowling & David Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, in BRINGING PEACE INTO THE ROOM 13 (Daniel Bowling & David Hoffman eds., 2003).

<sup>9</sup> See, e.g., Manuel London et al., *Relationships Between Feedback and Self-Development*, 24 GRP. AND ORG. MGMT. 5 (1999). See also Roger Volkema & Cheryl Rivers, *Beyond Frogs and Scorpions: A Risk-Based Framework for Understanding Negotiating Counterparts' Ethical Motivations*, 28 NEGOT. J. 379, 388–89 (2012).

is to get the case settled.<sup>10</sup> Period. Moreover, some such parties will say that the end (getting a settlement) is so important to them that they don't care what means are used to achieve that end. They might well say that they could not care less about the "health" or "quality" of the process. Some will even say that, if it would get a deal done, they would readily accept a process that featured overt and aggressive pressure from the mediator, and/or manipulation or deception by her (though holders of such views are likely to assume that the target of the pressure or manipulation or deception will be someone else—their opponent or, sometimes, their own client).

What are we to do with such views? The first order of business should be to determine whether the parties to a given mediation actually hold beliefs like these. The time to make this determination is before the date set for the mediation session.

In a pre-mediation phone conference with counsel, the mediator could ask if there is any particular approach the lawyers believe would be most appropriate to their clients' circumstances. Unless counsel respond with a very specific prescription, the mediator should describe, briefly, the approach she normally would take and the ways she would try to add value and provide help. She also might identify one or two things she will not do, e.g., try to manipulate parties emotionally (for example, by yelling at them) or to coerce them into accepting a deal. The mediator also could invite each lawyer to speak *ex parte* with her before the date set for the session, e.g., if they would like to share some information privately with her or if they want to discuss in greater depth how she will try to work toward settlement.

Pre-session contacts like these are likely to provide the mediator with some sense of the roles the lawyers anticipate her playing and of whether counsel might have misplaced expectations about the range of techniques she would be prepared to employ.

It is important to emphasize, however, that a mediator who senses that the parties really do elevate the end of reaching a settlement over any concern about how that goal is achieved is under no duty to play the role of bully or trickster just because that is what the parties are prepared to tolerate—unless the mediator has clearly agreed in advance to follow a script so written. In the private sector, if parties can agree on the methods they want used during a mediation for which they pay, they may feel that they have a right to insist that those means be used. They might believe that their right to

---

<sup>10</sup> The author has had numerous conversations with his colleagues at JAMS, Inc., who report that this view is widely held among lawyers in commercial cases.

choose the means their mediator would employ is an expression or dimension of their right to self-determination.

It does not follow, however, that a mediator has any obligation to accept an engagement in which she would be expected to use means that are not consistent with her sense of professionalism or with the mandates of applicable law. And there are applicable legal mandates, at least in California. For example, a mediator who has been selected or appointed by a California court, or who will be compensated for her service by the court, must comply with California Rule of Court 3.853, which compels mediators to "conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties." The Advisory Committee's Comment to this Rule identifies, as "examples of conduct that violate the principles of voluntary participation and self-determination," either "providing an opinion or evaluation of the dispute in a coercive manner or over the objection of the parties [or] using abusive language . . ." It is at least arguable that yelling at a litigant or lawyer during a mediation would constitute "using abusive language." Similarly, delivering an opinion about the merits of a party's position in anger (real or feigned), or with unbridled emotional vehemence, might well be deemed "providing an opinion or evaluation of the dispute in a coercive manner . . ." Thus, at least in some settings, public policy can provide support for mediators to resist pressure from counsel or parties to use emotionally or analytically aggressive tactics to pursue a settlement.

There is a broader reality, however, that is much more important to bear in mind. Given the very wide range of circumstances in which mediations take place, and the equally wide range of values and personalities that parties bring to mediations, it is likely that only a small percentage of consumers of mediation services (even big corporate parties in high stakes cases) would so decisively subjugate means to ends that they would endorse a mediator's use of crude emotional manipulation or outright deception in order to get a deal. In fact, it is quite likely that the vast majority of parties have strong feelings about how they should be treated during a mediation—and would be profoundly alienated by the disrespect for them that would accompany bullying, lying, or emotional manipulation by a mediator.

Nonetheless, we need to acknowledge that lawyers (and, to a lesser extent, litigants) enter the mediation experience with a wide range of often unexamined assumptions about mediation's purposes and about the means that should or likely will be used to pursue those purposes. Given this fact of life, it behooves us to be prepared to debate (with evidence not only from our experience, but also from social science) two of the premises that inform the views of those who would have us pursue settlement at all costs and by any



means imaginable, regardless of the ethical or emotional implications.

The first of these challengeable premises is that the mediation can deliver value commensurate with its cost only if it produces a settlement.

Mediations that "fail" to yield settlements can deliver great value. Mediations yield learning (about an opponent and her case, as well as about one's own client and case). That learning, some of which could be acquired in no other way, can equip lawyers to sophisticate their preparation for and execution of pretrial and trial strategy. As important, a failed mediation can expose clearly what the best alternative to going to trial really is—thus providing the firmest possible basis for decisions about whether to proceed with the litigation. At the end of a failed mediation whose potential has been exhausted, a party can say to himself (with much greater justification and conviction than would otherwise be possible): "I now know what my alternative to going to trial would in fact be, and, with that knowledge, I now see why it is necessary for me to go to trial." That sense of certainty is of great value—very often more than enough to justify the cost even of a "high end" mediator's fee.

The second premise that we should be prepared to debate is that there is no relation between means and ends—that the quality or character of the mediation process has no bearing on the likelihood that a settlement will be reached. There probably are some cases that could be settled only by resort to crude forms of pressure, emotional manipulation, or some kind of deception. But there are a great many circumstances in which the perceived quality and character of a negotiation can affect the potential value a mediation can deliver.

At least when circumstances present an opportunity for some integrative bargaining, there tends to be a correlation between certain aspects of the quality of the negotiation process (how much information is shared, how much trust is generated, how reciprocal the concession making seems, etc.) and the likelihood that the negotiations will yield an agreement, or the likelihood that the terms of the agreement reached will be at least in the vicinity of optimal.<sup>11</sup>

---

<sup>11</sup> See, e.g., John K. Butler, Jr., *Trust Expectations, Information Sharing, Climate of Trust, and Negotiation Effectiveness and Efficiency*, 24 *GRP. AND ORG. MGMT.* 217, 217–38 (1999); Carsten K. W. De Dreu, Biana Beersma, Katherine Stroebe & Martin C. Euwema, *Motivated Information Processing, Strategic Choice, and the Quality of Negotiated Agreement*, 90 *J. OF PERSONALITY AND SOC. PSYCHOL.* 927, 927–43 (2006); Catherine H. Tinsley, Kathleen M. O'Connor & Brandon A. Sullivan, *Tough Guys Finish Last: The Perils of a Distributive Reputation*, 88 *ORG'L BEHAV. AND HUM. DECISION PROCESSES* 621, 621–42 (2002).

One of the principal purposes of this essay is to help mediators identify some of the research that supports this important connection between quality of process and quality of negotiated outcome.

Having said all this, we must acknowledge, squarely, where the power rests to decide whether we engage in coaching. Regardless of what we believe about how some kinds of coaching might advance the parties' interests, it is the parties, not the mediator, who get to decide whether their mediation should include any coaching and, if so, what kind. While we are under no duty to adopt approaches that compromise our values, we have no authority to impose our values on parties who do not share them or to use methods to which parties object. So, instead of simply ploughing forward, we should use conversations about coaching, before and during a mediation, to demonstrate the importance of dialogue about and shared responsibility for how the mediation will proceed.

### III. CONTEXT

#### A. Risk of "Error"

Why should mediators or other participants in negotiations even consider engaging in coaching? Are there problems that reciprocal coaching might help address? If so, are there ways that mediators could expose the magnitude and frame the character of such problems that might encourage lawyers and litigants to be more open to coaching and to participating in the coaching enterprise?

One of the most fundamental kinds of contributions mediators can make to the level of wisdom that informs negotiations in cases that have survived motions for summary judgment is to help participants understand how thoroughly uncertainty pervades their circumstance. Uncertainty and unpredictability are the dominating facts of litigation life in cases whose resolution turns not on the law, but on how a jury or judge responds to competing evidentiary presentations. A civil trial, especially to a jury, is a *sui generis*, stand-alone, one time historical factum. It cannot be replicated or repeated. It is not subject to anything remotely akin to scientific analysis or predictive assessment. It is healthy for lawyers and litigants to be disabused (gently) of notions to the contrary.

Early in the life of a mediation, mediators might briefly describe the results of an illuminating study that compared outcomes at trial to earlier

(rejected) offers of judgment in more than 2,000 civil cases in California and in many hundreds of such matters in New York.<sup>12</sup> In 86% of these cases, a party "erred" in rejecting the offer of judgment, meaning that the outcome at trial left the party worse off than the party would have been if it had accepted the offer of judgment. While the incidence of this kind of error was much higher among plaintiffs than among defendants (61% compared to 24%), the cost of error was much greater for defendants than for plaintiffs (\$1,140,000 to \$43,100).

Interestingly, error rates were quite different for both plaintiffs and defendants when the case was tried to a judge than when it was tried to a jury. But the direction of change is counter-intuitive: defendants error rate increased dramatically (from 24% to 43%) in court trials, while the error rate for plaintiffs' decreased by a comparable margin (from 61% to 43%). It seems that defendants (or their lawyers) are more prone than plaintiffs (or their lawyers) to misplace confidence in their ability to foresee how judges will resolve contested factual issues.

There is one additional set of findings from this study that mediators might find especially useful in coaching. When the social scientists searched for variables that might affect error rates, they discovered that the factor that had the greatest impact, by far, was the making of an offer of judgment.

When only the plaintiff made an offer of judgment, the error rate by plaintiffs dropped significantly, from 61% to 41%—while the error rate by defendants in these circumstances increased substantially, from 22% to 46%. The pattern of change in error rates was just the opposite when only the defendant made an offer of judgment: in this circumstance, defendants' error rate dropped dramatically (from 22% to a mere 7%), while plaintiffs' error rate rose from 61% to a truly intimidating 83%.<sup>13</sup>

The hypothesis the study's authors suggested to try to explain these significant patterns is that the process of thinking through what offer of judgment to make might have required lawyers and their clients to engage in a more thorough assessment of the pertinent evidence and to make more careful assessments of value and risk than they would make when they did not prepare an offer of judgment, but, instead, merely reacted to such an offer from an opponent. In appropriate circumstances (e.g., perhaps after negotiations seem to have hit a temporary stall), mediators might consider

---

<sup>12</sup> Randall Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. OF EMPIRICAL LEGAL STUD. 551, 551-91 (2008).

<sup>13</sup> *Id.* at 572-76.

using this data (and the authors' explanatory hypothesis) to encourage both parties to go through the process of working up and exchanging offers of judgment.

There is an additional study whose results mediators might consider sharing with lawyers and litigants, early in the life of a mediation, to help foster an appropriate understanding of the mutually reinforcing roles of uncertainty and over-confidence in decision-making about settling civil cases. Entitled "Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes,"<sup>14</sup> the research discussed in this article by Jane Goodman-Delahunty and her colleagues supports the following propositions:

(1) Over-confidence is ubiquitous in our population generally, (2) over-confidence increases with the difficulty [complexity] of the task, (3) because trying to predict the outcome of something as multi-faceted as a trial is quite difficult, there is a significant risk that lawyers will make over-confidence based errors in such undertakings, and (4) "[l]awyers frequently make substantial judgmental errors, showing a proclivity to over-optimism." When they compared the outcomes of cases to lawyers' minimum goals for those cases, Ms. Goodman-Delahunty and her colleagues found that lawyers' expectations were off the mark about two-thirds of the time, but that far more lawyers displayed the over-confidence bias (44%) than displayed the under-confidence bias (24%).

When the authors of this study offered possible explanations for the considerable risk of error rooted in overconfidence by lawyers trying to foresee case outcomes they suggested, in addition to the complexity of the task, the following: (1) lawyers' absorption of their duty to advocate zealously, (2) their desire to attract clients and to encourage their clients to feel that they were being represented vigorously and effectively, (3) counsels' need to justify how much money they were charging their clients, a need that would grow over time as bills to clients mount, and (4) the lawyers' belief or assumption that they had the capacity to take steps during the litigation that would increase the likelihood that they would secure a positive outcome for their client. The last of these possible factors also might be characterized as a lawyer's illusion that he could exercise some meaningful control over how the litigation would play out.

How great a role any of these possible factors might play is less

---

<sup>14</sup> Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL., PUB. POL'Y. & L. 133, 133-57 (2010). See also Margaret A. Neal & Max H. Bazerman, *The Effects of Framing and Negotiator Overconfidence on Bargaining Behavior and Outcomes*, 28 ACAD. OF MGMT. J. 34, 34-49 (1985).

important than the foundational facts about the prevalence of the over-confidence bias and the incidence of error in predicting litigation outcomes. It is these foundational facts that mediators might use to best effect when trying to coach lawyers and clients toward wise appreciations of uncertainty and risk.

*B. Framing the Principal Purposes of a Mediation to Identify as Reliably as Possible What Is Possible and to Avoid False Failure*

For good and understandable reasons, lawyers and litigants who are engaged in settlement negotiations of a case that has survived challenges by motions are very interested in trying to develop at least some predictive leverage on what might happen, or what might be likely to happen, if the case is tried to judgment. This is certainly an important analytical arena that parties and mediators may be able to mine productively, in some cases, as they search for reasons or rationales for making adjustments in their expectations and in their settlement positions. But because there is considerable risk of error in predicting trial outcomes, and because reasonable and well-informed minds often can find a multitude of bases for disagreeing about how a case might play out at trial, it is not clear that it serves clients' interests best to permit a mediation to revolve entirely around, or even to focus primarily on, sustained substantive analyses of liability and damages. The merits are important, to be sure, and can be important sources of movement leverage, but it may be a mistake for mediators to suggest, or for lawyers and litigants to assume, that the primary purpose of a mediation is to develop the most reliable possible prognosis of outcome at trial.<sup>15</sup> As it

---

<sup>15</sup> There is indirect support for the notion that lawyers understand how difficult it is to predict with confidence how a trial will play out in data about the direction of change in patterns of user preferences among the four ADR process options offered to litigants in the Multi-Option Program of the United States District Court for the Northern District of California. Users have given all four of the Court-sponsored ADR processes very high marks (in responses to questionnaires) for overall quality. Despite this fact, and despite the fact that two of these four processes (non-binding arbitration and early neutral evaluation) are designed to provide parties with the most informational leverage for predicting outcome at trial, over the past decade or so users have shown a decided and growing preference for the two forms of ADR (mediation and settlement conferences hosted by magistrate judges) that (1) feature less direct and less systematic presentation and analysis of law and evidence and that (2) focus less on trying to improve parties' ability to predict outcome at trial. User assessments of the four ADR processes and patterns in user preferences among them are discussed in some detail in Wayne D. Brazil,

turns out, the most reliable possible prognosis might not be very reliable. And even if such a prognosis might be relatively sound in a particular case, focusing obsessively on it might cause participants in mediations to miss opportunities to find terms on which they could settle.

Are there alternative ways to frame [no need to underline] or articulate the principal objectives of a mediation that might, if embraced by the parties, better serve the interests that brought them to the mediation table? To present one such alternative, I set forth here a portion of the opening statement I often make in mediations I host. Three principal purposes inform this statement: (1) to encourage parties to think a little differently than they otherwise might about what the principal objective of the mediation should be (and thus to signal that the negotiations will embrace considerably more than analytical/argumentative sparring about the most likely outcome at trial), (2) to encourage all participants to feel some sense of responsibility for the health of the mediation process itself (as opposed to ownership only of its outcome), and (3) to discourage some of the common negotiation behaviors that could compromise the group's collective ability to maximize the value that the mediation can deliver.

#### *Opening Statement [in part]*

*"I'd like to suggest what I think is a useful way to conceptualize the goal of this mediation. Our primary goal is not to settle your case. Instead, our primary goal is to identify as reliably as possible what is possible through this process. What we want to do is to identify the best terms that are accessible through negotiation. It is only if we succeed in accurately identifying those terms that we will position each of you to compare rationally your alternative paths forward: agreeing to a settlement or proceeding to trial. Once we have identified what is possible through mediation, it will be up to each of you to decide, independently, whether to end this case by mutual agreement or to proceed with the litigation.*

*To maximize the odds that we will achieve our goal it is essential that everyone who is participating today share responsibility for the productivity of our process.*

---

*Informalism and Formalism in the History of ADR in the United States and an Exploration of the Sources, Character, and Implications of Formalism in a Court-Sponsored ADR Program, in DISPUTE RESOLUTION: ALTERNATIVES TO FORMALIZATION (Joachim Zekoll, Moritz Balz & Iwo Emelung eds.) (forthcoming 2014).*

*As we move through the day, each of you will be thinking about your positions, your interests, the relevant law and evidence—but we also need you to be thinking about the process itself. At each juncture, what would be healthiest for the process? What seem to be the principal barriers to getting a deal—and how might we best work to overcome those barriers? Are there ways we could proceed that would increase our chances of success? Should we change formats? Should the parties meet without their lawyers? Should only the experts meet with the mediator? Should we shift our attention to a different subject or to a different possible component of a deal? How is the other party likely to react to or interpret a contemplated proposal or move? Are there additional people we should involve, or is there additional information we should share, or for which we should ask?*

*In sum, we need to keep asking ourselves how we should shape or adjust our process so as to improve the likelihood that we will learn, as accurately as possible, what is possible. We have a much better chance of succeeding in this if all of our minds are thinking about these things than if it is only my mind that focuses on what is best for the process.*

*We will have a better mediation if we think of mediation as a team sport. But it is a team sport with an unusual feature. Every participant is simultaneously a player and a coach. One of my jobs is to offer coaching suggestions as we move through the day; for example, I might make observations, based on my experience, about how the other parties are likely to understand or respond to some move or idea that is being considered. I would like all of you to play the same role. Coach me; suggest ways I might play the most constructive role. If you have an idea about how we might best proceed, tell me about it and we can consider it together. If it would make you more comfortable, pull me aside so we can think about your idea privately before we plunge ahead.*

*Several years ago it occurred to me that one way to understand a primary objective of my coaching during mediations is to help reduce the risk of "false failure." False failure occurs when, in theory, there are terms "somewhere out there" on which the parties could agree, but we fail to find those terms because we make some unnecessary, avoidable process mistake.*

*The kinds of mistakes I'm talking about include:*

- *posturing too much or for too long,*
- *playing informational cards too close to the vest,*

- *interpersonal or psychological errors (for example, saying something that needlessly offends another party or taking positions that leave other participants too little room to achieve something),*
- *failing to see that shifting to some other format, or having principals or experts talk directly to one another, would create new opportunities or would better meet certain needs,*
- *sending misleading signals or misreading signals that others send, or*
- *falling victim to a common cognitive trap like reactive devaluation or confirmation bias.*

*As we proceed through the mediation today, let's keep these potential sources of false failure in mind. Each of us should be on the lookout for them; each of us should help us avoid them. In other words, let's coach one another about how to handle the process most productively."*

#### IV. WHY FRAME THE OBJECTIVE AS IDENTIFYING AS RELIABLY AS POSSIBLE WHAT IS POSSIBLE?

While one of the purposes of including these thoughts in an opening statement is to encourage all of the participants in a mediation to view themselves not only as players, but also as coaches, another is to urge lawyers and litigants alike to understand that they all share one overriding objective: to determine, accurately, what terms are accessible through mediation or settlement negotiations. All the participants, in other words, are coaching toward a common goal. Why might it be helpful to encourage parties to acknowledge that they have a common goal? Studies by social scientists support the following proposition: Negotiators are less likely to resort to ethically dubious and often counter-productive negotiating tactics if they believe that they share short term goals with their counterparts, or that the likelihood of success in a short term task is interdependent, or that in some other significant sense their fates seem intertwined.<sup>16</sup>

Thus, the more the parties buy into the notion that at least in one important sense their objective is the same, the greater the likelihood that they will go about the process of negotiating in ways that maximize a

---

<sup>16</sup> See studies and experimental research cited by Volkema & Rivers, *supra* note 9, at 389.



mediation's potential productivity.

*A. Early and Repeated Coaching About Coaching*

While the section of the opening statement presented above includes explicit encouragement of reciprocal coaching, mediators would be well advised not to wait until the session is convened to introduce litigants and lawyers to these kinds of ideas. To improve the likelihood that participants will understand that they have a significant role to play in coaching dynamics, and to give them an opportunity in advance to think about coaching ideas they might suggest, mediators should introduce this topic in pre-mediation conferences with counsel and in any material they provide the parties before the date set for the mediation.

In his pre-mediation contact with counsel, the mediator should make a specific point of encouraging each lawyer not only to make process suggestions, but also to pull the mediator aside at any point during the proceedings if the lawyer has ideas about how the mediator might more constructively interact with his or her client.

I have received some extremely helpful suggestions from counsel in this way. Sometimes, unbeknownst to me, the way I am handling my role is confusing or even alienating a litigant. I do my job better when a lawyer pulls me aside to explain the situation. Lawyers often are well positioned to provide us with feedback or suggestions about how we might adjust our approach to make their client feel more comfortable with and more confidence in the process. Lawyers sometimes can point us to subjects or circumstances on which we might more productively focus, or can make very useful suggestions about steps we might take to connect better with or to clarify something for their client. Our mediations are likely to be better if we explicitly encourage lawyers, both before and during the sessions, to share thoughts along any of these lines with us.

Encouragement in the abstract might well not be sufficient. In addition, we should create opportunities at various junctures during a session for each lawyer to speak privately with us. In these settings we should ask counsel directly (and separately) if they have any suggestions about the process or about how we might most appropriately and constructively interact with any of the other participants.

It can be important to create such opportunities relatively early in a session, before the mediation has progressed so far that adjustments in our approach would no longer be effective. By pulling counsel aside relatively early to ask for input of this kind, we can make our appeal for reciprocal coaching more real and encourage lawyers to feel more engaged and invested

in the process. As we get deeper into the session, we should continue to be on the alert for situations in which additional private conversations with counsel might be helpful. It can be especially important to create occasions for this kind of private communication at junctures where the risk of impasse seems to be growing.

### *B. Some of the Potential Benefits of Coaching Toward Reciprocal Coaching*

Working to convert other participants in a mediation from mere players into player/coaches can yield multiple benefits. While it is important to be realistic about such matters, and to acknowledge that the magnitude of the benefits I will describe lends itself to exaggeration, any contributions in the directions outlined in this section could deliver value to litigants and lawyers.

Discussing process ideas with lawyers and their clients provides mediators with opportunities to teach about negotiation dynamics and about the importance of maximizing the health of a mediation as a whole, to model careful thinking about the implications of various behaviors or steps that negotiators might consider taking, and to encourage parties to follow courses of action that are both ethically more attractive and, at least as suggested by social science, more likely to enhance the productivity of the mediation process. The act of engaging in this kind of discussion can open participant's minds and lead them to share more information with the mediator, perhaps opening doors to sharing more information across party lines.

Discussing process ideas with counsel and their clients also can affect the tone and focus of a negotiation. Generating and trying to assess the potential effects of process ideas are exercises in thinking, in reasoning: trying to identify pertinent circumstances and variables (legal and non-legal), and trying to understand or predict analytical, emotional, and psychological causes and effects. Because these undertakings are fundamentally exercises in reasoning, the more litigants and their lawyers engage in them, the more reasoning takes center stage in the process. The greater the role of reasoning, the less room and the fewer occasions there will be for participants to resort to crude theatrics or efforts at emotional manipulation. The greater the focus on reasoning, the less hospitable the environment will seem to gaming or slights of negotiation hands.

This is not to suggest that the value that should dominate all mediations is rationality. In some mediations a principal objective is to help parties recognize the emotional and psychological dimensions of a conflict and to provide them with vehicles for experiencing or processing feelings. There is no necessary tension, however, between such objectives and reasoning.

Reasoning can be an important tool for trying to understand emotions and for trying to identify the most effective ways to address psychological needs. Thinking creatively about such matters is a form of reasoning that can deliver great value to parties. Reasoning, in other words, can be an ally of emotion rather than its antagonist.

Discussing the pros and cons of various process ideas with lawyers and their clients also can provide a mediator with a unique opportunity to learn (perhaps a great deal) about the individual participants in the session and about how each of them is going about negotiating. A discussion of process options can reveal concerns, fears, motives, assumptions, objectives, or values that are in play (perhaps at a subterranean level) in the negotiation dynamic. More specifically, the way a participant responds to process ideas could shed light on how ready to share or inclined to hide information she might be, the level of confidence or apprehension she brings to the process, whether she assumes the bargaining will be fundamentally competitive and distributive or seems open to a more integrative approach. Similarly, the process ideas that a participant proposes, or the way he thinks about process options, could expose how tactical he is inclined to be—and what ideas or assumptions about negotiating and about the other participants in the process inform his tactical thinking. The more such information a mediator acquires, the better positioned she will be to help correct inaccurate assumptions and to help the parties avoid counterproductive acts.

Engaging parties in active assessments of the pros and cons of various process options, or in trying to project the various ways an opponent might react to or interpret different possible proposals or moves, also can reduce the risk that parties will thoughtlessly send misleading signals to other participants or will inadvertently invite an opponent to draw erroneous inferences about a party's intentions or motives. It can be important to the health and sustainability of a negotiation to encourage or preserve a perception that bargaining is being conducted in "good faith," and parties are less likely to take a step that inadvertently triggers cynicism and a perception of "bad faith" if, before deciding on a particular course of action, they join with their mediator in actively evaluating the possible effects of their process options.<sup>17</sup>

---

<sup>17</sup> It is useful to recognize that sometimes lawyers or litigants will invoke, with apparent but essentially insincere outrage, the notions of "good faith" or "bad faith" for tactical purposes, e.g., to justify refusing to make any significant change in a bargaining position, or to try to use artificial moral leverage to pressure an opponent to make a more generous offer or demand, or to try to influence the perceptions and actions of the

Converting participants into process coaches, involving them actively in generating and assessing process ideas, also can improve mediation dynamics by expanding the scope of participants' vision—extending the reach of their interest and concern beyond themselves to the mediation as an organic whole. To coach toward the goal of making the process as healthy and productive as possible it is necessary to think about the process holistically. A participant who looks at a mediation holistically is more likely than someone with a narrower focus to understand more clearly and to take more seriously the other participants' circumstances and perspectives.

As implied in the preceding paragraphs, the more participants in a mediation buy into the role of player/coach, the more invested in and responsible for the quality and productivity of the process they will likely feel. Enter social science.

Social science research offers substantial support for the proposition that elevating participants' sense of responsibility for the character and outcome of a negotiation can improve the dynamic between parties and increase the likelihood that they will be able to identify terms that deliver good value. While the relevant studies generally have involved situations with potential for integrative bargaining and solutions, the insights the studies have generated about negotiation behaviors seem worthy of close attention (and use) in a broad set of circumstances. For present purposes, the most illuminating single paper in this arena was published by Carsten De Dreu and his colleagues in 2006.<sup>18</sup> Building on earlier research and reporting new findings, this paper explores the effects of "process accountability" and "epistemic motivation" on the way people think and behave during negotiations. The phrase process accountability refers to the level of responsibility that negotiators feel for how a negotiation proceeds and plays out. The concept of epistemic motivation captures a negotiator's level of interest in or motivation to understand both (1) the causes or sources of the way each individual participant in a mediation feels and acts (including the interests or goals each negotiator pursues and the positions he or she takes) and (2) why the dynamic between the negotiating parties takes on the character and yields the outcomes that it does.<sup>19</sup> As discussed by Dr. De Dreu and his colleagues, these two concepts are in some measure related or overlap, at least in the sense that variations in their levels tend to have more

---

mediator.

<sup>18</sup> De Dreu et al., *supra* note 11.

<sup>19</sup> *Id.* at 928–29.

or less parallel effects.<sup>20</sup>

The research reported by Dr. De Dreu suggests that a host of positive effects are likely to result when negotiators feel higher levels of either process accountability or epistemic motivation, at least when the negotiators have some interest in how terms of a deal might affect others. Thus, elevated process accountability or epistemic motivation tends to increase a negotiator's readiness to accept new information and to cause her to process new information more carefully and systematically. As she is more open to new information, and processes it more carefully, such a negotiator is less vulnerable to being misled by her own crude heuristics or by a need for self-justification, and is more likely to make adjustments in the views or assumptions with which she entered the negotiations. She is less likely to be trapped by the fixed pie bias. She is more inclined to engage in forms of pre-emptive self-awareness or self-criticism that enable her to more even-handedly evaluate her options. And she is more inclined to engage in "problem-solving behavior," to devote more energy to searching for ways to solve problems. The more problem-solving behavior a negotiator exhibits, the greater the likelihood that her conduct will increase levels of trust in her by other participants in the process. As I discuss in greater detail, *infra*, increases in levels of trust across party lines tend to improve the likelihood that negotiators will identify a wider range of solution options.<sup>21</sup>

All of this sounds too good to be true. And it is—if we expect radical changes in behavior and complete transformations of negotiating dynamics. We would witness no such drama even if we could somehow quadruple the process accountability or epistemic motivation that lawyers and litigants in our mediations feel. Nonetheless, these studies should be important to us because they identify the directions in which behaviors might well change, even if only moderately, if we could induce the participants in our mediations be a little more interested in why others make the decisions they do and to feel at least a little more responsible for the character and productivity of the process as a whole. One of the principal theses of this essay is that persuading participants in our mediations to embrace the role of player/coach holds some promise of moving them in these constructive directions.

---

<sup>20</sup> *Id.* at 928.

<sup>21</sup> *Id.* at 936–39; *see infra* note 26.

### *C. Coaching by Mediators: Some Thoughts About Risks to Role and Ethics*

Coaching by a mediator, even in its most non-directive forms, represents a form of intervention. As intervention, coaching can create risks to role and ethics that cannot be wholly eliminated—even by the most circumspect and thoughtful practitioners of the mediation art.

#### *1. Social Darwinists and Equalitarian Transformationalists*

Social Darwinists presumably would reject coaching of any kind in any circumstance.<sup>22</sup> They want the litigation and negotiation chips to fall where they believe "nature" intended, their path undisturbed by any artificial interventions. If the strong can overpower or outwit the weak, so much the better; "nature's way" is to cull the weak from the herd. A "pure" Social Darwinist would feel that whatever outcome results from a negotiation that is completely free from external restraints or inputs is the best and the only appropriate result. How many litigators or litigants hold such views is not clear to me. I suspect that the percentage of lawyers who would admit to views so unvarnished is relatively small, but mediators might be well advised not simply to proceed into even a restrained coaching role on the assumption that no one harbors sentiments sounding in this spirit.

There also might be objections to coaching from the opposite end of the philosophic spectrum. A proponent of purely "transformative" mediation believes that the power and the beauty of this form of dispute resolution are rooted in affirmations of the innate capacities of all human beings to understand, work through, and solve the challenges they encounter.<sup>23</sup> Any form of coaching from an external source might appear to contradict this premise. Coaching might seem to threaten to derail a participant's exploration of her own resources and to prevent her from discovering the full range and depth of her own capacities. In these ways, coaching might seem to threaten to rob transformative mediation of its power to transform—to enable people to find much more in themselves than they assume is there, to reconfigure, fundamentally, their sense of self and their self-confidence, to instill a sense

---

<sup>22</sup> See RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (Beacon Press rev. ed. 1962).

<sup>23</sup> See, e.g., R. BARUCH BUSH & J. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

of ownership of solutions they craft, and to strengthen their motivation to honor those solutions.

Objections to coaching that are rooted in views like these could be quite telling for mediations in some settings or with some kinds of participants, but they would be formidable in a much wider range of settings if the coaching were done only by the "mediator" (as opposed to being done by everyone), was aggressive, clumsily over-confident, closed-minded, directive—or simply too frequent. A transformative critique of coaching would build, in part, on an insight that deserves considered respect in most mediation environments. There is a risk that the impulse to coach will be rooted (sometimes quietly or subconsciously) in arrogance or condescension. Even the simple impulse to "help" others can be accompanied by an unselfconscious sense that there is a need to be met that the coach sees and understands but that others do not. Believing that she understands the problem, the coach might be tempted to believe that she knows how the parties should go about addressing it. Self-regard in a mediator (in these forms), even when it is oblique or muted, can be dangerous. It can discourage parties' creativity, block access to important information and ideas, and distort or shrivel what might otherwise be a productive or healthy dynamic between parties.

On the other hand, declining to engage in any form of coaching—out of fear of displacing the independence of the parties—also might reflect and project a lack of confidence in the other participants in a mediation. By appropriately asking coaching questions or presenting coaching ideas, and by encouraging the other participants both to generate their own process ideas and to join actively in assessing the wisdom of different possible paths forward, a mediator in effect treats all the parties as her peers. She demonstrates her confidence in their ability to compare options intelligently and to make choices independently. In these ways, appropriate forms of coaching might be more consistent with the spirit of transformative mediation, and better advance its goals, than a mediator retreating into complete process passivity. Reciprocal coaching affirms the mediator's belief that all the participants in the process are fully capable of understanding and evaluating coaching ideas, regardless of their source, and of doing so without compromising the parties' creativity or their feeling of responsibility for their circumstances and their decisions.

Nonetheless, it is important to continue to acknowledge that coaching, no matter how thoughtfully undertaken, is a form of intervention, and as such, could push a mediator closer to the center of the process and could lead some or all of the parties to feel greater dependence on her. The closer to the center of the process the mediator moves, the greater her responsibility becomes for

its character and success, and the greater the risk becomes that she will assume an essentially directive role.

To avoid a slide into role distortion, it is essential that the mediator-coach take considerable care in how she plays her role. She should impose restraints on her impulse to coach—so that she offers coaching inputs only occasionally. She should present her coaching ideas in the form of questions as much as possible. She should actively solicit evaluations of her ideas from all participants. And she should invite and encourage everyone to generate coaching (process) ideas of their own.

### *2. Opposite Routes to Disproportionate Responsibility*

We also should bear in mind, however, that there are two (opposite) courses of conduct by a mediator that could result in her acquiring some responsibility for how a mediation plays out: over-coaching or, in some circumstances, refusing to coach. "Responsibility" arguably should attach when a mediator elects to take no action when it is clear that, by taking some action, she could enable the parties to avoid serious, unintended and unanticipated harm. I would contend that a mediator has a moral responsibility to "intervene"—at least by asking questions designed to encourage careful thinking about consequences—when she can foresee, with considerable confidence, that a course of action proposed by one party in caucus very likely would destroy, unnecessarily, any chance that the parties could achieve constructive ends through the mediation. For example, I believe that a mediator acquires some responsibility to do some coaching if she knows, both from experience and from her interactions with a particular plaintiff, that the session will come to an explosive and immediate end if the defendant communicates (directly or through the mediator) a specific, personally derogatory message. In such a circumstance, a mediator owes a duty to both parties to help avoid an unnecessary catastrophe, at least by asking the defendant to think through the purpose and the likely effect of having the communication made.

### *3. Imperiling Neutrality?*

Some kinds of coaching, or coaching in some circumstances, could imperil a mediator's neutrality—or some parties' perceptions of her neutrality. The purpose of conventional sports coaching, of course, is help your side win. It follows that in our sports-saturated culture, there is a risk that a party who feels that he is being coached (in caucus) by a mediator



might slip into feeling that the mediator is on his side. Similarly, a party who senses that the mediator is coaching her opponent might feel that he (the mediator) has taken sides against her.

To reduce these risks, the mediator should emphasize, in her opening remarks, that it is fundamental to her mission that she never take sides and that she interact with everyone, in caucus or not, in the same way. She should emphasize that she will engage in coaching conversations in the same spirit with everyone, that her goal in such conversations is simply to make every participant's thinking (including her own) about possible approaches or process options as thorough and careful as possible. She should remind the parties that her only "client" is the process itself, that the ultimate target of everyone's coaching should be that process, and that the goal of all their coaching should be to make that process as healthy and productive as possible.

Another way to frame the same message is to say that an essential goal of all coaching activity will be to avoid the kinds of mistakes that can lead to a false (unnecessary) failure of the negotiations.

While conveying important truths, messages like these imply that there always will be a clear distinction between help for the process as a whole and help for an individual party. We need to recognize, however, that making a coaching suggestion whose ultimate objective is to protect or improve the process as a whole might, in some circumstances, result in delivering more benefit to one party than the other. There is a possibility that by making a particular coaching suggestion at a particular juncture, we would help one party avoid making a negotiation mistake that would have put him at a disadvantage or would have made it less likely that he would secure favorable terms. Stated differently, when we declare that our goal is to help all parties identify as reliably as possible what is possible through a mediated negotiation, we may be glossing over a potentially uncomfortable fact: in some circumstances, our coaching ideas might help one party gain access to settlement terms that, if left to his own devices, he would never have discovered. In other words, our coaching ideas might disable one party from securing a more favorable outcome than he would have secured had we not interjected a question or an idea that we intended, generally, not to inure to the benefit of a particular party, but to enhance all parties' clarity about and confidence in the process and, thus, to improve the likelihood that the parties would reach an agreement.

Let's explore these issues more concretely through an example. Let's assume that very early in a mediation, in a private caucus, plaintiff's lawyer says: "We would accept a figure in the \$100–\$150 range. Please go tell the defendant that." Let's further assume that in our local legal culture, we know

that a defense lawyer who receives this message from plaintiff's counsel very early in a negotiation will completely ignore the \$150, will not hear anything above \$100, and will assume that what he is really being told is that the plaintiff would settle for less than \$100, probably significantly less.

In this circumstance, should a mediator consider engaging in any form of coaching with plaintiff and his lawyer in caucus? Should a mediator say anything to encourage plaintiff's counsel to think about how such a communication might be interpreted by the other side, or how it might affect the other side's expectations about how the negotiations might proceed or where they might end up?

It is possible, of course, that the plaintiff's lawyer who wants to communicate this message at this juncture in the mediation, fully understands the sociology of the negotiation process and, in fact, does mean to signal that his client would settle for less than \$100. So, maybe the mediator should not simply assume naiveté. But does it follow that the mediator should not intervene by asking the sender if this is really the message he wants to signal?

Should the mediator's thinking about this issue be affected by the level of experience of plaintiff's lawyer? Should it matter if this lawyer has had many years of experience with these kinds of cases? Or should it matter if the lawyer for the defendant has much more experience and seems much more worldly than counsel for plaintiff?

If the mediator were to ask plaintiff's counsel, in caucus, to think about how the defendant might interpret such a message at this stage in the negotiations, or what inferences the defendant might draw about plaintiff's settlement intentions, would the mediator be taking a step toward "leveling the playing field?" Would that be bad? Or, would the mediator simply be trying to help a party avoid sending a signal that the party did not intend to send and that, if sent, would make the negotiations less likely to be successful by encouraging misplaced expectations in the defendant and generating anger?<sup>24</sup>

---

<sup>24</sup> Many situations could raise a similar set of issues for a mediator. For example, what, if anything, should a mediator do if plaintiff's counsel asks the mediator to take the following question to the defendant: "Would you (defendant) offer \$200 if my client would lower his demand to \$600?" Should the mediator ask plaintiff and her counsel how the defendant is likely to interpret this question, i.e., what the defendant might think this question is signaling? Should the mediator suggest that the defendant might interpret this question as signaling that plaintiff would accept an offer at the mid-point between these two figures, i.e., \$400?

If the mediator were to take this question on behalf of the plaintiff to the defendant,

Sending a misleading signal, or an unintended signal, could hurt the overall mediation process and the prospects of finding mutually agreeable terms, e.g., by confusing the defendant or by making him angry, more rigid, or less trusting when the plaintiff's true intentions become clear. Thus, by helping one side avoid sending a misleading message, the mediator could be helping both parties by preventing an unnecessary source of confusion or resentment from polluting the process.

But a coaching intervention in this circumstance is likely to yield more benefit to the plaintiff's side than to the defense side. Only the plaintiff and his lawyer will learn from this private dialogue with the mediator, and only the plaintiff and his lawyer will have avoided taking a step that might have pushed the negotiations into zones that would yield either a less favorable settlement or no settlement at all. At a minimum, the mediator's coaching would have made the process less difficult for the plaintiff, and would have prevented the plaintiff from having to labor arduously to get the negotiations out of the lower ranges into which the plaintiff never wanted them to descend.

The question is: should a mediator refrain from any kind of coaching intervention in a situation like this because, at least in some sense, one side is likely to benefit more directly than the other side? My personal answer is no. I think the mediator should take the step that promises to enhance the viability of the process as a whole, unless the benefit the coaching intervention is likely to deliver is more clearly and more substantially disproportionate (i.e., benefits one side more directly than the other) than it would be in this example. This answer suggests that "neutrality" can be a complicated and sometimes elusive concept.

In working through how to honor the duty to remain neutral, a mediator should take into account not only the direct or immediate effects of her possible courses of action, but also their less direct but potentially significant (sometimes essential and positive) impact on the character or quality of the mediation process as a whole—and, thus, on overall prospects for helping all parties identify what kinds of terms are accessible through a mediated negotiation. Stated differently, by helping prevent one side from unknowingly causing potentially significant harm to the process as a whole, the mediator also is helping, by that same intervention, the other side.

---

should the mediator 'coach' the defendant not to respond with a simple "yes" unless the defendant intends to signal that it would pay \$400 to get the case settled?

More generally, should a mediator 'coach' parties about what signals are likely to be sent by making proposals that appear to take the form of bracketing?

In sum, I believe that a coaching step taken by a mediator whose purpose and effect is to help both sides by averting needless damage to the process as a whole would not compromise the mediator's neutrality.

#### *4. Imperiling Confidentiality*

Coaching of some kinds or in some circumstances also might imperil a mediator's promise to protect parties' confidences. There is a risk that, in raising questions or offering suggestions to one party during a caucus, a mediator might inadvertently or indirectly disclose secret information she had acquired earlier from another party. A lawyer who hears a mediator's question or suggestion might well wonder: "Where did that come from?" or "What does the fact that the mediator asked that question indicate about what the mediator has learned from or about the other side?" The answer might be "nothing"—but a mediator must take care to be sure that that actually is the answer before she makes a comment or offers a suggestion.

A mediator must recognize that counsel often analyze (silently) her comments or questions to see if they might contain any clues or signals about what the other side is telling the mediator or is thinking (or about what the mediator is thinking but not disclosing).

Because lawyers so often look for embedded signals in mediator's questions, suggestions, or comments, it is especially important that a mediator who does not intend to send a signal through a question, suggestion, or comment say so explicitly and with emphasis.

There is a risk, of course, that counsel will not believe the mediator, but that is a possibility that is beyond the mediator's control as long as she takes care not to indirectly disclose information acquired from an opponent in confidence.

The risk is not simply that the mediator will disclose a confidential verbal communication; the more subtle risk is that, through a comment or suggestion, the mediator will disclose an impression she has gained from her private interactions with a party about the kinds of things that are most important to that party or the kinds of proposals that he is likely to find attractive. Parties are likely to have a legitimate expectation that such impressions, when based on confidential communications and private interactions, will not be disclosed by the mediator. These expectations require mediators to proceed thoughtfully, and with great care when they respond to questions posed by opposing parties or make suggestions to them.

One not-uncommon situation illuminates well this kind of risk. Assume that from extensive caucusing with plaintiff and his attorney, a mediator has developed a clear sense of the dollar range within which the plaintiff would

agree to settle. When caucusing with the defense team, defense counsel asks, point blank: "What should my client offer?" The mediator knows the range of figures within which the deal could be struck. What should she do? Should she coach the defendants to offer a number at the high end of the range? In the middle of the range? At the bottom of the range? Can the mediator coach in any way in this circumstance? In my view, it would be unethical for the mediator to suggest any "number" (or range) to the defendant in this situation, because suggesting a number or range would involve the mediator in moving the likely terms of an agreement in a direction that was favorable to one side or to the other and could violate the confidence or confidences of the plaintiff. Faced with this dilemma, I think a mediator must put the ball back in the defendant's court, by saying something like:

*"I'm sorry, I can't suggest a number. But I think it would be most helpful if you and your client would work through your own thoughts about this. What are the things that should get some play in arriving at your number? How might plaintiff respond to or interpret various proposals or offers you might consider making? And why do you think plaintiff would respond the way you anticipate? By thinking these things through independently, the proposal you make will really be yours; you'll feel better about making it."*

As the preceding paragraphs acknowledge, coaching creates risks—risks to maintaining an appropriate role and to honoring our ethical obligations. Despite these risks, I believe that we would disserve the parties on whose behalf we labor if we refused to consider engaging in any kind of coaching. I believe that through appropriate forms of coaching in appropriate circumstances we can deliver real net value to litigants and lawyers—real net value as measured by the parties' values, real net value that might well remain inaccessible to them without our coaching. Our highest purpose is to serve others, not to protect ourselves from stressful dilemmas or risks of error. We should cultivate the courage to risk some of our sometimes precious self-regard to try to advance the interests of others. By mustering this courage we evidence respectful confidence in the parties' competence and independence, along with belief in our mission and trust in our commitment to its pursuit.

## V. NAVIGATING THE TRUST TEMPTATION

## A. Part One: Trust in Us

One of the most significant generalizations to emerge from social science research about negotiation<sup>25</sup> is that there tends to be a dynamic, mutually reinforcing relationship in bargaining between the sharing of information, the development or expansion of trust, and the extent to which negotiators are inclined to adopt a "problem-solving" approach to the process.<sup>26</sup> Because trust seems to contribute so much to improving the prospects for productive negotiations, mediators understandably might be tempted to try to elevate the level of trust in the negotiations they host. The paragraphs that follow explore what I call "the trust temptation," dividing the topic into two sections, the first focusing on issues related to trust of the mediator, the second focusing on issues related to trust across party lines (as well as trust between a lawyer and his own client).

Should we, as mediators, try to elevate parties' trust in us in order to try to elevate trust levels, generally, in a mediation? This is not a simple or self-answering question.

Because we are inclined to trust ourselves, because we want to feel connected to and respected by the parties, because we want to be liked by everyone, and because we really do want to help the parties settle their dispute (and to have them believe that we helped them settle their dispute), we are likely to feel a keen temptation to encourage the parties to trust us. This is a temptation whose power we need to acknowledge—and that we need to manage.

At least in some circumstances, we risk doing serious violence to our

---

<sup>25</sup> As noted earlier, the findings that support these generalizations were made, primarily, in studies of negotiations that presented at least some opportunities for integrative solutions. We cannot transport with full confidence findings from these kinds of settings to negotiations with no integrative potential. Even in aggressively litigated cases, however, many mediations offer some opportunity for integrative bargaining. Moreover, I am not aware of studies that demonstrate that lessons repeatedly learned from studies of bargaining in circumstances with integrative potential have no validity in bargaining that negotiators approach as if it were purely distributive. Until findings from future research might suggest that it would be unwise to do so, I think it is appropriate to assume that we can draw inferences that are useful in a wide range of negotiating settings from the research that supports the ideas presented in this essay.

<sup>26</sup> See, e.g., Butler, Jr., *supra* note 11. See also sources discussed in Volkema & Rivers, *supra* note 9.

roles, our ethics, and the mediation process if we encourage or permit the parties to trust us too much or about the wrong things. At a general level, there is a risk that if the parties trust us too much they will depend on us too much. If they depend on us too much, we compromise our access to them as potentially vital sources of ideas, information, and energy. If they trust us too much, or about the wrong things, they will look too much to us for guidance, which can become direction, and the more they look to us, the less they will look to themselves. By encouraging parties to trust us too much, and about the wrong things, we encourage them to abandon their roles as coaches. If they abandon their roles as coaches, their sense of responsibility for the quality of the mediation can decline (markedly), and as that sense of responsibility declines, so can the quality of the process and the prospects for its success.

There are some subjects or matters for which it is particularly dangerous and particularly tempting to encourage parties to trust us. Parties and lawyers often look to us for a substantive second opinion, i.e., about the merits or viability of the claims and defenses. In litigated cases, when parties are paying their mediator, they may feel that such opinions are the most valuable or useful form of service the mediator can provide. This may be all well and good – but only up to a point. We run considerable risk, in my view, if we encourage parties to trust too much in the reliability and sophistication of our substantive analyses or in the accuracy of our predictions. This risk has at least two sources: One is our always limited information base. The second is the very real possibility that, even if we had access to all the information in every party's secret storerooms, our analyses would be flawed or our predictions would be wrong.

As mediators, we never know the whole story. Parties tell us only some things, not everything. Even if they think they have told us everything, which is uncommon, they haven't—because they can't know in advance everything that might turn out to be significant. Purporting to offer sound analyses or to make solid predictions on such infirm and incomplete grounds can be foolish, dishonest, or both.

During my twenty-five years on the bench, I found it extremely difficult to predict accurately how a jury would resolve a civil case that had survived a motion for summary judgment. My predictions about such matters often have been dead wrong, even when I have made them while a jury was deliberating, i.e., after I had watched all the evidence come in, heard all the arguments, and instructed the jury in the law. I really believe that a jury trial, is a *sui generis* event—a one-time only historical factum that, fundamentally, is not replicable. It follows that if we as mediators purport to know how a jury trial will play out in cases that can survive motions for summary

judgment; we deceive both ourselves and anyone who might listen to us. These are matters about which we cannot responsibly ask the parties to trust us.

We need to be forthcoming and proactive in acknowledging the limits on our ability to analyze and predict reliably. We need to acknowledge openly that we don't have access to all the significant information, and that, even if we did, it is essentially impossible to predict accurately the outcome of a case that has survived a motion for summary judgment. Then, we need to preface any substantive analytical inputs we offer or any second opinions we provide, with substantial, clear, and unequivocal qualifications and conditions.

By doing so, we do not render ourselves substantively useless. Instead, the qualifiers and conditions we identify can be valuable sources of learning for the parties: integral parts of a useful second opinion and important reminders that the civil litigation process remains an intellectually fragile undertaking.

Moreover, by openly and actively qualifying our substantive inputs, we shift the parties' "trust focus" to appropriate targets: our sincerity, our honesty, our comprehension of the complexity of the situation the parties confront, and our appreciation of the fact that we can be truly helpful to others only by doggedly maintaining our intellectual and moral integrity. These are the kinds of things we can encourage the parties to trust in us.

There are others. We can encourage the parties to trust how much we want to be helpful to them. We can encourage them to trust our energy and our tenacity.<sup>27</sup> Our patience. Our interest in learning and our desire to listen. Our desire to think carefully and our ability to think systematically. Our refusal to resort to deception or manipulation. And our commitment to honor the promises we have made to the parties to preserve the confidentiality of their private communications with us and to protect the independence of their decision-making.

These are targets of trust of considerable potential significance to parties. By earning the parties' trust in so many important arenas, we can contribute appreciably to elevating the "trust dimension" of the mediation.

What are some of the ways that we might increase parties' trust in us in these appropriate and potentially important arenas?

Before the mediation: be sure that your first interaction with parties is not *ex parte*, but joint. If you have *ex parte* communications before the session,

---

<sup>27</sup> Opinion surveys by Goldberg and Shaw indicate that these kinds of qualities are extremely important to users of mediation services. See Goldberg & Shaw, *supra* note 7.



## RECIPROCAL COACHING

be sure that (1) all parties know that you will or might have such communications and that (2) all parties know that they have an equal opportunity for such communications.

Before the mediation, consider hosting a meeting or phone conference with parties to present yourself and to explain your philosophy and approach.

During a mediation, in your opening statement, talk explicitly about what you will not do to try to push parties toward settlement:

*"I will not lie to, mislead, or manipulate anyone. Preserving my sense of self is more important to me than getting your case settled. As significant, it would compromise my ability to help you (the parties) if you could not trust me.*

*One of our primary goals today will be to try to identify as reliably as possible what is possible through this process. In that central undertaking, I can be useful to you only if I tell you the truth."*

*"This does not mean that I will disclose everything that a party tells me in caucus. As I have explained, I will keep secrets when I am asked by a party to do so. But I will not pretend not to have a secret when I have one. If asked a question whose answer would require me to reveal a secret, I will say, 'I have a secret about that. I'm not going to answer that question.'"*

*"And I will not resort to theatrics or emotion (feigned or otherwise) to try to manipulate anyone for any purpose. I will not feign disappointment with anyone to try to get him to change a position.*

*Nor will I pretend that I have worked magic on the other side to get them to improve their offer."*

If asked during a caucus to mislead or lie to the other side, or to pressure the other side, explicitly refuse to do so, without anger or self-righteousness.

For example:

(A) One party asks you in caucus to "Tell them X." (X being untrue)

Mediator's response: "I'm sorry, I can't do that."

(B) One party asks you in caucus to, "Tell them this is the most I can get out of them."

Mediator's response: "I'm sorry I can't do that."

A calm refusal like this can teach the people with whom you are in caucus something important about you – that you are trustworthy. It should increase their confidence that what you tell them during the course of the mediation is true.

Some mediators would be tempted, in such situations, not to confirm to the requesting party what they intended to do with this message, and then to "re-frame" it before joining the caucus with the opposing party. The product of such re-framing could take a wide range of shapes, some of which would essentially eviscerate the intended message. In my view, resorting to such re-framing without telling the message-sending party is ethically ambiguous at best, and does nothing to encourage the kind of trust in the mediator that might enhance the overall trust environment of the mediation.

During a mediation, visibly take care not to validate, directly or indirectly, in caucus or in joint sessions, the use of any unethical or manipulative negotiating tactics. And tell the parties briefly about the research (described in a subsequent section) that indicates that resorting to such tactics can cause considerable harm to the prospects for a successful negotiation.

In caucuses, do not make negative comments about other participants in the mediation and do not appear to endorse negative comments from a party or lawyer about others. While it might be appropriate in some settings to carefully express or endorse a skeptical or negative analysis of parties' positions, we should make it clear that our critiques are of law and evidence, not of persons. If we make or endorse negative comments in private about others, the parties with whom we are speaking privately will worry that we are saying negative things about them when we are caucusing with the other side.

*B. One Especially Significant Variation on the Trust (Us) Theme:  
Delivering Value by Helping Parties Feel That It's OK to Say Yes*

In some situations, one of the services the parties look to a mediator to provide, perhaps subconsciously, is psychological cover for decisions the parties need and, at some level, want to make. Sometimes the parties want the mediator to make difficult decisions for them. This we must decline to do. Perhaps more often, however, parties look to the mediator's views for comfort or for reassurance as they try to resolve imponderables and to make very difficult decisions.

The subjects on which decision-making turns in mediations often are pervaded with uncertainty. When parties or lawyers confront such palpable uncertainty, they understandably are tempted to look to a mediator for help—for something that will reduce the anxiety that the uncertainty provokes. They look for at least some kind of oblique validation or support for what feels to them like a decision that is impossible to make on a fully rational basis. Sometimes clients do not have full confidence in the advice they are

receiving from their lawyers; clients who have considerable respect for their lawyers nonetheless understand that, because of nature of the analytical challenge, not even the most competent assessments are infallible. Even experienced, repeat players often feel some need to justify their decisions to others and to themselves—to be able to explain or to live with those decisions and their consequences. They want to sleep at night. The more support they can locate for a difficult decision, the better their sleep is likely to be. Therefore, they sometimes look to their mediator for help, reassurance, or a steadying arm, as they try to navigate toward these elusive emotional places.

One of the subtle, sometimes complicated ethical challenges mediators face is how to respond to these kinds of completely understandable needs. Because we want so much to be helpful and to reach out and connect, it often is incredibly tempting to rush in with high levels of reassurance, and thus to be perceived as "adding value" by providing what the parties really want, even if we know that what they are searching for is, at least in some measure, illusory.

It is at these crucial junctures that we must be most careful not to over-encourage or abuse the parties' trust in us. It is at these junctures that it is important to be forthright about our limitations—clear that there is an inescapable vulnerability in anyone's predictions about how the case might play out or in anyone's judgment about what is wise.

It does not follow, however, that a mediator should never share with a party an honest feeling or instinct about what course of action seems wisest. Before moving in that direction (presumably very late in the process); however, we must take special care to assess the integrity of such feelings. It will be tempting to "feel" that it is "wise" for a party to make the move or to accept the terms that we believe or sense will get the deal done. We covet the emotional high that a settlement agreement delivers. Because we covet that high, we need to watch ourselves and not permit our ideas about what is wise to be overrun by our sense of what needs to be done to get a deal.

However, if we really try to disentangle our feelings about what is wise from our desire simply to get a deal and if we share our views with appropriate qualifiers and deference, we ought to be able to provide at least represented parties with this kind of service without running afoul of our consciences. My comfort with this view grows if (1) the request for our sense of how the case might play out is made toward the end of a lengthy and careful set of negotiations and if (2) the original source of the proposed terms is the party that is asking for the guidance, for example, when a party says "I think I would like to propose X; do you think that would be unwise?"

We are all human. We know that we really don't know. At the end of a

long negotiation that has included wise coaching, the parties understand that none of us can be certain what the wisest course is. But we also know that their feelings of fear and uncertainty can be pointlessly damaging. Given our commitment to try be of service to people, it is not clear to me why, with appropriate circumspection, it would be inappropriate or unethical to share a view about what would seem wise when such sharing could help the parties suffer less.

### *C. Part Two: Trust in the Other Side*

Should mediators try to encourage parties to trust one another? There is a great temptation to answer this question in the affirmative because there seems to be so much evidence that (1) enhancing trust across party lines can enhance the quality and productivity of a mediation and (2) behaviors rooted in distrust are ubiquitous and potentially very damaging to negotiation dynamics. Let's look at some of the relevant social science findings before we confront the issue head on.

The environments in which settlement negotiations in civil cases take place are permeated with uncertainty—as is the settlement negotiation process itself. Social science research suggests the likelihood that people will resort to heuristics<sup>28</sup> increases with the complexity and uncertainty of tasks they face.<sup>29</sup> Not surprisingly, research has shown that negotiators commonly bring a limiting set of heuristics to the negotiation process, i.e., that they enter the process with the clarity and openness of their thinking already compromised by widespread "biases" (a term often used as a synonym for heuristics in the social science literature). One such heuristic that is very common is called "the fixed pie bias," meaning that people quite often enter a negotiation assuming that their object or target will be "a fixed pie" and that their goal is to get as big a piece of that pie as possible.<sup>30</sup> This bias often is

---

<sup>28</sup> Heuristics are mental short cuts or biases, presumptions or inferences triggered after multiple encounters with what are perceived to be similarly configured circumstances. While some heuristics can be essential to avoid sensory overload and chaos, they often are relatively crude and more than occasionally are misplaced (wrong). See, e.g., MARGARET A. NEALE & MAX H. BRAZERMAN, COGNITION AND RATIONALITY IN NEGOTIATION 43–60 (1991).

<sup>29</sup> See Goodman-Delahunty et al., *supra* note 14, at 135.

<sup>30</sup> See Margaret A. Neale & Gregory B. Northcraft, *Experience, Expertise, and Decision-Bias in Negotiation: The Role of Strategic Conceptualization*, in 2 RESEARCH ON NEGOTIATION IN ORGANIZATIONS (Blair H. Sheppard, Max H. Brazerman, & Roy J.

accompanied by an expectation that negotiating counterparts (the people on the other side) will engage in distributive or competitive bargaining, perhaps pretending to be interested in expanding the size of the pie but really being interested only in taking as much of it home for themselves as possible.<sup>31</sup>

According to social scientists, biases like these can significantly color how a negotiator interprets or understands the conduct of her counterpart. Thus, a negotiator who expects her counterpart to bargain distributively<sup>32</sup> is less likely to perceive constructive motives behind acts by her counterpart and more likely to fail to perceive genuine invitations to engage in problem solving approaches. Expecting a counterpart to negotiate distributively also inhibits a negotiator from taking the risks that sometimes are necessary to achieve high quality agreements.<sup>33</sup> Social scientists also have learned that the biases negotiators bring to their interactions with their counterparts can be tenacious—tending to remain intact even in the face of conduct that contradicts negative expectations.<sup>34</sup>

There is some silver lining. The fact that negotiators tend to respond in kind to how they think their counterpart is negotiating means, on the one hand, that a negotiator is more likely to be deceitful or difficult if she believes her counterpart is being deceitful or difficult, but, on the other hand, she is more likely to share information if she perceives her counterpart to be sharing information. Furthermore, as noted above, there tends to be a positive relationship between levels of trust and sharing information.

Taken together, these apparent facts of negotiation life could provide mediators with powerful incentives to try to increase levels of trust across party lines. We must be very careful, however, about how we respond to such incentives. To try to encourage parties directly to trust one another can be quite dangerous.

A mediator who tries to form a judgment about how trustworthy a party is undertakes a perilous task. We do not know enough and we are not smart or wise enough to make such judgments. If we try, there is a considerable risk that we will be wrong. We simply can't know, for example, how accurate

---

Lewicki eds., 1999). *See also* ROY J. LEWICKI, DAVID M. SAUNDERS, JOHN W. MINTON & BRUCE BARRY, *NEGOTIATION: READINGS, EXERCISES, AND CASES* 151–52 (4th ed. 2003).

<sup>31</sup> *See, e.g.*, Peter Robinson, *Contending With Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 *BAYLOR L. REV.* 963 (1998).

<sup>32</sup> *See, e.g.*, Tinsley et al., *supra* note 11, at 624–25.

<sup>33</sup> *Id.* at 623–24.

<sup>34</sup> *Id.*

or complete a party's representations to us are, even when made under the protection of secrecy in a private caucus. Given the limitations under which we work, it would be irresponsible to offer direct assessments of the reliability of other parties' representations, or generally, of their bona fides. Moreover, offering such assessments or assurances would tend to move us toward the center of the mediation process, increasing the risk that our inputs would take on pivotal, rather than clearly secondary or merely supplementary, roles.

It is far wiser for a mediator to work on the cross-party trust problem indirectly. What follows are a few ideas about ways to go about this.

Before a mediation, consider hosting a face-to-face pre-mediation meeting whose sole purpose would be to introduce or re-introduce the parties to one another—to try to humanize the players in one another's minds. This kind of meeting could be especially useful if considerable time has passed since the events or interactions occurred that gave rise to the lawsuit, creating time for feelings to subside and perspectives to broaden. The mediator also could use such a meeting to help parties identify categories of information they would share and to promote energetic commitments to making the mediation as productive as possible.

If a face-to-face meeting in advance of the mediation is impractical (as it often will be), encourage the lawyers to have their clients on the line during the pre-mediation phone conference. During this conference, very briefly describe the key findings about how preconceptions and defensive expectations can needlessly damage the productivity of a mediation, and about the positives that ensue when parties are willing to share more information.

Consider working *ex parte* with each lawyer and party team before and during the mediation to help them identify information they could take the initiative to share with the other side, e.g., in their written pre-mediation statements. Explain how much credibility a party can earn by sharing information that might be in some measure self-revelatory, or that might shed light on underlying interests, or that might have ambiguous or even some potentially damaging implications.

Raising this topic in an *ex parte* setting would be less threatening to counsel and would permit more forthcoming conversations about what kind of information a party might share without feeling that it was exposing itself to too much risk.

Point out (before and during the mediation) that one kind of information that a party might share with positive effect is why she is making a particular proposal (especially a non-monetary proposal), or what thinking underlies her views about terms that are under consideration.

The act of disclosing the "why" behind a party's proposal or position can that party seem more rational (and a party who seems more rational may seem fairer). The act of disclosing "why" could contribute to trust-building and could help encourage an opponent to do a little more sharing.

In addition, by disclosing the goals or purposes or concerns that underlie asking for a particular term or taking a particular position, a party enables her counterpart and the mediator to look for alternative ways to achieve the same goals—alternative ways that might be more effective or might be less painful to the counterpart.

*D. Concession Making, Respect and Trust*

Levels of trust across party lines also can be affected by how parties handle concession-making during a negotiation. Sophisticated analysts of negotiation dynamics teach us that considerable indirect communication can accompany different approaches to the concession-making process.<sup>35</sup> A party who refuses to reciprocate for a concession made by his counter-part, or whose responsive concession appears to be untethered to comprehensible considerations, runs considerable risk of damaging her counter-part's self-esteem or triggering fear of damage to her reputation.<sup>36</sup> Thus, a thoughtless or overly-aggressive response to a concession not only can reduce trust across party lines, but also can unnecessarily create an additional source of psychological resistance to making subsequent adjustments in positions.

In sharp contrast, appropriately framed concessions, or reciprocations to concessions, can communicate acknowledgment not only of another party's position and its underpinnings, but also (indirectly) of the other party himself.<sup>37</sup> A reciprocal concession can be a form of cross-party recognition, an oblique but meaningful acknowledgment that there is a self on the other side. In other words, a party might experience or feel an opponent's movement toward his position as a movement toward himself. This kind of acknowledgment or recognition of person or position can reduce tensions or antagonisms across party lines. Reducing tensions may reduce suspicions or levels of defensiveness, or may dilute self-protective instincts. Lowering suspicions and reducing self-protective animation can create at least a little

---

<sup>35</sup> See J. ANDERSON LITTLE, MAKING MONEY TALK: HOW TO MEDIATE INSURED CLAIMS AND OTHER MONETARY DISPUTES (2007).

<sup>36</sup> LEWICKI ET AL., *supra* note 31, at 50–54.

<sup>37</sup> *Id.*

more space for trust to grow—even if only slowly or very incrementally.

So, how a litigant handles concessions can either inflict damage on the negotiation process or can improve its emotional dimensions.

Share (in a compact way) these insights with a party who, in caucus, refuses to consider making adjustments to its position or to respond at all to a concession made by an opponent, or who seems to have devoted no thought to the effect that taking a rigid position might have on other parties or the vitality of the negotiation process. Suggest that it is important to avoid needlessly inflicting emotional wounds—and that an opportunity to reciprocate can be an opportunity to evidence good faith and to encourage more confidence across party lines. The mediator might add: "It can be important not to give the [plaintiff or defendant] an incentive to look for revenge, or to make him feel that he needs to extract a pound of flesh during the rest of negotiations in order to restore his self-respect or his reputation with the people who will pass judgment on how he has handled this process."

Social science research has generated two additional findings about concession making that, while not directly related to improving trust across party lines, could help mediators and parties avoid process errors that might needlessly compromise the health of negotiations. The first of these is that the level of parties' satisfaction with the negotiation process (as well as with its outcome) is likely to be higher if the negotiations have included multiple rounds of concessions than if the negotiations have included only a few such rounds.<sup>38</sup> The second of these findings is that immediate concessions are likely to be perceived as less valuable than concessions that are made after more substantial periods of negotiating.<sup>39</sup> A mediator might cite these findings in support of the following coaching ideas:

- Don't rush to the numbers.
- Urge parties to leave sufficient room between positions they take early in the negotiation process and the terms they ultimately would accept to permit several rounds of exchanges of offers and demands (or packages of term proposals).
- Don't make big concessions quickly; instead, make concessions on a

---

<sup>38</sup> See, e.g., A. D. Galinsky, V. L. Seiden, P. H. Kim, & V. H. Medvec, *The Dissatisfaction of Having Your First Offer Accepted: The Role of Counterfactual Thinking in Negotiations*, 28 PERS. SOC. PSYCHOL. BULL. 271 (2002).

<sup>39</sup> LEWICKI ET AL., *supra* note 31, at 51 (citing S. Kwon & L. R. Weingart, *Unilateral Concessions from the Other Party: Concession Behavior, Attributions, and Negotiation Judgments*. 89 J. APPLIED PSYCHOL. 263 (2004)).



- measured basis and on a deliberately paced track.
- Be very patient with the negotiation process. Leave plenty of time at each juncture for parties to adjust both analytically and emotionally to potential changes in circumstances, new information, etc.

## VI. POINTING PARTIES TOWARD MORE PRODUCTIVE APPROACHES

### A. *Postulates About Negotiation Dynamics Based On Social Science Research*

Based on careful analysis of studies of negotiation dynamics, Roger Volkema and Cheryl Rivers have developed a wide-ranging set of "postulates" about how negotiators are likely to behave when they encounter (or believe they are encountering) specific circumstances or specific kinds of behavior from their negotiating counterparts.<sup>40</sup> The principal targets of analysis by these social scientists are what they call "ethically ambiguous negotiation tactics" (EANTS). As defined by these scholars, EANTS include a broad range of negotiating behaviors, ranging from the relatively commonplace and less clearly unethical (e.g., exaggerating a client's expectations or demands, not disclosing potentially significant information, or hiding a bottom line) to the more extreme and more widely condemned (e.g., encouraging a counterpart to draw an inaccurate inference about a material fact, misrepresenting material facts, or making threats).

Volkema and Rivers contend that there is a greater risk that negotiations (at least in matters with integrative potential) will fail completely, or will fail to yield optimum outcomes, when both parties use EANTS. In their view, the relevant research also indicates that there is a considerable risk of damage to negotiation dynamics even if only one participant uses EANTS.

The specific postulates that Volkema and Rivers have developed are designed to help negotiators and mediators predict negative reactions to some negotiating techniques and to help parties and neutrals choose behavioral

---

<sup>40</sup> See Volkema & Rivers, *supra* note 9. But see D. Fleck, R. Volkema, S. Pereira, B. Levy & L. Vaccari, *Neutralizing Unethical Negotiating Tactics: An Empirical Investigation of Approach Selection and Effectiveness*, 30 NEGOT. J. 23, 43 (2014). A very recently completed study of negotiation dynamics in simulated settings that failed to yield substantial evidence that using positive negotiation behaviors would significantly reduce the likelihood that a counterpart would use EANTS, at least when the negotiations are conducted only via email and when the simulated problem does not clearly present substantial integrative opportunities.

paths that might move negotiation dynamics in productive directions. This section presents some of these postulates, followed in each instance by coaching suggestions arising therefrom.

**Postulate:** If a negotiator suspects his counterpart is using or likely to use EANTS, the negotiator is likely to use EANTS in return in order to protect himself.

**Coaching Point:** In caucus, when parties are considering what to do next in negotiations, a mediator who is concerned about how the other side might perceive or react to one of the moves or next steps a party seems inclined to make might ask:

"How might the other side view this move, or react to it?"

"Is there a risk that proceeding this way might needlessly make the other side more suspicious, defensive, or rigid?"

Or, a coach might say, in caucus: "It is important to minimize the risk that the other side will misperceive or misconstrue what you are doing, or get suspicious about what lies beneath this [act or move], because if that happens, [studies indicate that] the other side will look for ways to protect itself and to retaliate—and will give us less information and be less flexible."

**Postulate:** The more negotiators feel that they have in common—personally and/or professionally—the less likely they are to use EANTS.

**Corollary:** The more parties look to the same external sources for validation, reputation, business, etc., the less likely they are to use EANTS.

**Coaching Points:** At various junctures over the course of a mediation, emphasize values or experiences or challenges that both parties share. When trying to get leverage on whether a position is well taken or a proposal is "fair," search for external sources of norms that both parties respect or by which both parties might be judged (e.g., by peers, by possible business partners, or by customers).

**Postulate:** The more a negotiator believes that his opponent could help him gain influence with or access to important business or social opportunities, the less likely the negotiator is to use EANTS.

**Coaching Points:** Before and during negotiations, make sure the parties think about whether there is any possibility that in the future they might form a relationship (like a joint venture) or find other ways to work together that would benefit both of them. Look for ways that one party might help the other party develop or improve a relationship with someone else, or might help enhance the other party's reputation or standing in relevant quarters, e.g., through a press release or direct messages to customers, or through an

advertisement, or through coordinated presentations at trade shows.

**Postulate:** The less attractive the alternatives to a negotiated agreement, the less likely a negotiator is to use EANTS.

**Coaching Point:** Make sure each party fully understands, in detail and in specifics, what proceeding with the litigation would entail, in cost, time, and in uncertainty of circumstances, as well as in indirect effects like diversion of otherwise productive resources, stress, impact on reputation, undermining the confidence of customers, etc.

**Postulate:** The more a party believes his opponent has viable options to a negotiated agreement, the less likely the negotiator is to use EANTS.

**Coaching Point:** When caucusing with one party, be careful not to overstate the down-sides to the other party of proceeding with the litigation (or the risks/burdens to the other party).

**Postulate:** Generally, the farther out in the future a party will feel the negative effects of the terms of a deal, the more willing he will be to accept those terms.

**Coaching Point:** Look for ways to delay or postpone some of the negative consequences of some or all of the terms of a deal, e.g., through installment payments, or by giving a business more time to depart a market or to transition to a modified product.

## B. *Coaching to Help Parties Avoid "Cognitive Traps"*

Social scientists have identified a number of commonly encountered "cognitive traps" that can distort mediation dynamics and whose avoidance can enhance prospects for productive negotiations.<sup>41</sup> This section identifies a few of those traps and offers suggestions about how to coach parties around them.

### 1. *Asymmetries in Loss Aversion*

Research indicates that, as a general proposition, people are likely to experience more hurt from loss than pleasure from gain. They are likely to give more weight to a sure loss than to a merely possible gain, and to prefer a

---

<sup>41</sup> See generally LEWICKI ET AL., *supra* note 31, at 150–54; Neale & Bazerman, *supra* note 14, at 41–79.

smaller sure gain to a bigger gain that is only a possibility.<sup>42</sup>

One manifestation of these principles arises when out of pocket costs are clearly measurable and relatively certain, but opportunity costs are appreciably more difficult to measure and less certain. In this situation, many negotiators may be inclined to give more weight to smaller out of pocket costs than to potentially much larger (but more remote or less visible) opportunity costs.

**Coaching Points:** Slow parties down when they are trying to assess the indirect costs of failing to resolve their dispute by agreement; if appropriate, encourage them to give appropriate consideration and weight to the longer range or more indirect "costs" that are more difficult to measure. If circumstances permit, help parties understand concessions as foregone gains rather than as hard losses. Encourage a defendant not to abandon negotiations without first making a final firm offer, as generous and as concretized as possible. Turning down such an offer would involve giving up a sure gain in favor of an only possible larger gain in the future. In some settings it might be wise to suggest that a plaintiff plan to keep his demands on the high side of where the case might settle until the very last move is necessary, then be prepared to forego the last gain instead of asking the defendant to bear the last loss.

## 2. *The Endowment Effect*

The concept of an "endowment effect" has been used in a variety of ways in sophisticated social science literature, but for present purposes I will use this phrase to capture a relatively straightforward proposition: when a person thinks about the value of an object that could be sold or bought, there is a tendency to ascribe a higher value to the object if the person already possesses the object than if the person does not possess it and is considering purchasing it.<sup>43</sup> Stated less carefully, the simple fact of possessing a thing

---

<sup>42</sup> See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RES. 235, 243–45 (1993).

<sup>43</sup> I draw extensively in this section on recent work by Jennifer Arlen & Stephan W. Tontrup, *A Process Account of the Endowment Effect: Voluntary Debiasing Through Agents and Markets* (NYU Sch. of Law, Pub. Law & NYU Law and Econ., Research Paper No 13–26, 2013), available at <http://ssrn.com/abstract=2263447> or <http://dx.doi.org/10.2139/ssrn.2263447>.

Professor Arlen suggests that in the relevant social science literature the endowment

seems to incline a person to elevate its value.

Social scientists have suggested that the endowment effect can have roots in a person fearing that he will experience a feeling of regret after parting with something he possesses. He fears feeling regret over the item's loss. Research also suggests, however, that institutional repeat players (who might serve as a client's agent) become much less vulnerable to such feelings as they engage in multiple transactions and as they experience, repeatedly, the ups and downs of markets and deals.<sup>44</sup> Because they are less likely to be "biased" by fear of feeling regret over loss, transaction professionals, in theory, are better positioned than the "owners" on whose behalf they work to determine the "rational" market value of an item that their owner possesses.

These findings and insights tend to support a proposition that might be useful to lawyers representing clients in mediations and, secondarily, to mediators. Work by Professors Jennifer Arlen and Stephan W. Tontrup<sup>45</sup> suggests that we might be able to mitigate the 'biasing' of settlement decision-making (or the resistance to trading) that is attributable to the endowment effect if we could dilute the parties' sense of responsibility for the outcome of a negotiation by helping them transfer some of that sense of responsibility to their agents, namely, their lawyers. It is, of course, debatable whether it is appropriate or wise to try to shift some of the sense of responsibility for the outcome of a negotiation away from a party. It would be unwise, however, to ignore psychological phenomena that might impair clients' ability to identify the forces that are affecting them and to make uncluttered judgments about what is in their best interests to do.

Thus, thoughtful lawyers and mediators should be aware of the possibility that the endowment effect might be "biasing" (or acting as a drag on) the parties' decision-making. Alert to this possibility, counsel might find it advisable, in some circumstances, to talk directly to their clients about what the studies have shown about the endowment effect—thereby helping their clients understand better some of the things that might be subconsciously at play when they are considering various settlement options or proposed terms. A keener self-awareness might help a party reduce the role she permits 'fear of regret over loss' to color her thinking about how to assess

---

effect is described as either a resistance to trading or, more commonly, a circumstance in which an individual person's "willing to accept" price (WTA) is greater than that same person's "willing to pay" (WTP) price

<sup>44</sup> See, e.g., John A. List, *Does Market Experience Eliminate Market Anomalies?*, 118 Q. J. ECON. 41 (2003).

<sup>45</sup> Arlen & Tontrup, *supra* note 45.

her alternative paths forward.<sup>46</sup>

Interestingly, Arlen and Tontrup argue "that *both the principal and the agent* will be debiased [when] their relationship lets them share outcome responsibility. Both are causal for the final decision. So if people are represented by an agent [who in fact shares outcome responsibility] in the mediation process, the process should debias . . . ."<sup>47</sup>

I hasten to note, however, that *whether* a lawyer should invite her client to re-allocate to her some of the responsibility for the outcome of a negotiation raises more challenging ethical issues than we can address here. Those issues would be even more daunting if it were a mediator who was purporting to assume some of the responsibility for the outcome of the negotiations.

### 3. Reactive Devaluation

"Reactive devaluation" is a cognitive trap that is well recognized in mediation literature.<sup>48</sup> It occurs when a participant in a mediation "devalues" an idea or a possible term of an agreement simply because the idea or proposal originated in an opponent. Presumably lawyers, as well as clients, are susceptible to this kind of potential distortion of their "objective" judgment. If an idea is perceived as originating in a neutral source, e.g. a mediator, there apparently is less risk of it being reactively devalued. Knowing this, a mediator might be tempted either to try to generate a disproportionate share of the ideas (proposals) that move across party lines, or to present an idea (proposal) to a party as if it were hers even though the opposing party actually was its source. Both of these courses of action are problematic, the first imperiling the mediator's role, the second her ethics.

Neither of these potential concerns should arise, however, if a mediator simply makes sure that parties know about this kind of cognitive trap (and

---

<sup>46</sup> I hasten to add, however, that it is not clear, from the research, that merely increasing a party's self-awareness—understanding of the endowment effect—without more, would reduce the power of the endowment effect to 'bias' the party's valuations. Professor Arlen warns that one "key feature of our result . . . is that the agent only mutes the EE [endowment effect] when he assumes responsibility for the decision. Just learning what the agent thinks is not enough . . . . He must be acting as [the owner's] agent." E-mail from Jennifer Arlen, Professor, NYU School of Law, to author (Apr. 16, 2014) (on file with author).

<sup>47</sup> *Id.*

<sup>48</sup> See Mnookin, *supra* note 44, at 246–47. See also Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOT. J. 389, 394 (1991).

how well documented it is), and asks them to bear it in mind as they assess, as objectively as possible, the merits of any particular proposal—regardless of its perceived source.

One possible source of reactive devaluation is an assumption that a proposal from an opponent must be accompanied (or inspired) by pursuit of some hidden advantage or benefit for that party, or by some subtle downside for the party to whom it is made. The recipient of a proposal from an opponent might well be inclined to ask: "What's in this for them? Why are they proposing this? What are they trying to accomplish by making this proposal?" If such questions or concerns seem to be clouding a party's judgment or preventing him from moving forward with a negotiation, a mediator might consider working with the parties to address the "why" question directly. A recipient of a proposal might be freed to assess it more 'objectively' if he could be shown a reason for it that was not threatening.

For purposes of dealing with the risk of reactive devaluation it also can be useful to distinguish between substantive proposals (e.g., possible terms of a settlement contract) and process ideas. If a process idea is the product of a dialectical interchange between a mediator and one party (in caucus), it would seem perfectly fair for the mediator to indicate that she discussed the particular suggestion with the other side and feels that it is worthy of serious consideration, thus both endowing it with some imprimatur and inviting an open-minded consideration of its potential utility.

### *C. Behaviors Associated with the Most Successful Negotiators*

In 1978, social scientist Neil Rackham published an oft-cited article entitled "The Behaviour of Successful Negotiators."<sup>49</sup> Mediators could use several of Dr. Rackham's findings as support for suggestions to parties and lawyers about how they might most productively approach the negotiation process. The four coaching suggestions (to be made as appropriate to participants in a mediation) that follow are based on Dr. Rackham's work.

- *Move freely among issues without insisting on addressing them in a particular sequence and without forcing linkages between them.*
- *Ask more questions than you might otherwise be inclined to ask,*

---

<sup>49</sup> Neil Rackham & John Carlisle, *The Effective Negotiator Part I: The Behaviour of Successful Negotiators*, 2 J. OF EUR. INDUST. TRAINING 6 (1978). Dr. Rackham's findings are summarized in the 2003 edition of LEWICKI ET AL., *supra* note 31, at 169–81.

*and frame the questions as openly as possible—so they are real questions, not poorly disguised arguments.*

- *Test your understanding more often than you might be inclined, either through asking questions or by offering short summaries of your perception of the status of the negotiations, of the reasoning behind parties' positions, of matters to which parties have agreed, etc.*
- *Avoid gratuitous "irritator" comments, i.e., gratuitous positive characterizations of the speaker's own acts or proposals, e.g., our "generous" offer; our "fair" or "reasonable" proposal; our full "good faith."*

## VII. DECISION ANALYSIS RECONSIDERED

This final substantive section of this paper takes the discussion of coaching in a different direction. Instead of presenting coaching ideas that enjoy support from social science research, this section sets forth reasons (rooted in some measure in "science") for mediators to take special care before deciding how to use a particular coaching tool that has gained some currency in the mediation community.

"Decision analysis" (also known as "risk analysis") is a systematic approach to making difficult decisions about matters that include multiple uncertainties that has evolved in several fields over the past several decades.<sup>50</sup> Versions of this approach have enjoyed some vogue among mediators and lawyers for various purposes related to making settlement decisions, assessing litigation risk, and estimating the "discounted settlement value" of cases.<sup>51</sup>

As presented to lawyers and mediators for use in settlement work,

---

<sup>50</sup> Various forms of "decision analysis" have been propounded and elaborated over the past twenty-five years or so, some of which seek to integrate qualitative considerations into a broader model that includes quantitative components. The literature on this topic is extensive, much of it originating in economics and business. *See, e.g.,* PETER MCNAMEE & JOHN CELONA, *DECISION ANALYSIS FOR THE PROFESSIONAL* (1988). The fourth edition appeared in 2001 and was revised in 2005. It is available electronically from SmartOrg Inc.

<sup>51</sup> *See, e.g.,* DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES; EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES* 165–77 (2009); Marjorie Aaron, *Finding Settlements with Numbers, Maps, and Trees*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 202 (M. Moffitt & R. Bordone eds., 2005).



decision analysis features an effort to disaggregate or disassemble a case or a litigation circumstance into discrete component parts—and thus to push settlement decision-makers away from thinking about their case and assessing its value as if it were a unitary "blob" instead of something that ultimately consists of a large number of separable components or elements that need to be identified and examined carefully and independently if something approaching a reliable understanding of the whole is to be achieved. How far such disaggregation is extended can vary considerably, ranging from a few major components of an action (e.g., motion for summary judgment, liability at trial, range of damages) to a virtually limitless number of progressively smaller (which is not to say less significant) sub-parts, constituents, or factors. The deeper the disaggregation cuts, the more visible the complexity of a matter becomes.

As a tool for exposing the layers of intricacy or convolution in litigation, or the numerosity of the constituent elements of a case, decision analysis can be very illuminating and useful.<sup>52</sup> It can discourage the tendency to oversimplify and can help mediators and lawyers do battle with the subterranean power of over-confidence.<sup>53</sup> Lawyers and mediators can use decision analysis to press parties to assess their situations in lawsuits more systematically and more thoroughly, to reduce the risk that they will overlook or ignore a potentially significant variable or assess only superficially an element of their case that needs appreciably closer analytical (or emotional) attention. Thus, decision analysis can help parties and their counsel understand how many different "risk points" a given case involves. By improving the likelihood that counsel and clients will identify all of the major risk points, decision analysis provides them with a more comprehensive basis for developing a general sense of the overall quantum of risk that the case presents. In these ways, it can amplify appreciation for the extent to which uncertainty permeates civil litigation and, thus, for the fragility of prediction.

Because it breaks a case or a litigation circumstance into components and invites attention to each one, decision analysis also can be a useful tool for improving communication—from lawyer to client, across party lines, and between mediators and other participants in a negotiation. A lawyer or mediator can discuss each juncture or branch of a carefully drawn decision tree to try to make sure that parties understand each element of their situation and have a richer sense of the complexity of the constituency that makes up

---

<sup>52</sup> The discussion of potentially productive uses of decision analysis in this section is based in large part on the work of GOLANN, *supra* note 53.

<sup>53</sup> See, e.g., Neale & Bazerman, *supra* note 14.

the whole. And by discussing components one at a time, counsel and client can identify places where their analysis or understanding is incomplete or feels especially infirm.

As Dwight Golann points out, some clients are more comfortable with or find more psychological reassurance in quantitative approaches to thinking about problems.<sup>54</sup> Some client's work lives tend to be dominated by quantitative methods, so some may feel off center when they encounter a kind of "analysis" that is dominated by words that seem opaque and that feel heavy with elasticity and light on precision. Used with appropriate analytical restraint, decision analysis could make such people feel more comfortable in the discussions that inform negotiations. In this way, decision analysis could, for some parties (and for some lawyers), reduce barriers to getting to a psychological place where they can make settlement decisions.

Engaging in a decision analysis exercise also might be useful when the roles that emotion, blame, or pursuit of retribution are playing in a mediation seem to have exceeded appropriate or possibly constructive bounds. In such settings, the graphics, numbers and math associated with decision analysis could lend an air of objectivity to a negotiation, and could encourage parties to step back a bit from a consuming feeling of intense emotional immediacy. When they are focusing on decision tree graphics, parties may be distracted, at least for the moment, from their anger or pain, and may turn their focus for a moment to something other than one another, diluting obsessions with the apparent source of their problem or distress. As Marjorie Aaron suggests, for a few moments at least, the parties may be absorbed with the figures (in the form of a decision tree) on a piece of paper on the table in front of them or on a whiteboard, and for those few moments may take a break from the emotional tempest.<sup>55</sup> Such "space away" can be healthy.

In all of the ways just described, restrained use of decision analysis can make positive contributions to a mediation dynamic. But why should the use of this tool be restrained? And what should the restraint consist of?

The danger that lurks in at least some simple forms of decision analysis is that parties, lawyers, or mediators might invest it with a capacity to assess, "scientifically" and literally, the magnitude of the risk that a party faces or to determine the "actual" settlement value of a case. This danger has multiple sources,<sup>56</sup> but its deepest roots reside in potential misuse of fundamental

---

<sup>54</sup> GOLANN, *supra* note 53, at 163–64.

<sup>55</sup> Aaron, *supra* note 53, at 205.

<sup>56</sup> Among the sources of danger that are not explored in the text, the following especially warrant mention.

features of "probability" theory. Providing two examples will help set the stage for discussing these dangers.

*A. Example One:*

Assume that the parties have identified two contested elements in a tort case: causation and fault. Assume further that for the moment they are limiting their use of decision analysis to trying to estimate the likelihood that plaintiff will be able to establish liability in the defendant. In this setting, a participant in negotiations might try to use decision analysis to make this determination. He might reason that the likelihood that plaintiff would establish liability can be calculated by multiplying the likelihood that the plaintiff would prevail on the causation issue by the likelihood that the plaintiff would prevail on the fault issue. Thus, he might contend, if the plaintiff has a 60% chance of prevailing on causation and a 60% chance of prevailing on fault, the plaintiff has only a 36% chance of establishing liability:  $.60$  (causation)  $\times$   $.60$  (fault) =  $.36$  (liability). While he might well acknowledge that the accuracy of the components of this formula depend on the quality of the information base and the judgments that inform them, this proponent of decision analysis would argue that if these estimates are

---

First, probability theory is rooted largely in formal philosophy and mathematical equations and not, principally, in controlled empirical experimentation. See IAN HACKING, *THE EMERGENCE OF PROBABILITY: A PHILOSOPHICAL AND STATISTICAL INFERENCE* (2d ed. 1975).

Second, probability theory purports only to estimate likelihoods for events that are repeated many, many times, not a single likelihood of the outcome of any one event. A civil trial, of course, at least when it involves a jury, is a fundamentally un-repeatable, un-replicable event. At a minimum, a second trial of the same case would involve a new dynamic between lawyers, witnesses, and evidence and a different group of jurors.

Third, decision-analysts freely concede that the value of the results of any given application of this method can be no better than the reliability of the individual estimations that are inserted into the formulae. So, to the extent that the estimates of the likelihoods of the events that populate the formulae are infirm or unreliable, so, too, are the products of the multiplications.

Fourth, decision analysts also freely concede that the formulae they use generally do not take into account many factors that can play quite significant roles in parties' thinking about settlement, e.g., litigation transaction costs, the time-value of money, the indirect ill-effects of involvement in litigation (e.g., distraction, stress, damage to reputation, just to name a few), the psychological and economic tolls of uncertainty, personal or business interests in cabining harm to relationships, or in forgiveness, or in retribution, as well as varying levels (over time and between different parties) of risk aversion.

accurate, multiplying them in this way yields a valid prediction of the likelihood that plaintiff will establish liability.

*B. Example Two (unrelated to example one, above):*

Assume that a party estimates that the plaintiff has an 80% chance of surviving a motion for summary judgment and a 60% chance of establishing liability at trial. Assume further that, under his application of probability theory, this party contends that the plaintiff has a 48% chance of emerging from a trial as the prevailing party.

To determine the discounted settlement value of the case, our hypothetical proponent of decision analysis would tell us that it also is necessary to estimate the various likelihoods that the jury would award the different possible levels of damages. Toward this end, our decision-analyst proceeds to estimate that there is a 20% chance that the jury would return a damages award of \$200,000, a 60% chance the jury would return an award of \$120,000, and a 20% chance the jury would return an award of only \$50,000. Next, this analyst would suggest that the way to determine the probable magnitude of a damages award (if the plaintiff were to prevail at trial) would be to multiply each of the three possible damages figures by the separate probability that the jury would make that particular award, then to add these three figures. The math in this part of this exercise would look like this:

20% chance of a \$200,000 verdict = \$40,000

60% chance of a \$120,000 verdict = \$72,000

20% chance of a \$50,000 verdict = \$10,000

Total = \$122,000

According to this decision analyst, however, the discounted settlement value of this case is not \$122,000. Rather, to determine that settlement value, it is necessary, under this approach, to multiply this probable damages figure by the analyst's separate estimate of the chances that the plaintiff would emerge from a trial as the prevailing party (48%). So, as applied by this decision analyst, the ultimate discounted settlement value of this case is .48 x \$122,000, which equals \$58,560.

While many defense lawyers might find this analysis attractive, a plaintiff's lawyer is quite likely to feel, perhaps only instinctively, that this approach has yielded a product that bears little relation to the real world and, therefore, must be infected by some fundamental flaw.

As it turns out, there is a high probability (to strain readers' patience) that the plaintiff's lawyer's instinct (in this example) is informed by more than positional bias and delusional self-interest. What might support this

skepticism?

Our decision analyst's apparently straight-forward use of probability theory to determine the discounted settlement value of civil cases appears to suffer from two fundamental problems. The first is rooted in the principle that it is appropriate, under probability theory, to multiply the separate likelihoods that each of two events will occur in order to estimate the net likelihood that both of those events will occur in conjunction only if the occurrence of each event is truly independent. In civil litigation, however, the "events" that would populate the formula that would be used to calculate probability often are not truly independent.

For example, there often is a relationship between the likelihood that a plaintiff will survive a motion for summary judgment and the likelihood that the plaintiff will prevail on the liability issue at trial. In many cases, the same or similar evidentiary variables affect the likelihood of surviving a potentially dispositive motion and of prevailing at trial. Moreover, the size of a damages award can be related to the likelihood that the plaintiff will prove that the defendant is liable, e.g., how much the jury likes and believes the plaintiff is likely to affect both the odds that she will prevail on the liability issue and the amount of damages she will be awarded. Because some of the same variables could have a significant effect on the likelihood of each occurrence, we cannot say, as a matter of probability theory, that each of these events is truly independent.<sup>57</sup>

When two occurrences or events are not truly independent, we cannot reliably use the version of probability theory that is based on multiplying the likelihood that one event will occur by the likelihood that a second event will occur in order to determine the likelihood that the two events will occur conjunctively.

Harvard Law Professor Charles Nesson alerts us to the second potential difficulty with trying to use probability theory in such simple ways to determine the discounted settlement value of civil cases. In an influential 1975 article entitled "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts,"<sup>58</sup> Professor Nesson emphasized that in civil litigation, legal and historical conclusions often are not conjunctive. Instead, as he reminds us, when the law requires a plaintiff to establish several different facts in order to prove liability, the question the law often asks the jury to answer is not "what is the net probability that all of these facts (or

---

<sup>57</sup> See HACKING, *supra* note 58.

<sup>58</sup> Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

events) occurred?" Similarly, when the law requires a plaintiff to prevail on several different issues, the jury is not asked "what is the net probability of plaintiff prevailing on all of these issues?" Stated differently, the law usually does not impose a duty on a plaintiff to prove that the conjoined probability of multiple events exceeds 50%, or that the conjoined probability of prevailing on multiple issues exceeds that figure.

Instead of asking the jury to answer a question of probability theory, the law usually asks the jury to determine, for one central factual issue at a time, whether the plaintiff has proved the particular fact by a preponderance of the evidence. In other words, the jury's job is to decide whether plaintiff's contention about a particular fact is supported by 51% of the persuasive power of the evidence that is relevant to resolving that particular factual issue.

There may be occasions, of course, when juries get confused about what they are being asked to do or for some other reason blur or blend what are supposed to be separate issues or inquiries. A jury might misunderstand a judge's instructions, or the instructions might be unclear. The risk that jurors will blur or blend inquiries presumably is greater when courts use general verdict forms. But any such risk would be greatly reduced when the form in which a jury returns its verdict consists of answers to special interrogatories, as each question asks the jury to determine separately for each material fact whether the plaintiff has met her burden of proof. Moreover, juries are not instructed in probability theory, and even when they blur or blend inquiries that are separate under the law, there is no reason to assume that they purport to apply probability theory during their deliberations. It is more likely that in such circumstances they are relying more primitively on gestalt impressions or their "gut" instincts.

The methods used by some decision analysts, however, seem to be designed to assess the conjoined probability of events or facts whose occurrence are truly independent. Thus, there seems to be a fundamental disconnect between some simple versions of decision analysis and what juries are asked by the law to do. To repeat: juries generally are not asked to determine conjoined probability, and the factual issues that they are asked to resolve separately often are not independent. Given these circumstances, it is not at all clear how the kind of decision analysis discussed above could be used reliably to determine the discounted settlement value of a civil case.<sup>59</sup>

---

<sup>59</sup> The infirmity of using decision analysis to determine settlement value would seem to be compounded if some of the determinations in a particular decision tree would be made by a judge and others by a jury.

## RECIPROCAL COACHING

What are the implications of all this for mediation coaching? As noted in the first part of this section, mediators and other participants in negotiations might be able to use decision analysis for any one of several different potentially salutary purposes, but one such purpose does not seem to be to determine reliably something denominated as the discounted settlement value of a civil case. So a mediator should steer clear of purporting to use decision analysis for this latter purpose, at least absent considerable explanation. And if a party wants to introduce decision analysis into a settlement dynamic, the mediator would be well advised to discuss the purposes of any such use with that party in advance (and probably in private caucus). In such a setting, the mediator probably should suggest that the purposes of a decision analysis exercise be clearly limited and that no claims be made about the utility of such an exercise for identifying the discounted settlement value of the case (or, at least, that any such claims be very clearly conditioned and restrained).

## VIII. CONCLUSION

The concept of coaching by mediators is neither new nor free from controversy. One purpose of this essay has been to explore different possible approaches to coaching (in the context of mediations) and to assess their ethical and utilitarian implications. A more central purpose has been to cast the net of responsibility for coaching activity much wider than it often is. Thus, the phrase "reciprocal coaching" captures the notion that one way to maximize the benefits that mediations can deliver is to encourage all participants, not just the mediator, to assume responsibility for the character and quality of the process, to think about how the health of the process would be affected by behaviors or moves that are being considered, and, at all stages of a mediation, to take the initiative to suggest ideas about how to move the process forward most constructively. Toward these multiple ends, this essay has mined social science research about negotiating, identifying approaches, behaviors, and tools whose use the studies commend. The ultimate goal is to expand the universe of process ideas or devices on which all participants might draw, while enriching their thinking about which tools or approaches might carry the most constructive promise in any given mediation circumstance.

