Texas Wesleyan Law Review

Volume 11 | Issue 1 Article 4

10-1-2004

Settlement Advocacy

Kay Elkins-Elliott

Frank W. Elliott

DOI: https://doi.org/10.37419/TWLR.V11.I1.2

SETTLEMENT ADVOCACY

Kay Elkins-Elliott† *& Frank W. Elliott*††

I. INTRODUCTION 8
II. THE FEARSOME OGRE OF "ZEALOUS ADVOCACY" 9
III. EFFECTIVE SETTLEMENT ADVOCACY 12
A. *Influencing the Minds of Conflict Partners* 12
B. *History of Settlement Science: Law and Social Science* 13
C. *Is It Critical to the Success of a Mediation to Have the Parties Brainstorm as Many Options as Possible Before Deciding on the "Solution"?* 15
D. *Do the Parties (Clients) Need to Tell Their Stories in Joint Session for the Mediation to Succeed?* 17
1. Why Telling One's Story Is Crucial to the Mediation Process 18
2. How Advocates Can Insure that Clients Feel Validated 19
E. *If the Parties Make Their Proposals for Resolution Directly to Each Other, Does the Mediation Have a Better Chance of Success?* 21
1. Defining the Bargaining Zone 22

† Kay Elkins-Elliott, J.D., LL.M., M.A., has arbitrated and mediated over 1700 cases since 1982, specializing in employment, family, and business matters. She served for three years as an Administrative Law Hearing Officer for the EEOC. She has taught ADR, Mediation, Family Mediation, Settlement Advocacy, and Negotiation at Texas Wesleyan University School of Law for thirteen years. During that time, she has coached national championship teams in Negotiation and in International On-Line Negotiation, and regional championship teams in Client Counseling and Representation in Mediation. She has coordinated the Certificate in Conflict Resolution program for Texas Woman's University for 8 years, teaching courses on Arbitration, Conflict Resolution, Mediation, Family Mediation, and Negotiation. She is a Life Fellow of the Texas Bar Foundation, past president of SPIDR, Dallas (now ACR), Council Member of the Texas Mediation Trainers Round Table, a former Council Member of the ADR Section of the State Bar of Texas, a Credentialed Distinguished Mediator, and serves on the Board of the Texas Mediator Credentialing Association. She was co-editor of the State Bar of Texas ADR Handbook (3d ed. 2003).

†† Frank W. Elliott has taught and written about evidence and Texas Civil Procedure for forty-seven years, including thirty-seven at law schools—nineteen at the University of Texas, three at Texas Tech, and fifteen at Texas Wesleyan. He served as Dean at Texas Tech and Texas Wesleyan. He was a Briefing Attorney for the Supreme Court of Texas, Assistant Attorney General of Texas, Parliamentarian of the Texas Senate, and President of the Southwestern Legal Foundation. He served two tours of duty in the Army, one as a tank platoon leader in Korea and the other as a visiting professor at the Judge Advocate General's School, U. S. Army. He is retired from the Army Reserve with the rank of Colonel. He is a member of the American Law Institute, a Life Fellow of the American and Texas Bar Foundations, the namesake for the Elliott Inn of Phi Delta Phi, and appears in the New Mexico Military Institute Alumni Hall of Fame. He was co-editor of the State Bar of Texas ADR Handbook (3d ed. 2003).

2. The Transformative Model 22
3. Framing Proposals Effectively 23
4. Efficient Bargaining 24
F. *Will the Settlement Advocate Have a Hard Time Convincing the Other Party, Who Thinks She Has a 50-50 Chance of Winning a Certain Amount, to Accept an Offer of Half That Amount?* 26
1. Mathematics as Persuasion vs. Costs as Coercion 27
2. Compromise Is Rational vs. Advocate's Belief in Client's Case 28
3. Redefining the Bargaining Zone vs. Adversarial Posturing 28
IV. CONCLUSION 29

I. INTRODUCTION

For many years, law schools have based most of their "practical" instruction on the adversary system's last choice: trials and appeals. First year students are taught how to write an appellate brief and how to make an appellant argument. Maybe this is good, since the odds are that any given student will never again write a brief or make such an argument. After the first year of law school, students are swept into trial advocacy courses, mock trial competitions, and appellate advocacy competitions: *learning how to influence the minds of jurors and appellate judges.* We all know that these activities do more than train advocates, and that is fine, but when less than five percent of all filed civil cases go to trial, we believe that some of the practical emphasis should be on the cases that do not go to trial or even on problems that do not reach the level of a law suit. Most disputes are settled at some stage of the process. Some are even settled after trial or appeal. Why not include the study of how to represent a client in a settlement process as a regular part of the law school curriculum: *learning how to influence the minds of other parties*?

This paper will guide the reader through the legal settlement process stage by stage but will first show an opposing "twitch" that comes from the traditional law school training noted above, emphasized by television and motion picture portrayals of lawyers: zealous advocates in a trial setting (read: warrior) with fights to the finish, flags waving, and trumpets blaring the Deguello. Of course, few people consider the reason for those showings on commercial media. Quiet discussions between lawyers, the back and forth process in mediations, or conferences concerning the wording of a contract do not make lively, exciting entertainment that would draw viewers and win awards. But they do make up the day to day existence of the vast majority of lawyers.

Once the "twitch" has been calmed, this paper will show ways to really be a zealous advocate for a client in negotiation, mediation, and other settlement procedures. This paper will also show the process of how to persuade, influence, and convince others without injury and how to be a zealous advocate in order to obtain the best result for your client.

There is art in persuasion, and there is science. The art is sometimes referred to as emotional intelligence and is exemplified by heroes such as Abraham Lincoln, Winston Churchill, and Clarence Darrow. The art and power of rhetoric in trial advocacy can be taught and is backed by science composed of years of jurisprudential research and writing. The art and power of negotiation and settlement advocacy can also be taught and is backed by a science composed of a solid multi-disciplinary base of research and writing.

II. THE FEARSOME OGRE OF "ZEALOUS ADVOCACY"

Many lawyers refuse to consider anything but complete victory in a dispute because they have been trained to be "Zealous Advocates." To them, to be "zealous"[1] is to fight to the bitter end, even though that end may be defeat.[2] To consider something between victory and defeat would be wimpy. They will even defend that position by saying that it is unethical to do otherwise. Where do they get that idea? More than likely they get that idea from the statement that "[a]s [an] advocate, a lawyer *zealously* asserts the client's position under the rules of the adversary system."[3] However, this statement is taken out of context. The relevant portions of the preamble to the Texas Disciplinary Rules of Professional Conduct read:

> 2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer *zealously* asserts the client's position under the rules of the adversary system. As

1. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1488 (William Morris ed., 1969) (defining "zealous" as "[f]illed with or motivated by zeal; ardent; enthusiastic; fervent. See synonyms at 'eager[,]'" and defining "zealot" as "[o]ne who is zealous; a fanatically committed person; See synonyms at 'fanatic'"); *see also* THE COMPACT OF THE OXFORD ENGLISH DICTIONARY 3868 (24th prtg. in U.S. 1985) (defining "zealous" as "[f]ull of or incited by zeal; characterized by zeal or passionate ardour; fervently devoted to the promotion of some person or cause; intensely earnest; actively enthusiastic[,]" and defining "zealot" as "[o]ne who is zealous or full of zeal; one who pursues his object with passionate ardour; usually in disparaging sense, one who is carried away by excess of zeal; an immoderate partisan, a fanatical enthusiast").

2. *See* Judge David Evans, The Dangers of Zealous Advocacy, Tarrant County Bar Association CLE Seminar Series, September 24, 2004.

3. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 2, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9) (emphasis added).

> negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others . . . .[4]
> 3. In all professional functions, a lawyer should *zealously* pursue clients' interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent . . . .[5]
> 9. Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.[6]

The functions of advisor and negotiator are no less important than that of advocate and include such duties as informing a client of various rules, rights, and possibilities and, most importantly, informing the client of the requirement of honest dealing with others. These duties are reinforced by the rules themselves. Rule 1.03 requires a lawyer to keep a client informed about the status of a matter and to explain the matter so as "to permit the client to make informed decisions . . . ."[7]

Rule 3.03 is entitled "Candor Toward the Tribunal" and provides that "[a] lawyer shall not knowingly make a false statement of material fact or law to a *tribunal*, [nor] fail to disclose a fact to a *tribunal* when disclosure is necessary to avoid assisting a criminal or fraudulent act, . . . [nor] offer or use evidence that a lawyer knows to be false."[8] What many lawyers do not comprehend is that a tribunal is "any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy."[9] Tribunals are "courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, *arbitrators*, *mediators*, hearing officers, and comparable persons empowered to resolve or to recommend a resolution of a particular matter."[10]

The issue of candor is repeated in Rule 4.01, which provides that:

> [i]n the course of representing a client[,] a lawyer shall not knowingly make a false statement of material fact or law to a third person[, nor] fail to disclose a material fact to a third person when

4. *Id.* at preamble ¶ 2 (emphasis added).
5. *Id.* at preamble ¶ 3 (emphasis added).
6. *Id.* at preamble ¶ 9.
7. *Id.* at Rule 1.03.
8. *Id.* at Rule 3.03.
9. *Id.* at terminology.
10. *Id.* (emphasis added).

> disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.[11]

The duty of honesty must be kept in mind when considering the further duty of a lawyer to inform the appropriate disciplinary authority when he knows that another lawyer has committed a violation of the rules "that raises a substantial question as to that lawyer's *honesty* [or] *trustworthiness* . . . ."[12]

The Preface to the recent Ethical Guidelines for Settlement Negotiations from the Section of Litigation of the American Bar Association states:

> Settlement negotiations are an essential part of litigation. In light of the courts' encouragement of alternative dispute resolution and in light of the ever increasing cost of litigation, the majority of cases are resolved through settlement. The settlement process necessarily implicates many ethical issues. Resolving these issues and determining a lawyer's professional responsibilities are important aspects of the settlement process and justify special attention to lawyers' ethical duties as they relate to negotiation of settlements.
> These Guidelines are written for lawyers who represent private parties in settlement negotiations in civil cases . . . . The Guidelines should apply to settlement discussions whether or not a third party neutral is involved . . . . As a general rule . . . the involvement of a third party neutral in the settlement process does not change the attorneys' ethical obligations.[13]

The substantive portions of the Guidelines echo the Texas Rules on honest and fair dealing generally[14] with courts[15] and with third persons[16] and adds an important duty that "[i]n the settlement context, a lawyer should not exploit an opposing party's material mistake of fact that was induced by the lawyer or the lawyer's client and . . . may need to disclose information to the extent necessary to prevent . . . reliance on the . . . mistake . . . ."[17] The Guidelines also require "[a] lawyer [to] consider and . . . discuss with the client, promptly after retention in a dispute, and[,] thereafter, possible alternatives to conventional litigation, including settlement."[18]

A lawyer is not just a hired gun committed to a fight to the finish. A lawyer should consider himself to be a professional retained to do

---

11. *Id.* at Rule 4.01.
12. *Id.* at Rule 8.03 (emphasis added).
13. SECTION OF LITIG., ABA, *Ethical Guidelines for Settlement Negotiations* § 1, at 1 (Aug. 2002), *available at* http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf (last visited Oct. 2, 2004) (on file with the Texas Wesleyan Law Review).
14. *Id.* §§ 2.1, 2.3, at 2–4.
15. *Id.* § 2.5, at 5–6 (stating that a "[f]ailure to make such disclosure is not excused by the lawyer's ethical duty otherwise to preserve the client's confidences").
16. *Id.* §§ 4.1.1, 4.1.2, at 34–37.
17. *Id.* § 4.3.5, at 56.
18. *Id.* § 3.1.1, at 7–8.

what should be done for the client. If settlement through negotiation or some form of ADR is best for the client, then that is what should be done. If settlement fails, then a lawyer should be the best litigation advocate that he can be. In either case, a lawyer should prepare himself and the client for the proper process. Just as the lawyer and client have to be prepared to testify if litigation occurs, the lawyer and client have to be prepared for negotiation, mediation, or other forms of ADR. For some lawyers, wearing the "gorilla suit" of trial advocacy while carrying the olive branch of peaceful resolution is impossible. For some personalities, trial activities are more suitable while for others, reasoned, creative efforts to end disputes and create deals are both appropriate and comfortable. A client needs both sets of skills. Lawyers and law firms can meet these quite different objectives by providing specialists in both fields. Law schools must equip future lawyers with settlement advocacy expertise as well as trial and appellate advocacy skills. Now, let us examine some of those skills.

III. Effective Settlement Advocacy

Persuasion can be accomplished through the use of power, rights, or collaborative problem solving. The use of power carries risks of impasse and injury to relationships. Persuasion of a judge or jury that one party is right and the other wrong is a high stakes gamble: someone will always be a loser. Both of these methods are costly. The history of negotiation in the shadow of the law reflects delays, high costs, and the risk of loss. Mediation and other forms of ADR were introduced to alleviate those costs and reflect a collaborative, rather than adversarial, method of problem solving.

A. *Influencing the Minds of Conflict Partners*

Although the arts of persuasion and negotiation are powerful tools for influencing others, they have palpable limits. Mastery of either or both does not guarantee success for advocates. In transactions and disputes, lawyers and clients make choices: shall we use power, for example, economic leverage, or a strike rally? Shall we focus on who is right under the law or on morality or on fairness norms? Shall we negotiate from an interest-based perspective and attempt to create value which can be appropriately allocated in a problem-solving process? Shall we bring in a transformative facilitator to provide an opportunity for the parties to become empowered, to make their own decisions, and develop ground rules based on their own values and perceptions of the problem and each other?

In a dispute that has escalated to the level of litigation, we typically first use negotiation or its cousin, mediation, as the preferred type of interpersonal communication. Even after that process decision has been made, many other questions arise. What style of negotiation is

best suited to this case: adversarial or problem-solving? What tactics should we use in the distributive bargaining phase of negotiation: competitive or cooperative? How much involvement, if any, should our client have and how should her role be defined? Is there a particular strategy that will increase our effectiveness? Does negotiation theory have a useful application in settling a lawsuit? Should the settlement advocate strive for objectives beyond just settling the lawsuit? What financial incentives could be created to more closely align the interests of the client and those of the lawyer?

There is now a modern ritual for effective conflict resolution that unfolds in predictable stages. In the beginning, a client's feelings and needs are identified so that many possibilities for meeting those needs can be created. Clients are then given an opportunity to tell their own story in their own way, clearing the way for an exchange of proposals. The proposals can then be evaluated in a rational manner with the help of the lawyer and the mediator. Clients can be empowered either to accept or to reject final offers or to settle. In the end, once tentative closure has been reached, further opportunity for additional value for each side can be sought before the final agreement is written and signed. This ritual has been developed in the past twenty or more years in Texas and the rest of the nation in response to perceived inadequacies in legal procedures and remedies.

B. *History of Settlement Science: Law and Social Science*

At the 2004 annual meeting of the American Bar Association Alternative Dispute Resolution Section, a legal educator's colloquium focused on some of these inadequacies under the heading: The Interface Between Negotiation Theory and Mediation Practice.[19] This meeting came near the end of a semester in which the course, Settlement Advocacy, was first taught by the authors of this piece at Texas Wesleyan University School of Law. After the authors' combined experience of many arbitrations and mediations during thirty years of mediation practice, eighty-seven years of law practice, fifty-two years of teaching law students, and hundreds of hours of attending dispute resolution programs and training, some questions seem particularly important to answer or at least to ponder. The necessity for specialized settlement advocacy training is not apparent to many lawyers, since most of whom believe themselves to be excellent negotiators because they settle ninety-five percent of their lawsuits and consider a split-the-difference compromise of the extreme financial positions taken during legal negotiations to be an acceptable outcome.

19. Bobbi McAdoo et al., The Interface Between Negotiation Theory and Mediation Practice, Address at the American Bar Association Section of Dispute Resolution: The Sixth Annual Conference Resolution and Resilience in New York (Apr. 17, 2004).

Until quite recently, research and writing in the related fields of conflict resolution, communication, negotiation, and the psychology of influence have come more from social scientists than from lawyers. Perhaps this is an explanation for the general resistance to use more sophisticated techniques in negotiation and the settlement of law suits: most practicing lawyers simply never read the abundant literature which would inform them of a paradigm shift. If the only objective of an advocate is to make the deal or end the lawsuit, why bother to update our skills? We are already achieving those objectives. The phenomenon of collaborative law and the institutionalization of ADR in many Texas courts, agencies, and organizations point to an expansion of consciousness in consumers and their lawyers. For many graduating law students, expertise in these new areas of law practice is necessary as law firms, corporations, and government employers become more frequent and sophisticated users of ADR and market their competency in these areas.

From a therapeutic justice[20] or peacemaking perspective, conflict can be an opportunity for the creation of mutual gain, personal growth, redefinition of the issues, and enhancement of an existing relationship that is threatened. These goals are not inconsistent with traditional advocacy; in fact, they are implicit in the ancient role lawyers have always played: protecting the client and society. The methods used to resolve conflict will determine if these objectives are met. The alternative is to continue to be content with mere split-the-difference compromise, less than optimal results for our clients, and a negative image in our society.

Until recently, the impact of negotiation analysis on the legal profession has been relatively slight when compared to the "juggernaut of adjudication analysis that dominates the legal horizon."[21] Even in the orientation to law school, before the first classes in contracts or torts, we come to value a command of trial procedure. We are now being told that the civil trial to a jury is an endangered species. Despite more civil law suits being filed in the last decade than in the previous decade,[22] only three percent actually are tried.[23] Why are we spending so much valuable class time training for a vanishing process? The civil trial will never disappear, but more attention needs to be given to

20. Hon. John Coselli, Address at Problem Solving Processes: Peacemakers and the Law (Apr. 30, 2004) (Therapeutic Justice is a concept that is finding particular favor with family judges. It is characterized by a concern for the welfare of the society at large, and third parties to the lawsuit (such as the children in a custody hearing) rather than a narrow focus on which of the litigants should prevail based on legal or factual arguments and proof).

21. CHARLES B. WIGGINS & L. RANDOLPH LOWRY, NEGOTIATIONS AND SETTLEMENT ADVOCACY: A BOOK OF READINGS, at v (1997).

22. *Id.* at 40 (alluding to the fact that civil litigators complained of the increasingly uncivil behavior of other civil litigators).

23. Hon. Ed Kinkeade, Address at Problem Solving Processes: Peacemakers and the Law (Apr. 30, 2004).

negotiation analysis and the creation of faster, cheaper, better outcomes for our clients. The responsibility for this lies with law schools.

In the last two decades, research and writing in the field of understanding conflict and eliminating barriers to successful negotiation and dispute resolution have blossomed.[24] No one discipline or level of analysis is sufficient for this work. Lawyers benefit from the continued research focusing on conceptual analysis, theory building, and application. From that work, some concerns and issues have emerged that form the basis for this monograph. We will address four of those issues in this section: brainstorming, the stories, demands, and decision making. It has been said that the knowledge base from scholarly output operates like an expensive perfume because "[w]hile the fragrance of sound bargaining knowledge may be universal, the scent takes on the individual characteristics of each bargainer's personality . . . ."[25]

C. *Is It Critical to the Success of a Mediation to Have the Parties Brainstorm as Many Options as Possible Before Deciding on the "Solution"?*

One step in the classic integrative bargaining process articulated by Roger Fisher and William Ury[26] is to brainstorm as many options as possible to meet the previously identified interests of the parties. The purpose of this activity is to create value or opportunities for mutual gain from which the parties will later produce actual proposals for settlement. The creation of options is supposed to be an exercise in free association without evaluation. However, evaluation of options frequently coincides with brainstorming due to several psychological phenomena, one of which is known as *reactive devaluation.* In a mediation, one party will hear an option from the other side and may immediately devalue it in reaction to the competitive climate and in the belief that, if the idea came from the opposition, it must be suspect.[27] While having many options on the table from all stakeholders is an important ingredient in creating value, the problem of reactive devaluation can have a negative impact on the mutual gain perceived.

One operational solution is to have the parties generate options in separate rooms and then to have the mediator or a spokesperson for

24. Kay Elkins-Elliott & Frank W. Elliott, *Introduction to Chapter 1* of the ALTERNATIVE DISPUTE RESOLUTION HANDBOOK: ALTERNATIVE DISPUTE RESOLUTION SECTION, STATE BAR OF TEXAS 1, 10 (Kay Elkins-Elliott & Frank W. Elliott eds., 3d ed. 2003) (noting research and writing in the ADR field since the Pound Conference as 3,988 books on mediation, 2,910 books on negotiation, and 2,376 books on conflict resolution).

25. WIGGINS & LOWRY, *supra* note 23, at vi.

26. ROGER FISHER & WILLIAM URY, GETTING TO YES 60–62 (Bruce Patton ed., Penguin Books 2d ed. 1991) (1981).

27. Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 246–47 (1993).

each stakeholder group communicate the preferred options as merely areas for discussion which are likely to be attractive to the other party. The mediator may even be instructed to convey some of the favored options to the other party as the mediator's hypothetical ideas for ways to meet the parties' interests. This reframing of the options could preclude or diminish reactive devaluation. After the initial presentation of ideas for meeting the parties' needs, the evaluation of those options could then be accomplished in joint session, where the comparisons to reference points or expectations could be aired, or in caucus, where the mediator could interject some rational methods of evaluation based on actual value.

It is useful for all clients, particularly sophisticated business professionals and anyone with negotiation expertise, to be prepared by the advocate to participate fully by bringing to the table many ideas for resolving the joint problem the parties share.[28] Often, options generated by one side will duplicate or be complementary to options generated by the other, particularly when the clients have spent sufficient time in preparing for the process. Although the processes differ, advocates should coach their clients to be eloquent and creative participants in the settlement process just as they would prepare the client for success on the witness stand.

Clients can also be coached to listen actively and openly without critiquing the ideas of the other side in order to get useful ideas on the table. Advocates should present options strategically to the other party or the mediator to gain any possible advantage for their client. There may be low-cost-for-our-side but high-value-to-the-other-side options (value-creating trades) that provide benefits for both parties. In order to prevent leaking strategic information, strong preference for one option over another should not be disclosed until the final phases of negotiation. While openness and creativity are important, a strategic plan should be formulated and followed to achieve as much of the joint value as possible. All of these techniques represent zealous, ethical, and effective advocacy.

Another type of devaluation occurs when recipients of an option for settlement compare it with a result achieved in a separate, but similar, negotiation. This may arise because a disputant will speak with family, friends, or colleagues about a prospective negotiation or mediation and will be told what they have achieved in a supposed similar situation. Knowledge of that other process may lead the disputant to expect an equal or better outcome in her own process, even though each negotiation has its own unique mix of human dynamics, facts, exogenous climate, and alternatives. *Anchoring* is the cognitive process of determining value based on some reference point in the negotiator's

28. HAROLD I. ABRAMSON, MEDIATION REPRESENTATION 191–92 (Anthony J. Bocchino et al. eds., 2004).

mind or by comparing an offer to a predetermined reservation price in the current negotiation.[29] Dispute resolution scholars have noted that this tendency to link current options and offers to past events impedes rational decision-making and frustrates the point of brainstorming: to create opportunities for mutual gain.[30] The settlement advocate should be prepared to explain each option in terms of value to the other side and urge that in the brainstorming phase of negotiation, option generation just be a trigger for creative thinking rather than a suspicious interchange. When the options suggested by the advocate are discounted because she is not neutral, the mediator can accomplish the same objectives.

Negotiators tend to be more risk-averse to a perceived loss than to a possible gain, even though a rational person would simply weigh the probabilities and the expected outcome of each transaction and make decisions based on statistics.[31] Since the negotiator is not a computer, many factors impact decision making such as reactive devaluation, anchoring, risk preference, and attitude toward the other party to name a few of these factors. Skilled advocates craft options in language that minimizes the irrational, distorted reception they may receive at the bargaining table. Settlement advocates prepare for the psychological aspects of bargaining just as assiduously as they prepare their presentation concerning the facts and the law, and they coach their clients to actively assist in the creation of mutual gain from which optimal outcomes arise. In choreographing the mediation or negotiation process, settlement advocates should devise a representation plan that reflects the functions of the forum for the client. Implementing this plan will shape the process itself along lines that best serve each client's needs in the particular fact pattern at issue: the form of the process follows its function.

D. *Do the Parties (Clients) Need to Tell Their Stories in Joint Session for the Mediation to Succeed?*

A disputant should have an experience of justice as well as an end to conflict. Constitutional guarantees focus on procedural fairness, the opportunity to be heard in a public trial, and the opportunity to be judged either by a jury of our peers or a public official who is neutral.[32] These rights are precious and define to many the essence of what makes American jurisprudence superior to other systems. These days, the right remains, but its actualization is rare. Long before trial day, many Texas litigants are ordered to mediation, where most mat-

29. *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 138–42 (1994).

30. *See id.* at 139.

31. RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 45 (2002).

32. *See* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do with It?*, 79 WASH. U. L.Q. 787, 791 (2001).

ters settle. The modern courthouse is multi-doored[33] because courts are unable to try every case on their dockets. How then does the disputant experience justice?

When ordered to mediation or when voluntarily choosing it, most lawyers prefer a mediator who will bypass or eliminate joint sessions, giving the clients no opportunity to tell their story to the other real decision-makers in the process. There are many strategic and philosophical justifications for this practice, withholding information that may be crucial to winning at trial being the most obvious. How can this concern be addressed while giving the client an opportunity to tell her story?

1. Why Telling One's Story Is Crucial to the Mediation Process

A client can achieve some sense of justice by telling her story in caucus to a mediator who really listens and does not interrupt, criticize, or cross examine her. The mediator cannot reveal any information to the other party unless authorized to do so,[34] and the client may perceive this court-appointed neutral as a substitute for a judge. The client may really want to receive an apology, have feelings validated, or just be heard by the party she believes wronged her. If the advocate has not prepared her for this opportunity, or does not believe the client can speak without weakening the case, the mediator may be asked to convey the story and bring back an apology or at least a validation of the client's perception of the dispute. In some cases, this acknowledgment may be as important as a monetary settlement.[35]

In a recent probate case, a brother and sister were left two pieces of property, one as a tenancy in common and the other, which included a house, as a life estate to the brother with remainder to the sister. The siblings had been raised in an atmosphere of physical violence, alcoholism, and emotional neglect. At the time of the mediation, the siblings had not communicated with each other in over two years. The process was structured to allow the brother, a violent and somewhat low functioning individual, to speak directly to his sister about his perception of his deprived childhood. The sister was willing to be an attentive listener for as long as was necessary in order to be able to reach a place where decisions could be made. Because the brother

33. *See* Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 130–31 (1976) (The concept of the multi-door courthouse was first proposed by Professor Frank Sander of Harvard. This concept refers to the practice of using the process which best suits the problem. After the Pound Conference in 1976, court connected alternative resolution programs were created.).

34. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(b) (Vernon 1997 & Supp. 2004–2005).

35. *See* Jennifer K. Robbennolt, *Apology—Help or Hindrance?*, DISP. RESOL. MAG., Spring 2004, at 33, 33–34. *See generally* THANE ROSENBAUM, THE MYTH OF MORAL JUSTICE (2004) (discussing the idea of moral justice as opposed to mere monetary settlement).

was empowered to speak, and the sister was willing to give empathy and attention, the parties were both able to recognize their own and the other's interests. The sister did not want any of the property, only money. The brother wanted to own the house and receive very little money because of the possible effect on disability income. Their strong preferences promoted tradeoffs that were valuable to each. The sister got more than half of the cash from the sale of the vacant property, and the brother got the remainder interest in the house. Joint session was used during most of the mediation. Because most of the day was spent telling and listening to the life stories, and the stories disclosed the siblings' perceptions, feelings, and interests, little time needed to be spent in haggling about money details. At the end of the process, the siblings hugged and made plans to visit in the future. The relational aspects of the process, past and future, could not have been resolved in a caucus setting. The parties resolved the financial aspects of the dispute more completely than any judge could have ordered.

2. How Advocates Can Ensure that Clients Feel Validated

It is the responsibility of the settlement advocate and the mediator to design, manage, and deliver an experience that will meet a client's expectation of procedural justice and result in satisfaction with the process and long-term compliance with the settlement.[36] Parties need to believe that they influence each other and the ultimate decision. Although a mediator has no actual power to decide, parties perceive court-annexed neutrals as having the imprimatur of the court system with which they are associated. Unfortunately, "[l]awyers regularly fail to appreciate and accommodate their clients' need to tell their stories."[37] Settlement advocates would be wise to temper their primary need for an expeditious settlement with some consideration for their clients' needs to be valued members of a society and for self-determination in their own dispute.[38]

In a recent partnership mediation involving the failure of one of the partners to pay the other the agreed amount at dissolution, the lawyers first refused to allow their clients to participate in a joint session. When the partnership was working, one partner was the creative designer, and the other kept the books and attracted new business. The dissolution involved the designer's buying out the business partner. The mediator began to suspect that the parties would profit from being able to address each other directly, and the lawyers agreed. In the joint session, the designer admitted that he had not paid because ever since the dissolution, the business did not generate enough income to

36. *See* Welsh, *supra* note 32, at 791–92.
37. *Id.* at 854.
38. ABRAMSON, *supra* note 28 at 186–87.

discharge the contractual obligation. In response to questions from the mediator, the business partner admitted that she was often asked for referrals to a designer but refused to refer any business to someone who owed her money and was on the other side of a lawsuit. This exchange led to an enhanced working relationship in which each party was able to help the other. The business partner agreed to refer new business to the designer, who agreed to pay the first $30,000 received from that business to honor the debt. The business partner also agreed to find and train a replacement for herself in the business, freeing the designer to do what he did best. Each acknowledged the value of the prior relationship and paid respect to the other's talent.

If that mediation had continued to be an exercise in legal negotiation, which was characterized by separate caucus sessions, the domination of lawyers, and the solutions generated by the lawyers and the mediators, the clients' mutuallly beneficial, collaborative outcome would not have been achieved. Every case must be considered on its own merits: the relationship the parties had, the respect they may still feel for each other, their complementary needs, the strengths and weaknesses of their legal positions, their cognitive intelligence, emotional intelligence, and numerous other factors. Advocates and mediators, working as a team, must structure every mediation in light of those contextual facts.

Very few litigants get to tell their story in a courtroom. Many now expect to get that opportunity in a mediation that is being mandated by the court. If that expectation is not met, the current esteem in which mediation is generally held could be diminished, and that could even "tarnish the legitimacy and authority of the courts."[39] Collaborative lawyers, some advocates, and many mediators understand and accommodate this need. All settlement advocates must do so.[40]

The need to tell the story and influence the other party is true for people of all cultures, for example, the Navajo Peacemaker Court and the Peoples' Courts of China. People in conflict, irrespective of their cultural values, need considerate treatment by third parties in authority (judges, police), even-handed, dignified treatment by decision makers (judges, arbitrators, other parties, juries), and an opportunity for voice. These social needs matter even more to most disputants than the substantive outcome of the processes. Citizens consider

39. Welsh, *supra* note 32, at 861.

40. ABRAMSON, *supra* note 28, at 187 (The traditional relationship between lawyer and client is that the client unloads the story onto the lawyer and then returns to business. Lawyers like this arrangement because it lets them do what they do best: deal with legal problems. In mediation, this behavior does not always work because, in many cases, the clients need to interact with each other. Selecting a mediator who progressively involves each client in actively resolving the dispute is important for effective settlement advocacy.).

themselves to be the "clients" of public servants.[41] Settlement processes will be successful to the extent they meet the need for voice.

E. *If the Parties Make Their Proposals for Resolution Directly to Each Other, Does the Mediation Have a Better Chance of Success?*

Parties need to tell their stories to someone other than just their lawyer, but the decision to have clients make proposals at the bargaining table raises different issues. When the bargaining process reaches the distributive phase where value is being claimed, certain psychological, strategic, and organizational barriers must be considered.[42] In formulating a mediation representation plan to overcome or minimize these barriers, settlement advocates will accomplish four tasks: (1) choosing a negotiation approach consistent with creative problem solving; (2) setting clear objectives and goals that meet the parties' interests; (3) determining how to use the mediator most effectively; and (4) deciding when to use certain techniques at each key junction in the mediation process.[43] Within this framework, the offering of proposals for actual deals should be postponed until after interests, options, and psychological issues have been fully addressed. This sequence may be frustrating for the other party who is anxiously waiting for the first real offer which will signal the essence of the "real" negotiation. Unless all clients are coached on the process, and the mediator's style is consistent with a problem-solving approach, having proposals occur late in the process will be puzzling and may make everyone impatient. There may be tension between lawyers and clients whose interests are in conflict because lawyers usually prefer to do protracted discovery to gain leverage and properly evaluate the

41. *See* James W. Gibson, *Mediating Criminal Conflict*, *in* ALTERNATIVE DISPUTE RESOLUTION HANDBOOK: ALTERNATIVE DISPUTE RESOLUTION SECTION, STATE BAR OF TEXAS 203, 203–04 (Kay Elkins-Elliott & Frank W. Elliott eds., 3d ed. 2003) (explaining the process of criminal mediation and citing M. UMBREIT & J. GREENWOOD, UNIV. OF MINN. SCH. OF SOC. WORK, NATIONAL SURVEY OF VICTIM OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES 4 (1998)) (There were 289 victim offender mediation programs identified of which eighty-one percent reported working with juvenile offenders and their victims). The Truth and Reconciliation Hearings in South Africa, conducted after apartheid was abolished, illustrate this process, and the deep need to air wrongs and to be given a full, compassionate, and public hearing. During these hearings, citizens were present and allowed to gain emotional closure when public servants confessed, and in some cases apologized, for violations of human rights and for violations of law. No reprisals or punishments were allowed in the proceedings. This process used during the Truth and Reconciliation Hearings in South Africa, on a grand scale, resembles the model for Victim Offender Mediation used in Texas and many other states. Furthermore, an active juvenile mediation program exists in Fort Worth, Texas, supported by Judge Jean Boyd and staffed by voluntary mediators through Dispute Resolution Service of North Texas.

42. *See* Robert H. Mnookin & Lee Ross, *Introduction*, *in* BARRIERS TO CONFLICT RESOLUTION 2, 22–23 (Kenneth J. Arrow et al. eds., 1995).

43. ABRAMSON, *supra* note 28, at 154–62.

chances of winning in court. Clients may not be comfortable paying for this part of litigation but will still expect the lawyer to tell them what the case is worth. Here, a skilled mediator can point out to both parties their shared interests and the advantages of having a defined bargaining zone to work within and the advantages of minimizing legal fees, and the costs of experts, by stipulating to certain realities for the purpose of settlement.

1. Defining the Bargaining Zone

Settlement advocates, even with minimal discovery, can usually estimate the expected value of a case. In most situations, the advocates should make proposals after consultation with their clients or should enlist the help of the mediator. The advocate can always use confidentiality as a way to keep information from the other party, and the mediator has additional layers of confidentiality to bolster the auction activity. The mediator can also expand the bargaining zone by pointing to opportunities for relationship enhancement, future business revenue, the value of in-kind services, trade-offs of preferences, lowered transaction costs, and the value of not risking a public loss at trial. Primarily, the mediator can educate the parties to the existence of common barriers to settlement and work through or around them in a way that the parties and their lawyers cannot do because they are partisan.[44]

2. The Transformative Model

From a different perspective, transformative mediators consciously reject responsibility for generating or reframing proposals in favor of calling attention to the process opportunities for empowering the parties.[45] Mediators using this approach will encourage the parties themselves to behave in any way they choose consistent with their own empowerment and recognition of the problem and their relationship to it. Parties are not directed to solve their problems in a structured, problem solving sequence but to recognize each other's needs and values, to hear the other party's perceptions and feelings, and to celebrate small, incremental improvements in understanding the conflict environment and the consensus process.

This type of process can and often does occur with no advocates present, for example, the transformative employment mediation program of the United States Postal Service. The mediator does not convey offers because most transformative mediators use a joint session model with no or rare caucuses. There is no reason, however, that

44. *See* Mnookin & Ross, *supra* note 42, at 22–23.

45. *See* Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach To Practice*, 13 MEDIATION Q. 263, 267 (1996).

properly trained settlement advocates could not promote such a mediation style and could not be a meaningful part of it. In one mediation observed by the Author, board certified family litigators sat by for eight hours in joint session while their clients, aided by a transformative mediator, worked through issues involving domestic violence, joint managing conservatorship of two children, and visitation. The advocates were supportive, cautious, and able to promote this type of process, which the parties requested, while protecting their clients' financial and psychological interests. These parties and their lawyers had a common and overwhelming interest: to protect their children from protracted conflict.

Whether the parties, their lawyers, or the mediator convey proposals is a function of the mediator's style and, therefore, depends on what mediator is chosen by the participants. The success of the collaborative or transformative process depends in part on how the participants define success.

3. Framing Proposals Effectively

When lawyers offer proposals to each other, with or without the mediator's assistance, as an implementation of the representation plan prepared before mediation, there is an opportunity to frame the offers in a way that is most likely to be positively perceived. Rational economic analysis suggests an offeree should be sensitive to the actual financial impact of offers on the client's balance sheet, but research shows that other factors intervene. Behavioral decision theorists have demonstrated empirically[46] that lawyers who describe offers in terms of gains rather than losses can influence the other party's receptivity. Lawyers tend to craft statements to avoid admitting liability or revealing any bargaining weakness (avoidance of a negative), but lawyers are not as skilled in framing offers that are likely to be accepted because they suggest value (pursuit of a positive). *Prospect theory* is a term for the phenomenon of risk preference in conditions of uncertainty and assumes that people's tolerance for risk (risk preference) differs for gains and losses. Researchers have documented a systematic preference for receiving $1,000 for sure to a fifty-fifty chance of receiving $2,000 or nothing, even though a computer would rank these outcomes as identical.[47] Studies show that the loss of $1,000 is more than half as painful to the possessor as losing $2,000, and people will prefer to risk a fifty percent probability of losing the $2,000 or losing nothing to the certain loss of $1,000 because they are more risk-seeking in conditions of medium probability losses. This may not be rational, but it is very human. How can advocates use the information

46. *See* Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 43 (1999).

47. *See id.* at 43–44 (noting that people are generally risk-averse to medium probability gains).

that potential losses affect choices more often than potential commensurate gains to achieve optimal outcomes?

People usually require a fifty percent chance of gaining much more ($200 to $300 more to be exact) than the $100 they have a fifty percent chance of losing.[48] An advocate can propose tradeoffs for mutual gain that minimize any perception of actual loss. For the unemployed wife in a divorce case, framing an offer as a way to pay more dollars into her budget for her three children because it is characterized as alimony (a tax credit) sounds better than pointing out that the payor gets a tax advantage because he is in a much higher marginal tax bracket than his spouse. Both parties financially benefit from this outcome, but if emotions are strong, any benefit to one side may be perceived as a loss for the other, that is, reactive devaluation. Even though the wife may have non-monetary reasons for wanting the money to be characterized as child support (does not terminate upon remarriage, different enforcement options), if her preference is for receiving more dollars, and his is for the tax dollars saved, and if his preference is even stronger than hers, there is a net gain for both with no loss, even though their positions are opposed. Even in pure distributive bargaining, there are opportunities for value-creating trades.

Both parents are better off saving the transaction costs of going to trial so long as the agreement is within the zone of positive agreement they have defined.[49] In this case, there is further value or final settlement after tentative settlement (that is, *post settlement settlement*) because of the different marginal tax brackets and the stronger preference of the husband for the favorable tax treatment. Aside from math and psychology, this outcome creates value because it benefits the children who are loved by both parents and, therefore, enhances the family unit. In the "singed earth" climate of many divorce cases, intelligent framing for psychological effect makes good sense.

4. Efficient Bargaining

Knowledge of the psychology of value also improves the efficiency of negotiation. The natural reluctance to make concessions (losses) slows down the distributive bargaining phase. Trade-offs of strong preferences, however, are perceived as gains by each side and are easier to make. A good strategy is for each advocate to prepare a unified *dollar metric*, that is, a spreadsheet for all issues under consideration, and to continually update the trade-offs as global gains rather than fixating on each change as an incremental loss or gain. Settlement

48. *Id.* at 44.

49. *See* Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791–92 (2000) (describing the zone of positive agreement as the "zone definition"). The Authors note that the Zone of Positive Agreement (ZOPA) is that area of agreement between the two parties' reservation points, within which any agreement is better than no agreement.

advocates can project spreadsheets from a computer for the clients to view together and change while the overall effect is shown at the "bottom line."[50] If both settlement advocates agree on the data, this objective visualization of the community estate eliminates many hours of haggling. A pre-mediation accord of the two lawyers, eliminating data confusion, accompanied by neutral appraisals of value for all assets in dispute would eliminate many of the problems encountered in closure. In our many mediations, we have only seen this technique employed once by a certified public accountant brought in as a neutral expert. Some advocates have prepared similar presentations but never in cooperation with their opposing counsel. Collaborative lawyers frequently use these techniques.

There are other forces at play in auction bargaining. One of these forces is the natural desire of sellers to maximize and buyers to minimize, referred to as the "zero-sum" assumption; that is, every dollar the seller gains is a dollar the buyer loses. Another powerful weapon of influence is the *reciprocity norm*.[51] The psychology of influence teaches us that reciprocation governs the compromise process, which is the basis for all bargaining.[52] Once the first concession is made by a defendant, there is a powerful social norm triggered that virtually compels the plaintiff also to make concessions. The gifted negotiator takes an initial position that yields a desirable final offer after a series of carefully calibrated, reciprocal concessions.[53] In the tension of opposing psychological forces, reciprocation trumps. We participate knowingly in this powerful network of obligation because it has helped us individually and societally since the dawn of humanity.[54]

In court-annexed mediation, the client is usually the least skilled negotiator in the room and has an emotional or financial stake in the outcome. The settlement advocate should be the most skilled and the best informed on the substantive and psychological issues that must be resolved but is partisan by definition. The mediator may actually be the most skilled negotiator in the room because that is her specialty while the advocate usually has to spend many working hours preparing for a possible trial as well as advocating in mediations. The media-

50. Clients are usually pleased to have a moving, visual summary of their assets and liabilities, and clients are usually pleased to see the impact on the overall estate of each decision they make. The more sophisticated the client, the more useful this approach. For clients who are math challenged, this technique may be necessary if decisions are to be reached quickly without confusion, delay, or decision regret.

51. *See* KOROBKIN, *supra* note 31, at 184 (referring to a seminal work on negotiation, HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 47 (1982), where the process is called the "negotiation dance").

52. *See id.* at 185 (quoting ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE (1993)); *see also infra* Part III.F.

53. *See id.* at 189–91 (quoting ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE (1993)).

54. *Id.* at 185 (quoting ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE (1993)).

tor is also neutral and has the best chance of framing offers that will be carefully considered and perhaps lead to success. In the auction bargaining stage of settlement, tensions mount, and the threat of impasse looms large. The leverage of bargaining in the shadow of the law can be an advantage if lawyers and mediators design this part of the process to resemble a moderated settlement conference.[55] The mediator is the tribunal and sits in for the panel but has no power to decide for the parties or to coerce them into ending the lawsuit: leverage without loss.

F. *Will the Settlement Advocate Have a Hard Time Convincing the Other Party, Who Thinks She Has a 50-50 Chance of Winning a Certain Amount, to Accept an Offer of Half That Amount?*

The psychophysics of value and chance distort rational decision making.[56] Although a body of social science data explains these "irrational" determinants, few advocates are knowledgeable about or skilled in applying this wisdom. Lawyers are heavily schooled and practiced in analyzing law and making it conform to the remedies they seek for their clients. Although negotiation is frequently employed to settle lawsuits or to create new deals, few lawyers understand how to turn a dispute *into* a deal. Legal scholars attribute this to a lack of training in interest-based negotiation and cognitive tension between creating and claiming value.[57] The following aspects of settlement explain why lawyers can become part of the problem rather than the solution: (1) using litigation costs to coerce the other party into surrendering is an old war tactic that can work but more often postpones or prevents settlement; (2) urging a client to compromise may seem like a loss of faith in the case; conversely, delaying settlement rewards the lawyer at the client's expense; and (3) puffing up the strengths of one case and attacking the weakness of the other leads to rigid, adversarial haggling.[58]

To address these issues, it is necessary first to understand more about decision making. The study of decisions involves normative analysis, that is, the logic and rationality of decision making and descriptive analysis; which looks at people's actual beliefs and preferences.[59]

The standard rational theory of consumer behavior assumes invariance in similar situations: saving $5 on a $125 purchase (a savings of

55. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.025 (Vernon 1997).

56. *See generally* Robert H. Mnookin, *Turn Disputes into Deals*, NEGOTIATION (Newsletter from Harv. Bus. Sch. Pub. & the Program on Negotiation, Cambridge, Mass.), May 2004, at 1–4 (discussing influences on decisions to negotiate instead of litigate).

57. *See id.* at 1.

58. *See id.* at 2–3.

59. *See* Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, 39 AMER. PSYCHOLOGIST 341, 341 (1984).

four percent) by driving an additional twenty miles is just as acceptable as saving $5 on a $15 purchase (a savings of thirty-three and one-third percent) by driving the same distance. Research shows that consumers construct mental accounts when faced with such choices, and they do not make rational decisions.[60] The actual choice, unlike standard economic theory, is affected by loss aversion—that in turn favors stability over change—and by the perceived proportionate gain. Research shows a systematic preference for driving twenty miles to save one third of the purchase price but a resistance to driving that distance to save four percent of the purchase price.[61] The mental account of the decision maker has automatically reframed the parameters of the problem, producing opposite decision rules with identical payoffs.

In our example, given a choice to accept a certain gain of $200,000 today and avoid a loss of $75,000 in anticipated litigation costs or gamble on a fifty percent chance of winning $400,000 less litigation costs in two years, a plaintiff who has only one chance to prosper could be expected to choose certainty over the risky future payoff. If the problem is framed by her own lawyer as a seventy-five percent chance of winning, with no mention of litigation costs (forty percent contingent fee plus litigation costs,) the risk assessment math looks like a $300,000 future gain and no certain loss. For that litigator, the preference for trying the case may be part of an overall strategy to win at least half of the cases tried and receive forty percent plus court costs.

1. Mathematics as Persuasion vs. Costs as Coercion

Mediators often take the parties through a different risk assessment that accounts for *all* costs: .75 x $400,000 = $300,000 - $120,000 contingent fee = $180,000 less costs of litigation, appeal, and the missed opportunities for profit or pleasure as another uncertain future value. If the defendant is offering $200,000 today, and the plaintiff's lawyer reduces her fee to thirty percent and $2,000 court costs, there is a certain present value of $138,000 and no possibility of loss, that is, receiving a verdict of $0. If the defense lawyer were to conduct the same exercise, the plaintiff would tend to reject the logic as adversarial positioning and suspect the mathematical conclusion due to reactive devaluation. Although the math is simple, the exercise is seldom conducted by either settlement advocate in mediation. Perhaps it is more appropriate that it comes from the mediator because the plaintiff needs to regard her lawyer as a warrior and does regard the other lawyer as just that. Whatever the attitude is, once the $400,000 aspiration has been embedded, accepting the $200,000 offer may seem like losing $200,000, even though the plaintiff never had the $400,000, and

60. *See id.* at 347.

61. *See id.*

the probabilities would favor a certain actual gain over an uncertain future one.[62]

2. Compromise Is Rational vs. Advocate's Belief in Client's Case

If the responsible settlement advocate frames the other party's offer as a certain gain for the client of $200,000, less court costs and attorney's fees, pointing out that in many cases there is only a fifty-fifty chance of winning anything and a lower chance of getting all that has been pleaded, the client can create a mental account that favors a rational decision to settle. The new calculation of risking paying the other party's attorney's fees when an offer of settlement under Rule 167[63] has been rejected must also be factored into the realistic probability assessment and calculation of exposure. The fact that most lawyers receive a lower contingent fee in settlement (in the above example, thirty percent compared to forty percent) and that litigation costs will cease immediately are other tools to use in rational decision making. Advocates can also point out that turning this dispute into a deal creates mutual gain and prevents future loss, not only at trial but in terms of a future business or personal relationship with the other party or just in terms of *this* party's returning to positive activities in life.

The risk-averse, onetime plaintiff, can be helped to make a rational decision by the framing skill and expert advice of the ethical settlement advocate for whom the client's best interests are paramount. If the client knows of another plaintiff, similarly situated, who received a generous payoff in another case (for example, television advertisements of lawyers), the rational process can be impeded by the anchoring and reactive devaluation discussed above.[64] For the plaintiff who has already mentally spent the $400,000 on a new house, the advocate or the mediator can frame the compromise offer as a healthy down payment today on that house and can walk through the cost-loss assessment by referencing what it will feel like to endure two more years of litigation and another two years of appeals to possibly receive nothing for that house they could have been living in for four years.

3. Redefining the Bargaining Zone vs. Adversarial Posturing

Risky choices in the unfamiliar world of litigation require settlement advocates for plaintiffs to sublimate their own desire to demonstrate trial skill and substitute them with negotiation skill in order to push the zone of positive agreement into the upper reaches of the plaintiff's bargaining range. When logic is displaced by the various

62. *See supra* text accompanying notes 52–54.
63. TEX. R. CIV. P. 167.
64. *See supra* notes 27 and 29.

psychological, strategic, and cognitive barriers previously considered in this paper, optimal outcomes are not achieved.

There are strategies that turn disputes into deals. Some of them have already been considered. Other strategies could also be used. The financial incentives of the advocate should be aligned with the client by setting a higher fee if the case is settled satisfactorily within 120 days. If the litigator is not a skilled settlement advocate, a settlement counsel should be retained for that purpose. There are boutique law firms that specialize in this service.[65] If there is any possibility for a future relationship with the other party that will bring gain, financial or psychological, you should find ways to create a deal from the conflict and postpone hiring a trial lawyer. Before and during the litigation process, you should quantify the risks and opportunities with rigorous decision analysis, including decision trees and dependency diagrams.[66] Also, you should find low cost ways of gathering enough information to stipulate to certain facts and create strategies for settlement. You should assume there is a way to create more value for your client and even for the other party; then generate options before any concrete proposals for settlement are made. Consider your client's resources, health, true motivation, and whether her perception of this case could be less than the whole story. Gain the trust of your client by giving her enough of your time and letting her hear the sound of you listening while she tells her story until she is calm enough to let you guide her to a strategy for settlement and ultimately a decision that will be rational, creative, efficient, and supportive of her true interests.

IV. CONCLUSION

Mediation and negotiation unfold in stages: (1) needs and interests are identified; (2) options are generated to create value; (3) stories are exchanged to permit venting and set the stage for claiming value by; (4) exchanging proposals; (5) the proposals are evaluated; (6) impasse occurs or closure is achieved, and, finally; (7) there is an opportunity for increasing value before the final agreement is signed.

Four issues for settlement advocacy have been considered that track these stages of mediation. When brainstorming options, let the form of the process reflect the function of creating value by preparing the client to respond creatively and convey options in the most psychologically persuasive manner. Prepare the client to tell her story to the other side directly in a way that strengthens the case. Give each client an opportunity for voice and coach your client to let the other side hear the sound of her listening. Insist that the procedure provide your client with a sense of fairness and even recognition for her point of

65. *See* Mnookin, *supra* note 56, at 3.
66. *See id.*

view. When proposals are made, use either the power of the mediator, a trained neutral, or carefully convey the offers in a positive frame. Evaluate and reframe offers coming to your client in a way that diminishes the various psychological, cognitive, and strategic barriers to finding a good outcome. If necessary, ask the mediator to assist in helping the client make a more rational decision. To achieve closure, bring enough undisputed information to the table so that a final offer can be precisely evaluated by the client. Look for one more low-cost-high-value way that each party can be generous to the other.

Some lawyers contend that their primary function is to protect their clients. We believe that among the lawyer's functions is the duty to do something *for* the client, not just to protect the client *from* something. In many cases, a lawyer is a healer of conflict *and* a protector of the client's rights. The two complementary roles, while differing in skill sets, can be sequentially employed in the four stages of negotiation or its relative, mediation. A client needs help and guidance to participate effectively in legal settlement processes and is entitled to an expert settlement advocate because so few cases actually require expertise as a trial or appellate advocate.

Knowledge of the research in negotiation theory is helpful to expert, effective settlement advocacy. Some of this research is found in non-legal sources. Many empirical studies exist that would aid lawyers in honing their settlement skills. Mediators, who often assist litigators in overcoming cognitive and psychological barriers to settlement, also need to be familiar with negotiation theory. A zealous advocate for settlement is complying with all ethical rules when the advocate knows that his client is best served by settlement. Do not draw the gun if it is not needed. Extend the olive branch early. There may be enough olives for all. You might just plant an olive grove (create a new deal out of old conflict) to be shared or just for the benefit of your client, who will reward your settlement advocacy with premium fees, gratitude, and new business. You will be manifesting the true purpose of advocacy: helping your client.