

Joseph McMahon is an arbitrator, mediator, and facilitator based in Denver. His practice focuses on commercial, natural resource, environmental, and water matters—www.jpmmahon.com, (303) 333-1960, joe@jpmmahon.com.

Because most civil cases eventually result in settlement, improved settlement and mediation outcomes are important. An explicit lawyer–client discussion of these errors and barriers can eliminate or significantly diminish their effects on settlement decisions. This article highlights the most common errors and barriers in three categories: litigation-specific errors, cognitive errors, and decisional errors. Although each litigation case has its unique facts and context, the errors made in settlement negotiations are not unique, and are repeated daily.

Common Barriers and Decision Errors in Settlement and Mediation

by Joseph McMahon

Most civil cases settle before hearing. The actual percentage quoted in studies and interviews varies, but it is always high—often approximating 80-90 percent.¹ The question this article raises is whether more candid, direct, and early consideration of the barriers to settlement would improve the results for litigants. This article suggests that it is the role of both counsel and mediators (where applicable) to raise the issue of whether barriers and decision errors may be occurring.

The working hypothesis is that by candidly discussing expected errors and barriers, their effect can be reduced. Although many mediators see error avoidance as part of their assigned task, that role may not be universally accepted. Similarly, the viewpoints of counsel may vary as to whether to ask clients whether their chosen path is in error. For example, counsel may say, “That is a business decision and not mine to question.”

This article does not propose more direct consideration of barriers and common errors to increase settlement rate—the civil settlement rate already is quite high. Instead, this article considers the hypothesis that better and early consideration of settlement

barriers would lead to: (1) earlier settlements; (2) reduced transactional costs; and, most important, (3) the prospects of improved settlement terms for the parties.

This hypothesis is a proposal, because hard data or statistics on the factors improving settlement are difficult to find. Because the parties to a case eventually chose a path, it is difficult to assess what would have happened if other paths had been explored. The reality is the barriers and errors noted in this article not only prevent or delay settlement, they also contribute to settlements that are less favorable to all parties than could have been obtained with a better settlement process. Again, this is difficult to demonstrate with statistics other than supportive research in various negotiation texts.²

Limits and Scope of This Article

This article identifies the principal barriers to and errors in settlement, and creates categories for such barriers and errors. There could be—and perhaps will be—significant debate on which factors should be included and what has been omitted from the discussion in this article. For example, there recently has been a great deal of discussion on neuropsychology in alternative dispute resolution (ADR), and one could argue for more attention on that topic. Similarly, recently developed theories on cognition may have needed greater consideration and inclusion.³

Nonetheless, this article is intended to identify the most common barriers and errors as a starting point. If a discussion of barriers could begin among those working in conflict settlement, it is likely that other settlement barriers would be identified. Therefore, this article aims to begin a conversation about errors and barriers to settlement and what role counsel can serve in client counseling (and mediators in processes) to lessen the effects of such barriers. The data sources for this article are both informal (conversations with experts and experience in mediation and settlement), as well as published articles on settlement. Many factors and persons contributed to developing the underlying concepts in this article.⁴

This article is aimed at identifying the barriers and errors to settlement rather than suggesting solutions, other than the solution that the barriers and errors be directly discussed. Because solutions appear to be contextual, specific suggestions are not presented. This article also focuses on individual or party/counsel errors and biases, rather than group decision-making errors. Group decision errors and processes can be

relevant in settlement (such as with a corporate team making decisions) but are beyond the scope of this article.⁵

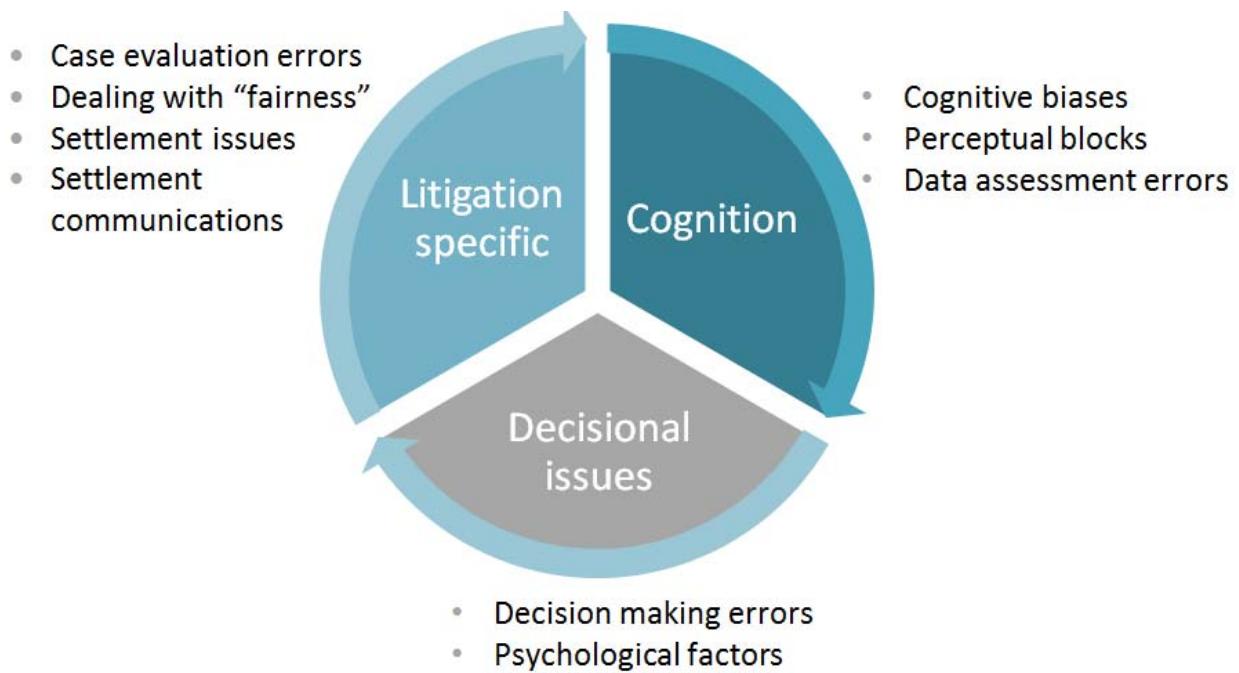
This article does not distinguish between direct settlement negotiations and mediated processes in any substantial way. Although the processes are different and roles change, the presence of barriers and errors is not meaningfully different, although the mediator could play a significant role in guiding the conversation to such errors. As the only neutral actor in the mediation process, the mediator occasionally could raise the issue of whether a barrier or error is likely, leaving it for the party or counsel to assess the matter privately. For example, a mediator could state, “I don’t know whether [a certain settlement error is present], but I ask you to consider it in your private discussions with counsel”.

Creating Categories for Settlement Barriers and Errors

As with the identity of the most common errors, the categorization of the errors is rather subjective. Categories may overlap in subject matter, and reasonable persons could disagree about the definition of appropriate categories. For this article, the following categories for settlement barriers and errors are used:

- cognitive biases
- perceptual blocks
- information/data assessment errors
- case evaluation errors
- difficulties in dealing with “fairness”
- settlement-specific issues
- communication errors
- decision-making errors
- psychological factors

One way to group these barriers and errors into three groups is shown in Figure 1. Each such group and element is briefly discussed below.



Cognitive Biases

Various cognitive biases⁶ are discussed below. For purposes of this article, the term “cognition” is used as defined in *The Free Dictionary*: “The mental process of knowing, including aspects such as awareness, perception, reasoning, and judgment.”⁷

Oversimplification of the conflict. The error of oversimplification⁸ occurs when a party or counsel reduces the conflict to something less than it really is.⁹ The party or counsel may simplify by ignoring key factors or the larger context or scope of relevant relationships. In the litigation context, the oversimplification often involves blaming the opposition. For example: “This is all their fault; this never would have happened if they had not acted as they did.” The oversimplification seems to make the fact of the conflict easier for the party or counsel to accept, while avoiding the self-reflection that may be useful but painful.

Conflict exaggeration. There is a common tendency to exaggerate the intensity (not the complexity) of the conflict.¹⁰ The parties or counsel perceive the conflict to be greater than it is in fact. As such, the actual gap between the parties’ comparative needs and interests may not be as large as believed by one or more parties; yet, the exaggeration can lead them to have low expectations of settlement negotiations or to

avoid settlement altogether. The common tendency to exaggerate the level of the conflict becomes even greater in the litigation context, as new claims are added.¹¹

The lawyers' need to be comprehensive and avoid waiver of any potential claim often means new conflicts are added to the original conflict, as claims or counterclaims. Sometimes, weak claims are added to a suit as bargaining chips, thus adding to the original existing conflict. Discovery may be used to determine whether such claims exist. The resulting larger conflict then becomes more challenging to resolve in settlement.

Whether and how to cooperate. The distrust that accompanies litigated conflict can make parties less willing to cooperate.¹² This barrier to negotiation can occur because the parties or counsel see a false dichotomy between competition and cooperation, and they fear being perceived as weak or not confident. They also may feel that anything that distracts them from the litigation battle will weaken their resolve. The party or counsel may err by believing that discussion settlement with the opposing party is inconsistent with being steadfast in one's litigation cause. (See also the discussion below on "bargaining with the devil.") Of course, there are contexts in settlement where negotiations are futile, but they are more rare than commonly thought.

Egocentrically tainted judgment. Perhaps needing little explanation, the error of egocentrically tainted judgment¹³ occurs when the party or counsel cannot make judgments that are not driven by ego. The result of this self-centered judgment is very a low level of objectivity. In litigation, this may be shown as "I am right and they are wrong—and that is that."

Protective cognition. The terms "protective cognition" or "cultural cognition" refers to the tendency to perceive risk and facts in a manner that protects the perceiver's self-identity. Protective cognition therefore can cause a party or counsel to view facts in a manner that reinforces their preferred way of life and self-definition.¹⁴ Consequently, facts or risks that contradict the party's self definition are ignored or highly discounted. Substantial work on this bias has been undertaken by the Cultural Cognition Project¹⁵ at Yale Law School, and appears to be adaptable to use in settlement, mediation, and facilitated processes.

Practice considerations. Cognitive biases result in a distortion of the conflict, making it more difficult for parties and counsel to assess and undertake settlement. The

biases may come from either the client, counsel, or both. The result may reinforce a reluctance to settle, or—in settlement negotiations—the bias may make it more difficult to accept and understand new facts or perspectives. The practice consideration for counsel is to work with the client to engage in self-reflection, using questions, such as: Are one or more of these biases distorting our view of the conflict? Is our identity so closely aligned with the lawsuit that we cannot settle without diminishing our view of ourselves? Do we have cognitive blind spots, and are we blind to the blind spots?

Where settlement is sought in mediation, a mediator may work to assess and question the presence of these problems. The mediator need not prove that a bias is present, but certainly can coach the parties to candidly assess it themselves, perhaps by referring to previous cases or mediations in which it was clearly present.

Information and Data Assessment Errors

This category of errors is about parties or counsel getting data needed for decisions and their ability to use that data. To be an effective negotiator, a party must obtain the needed data and then be able to incorporate the data into tactical and strategic plans. The errors listed in this section pertain to whether the data are received and, if so, whether the data are effectively used.

Ignoring inconsistent data. In this error, parties or counsel have access to data that is informative but inconsistent with their current theory of the case. Those committing this error ignore information inconsistent with early beliefs about the dispute, similar to the error of confirmation bias discussed below. An example of this can be seen in a deposition of an opposing party witness. When the witness responds with information deemed bad for the deposing attorney's case, the inquiry into the subject stops. Rather than explore this difficult and perhaps unsettling data, the deposing attorney moves to a new subject.

Inability to assimilate information. Similar to ignoring data, this error occurs when parties or counsel learn new data but nonetheless fail to incorporate it into their case analysis and theory. In effect, new data are obtained but are not meaningfully evaluated or incorporated into the case or settlement theories.

Availability error. In this error, parties or counsel are satisfied with the information that is readily available, rather than gathering what is needed, perhaps failing to carefully

develop a comprehensive case theory. This can occur because no meaningful discovery plan was made and then later revised, so parties or counsel seem content use the information that is easily found.

Plunging in. Plunging in¹⁶ occurs when parties or counsel make case assessment or other settlement decisions without any real effort to determine what is needed and how to get it. Instead, the parties or counsel just plunge into the decision process without having the needed information—that is, they do not know what they do not know. The error of plunging in can occur in litigation—and in other situations—when there is pressure to move quickly or mere impatience (for example, “Get this case filed ASAP!” or “I need a decision now!”).

Preoccupation with a recent or vivid fact. On occasion, some fact or event inappropriately captures the attention of parties or counsel.¹⁷ Often, this preoccupation or inappropriate focus on information or evidence involves data that are recent or vivid, such as the strong language in a document or e-mail communication. The preoccupation with the document may well cause the parties or counsel to overvalue its evidentiary weight and, as a result, hinder settlement.

Practice considerations. As with other settlement barriers, the barriers are best addressed by individual and team self-reflection aimed at ensuring that: (1) obtaining the data that is really needed; and (2) skillfully assessing the data. A thoughtful case strategy can identify the key issues to be proven or disproven, as well as the data that bear on such proofs. This approach does not require “no stone unturned” discovery, but instead focuses on what the fact-finder needs to make a decision on core disputed issues.

Also, the data needed for a client to make a good settlement decision are not necessarily the same data needed for the hearing. Trial-related data tend to be historic, while settlement-related data tend to be forward-looking. Therefore, parties or counsel should not necessarily accept that discovery data also is what is needed for settlement. For example, for corporate entities, the following questions should be considered: In what direction is the opposing party moving? What trends and forces are affecting it? In what ways could settlement positively affect their business?

Perceptual Blocks

The following listed errors or biases can inhibit the ability to accurately see the problem that is being faced. They also can negatively affect the means of resolving the conflict.

Stereotyping. Although the use of the term “stereotyping” is almost a cliché, it remains a strong negative force in settlement and mediation (for example, “They are always that way.” or “She will never cooperate.”). The effect of stereotyping can increase during the long course of litigation and discovery and it can block parties or counsel from seeing a shift in attitude of the opposing party.

Saturation with data. This block occurs when parties or counsel become overwhelmed with the volume of data that must be assessed to meaningfully address the litigation matter. This may occur in cases with many individual transactions tied to a claim—for example, royalty or rental calculations—or where the litigating parties had a long relationship, leaving volumes of material and agreements to assess.

Narrow perspective. Although it may sound trite, a thoughtful assessment of a litigated matter usually requires that parties or counsel try to see the problem from different viewpoints, including that of the opposing party and importantly that of the judge or jury. The error of a narrow perspective leads to what is commonly noted as “we only see what we want to see.”

Practice considerations. Perhaps no bias is as pervasive in settlement as stereotyping. When negotiating a settlement, negative stereotyping may cause both the client and counsel to miss an opportunity or fail to see a signal of some willingness by the opposing party to change positions. Therefore, counsel needs to accept the common presence of the stereotype bias and counsel clients to be aware of it. An opposing party cannot easily change if the client will not permit or accept the change of position.

Saturation with data can cause indecision or preference for the status quo. For example, instead of pouring over the data and reevaluating the case, parties or counsel may simply decide to let the matter continue on the current litigation path. The fear of missing a key fact motivates counsel to get as much data as is reasonably possible, potentially leading to this error if the data are not thoughtfully reviewed and assessed. Attorney–client conferences should address these issues.

In mediation, a mediator could question the presence of some of these biases and suggest approaches to lessen the effects. For example:

I am concerned that each side of this case stereotypes the other rather than really listening to the information being shared, and this can reduce our chances for settlement. Please discuss this when you caucus, and work to be open to settlement possibilities.

Litigation-Specific Barriers

Many barriers or decision errors in litigation generally are present in all decision making. There are some matters that have a unique expression or strength in litigation.

Case Evaluation Errors

Although there can be many detailed errors made in case evaluation, the following three are extremely common. Moreover, these errors beget other and more case specific errors.

Overconfidence. Overconfidence is a common decision error.¹⁸ Overconfidence in litigation can be enhanced because the process is competitive, takes a long time, and asks for argument, all of which can inappropriately bolster confidence. Moreover, in some instances, litigation counsel believe they are expected to show (or exude) confidence—thus, the illusion can become “reality.” When later engaged in settlement discussions, this overconfidence leads to a lower than realistic view of trial risk and an accompanying overestimation of the value of the case or defense.

Overconfidence also can invade litigation counsel’s perception of his or her ability to affect courtroom events that are very much independent of the effort of counsel and parties—and perhaps are even random events. The party witnesses also may be overconfident in their abilities on direct and cross-examination. Consequently, in settlement negotiations, parties or counsel (or both) may wonder why they should accept such a settlement proposal when the case is so strong.

Failure to see case uniqueness. This error typically arises when counsel make insufficient adjustment for the individuating factors of the specific case. For example, this case is not really similar to the previous case or cases counsel has in mind. When

making a risk assessment, counsel may believe “this is just like the *Jones v. Newco* case,” when it actually is not similar on one or more key aspects.

Confirmation bias. This is perhaps one of the most common errors of litigation counsel. It occurs when counsel has met with the client, reviewed some documents, and thereafter created a case theory that fits these known facts. Unfortunately, the case is continually evaluated from the initial perspective of parties and counsel and to confirm those preexisting beliefs. However, early case assessments often are not realistic and may not be meaningfully reevaluated thereafter. When this error is present, case discovery is used to confirm existing theories, rather than to explore or test new theories. Confirming facts are given weight, and nonconforming facts or law are largely ignored.

Practice considerations. The practical response to each of the above biases is to directly and expressly consider them. Because case evaluation typically is the domain of trial counsel, lawyers should accept that they may bear the responsibility for being aware of and responding to these biases. A thoughtful approach is to ensure that counsel completes an early case evaluation and maintains an open mind to adjusting the evaluation as more is learned. Parties and counsel should avoid being locked into a case evaluation that, while seeming appropriate at the beginning of the case, needs to be adjusted for facts subsequently learned.

Difficulties Dealing With “Fairness”

Although one may assume that a cry of “it’s not fair” is more commonly associated with young children, a realistic look at litigation shows that many cases are driven by feelings of unfairness by one or more parties. Although we may assume the rational economist is assessing the pros and cons of claims and defenses, the real drivers may be claims of unfairness.

Highly subjective view of fairness. Fairness generally is defined by parties in a self-interested or self-serving manner.¹⁹ When coupled with other biases or errors (such as confirmation bias and overconfidence), parties or counsel may engage in settlement conversations using a highly subjective view of what is fair to them, as well as what is not. When not aware of this subjectivity, proposals from the opposition can seem wildly unfair, perhaps leading a party to walk out of settlement discussion because the opposing party does not seem to be acting in good faith.

Erroneous relative comparisons. Parties or counsel can participate in settlement using the erroneous comparisons in evaluating settlement outcomes. Often, parties or counsel place undue emphasis on the relative comparison—for example, comparing what one party gets with what the other party gets, rather than comparing it with what the party needs from the outcome. A party’s worry that the opponent is “getting too much” may cause a party to reject an otherwise beneficial settlement.

Anchored in the past. On occasion, a party may get so preoccupied with the previous and seemingly favorable situation that any change is unacceptable. This preoccupation with what used to exist may, due to changed context, be an inappropriate point of reference that prevents parties or counsel from seeing new opportunities. The past may seem fair, while the new situation is challenging and therefore seen as unfair.

Self-destruction. In some lawsuits, a party believing he or she was treated unfairly seeks ways to cause harm to the other party. In such instances, a party may harm his or her own interests to further the desire to punish the other party. This can be the origin of some “lose/lose” lawsuits, where there is no winner. Unfortunately, this is not a rare event.

Practice considerations. The fairness bias can cause clients to pursue litigation paths that are unproductive and even self destructive. As with other biases, the practice response is to find approaches to discussing difficult issues with the client. Although it can be difficult, counsel may need to tell the client that it is time to let go of this painful experience and move on to new ventures that will be more productive than litigation. Counseling would need to address not only outcome risk but also the transactional and opportunity costs associated with going to trial and possible appeal. Counsel should be careful to note when clients intend to use lawsuits to punish the opposing party, which is a recipe for a lose/lose lawsuit. When in mediation, an experienced mediator can discuss his or her experience in cases where highly subjective views of fairness inhibited chances for settlement.

Settlement-Specific Issues

Many errors mentioned in this article apply not only to litigation but to many personal, business, institutional and even international matters. Yet, a few errors seem to either exist principally in or have special importance in litigation settlement.

Settlement asymmetry. In many lawsuits, there are unequal stakes at trial. For example, what may be a small loss for a large entity could ruin a smaller party. The asymmetry could be due to fewer resources, economic context, or other factors. Because of this asymmetry, it may be much more difficult for one party to settle than the other.

Some large entities may have suits filed against them regularly,²⁰ whereas for the smaller party, this may be the only suit ever faced. There can be many factors that make it far easier for one party to settle than the other—perhaps not only resources but also party identity, media attention or publicity, positions made publicly or on the record, reputation, external pressure, or need to make law on an issue. For these reasons, one party may be very willing to settle and the other may be reluctant.

Decision-making differences. In decision making, litigating parties can be quite different. Imagine Party A as a small and centrally controlled corporation, and Party B as a large, complex organization. The approach to decision making will be quite different, where long delays arising from the entity that needs time may be viewed by the other as a lack of good faith.

Litigation games. An unfortunate element of the current litigation context in the United States is that there are some lawyers or parties who “keep score.” For them, prevailing (or appearing to prevail) is more important than the actual benefits of the litigation outcome. Obviously, when a party or counsel is scorekeeping instead of negotiating, time will be wasted or the negotiation may end poorly.

Reservation value (bottom line) errors. Reservation value errors²¹ occur when the “walk away” value to one or more of the parties is not evaluated or is poorly evaluated. Much has been written on use of a best alternative to a negotiated agreement (BATNA),²² but less attention is given to determining a reasonable BATNA.

Often, parties or counsel do not give adequate attention to a thoughtful determination of their reservation value—the value below which they cannot negotiate. Often, it is preferable for parties or counsel to establish a general target zone for their BATNA, but not to get too fixed on the precise number.²³ What should have been an “anticipated reservation value” became a fixed and unchangeable value. In negotiating litigation settlements, this issue arises near the end of the negotiations and when fatigue may have set in. Thus, it may be common that a party cannot or does not reexamine his or her reservation value when it would be prudent to do so.

Differing risk tolerance. Often, parties to litigation bring different ideas about risk and have very different risk tolerance. Some parties have a great fear of taking risk (for example, a trust); others take risk regularly as part of their day-to-day activities (for example, oil exploration companies). Thus, their approaches to litigation and the risk of losing are very different—and those differences impact how they negotiate settlement. The party more accepting of risk often can be frustrated or distrustful of the risk averse (and thereby slow to decide) opposing party.

Although parties negotiating a settlement may have a good zone for reaching an agreement,²⁴ the parties may have different ideas of what is acceptable risk. Settlement agreements often involve external and uncertain factors, and the parties may respond very differently to that uncertainty. Consider the commonly accepted ideas about industries where risk is a day-to-day factor, such as developers of new electronic devices, oil and gas companies, or mining concerns. If the opposing party has much more conservative views of risk—for example, a trust or government agency—this differing tolerance may interfere with settlement. Each may believe the other is being difficult, rather than understanding there is a substantially different idea about what risk is acceptable. For the mediator, parties, and counsel, this may need to be addressed to make settlement possible.

Low (or nonexistent) levels of self-reflection. Though overlapping with other errors, low (or nonexistent) levels of self-reflection²⁵ exist where parties or counsel do not engage in any meaningful level of self-reflection (an examination of one’s thoughts, feeling, actions, and relationships). With low or nonexistent self-reflection, the conflict is not evaluated and continues on “autopilot.”

Because litigation commonly involves at least a two-person team (client and lawyer), both need to be involved in the self-reflective effort. This could include assessing whether events have changed, new data changed some early conclusions, or the potential risk or benefit of the lawsuit is significantly different from what was perceived earlier in the case when the case theory was developed.

Bargaining with the devil. Consider the case where one party believes he or she operates from the moral “higher ground” and has mistakenly been entangled with an opposing party having low or no values.²⁶ The party believing he or she is on the high road may refuse to negotiate with the other, or may do so only in a distant manner.

Counsel (and mediator, if applicable) will need to counsel on this point to find a way to have needed settlement communications.

Practice considerations. The biases identified as settlement-specific are too diverse for any broadly defined response. Counsel should review and discuss each with clients in a settlement strategy session. It should be noted that reservation value errors are common, so when counsel confers with a client about his or her reservation value, counsel should stress that the value determined often is very preliminary. Counsel should not permit clients to be locked into a number or outcome that later cannot be changed as facts about the case develop.

These matters also can be discussed in mediation as the mediation process begins. To the extent the biases are present, a direct discussion of them can lessen their effects, and the mediation can be tailored to address them.

Settlement Communication Errors

Although communication problems may often give to litigation, communications in settlement negotiations can also block settlement. Once the complaint or arbitration demand is filed, communications often become tense and restrained – and the two errors listed below emerge.

Strategic misrepresentation. The issue of strategic misrepresentation is important, because it can be both an error and a negotiation tactic. The party engaging in this understates the value of what is important in settlement, and overstates the value of any proposed concessions to be made to the other party.²⁷ A misrepresenting party may place a high value on obtaining a concession from the other, but report in negotiations that he or she does not value the concession very highly. Little is written on the effect of this on outcomes, but common sense suggests that achieving the highest overall settlement value is not aided by misrepresentation. If it is more than mere puffery, ethical issues may be raised in such misrepresentation.²⁸

Low disclosure. There are many reasons for parties or counsel to have very low disclosure levels in settlement. These include fear the settlement is just being used for discovery, mistrust of the motives of the other, and fear of losing negotiating advantage if disclosures are made. This can lead to excess caution in sharing data in settlement, perhaps leading to withholding data needed by the other party and reducing settlement

prospects. Like many aspects of litigation conduct, reciprocity can begin—when one party has very low levels of disclosure in settlement negotiations, the other party reflexively retreats into a parallel degree of low disclosure.

Practice considerations. When clients are not frequently involved in lawsuits, they look to trial counsel for guidance as to how to conduct settlement negotiations and communications. Client counseling can encourage appropriate disclosure, rather than under-disclosure. Modeling candor in settlement negotiations can encourage reciprocal conduct from the opposing party. Settlement communications work best when they result from thorough planning.²⁹

When in mediation, a core task of the mediator is monitoring and attempting to improve communications. A reduction in communication and other errors is a hoped-for outcome of deciding to use mediation.

Decisional Issues and Challenges

Decisions (for both individuals and groups) can be challenging—and when required in the context of litigation, the challenges to making decisions may increase. Worry about the claims, trial preparation, discovery and depositions, and delay in getting to hearing necessarily increases stress. That stress can impair decision making.

Psychological factors

Psychological factors lie in the background of decision making, and often may be unnoticed. The psychological factors described below are often overarching errors that shape the entire approach to the litigated case. Having the power to strongly direct how a party proceeds in litigation, the failure to see the presence of these errors is very serious.

Avoidance. Litigation and settlement necessarily involve conflict. Given the natural human tendencies for conflict avoidance, there are challenges inherent in these difficult conversations. Often in the settlement or mediation process, the parties (and perhaps the mediator) are not comfortable discussing conflict or a part of it, so the topic is sidestepped. Where avoidance does not entirely prevent the discussion, it may limit a realistic and candid conversation geared toward settlement.

Denial. It can be common for a litigating party (or counsel) to minimize the risk he or she faces, by pretending the problem does not exist or that the risk is quite low. For example, a party might think, “I really don’t see much risk here; we have a very strong case.” Litigation team members (clients, experts, and counsel) may reinforce this risk denial in a form of groupthink.³⁰

Stuck in short-term thinking. Short-term thinking may be appropriate in some matters but very dangerous in others. In litigation, short-term thinking (for example, the need to “win” this dispute) may be in conflict with the party’s long-term strategy. The tendency to engage in short-term thinking is a common part of our human history³¹ and therefore may be natural. Nonetheless, parties and counsel negotiating settlements need to consider the long-term impact of the proposed settlement. According to economist Daniel Altman, “The biggest problem facing the global economy is not climate change, trade imbalances, financial regulation, or the Euro zone. . . . It is short-term thinking.”³²

Sunk costs. Another factor common in settlement is the preoccupation with sunk costs (for example, “I can’t settle now—I have too much invested in this lawsuit”). Because of the tendency to delay settlement exploration until some discovery has been completed, the costs of investigation, initial filings, and discovery have been incurred before parties first meet in settlement or mediation. Thus, those incurred costs may well be seen as sunk costs, thereby raising the error of sunk costs. This sometimes is referred to as “escalation of commitment,”³³ where investments become justification for even greater—although ill-advised—investment.

Status quo errors. This is an unthinking bias toward the status quo. In litigation, this could mean parties or counsel erroneously assume the status quo has low risk and low uncertainty. Consequently, they may be biased toward proceeding to trial rather than recognizing the future risk they face—perhaps of losing the case. Counsel could work to divert this error by ensuring that future and likely risks are thoughtfully evaluated by clients.

Equity seeking. Equity seeking is the desire to punish the other party via court proceedings even if done at a very high cost and not really for the punishing party’s benefit. The party seeking equity has such a desire to punish the other that he or she will endure the cost of potentially unproductive litigation.

Endowment effect. The endowment effect³⁴ is that the ownership of an asset by a party causes that party to place an unrealistically high value on the asset. This error in value could arise in instances such as condemnation, failure of purchased equipment, or destruction of property. It might not always be present, but is potentially present. This effect is considered to be in line with the “prospect theory” of Professors Tversky and Kahneman.³⁵ It is considered similar to status quo bias or error described above.

Practice considerations. The factors described in this section are those that can be settlement barriers that cause a party either to significantly underestimate trial risk or to overestimate the benefit of prevailing. An attorney counseling a client where one of these errors is occurring should try to find a way to introduce objectivity to the client’s views. This could be done by looking for objective valuations of an asset, counseling against placing excessive value on sunk costs, and avoiding short-term thinking by having a conversation with a client about his or her long-term goals.

Decision-Making Errors of a Person or a Party³⁶

This section described potential errors by either “a person or a party” because a litigating party (such as a corporate entity) may take on a litigation ‘personality’ – and commit the same errors as an individual. Even with a “litigation team” working for the institution, institutional errors look a great deal like those of an individual. Therefore, trial teams must take care not to reinforce these errors by ensuring that the perceived need for team coherence does not mask serious decision errors.

Anchoring. The error of anchoring occurs when a fact or number anchors the party’s thinking and prevent or limits the ability to take in new data. In essence, the party is stuck on something and cannot move to other perspectives or thinking. In the settlement context, an example is when a party states “I will never take less than \$X” or “I will never pay more than \$Y,” even if the numbers have not been realistically and recently reconsidered. A party also may be anchored by a fact, date, or piece of evidence, such as when one of many communications between parties on a breach of contract or an internal memo takes undue importance in a party’s mind.

Coherence bias. In this decision error, parties or counsel seek to interpret new data or developments to be coherent with past thinking. This often results in a failure to see

inconsistent facts or evidence. A trial attorney or trial team can be very susceptible to this after spending a lot of time and energy developing a case theory. In these instances, there is a natural reluctance to change the case theory.³⁷

Reactive devaluation. The mistrust that arises in litigation carries over into settlement negotiations. The error of reactive devaluation occurs when an offer is devalued solely because of the identity of the offeror. For example, a party may think “my opponent would not make this offer unless it’s good for him, so it’s likely bad for me.” By reactively devaluating the offer, the recipient never really values the offer objectively.³⁸

Decision-framing errors. These errors arise from using the wrong frame of reference for the issue, decision, or problem. Framing is the initial step in decision making. For example: What is the purpose and scope of this decision? How important is this decision? What are its consequences?³⁹ The frame then is the perspective from which the issue is viewed. Is the company’s future at stake in this decision? Is this a normal course of business decision? Parties or counsel could come to very different and potentially erroneous decisions using the same data but with different “frames.” Over- or under-estimating the value or impact of the decision can be a risky error, and it may be helpful for counsel to discuss this with clients. Mediators also may inquire about the significance of the settlement (or individual elements of the settlement) with the mediating parties or counsel.

Risk-seeking behavior when facing a perceived loss. The hypothesis about this error is that when facing gains, people are risk-averse. However, when facing losses (perhaps the defendant who likely will lose on liability), people tend to be risk-seeking.⁴⁰ In some settlement processes, both plaintiffs and defendants can see themselves as facing loss—and perhaps both sides become risk-seeking, thereby delaying or preventing settlement.

Improper heuristics. A heuristic is a mental shortcut.⁴¹ Although shortcuts can be helpful in some instances, they can lead to error in others, such as when a party has the opinion that “I always do X in these situations.” Consequently, the party fails to determine what is his or her best option. It is important to consider whether parties or counsel are thoughtfully making the decision, or whether they are using a heuristic that may be inappropriate. Many of the issues listed above may be considered heuristics.

One heuristic that can occur in litigation is the “intuitive heuristic,” in which a person unknowingly answers a simpler question rather than the real question. This can mean a party may convert the question of “Should I accept this settlement?” into “Do I like this person?” According to Professor Daniel Kahneman, this is the essence of intuitive heuristics: “[W]hen faced with a difficult question, we often answer an easier one instead, usually without noticing the substitution.”⁴²

Practice considerations. As with almost all of the biases and errors discussed above, client counseling is key to avoiding the effect of the bias. When settlements are quantitative, clients should be counseled about the danger in attaching themselves too greatly to an early estimate of settlement, thereby being anchored. By urging flexibility, many decision biases can be avoided. Similarly, in mediation, the mediator could inquire: “What is our frame of reference for this settlement? Are we viewing it similarly? If no, why not?”

Suggested Future Considerations Concerning Settlement Negotiations

Although this article is intended to move a discussion forward, there are additional topics that may merit inclusion in such a discussion. These topics could include:

- the interplay between rational and emotional thinking—there are many researchers and authors working on this, notably Daniel Kahneman
- inquiry into more recent discoveries and hypotheses in neuroscience
- whether and how changes in communications (such as e-mail, quick turns on decisions, instant messaging, and electronic discovery) have brought about new settlement or mediation errors or barriers
- whether the move to make mediation a “commoditized” business⁴³ has induced new forms of decision errors.

Conclusion

Because settlement is likely as the terminal outcome of a case, parties, counsel, and mediators may need to consider whether lawyers give adequate attention and counseling to decision errors in settlement. Counsel should ask each client to engage in a settlement-specific client conference in which biases are discussed and evaluated.

Although settlement rates are high, could settlement and mediation processes be more efficient? Could they lead to better outcomes? These questions are suitable for greater consideration by the bar, and could lead to better outcomes for clients and associates.

Notes

1. "Study Finds Settling is Better Than Going to Trial," *The New York Times* (Aug. 7, 2008).

2. *E.g.*, Raiffa, *The Art and Science of Negotiation* (Harvard University Press, 1982).

3. *See, e.g.*, Kahan, The Cultural Cognition Project at Yale Law School, available at www.culturalcognition.net.

4. Interviews with Robert Mnookin, Harvard University Interviews with Gary Friedman and Jack Himmelstein, Center for Understanding in Conflict; Russo, *Decision Traps* (Simon & Schuster, 1989); Hammond *et al.*, "The Hidden Traps in Decision Making," *Harvard Business Rev.* (Sept.–Oct. 1998), available at www.mdecgateway.org/olms/data/resource/7579/Hidden_Traps_in_Decision-Making.pdf; Korobkin and Guthrie, "Psychology, Economics and Settlement: A New Look at the World of a Lawyer," 76 *Texas L.Rev.* 77 (1997); Birke and Fox, "Psychological Principles in Negotiating Civil Settlements," 4 *Harvard Negotiation L.Rev.* 1 (1999); Thompson and Nadler, "Judgmental Biases in Conflict Resolution and How to Overcome Them," in *The Handbook of Conflict Resolution* (Deutsch and Coleman, eds., 2000); Raiffa, *Decision Analysis: Introductory Lectures on Choices Under Uncertainty* (Random House, 1968).

5. *See* Janis and Mann, *Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment* (Free Press, 1977) (discussion of group decisions and decision errors). *See also* Hammond *et al.*, *Smart Choices* (Broadway Books, 1999); Oxenfeldt *et al.*, *A Basic Approach to Executive Decision Making* (Amacom Books, 1978).

6. *See generally* Thompson and Nadler, *supra* note 4.

-
7. See www.thefreedictionary.com/cognition.
 8. See Thompson and Nadler, *supra* note 4 at 215.
 9. Professor Albert Einstein reportedly said, “Everything should be made as simple as possible, but not simpler.” In litigation, there can be a tendency to make it too simple—for example, by saying “they caused all of this trouble.”
 10. See Thompson and Nadler, *supra* note 4 at 220-21.
 11. See Delaware State Courts, “Alternative Resolution Movement,” available at courts.delaware.gov/Superior/ADR/adr_history_movement.stm.
 12. Thompson and Nadler, *supra* note 4 at 217.
 13. *Id.* at 218.
 14. The underlying theories tie to “cultural cognition,” as presented in Douglas and Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* (University of California Press, 1982).
 15. See Cultural Cognition Project, *supra* note 3.
 16. See Russo, *supra* note 4.
 17. See “The Mediation Effect of Ease of Imagery” in *Heuristics and Biases* 101-02 (Gilovich *et al.*, eds., Cambridge University Press, 2002).
 18. Plous, *The Psychology of Judgment and Decision Making* (McGraw-Hill Education, 1993).
 19. Thompson and Nadler, *supra* note 4 at 224.
 20. Willing, “Lawsuits A Volume Business at Wal-Mart,” *USA Today* (September 13, 2001) (reporting that a suit was filed against Wal-Mart every two hours).
 21. See Raiffa, *supra* note 2 at 45 (reservation value or reservation price).
 22. See, e.g., Fisher and Ury, *Getting To Yes*, (Penguin Books, 1981).
 23. See discussion regarding “anchoring,” *infra*.
 24. See Raiffa, *Lectures on Negotiation Analysis* (PON Books, 1996 (discussion of Zone of Possible Agreement or ZOPA)).
 25. Used here to mean being self-aware and able to reflect on one’s actions and behaviors.

26. Mnookin, *Bargaining With the Devil: When to Negotiate, When to Fight* (Simon & Schuster, 2010) (discussing the issue of when to bargain with a perceived enemy and when not to do so).

27. Raiffa, *supra* note 2 at 142 (“A common ploy is to exaggerate the value of what one is giving up and minimize the importance of what one gets in return.”).

28. See ABA Section on Litigation, *Ethical Guidelines for Settlement Negotiations* at Section 4 (2002); Van Pelt, “Ethical Guidelines for Settlement Negotiations,” 34 *The Colorado Lawyer* 11 (Feb. 2005); Glenn, “Settlement Ethics,” 30 *The Colorado Lawyer* 53 (Dec. 2001); Jostad, “The Challenge of Being a Truthful Advocate,” 32 *The Colorado Lawyer* 19 (Oct. 2003).

29. Often, vast amounts of time are used to prepare clients for deposition, and very little time is used to prepare clients for settlement negotiations. This sometime leads to trial counsel conducting the settlement discussion while the client merely observes.

30. “Groupthink” refers to decision problems that arise when a need for group harmony overrides independent rational thinking.

31. Novelist H.G. Wells is quoted as saying, “[H]uman history more and more becomes a race between education and catastrophe.”

32. Altman, “Foreign Policy: Losing The Future,” *NPR Opinion* (Sept. 26, 2012), available at www.npr.org/2012/09/26/161807859/foreign-policy-losing-the-future.

33. “Escalation of commitment” was identified in Staw, “Knee-deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action,” 16 *Organizational Behavior and Human Performance* 27 (1976).

34. Thaler, “Towards a Positive Theory of Consumer Choice,” 1 *J. of Economic Behavior and Organization* 39 (1980).

35. Kahneman and Tversky, “Prospect Theory: An Analysis of Decision Under Risk,” 47 *Econometrica* 263 (1979).

36. Kahneman *et al.*, *Thinking Fast and Slow* (Macmillan, 2011).

37. Simon, “A Psychological Model of Judicial Decision Making,” 30 *Rutgers L.J.* 1 (1998) (coherence bias in judicial decisions).

38. See Thompson and Nadler, *supra* note 4 at 227-28.

39. See Russo, *supra* note 4.

40. Kahneman and Tversky, *supra* note 35.

41. A heuristic is an experience-based decision method, sometimes thought of as a decision shortcut.

42. This is a core teaching of Professor Daniel Kahneman, as explained in Kahneman, *supra* note 36.

43. McMahon, "Moving Mediation Back to Its Historic Roots—Suggested Changes," 37 *The Colorado Lawyer* 23 (June 2008).

