



The Jury

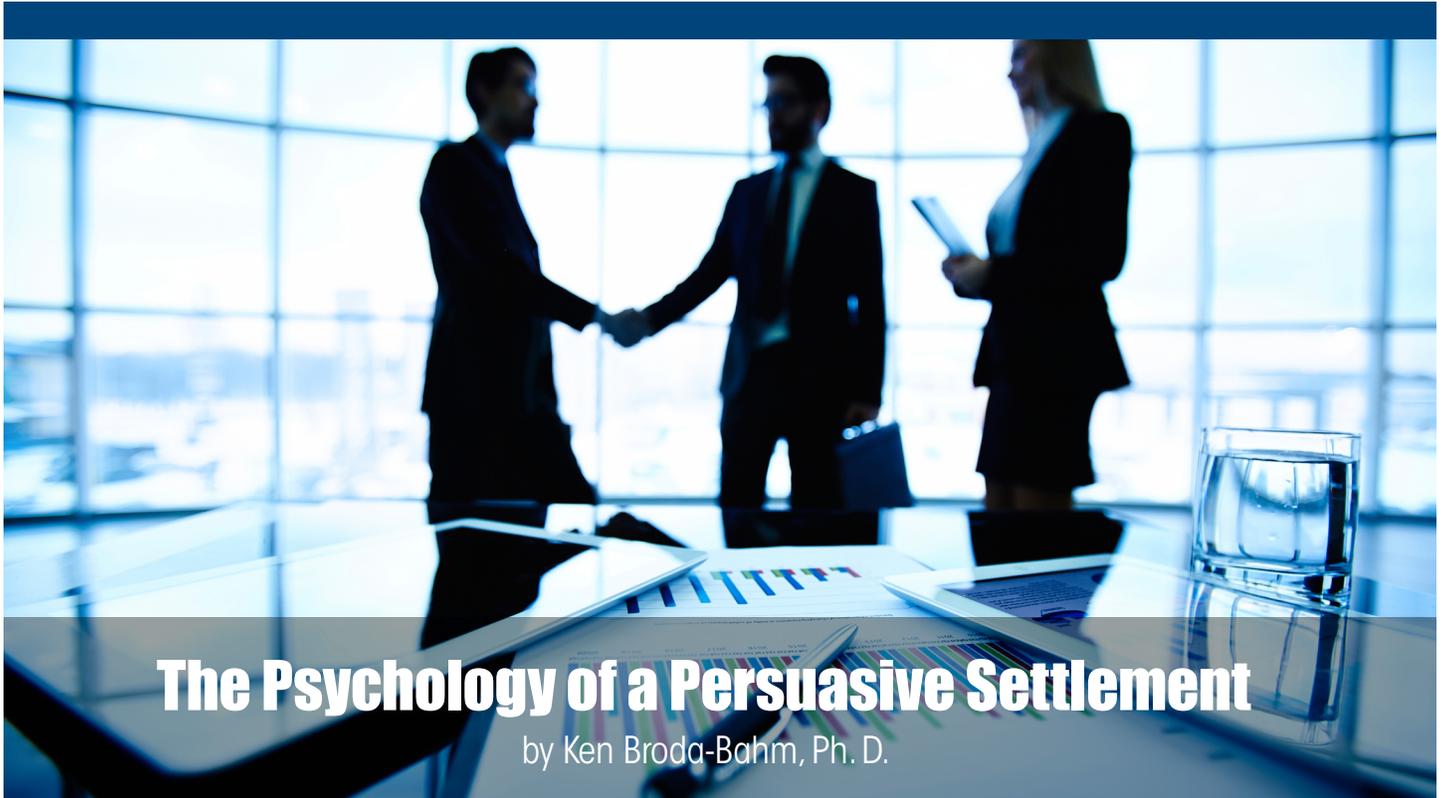
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The Psychology of a Persuasive Settlement

by Ken Broda-Bahm, Ph. D.

WE ALL HAVE AN IMAGE in our heads of the way we expect cases to end: passionate presentations, gripping witness testimony, then a tense wait followed by the dramatic verdict. In the **great majority of cases**, however, the dispute will end not in a courtroom but in a conference room. After some awkward moments and handshakes, it will settle. Despite this, however, we all know that there are many cases that should settle but don't, and an even greater proportion of cases that only settle after far too much has been spent in time, patience, and money. Talking to the trial teams, it is clear that there is one common barrier to the timely settlement of those cases: the *other side*. Now, it may be that I'm just more likely to work for the side that is fair, reasonable, and realistic (and for any clients reading, let's assume that is the case). Or it may be that there is a large class of cases where *both sides* are saying in effect, "Believe me, we would settle this case if we could – if the other side would just see reason."

The realm of settlement has broad and increasing relevance to litigators and to litigation consultants alike. Instead of just the narrow frame of "jury consulting" or "trial consulting," those of us who work in shaping legal messages to legal audiences

should be looking closely at settlement as well. Not only does it account for a substantial proportion of case dispositions, but it also draws upon many of the skills we have in psychology and communication.

In this article, I want to take a look at some of the ways a psychologically-informed perspective on settlement communication could change the way we work. Specifically, I will focus on three questions:

- What prevents cases from settling?
- What's wrong with gamesmanship?
- What does a "good settlement" mean?

What Prevents Settlement-Worthy Cases From Settling

Settlement-worthy cases can end up avoiding or delaying resolution for many reasons, some good and some not so good. There can be legal barriers to settlement, or situations where settlement is not the rational option. But there are also psychological barriers: perspectives and habits that aren't working to either side's advantage, yet are still preventing or delaying case

resolution.

This first section of the article draws from a body of research and commentary on the psychology of Alternative Dispute Resolution, I'll be suggesting some ways of looking at the artificial barriers to settlement to see how they might be overcome.

The Common Psychological Walls

There are probably as many reasons for denied or delayed case settlements as there are cases. At the same time, a review of the advice and commentary provided by experienced mediators points to several psychological factors that are likely to play a role in making settlement harder in nearly every case. Let's look at a few of those barriers.

1. Confidence is an adaptive trait, but beyond hoping for the best, parties in litigation can sometimes anchor on an ideal outcome and see any deviation from that outcome as a net loss. In other words, if someone tells a plaintiff, "you have a million dollar case!" that plaintiff will often see a \$700,000 settlement not as a \$700,000 gain, but as a \$300,000 loss. This process of anchoring on a high expectation for outcome can translate into a high estimate of one's probability of winning as well. Writing a comprehensive review of the research on settlement psychology in the *Harvard Negotiation Law Review*, Richard Birke and Craig Fox (1999) observed that "if both sides overestimate their chances of prevailing in court, this bias will lead to excessive and costly discovery and litigation."
2. Beyond overestimating our chances, we also tend to devalue our adversary's arguments and overvalue our own: We always think we make much more sense than the other side. This is a process that California mediator and arbitrator John McCauley (2000) refers to as "partisan distortion," while noting that it is a virtually universal phenomenon among advocates in litigation. Birke & Fox (1999) cite research confirming that, "Most negotiators believe themselves to be more flexible, more purposeful, more fair, more competent, more honest, and more cooperative than their counterparts." The arbitrator and mediator Barry Goldman (2006) describes that as the "Lake Wobegon effect," in the sense that most believe themselves to be above average and we can't all be right.
3. Parties enter into a dispute with not just a need for resolution, but a need for judgment as well. We don't just want the conflict to end, we want someone to step in and tell us who is right and who is wrong. A fair and definitive outcome is not nearly as strong a motivator as vindication and a win. In Goldman's words, many clients like to see themselves as "The Avenging Sword of Justice," rather than as reasonable decision makers. "What this means to you as a lawyer," Goldman explains, "is that the person who comes into your office with a lawsuit believes he has a strong legal case; believes he is morally in the right; is willing to take plenty of risk; and believes he would be violating the laws of nature if he rolled over, caved in, wimped out, and

settled."

4. There is a simpler barrier – without some of the psychological nuance – that is probably more common. Many litigators delay settlement because they simply haven't yet dug into the details, and may not have a good knowledge of the strengths and weaknesses of their own case. In that condition, the sides are comfortable with broad and absolute negotiating stances ("Please give me the best result I can imagine getting and we'll settle..."), but less comfortable with the nuance and the assessment that true negotiations require. That absence of engagement can be a rationalized barrier, since it doesn't make sense to invest a lot of time preparing for a trial until we start to have a strong feeling that a trial is actually going to happen. While that rationale can make sense in some cases, in many others it doesn't. When a case drags on for years before client and trial team become fully informed and engaged, the slow drip of expenses can add up. A case-in-waiting for years can still generate some hefty bills, and these are expenses that don't necessarily improve the ultimate outcome.

Breaking Through: Moving From a "Trial Preparation" to a "Case Assessment" Mindset

Of course, settlement is a very complex calculation, and there is no one-step solution to these and the other barriers to settlement. But one strong step in the right direction is an engagement that leads to realistic assessment, and that means reorienting our thinking about many activities that have traditionally been seen as trial preparation. When we are focused on trial preparation for a trial that, at least nine times out of ten will never happen, it is easy to see the work as a waste and to avoid it or put it off. But much of the work that we tend to see as message improvement at trial, functions far better, and much more often, as case assessment and preparation for settlement.

There are a few things that trial teams could be doing to make sure that they're breaking down the barriers that would prevent a case from settling when it should.

Early Case Assessment

Before you're embroiled in discovery or putting on armor for trial, conduct a full, clear-eyed assessment of your case. Granted, you don't yet know all you would learn in discovery, but you do generally know the basic story outline from each party. And in most cases, fact finders are reacting to the story and then fitting that reaction to the evidence you discover.

Run a Mock Trial of the Other Side's Case

As Birke and Fox note, research shows that the "egocentric bias," or the tendency to see your case through an advocate's lens "was significantly mitigated when participants were asked to explicitly list weaknesses in their own case." Nothing forces you to identify your weaknesses like the act of stepping into your adversary's shoes.

Ground Your Case Evaluation Memo in Research

When attorneys write up memoranda to support a case assessment for a client, financier, or insurance company, that

assessment is often based on experience and subjective judgment. Why not add research, in the form of a focus group or a mock trial to that mix? The mock trial will not predict your trial result, but it will help inform your own judgment of the strengths, weaknesses, and probabilities that factor into your evaluation. Specifically, it can help you and your client to anchor on something other than a best case scenario.

Bring Research To The Attention of Your Mediator

We've written before that a mediator can often appreciate the perspective provided by an early mock trial or focus group, particularly when it allows you to admit to a weakness or two while still pressing your strengths. An additional opportunity is to design the research to directly serve the mediator who is working for both parties. We call that approach "Research Aided ADR" (or "RA-ADR, pronounced 'Radar' for short), and it can be a useful tool for focusing on the factual questions that most divide the parties and providing that opportunity for judgment that mediation can often lack.

One interesting dilemma is the possibility that everything that makes one a good advocate in trial — unshakable confidence, an ability to refute an adversary's every argument, and an unquenchable desire to win — can also make you a poor assessor for purposes of settlement. The trick is to develop a way to operate in both modes: the objective negotiator when you can, and the unshakable advocate when you must.

What's Wrong with Gamesmanship?

There is a perspective on negotiations focusing on tactics, secret strategies, or tricks. The problem with this tricks-based approach is that once you have two sides who think they know the tricks — like "never make the first offer," — then you're headed for a stalemate faster than a game of tic-tac-toe played by someone older than four. One such negotiating tactic is playing chicken, or taking an extreme and inflexible stance in order to force the other party to bargain down or face an even greater possible loss. At a time when approximately [two percent](#) of legal disputes are ended by a trial, the walk-up to trial itself is often a game of chicken. The strategy is to stick with an improbable "We'll see you in court" message for as long as possible in order to bring the other side around to your settlement demand.

But is playing chicken an effective tactic? While the threat of some sort of less favored alternative always plays a role in negotiations, the problem with communicating inflexibility is that it is too often believed. It can end up simply motivating a parallel approach, just as righteous and steadfast, from the other party. This second section of the article, looks at the game of chicken from a couple of different angles, and provides a few bits of advice on avoiding stalemate when trying to resolve your case.

Example: The Continuing Debt Ceiling Debate

It's been a common occurrence in Washington lately: here-

tofore routine request to increase to the federal debt ceiling touches off an escalating struggle between congressional Republicans and the Obama administration where, for months, the only apparent adjustment is for the parties to harden their positions and escalate their rhetoric. "Both sides are playing chicken," [Sebastian Mallaby](#) put it in a brief from the Council on Foreign Relations, "Both may swerve enough at the last minute to avert a collision. But games of chicken can be hard to exit. Leaders can get trapped by their own angry rhetoric: Having denounced your opponents as extremists, it's hard to explain to your partisan base why you decided to compromise with them. And recall what happened in the famous game of chicken in the James Dean movie, *Rebel Without a Cause* — Buzz Gunderson got his jacket tangled in the car door handle and drove off a cliff."

As it turned out, the political debate didn't end with a cliff, but it may as well have, since many analysts attribute the reduction in the country's [credit rating](#) to the fissures revealed in this dispute. And the same dispute is just getting ready to [play out again](#) this summer. Tactics can be habitual even when they aren't effective.

The consequence of hardened positions, in either politics or litigation, are predictable — and often predicted. But the parties end up being bound by the tactic. "Chicken is used in competitive negotiation by bluffing and threatening in order to get what you want," a current negotiation primer advises. "The problems with this strategy are that it has very high stakes and you must be willing to follow through on your threat." In legal cases, the threat — or the cliff — is generally trial. It remains a possibility, of course, but when your interests are better served by avoiding it, you want to make sure that your negotiating posture isn't entangling you in a course that is taking you to the courthouse.

A Few Simple Rules for Legal Settlement Negotiations

1. Don't Waste Time on Nonstarters

The problem in the debt ceiling debates, both past and present, is that the two sides are starting with positions that they know will be rejected by the other side. Republicans want deep and dramatic spending reductions and/or a balanced budget amendment, which Democrats will not agree to during a recession. Democrats want tax increases on upper incomes which Republicans have pledged not to enact. Both sides start with, and stick to, a proposal that the other side considers a nonstarter.

The same can happen in litigation. I once sat in on part of a mediation with a group of lawyers for the defense. When the mediator came in the door with the plaintiff's first offer — an incredibly high demand from our perspective. "We'll take it!" the client representative replied in a chipper voice. The entire room including the mediator burst out laughing in response to the obvious sarcasm — after all, who would expect that the offer would actually be accepted? But as I looked around the

room at probably twenty attorneys all billing high rates, it occurred to me that this posturing takes time, and time literally is money in this case. Granted, the initial demand can sometimes be made merely to establish a range and not determine a result. But when it comes to subsequent numbers, why not spend the time where it is most likely to lead to a realistic deal?

2. Don't Waste Time on Tit for Tat Negotiating

Writing in the [Maryland Injury Lawyer Blog](#), Ronald V. Miller illustrates the common approach of negotiating by saying, "We've come down by \$100,000 so you need to come up by \$100,000" or vice-versa. Reciprocity is a strong principle in human relations, but in the case of settlement negotiations, the two sides aren't exactly in the same boat. As Miller explains, "the problem is that many adjusters think that plaintiffs have no ceiling on the amount that they can demand, whereas defendants can never offer anything less than zero." For that reason, the sacrifice in the plaintiff's reduction is not parallel to the sacrifice in a defendant's increase.

The problem with the approach is also that it is blind to the case itself. If you are haggling over money alone, then you could be talking about anything. Instead, you should be focused on a case with merits that influence the ultimate resolution. We've [written before](#) that it helps if you separate the "positioning phase," where you argue merits, from the "bargaining phase" where you make offers and counteroffers, but those stances should still be based on some measure of case value.

3. Base Your Demands on Law and Specific Case Analysis.

Ronald V. Miller also stresses that numbers need to be grounded in reality. "If you are demanding the cap in a soft tissue injury claim, you are also sending the wrong message. Similarly, when you demand \$5 million in a case where your cap is \$2 million, you are sending the same 'I'm not exactly sure what I'm doing' message." While caps help to frame the appropriate range, they have the disadvantage of being blind to the circumstances of your case. A more specific measure of potential exposure or opportunity can often be found in pre-trial research. When several panels of mock jurors are reacting to both side's summary arguments and deciding on the value of a specific case, that can provide very useful information. Of course, the research design has to be customized to that purpose: If mock jurors hear little to nothing on damages, then their deliberations on numbers won't have much value – the reasoning they use can be interesting, but the values themselves are much less important. If instead, the project is designed to focus on case value and the mock jurors hear each side's basis, then the resulting discussion and decision can help to set your expectations on a reasonable range. While it isn't a prediction of trial outcome, when the research is done right it is substantially better than a guess.

One way out of the game of chicken is to hope for capitulation by the other side before you go over the edge. The other

way out is not to play the game in the first place. That doesn't mean giving away the farm, but it should mean focusing on offers and counteroffers that are fair, realistic, and grounded in a specific analysis of your case.

What Does a 'Good Settlement' Mean?

I'd say it starts with that fuzzy concept of "happiness." If we don't normally think of "happiness" when we think of mediation, it may be because a good settlement is generally not something that makes all the parties happy. Instead, it is more often something that makes the parties equally unhappy. At the same time the notion of happiness, or at least relative satisfaction, has an important role to play in determining when cases settle. In this final section of the article, I want to end on a positive note by looking at a few of the ways happiness can impact the process.

Settlement is above all a negotiation. But apart from the grim calculation of economic value at the end of a legal dispute, there are also the less tangible measures of satisfaction: Do the parties feel validated, respected, and vindicated? Are they happy? The term itself may seem a little fluffy, I admit. But proving that there is nothing that determined academics can't turn into a discipline, the study of happiness — the field known as "hedonics" — is receiving increasing attention. And it is a field that is worth thinking about for litigators who focus on ending their cases well, most often in the form of a mediated solution that the parties can live with. This post takes a look at some of the research on happiness that bears most heavily on civil settlement, pairing that with ideas on some ways litigators can increase their clients' satisfaction with the result.

Calculation of happiness, of course, is an individual act that comes from knowing your client and their concerns. At the same time, there are some psychological forces involved that shouldn't be lost in a focus on economic valuation alone. I recommend three considerations for thinking about happiness and your case settlement.

1. Consider the Possibility that Litigation Is a "Focusing Illusion"

Lets start with a quick look at the way we think about happiness itself. Our satisfaction, of course, can be experienced in the present, remembered in the past, or forecast in the future. As you might expect, we have not all quite reached a zen level of present-ness, and our experience in the moment doesn't drive us as much as our recollections about the past or, particularly for decision making, our forecasts for the future. One breakthrough article ([Schkade & Kahneman, 1998](#)) in the field of hedonics asked the question, "Does living in California make people happy?" The answer is, "not nearly as much as we might think it does." When people consider the impact of one factor on their overall happiness, they are prone to greatly exaggerate the influence of that factor, and overlook many other factors that might play a greater role. Professor Daniel Kahneman calls this a "focusing illusion," and it might

inform the calculations that parties make in the long walk up to civil trial. As they think about the effect that a verdict, for good or for ill, might have on their happiness, they are apt to exaggerate. As Schkade and Kahneman note, “Nothing in life is quite as important as you think it is while you are thinking about it.” And if thoughts of litigation outcomes function as focusing illusions, then maybe that explains why the parties come to have such different views on the importance and value of their claims, views that diverge over time instead of coming closer together. In short, psychology is pushing the parties toward different and potentially irreconcilable views of the case.

So one obvious recommendation that I’ve made before is this: Provide clients with a reality check. Instead of leaving the parties, and counsel as well, with their own estimations of case merit, value, and probability, get past the illusions by providing one or more early sounding boards in the form of focus groups and mock trials.

2. Consider An Apology to Promote Settlement

In the *Persuasive Litigator* blog, we have [written previously](#) that apologies can help cases to settle. Supplementing the increasing experience of defendants in settings like medical malpractice, experimental research confirms that apologies increase the acceptability of settlement offers by improving the credibility and the favorability of the party making the offer ([Robbenolt, 2003](#)). The finding is that complete apologies – those that convey remorse, responsibility, repair and reform – ([Bouly, 2007](#)), tend to work while partial apologies – e.g., “I’m sorry you feel that way...” – will fail or even make things worse. This suggests that the reason that an apology works is that it brings greater satisfaction. Because it contains an acknowledgement of wrongdoing, it validates the harmed party’s perceptions. Because it communicates a commitment to fix the problem and prevent it in the future, and provides a sense of vindication, it adds to the level of happiness that would have been provided by a monetary settlement alone.

3. Consider the Effect of Time

Time is usually blamed for adding to the misery of litigation. As the wait for justice moves from months to years, the delay has a cost that is financial as well as psychological. For both sides, it can also raise the stakes in a way that makes settlement less likely since the parties are now looking for a result that makes it all worth it. There may, however, be a silver lining to delay in some cases. Research looking at the role of happiness in a litigation settlement context points in what might be an unexpected direction. [Bronsteen, Buccafusco & Masur \(2008\)](#) apply the research on “hedonic adaptation,” or loosely translated as our ability to “get over it” over time. Injured parties, they argue, will initially predict greatly diminished happiness as a result of the injury, but over time they will adapt to the change and their overall happiness comes back into balance. That finding may seem counterintuitive,

but the article cites research showing that even fairly extreme events that are positive (winning the lottery) or negative (becoming disabled) have little long-term effect on our subjective happiness, due to our ability to adapt. That means that a plaintiff is likely to set the bar very high initially for what would make them whole, and then gradually lower that bar as it becomes clear that that the loss is not as grave as they once forecast it to be. “Adaptation will drive down the settlement prices for many personal injury plaintiffs,” the authors argue, “enlarging the available window for negotiation between plaintiffs and defendants and increasing the rate of settlement.”

Before defendants embrace delay as a strategy – any more than they already have – there are other views (e.g., [Huang, 2008](#)) suggesting that it is not as simple as delay equaling a lower settlement. In many cases, adaptation is slow or incomplete, and we might expect that a continuing battle in the litigation arena might nurture or enhance the perceived wrongs.

Ultimately, the message from the apology research and the adaptation research is that both timing and tone should be taken into account in resolving legal disputes. Instead of seeing settlement as just a business negotiation designed to maximize value, it helps to also see it as a “speech act” in its own right, or as a message that carries a separate meaning independent of the money being offered or accepted. Instead of seeing settlement as just a question of when the other side will come to the table, it is also a question of when your client is psychologically ready for realistic closure. 🎯

Dr. Ken Broda-Bahm is a Senior Litigation Consultant for Persuasion Strategies and has provided research and strategic advice on several hundred cases across the country for the past fifteen years, applying a doctorate in communication emphasizing the areas of legal persuasion and rhetoric. As a tenured Associate Professor of Communication Studies, Dr. Broda-Bahm has taught courses including legal communication, argumentation, persuasion, and research methods. He has trained and consulted in nineteen countries around the world and is a past President of the American Society of Trial Consultants.

Ken blogs at Persuasive Litigator www.persuasivelitigator.com, is an editor for The Red Well (www.redwellblog.com), is active on LinkedIn and can be reached directly at 303-295-8294 or kbrodabahm@persuasionstrategies.com.

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Note: Content for this article is adopted from three posts in the author's blog, Persuasive Litigator.