

# **PICTURE IT SETTLED: INTEGRATING THE POWER OF PICTURES INTO SETTLEMENT NEGOTIATIONS**

ADR Section Program

**Donald R. Philbin, Jr.**

Donald R. Philbin, Jr., P.C.

PO Box 12286

San Antonio, Texas 78212

(210) 212-7100

(210) 212-7118 Fax

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## **SUMMARY BIOGRAPHY**

Don Philbin is an attorney-mediator, negotiation consultant and trainer, and arbitrator. He has resolved disputes and crafted deals for more than 20-years as a commercial litigator, general counsel, and president of communications and technology-related companies. Don has mediated hundreds of matters in a wide variety of substantive areas and serves as an arbitrator on several panels, including CPR's Panels of Distinguished Neutrals. He is an adjunct professor at the Straus Institute for Dispute Resolution at Pepperdine Law School, Chair of the ABA Dispute Resolution Section's Negotiation Committee, and a member of the ADR Section Council of the State Bar of Texas. Don is a Fellow of the American Academy of Civil Trial Mediators and is listed in THE BEST LAWYERS IN AMERICA (Dispute Resolution), THE BEST LAWYERS IN SAN ANTONIO, and the BAR REGISTER OF PREEMINENT LAWYERS.

# Alternatives



CPR

International Institute for  
Conflict Prevention & Resolution

## TO THE HIGH COST OF LITIGATION

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION

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CPR

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# Alternatives

TO THE HIGH COST OF LITIGATION

## DIGEST

### NEGOTIATION

Taking a lesson from a popular network television show, **Donald R. Philbin Jr.**, of San Antonio, discusses closing a deal. He pinpoints issues when analyzing options and shows how to use a decision tree, as well as maximize the mediation experience.....**Page 177**

### CPR NEWS

A rundown of recent activities by the CPR European Insurance Committee and the European Advisory Committee; a DVD of a negotiation exercise from last January's Annual Meeting, suitable for training use, is now available; more from Philadelphia's Stradley Ronon on winning the first CPR Law Firm Award for Excellence in ADR, and highlights from the first day of CPR's 2007 Fall Meeting in Boston.....**Page 178**

### ADR PROCESS DESIGN

**Richard A. Posthuma**, of El Paso, Texas, provides the fundamentals of installing best conflict resolution practices into a workers' comp scheme to yield lower costs and better employee relations.....**Page 179**

### ADR BRIEFS

A group of international attorneys decide to do something about the arbitrator selection issues they had been chatting about on a list serv. The result is a new arbitrator feedback form, and a proposal to collect information for a subscription database. Also, details on a new international pledge under which attorneys will put ADR forward as a first option.....**Page 183**

### DEPARTMENTS

CPR News .....**Page 178**  
Subscription Info .....**Page 178**  
ADR Briefs .....**Page 183**  
Cartoon by Chase.....**Page 184**



INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION

VOL. 25 NO. 11 DECEMBER 2007

## *Deal or No Deal? Or Perhaps a Better Deal?* The Impact of Improved Information

BY DONALD R. PHILBIN JR.

A spunky St. Louis grandmother and preschool teacher claims \$1 million. Her unseen opponent offers her \$38,000. As they work through previously undiscovered information, they conclude a "deal" at \$272,000.

No, this deal doesn't settle a claim on the eve of trial. It concludes the 2006-07 season of the popular NBC television series, *Deal or No Deal*. There, contestants select one of 26 suitcases containing amounts between one cent and \$1 million. The parties then discover the contents of the selected case by eliminating the other 25. (See [www.nbc.com/Deal\\_or\\_No\\_Deal](http://www.nbc.com/Deal_or_No_Deal).)

Fun or annoying, the show gives a national audience exposure to the vagaries of valuation with incomplete information. Both the *Wall Street Journal* and National Public Radio have examined academic research into the probabilities issues the show presents.

Contestants begin with a one-in-26 chance—3.8%—of the 26 outcomes be-

tween \$0.01 and \$1 million. In the U.S. version of the show—which airs in more than 50 formats world-wide—each selection simultaneously reduces the total number of outcomes while increasing each of their probabilities. After selecting the first six cases, contestants know the odds of any single outcome have dropped to one in 20, or 5%, and hope that the top outcomes, including the hyped \$1 million payoff, remain in play. An unseen "banker" calls at various points to offer settlement.

Of course, the offer varies depending on the expected value of the remaining suitcases. But the offers do not mathematically equal the net expected value of the remaining outcomes. And like all negotiations, psychology plays an important role—helping making this show a television event.

While negotiating claims in the shadow of the law are more complex, similarities abound. Litigants and contestants are routinely asked to make decisions with less than-perfect-information. That is not always bad—especially if time and transaction costs are associated with continued discovery. Perfect information may reveal a player's case to contain only \$20.

Absent that certainty, however, contestants often have an opportunity to make a better deal. Of course, the reverse also is true. Many have taken the certainty of a sure deal when later—and perfect—information revealed more favorable outcomes.

So if "certain" decisions are impractical because perfect information is elusive or prohibitively expensive, how do we combine law, economics, and psychology to increase the probability of a more efficient deal?

(continued on page 181)

### NEGOTIATION

The author is an AV-rated attorney, mediator, arbitrator and consultant based in San Antonio. He is a former commercial litigator, general counsel and president of a \$100 million dollar company. He is listed in *The Best Lawyers in America* (Alternative Dispute Resolution; Woodward/White 2007, 2008), and a member of the CPR Institute's Panels of Distinguished Neutrals. This article is based in part upon "The One-Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation," which is slated for publication in the forthcoming Volume XIII of the *Harvard Negotiation Law Review*.

apists to try to retrain workers with severe cases to work in a different job. This technique can be effective because it gives the worker higher earning capacity and reduces the wage loss expense.

- 10) *Compare Prices*. Under this technique, employers periodically compare the prices of medical service providers, workers compensation insurance premiums, and attorneys. This technique can be effective whenever it helps them obtain the best service at the lowest cost.

## AVOIDING EXPENSES

The techniques described above can help employers in a variety of conflict resolution settings.

Nonunion employers often provide their employees with a dispute resolution system that permits them to file a complaint to someone inside the company. A key advantage of resolving disputes internally is that both the employee and the employer can avoid the expense of legal fees.

These complaints often are resolved informally through discussions or mediation. During this process, the employer has the opportunity to explain to the employee directly what reports they have obtained from their company doctor or independent medical examination, as well as the implications of these reports.

If the employer and employee are unable to resolve their dispute internally, the employee always will have the right and option to hire an attorney, and file a complaint with the appropriate state agency. Where there is a union that represents the employees, it is more common that the union will advise the employee to file the complaint directly, with their own attorney or the state workers compensation bureau.

But even when this occurs, there is still a good chance that the dispute can be resolved short of an actual trial. Many states are implementing voluntary or mandatory mediation programs that provide a dispute resolution process. In these programs, the employer and employees and their legal

representatives meet and attempt to resolve their dispute voluntarily. This is more expeditious, and the trial or hearing expenses can be avoided.

Typically the discussion in these dispute resolution meetings focuses on the likelihood of winning or losing the case, based on the medical and activity evidence that the parties have obtained.

In some cases, the parties may discuss whether there is light duty or favored work that is available and appropriate for the employee to return to work. The parties also may discuss the costs of alternative treatments and the appropriateness of vocational rehabilitation for the employee.

When a voluntary settlement is achieved, it may take the form of a lump sum settlement.

The bottom line is that there is a big advantage with voluntary dispute settlements: Often both parties are more satisfied with the outcome.

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## Deal or No Deal?

(continued from front page)

Rigorous legal analysis is the foundation of case evaluation. Lawyers associate legal causes of action and remedies with party interests—for example, “We missed our quarterly numbers because they failed to deliver widgets on time.” Not unlike *Deal*, a range of outcomes result. A breach of contract claim may yield benefit-of-the-bargain damages. An associated tort action may allow punitive damages that exceed that measure, but come with longer odds. Of course, defenses may reduce or eliminate any recovery.

Advising litigants that their outcomes range from \$0.01 to \$1 million is not that satisfying. Worse, psychologists remind us that we lock on the most favorable number—*Deal* contestants inevitably focus on the \$1 million result, if for no other reason than to make decisions more manageable.

chance of winning \$1 million. With nothing to lose, it makes good theatre. Faced with personal or economic injury and the

### Assessing the Odds

**The issue:** What are your chances for a given outcome in a negotiation?

**The problem:** Legal analysis is hard enough. Layering economic analysis on top of it is daunting.

**The bottom line:** You’re already valuing every negotiation move. Applying common economic principles to monitor yourself is common sense—with lessons learned from a game show.

efficient outcome without turning over every rock. We are comfortable making decisions with less-than-perfect information routinely—60% may be great for a new product launch but not for bet-the-company-litigation.

By layering economic analysis atop legal analysis, we begin to build economic scenarios. Economic analysis does not predict a certain outcome; it helps us analyze uncertain decisions by thinking in terms of the range of potential outcomes that might result if we tried the same claim 100 times.

Some outcomes will be high and others low, but the majority gravitates to the center of a bell curve. The contours of that curve can make a big difference, and modifying assumptions one-at-a-time tests sensitivity to each change.

In the process, the scenarios crystallize decisions. They can even be displayed graphically in a decision-tree format. See Chart I at the bottom of page 182. If we know that the \$1, \$200, \$300, \$500,000, and \$1 million cases are unopened, and the chances of each outcome are equal at 20% each, the contestant faces this choice in the chart.

## NO ‘GOOD’ CHANCE

But even with half the suitcases opened, contestants still do not have a “good”

transaction costs associated with improved information, one may reasonably search for ways to increase the likelihood of an ef-

(continued on next page)

## Deal or No Deal?

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The unopened suitcases' net expected value, or NEV, is \$300,100. But more than half of that value is dependent on a single outcome. With \$1 million out, NEV falls to \$125,125. So the spunky school teacher settles for the banker's sixth-round \$272,000 offer, nine percent below NEV. A big win for anyone, even if the maximum \$520,000 outcome would have come three rounds later—right before perfect information revealed that her case contained just \$200.

### MIND GAMES

There are obvious psychological principles at play. This contestant was fairly risk-seeking—she turned down two six-figure offers, \$145,000 and \$201,000. And that is not unusual for someone facing a sure gain. She also was overconfident.

The producers hype the \$1 million outcome without much mention of the higher probability of something much lower. In fact, no one walked away with \$1 million this season.

Outcomes vary widely in repeat play, but the spread between the offer and NEV on a normalized basis does not. The banker's opening bid is usually 35% or less of NEV. As contestants continue risking early offers to discover more perfect information, the gap between the offer and NEV closes, but not quickly. Contestants usually have to open 20 of the 26 suitcases, or 77%, by Round 5, to reach 80% of NEV. And in limited online play, it seems to take even longer. See Chart II below.

Negotiations also follow a ritualistic "dance" that is heavily influenced by im-

proved information and time. Fixed price car deals have not caught on widely because we are accustomed to the dance—and we tend to suffer Winner's Curse if the dealer accepts an early offer.

In fact, some experts in the field say that subsequent negotiation offers take twice as long and concede half as much. Whatever the interval, few negotiators offer their best terms without some give and take.

### PROCESS DESIGN ISSUES

If contestants and litigants are more satisfied with a process that recognizes a need to arrive at satisfactory outcomes incrementally by comparing real alternatives through improved information, how do we design a process that appeals to those interests?

Mediation is an obvious but incomplete answer because it covers such a wide range of practices. Some would say that mediators should simply keep the parties talking. Others would argue that the neutral needs to throw a cold-water evaluation on the contestant gunning for \$1 million because no one has done it yet. Each has its place.

But what if the neutral were to guide the parties through a cathartic discussion of past events—probably the equivalent of their "day in court" since 98% settle pre-trial—and turn their attention to the future through an elicitive probe of the range of outcomes, probabilities, and choices before them?

*Deal* contestants bring friends and family to advise them. Litigants have the advantage of repeat-playing lawyers that know the market—and the legal system essentially forces parties to write call-options

for one another at prices that are negotiated between them or imposed by others.

Mediators are uniquely positioned to help parties explore informational disparities under an umbrella of confidentiality. Even without sharing the information—unless given permission to do so strategically—a mediator can better probe each side's outcome and probability assumptions with a more rounded view of the case. With or without transaction costs, a zone of potential agreement, or "ZOPA," may emerge from overlapping bell curves depicting the potential outcomes.

### YOUR OPPONENT'S VIEW

And negotiation is not simply a matter of bracketing legally available remedies and running scenarios based on the probability of those outcomes. Psychology plays an important role. Even the best idea conveyed by an opponent will be heavily discounted.

In fact, a Cold War experiment quantified the extent of this "reactive devaluation." Soviet leader Mikhail Gorbachev made a proposal to reduce nuclear warheads by one-half, followed by further reductions over time. Researchers constructed a test attributing that proposal to President Ronald Reagan, a group of unknown strategists, and to Gorbachev himself. When attributed to the U.S. President, 90% reacted favorably. That dropped marginally when attributed to the third-party, to 80%, but dropped by more than half, to 44%, when attributed to the Soviet leader himself.

Planning for successful negotiations is a multifaceted endeavor. It cannot be done without rigorous legal analysis. Normalizing that analysis with probabilities crystallizes our own thoughts. More im-

CHART I: Using a Decision Tree

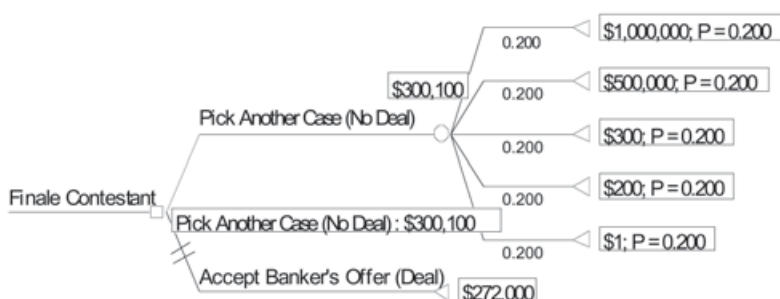
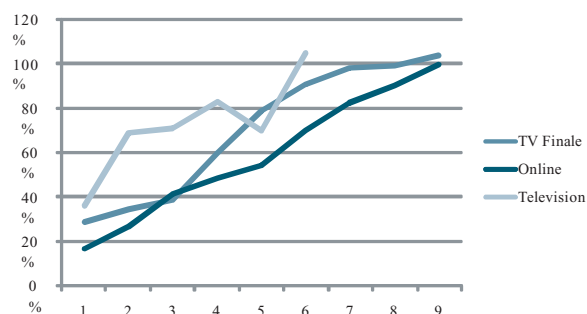


CHART II: Offer as a Percentage of NEV






portant, it helps us communicate the rationale for our positions to opponents and business decision-makers alike. Disagreements will likely focus on the assigned probabilities, but the analysis can test how far off those assumptions would actually have to be to erase the transaction cost-loaded ZOPA.

Recognizing that human differences are the spice of life, we would also do well to

fold psychology into our planning and negotiation. That plan may include bringing in third-parties who can guide the journey through all of these disciplines.

Together, parties may decide to accomplish that goal by selecting a mediator who can assist with such analyses in caucus with attendant confidentiality. Others may choose to hire consultants to help plan strategic negotiating moves or to serve as

settlement counsel so the generals can stay focused on the war. Peace is often made under threat of war, but it is rarely negotiated by the generals conducting it. Third-parties with a broad understanding of party interests and improved information help them find alternatives. 

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## Mediation Is the Best Place to Constructively Test Party Aspirations

Mediation offers a safe and effective place to test party aspirations with a variety of tools. Under various statutory provisions protecting mediation, and evidentiary rules excluding settlement negotiations, parties can share background information with a mediator, enabling him or her not only to test the range of remedies associated with legal causes of action, but build economic models with those remedy brackets.

Economic models do not predict specific outcomes. Rather, they help us translate gut instincts like "good case" into probabilities. If we assume that the same case will be tried 100 times and begin to quantify the number of trials that might result in various outcomes, a form of bell curve starts to emerge. With no more than rough guesses as to the number of times a trial may result in high,

medium, low, and zero outcomes, scenarios start to emerge.


The magic is not in the mathematical precision of the resulting economic calculations. It's in the conversations that the modeling facilitates.

Psychologically, we focus on information that reinforces our desired outcome. So if we want a \$1 million recovery and perceive that we have a good case, we naturally combine the two to mean we have a good shot at \$1 million.

Of course, the reverse also is true. If we are defending the claims, we may focus on \$0 and believe our "good case" lies there. The highest probabilities may in fact lie between those two brackets.

Like *Deal or No Deal* contestants, our estimates may change with improved information. Skilled mediators can draw caucus

discussions to these future outcomes and test their likelihoods, interactively using their own experience or case-specific information that others may be willing to share under the umbrella of mediation. Doing so hypothetically may help reduce the transaction costs associated with discovering information that would adjust these case assessments through traditional means.

In the right hands, economic tools can help turn mediation from a necessary and cathartic discussion of past events to a meaningful discussion of future outcomes based upon information shared under an umbrella of confidentiality. Appreciation of the psychological biases we all carry should only help tailor the way the process is conducted and any resultant offers are presented. 

—Donald R. Philbin Jr.

## ADR BRIEFS • ADR BRIEFS • ADR BRIEFS

### SEEKING TRANSPARENCY, INTERNATIONAL ARBITRATION USERS PROPOSE TO GATHER FEEDBACK

In an attempt to get more information circulated about arbitrators' talents, a group of international practitioners has developed a feedback form they hope will produce more confidence in the processes they rely on.

The form emanates from an ad hoc group established by participants in a private international arbitration list serv, and grew out of discussions earlier this year. It's still labeled a draft, and people involved

with the process say they expect additional refinements.

The form also contemplates dissemination. A member of the ad hoc committee has produced a lengthy proposal for a commercial database that would address the gripes many practitioners have about the lack of information on arbitrators' experience and competence. As a result, the two separate but related projects reflect an increased focus on improving arbitration processes. The form and the proposed database would serve to address, and maybe solve, cross-border practitioners' chronic complaints over insufficient arbitration information.

For now, the feedback form remains a

discussion topic and is not yet in use. The ad hoc group has presented the form to a variety of law firms, companies, and international arbitration organizations for broader feedback, with a goal of institutional adoption.

[The CPR Institute, which publishes *Alternatives* with Jossey-Bass, has referred consideration of the feedback form to its arbitration committee, which will examine the form and discuss its potential use generally, and by CPR. CPR's Dispute Resolution Services Department routinely surveys arbitrators and parties in matters on which it works, but it has not used the new draft form.]

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# DECISIONAL ERRORS

## Why We Make Them and How to Address Them

**U**mpiring errors were a bigger story in the recently completed World Series than the New York Yankees' record-setting 27th pennant. Decision errors reached comic proportion in game four of the American League playoffs in Anaheim. In what ESPN dubbed "the worst umpiring performance at an Angels game since Leslie Nielsen in *The Naked Gun*,"<sup>1</sup> third-base umpire Tim McClelland called Yankee Nick Swisher

**Umpiring errors reached comic proportions in the recently completed World Series, highlighting the fact that people regularly make decisional errors. There are many reasons for this and a variety of dispute resolution processes that can be tailored to fit the specific fuss in a cost-effective way.**

**BY DONALD R. PHILBIN JR.**

Don Philbin is an attorney-mediator, negotiation consultant and trainer, and arbitrator. He has resolved disputes and crafted deals for more than 20 years as a commercial litigator, general counsel and president of communications and technology-related companies. Don has mediated hundreds of matters in a wide variety of substantive areas and serves as an arbitrator on several panels. He is an adjunct professor at the Straus Institute for Dispute Resolution at Pepperdine Law School, Chair of the ABA Dispute Resolution Section's Negotiation Committee, and a member of the ADR Section Council of the State Bar of Texas. Don is listed in *The Best Lawyers in America (Dispute Resolution)*, *The Best Lawyers in San Antonio*, and the *Bar Register of Preeminent Lawyers*.

safe when he was out, out when he was safe, and “blew an obvious call on what should have been a double play at third base.” McClelland could not even explain why he missed what seemed obvious with the benefit of instant replay.

Fortunately, McClelland’s mistakes were not outcome determinative, but they fueled the case for expanding Baseball Commissioner Bud Selig’s limited replay system beyond disputed home run calls.

But those of us who work in the dispute resolution field were probably not surprised by the umpiring errors, since we know that errors are inevitable in sports, our personal and business lives, and certainly in the crucible of litigation. As Yankee Derek Jeter put it post-game: “Umpires are human. They make mistakes sometimes.”<sup>2</sup> The negotiator for the umpire’s union also noted that players are just as susceptible to making mistakes: “Part of the game,” he said, “is the potential for human error, not just for umpires, but for players, that’s part of the game.”<sup>3</sup>

Decision-making errors have many causes. Overconfidence can certainly push parties to the margins of a negotiating range. It’s human nature to place more emphasis on facts supporting a desired outcome than those that contest that position. Overconfidence leads people to discount small probabilities and luck, and overestimate their own situation. It’s sometimes referred to as the “Lake Wobegon” effect.

Researchers have begun to quantify the magnitude of this cognitive error. In one study, more than 80% of interviewed entrepreneurs described their chances of success as 70% or better, and 33% described them as “certain.”<sup>4</sup> That compares with a 33% five-year survival rate for new firms. In another study, couples about to be married estimated their chances of later divorcing at zero, even though most knew that the divorce rate is between 40%-50%.<sup>5</sup>

Yet another study found that negotiators in final-offer arbitration<sup>6</sup> overestimated by 15% the chance that their offer would be chosen.<sup>7</sup>

Optimistic overconfidence can make it very difficult for parties to see the same problem similarly.

It can be involved whether we have equal information or asymmetric information. You might

think that if humans were completely rational and shared all the available information, they would reach similar decisions. But you would be wrong. This was confirmed by a study showing that people with exactly the same information reach different conclusions. For example, one study showed that buyers rarely want to pay as much as sellers demand. Subjects asked to price a generic coffee cup for sale assigned it a value of \$7.12. Their would-be buyers initially offered \$2.88 for the same cup—2.5 times less.<sup>8</sup> While the different val-

uations may largely be a matter of assigned position, the spread between the offers is attributable in large part to the assigned position of the parties making or receiving those offers.

Interestingly, people with less information about an issue are more definitive in their position than are those with more complete information. They tend to undervalue aspects of a situation about which they are ignorant. In one study, subjects given only half of the evidence in a case predicted the jury’s decision with greater confidence than those who were given all of the information.<sup>9</sup> Not only were they more confident than those who were better informed, they were not able to adequately compensate for their overconfidence when told that their evidence was lopsided. Not only are we predisposed to camp near our positional interests, it’s human nature not to fully appreciate another perspective. A noted 19th Century Boston educator observed that, “To be ignorant of one’s ignorance is the malady of the ig-

norant.”<sup>10</sup>

Decision-making errors could also involve the phenomenon called “anchoring” (an overreliance on a particular fact or piece of information, especially information dropped early to anchor negotiations). The problem is that the anchor may be unreasonable and increase the odds of impasse and other unintended consequences. There is evidence that even knowledgeable professionals are susceptible to manipulation of anchors. By varying real estate asking prices, researchers were able to throw professional real estate agents off track in negotiations.<sup>11</sup>

Negotiation training, or obtaining a legal

***Decision-making errors have many causes. Overconfidence can certainly push parties to the margins of a negotiating range. It’s human nature to place more emphasis on facts supporting a desired outcome than those contesting that position.***

opinion or an economic analysis, can help assess the reasonableness of an anchor. It can also place us in a better position to decide whether to make a first offer or wait, or disregard an offer or demand by the other party that is based on an unreasonable anchor.

Then there is the phenomenon of reactive devaluation, in which people tend to reject or devalue whatever the other side offers, even if it's favorable ("They wouldn't have offered those terms if those terms strengthened our position relative to theirs."). We also tend to reject things that are free and want things that are expensive—an example of the adage that the "grass is always greener on the other side of the fence."

Why do people reactively devalue offers from the other party? The simple fact is that there are things we just do not want to hear from adversaries. Our perception of the source of the offer colors our perception of the offer. This was demonstrated in an experiment in which different groups of students were told a different story about the Cold War. One group was told that a group of unknown strategists made a proposal to reduce nuclear warheads by one-half, followed by further reductions over time.<sup>12</sup> Another group was told that President Reagan made the proposal, and a third group was told that Soviet leader Gorbachev was the source of the proposal (he was the real author). The surprise was not that the groups reacted differently to the proposal depending on its source, but the wide range of difference between two of the groups. When attributed to the U.S. President, 90% reacted favorably. That dropped marginally (to 80%) when attributed to unknown negotiators, and then to 44% when attributed to the Soviet leader. Thus the arms control proposal from "unknown strategists" and President Reagan were viewed almost equally and twice as favorably as when the proposal came from the opponent.

Strong emotions, like anger, can be a powerful trigger of judgment errors. When people are angry they can make "attribution errors"—i.e., they take credit for positive outcomes and attribute negative outcomes to external factors, no matter what actual caused them.<sup>13</sup> When making decisions, it is important to contemplate the attributions we are making to another person, and the ones they are surely making to us.

Our attitude toward others impacts their attitude toward us. Not only does that attitude affect the negotiation dance, it shows up in claim escalation. For example, doctors who treat patients with respect tend to be sued less often. In his bestselling book *Blink: The Power of Thinking Without Thinking*, Malcolm Gladwell observes

that "there are highly skilled doctors who get sued a lot and doctors who make lots of mistakes and never get sued." He says the differentiator is not shoddy medical care but rather a shoddy attitude: "[P]atients say that they were rushed or ignored or treated poorly" and it made them mad. Gladwell quotes medical malpractice lawyer Alice Burkin: "People just don't sue doctors they like ... [A good] bedside manner and a willingness to answer patient questions are effective ways to reduce the odds of facing a malpractice suit," she said.

Judges also makes mistakes—or at least many litigants think so after they force a judge to decide a case that they could not resolve among themselves. While we do not know that much about judicial decision-making, efforts have been made to quantify decisional errors among judicial populations. Chris Guthrie, Jeff Rachlinski and Andrew J. Wistrich, using Gladwell's "rapid cognition" concept (i.e., that people make decisions based on a snap answer that comes to mind first; Gladwell calls it a "blink") attempted to determine whether judges make snap decisions.<sup>14</sup> They asked over 250 Florida trial judges who were attending an annual judicial conference to answer a survey questionnaire containing three questions (called the Cognitive Reflection Test):

1. If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets?
2. A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?
3. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half the lake?

The questions were designed to distinguish "intuitive" from "deliberative" thinking since each had an intuitive wrong answer and a deliberative right answer. The intuitive snap answer to question 1 was 100 minutes, but the right answer was five minutes. The snap answer to question 2 was 10 cents but the right answer was five cents. Finally, the snap answer to question 3 was 24 days, while the right answer was 47 days.

How did the judges do? Just 28.2% picked the right answer to question 1; 44% answered question 2 correctly; and 50.4% gave the correct answer to question 3. This represented an average correct score of 1.23 out of 3.00.

But more interesting is the fact that 31% of the responding judges did not get any of the questions right. True, there could be inherent problems with the questions, which were remi-

niscent of intelligence tests and SATs taken in high school, not at all like the “application of law to fact” questions that judges are used to answering on the bench. In addition, the judges who responded to the questions during a packed conference may not have put much effort into answering them. But it nevertheless suggests that judges are susceptible to the same decisional errors that plague the rest of us, even other umpires.<sup>15</sup> That should trouble disputants who choose to litigate over making a deal themselves during negotiations, in mediation or reaching a settlement on the courthouse steps.<sup>16</sup>

Besides judicial errors, there are other structural features of our judicial system that foster decisional error. For example, it is a rigidly rule-bound and adversarial process, with parties represented by warrior advocates, who test the veracity of adversary witnesses at trial through live and often acerbic cross-examination. Our uniquely

## Alternatives to Litigation

Since most disputes don’t have to be resolved in litigation, and most disputants do not want the resolution process to take years and cost a mint, we have alternatives to going to court. At the Pound Conference in 1976, Frank Sander, a pioneer in the field of alternative dispute resolution, recognized that there are multiple ways of processing disputes. It was at that conference that he coined the “multi-door courthouse” metaphor.<sup>18</sup> Sander also authored the concept that the dispute resolution process should “fit the fuss.”<sup>19</sup>

That goal is even more important today as the discovery conundrum is magnified with electronic discovery. Retrieving and producing a usable email can be debilitating—for whichever side has to bear the expense. No matter whether the disputes involve sports figures, a family in conflict, an employee-employer problem, or a business deal gone south, the process can be and should be

## ***Judges also make mistakes—or at least many litigants think so after they force a judge to decide a case that they could not resolve among themselves.***

American rule allowing liberal pre-trial discovery of information—including e-mail and other forms of electronic information—in the possession of the adversary and third parties often leads to delays, procedural disputes, and pre-trial motions. It could result in the discovery of relevant information, but whether it does or not, the cost is high. Litigants may need a war chest as large as the New York Yankee’s payroll to fully participate in a process that may try their patience while taxing their treasure.

It’s also difficult to tailor litigation to specific disputes. We follow one-size fits all procedural and evidentiary rules regardless of the scope of the issues involved or the magnitude of the damage.

Of course, many criminal matters<sup>17</sup> and civil disputes in which a legal precedent needs to be forged must go through the court system. And some disputes are clearly unsuited for other means of dispute resolution. For example, it is likely that even the most capable mediator would have had trouble mediating *Brown v. Board of Education*. The parties’ distant positions were on bright display in that case, as were the underlying interests and biases that animated their dispute. Indeed, it took the power of the federal courts and the artillery of the National Guard to get some of those parties to yes.

tailored to the dispute.

Cost and time are critical factors in designing processes to avoid or reduce decisional errors, even when made by the disputing parties themselves. What works in one area does not always work in another. For example, a World Series pennant game broadcasted nationally can afford to have 12 cameras to record different plays for instant replay purposes. But that would be too costly an approach in little league baseball. The result is that we sometimes read about parents who become violent when an unfavorable call is made involving their child.

Arbitration and mediation are both well-known ADR systems. Arbitration results in a binding and final decision by a private neutral decision maker, called an arbitrator. The parties can select the arbitrator, which allows them to select an expert in the field of the dispute. Parties can agree to use arbitration’s efficient procedures and set time limits for the issuance of an award. To address the reality that arbitrators can also make decisional errors too, there is a system for limited review of awards by trial courts,<sup>20</sup> or if the parties agree, an appellate arbitrator or panel.

Mediation has been wildly popular in the United States, probably because the parties retain ultimate control over the outcome while leveraging the talents of a neutral mediator to reduce

human bias. The Reagan-Gorbachev study quantifies what we intuitively know—the same idea will be received more favorably from a neutral party than an opponent—by a factor of two. Since we all like decisions we make better than those that are foisted upon us, mediated agreements tend to be more self-enforcing than judgments.

The psychological causes of decisional errors can come into play in these processes as well. There are, however, techniques that can address them. For example, counsel can use decision trees and animated scenario modeling to display and assign probabilities to various outcomes, including whether to negotiate, litigate, arbitrate or mediate, or use some other process (see Figure A),<sup>21</sup> or how much to pay to close an information gap that has been framed by an offer. The amount has everything to do with the spread between the decision points (*litigate v. settle*).<sup>22</sup>

A technique employed to curb reactive devaluation in mediation is to reframe the discussion in more positive terms and work through various possible outcomes.

But clients want their lawyer to be their champion and agree with their optimistic view of the case. Most do not like their champion poking holes in their case. This is why counsel will often suggest getting an opinion from an expert, or if the case is in mediation, will urge the mediator to provide a reality check. Mediators, not counsel, are the ones who generally use reframing to move the mediation along.

The bottom line is that if the parties' positions are aggressively opposite and neither is tempered by a reality check, an impasse is likely to occur. This scenario tends to lead the parties to embark on a dispute resolution process involving a decision by a third party, such as arbitration or litigation.

A key psychological factor that tends to affect most decision making is the person's tolerance for risk and aversion to loss. Some people are risk-takers and others are risk-averse. Attitudes toward risk are dependent, in part, on whether the party believes they face a gain or risk a loss. Plaintiffs generally seek recoveries that defendants resist paying. Unless they have sunk a great deal of money into the transaction or lawsuit, or their agreement contains a fee-shifting provision (i.e., a loser pays clause), plaintiffs tend to believe that they will have a gain from settling and perhaps a bigger gain from going to trial. In the absence of strong counterclaims or an offer of judgment that may change the cost dynamic, defendants are in the opposite position: they face a sure loss by settling and perhaps a bigger loss by going to trial.

People tend to make risk-averse choices when

facing a gain (they prefer a sure gain over a less certain larger gain) and risk-seeking choices when facing a loss (they prefer riskier outcomes to sure losses). So one group of people facing a gain would prefer receiving \$240 in hand to a 25% chance of receiving \$1,000 (worth on average \$250). The same group, when facing a loss, would prefer a 75% chance of losing \$1,000 (worth \$750) to a sure loss of \$750.<sup>23</sup>

But these risk profiles can change. For example, many game show contestants are risk takers. You probably won't see many negotiation theorists risking humiliation on national television, even if the payoff is potentially high. Having said that, a Harvard-educated entertainment lawyer recently went for broke on "Who Wants to Be a Millionaire?" He astutely answered a long series of questions, accumulating a purse of \$475,000. That series of wins no doubt inflated his confidence in his ability to play this game. When asked whether he wanted to risk his hard-won purse on a single question that could double his payoff to \$1 million, he said yes. The problem was that he didn't know the answer to the half-a-million dollar question and it was not self-evident or logically deducible. He opted to ask the audience for its opinion and was ultimately influenced by its incorrect answer—a stark example of the phenomenon of anchoring.

What happened here is that a very smart, initially successful player turned into a prisoner of psychological biases. He must have realized the ebbing of his overconfidence when during a seemingly long period of introspection upon hearing the problematic question, he generalized that risk seekers usually go to business school while law schools attract the risk averse.

Risk profiles have an impact on deciding which dispute resolution process to use. In the classic article, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure,"<sup>24</sup> Sander and Goldberg focused on: (1) achieving the disputants' goals in making a forum choice, and (2) the obstacles that their choice might overcome.<sup>25</sup> Leonard Riskin focused on mediation as the forum of choice and described different mediator styles using a two-dimensional "grid."<sup>26</sup> Those styles range from facilitating dispute-focused conversations to offering case evaluations. A neutral mediator may elicit "best" and "worst" outcomes by leading disputants through a process of "scenario assessments" that takes into account psychological biases on both sides.

Some scholars oppose mediators making evaluations<sup>27</sup> and many disputants are sorry they asked for an evaluative answer after they get it. But the fact is that disputants will not agree to resolve



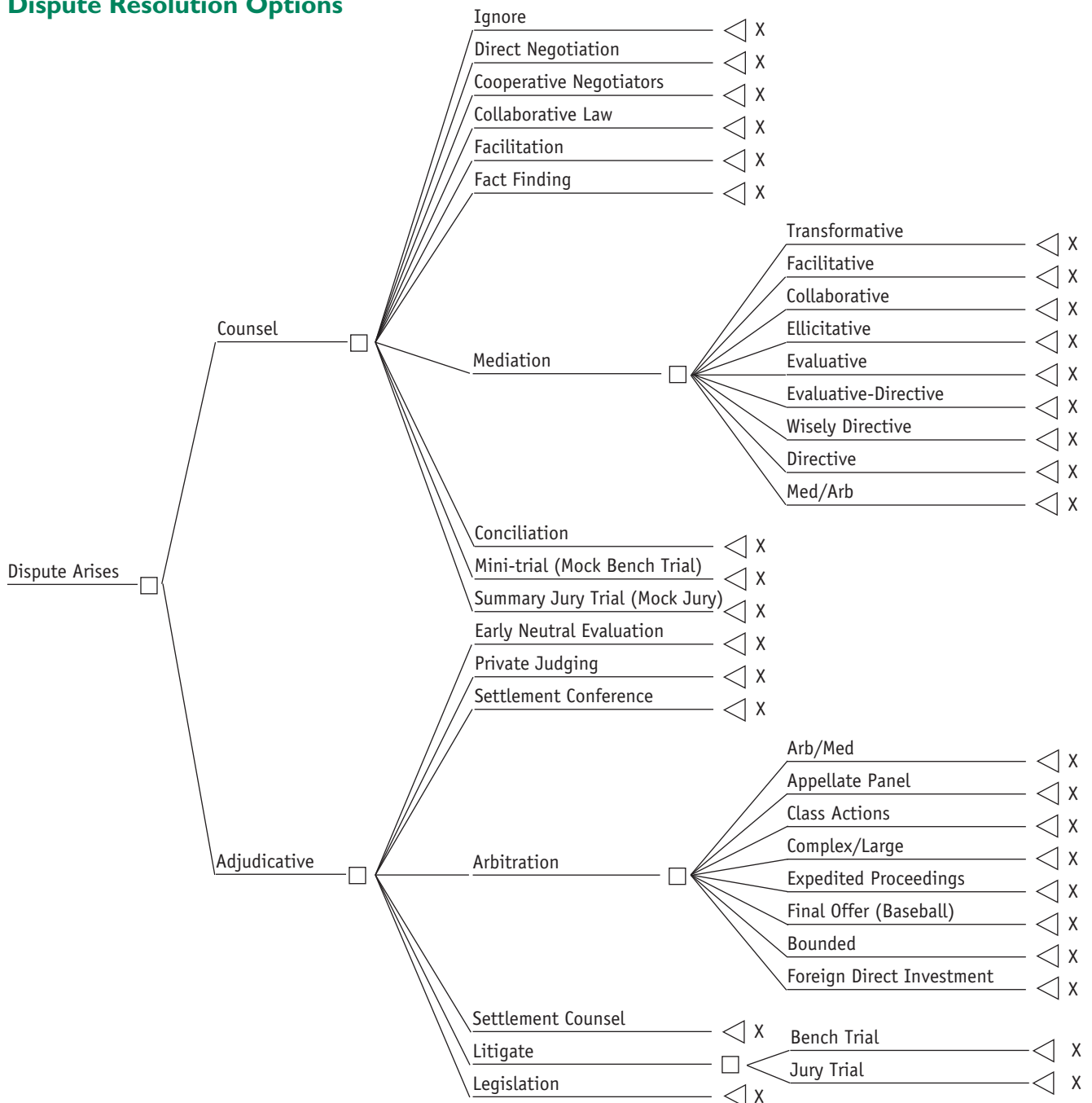
the disputed issues unless they believe the settlement terms are better than they would get at trial, taking into account the cost of litigating, including appeals, the time value of money, and how long it might take to resolve the case in court.<sup>28</sup>

If disputants choose not to mediate, they could simply ignore the dispute and then see what happens. It could get worse or go away. If it doesn't go away, disputants could decide to resolve it in the same way they got into their deal—through

direct party-to-party negotiations. Direct negotiation is the most frequently used dispute resolution technique. The negotiators retain complete control over the process and the solution.

An alternative to doing nothing is choosing to use cooperative negotiations or collaborative law. These are related processes in which the parties usually commit in a “participation agreement” not to file a lawsuit until they have participated in a number of problem-solving meetings and exhausted negotiations. Finally, they could go to a more

**Figure A**  
**Dispute Resolution Options**



adversarial procedure—litigation or arbitration.

Brain scientists are decoding what psychologists have observed in the human condition for decades: Everyone makes mistakes. Being a major league umpire, a seemingly rational and objective lawyer, or even a judge does not remove the human susceptibility to making cognitive errors. So we turn our attention to reducing their frequency in negotiation. And, like most endeavors, that involves cost and balance, particularly when it comes to deciding on a conflict resolution system.

Fortunately there are now many forums for

different fusses. Baseball can decide how broadly it will use instant replay to sort out major league mistakes. Disputants increasingly recognize the advantages of using win-win models of dispute resolution over win-lose (or win at any cost) models, and are implementing systems to manage conflict upstream.

In addition, the role of counselor has necessarily broadened to full-spectrum representation and market pressures will continue that trend. Conflict is inevitable. But the ways in which we manage it is evolving rapidly. ■

## ENDNOTES

<sup>1</sup> [http://sports.espn.go.com/mlb/playoffs/2009/columns/story?columnist=cable\\_jim&id=4581598](http://sports.espn.go.com/mlb/playoffs/2009/columns/story?columnist=cable_jim&id=4581598); [www.youtube.com/watch?v=x-S-eeInJVk&NR=1](http://www.youtube.com/watch?v=x-S-eeInJVk&NR=1); see also an early and abbreviated version of this article in the online version of the *Harvard Negotiation Law Review*, available at <http://www.hnlr.org/?p=471>.

<sup>2</sup> [http://sports.espn.go.com/mlb/playoffs/2009/columns/story?columnist=cable\\_jim&id=4581598](http://sports.espn.go.com/mlb/playoffs/2009/columns/story?columnist=cable_jim&id=4581598).

<sup>3</sup> Sports Business Daily 10/22/2009.

<sup>4</sup> Daniel Kahneman & Amos Tversky, "Conflict Resolution: A Cognitive Perspective," in *Barriers to Conflict Resolution* 45, 48 (Kenneth Arrow *et al.*, eds. 1995).

<sup>5</sup> Russell Korobkin, "Psychological Impediments to Mediation Success: Theory and Practice," 21 *Ohio St. J. on Disp. Resol.* 281, 284-85 (2006).

<sup>6</sup> Final Offer Arbitration or Baseball Arbitration is "a form of arbitration in which each party submits a proposed monetary award to the arbitrator. At the conclusion of the hearing, the arbitrator is required to select one of the parties' proposed awards, without modification." Stephanie Smith & Janet Martinez, "An Analytic Framework for Dispute System Design," 14 *Harv. Negot. L. Rev.* 123, 165 (2009).

<sup>7</sup> Kahneman & Tversky, *supra* n. 4, at 47.

<sup>8</sup> *Id.* at 55.

<sup>9</sup> *Id.* at 46.

<sup>10</sup> Amos Bronson Alcott (1799-1888).

<sup>11</sup> Dan Orr & Chris Guthrie, "Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis," 21 *Ohio St. J. on Disp. Resol.* 597, 607 n. 21 (2006).

<sup>12</sup> Lee Ross, "Reactive Devaluation in Negotiation and Conflict Resolution," in *Barriers to Conflict Resolution*, *supra* n. 4, at 26, 30.

<sup>13</sup> Dan Lovoal & Daniel Kahneman, "Delusions of Success: How Optimism Undermines Executives' Decisions," *Harv. Bus. Rev.* 56, 59 (July 2003).

<sup>14</sup> "Blinking on the Bench: How Judges Decide Cases," 93 *Cornell L. Rev.* 1, 2007; see generally, Richard A. Posner, *How Judges Think* (Harvard Univ. Press 2008).

<sup>15</sup> U.S. Supreme Court Chief Justice John G. Roberts Jr. said, "Judges are like umpires ... Umpires don't make the rules; they apply them." Bruce Weber, "The Deciders: Umpires v. Judges," *N.Y.T.* (July 11, 2009)(available at [www.nytimes.com/2009/07/12/weekinreview/12weber.html?\\_r=1](http://www.nytimes.com/2009/07/12/weekinreview/12weber.html?_r=1)).

<sup>16</sup> Randall L. Kiser, *et al.*, "Let's Not Make A Deal: An Empirical Study of Decision-Making in Unsuccessful Settlement Negotiations," 5 *J. Empirical Leg. Stud.* 551-91 (Sept. 2008), (for empirical research on negotiating errors in litigated cases).

<sup>17</sup> The multi-door courthouse in some jurisdictions allows some criminal matters to be mediated.

<sup>18</sup> This conference commemorated the 70th anniversary of Roscoe Pound's famous lecture, "The Causes of Popular Dissatisfaction with the Administration of Justice."

<sup>19</sup> The quoted phrase is derived from Frank E.A. Sander & Stephen B. Goldberg, "Fitting the Forum to the Fuss: Guide to Selecting an ADR Procedure," 10 *Negotiation J.* 49, 67 n. 7 (1994).

<sup>20</sup> Only certain arbitrator errors can be challenged in court. The alleged errors must be authorized by state or federal law or common law. Mediators are facilitators, and unlike arbitrators, do not decide the parties' disputes. So they are rarely the subject of litigation.

<sup>21</sup> Some common definitions of these dispute resolution procedures are con-

tained in an appendix to Smith & Martinez's article, *supra* n. 6, at 165.

<sup>22</sup> For a more complete discussion, see Donald R. Philbin Jr., "The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation," 13 *Harv. Negotiation L. Rev.* 249 (2008).

<sup>23</sup> Korobkin, *supra* n. 5, at 309.

<sup>24</sup> Sander's work continues to animate modern dispute resolution.

<sup>25</sup> Sander & Goldberg, *supra* n. 19, at 66; Peter Robinson, "Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy," 50 *Baylor L. Rev.* 963, 964 (1998) ("Mediation is facilitated negotiation.").

<sup>26</sup> Leonard L. Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed," 1 *Harv. Negotiation L. Rev.* 7 (1996).

<sup>27</sup> Mediator evaluations come in three primary forms: (1) "gestalt evaluation" (overall reaction without detailed feedback); (2) detailed feedback with or without "gestalt"; and (3) decision analytic approach. Marjorie C. Aaron, "The Value of Decision Analysis in Mediation Practice," 11 *Negot. J.* 123, 123 (1995); see also Laurence D. Connor, "How to Combine Facilitation with Evaluation," 14 *Alternatives to High Cost of Litig.* 15 (1996); Dwight Golann, "Benefits and Dangers of Mediation Evaluation," and "Planning for Mediation Evaluation," 15 *Alternatives to High Cost of Litig.* (1997).

<sup>28</sup> Dwight Golann said, "Absent an analytical structure for understanding a complex case, the parties have no mechanism with which to consider how the mediator's feedback on individual issues, if accepted, will affect their case's value." *Id.* at 125.



