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Emotions, anger, neuroscience and the opening demand in mediation

WHY SOME MEDIATIONS FAIL *RIGHT FROM THE BEGINNING* AS THE PARTIES RETREAT TO THEIR CORNERS AND NEVER EMERGE

"Hence, in order to have anything like a complete set of human rationality, we have to understand what role emotion plays in it." – Herbert Simon (Nobel Laureate), 1983

"For since nobody aims at what he thinks he cannot attain, the angry man is aiming at what he can attain, and the belief that you will attain your aim is pleasant. Hence it has been well said about wrath, 'Sweeter it is by far than the honeycomb dripping with sweetness, And spreads through the hearts of men.' It is also attended by a certain pleasure because the thoughts dwell upon the act of vengeance, and the images then called up cause pleasure, like the images called up in dreams." – Aristotle, *Rhetoric*, 350 BCE

There are many reasons why mediations can fail: lack of authority, insufficient preparation, lack of access to key information, lack of consensus as to what the key issues are, too little time and hostility or distrust between the parties, to name a few of the most common reasons.

The focus of this article is why some mediations fail *right from the beginning*. Rather than coming together during the course of the mediation, the parties retreat to their corners and never emerge, despite the mediator's best efforts. A common characteristic of these cases is an opening demand by the plaintiff that is unexpectedly and outrageously high (as viewed by the defendant) and/or an initial offer from the defendant that is unexpectedly and outrageously low (as viewed by the plaintiff). The parties respond with anger, and the rational give-and-take of mediation is hijacked. The "angry man" of Aristotle's *Rhetoric* takes control and delights in the process of risking all to win.

Experienced counsel and mediators are familiar with the opening phase of many mediations: The plaintiff makes a demand in the stratosphere, and the defendant responds with an offer in the basement. For counsel and mediators familiar with this opening gambit, the worst that happens is that the parties spend a few hours jockeying about numbers that are not realistic from either party's point of view, until finally the mediation moves into a range within which a settlement can be reached. So, why is it that some mediations proceed gradually toward resolution while others go off track so quickly and irretrievably? Why don't the parties just dispense with outrageously high/low demands/offers and get down to business? The answer can be found in the role that strong emotions, in particular, anger, play in the judgment and decision-making processes.

Getting off on the wrong foot

Before getting into psychology and neuroscience, let's consider two examples.

Example 1: In a wrongful-termination case involving age discrimination, plaintiff's counsel demanded $4.9 million. When initially pressured by the mediator not to start so high, the plaintiff's counsel responded that he was convinced the defendant would never make an offer higher than five figures unless faced with an opening demand well into seven figures.

Defense counsel let the mediator know that he had been expecting a demand in the mid-six figures and that his client wanted to settle and had come with sufficient authority from the in-house counsel and adjuster. Upon receipt of the $4.9-million demand, the defendant countered with $2,000 and refused to move above $25,000. With virtually no movement from the defendant, notwithstanding defense counsel's recommendation to his client to move to the high-five figures or low-six figures, the parties reached an impasse. At the end of the day, the mediator made a mediator's proposal of $100,000, good for 24 hours. That proposal was accepted by the plaintiff and rejected by the defendant. Despite repeated efforts by the plaintiff's counsel and the mediator to re-engage the defendant over the subsequent days and weeks, the defendant simply said, "See you in court."

Example 2: In a False Claims Act case, the parties had already exchanged expert damages reports, with plaintiffs' expert report calculating damages at somewhere between $300 million and $400 million, and defendants' expert report calculating damages at about $15 million. The difference in positions was based upon sharply different damage theories, which in turn were based upon different interpretations of the applicable regulatory framework. The mediator encouraged the parties to recognize the risk of their respective positions and the potential for a large loss or limited recovery.

Nonetheless, the plaintiffs' opening demand was $440 million, adding attorneys' fees on top of their expert's maximum damages calculation.

The defendants responded with an offer of $50,000 and never moved, arguing that nothing they could reasonably offer would be accepted by the plaintiffs, who clearly were not negotiating in good faith. The plaintiffs moved down to $300 million, signaling that they were willing to continue to negotiate, but the defendants, even though they had come with settlement authority of at least $10 million, refused to engage.

The mediation went nowhere.

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The common factor in both examples is an unreasonably high opening demand followed by an unreasonably low offer. In the first example, the defendant initially froze, then became bullish on its position, becoming more and more confident that the plaintiff's claim would be defeated in court. In the second example, the defendant froze and decided not to participate.

Given that plaintiffs' opening demands are often extremely high and defendants' initial offers are generally extremely low, wouldn't one expect that rational decision-makers would simply set aside the opening moves and continue to negotiate in an effort to reach a realistic range? It would seem logical that if the parties possess the same information about the facts and have the benefit of knowledgeable counsel advising on the law, they should be able objectively to evaluate the total potential damages, discount for the likelihood of success and negotiate within an agreed-upon range.

However, we know that even when people face the same decision, with the same information, they nonetheless may make different choices. Why?

The thesis of this article is that unexpected and extreme positions taken in the opening demands and/or offers can trigger anger. Anger is an extremely powerful emotion that can completely disrupt rational cognitive processes when making judgments and decisions. To explain this, the article turns to the neuroscience and psychology of human decision-making.

Psychology and neuroscience

I am not a neuroscientist or a psychologist, but I read a lot. This article draws on my nonscientific summary of current findings from the fields of psychology and neuroscience, and what they can tell us about the question of why extremely high opening demands and/or extremely low initial offers sometimes result in failed mediations.

Historically, research into decision-making focused on the economics of evaluating expected gain or loss against conditions of uncertainty. The rational man would calculate expected gains and potential losses, apply reasonable probabilities and reach a decision regarding the value or cost of a particular decision. Over the past few decades, researchers in other fields, specifically psychology and neuroscience, have been trying to understand how the brain handles decision-making. They have concluded that the brain does not use a unified neural path to process information when faced with decision-making under conditions of uncertainty; rather, it engages several different regions and neural circuits, some of which are stimulated by, and in turn generate, emotions. This field is often called cognitive neuroscience, and it interconnects with the field of psychology in understanding how and why people make judgments about, for example, financial matters.

Cognitive neuroscience research has studied the roles of different regions of the brain when we make judgments, regions that are activated when logical thought is triggered and when emotions are involved. When someone experiences an extreme insult, physiological changes, such as increased heart rate and endocrine activity, occur in the body and are relayed to the brain, where they are transformed into an emotion. That emotion flows into the circuits the brain is using to make or respond to specific decisions involving choice under uncertainty. Functional imaging studies have shown that the insular cortex is activated when subjects evaluate the fairness of offers of money from another, which produces an emotional response. The level of activity in the insular cortex predicts the likelihood of rejecting an unfair offer. Both neuroscience and psychology recognize that judgments and decisions are not simply the results of logical analyses of risks and rewards, costs and benefits, but are also guided by evaluations of fairness and endowment.

Fairness is ingrained into us from childhood. A child may be happy to receive a treat but then become angry when her sibling receives a larger or better treat. (Frans de Waal's capuchin monkey fairness test demonstrates this well: Two monkeys perform tasks, but one perceives that her reward is not equivalent and angrily throws it back at the experimenter. You can view a brief except of it here: https://www.youtube.com/watch?v=meiU6TxysCg.)

There are a number of emotions that impact decision-making: joy, sorrow, fear, anxiety and anger, to name a few of the most common. Researchers have identified anger as being especially powerful and as having a strong impact on decision-making. Angry people are less likely to trust others and are more inclined to blame others. They tend to make risk-seeking choices, have optimistic perceptions of future risk and be driven by a defensive optimism that de-emphasizes the importance and impact of negative events. The more anger they feel, the more blame they will place on others.

A well-known study conducted after the 9/11 terrorist attacks had people read either a real news story about the threat of an anthrax attack (selected to elicit fear) or a real news story on the celebrations of the 9/11 attacks by people in some Arab countries (selected to elicit anger). The participants were then asked a series of questions about perceived risks and policies. Participants who had been exposed to the story that elicited concern and fear viewed the world as a riskier place than those who had been exposed to the story that elicited anger. The anger-induced group perceived lower risk in the world and were more optimistic about perceptions of risks within the year following 9/11. It appeared that anger had activated a defensive optimism that de-emphasized the importance and impact of negative events and increased the participants' belief in their ability to prevail over potential risks.

A similar study modified the test: After viewing an anger-inducing video (of a boy being bullied), participants were more punitive toward defendants in a series of unrelated fictional tort cases involving negligence and injury than were those who watched a neutral video – unless they were told that they'd be held accountable and would be asked to explain their decisions to an expert. Those who were told they'd be held accountable to explain their views

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managed to control the anger they felt and made more "neutral" decisions. Accountability does not necessarily change the fact that the decision-makers felt anger; rather, it appears to change how decision-makers can control their feelings.

In other words, anger provides the motivation to respond harshly to a perceived injustice. Anger causes people to be optimistic about their ability to fight back and to prevail. Anger causes people to become more certain about their predictions, to desire more control, to blame others and to be unwilling to be pleasant. Angry people view negative events as being caused by and under the control of someone else. Anger can degrade decision-making and override otherwise rational courses of action.

This optimism is derived primarily from a sense of certainty and predictability, as well as from a sense of control over outcomes. Rather than causing people to consider alternative options before acting, anger prompted them to make quick and harsh judgments, with confidence, a sense of control, and negative thoughts about others.

How this applies to mediation

In most mediations, positive developments accumulate slowly, creating trust, and the dialogue improves. Essentially, through a set of reciprocal moves, trust evolves as parties make trade-offs.

When a party makes an excessively high demand or low offer, negotiations can begin on the wrong foot. Parties who are invested in the case, or who strongly identify with their positions, perhaps because they were involved in the conduct or decision that led to the dispute, react to an initial excessively high demand or low offer as one would to a physical attack or an attack on one's strongly held values. During the initial stage, the parties don't necessarily expect cooperation, but neither do they expect a punch in the stomach or an attack on their values.

As described above, once such an initial move triggers anger, the angry party is more likely to make overly optimistic judgments of future events and thus choose a high-risk, high-reward option – millions for defense, not a penny for compromise – a choice that is self-defeating in a mediation. In mediation, these appraisal tendencies caused by anger may lead to undesirable outcomes, such as unrealistic optimism, overconfidence and inability to evaluate risks properly.

What can be done to get the mediation back on track?

First, during the pre-mediation call, inform the mediator of prior settlement communications. This will enable the mediator to better understand the parties' expectations going into mediation and avoid unexpectedly high demands and/or low offers.

Second, at the mediation, the mediator can "coach" counsel and the parties about the damage that unreasonably high or low opening positions can cause and encourage the parties to consider how they expect the other party to respond, and how they would respond to hypothetical positions, in an effort to place the parties in a negotiating range that will not trigger an angry response. By testing for emotional responses, the parties can be prepared to avoid them.

Third, resist the temptation to begin exchanging numbers too soon. Talk and negotiate with the mediator about the "right" number to get the negotiations started on the right foot and take your time before launching your demand.

Fourth, consider to whom the parties in the room are accountable, whether or not they settle. Adding that consideration to the discussion should temper the likelihood of a party making an excessively high demand/low offer, and if such an excessively high demand/low offer is made, identifying to whom the parties are accountable and discussing how they will explain their positions should enable them to temper their anger.

Fifth, once an excessively high demand/low offer is on the table, parties with a great deal of experience with mediations, such as experienced counsel, should be able to correctly identify what happened, screen out the offending demand or offer and suggest that both parties recalibrate their positions. The parties themselves may not have the ability to distance themselves from their anger; they may need the strong hand of their counsel, and of the mediator, to regain control of their neural circuits.

Conclusion

The opening demand in a mediation is more than just a number for beginning the negotiation. It is a communication that sends a multilayered message to the other party, one that will activate neural networks transmitting neurons through the brain, producing calm, logical analysis and predictably strong emotional responses.

Looking back at the two examples above, one can see how the mediations unraveled so quickly.

In the first example, during the day, the defense counsel had confidentially let the mediator know that his client recognized that there was liability, disputed the amount of damages and recognized exposure to attorneys' fees. As a result, defense counsel expected to see the negotiating move into high five figures or even the low six figures. Defense counsel was comfortable with the mediator's proposal at the end of the day.

What the defense counsel and the mediator missed was the in-house counsel's shocked and angry response to the $4.9-million demand. His anger bubbled up and fed on itself during the day as he planned how to defeat the plaintiff's claim in court and vowed to defend his company's position, becoming more and more confident. He was convinced that the plaintiff was acting in bad faith, disrespecting the process and disrespecting the defendant. He kept his feelings to himself until he had the opportunity to respond to the mediator's proposal with not only a "no," but a "hell no."

In the second example, the defendants became so angry at the excessively high demand that they convinced themselves that any reasonable offer they made, even in the low seven figures, would be useless, so they ended the mediation. This in turn angered the

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plaintiffs. The parties had competing summary adjudication motions pending before the judge and had originally chosen to mediate while the motions were pending, recognizing that there was a very high likelihood that the court would deny both motions, leaving the parties headed toward trial. However, after the opening round of demand and offer, each side became more and more pugilistic, convinced of the righteousness of their respective positions, and lost track of the logic of why they had come to mediation in the first place.

Bottom line: Your opening demand or offer may trigger emotions on the other side. The goal of mediation is to resolve the dispute, and that requires trust and goodwill to advance the process. The wrong opening number runs the risk of triggering emotions, especially anger, that, much like Aladdin's genie, cannot easily be put back into the bottle once released.

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