The Psychology of Mediation (Part 1)

By Richard Birke, Esq.

If human beings always behaved rationally, there would probably be little need for mediators. There would certainly be fewer disputes, and even when disputes arose, rational decision makers would quickly determine the range of potential settlements and would choose the settlement that made as many people involved as happy as possible.

However, human beings do not always behave rationally. We aren’t robots and our brains aren’t computers, so we fall prey to any number of temptations to veer off the divine path of perfect decision making. We behave in ways that are self-interested. We make too much of too little data. We interpret facts and events in ways that tend to support what we want to believe, and we ignore evidence that suggests that we might be wrong.

Experienced mediators know all too well how psychology can pose obstacles to the resolution of a dispute. Even when a neutral observer can see that there exist dozens of possible solutions that would leave parties better off than continuing with their dispute, the parties fail to see these solutions or they refuse to ac-

knowledge that they exist. In many cases, the mediator must guide the parties through a thicket of psychological barriers before productive settlement discussions can begin.

Unfortunately, most mediators have little formal education in the social and behavioral sciences and their understanding of decision making is a product of experience and observation, not of study and reading. And while the school of hard knocks is a good one, and while many mediators have a wealth of experience that helps guide them through rocky situations, this anecdotal database may be unwieldy and may not readily yield useful strategies to help disputants find a solution to their problems.

Fortunately, behavioral and social psychologists have spent decades studying the various ways in which humans systematically depart from best decision making practices, and some curious legal academics have begun to adapt the findings of the psychologists to the practice of law and particularly to dispute resolution.

In this article, I hope to describe in a brief and practical way some of the best work of these psychologists as

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it impacts the mediation process. Because the number of psychological principles is great and because the mediation process is complex, I will divide the entire topic into two parts, one of which will be covered in this edition and the other of which will be covered in an article appearing in the next edition. This time around, the coverage will be of those principles which impact the first significant set of tasks in the mediation process, i.e., getting parties off of their initial positions and making them ready to look for a solution. This cluster of principles centers around the reasons why parties and their lawyers believe their case is worth more than it really is. Next time, coverage will be of the principles involved in bringing the parties to a deal. This cluster centers around issues in the relationship between the parties and the dynamics of the exchange of offers.

Cluster One: Formation of Starting Points for Bargaining

This cluster consists of four discrete subparts each with a total of eight significant psychological principles at work. I’ll offer the principles and then very briefly discuss what a mediator might be able to do to help parties get past the obstacles these principles might present.

SUBSET ONE — Availability and Anchoring: Why parties form initial estimates that favor their side.

The most common way to form an estimate of the value of something unknown is to compare it to the value of something known. If a person wants to know what her house is worth, she may look to the price at which a similar house sold recently. The same is true for lawsuits.

Clients ask their lawyers for estimates of the strength and value of their case and the lawyers try to recall cases similar to the ones that the client describes. Unfortunately, the cases that come to mind do so because they are memorable and relatively unusual, not because they are run-of-the-mill. When a client describes his tort case against a restaurant, his lawyer is likely to flash for a moment on the McDonald’s coffee cup case. When the client describes a CEO mishandling money, the lawyer might think of TYCO or any of a number of such cases recently in the news. When the lawyer compares her client’s case to a notorious case, he or she distorts its value as a result of the availability heuristic. The attorney, like all people, doesn’t have the memory to retain every bit of information that comes before her, so her mind selects the most vivid memory. The vividness of the image or the ease with which it can be recalled distorts its representativeness. This is why people tend to believe, incorrectly, that there is more annual rainfall in Seattle than in northern Georgia, that shark attacks lead to more deaths than falling airplane parts, or that murder is more common than suicide.

A good lawyer understands that the case the client described is not the McDonald’s coffee cup case. She understands that this client’s case is probably worth less, so she adjusts from the McDonald’s verdict downward. The question is whether she adjusts far enough. Research suggests that she will not adjust sufficiently because of something called the Anchoring Effect: that decision makers will become anchored on reference points with highly attenuated or even nonexistent links to the decision at hand. For example, people — many with legal training — have been asked questions such as, “What are the odds that the temperature in San Francisco is higher or lower today than 578 degrees?”

Naturally, everyone says the odds are 100% that the temperature is lower than 578 degrees. But when they are then asked to estimate the true San Francisco temperature, their estimates are invariably higher than the true temperature. When asked the likelihood that the temperature is higher than 1,000 degrees below zero, they answer 100%. If then asked the true temperature,
the distortion is toward the low side. Of course, these temperatures are absurdities and are entirely unrelated to the true temperature of any place on this planet. Nonetheless, they impact the responses given. Thus, when a lawyer recalls a notorious case like McDonald’s Corp.’s for torts, Mitsubishi Motor Corp. or Baker & McKenzie for sexual harassment, or some locally notorious case after a client has begun to recount the facts of his case, rest assured that it has a distorting effect on the lawyer’s initial case evaluation. When availability causes a case to pop to mind as comparable, the odds are that the mind will anchor on it and insufficiently adjust.

What can a mediator do? The best cure is to check base rates. Checking a database of awards in the local jurisdiction will yield a better estimate of case value than will reliance on experience and adjustment from seemingly comparable cases. Data always trumps intuition.

In addition, it would behoove a mediator to ask explicitly where the estimates of case value came from, and perhaps to try to use the heuristics to re-anchor the parties in the opposite direction. For a client who thinks that they are going to get a not-guilty from a jury, it may be better to focus on Martha Stewart than on O.J., and vice-versa.

SUBSET TWO — Perspective Biases and Positive Illusions: Why we always win.

The mere fact that the client hires a particular lawyer often triggers a “bias of perspective” exacerbated by “positive illusions.”

Perspective biases cause lawyers to overestimate the rightness of their side, and also to feel more confidence in their assessments. In one well-known experiment, each of four groups of subjects was given one of several different packets of information. Members of Group A received plaintiff’s information only, and these people were told that they were representing the plaintiff. Members of Group B received only the defendant’s information and were told that they were representing the defendant. Groups A and B were both informed that other information existed — namely, the other side’s information and some background information — but that they, as the plaintiff or defendant, would not receive that information.

Group C received both sides’ information and Group D received both sides and background information. Groups C and D were not assigned roles as plaintiff or defendant.

Each group was asked to estimate the plaintiff’s odds of winning and to indicate their confidence in their prediction. Groups C and D estimated that plaintiff’s chances were about 50/50, while Group A (plaintiffs) viewed themselves as having a very strong chance of winning and Group B (defendants) viewed the plaintiff’s chances as poor. In addition, the plaintiffs and defendants (the people who received the least information) were more confident in their assessments than the neutral groups, suggesting that people fail to take into account the existence of information that they know exists but that they do not have.

Thus, when a client comes to his lawyer’s office and tells his or her side of the case, the lawyer may know that there is another side of the story and may try to withhold evaluation until he or she hears it, but experiments indicate that the lawyer will form an opinion favorable to the client and be more confident in that opinion than the lawyer would be if he or she were not partisan.

Perspective biases are reinforced by positive illusions — unrealistic optimism, exaggerated perceptions of personal control and inflated positive views of the self. For example, people tend to overestimate the probability that their predictions and answers to trivia questions are correct. There are a great many studies that indicate lawyer overconfidence. I performed one of these at a recent American Bar Association meeting, and found that lawyers rated themselves in at least the top 80th percentile on such qualities as ability to predict the outcome of

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a case, honesty, negotiation skills and cooperativeness. This high degree of self-regard leads to an inflated sense of the value of a case.

What can a mediator do? These biases are difficult to correct, but if the goal is a realistic estimate of case value, lawyers should be made to realize that their healthy self-images may lead to distorted images of how much a case is worth, and how likely they are to win. The mediator can act as “devil’s advocate” and help a client realize that even the best lawyers lose cases. I like to recall the career of James St. Clair who, among other notable losses, was on the losing end of the Nixon Tapes case. He was hired by Nixon because he had a reputation as a winner, but he didn’t always hit homeruns. Make sure clients think about baseball greats, for whom a hit 4 times out of 10 is considered fabulous. A lawyer who wins 3/4 of her cases is one in a million, but that still means that clients lose 25% of the time, and this may be one of those times, and it may have nothing to do with the skill of the lawyer.

Mediators should not beat up on the lawyer’s confidence, at least not in front of the client. Driving a wedge between the lawyer and the client is not something I advise, except in the rarest of cases. It is often unethical and rarely helps the settlement effort. Only when a lawyer is obviously mistreating the client and behaving unethically is this wedge appropriate, and even then, it makes the likelihood of settlement almost nil. Instead, build up the lawyer as a great gladiator who expects to lose, at least once in a while.

SUBSET THREE — Biased Assimilation and Confirmation Biases: Why discovery makes us overconfident

Operating in tandem, assimilation biases and confirmation biases distort both the search for information and the valuation value of information found.

As the lawyer begins discovery she has a theory of the case — a plan of attack or defense that is discussed with the client. As the attorney gathers cases and information, she sorts the information into three categories, helpful, harmful, or neutral. The psychology of biased assimilation suggests this lawyer will interpret cases and evidence in a way that supports the conclusion she wants, whether the information actually supports that conclusion or not. If the information is favorable, she will overweight its relevance and applicability. If the information is harmful, the attorney may concede that it is harmful but will underweight its harmful effects. If the information is neutral, the attorney will tend to see it as marginally helpful.

Finally, if the information contains information that is part helpful and part harmful, the attorney will tend to overweight the helpful parts and underweight the harmful parts, concluding that the information is of net positive value. This often causes a distortion in the valuation of the evidence. If both sides have done this, the case may be difficult to settle.

Moreover, experienced attorneys rarely start case research by canvassing the entire legal literature to determine the state of the law and the relative power of all of the related areas of law. It would be hard to justify billing too many hours doing general research. Instead, the lawyers try to go straight to research directly bearing on their client’s case. They are biased and have incentives in favor of confirming that which they already believe to be true.

The same, of course, is true of lawyers processing cases. When they hope a proposition is true (e.g., a theory of liability or a defense), they will see supporting information as strong and negating information as weak. This is biased assimilation. Furthermore, because they tend to look for and find corroborating information first, their theories tend to be mentally reinforced. This is a confirmation bias.

What can a mediator do? In order to reduce the negative effects of these biases, it may make some sense to think about the “antithesis.” Ask what the case looks like to the other client, and consider doing a little bit of research into their case-in-chief. Research suggests that if you argue the other side’s case to the lawyer, the lawyer will create answers to your arguments and that will stiffen their resolve. Instead, you play the role of the lawyer in the room and make the lawyer respond with the other side’s arguments. The lawyer’s ability to respond as if he were the other side will create a certain kind of cognitive dissonance because he will discover that he has frighteningly good answers to her own arguments.
SUBSET FOUR — Commitment and Consistency and Loss Aversion: Why lawyers “stay the course.”

Discovery exacerbates a tendency to escalate commitment to initial courses of action. The concept of “sunk costs” causes people who have invested in a course of action to make economically irrational choices to promote their desired outcome. A powerful example of this is known as the “dollar-bill auction,” where an auctioneer auctions off an amount of money. Twenty dollars usually works well. The rules are simple — the high bid gets the money, but the second highest bidder must also pay the amount of their last bid. Many people in the room hope to buy the twenty for something less than twenty dollars, and so they bid readily. Typically, the auction starts at a very low amount, and zooms up from there. Once one bidder has bid ten dollars and this bidder is outbid, the auctioneer is assured of a profit.

As the amount approaches the face value of the item, the number of bidders usually winnows to two. As one bids $18, the other faces the sure loss of his last bid, so he bids $19. The $18 bidder faces a sure loss so he or she bids higher than $19. At some point, one of the bidders realizes that breaking even is better than losing $19 or more, so he or she bids $20.

The other bidder then bids more than the $20 face value, because a bid of $21 results in a loss of $1, whereas concession results in a loss of $19 or more. Thus, the “winning” bid is generally higher than the value of the auctioned item.

A colleague told me that a $1 auction in one of his law school classes produced a winning bid of $6.50, and a second highest bid of $6 — a net loss for the players of more than 1,100%. The only auction winners are the auctioneer and those audience members who didn’t bid at all. Those who committed to a course of action escalate their commitment, and make choices consistent with that initial commitment — even if the original commitment turns out to have been unwise.

Couple this with Loss Aversion and the problem becomes doubly hard. Loss aversion is the tendency of people to take bad gambles in order to avoid taking a loss. When you have lost ten dollars at a casino in Las Vegas, you are more likely to gamble again than you would be had you not lost, even when the casino gave you the original ten dollars as part of your junket. You might not be a gambler, but if you feel like you are out-of-pocket “your” ten dollars, you are likely to be more risk-seeking than you would be otherwise.

In disputes, a client who might be looking at a particular chance of winning at trial would forgo the expense and the trial, but after spending all the money in discovery and pre-trial preparation, the client is willing to gamble because taking the sure loss is so painful.

What can a mediator do? When disputing resembles a dollar-bill auction, the litigants often invest far more than the value of the claim. It is the mediator’s job to remind clients of the dangers of commitment and its attendant invitation to irrationally escalate that commitment.

If the client is taking unrealistic positions merely because she is seeking to avoid sunk costs, make sure that the client realizes that the odds of future events are totally unrelated to past investments and that all decisions should be made prospectively, not with an eye toward the past. The odds of a coin being flipped and coming up “heads” ten times in a row are pretty low (assuming a fair coin) but when the coin has come up “heads” nine times already, the odds of it coming up “heads” again are 50/50 — even if the client has bet on “tails” and lost the past nine times.

Temporary Conclusion

This time we went over the issues that impact the parties’ initial positions — the stances that they take independently of the moves of the other side. Next time we’ll discuss what happens when they interact — this time was cognitive psychology and the next is a bit more behavioral. I hope that this first part helps get a case or two resolved, and if it does, I’ll be “psyched.”
Cases of Interest

Florida Supreme Court Creates New Standard For Vacating Arbitration Award — Inappropriate Statutory Interpretation

Evelyn Barlow sued North Okaloosa Medical Center (NOMC) following the death of her husband. NOMC admitted liability for medical malpractice and, pursuant to Florida’s Medical Malpractice Act, the parties agreed to arbitrate the issue of remedial compensation. Although the arbitration panel awarded Barlow damages for lost service and funeral costs, it refused to compensate her for lost social security retirement benefits. Basing its conclusion on Florida’s Wrongful Death Act, requiring “net” economic damages, the panel reasoned that Barlow failed to establish that the social security benefits would not have been devoted solely toward her husband’s maintenance had he lived (i.e., that there would be “net proceeds after consumption”). Barlow appealed to the First District Court, which affirmed the award. Barlow then appealed to the Florida Supreme Court, reversing the lower court’s decision and vacating the award, the 4-1 majority held that the panel improperly applied the Wrongful Death Act’s “net” economic damage requirement to a claim advanced under the Medical Malpractice Act. The Florida Supreme Court thus recognized a new standard for vacating an arbitration award — inappropriate interpretation and application of a state statute.

Court Admits Videotape Of Unrelated Confidential Mediation In Child Custody Case

David B. (Father) and Stephanie C.S. (Mother), the parents of Emily C.B., entered a custody agreement that provided for joint legal custody, with Father having primary custody. Seven months later, Mother filed a motion to modify the placement and paternity stipulation. After a 10-day hearing, the trial court granted primary custody to Mother. The court determined that Father was not fostering a healthy relationship between Emily and her mother. Father appealed, claiming the trial court erred when it admitted a tape of an unrelated mediation session Father had with his older daughter. The older daughter testified at the custody trial and revealed the existence of the tape in her testimony. Father argued the tape should not have been admitted since it was part of a confidential mediation proceeding. However, Father had supplied the tape to a court-appointed psychologist and the court would not allow selective disclosure. The
Court of Appeals held that otherwise confidential information from a separate mediation may be admitted at trial “to prevent a manifest injustice” the importance of which outweighs the principle of confidentiality.

Unfair to Allow Employer To Select The Pool Of Arbitrators


Wendy McMullen worked for Meijer, Incorporated (Meijer) as a store detective for nine years until she was terminated in 1998. She challenged her termination, alleging claims of statutory gender discrimination. Pursuant to Meijer’s termination procedures, McMullen instituted arbitration proceedings. Shortly before the arbitration hearing was due to commence, McMullen filed a declaratory judgment action challenging the fairness of the arbitration process, given Meijer’s unilateral right to select the pool of arbitrators. Meijer unsuccessfully moved in district court to compel arbitration. Subsequently, in light of an intervening 6th Circuit decision (Haskins v. Prudential Ins. Co. of America, 230 F.3d 231 (6th Cir., 2000)), the district court, upon reconsideration, granted Meijer’s motions. In its reversal of the district court’s decision, the United States Court of Appeals, Sixth Circuit held that the court’s ruling “overstate[d] the impact of Haskins on the agreement signed by McMullen.” The Sixth Circuit found that McMullen’s substantive rights could not be “effectively vindicated” where Meijer had the right to unilaterally select the pool of arbitrators. Noting Meijer’s uniform practice of using the same five to seven arbitrators in each of its Michigan arbitrations, the court expressed concern over the potential bias created by this “symbiotic relationship.”

U.S. Supreme Court Instructs California That Determination of Class-Wide Arbitration Is A Matter For The Arbitrator To Decide


Robert Garcia is one among a network of independent dealers of DIRECTV digital satellite television services. Garcia and other members of the DIRECTV dealer network consecutively filed a class-wide arbitration and class action lawsuit against DIRECTV pursuant to the arbitration provisions within their standard sales agency agreements. DIRECTV responded by moving to compel arbitration. In granting DIRECTV’s motion, the Los Angeles Superior Court decided that it, rather than an arbitrator, could determine whether the sales agreements allowed class-wide arbitration. On appeal, DIRECTV unsuccessfully challenged the court’s authority to determine if the sales agreements allowed for class-wide arbitration. Following denial of DIRECTV’s petition for review from the California Supreme Court, the United States Supreme Court granted certiorari, vacated, and remanded the case in consideration of its decision in Green Tree Financial Corp. v. Bazzle, 123 S.Ct 2402 (2003). On remand, the California Court of Appeals noted that the Green Tree decision vested arbitrators, rather than trial judges, with the authority to determine whether an agreement provided for class-wide arbitration.

Georgia Arbitration Code Trumps FAA Regarding Insurance


McKnight bought title insurance from Chicago Title Insurance Co., Inc., (CTI) that included coverage for a 50-foot easement. McKnight filed a breach of contract claim after discovering the easement was only 20 feet wide. CTI moved to compel arbitration. The district court denied CTI’s motion, citing the Georgia Arbitration Code’s (Georgia Code) exclusion of arbitration provisions in insurance contracts. CTI appealed, arguing that the arbitration clause was enforceable because the FAA preempts the Georgia Code. The Court of Appeals held that the FAA did not preempt the Georgia Code because the McCarran-Ferguson Act leaves the regulation of the insurance industry to the states.
Worth Seeing

The Fog of War: Eleven Lessons from the Life of Robert S. MacNamara

Directed and Produced by Errol Morris
Reviewed by Richard Birke

Yes, you read it right — worth “seeing.” And yes, this is still a book review column, not a movie review column, and it will be called “Worth Reading” again in the next edition of this newsletter.

So why the switch to a movie review? Maybe I was too lazy to read a book in time for this edition? Maybe there were no good books out now that were worth reviewing? No and no. I had already read Scott Brown’s book on negotiating with your children and I had adapted his Fisher/Ury lessons for kids to the adult dispute resolution world. And then I ran across Linda Babcock’s recent work on the role of gender in negotiation (a gem) and I had lots to review and lots to say about the books. I am reviewing this movie because it spoke to me about negotiation and mediation in a way that was powerful, instructive and entertaining.

First let me tell you about this movie and then I’ll move on to the dispute resolution lessons from the movie.

This movie is an interview with now-86-year-old Robert S. MacNamara. For those of you who don’t know, MacNamara was born in time to have an active memory of the state of the world at the end of World War One, and he became a star student who became a professor of mathematical decision theory at Harvard at an obscenely young age. The military wanted a school where its top people could use these theories to gain an advantage in military engagements. MacNamara started making conclusions about the efforts in World War II, and some generals listened and changed their strategies in ways that were clearly beneficial. MacNamara was a star and he became popular with powerful military and political luminaries of the day. When John Kennedy became president, he chose many Harvard faculty for important positions in his administration, and he asked MacNamara to become Secretary of Defense.

In that position, MacNamara served through the Bay of Pigs, the Cold War, Kennedy’s Assassination, the Civil Rights movement, and of course, Vietnam.

MacNamara is more lucid and articulate at 86 than most people are at the peak of their abilities. He talks straight into the camera and his discussions are punctuated with an expertly selected and edited set of film and news clips showing the real-time events that MacNamara refers to in his stories. His perspective on events is offered untempered, unapologetic, with honesty and no sub-rosa ego need for the listener to agree with him or his decisions.

Moreover, the movie was an outstanding history lesson for someone old enough to remember Vietnam but young enough that I didn’t have to face the draft. I know that many of you readers will remember these events because of your first-hand experiences and involvement. For you, the movie will offer incredible, heretofore unexposed views on events that changed your lives. For those, like me (early 40’s), you can learn a lot about the world you came into and grew up in. And for you kids . . . it’s a well done historical documentary about events that we old folks are attached to, and at least for the next few years, you have no choice but to deal with us, so you may as well take this entertaining chance to learn something more about how we tick.

And now here’s the good part — go to the movie even if you don’t give a damn about the whole era, the guy, the style or anything. Go if you want to improve your chances of getting a better result at your next negotiation or mediation. MacNamara’s Eleven Lessons is an awesome collection of mantras for good dispute resolution.
Here they are — I'll go through them quickly and then come back and discuss them one-by-one. Here's the order in which they were presented in the film.

1. Empathize with your enemy
2. Rationality will not save us
3. There's something beyond one's self
4. Maximize efficiency
5. Proportionality should be a guideline in war
6. Get the data
7. Belief and seeing are often both wrong
8. Be prepared to reexamine your reasoning
9. In order to do good you may have to engage in evil
10. Never say never
11. You can't change human nature

I'll now discuss them, but in an order that is more suited to their application in dispute resolution.

Lessons Four, Six and Two: Maximize Efficiency, Get The Data and Rationality Will Not Save Us.

One of these things is not like the other . . . the first two homilies exhort us to make rational decisions and the last seems to suggest that this is a worthless effort. But I think the statements are entirely consistent.

MacNamara was interested primarily in reducing rates of injury among our troops and increasing damage on theirs in major armed world conflicts. Readers of this newsletter are likely involved in less monumental struggles, but the lessons are apropos nonetheless.

Efficiency in dispute resolution often involves exploitation of differences in the relative valuations of an item as between party A to party B. This item may be a decision, a risk, an idea or a physical thing, but the concept is the same — items ought to be allocated to those who value them the most, and the other parties who might be entitled to the item ought to receive appropriate compensation. The notion that I care a lot about item X (about which you care little) and you care a lot about Y (about which I care little) gives rise to the possibility that we make a trade in which I get most or all of X and you get most of all of Y. That deal is more efficient than one in which we burn resources fighting and/or we misallocate. Achieving an efficient outcome isn't easy, and it requires people who are very successful cooperators.

Similarly, a good decision will only emerge if the decision maker really has all the necessary data, and extensive data gathering is often slow and expensive. Furthermore, lay decision makers rely on heuristic thinking in most of their decisions, so these same people have little problem with the idea that they can be effective through a series of instinctual choices based on very limited data. For example, no one really knows exactly how much their lawsuit is worth on the day of the settlement conference or the first day of trial — you may know how much you want or how much you will take for a settlement, but these are subjective measures. Every case is different, and there aren't enough trials anymore to have a steady flow of recent verdicts that are close enough to a given case that a lawyer can make anything more than a ballpark estimate of the value. But the fact that you can't have all the data doesn't offer an excuse to a client who won't deal with the data that exist, and in my experience, clients and lawyers are often way too selective and self-interested in their assessments of what is important and what is irrelevant in their cases.

So MacNamara urges data and efficiency — two hallmarks of the economic, value-maximizing school of decision making, and then he says rationality won't save us? Exactly right — we need to behave rationally because failure to behave rationally dooms us to random results. However, we have to recognize that even rational decisions sometimes fail — for example, if I offer you a lottery ticket costing $5000 and you have a 99% chance of winning $3 million, you'd probably buy it. I certainly

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would. But that doesn’t mean that we would win. And if we lose the $5000 — OUCH! — it doesn’t make the decision bad. We should take the same bet again immediately, and if we lose a second time, we should still take it if it’s offered a third time. In sum, MacNamara argues that rationality may not be a guarantee, but there’s no second best way to go.

Belief And Seeing Are Often Both Wrong, Never Say Never and Be Prepared to Reexamine Your Reasoning

The next set follow logically from the last set. These are pretty straightforward statements of the belief that decision makers are fallible in their data interpretation and in their construction of logical systems of decision making. MacNamara was an impeccable trained decision maker, and he had a cool head and a persuasive style. He spent enough time as an academic to be truly curious about his chosen field, and his study of decision making under conditions of uncertainty and risk in conflicts led him to conclude that best efforts only go so far when the computer is flesh and blood.

In mediation and negotiation, these rules are reasons why each settlement event ought to be approached with an open mind, a willingness to reexamine data, preferences and preconceptions, and a sincere interest in an elegant, creative solution. Unfortunately, many parties approach mediation with a stale set of arguments and an embedded, concretized vision of what the conflict is, who is at fault, and a narrow sense of what must be done in order for the case to settle. Mac says “loosen up!”

Empathize with Your Enemy

I’m not big on the word “enemy.” It sounds so — permanent. It doesn’t have enough of an aura of “win-win” possibilities for me . . . but I accept that in MacNamara’s world, where people were trying and succeeding at killing each other, the word may have been more accurate than “counterpart.” But for the person trying to settle a case, whether you think of the person as your enemy or counterpart or whatever, it does help to see the conflict from their perspective. If your arguments are really strong, why do they fail to persuade? Is the other unable to understand them? Or is there information that they have that tempers the strength of those arguments? Until you understand them, you don’t know how to persuade them. And if true rationality is not the answer, then rationality needs to be blended with a little schmoozing — and if you do empathize with them, it’s easier to figure out how to talk in a way that they understand.

Proportionality Should Be A Guideline

In War and There’s Something Out There Beyond One’s Self

These are about as close as MacNamara comes to advocating morality in dispute resolution. MacNamara is a cold mathematician and as any numbers-oriented person will confess, morality is a difficult factor to include in equation-making. However, in dispute resolution, as in war, each side would do well to remember that the point of each tactical choice should be to bring the maker of the choice closer to a chosen initial objective, and that objective usually has very little to do with obliterating the other side. Unfortunately, once conflicts are un-
derway, interests shift and parties who once cared only about taking care of themselves now care more about punishing the other side.

In World War II, after Japan entered the war and caused casualties to the U.S., the military formed a plan that included firebombing major population centers in Japan. This plan of action caused the destruction of hundreds of thousands of Japanese homes and cost the Japanese tens of thousands of lives. In one of the movie's most horrific scenes, MacNamara recounts the firebombings of various cities and compares them to U.S. cities to give an idea of the devastation we caused — a raid that destroyed a city the size of Boston, of Portland, of Nashville, of half of New York, and on and on and on. Of course, all of these firebombs were a mere prelude to Hiroshima and Nagasaki.

In some litigation, defendants take it upon themselves to do far more than seek a deal with an aggrieved plaintiff. As a prelude to settlement, they seek to destroy the plaintiff's reputation, their economic vitality, and their sense of self. This tactic may backfire if all they have done is back plaintiff into a corner and given him no choice but to fight for his life. It certainly does little to create a willingness on plaintiff's part to look for a deal that leaves everyone better off. If settlement occurs, it happens only because defendant crushed plaintiff's will and ability to continue. Of course, some plaintiffs act exactly this way toward defendants, and I don’t mean to single defendants out, but they are typically stronger and better able to fight vigorously than are plaintiffs. But the point remains the same — the tactics of a vicious litigant have negative consequences if they are disproportionate to the conflict.

America suffered, in my opinion, as a result of the dropping of the bombs in Japan. We created a lot of hatred against us in the rest of the world, and we created a suspicion in our own citizenry of the decision making ability of our own leadership. Many Americans alive at the time (I was not among them) heard the rhetoric that the firebombings and the H-bombs saved lives, but many could not bring themselves to believe it. The only way to sell the idea was to vilify the Japanese and make it seem as though they deserved to die. This initial suspicion of governmental disproportionality impacted support for the war in Vietnam and continues to this day to impact support for the war in Iraq.

In litigation, when a company engages in disproportionate tactics against a complaining employee or a competitor company, it has an impact that extends beyond the conflict. It impacts the morale of workers at the company and it has a negative effect on a company's external reputation.

I don't mean to second-guess decisions made during war time or litigation. However, I do mean to echo MacNamara’s warning that proportionality ought to be a guideline. And morality matters. You may not believe in God, but there is still something out there beyond one's self, even if that something is just one's reputation.

**In Order to Do Good, You Sometimes Have to Engage in Evil**

MacNamara is clearly a man willing to live with contradiction. Hence the lesson that seems to contradict his moral pronouncements. Perhaps this is how he justified the actions in Hiroshima and Nagasaki and Viet Nam — some of what we did was evil, but in the service of good. Frankly, I agree with the lesson but I am deeply uncomfortable with the notion that evil is a necessary path to the good. Must Richard Clarke's reputation be destroyed so that we can learn how to ensure that our government deals appropriately with terrorism? Must candidate's reputations be besmirched just so that the other can win an election? Must expensive litigation go on so that rights can be vindicated? Perhaps so, but I think Gandhi and Martin Luther King might disagree with MacNamara.

**You Can’t Change Human Nature**

This is a frightening moment in the film. MacNamara suggests that this propensity not to learn from the past, this willingness to make mistakes and try to clean up afterward, this disposition toward aggression will lead us ultimately to the use of large scale nuclear weapons. MacNamara makes no bones about the fact that we won't be able to clean up after that.

For those of us who are involved in smaller conflicts — the mediation and arbitration and negotiation of commercial disputes — this lesson, if true, probably means we do not have to worry that our business will dry up. For those of us who are hopeful that mankind is in its early days, not its late stages, let's hope that MacNamara is very very wrong.

For all of us, this film is definitely worth seeing.
Introducing ACCESS ADR

ACCESS ADR, an initiative sponsored by the JAMS Foundation in cooperation with the ABA, is designed to expose users of ADR services to highly qualified, racially and ethnically diverse mediators who are currently under-represented in the ADR field. This initiative includes training, mentoring and business development support for mediators who will be available and qualified to handle high-stakes, complex cases. ACCESS ADR mediators will be admitted based on a demonstration of professional integrity, competence and commitment to providing full-time ADR services. Applications will be reviewed by an independent Advisory Board that will include members of plaintiff and defense bar organizations, insurance company representatives, corporate executives and other high-volume users of neutral services.

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Dispute Resolution Alert

Editorial Guidelines

The JAMS Dispute Resolution Alert publishes articles of varying lengths on subjects of interest to attorneys, mediators, arbitrators, and others who want to learn more about alternative dispute resolution and the latest trends in the field. Articles may be written in the first or third person. We encourage authors to minimize or avoid footnotes and endnotes.

We welcome submissions that include practice tips, case studies, or research and ideas valuable to those acting as settlement counsel as well as those who are mediating and arbitrating disputes. The Board of Editors is interested in receiving articles on a variety of ADR processes and areas of the law, ranging from complex commercial disputes, to employment cases to ethics issues to decision-making. In addition, we have a regular book review section where ADR related books are profiled and critiqued for our readers. The book reviews are generally two published pages or 1,500 words in length.

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