

Psychology of Settlement

Behaviors that encourage opportunities
for resolution

LAWPAY[®]

AN AFFINIPAY SOLUTION

Claude E. Ducloux
Austin, Texas

**STATE BAR
COLLEGE
SUMMER SCHOOL**

July 13-15, 2018
Moody Gardens
Galveston, Texas

2 Claude E. Ducloux

- 40-year seasoned attorney
- Board Certified in Civil Trial Law and Civil Appellate Law, Texas Board of Legal Specialization
- Former President, Austin Bar Association
- Received Gene Cavin Award for Lifetime Achievement in Teaching Continuing Education



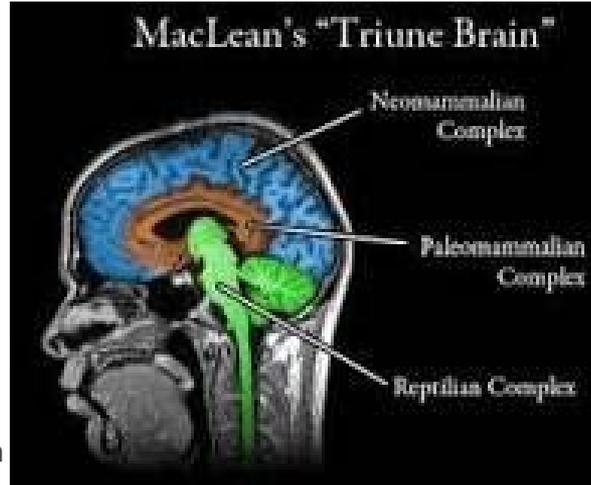
3 The biology of decision-making

The brain's frontal lobe presides over reasoning, self-control, and decision-making, including:

Social behavior

Complex cognitive behavior

Your personality



[blogs.scientific american. com](https://blogs.scientificamerican.com)

By contrast, the limbic cortex (also nicknamed "Lizard Brain") is associated with emotion, addiction, and mood. It is much more primitive in development.

OUR DECISIONS RELY ON BOTH PARTS OF THE BRAIN.

The world is complex. To simplify, we rely on a range of cognitive mechanisms to cope with adverse environments where we face the unknown.

Heuristics—confidence-sustaining “mental shortcuts” that help us make quick decisions. However, relying on heuristics is at the expense of rigorous logic and rational reasoning.

Why do we use heuristics—we don’t have time (or perhaps the mental ability) for complex analysis, so we limit the information we will consider.

Example: relying on “Brand Name” over analysis of a product’s quality.

The problem with heuristics—They rely on, and result in, significant biases in decision-making. The variables:

Framing the problem—How you see the problem has a significant effect on how you make decisions. If we think we're "winning," we become risk averse. If we think we're losing, we're likely to take more risks to recover losses.

The car crash video: words matter

Groups of students were shown the same video, but were asked, "How fast were the cars going when they [smashed][collided][bumped][contacted] the other car?" The verb made a huge difference in their answers.

Using information—We pay more attention to easily available information and to our own biases. We are self-serving in our analysis, paying more attention to anything that shows our position favorably (self-serving bias) and supports our already established point of view (confirmation bias).

Worse yet, we tend to surround ourselves with people who have similar viewpoints.

Problems with judgment—We tend to be unduly optimistic about estimates and filter out uncertainty. We hesitate to re-evaluate new information.

“I may not be right, but I’m never in doubt.”

7 The “7 Steps” —U. Mass Dartmouth, 2017

7 STEPS TO EFFECTIVE DECISION MAKING

Decision making is the process of making choices by identifying a decision, gathering information, and assessing alternative resolutions.

Using a step-by-step decision-making process can help you make more deliberate, thoughtful decisions by organizing relevant information and defining alternatives. This approach increases the chances that you will choose the most satisfying alternative possible.



Biggest mistakes lawyers make in the settlement process

Subserving the client’s “Confirmation Bias”:

Telling the client what you *think* they want to hear—how great their case is, or how wrong the other side is

Getting too far ahead on attorney’s fees:

The cost of the controversy quickly exceeds value and quashes intermittent settlement opportunities

Engaging in unnecessary, uncivil conduct:

Nothing interferes with resolution more than nasty, discourteous acts that require “payback”

Failing to keep the client informed—huge problem!

So, how do we help our clients?

Be an honest advocate, not a “cheerleader”

Whether clients admit it or not, they want honesty. Lawyers can be honest and candid, with these foundations:

- a. An understanding by the lawyer of what the client’s goals are and what they should be, and
- b. Reasonable expectations by the client of what their lawyer can and can’t achieve for them

Always conduct ourselves in a way that fosters an “atmosphere of resolution”

Settlement itself is a process

People go to court/hearing when settlement is impossible.

We always blame it on the client, but in my opinion, that failure is all too often the fault of the lawyer for not creating the necessary environment.



11 The psychology of settling

When do cases settle?

1. When each lawyer has enough information to make a reasonably informed decision (even the laziest, yet competent, lawyer must wait until he/she has enough information to advise the client);
2. When the client understands the cost v. benefit of going forward;
3. When some outside influence intervenes; and
4. WHEN THE PARTIES ARE TOGETHER!

Three steps to settlement

1. Good client control

- Reasonable expectations
- Teamwork
- Client's goals are understood

2. Good relationships with opposing counsel

- Don't ever burn bridges, unless you're independently wealthy

3. Respect from the court/agency/staff

- Requires integrity and dependability

Client control—what business are you in?

- You are **not** in the happiness business
- You are a problem solver
- You are a counselor and adviser
- You have a duty to find the most complete solution at the most reasonable value
- You must follow the rules of law and ethics

What business some clients think you are in

- Hired gun
- Junkyard dog
- Excuse factory
- Shield-er from the truth
- Avenger

Remember: you won't ever make these people happy



Determine client goals: The interview

- Hone your listening skills.
- Do not allow any interruptions.
- Bond with the client.
- Ask questions. Keep good notes. Clarify.
- Client must believe you're a "team player."



The most important questions

1. What are your goals in this case, i.e., “*What do you think I can do for you?*”
2. What will I learn about you from the **opposing party**?
3. What are your timeline expectations?

Note: all responses must be realistic at the end of the interview.

17 Objectives in contested matters

Discuss their most important objective—is it to win or delay the inevitable?

If they say “it’s the principle,” that rarely results in a good outcome...

(so, raise your rate).

Always provide these things to a client

1. A reasonable list of options
2. Timelines
3. The scope and costs for each option
4. The nature (and limits) of relief to be expected
5. Your list of unrealistic expectations (you need to weigh in early)



Relationship with counsel

- Most important concept: communicate often!
- Encourage dialogue about realistic documentary needs prior to settlement. The “tone” of communication is important.
- Treat everyone with respect and as if you’re being watched.
- Set goals with opposing counsel.
- Do not expect friendship to save you if you err.
- Plan for a career, not just this case.
- Keep your client abreast of all important communication.

Be proactive: Enhance the chances of settlement

- Offer the other side documentation that provides support for your position.
- Continue to monitor the case posture and inform your client.
- Be flexible about meeting with the other side for discussion.
- Be trustworthy—**DO WHAT YOU SAY YOU WILL, WHEN YOU SAY YOU WILL.**



Why do you want to use ADR?

1. You get to choose the mediator (in most counties/cities).
2. You avoid prejudiced fact-finders.
3. You avoid judges who profess contrary religious, lifestyle, or political beliefs.
4. In mediation, you have much more time to discuss the overarching issues.
5. *“Use a scalpel to carve settlement rather than the judge’s hammer.”*

- You have to be an excellent listener.
- Very often, you have the opportunity to promote healing.
- You have the opportunity to demonstrate that the clients should be treated with dignity and respect.
- All of the previous are a prelude to when you actually have to discuss the legal limitations of the relief available in “your case.”
- *Invite their lawyer to weigh in—“do you disagree?”*

Additional mediator perspectives

- Never trivialize any issue no matter how trivial it may seem to you. That does not mean you don't put the issue in the correct legal perspective, i.e., *"I know this is important to you, but it will not be important to the court."*
- Remember, for most people, any litigation (especially divorce) is a diseased process.
- Treat everyone like you would if that person were going to be your next-door neighbor.

Good judgment



Intense legal experience/knowledge



Intuition for personal dynamics



Objectivity



Honesty: the “neighbor for life”

Mediator skills (cont'd)

- In complex cases, the mediator has the best chance of forcing analysis outside of heuristics.
- Use statistics, not stereotypes, i.e., “How many people win/lose these types of cases? What makes you different? What is the typical range? Why is your case better/worse?”
- Don’t allow “**anchoring**”—staying with a preconceived position if it is not rationally based.
- ***The truth? People really want a second opinion.***

Managing expectations

- At the outset, tell the parties today's overarching goal: a signed agreement ending this dispute.
- Make sure you identify each party's unique goal: what do you want to happen?
- Assure yourself this is realistic. If not, tell them it's not realistic when you're confident of that fact.

27 Managing expectations (cont'd)

Things to keep in mind:

- How many issues?
- What is your model?
- Money damages? Injunction? Requiring numerous actions?
- Can partial resolution help this matter?

Reinforce to the parties:

“This is your chance to control your own destiny.”

Must these parties relate in the future?

Reinforce that legal outcomes are uncertain

(the “4 times in 7” rule)

29 Purpose of mediation

- Allowing parties to formulate their own solution.
- Underlying goal: to provide a sounding board and second opinion.
- Your own style as a mediator:
 - “Catharsis” or “Directive”?

Being “directive”

When it works:

- Requires thorough knowledge of and experience resolving these types of disputes.
- Credibility (you know what you’re talking about).
- Knowledge and experience must be tempered with an attitude of absolute impartiality.



31 Inspiring confidence

- Look professional.
- Act professional. Don't gossip.
- Do your share of the work.
- Don't make excuses.
- Get involved in your profession—people will think of you for referrals.
- Communicate often and with everyone.



Your ethical responsibilities

The 4 competing duties:

- To your client
- To your fellow lawyer
- To the administration of justice
- To yourself



Improve and defend your profession

- Support the fair administration of justice.
- Make sure people understand the judiciary is the third branch of government.
- Speak out as a true professional when you see undue criticism.



What clients *really* want

The Six Concepts

- Competence
- Communication
- Accessibility
- Accountability
- Collaboration
- Respect and courtesy

“Survey Says...”

1. Collaboration
2. Accessibility
3. Communication
4. Accountability
5. Respect and courtesy
6. Competence

LAWPAY[®]

AN AFFINIPAY SOLUTION

Claude Ducloux

866-376-0950

claude@LawPay.com

Thank You!