Grieving Over Settlement: The Role of Loss in Settlement Negotiations

DWIGHT GOLANN*

* Professor of Law, Suffolk University. I wish to express my thanks to Helaine Scarlett Golann for her insights into the psychology of loss, and to her, Marjorie Corman Aaron and Robert Smith for reviewing drafts of this article and suggesting changes that transformed it. My thanks also to the Dean and Faculty of the Moritz College of Law at Ohio State University, who invited me to give the lecture on which this article is based.

"It's hard . . . There's a finality about it . . . . When we sign, then it's done. He's really gone.

– The widow of a victim of the 9-11 disaster,
describing her reluctance to apply for compensation

I. INTRODUCTION

The development of negotiation theory and growth of mediation has greatly improved, indeed transformed, how disputes are resolved in America and, increasingly, around the world. Yet I have been struck in my work as a mediator and teacher that something is missing from our approaches to settlement. In emphasizing so strongly the creative potential of these techniques we have obscured an equally important reality—that in even the best settlement negotiations many, perhaps most, parties must deal with significant feelings of loss.

The perception of disputants that they are losing as they bargain is important for several reasons: Emotions stimulated by loss have a special intensity and often appear without warning, at times when the bargaining process is most vulnerable. The behaviors provoked by these feelings resemble tactics used by adversarial bargainers, magnifying their disruptive impact. Finally, for some disputants, like the 9-11 widow above, their case takes on a significance that makes them reluctant to resolve it on any terms. I have come to believe that disputants' struggles with perceptions of loss, and the feelings and behaviors they stimulate, are a primary reason that settlement negotiations fail.

In this article I will explore the following issues: What causes parties to feel they are losing as they negotiate to resolve a dispute? What emotions does this experience provoke, and how do they affect parties' bargaining behavior? And what strategies can mediators use to deal with these feelings and behaviors, to assist parties to settle?[1]

[1] Many of the points made in this article, and the suggestions I offer, apply also to lawyers, both as participants in direct bargaining and in mediation. In the interest of clarity, however, I will write from the perspective of a mediator. I will also speak in terms of negotiations between two parties, although the same issues arise in multi-party cases.

II. TWO EXAMPLES

In exploring these questions, I will draw on psychological literature, and also on my own experiences as a lawyer and mediator.[2] I will use two actual disputes as examples.[3]

> *A fatal accident.* A state trooper began a high-speed chase of a drunk driver in a small New England town. Pursuing rapidly, the policeman ran a stop sign and hit a third car that was crossing the intersection. The trooper was unhurt, but the driver of the third vehicle died instantly. He was a seventeen-year-old boy.
>
> The driver's family sued the state, arguing that the trooper had been negligent in ignoring the stop sign. It was a typical tort case in which a jury would have to decide whether the officer had acted carelessly. Defense counsel investigated, looking for facts to show the victim had been drinking or irresponsible. It seemed, however, that the boy was a model student and had left behind a loving family. On the other hand, the trooper was showing initiative in giving chase to a dangerous driver, and juries in the area had consistently found for police in such circumstances. Also, liability was capped by law at $150,000. The lawyer began preparing the case for trial.
>
> Two years later, as trial neared, the defense made a settlement offer of $100,000. It was rejected. Defense counsel waited a few weeks and then raised the offer to $120,000. Word came back from the plaintiff's lawyer that while he was ready to recommend that his clients accept the offer, the family had refused and would not make a counteroffer. He suggested they mediate.

That strong emotions would affect decisionmaking in a wrongful death case is not surprising, but consider the following dispute, involving a contract claim:

> *A stock dilution claim.* The COO of a startup sued his former company, claiming that his interest in the company had been illegally

---

[2] Over the past twenty years I have mediated several hundred legal disputes, including tort, contract, property, employment and other claims. I have not been involved, however, in resolving divorce cases or, with a few exceptions, disputes in which parties were proceeding *pro se*. The observations in this article based on my experience as a mediator, therefore, are limited to civil mediations in which lawyers are involved.

[3] Details have been changed to preserve confidentiality, but the dynamics and outcome of each case are the same.

"diluted." Dilution—a reduction in the percentage of a company's stock held by an investor—is common in startups. As a venture prospers the owners solicit additional funding, which they repay by issuing new stock. The issuance of additional shares lowers the percentage of the company's stock held by the early investors. The additional capital and show of confidence by outsiders typically makes the company much more valuable, however, causing the total value of the founders' shares to rise.

In this case the former executive's two percent stake in the current company was worth $6 million, far more than the five percent share of the company stock he'd had when he joined it. The plaintiff claimed, however, that he had gotten special "anti-dilution" assurances from the company which guaranteed that his percentage share would not go down as new stock was issued; without dilution, his stock would now be worth $15 million. After three years of litigation the parties went to mediation.

In each of these cases feelings of loss posed challenges; let us explore what they were, and how they played out.

III. WHAT IS MEANT BY LOSS IN SETTLEMENT?

The first question is what we mean by "loss in settlement." Parties often feel disappointed as they make the compromises necessary to reach agreement. In this article, however, I will focus on feelings of loss so severe that they produce dysfunctional bargaining behavior. Such emotions could be triggered by two different forms of loss. One is a disputant's perception that the terms of settlement are unacceptable—a loss based on bargaining expectations. The other occurs when the very existence of a legal case has taken on emotional significance, so that ending it on almost any terms feels like losing—the loss of a case.

A. *Loss Based on Expectations*

To decide whether a settlement offer represents a loss or a gain, a disputant needs a break-even point, or benchmark, from which to measure.[4] The more optimistic a party's point of reference, the more likely it is that they will perceive terms of settlement as a loss; the more modest, the more probable they will see a resolution as a gain. What benchmarks do parties in legal

[4] See DANIEL KAHNEMAN, THINKING FAST AND SLOW 282 (2011); Robert Mnookin, *Why Negotiations Fail: An Exploration of the Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 245 (1993).

disputes use to assess whether a proposal of settlement represents a loss or a gain?

Of the possible benchmarks two seem most likely. One is a disputant's perception of what they had, or expected to have, before the dispute arose. A second is a party's benchmark at the point they enter settlement negotiations, which may be quite different from their expectations when the dispute first arose. Each are influenced by the disputant's concept of what is fair.

1. *SETTLEMENT COMPARED TO THE STATUS QUO ANTE*

Many disputants measure settlement offers by what they had or expected to have before the dispute arose. This is entirely logical, and mirrors how the legal system measures loss. The common law typically assesses a plaintiff's right to relief by asking what amount of money will restore them to the condition they were in, or is needed to satisfy their reasonable expectations, before their rights were violated. Victims of negligence, for example, are entitled to a money judgment adequate to compensate them for the difference between their present condition and their former state of health,[5] while someone with a contractual claim is entitled to the difference between what they could reasonably have expected from a deal and what they actually received.[6] The common law, in other words, uses a plaintiff's status quo ante as the reference point for what they have lost.

There are reasons, however, why common law definitions of compensation may not be adequate. An accident victim, for instance, might not feel that even a court's "full" award of damages would leave them as well off as before they were injured, while a business executive might view the judicial definition of lost profits as much too narrow to cover their lofty, perhaps speculative, expectations for a deal or outrage at having been cheated. A defendant who prevails in court might similarly feel that a simple verdict of "not liable" does not begin to compensate them for the damage done to their reputation.

To this point we have focused only on the losses caused by the events that give rise to a dispute. For most parties, however, being in a legal conflict imposes large additional costs. Disputants must usually pay for legal representation and being involved in ongoing litigation is distracting and disruptive. With few exceptions, courts do not compensate parties for their legal expenses or the intangible costs of being involved in litigation.

---

[5] *See* RESTATEMENT (FIRST) OF TORTS § 910 (AM. LAW INST. 1939).

[6] RESTATEMENT (SECOND) OF CONTRACTS § § 344, 347 (AM. LAW INST. 1981).

To feel fully restored to their situation before a conflict arose, therefore, a party would usually have to obtain settlement terms substantially *more* valuable than what they had before the dispute arose.[7] For each of the parties to a negotiation to feel they are avoiding loss, *both* would have to receive settlements more valuable than their status quo ante, which is usually impossible.

2. *SETTLEMENT COMPARED TO EXPECTATIONS AT THE OUTSET OF BARGAINING*

Between the time a loss occurs and a person enters a settlement negotiations, their benchmark for measuring gain or loss may change. Ideally, a party's lawyer would counsel them about the high costs and limited remedies available from the legal system, as well as the risk of losing,[8] influencing the litigant to lower their expectations for settlement. A litigant counseled in this way would be much less likely to be affected by perceptions of loss when they bargain, because they would have already gone through at least some of the process of adjusting to the loss of what they had before.

Often, however, parties are not well-counseled, or do not listen to the advice they receive. A disputant may read about an exceptional legal outcome in the media or hear a story from a friend that inflates their opinion of the appropriate result for their own case. The stories that grab the attention of the media or "go viral" on the internet, such as the "McDonald's coffee case,"[9] are by definition exceptional, however, and do not accurately reflect the modest results that are vastly more likely.[10] Extreme examples also take on exaggerated importance in disputants' minds because of cognitive forces such as availability and vividness bias—the tendency of the human brain to notice and remember striking events more readily than common ones, and as a result to overestimate how often they actually occur.[11] Disputants usually understand

---

[7] Because the legal system generally does not compensate parties for their expenses, past costs should not enter into parties' calculations of loss or gain in settlement. In practice, however, they do. *See* Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 25 (1999).

[8] *See* MARJORIE C. AARON, CLIENT SCIENCE 10–11 (2012).

[9] *McDonald's Cup of Scalding Coffee: $2.9 Million Award*, CHI. TRIB., Aug. 19, 1994, at 1.

[10] Birke & Fox, *supra* note 7, at 6. The judge in the "McDonald's coffee case" reduced the award to $640,000, McDonald's appealed, and the case was settled, but these developments received less attention. *Judge Reduces Award in Coffee Scalding Case*, CHI. TRIB., Sept. 14, 1994, at C2, *cited in* Birke & Fox.

[11] Birke & Fox, *supra* note 7, at 9–10. JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 73 (2012).

that their case is not identical to one reported in the media and seek to adjust for the differences, but they consistently fail to adjust sufficiently.[12]

Human beings also suffer from other cognitive forces that distort their judgment, particularly the "above-average effect" and judgmental over-optimism. Most people believe, for example, that they will exceed the average member of their high school class in longevity and financial success.[13]Even professionals regularly make over-optimistic predictions. Doctors, for example, over-estimate the life expectancy of terminally-ill patients,[14] and lawyers regularly become wedded to their own advocacy and reject advantageous settlement offers.[15] As a result, even when parties and their counsel set benchmarks for settlement that reflect their honest assessment of the likely outcome in a case, they are likely to adopt unrealistic goals.[16]

Litigants' expectations are also affected by their feelings about what is fair. Participants in experiments, for example, consistently refuse offers that they consider unfair, even when they know that if they do they will receive nothing.[17] Human beings' views of fairness, however, are often distorted by self-interest,[18] and even when disputants define fairness "objectively," in terms of what a court is likely to do, the cognitive forces described above are likely to distort their conclusions.

Effective counseling by lawyers can help a client develop realistic goals for settlement. Often, however, attorneys do not provide such assistance, and sometimes do the opposite.[19] Litigators may encourage clients to focus on

---

[12] Birke & Fox, *supra* note 7, at 9–12.

[13] AARON, *supra* note 8, at 143; Birke & Fox, *supra* note 7, at 9–12.

[14] Physicians advising terminally ill cancer patients overestimated their patients' lifespan sixty-three percent of the time while underestimating in only seventeen per cent of cases. Atul Gawande, *Letting Go: What Should Medicine Do When It Can't Save Your Life?,* NEW YORKER 43 (Aug. 2, 2010).

[15] ROBBENNOLT & STERNLIGHT, *supra* note 11, at 68; AARON, *supra* note 8, at 146–47.

[16] See AARON, *supra* note 8, at 156–160; Randall L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551 (2008).

[17] In the so-called "Ultimatum Game" players are placed in pairs. Player A offers an allocation of a sum of money between them, and Player B must decide whether to accept Player A's offer. If B refuses they receive nothing. Any sum above zero is a gain for B compared to their alternative, but in practice some B's refuse offers of as much as thirty to thirty-five percent of the amount being divided. G. RICHARD SHELL, BARGAINING FOR ADVANTAGE, 61–62 (2d ed. 2006).

[18] See ROBBENNOLT & STERNLIGHT, *supra* note 11, at 174 ("[W]e . . . tend to conflate what is fair with what benefits us . . . ."). Birke & Fox, *supra* note 7, at 14–15.

[19] *See* Linda F. Smith, *Medical Paradigms for Counseling: Giving Clients Bad News,* 4 CLINICAL L. REV. 391, 398–99 (1998).

what they have lost to enhance a legal claim, but in doing so lead them to fixate on their losses and increase what they expect in compensation. Some lawyers, unfortunately, also inflate clients' expectations to increase the demand for their services.[20] More often, however, if an attorney does not give a client realistic advice it may be because doing so feels inconsistent with the loyalty they believe the client expects. Helping a client move toward realistic goals also requires dealing with difficult feelings, which many lawyers may be unable or unwilling to undertake.

B. *Loss of a Case*

Some parties use the existence of a claim to avoid feeling some of their loss. Such litigants fear they will lose by ending the case, regardless of how valuable the terms of settlement may be. The 9-11 widow quoted at the outset appeared to feel this way: although she knew intellectually that her husband had died, applying for compensation would confirm that he was "really gone," a severe emotional loss.[21]

To understand why resolving a legal claim can feel like a loss it is helpful to examine how people respond to purely personal tragedies, such as the death of a loved one from illness. Psychologists have observed that while most victims go into shock or numbness, followed by a period of grief and mourning,[22] some remain in partial denial that a loss has occurred. John Bowlby, for example, described victims as alternating between two states of mind, one recognizing the loss while the other remains in disbelief.[23] He was struck by how strong the resistance to accepting a loss can be, commenting, "The urge to regain the person lost . . . is powerful, and often persists long after reason has deemed it useless."[24]

People who deny loss in this way sometimes also undertake "displacement behavior...as a means of avoiding the facts of the situation"[25]

---

[20] *See* Mnookin, *supra* note 4, at 242.

[21] The widow was speaking of her reluctance to file a claim rather than settle one, but because her right to compensation was not in dispute, filing her legal claim also meant resolving it.

[22] JOHN BOWLBY, ATTACHMENT AND LOSS: VOL III LOSS 85, 116 (1980); ELIZABETH KÜBLER-ROSS, ON DEATH AND DYING 51–52, 54–55 (1970); Sigmund Freud, *Mourning and Melancholia, in* 14 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 244–45 (James Strachey ed., 1957) (observing that persons who suffer the loss of a loved one typically go through a period of deep mourning).

[23] BOWLBY, *supra* note 22, at 87.

[24] *Id.* at 27.

[25] ROBERT BUCKMAN, HOW TO BREAK BAD NEWS: A GUIDE FOR HEALTH CARE PROFESSIONALS 111 (1992).

or engage in "the defensive use of action to do away with something painful and unpleasant."[26] Such victims sometimes search for the lost person for months or years.[27] By partially denying that a loss has occurred, they avoid feeling much of the grief the realization would trigger. But they also do not go through the process of mourning and, when their illusion eventually collapses, experience the grief they had been pushing away.

Some disputants use a lawsuit in the same way. They do not deny the underlying facts—for example that they were fired—but use their legal action as a "displacement behavior" to avoid feeling at least some of the resulting loss. A terminated employee, for example, may insist that a court will compensate him for his lost wages, even reinstate him, while an executive maintains that she will be publicly vindicated by a judge.

A disputant is especially likely to invest a conflict with symbolic meaning when it injures their sense of personal identity.[28] A worker fired from their job, for example, often loses not only income but also their image of themselves as a competent employee and breadwinner. As one writer puts it, "From a grief perspective, the worker is saying, 'Two parts of me are about to die.'"[29] Even litigants in routine commercial disputes sometimes say they cannot compromise because a case involves "a matter of principle."

As such disputants become involved in settlement discussions, however, their denial becomes increasingly difficult to maintain. The worker mentioned above, for example, might be asked to give up his claim for reinstatement in return for a money payment, or defendant told that she has to forgo public vindication to obtain a release of liability. At this point the denier can no longer avoid confronting their loss, and suddenly experiences emotions that other parties had worked through much earlier.

What standard did the parties in the cases I described earlier bring with them to mediation? In the fatal auto accident case, no amount of money could replace the loved one, and even when offered 80% of the highest amount they could obtain from a court, the family refused to bargain. It seems likely that pursuing the case allowed family members to maintain a sense of connection to their loved one, and they could not make a decision that would end it.

In the stock dilution case, the plaintiff's claim was for the difference between the value of his diluted and undiluted shares, or nine million dollars. In setting a goal for settlement the plaintiff was presumably advised to

---

[26] JOSEPH SANDLER & ANNA FREUD, THE ANALYSIS OF DEFENSE: THE EGO AND THE MECHANISMS OF DEFENSE REVISITED 341 (1985).

[27] BOWLBY, *supra* note 22, at 85.

[28] DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS 112–14 (2d ed. 2010).

[29] Michael J. Evans & Marcia Tyler-Evans, *Aspects of Grief in Conflict: Re-Visioning Response to Dispute,* 20 CONFLICT RESOL. Q. 83, 91 (2002).

discount that number to reflect the risk of losing, bringing his reference point for loss/gain to a lower amount, although the mediator did not know what it was. As we will see, however, for the executive the case had other significance as well.

C. *Can Perceptions of Loss be Avoided Through Good Bargaining Techniques?*

Can good negotiation or mediation techniques produce settlements that eliminate disputants' perception of losing? Teaching about mediation focuses on its ability to promote interest-based bargaining and problem solving.[30] In a wrongful discharge case, for instance, an employer might be persuaded to change company records to show that the plaintiff was laid off rather than fired, allowing the worker to repair some of the damage to his self-image, qualify for unemployment benefits, and improve his chances of finding another job. In return, the employee might agree to accept a lower monetary payment and keep information about the dispute confidential, leaving both parties better off than if they had reached a purely monetary agreement or continued in litigation.

Losses that flow from the disruption of a relationship can also be alleviated by repairing it, but this is difficult to achieve in practice. As Marc Galanter has commented, "In the American setting . . .resort to litigation is viewed as an irreparable breach of the relationship."[31] Once parties initiate a lawsuit, in other words, a mediator's task is not simply to repair their relationship but rebuild it from scratch. I have surveyed mediations of disputes arising from relationships to determine how often good mediators are able to obtain repairs. Repairs were achieved in seventeen percent of the sampled cases, while in eighty-three percent the parties remained estranged.[32] The

---

[30] *See, e.g.*, JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 108 (2d ed. 2006) (noting the ability of mediators "to help the parties understand their situation in a new way and consider creative alternatives . . . "); CARRIE J. MENKEL-MEADOW ET AL., MEDIATION: PRACTICE, POLICY, AND ETHICS 235–42 (2d ed. 2013); MEDIATION: THE ART OF FACILITATING SETTLEMENT, 5:2–15 (Straus Institute for Dispute Resolution 2009).

[31] Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 25 (1983). *See also* Tom Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 428 (1989).

[32] Dwight Golann, *Is Legal Mediation a Process of Repair—or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 311 (2002).

mediators also reported that when repairs did occur, it was usually because the parties could not afford to separate.[33]

Significantly, although books and videos (including my own) present positive stories about integrative processes, they generally do not claim that even the best bargaining techniques can avoid all loss. The classic text *Getting to Yes*, for example, advises readers to:

> **Look forward, not back...**We can *choose* to look back or to look forward. You will satisfy your interests better if you talk about where you would like to go rather than about where you have come from. Instead of arguing with the other side about the past...talk about what you want to have happen in the future.[34]

This is a sensible suggestion, but for a typical disputant it is usually psychologically impossible. As one writer points out, taking this advice "requires that she try to ignore the loss of part of her existence."[35] By offering this suggestion, however, *Getting to Yes* recognizes a basic reality: interest-based bargaining can reduce the loss associated with settling, but usually cannot eliminate it.[36]

IV. How do Perceptions of Loss Distort and Complicate Negotiations?

What feelings do perceptions of loss produce? Before answering, let me describe what occurred in the mediations of the cases I mentioned earlier.

In the fatal accident case the plaintiff's lawyer called the trooper's attorney to tell her that the family did not want to begin the mediation with an opening session, but instead wanted to meet with the trooper without attorneys present. The defense attorney was initially resistant: What was the point of having angry people rehash the facts, given that the evidence was largely undisputed? Eventually, however, she agreed.

The meeting was an extraordinary event. The victim's mother, father and sisters came and talked not about the case, but about their lost son and brother. The mother read a poem to the trooper describing the hopes she had had for her dead son, and the life she knew they would never be able to share.

The officer surprised everyone. Although he maintained he had not been negligent, he said he felt awful about what had happened. He had three

---

[33] *Id.* at, 307–08; *see also* Galanter, *supra* note 31.

[34] Roger Fisher et al., Getting to Yes: Negotiating Agreement Without Giving In 52–53 (2d ed. 1992).

[35] Evans & Tyler-Evans, *supra* note 29, at 93.

[36] *See generally* Gerald B. Wetlaufer, *The Limits of Integrative Bargaining,* 85 Geo. L.J. 369 (1996).

sons and had thought over and over about how he would feel if one of them were killed. He had asked to be assigned to desk work, he told the family, because he could no longer do high-speed chases.

The mediator eventually suggested that he meet with the parties separately. He began with the plaintiffs and listened empathically as they described their feelings. After more than an hour, he gently suggested that they might talk about how to begin the process of settling their case. The family, however, said they could not think about how much money to accept for their son and brother's life, and the mediation was adjourned.

The stock-dilution case began with a conventional opening session, in which the lawyers presented arguments and the mediator invited each principal to give his perspective. The CEO took up the offer, maintaining that he'd treated the plaintiff entirely fairly. He emphasized that everyone's shares, including his own, had been diluted as the company attracted investment, but their investments had also become much more valuable. The plaintiff declined to speak, instead passing notes to his lawyers. When the discussion became contentious, the mediator suggested that they adjourn to private caucuses.

For several hours, the parties exchanged legal arguments and offers. In response to the plaintiff's claim for 9 million dollars the company made an initial offer of $500,000. The bargaining moved slowly forward from there. At one point the mediator suggested that the plaintiff and the company CEO meet together, but neither side was interested. The negotiation continued for hours.

At 5 pm, the plaintiff lowered his demand from 7 to 6.5 million dollars, and the company responded by increasing its offer from 2 to $2.25 million. Then the bargaining stalled. The plaintiff refused to compromise further, insisting that he'd given up too much already. He attacked the CEO as an ungrateful twerp who had forgotten the crucial guidance which enabled him to grow from college nerd to chief executive of a successful company. For the CEO to begrudge him a fair share of the bounty of his work was outrageous, according to the executive.

The mediator listened respectfully to the plaintiff's views. He then mentioned that the defense had produced emails in which, they argued, the plaintiff had agreed to give up his anti-dilution protection in return for an enhanced bonus formula. The plaintiff, however, rejected the emails as meaningless chatter, unworthy of consideration.

Reluctantly, in response to urging, the plaintiff agreed to drop to $6.25 million and the mediator left to deliver the offer. As the mediator was talking with the defense team, however, the plaintiff lawyer came to tell him that the plaintiff had changed his mind; he was still at $6.5 million.

Returning to the plaintiff's room the mediator found him very agitated. He exclaimed angrily that the company could pay him what he knew his claim was worth or see what happened when they got to trial. The mediator noted that he'd already told the defense group about the plaintiff's concession and raised the risk that they would react badly if he withdrew it. The plaintiff was adamant, however.

The defense team interpreted the plaintiff's move as bad faith reneging and walked out. The mediator, however, remained hopeful of reviving the process.

One might reasonably react to these examples by agreeing that perceptions of loss are likely to provoke strong feelings. But parties in mediation often show high emotion; what is special about feelings triggered by losing? Such emotions have a special impact because of three factors: their intensity, their timing, and their resemblance to tactics used by adversarial bargainers.

A. *The Special Intensity of Reactions to Loss*

What induced the CEO to withdraw an offer he had already made, and the family of the accident victim to refuse to bargain at all? The answer, I believe, lies in the intensity of the emotions stirred by perceptions of losing.

1. *THE NATURE OF EMOTIONAL RESPONSES*

To understand the feelings of disputants in legal cases, it is helpful to again to consider the reactions of persons dealing with death. Elizabeth Kübler-Ross famously described the reactions of terminally-ill patients as involving intense grieving which manifested itself in five stages: numbness/denial, anger, unrealistic bargaining, depression, and acceptance.[37] John Bowlby offered a four-stage model of response to loss, consisting of numbing, yearning for the lost figure and anger, disorganization and despair, and reorganization.[38]. He noted, however that reactions vary greatly from one person to another. Some victims show emotions in a different order, while others omit a stage entirely or "oscillate for time back and forth between . . . two of them";[39] someone in denial, for example, may become angry, then revert to denial.

---

[37] KÜBLER-ROSS, *supra* note 22, at 51–124. Kubler-Ross devotes a chapter to each of these five stages. *See id.*

[38] BOWLBY, *supra* note 22, at 85.

[39] *Id.*

The following feelings and behaviors are common in persons suffering from severe loss.

Denial. As a defense against perceiving the truth and the feelings it would provoke, victims take refuge in denial. Their minds engage in "selective exclusion" of information that contradicts their belief or, if they register unwelcome information, adopt a "degree of amnesia" to forget it.[40] Denial can be more or less severe: People who are less affected will admit that unfavorable information exists, but refuse to believe it or minimize its importance. People in complete denial do not perceive that the objectionable information exists at all; in the words of one medical text, full deniers "*will not take . . . information in.*"[41]

Disputants in legal cases behave similarly to victims of purely personal loss. They engage in selective perception to deny the existence of facts, or concede that evidence exists but deny its significance.[42] This is what happened, for instance, in the stock-dilution case, when the plaintiff refused to recognize the significance of emails indicating that he had agreed to give up his protection from dilution. Parties also deny the impact of their bargaining decisions: A disputant who refuses to reciprocate a concession may not admit the risk that an opponent will respond in kind.

Anger. Disputants angry at the prospect of losing sometimes express their feelings through unreasonable offers. A plaintiff who makes an astronomical demand may, in effect, be expressing the feeling that "If the system were fair, $1 million would be *cheap* for this case!"[43] Angry parties often accompany extreme positions with denigrating comments about their opponent's character or legal case. They may act out their anger by arriving late, refusing to shake hands, or walking out without warning.

Inability to decide. Persons suffering a personal loss often become depressed, disorganized or apathetic.[44] I have observed parties in mediation become listless, refusing to make a bargaining decision or obsessing over it, slowing or paralyzing the settlement process. This is what may have been happening, for example, when the family in the fatal accident case initially refused to bargain.

---

[40] *Id.* at 45.

[41] BUCKMAN, *supra* note 25, at 112 (emphasis in original); *see also* BOWLBY, *supra* note 22, at 86.

[42] DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 56–57 (3d ed. 2016).

[43] Medical patients facing death express similar resentment. In Kübler-Ross's words, the cry "No, it's not true. . ." becomes "Why me?"" Patients often project anger "almost at random," including at their family and doctor. KÜBLER-ROSS, *supra* note 22, at 63–64.

[44] BOWLBY, *supra* note 22, at 85, 93; *see* KÜBLER-ROSS, *supra* note 22, at 97–98.

Inconsistency. Persons suffering from personal loss go through something akin to an internal negotiation. Sigmund Freud described their minds as reaching a "compromise" between their wish to cling to what they have lost and "the command of reality" to adjust to the present.[45] As noted, Bowlby described such victims as alternating between two states of mind, one that recognizes what has happened and the other disbelieving it.[46]

A disputant may be similarly torn between clinging to an unrealistic goal and acceding to the demands of settlement. As their feelings of loss arise and recede, disputants' behavior also changes abruptly. The plaintiff in the stock-dilution case, for example, first refused to make a concession, then agreed to one, but then became angry and withdrew it.

Such emotions are reported most frequently in divorce cases,[47] where the parties face choices they fear will disrupt their lives and relationships with loved ones or threaten their self-image as a good parent or person worthy of love. Parties also show Kubler-like feelings in non-marital disputes, however.[48] I have seen them most often in mediations of employment claims and disputes that arise from a close relationship such as a family business, inheritance or partnership, but as the stock dilution case shows, they can appear in commercial disputes as well.

2. *THE IMPACT OF LOSS ON DECISIONMAKING*

Perceptions of losing have a major impact on human decisions even when the decisionmaker is calm and the loss involves only money. Daniel Kahneman and Amos Tversky conducted seminal experiments proving that people are strongly averse to loss, a phenomenon they called "loss aversion."[49] Humans consistently "seek loss" – that is, they opt to take large risks of losing in an effort to avoid a loss, even if on average this means that they will lose

---

[45] Freud, *supra* note 22, at 245.

[46] COLIN MURRAY PARKES & HOLLY G. PRIGERSON, BEREAVEMENT: STUDIES OF GRIEF IN ADULT LIFE 75 (2010) (noting that patients who refuse to accept diagnoses of terminal illness are also less likely than others to ask for a second opinion).

[47] *See* Mary Kollas Kennedy, *The Family Lawyer as Grief Counselor*, 23 PENN. LAWYER 36, 39 (2001) (noting that "In one appointment I have seen a client go from anger to sadness back to anger and finally to acceptance."); Evans & Tyler-Evans, *supra* note 29, at 91–92. *See also* James Kochalka, *Coping with Client Expectations in Divorce,* 72 FLA. B.J. 55 (1998) (describing denial and depression in divorce clients).

[48] Joe Epstein & Susan Epstein, *Grief, Anger and Fear in Mediation,* MEDIATE.COM (Sept. 2010), https://www.mediate.com/articles/epsteinJS10.cfm?nl=281.

[49] *See* Kahneman, *supra* note 4, at 283–85.

more.[50] Kahneman and Tversky also demonstrated that people are much more likely to accept unreasonable risks to avoid a large loss than a small one.[51]

These findings have particular significance for legal negotiations, because settlement decisions often require parties to make a choice between accepting an immediate loss—the difference between their benchmark and what they are offered—or continuing in litigation, which offers the hope of avoiding the loss entirely but on average will be more expensive. Kahneman and Tversky's findings explain why parties consistently decide to accept unreasonable risks of losing to avoid the certain loss of settling.

When a decision is seen as having moral implications the perceived loss is even greater, a phenomenon Kahneman and Tversky termed "enhanced loss aversion." [52] There is a high psychological price, in other words, to accepting a deal one thinks is unfair. Parties in lawsuits often see deep moral aspects to a dispute, believing that they have been cheated, unfairly accused, or treated in ways that violate their dignity. To compromise a matter that one sees as involving immoral conduct or an assault on one's self-respect without a finding that that one is in the right or letting an opponent "buy his way out" of improper conduct, often strikes litigants as deeply unfair, generating feelings that are correspondingly intense.

B. *Problems of Timing*

The feelings provoked by perceptions of loss are also especially disruptive because they usually do not appear until the parties are well into a process that until then had been progressing normally. The delay may be due in part to the bargaining strategies that dominate legal settlement negotiations. Litigators typically open the process with extreme offers[53] accompanied by aggressive arguments. Lawyers do this intentionally, to obtain the benefit of

---

[50] A large majority of subjects who were offered a choice between paying $20 and taking a gamble with a 75% chance of losing nothing and a 25% chance of paying $100, for example, chose to gamble, although it was clear that doing would cost more on average. Mnookin, *supra* note 4, at 244.

[51] *See* Kahneman, *supra* note 4, at 318–19.

[52] Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective, in* BARRIERS TO CONFLICT RESOLUTION 44, 59 (Kenneth J. Arrow et al. eds., 1995) (commenting that "Losses that are compounded by outrage are much less acceptable than losses that are caused by misfortune or by legitimate actions of others").

[53] DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT 27–28 (2008J. ANDERSON LITTLE, MAKING MONEY TALK: HOW TO MEDIATE INSURED CLAIMS AND OTHER MONETARY DISPUTES 35 (2007); Birke & Fox, *supra* note 7, at 40–41.

"anchoring"—the tendency of a first offer to affect the listener's expectation about what the final terms of settlement will or should be.[54]

Experienced lawyers know that their initial positions are unrealistic, but clients may interpret an attorney's offers and statements as confirmation that their exaggerated expectations are achievable. They suffer in effect from "self-anchoring," being swayed by their own lawyer's tactics. Later, however, each side must make concessions to avoid impasse. Lawyers often express frustration about this phase of a positional process, but they are not surprised by it. For a party, however, the need to offer major concessions can come as a shock.

Although emotional responses to loss can complicate bargaining at any point, they pose a special problem when they appear in this way, late in the process, because by this time other participants are often tired, frustrated and impatient to move the process to a conclusion.

This is apparently what happened in the stock-dilution case. For several hours, the plaintiff's demands remained high and he was able to bargain normally, but at the end of the day he was asked to go below what appears to have been his internal benchmark and reacted strongly.

C. *Impact on Opponents*

Feelings provoked by the perception of loss are of special concern, finally, because parties reacting to loss behave in ways confusingly similar to adversarial bargainers. This provokes anger, suspicion and reactions from opponents that create additional barriers to settlement.

When an emotional party denies any risk of losing at trial, for example, their opponent is likely to assume the party is executing a positional strategy and respond by inflating their own arguments. A disputant who makes an "insulting" offer will lead even a counterpart who had been open to bargaining cooperatively to respond in kind.[55] Similarly, abrasive comments often provoke anger in their targets.[56] When a disputant paralyzed by loss does

---

[54] *Id.*; AARON, *supra* note 8, at 166–69; ROBBENNOLT & STERNLIGHT, *supra* note 11, at 71–72.

[55] The effects of attribution bias increase the likelihood that opponents will place the worst possible interpretation on an emotional party's actions. GOLANN & FOLBERG, *supra* note 42, at 159–60.

[56] Attorneys justify increasing their reluctance to hold opening sessions in mediation in part on the belief that hostile statements exchanged in such meetings poison the atmosphere for bargaining. *See, e.g.*, Jay Folberg, *The Shrinking Joint Session: Survey Results,* DISP. RESOL. MAG. 12, 17 (2016) (noting mediators' comments that joint sessions often make parties angrier due to posturing).

not reciprocate a concession, an opponent is likely to interpret their behavior as purposeful "stonewalling," while a party who retracts an offer is seen as intentionally reneging.[57] Opponents often respond to what they see as unreasonable or unethical tactics in kind, further escalating a difficult situation.

In the fatal accident case the mediator avoided these problems by delaying bargaining to accommodate the family's wish to speak with the trooper, and then adjourning to allow them to process their feelings. In the stock-dilution case, however, the mediator and the lawyer did not recognize the plaintiff's emotional state and urged him to make an additional concession. When he did and then withdrew his offer, the defense interpreted his behavior as a bad-faith tactic and walked out.

V. RESPONSES TO PERCEPTIONS OF LOSS

How should mediator deal with someone who is in the throes of a reaction to loss?[58]

Be open to the possibility. First, and by far most important, is to understand what is happening—that what appears to be illogical or adversarial behavior may be driven at least in part by strong feelings. This is can be difficult, because parties often disguise their feelings. In business cases in particular, executives are likely to arrive at mediation with "game faces on," projecting an air of hardheaded analysis, often coupled with anger and frustration, while concealing more vulnerable feelings such as fear, grief and anxiety. Also, as noted, disputants reacting to loss act very much like competitive bargainers, making it hard for a mediator to determine whether their behavior is tactical, motivated by intense feelings or a combination of both.

Diagnosing emotions stimulated by loss can also be complicated by lawyers' strategies. Attorneys sometimes block mediators from talking with clients even in a private caucus setting, by instructing the client to offer minimal responses to the mediator's questions or answering before they can reply. Recognition of loss reactions is complicated, finally, by the fact that

---

[57] *See, e.g.*, ROGER DAWSON, SECRETS OF POWER NEGOTIATING: INSIDE SECRETS FROM A MASTER NEGOTIATOR 42, 86, 98–101, 119–20, 198, 207 (2d ed. 2001) (discussing refusing to make concessions, ultimatums, escalations, withdrawals of offers, and nibbling at deals).

[58] It is possible to deliver "bad news" in a way that helps a party to absorb it. *See generally* Smith, *supra* note 19. In this article, however, I focus on what a mediator can do when, despite best efforts, a strong reaction occurs.

neither the affected person nor the lawyer may understand what is driving a party's erratic behavior.

Avoid expectations of what "should" occur. Another problem arises from the fact that many models of mediation organize the process into stages. Encouraging the expression of feelings and responding to them are presented as an important aspect of the process, but one that occurs in its early stages, during the opening session or a mediator's initial meetings with parties. Texts portray the process as then moving to activities such as fostering communication, identifying interests, developing creative solutions, managing bargaining, and closure.[59]

The implication is that dealing with feelings is important, but once completed is over, somewhat like opening a window to allow smoke and fumes to escape from a room. Unfortunately, emotions stimulated by experiences of loss are not like smoke; they do not follow a predictable pattern and, as we have seen, often appear only late in the process, when disputants realize that losing is inevitable. For a mediator who expects an orderly process that focuses on emotions and then moves on to fostering creative solutions, such reactions will come as an unwelcome shock. One lesson, then, is not to assume that a mediation will follow a regular progression and be ready for loss-driven behavior to appear at any time.

Facilitate mourning. Having recognized that a disputant is going through a reaction to loss, a mediator must respond. The first step is to distinguish between responding to feelings and facilitating decisions.[60] Until a disputant has worked through at least some of their grief, any decision they make is likely to be distorted by emotion.

---

[59] *See, e.g.*, ALFINI ET AL., *supra* note 30, at 107–08 (suggesting five stages: beginning, accumulating information, developing an initial agenda, generating movement, and ending); MENKEL-MEADOW ET AL., *supra* note 30, at 219, 235–42 (describing the same structure plus a sixth stage of electing separate sessions, with an emphasis on fostering interest-based bargaining); MEDIATION: THE ART OF FACILITATING SETTLEMENT, *supra* note 30, at 6:6–6:10 (using a five-part structure, consisting of convening, opening, communicating, negotiating, and closing, and listing twelve mediator functions, two of which are listening to understand and expressing empathy). Douglas Frenkel and James Stark do address this issue, warning students that, "Many disputes will not permit an orderly, logical progression from one stage to the next. Emotions may run so high . . . as to challenge even the best attempts to impose structure on the process." FRENKEL & STARK, *supra* note 53, at 126.

[60] Atul Gawande has observed that doctors often assume that meetings with seriously ill patients are for the purpose of making decisions about treatment, but from the patient's perspective what is needed is a chance to process their feelings. Gawande, *supra* note 15, at 47.

To facilitate a disputant's grieving over loss one does not need to become a therapist. I think of my role as similar to comforting a friend who has lost a loved one. My job is not to erase the disputant's loss,[61] but rather to facilitate a kind of funeral for what they are losing by settling.

One also needs to accept that the process of grieving takes time and effort, and disputants' feelings and behavior will fluctuate as they go through it. As Freud observed in the context of personal loss, "Normally, respect for reality gains the day [but only] bit by bit, at great expense of time and [emotional] energy . . . ."[62] A disputant needs time and space to experience their grief and work through the associated emotions.

As they do, it is helpful to validate a party's feelings, agreeing that in light of how they see a situation it is entirely understandable why they feel as they do. By using conditional terms when speaking about contested facts, such as "if I felt" or "given how you see the situation . . ." one can avoid taking sides about what happened, while confirming that the person's emotions are appropriate, given the facts as they see them.

Another option is to agree that a party's situation is fully as bad as it says it is ("This is awful, what has happened—nothing can make up for what you have gone through.") Parties are often relieved to hear that the mediator understands why an offer feels so inadequate and is not trying to persuade them to look to a brighter future."[63] Freed of the need to argue their loss, a party may be able to experience grief they had been pushing away.

Although texts advocate allowing disputants to express emotions directly to each other,[64] this may not be the best way to deal with feelings provoked by loss. Neurological research has found that "venting does not necessarily reduce anger and 'clear the air' as mediators have long believed, but rather has the opposite effect of increasing aggression."[65] If there appears to be a risk of disputants becoming inflamed by each other's accusations, the mediator should explore their state of mind in private settings.[66] A neutral can encourage a party to explain why they see a situation as a loss. By reflecting back what they hear and responding empathetically, mediators can shine a

---

[61] Evans & Tyler-Evans, *supra* note 29, at 92 (emphasizing that when dealing with a conflicted situation, the first point to remember is that you are not there to fix the parties).

[62] Freud, *supra* note 22, at 244–45.

[63] Evans & Tyler-Evans, *supra* note 29, at 92–93.

[64] This is the basis, for instance, for the practice of holding an opening session in which disputants are encouraged to express, or "vent," their feelings. *See, e.g.*, FRENKEL & STARK, *supra* note 53, at 137–44; MENKEL-MEADOW, ET AL., *supra* note 30, at 228; DWIGHT GOLANN, MEDIATING LEGAL DISPUTES 15–19 (2009).

[65] Jill S Tanz & Martha K. McClintock, *"The Physiologic Stress Response during Mediation,"* 32 OHIO ST. J. ON DISP. RESOL. 29, 54, 61 (2017).

[66] *Id.* at 59.

spotlight on the loss and encourage a reluctant party to stay with difficult feelings and work through them. If based on what the mediator learns in private meetings they decided it would be useful to have a joint conversation, they can then propose it.

Avoid becoming defensive. Persons who experience the loss of a loved one often lash out indiscriminately, including at medical personnel who had treated the person. [67] Mediators, as the person delivering unwelcome information in a negotiation, can also become targets of disputants' anger, and may be upset at being unjustly blamed. If a mediator shows annoyance, however, they are likely to alienate the party and damage their effectiveness. Similarly, disagreeing with a party in denial is ineffective, usually pushing the denier to cling even more stubbornly to their viewpoint. Pressure to make concessions also risks making disputants rigid, mistrustful and angry.[68] This is what appears to have happened in the stock dilution case.

A mediator should allow a party in denial to express their views fully, no matter how unrealistic they appear, and gently draw out the data the person believes supports their perspective. If a disputant appears ready, the mediator can present contrary information, but without arguing for it and if possible as coming from a third party, then encourage the person to comment on the new data and fit it into their viewpoint. The goal is to allow a party to become aware of contradictions generated by their denial rather than confronting them with them. A mediator needs to keep in mind that what the denier is really protesting is usually not facts, but the feelings they evoke.

Delay problem solving and reframing. Interest-based bargaining can be helpful in minimizing loss, but such efforts are more likely to bear fruit if litigants are given an opportunity to work through at least some of their grief. People who have not mourned will usually reject the idea that there is a viable solution to their problem.[69]

Reframing is another useful technique, which can help a disputant to adopt a new benchmark or view of the process which makes a loss less painful.[70] To accept reframing, however, a disputant must often give up a

---

[67] Kübler-Ross observes that terminally-ill patients' "anger is displaced in all directions . . . The doctors are just no good . . . The nurses are even more often a target . . . . " KÜBLER-ROSS, *supra* note 22, at 44-45; Erich Lindemann, *Symptomatology and Management of Acute Grief,* 101 AMER. J. OF PSYCHIATRY 141, 145 (1944) (describing victims' "furious hostility against specific persons; the doctor or surgeon are accused bitterly for neglect of duty . . . .").

[68] Tanz & McClintock, *supra* note 65, at 38, 44–45, 47–48.

[69] Evans & Tyler-Evans, *supra* note 29, at 92–93.

[70] *See, e.g.,* Ken Bryant & Dana L. Curtis, *Reframing, in* MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 128–30 (Dwight Golann & Jay Folberg eds., 3d ed. 2016).

benchmark or perspective in which they have invested a great deal of time, emotion and money. Again, until a disputant appears open to moving, on even the most skillful reframe risks being rejected.

Manage the negotiation. In one respect a mediator's task is more complex than that of a therapist, because as the mediator works with an emotional party, the mediator must also monitor the other side's reactions and manage the settlement process.

The first step is to forestall disruptive actions. One can ask questions that prompt a disputant to consider the likely effect of an emotional decision ("How do you think they'll react . . . ?") or, if this is not effective, offer a prediction of how the other side will respond ("From what I've seen in the other room, I'm concerned that . . . .") Another option is to look for a way to express the disputant's feelings while avoiding damage to the negotiation ("I'll make sure they know just how insulting their offer is, given what you've gone through. To keep the process moving, though, I'd suggest . . . .").

In a caucus-based process the mediator can contain problematic behavior for a time by not communicating it or convey an offer with a translation or explanation that lessens its sting. If the lawyers for each side have a good working relationship, it is possible to put them together to address an issue. If possible while respecting confidentiality, the mediator can alert an opponent to what is going on ("You need to know that they found your last offer pretty upsetting. I think we're seeing that in their response . . . . We have to wait awhile . . . .").

Adjourn. Some disputants need time to grieve over a loss. Divorce mediations are usually conducted in multiple sessions spread over a period of months, giving the parties time to adjust to difficult choices. Mediations in civil disputes, however, are typically scheduled for a single day and sometimes for only a few hours.

Civil mediators usually work in a caucus format, which allows a disputant some time to adjust as the mediator talks with their opponent. However, a party usually gets time to adjust to a concession only after they have made it and the mediator leaves the room. As a mediation progresses caucus meetings also typically become shorter, giving parties less time to adjust, even as their decisions become more difficult. Because many parties need more time than is possible in a one-day process, I have become more open to suggestions to adjourn with the intent of resuming later.

In the fatal accident case, the victim's sister said as she left the meeting with the state trooper, "It's been three years since my brother died, and now I feel he's finally had a funeral." Two weeks later, their lawyer said they would accept the defense's settlement offer. The unconventional format respected the emotional needs of the family, making settlement possible.

In the stock-dilution case I met with the plaintiff and his lawyer a few days after the mediation ended and asked him to tell me more about his early days at the company. He described having begun as an outside lawyer, then gradually becoming closer to the CEO. For the plaintiff, it was a chance to go far beyond his usual work, become a key player in an exciting venture, and feel he was providing a perspective crucial to the company's success. He served, he said, as a mentor to the CEO, a role that gave him great satisfaction. After a few years, however, the executive shunted him aside. The plaintiff felt the loss of his role in the company deeply; it also felt agonizingly unjust to be discarded just as the venture was showing its possibilities. He had invested too much, he said, to give up his case for a mediocre deal.

I listened quietly as all this poured out. When he finished I said that it was impossible for me to really understand what he'd gone through. I realized, though, that this was much more than a contract claim; he felt he'd been betrayed by someone he'd been close to, and shabbily treated by people he'd helped to succeed. I could imagine, I said, how hurtful that must be.

As we talked the plaintiff gradually became calmer, and I asked him to think about resuming the process, to find out how far the company would really go to settle. His lawyer said they'd talk and let me know. A few days later I called the defense lawyer, saying I had a new offer and suggesting we resume the process. She replied that the company was no longer interested in settling and wanted to end the mediation.

With the benefit of hindsight, I wish I had learned about the plaintiff's strong feelings in advance, allowing me to help him work through them before we met to mediate. Failing that, it would have been wise to adjourn when I saw the plaintiff becoming agitated rather than urge him to make a decision which he could not sustain. It is not clear whether the defendant's executives would have agreed to an adjournment, but I should have suggested one.

In conclusion, mediators and teachers need to understand that many parties to legal disputes experience settlement negotiations as a process in which they are forced to give up important hopes and expectations. Helping parties to reach agreement often demands, in addition to listening and problem solving, that a mediator remain alert to the possibility that parties have not yet made the emotional adjustments required to resolve their dispute. By helping them mourn for what they cannot achieve, a mediator can provide crucial assistance to disputants at their most vulnerable moments.