

Settlement Errors and Barriers

Part of my goal as a mediator is to help parties overcome the common errors made by parties engaged in settlement negotiations. The following is a list of the most common.

Cognitive biases

- Oversimplification of the conflict (e.g., ignoring key factors or the larger scope of relationships).
- Exaggeration of the conflict.
- Parties see a false dichotomy between competition and cooperation.
- Egocentrically tainted judgment.

Source: Cognitive Biases and Their Effects on Conflict Management, Leigh Thompson and Janice Nadler in *The Handbook of Conflict Resolution* (edited by Deutsch and Coleman)

Case evaluation errors

- Overconfidence in judgment about trial risk.
- Lack of objectivity.
- Overconfidence by lawyers or parties in their ability to affect courtroom events that are very much independent of the effort of counsel and parties (and perhaps are even *random* events).
- Insufficient adjustment for the individuating factors of the specific case (e.g., this case is not really comparable with a prior case or cases).
- Case is evaluated from the parties' existing perspective and to confirm preexisting beliefs. Early case assessments are not realistically evaluated and discovery is used to confirm rather than test theories.

Information/data assessment errors

- Inability to assimilate information (e.g., new data is obtained but not really used).
- Ignore information inconsistent with early beliefs about the dispute – “confirmation bias.”
- "Availability" error - use what is *available* rather than what is *needed*.
- "Plunging in" without the needed information (*i.e.*, don't know what you don't know).
- Preoccupation or inappropriate focus on information or evidence that is recent or vivid (such as the strong language is a given document or communication).

Information/data communication errors

- Strategic misrepresentation (e.g., understate the value of what is important to you, and vice versa).
- Excess caution in sharing data thereby leading to withholding data needed by the other party.

Decision-making errors

- Anchoring (a fact or number ‘anchors’ the party's thinking, e.g., "*I will never take less than X*" or "*I will never pay more than Y*" even if the numbers have not been realistically and recently reconsidered).
- Risk seeking behavior in facing a "loss." Defendants may prefer trial more than plaintiffs.
- Framing errors (wrong frame of reference for the issue or problem).
- Decision making shortcuts/heuristics (“I always do ‘X’ in these situations”).
- Group decision-making errors (see list below).

Psychological factors

- Challenges inherent in difficult conversations (e.g., not comfortable with discussing conflict or a part of it, so the topic is sidestepped).
- Sunk costs (e.g., "I can't settle now, I have too much invested in this suit").
- Denial/avoidance - pretending the problem does not exist; e.g., "I really don't see much risk here."
- "Status quo" errors - erroneously assuming the status quo has little risk/uncertainty.

- "Equity seeking" - desire to punish the other via court proceedings.
- Reactive devaluation – offer is devalued solely because of the identity of the offeror ("my opponent would not make this offer unless it's good for him, so it's likely bad for me").
- "Endowment" effect – ownership of an asset causes the asset to hold unrealistically high value.

Settlement specific issues

- Asymmetry - unequal stakes at trial making it more difficult for one party to settle than the other.
- Decision-making differences (e.g., small monolithic vs. large, complex organization).
- Litigation "games" (e.g., lawyers or parties who 'keep score').
- Reservation value ("bottom line") errors. The 'walk away' value is not or is poorly evaluated. What should have been an 'anticipated reservation value' became a fixed and unchangeable value.
- Fear and misunderstanding of risk, or parties with very different risk tolerances.
- In multiparty negotiations, is there a "hold out" party who benefits from stalling or impeding settlement?

Difficulties in dealing with "fairness"

- Fairness is generally defined by parties in *self-interested* manner.
- Emphasis on relative (e.g., comparing what you get with what the other party gets rather than comparing it with what you need from the outcome).
- View of past situation becomes an inappropriate reference state (e.g., preoccupied with what used to be).
- A party may harm their own interests to 'punish' the other.

Perceptual blocks

- Stereotyping (e.g., "they are always that way").
- Oversimplifying the conflict and over-isolating the problem (e.g., failure to see the issue as part of the system).
- Saturation with data (e.g., too much data causes indecision or preference for the status quo).
- Inability to see the problem from different viewpoints.

Concept sources: Concept sources: Robert Mnookin, Harvard; Gary Friedman & Jack Himmelstein, Center for Mediation in Law, "Decision Traps" (Russo & Schoemaker); James Adams; Psychology, Economics and Settlement: A New Look at the World of a Lawyer, Russell Korobkin and Chris Guthrie, 76 Tex. L. Rev. 77 (1997). Richard Birke & Craig Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 Harv. Negotiation L.R. 1 (1999), Leigh Thompson and Janice Nadler in *The Handbook of Conflict Resolution* (edited by Deutsch and Coleman).

Group Decision Making Errors

In addition to the most common settlement errors and barriers, often errors occur in the ways the groups make their decisions. Some of the most common are noted below.

- No person wants to champion settlement, so "let's go to trial."
- Settlement may suggest the culpability of a person or executive, so "let's go to trial" instead.
- Premature agreement within the group.
- Inquiry into flaws in decisions is discouraged within the group.
- The group has a strong desire to preserve harmony.
- Members cling to opposite positions (for collateral unrelated reasons).
- Self-censorship of individual participants.
- Pressure on those who disagree with the majority.
- Strong director who tries to control the group decision.
- Group stress and isolation.

Concept source: *Decision Traps*, Paul Russo & Paul J. H. Schoemaker (Doubleday, 1989; Simon & Schuster, 1990)