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PRINCIPLES OF INFLUENCE IN NEGOTIATION

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I. INTRODUCTION

Negotiation is often viewed as an alternative to adjudication.¹ In fact, however, negotiation and adjudication may be more alike than different because each is a process of *persuasion*. Both in the courtroom and at the bargaining table, the lawyer's primary task is to persuade someone other than her own client that her client's positions, interests, and perspectives should be honored.

Despite this apparent similarity, persuasion operates differently in adjudication and negotiation because the lawyer seeks to influence a different party in each process. In adjudication, the lawyer seeks primarily to persuade the judge or jury hearing the case.² The judge or jury is empowered to resolve the dispute unilaterally by applying rules of law to the relevant facts of the case. In negotiation, the lawyer seeks to persuade not a judge or jury, but rather her counterpart at the bargaining table. One's counterpart in negotiation is free to ignore the law and facts of the case but can only resolve the dispute through bilateral agreement.

The import of these differences is that the lawyer must use different persuasive tactics in each process. In court, the lawyer can use various rhetorical and even dramatic devices to persuade the judge or jury to render a

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1. All of the leading "alternative dispute resolution" or "ADR" casebooks include sections regarding negotiation along with such other processes as mediation and arbitration. *See, e.g.*, STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (4th ed. 2003); ALAN SCOTT RAU ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (3d ed. 2002); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (2d ed. 1987).

2. *See, e.g.*, STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* 15 (2d ed. 1997) ("A lawyer's goal at trial is to persuade the fact finder."). Often, the lawyer uses the litigation process not only to persuade the judge or jury to rule in her favor but also to persuade her counterpart to settle the case. *See, e.g.*, Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 *J. LEGAL EDUC.* 268, 268 (1984) (coining the term "litigotiation"); Gary Goodpaster, *Lawsuits as Negotiations*, 8 *NEGOTIATION J.* 221 (1992) (exploring the interplay between litigation and negotiation).

decision under the law that favors her client;³ in negotiation, the lawyer needs to use a more subtle set of devices to induce her counterpart to agree to enter into a favorable settlement.

Psychologist Robert Cialdini has identified six persuasive devices or “weapons of influence”⁴ that a lawyer can use to induce her counterpart to settle on terms that are advantageous to her client. The purpose of this essay is to introduce Cialdini’s principles of influence, explore how they operate, and explain how the lawyer-negotiator may be able to use them at the bargaining table.⁵

II. PRINCIPLES OF INFLUENCE

In a seminal article published in *Science*, Amos Tversky and Daniel Kahneman introduced “heuristics and biases” into the psychology literature.⁶ Tversky and Kahneman defined heuristics as mental shortcuts that individuals employ automatically to make judgments and decisions.⁷ These heuristics are “economical and usually effective,” but they can also lead to “biases” or “systematic and predictable errors.”⁸

Cialdini’s principles of influence operate like these heuristics and biases (though they are “motivational” rather than “cognitive” in origin). When deciding whether to comply with a request, individuals generally look for simple cues—like whether the requester is an authority figure—to help them decide how to respond. Often, it is sensible for people to behave this way; other times, however, it can induce a “distinct kind of automatic, mindless compliance from people.”⁹

Cialdini’s principles of influence—liking, social proof, commitment and consistency, reciprocity, authority, and scarcity—are quite powerful. A lawyer who recognizes that her counterpart is likely to be influenced by these principles may be able to employ them to her client’s advantage at the bargaining table. Each principle can be used to persuade, or as Cialdini puts it, each “can be used like a weapon (of influence) to stimulate people to agree

3. See, e.g., LUBET, *supra* note 2, at 15 (devoting a chapter to “lawyer’s tools” which “may be employed to clarify, underscore, and emphasize your presentations at trial”).

4. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE*, at ix (4th ed. 2001).

5. Although this essay focuses primarily on the ways that *lawyer*-negotiators can use these principles of influence to persuade their counterparts to settle, the principles are equally applicable to *non-lawyer*-negotiators.

6. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124, 1124 (1974).

7. *Id.*

8. *Id.* at 1131.

9. CIALDINI, *supra* note 4, at x.

to requests.”¹⁰ Even those lawyers who would prefer not to employ these techniques will benefit from understanding what they are and how they might be used by their counterparts in negotiation.

A. Liking

The first principle of influence that a lawyer might use to her client’s advantage is the “liking” rule. According to this principle, individuals prefer to comply with requests made by those they know and like.¹¹ Individuals tend to like those who are physically attractive,¹² those with whom they share something in common,¹³ and those with whom they are familiar.¹⁴

Not all lawyers will be physically attractive to their counterparts, of course, but every lawyer shares something in common with her counterpart—at a bare minimum, both are members of the same profession. Thus, every lawyer can attempt to capitalize on this similarity at the beginning of the negotiation to try to develop a rapport with her counterpart. In one recent study, Janice Nadler found that law students previously unknown to one another who spent a few minutes chatting on the telephone prior to engaging in an email negotiation obtained better outcomes than did those who did not have a prenegotiation conversation.¹⁵ Similarly, Jason Johnston and Joel Waldfogel found that lawyers who litigated against each other frequently were more likely than others to settle their cases and to do so more quickly.¹⁶

B. Social Proof

The second principle of influence that a lawyer might use to her client’s advantage is “social proof.” According to this principle, individuals “view a behavior as correct in a given situation to the degree that we see others

10. *Id.* at 17.

11. *Id.* at 144 (“[A]s a rule, we most prefer to say yes to the requests of people we know and like.”).

12. *Id.* at 148-50 (describing how physical attractiveness creates a kind of “halo effect”).

13. *Id.* at 150-51. As one commentator stated:

We like people who are similar to us. This fact seems to hold true whether the similarity is in the area of opinions, personality traits, background, or lifestyle. Consequently, those who want us to like them so that we will comply with them can accomplish that purpose by appearing similar to us in a wide variety of ways.

Id. (citation omitted).

14. *Id.* at 154 (“For the most part, we like things that are familiar to us.”) (citation omitted).

15. See Janice Nadler, *Legal Negotiation and Communication Technology: How Small Talk can Facilitate E-Mail Dealmaking*, HARV. NEGOT. L. REV. (forthcoming).

16. Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39 (2002).

performing it.”¹⁷ For example, individuals are more likely to laugh when watching situation comedies if the “sitcoms” are accompanied by “laugh tracks.”¹⁸ Individuals “use others’ laughter”—even canned laughter—“to help decide what is humorous.”¹⁹

Social proof is most likely to prove persuasive when two conditions are obtained. First, social proof is more influential under conditions of uncertainty. “In general, when we are unsure of ourselves, when the situation is unclear or ambiguous, when uncertainty reigns, we are most likely to look to and accept the actions of others as correct.”²⁰ Second, social proof is more influential when the observer perceives similarities between herself and the party she is observing. “The principle of social proof operates most powerfully when we are observing the behavior of people just like us. It is the conduct of such people that gives us the greatest insight into what constitutes correct behavior for ourselves.”²¹

Thus, social proof might work hand-in-hand with the liking rule to enable one lawyer to persuade the other to behave in the desired manner. For instance, a lawyer who has garnered her counterpart’s affection at the outset of the negotiation²² might exhibit certain behaviors at the bargaining table (e.g., she can attempt to frame the negotiation as a search for jointly desirable outcomes) and thereby “model” that behavior for her counterpart. This, in turn, may induce her counterpart to conduct herself in a similar manner. Likewise, a lawyer might use evidence from similar cases (perhaps drawn from publications containing verdict and settlement data) showing how often—and perhaps even for what amounts—litigants in similar cases have settled. By demonstrating that similarly situated others have settled, the lawyer may be able to persuade her counterpart that settlement is appropriate for her as well.

C. Commitment and Consistency

The third principle of influence that a lawyer might use to her client’s

17. CIALDINI, *supra* note 4, at 100 (emphasis omitted).

18. *Id.* at 99-101 (citing to Raymond G. C. Fuller & Alan Sheehy-Skeffington, *Effects of Group Laughter on Responses to Humorous Materials: A Replication and Extension*, 35 PSYCHOL. REP. 531 (1974); Mary M. Smyth & Raymond G. C. Fuller, *Effects of Group Laughter on Responses to Humorous Materials*, 30 PSYCHOL. REP. 132 (1972)). For a different interpretation of the operation of laugh tracks, see Rob Walker, *Making Us Laugh*, N.Y. TIMES MAG., Dec. 28, 2003, at 28 (profiling the inventor of the laugh track and citing psychologist Robert Provine for the proposition that laugh tracks influence us for neurological, not social or psychological, reasons).

19. CIALDINI, *supra* note 4, at 100.

20. *Id.* at 111 (citations omitted).

21. *Id.* at 119 (citation omitted).

22. See *supra* Part II.A.

advantage is the “commitment and consistency” principle. According to this principle, “[o]nce we make a choice or take a stand, we will encounter personal and interpersonal pressures to behave consistently with that commitment.”²³

Consider, for example, the “drive carefully” study.²⁴ Researchers randomly assigned homeowners in a residential neighborhood to either a control group or an experimental group. A researcher, posing as a “volunteer,” asked the homeowners in both groups if they would allow the volunteer to post a gigantic “Drive Carefully” billboard in their front yards. Each homeowner viewed a photo of the billboard demonstrating that it was so large it would almost completely obscure the view of the house from the street.

The only difference between the two groups was that two weeks earlier another “volunteer” had asked the homeowners in the experimental group to display a three inch by three inch sign that read “Be a Safe Driver.” The subjects in the experimental group, who complied with this seemingly innocuous request, were much more likely to agree to the gigantic billboards in their front yards: seventy-six percent of those in the experimental group versus a mere seventeen percent in the control group agreed to do so. “Because they had innocently complied with a trivial safe-driving request a couple of weeks before, those homeowners became remarkably willing to comply with another such request that was massive in size.”²⁵

Likewise, a lawyer may prosper by encouraging her counterpart to make small commitments early in the negotiation process. Perhaps, for example, she can persuade her counterpart to agree to a minor substantive term, such as a confidentiality clause or a no-publicity clause. By inducing one’s counterpart to make a small commitment like this, the lawyer may be able to obtain much more substantial agreements later in the process. Her counterpart may simply feel duty bound to comply due to her earlier compliance in the process.

D. Reciprocity

The fourth principle of influence that a lawyer might use to her client’s advantage is the “reciprocity rule” or “reciprocity norm.” According to this

23. CIALDINI, *supra* note 4, at 53 (emphasis omitted). For more on commitment and consistency, see generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957) (introducing his theory of cognitive dissonance).

24. See Jonathan L. Freedman & Scott C. Fraser, *Compliance Without Pressure: The Foot-in-the-Door Technique*, 4 J. PERSONALITY & SOC. PSYCHOL. 195, 199-201 (1966).

25. CIALDINI, *supra* note 4, at 65.

rule or norm, one “should try to repay, in kind, what another person has provided us.”²⁶ Because reciprocity appears to be a universal norm,²⁷ examples of it abound. Consider the following amusing example reported by Cialdini:

Several years ago, a university professor tried a little experiment. He sent Christmas cards to a sample of perfect strangers. Although he expected some reaction, the response he received was amazing—holiday cards addressed to him came pouring back from people who had never met nor heard of him. The great majority of those who returned cards never inquired into the identity of the unknown professor. They received his holiday greeting card, *click*, and *whirr*, they automatically sent cards in return.²⁸

A lawyer can use the reciprocity rule in two ways to persuade her counterpart to make a meaningful concession at the bargaining table. First, and most obviously, she can make a concession herself, and this can create in her counterpart a sense of obligation to respond similarly.²⁹ If she started from a more favorable position than her counterpart, the reciprocal concession she induces her counterpart to make is likely to work to her client’s advantage in a distributive negotiation.

Second, and more subtly, a lawyer can request a substantial concession, get turned down, and then make a more modest request. In many instances, the lawyer’s counterpart will feel obligated to respond to this ostensible concession. Cialdini calls this the “rejection-then-retreat” strategy and explains it as follows:

Suppose you want me to agree to a certain request. One way to increase the chances that I will comply is first to make a larger request of me, one that I will most likely turn down. Then, after I have refused, you make the smaller request that you were really interested

26. *Id.*

27. *Id.*

28. *Id.* (citing to a 1976 study reported by Kunz & Woolcott).

29. See, e.g., Paul W. Paese et al., *Caught Telling the Truth: Effects of Honesty and Communication Media in Distributive Negotiations*, at <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=305146> (showing that honest disclosures up front can induce the other party to make lower demands). Note, however, that there is some evidence suggesting that the concessions one makes may be devalued by the recipient due to loss aversion, see Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in BARRIERS TO CONFLICT RESOLUTION 54 (Kenneth J. Arrow et al. eds., 1995); or reactive devaluation, see Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389 (1991).

in all along. Provided that you structured your requests skillfully, I should view your second request as a concession to me and should feel inclined to respond with a concession of my own—compliance with your second request.³⁰

E. Authority

The fifth principle of influence that a lawyer might use to her client's advantage is "authority." According to this principle, individuals feel an obligation to comply with those who are in real or perceived authority positions. The most powerful, and troubling, illustration of the power of authority comes from Stanley Milgram's obedience experiments,³¹ in which participants inflicted (what they thought were) dangerous electric shocks on coparticipants simply because an authority figure (i.e., the experimenter) told them to do so.

The authority principle dictates that individuals often defer to people in positions of apparent authority—leaders, state officials, experimenters in lab coats, and the like. Thus, a lawyer may try to invoke the judge as an authority figure and make arguments about what the judge would do in the case to persuade her counterpart to settle. In addition, although the authority principle is generally understood to apply to human authorities, it could extend to nonhuman authority, like the law or legal precedent. Thus, even though lawyers in a settlement negotiation are generally free to disregard applicable legal rules, a lawyer who appreciates the unique persuasive impact of legal precedent as authority may wish to invoke it to persuade her counterpart of the merits of some position.

F. Scarcity

The sixth principle of influence a lawyer might use to her client's advantage is "scarcity." According to this principle, "opportunities seem more valuable to us when they are less available."³² Scarcity induces compliance in large part because it threatens our freedom of choice ("if I do not act now, I will lose the opportunity to do so").³³

30. CIALDINI, *supra* note 4, at 38.

31. For the original study, see Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963). For an overview, see STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* (1974).

32. CIALDINI, *supra* note 4, at 205 (emphasis omitted).

33. We tend to bristle at such restrictions on our freedom due to a phenomenon called "reactance." See generally JACK W. BREHM, *A THEORY OF PSYCHOLOGICAL REACTANCE* (1966); S. SHARON BREHM & JACK W. BREHM, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM*

The lawyer who appreciates the impact scarcity is likely to have on her counterpart may try to create the impression in negotiation that opportunities to settle are limited and time is running out. For example, she might extend an offer but give her counterpart a limited window within which to accept it. Likewise, she might make an offer immediately prior to an expected judicial ruling that might be harmful to her counterpart's case, or she might make an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure. In each instance, her counterpart might feel more motivated to settle due to the scarcity principle.³⁴

III. CONCLUSION

Advertisers, marketers, and salespeople use Cialdini's principles of influence to induce consumers to purchase their products. Likewise, a lawyer can use these principles of influence to induce her counterpart in negotiation to settle on terms that are favorable to her client. Simply because a lawyer *can* use these principles, however, does not necessarily mean she *should*. A lawyer should try to obtain the best possible outcome for her client, but she should do so in ways that comport not only with the formal ethical rules, but also with her own sense of professional responsibility³⁵ and personal ethics. (Would I want my mother to know I used that tactic? Would I want my counterpart to use that tactic? How would I feel if the local newspaper ran a story about the negotiation?)

Most lawyers will feel comfortable employing Cialdini's principles of influence; indeed, many lawyers already use these principles, even if they do not apply Cialdini's labels to them. Like other negotiation tactics, these principles often prove effective and do not run afoul of any formal ethical rules. Other lawyers, however, might feel uncomfortable using at least some of the principles. For example, a lawyer who attempts to garner her counterpart's affection solely to facilitate agreement,³⁶ or who attempts to secure a small commitment from her counterpart solely as a way of obtaining a larger one later,³⁷ might feel as though she is treating her counterpart "as a mere means towards one's ends" and ignoring "general ethical requirements

AND CONTROL (1981).

34. Additionally, her counterpart might be influenced by regret aversion. See Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43.

35. For a progressive formulation, see Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153 (1999).

36. See *supra* Part II.A.

37. See *supra* Part II.C.

for treating people.”³⁸ The lawyer, as a professional, must decide for herself whether, and, if so, how to employ these powerful persuasive devices at the bargaining table.

38. Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 743 (2001) (emphasis omitted). Some lawyers might even avoid using these principles—like the authority principle—on the grounds that they might systematically disadvantage members of less powerful groups in society, like members of ethnic minorities, women, and gays and lesbians.

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