

PRESENTED AT

39th Annual Corporate Counsel Institute

May 11-12, 2017
Houston, Texas

**The One Minute Manager Prepares for Mediation:
A Multidisciplinary Approach to
Negotiation Preparation**

Donald R. Philbin, Jr.

The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation

Donald R. Philbin, Jr.*

Introduction	250
I. Rigorous Legal Analysis Forms the Basis for Negotiation Preparation	252
II. Decision Tree Analyses Help Develop and Test Scenarios.....	257
A. Decision Trees Are Used to Analyze Complex Business Decisions	260
B. Legal Claims Share Similarities with Complex Business Decisions	263
1. Car Buyer Becomes Plaintiff with a “Lemon”	264
2. Indignant Dealer Reviews Its Options Too	270
III. Adjust for Psychological Biases	276
A. Risk Tolerance and Loss Aversion Change Our Perspective	277
B. Optimistic Overconfidence: The Lake Wobegon Effect.....	281
C. Perfect Information – Why We Settle “On the Courthouse Steps”	283
D. Attribution Errors and Anger	287

* Don Philbin is an AV-rated attorney, mediator, arbitrator, and consultant based in San Antonio, Texas. His experience as a commercial litigator (associate and partner in *Bar Register* firms), general counsel, and president of hundred-million dollar plus communications and technology related companies augment his business and legal education: B.A. (business), Trinity University; M.B.A., The University of Texas at San Antonio (executive); J.D. and LL.M. (dispute resolution), Pepperdine University School of Law. Mr. Philbin is listed in *The Best Lawyers in America* (Alternative Dispute Resolution; Woodward/White 2007, 2008) and may be contacted at don.philbin@adrtoolbox.com. The author gratefully acknowledges the contributions of the HNLR editors, especially Katie Kern, to this article.

	E. Anchoring – Increasingly Perfect Information Lightens Anchor	289
	F. Reactive Devaluation – It’s a Trick Because They Offered It	290
	G. Other Factors – And There Are Always Other Factors	292
IV.	Planning for Negotiation – Mapping Out the Path to Success	293
	A. Recap of Earlier Analyses and Mathematical Projections	295
	B. Identify Party Preferences and Rank Alternatives	300
	C. Creative Options May Avert Impasse	302
	D. Offer Alternatives when Possible	302
V.	Fit the Forum to the Fuss	303
	A. The Rule of Presumptive Mediation.....	305
	B. “Mediation” Means Different Things to Different People	307
	C. Goal is a Tailored Process Through Information ..	310
VI.	Conclusion	310

If I had six hours to chop down a tree,
I’d spend the first hour sharpening the ax.

– Abraham Lincoln¹

INTRODUCTION

We are often advised to prepare for negotiation, and scholars in many disciplines (law, economics, psychology, and others) have developed a rich mosaic cataloging dispute resolution processes. Debates rage about the role of economic analysis in legal disputes and whether neutral mediators should help parties “evaluate” claims or merely “facilitate” party communication. But practitioners have a tree to chop down in six hours and need practical tools. While the best ax is only as good as the human muscle behind it, even those with well-honed “guts”² can sharpen their results with analytical

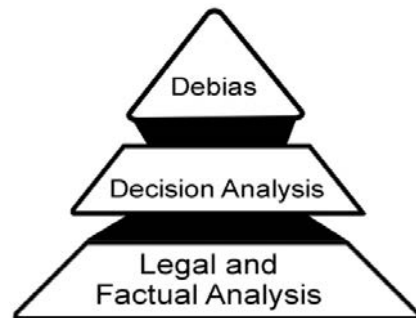
1. JOSHUA N. WEISS, YOU DIDN’T JUST SAY THAT! QUOTES, QUIPS, AND PROVERBS FOR DEALING IN THE WORLD OF CONFLICT AND NEGOTIATION 19 (2005), available at http://www.pon.org/downloads/quote_book.pdf.

2. Marjorie Corman Aaron & David P. Hoffer, *Using Decision Trees As Tools for Settlement*, 14 ALTERNATIVES TO HIGH COST LITIG. 71, 71 (1996); see also Max H. Bazerman et al., *Negotiation with Yourself and Losing: Making Decisions With Competing Internal Preferences*, 23 ACAD. MGMT. REV. 225 (1998); Eric Bonabeau, *Don’t Trust Your Gut*, HARV. BUS. REV., May 2003, at 116, 118 (“Intuition is a means not of

tools and psychological debiasing. With planning, they also improve the odds of dropping the tree in the yard rather than on the house.

This article endeavors to explain simple tools that may assist lawyers and managers in preparing for mediation success.³ Part I reviews an outline for traditional legal and factual analysis of litigated cases. Part II layers economic decision tree analysis atop that foundation. Part III acknowledges that we all have biases and draws on psychological scholarship to help isolate their effects. Part IV synthesizes this analytical work into an adapted negotiation planning instrument. Finally, because different people play different roles in unraveling a dispute, Part V offers a decision tree designed to help disputants not only design a dispute resolution process tailored to their case, but also decide what roles should be cast and who would be the most effective choice for each role.

Since car negotiations are easy targets and nearly ubiquitous, we will periodically turn to the hypothetical purchase of a new Chevrolet Impala and some legal claims that might later arise from its performance and use. Our “gut” sense may get us close by ruling out clearly erroneous valuations like \$100,000. But there are limits to that precision. One trip to the dealership confirms that gut senses are not evenly pared with repeat playing dealers that are making enough money off of repeated transactions to keep the showrooms glittering and their sales people well-employed. Economic



assessing complexity but of ignoring it. That's valuable information if you're a firefighter in a burning building or a soldier on a battlefield. It's not valuable if you're an executive faced with a pressing decision about investing millions in a new product for a rapidly changing market.”); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 1 (2007) (describing a model that “accounts for the tendency of the human brain to make automatic, snap judgments, which are surprisingly accurate, but which can also lead to erroneous decisions”); *but see generally* MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005) (arguing that intuition can lead to accurate decisions).

3. Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 282 (2006) (asserting that mediation “success flows logically from the following normative standard: disputes should settle in mediation if there are one or more sets of agreement terms that both parties would prefer to accept rather than try the case to an adjudicated conclusion”). Thanks to Kenneth H. Blanchard and Spencer Johnson for popularizing the term “One Minute Manager” with their 1982 book *The One Minute Manager*. Many other books and articles incorporating the phrase have followed.

Also available as part of the eCourse

[Hot Topics for Corporate Counsel: Settlement Strategies and Government Relations](#)

First appeared as part of the conference materials for the

39th Annual Corporate Counsel Institute session

"Investigation and Settlement Strategies: The Right Number at the Wrong Time is the Wrong Number"