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ARTICLES

Who is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring
Judge David A. Hardy, CELA

Maneuvering the Labyrinth of Long-Term Care Admissions Contracts
Amy Parise Delaney, CELA

The Transfer-On-Death Deed in the Elder Law Setting
Catherine Anne Seal, Esq., J.D.
Michael A. Kirtland, Esq., J.D., LL.M.

Fair Hearing Decisions on Medicaid "Hardship" and "Intent" Claims
William J. Brisk, CELA
Kathalene C. MacPherson

**The Use of Qualified Settlements Funds, Qualified Assignments
and Special Needs Trusts in Physical Injury Settlements**
John J. Campbell, CELA, MSCC

The Psychology of Mediation
Barry Goldman, Esq.



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THE PSYCHOLOGY OF MEDIATION

Barry Goldman, Esq.*

I. LIKING	115
II. AUTHORITY	117
III. RECIPROCITY	118
IV. SCARCITY	119
V. COMMITMENT AND CONSISTENCY	120
VI. SOCIAL PROOF	122
VII. WHY MEDIATION WORKS	123

Mediation works. We all know that, many of us from personal experience. As a result, many attorneys and judges turn to it as a method to resolve disputes and avoid litigation. But how does it work? What are the psychological levers that move the parties to come to agreement?

According to the social psychologist Robert Cialdini, there are six psychological “weapons of influence.” In his widely cited book, *Influence: The Psychology of Persuasion*,¹ Cialdini says the many ways salespeople, politicians, con-artists and other influence professionals get us to do their bidding all boil down to one or another of these six weapons: authority, reciprocity, scarcity, commitment and consistency, and social proof. This article will introduce each of Cialdini’s weapons and show how they are used in mediation.

I. LIKING

We tend to be influenced by people we like. Who do we like? We like people who are similar to ourselves. This is called the *similarity-attraction effect*, and it accounts for a well-known sales gimmick. The salesman from the copier company comes into your office and notices the sailing pictures on the wall. It turns out that he is a big sailor himself; sails all the time. Yes sir.

Later in the day he will be a big fisherman, football fan, golfer, or bowler. He also has always had a deep fascination with antique cuckoo clocks. Why is this?

* Barry Goldman, Esq. is an arbitrator and mediator and adjunct professor at Wayne State University Law School in Detroit. This article is adapted from his book, *The Science of Settlement*, just published by the American Law Institute—American Bar Association (2008). (For more information or to order the book, go to <http://tinyurl.com/38uaws>.)

1. Robert B. Cialdini, *Influence: The Psychology of Persuasion* (William Morrow 1993).

This is a question we can answer from the perspective of evolutionary psychology. For human beings, as well as other social animals, enormous importance attaches to in-group and out-group membership. Within the group we share, outside the group we compete. Fights within the group are largely symbolic. Fights between groups are merciless.²

In the ancestral environment it made sense to fear the stranger. It was an adaptive strategy. When we lived in groups of 100 people, if you met someone you did not recognize you had good reason to be afraid. Jared Diamond put it this way: "Should you happen to meet an unfamiliar person in the forest, of course, you should try to kill him or else to run away; our modern custom of just saying hello and starting a friendly chat would be suicidal."³

Either the stranger is friendly or he is dangerous. Either you trust him or you do not. That sets up a two-by-two matrix with the following outcomes.

Outcome of Trusting or Fearing a Stranger

Stranger proves to be		
	Friendly	Dangerous
Trust	Good	Terrible
Fear	Missed Opportunity	Escape Disaster

If the stranger is friendly and you trust him, something good can happen. You could learn something, trade goods or have sex. But if the stranger is dangerous and you trust him, something very bad can happen, e.g., he can kill you. If the stranger is dangerous and you fear him, you increase the chances that you will survive the encounter. If he is friendly and you fear him, you miss a chance to have a nice visit but no serious harm is done. What is a sensible *homo sapien* to do? In general, the strategy is to reduce the downside risk. Take the choice that offers the smallest chance of the worst outcome. If you fear all strangers you reduce the chance of getting the worst possible payoff. Evolution favors that choice, and it is the choice our ancestors took. We are not the descendants of people who trusted people they did not know.

The copier salesman's gimmick is designed to tap into this primal psychological instinct. He is not a threatening stranger from the tribe of copier salesmen. He is a fellow sailor or fellow football fan—one of us.

The notion that we like people who are like us is also the foundation of a technique called *mirror and match*. The idea is that people who are in synch with each other will have similar posture, tone, vocabulary, and tempo in their conversation. If you train yourself to notice body language, you will often see that a group of friends talking will all be sitting in the same posture. Practitioners of the mirror and match

2. Frans de Waal, *Our Inner Ape* (Penguin Group 2005).

3. Michael Shermer, *The Science of Good and Evil: Why People Cheat, Gossip, Care, Share, and Follow the Golden Rule 36* (Henry Holt 2004).

method will consciously adopt the posture, tone and delivery of their target. Proponents claim that in the hands of an expert the effect is hypnotic. The target gets more and more comfortable with the amazing closeness he feels toward the practitioner and allows himself to be led. The practitioner can be a therapist whose goal is to help, or it can be a salesman. The process is the same.

In addition to liking people who similar to us, we like people who like us. That is why salespeople are so friendly and why they use our first names so often. The principle is the same. People who are perceived to like us are perceived to be less likely to harm us. The true situation is complex. We do not have the time or mental energy to do a careful evaluation, so we depend on cues. Smiling and acting friendly are usually cues that signal an absence of danger. But once a cue like that is identified, it can be simulated, and the simulated cue will often work as well as the real one. It is best to take Lord Chesterfield's advice. "Distrust all those who love you extremely upon a very slight acquaintance and without any visible reason."

II. AUTHORITY

We tend to obey authority and do what we are told. If the person we are dealing with has sufficient authority, we tend to experience what we are told to experience. Consider:

[P]articipants in one experiment were told that a substance they would be asked to drink might induce vomiting. After drinking the liquid, nearly 80% of the participants actually vomited. When they received a placebo "antidote" to stop their vomiting, their condition improved almost immediately. As you may already have guessed, the antidote was the same inert substance but in a different color.⁴

Again, there is probably a good reason for our obedience to authority in terms of our evolutionary history. The people with authority, old people for example, were likely to have greater knowledge. They knew from experience that when the ocean suddenly receded it meant a big wave was coming. When they told you to get to high ground, you went. The people who did not go, did not survive to become our ancestors.

Sometimes, however, deference to authority can be a mistake. Flight recorders recovered after fatal crashes, for instance, provide plenty of examples of overly polite co-pilots deferring to their pilots.

Another problem, of course, is that authority can be faked. In the ancestral environment we knew who had authority because we knew everyone in the group. Today we identify people with authority by their badges and indicia. Medical authorities wear white coats. Judges wear black robes. Cops wear uniforms. Generals wear stars. The danger is that the badges and indicia work as a heuristic, so we trust them even when they are false. We follow the medical advice of actors dressed as doctors.

4. Gerald Zaltman, *How Customers Think: Essential Insights Into the Mind of the Market* 62 (Harvard Business School Press 2003).

III. RECIPROCITY

In most negotiations, once there are two opening offers on the table the negotiation proceeds by means of reciprocal concessions. And the subject of reciprocity takes us again to evolutionary psychology. Imagine two populations from the ancestral environment. Hunting is successful only intermittently, and refrigeration will not be invented for another few hundred thousand years. One population, we might imagine, is made up of individualists who eat what they kill, without sharing, and one is made up of cooperative sharers. It is easy to see that the sharers are more likely to survive food shortages and become our ancestors. This intuition turns out to be correct when the behavior of our closest relatives is studied. Not only do apes share food, but they share it preferentially with other individuals who have previously shared with them. They reciprocate. Furthermore, apes have been shown to retaliate against individuals who do not engage in reciprocal sharing.⁵

But in order for sharing to develop, our ancestors had to figure out a way to solve what the theorists call the first mover problem. Suppose I give you something or do something for you—I make the first move—and you simply accept what I give you and go away. If that is the anticipated response, I never do anything for you or for anybody else, and we all die. That is no good.

We needed a way to ensure that the first mover will be compensated. The reciprocity norm is that solution. If I do something for you, you do something for me. This fact is built into who we are at the biological level, and it is enforced by every culture around the world. If someone gives you something, you give them something back. If you fail to reciprocate, you can expect to be punished.

This can be easily shown by experiment. Go to your neighborhood bar and get in a conversation. When someone at the table buys a round of drinks, accept. When someone else buys a round, accept that too. Then when everyone has bought a round but you, announce that you have something else to do and leave. See how well you are received the next time you come back.

Not only will your companions resent your behavior but, more important for purposes of this discussion, you will feel uncomfortable about it too. Unless you are a lonely sociopath, you will not be proud of yourself for having put one over on the suckers at the bar. You will be ashamed—again far out of proportion to the cost of the beer—and you will seek out an opportunity to make it right. Baked into the ancient depths of your brain is the knowledge that without the reciprocity norm, we die.

As we have seen, wherever there is a strong natural response like this, someone is going to develop a way to exploit it. It is a jungle out there.

We can see this in the classic reciprocity norm experiment. The experimental subject is presented with some task or other that will take several hours. Say, rating the attractiveness of a pile of pictures. It does not matter. What matters is that seated next to him, doing the same task, is another person who appears to be an experimental subject but is really a confederate of the experimenters. After some time the confederate goes out and comes back with two Cokes. He says something like “I was

5. Frans de Waal, *Our Inner Ape* (Penguin Group 2005).

getting a Coke so I got one for you too." More hours go by. Then during a break the confederate mentions that he is selling raffle tickets for charity and offers to sell some to the subject. Subjects who got the Coke bought twice as many raffle tickets on average as subjects who did not get the Coke.⁶

There are two important features to notice about this experiment. One is that Cokes have nothing to do with raffle tickets. The other is that the Coke was not requested. In other words, the reciprocity norm is so strong that it is possible to get people to give you things you want by giving them things they do not want and did not ask for.

The reciprocity norm manifests itself in negotiation in the form of the prohibition against consecutive unreciprocated concessions. Once I have made a concession, it is your turn. I will not move again until you do. Correspondingly, I do not expect you to make unreciprocated concessions. If you have made a concession, you are entitled to expect me to make the next one.

The reciprocity norm can thus explain a great deal of negotiation behavior. It explains, for example, the widespread practice among union negotiators of bringing a laundry list of demands to collective bargaining negotiations. Many of these demands will have been presented to the Union by individual members and have only minimal support. But they are not there on their merits. They are there so they can be conceded, and so that the concession can prompt a reciprocal concession from the employer on an issue that has real importance to the union.

It is psychologically powerful for a negotiator to say, "On point number one, we give up.... On point number two, we give up. On point number three... you should give up."⁷ It triggers the deeply-seated urge to reciprocate. It is your turn. You feel the pressure of a million years of evolution telling you so.

IV. SCARCITY

We want what we cannot have. There is something irresistible about forbidden fruit. It is an old story. Adam and Eve come to mind.

Why is this so? One explanation is that our reaction is a form of loss aversion. If I tell you there is only one more *potrzebie*⁸ left and once it is gone you will never be able to get another one, you experience a threat of loss. Your freedom to be the owner of a *potrzebie* is about to disappear. We hate loss. So we buy the *potrzebie*.

Real estate sales people are famous for the phantom offer gimmick. "There is someone else coming to look at the house later today." Some private sellers of used cars will put an ad in the paper, ask people to call for an appointment and then schedule all the appointments at the same time. If there are not enough real potential buyers to make a small crowd, such sellers may enlist friends or relatives to stand around in the driveway looking eager.

6. Robert B. Cialdini, *Influence: The Psychology of Persuasion* 20 (William Morrow 1993).

7. G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* 231 (2d ed., Penguin Books 1999).

8. An object, never specifically described, subject of a long-running gag in *Mad Magazine*.

The scarcity weapon is what drives negotiation deadlines. Anyone who has engaged in settlement discussions has heard this thinly veiled threat. "At this point my client is prepared to settle for X. But if we have to engage in expensive discovery and retain an expert and all the rest of it, the settlement price is going to go up." Sometimes this is accompanied by a time limit. "I'll keep this offer open for 24 hours. After that the offer comes off the table and we start over."

If you believe him, this may work. If you believe he would take \$20,000 today but the day after tomorrow he would refuse it, he may be able to get you to offer \$20,000. But why would that be so? What is the real difference between today and the day after tomorrow?

Once you begin to ask questions like this the scarcity weapon loses some of its effectiveness. Not long ago I saw a sign by the roadside that said,

Needed: 36 people to Make Money and lose 10 lbs in 14 days

Right. Better call now. If you are the 37th person he will turn you down.

The point is that a scarcity claim has to be credible. There has to be some actual reason for a deadline or for a claim of limited availability. Otherwise it is too obviously just bluster.

This is related to another piece of advice. People do not like to be threatened, but they do not mind so much being warned. There is a difference between saying, "If you don't accept my offer today, I'm taking it off the table," and saying, "Tomorrow is the end of the period when the company sets its reserves for outstanding lawsuits. If I can go back with a settlement today, the settlement will come out of the current period reservation fund. But after today, the reservation funds go into the retention account for previous lawsuits and the valuation is booked based on the retention amounts in the subsequent quarter. So after today the new formula will apply and that settlement amount won't be available."

This is gibberish, of course, but it is gibberish of a specific kind. It is expressed in terms of a warning rather than a threat. I am not telling you I am taking the offer off the table if you do not accept today. That is not credible. I am telling you that vast and mysterious forces beyond my control are taking the offer off the table. I am trying to help you out here. That is credible.

V. COMMITMENT AND CONSISTENCY

Thinking is expensive. It takes a lot of blood to run the brain and it takes a lot of calories to circulate the blood. Thinking takes time and attention away from activities that evolution thinks are more important, like finding food, fighting off predators and having sex. So we avoid thinking when we can. We prefer to use heuristics instead.

We can imagine that there are two piles of documents in the brain, one marked "Decisions I Need to Make," the other marked "Decisions I Have Already Made." Our preference is to move the documents from the first pile into the second with as little effort as possible and not to let any documents slip back into the undecided pile once they have been decided. We are busy with new decisions. If old decisions insist on being reconsidered the whole system will bog down. So we have a rule that says the way a decision was made the first time is the way it will be made henceforth. We agree

with Friedrich Nietzsche: "It is hard enough to remember my opinions, without also remembering my reasons for them!"

As a result, we tend to behave consistently with our earlier verbal commitments and consistently with our earlier behavior. This is the basis of the ancient sales technique called the foot-in-the-door. If I can get you to make one small purchase, you change from being a prospect to being a customer. It is easier to sell to a customer than to a prospect. And this is so because the customer has put this decision in the "Decisions I Already Made" pile and does not want to have to take it out.

Recent research has shown that car buyers loyal to one make of car pay more for their cars than first-time buyers of that make. Why? The reason is that first-time buyers have to be persuaded and price is one of the ways to persuade them. Much of the persuading of loyal buyers has already been done in advance. They do not need a cut in price to be convinced to continue buying the same make. They need only to look in the "Decisions Already Made" pile and see: "I drive Pontiacs. I do not have to revisit that decision every time I need a new car."

The Commitment and Consistency principle is behind the willingness of Oriental rug merchants to let you take a rug home and look at it in your house. It is behind the ingenious 24-hour test drive recently introduced by Cadillac. Once the salesman's foot is in the door, our cognitive parsimony is likely to let him get himself the rest of the way in. This is why Amazon.com suggests you put things in your shopping cart. You can always take them out later. Sure you can.

The commitment and consistency weapon can be used to make it easier to get people to agree to settlements. One technique, used often in domestic relations mediations, is to seek an early commitment to a guiding principle. John and Mary are getting a divorce. They hate each other and each seems motivated only by the desire to cause the other harm. On the table is the custody and visitation question with regard to little Emmylou. The mediator might start by talking to John about what a satisfactory settlement would look like. John says a satisfactory settlement would be one that keeps Emmylou away from Mary since she is a Satanist and a drunk. The mediator thanks John politely and turns to Mary. What does she think a satisfactory settlement would look like? Mary says it would be one that keeps Emmylou away from John since he is a dope fiend and a psychopath. The mediator thanks her politely and says, "While you certainly have your differences, that is to be expected under the circumstances. What pleases me is that you both agree the most important thing we are going to work to accomplish here is to reach the solution that is going to be the best for little Emmylou. Isn't that right? That's the most important thing? And we all agree?"

It is difficult for either John or Mary to disagree. Whatever they may be thinking in their treacherous and hate-filled hearts, publicly they are going to agree that all they want is what is best for Emmylou. This sets the tone of the negotiation. Whenever the session degenerates to the Hobbesian war of all-against-all, the mediator can gently remind the participants of what they agreed was the goal of the mediation.

A negotiator will have an easier time getting an opponent to agree to a position when it follows from a position to which the opponent is already committed.

VI. SOCIAL PROOF

When people do not know what to do, they look around to see what other people are doing and do that. This is called social proof. Once again, we can see how doing what the rest of the tribe is doing was an adaptive strategy in the ancestral environment. As a default position, doing what the rest of the tribe is doing is probably safe. If everyone is running that way as fast as they can, the odds are it is a good idea to do the same. It is probably not wise to stop to investigate and inquire or to adopt a contrary attitude and go the other way. Sometimes, perhaps, but not often enough to be worth the risk.

To some extent we have evolved as herd animals. If we see people running, we run. If we hear people laughing, we laugh. This is not because we consciously want to be like other people. It is because the sound of people laughing makes us think what is happening is funny. We consistently judge television shows with laugh tracks funnier than shows without them.

Back in the 1950s, the psychologist Solomon Asch did a famous experiment where he asked people which of three lines was the same length as a fourth line. Anyone could plainly see what the correct answer was, but a substantial number of subjects got it wrong. They got it wrong because before they answered they listened to the answers of a number of other "subjects" who got it wrong. The other subjects were, of course, confederates of the experimenter and the goal of the study was to measure social conformity. Some of the subjects reported that they went along with the majority even though they knew it was wrong because they did not want to stick out and be thought peculiar. Others reported that they really did perceive the wrong answer as right. New evidence from the infant science of neuro-economics supplies some surprising support for this latter explanation. Evidently, there are neurological changes in the brain that take place when we learn about the behavior of other members of our tribe. The brain changes not just the way we behave in order to conform; it changes the way we perceive.

This is why sales pitches emphasize that their brand is the most popular, largest selling, fastest growing. Your internal, instinctive decision-maker judges that it is in your interest to make the choice made by so many other members of the tribe and buy the same brand.

The same social proof weapon is at work when your lawyer tells you your severed leg is worth \$500,000 in Wayne County, Michigan. Other people in this jurisdiction have received awards clustering around \$500,000 for their severed legs. That is the going market price. You are selling yourself cheap if you accept substantially less and you are being greedy if you demand more. The right number is \$500,000.

Why is it the right number? Because lots of similarly situated people have determined that it is the number they are willing to take or pay. It is deemed to be sufficient to compensate you for your injury because it has been deemed to compensate others for theirs. That is all there is to it.

At that point the burden shifts to you to show that yours was a particularly excellent leg or that your relationship to it was particularly close. Some adjustment

may be appropriate in light of your peculiar circumstances, but the anchor price is the one set by the market. This is not unreasonable, and it is difficult to come up with a better approach. But it is important to see what is happening here and to be able to identify when social proof is being used.

VII. WHY MEDIATION WORKS

Mediation works because an experienced mediator uses all six of Cialdini's weapons. Let us see how.

Even before the litigant walks into the mediator's office he or she is prepared to be impressed with the mediator's authority. The whole idea is that this person has the ability to get people out of what they have so far found to be an intractable dispute. The mediator has the knowledge and the experience and the magical techniques—like a medical specialist or a witch doctor, someone who knows the mysteries. A litigant who walks into the office meets someone with the badges and indicia of authority. A secretary greets visitors, takes coats, and offers coffee. The litigant is kept waiting; not long, just enough to demonstrate that the Great Mediator is busy with important matters. He emerges: dark suit, white shirt, silk tie, shiny black shoes, and gray temples. Or she emerges: dark suit, white blouse, simple gold chain, shiny black pumps. The mediator takes the litigants to the room with the leather chairs, long table, thick books and dark paneling. This is the authority weapon at work.

The mediator, powerful and important and busy as he or she is, shakes hands and smiles warmly. The mediator makes sure the litigant has fresh coffee and makes friendly small talk about the weather or the traffic or the parking. Did you give your parking ticket to the secretary to have it validated? No? The mediator will do it for you. He or she takes your ticket and summons the secretary. The mediator asks you about yourself. Often it turns out you have something in common.

The mediator could sit behind the big desk but does not. He or she sits directly across from the litigant with nothing between them. Both feet on the floor, the mediator looks the litigant in the eye, leans forward and asks "How can I help?"

How can you not like this person? He or she cares, listens actively, paraphrases and validates. He or she mirrors. Busy and important and rich and powerful as the mediator obviously is, he or she understands and wants to help. This is the liking weapon.

Then the mediator gets the commitment; listens for it during all that time. The mediator asks, "It sounds to me like you are tired of this litigation and you would like to get past it and get on with your life. Is that right?" Or, "It sounds to me like you are concerned this litigation is having a negative effect on little Wanda June. Is that right? And you would like to get it settled so your lives can return to normal? We're not here to punish your opponent for being a crook or to teach your rotten ex-spouse a lesson, right? We're here because you want to get this matter behind you and get back to what's really important. Is that what I hear you saying?" That is the commitment and consistency weapon.

Then the negotiation enters the explicit bargaining phase. There are offers and counter-offers, back and forth. The reciprocity norm is the weapon used to extract them. The other side moved last, and now it is your turn.

So far the mediator has not said anything evaluative. He or she has been functioning mainly as a facilitator, helping the parties frame issues, helping them express interests and you look for outcomes that will maximize mutual gains. But there comes a time when the mediator will be asked to give some evaluative advice. What do you think, Mr. or Ms. Mediator? You have seen a lot of these cases. You know the judges in this jurisdiction. You're familiar with the jury awards. You know these lawyers. Is this a good deal or not?

There are mediation purists who will tell you a mediator should not answer that question. I am not one of them. I think a fair assessment of the market value of your case is one of the reasons to go to a mediator. I think a mediator has a duty to tell a party who asks, "In my experience cases like yours in this jurisdiction tend to settle in the range of \$x—y. That's not to say you won't get more, maybe you will. That's not to say you should settle for \$x. It's your decision and you should do what you think is best. But you should make that decision based on the best information you can get." This is the social proof weapon. Most people in your situation do S. If you do S, you won't be out there all alone.

Finally, the settlement offer on the table will be available for a limited time only. If your opponent has to go back and conduct more depositions and retain an expert and all the rest, his or her costs will go up and the settlement demand will go up. The mediator points out, "Right now we've got a proposed deal on the table and everyone has done the work necessary to get us there. We can agree and walk out of here with the deal closed and the case behind us. Or we can reject. It's up to you. But if we stop now it is very likely the deal will unravel, the good-will will go away and we will start back at the beginning, or worse." This is the scarcity weapon.

Put them all together and it is no wonder mediation is such an effective form of dispute resolution.