

~TAMING OF THE SHREWD:



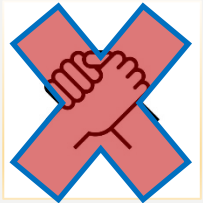
Adaptive Techniques for Mediating
with Adversarial Attorneys ~

PRESENTED BY

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Please do not use any portion of this work without the presenter's consent; thank you!



DISCLOSURES!



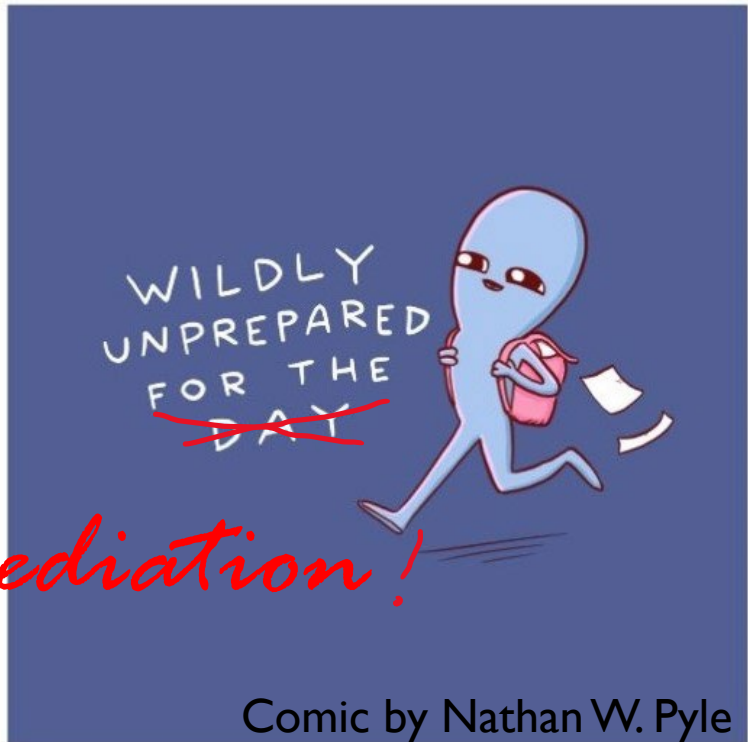
- *I am an attorney, though I rarely practice law.*
- *I am certified in county, family, and dependency mediation.*
- *I am NOT a psychologist.*

The information contained in this presentation is based on my own observations and experience. It includes some broad-strokes review of psychology-based principles, but these are merely intended to help frame the discussion.



VIEWER DISCRETION ADVISED

WHAT MAKES FOR A “DIFFICULT” ATTORNEY?



Mediation!

Comic by Nathan W. Pyle

Identify how attorneys/ reps may hinder mediation:

- ✚ By undermining the value of mediation, as a whole.
- ✚ By being overly/underly zealous.
- ✚ By impeding progress.

Remember: Attorneys, Parties, Mediators...

WE'RE ALL HUMAN!

Vulnerability Factors and Other Considerations:

- Some attorneys don't meet clients until just before mediation begins.
- Clients don't tell their attorneys everything (don't know/don't trust attorneys or process).
- Attorneys may be driven by idealistic principles of justice.
- They may also be experiencing burnout or compassion fatigue.
- Every mediation shapes how participants will feel about mediating in the future!

SO... HOW DOES THIS EFFECT BEHAVIOR?

One way to view the behavior of mediation participants is through a lens of **COGNITIVE BIASES**.

These are systematic, often irrational errors in thinking that result from mental shortcuts or attempts to quickly categorize and process input. They may arise more often when we are emotional or feeling rushed.

(See, e.g., Shatz, Itamar.)

A Very Brief Overview...

COGNITIVE BIASES IMPACT DECISION-MAKING AND AFFECT JUDGMENT

(See, e.g., Yagoda, Ben. “The Cognitive Biases Tricking Your Brain.”)

Common Examples Include:

- **Confirmation Bias:** paying closer attention to information that verifies our own, preconceived ideas; ignoring information that conflicts with or challenges these same positions.
- **Anchoring:** becoming locked into a position based on a specific portion of information; unwilling to adjust these ideas within a greater context.
- **Hyperbolic Discounting:** favoring short-term comfort over long-term reward.
- **Actor/Observer Bias (Self-Serving Bias/False Attribution Error):** attributing failure to the process or to others (external) instead of to one's own lack of preparation/participation (internal fault); reverse re: achievements.
- **Excessive Optimism/Pessimism Bias:** underestimating the possibility of negative results (things will work out)/ overestimating the likelihood of failure (no real hope for the future).
- **Sunk Cost Fallacy:** hanging onto something because of the effort/money invested so far (loss aversion).
- **Plan Continuation Bias:** failing to change one's course of action to reflect changing circumstances.
- **Relevance Bias:** misconstruing how (in)consequential certain information may be.



VULNERABILITY FACTORS + NON-IDEAL CIRCUMSTANCES + COGNITIVE BIASES = ATTORNEYS WHO...

- Devalue Mediation
 - State the case must go to trial because parties will never settle
 - Only attend mediation because it's required by the Court
 - Want to utilize mediation to conduct discovery instead of working towards resolution
- Are overly/underly zealous
 - Act aggressively, bully the other party/mediator, or showboat for their client without letting client speak
 - Do not prepare, and are clearly unfamiliar with the case/client
 - Barely participate in the process or (unsuccessfully) multitask throughout the mediation session
- Impede Progress
 - Puff or stall re: willingness to settle
 - Refuse to provide or consider basic information or details
 - Will not make offers (won't "bid against themselves") or are unwilling to counter



~ WHAT'S A MEDIATOR TO DO? ~

- Focus on PROCESS and Highlight Benefits of ADR
 - Avoid excessive time/costs
 - Provide peace of mind
 - Narrow the scope of issues for trial
-
- Refer to RULES and Guidelines
 - Mediators are the guardians of self-determination
 - Attorneys are in charge of the clients/case, but mediators safeguard participation
 - We encourage civility despite disagreement
-
- Redirect BEHAVIOR
 - Speak to lawyers in caucus (with client, w/out client, with opposing counsel)
 - Give lawyers the opportunity to shine
 - Plan ahead for particular “repeat offenders”; use de-escalation, as needed

WHY DOES THIS WORK?

In general, a rationalistic, “debiasing” approach works by helping to shift from unproductive perspectives while redirecting focus towards end goals. (See, e.g., Shatz, Itamar.)

- Highlight Incentives: Remind participants of mutual goals (best interest of children, saving money/time, having an immediate result which each party helped to formulate); direct say in outcome.
- Offer Nudges: Review how a judge may look at the case, what they may/may not consider, and reframe options in light of BATNA/WATNA; explain “many people prefer participating in the outcome vs. letting the judge decide everything for them.”
- Provide Training: If certain attorneys mediate with you frequently, help them to recognize patterns in your approach and adapt your own methods to complement their style; reflect on common issues and reference them specifically in opening statements.



FURTHER RATIONALE

➤ All lawyers are officers of the court

- ✓ **The language of their trade is laws, rules, and ethics**
- ✓ **They ultimately answer to the presiding judge**
- ✓ **They are obligated and bound to proceed “in good faith”**



Helpful legal authority:

- "Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process....The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.” § 44.1101(2), *Fl. Stat.*
- "Mediator" means a neutral, impartial third person who facilitates the mediation process. The mediator's role is to reduce obstacles to communication, assist in identifying issues, explore alternatives, and otherwise facilitate voluntary agreements to resolve disputes, without prescribing what the resolution must be. § 44.403(4), *Fla. Stat.*
- "Subsequent proceeding" means an adjudicative process that follows a mediation, including related discovery. § 44.403(5), *Fla. Stat.*
- Counsel. Counsel shall be permitted to communicate privately with their clients. The mediator shall at all times be in control of the mediation and the procedures to be followed in the mediation. *Fla. Fam. L. R. P. 12.471(4)*
- Communication with Parties. The mediator may meet and consult privately with any party or parties or their counsel. *Fla. Fam. L.R.O. 12.471(5)*
- Mediator's Responsibility to the Parties The purpose of mediation is to provide a forum for consensual dispute resolution by the parties. It is not an adjudicatory procedure. Accordingly, a mediator's responsibility to the parties includes honoring their right of self-determination; acting with impartiality; and avoiding coercion, improper influence, and conflicts of interest. A mediator is also responsible for maintaining an appropriate demeanor, preserving confidentiality, and promoting the awareness by the parties of the interests of non-participating persons. A mediator's business practices should reflect fairness, integrity and impartiality. *Fla. R. Med. 10.300*
- Mediator's Responsibility to the Mediation Process A mediator is responsible for safeguarding the mediation process. The benefits of the process are best achieved if the mediation is conducted in an informed, balanced and timely fashion. A mediator is responsible for confirming that mediation is an appropriate dispute resolution process under the circumstances of each case. *Fla. R. Med. 10.400*
- Balanced Process A mediator shall conduct mediation sessions in an even-handed, balanced manner. A mediator shall promote mutual respect among the mediation participants throughout the mediation process and encourage the participants to conduct themselves in a collaborative, non-coercive, and nonadversarial manner. *Fla. R. Med. 10.410*
- Mediator's Responsibility to the Courts A mediator is accountable to the referring court with ultimate authority over the case. Any interaction discharging this responsibility, however, shall be conducted in a manner consistent with these ethical rules. *Fla. R. Med. 10.500*
- Compliance with Authority A mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation. *Fla. R. Med. 10.520*
- Relationships with Other Professionals A mediator shall respect the role of other professional disciplines in the mediation process and shall promote cooperation between mediators and other professionals. *Fla. R. Med. 10.670*
- Rules Regulating the Florida Bar, *Rules of Professional Conduct* include requirements that attorneys bring cases/file lawsuits in good faith.

FURTHERER RATIONALE

➤ Attorneys are also human beings

- ✓ **They may need to be reminded of how mediation works and why it's a valuable process**
- ✓ **Offering alternate avenues of resolution can help attorneys save face**
- ✓ **Attorneys appreciate the ego boost of you highlighting their expertise**



- Keep in Mind:
 - Lawyers may have ongoing relationships with the clients after this mediation/case concludes; the mediator will not!
 - Attorneys want to stay on good terms with clients; mediators should stay on good terms with attorneys.



- Set a clear roadmap for the mediation process during your opening/introductory remarks (and ask for full attention).
 - Underscore the possibility of partial agreements, temporary agreements, etc.
 - Assure all participants that they'll have a chance to speak; no one side will dominate
 - Highlight progress and encourage movement throughout the session
 - Reflect on the situation(s) instead of the people involved
 - Teach the participants about "neutrality"



- Reframe specific or personal concerns into unbiased issues for discussion
 - "Help me to understand..."
 - Defer to attorney's expertise and experience
 - Ask versus tell
 - "This is unusual... what if...?"
 - Other options?



FURTHEREST (?) RATIONALE

➤ A Bit More “Amateur Psychology”

- ✓ **Needs-Based Communication helps refocus and redirect when biases arise**
- ✓ **Humility of the mediator may translate to humility of counsel (be “genuinely curious” and ask for help)**
- ✓ **Fostering a sense of mutual respect also fosters faith in the mediation process (circular affirmation)**



- Remove the personal investment, emotions, ego, and focus on needs
 - Needs of parties (how does this help reach your goal?)
 - Needs of attorneys



- Ask questions about process and law, how case would be presented, etc.
 - How would this evidence get before the judge?
 - What can I help your client understand about the process?
 - Would you like to confer with opposing counsel?



- Reiterate Attorney's role as officer of the court
 - “I'm sure your lawyer has told you...”
 - Your attorney is thinking about how this will be demonstrated at trial.
 - The lawyer has to consider your case as a whole; it's their job to be detached so they can assess all facts and estimate how a judge will apply the law.

DE-ESCALATION TECHNIQUES



Mediators' Tried and True Tools:

- Use Active Listening: Provide cues to acknowledge that you are focused, attentive, and have heard all voiced concerns; give attorneys and their clients time to reflect.
- Feedback re: the Mediator's Role: "My job is to help you find common ground; is this approach likely to get us there?"
- Promote Movement: "What other issues can we explore that might not encounter so much resistance?"

Process-Based Options:

- Take a Short Break: Ask for a minute to review pleadings or your notes ; BREATHE.
- Call a Recess: Give everyone a specific time to report back; suggest issues they might consider while temporarily adjourned.
- Continue: Is this a situation where time will truly make a difference?



So, remember...

Vulnerability Factors

+

Non-Ideal Circumstances

+

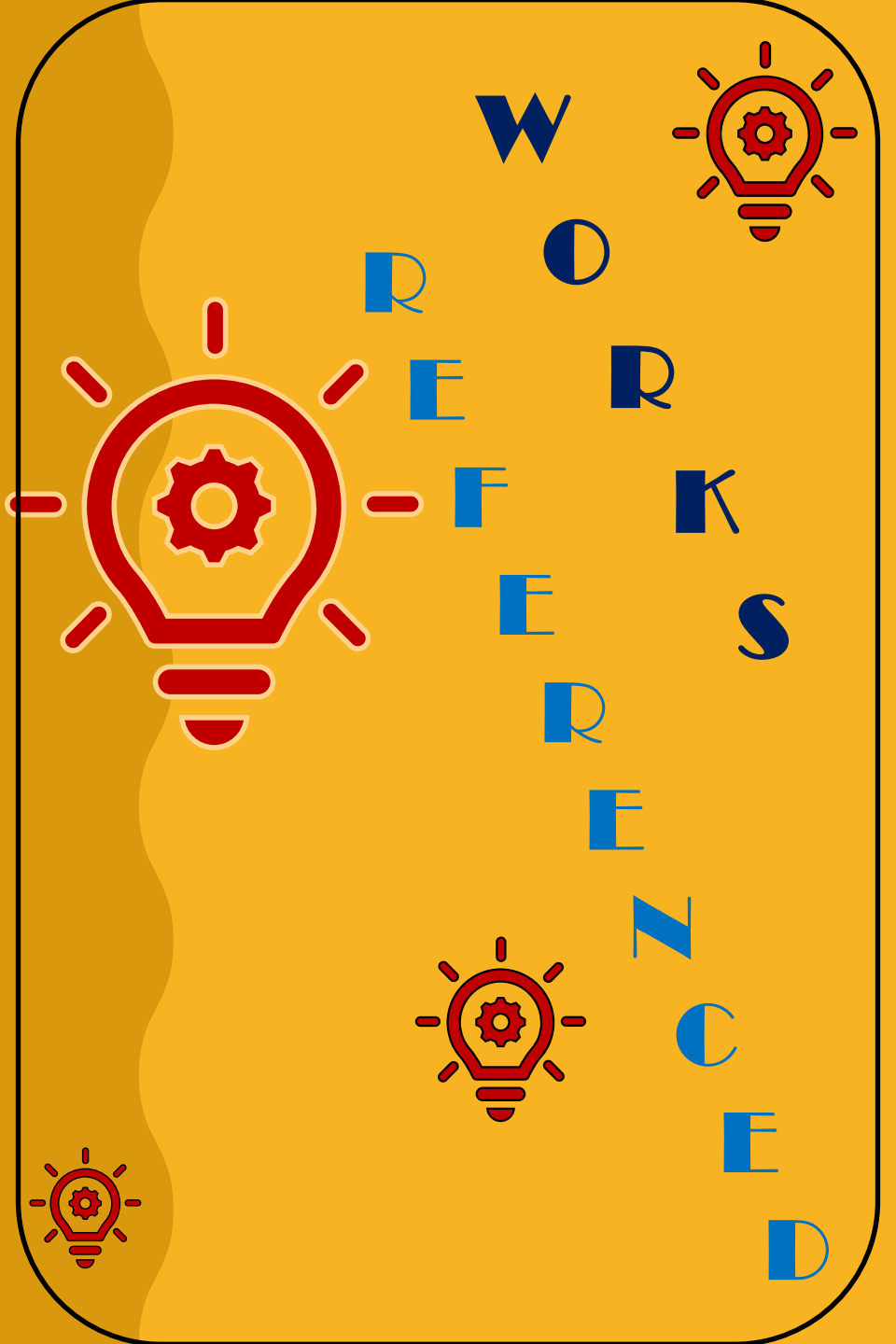
Cognitive Biases...

OH, MY!

LIFE (and trying to mediate it)
CAN SURE BE
DIFFICULT!



**LET'S STRIVE TO BE
HUMAN AND KIND.**



Resources/ Additional Reading:

Re: Cognitive Biases and Debiasing

Shatz, Itamar. “Debiasing: How to Reduce Cognitive Biases in Yourself and in Others.” *Effectiviology*,
<https://effectiviology.com/cognitive-debiasing-how-to-debias>.

Shatz, Itamar. “Nudge: How Small Changes Can Significantly Influence People’s Choices.” *Effectiviology*,
<https://effectiviology.com/nudge>.

Yagoda, Ben. “The Cognitive Biases Tricking Your Brain.” *The Atlantic*, September 2018,
<https://www.theatlantic.com/magazine/archive/2018/09/cognitive-bias/565775>.

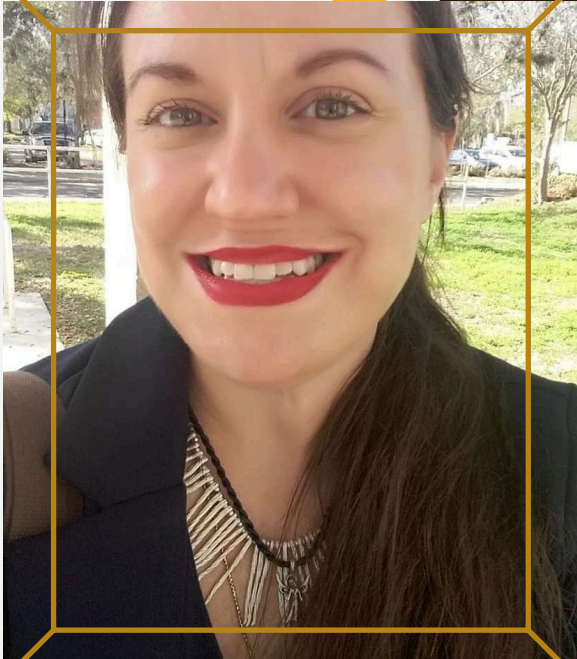
Webcomics: “Strange Planet” by Nathan W. Pyle,
<https://www.nathanwpyle.art> (individual comic strips available on artist’s Facebook, Twitter, and Instagram pages).

Thanks for joining me!

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