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Saving Face: Ego Utility in ADR

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Parties to a dispute can feel prideful, threatened, or just plain right about the case. Sometimes, it's the last one that's the problem.

In Botond Koszegi's 2006 article "Overconfidence, Ego Utility and Task Choice" (link), he uses decision theory to demonstrate the dissonance between peoples' chronic overconfidence and their constricting risk aversion. In short, people need to see themselves as successful, and to erect a forcefield around that vision:

> The model starts from a simple premise: People have ego about what activity they see themselves capable of succeeding in... In addition to caring about financial outcomes, a person might derive pleasure from thinking that she belongs to the distinguished group of people who could have a successful business.[1]

When ego rules, parties view themselves as right and others as wrong, regardless of what anyone is saying or what the facts are. When ego is an issue, deflecting the source of a settlement offer away from the temporarily hated opposing party may be prudent. Similarly, allowing a party to exercise self-agency in resolving a dispute may save the self-image of a party that is terrified of having that image shattered, whether the party is conscious of that terror or not.

CONSIDERING THE SOURCE OF THE OFFER

Money of a certain value can be framed as a loss, a gain, a cost of doing business, an unexpected windfall, or basically anything else to someone wanting to believe it badly enough. Koszegi explains the intimate connection between information and self-image concisely:

> [A]n agent with ego utility prefers to receive her information in the most flexible and manipulable manner possible, so that she can tailor information acquisition finely to achieve a favorable self-image.[2]

Parties to contentious disputes can discount or disregard offers not because of the contents of those offers, but because they think the other side is wrong no matter what it says. “Do you want this to come from you, or do you want this to come from me?” I once heard a mediator ask a party at the end of a mediator-party caucus, when the party was ready to make an offer. Depending on how far parties are apart, and how hostile they feel toward each other, a mediator – or a litigant – can present an offer as a suggestion or as brainstorming. This helps an opposing party see the mediation as more of an opportunity for discussion than like a duel of offers.

A common example is splitting the difference: if a defendant offers $100,000, but the plaintiff wants $200,000, a compromise offer of $150,000 may be best received from the mediator. If the $150,000 offer is framed as coming from the defendant, the plaintiff may see it as a sign of weakness or as an invitation to haggle. If the mediator simply says, “based on where we are in this case, and the cost of continuing the dispute, you’re better off eating $50,000 each”, the party in the room may be more likely to consider the offer a fair one. It also presents the settlement amount as the result of a shrewd litigation strategy rather than as a weakness in a party’s case.

REMINDING PARTIES OF THEIR ROLE IN SHAPING THE OUTCOME

Koszegi’s finding that people simultaneously overvalue their contributions to their workplaces, yet prefer fixed salaries to incentive-based compensation, is explained through a particularly ego-damaging realization: not only do people overestimate themselves, they also want to avoid being exposed as wrong about this overestimation. Rather than throw their egos to the wind, parties benefit from being able to have a say in how they are rewarded:

> The organizational setting is perhaps the most fruitful application of ego utility, with both straightforward utilization of the model in this paper and more complex further questions.[3]

One of the main reasons parties choose ADR is to have some control over the proceeding. Although this is especially true in non-binding ADR like mediation, parties in binding arbitration proceedings still have procedural input. Giving an opposing party a menu of options, especially when there are items one party cares about more than the other, allows the party receiving the offer to feel more control.

For example, an employer may offer a departing employee a limited-term benefits extension or an equivalent cash payout – provided the employer is indifferent as to which offer the employee accepts. The employee not only gets what he or she wants, but can also feel as though there’s a palpable choice. People are less likely to feel cheated by an offer, and therefore more likely to settle, if they feel like they have a say.

For an arbitration example, consider what a small natural resources client once told me when I advised him to abandon a land rights case he was willing to take to a costly arbitration. It was my opinion the opposing party was correct (always a difficult thing to tell a client). His response was, “if the arbitrator tells me I’m wrong, fine, I’ll accept that, but I’m not letting *those guys* tell me I’m wrong”. The parties’ mutual selection of an arbitrator put the decision-making power in the hands of someone they each respected, even if the outcome wouldn’t necessarily be what the client wanted.

A CONCLUDING TAKEAWAY

Factual, objective correctness and incorrectness are only some of the concerns parties have during disputes. The need to main a positive self-image, internally (ego) and outwardly (reputation), is something that can derail a good settlement – or, with a little creativity, help it come to pass.

ABOUT THE AUTHOR.

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[1] Koszegi, Botond. "Overconfidence, Ego Utility, and Task Choice." *Journal of the European Economic Association*, June 2006 4(4):673–707 at p 676.

[2] Koszegi, 2006 at p 675.

[3] Koszegi, 2006 at p 691.