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## Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know about How Mood Relates to Successful Negotiation, The

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## The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates To Successful Negotiation

*Clark Freshman\**  
*Adele Hayes\*\**  
*Greg Feldman\*\*\**

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\* Professor of Law, University of Miami School of Law. B.A., Harvard College, 1986; B.A., University College, Oxford University, 1988, J.D., Stanford Law School, 1991. We are grateful for research support from the University of Miami for a Provost's Award for Interdisciplinary Research funded by the Provost, the School of Law, and the Department of Psychology for this article, our related empirical research, and our related curriculum development on using mood management to improve negotiation. We are also grateful to participants in presentations at the Second International Conference on Therapeutic Jurisprudence and the International Law and Society Meeting in Budapest. We are especially grateful for suggestions and encouragement as well from many friends and colleagues: Greg Assmar, Michael Graham, Patrick Gudridge, Gerry Levy, Leigh McDonald, Pete Popejoy, Len Riskin, Lonny Rose, Rob Rosen, Rick Williamson, and Bruce Winnick. We welcome correspondence at [cfreshma@law.miami.edu](mailto:cfreshma@law.miami.edu). We are especially grateful for research assistance from Karla Alvarez, Carlos Bonilla, and Allyson Greenfield and, particularly for data analysis, to David Greenawalt. Rachel Moran provided an especially careful and helpful read of an earlier draft. Chris Beevers provided consistently outstanding suggestions at our weekly research meetings. We are especially grateful to the ever resourceful University of Miami Law Library, particularly Sue Ann Campbell and Barbara Cuadras. We dedicate this article to Carrie Menkel-Meadow.

\*\* Associate Professor of Psychology & Associate Director, Adult Track in Psychology, University of Miami.

\*\*\* Doctoral Candidate, University of Miami, Department of Psychology.

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## ABSTRACT

This article explores two related questions: First, does mood shape how well lawyers succeed at negotiation? Second, can lawyers succeed better at negotiation by understanding and managing the role of mood?

On the first question, many studies of psychology and business school students show those in even mildly better moods – after smelling a pleasant scent, or watching a funny five minute video – do better at negotiation. The studies tell us much less clearly how mood leads to success. Nor do the studies carefully consider how much they apply to law students, lawyers, and legal negotiations. Although it is likely that such studies apply to at least some degree to at least some lawyers and legal negotiations, the article suggests several reasons why mood may apply differently.

There is far less clear scientific research that addresses the second question, key to negotiators: How does one do better in negotiation by studying mood? Based on scientific research on mood management, the article shows the limitations of both pop psychology mood management and the limitations of basic research on mood and negotiation. Instead, the article offers some preliminary suggestions on potential short-term and longer-term strategies based on: (1) correcting for the dysfunctional effects of certain moods, and/or (2) attempting to change moods that may have dysfunctional effects.

In short, the article presents a critical analysis of existing scientific research on how mood affects negotiation, analyzes how that research might apply differently to lawyers, and offers practical advice – rooted in empirical research – on how lawyers might manage their moods to improve both their results in negotiation and their own health.

The article differs in four ways from two recent books by the Harvard Project on Negotiation, *Beyond Winning* (2000) and *Difficult Conversations* (1999). First, while both those books emphasize that emotion may be a barrier to negotiation, this article also addresses how moods and emotion may *help* negotiation. Second, while both books concentrate on negative mood, this article presents research that positive mood – not merely the absence of negative mood – may lead to better results at negotiation. Third, while both books depend on an uncritical incorporation of psychological theories and research on non-lawyers, the article questions *some* of the ideology and method of psychological research including how much it applies to lawyers. Fourth, while *Difficult Conversations* focuses on deep-seeded and intense emotion, the article instead shows how even very mild changes in mood (such as from watching a five minute funny video or smelling a mild scent) have significant effects on success in negotiation.

## The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates To Successful Negotiation<sup>1</sup>

### PROLOGUE:

Five minutes before the big deal, and all the players are getting psyched. One man starts punching a pillow to vent his anger<sup>2</sup> and psych himself up for the big fight. One person is watching his favorite funny movie.<sup>3</sup> Another suggests playing some pleasant music before discussions begin.<sup>4</sup> One person is taking Botox to keep from letting his face show any emotion. One person is meditating with his breath to make himself more aware of reality. One person is visualizing himself as the successful winner.<sup>5</sup> One person is popping Xanax to keep from getting too worked up.<sup>6</sup>

Are these people nuts – or can science reveal how certain moods may promote successful negotiation?

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1. We acknowledge the inspiration of Galanter's criticism of common misunderstandings about data on other topics about which we think we know much, but where our common understandings lack support. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983).

2. On the dysfunctional aspects of mere venting, see *infra* text accompanying n. 321.

3. See Roderick Kramer et al., *Self-enhancement Biases and Negotiator Judgment: Effects of Self-esteem and Mood*, 56 *Org. Behav. & Hum. Dec. Proc.* 110, 116-19 (1993).

4. At informal meetings of the United Nations Security Council, diplomats began playing music at the beginning of each session. Barbara Crosette, *Stop The Music, Envoy Says*, N.Y. Times (New York, NY) A10 (June 12, 2001). At least one diplomat was not amused, asking the Council to "stop such jokes." *Id.* Scientific study of music and mood suggests the diplomat misunderstood how music could help negotiations. See generally, Lawrence J. Sanna, *Defensive Pessimism and Optimism: the Bittersweet Influence of Mood on Performance and Prefactual and Counterfactual Thinking*, 12 *Cog. & Emot.* 635, 648-49 (1998) (showing how use of certain music predictably induced negative or positive moods); Benjamin M. Dykman, *A Test of Whether Negative Emotional Priming Facilitates Access to Latent Dysfunctional Attitudes*, 11 *Cog. & Emot.* 208, 210 (1997) (same).

5. Visualizing success is a familiar pop psychology mantra, but experimental research shows that merely picturing success does not help. Shelley E. Taylor, Lien B. Pham, Inna D. Rivkin & David A. Armor, *Harnessing the Imagination: Mental Simulation, Self-Regulation, and Coping*, 53 *Am. Psychol.* 429, 438 (1998) ("Mental simulations in which people focus exclusively on the outcomes they want to achieve may succeed in making them feel good, but these emotional regulation benefits may be achieved at the expense of effective planning and problem solving.").

6. Interview with Dan Smith, (May 24, 2001) (describing how some prominent lawyers act before settlement conferences).

## INTRODUCTION

This article explores two related questions: First, does mood<sup>7</sup> shape how well lawyers succeed at negotiation?<sup>8</sup> Second, can lawyers succeed better at negotiation by understanding and managing the role of mood? We begin by exploring what scientific evidence we currently have about how mild changes in mood are associated with significant differences in success at negotiation. Ultimately, we argue that existing scientific evidence shows mood plays a far more complicated role than negotiators and negotiation scholars usually imagine, but that further research needs to address more carefully exactly how mood works and how it affects lawyers

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7. We use “mood” as the most generally familiar word that captures the relatively mild emotional changes that may affect the way people negotiate. For our purposes, because we are concerned with helping negotiators improve their own behavior, we examine a continuum that begins with quite transient moods, which may be readily changed by such simple things as music, scents, small gifts, funny videos, and so on. See *infra* text accompanying nn. 190-93 (distinguishing between transient mood, moderately stable mood disorders, and more stable personality). We follow an entire cottage industry of researchers who use “mood” to refer to the mild changes such simple manipulations induce in most people. W. Gerrod Parrott & Paula Hertel, *Research Methods*, in *Handbook of Cognition and Emotion* 665 (Tim Dalgleish & Mick Power eds., Wiley 1999). At the other extreme are quite stable personality predispositions, which might change, if at all, only due to lengthy therapy. In between, we consider a range of mood disorders which are more difficult to change, but which typically change on their own or respond to relatively brief psychological counseling.

Other researchers use the terms “mood,” “affect,” and “emotion” in various different ways that are of less concern to our project. We note that other researchers often use the less familiar term “affect” as an umbrella term. See Susan T. Fiske & Shelley E. Taylor, *Social Cognition* 415 (2d ed., McGraw-Hill 1991) (“[a]ffect subsumes preferences, evaluations, moods, and emotions”); Leigh L. Thompson, Janice Nadler & Peter H. Kim, *Some Like It Hot: The Case For The Emotional Negotiator*, in *Shared Cognition in Organizations: The Management Of Knowledge* 140 n. 1 (Leigh Thompson et al., eds., Lawrence Erlbaum 1999) (acknowledging various distinctions sometimes made by other psychologists but using “affect in a very broad sense to refer to the entire constellation of emotion and feeling states that are experienced by negotiators and characterize the negotiation process”). As one leading text summarized, “[M]any of these distinctions are not uniformly applied by those working in the field. In fact, some of the best empirical work . . . bears little relation to the best taxonomic work . . .”. Fiske & Taylor, *supra* at 415.

8. We note there is no single agreed upon definition of negotiation – other than the consensus among scholars of negotiation that it describes much of what all of us, particularly lawyers, do much of the time. Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. of Dis. Res. 1, 66 (1996); Joseph D. Harbaugh & Barbara Britzke, *The Negotiation Process*, 347 Practicing Law Institute 17, 34 (1988) (“More than 90 percent of all matters handled by lawyers, whether they be planning problems or litigation cases, are resolved through the process of negotiation.”); Leonard L. Riskin, *A Response to Professor Pipkin*, 50 Fla. L. Rev. 757, 759 (1998) (“[A]ll lawyers negotiate . . .”); Charles Thensted, *Litigation and Less: The Negotiation Alternative*, 59 Tul. L. Rev. 76, 92 (1984) (“[N]egotiation is what litigators now do . . .”); John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 Neb. L. Rev. 704, 704 (1996) (“Negotiation pervades the life of a lawyer.”); Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 Vand. L. Rev. 1387, 1387 (1986) (“[M]any lawyers negotiate more than they litigate.”).

Some emphasize the potential to help individuals do more together than they might as individuals; others emphasize the potential of individuals to obtain more at the expense of another. See *infra* text accompanying n. 15. We prefer a functional approach to negotiation, using the term “negotiation” when analyses and skills associated with “negotiation” may help individuals and groups of individuals understand and/or improve their situation.

and legal negotiation. We also preview our ongoing empirical research attempts to meet such needs.

Our shift to scientific study of mood and legal negotiation represents a kind of third generation in negotiation scholarship. The first generation of negotiation advice brought attention to negotiation as a phenomenon, but relied largely on anecdote and theory rather than systematic empirical testing.<sup>9</sup> A second generation of legal negotiation scholarship brought quantitative rigor to the rational aspects of negotiation, such as importing decision analysis to offer quantitative models of settlement.<sup>10</sup> The rigor of this second generation, however, extended relatively little to the questions of mood and emotions.<sup>11</sup> Instead, this second generation largely recreated the folk wisdom that lawyers and other super-negotiators could manage emotion better largely by ignoring it -- lawyers could cool out the emotional client. As one recent study by two business school teachers suggested, "human emotions often interfere with rational judgment."<sup>12</sup> The legal mediator could use reason to "test" the overly emotion-laden reality of parties. There remains little careful study of whether this folk wisdom about lawyers and emotion is correct.

The lack of careful study of how mood affects legal negotiations is curious when so many see the importance of legal negotiation and the potential complications of emotion. As a purely financial matter, lawyers have a huge financial stake in the success of negotiations. Indeed, most of what lawyers do is negotiate in one way or another.<sup>13</sup> From the perspective of individual lawyers, the ability to negotiate may mean the ability to get better results for clients and, therefore, attract clients -- rather than lose clients to other professionals who might negotiate better.<sup>14</sup> The significance extends beyond clients as well. Many academic lawyers claim that lawyers not only help their clients but also help identify more efficient deals and efficient ways to resolve conflict, thereby creating value that benefits society as a

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9. See Arvind Rangasway & G. Richard Shell, *Using Computers to Realize Joint Gains in Negotiation: Toward an "Electronic Bargaining Table"*, 43 *Mgmt. Sci.* 1147, 1148 (1997) (contrasting "purely anecdotal approaches to bargaining" with "analytical approaches that are based on models used in economics, decision analysis, and game theory").

10. See e.g. John S. Murray et al., *Processes of Dispute Resolution: The Role of Lawyers* 218 (2d ed., Found. Press 1996) (describing use of decision analysis to mathematically predict expected values of cases); Robert H. Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 106-18 (Belknap Press of Harvard U. Press 2000).

11. See Thompson, Nadler & Kim, *supra* n. 7, at 139.

12. Rangasway & Shell, *supra* n. 9 at 1150. In a similar way, the most recent major book by the head of the Harvard Project on Negotiation includes a heading "irrationality and emotion." See e.g. Mnookin et al., *supra* n. 10, at 156. In a similar way, another book by three persons affiliated with the Harvard Project on Negotiation also sees emotion as a barrier to negotiation. See Douglas Stone, Bruce Patton & Shelia Heen, *Difficult Conversations: How to Discuss What Matters Most* 13 (Viking 1999) ("Getting too deep into feelings is messy [and] clouds good judgment," but some less deep discussion of feeling may be helpful in "difficult conversations.").

13. See *supra* n. 8.

14. See *infra* text accompanying n. 230 (Non-lawyers may often perform the same activities as lawyers, such as advocating in a grievance arbitration.).



whole.<sup>15</sup> And much of the existing scientific research on negotiation and mood is strongest in showing that certain moods are indeed associated with such joint gains.<sup>16</sup> For all these reasons, it is incredibly important to critically examine the evidence that the mood of negotiators has a significant impact on how well lawyers achieve their own goals and how well they facilitate truly win-win agreements that may benefit other parties and society.

In exploring the way mood affects negotiation, we draw lessons from a constellation of social psychology studies that seem to show that even mild changes in mood<sup>17</sup> can affect the way even sophisticated and educated professionals, like elite academic doctors and Stanford business school students, think and act.<sup>18</sup> These studies discussed at length in section one below, show that mood really can affect the bottom line of negotiation success. But these studies alone tell us very little about how lawyers can harness these findings into making themselves more successful negotiators.

Our emphasis on the importance of mood and negotiation, rooted in these studies, diverges from two different views about mood and negotiation that many negotiation scholars, teachers, and popular books hold. One extreme view makes personality everything: people have a certain durable way of approaching conflict, and they apply this approach in all of their negotiations. In this extreme view, some people always tend to compete, other people always tend to just give in to others, some always avoid conflict, and so on. This view is most recently embodied in the otherwise very valuable and lucid book by the head of the negotiation program at the prestigious Wharton school.<sup>19</sup> In one popular variant of this theme, individuals may

15. One may distinguish among several views. On the least sophisticated view, lawyers are better negotiators because they are somehow more cool and rational than their hot and emotional clients. A more sophisticated set of views, most prominently associated with the ideas of Gilson and Mnookin, suggest that lawyers have the *potential* to lead more efficient negotiations in a variety of ways. See e.g. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 Colum. L. Rev. 509, 522-34 (1994) (suggesting that clients may use lawyers with ethical reputations as a means to overcome the distrust of any given party that the information from some other party is not accurate); Mnookin et al., *supra* n. 10, at 4 (“Lawyers have special opportunities to create value that would not otherwise be available to their clients.”).

16. See *infra* text accompanying nn. 51-53.

17. In our emphasis on *mild* mood, we differ from the emphases in recent excellent work on more serious kinds of mood associated with “difficult conversations.” See Stone, Patton & Heen, *supra* n. 12, at xv (“Anytime we feel vulnerable or our self-esteem is implicated, when we care deeply about what is being discussed or about the people with whom we are discussing it, there is potential for us to experience the conversation as difficult.”). In the kinds of studies of mood and negotiation this article considers – such as simulated simple negotiations by students over financing movies, buying and selling appliances, picking curriculum – it is unlikely students “care deeply” about either the topic of negotiation or the other students with whom they negotiate.

18. See *infra* section one.

19. Richard Shell, *Bargaining For Advantage: Negotiation Strategies For Reasonable People* 3 (Viking 2000). In the first page of the first chapter, Shell quotes a Danish proverb to support the idea that people should accept that people have certain negotiation personalities. *Id.* at 3. In contrast to this fixed view, Mnookin recognizes that people may have different approaches to conflict in different situations. Mnookin et al., *supra* n. 10, at 57-58 (“Most people are complicated amalgams of these three styles [to approaching conflict] . . . [and] shift from one to the other depending on the situation . . .”).

not negotiate in a particular way because of idiosyncracies of their individual personality, but possibly because of “cultural” features.<sup>20</sup> The implication for change, however, is the same: different individuals always negotiate in different ways because of some feature ingrained early on, be it from idiosyncratic personal circumstances or particular cultural patterns. In a sense, a variation is the emphasis on the way that women may negotiate differently from men.<sup>21</sup>

At the opposite end, another extreme view suggests that personality and individual differences very rarely matter.<sup>22</sup> Instead, what really matters is the way all of us respond to changing social situations and often display common – even “normal” – cognitive mistakes, be they reliance on racial stereotypes or defects in decisionmaking that affect negotiation.<sup>23</sup> Such errors include the way we all tend to get stuck at the first price mentioned in a negotiation, which psychologists identify as the anchoring effect.<sup>24</sup> Such social settings include the way we tend to discount

20. See e.g. Williams, *supra* n. 8 (different cultures may engage in different negotiation rituals); Allan Edward Barsky, *Conflict Resolution for the Helping Professions* 54 (2000); Rajesh Kumar, *Affect, Cognition, and Decision Making in Negotiation: A Conceptual Integration*, in *Managing Conflict: An Interdisciplinary Approach* 185, 193 (M. Afzalur Rahim, ed., Praeger 1989) (theorizing that, in response to the stress of negotiations, Japanese negotiators may withdraw from negotiation, but Americans may get more aggressive). From a definitional viewpoint, one may be skeptical that any given individual neatly falls within a particular culture. See e.g. Kevin Avruch, *Culture and Conflict Resolution* 106 (U.S. Inst. of Peace Press 1998); Michele J. Gelfand & Naomi Dyer, *A Cultural Perspective on Negotiation: Progress, Pitfalls, and Prospects*, 49 *Applied Psychol.: An Intl. Rev.* 62, 75 (2000) (“With some notable exceptions, researchers often utilized post-hoc explanations to interpret unexpected patterns of results, and generally used geographical location as a surrogate for culture.”); Clark Freshman, *Re-visioning the Dependency Crisis and the Negotiator’s Dilemma: Reflections on the Sexual Family and the Mother-Child Dyad*, 22 *L. & Soc. Inquiry* 97, 117-21 (1997); Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 *UCLA L. Rev.* 1687 (1997). Our criticism here, however, is different: a distinct problem with culture is that it makes the way people behave seem far deeply ingrained and far less susceptible to change. Where many would say someone negotiates a certain way because of a certain culture, we would say they may negotiate a certain way *in large part* because of their mood on a particular day.

21. See e.g. Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, *Va. J. Soc. Pol. & L.* 75, 87-88 (1994) (showing recent research raises questions about claims that men and women negotiate differently); Deborah M. Kolb & Judith Williams, *The Shadow Negotiation: How Women Can Master The Hidden Agendas That Determine Bargaining Success* 9-10 (Simon & Schuster 2000) (suggesting that women tend to negotiate differently from men in some ways, such as not asking for better terms as often as men do).

22. On this view, to the extent individual differences matter, they are only a few individual differences, commonly understood by social psychologists as the Big Five personality factors. See generally Lee Ross & Richard E. Nisbett, *The Person and the Situation: Perspectives of Social Psychology* 90-118 (Temple U. Press 1991).

23. See e.g. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 *The Handbook of Social Psychology* 357, 361 (Daniel Gilbert et al., eds., 4th ed., McGraw-Hill 1998) (describing the “core insight” that “still sustains most current theories of stereotyping, prejudice, and discrimination” as “[J]ust as people categorize furniture into tables and chairs, putting their drinks on one and sitting on the other, so, too, people categorize each other into ingroups and outgroups, loving one and (therefore, he argued) hating the other”).

24. See e.g. Max H. Bazerman & Margaret A. Neale, *Negotiating Rationally* 23-30 (Free Press 1992); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflicts*, 8 *Ohio St. J. on Dis. Res.* 235 (1993).

suggestions by those we see as opponents (what social psychologists call reactive devaluation), and the way we treat the same suggestions better if they come from a seemingly neutral person, like a mediator.<sup>25</sup> This social psychology perspective on the dysfunction of the “normal” behavior of all of us is a grand theory, and a theory that may well reflect in part the professional incentives of psychologists to describe the normal behavior of all of us rather than potential differences of some of us.<sup>26</sup>

Ironically, both the extreme view that personality is everything and the extreme view that personality is nothing actually betray a certain pessimism about the ability of individuals to alter the way they negotiate. The personality view suggests people will keep approaching conflict in the same ways, even when they are dysfunctional; likewise, the social psychology emphasis on cognitive errors suggests that we all will tend to repeat the same errors again and again.<sup>27</sup> Of course, there are more and less pessimistic versions of the way individuals may modify their behavior on their own.<sup>28</sup> And neither view is especially negative about the abstract potential of resolving conflict – both simply imply conflict sometimes must be better resolved by calling in additional experts, such as those with some special immunity to cognitive errors through experience or intensive training,<sup>29</sup> those who can function as mediators,<sup>30</sup> or those with reputations for different approaches to conflict.<sup>31</sup> In marked contrast, our view suggests that individuals themselves may be trained in ways to negotiate better by learning how very mild changes in their mood may affect their success at negotiation. Although the exact ways to manage mood depend on further research on exactly how mood affects legal negotiation, we are optimistic in

25. See e.g. Lee Ross, *Reactive Devaluation*, in *Barriers to Conflict Resolution* 26 (Kenneth Arrow et al., eds., W.W. Norton 1995) (hereinafter *Barriers*).

26. Cf. Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science' Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 *Cornell L. Rev.* 313, 397 (2000) (“Academic psychologists may feel tempted to link discriminatory attitudes and behavior to normal behavior because academic psychology rewards those studying mainstream topics more than those studying peripheral phenomena that affect the relatively powerless.”). Nevertheless, negotiation scholarship has been overwhelmingly dominated by social psychology research, which often minimizes differences between individuals. Max H. Bazerman et al., *Negotiation*, 51 *Annual Rev. of Psych.* 279, 303 (2000) (“The psychological study of negotiation was once a subfield of social psychology.”).

27. See e.g. Max H. Bazerman, *Judgment in Managerial Decision Making* 165 (5th ed., John Wiley & Sons 1994) (relatively pessimistic about change because, among other things, “[i]t is far easier to identify a bias while reading a book about decision making than it is to identify a bias when you are in the middle of an organizational crisis”); Leigh Thompson, *A Method for Examining Learning in Negotiation*, 1 *Group Dec. & Negot.* 71 (1992) (People may cling to notion that negotiation involves a zero-sum battle over a fixed pie even after other potentials have been pointed out to them.).

28. Compare e.g. *supra* sources in n. 27 with Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 *Am. Econ. Rev.* 1337 (1995) (mere awareness of bias may sometimes eliminate bias).

29. See Bazerman, *supra* n.27, at 196-97 (expressing doubt that any training may reduce some biases, but suggesting intensive training may work with some); cf. Leigh Thompson, *Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues*, 108 *Psychol. Bull.* 515, 528 (1990) (reporting results of one study that real estate executives with ten years average experience did better at reaching win-win agreements in a bargaining simulation than college students).

30. See e.g. Ross, *supra* n. 25, at 41 (calling on mediators to combat the way that parties discount offers presented by opponents by having a mediator present offers as if they were the mediator’s own).

31. See Gilson & Mnookin, *supra* n. 15.

principle that such mood management may be integrated into law school and other negotiation classes.<sup>32</sup>

Section one first examines studies that show psychology and business school students put in even mildly better moods by a few minutes of music or funny videos do significantly better at negotiation. Section two then suggests ways in which mood might play a different role with lawyers and with legal negotiations. In so doing, we part company with many distinguished scholars who often assume that studies based on non-lawyers and non-legal contexts may translate directly to lawyers and legal contexts, such as settlement negotiations.<sup>33</sup> In part, from the perspective of clinical psychology that emphasizes differences among individuals and the ability of individuals to change their own behavior, we are answering the call from leading scholars and teachers of negotiation to supplement the important contributions of social psychology, which assumes individual differences matter little, with insights from other branches of psychology.<sup>34</sup> Although section two suggests that mood may have *somewhat* different effects on at least *some* lawyers and at least *some* legal negotiations, we expect further research will still show that certain moods also are associated with negotiation success by lawyers in legal negotiations. Section three concludes with a far more preliminary outline of the needs for further research and some promising potential ways that lawyers and others might manage their moods to succeed better at negotiation.

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32. In particular, we are encouraged by the success of various cognitive-behavioral techniques taught in classroom settings, which we think may be incorporated into existing negotiation trainings in law schools and elsewhere. See *infra* text accompanying n. 351.

33. The earliest reports of psychological insights into negotiation typically offered advice to lawyers and others based largely on findings of experiments involving negotiations and other activities involving psychology students. See Robert Mnookin & Lee Ross, *Introduction*, in *Barriers supra* n. 25, at 17 (assuming implicitly that overconfidence bias established in studies of psychology students would translate directly to “[l]itigants deciding whether to go to trial”). Even these early reports, however, sometimes acknowledged that psychological insights might vary with settings. *Id.* at 15 (the discounting of offers presented by opponents compared to the exact proposal offered by neutrals might “operate to different degrees in different negotiation contexts”).

Often, however, studies implicitly assumed psychological insights gathered by experiments involving psychology students would apply directly to law students and lawyers. The most recent book by Mnookin, now head of the prestigious Project on Negotiation at Harvard, discusses psychological barriers to negotiations involving lawyers by citing almost exclusively to studies based on experiments involving those neither lawyers nor law students. Mnookin et al., *supra* n. 10, at 336-38.

Two notable and exemplary exceptions: a careful study by Chris Guthrie, Jeffrey J. Rachlinski, and Andrew Wistrich shows that judges share many of the same cognitive biases as others, including lawyers, but that judges actually show less bias in some areas. Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside The Judicial Mind*, 86 *Cornell L. Rev.* 777, 817 (2001). An earlier study by Chris Guthrie noted the general tendency of individuals to reach agreements that might avoid future regret but noted “some individual litigants are likely to be more susceptible to regret aversion than others.” Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 *U. Ill. L. Rev.* 43, 83 (1999).

34. Bazerman et al., *supra* n. 26.

## I. WHAT WE KNOW SO FAR: MILD CHANGES IN MOOD MEAN SIGNIFICANT DIFFERENCES IN NEGOTIATION SUCCESS

### A. Normal and Mild Moods Matter

The most important aspect of research on how mood affects the way we think and act is that normal and mild moods matter. By *normal moods*, we mean that much current psychology often avoids the sharp dichotomy between “normal” and “abnormal” or “mentally ill” and “mentally well.”<sup>35</sup> Instead, modern psychology often sees many aspects of mental health as resting on a broad kind of continuum.<sup>36</sup> This notion departs sharply from many popular images of the “sane” and “insane.”<sup>37</sup> In part, the emphasis on normal moods is also enhanced by the related emphasis on the presence of positive moods rather than merely the absence of extreme negative moods: emphasis on extreme negative moods like clinical depression focuses by definition<sup>38</sup> on a narrow subset of the population, but an emphasis on the potential for more positive moods can affect all of us. By *mild moods*, we mean that all of us tend to have ups and downs and all sorts of variations in our mood: just as we know we can have a cold without having a brain tumor, we should know we can be feeling somewhat sad without being clinically depressed.<sup>39</sup> That mild and normal

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35. See e.g. Jaihyun Park & Mahzarin R. Banaji, *Mood and Heuristics: The Influence of Happy and Sad States on Sensitivity and Bias in Stereotyping*, 78 J. Pers. & Soc. Psychol. 1005, 1020 (2000) (“ordinary feeling states (transient happy and sad moods) can increase or decrease existing tendencies to rely on stereotypes”). As one study emphasized, “[w]e stress the ordinary nature of the processes under investigation to emphasize that the implications of such results cannot be set aside as reflecting the peculiar actions of a unique group of individuals making unusual decisions. The feeling states we provoked were ordinary, the individuals we studied held beliefs that were ordinary, and the judgments they performed were ordinary.” *Id.* at 1020. We acknowledge that some psychologists differ on how much they emphasize continuum versus divisions such as labeling pathologies; many still refer to the diagnoses codified in the Diagnostic and Statistical Manual. To some extent, many may use such diagnoses to justify treatment to insurers, but may have various degrees of doubt about the diagnoses.

36. See e.g. Theodore Millon & Roger D. Davis, *Disorders of Personality: DSM-IV and Beyond* 7 (2d ed., John Wiley & Sons 1996) (“Personality exists on a continuum. No sharp division exists between normality and pathology.”).

37. See generally Susan Stefan, *Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act* (1st ed., Am. Psychol. Assoc. 2001); Michael L. Perlin, *On “Sanism”*, 46 S.M.U. L. Rev. 373, 374 (1992) (defining sanism as “an irrational prejudice, an ‘ism,’ of the same quality and character of other prevailing prejudices such as racism, sexism, heterosexism, and ethnic bigotry”).

38. For example, depression is often distinguished from the sadness associated with particular events such as death of a loved one; the standard definition for depression excludes those who are very sad if they are only having the sadness typical of one who has lost a loved one. American Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders, DSM-IV-TR, Text Revision* 356 (4th ed., The Assoc. 2000).

39. Some important qualifications apply. First, although mood may be part of a continuum, there may be significant points that correspond to key differences: much as temperature may be continuous but water boils at one temperature and freezes at another, a certain level and duration of sadness may correspond to a distinguishable phenomenon of depression. Second, therefore, some researchers believe that studies of mood in undergraduate psychology students do not map neatly onto generalizations about the nature of serious mental illness. See e.g. James C. Coyne, *Self-reported Distress: Analog or Ersatz*

moods matter means that addressing mood is both important and realistic: important because it has significant effects on results and realistic because it is more plausible for lawyers and teachers of legal negotiation to teach identification and management of mild moods than the wholesale personality re-organization associated with years of therapy.

The notion that mild and normal moods matter is reflected in an entire constellation of psychological studies that show mild mood significantly affects the way people of different professions think and act in a variety of tasks:<sup>40</sup>

1. Physicians in a prestigious medical center reach correct diagnoses significantly faster when they are given a small gift, which presumably puts them in a slightly better mood.<sup>41</sup>
2. Students induced to be in positive moods by reading cards with simple positive statements like “I’m sitting on top of the world” identified significantly more differences and similarities between pairs of television shows than those who read neutral cards or those who read negative cards like “no matter how hard I try things always go wrong.”<sup>42</sup>
3. Children induced to be in a more positive mood came up with more ways to manipulate a stuck candle, a standard test used to measure creativity.<sup>43</sup>
4. Stanford business school students got significantly better negotiation results when they saw a short video – even though the video only increased their self-report mood from a 4 to a 5 on a scale of 1 to 7.<sup>44</sup>
5. Watching a few minutes of funny commercials enhanced the ability of people to remember brand names.<sup>45</sup>

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*Depression?*, 116 *Psychol. Bull.* 29 (1994); Darcy A. Santor & James C. Coyne, *Evaluating the Continuity of Symptomatology Between Depressed and Nondepressed Individuals*, 110 *J. of Abnormal Psychol.* 216 (2001).

40. See e.g. Alice M. Isen, *On The Relationship Between Affect and Creative Problem Solving*, in *Affect, Creative Experience, and Psychological Adjustment* 3, 3 (Brunner/Mazel 1999) (“A growing body of research indicates that positive affect is associated with greater cognitive flexibility and improved creative problem solving across a broad range of settings.”); Thompson, Nadler & Kim, *supra* n. 7, at 141 (mood “influences the way people make judgments, solve problems, remember, and process social information” and “[t]hese processes are all implicated during the course of a typical negotiation”); Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 *J. Pers. & Soc. Psychol.* 565, 565 (1998) (“Despite strong recent evidence for mood effects on many cognitive processes, little is known about how mood affects negotiator cognition and bargaining strategies.”).

41. Alice M. Isen, Andrew S. Rosenzweig & Mark J. Young, *The Influence of Positive Affect on Clinical Problem Solving*, 11 *Med. Dec. Making* 221 (1991).

42. Noel Murray et al., *The Influence of Mood on Categorization: A Cognitive Flexibility Interpretation*, 59 *J. Pers. & Soc. Psychol.* 411 (1990).

43. Terry R. Greene & Helga Noice, *Influence of Positive Affect Upon Creative Thinking and Problem Solving in Children*, 63 *Psychol. Rpts.* 895 (1988).

44. Kramer et al., *supra* n. 3.

45. Angela Y. Lee & Brian Sternthal, *The Effects of Positive Mood on Memory*, 26 *J. Consumer Res.* 115 (1999).

Although there are relatively few studies that look at the role of mood and negotiation exercises specifically, the constellation of studies of the way mood affects a variety of ways of thinking and acting is much larger.<sup>46</sup> These studies illustrate that normal and mild mood matters. They show normal mood matters because the studies involve normal populations such as students and professionals.<sup>47</sup> They also show that mild mood matters because the changes in mood are self-reported as very small and/or involve very mild behaviors designed to have very mild effects on mood. The notion that mild moods matter, particularly mild increases in positive mood, is also consistent with a range of studies of physical and mental health that show how mild improvements in mood may increase a range of physical and mental outcomes.<sup>48</sup> We next turn to the bottom line results that show even mild moods lead to very different success and then turn to the more complex – and largely incomplete – findings on *how* mood leads to different degrees of success.

### *B. The Clear Bottom Line Lesson For Mood and Negotiation: More For “Us” and Sometimes More For Me*

Researchers have examined at least two different kinds of bottom line results. Most lawyers and lay people who think of negotiation success would want to know about how mood affects individual gains: Do I get more if I’m in a good mood or a bad mood? Most studies instead have focused on a less intuitive notion of negotiation success: joint gains. Studies typically measure joint gains by looking at the results one negotiator got with the results the person with whom she negotiated got.<sup>49</sup> In more popular language, scholars look at whether the negotiators created a bigger pie rather than just who got the larger share of the pie.<sup>50</sup>

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46. For useful surveys, see Alice M. Isen, *Positive Affect*, in *Handbook of Cognition and Emotion*, *supra* n. 7, at 521. See generally Joseph P. Forgas, *Feeling and Thinking: The Role of Affect in Social Cognition* 131 (Cambridge U. Press. 2000) (describing latest research and theories of the way that mood influences cognition).

47. Thus, in the context of thinking about how to translate research about mood and negotiation into teaching lawyers and law students about negotiation, the use of ordinary students and professionals in the studies is a strength for our purposes for precisely the same reason that others see it as a weakness in thinking about how to treat persons with severe mental illness. See *supra* n. 39.

48. See *infra* text accompanying n. 298.

49. See Leigh Thompson, *Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues*, 108 *Psychol. Bull.* 515, 517-18 (1990) (describing typical use of sum of individual scores as measure of joint gain).

50. Although there are some controversies about exactly how to measure this joint gain, the basic idea is that scholars look whether negotiators made the best deal possible. See e.g. Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 *Org. Behav. & Hum. Dec. Proc.* 175, 181 n. 2 (1997).

### 1. Consistent Evidence That More Positive Moods Mean More Joint Gains

In terms of such joint gains, the results here are consistently dramatic: Groups of negotiators in a positive mood got significantly larger joint gains than negotiators either in a neutral mood or in a negative mood. Moreover, it required very little to put students in a sufficiently better mood that led to better results: one group of business school students at Stanford saw a funny video,<sup>51</sup> and another group of students got to read funny comics and received a small gift.<sup>52</sup>

### 2. Less Consistent Evidence That Positive Mood Sometimes Means More Individual Gains

The findings on individual gains are far less consistent. Most studies show that positive moods generally are associated with higher joint gains<sup>53</sup> and negative moods with lower joint gains;<sup>54</sup> the same studies often simply show that the moods do not have any significant effect on individual gains.<sup>55</sup>

### 3. Who Cares About Joint Gains Anyway? Will Mood Help Me?!

The lack of evidence for how mood affects individual gains may have less to do with the lack of any genuine effect and more to do with certain features of the ideologies of negotiation scholars. As an ideological matter, many of those who study negotiation seem less interested in advising any given individual to get more of what that individual wants than in some kind of more transcendent goal.<sup>56</sup> Some psychologists who study negotiation seem more interested in studying the basic phenomenon of decisionmaking or how mood affects decisionmaking. Others seem more interested in promoting rational decisionmaking. Among leading scholars in the legal academy, too, there are various ideological tendencies that obscure a focus on the bottom-line for any given individual. It is as if negotiation scholars aspire to

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51. Kramer et al., *supra* n. 3.

52. Peter J.D. Carnevale & Alice M. Isen, *The Influence of Positive Affect and Visual Access on the Discovery of Integrative Solutions in Bilateral Negotiation*, 37 *Org. Behav. & Hum. Dec.* 2 (1986)

53. *Id.*; Kramer et al., *supra* n. 3, at 116-17.

54. See e.g. Allred et al., *supra* n. 50.

55. The only studies to show greater individual gains we identified were Robert A. Baron, *Environmentally Induced Positive Affect: Its Impact on Self-Efficacy, Task Performance, Negotiation and Conflict*, 20 *J. App. Soc. Psychol.* 368 (1990); Forgas, *supra* n. 40. We therefore are more cautious than some in concluding that positive mood is associated with better individual gains. Compare Thompson, Nadler, & Kim, *supra* n. 7, at 141 (citing only an earlier unpublished version of Forgas study to support the proposition that "negotiators in a positive mood who negotiate with negative-mood negotiators achieve a larger share of the resources"). The Allred and Kramer studies simply showed that mood had no effect on individual gain. Allred et al., *supra* n. 50; Kramer et al., *supra* n. 3.

56. For a notable exception, see Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 *Geo. L.J.* 2663 (1995).



be Brandeisian counselors to the situation,<sup>57</sup> with benefits to any given individual secondary. Fisher and Ury describe a good agreement as “wise” and “efficient”;<sup>58</sup> economically trained scholars like Mnookin, now head of the influential Harvard Project on Negotiation, concentrate on the efficiency of solutions.<sup>59</sup> In short, insofar as we look at how others have studied the potential effects of mood and negotiation to extend them to how lawyers and law students may use such research, we are mindful that any research partially reflects the professional incentives and ideologies of those conducting the research itself.<sup>60</sup>

Still, the findings on joint gain may matter even to self-concerned individuals far more than skeptics may intimate. There has long been a controversy in negotiation teaching circles about how much to concentrate on joint gains: some think nearly every negotiation involves some aspect of joint gains,<sup>61</sup> but others take the tougher line that most negotiations really reduce to a fight over a single item, such as money, that both parties want.<sup>62</sup> For the most part, these debates take the form of swapping assertions and anecdotes. Recently, however, a systematic meta-analysis by Leigh Thompson showed that negotiators in studies often do not succeed in identifying the potential for joint gains: in half of all instances, in fact, negotiators fail to harness joint gains.<sup>63</sup> Indeed, very often negotiators do not even realize when their “opponents” want exactly the same thing on a particular issue!<sup>64</sup> This rigorous finding supports the idea that people often fail to identify potential to increase joint gains when they exist, but it still leaves open the much larger and more difficult

57. Cf. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727 (1988) (criticizing lawyers for being enchanted with the ideal of being counselors to the situation by recommending joint custody).

58. Roger Fisher, William Ury & Bruce Patton, *Getting to Yes* (2d ed., Penguin Books 1991).

59. See e.g. Gilson & Mnookin, *supra* n. 15. Some might also read Carrie Menkel-Meadow's emphasis on fulfilling the “needs” of clients in early scholarship in a similar way, but her later scholarship makes clear how highly she values the choice by individual clients about their own values. Compare Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754 (1984) with Carrie Menkel-Meadow, *supra* n. 56.

One might also hypothesize that the emphasis on joint gains makes sense if researchers emphasize mediation by neutrals rather than individual negotiation; the mediator is less concerned with what benefits any particular party. This, however, is the least plausible hypothesis since the overwhelming majority of quantitative and experimental research, such as that on mood and negotiation, is based on studies of individual negotiators, not mediators. See Leigh Thompson & Peter H. Kim, *The Quality of Third Parties' Settlement Solutions*, 6 J. Exper. Psychol.: Applied 3, 11 (2000) (“Negotiation research is empirically based and descriptively rich, but often suffers from lack of formal prescriptive methods; in contrast mediation research tends to be more qualitative, lacking in empirical rigor.”).

60. See *supra* n. 26.

61. See e.g. Menkel-Meadow, *supra* n. 59.

62. See e.g. Gerald B. Wetlauffer, *The Limits of Integrative Bargaining*, 85 Geo. L.J. 369, 369-72 (1996) (arguing that many negotiations end with one party winning at the expense of another).

63. Leigh Thompson & D. Hrebec, *Loss-lose Agreements in Interdependent Decision Making*, 120 Psychol. Bull. 396 (1996).

64. See Leigh Thompson & Reid Hastie, *Social Perception in Negotiation*, 47 Org. Behav. & Hum. Dec. Proc. 98, 114 (1990).

question of just how often and how much such potential joint gains exist outside of academic negotiation studies.<sup>65</sup>

Joint gains may also matter to selfish negotiators for another reason: a party may be more likely to get what she bargained for if the other party also thinks a deal is fair.<sup>66</sup> Again, this is a far more significant issue than might appear at first glance. In many instances, parties may reach an agreement at one point, but the agreement may fall apart later. This is true of both personal and business negotiations. In the more personal context, scores of studies show that divorcing and divorced persons seem to reach an agreement at one point but then return to court when one party thinks the other has not honored the agreement.<sup>67</sup> For the most part, the existing studies on mood and negotiation do not test this because the studies simply look at the way individuals negotiate in a single negotiation session – they do not examine whether individuals actually honor the agreements.

### C. *What We Don't Know As Well:*

#### *How Do Different Moods Lead to Different Negotiation Results?*

Although the studies on the bottom line effects of mood consistently show that positive moods are associated with better negotiation results, it's less clear exactly *how* mood is associated with better results.<sup>68</sup> This “how” question – identifying the *pathway* – is crucial to translating the laboratory findings into practical advice for actual negotiators. For example, if one found that positive mood led to better results because people in positive moods set higher targets<sup>69</sup> – a plausible hypothesis in light of existing research that higher targets are often associated with greater success<sup>70</sup> – one might explore whether one could get others to harness this effect by setting higher targets if they do not feel in as good a mood. On the other hand, if positive mood instead led to better results because people in positive moods showed more interest in the needs of the other side, thus allowing them better to identify potential tradeoffs, one might advise persons not in a good mood to make an extra effort to

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65. The evolving state of the art in negotiation scholarship essentially recognizes that many negotiations involve some potential to create value by making a pie bigger and some possibility for individuals to get larger shares of that pie by claiming more value; the consensus is that some negotiations involve more of one potential than the other. *See e.g.* Mnookin et al., *supra* n. 10, at 42-43.

66. Carnevale & Isen, *supra* n. 52, at 2 (“integrative solutions to conflicts contribute to the long-term stability of relationships”).

67. *See e.g. Dispute Resolution: Negotiation, Mediation, and Other Processes* 154-55 (Stephen B. Goldberg, Frank E.A. Sander & Nancy H. Rogers eds., 2d ed., 1992) (one study found that parties only paid the full amount that courts ordered them to pay in 33.8% of cases, but parties to mediations paid the full amount to which they agreed in 70.6% of mediations); Fisher, Ury & Patton, *supra* n. 58 (discussing durable agreements); Kenneth Kressel, *Frances Butler*, in *When Talk Works: Profiles of Mediators* 17, 56-57 (Deborah M. Kolb ed., 1994) (example of mediated agreement in child custody and visitation dispute requiring further meetings).

68. As one of the leading researchers on the entire field of how mood affects negotiation wrote as late as 1998, “the processes mediating mood effects on negotiation also remain incompletely understood.” Forgas, *supra* n. 40, at 566.

69. *Id.*; Baron, *supra* n. 55.

70. Shell, *supra* n. 19.

ask more questions. Or, if instead positive mood led to better results because other negotiators make greater concessions to people they like, and they like happier people more, one might need to give more complex advice about how to otherwise develop liking behaviors, such as chit-chat designed to personalize a negotiation.<sup>71</sup> So, too, with the somewhat surprising evidence that too much eye contact – long valorized as a sign (albeit not clearly correct) of truth-telling – also decreases joint gain, and positive mood may reduce joint gain.<sup>72</sup> If we accept such findings, then even if we cannot be in a better mood, we can make an attempt to monitor and correct our eye contact.

### 1. Any Given Mood May Have Functional and Dysfunctional Consequences

It is especially important to tease out the effects of mood because given moods may have some functional *and* some dysfunctional consequences. Of course, one simple strategy to tap the potential of mood effects is to put people in situations and moods associated with bottom line success, such as putting people in a happy mood.<sup>73</sup> However, a more ideal strategy would be to have such awareness of the pathways of mood that one might harness potential functional consequences while minimizing less functional consequences.<sup>74</sup> For example, if people in happier moods do better partially by setting higher targets, but they also make more concessions, then one might caution happy people to try to correct the tendency to give in too much, too quickly, and/or too often. Another hybrid approach might be to have people be in one mood for one part of a negotiation and another mood for another part of a negotiation. Suppose, as research below suggests, positive mood makes people more likely to make concessions but also leads them to set higher goals. In such an event, then to the extent one is competing with another for limited resources – a feature of many negotiations – one might want to have the persons initially in a neutral mood so they set low targets for themselves; later one might try to put another in a better mood in order to induce them to make more concessions.

Unfortunately, it is much harder to make empirically-supported generalizations about this area because different studies on mood and negotiation use some very different questions. As one recent article noted, such research has “over-emphasized outcomes and under-emphasized process . . . [and] relied on methods that facilitate

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71. This is also plausible in light of existing research. One study of electronic negotiation showed parties did significantly worse in electronic negotiations. Don A. Moore, *Long and Short Routes to Success in Electronically Mediated Negotiations: Group Affiliations and Good Vibrations*, 77 *Org. Behav. & Hum. Dec. Proc.* 22 (1999). However, when parties in electronic negotiations took the time to find more information out about other negotiators, this negative effect was reduced. *Id.*

72. Carnevale & Isen, *supra* n. 52.

73. See e.g. Baron, *supra* n. 55.

74. We acknowledge that such an ideal strategy may be difficult to accomplish. As discussed in the final section, it is generally very hard to get people to correct for potential defects in perception and reasoning because people may readily over-correct or under-correct. See *infra* text accompanying n. 326.

laboratory study but do not adequately simulate real-world negotiations.”<sup>75</sup> Thus, as we identify pathways below, we often must rely on results from single studies with the obvious qualification that these findings are significantly less reliable than the bottom-line findings described above. Likewise, as we discuss in the next section on questions about the mood and negotiation studies, it is possible that the same moods may have different pathways in different types of negotiations.

Overall, however, the existing studies point to three ways mood may affect negotiation: (1) the setting of goals in negotiation; (2) the nature of the relationship between the negotiators; and (3) the strategies the negotiators use. To summarize briefly: First, parties in more positive moods tend to set higher goals, and high (but “realistic”) goals tend to be associated with better results. Second, parties in worse moods tend to have worse relationships. In general, at least when there is a potential for joint gain, better relationships lead to better deals. Third, negotiators in more positive moods tend to use more cooperative and problem-solving tactics, such as making deals and keeping the deals they make; parties in more negative moods tend to use more threats, make fewer deals, and break the deals they do make. Finally, we consider some other explanations that have less direct support.

Individual studies tend to isolate only one of these particular pathways at a time, but the pathways may very well be understood as interrelated; for example the more one sees a negotiation as having more integrative potential, one may see the relationship differently; or if one sees a relationship as stronger, one may hope there are more tradeoff possibilities to satisfy everyone, and therefore one may try harder to identify them. In addition, as one finds more tradeoffs, this may reinforce the relationship, which in turn may lead to additional searches for tradeoffs.<sup>76</sup>

## 2. Controlled (“Conscious”) Versus Automatic (“Unconscious” or “Preconscious”) Pathways

Before we turn to more specific pathways, it is useful to distinguish another level of different pathways: controlled versus automatic processes (roughly similar to “conscious” and “unconscious” processes.) We use the term automatic or preconscious because both terms have become more popular in recent psychological research and because they better capture the relative ease with which we become aware of such processes. As popular understandings of Freud suggest, it may take months or years to unearth an unconscious motivation.<sup>77</sup> In contrast, automatic or

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75. Leonard Greenhalgh & Deborah I. Chapman, *Negotiator Relationships: Construct Measurement and Demonstration of Their Impact on the Process and Outcomes of Negotiation*, 7 *Group Dec. & Negot.* 465, 482 (1998).

76. For one theoretical account that attempts to link a number of pathways, see Bruce Barry & Richard L. Oliver, *Affect in Dyadic Negotiation: A Model and Propositions*, 67 *Org. Behav. & Hum. Dec. Proc.* 127, 139 (1996).

77. See generally Fiske & Taylor, *supra* n. 7, at 282-83. In one framework, one may distinguish between material that is not within our consciousness for two distinct reasons: (1) we may not be paying attention (“failures of attention”), perhaps because we are preoccupied with other tasks or thoughts versus (2) failure of memory. The earlier Freudian accounts emphasized more the failures of

preconscious information is not at the forefront of our minds, but may become available to most of us by a simple resolution to focus more mindfully.<sup>78</sup> As discussed further below, mood may affect the degree to which one perceives a particular negotiation – often automatically and without any consciousness of this perceptions – as relatively zero-sum or with a relatively wide range of potential trade-offs.<sup>79</sup> Mood may also affect one's more conscious and deliberate choices, such as the degree to which one makes a decision to make a particular opening offer. Both these deliberate and automatic decisions may be related.<sup>80</sup> The more one perceives a negotiation as having the potential for joint gain consciously, the more likely one may automatically choose cooperative and problem-solving tactics to explore joint gain.

This distinction between deliberate and automatic effects is of crucial significance in trying to extend the theoretical research to training lawyers and law students in negotiation. To the extent that mood has certain conscious and predictable effects, one might try either, or both, inducing a functional mood or advising people to try to correct for the absence of the functional mood (and/or presence of a dysfunctional mood). On the other hand, if mood actually triggers less conscious automatic responses, and particularly if it enables certain capacities, then one must try other strategies. One might instead try to induce or maintain certain moods themselves or try to develop various techniques to become more aware of these automatic processes.

With this overview in mind, we can see the evidence of pathways and potential pathways future research could explore.

### 3. Evidence Shows Positive Mood Increases Confidence and Goals

One key finding from Kramer's study of Stanford business school students is that even the very mild mood increase from seeing a short funny video makes students more confident of achieving their goals. Those who saw the funny video

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memory and the more recent work emphasizes failures of attention. Arne Ohman, *Distinguishing Unconscious From Conscious Emotional Processes: Methodological Considerations and Theoretical Implications*, in *Handbook of Cognition and Emotion* *supra* n. 7, at 326 (automatic versus controlled) and 333-34 (failures of attention versus memory).

78. The term mindfulness is used by two related but distinct bodies of research: the psychological mindfulness research associated with Ellen Langer, *see* Ellen J. Langer, *Mindfulness* (1989), and the perspective of Buddhist mindfulness meditation, also sometimes known as "stress reduction mindfulness" and "attentional control." In this paper, we draw on the tradition of mindfulness meditation. *See also infra* text accompanying n. 355.

79. Joseph P. Forgas, Robert Johnson & Joseph Ciarrochi, *Mood Management: The Role of Processing Strategies in Affect Control and Affect Infusion*, in *Personal Control in Action: Cognitive and Motivational Mechanisms* 155, 156 (Miroslaw Kofta, Gifford Weary & Grzegorz Sedek eds. 1998) ("managing our affective states is a continuous, subtle and frequently subconscious process in which people selectively search for and use information in ways that help them to calibrate their moods, and typically do so without any conscious awareness of these strategies").

80. Forgas makes a similar distinction between informational effects, such as when mood "colors" the way people perceive information, and processing effects, such as "when mood influences how people think." Forgas, *supra* n. 40, at 566.

generally reported they were much more likely to achieve their goals.<sup>81</sup> Exactly why the students expected to achieve their goals was less clear. Positive mood alone did not predict higher goals. Those in a positive mood who also had higher self-esteem, however, expected the other side to have significantly lower goals.<sup>82</sup> This also explains why such high self-esteem students who saw the video would have higher expectations: they expected the other side not to try to get as much. Because the study did not record actual negotiations, or attempt to code them as they occurred, we cannot be sure what other effects positive mood may have had. One might hypothesize that one way the greater expectations to increased persistence;<sup>83</sup> as both parties stuck to their high goals, they may then have looked harder for the tradeoffs that would let them both get closer to their goals.

#### 4. Mood, Relationships, and Information: Negative Moods Hinder Relationships and Ability to Identify the Interests of Others

Negotiation scholars have long emphasized that the relationship among negotiators may affect results, and research suggests one pathway for mood may be its effect on relationships. One study suggests that anger hurts joint gains without making any individual better off. Allred<sup>84</sup> tested anger by comparing two groups of organizational psychologists who performed a simulated job negotiation. To test for the effects of anger, one group was given instructions that led them to be angry with one another: the prospective employee was told that having a computer was an important status symbol, and the employer gave out better computers to new employees it valued most.<sup>85</sup> The employers in this condition received very different instructions that the firm generally did not like giving out such “ostentatious fringe benefits” and, more significantly, the failure to give such a computer did not indicate lack of regard for the employee but rather “respect” that the individual was willing to “sacrifice for the good of the firm as a whole.”<sup>86</sup> As predicted, those in the pair that received these conflicting instructions indeed said they were more angry with the other person.<sup>87</sup> In addition, they said they were less compassionate, consistent with Allred’s hypothesis that the combination of more anger and less compassion

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81. Kramer et al., *supra* n. 3. Research in other areas also suggests that persons in better moods set higher goals on other tasks as well. See e.g. Baron, *supra* n. 55 (persons who did filing and sorting tasks in rooms with pleasant scents expected to complete more sorting than those in rooms with no such added scents).

82. Kramer et al., *supra* n. 3.

83. Charles S. Carver & Michael F. Scheier, *On the Self-Regulation of Behavior* 180–81 (Cambridge U. Press 1998) (“If expectations of success are sufficiently positive, the person returns to efforts toward the goal. If expectations are sufficiently negative, the result is an impetus to disengage from further effort, and, potentially to disengage from the goal itself.”).

84. Allred et al., *supra* n. 50.

85. *Id.* at 179.

86. *Id.* at 179.

87. *Id.* at 182.

explained more than anger alone.<sup>88</sup> In terms of bottom lines, the joint gains were less in groups that were angrier and less compassionate.<sup>89</sup>

Moreover, Allred was able to identify how this high anger/low compassion led to worse results: angrier negotiators did not understand what the other side wanted.<sup>90</sup> Allred tested for this by asking each negotiator to try to guess the priorities and incentives of the other side.<sup>91</sup> This was a simple mechanical matter in the study because each side received a chart of how many points they got for each possible item, such as how many points for each salary level, each type of computer, and so on.<sup>92</sup> Like many negotiation studies, and at least some negotiations, parties both wanted to win equally on some items (such as salary), agreed completely on others, and differed but with different priorities on other items.<sup>93</sup> The key to joint gains was the ability to realize when each side wanted the same thing and to make tradeoffs between getting more on items that mattered more to one side and less to the other.<sup>94</sup> Thus, the bottom line that the angry negotiators got fewer joint gains was consistent with the less accurate identification of the interests of the other side.<sup>95</sup> Allred also found the angrier negotiators did not do any better for themselves either.<sup>96</sup>

## 5. Mood And Tactics: Research Shows Positive Moods Promote Collaboration and Cooperation; Negative Moods Promote Competition and Lying

Research also shows that mood not only affects how people choose their mix of relatively cooperative tactics (such as making deals), but also relatively competitive tactics (such as lying).<sup>97</sup> Just as the studies that show how mood specifically affects negotiation results are consistent with a larger constellation of studies that show how mood affects a variety of other activities, a large number of studies show that people in more positive moods tend to be more cooperative, and people in negative moods

88. *Id.*

89. *Id.* at 183-84.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 179 (showing exact payoff schedule with points each side would earn for each outcome on each item, such as salary, type of computer, etc.). See generally Thompson, *supra* n. 49.

94. Allred et al., *supra* n. 50, at 183 ("more accurate judgments of the other party's interests by both employers and employees led to greater joint gains"). See generally Leigh Thompson, *Information Exchange in Negotiation*, 27 *J. Exper. Soc. Psychol.* 61 (1991) (when parties knew more about the goals of the other side, then they were more likely to identify tradeoffs and increase joint gain).

95. A related pathway suggested by other research is that those in a positive mood are more likely to exchange more information. Thompson, Nadler & Kim, *supra* n. 7, at 143 (citing Carnevale & Isen, *supra* n. 52).

96. Allred et al., *supra* n. 50, at 184.

97. Most negotiation theorists and teachers reject the single contrast between cooperation and competition. Instead, most recognize and endorse strategies that involve problem-solving that tries to identify agreements that meet the needs of all parties. See e.g. Fisher, Ury & Patton, *supra* n. 58 (rejecting contrast between "soft" and "hard" tactics). Many also adopt some version of the Thomas-Kilman measure of conflict resolution, which includes styles not just of cooperative, competitive, and problem-solving (collaborative) but also avoidant and accommodating (giving in to the demands of others). See e.g. Barsky, *supra* n. 20, at 42; Shell, *supra* n. 19.

tend to be more competitive.<sup>98</sup> One early study showed that persons placed in a slightly higher mood because of the pleasant scent from an air freshener were less likely to resolve future conflicts through either competition or avoidance.<sup>99</sup>

Forgas extended these general findings to the specific context of negotiation in a series of experiments. In each experiment, Forgas manipulated the mood of some students by providing them with false feedback on tests supposedly unrelated to the negotiation experiments.<sup>100</sup> To put one group in a better mood, he gave them a relatively hard test, but said they were not expected to finish.<sup>101</sup> To put another group in a bad mood, he gave the same test, but said the test was easy, and they should finish many problems.<sup>102</sup> As expected, when asked about their moods, those in the negative group reported they were in a worse mood than a control group, and those in the positive group indicated they were in a better mood.<sup>103</sup> The groups of psychology students then engaged in a series of negotiations in small groups and larger groups to pick the classes to be required for their department; each student was told to try to get a certain course selected.<sup>104</sup> To some extent, the negotiation had features of a competitive scenario since one could test how often an individual succeeded in persuading others to pick her course as part of the required courses. At the same time, the negotiation also had potential for win-win solutions since several (though not all) courses could be picked.

The first key conclusion was that better moods predicted better individual success. Those in the better mood group more frequently persuaded others to pick their courses than those in the control or the negative mood group.<sup>105</sup> In short, those put in a good mood did better than those in their natural mood state; those put in a more negative mood did worse than others.

The second conclusion focused on how tactics were associated with success. Those in a better mood were generally more likely to say that they would (and did)<sup>106</sup> make deals with others, such as one promising to vote for the course of another if the other would reciprocate.<sup>107</sup> In addition, those in the better mood were more likely

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98. See Forgas, *supra* n. 40.

99. Baron, *supra* n. 55, at 377.

100. Forgas, *supra* n. 40.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Unfortunately, the study relied simply on asking people to report in advance of negotiations what tactics they intended to use, and then asking them afterwards about the tactics that they in fact did use. There was no independent confirmation that individuals indeed used the tactics they said they used. Forgas acknowledges that his proposed model in terms of "mood induced influences on cognitive strategies as predicted . . . would benefit from further confirmation that more directly assesses actual processing strategies." Forgas, *supra* n. 40, at 576. One may be skeptical of such reports since there is some evidence that there is a gap between how individuals describe the way they negotiate with the way that independent observers say they negotiate. See e.g. Leigh Thompson, *They Saw A Negotiation: Partisanship and Involvement*, 68 J. Pers. & Soc. Psychol. 839 (1995).

107. *Id.*



to report that they honored the deals they made.<sup>108</sup> In contrast, those in the negative mood were more likely to say they planned to threaten others (and did), and they planned *not* to honor whatever deals they said they would make.<sup>109</sup>

#### 6. Mood and Compliance: Research Shows People in Positive Moods Say They Will Honor Their Agreements

This research on honoring deals is especially significant because many deals outside the laboratory fall apart when one party does not comply. Therefore, one pathway that deserves study is whether positive mood itself increases the likelihood that parties will comply with an agreement reached in negotiation.<sup>110</sup> Supporters of alternative dispute resolution (ADR) often claim that ADR is more efficient than other ways to resolve disputes because parties participate more directly in resolving their own conflicts. A cottage industry of empirical literature has provided mixed support for this notion by examining a variety of mediation programs. In one study, when courts ordered someone to pay money, people paid the full amount in only 33.8% of cases, but 70.6% of people paid the full amount when they agreed to do so in mediations.<sup>111</sup> At the other end of the legal spectrum, one study showed one-third of complex mergers and acquisitions fall apart after agreement.<sup>112</sup>

Finally, Forgas found the mood of one set of negotiators mattered even if those with whom they negotiated were in a different mood. Thus, even when those in a more positive mood negotiated with those who were in a more negative mood, the ones in the more positive mood were still likely to do better.<sup>113</sup> Again, this is an especially significant finding since prior studies had simply compared how all those negotiating with others in the same mood, such as angrier people with other angrier people.<sup>114</sup> These earlier studies may have implications for the way that neutrals, like mediators, may try to foster certain moods, but they had more limited applications

108. *Id.*

109. This finding is supported by another study of business school students that also showed a relationship between negative mood, as reported by students, and their reported use of various contentious tactics. Leonard Greenhalgh & Deborah I. Chapman, *Negotiator Relationships: Construct Measurement and Demonstration of Their Impact on the Process and Outcomes of Negotiation*, 7 *Group Dec. & Negot.* 465, 481 (1998).

110. Bruce Barry & Richard L. Oliver, *Affect in Dyadic Negotiation: A Model and Propositions*, 67 *Org. Behav. & Hum. Dec. Proc.* 127, 138 (1996). ("We know of no empirical research in the social psychology of negotiation that has explicitly addressed post-settlement compliance."). We note that Barry and Oliver propose a slight variation on this theme: they theorize that the fairness of an agreement will lead to positive emotion that will in turn lead to compliance. *Id.* at 138-39. As expressed, however, this seems to be more a statement about the effect of fairness than about the effect of mood itself.

111. Stephen B. Goldberg, Frank E.A. Sander & Nancy H. Rogers, *Dispute Resolution: Negotiation, Mediation, and Other Processes* 154-55 (2d ed., Little Brown 1992).

112. See Ronald J. Gilson & Bernard S. Black, *The Law and Finance of Corporate Acquisitions* 1566 n.14 (Found. Press 1995).

113. Forgas, *supra* n. 40.

114. See Forgas, *supra* n. 40 (explaining prior studies paired people in a similar mood).

for how any individual might enhance his<sup>115</sup> own success simply by working on his own mood.<sup>116</sup>

#### 7. Disadvantages of Positive Moods: Some Research Shows Positive Moods Predict More Concessions, and Some Theories Predict Sloppier Reasoning and Less Persistence

Despite substantial evidence that positive moods predict negotiation success – and despite evidence of several ways it enhances the negotiation process – other research and theories suggest positive mood may also lead to less functional tactics. First, those in positive moods may make more concessions. The most direct evidence comes from Baron's study of psychology students he induced into a slightly positive mood (an average of 5.38 rather than 5.02 on a scale of one to 7) by exposing them to room fresheners in their negotiating rooms.<sup>117</sup> In a series of negotiations over how to allocate cuts in personnel, and how to allocate budget cuts, those in the pleasant scented rooms made significantly more concessions.<sup>118</sup> Second, those in positive moods may think they did significantly better than they actually did. The most direct evidence comes from Kramer's finding that those induced to a slightly elevated mood by watching a five minute funny video of Apple's founder Steve Jobs thought they did significantly better than they actually did.<sup>119</sup>

In addition to such direct evidence in negotiation studies, there is a lingering theoretical dispute among leading scholars of mood and cognition generally about how positive mood may be dysfunctional in some instances. At one end of the debate, Forgas maintains that positive mood not only makes persons more cooperative, but also leads them to use relatively simplistic strategies rather than more complex strategies.<sup>120</sup> Under Forgas's model, when we are happier, we automatically resort to such strategies without necessarily any awareness or

115. We use the male pronoun advisedly here to deliberately counter the stereotype that only women are emotional. See generally Clark Freshman, *Were Patricia Williams and Ronald Dworkin Separated at Birth?*, 95 Colum. L. Rev. 1568, 1590-91 (criticizing Richard Posner for explaining women's writing by their psychology, but not so pathologizing male authors).

116. In principle, individuals, like mediators, might try to modify the moods of others. See Thompson & Kim, *supra* n. 59. However, we remain skeptical of the ability of individuals, particularly in more adversarial settings like settlement of pending lawsuits, to modify the mood of those they may readily see as their opponents. In particular, since much research shows the value of positive moods, we wonder how well negotiators may make those who view them as opponents feel in a more positive mood.

117. Baron, *supra* n. 55, at 377.

118. *Id.* at 379.

119. Kramer et al., *supra* n. 3. Baron also found that males exposed to a pleasant scent – but not females so exposed – thought they did better at a coding task. Baron, *supra* n. 55, at 375. Unfortunately, it is not easy to compare as neatly how well this perception matched reality. First, the measure of success was ambiguous. *Id.* at 376 (“exposure to pleasant scents increased subjects’ use of *what can be viewed as* a relatively efficient strategy of task performance”) (emphasis supplied). Where Kramer's study allowed direct comparison of how many points students got and how many they thought they got, Baron offered only a self rating on a scale of how well students thought they did and no corresponding quantifiable measure of success. *Id.*

120. Forgas, *supra* n. 40 (discussing his affect infusion model).

consciousness.<sup>121</sup> There is some empirical support for this often dysfunctional aspect of positive mood in a variety of areas, including a very troubling tendency for even very mild increases in positive mood to lead to *greater* reliance on racial stereotyping.<sup>122</sup> Such evidence is especially important for negotiators from various outgroups to consider since research suggests that stereotyping – such as the stereotype that women do not like to negotiate – may be associated with the relatively poor results women and other outgroups obtain in various studies.<sup>123</sup> In a related way, those in positive moods may have less motivation and therefore slack.<sup>124</sup> At the opposite end of the debate, Isen insists there is little empirical evidence that positive mood is associated with any such dysfunctional effects.<sup>125</sup> These theoretical concerns, however, have potentially serious consequences for many negotiations. Take first the notion that those in positive moods engage in relatively simple strategies. Research shows that simple strategies do not work well: often people will suggest the simple strategy of “splitting the difference” between what they want and what they think another person wants. This is dysfunctional and inefficient when others may want exactly the same thing or may have preferences that are complimentary (they care more about some issues than others).<sup>126</sup> In addition, it may be dysfunctional if people split a difference between their first offer and another’s arbitrarily high/low offer; a car buyer who splits the difference between his offer and what sticker the used car dealer first puts on the car may pay too much.<sup>127</sup> There is some indirect evidence of this from a study that looked at exactly this scenario: pairs negotiated over prices of three different commodities

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121. *Id.*

122. Park & Banaji, *supra* n. 35, at 1020.

123. Kolb & Williams, *supra* n. 21.

124. In a related, but somewhat distinct way, Carver and Scheier theorize that people may “coast” in one activity once they meet their goals so that they can devote resources to another distinct domain of activity:

People who exceed the desired rate of progress should slow subsequent efforts in this domain of behavior. They’ll “coast” for a while. The result in the person’s subjective experience would be that the positive affect from the overshoot isn’t sustained for very long... Why should there be a built-in tendency to cause positive feelings to be short-lived? A plausible basis can be found in the idea that behavior is hierarchically organized, with multiple current concerns. People typically are working towards several goals more or less simultaneously. To the extent that movement toward goal attainment is more rapid than expected in one domain, it lets the person shift effort toward strivings in another domain, at no cost. To continue an unnecessarily rapid pace in the first domain may increase positive affect, but by diverting efforts from other goals it may create the potential for negative affect in other domains.

Carver & Scheier, *supra* n. 83, at 130-31.

125. Isen, *supra* n. 46, at 522 (positive mood “is not usually found to be disruptive or impairing of thought processes, as many people may assume would be true of any emotion’s effect on organized cognitive functioning or complex cognitive processing.”).

126. See *supra* text accompanying n. 63.

127. See Shell, *supra* n. 19.

when each cared about one more than the other two.<sup>128</sup> The best strategy was to figure out these preferences and then get the most of the preferred commodity and compromise the most on the commodity that mattered the least.<sup>129</sup> Instead, those pairs that were romantically involved simply split the difference.<sup>130</sup> One interpretation is that romantic couples were in a positive mood that led them to the simpler strategy of splitting the difference.<sup>131</sup>

So, too, less motivation may also be dysfunctional. Those who try less may not get better results. This is particularly significant because some research suggests that parties in some disputes may obtain important results simply by asking: in one famous study of tort disputes, most of those who made any demand at all got that demand met.<sup>132</sup> We may assume a car salesperson does not want to sell us a stick shift because it is the last one on the lot, but the car salesperson may instead be quite anxious to unload the car because only a tiny minority of current drivers even know how to drive stick, let alone want to!

Finally, even the innocuous finding that individuals in positive moods think they did better than they did may have negative implications. This is particularly true for negotiations that involve multiple rounds and negotiators who engage in the future negotiations. On the one hand, the sense of past accomplishment may serve as incredibly powerful support for future positive moods,<sup>133</sup> thereby lending to those future negotiations the bottom line beneficial effects associated with positive mood. However, the inaccurate sense of one's level of accomplishment may also reduce performance in future negotiations for at least two reasons.

First, persons who think they have done better than they did with the same negotiator may make more future concessions to the negotiator out of a sense of fairness. This may reflect the well-known reciprocity effect where persons, in negotiation and otherwise, tend to feel that if one person has done something, such

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128. William R. Fry, Ira J. Firestone & David L. Williams, *Negotiation Process and Outcome of Stranger Dyads and Dating Couples: Do Lovers Lose?*, 4 *Basic & Applied Soc. Psychol.* 1 (1983).

129. *Id.*

130. *Id.*

131. We acknowledge a number of other interpretations. Perhaps the couples adopted the simpler strategy because the payoff of getting a better strategy in an experiment was less than the alternative of spending more time together in some more enjoyable activity. Max H. Bazerman, *Smart Money Decisions* 61-62 (John Wiley & Sons 1999); cf. John Hammond, Ralph L. Kenney & Howard Raiffa, *Smart Choices: A Practical Guide to Making Better Decisions* 221 (Harv. Bus. School 1999) (sometimes it is efficient to make a decision quickly on available information). Or perhaps the couple understood the abstract inefficiency but thought the norm of pure equality on all terms best. Cf. Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 *Wm. & Mary L. Rev.* 145 (1998) (people may not negotiate for premarital agreements because it seems unromantic).

132. See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *L. & Society Rev.* 525, 537 (1980-81).

133. Both theory and psychological research suggests that one of the best ways to put people in a good mood is to have them recall a similar experience in which they felt good and/or did well. See e.g. Aaron Beck et al., *Cognitive Therapy of Depression* 99 (Guilford Press 1979).

as having made a concession or shared certain information, then they should reciprocate by a similar move.<sup>134</sup>

Second, from a motivational perspective, persons who think they have done well in a certain negotiation may have already satisfied their own sense of their bottom-line expectations and therefore try less hard later. For example, the music lawyer who thinks he got a great deal on the term of a recording agreement may press less hard later on the issue of residuals for other kinds of media; the district attorney who thinks he got a great deal with the local public defender on one set of defendants may be less motivated to press hard on the next set of defendants. In our classes, we have often directly observed such effects. In one instance, we asked a student why she pressed only for delivery of a small percentage of some goods by a target date rather than all, and she replied that she was so glad that she had gotten such a good price she did not want to push too hard.

It is especially important to remember that the absence of direct evidence about how positive mood hinders negotiation may reflect features of the prior studies themselves rather than some failure of proof. First, many studies simply look at bottom-line effects rather than looking at what actually happens in a negotiation. This is understandable because the cost of recording negotiations and the cost of coding those negotiations may be high in time and money. However, it masks the possibility that some functional consequences, such as high goals and likeability, may be offset by quicker concessions. Second, the dysfunctional effects of positive mood may not kick in until high levels of positive mood, but the increases in positive mood studied are relatively limited.<sup>135</sup> Again, this is understandable since the ability to produce large enough pools of people in a very high mood by legally permissible means is also limited.<sup>136</sup> Third, many of the studies simply look at a single negotiation rather than a series of negotiations over an extended period of time, such as the series of small negotiations that may characterize many lawsuits.

To put the skepticism about positive moods in some perspective, one might adopt at least two possible frameworks in lieu of the simple "be happy" emphasis on positive mood. The simpler approach would be to hypothesize (and test) that positive mood promotes some functional activity up to a point, but then may be counterproductive. Another possibility, suggested by emotion research in other areas, is to emphasize the balance of negative and positive emotion. Therefore, the best negotiators may have a certain balance of positive and negative emotion. In

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134. See e.g. Michael D. Large, *The Effectiveness of Gifts as Unilateral Incentives in Bargaining*, 42 *Sociol. Persp.* 525, 538 (1999) (those given gifts tended to make more concessions in other areas based on the perception of the cost of the gift).

135. See Baron, *supra* n. 55, at 380 (positive mood induced by scents may not have had the predicted effect, based on prior studies, of increasing collaboration and compromise, because the increase in positive mood was not very large).

136. We exclude the notion of giving large portions of psychotropic drugs like ecstasy.

other areas, researchers have developed this idea to such an extent they hypothesize exact ratios, such as five times as many positive thoughts as negative thoughts.<sup>137</sup>

#### 8. Potential Role: Mood, Persistence, and Bargaining Intensity

One theoretically fruitful area for future research is how mood affects persistence and bargaining intensity. Existing research points to two potential kinds of persistence and bargaining intensity. First, there is the question of how people translate their initial goals into what they actually do in a negotiation. Surprisingly, people tend to ask for significantly less in a negotiation than what they reported as a goal. In one study, participants asked for only between 59% and 68% of their goal.<sup>138</sup> We hypothesize that various kinds of mood and personality may well affect how closely people match what they ask for with their reported goals. Like others, however, we expect the relationship may be complex.<sup>139</sup> We agree that positive mood may well be associated with asking for something closer to one's goal. However, we also think it is worth investigating whether certain types of negative mood also predict higher goals as well. Some research shows depressed persons may indeed set high goals because only high success seems to offer hope of lifting them out of depression.<sup>140</sup>

A second related variable also involves the question of persistence, the movement of offers within a negotiation. We like the notion of persistence one of our law school negotiation students shared with us from her years as a real estate

137. See e.g. Robert M. Schwartz, *The Idea of Balance and Integrative Psychotherapy*, J. Psychotherapy Integ. 159, 164 (1993) ("normal individuals strive to maintain an optimal balance of positive and negative cognitive/affective information, and deviations from this balance are associated with psychopathology").

138. See Barry & Oliver, *supra* n. 76, at 134.

139. We agree that *one* factor may be whether the source of the positive affect comes from the relationship, which may lead parties to pick reasonable demands, or from outside the relationship, which may lead them to pick high targets. See Barry & Oliver, *supra* n. 76, at 134. However, as discussed in the text, we suspect other complexities as well.

140. See Julie L. Tillema, Daniel Cervone & Walter D. Scott, *Negative Mood, Perceived Self-Efficacy, and Personal Standards in Dysphoria: The Effects of Contextual Cues on Self-Defeating Patterns of Cognition*, 25 Cog. Therapy & Res. 535 (2001); Daniel Cervone, Deborah A. Kopp, Linda Schaumann, & Walter D. Scott, *Mood, Self-Efficacy, and Performance Standards: Lower Moods Induce Higher Standards for Performance*, 67 J. Pers. & Soc. Psychol. 499 (1994). Ironically, although persons in negative moods may set higher goals, such persons did not *think* they did better:

The present results indicate that negative mood can induce higher personal standards for performance and thereby create negative discrepancies between the performance standards people adopt and the level of performance they judge they actually can achieve. Across a variety of measures in three studies, subjects exposed to negative mood inductions felt they would have to achieve relatively higher levels of performance to be personally satisfied with their attainments. The mood inductions consistently had no effect on perceived self-efficacy. Thus, subjects in a negative mood held minimal standards for performance that significantly exceeded the level of performance they judged they could attain.

*Id.* at 507.

agent: "If you haven't asked five times, then you haven't asked."<sup>141</sup> Negotiation researchers have translated this into the idea of bargaining intensity, typically how many times individuals ask for better terms.<sup>142</sup> In many instances of actual negotiation, for example, bargaining intensity may be zero, such as the way relatively few persons translate their sense of discrimination into a claim for damages.<sup>143</sup> In many other instances, bargaining intensity may be one because initial offers are accepted, such as the case with many simple auto injury cases.<sup>144</sup> In law school negotiations and other actual negotiations we have observed, the intensity varies considerably.

It is unclear exactly how mood translates into such intensity. In the simplest case, one might associate certain kinds of depressive tendencies with low bargaining intensity since a sense of hopelessness and helplessness is typical of many instances of depression;<sup>145</sup> many people who, although they may not meet the strict and extreme criteria for clinical depression, may have greater degrees<sup>146</sup> of depressive personalities.<sup>147</sup> One early negotiation and mood study showed those induced to be in a better mood by reading cartoons asked for more responses to their offers and proposed more alternatives.<sup>148</sup> Some research in other areas shows that positive mood also leads to greater persistence in other non-negotiation tasks.<sup>149</sup> Another possibility builds on evidence that people in better moods think good things are more likely to occur.<sup>150</sup> Various negotiation theories suggest people should<sup>151</sup> and do<sup>152</sup> base decisions on what they believe their alternatives are. Therefore, because positive moods make people think positive events are more likely, they may think their alternatives are better and they will set and pursue higher targets – or walk away to take advantage of a better alternative.

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141. We are grateful to our student, Leigh McDonald, for this quotation from her years of real estate sales.

142. See e.g. Herbert M. Kritzer, *The Form of Negotiation in Ordinary Litigation* 18 (U. of Wisconsin-Madison Disputes Processing Research Program Working Paper Series 7, No. 2, 1985).

143. See *supra* n. 132.

144. Compare *supra* n. 142, at 18 (more tort cases involved high bargaining intensity than other cases) with *supra* n. 132 (many tort cases involved a defendant simply accepting the first demand).

145. See e.g. Lauren B. Alloy et al., *The Temple-Wisconsin Cognitive Vulnerability to Depression Project: Lifetime History of Axis I Psychopathology in Individuals at High and Low Cognitive Risk for Depression*, 109 *J. Abnormal Psychol.* 403 (2000).

146. See *supra* text accompanying n. 36 (personality exists on a continuum).

147. See Millon & Davis, *supra* n. 36, at 287 (describing the depressive personality as "[t]he giving-up pattern"). *Id.* at 306 (some depressive personalities may feel especially "incapable of coping" but other depressives may have "sufficient feelings of competence and self-worth to enable them . . . to believe that they may ultimately cope with the difficulties they experience").

148. See Carnevale & Isen, *supra* n. 52.

149. Alice M. Isen, *On the Relationship Between Affect and Creative Problem Solving, Affect, Creative Experience and Psychological Adjustment* 3, 4 (S. Russ ed., 1999).

150. See William F. Wright & Gordon H. Bower, *Mood Effects on Subjective Probability Assessment*, 52 *Org. Behav. & Hum. Dec. Proc.* 276, 281 (1992).

151. See Fisher, Ury & Patton, *supra* n. 58 (discussing idea that negotiators should make decisions based on their best alternative to a negotiated agreement).

152. See Shell, *supra* n. 19, at 99-105 (discussing the importance of shaping what others believe their alternatives to be).

## 9. Potential Role: Positive Mood May Increase Creativity In Negotiation

In principle, mood might automatically affect goals and tactics by increasing creativity. In particular, mood might make it more likely that individuals identify more complex kinds of relationships, such as tradeoffs, rather than pursuing relatively simple strategies, such as taking the middle position on a variety of topics. In a number of studies, for example, researchers found those in positive moods better able to identify relationships between words; from such studies research developed the often-cited broader generalization that positive mood increases “cognitive flexibility” and “creativity.”<sup>153</sup> In principle, this same kind of automatic effect might make individuals more likely to identify the possibility of tradeoffs or other creative solutions.

Existing studies of negotiation, however, do not let us test this pathway directly. Instead, as we will see, studies compare how often individuals reached tradeoffs not how often they identified the possibility of such tradeoffs. Thompson developed a sophisticated methodology to ask students after a negotiation to identify what they thought the exact goals of the other side were, and at least one other study used a similar method.<sup>154</sup> Such a method lets us see whether people in different moods understand the different needs of other sides; knowing this is a step toward identifying gains to be made by trading on such differences. However, such research does not test whether individuals recognized that such tradeoffs were a desirable possibility. One way future research might test more directly for how mood affects such perceptions would be to ask individuals to identify potential solutions to a negotiation at various stages in a negotiation process, such as the beginning of a negotiation, the middle, and the end. Such research should also consider the possibility that mood enhances the speed at which individuals identify the potential for such tradeoffs since other mood research suggests mood may affect the speed of diagnosing problems.<sup>155</sup>

## 10. Potential Role: “Mood” May Trigger Thoughts and Schemas

The last potential pathway for mood is the most complicated, but potentially the most significant for helping us translate laboratory research into practical advice for negotiators: existing studies may, at least in part, prove not that mood affects negotiation but rather that certain “mood inductions” really trigger certain patterns of thought. If this is true, then the studies do not suggest that negotiators, mediators, and others should seek to promote certain moods, or to deploy negotiators who

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153. See Isen *supra* n. 46 at 530-32. One interesting explanation for the biological basis to positive mood and creativity concerns dopamine, a neurotransmitter. Isen and others theorize that dopamine, associated with positive mood, may facilitate creativity. There is some support for this theory in the way that persons with Parkinson’s, caused by a decrease in dopamine, do less well on some tests of creativity. *Id.* at 531.

154. See Thompson, *supra* n. 94; Allred et al., *supra* n. 50.

155. See Isen, Rosenzweig & Young, *supra* n. 41 (physicians given a small gift, and presumably placed in a better mood, reached a correct diagnosis faster than other physicians).



exhibit those moods; at one extreme, the “moods” are just a sideshow, and the real work is in the way particular mood inductions trigger particular thought patterns.

To see exactly how “mood” might be a sideshow to cognitions, we need to carefully examine the existing studies. First, take the claim by Allred that “anger” reduces accuracy in identifying the incentives of others, thereby reducing the ability to make tradeoffs and negotiate better. Recall that Allred induced anger and lack of compassion by giving inconsistent instructions to pairs of students playing employers and employees.<sup>156</sup> Researchers told employees they should expect a good computer, but researchers told employers that potential employees would not want such a computer.<sup>157</sup> Of course, one effect of this is no doubt that students report greater anger and less compassion. However, a more important effect left unexplored is that these inconsistent instructions led individuals to mistrust each other quite rationally: each side believed the other was acting inconsistent. Therefore, each side reasonably discounted everything the other side said.

This alternative explanation suggests “anger” might not have similar effects in other negotiations. First, research in cognitive clinical psychology suggests some individuals are likely to develop mistrust more quickly. According to the schema<sup>158</sup> theory of Jeffrey Young, some individuals develop a schema of mistrust early in life through crucial experiences, and they are more likely to develop mistrust than other individuals.<sup>159</sup> We have not identified any existing research that tests whether law students and lawyers have higher incidences of such mistrust schemas, but we think it is plausible they do. In particular, we suspect the critical thinking associated with law school, and the skepticism engendered by the adversarial way advocates selectively disclose information may make law students and lawyers be more mistrustful generally. Our current research measures both the relative scores on schema scales for law students and the change in these measurements during law school. Second, the more that mistrust rather than pure anger explains the results,

156. See *supra* text accompanying nn. 85-87.

157. *Id.*

158. Various other definitions of schemas exist as well:

The term schema has been used by different researchers and theorists in different contexts with different degrees of precision. This has led to considerable confusion and lack of specificity in the use of the term. However, some common specific criteria are emerging. These are that a schema: (1) is a stored body of knowledge with which incoming information interacts; (2) has a consistent internal structure that organizes incoming information in a particular fashion; (3) embodies generic prototypical information such that specific instances are processed using the appropriate schematic prototype to impose structure; (4) and finally that it is modular in nature such that the activation of any part will tend to produce activation of the whole.

Laura Rice, Robert Elliot & Leslie S. Greenberg, *Facilitating Emotional Change: The Moment-To-Moment Process* 46 (Guilford Press 1993). Although various distinctions are of interest to other research, they are not especially important to our main point here: different experiments that purport to test an emotion, such as anger, may activate a schema, such as mistrust. Therefore, the emotion from other sources, which do not activate this schema, may have different consequences.

159. Jeffrey E. Young, *Cognitive Therapy For Personality Disorders: A Schema - Focused Approach* 72 (Prof. Resource Press 1990).

the less likely that negotiators who are angry for other reasons may show similar results. For example, the lawyer who runs a red light on the way to a negotiation, or gets a call from a difficult client on the way, may experience anger, but may have none of the mistrust associated with Allred's study.

A close examination of Forgas's study also suggests that certain cognitions about competence play more of a role than happiness or sadness. Again, recall the exact way Forgas manipulated mood: he made one group happier by giving them an easy test and saying they did well on a hard test, and he made one group sadder by telling them they took an easy test but did very badly.<sup>160</sup> Imagine how this experience affected the thoughts of such individuals: the happy mood group may have considered themselves much more competent, and the sad group may have considered themselves much less competent. Therefore, the happy group may have tried harder because they expected, based on what they thought was their success on the test, that such hard work would pay off; the sad group, on the other hand, may have given up because, based on what they thought was their test experience, hard work did not pay off.<sup>161</sup> Again, in Young's schema vocabulary, the experience with the test may have activated a "failure to achieve" schema in which people "feel stupid, inept, untalented, or ignorant."<sup>162</sup> When this schema is activated, people "often do not try to achieve because they believe that they will fail."<sup>163</sup>

In short, we face several reasons why existing studies that rely on inducing mood may not show how happiness and sadness will generally affect negotiators. First, schema research suggests some individuals are more or less likely to recall patterns of incompetence or lack of ability to meet their own needs. We have hypotheses about how this pattern may affect lawyers: perhaps the rigors of law school immunize some so that feedback does not trigger such competency schemas; or perhaps the rigorous hierarchical and competitive nature of law school further engenders and/or strengthens such patterns.

Second, it is possible other sources of happiness and sadness will not have the same effect.<sup>164</sup> For example, if a negotiator receives flowers from a loved one on the

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160. Forgas, *supra* n. 40, at 567-70.

161. We acknowledge that one strategy to avoid the critique that studies depend upon triggering a particular cognition is instead to engage in a series of different types of inductions, all presumed to induce positive emotion. Isen, *supra* n. 46, at 523. Thus, for example, if exposing people to funny videos, giving them false positive feedback on tests, etc. all are associated with increased creativity, one may interpret this as empirical support for the idea that positive affect is associated with creativity. On the other hand, one might also construe such studies to say that they simply show these particular inductions induce creativity; or one might interpret them as all triggering some other cognition, such as the schema that they are entitled to special treatment, a schema often associated in extreme measures with narcissism. See Young, *supra* n. 159, at 14.

162. Young, *supra* n. 159, at 73.

163. *Id.*

164. Our basic point is that mood inductions that purport to be about "anger" may not generalize to sources of anger different from the experimental context. We acknowledge that one might make the same point without referring to different cognitions. Instead, one might distinguish between different sources of anger, such as anger directed at the person with whom one is negotiating from simple free-floating anger, or anger directed at some other person. See generally Fiske & Taylor, *supra* n. 7, at 411 (there may be a variety of distinct emotions).

way to a negotiation, this may lead to happiness, but it may not activate cognitions about competence.

Third, the exact mood manipulations may exert effects in ways other than mood. As Barry and Oliver noted, it is problematic to rely on the giving of gifts to induce positive mood because this may trigger cooperation not via a happy mood but through the well-known reciprocity effect: if one receives something, one has a tendency to want to give something in return.<sup>165</sup> Overall, as one leading overview of research on emotion and cognition concluded, “[E]ven if one grants the internal validity of a laboratory method, a researcher may wish to adopt more naturalistic methods to ensure the ecological validity and the generalizability of the findings.”<sup>166</sup>

#### *D. Alternative Methods to Identifying Pathways: The Importance of Naturally-Occurring Mood Versus Mood Inductions*

In light of these limitations of existing studies, we have turned in our own ongoing research to a different method of testing the way mood affects negotiation. We have declined to try to induce certain moods. Instead, we have surveyed students about their moods before and after negotiations; we then compare the way these moods predict negotiation outcomes and behaviors.<sup>167</sup> In mood research circles, this is known as studying naturally occurring mood.<sup>168</sup> This research is more likely to produce results that show a variety of different sources of the same mood, such as happiness, really will have similar effects. When we find that a group of students is in a happier mood, it is more likely that this happy mood has come from a variety of sources than if we simply induce a happy mood. Therefore, findings based on such naturally occurring mood suggest that one may give empirically supported advice about how the moods, whatever their source, affect negotiation. In addition, such research also allows us to draw on a variety of existing methods in

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This alternative explanation of why particular mood inductions may not generalize outside the experimental context avoids potential entanglement with complex debates about the exact relationship between mood and cognition, such as whether any kind of mood or emotion invariably involves some implicit, even if not conscious cognition. See generally *id.* at 450-57 (discussing various rival accounts of the relationship between emotions and cognitions); John D. Teasdale, *Multi-level Theories of Cognition-Emotion Relations*, in *Handbook of Cognition And Emotion* 665 (Tim Dalgleish & Mick Power, eds., John Wiley & Sons 1999); Robert B. Zajonc, *Closing the Debate Over the Independence of Affect*, in *Feeling and Thinking: The Role of Affect in Social Cognition* 31, 48 (Joseph Forgas ed., Cambridge U. Press 2000) (arguing that one should pay greater attention to general and nonconscious mood because it may easily “spill onto almost any stimuli that are currently present – stimuli totally unrelated to the individual’s condition at the moment”).

165. Barry & Oliver, *supra* n. 76, at 139. Among negotiation studies, the first major study of mood and negotiation relied on both the use of funny cartoons and a small gift to induce pleasant mood. *Id.* at 134.

166. Parrott & Hertel, *supra* n. 7, at 67. See Barry & Oliver, *supra* n. 76, at 139 (“In general, external validity concerns argue for observation over manipulation . . .”).

167. We acknowledge the limitation that different people may have different understandings of words like “angry” or “happy.” To minimize these differences, we now are developing definitions to accompany the words.

168. See Parrott & Hertel, *supra* n. 7, at 67.

clinical psychology that have been empirically-supported to affect such moods, such as short term management of anxiety through breathing or longer term cognitive-behavioral skills that may be taught in classes.<sup>169</sup> In contrast, findings based on particular mood inductions may only lead to the very limited advice that individuals should replicate a particular induction: this is easier with some inductions, such as using pleasant scents, but harder with others. How does one give oneself false feedback on a test?

On the other hand, the existing studies may also be useful for other purposes as well. Even if Allred's study of "anger" has more to do with "mistrust," then it may suggest predictable ways that perceptions of dishonesty may affect a negotiation. This may be an important topic because misunderstandings and individual differences, such as assumptions about what nonverbal behavior indicates lying, may be very common in negotiation. In a similar way, even if one cannot directly replicate false feedback on a test, one may analogize this to situations in which a lawyer may attempt a negotiation after winning/losing an argument in court or in another negotiation.

Other alternatives for measuring mood also exist. One may look for stress hormones in blood, activation of areas of the brain associated with different emotions, or code for nonverbal communication, such as facial movements, associated with different emotions.<sup>170</sup> Such methods may be expensive, and, in some instances, more invasive than many people would like. (How many would like to negotiate while in a brain imaging machine – even the new partially open ones?). Ultimately, however, the best understanding of how mood affects negotiation (as well as other cognitions and tasks) may come from the cumulative findings of a number of studies using a combination of mood inductions, naturally-occurring mood, and these other more time-consuming and costly methods. As in other areas of psychological research, the best approach often involves an examination of multiple traits by multiple methods.<sup>171</sup>

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169. We acknowledge that there are some potential risks to studying naturally-occurring mood as well. As even Barry and Oliver note, there may be the danger that it is harder to detect emotion without a manipulation. Barry & Oliver, *supra* n. 76, at 139. In seeking funding for our own experimental research, for example, some anonymous reviewers doubted whether law students would actually exhibit any emotion during a mere classroom negotiation; others doubted whether law students would accurately report whatever emotions they did feel. See Isen, *supra* n. 46, at 523. Our initial pilot research has addressed these concerns in several ways: First, on the measures we used, students did report a range of emotion; second, many of the students reported symptoms associated with depression, which one might have feared students would conceal because the legal profession, like society, stigmatizes those who describe mental health concerns. More generally, self-reports of emotional states are the usual method used to measure naturally occurring mood, and some research suggests a priori concerns about potential biases do not explain the results. Parrott & Hertel, *supra* n. 7.

Others fear that asking persons to report their emotions may itself disrupt negotiations. See Isen, *supra* n. 46, at 523.

170. See Parrott & Hertel, *supra* n. 7, at 73-74 (for an overview of these other methods).

171. Jeffrey Z. Rubin & Bert R. Brown, *The Social Psychology of Bargaining and Negotiation* 298 (Acad. Press 1975) (citing D.T. Campbell & D.W. Fiske, *Convergent and Discriminant Validation by the Multitrait-multimethod Matrix*, 56 Psychol. Bull. 81 (1959)).

## II. WHAT WE DON'T KNOW: HOW DOES MOOD AFFECT LAWYERS AND LEGAL NEGOTIATIONS?

### *A. What We Know: Mood Affects Many People, But Affects Some People And Some Negotiations In Different Ways*

We have seen that studies of business and psychology students suggest even mild changes in mood may have dramatic effects on the strategies and successes of negotiators, but there remains the question of how studies relate to legal negotiations.<sup>172</sup> Negotiation scholarship often borrows conclusions about the way psychology and business students negotiate and assumes this reveals some general truth about negotiation that law students and lawyers can apply directly.<sup>173</sup> This partially reflects the much bemoaned – and slowly changing – habit of legal academics not conducting empirical research.<sup>174</sup> This habit may reflect not so much laziness or lack of skill but rather the lack of incentives and lack of resources that law schools provide for empirical research. In larger part, however, it is consistent with a deeply held belief of social psychologists that different individuals negotiate the same way if they are in the same social settings; this belief in turn reflects a broader belief – and large body of experimental literature – that different individuals behave the same if they are in the same social conditions. To put the ideas in a slogan, it is the situation and not the personality that determines how people act, be it in negotiation or some other activity.<sup>175</sup>

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172. We recognize that there is no simple definition of legal negotiations, and the term is most often used without any definition. Mnookin defines legal negotiations as one in which a “client’s negotiation involves legal issues – when it occur in the shadow of the law.” Mnookin et al., *supra* n. 10, at 93-94. Some might question the precision of such a definition since any negotiation often silently involves assumptions about how law defines things like property, but we think this definition works well enough for research into how mood may affect different kinds of negotiations.

173. See *supra* text accompanying n. 33.

174. On the much bemoaned habit, see e.g. Richard A. Posner, *Overcoming Law* (Harv. U. Press 1995). Ironically, it is far more common to find legal academics who bemoan the lack of empirical research than those willing to follow up with empirical research of their own. See Clark Freshman, *Were Patricia Williams and Ronald Dworkin Separated at Birth?*, 95 Colum. L. Rev. 1568 (1995) (reviewing Richard A. Posner, *Overcoming Law* (Harv. U. Press 1995)).

175. For a leading general statement of this view, see Lee Ross & Richard E. Nisbett, *The Person and the Situation: Perspectives of Social Psychology* (Temple U. Press 1991). In negotiation circles, the possibility that differences matter has received mixed attention in research and teaching publications. For an early review, see Rubin & Brown, *supra* n. 171, at 195 (noting “a surprisingly large number of experiments that find no systematic relationship between individual differences parameters and bargaining behavior.”). Even this early review argued that negotiation research needs better tools “for the measurement of individual difference variables.” *Id.* at 298. On the research side, one of the leading researchers, Leigh Thompson, suggested in 1990 that research might focus more on individual differences, but in 2000 contributed to a joint article that concluded individual differences did not matter much – despite citing the very Forgas article that demonstrated individual differences did show mood affected some people far more than others! Compare Thompson, *supra* n. 49, at 527 (suggesting that study of individual differences may be valuable approach to study of negotiation) with Max H. Bazerman et al., *supra* n. 26, at 285 (citing Forgas’s article, which shows machiavellianism differences among individuals make difference in how mood affects behavior, but also asserting that individual

More recent studies, however, suggest mood may indeed have different effects on different kinds of negotiations.<sup>176</sup> The data are still only suggestive and our own empirical study of how mood affects law students when they negotiate is only in its preliminary stages. Still, two possibilities deserve consideration: First, mood affects negotiation by lawyers differently because of some characteristics lawyers, be they formed before law school, during law school, or in legal practice. Second, mood may not affect negotiations involving legal issues because the nature of those issues leads lawyers and non-lawyers to negotiate in ways that are less susceptible to the vagaries of mood. We distinguish lawyers and legal negotiations because: (1) nonlawyers may engage in a variety of legal negotiations, such as settlement of arbitrations in jurisdictions which permit nonlawyer advocates in arbitrations, and (2) lawyers may engage in relatively nonlegal negotiations, such as renting hotel rooms for their own vacation. Section A sets out general reasons why mood may apply differently to different types of negotiations and/or groups of people with different personality profiles. Such different psychological profiles might characterize different professionals, like lawyers, people in different countries, people of different genders, and so on. We acknowledge the problematic nature of any particular system of psychological classification; dominant psychological paradigms in the helping professions historically stigmatized lesbians and gay men<sup>177</sup> and may continue to stigmatize women.<sup>178</sup> Everyday informal psychologizing may be infected by similar biases.<sup>179</sup> Section B directly applies this framework to lawyers, and Section C applies it to legal negotiation.

Although the potential differences we survey are many, we believe the bottom-line is clear: we need empirical research of the way mood affects various lawyers and legal negotiations. For a number of plausible reasons, mood may affect lawyers less than it affects other individuals. For example, lawyers may have personalities associated with deliberate strategies Forgas has shown lead to fewer mood effects on cognition and behavior. On the other hand, it is also plausible that mood may have greater effects on lawyers and/or legal negotiation. For example, many legal negotiations, such as settlements of pending legal disputes or negotiation of collective bargaining agreements between unions and employers, take months or years – far longer than the brief negotiation studies conducted so far on mood. As shown below, this might lead to fewer effects as lawyers have time to plan and execute deliberate strategies; or it might lead to greater mood effects because the initial mood may escalate over time.

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differences do not matter in negotiation.).

176. See e.g. Forgas, *supra* n. 40, at 576 (“It is also possible, indeed likely, that additional features of the person, the task, and the opposition not considered here may play a critical role in cueing alternative processing strategies and thus different mood effects. Future research needs to consider the role of such contextual variables in recruiting different processing strategies and, thus, in mediating mood effects on negotiation performance.”).

177. See Freshman, *supra* n. 20.

178. See Stefan, *supra* n. 37.

179. See Clark Freshman, *Re-visioning The Dependency Crisis and the Negotiator’s Dilemma*, 22 L. & Soc. Inquiry 97, 101 (1997).

## 1. Mood Affects Deliberate Decisionmaking and Deliberate Decisionmakers Less

The most direct evidence comes from Forgas's experiments on bargaining. In general, those in worse moods behaved more competitively, but mood had no significant effects on some individuals.<sup>180</sup> Specifically, individuals who scored high in Machiavellianism<sup>181</sup> and social desirability<sup>182</sup> did not behave differently when exposed to different mood manipulations.<sup>183</sup> In a similar way, Kramer's study of business school students showed that mood lowered students' expectations of the other side at a greater rate for students who had high self-esteem.<sup>184</sup> Both these findings are consistent with a small but growing body of research that demonstrates

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180. It's worth noting that there is an unresolved ambiguity in Forgas's research between two possibilities: (1) As implied, certain individuals had the same changes in mood in response to the false feedback as other individuals, but their behavior did not change, or (2) certain individuals behaved differently because the false feedback did not change their moods. It is impossible to resolve this ambiguity from the published research because the study simply reports in general that the false feedback succeeded in changing individual's mood, but it does not report separately on whether there was any relationship between the degree of various individuals traits and the amount of mood change. Conceivably, one explanation applies more to one group than the other. The machiavellians may have been immune to what others told them, and thereby had no mood change; those high in the need for social desirability, on the other hand, may have been especially unnerved by the notion that others rated their abilities as less desirable. In e-mail correspondence, Forgas agreed that the data were unclear, and a number of interpretations were possible:

[W]e did not collect data on precisely how the social desirability and machiavellianism effects occurred, but simply assumed that high scores on such dimensions tend to reduce mood valence effects because those people have motivated reasons to respond to social situations in particular ways. The possibility that effects were reduced because of the reduced effectiveness of the false feedback mood induction is also a reasonable possibility that could be tested in the future; however, this could only apply to high scorers on some individual difference measures (such as machiavelliansim) but not to other (such as social desirability), so on balance the former explanation seems more plausible and parsimonious than the second one.

E-mail from Joseph P. Forgas, Professor of Psychology, University of New South Wales, to Clark Freshman, Professor of Law, University of Miami (July 26, 2001) (on file with author).

181. As described by Forgas, the twenty item Machiavellianism scale is to "measure[] a person's view of others and their preferred strategies of dealing with people, assessing the extent to which a person is likely to have a motivated, detached, and even cynical view of human nature, and is likely to see others as manipulable in social situations." Forgas, *supra* n. 40, at 570. See also Rubin & Brown, *supra* n. 171, at 189 (defining Machiavellianism as "the willingness and ability to use guile, deceit and other opportunistic strategies in interpersonal relations in order to manipulate people") (internal quotations and citations omitted). A number of other studies have long shown that persons who score high on the scale tend to behave more competitively. *Id.*

182. As Forgas summarized it, the thirty-three item scale of true false questions "measures the extent to which individuals are motivated to seek approval, by acting and describing themselves in terms of favorable, socially desirable characteristics." Forgas, *supra* n. 40, at 570.

183. Forgas, *supra* n. 40, at 570-74.

184. Kramer et al., *supra* n. 3.

mood does not have the same effects on all individuals, but that individuals with certain identifiable characteristics may react differently to mood.<sup>185</sup>

It is important to understand how Forgas relates his finding to a broader theory of how mood affects particular decisions for what people; this will later give us one way to think about how mood may affect law students and lawyers. Forgas's explanation for this data largely focuses on the degree to which people engage in relatively deliberate and consistent strategies. The reason why people who are Machiavellian are less affected by mood, according to this theory, is not that they are "evil," or willing to "use" people, but rather because they engage in deliberate and planned strategies.<sup>186</sup> In principle, then, one might think those who consistently engage in strategies of "goodness" would also be less affected by mood. For example, a Tibetan lama, who consistently tries to help others and always take on their pain, would seem to be less affected by mood<sup>187</sup> because the lama follows a consistent, deliberate strategy. In short, people who act consistently for whatever reason may be less affected by mood. As we shall see, such a variable might include the tendency to be obsessive and/or compulsive.<sup>188</sup>

185. For an overview, see Forgas, Johnson & Ciarrochi, *supra* n. 79, at 183 ("Unfortunately, evidence for the role of individual difference variables in affect infusion or affect control processes is still relatively scarce.").

186. *Id.* (noting that there is less effect of emotion on people with Type A personality: "As we know that Type A persons are characterized by a high level of concern with control, as well as feelings of time pressure, urgency and tension, it seems likely that these individuals processed information in a more targeted, motivated manner that eliminated affect infusion effects"). It is worth noting that emotion may still have a significant effect on Type A persons. Among other examples, the Stanford Business School students who negotiated differently in different mood conditions likely include many Type A personalities. See Kramer et al., *supra* n. 3.

187. It is worth noting that the ambiguity latent in Forgas's work – are deliberate individuals less susceptible to mood or do they experience less mood variation – is confronted directly in Tibetan practices: the Tibetan tradition emphasizes the rooting out of most emotions. "As soon as disturbing emotions arise," one classic Tibetan text advises "jump on them, round them up, isolate and crush them." Jamgon Kongtrul, *The Great Path of Awakening* 45 (Ken McLeod trans., 2000). See also *id.* at 37 ("be decisive in your attitude that such [disturbing emotions] . . . will never arise again"). To the extent that the Tibetan tradition, like other Buddhist traditions, emphasizes the development of feelings of compassion, see e.g. *id.* at xiv, then the explanation seems to be more that emotion is felt but balanced by a quite deliberate cultivation of equanimity, the ability to feel for another but without giving in to the needs of another:

The example might be given of a friend who is engaged in extremely self-destructive behavior. We wish wholeheartedly with great intensity, that they be free of suffering . . . . But, in the end we have to recognize where the boundaries actually are what our responsibility really is . . . . [W]e continue to offer them . . . compassion but we do this with the wisdom and acceptance that they are ultimately responsible for their own actions.

Sharon Salzberg, *Lovingkindness: The Revolutionary Art of Happiness* 147 (Shambhala 1995). This attitude is cultivated through quite explicit meditations. *Id.* at 152.

188. Obsessive and compulsive are strongly evocative words – it's tempting to think that only "crazy" other people are "obsessive" but that we focus on detail. See e.g. John M. Oldham & Lois B. Morris, *The Personality Self-Portrait: Why You Think Work, Love, and Act the Way You Do* 56 (Bantam Books 1990). Instead, it's worth noting that the qualities of focusing tightly and persistently are better understood as part of a continuum, with many people exhibiting similar qualities to a lesser degree.



## 2. "Mood" May Interact Differently With Persons With Different "Personalities" and Mood "Disorders"

To the extent we want to apply this research to improve negotiation, a very important question is precisely how ingrained these different responses to emotion are. In general, those who study how to change individual behavior, although seeing a continuum of stability, make three relevant distinctions about mood: (1) some mood is simply transient and quite easy to change; (2) some mood differences stem from relatively stable mood disorders, such as depression and anxiety, and are more difficult to change; and (3) other differences are more deeply rooted in aspects of personality and are far more resistant to change. For example, many mood disorders like depression are successfully treated in sixteen to twenty weeks of cognitive therapy,<sup>189</sup> and there is some evidence such treatment may work successfully in group settings such as classes in mindfulness or problem-solving.<sup>190</sup> There is considerably more variation with different types of personality disorders. In contrast to the substantial studies that support cognitive-behavioral therapy for depression and anxiety, only preliminary studies exist for other personality disorders, and even these require longer treatments of approximately one year.<sup>191</sup> At the opposite end of the spectrum, there is more recently developed evidence that some persons may have propensities to be in positive moods. Some persons generally tend

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Nevertheless, clinicians frequently distinguish at the more obsessive end of the spectrum between those who have obsessive-compulsive personality disorder ("OCPD") and those who have the more serious and entrenched obsessive-compulsive disorder ("OCD"):

Simply stated, when your obsessions and compulsions are enough to cause significant functional impairment, you have OCD. In OCPD, these "obsessions" and "compulsions" are more like personality quirks or idiosyncracies, however unpleasant. For example, a man with OCPD may hang on to some object because he believes he may need it someday. But a man with an OCD hoarding compulsion may fill every square foot of his house with worthless trash he knows he'll never need.

Jeffrey M. Schwartz & Beverly Beyette, *Brain Lock* xxiii (Diane Publ. Co. 1996). Others see OCPD and OCD as more distinct. See Millon & Davis, *supra* n. 36, at 506 (criticizing use of "obsessive-compulsive" when "the great majority of these patients exhibit neither compulsions nor obsessions"). In addition, many of those with OCPD often have no desire to change *their* habits but blame others for not sharing them! Schwartz & Beyette, *supra* at xxii; Millon & Davis, *supra* n. 36, at 523 (some compulsives are less satisfied). See *infra* n. 350.

189. Beck, *supra* n. 133, at 104-16 (describing typical course of cognitive-behavioral therapy for depression).

190. See *infra* text accompanying n. 354.

191. See e.g. Kelly Koerner & Linda Dimeff, *Further Evidence on Dialectical Behavior Therapy*, 7 *Clinical Psychol.: Science & Prac.* 104, 105 (2000).

to be more optimistic.<sup>192</sup> Somewhere else on the spectrum, other researchers have also identified relatively stable propensities to be angry.<sup>193</sup>

Thus, in terms of negotiation, it is important to know just how broadly the effects of mood change occur on a given set of negotiators. The more a population consists of persons with relatively stable negative moods due to depression, for example, the more comprehensive responses may need to be developed. Differences in propensity to mood also raise a very different possibility: perhaps much of the effect of mood on negotiation applies disproportionately to only a few individuals. For example, although depressed persons tend to be in a generally bad mood much of the time, they may also respond to negative events more quickly by entering an even worse mood than others.<sup>194</sup> Some existing research in other areas shows depression (or dysphoria)<sup>195</sup> has an effect on the way mood affects individual decisionmaking.<sup>196</sup> We know of no studies, however, that have examined the effect of either depression or anxiety on negotiation results.

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192. See Ed Diener & Richard E. Lucas, *Personality and Subjective Well-being*, in *Well-Being: The Foundations of Hedonic Psychology* 213 (Daniel Kahneman, Ed Diener & Norbert Schwarz eds., Russell Sage Found. 1999); Sonja Lyubomirsky, *Why Are Some People Happier Than Others? The Role of Cognitive and Motivational Processes in Well-Being*, 56 *Am. Psychologist* 239 (2001) (individuals who identify themselves as happy are more likely than individuals who identify themselves as unhappy to engage in a variety of cognitive and motivational processes which are hypothesized to moderate the impact of the objective environment on well-being); Carol D. Ryff & Corey Lee M. Keyes, *The Structure of Psychological Well-Being Revisited*, 69 *J. Pers. & Soc. Psychol.* 719 (1995).

193. See e.g. Mario Mikulincer, *Adult Attachment Style and Individual Differences in Functional Versus Dysfunctional Experiences of Anger*, 74 *J. Pers. & Soc. Psychol.* 513 (1998).

194. Consider recent evidence that women law students have less confidence about how they did compared to men – even though they did just as well. Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 *Yale J. L. & Feminism* 271 (1999). One might consider the degree to which this finding reflects a difference in gender per se versus the degree to which it may reflect the higher proportions of diagnoses of depression among women.

195. Some reserve the term “depression” to refer to those diagnosed with depression only according to certain methods, such as the use of an individualized clinical interview by a psychologist trained in such methods; such persons prefer to describe research that uses pencil and paper tests of depression, such as the Beck Depression Inventory, as research instead on “dysphoria” or “depressed mood.” See e.g. Parrott & Hertel, *supra* n. 7, at 68-70.

196. Galen Bodenhausen et al., *Sadness And Susceptibility To Judgmental Bias: The Case of Anchoring*, 11 *Psychol. Sci.* 320 (2000) (sad persons were more subject to the anchoring bias).

### 3. Mood May Affect Experts and Other Intuitive Decisionmakers Less (But Produce Suboptimal Decisions)

Ironically, even as some research suggests deliberate decisionmakers are affected less by mood, another set of research suggests those who act automatically or intuitively may also be *less* affected by mood. In principle, those who have made many similar decisions in a field previously, typically labeled “experts,”<sup>197</sup> often make decisions by recalling a similar situation and the responses that worked best in such scenarios.<sup>198</sup> This research suggests experts make decisions in stressful situations that are much like the decisions they make when not in stressful situations.<sup>199</sup> If one assumes that stressful situations provoke mood changes even in experts, then this evidence suggests mood affects experts decisionmaking less.

Despite its obvious differences from Forgas’s notion that mood affects deliberate decisionmakers less, the expert model shares some features. Of course, the notion that experts are less affected by stressful situations because they think less deliberately, not more, seems the exact opposite of Forgas’s research. On the other hand, the stress research shares a similar structure: just as Forgas found high-Machiavelians are unaffected by mood because they always act competitively, the stress research finds that stressful situations do not affect certain individuals because they always recall the same prior patterns and always act consistently with them. In other words, mood does not affect certain decisionmakers because they always act in certain predictable ways: Machiavellian deliberate decisionmakers in Forgas’s study always act competitively, and expert decisionmakers always simply recall the expert pattern of response to a situation. The stress studies also share the ambiguity between the idea that: (1) mood may affect some individual decisionmaking less, or (2) certain situations do not affect some individuals’ decisionmaking because situations that generally put most people in certain moods do not change the moods of some individuals. This ambiguity is even more pronounced in the stress and decisionmaking studies than in Forgas’s research because the stress studies we examined do not measure the mood of any individuals but simply compare how experts versus novices responded to stress.<sup>200</sup>

In addition, like Forgas’s model, the expertise studies leave open the possibility that some decisionmakers are less affected by mood but still make suboptimal decisions. Both merely show that some decisionmakers make the same decisions in circumstances where the decisionmaking of others would be affected by mood. As Emerson noted, however, a foolish consistency can be the hobgoblin of little

197. Perhaps a more neutral way to describe such persons would be to say that they are “repeat players;” this shows they have experience doing something, but not necessarily that they have mastered a particular area – nor that whatever area they have mastered is relevant to a particular current task.

198. Gary Klein, *The Effect of Acute Stressors on Decision Making*, in *Stress and Human Performance* 49, 64 (James E. Driskell & Eduardo Salas eds., Lawrence Erlbaum Assoc. 1996).

199. *Id.*

200. On the other hand, other scholars of mood and cognition routinely do not measure mood in individual studies once they have established in other studies that some given activity, such as giving a small gift, has a consistent effect on mood. See Isen, *supra* n. 46.

minds.<sup>201</sup> In the case of Forgas, the consistent use of a competitive strategy may neglect the potential to perform well by the development of relationships and tradeoff skills associated with success in at least some negotiations. In the case of expert decisionmaking, the reliance on pattern recall sacrifices the possibility of developing new solutions, which may include better solutions to older problems or appropriate solutions to new problems.<sup>202</sup> Likewise, even fans of expert decisionmaking note that such decisionmaking under stress may not be optimal, particularly if the situation at hand differs from patterns recalled.<sup>203</sup> Thus, although expert decisionmakers may seem to be less affected by stressful conditions, it is possible they could perform even better over a wider range of circumstances if they were better trained to manage mood and negotiation.<sup>204</sup>

The nature of the existing study of experts obscures this possibility. Research suggests experts use of (often automatic) recall works well for a number of reasons. Such research on expert decisionmaking limits itself to decisions where speed is especially important, where routine solutions work acceptably well, and where the possibility of more optimal decisions is not considered.<sup>205</sup> Partly this stems from the selection of activities, like firefighting, where speed is important. This also stems from considering scenarios, such as games of chess, in which there are strict rules that by definition limit novel solutions.<sup>206</sup> In other instances, there is simply an unstated assumption that novel solutions do not exist, such as in decisions by firefighters about how to fight fires.<sup>207</sup>

201. Ralph Waldo Emerson, *Self Reliance*, in *Selections from Ralph Waldo Emerson* 147, 153 (Stephen E. Whicher ed., Riverside Press 1957).

202. Maurice Allais, *Nobel Lecture: An Outline of My Main Contributions to Economic Science*, 87 *The Am. Econ. Rev.* 3, 8 (Dec. 1997) (“[I]t is only through the constant questioning of ‘established truths’ and the blossoming of new ideas suggested both by empirical evidence and by creative intuition, that science can truly progress . . . . Dominant ideas, however erroneous they may be, end up, simply through continual repetition . . .”).

203. Klein, *supra* n. 198, at 64 (“My point is that, given the inherent difficulties of performing a task with reduced time and attention and working memory, decision quality is usually satisfactory, although not necessarily optimal.”).

204. This hypothesis remains speculative, however. It is possible that training in the awareness of the reality that mood affects performance might diminish performance in some cases. In the narrowest sense, the resources devoted to monitoring mood might tax limited cognitive resources. In a broader sense, the attention to the possibility of mood effects might itself cause the very anxiety that may have a negative effect on performance.

205. Klein, *supra* n. 198, at 49.

206. One may also put the expertise in another research context. Isen, one of the leading advocates of the idea that mood affects many decisions, and co-author of the first published paper to show such effects on negotiation, notes that mood does not seem to affect routine activities. One reason mood may not affect some expert decisionmaking is that, from the perspectives of such experts, decisions that might seem quite novel to us are really quite routine to them. Where we might be overwhelmed by the idea of how to fight a fire, and engage in elaborate types of research and cost-benefit analysis, a veteran fire chief may just experience the situation (often accurately) as indistinguishable from dozens of similar situations she faced. See Isen, *supra* n. 46.

207. Klein, *supra* n. 198, at 64. *But cf.* Michael Wheeler, *Presence of Mind*, Harvard Business School Case N9-902-176 12-13 (January 22, 2002) (only firefighter to escape fire came up with “novel situation”).

Some of these same considerations apply differently to non-experts who generally rely on more intuitive processes, like automatic recall of prior experiences. Research reveals that some individuals generally rely more on intuition or automatic recall of prior circumstances.<sup>208</sup> Such intuitive thinking often entails a “‘quick and dirty’ approach, arriving at usually reasonable answers . . . effortlessly [such as] agree[ing] with an argument because a quick glance reveals that it is presented by an expert source.”<sup>209</sup> As with the other concepts we have explored, research on intuition has evolved from dichotomizing between rational and intuitive thinking to a more complex model. In particular, researchers now see rational and intuitive reasoning as partially autonomous so individuals may draw on both rational and intuitive processes;<sup>210</sup> the relative balance, however, will vary with individuals.<sup>211</sup> Again, we may ask whether mood affects such individuals who use more intuitive decision-making less than those who engage in more “rational” thinking.

We think it less plausible that mood affects such intuitive individuals differently. First, to the extent that stressful situations do not affect experts because the experts never exhibit any mood change, we think those less expert and less familiar with various stressors will still experience emotional change. To take a popular example, even the most intuitive decisionmakers may still find buying a car stressful. As a result, the change in mood may affect even intuitive decisionmaking because research shows that people in certain moods tend to recall examples associated with those moods.<sup>212</sup> Thus, the intuitive car buyer may get anxious and recall similar examples of decisions made when anxious.

Second, as a consequence, it is even more plausible that mood may make intuitive decisionmakers reach sub-optimal decisions. The less an individual has experience in an area, the more likely the examples recalled will be inappropriate

208. For a recent synthesis, see Eliot R. Smith & Jamie DeCoster, *Dual Process Models in Social and Cognitive Psychology: Conceptual Integration and Links To Underlying Memory Systems*, 4 *Pers. & Soc. Psychol. Rev.* 108 (2000). Particular theorists and researchers vary in the extent to which they see differences in how much given individuals use one mode or the other; theorists also differ in the extent to which the differences depend on some capacity of an individual for various kinds of reasoning versus the motivation to engage in various kinds of reasoning. *Id.* at 125. In our research, we have relied on the Normative Message Processing Scale. It has twenty-four items, distinguishing between tendency to engage in message processing that is selective, effortful, and highly deliberate (analytical factor) and message processing that is unselective, low effort, and nondeliberate (intuition factor). R. Kelly Aune & Rodney A. Reynolds, *The Empirical Development of the Normative Message Processing Scale*, 61 *Commun. Monographs* 135 (1994).

209. Smith & DeCoster, *supra* n. 208, at 108. We omit the authors’ use of the modifier “efficiently” because efficiency, as understood by economists, depends both on the costs and the benefits; a decision is not efficient merely because it cuts costs if, as in specious reliance on an expert, it results in a worse outcome.

210. *Id.* at 109 (“numerous theorists have advanced generally similar proposals . . . that [all] humans have two separate memory systems.”).

211. *Cf. id.* at 115 (“[S]ome people may make decisions based on gut instincts, but [o]ther people are likely to be more readily convinced of a conclusion if one can offer a step-by-step logical account of how it was derived than if the conclusion is simply based on ‘gut feelings’ or intuitions.”).

212. See e.g. Eric Eich & Dawn Macaulay, *Fundamental Factors in Mood-Dependent Memory, in Feeling and Thinking: The Role Of Affect in Social Cognition* 109 (Joseph P. Forgas ed., Cambridge U. Press 2000).

examples: the intuitive car buyer may recall situations in which he worried too much about getting the best price on something; he therefore may concede too quickly on car pricing or car financing when holding out would get a much better price. Our ongoing research has attempted to address this question empirically by studying the way those prone to more intuitive decisionmaking perform on negotiation tasks.<sup>213</sup>

### *B. What We Don't Know: Does Mood Affect Negotiations By Lawyers Differently?*

We next turn to why lawyers present such an important case for the study of mood and negotiation. As we saw, there is clear evidence, and a number of theories, that mood does not affect people equally. Forgas's experiments with negotiation show that mood does not affect people with Machiavellian personalities, and he thinks, more generally, that those who tend to engage in any kind of deliberate and/or consistent pattern of behavior will be less affected by mood. It is difficult to apply existing studies directly to different populations because different researchers have used very different ways to measure individual differences, rather than including the same measures of mood and the same individual difference measures, such as standard personality measures. Therefore, our hypotheses about how mood may affect lawyers are not definitive, but a set of empirically-testable propositions.

#### 1. The "Personalities" of Lawyers: Do More Symptoms of Obsession, Anxiety, and Depression Mean Mood Affects Negotiation Differently?

The largest reason to suspect mood affects lawyers differently from other negotiators is that lawyers and law students have very different psychological profiles from other individuals. Lawyers have much higher rates of symptoms of depression, anxiety, and obsessiveness from the general population.<sup>214</sup> There is also

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213. In particular, our research has looked at law student negotiations and the response of students to an inventory designed to measure their propensity to think in relatively rational versus relatively intuitive ways. This approach relies on the notion that: (1) there is some kind of measurable propensity to rely on such intuitive thinking, and (2) the measures based on student self-reports in fact measure this propensity. Another way to test the same question would be to instead try to examine more directly how students said they made decisions in a particular negotiation, such as the process used in "think-aloud" studies that ask individuals to describe how they are approaching a situation as they plan for it or engage in their thinking process. For an overview of such think-aloud measurement methods, see e.g. Gerald Davison, Ralph Vogel & Sandra Coffman, *Think-Aloud Approaches to Cognitive Assessment and the Articulated Thoughts in Simulated Situations Paradigm*, 65 J. Consulting & Clinical Psychol. 950 (1997); Christopher Eckhardt, Krista Barbour & Gerald Davison, *Articulated Thoughts of Maritally Violent and Nonviolent Men During Anger Arousal*, 66 J. Consulting & Clinical Psychol. 259 (1998). One might also get some similar results by asking individuals to plan for a negotiation in writing and examine their written plans.

214. William Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. Occup. Med. 1079 (1990) ("A recent study found lawyers to have the highest rate of major depressive disorder among 104 occupational groups."); Susan Diacoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U. L. Rev. 1337, 1378 (1997); G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress*

evidence that other professions, such as stockbrokers, have very different psychological profiles, and one may question in a similar way how mood will affect negotiations by persons in such professions.<sup>215</sup> As we have seen, there are good theoretical reasons to suspect that people with such characteristics are affected by mood in very different ways from other individuals. We also saw existing research already shows mood affects the cognition of depressed individuals differently from others.<sup>216</sup> In a similar way, if we accept Forgas's theory of why mood affects some cognitions more than others, the large number of obsessive lawyers might also be less affected by mood because they generally follow the more deliberate strategies that Forgas has found are less affected by mood.

Although we are not aware of existing studies that test the way the different characteristics of lawyers relate to how mood affects negotiation or other cognitive activities, it is plausible that it might. In part, those with certain personalities may not be affected by mild moods in the same way as others. For example, those with more obsessive characteristics may cling rigidly to a particular plan, such as a particular negotiation bottom line, rather than being swayed by emotion at the time of negotiations. At the opposite end, those who tend to be more avoidant in dealing with conflict may be more affected by mild moods: the mild moods may be relatively intolerable, leading the persons to terminate negotiations altogether or to give in relatively quickly. In other cases of personality, the type of mood interaction may be important. For example, narcissists may have such low empathy that they are unaffected by sadness, but an attack on their abilities ("Who do you think you are to deserve such a good computer?") may trigger irrational rage that makes them walk out of a negotiation or trigger such entitlement that they make outrageous demands.

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*Among Law Students and Lawyers*, 1986 Am. B. Found. Res. J. 225, 240; Connie J. A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J. L. & Health 1, 2 (1995); Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 Creighton L. Rev. 265 (1997). (The devastating effects of a lawyer's alcoholism harm the quality of service their clients receive.); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 Intl. J. L. & Psychol. 233, 241 (1990). ("Statistics show that one in five lawyers has a problem with substance abuse."); Greg K. McCann et al., *The Sound of No Students Clapping: What Zen Can Offer Legal Education*, 29 U.S.F. L. Rev. 313, 314 n. 6 (1995) (summarizing findings in Benjamin Sells, *The Soul of the Law* 17 (1994)) ("One of every eight graduating law students exhibits signs of chemical dependency."). We note that, while these studies show a clear problem, they often use diagnostic terms loosely; most clinicians would not use terms like "depression" without an in-person clinical interview. See *supra* n. 195. In the text, therefore, we prefer to use the term "symptoms" of (for example) depression.

215. Carin Gorrell, *Wall Street Warriors*, Psychol. Today, 14 (Feb. 2001) (reporting on study by Nova researchers John Lewis and Alden M. Cass, that stockbrokers had a twenty-three percent rate of subclinical depression compared to only seven percent of men).

216. See *supra* n. 196.

## 2. Personality as Probabilities and Potentials

As much as personality deserves exploration in studies of mood and negotiation, we caution that personality styles are not a fixed predictor of outcomes. Instead, one may think of personality styles as a risk factor: given a predisposition to fear one is incompetent, for example, false feedback on a test may produce more of an effect than on others. In addition, given a certain predisposition, a given activity may produce not merely more emotion, but different kinds of emotions, cognitions, and behaviors. Give false negative feedback to one person prone to fears of incompetence and another prone to a sense of entitlement; one may become depressed and withdrawn and the other energized and angry.<sup>217</sup> As a result, the person prone to fears of incompetence may give up, but the person prone to senses of entitlement may ask even more insistently! In addition, personality, like mood, exists on a continuum,<sup>218</sup> and mild differences in personality may matter just as we saw mild differences in mood do.

Another way to treat personality is to examine whether certain personalities explain more about negotiation results and tactics than do mild moods. For example, existing research by Allred confirms that those with low empathy have less success identifying the actual needs of others and, not surprisingly, less success at identifying joint gains. Narcissists typically have very poor abilities to empathize with others, and it might therefore be useful to know how scores on measures of narcissism affect research like Allred's.<sup>219</sup>

Moreover, all this may be even more important with lawyers because existing data on the psychological characteristics of lawyers and law students may underestimate the differences between them and other populations. First, some statistics simply identify the number of persons who pass a crucial threshold for relatively severe cases of depression and obsessiveness.<sup>220</sup> Many largely

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217. Consider Young's explanation of how feedback may operate:

Schemas are usually activated by events in the environment relevant to the particular schema. For example, when an adult with an incompetence/failure schema is assigned a difficult task in which performance will be scrutinized, the schema erupts. Thoughts begin to arise such as: "I can't handle this. I'll fail. I'll make a fool of myself." . . . Depending on the circumstances and the particular schema, the individual might experience other emotions, such as sadness, shame, guilt, or anger.

Young, *supra* n. 159, at 11.

218. Millon & Davis, *supra* n. 36, at 7.

219. See *supra* text accompanying nn. 87-99. How much lack of empathy is characteristic of narcissists varies to some degree with different sources. The most widely used diagnostic criteria, the Diagnostic and Statistical Manual, lists lack of empathy as one of several characteristics, and persons need only have some to be diagnosed with narcissistic personality disorder. On the other hand, a leading cognitive-behavioral therapy manual for treatment of personality disorders lists lack of empathy as one of the three major components of narcissism (along with "grandiosity" and "hypersensitivity to evaluation"). Aaron T. Beck & Arthur Freeman & Associates, *Cognitive Therapy for Personality Disorders* 233, 249 (Prof. Resource Press 1990).

220. But see *supra* n. 195 (some studies use the number reporting some symptoms of a disorder even though those reporting symptoms may not meet the diagnostic criteria).



dichotomous characterizations overlook the importance of some symptoms of depression even among those without enough symptoms to meet the definition of depression.<sup>221</sup> Therefore, it is possible that there are large numbers of lawyers and law students with significantly greater symptoms of depression or obsessiveness who may not be classified by existing studies; nevertheless, such individuals may negotiate differently, and they may respond to stress and other events in negotiation differently. Second, studies of the psychological characteristics of lawyers rely on standard measures of what lawyers and law students say about themselves, and lawyers and law students may under-report symptoms of mental illnesses. Of course, any population may have such a tendency to under-report,<sup>222</sup> but lawyers may under-report more than others because official organs of the profession, like the bar and judicial selection committees, stigmatize mental illness.<sup>223</sup> In any event, the existing data on the psychological profiles of lawyers and law students raise crucial questions about the effect of mood on how lawyers and law students negotiate. Even at the rates of elevated symptoms of depression, anxiety and obsessiveness shown in existing studies, lawyers are so different from the general population in these aspects that mood may affect them quite differently from other negotiators.

In addition, one branch of cognitive-behavioral research suggests as well that different measures of “mild personality differences” play a role similar to “mild mood differences.” According to cognitive theory developed by Aaron Beck<sup>224</sup>, schemas are cognitive structures individuals use to make sense of the world; they are the lenses through which we view experience.<sup>225</sup> At best, the schemas offer efficient ways of sorting sometimes complex reality to highlight important features and facilitate rational decision-making; too often, however, schemas may be maladaptive and highlight information in a distorted way. Such maladaptive schemas distort reality in the way a defective lens would distort our vision.<sup>226</sup> The mistrust schema, for example, leads individuals to mistrust individuals too quickly; another schema, the entitlement schema, leads individuals to have unreasonable expectations of others. Some pencil and paper tests help identify the degree to which individuals are prone to such schemas.<sup>227</sup>

Such schema measures may be especially useful in testing whether mood may affect given populations to different degrees and/or in different ways. First, because

221. See *supra* text accompanying nn. 35-39.

222. For example, the reasons why lawyers and law students may under-report symptoms of narcissism are common to other populations: narcissists have unrealistic expectations, but by definition, they will not report such expectations as unrealistic.

223. Stefan, *supra* n. 37. We note as well that other groups of persons, such as business executives, may also hide mental illness because of fear of stigma. See e.g. Micheline Maynard, *Grim Reminder of Mental Illness*, N. Y. Times (New York, NY) C1, C14 (July 21, 2001) (Experts estimate “as many as 10 percent of senior executives have at least some symptoms of manic depression, yet 9 out of 10 of their cases are going undiagnosed and untreated.”).

224. See e.g. Beck, Freeman & Associates, *supra* n. 219.

225. We acknowledge that other researchers have used schema in somewhat different ways. See *supra* n. 158.

226. Young, *supra* n. 159.

227. *Id.* at 61-67.

the measures presume something of a continuum, they may identify mild “personality” differences better than other measures. In particular, many prominent schema theories understand schemas as predisposing individuals to certain actions when the schemas are activated by certain events. Thus, as discussed above, when someone perceives someone has lied to them in a negotiation this may activate a schema that leads the individual to mistrust other things the other negotiator says – or even to begin more broadly mistrusting things others say. Second, and perhaps more importantly, the measure is associated with specific methods to replace maladaptive schemas with better behaviors.<sup>228</sup> The schema’s continuous nature means it may identify meaningful differences that other measures miss. The association with a relatively brief therapy means it is more likely to yield possible classroom interventions than would measures associated with lengthier therapies. This possibility of intervention and correction also flows from the nature of these patterns as predispositions that ripen into action only after a particular trigger; therefore, although people with more developed mistrust schemas may be more likely to get angry when someone appears to lie to them, there is still the possibility of training individuals. Such individuals might be trained so the tendency to be angry is minimized and/or the tendency to act on any such anger is minimized. However, unlike other types of cognitive behavioral therapy, there are no published studies that support the therapy, though some such studies are underway.<sup>229</sup> Our suggestions, though optimistic, are not rooted in rigorous empirical support in the way that group treatment for depression is.

In short, the existing evidence raises a substantial reason to think mood may affect lawyers and law students differently in some of their negotiating. The most direct evidence flows from Forgas’s finding that individuals who scored differently on certain measures, like Machiavellianism, responded to mood differently in negotiation together with evidence that shows many lawyers and law students vary in a number of personality and mood predispositions. Exactly how differently lawyers and law students do negotiate, and in exactly what ways they negotiate differently, remains an empirical question that deserves further study. At a minimum, these differences alone should give us pause in presuming that studies that show mood affects psychology and business school students always applying precisely the same ways to lawyers and law students. On the other hand, because not all lawyers and law students differ from other persons, it still remains likely that mood will have some effect – sometimes parallel to the effect on psychology and business school students in similar negotiations. More specifically, mood may affect some lawyers less, but may well affect many lawyers in the same way and may affect other lawyers in the same way to a lesser degree.

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228. *Id.*; Beck, Freeman & Associates, *supra* n. 219.

229. *Cf.* Young, *supra* n. 159, at 7 (“The constructs proposed here have not yet been tested empirically, and so must be viewed as speculative.”). Recent research has been reported at conferences, but not yet published. Karla Moras et al., *Modifying Schema-Focused Cognitive Therapy for Drug Resistant Depression: Preliminary Observations and Findings* (Association for the Advancement of Behavior Therapy Nov. 1999). Contrast *infra* n. 351 (support for group therapy for depression).

### C. What We Don't Know: Does Mood Affect Legal Negotiations Differently?

Apart from the characteristics of lawyers, the nature of legal problems may also mean a different role for mood. This is distinct from explanations having to do with the nature of lawyers themselves. In some instances, non-lawyers may negotiate over what many would consider legal negotiations, such as when individuals themselves settle a divorce dispute, when union representatives represent workers in grievance arbitrations, or when former stockbrokers represent brokerage houses in securities arbitrations.<sup>230</sup> Indeed, the number of such non-lawyers engaged in what looks like legal negotiations may increase as states reconsider limits on the right of non-lawyers to engage in various kinds of activities and as many individuals and organizations promote the ability of individuals to lawyer for themselves.<sup>231</sup>

First, we consider the nature of legal problems. In particular, we address in detail the notion that mood may matter less to legal negotiation because (1) there is less potential for joint gain/win-win solutions than in the mood and negotiation studies, and (2) even if there is such potential, it involves relatively routine and recurring tradeoffs. As we saw, however, theory and experimental data instead suggest mood matters more for novel tradeoffs or solutions.

Second, we consider some of the nature of legal decisionmaking. In particular, we consider how legal negotiations may involve deliberate and systematic predictions about what courts or other legal officials, like regulators or tax auditors, might do in the absence of a settlement. We also consider the way anyone negotiating for another may be drawn to *explain* decisions in such a way even if they really decide in some other way. In addition, we consider the way legal negotiations, like prolonged labor-management negotiations or settlement of a long pending case, may be spread out far more than the negotiations studied so far. Finally, we consider the way mood may function as information to other negotiators and, in a related way, why those negotiating for others may show less emotion.

#### 1. Nature of Legal Problems

##### a. Zero-sum Negotiations: "It's the Money, Stupid"

To consider how much the existing mood and negotiation studies tell us about legal negotiation, we must examine the potential for joint gains built into the studies.

First, nearly all of the studies include some clear and quantifiable opportunity for individuals to make themselves better off if they cooperate. Most give different

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230. See Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* 151 (U. of Mich. Press 1998) (arbitration of labor grievances "regularly pits experienced nonlawyer advocates against experienced lawyer advocates").

231. Some advance the idea of lay representation as a way to help poor people who otherwise might not have access to any representation. See Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Westview Press 1992).

payoff schedules to, say, employers and workers so one side gets more points for winning on, say, vacation and another, say health benefits.<sup>232</sup> Next the different payoff schedules always include a number of items where the points that one side may get are vastly greater than the points another side might get for a particular issue. Thus, if individuals realize this, they can increase their points by conceding on issues that offer relatively few points to them in return for getting concessions on issues that offer them many points. In addition, most of the studies presume that individuals actually have identical preferences for some issues, such as the start date for employment.<sup>233</sup>

The bold assumption comes in the degree of tradeoff potential. In many of the studies, students received a payoff sheet that told them how many points they achieved for certain outcomes, such as salary, medical benefits, vacation, and start date.<sup>234</sup> Some degree of similar preferences indeed characterizes many legal negotiations; often parties have some interest in ending litigation earlier so they save legal costs. Many negotiation teachers and scholars would agree that an employer might be worried about health care insurance and would rather pay only sixty percent of expenses than 100 percent. However, the Allred study made this preference quite extreme by having the employer get an additional 660 points if the employer paid only sixty percent rather than 100 percent, but only getting an additional 100 points if the employer paid \$40,000 rather than \$48,000.<sup>235</sup> In short, the extent of the tradeoff was unrealistic for this kind of scenario, and it therefore raises questions about how it applies to scenarios in which the tradeoffs are not so extreme.

The data raise the serious question whether mood that increases success in negotiations with huge potential for tradeoffs will have similar effects in other negotiations with less tradeoff potential, including (as many see them) legal negotiations. As we saw from the Baron and Kramer studies, positive mood leads individuals to set higher goals; if both sides set higher goals in negotiations with many potential tradeoffs, the high goals may motivate both sides to search harder to identify those tradeoffs.<sup>236</sup> Likewise, to the extent that positive mood makes individuals more likely to seek deals and otherwise behave cooperatively, as Forgas found,<sup>237</sup> this may make them more likely to discover tradeoffs and agree to them as well. In contrast, both effects may lead to quite different results if there is less potential for joint gains. If both sides set higher goals, and tradeoffs are less possible, then it is more likely that the parties may never reach an agreement.

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232. This is true of the movie negotiation by Kramer, the job negotiation by Allred, and the sale of appliances by Carnevale and Isen. See Kramer et al., *supra* n. 3 at 128-29; Allred et al., *supra* n. 50 at 179; Carnevale & Isen, *supra* n. 52.

233. Allred et al., *supra* n. 50 at 179 (instructions to those playing employer and employee gave same preferences for some issues).

234. *Id.*

235. *Id.*

236. Baron, *supra* n. 55; Kramer et al., *supra* n. 3.

237. Forgas, *supra* n. 40.

Moreover, if both parties set higher goals and reach no agreement,<sup>238</sup> then this may lead to negative mood, which may further reduce the odds of success in future negotiating.

Furthermore, if the positive mood leads individuals to search for tradeoffs but such tradeoffs do not exist, there are several potential problems. Arguably, individuals simply waste time.<sup>239</sup> In addition, individuals will likely experience such negotiations as frustrating because their expectations for how the negotiation would proceed – pleasant discussion of needs, identification of tradeoffs, win-win solution! – have not been met.<sup>240</sup> In principle, such disappointed expectations may themselves produce negative mood during the negotiation. And, as we saw, negative mood is often associated with worse outcomes. Again, however, it is important to test exactly how negative mood plays out in such scenarios. Recall that the bottom line associations of negative mood with less success involved negotiations in which there was potential for joint gain. If negative mood does not have this effect in more zero-sum negotiations, then this negative mood produced by frustration may not hurt results. Indeed, if the negative mood leads individuals to shift their behavior to something more appropriate for a zero-sum negotiation, then this may actually enhance their negotiation success, mitigating the potentially dysfunctional consequences of an initially positive mood!

All of this suggests that one fruitful area for further empirical research is the question of how mood affects negotiations with more of a zero-sum nature. The first and simplest way to study this is to determine how mood affects negotiations that allow no tradeoffs of any kind, such as the sale of a commodity with no conditions or the settlement of a lawsuit for a specific amount of money. Some, of course might suggest that such a strict approach goes too far and neglects the potential for some tradeoffs in many legal negotiations.<sup>241</sup> Fortunately, the existing structure of negotiation research makes such fine gradations possible. Researchers may simply reduce the degree of tradeoffs possible by limiting the gap in points one side receives on a given issue with the number of points another side receives on that issue.

Finally, researchers should consider the not infrequent scenario when there is not only no potential for joint gains, but no rational incentive for at least one side to reach an agreement at all. For example, when someone has an offer from one car dealer to sell them a particular car at \$10,000 – perhaps an especially good price because of special incentives available to that dealer alone – then there is no bargaining potential with a dealer who cannot afford to sell the car at less than

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238. A significant number of persons reached no agreement in the Allred study despite the presence of large potential tradeoffs and, therefore, win-win solutions. See Allred et al., *supra* n. 50.

239. See generally Bazerman, *supra* n. 131. This is arguable. First, this looks less efficient the more one examines the decision *ex post* after one knows that the search was in vain, but looks considerably less inefficient if one looks at it *ex ante*. Second, this looks less efficient the more one generally believes that the odds of finding tradeoffs and creative solutions are less. See *supra* n. 62.

240. See Kumar, *supra* n. 20 (unpleasant emotion may arise when individuals have a “script” – a set of expectations for the process of negotiation – that is not met).

241. See e.g. Menkel-Meadow, *supra* n. 59.

\$11,000. Some scholars call this a negative bargaining zone.<sup>242</sup> In such scenarios, those in positive moods may be particularly less efficient if they take too long to realize that no potential agreement is feasible.<sup>243</sup>

b. Repetitive Tradeoffs: Another Day, Another Structured Settlement

A second more complicated possibility involves probing the exact nature of the tradeoffs in particular negotiation. As we saw, existing studies apply most when there are large potentials for tradeoffs. There exists an additional and far subtler limitation to existing studies. They deal with populations of individuals who will likely view the potential tradeoffs as quite novel. Therefore, the studies raise the question of how mood may affect tradeoffs when the relevant tradeoffs are instead experienced as more routine. Where negotiations involve routine tradeoffs, two theories we saw above converge to predict mood will play less of a role: Forgas predicts mood plays less of a role when activities are narrow versus open-ended,<sup>244</sup> and the expert decisionmaking literature predicts mood plays less of a role when experts confront a familiar problem.<sup>245</sup>

Consider how the existing studies create situations where negotiators will experience potential tradeoffs as novel. Many of the studies seem to include subjects with relatively little negotiation experience at all.<sup>246</sup> To such students, the notion of any tradeoffs at all may be quite unfamiliar. To anyone trained in negotiation, of course, this mind state may be difficult to recall, but both anecdotal and systematic study show many individuals assume that negotiations always involve only zero-sum possibilities.<sup>247</sup> In addition, it is unclear how familiar individuals were with the relevant subject matters of the negotiations. In some instances, such as the Forgas negotiation over curriculum selection, students may have been familiar with the topic in general, but not with the kinds of negotiations individuals have about curriculum selection. Likewise, students in the Kramer study may have seen lots of movies, and maybe even movies about making movies, like *The Player*, but most of the students probably had not studied negotiations about making movies, let alone engaged in them.

The contrast with individuals already familiar with repetitive tradeoffs may be quite dramatic. While participants in one negotiation may experience the tradeoff between, salary and health insurance as novel, experienced labor negotiators may

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242. Shell, *supra* n. 19.

243. In a sense, such a test resembles Isen's study of the speed with which doctors reach correct diagnoses. Isen, Rosenzweig & Young, *supra* n. 41.

244. See *supra* text accompanying n. 186.

245. See *supra* text accompanying nn. 199-202.

246. Exactly what kind of experience and/or training students had in negotiation is not clear from the published studies. Typically, the studies merely describe the classes in which students were enrolled, which often includes only psychology students. *But cf.* Isen, Rosenzweig & Young, *supra* n. 41 (suggesting mood affects practicing physicians).

247. See Thompson & Hastie, *supra* n. 64, at 107 (sixty-eight percent of negotiators in one study assumed a fixed amount of resources).

find them familiar – indeed, even routine.<sup>248</sup> Thus, even casual conversations with dealmakers and lawyers reveals repetitive tradeoffs available in areas like mergers and acquisitions,<sup>249</sup> divorce settlement provisions for joint custody<sup>250</sup> and trading concessions on child custody for concessions on alimony and/or child support,<sup>251</sup> or personal injury lawyers characterizing damages so they avoid tax liability.<sup>252</sup>

Although some theories predict mood will affect these negotiations less, some research on the way mood affects recall leaves room for doubt. This is because mood may affect what it is that we recall.<sup>253</sup> In particular, when we are in a certain mood, we tend to recall events that we experienced in a similar mood.<sup>254</sup> Even in routine and repetitive negotiations, there may be instances in which individuals recall cases that had greater or fewer potential for joint gains. Indeed, individuals – and even mediators – may talk of cases that “can settle” and those that “cannot settle.” And, as we saw, there is also evidence mood not only affects recall but also our assessment of the probability of different events.<sup>255</sup> Thus, those in a positive mood may recognize the possibility of a stalemate but may think settlement more likely or they may recognize they might lose in court, but think they will win. Suppose individuals were in a positive mood in cases that settled. This might suggest that when negotiators sit down to settle in a positive mood they are more likely to automatically recall those cases that settled; conversely, when they sit down in a less positive or even negative mood, they may be more likely to automatically recall cases that “could not” settle.

A final complication, too, depends on another individual difference in the way mood affects recall of events. Although earlier research simply suggested that all individuals recall events that occurred when they were in similar moods, more recent research suggests some people moderate this effect by recalling positive events when they are in a negative mood.<sup>256</sup> In particular, it appears that those able to recall

248. See e.g. Robert B. McKersie & Richard E. Walton, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (2d ed., ILR Press 1991) (discussing the kinds of similar tradeoffs that different union and business organizations make).

249. For example, many view a contingent agreement as one that creates value, but a provision allowing a company entering a merger to rescind its commitment if there is a material change – a classic contingency agreement – is routine. See e.g. Edward D. Herlihy et al., *Financial Institutions Mergers and Acquisitions 2001: Adapting to the Challenges of a Changing Landscape* 8-9 (2002).

250. See generally Fineman, *supra* n. 57 (criticizing the tendency of mediators to encourage joint custody).

251. See Scott Altman, *Lurking in the Shadow*, 68 S. Cal. L. Rev. 493 (1995) (noting that reports of husbands who say they will contest custody unless wives ask for less money, while of dubious ethics, may not occur that frequently).

252. See J. Gillespie & Max H. Bazerman, *Parasitic Integration*, 13 *Negot. J.* 271 (July, 1997) (negotiators often claim deals that limit tax liability create value, or are win-win, but they often do so at the expense of parties without a formal role in the negotiations, like other taxpayers).

253. See e.g. Fiske & Taylor, *supra* n. 7.

254. *Id.*

255. Wright & Bower, *supra* n. 150.

256. Cathy McFarland & Roger Buehler, *Negative Affective States and the Motivated Retrieval of Positive Life Events: The Role of Acknowledgment*, 1997 *J. Pers. & Soc. Psychol.* 200 (1997).

positive events do not suppress their negative mood, but rather first acknowledge it and then recall positive events in a conscious effort to shift mood.<sup>257</sup>

The more complicated question, ultimately, becomes not merely how often legal negotiation involves tradeoffs, but how often *novel* tradeoffs. The more novel a solution, the more that the expertise and Forgas theories converge to suggest mood may play a role. Perhaps the greatest potential for mood effects in law and elsewhere is simply not studied: the creation not merely of tradeoffs but novel solutions. In the familiar scenario in *Getting To Yes*, the creative solution to Mideast peace is not a tradeoff between Israelis and Egyptians both seeking the Sinai; it is a creative solution: the Sinai will be under the sovereignty of Egypt, thus satisfying Egyptian pride, but it shall be demilitarized, thus satisfying Israeli security interests.<sup>258</sup> In a classic example used by Menkel-Meadow, the husband who wants to vacation in the mountains and the wife who wants to vacation by the sea can both get exactly what they want by vacationing in Santa Barbara, which has both mountains and the Pacific Ocean.<sup>259</sup> In the terminology of Pruitt, these types of creative solutions are bridging agreements; the simple tradeoffs studied in the mood and negotiation studies, however, are simply logrolling.<sup>260</sup> It is likely that mood would affect these novel bridging agreements most.

Unfortunately, this important theoretical problem is difficult to study for two reasons. First, as a matter of principle, it is difficult to reach agreement on when legal negotiations may involve genuinely good and genuinely creative solutions. Some legal scholars view any negotiation that does not duplicate the results in court as a sham.<sup>261</sup> Others, in principle, suggest that the law (in at least some instances) may allow individuals to arrive at creative solutions that nonetheless may be consistent with the law.<sup>262</sup> Thus, in a negotiation between a tax auditor who first

257. *Id.*

258. Fisher, Ury & Patton, *supra* n. 58.

259. Menkel-Meadow, *supra* n. 59.

260. Dean G. Pruitt, *Negotiation Behavior* 155 (Acad. Press 1981) (“[L]ogrolling involves a simple additive combination of demands previously endorsed by each party, whereas a solution by bridging entails some novel substantive element not previously under consideration”).

261. Compare Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984) (settlements should reflect underlying legal principles) with Menkel-Meadow, *supra* n. 56 (legal values themselves may not be just, but product of imperfect legal system, and values of settlement may reflect autonomy value of litigants to choose the values that best reflect their own principles). As Menkel-Meadow notes, the law in a particular case may not have developed in a particularly just manner, be it because a process was infected with the inequalities, exposed by various left critical scholars of various hues, or the piggish interest politics bemoaned by public choice scholars of the right. So, too, as various perspective scholars have suggested, the general law in any particular case may represent and even reify the perspectives of some individuals or “cultures” at the expense of others. See e.g. Martha Albertson Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* 145 (1995) (coining the term perspective scholar to capture the insights of feminists, women of color and others); Freshman, *Privatizing*, *supra* n. 20. See generally James R. Averill, *Creativity in the Domain of Emotion*, in *Handbook of Cognition and Emotion*, *supra* n. 7, at 765, 773 (different cultures may have different awareness of emotion).

262. See e.g. Meadow, *supra* n. 56. Cf. Steven Ware, *Default Rules From Mandatory Rules: Privatizing Substantive Law Through Arbitration*, 83 Minn. L. Rev. 703 (1999) (arbitrators should often be able to impose decisions on parties that a court would not impose because the competition between



stakes out one legal position, and a taxpayer's lawyer who stakes out another, the two might agree to a solution that is both workable and reflects an acceptable interpretation of the law, albeit one neither adopted at the outset. Or consider the compromise pardon in the infamous Leo Frank case: with the help of informal mediation, the board of pardons moved from its initial insistence on granting only a routine pardon (which implied guilt) and the insistence of Jewish organizations that the board issue a rare pardon that exonerated Frank.<sup>263</sup> Instead, all agreed to a compromise pardon that stated guilt or innocence could not be determined, but that the state regretted the way the case stood for anti-Semitism and mob rule.<sup>264</sup>

Second, even apart from the difficulty of arriving at agreement on good novel solutions, it is difficult to generate quantifiable data on such solutions. The great elegance of negotiation that imposes only certain solutions as possible, and certain points for each solution, is that they yield very neat results that, in principle,<sup>265</sup> value the same results by the same quantitative criteria. In legal negotiation classes, one popular negotiation exercise involves the "angry neighbor" who chopped down a tree he mistakenly thought was on his property.<sup>266</sup> The true owner of the tree seeks to be made whole, but students can identify a number of ways of satisfying the owner's need for vindication, privacy, shade and convenience: some students have one party care for a replacement tree, others pick different vegetation, like a hedge, that provides privacy, and so on.<sup>267</sup> Although teachers of negotiation can lead interesting discussions of such solutions, it would be far more difficult to agree on a number that represents the value of the novel solutions. In principle, however, one could imagine negotiation research in which a panel of raters evaluated the results that participants received. Even if researchers could design such studies and convince other researchers of their importance it might be far more difficult to produce such examples in the neat and dramatic ways that one may (in principle) demonstrate dramatic effects in zero-sum negotiations or the way that existing studies demonstrate such effects with joint gains by simple tradeoffs. Some readers would simply not share the assumptions of the raters in principle, and others might simply not agree on the precise calibration of different solutions.

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arbitrators and courts will lead to the production of better law in a way analogous to the expansion of overnight delivery after Federal Express began competing with the post office).

263. See Clark J. Freshman, *By the Neck Until Dead*, *Am. Politics* 99 (Jan. 1988).

264. *Id.*

265. We qualify this by noting that students who report a certain deal may also include side agreements that are not captured by their simple reports. Most studies do not include transcripts and therefore may overlook this.

266. Leonard L. Riskin & James E. Westbrook, *Dispute Resolution and Lawyers, Instructor's Manual With Simulation and Problem Material* 221-27 (West 1987).

267. *Id.*

## 2. Nature of Legal Negotiation Culture

### a. The Culture of Prediction: Decision Analysis and the Similar Case

Another reason why mood might affect legal negotiations differently is legal negotiations may tend to be more planned, systematic, or rational than other negotiations. This is related to the idea of zero-sum negotiations because the fewer the dimensions, all else being equal, the easier one may make a prediction: predicting how a court will decide innocence or guilt is easier than predicting how a jury might return 20 questions asked in a special verdict form. Recall, again, that Forgas's affect infusion model presumes emotion and mood will have less impact if decisionmakers follow a deliberate and consistent strategy, such as the consistently competitive strategy of high Machiavellians. One example of such a pattern might be if legal negotiators engaged in the kind of relatively careful and systematic consideration of alternatives that some scholars and teachers of legal negotiation suggest: legal negotiators should settle cases based, at least in part, on a prediction of how a court might rule in a dispute. (Other patterns might be typical of other social settings or other cultures: for example, in some settings traders might converge on the midpoint between the opening offer of a buyer and the opening price asked of a seller.)<sup>268</sup> Others might characterize legal argumentation as more about arguments about the correct analogy, be it the most apt prior case or most similar prior administrative decision.<sup>269</sup> To the extent such predictions focus simply on pattern recall typical of experts discussed above, then the expert decisionmaking literature would also predict mood would play less of a role.<sup>270</sup>

The notion that such arguments about predictions should influence, and even determine negotiations, has a rich history in theory and philosophy. Most famously, Mnookin and Kornhauser, in one of the most frequently cited law review articles of all time, said that predictions about what a court would do serve as "endowments" or "bargaining chips" that serve as one source of influencing a negotiation.<sup>271</sup> In their classic example, custody negotiations between a mother and father would often be influenced by predictions of how a court would order custody.<sup>272</sup> Others have

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268. The famous Harvard scholar and teacher of decisionmaking and negotiation found just such a pattern among his students. Howard Raiffa, *The Art and Science of Negotiation* (Belknap Press 1982). This familiar and tempting pattern, however, may be systematic, but neither functional nor rational: there may be nothing rational about the starting point that either the buyer or seller initially picks, but these may nonetheless serve as an irrational anchor. See *supra* text accompanying n. 24; Shell, *supra* n. 19, at 189-91 (providing a more popularized how-to critique of letting an initial price be the basis for "splitting the difference"). To take a familiar example, the sticker price for a car is simply the price that a dealer stuck on the car, not necessarily a rational basis for "splitting the difference" with a reasonable offer that a customer makes.

269. See generally Steve Winter, *A Clearing in the Forest: How the Study of the Mind Changes Our Understanding of Life and Law* (U. of Chi. Press 2001) (lawyers frequently reason by trying to recall the appropriate case).

270. See *supra* text accompanying n. 198.

271. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 997 (1979).

272. *Id.*

made the model seem even more systematic than this relatively modest claim. In one of the best and most thorough texts on legal negotiation, Murray, Rau, and Sherman suggest that predictions about the law are not merely “chips” but a “blueprint” for an agreement.<sup>273</sup> Notice that this metaphor of blueprint extends the original model even more in the direction of predicting systematic and planned moves; predictions about the law morph from some chips in the game to the ground rules for the entire game!

In addition, others have extended this culture of prediction even further. For example, a defendant may offer to settle a claim of \$10,000 for \$5,000 based on the argument there is only a fifty percent chance of success. In more complex cases, involving multiple defenses or a copyright infringement claim, various contingencies might arise: there might be some chance any of three defenses might work entirely or there might be various decisions on each element of damages. Even for complex cases, Murray, Rau, and Sherman reproduce a complex decision analysis tree in their text.<sup>274</sup> Others suggest mediators use complex math to shape settlement discussions through systematic predictions.<sup>275</sup> As with the emphasis on joint gains and win-win bargaining above, some of the discussions become confusing because they blend the utilitarian advice that predictions promote success in negotiation, or that they simply describe how negotiation naturally occurs, with a rather moralistic notion that cases *should* be resolved based on such systematic predictions.

Exactly how well the notion of systematic predictions describes the process of legal negotiations or their outcomes is unclear. Many cite Condlin’s famous study showing that law students negotiate by quickly shifting from citation of cases to the facile incantation that there are “cases on both sides” of any dispute.<sup>276</sup> However novel its methodology and however welcome such an early attempt to ground theories of negotiation in some empirical reality, the study remains limited in several ways. Most obviously, it may well be that law students, unfamiliar with the law, move more quickly away from it than attorneys. Likewise, it may well be that different attorneys also give different weight to such arguments: perhaps relatively elite attorneys discuss law more or perhaps attorneys in some specialized areas of practice, like probate law, discuss predictions of the law in greater detail.

Before dismissing the prediction theory too quickly, it is worth noting that it is also consistent with non-lawyer arguments in many ways. Consider in particular the lessons of labor arbitration. In many instances, labor unions and management agree to submit disputes about firing employees to arbitration. Often non-lawyers argue such cases, and often such non-lawyers shift at a certain point to settling their dispute before the arbitrator rules. Such labor arbitrations have evolved into a relatively

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273. Murray et al., *supra* n. 10, at 218.

274. *Id.*

275. See e.g. David Hoffer, *Decision Analysis as a Mediator's Tool*, 1 Harv. Negot. L. Rev. 113 (1996).

276. See Robert Condlin, “Cases on Both Sides”: *Patterns of Argument in Legal Dispute Negotiation*, 44 Md. L. Rev. 65 (1985).

detailed body of work about precisely when there is “good cause” to fire someone.<sup>277</sup> The more lawyers try to recall the appropriate case, the more they engage in the kind of pattern recall in which the expert decisionmaking literature leaves little role for mood;<sup>278</sup> in contrast, the more lawyers analyze each case in open-ended ways, the more Forgas’s theory predicts mood will play a larger role.<sup>279</sup>

Overall, then, the nature of legal arguments – in at least some substantive areas of law, and with at least some groups of lawyers – may lead to very different effects for mood. In particular, the systematic nature of some legal argument may reduce the way that mood affects negotiation. Exactly how mood interacts in each substantive practice area is an empirical question that deserves further research.

b. Explanations to Clients and Courts: Decision Analysis and the Right Case Revisited

Another factor that may affect the deliberate nature of legal decisionmaking is the need to explain decisions to others. Such explanations may flow from legal duties, as in the case of lawyers, or from the simple need of anyone negotiating for a client to keep the client happy. In many instances, lawyers in principle must explain decisions to clients as an ethical matter. In some instances, this need to explain may force a client to think seriously and systematically about how to approach a legal problem. In an effort to trim legal expenses, many corporate clients have added in new loops of decisionmakers who have to approve legal strategies, expenses, and settlements: both more sophisticated and experienced in-house counsel and outside consultants purport to get outside law firms to act more efficiently. In principle, these pressures might condition lawyers to make decisions in a more systematic and deliberate way. In a similar way, some lawyers must also explain decisions to courts. Those without a powerful client, such as lawyers who bring suits on behalf of an abstract class that never meets with the lawyers, must theoretically explain proposed settlements to courts.<sup>280</sup>

Exactly how more deliberate and rational these pressures make lawyers is debatable for a number of reasons. First, many of the pressures that sound so confining in theory actually exercise little power in practice. Clients differ in how much power they have over a particular lawyer. For example, contrast the general counsel of IBM with the indigent illegal immigrant represented by a legal aid volunteer. In addition, clients themselves may differ in how much they actually

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277. See generally *United of America Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960) (“[T]he labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.”).

278. See *supra* text accompanying nn. 199-201.

279. See *supra* text accompanying n. 185.

280. Just how well courts police such settlements is a separate question. See generally John C. Coffee, Jr., *Understanding The Plaintiff’s Attorney: The Implication of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 677-679 (1986) (expressing doubts about how well courts monitor plaintiffs’ lawyers).

demand deliberate rational expectations. Second, even clients and courts with real power and real incentives may not focus on complex explanations and decisionmaking. Clients may want to get to the “bottom-line” more than elaborate decision trees and mathematical models of possible outcomes versus possible risks and costs. One prominent probate litigator describes the final mediation involving a claim by someone who might have been entitled to millions in a trust in several years; another party offered the person a very small sum immediately, and the client accepted.<sup>281</sup> Even seemingly “sophisticated” in-house counsel and consultants may be less interested in balancing complex scenarios than in cutting their legal costs in a given fiscal year. Although the data remains sharply contested, Janet Alexander answered the question, “Do the merits matter?” when companies settle large class actions with a resounding “no.”<sup>282</sup> Third, even if clients and courts had the power and incentive to demand elaborate and rational explanations, it does not follow this is how lawyers would actually settle cases. Rather, lawyers might give complex explanations but make their actual decisions in very different ways.

c. Longer Negotiations: More Emotion Because of Escalation of Conflict or Less Emotion Because of Perspective of Time?

Another key distinction between existing mood and negotiation studies and many legal negotiations concerns the time frame for negotiations: nearly all studies focus on negotiators who get information, study it, and negotiate in one brief class period.<sup>283</sup> From one perspective, however, many legal negotiations instead stretch out over long periods of time. In settlements of lawsuits, for example, many suits do not settle until after years of some kind of litigation, including various depositions, exchanges of information, motions, and so on.<sup>284</sup> Though the data are less easy to obtain and quantify as neatly, many legal transactions like collective bargaining agreements and mergers and acquisitions also take place over many months.

Longer negotiations may decrease the role of mood on negotiations. In such long interactions, people may develop strategies over long periods of time. This

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281. Of course, even the most seemingly irrational decisions, such as this decision, could be explained as rational: Perhaps the person accepted the smaller payment because he discounted future payments in a dramatic way; perhaps this discount stemmed from his knowledge that he had some terminal disease; or perhaps the possible regret associated with losing and getting nothing at all seemed great to him. See Guthrie, *supra* n. 33, at 83.

282. Compare Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991) (even large corporations may settle cases without taking into account the likely outcomes at trial) with Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2081 (1995) (suggesting that Alexander’s study exaggerated the extent to which likely outcomes play little role in corporate decisions to settle cases).

283. See e.g. Allred et al., *supra* n. 50, at 175. We are grateful to Gerry Levy for first suggesting this critique of the existing psychological studies based on the way they took place in a single period rather than in the prolonged way typical of litigation.

284. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 Mich. L. Rev. 319 (1991).

means that any given decision will be made while individuals have been in a variety of moods at various times; the mood at any given time should therefore have less influence over the decisions. Or, quite the opposite may occur, and time may allow the escalation of conflict as individuals interpret each other in the worst possible light, act more aggressively, provoking another to react more aggressively, and so on in an escalating cycle of aggression and misunderstanding.<sup>285</sup>

Again, there also may be other factors that still let mood play a large role. First, even if negotiations nominally take place over a long period of time, there may be a relatively short period of time when actual decisions are made. Some lawyers may indeed use the luxury of time to engage in careful planning, consultation with clients, and so on. Others, however, may simply engage in routine, automatic, mindless litigation mode or due diligence mode until the final moment of decision.<sup>286</sup> For example, union bargainers may postpone real decisions until the deadline for an agreement to expire approaches or lawyers may wait until the court ordered settlement conference, or the eve of trial. Partly this may reflect the individual habits of particular lawyers. Partly, too, this may reflect differing realities: the lawyer who handles a case for what looks like five years may actually do little between filing a case at one point and having the case scheduled for a mediation or hearing until months or years later.<sup>287</sup>

#### d. Uncertain Negotiations and Mood as Information About Interest

Mood also may play a different role when the amount of interest of various parties is not clear. In certain negotiations, we hypothesize that individuals may treat (what they perceive as) the mood of another as information:<sup>288</sup> negotiators may think a happy buyer is more interested in a purchase. Earlier research, apparently by unintentional design, did not address this possibility. In all of the negotiations studied, students knew the person with whom they negotiated already had a large

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285. For an analysis of several potential ways such conflict may escalate in terms of economic rationality analysis, see Bazerman, *supra* n. 27, at 77-90. For an analysis in terms of the analysis of the psychological theory of mutual projective identification, see Peter D. Kramer, *Should You Leave?* 208-09 (Scribner 1997).

286. Steve Schwartz, a prominent legal advocate for persons with mental disabilities, distinguishes between three approaches to settlement. Early on in cases, he tries to think about what defendants may ultimately agree to and tries to move toward that point. Another lawyer in his office tends to make decisions about settlement based on an assessment of how culpable the defendant was, a determination which shifts over time as more information becomes available. Still another lawyer simply focuses on what the correct legal solution is that a court should order and tries to move litigation toward such an official determination. Telephone interview with Susan Stefan (June 5, 2001).

287. Lawyers may continue with such practices despite academic and other advice that lawyers begin thinking about how cases may be tried and/or settled earlier on. We are very grateful to Lonny Rose, for raising this point. In-person interview with Lawrence Rose, Professor of Law, University of Miami School of Law & Educational Director, National Institute of Trial Advocacy, Miami, Florida (May 29, 2001).

288. We do not wish to confuse our view with another view that information as one's own mood may be treated by oneself as information. See e.g. Forgas, Johnson & Ciarrochi, *supra* n. 185, at 163.

interest in reaching an agreement – be it hiring a particular person,<sup>289</sup> arranging financing for a film with a particular person,<sup>290</sup> buying and selling appliances with a particular person,<sup>291</sup> and so on. Such given levels of interest characterize many real-world negotiations. In other instances, however, the amount of interest may be less clear; one may meet with a potential buyer of some real estate and not know if the person contemplates other real estate or even deciding to purchase some other goods – or no goods at all! – instead. In such instances, mood may serve an additional function as a proxy for one’s interest. For example, the person who seems very happy in viewing a property may be at a disadvantage to some degree: a real estate sales person may interpret this happy mood as a sign of interest.<sup>292</sup> Although we are unaware of any systematic testing of this possibility, many negotiation advisers suggest that people feign certain emotions as a tactic.<sup>293</sup> In principles, one might really have one mood, such as the positive mood associated with high targets, but try to display a different mood.

Such ambiguity about interest is not only common for many transactional lawyers but for litigators as well. At any given stage of litigation, lawyers do not know how willing and/or able other parties are to proceed with litigation. Lawyers not only do not know the inherently subjective aspects of how willing another party is to risk litigation but also do not know other objective features, such as their capacity to finance litigation.

Mood may also signal information to lawyers about the legal knowledge of other lawyers. Simply put, a lawyer who confronts an unexpectedly happier negotiator may think that the negotiator must have some unknown legal knowledge.<sup>294</sup> Sometimes such unknown knowledge may be factual information that an adversary may spring at a later date or even, subject to the usual rules of discovery, at trial itself. Other times, such unknown knowledge may be knowledge

289. See Allred et al., *supra* note 50.

290. See Kramer et al., *supra* n. 3.

291. Carnevale & Isen, *supra* n. 52.

292. Cf. Shell, *supra* n. 19 (persons often reach suboptimal deals because they relax when another side has made an offer that meets their bottom line – even if they might have had a goal that was better and even if the other party would have been willing to move closer to that goal).

293. One description of emotion and negotiation canvasses a number of such examples:

Bill collectors . . . are required to display urgency (high arousal with a hint of irritation) to debtors but are not required to internalize the emotion; Mary Kay teaches her beauty consultants to offer fake enthusiasm to customers when they do not feel genuine enthusiasm. Flight attendants at Delta, however, are given explicit feeling rules, which require that they imagine being hosts in their own home and view the passengers as their guests.

Thompson, Nadler, & Kim, *supra* n. 7, at 152, 157 (arguing that “[e]ffective negotiation outcomes are best achieved by maintaining positive affect during the negotiation, but we must act tough, and get angry and upset to show we are serious”).

294. Jerome Culp, Professor of Law at Duke Law School, reveals the way one lawyer exploited every lawyer’s fear of the overlooked case. One lawyer, as he tells it, would always tell other lawyers, “I have a case directly on point, and it says you lose. You can settle for something now, or I’ll show the case later, and you’ll get nothing.” In-person interview with Jerome Culp, Professor of Law, Duke Law School (May 2001).

of a crucial legal argument, such as a reason why a seemingly valid contract may not be enforceable. Think of the classic first year civil procedure case of *Mottley*<sup>295</sup>: a couple thought a railroad had no reason not to honor a railroad pass, but the railroad at some point developed the argument that federal law made the pass unenforceable. Early on in a negotiation, the railroad might not have disclosed this argument, but the happiness and confidence of its lawyers may have signaled such an argument. Thus, in some negotiations, the most functional mood as information for other parties may be positive.

In short, mood may signal a level of commitment and interest in reaching an agreement under particular terms. In some instances, then, positive mood may be dysfunctional because it may lead another party to perceive that the offer that party made is acceptable; instead a lack of positive mood – or even a negative mood – may indicate that the offer is less acceptable. The absence of positive mood and/or the presence of negative mood may also be functional in some negotiations for a different reason: people may be willing to settle on somewhat less advantageous terms to avoid having to be in the presence of someone in a less positive or even negative mood. It is worth noting, however, that this dynamic may vary with negotiators of different races, genders, and other identities. As Ayres showed in his study of car bargaining, car salespeople may actually enjoy prolonging a negotiation with an African-American male in order to act out their dominance over the African-American male.<sup>296</sup>

e. The Cold Agent: Why Get Emotional About Someone Else's Problem?

Another related hypothesis is that those negotiating for others, be they lawyers or others negotiating for a client in a legal negotiation, simply do not have any emotional reactions when they negotiate. One might hypothesize that lawyers and other agents – Jerry McGuire and Arliss, notwithstanding – are not that emotional. This may seem especially plausible when lawyers or others negotiate on behalf of others since *often* lawyers may have no tangible stake in the outcome – or, in the case of agency percentages or contingent fees, at least *less* of a stake. One thinks of the story of the man just condemned to death who turns to his lawyer and asks, “What do we do now?” The lawyer replies, “What do *we* do now? You’re off to the electric chair and I’m due at the golf course at 2.” At first blush, this hypothesis seems implausible given the high rates of mental distress among law students and lawyers.<sup>297</sup> On the other hand, the high rates of distress could be evidence that many lawyers and law students have emotion, but attempt to suppress their emotional

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295. *Louisville & N. R. Co. v. Mottley*, 211 U.S. 149 (1908).

296. Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 Mich. L. Rev. 109 (1995). The film *In The Company of Men* offers a vivid illustration of such an interaction. In one scene, a white manager asks an African-American male to come into his office and, eventually, asks him to expose himself. The white manager then acts unimpressed and tells him to leave.

297. See *supra* text accompanying n. 214.



responses and/or their awareness of those responses: much research shows that attempts to suppress emotion often rebound later and often are associated with worse health.<sup>298</sup>

One might also hypothesize that, even if those negotiating for others do have emotions, they do not show such emotions during negotiations. After all, as we saw in the last subsection, the appearance of one's actual emotion, such as the happiness associated with an imminent settlement one desperately needs, may disadvantage a negotiator.<sup>299</sup>

Ultimately, the claim that those negotiating for others have little emotion when they negotiate deserves empirical testing. Most of the existing studies of mood and negotiation do not address this at all: instead of looking at how different people have different emotions, either before a negotiation or in response to the negotiation, the studies instead compare all those in general induced to have one emotional reaction with all those induced to have another reaction (or not induced to have a reaction at all). Another advantage of studying naturally-occurring mood, as we do in our current program of research, is that it permits us to test directly the question of whether individuals mood changes during the course of negotiation. We may test whether people have more or less emotional reactions when negotiating on behalf of others.

#### *D. The Need For Empirical Testing Involving Lawyers and Law Students*

If the first section made clear that lawyers need to pay attention to mood because studies show even mild changes in mood affect success at negotiation, this second section shows that legal academics and academic psychologists also need to consider the nature of lawyers and the nature of legal negotiation. Given the extensive evidence of the way mood affects a variety of decisionmakers in a variety of contexts, including negotiation, it is unlikely that mood plays no role at all in negotiations by lawyers and other negotiators in legal settings. At the same time, exactly what role mood plays in which legal negotiations is not free from doubt. Instead, as we've seen, there are plausible reasons to suppose mood plays less of a role (e.g., longer negotiations may minimize mood at any one time), more of a role (e.g., longer negotiations may allow emotions to spiral), or some more complex and

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298. Richard M. Wenzlaff & Daniel M. Wegner, *Thought Suppression*, 2000 Annual Rev. of Psychol. 59, 80 (trauma, obsessive-compulsive disorder, and depression are problems that are "associated with disturbing, intrusive thoughts and frequent suppression attempts, and for which there exists at least some experimental evidence that thought suppression may play a role in the production or maintenance of the disorder"); Keith Petrie, Roger Booth & James Pennebaker, *The Immunology Effects of Thought Suppression*, 75 J. Pers. & Soc. Psychol. 264 (1998). See also Thompson, Nadler & Kim, *supra* n. 7, at 141. On the emotional labor of lawyering, see Robert Eli Rosen, *And Tell Tchaikovsky the News: The Wedding of Therapeutic Jurisprudence and Preventive Lawyering*, 5 Psychol., Pub. Pol. & L. 944, 945 (1999).

299. See generally Thompson, Nadler, & Kim, *supra* n. 7 (suggesting that former Secretary of State James Baker may have allowed Iraqis to believe their invasion of Kuwait would not provoke a United States response because Baker did not seem too emotional).

different role (such as the different meaning that mood may signal to others). We next turn to how lawyers and other legal negotiators may try to manage mood to improve their negotiations. In general, we assume that more positive moods will be associated with greater success and negative moods with less success for many lawyers for much of the time. Although we speak primarily of lawyers and legal negotiators, much of the general advice will apply to other negotiators as well.

### III. WHAT WE NEED TO KNOW: CAN RESEARCH ON HOW MILD MOOD AFFECTS NEGOTIATION SUCCESS TRANSLATE INTO TRAINING LAWYERS TO NEGOTIATE BETTER THROUGH MOOD MANAGEMENT?

For those of us who teach negotiation, the logical question that follows from the basic scientific research that even mild moods affect negotiation is simple: How can we manage mood better to get better negotiation results?<sup>300</sup> For those of us who worry about the mental and physical health of negotiators, there is a related questions: Can we teach negotiation in ways that improve the mental and physical health of lawyers?<sup>301</sup> Again, as with the basic question of how mood affects negotiation, there has rarely been a shortage of opinions about what negotiators should do.<sup>302</sup> However, there has been a large shortage of scientifically-linked research on precisely how to manage moods to get better negotiation results. In part, as with the basic research on how mood affects negotiation, this is because much negotiation literature is not statistical and quantitative, but often more qualitative and contextual. It is also largely because of the nature of even scientific research on how mood affects negotiation. Many of those who study how mood affects negotiation are interested in the topic as part of more general research on how mood affects a range of cognitions and activities; once they have shown that mood affects negotiation, they seem more interested in moving on to how mood affects other activities than trying to figure out how to tell negotiators how to manage mood better.<sup>303</sup>

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300. Although this is a logical question, it is a question that many teachers of negotiation treat with some skepticism, sometimes bordering on hopelessness: many act as if their students will simply never learn. Indeed, some point to evidence that people often continue to make many cognitive errors even after they are pointed out. One of the most accomplished scholars and teachers of negotiation, Max Bazerman, has written that he thinks it is difficult to change the ingrained cognitive errors that people make in negotiation, such as the anchoring error of sticking too much to an initial price, e.g., the sticker price of a car. See *supra* text accompanying nn. 27-28.

301. See *supra* text accompanying n. 297. See generally Dennis P. Stolle, David B. Wexler & Bruce J. Winick, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Acad. Press 2000) (legal scholarship, policy, and teaching should consider therapeutic consequences as one value).

302. See generally Thompson & Kim, *supra* n. 59, at 3 (“Prescriptive solutions to avoid or eliminate bias at the bargaining table are less widely researched than establishing the existence of the biases themselves.”).

303. See *supra* n. 40 (leading researchers on mood and negotiation generally to study how mood affects a variety of thoughts and behavior). In part, this reflects the relatively large contribution of social psychologists to negotiation and the relatively untapped potential of psychologists in other areas, particularly clinical psychology. See Bazerman et al., *supra* n. 26, at 303.

Even those who do have such an interest, however, may be far more familiar with the social psychological study of how emotion affects thinking and doing than with the focus of clinical scientists (including clinical psychologists and psychiatrists) with how to manage moods and our reaction to moods.<sup>304</sup> As we saw, this orientation also affects the way that researchers study how mood affects negotiation: researchers often do not look at the kinds of measures and variables, such as measures of depression and anxiety and obsessiveness, that are linked to research on how to manage mood and personality. In part, then, the reason why it is difficult to figure out precisely what to do stems from the various questions identified above, including questions about how different moods affect different persons in different kinds of negotiations.

Despite the need for more basic research on how mood affects negotiation, this section draws some tentative lessons and additional questions about what is to be done. First, we can see that some of the most conventional approaches about how to deal with mood run counter to scientific evidence. Second, we examine two more promising strategies: (1) attempts to correct for the potentially dysfunctional effects of certain moods and (2) attempts to change dysfunctional moods. As we noted early on, and in the last section, we do not yet know precisely what moods will be best for what lawyers and what legal negotiations; therefore, we cannot be sure exactly what moods to induce or exactly what corrections to apply. Nevertheless, we are reasonably confident that research will show that positive mood often leads to better negotiation results. Finally, we consider a frequent tension between shorter term strategies to manage mood in particular instances and longer term strategies to manage mood.

### *A. What We Know: Popular Strategies Don't Work*

#### 1. Avoiding and Suppressing Emotion Don't Work

The advice to try to ignore or suppress emotion comes in several different variations. In its crudest form, some negotiators simply think it is best to ignore emotion as something that is simply irrational and therefore irrelevant.<sup>305</sup> In a less crude form, some people might think emotion in negotiation is important, but not to the negotiation itself; the emotion can simply be ignored during the negotiation and dealt with later.<sup>306</sup> Sometimes one finds such emotion-avoiding strategies clearly articulated in maxims like, "Don't get mad; get even." Often, however, these emotion-avoiding strategies may be so deeply entrenched and rooted in culture (be

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304. Thompson, Nadler, & Kim provide a concise introduction to the social psychology of mood and negotiation, but their discussion of the management of emotions does not draw on much of the literature in clinical psychology on how moods are managed. See Thompson, Nadler & Kim, *supra* n. 7.

305. See *supra* text accompanying n. 12.

306. Cf. Rosen, *supra* n. 298, at 945 (acknowledging that denial of emotion may be linked to masculine practices but suggesting that "[a]lthough being aware of emotions and psychological phenomena generally is always indicated, being disengaged is not always therapeutically contraindicated").

it labeled Anglo or male or otherwise<sup>307</sup>) that we see this implicit dictate to avoid emotion in the way that the topic is simply not discussed. In legal texts and materials, this same view of emotion as merely irrelevant or distorting arises from the view of the cool-headed lawyer who can simply “cool out” the client and prevent emotions from getting in the way – a role sometimes also attributed to some kinds of mediators who try to help opposing parties get “beyond” emotions into a purely “rational” resolution of issues.<sup>308</sup>

This strategy does not work for at least four sets of reasons. First the attempt to suppress emotions simply may not work at all – the emotions will still exist. A slew of research on thought-suppression shows it often leads to a paradoxical rebound effect: the very thoughts one tries to suppress will often come back more frequently and/or more intensely.<sup>309</sup> And, as we saw, when an emotion is present, it may have a powerful effect on the way parties negotiate and the results they obtain.<sup>310</sup>

Second, apart from the research on how mood affects negotiation, shows other research that attempting to suppress emotions impairs one’s cognitive skills, particularly memory. In one very recent study, researchers found that people who were told to conceal their emotions remembered fewer details from slides they saw.<sup>311</sup> The researchers theorized that trying to conceal emotions drained limited cognitive resources, thereby leaving less cognitive resources available for storing information in memory.<sup>312</sup> This has crucial implications for negotiations: negotiators must be able to observe and retain details about what others want and need in order to identify potential tradeoffs and to identify the terms others will accept that will benefit the negotiator best.

Third, established research shows that attempts to suppress emotion are associated with worse physical and mental health in the long-run.<sup>313</sup> These worse base line mental health conditions, in turn, may make it more likely in future negotiations that negotiators will be in the kind of negative moods that we saw led to worse results.<sup>314</sup>

307. See Menkel-Meadow, *supra* n. 21, at 81-88. See also *supra* n. 20 (on the difficulties of defining the exact scope of any culture).

308. See Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 L. & Policy 7, 13 (1986) (some mediators emphasize predictions about what courts might do and others probe underlying psychological needs more).

309. See Leslie S. Greenberg, *Emotion and Change Processes in Psychotherapy*, in *Handbook of Emotions* (Michael Lewis & Jeannette Haviland eds., 1993) (“Trying to stop emotion is like trying to stop a stream; a flood may be the result.”); Richard M. Wenzlaff & Daniel M. Wegner, *Thought Suppression*, 51 Annual Rev. Psychol. 59 (2000); Joseph Forgas, *Introduction*, in *Feeling and Thinking*, *supra* n. 46, at 8 (providing historical context to idea that suppressing emotion does not work).

310. See *supra* section four.

311. See Jane Richards & James Gross, *Emotion Regulation and Memory: The Cognitive Costs of Keeping One’s Cool*, 79 J. Pers. & Soc. Psychol. 410, 414 (2000).

312. *Id.*

313. See Wenzlaff & Wenger, *supra* n. 298; Petrie, Booth & Pennebaker, *supra* n. 298.

314. One of the goal’s of treatment of depression is to train those prone to depression to prevent sad moods from spiraling into depression:

Finally, although there are not empirical data to support this directly, suppressing emotions may lead to worse negotiation outcomes if suppressed conflict leads to conflict later and therefore less compliance with agreements. One of the major claims made by supporters of ADR is that parties comply more with agreements reached in ADR than with agreements imposed by court. Moreover, there is at least some evidence that positive mood increases the likelihood that parties will honor agreements they make.<sup>315</sup> It is plausible to suppose that parties that suppress their emotions, particularly if it is suppressed by the pressure from lawyers or other agents, may find that, when these suppressed emotions surface later on, they are less satisfied with their agreements and therefore less likely to comply with them. Veteran probate mediator Clay Craig puts it this way:

When I'm mediating a case, and there's an agreement, I try to get my fee paid right away. That night, they are very satisfied with the agreement, and they can't thank the mediator enough. A couple days later, they think they could have reached the agreement by themselves. After that, they think it's a lousy deal, and you forced them into it.<sup>316</sup>

In part, this pattern may stem from the way parties attempt to suppress emotion during mediations, but the suppression cannot hold long past the mediation.<sup>317</sup>

## 2. Merely Venting Emotion Doesn't Work Either

At the opposite end of the spectrum from denying, avoiding, and suppressing emotion, venting emotion is perhaps one of the most frequently listed approaches to emotion in popular negotiation literature.<sup>318</sup> Again, this includes a relatively unsophisticated claim that mere venting will sometimes be a phase that allows parties

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prophylactic effects of psychological treatments depend on patients acquiring the capacity to respond to initial symptoms of depression by active coping responses, or at minimum, by "distancing" from symptoms, rather than by ruminations related to hopelessness or personal inadequacy. In this way, mild depressed states that might otherwise "spiral" into more severe and prolonged conditions are "nipped in the bud" and relapse is prevented.

John Teasdale & Philip Barnard, *Affect, Cognition, and Change: Re-Modeling Depressive Thought* 233 (Lawrence Erlbaum & Assoc. Ltd. 1993); Zindel V. Segal, J. Mark G. Williams & John D. Teasdale, *Mindfulness-Based Cognitive Therapy for Depression: A New Approach to Preventing Relapse* (Guilford Press 2002).

315. See *supra* text accompanying nn. 108-09 (positive mood enhanced reported compliance with agreements). See also *supra* n. 111 (studies in general show people comply more with agreements reached in mediation than in verdicts imposed by courts).

316. Interview with Clay Craig, Attorney at Steel, Hector & Davis; Miami, Florida (November 2000).

317. We note that Barry and Oliver propose a slight variation on this theme: they theorize that the fairness of an agreement will lead to positive emotion that will in turn lead to compliance. Barry & Oliver, *supra* n. 76, at 139. As expressed, however, this seems to be more a claim that parties comply with agreements that they see as fair, whether the fairness was associated with a positive mood or some other factor.

318. See Allred et al., *supra* n. 50, at 185 (criticizing *Getting To Yes* for such an emphasis).

to somehow move on – seemingly as if an emotional analog to the way vomiting up some difficult to ingest food may be one way to calm one’s digestion.<sup>319</sup>

As with the popular advice to suppress emotions, however, research shows that venting emotions – at least in the relatively unregulated and spontaneous way discussed in popular negotiation advice – also is often not effective. Most importantly, Allred’s study of anger, empathy, and negotiation shows that those who are angry actually have less accurate views of what other parties want.<sup>320</sup> Allred’s study documents clearly that higher rates of anger, and lower rates of concern for other parties, are associated with identifying fewer opportunities for tradeoffs and with reaching agreements that identify less joint gains. In other words, the experience of intense anger makes people less accurate at identifying the needs of others. This, too, may lead to less success at even zero-sum negotiations if anger clouds a negotiator’s awareness of other parties’ interests and bottom-lines.<sup>321</sup> All these negative consequences of venting may be compounded because venting may simply lead to an escalating cycle of negative emotion.<sup>322</sup>

Finally, we acknowledge that venting in conjunction with processing of emotion may work.<sup>323</sup> Complex processing seems relatively unavailable in most legal settings. This kind of processing is unlikely to occur in a simple discussion between either parties to a case or between lawyers. It may be worth exploring whether such processing might be possible in negotiations that involve persons trained in relatively advanced therapeutic skills, and such processing may be plausible with the presence of properly trained professionals, such as some mediators.<sup>324</sup>

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319. *Id.* (“People obtain psychological release through the simple process of recounting their grievances.”) (quoting, with disapproval, Fisher, Ury & Patton, *supra* n. 58). We are grateful to the inspiration of one of our cat’s encounters with a hairball for the text accompanying this footnote.

320. See *supra* text accompanying nn. 84-96.

321. See Shell, *supra* n. 19 (suggesting that negotiators can do better for themselves when they know what others want). Nevertheless, it is also possible that the anger might have other effects that might not lead to fewer individual gains. For example, angry parties might be more motivated, feel justified in higher goals and – since higher goals often are associated with better individual results – get better individual results. Again, unfortunately, the design of Allred’s study makes this question difficult to assess as well since, as with nearly all mood and negotiation studies, both parties were induced to be in the same (here, angry) mood; thus, both parties would perhaps feel justified in setting higher goals. In other studies, the setting of higher goals might lead parties to search for tradeoffs, but in the angry condition the parties may actually be so angry that they avoid solutions that would benefit themselves if they also would benefit an opposing party.

322. See *supra* text accompanying n. 285.

323. See e.g. James Pennebaker, *Writing About Emotional Experiences as a Therapeutic Process* 8 Psychol. Sci. 162-66 (1997); Rice, Elliot & Greenberg, *supra* n. 158, at 70-71 (therapy requires clients not just become aware of emotions but “construct new emotional meanings that can lead to more adaptive responding”).

324. Exactly what degree of processing and what kind of interventions work best is a relatively complex topic beyond the scope of this particular article. In particular, the scope of this article does not give us adequate space to consider how well transformative mediation may accomplish helpful processing of emotion. See e.g. Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994).

## B. More Promising Strategies For Mood Management

### 1. Basic Choices: Correcting Mood Effects Versus Modifying Mood; Short-Term Versus Long-Term Strategies

We distinguish between strategies designed to improve negotiation by bringing about actual moods associated with negotiation success from strategies designed to correct for biases that different moods may produce. As an example of the first mood induction strategy, Baron suggests that pleasant scents might be introduced into workplaces because his research showed pleasant scents improved mood and negotiation performance.<sup>325</sup> A second strategy might tell persons who are feeling sad to make a self-conscious attempt to consider cooperative kinds of tactics because research shows persons in sad moods tend to adopt more confrontational tactics. We distinguish these two in principle initially, although we recognize the complex feedback between these two strategies: correcting for mood distortions by adopting certain strategies that may lead to greater success, and this greater success may in turn bring about different moods.

We recognize the limitations of both the mood induction and mood correction strategies. Both strategies share a common problem of over- or under-correction. Existing research more clearly establishes this problem for the mood correction strategy. Although we are not aware of any studies that look at the way that individuals may attempt to correct for the way that mood may bias negotiation, research shows people often overcorrect for the potential effect of their emotions.<sup>326</sup>

Although less clearly recognized, the mood induction strategies also involve problems of overcorrection. For example, if we try to induce a positive mood because that is associated with success, we may induce a positive mood whose disadvantages outweigh its advantages. Indeed, what may look more like functional moods overall may really involve both functional and dysfunctional elements. Although existing research shows that positive moods may be functional by inducing cooperative strategies, higher goals, and better identification of the goals of others, research also suggests it may be associated with some dysfunction, like increased reliance on simplistic reasoning and stereotyping. The same dangers caution against attempts to induce negative moods. For example, we saw some research showed negative moods might lead to higher goals, but very negative moods may lead to a sense of hopelessness that leads to withdrawal, accommodation, and poor results. Just as happy negotiators may give up because they thought they did better than they actually did, unhappy negotiators who do not realize how well they did may also give up in the longer term. In addition, although we emphasize in this article the way that mood affects success in relatively narrow terms, we note that many would

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325. See Baron, *supra* n. 55.

326. Leonard Berowitz et al., *On the Correction of Feeling-Induced Judgmental Biases*, in *Feeling and Thinking: The Role Of Affect in Social Cognition* 131 (Joseph P. Forgas ed., 2000).

find mood strategies that depend on illusions and distortion of reality to be a disadvantage.<sup>327</sup>

Outside the area of negotiation, even many social psychologists who recognize the virtues of positive moods and attitudes recognize they may distort reality.<sup>328</sup> In a telling phrase, one prominent researcher who has shown optimistic patients do better but nonetheless misperceive their own conditions speaks of “positive illusions.”<sup>329</sup> The disadvantages of positive mood may be even greater in certain legal negotiations and for certain individuals. For example, longer negotiations may exaggerate the dangers of overconfidence, as those who think they did well in one phase of a negotiation either self-consciously make additional concessions to others or simply slack in their efforts.

## 2. Short-Term Strategies and Mood Inductions: Replicating Mood Inductions From Existing Research Has Limitations

If one reads the existing research without looking too closely, one might be tempted to think anything that will induce a positive mood should work to improve negotiation success. Even some of the most careful students of negotiation suggest that one useful strategy may be to put oneself and others in a negotiation in a positive mood.<sup>330</sup> We think instead this mood induction strategy, though promising, faces several limitations.

The first limitation, is that it is not clear that anything that induces a positive mood will lead to better results. Instead, the particular ways in which researchers thought they manipulated mood, such as false feedback on a test, may have instead operated largely by affecting cognitions, such as one’s confidence in one’s abilities.<sup>331</sup> Existing research therefore makes it difficult to believe that simply inducing a mood by other means, such as the pleasant music that researchers in other areas have shown generally induces a positive mood,<sup>332</sup> will work to improve negotiation.

One might instead try replicating the manipulations associated with mood. Such a strategy works better for some of the manipulations than others. One might try to post cartoons around a conference room or spray it with a scent. On the other hand,

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327. Moreover, when one turns from the question of how one’s own optimism may distort reality to inducing moods in others that distort their view of reality, additional moral problems arise. See John Rawls, *Theory of Justice* (Harv. U. Press 1971) (one principle of justice may be that the principles be transparent to all).

328. See e.g. Martin F. Seligman, *Learned Optimism* 291 (1990) (optimism “may sometimes keep us from seeing reality with the necessary clarity”).

329. Shelley E. Taylor et al., *Psychological Resources, Positive Illusions, and Health*, 55 *Am. Psychol.* 99, 106-07 (2000) (“The ability to remain optimistic, even unrealistically optimistic, in the face of deterioration . . . appear[s] to be physiologically protective.”); Shelley E. Taylor, *Positive Illusions: Creative Self-Deception and the Healthy Mind* (Basic Books 1989).

330. Thompson, Nadler & Kim, *supra* n. 7.

331. See *supra* text accompanying n. 164.

332. See *supra* n. 4.



it's relatively difficult to replicate directly the effects of giving false feedback on a test in most negotiation scenarios!

A second limitation of such mood inductions is their uncertain effect on particular individuals and their uncertain effect over time. What induces positive moods in one individual will not necessarily induce positive moods in another. For example, we find the commercial air fresheners that induce positive moods in many puts us in a rather annoyed mood.<sup>333</sup>

We expect our ongoing research on naturally-occurring mood will remedy some of these difficulties. Our current research involves asking individuals about their moods before a negotiation without attempting to change those moods. To the extent we find that those who report being in certain moods have certain results, we may generate advice that individuals might do whatever works for them to induce moods associated with success in negotiation. Likewise, we could advise them to alter moods associated with impediments to negotiation. For example, if someone noticed they did better at negotiations that called for creativity and collaboration when they felt more positive moods, and certain music made them feel better,<sup>334</sup> then we might advise them to listen to such music before such negotiations. Such an approach is consistent with the success shown by behavioral medicine researchers in using relaxation and stress management techniques to help persons living with breast cancer and other disorders: as part of an extensive program of research, they found a program including relaxation improved physical health, but that different relaxation techniques (such as visualization, progressive relaxation, and mindfulness meditation) appealed to different people.<sup>335</sup> We expect that the exact methods needed to generate certain emotions will vary not just by individuals but perhaps, too, among those from different cultural backgrounds as well.<sup>336</sup>

A final limitation of short term mood inductions is that they may not last long enough for some negotiations. In one doctoral dissertation for example, the

333. At a recent conference on translating theory to practice, veteran negotiation teacher and trainer Lela Love tried to apply research on conditions conducive to creativity by designing an exercise that would put individuals in a playful mood: she had the audience of seventy or so divide into groups according to birth month and then make various animal noises, *i.e.*, those born in the winter month made cow noises, in spring months, pig noises, and so on. One of us in the audience laughed a lot, but other prominent negotiation teachers sat stone faced. At a panel discussing that effort, and a version of this paper, we asked an international audience in Budapest to moo as well and then asked how many felt better, worse, or no difference. We found a variety of responses. In addition, it is unclear whether inductions that work on unsuspecting students in one negotiation will work consistently in others: Glade air freshener that makes people happy may not make people happy if it is always in the background. See Baron, *supra* n. 55, at 377.

334. See *supra* n. 4.

335. Michael Antoni et al., *Cognitive-Behavioral Stress Management Intervention Enhances Optimism And The Sense Of Positive Contributions Among Women Under Treatment For Early-Stage Breast Cancer*, *Health Psychol.* (forthcoming). See John Kabat Zinn, *Full Catastrophe Living* 435 (Dell 1990) (describing various techniques of stress reduction, including sitting meditation, body scans, and mindful yoga).

336. Cf. Seligman, *supra* n. 328 (optimism "may work better in some cultures than in others"). We gratefully acknowledge audience members in our presentation to the 2001 Law and Society meeting for emphasizing this point.

researcher failed to replicate prior effects of a mood induction, and she concluded that this resulted from the failure of the mood induction to last as long as the negotiation.<sup>337</sup>

### 3. Short Term Strategies: Corrections For The Effect of Mood May Work

The exact mood correction depends on further findings about legal negotiations, but the existing research suggests at least three corrections worth considering. First, one may try to correct for the way that mood affects strategy. As we saw, most people negotiate more cooperatively when in a better mood and more competitively when in a worse mood.<sup>338</sup> Exactly when to use which strategy is a source of considerable disagreement depending in part on an assessment of how frequently negotiators have potential for tradeoffs or other creative solutions and how often they essentially involve zero-sum arguments over some finite good like a sum of money. Our purpose here is not to resolve that debate.

Once an individual decides on one kind of strategy, he<sup>339</sup> should consider how his present mood may undermine or bolster that strategy. If, for example, he decides the settlement of a billing dispute is really about the payment of money (perhaps because, despite consultation, his client explicitly instructs him only to concentrate on maximizing the collection of money at this point), then he should be aware of how his positive mood may undermine that strategy. Such a positive mood might incline him to lose sight of his client's explicit instructions and be more cooperative, as Forgas's study suggested; worse, as Baron's study showed, a positive mood might induce him to make more concessions.<sup>340</sup> Exactly how he corrected for this danger might involve a variety of possibilities. For example, if he fears he is in such a good mood that he might be tempted to concede in person, he might conduct the negotiation by email.

Consider a quite different scenario: a somewhat unhappy or even angry person has been asked to collect on a debt owed by a producer to an actor. The actor may be somewhat satisfied with receiving the money, but he might well instruct his attorney that he has other goals as well: he may be concerned about his long-term reputation in a close industry, or he may even be interested in pursuing some further acting job with this particular producer. In that case, the lawyer would want to correct for the way that his negative mood might make him tend to be more adversarial and tightly focused. Therefore, based on research that direct email further promotes adversarial negotiations,<sup>341</sup> he might choose to meet with the producer in person. If he negotiated by email, he would make a deliberate effort to include some personal chit-chat in the beginning of the email exchange. In addition,

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337. See Michelle Weitzman, *An Examination of the Effect of Affect on the Outcomes and Processes of Negotiations* 85-86 (1995) (unpublished manuscript on file with authors).

338. See *supra* text accompanying nn. 106-09.

339. We use the male pronoun deliberately here to counter the silent assumption that only women and other outgroups have emotion. See *supra* n. 115.

340. See *supra* text accompanying n. 118.

341. See *supra* n. 71.

to correct for the tendency to be competitive and narrow, he might try in advance to come up with a variety of potential options, such as paying money over time, paying in other forms of goods, taking a share in some future productions' revenue, and so on.

Second, individuals may want to correct for the way that mood shapes perception of information. When angry, individuals often make incorrect assumptions about what matters to other persons. When happy, persons often think that they may have done better than they did, and unhappy persons may not realize quite how well they did.<sup>342</sup> In addition, research outside negotiation shows that happy persons may actually have positive illusions about how good reality is.<sup>343</sup> Thus, to return to the scenarios above, the somewhat angry negotiator with the producer will want to make extra efforts to find out what the producer's interests really are. A variety of corrections may apply: he might ask about such interests in a letter in advance, or he might put such a discussion in a written agenda he offers at a meeting in person. The happy negotiator may also want to correct for his perceptions as well. In collecting on the debt, the negotiator may be too quick to accept representations about just how much money the person has to pay: perhaps the person will accept that the debtor only has so many assets, without asking about other assets his wife may have, or about prospects of future assets from inheritances or otherwise.

Third, negotiators may attempt to correct for the way that mood may affect bargaining intensity, both in terms of initial goals and persistence. Here, the evidence is more mixed: some research suggests those in more positive moods may set higher goals,<sup>344</sup> but others suggests those in persistently worse moods may also set higher goals.<sup>345</sup> Accordingly, one potential source of correction may be for negotiators to be aware of whether their mood is either better or worse – either than their typical mood or of typical negotiators. If they determine it is, then they may make extra efforts to think exactly about why they have set the goals that they have. As with the discussion of what tactics are best,<sup>346</sup> precisely how individuals should set goals is a matter of some controversy that we do not seek to resolve here. Instead, we suggest that individuals aware of mood changes pay close attention to the approach they believe generally best helps them set goals.

In a similar way, individuals may correct for the way that mood distorts their bargaining intensity. As with goals, we face two similar complications. First, there is some controversy over how much time individuals should spend on a particular

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342. See Kramer et al., *supra* n. 3, at 122 (happy negotiators); Tillema, Lebrone & Scott, *supra* n. 140 (depressed individuals).

343. See *supra* text accompanying nn. 328-29.

344. See *supra* text accompanying n. 81.

345. See *supra* n. 140.

346. Compare Fisher, Ury & Patton, *supra* n. 58 (set goals according to objective standards like market value or expert evaluation) with Shell, *supra* n. 19 (set high goals generally because high goals lead to greater success).

negotiation and how intensely they should bargain.<sup>347</sup> Second, it is not entirely clear how mood will affect such intensity: happy negotiators may give up in longer term negotiations because they believe they have done better than they actually did, and unhappy negotiators may give up because they feel that they have not done as well as they actually did.<sup>348</sup> As with goals, our best advice, on the evidence now available, is that, if negotiators notice a significant variation in their mood, they pay careful attention before they finalize a deal. Again, different negotiators may implement this in different ways: some may state early on that they need to consult a client before finalizing a deal; others may make a note to themselves; others may bring along someone who is instructed to stop him before he reaches a final agreement.

### *C. What Science Shows Best: Strategies For Promoting Longer Term Mood Management*

We next turn to two scientifically studied ways of dealing with emotion. The better established and better studied method involves variations of cognitive-behavioral techniques. There is already a variety of evidence that suggests that people in better moods will often negotiate better, though there remain questions about whether some better moods sometimes become dysfunctional. Cognitive-behavioral techniques have been well-established to improve the moods of even severely depressed persons,<sup>349</sup> persons with severe anxiety, and persons with severe obsessive thoughts.<sup>350</sup> Moreover, there is mounting evidence that these techniques may be taught in classroom settings rather than in individual one-on-one treatments.<sup>351</sup> The second technique involves various approaches to training people

347. See e.g. Bazerman, *supra* n. 131 (some people may spend too much time negotiating over things that are not worth that much). See also Williams, *supra* n. 8 (American in foreign store does not bargain as much as shopkeeper wants, and he refuses to deal with her).

348. See *supra* n. 140.

349. By "severe," we mean here those with symptoms of depression sufficient to be diagnosed with depression or other disorders.

350. See e.g. Brian F. Shaw, *Comparison of Cognitive Therapy and Behavior Therapy in the Treatment of Depression*, 45 J. of Consulting & Clinical Psychol. 543 (1977); Christine Jamison & Forrest Scogin, *The Outcome of Cognitive Bibliotherapy with Depressed Adults*, 63 J. of Consulting & Clinical Psychol. 644 (1995); Peter D. McLean & Ralph A. Hakstian, *Clinical Depression: Comparative Efficacy of Outpatient Treatments*, 47 J. Consulting & Clinical Psychol. 818 (1979); Dianne L. Chambless & Martha M. Gillis, *Cognitive Therapy of Anxiety Disorders*, 61 J. Consulting & Clinical Psychol. 248 (1993); Thomas D. Borkovec & Ellen Costello, *Efficacy of Applied Relaxation and Cognitive Behavioral Therapy in the Treatment of Generalized Anxiety Disorder*, 61 J. Consulting & Clinical Psychol. 619 (1993); David H. Barlow, Ronald M. Rapee & Timothy A. Brown, *Behavioral Treatment of Generalized Anxiety Disorder*, 23 Behav. Therapy 551 (1992); William Fals-Stewart, Allen P. Marks & John Schafer, *A Comparison of Behavioral Group Therapy and Individual Behavior Therapy in Treating Obsessive-compulsive Disorder*, 181 J. Nervous & Mental Disease 189 (1993); Patricia Van Oppen et al., *Cognitive Therapy and Exposure in Vivo in the Treatment of Obsessive Compulsive Disorder*, 33 Behav. Res. & Therapy 379 (1995).

351. See e.g. Thomas E. Joiner, Zachary R. Voetz & M. David Rudd, *For Suicidal Young Adults With Comorbid Depressive and Anxiety Disorders, Problem-Solving Treatment May Be Better Than Treatment as Usual*, 32 Prof. Psychol.: Res. & Prac. 278 (2001); Thomas J. D'Zurilla & Arthur M.

in concentration and mindfulness. This second technique is largely based on various kinds of meditative practices, but researchers sometimes avoid the word "meditation."<sup>352</sup> This mindfulness has been scientifically associated with a decrease in self-reports of moderate depression, anxiety, and pain.<sup>353</sup> There is also some limited recent evidence that it may increase the empathy,<sup>354</sup> which (over some relevant range) is associated with better negotiation results and creativity.<sup>355</sup> In addition, mindfulness may also be useful in promoting the awareness of emotions and mood that is frequently a component of cognitive-behavioral techniques.<sup>356</sup>

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Nezu, *Problem-Solving Therapy: A Social Competence Approach to Clinical Intervention* (Springer 1999); Arthur M. Nezu, Christine M. Nezu & Michael G. Perri, *Problem-Solving Therapy for Depression: Theory, Research, and Clinical Guidelines* (Wiley 1989); Peter M. Lewinsohn, Gregory N. Clarke & Harry M. Hoberman, *The Coping With Depression Course: Review and Future Directions*, 21 *Canadian J. of Behav. Science* 470 (1989); Peter M. Lewinsohn et al., *Group Therapy for Depression: The Coping with Depression Course*, 13 *Intl. J. Mental Health* 8 (1985). We are particularly encouraged by evidence of success of a group based prevention of depression class for college students who scored high on pessimism scales, which are associated with risk for depression. Martin E.P. Seligman, Peter Schulman, Robert J. Derubeis & Steven D. Hollon, *The Prevention of Depression and Anxiety*, 2 *Prevention & Treatment* (1999) (available at <<http://journals.apa.org/prevention/volume2>>).

This evidence that more efficient group settings may work in teaching mental health skills is also reflected by some evidence in physical health settings. Researchers in Colorado found that people with chronic physical health problems who attended group meetings with a doctor not only had better physical health results but also reported greater satisfaction with their physicians. Gina Kolata, *Harried Doctors Try to Ease Big Delays and Rushed Visits*, N.Y. Times (New York, NY) A1, A16 (Jan. 4, 2001).

We acknowledge that *Difficult Conversations* alluded to the influence of cognitive-behavioral therapy and included some very brief examples of techniques related to cognitive-behavioral therapy. See Stone, Patton & Heen, *supra* n. 12, at 100 (including advice that "the route to changing your feelings is through altering your *thinking*" and "we need to explore our assumptions about the other person's intentions"). Such advice is consistent with recommendations Beck has given in a variety of contexts and publications about cognitive-behavioral therapy. See e.g. Aaron T. Beck, M.D., *Love Is Never Enough* 123 (1988) (discussing importance of recognizing automatic thoughts in changing feelings) and 11-12 (discussing dangers of inferring what another person intended).

352. See e.g. Kabat Zinn, *supra* n. 335, at 2 (acknowledging that program of "stress reduction and relaxation program" is rooted in Asian practices, but generally avoiding such references explicitly in book); Jon Kabat Zinn, *Wherever You Go There You Are*, 263 (Hyperion 1994) ("As much as I can I avoid using the word 'spiritual' altogether."). In considering the potential role of meditation for lawyers and law students, we are inspired by Len Riskin. See Leonard Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 *Harv. Negot. L. Rev.* 601 (2002). We also acknowledge the help of the Center for Contemplative Mind in Society and Joseph Goldstein who conducted a meditation retreat for lawyers and law professors, which two of us attended. Although we emphasize mindfulness mediation here, we elsewhere have discussed how research shows a variety of forms of meditation may improve mood. See Clark Freshman, Adele M. Hayes & Greg C. Feldman, *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 *Harv. Negot. L. Rev.* 701 (2002).

353. Kabat Zinn, *supra* n. 335; Riskin, *supra* n. 352.

354. Shauna L. Shapiro, Gary E. Schwartz & Ginny Bonner, *Effects of Mindfulness-Based Stress Reduction on Medical and Premedical Students*, 21 *J. Behav. Med.* 581, 592 (1998).

355. Cf. Allred et al., *supra* n. 50 (concern for other associated with greater joint gain); Freshman, Hayes & Feldman, *supra* n. 352 (on mindfulness and creativity). But cf. Mnookin et al., *supra* n. 10 (describing "tension" between "empathy" and "assertiveness").

356. See generally Teasdale & Barnard, *supra* n. 314.

Despite their seemingly dramatic differences,<sup>357</sup> both cognitive-behavioral therapy and mediation share two virtues: First, both aim not simply to induce a particular mood but to allow individuals to see reality more clearly.<sup>358</sup> Therefore, both strategies avoid the dangers of simply attempting to induce a mood associated with success. Neither depends entirely on inducing a certain mood. Second, both have been shown in general to improve mood in relatively short periods of time (less than 20 weeks) when taught in group settings.<sup>359</sup>

Although a full exploration of how to apply either of these two longer-range strategies to lawyers is beyond the scope of this paper, we have several reasons to believe that cognitive-behavioral training techniques could be incorporated into legal curriculum at law schools and in continuing legal education. Most importantly, many of the techniques associated with cognitive-behavioral therapy fit neatly within the framework of legal education on negotiation. Like much legal reasoning, they rely on making decisions based not on first impressions but on careful weighing of evidence.<sup>360</sup> Like much legal teaching on negotiation, they rely on teaching one to

357. Although these two strategies may seem quite distinct, and indeed may be taught distinctly, we are not alone in recognizing the way the two may contribute to each other or, more generally, the way more Western psychological techniques may work with more Eastern meditation techniques. Most prominently, we note that the psychologist Teasdale and others have studied the way that mindfulness may be combined with cognitive techniques. See Teasdale & Barnard, *supra* n. 314; Segal, Williams & Teasdale, *supra* n. 314. More recently, Tara and Daniel Goleman (the famous author of *Emotional Intelligence*) have also pursued this connection. See Tara Benett-Goleman, *Emotional Alchemy* (Harmony Books 2001).

358. Aaron Beck made this clear in his influential first major work on using cognitive-behavioral therapy to treat depression:

The *personal* paradigm of the patient when he is in a depressed state produces a distorted view of himself and his world. His negative ideas and beliefs appear to be a veridical representation of reality to him even though they appear farfetched to other people and also to himself when he is not depressed . . . . The gross changes in his cognitive organization lead to incorrect information processing . . . . We propose . . . that when the patient's personal paradigm is reversed and realigned with reality . . . his depression starts to disappear.

Beck, *supra* n. 133, at 21 (emphasis in original).

In terms of meditation, the goal is also to see reality. See e.g. Daniel Goleman, *The Meditative Mind* 23-28 (G.P. Putman's Sons); Freshman, Hayes & Feldman, *supra* n. 352.

359. See Shaprio, Schwartz & Bonner, *supra* n. 354 (eight week course in meditation techniques taught to medical school students); Judith S. Beck, *Cognitive Therapy: Basics and Beyond* 8 (Guilford Press 1995).

360. One of the most recent books on cognitive-behavioral therapy, emphasizes the careful scrutiny of evidence – indeed even using the phrase “Socratic” so familiar to lawyers to describe how a cognitive-behavioral therapist works with clients:

Sally' therapist helps her focus on a specific problem . . . identify her dysfunctional thinking [and] . . . evaluate the validity of her thought . . . . He does so through gentle *Socratic questioning* which helps foster Sally's sense that he is truly interested in *collaborative empiricism*, that is, helping her determine the accuracy and utility of her ideas via a careful review of data.

Beck, *supra* n. 359, at 8.

Consider, too, Young's description of his approach to dealing with schemas, which includes such schemas as the mistrust schema that may infect experiments with anger like Allred's:

replace either-or thinking that fixates on a narrow range of solutions with problem-solving that identifies a range of options that may satisfy one's underlying interests.<sup>361</sup> Mindfulness training presents a more complicated case, and we and others have made that case elsewhere.<sup>362</sup> Although it may often deliver positive mood in the same way as cognitive behavioral training, it also offers a distinct benefit: mindfulness may allow individuals to learn how their moods affect them.<sup>363</sup> Such individual awareness may be especially helpful because mood may affect different individuals in different ways.<sup>364</sup>

#### D. *The Tension Between Short-Term and Longer-Term Strategies*

The final complication in translating mood research into training efforts involves tensions between relatively short-term and relatively long-term strategies. Short-term mood induction strategies may involve a variety of mild mood manipulations; longer-term strategies may involve various techniques to change one's baseline mood or to alter the degree to which mood varies in stressful circumstances. At one end of such a continuum, one may spray scents or play music that typically bring about a certain mood in the short term; at the other end, one may resort to multi-week training programs, individually or in classes.

Some tempting short-term strategies may not work over longer periods of time. Most notably, as we saw, simply ignoring or suppressing emotion may work in the short term, but may produce negative consequences in the long term.

Less obviously, techniques that may work over the longer-term may involve costs in the short-term. Although the research is less clear on this point, we note this tension in both cognitive-behavioral training and mindfulness meditation, two longer-term strategies we find promising. In cognitive-behavioral training, we note there is reason to believe that changing habits of thought may indeed produce better outcomes in the medium term, but may involve short-term distress. This phenomenon also fits a more general explanation of change associated with dynamic systems theory: research suggests that before individuals make changes in the way they think and act, they sometimes get worse on the very dimensions that later improve. For example, depressed patients seem to have more ups and downs in their moods before an improvement in their moods.<sup>365</sup> Although a number of studies

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The first step in dealing with schemas cognitively is to examine the evidence for and against the specific schema which is being examined. This involves looking at the client's life and experiences and considering all the evidence which appears to support or refute the schema. The evidence is then examined critically to see if it does, in fact provide support for the schema.

Young, *supra* n. 159, at 77.

361. See e.g. Beck & Freeman & Associates, *supra* n. 219.

362. See Freshman, Hayes & Feldman, *supra* n. 352.

363. *Id.*

364. *Id.*

365. Adele M. Hayes & Jennifer Strauss, *Dynamic Systems Theory As a Paradigm For The Study Of Change in Psychotherapy: An Application To Cognitive Therapy For Depression*, 66 *J. Consulting & Clinical Psychol.* 939 (1998).

document that mindfulness training may increase positive mood and a variety of health outcomes, many meditation teachers note that meditators may go through periods of feeling worse as well.<sup>366</sup>

#### IV. CONCLUSION

We conclude primarily by noting that our project has barely begun. Our overall goal here has been to help the scientific study of mood and the legal study of negotiation inform each other. In particular, we hope that legal scholarship and teaching may begin to take seriously the importance of mood in both scholarship, where it may offer scientific methods to test conventional folk wisdom, and in legal teaching, where it may offer scientific insights into mood that compliment the rigor of rational analysis of negotiation. So, too, we hope that the already well developed study of how mood affects cognition may take seriously the possibility that mood may affect different persons and different contexts in somewhat different ways. In addition, we hope that both social and clinical psychologists may begin exploring not just the effects of mood on negotiation, but how negotiators may be better trained so mood furthers their success in negotiation, both by mood corrections and corrections for mood effects, both in short-term and longer-term ways. Eventually, we hope such research shows the potential to teach negotiation to promote moods that not just lead to successful and efficient negotiations but also mentally and physically healthy negotiators.

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366. See e.g. Goleman, *supra* n. 358, at 28 (at a relatively advanced stage of meditation, the meditator's mind "is dominated by feelings of discontent and listlessness towards all its own contents"); Freshman, Hayes & Feldman, *supra* n. 352.



