



COGNITIVE BIASES AND REPRESENTING CLIENTS

BY LEE HORNBERGER, ARBITRATOR AND MEDIATOR

This article reviews cognitive biases that attorneys should understand to better represent their clients.

Anchoring

Anchoring occurs when decisions are influenced by a reference point or anchor. Once the anchor is set, subsequent arguments and numbers may be different from what they would have been without the anchor. Precedent can be an anchor.

We are involved with anchors in our daily lives. A person may be more likely to buy a car if the car is next to a more expensive car. Prices discussed in negotiations that are lower than the anchor may seem reasonable, even inexpensive to the buyer, even if these prices are higher than the actual value of the car.¹

The first offer sets the anchor and establishes the negotiating neighborhood. No other number has the psychological power of the first offer. No other psychological principle has the same punch as the anchoring effect.²

We should consider being the first to put a proposal on the table. When we put a proposal on the table, we are creating the starting point for the negotiation. Even if our proposal is high or low, it will result in structuring the remainder of the negotiation. We should know that our first proposal will be quickly disregarded.

The initial meeting predictions with our client can create an anchor. At the earliest meetings, when clients are interested in hearing how much we think their case is worth, we should resist the temptation to create what might amount to a “too early” evaluation. At the first discussion, we have heard only one side of the story and a possibly biased one at that. The temptation to start with anchors that our own clients may hold us to creates potential problems for attorneys.

The insurance company’s initial analysis can create an anchor.

As stated by David Eisenhower:

Hitler’s view [of the Western Front in June 1944] had little to do with logic and facts ... but instead rested on memories of Munich and the German victory over France in 1940 ...³

Justice Markman (concurring) discussed anchoring at *Hodge v State Farm Mutual Automobile Ins Co.*⁴

By litigating a “circuit court case” in the district court, the plaintiff may also take advantage of ... the “anchoring effect,” that could affect the jury. ... [T]his “occurs when people consider a particular value for an unknown quantity before estimating that quantity.”⁵ ... [T]he anchoring effect influences decisions even if the “particular value” considered has nothing to do with the quantity to be estimated.

It is a difficult challenge to remove an anchor. Some approaches are to make an equally unreasonable counter-offer in order to hopefully create a new anchor. This might create a mid-point anchor. Provide information from experts or other precedent to counter the anchor. Propose a bracket or range in which to do further negotiating. This would help to create new anchors. Silence can sometimes be helpful in removing an anchor. Work on creating formulas that would go into generating a number before stating a new number.

Endowment Effect

The endowment effect is that we are more likely to want to keep something that we already have than to obtain that same object when we do not already have it. We put a higher value on what we already have as opposed to what we do not have. What belongs to me is good. We believe that what we have is better than what other people have.⁶ A party can become so invested in the lawsuit, that the lawsuit has an endowment effect on the party.

Framing

How we describe our proposals can make a difference as to how others will view the proposals. We tend to oppose compromises that are framed as losses rather than gains. We should emphasize what the other party would gain rather than lose in a situation.⁷

Consider two parents in a dispute regarding child custody. The first parent is described as being

about average in a number of relevant areas for consideration. The second parent has some traits that are viewed as very positive and others as more negative. When research subjects are presented these two parents and asked who should be granted custody, the group focuses on the positive traits and grants the latter parent custody. When framed as who should be denied custody, they focus on the negative traits and choose the same parent!⁸

In reframing, we change the focus of attention. Napoleon reframed the situation for the French troops opposing him on the road to Paris when he said: “Soldiers, I am your emperor. Know me! If there is one of you who would kill his Emperor, here I am.”⁹

BATNA (best alternative to a negotiated agreement).

What do we do if we do not reach a negotiated agreement? Knowing our BATNA gives us power in negotiations. We should write our BATNA on a piece of paper.¹⁰ When we know what our walk-away point is, we are empowered. It is as if Kenny Rogers were singing to us saying, “know when to hold them and when to fold them.”

Confirmation Bias

Confirmation bias is the inclination to construe information in a way that confirms or supports what we think we are looking for. We do this when we choose information that supports our views, paying no attention to different information. Confirmation bias also occurs when we construe unclear information as reinforcing our own beliefs.¹¹

When negotiating, it is easy to start analyzing the situation purely from our own perspective. It is important to understand that we do not see the complete picture.

We are ready, willing, and able to quickly assimilate information that fits our view of the world, our personal stereotypes of events and people, our internal stories about life on this planet. But when someone argues against our mental framework, we go out of our way to avoid changing our basic beliefs.¹²

As indicated by John Kenneth Galbraith, “The conventional view serves to protect us from the painful job of thinking.”¹³

We can try to counter confirmation bias by arguing the other side’s case. We can have a Devil’s Advocate.¹⁴

Confirmation bias is related to the sunk cost effect. The sunk cost effect is continuing on a course of action because we have already spent or “sunk” resources into that course of action. We cannot settle a case for a reasonable figure because we have already invested money and resources in the litigation.

Relationships and What Comes from Whom

Reactive devaluation

Reactive devaluation occurs when a proposal is devalued because the proposal comes from the other side. This can happen in spite of the real value of the proposal.¹⁵ After we hear the proposal from the other side, we automatically think, “It must be a trick.” This is even though the “trick” proposal might be a reasonable, albeit unacceptable, proposal under the circumstances.

Reactive devaluation can occur in the situation of objecting to a belatedly produced exhibit at a hearing. The document comes from the other side. Therefore, it must hurt me. This is even though, when read with an open mind, the document might actually help the objecting party.

Attribution Error

Attribution error is the tendency to under-emphasize situational explanations for an individual’s behavior while over-emphasizing dispositional and personality-based explanations for that person’s behavior. This is the tendency to think that what people do reflects who they are.¹⁶

Our need for “self-worth” as well as “self-esteem” plays a role here. We all have needs for these emotions or internal sense of worth. The litigation process is based upon “breach, failure to perform, responsibility, guilt, etc.” These allegations generate the “deny, defend, deflect” response. When we negotiate or try to find a way to solve a problem, we do not have to assign blame, fault, or guilt. We should reframe the conflict into a shared problem.

Biased Punctuation of Conflict

Biased punctuation of conflict is a tendency to interpret the history of a conflict in a self-serving fashion. We see ourselves as the victim. We see our opponent as the entity against whom we have to defend ourselves. The other person started the controversy.¹⁷ It is not my fault I am in this situation. It is the other person’s fault.

How can we get around biased punctuation of conflict? One way is to do active listening. It is important to understand it is not what we say. It is what we hear.

Effect of Ongoing Relationships

Ongoing relationships can have a major impact on the negotiation process. Close relationships can help to lead to cooperation in negotiations.

[At Appomattox Court House] both Lee and Grant chose dialogue. Through a series of polite written communications, Grant requested that Lee meet with him to discuss terms. Lee responded with equal politeness. Lee put on his best uniform so as to be

dressed for the occasion. They met. At first, they reminisced about the Mexican-American War in which they had both fought. Then they discussed surrender terms. Grant's proposal to Lee permitted Confederate soldiers to return to their homes with their mules and horses. There would be no prison camps. There would be no guerilla warfare.¹⁸

Mimicry, Sunshine, and Touch

Mimicry

Mimicry is commonly used to curry favor. Servers who mimic their customers' tone of voice receive bigger tips. People who are talking with one another unconsciously mimic each other's posture and gestures. Mimicry is one of the ways people show they are in sync with each other. When people are in sync, their interactions go more smoothly.¹⁹

Sunshine

Studies have shown that servers get more in tips on sunny days. Job seekers who are interviewed on sunny days are more likely to be hired than job seekers who are interviewed on cloudy days.

The mediation should be in a pleasant conference room with windows. When we are in a good mood, we have more imagination.

Food can have the same soothing, helpful effect as sunshine and other pleasant surroundings. Michigan case law recognizes the benefits of food in mediation. In *Jaroh v Jaroh*²⁰ the defendant moved to set aside the mediated settlement agreement, contending she signed it under duress, had no food during the nine hour mediation, and was pressured to sign it. The Court of Appeals said the mediator provided snacks and there was no evidence the defendant was refused a request to get something to eat.

The beneficial effect of food and physical arrangements was used during the 1995 peace negotiations at Wright-Patterson Air Force Base that helped resolve the war in Bosnia.

According to [then Assistant Secretary of State Richard] Holbrooke, "[P]hysical arrangements could make a difference; every detail mattered... We constantly looked for ways to break down the barriers of hatred and distrust."

... Dinner tables were placed under the wing of a B-2 stealth bomber suspended from the ceiling. Holbrooke "thought that reminders of American airpower would

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not hurt” and would exemplify the “best alternative to a negotiated agreement” to the diverse participants if they did not reach an agreement.²¹

Touch

When we like and trust someone, we are more likely to touch them. Touching indicates caring and connection. The unconscious mind often cannot tell the difference between caring and connection as opposed to no caring and connection.

Waiters who touch customers get bigger tips. As indicated by a server,²² “The tips are better when I know who I am serving.”

Cognitive Fluency

We are in a room. On the refreshment table there are donuts and fruit. We are asked to remember a number. When we try to remember a large number, we pick the donut. When we try to remember a small number, we pick the fruit. This is cognitive fluency. When things are complicated, we select the easier option.

We should make it easy for the other side to understand what we are proposing. We should keep things simple. We should reduce complexity.²³

Peak End Rule

The peak end rule tells us that what happens at the end of a venture is important.²⁴ The peak end rule suggests we should consider making the last move.

Richard Nixon wrote:

The point of greatest danger is not in preparation to meet the crisis or fighting the battle; it occurs after the crisis of battle is over, regardless of whether it has resulted in victory or defeat. The individual is spent physically, emotionally, and mentally. He lets down. Then, if he is confronted with another battle, even a minor skirmish, he is prone to drop his guard and to err in his judgement.²⁵

As indicated by former Prime Minister of Canada Kim Campbell, “[P]eople who are tired make mistakes. ... Fatigue is the great enemy of patience and judgment.”²⁶

Conclusion

This article has reviewed cognitive biases that attorneys should understand to better represent their clients.

About the Author

Lee Hornberger is a former Chair of the SBM Alternative Dispute Resolution Section, Editor Emeritus of The Michigan Dispute Resolution Journal, former member of the SBM’s Representative Assembly, and former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is a member of the Professional Resolution Experts of Michigan (PREMi) and a Diplomate Member of The National Academy of Distinguished Neutrals. He has received the Bashara Award from the ADR Section.

Endnotes

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- 2 Goldman, *First Offer*, Mich B J 22, 23 (June 2015).
- 3 *Eisenhower at War 1943-1945* (Random House, 1986), p 286.
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- 10 *Psychology*, pp 312.
- 11 *Psychology*, pp 262-263. *Science*, pp 35-36 and 113-117. *Conflict*, Mich B J (February 2019) at 33.
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