

Convenience, cost and access

Focus group participants agreed with the NADN respondents that disputants love the convenience and cost savings inherent in using Zoom, and the ability to get direct access to decisionmakers such as adjusters and executives. Disputants also say they find the virtual format less fatiguing—although mediators do not always agree with this.

Time differences

Focus group members mentioned some disadvantages of virtual processes. One is that participants in different time zones may have trouble coordinating. In a mediation with participants in Boston, San Francisco and Mumbai, for instance, I had only only a few hours during which everyone was fully rested and engaged.

Hybrid processes

Mediators also stressed how difficult it is to conduct a hybrid process, in which the participants from each side are assembled together and the mediator appears online. Parties in this structure may be blocked by their lawyer, too far away to be seen well, or off-camera completely, while the mediator is a distant presence on a screen.

The implications of all this? The NADN survey concluded that in-person mediation “*will not regain majority status*” even after the pandemic is history. Whatever our personal preference, it appears that from this point on we will practice our profession primarily over the internet. ❄️

About the Author

Dwight Golann has been a mediator and teacher of dispute resolution for more than twenty-five years. A Professor of Law at Suffolk University in Boston, he has led trainings for federal and state courts and agencies and ADR organizations around the world.

Professor Golann has resolved hundreds of legal disputes in a wide variety of subject areas and is the author of the ABA’s leading books on commercial mediation technique, *Mediating Legal Disputes*, and *advocacy*, *Sharing a Mediator’s Powers*.

He is the recipient of the Lifetime Achievement Award of the American College of Civil Mediators and recipient of the ABA’s 2021 Award for Outstanding Scholarship in Dispute Resolution.



Lee Hornberger

An Overview of Cognitive Biases

By Lee Hornberger, Arbitrator and Mediator

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

Beginning

Anchoring

Anchoring occurs when decisions are influenced by a reference point or anchor. Once the anchor is set, subsequent positions 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 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. The proposal will result in structuring the remainder of the negotiation.

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

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 or to remove an anchor. One approach is 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 helps to create new anchors. Silence can sometimes be helpful in removing an anchor. Work on creating formulas that 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 have as opposed to what we do not have. What belongs to me is good. 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 makes 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 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. 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, "know when to hold them and when to fold them."¹¹

Confirmation Bias

Confirmation bias is the inclination to construe information in a way that confirms 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 beliefs.¹²

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.¹³

John Kenneth Galbraith said, “The conventional view serves to protect us from the painful job of thinking.”¹⁴

We can try to counter confirmation bias by arguing the other side’s case. We can have a Devil’s Advocate.¹⁵

Confirmation bias is related to the sunk cost effect. The sunk cost effect is continuing on a course of action because we have already “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 happens in spite of the real value of the proposal.¹⁶ After we hear the proposal, we think, “It must be a trick.” This is even though the “trick” proposal might be a reasonable, albeit unacceptable, proposal.

Reactive devaluation can occur in 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 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.¹⁷

Our need for “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, guilt, etc.” These allegations generate the “deny, defend, deflect” response. When we 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.¹⁸ It is not my fault. 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 that 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.

At the beginning of these [1953 Geneva] negotiations, United States Secretary of State John Foster Dulles refused to shake the hand of the premier of the People’s Republic of China, Zhou Enlai. Ultimately, to spur the negotiations, Zhou Enlai said, “The two parties should take a few steps toward each other - which doesn’t mean that each has to take the same number of steps.” Vietnam: A History teaches us to shake hands with the other side because, in part, people can have long memories¹⁹

Furthermore,

[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.²⁰

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.²¹

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. Michigan case law recognizes the benefits of food in mediation. In *Jaroh v Jaroh*²² 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 importance of snacks arose during the negotiations between the United States and North Vietnam,

Nixon had long been skeptical about negotiations. "The North Vietnamese are not gonna deal; they never were," he complained to Kissinger. "They were diddling Henry along." But in August [1972], Kissinger's antennae quivered: his North Vietnamese counterparts had augmented the quality of the snacks they served at tea breaks. By late October, he and negotiator Le Duc Tho had reached an agreement. "The situation is now ripe," Tho told his counterpart.²³

The beneficial effect of food and physical arrangements was used during the 1995 peace negotiations 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 not hurt" and would exemplify the "best alternative to a negotiated agreement" to the diverse participants if they did not reach an agreement.²⁴

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,²⁵ "The tips are better when I know who I am serving."

The novel *Leave the World Behind* points out that "Touching another human being was a curative."²⁶

Inspector Ian Rutledge said, "the warmth of human contact was often more important than words."²⁷

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.²⁸

Peak End Rule

The peak end rule tells us that what happens at the end of a venture is important.²⁹

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.³⁰

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."³¹ ❄️

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 Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators, and a Diplomate Member of The National Academy of Distinguished Neutrals. He is a Fellow of the American Bar Foundation.

He has received the George N. Bashara, Jr. Award from the ADR Section in recognition of exemplary service.

He is in The Best Lawyers of America 2018-2019 for arbitration, and 2020-2022 for arbitration and mediation. He is on the 2016-2021 Michigan Super Lawyers lists for alternative dispute resolution. He received a First Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2022, a Second Tier ranking in Northern Michigan for Arbitration in 2022, a Second Tier ranking in Northern Michigan for Mediation in 2021, and a First Tier ranking in Northern Michigan for Arbitration in 2019 and 2020.

While serving with the U.S. Army in Vietnam, he received the Bronze Star Medal and Army Commendation Medals. The unit he was in received the Meritorious Unit Commendation and the Republic of Vietnam Gallantry Cross Unit Citation with Palm.

He holds his B.A. and J.D. cum laude from the University of Michigan and his LL.M. in Labor Law from Wayne State University.

He can be contacted at 231-941-0746 and leehornberger@leehornberger.com. His website is <https://www.leehornberger.com/> .

Endnotes

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