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Decision-making in negotiating settlements and anchoring effect

In my previous column, I described how clients and their lawyers sometimes make decisions in negotiations that are not in their best interests without realizing that they are falling victim to primitive cognitive biases, neurological shortcuts and cognitive illusions that evolved to help humans survive.

I pointed out that knowledge of decision science, which refers generally to discoveries in behavioral economics, cognitive psychology and neuroscience, can be useful to avoid common errors. ("Decision-Making in Negotiating Settlements: the Overconfidence Bias," March 23.)

In describing the overconfidence bias, I relied primarily on the work of Daniel Kahneman, winner of the Nobel Memorial Prize in Economic Sciences and author of "Thinking, Fast and Slow," a book that describes the two systems in our brains.

System 1 is the unconscious automatic part of our brain that controls most of our actions (the part of your brain that is driving the car once you have learned to drive), while System 2 involves the more recently evolved analytical part of the brain. System 1 constantly takes shortcuts to conserve energy.

Sometimes these shortcuts can be surprising.

While giving a presentation recently, I realized that one such shortcut, the anchoring effect, is still not widely known in the legal community.

Kahneman and his colleague Amos Tversky performed a famous experiment demonstrating the power and absurdity of the anchoring effect where they rigged a wheel of fortune to stop only at 10 or 65. They asked participants to spin the wheel and write down the number.

They then immediately asked them to estimate the percentage of African nations in the United Nations. The participants were unable to ignore the number they had just written, and those who just seen the number 10 estimated an average of 25 percent, while those who had just seen 65 estimated an average of 45 percent.

Anchoring effect research has been replicated in many forms and, according to Kahneman, "is one of the most reliable and robust results of experimental psychology."

Another interesting example, cited by Jonah Lehrer in "How We Decide," was a study by Dan Ariely and colleagues at the Massachusetts Institute of Technology where participants wrote down the last two digits of their Social Security numbers and then estimated an auction bid for items ranging from a keyboard to chocolates. The participants with Social Security numbers ending in the 80-99 range made an average bid of \$56, while those with numbers ending 20 or below made an average bid of \$16. This happened for every item in the auction.

The anchoring effect is just one

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aspect of priming. After being exposed to a particular kind of information, the brain will automatically find a pattern if possible by coming up with associated information. People exposed to words such as "gray" and "wrinkled" will actually walk more slowly down the hallway after the experiment.

BEYOND DISPUTE



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The traditional view of negotiating is to let the other side make the first move. For example, if you find a treasure at a yard sale, perhaps it makes sense to ask the owner to set the price. Similarly, if your opponent does not often handle a particular kind of case, you may believe if they move first, your client may reap a windfall.

Barry Goldman in "The Science of Settlement" acknowledges the anchoring effect but supports the traditional view, suggesting that in most cases, you should have your opponent make the opening move because it may be to your advantage to have your opponent establish the "negotiation neighborhood" and because you will avoid the "winner's curse" of having your offer accepted too easily.

Kahneman, however, takes the opposite view, concluding that based on anchoring effect experiments, "moving first is an ad-

vantage in a single-issue negotiation — for example when price is the only issue to be settled between a buyer and a seller."

What about defeating the effects of an anchor? Kahneman suggests that when the other side makes an outrageous proposal, avoid the temptation to counter just as outrageously because of the risk of creating too large a gap.

"Instead you should make a scene, storm out or threaten to do so, and make it clear — to yourself as well as to the other side — that you will not continue the negotiation with that number on the table."

While I am admittedly intrigued by the prospect of watching a lawyer raise her voice and stomp out of a mediation, suspecting she has read Kahneman and is consciously trying to make an impression on her own primitive brain as well as everyone else's, I am concerned that such behavior could undermine any creative problem-solving by pushing everyone into amygdala hijack and shutting down System 2.

Perhaps the answer is to wait a bit or make a scene calculated to impress our own System 1 in the privacy of the office or in a caucus and diplomatically communicate the reluctance to proceed.

Another effective way to help System 1 avoid being influenced by an anchor, also cited by Kahneman, is the method proposed by psychologists Adam Galinsky and Thomas Mussweiler.

When you hear an anchor, focus your attention and search your memory for arguments against the anchor; the minimal offer that the opponent would accept or on the costs to the opponent of failing to reach an agreement.

This method offers the extra advantage of helping all participants effectively manage emotions.