



Conflict Management By Managing Cognitive Biases

By Graham Ward

While teaching courses over many years that fall under the broad label of conflict management, I have become fascinated with lessons from cognitive and behavioral psychology. This article intends to demonstrate the value of applying those lessons to conflict resolution.

For some time, reports from the State Court Administrator's Office have shown a declining rate in the number of civil trials.¹ Trying only 1 percent of our cases may be good news for those of us in conflict resolution striving to assist litigants in resolving the other 99 percent. I prefer "resolving" to "settling," as the former connotes a sense of mutually agreed-upon, interest-based decisions that result in long-term legal and emotional finality, while the latter sounds more like both giving in and giving up. Resolution contemplates mutual investment in both the substance and process of decision. This stands in stark distinction from decisions imposed by third-party decision-makers such as courts and juries, who are far less understanding of the short- and long-term impact

of that which they impose. Those decisions are often met with minimal compliance or outright defiance rather than commitment, which should be our goal. This article identifies a number of biases that can negatively affect decision-making and suggests ways to manage them.

Around the same time that Roger Fisher and William Ury were gifting us with *Getting to Yes*,² behavioral scientists began educating us about cognitive biases, including confirmation bias and attribution error, and the impact of heuristics, mental shortcuts, and framing and anchoring, which often help us decide without the need to think. Heuristics or mental models are usually right, but when they fail, they do so miserably. When decision-making takes place automatically, we label it System One; when deliberately, System Two.³

Lawyers who understand these concepts have the potential to better serve our profession, the community, and clients. What follows is a discussion of a few conflict-resolution concepts that impact our advice, both regarding the generation of conflict and how we may address it.

Confirmation bias

Confirmation bias refers to our inherent ease in seeing the validity and truth in that which supports our position and difficulty in seeing that which supports the position of our opponent. The adversarial process, competitive and focused on winning, only has the potential to enhance that bias. The adversarial approach may seek to reinforce decisions made some time ago, often with less information than currently is known. Such an approach may force us to defend the acts of decision-makers rather than the decision itself.⁴ We are inclined to have this bias be confirmed, and thus challenge, rather than seek to understand, that which is contradictory. This bias has been confirmed in studies, e.g., with people who support and oppose the death penalty. When proponents of each position are shown identical information with both supporting and contradicting content, rather than move the two sides more toward the middle, both sides pick out the content that supports their preexisting beliefs and become further entrenched in their views.⁵

This is the prism through which many lawyers view discovery, evaluate witness credibility and expert opinions, and respond to offers or demands. Efforts by attorneys to educate clients about the validity of opposing positions and engage them in viewing their issues from more than one perspective are often regarded as siding with the opposition, causing clients to wonder whose side their attorneys support. Attorneys may want to consider ways to help clients assess their conflict, such as “perspective taking,” mock trial, and role play, which can clarify whether conflict actually exists or whether they are defending a confirmation bias or attribution error.

Attribution error

Attribution error involves inferring intent, or scienter, to another party when that party acts in a way we find damaging. We infer that the actor intended his or her conduct to cause the harm we sustained.⁶ When we are the actor and injury results, our actions are understood as necessary or dictated by extraneous forces. These perceptions play a major role in generating conflict. The adversarial system requires proof of blame, fault, responsibility, or breach. Combine that with the inherent human tendency to deny, deflect, and defend to maintain one's self-esteem and standing in the eyes of others as well as the need to be vindicated and understood, and the damage caused by attribution error is only enhanced. This bias can act in a synergistic fashion with confirmation bias. Might we be better served by framing the situation as an effort to reach mutual understanding or by focusing on principles of restorative justice rather than responsibility?

Framing

Framing recognizes that we can change people's minds regarding a choice or decision by how we present, or frame,

AT A GLANCE

Those of us in conflict resolution try only 1 percent of the cases we file. Disputes in litigation often involve efforts to defend decisions made by others and, often, without a meaningful exchange of information. Rather than expend monetary and emotional assets to defend “psychological biases,” why not become creative problem solvers and preserve relationships?

that choice or decision. 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!⁷

A similar example is used regarding decisions about vaccinations for viruses and mortality. People change their decisions not based on statistics, but on whether the question is framed as lives saved or lives lost. Most of us are loss averse, meaning we will take more risks to avoid a loss than achieve a gain. Frame the question as lives lost, and we take more risk. Frame the question as lives saved, and we take less risk.⁸

Many people like to gamble, and those who find themselves “in the hole” often choose to wager more money and on riskier bets to recoup losses. Commonly, we refer to this as “throwing good money after bad,” yet that is what people often do. Long-term winners lose more hands but for smaller amounts, and win big when they have good hands and know the odds. Google “the Gamblers Fallacy” in your free time. Then ask whether our decisions are often impacted by that same taking of the riskier bet, with more money, in business decisions. This is also seen in the “sunk cost heuristic.”⁹

This kind of behavior encourages more discovery investment and additional expert retention to confirm prior decisions rather than exploration of options for creative resolution. This was one of the many biases that led to the death of a number of Mt. Everest climbers.¹⁰ They had each spent \$70,000 for the opportunity to try to reach Everest's summit, invested many months in preparation, and framed the situation so that they simply could not turn back—violating their own rules when the summit was no longer within reach.¹¹ They could not turn back because they had framed doing so as an unacceptable loss.

Anchoring

Anchoring helps explain the influence that numbers, even irrelevant ones, exert over us when making decisions. As a defense lawyer, I used to think a grossly unrealistic demand only showed that a plaintiff had no idea of the value of his or her case, i.e., what it was worth. (I dislike the phrase “what it was worth,” as it sounds as if we can assign dollar values to misery.) Yet we are biased by numbers, often with no relation to our decisional question.

People who were asked for the last three digits of their cell phone numbers were then asked whether Attila the Hun was defeated before or after a certain date. Those with lower numbers estimated an earlier date, while those with higher numbers guessed later dates. Cell phone numbers introduced bias and influenced the estimates individuals made.¹² Amos Tversky and Daniel Kahneman demonstrated anchoring bias when questioning subjects about the percentage of African nations that belonged to the United Nations. When asked if the percentage was greater than 50 percent, people guessed a higher number than when asked if it was more than 25 percent.¹³

As a former personal injury defense lawyer, I am deeply troubled by the fact that we only negotiated a number, without any type of actual formula. Both sides had to be influenced by these anchors. For that reason, I am interested in whether we can use other nonmonetary exchanges or trades or election of remedies when seeking resolution. Can a sincere, well-crafted, unqualified apology, delivered by the individual who caused harm, bridge the last gap between offer and demand or bring the parties to the negotiating table earlier, thus avoiding the damage done by time and ongoing litigation? Can we move away from tort concepts necessitating blame, fault, denial, and defense and toward a framework of parties sharing a common concern, perhaps offering an election of remedies such as what was once implemented with on-the-job injuries?

Conclusion

The vanishing trial, trial lawyer, trial judge, and associated institutional memory suggest that the economic utility attorneys can offer must be focused on more creatively managing conflict. When faced with something new and challenging, we see ambiguity. Do we see a threat or opportunity? Those who survive and thrive will see an element of both and act accordingly. While many lawyers become judges or serve as mediators, arbitrators, or case evaluators, we are all constructive ADR practitioners for clients. The threat of the vanishing trial is also an opportunity for ADR practitioners to help parties listen and understand; mutually generate creative, interest-based, long-lasting resolutions; craft new remedies; and allocate risk based on shared concerns. Understanding the cognitive biases previously discussed can direct our attention

away from adversarial distraction and toward resolution based on shared concerns.

I suggest this means becoming better conflict managers, as conflict, like many things, is inevitable. Test theories before mock juries and without the bias of opening statements. Spend more effort determining and designing the process to use in achieving resolution and to reach agreement regarding how damages should be calculated. Reach agreement using a formula for damage calculation to remove much of the subjective disparity in damage evaluation. Teach parties understanding by demonstrating perspective-taking, putting oneself in the other's position. Look for ways to improve the preexisting relationship from which conflict has developed and minimize future damage. Focus on the problem and not the people who may have caused it.

When we can teach ourselves to do these things, we evolve, move to eliminate the uncertainty of third-party decision-makers, and better control our own resolutions and destiny. This is behavioral law. ■



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ENDNOTES

1. Mich Courts, *Statistics, Statewide Circuit Court Summary: 2017 Court Caseload Report* <<http://courts.michigan.gov/education/stats/Caseload/reports/statewide.pdf>> [<https://perma.cc/R5Y8-NGCE>]. All websites cited in this article were accessed January 5, 2019.
2. Fisher & Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1981).
3. Kahneman, *Thinking, Fast and Slow* (New York: Farrer, Straus and Giroux, 2013), pp 13–14, 19–30, 127–128.
4. Sunstein, *Behavioral Law & Economics* (New York: Cambridge University Press, 2000), pp 95–115.
5. *ChangingMinds.org, Disconfirmation bias* <http://www.changingminds.org/explanations/theories/disconfirmation_bias.htm>.
6. Mnookin, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge: Harvard University Press, 2000), p 49.
7. Roller, *How Anchoring, Ordering, Framing, and Loss Aversion Affect Decision Making*, UX Matters (March 7, 2011) <<http://www.uxmatters.com/mt/archives/2011/03/how-anchoring-ordering-framing-and-loss-aversion-affect-decision-making.php>> [<https://perma.cc/3WEG-L4Z5>].
8. *Thinking, Fast and Slow*, pp 368–369.
9. *Id.* at pp 253, 343–346, 371, 475n–476n.
10. History.com, *Death on Mount Everest* (August 21, 2018) <<https://www.history.com/this-day-in-history/death-on-mount-everest>>.
11. Paypervids.com, *Application of Sunk-Cost Bias in the Mt. Everest Case Study* (April 26, 2018) <<http://www.paypervids.com/application-of-sunk-cost-bias-in-the-Mt-everest-case-study/>> [<https://perma.cc/YLZ6-QZ2W>].
12. Michalko, *Bias, Creative Thinking* (August 30, 2014) <<http://creative-thinking.net/?s=bias>>.
13. *Thinking, Fast and Slow*, p 119.