The Master Mediator addresses a series of columns the psychological factors and cognitive bias that may affect dispute resolution. Recent columns have explored the seminal work of Professor Daniel Kahneman in identifying two cognitive modes: "System 1," which is fast, instinctive and emotional, and "System 2," which is slower, more deliberative, and more logical. Cognitive Bias is the tendency to make incorrect judgments based on erroneous presuppositions. It is a default to the System 1, with the brain processing information quickly to reach a decision or to act, without the filter and reflection of System 2. According to Professor Max Bazerman, it arises when "a heuristic is inappropriately applied by an individual in reaching a decision" (see box).

FRAMING THEORY

Randy Kiser in his landmark book, Beyond Right and Wrong, discusses framing theory, relying primarily upon the work pioneered by Professor Kahneman and the late Amos Tversky, and noting that Kahneman and Tversky have shown that "decision makers are consistently 'risk averse in the domain of gains' and 'risk seeking in the domain of losses.' They underweight a high probability of gain, preferring a 'sure thing,' and underweight a high probability of loss, preferring a gamble to a certain, smaller loss. The perceptual illusions fostered by framing outcomes, moreover, are 'as common among sophisticated respondents as among naïve ones.'"

The research supports the proposition that plaintiffs are often more risk averse than defendants, which results in plaintiffs who try cases obtaining slightly more per case ($27,687 in one study), while defendants may obtain more success in predicting defense verdicts—but the magnitude of error in the same study was $354,949 per case compared to the average of $27,687.

My uneasiness with the study implications is based upon my own experience in the field in specific cases, and the general composition of garden-variety personal injury and commercial cases. Although courts level the playing field, there is almost always an inherent asymmetry and typically an imbalance of power in negotiations conducted directly or in mediation. One party is usually in the litigation on a one-off or infrequent basis, while the other party is often a repeat player managing an inventory of cases. This is true not only in personal injury and product liability cases, but also for professional negligence, employment, and commercial disputes. The plaintiff is often an injury victim, a terminated employee, a small business, a small developer or homeowner in a construction claim, or another person who is not often a party in litigation. The other party or parties are insurance carriers, risk managers, human resource professionals and other professionals tasked with managing claims and litigation. The plaintiff may have only one case in a lifetime, while litigation is business as usual for the defendant.

Repeat players have the opportunity to spread risk over a book of business and are influenced by a multitude of factors that impact, but are not determinative of, the fair market settlement value of a particular claim. As the late Steve Frankel, then in-house counsel for John Deere, told me in numerous product liability cases, he would not be judged on the outcome of any one case but rather on the total results of all the cases in his inventory. Recognition of this dynamic and of cognitive biases, especially framing, has guided specific behavior of mine as a mediator.

FRAMING IN PRACTICE

For the occasional plaintiffs, especially when the outcome of the litigation has profound impact upon their future, characterizing the defendants’ successive offers as gains is consistent with framing and loss aversion theories. The bird in the hand is indeed worth two in the bush when this is the only case involving the decision maker. My approach is to establish a framework that focuses on the defendant offer rather than a plaintiff demand. Offers are made in real, “now” dollars, while demands are aspirations that can only come to fruition by acceptance or by a verdict. I am transparent about this viewpoint and attempt to convey to the plaintiff that a reduction in a demand is not a true loss, since it was all abstract to begin with, while an increase in an offer is a real gain. I resist statements about how much the plaintiff has “moved” from an original demand or last number, unless the numbers are objective based upon a liquidated damages clause or undisputed contract damages. In almost all cases, there is a speculative element in the (continued on next page)
amount or availability of damages. Taking my cues from the science, I avoid a perspec-
tive that articulates a reduction in demand in terms of loss.

I often reduce the numbers to the “birds” in the bush, by noting that in a case with a
50% chance of success, the bird analogy is lit-
ernally true. I sometimes ask for the maximum number of “birds” likely to be won at verdict
on a good day. Sometimes specific amounts are discussed in terms of concrete impact
upon the plaintiff. For example, what home improvements or retirement security would
be generated from the net settlement? Mediators often ask claimants what they would
do with the funds. The van not purchased, the Disney vacation, the home improvement,
the college tuition, now become not only a psychological gain or savings. As one of my
colleagues is fond of asking parties, are you
willing to “buy-back” your case, and the litiga-
tion product, by rejecting the sure sum that is
accessible now?

FRAMING IN ACTION

One of my mediations involved a terminated
employee. A family business with a small num-
ber of employees operated a warehouse. An
employee had been terminated and brought
suit claiming discrimination. The patriarch of the family was indignant; he resisted pay-
ing “blackmail” and was inclined to fight on
principle. I asked him to answer two questions
in whatever manner represented his identity
as a business owner or articulated his values. I
posed the questions at the same time and said
we would all leave the room for ten minutes or
so to let him reflect. His counsel agreed to my
process. The questions were:

What information might persuade you to
make a different decision?

As a mediator who has come to the conclu-
sion today that the costs and non-economic
impact and risks of the litigation favor closure
today, what can I say or do for you to effectuate
resolution and closure?

Counsel and I went back into the cau-
cus room once he was ready to answer. His
response was more to my second question, and

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was in the form of a question. He said:

“Bob, why is it in the best interests of my
business mission to settle by paying the last
demand of plaintiff? I understand that the
documents will say there are no admissions
of wrongdoing but everyone will know the
former employee got paid and that to me is an
admission of wrongdoing on our part.”

He grinned and said, “If you want to
take your time alone in the room before you
answer, that is fine with me. Take as much
time as you need!” I smiled back and felt a
genuine bond and connection that we were
engaged in a respectful dialogue, while rec-
ognizing—as an old chess player—the chal-
lenge in his question. Turn-about is indeed
fair play.

I thanked him and said I had been
thinking about how to frame the matter
as an economic decision, one based upon
practical considerations and not values and
principles. I said something to the effect that
his question was consistent with his identity
as a self-made businessman, and that he
could not have been successful if he did not
make decisions in the context of furthering
the growth and protection of his business.

I pointed out that he made many economic
decisions in running a small business, and
that unless a decision is one that you are
forced to make to “bet the farm,” choices are
usually made, in a baseball terms, to
hit for average, including walks, and not to
swing for the fence. Reminding him that
the plaintiff was seeking X dollars, I invited
him to share with me what that represented
as a line item in his budget for premises
insurance or other general comprehensive
insurance. He replied that it represented Y
months of premium payments. I suggested
that he would not forgo paying premiums
and gamble on not having a loss; neither
would he be disappointed, having paid pre-
miums and collected nothing economically in return, that his warehouse did not in fact

burn down. We discussed this “frame” and
translated settlement into an “extraordinary”
surcharge or other one-time expenditure
that was fully deductible as an “ordinary
and necessary” business expense. This re-
framing of the payment to the plaintiff as
a business expense that was consistent with
his identity and business mission gave him
permission to settle.

SUMMARY

Mediation is a complex, unfamiliar environ-
ment for the clients of the counsel representing
them. Information generated from opposing
parties or inconsistent with prior beliefs or
interests of the participants is discounted if not
ignored. A key mediator role is to engage with
the participants in a creative manner on a plat-
form of authenticity and transparency, mindful
of how information is transmitted and framed
with a respect to cognitive biases, identity, and
human behavior.

(For bulk reprints of this article,
please call 888-378-2537.)

FURTHER READING

Max H. Bazerman, Judgment in Mana-
gerial Decision Making (2d ed. John Wiley
& Sons, 1986).

Samuel Gross and Kent Syverud, “Don’t
Try: Civil Jury Verdicts in a System Geared

Samuel Gross and Kent Syverud, Get-
ting to No: A Study of Settlement Negotia-
tions and the Selection of Cases for Trial, 90

Daniel Kahneman, Thinking, Fast and
Slow (Farrar, Straus & Giroux, 2011).

Randall Kiser, Beyond Right and
Wrong, The Power of Effective Decision
Making for Attorneys and Clients 89-139
(Springer, 2010).