The Master Mediator / Part 2

Bias, Fallacies & Decision Errors–Processing Information: Sights, Sounds and Framing

BY ROBERT A. CREO

The Master Mediator addresses in 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.

Robert A. Creo

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)

The author is a Pittsburgh attorney-neutral who has served as an arbitrator or mediator in thousands of cases in the United States and Canada since 1979. He conducts courses on negotiation behavior that focus on neuroscience and the study of decision-making, and was recently recognized by *Best Lawyers in America* as 2014 Mediator of the Year for Pittsburgh. He is the author of "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is a member of *Alternatives*' editorial board, and CPR Institute's Panels of Distinguished Neutrals.

The Master Mediator

(continued from previous page)
amount or availability of damages. Taking my cues from the science, I avoid a perspective 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 literally 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 litigation 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 number of employees operated a warehouse. An employee had been terminated and brought suit claiming discrimination. The patriarch of the family was indignant; he resisted paying "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 conclusion 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 caucus room once he was ready to answer. His response was more to my second question, and 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 recognizing—as an old chess player—the challenge 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 premiums 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 reframing of the payment to the plaintiff as a business expense that was consistent with his identity and business mission gave him permission to settle.

> . . . [E]stablish 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."

SUMMARY

Mediation is a complex, unfamiliar environment 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 platform of authenticity and transparency, mindful of how information is transmitted and framed with a respect to cognitive biases, identity, and human behavior.

FURTHER READING

Max H. Bazerman, *Judgment in Managerial Decision Making* (2d ed. John Wiley & Sons, 1986).

Samuel Gross and Kent Syverud, "Don't Try: Civil Jury Verdicts in a System Geared to Settlement," 44 *UCLA L. Rev.* 44 (1996).

Samuel Gross and Kent Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 *Mich. L. Rev.* 319 (1991).

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).