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NEWSLETTERS

Leveraging Cognitive Science When Mediating High-Stakes Commercial Cases

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Barnes & Thornburg Commercial Litigation Update, May 2018

Commercial litigators know that an initial demand or offer often sets the tone for an entire mediation. The first move sometimes determines whether mediation will succeed or not. The guidance of mentors combined with trial-and-error experience are how most commercial litigators develop their own best practices for making an opening move. But is there cognitive science that informs this critical strategy call?

Cognitive science tells us that initial perceptions linger in our minds, affecting later perceptions and decisions, but within limits. The phenomenon of cognitive “anchoring and adjustment” is the tendency to rely too heavily on, or “anchor,” an initial numeric value and “adjust” from there. It is generally accepted among cognitive scientists that our brains are essentially hard-wired to anchor and adjust. Operating this way often serves us well, providing cognitive shortcuts that facilitate quick decisions that are usually “good enough.” But occasionally, anchoring and adjusting leads to unintended negative consequences. We can be overly and irrationally influenced by the first number we encounter, even where the number is irrelevant.

In the lab, numerous studies over the past 40 years have reliably demonstrated the anchoring effect. Tversky and Kahneman conducted one of the earliest studies in 1975, where they spun a roulette wheel with values from 0 to 100 in front of a group of participants. Unbeknownst to the participants, they rigged the wheel to land on either 10 or 65. After the spin, participants wrote down the rigged number and were asked whether the percentage of African countries in the U.N. was higher or lower than the number. Next, they asked the participants to estimate the actual percentage. When the wheel landed on 10, participants gave estimates around 25 percent. When it landed on 65, participants’ estimates jumped to 45 percent.

Subsequent studies have reported that attempts to increase motivation, such as offering payoffs for accuracy, do not reliably mitigate the anchoring effect. Further, studies by Quattrone in 1981 and Chapman and Johnson in 2005 showed that even when told about anchoring in advance, or expressly instructed to avoid anchoring, most people still fall prey to its effects.

Studies have also explored the anchoring effect specifically in negotiation settings. In 2006, Guthrie and Orr conducted a meta-analysis of anchoring studies. Their results showed a robust relationship between

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initial offer and final price. For every dollar increase in an opening offer, there is a nearly 50-cent increase in final price.

Does this mean that plaintiffs' counsel should always make a high demand, no matter how outrageous, and defense counsel should always offer zero? Every experienced litigator knows that, in practice, this would be a bad idea. Taking an extreme initial position often blows up the mediation and encumbers any future settlement efforts. If fighting appears more promising than negotiating, a party will simply walk away because continued litigation is the party's "best alternative to a negotiated agreement," known as BATNA.

Additional research sheds light on factors that can mitigate the influence of an initial offer or demand as an anchor. One factor is the negotiator's level of experience. Anchoring effects are diminished, though not eliminated, among more experienced negotiators. The second factor is relevant additional information available to the negotiating parties. Guthrie and Orr's research also confirmed that when negotiators had little information about their opponent's position and the initial anchor was the only salient price, that anchor had a greater influence on the outcome. But, when the negotiators received relevant knowledge regarding their opponent's position, the correlation weakened.

So what does cognitive science and the wisdom of experience tell us?

1. **Consider making a first move as favorable to your client as possible without disregarding your opponent's BATNA.** This has the potential to set your anchor just within the range that keeps a rational opponent at the mediation table, while still leveraging the anchoring phenomenon. Alternatively, making a first move too close to one's final position, perhaps to appear reasonable or to make the negotiation more efficient, may be a bad idea because it forgoes the potential influence of anchoring.
2. **Consider using settlement counsel.** Much like trying cases is a skill that improves with study and practice, so too is negotiating settlements. Although it is somewhat common for in-house counsel to engage trial counsel for the limited purpose of a jury trial, it is perhaps less common to see settlement counsel engaged for the limited purpose of mediation. But the principle is the same. Although every commercial litigator is sometimes involved in negotiating settlements for complex, high-stakes commercial litigation, engaging settlement counsel can make economic sense. The cognitive science supports that more experienced negotiators are less susceptible to cognitive errors such as anchoring and adjusting. Further, settlement counsel can bring a fresh pair of eyes, making them less tainted by factors such as a history of contentious disputes and interactions within a certain piece of litigation. This puts settlement counsel in a more objective position for accurately estimating the opponent's, and the client's, BATNA.]
3. **Prepare, prepare, prepare.** As with almost all aspects of commercial litigation, preparation is critical. The cognitive science and common experience support that the more you know about the interests and positions of all parties involved, the better armed you are to avoid the influence of cognitive errors, such as undue influence from an opponent's anchor. The importance of preparation also runs in the other direction. The better prepared you are to provide your opponent with objective, verifiable facts to

> back up your anchor, the more effective that anchor will be. This does not mean offering reasons such as “we are better lawyers than you.” Or, “a jury will probably like us better than you.”

Instead, try using verdict data from similar cases, often available through the major online legal research services. Likewise, hard economic data, not mere opinions, on otherwise slippery concepts such as the cost of a business interruption can also go a long way toward making sure your anchor is well set. Your opponent will try to distinguish your case, but the more verifiable case valuation facts you bring to the table, the more difficult that becomes for opposing counsel. It is seldom a bad strategy to be the best prepared lawyer in the room.

Amit Patel is a consultant with ThemeVision LLC, which is a jury research and litigation consulting firm affiliated with Barnes & Thornburg LLP. Amit is both a lawyer and a social psychologist, combining his background in law and psychology to provide clients with a comprehensive approach to jury selection and consulting. Amit can be reached via telephone at (317) 231-7744 or by e-mail at amit.patel@themevision.com.

Dennis P. Stolle is a partner in Barnes & Thornburg’s Indianapolis office and is a member of the Commercial Litigation Practice Group. Dennis is both a lawyer and a social psychologist. He concentrates his practice on trial consulting, jury research, and litigation. Dennis is also the president and a founder of ThemeVision LLC. Dennis can be reached via telephone at (317) 231-7742 or by e-mail at stolle@themevision.com.