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## Decision-making in negotiations and handling the reaction to unfairness

There is a famous experiment that illustrates how humans may be hardwired to react negatively to unfairness, even if it means hurting our own interests.

In the experiment (led by Frans de Waal and available on YouTube), a scientist teaches monkeys in adjacent cages to return the pebbles she hands them by rewarding them with a piece of cucumber. One day, however, she rewards one monkey with a grape. The monkey in the cage next door observes this exchange.

When the experimenter turns to the second monkey and gives him only a piece of cucumber for returning the pebble, he pitches a tantrum and flings his treat out of the cage — where the first monkey happily sticks his arm through the bars and retrieves it.

Like many people involved in litigation, in the face of perceived unfairness, the monkey prefers to accept nothing.

In my last two columns, I addressed some cognitive biases and brain shortcuts that operate beneath consciousness and can affect clients and their lawyers in negotiations. I suggested that being on the lookout for such brain behaviors may help negotiating teams avoid common decision errors. (“Decision-making in negotiating settlements: the overconfidence bias,” March 23, “Decision-making in negotiating settlements: the anchoring effect,” April 22).

As previously noted, Daniel Kahneman, author of “Thinking, Fast and Slow” and winner of the Nobel Memorial Prize in Economic Sciences, describes two cognitive systems in our brains as System 1, the brain’s fast, automatic, intuitive approach, and System 2, the slower, analytical mode, where reason dominates.

System 1, it turns out, generally

runs the show when it comes to negotiation or anything else. As discussed in previous columns, sometimes this can be a problem. People frequently make decisions based on such brain shortcuts without regard to logic, or what might actually be in their best interests.

According to Kahneman, “We must get used to the idea that even important decisions are influenced, if not governed, by System 1.”

The ancient parts of our brains, including both the reptile brain that functions the same in humans as in lizards and the early mammalian brain that is focused on survival and reproduction, appear to be involved in System 1.

An example of this kind of decision-making is System 1’s reaction when it encounters something that seems unfair. System 1 appears to have a very sensitive unfairness detector that can lead to a swift and negative response.

John Medina explains in “Brain Rules” (2008) that humans evolved to cooperate with each other in order to increase chances of survival. Being able to understand one another’s intentions and motivations, an ability known as theory of mind, and to identify whether someone is cooperating with the group is basic to survival.

Many human experiments have

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explored the System 1 reaction to unfairness, often involving a two-player contest called the Ultimatum Game where players can keep or reject offers that typically give them 80 percent, 50 percent or 20 percent of money they would not

### BEYOND DISPUTE



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otherwise receive.

The interesting part of the experiment is that when their counterparts make “unfair” suggestions as to how to share the money, such as giving only 20 percent, players usually punish them with a rejection, even though it costs them.

This experiment has also been done using brain imaging. Earlier research had suggested that the area controlling the ability to analyze and make financial decisions is located in the more recently evolved part of the brain, including the prefrontal cortex.

Researchers in Sweden, however, were able to see that the brain area controlling fast financial decisions was actually located in the amygdala, part of the primitive brain that is often involved in feelings of anger and fear.

Hypersensitivity to perceived unfairness, whether it is in reaction to Uber’s surge pricing or a hardware store that increases shovel prices during a blizzard, is just one example of the dominance of negativity.

According to Kahneman, we are driven more strongly to avoid losses than to achieve gains.

He refers to an experiment by economists Devin Pope and Mau-

rice Schweitzer at the University of Pennsylvania that illustrated the power of loss aversion by proving that golfers unconsciously try a little harder to avoid a bogey (one stroke over par) than when putting for a birdie (one stroke under par).

They analyzed more than 2.5 million putts, and whether the attempted putt was easy or hard, “at every distance from the hole, the players were more successful when putting for par than for a birdie.”

So what is to be done about the client or lawyer who wants to fling away his bit of cucumber?

According to Kahneman, a negotiator may have more success if she describes an offer using language that anticipates the unfairness reaction, such as pointing out that the pie is actually increasing and the parties are allocating gains not losses.

Explicitly using the language of fairness may also help. A former student recently had great success dealing with a positional bargainer by asking, “What is it about my proposal that does not seem fair and reasonable to you?”

Finally, carefully explaining the context of your client’s position could avoid the unfairness reaction. According to experiments by Kahneman, Richard Thaler and Jack Knetsch, an existing price, wage or rent sets a reference point that System 1 views as an entitlement. Any attempt to change it to increase profits will cause the unfairness reaction.

Explaining your client’s position in terms of threatened losses and his own entitlement to make a profit, however, does not cause the same reaction.

As with any other aspect of negotiation, planning pays off and putting in time preparing the language to be used in articulating your client’s position could very well make a difference in whether an offer is perceived as a grape or cucumber.