

Mastering the Unconscious

Arbitrators and Decision Making: Can We Improve?

Edna Sussman

Esussman@SussmanADR

NYSBA Arbitration Training

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This year's hot subject

- IBA Arbitration Day - February 21, 2013- Making the award: need we rethink the process? Deliberations: an opaque and disorganised process?
- Swiss Arbitration Association- February 1, 2013- Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions
- Brunel University London- May 22-24, 2013- The Roles of Psychology in International Arbitration

Mental Contamination

- *“Mental contamination is the process whereby a person has an unwanted judgment emotion or behavior because of mental processing that is unconscious or uncontrollable.”* Timothy and Brekker, psychologists
- *[We] should take steps to limit the impact of ‘blinking on the bench’”* Guthrie, Rachlinski, and Wistrich, law professors and magistrate

Justice Cardozo

- “Deep below consciousness are other forces. The likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man whether he be litigant or judge.”

The Nature of the Judicial Process 167 (1921)

Judge Frank

- “The conscientious judge will, as far as possible, make himself aware of his biases...”

Judge Frank in *In re J.P. Linahan*, 138 F. 2d 650 (2d Cir. 1943)

Justice Scalia

- *While computers function solely on logic, human beings do not. All sorts of extraneous factors-emotions, biases, preferences-can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are.)”*

Justice Scalia, *Making Your Case: The Art of Persuading Judges* (2008)

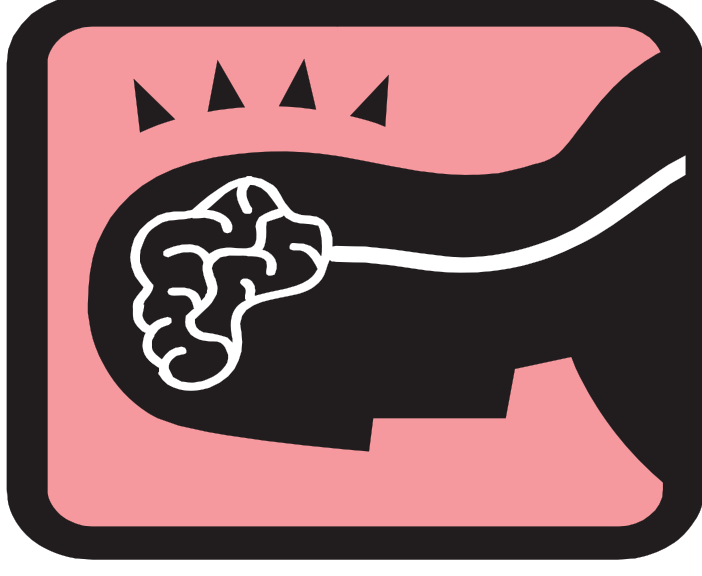
The Brain

- Plato (424-348 BC)
 - two horses
(rational/moral
and
irrational/passionate)
- Kahneman (2011):
 - System 1 and
System 2



Blinders

- Informational-
“unringing the bell”
- Attitudinal – personal
predilections
- Cognitive – heuristics-
mental short cuts



Judge experiments

- 265 state and federal judges
- Average 9 years on the bench
- Anonymous questionnaire



1. Informational Blinder- Inadmissible Evidence

- Privileged Communication
 - very damaging to plaintiff
- Half the judges saw it
- 75 % of those judges ruled that the communication was privileged
- Judges who did not see the document- 55% found for plaintiff
- Judges who saw it and ruled privileged - 29 % found for plaintiff



Informational Blinder-

Subsequent remedial measure

- Gasoline flare up from a gasoline can • Judges who saw the evidence- - 75% said not liable
- Company said almost never happened • Judges who did not see the evidence- 100% said not liable
- Warning and recall letter sent later
- Held inadmissible as a subsequent remedial measure



Application to arbitrators?

- Hearsay
- Expert witnesses
- Privileged document review
- Med – arb
- Should we be less generous in admitting inadmissible evidence? Risk of vacatur real?
- Should counsel highlight inadmissibility and unreliability of evidence more without unduly disrupting the proceeding?

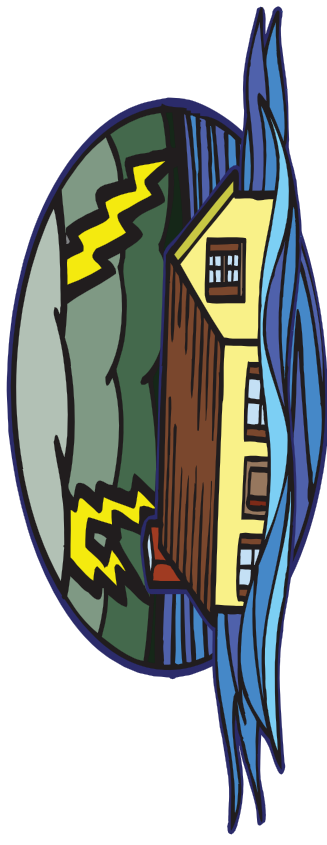
2. Attitudinal Blinders

Personal predilections

- Democratic judges studies show are 1.4 times as likely to render a liberal decision
- Our backgrounds; personal experiences and how they influence us
- Other forms of bias? Manner of presentation across cultures, deep pocket, plaintiff versus defendant, corporation vs. individual, race, culture, fill it in for yourself

3. Cognitive Blinder- Hindsight Bias Heuristic

- Was failure to take precautions against flooding negligent?
 - Not told about the flood, 24% found negligence
 - Told about the flood, 57% found negligence
- Half the judges were told that a flood costing \$1 million occurred subsequently



Cognitive Blinder

Confirmation Bias Heuristic

- Study of what you already believe
- Study of supporters of Bush and Kerry in the 2004 elections- statements by candidates- only the parts of the brain that control emotions were triggered; reasoning part completely inactive



Cognitive Blinder

Anchoring Heuristic

- Pedestrian hit by truck
- Half the judges heard a motion to dismiss for lack of \$75,000 jurisdictional minimum
 - they denied it
- Other judges did not hear the motion
- Judges who did not hear the motion awarded a mean of \$1,200,000 million
- Judges who heard the motion awarded a mean of \$880,000- 30% spread



Cognitive Blinder

Anchoring

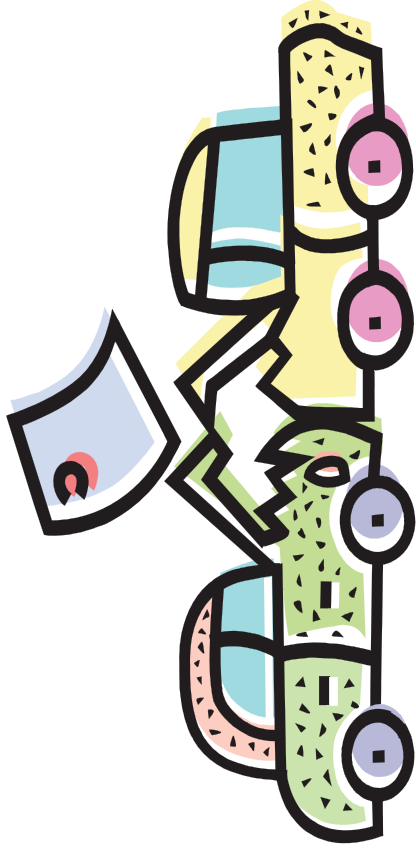
- Auto accident- arm amputated- facts presented
 - Judges who heard \$10,000,000 awarded mean of \$2,210,000
- Some Judges heard demand of 10 million dollars in settlement conference
 - Judges who only heard large number awarded mean of 808,000
- Other judges heard demand for “a lot of money”



Cognitive Blinder

Framing

- Alan- intelligent-industrious-impulsive-critical-stubborn-envious
- Ben- envious-stubborn-critical-impulsive-industrious-intelligent
- Who did you view more favorable?
- Film: asked how fast between 30-40 MPH car was going
 - Smashed 40 MPH
 - Collided 39 MPH
 - Bumped 38 MPH
 - Hit 34 MPH
 - Contacted 31 MPH



Application to Us?

- **Hindsight bias**– our job is often to reconstruct what must have been then – Actual outcome makes it seem more predictable than it was. Careful...
- **Confirmation bias**- our job is to listen and assess with an open mind; An early view of the case or our personal feelings about a subject may cause us to only hear and process what confirms that view. Careful...
- **Anchoring Bias**- Assessing damages- number anchors can impact thinking. Careful...

Application to counsel?

- Careful selection of arbitrators
- More expansive arbitrator interviews unrelated to merits to flush out biases
- Mock arbitrations
- Presentation tailored to suit particular arbitrators
- Play to cultural norms

The Coherence Bias:

On Being Certain

- “People hate being in a state of doubt and will do whatever is necessary to improve from doubt to belief.” **Judge Richard Posner**, THE JURISPRUDENCE OF SKEPTICISM, 86 Mich. L. Rev. 827 (1988)
- Coherence bias
- The feeling of pleasure/reward - Triggered by the feeling of being certain
- Brain’s mesolimbic dopamine system
- Same biology as sex, drugs and alcohol. Robert Burton, *On Being Certain*, 2008
- **Does feeling certain assure you are right?**

The Hunch

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, **wait for the feeling, the hunch**—that **intuitive flash of understanding** which makes the jump-spark connection between the question and decision, and . . . sheds its light along the way.”

5th Circuit Judge Joseph C. Hutcheson, Jr., “The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decisions” (1929)

Similar statements by Judge Friendly and Judge Hand



Overcoming Unconscious Bias

- Awareness of the mental contaminant
- Motivation to correct it
- Awareness of the direction and magnitude of the bias
- Control over resolve to correct it
- People, even if they believe they are biased, do not believe their bias has infected their judgment – the “bias blind spot”
- **Awareness, knowledge and motivation do not work; not enough; control does not follow**

Denial

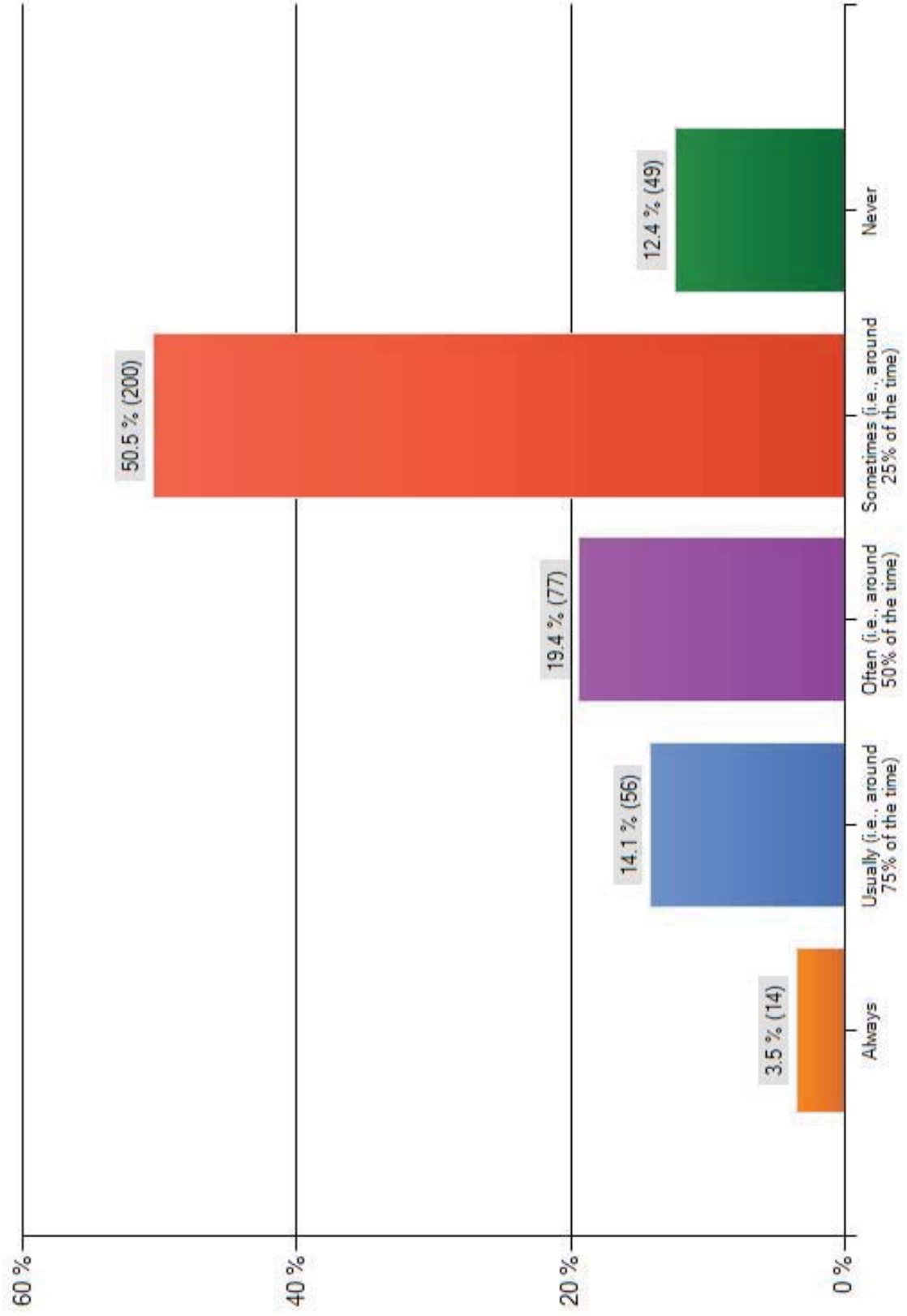
- De Nile
- The Illusion of objectivity



Decision framework

- “A typical arbitrator concludes the initial phase with a single dominant story in mind... Sizeable percentage of arbitrators have established a clear leaning by the end of the opening statement.”
- Richard C. Waites and James E Lawrence, *Psychological Dynamics in International Arbitration Advocacy*, In *The Art of Advocacy in International Arbitration* 109 (2010).
- **If we form a view early does it lead to biased assimilation of new evidence? Confirmation bias?**

Do you form a preliminary view of the merits of the case after receiving the pre-hearing submissions ?



Debiasing: Overcoming your “bias blind spots”

- Play both stories throughout the proceeding - Consider the Opposite
- Marshal and constantly weigh positive as well as negative evidence for both sides
- Makes sure you ask questions that elicit the full story- not just confirming preliminary view
- Identify why you may be wrong
- Reduce reliance on memory
- Replay how you reached your conclusions- what did you reject
- Write down your reasoning
- Estimate odds of your being wrong
- Were you influenced by any biases /heuristics /inadmissible evidence
- Consult your co-arbitrators
- Leave enough time - Delay decision making - Sleep on it
- What did you need to have presented to go the other way
- What would the losing party feel you overlooked
- If someone were writing it the other way- where and how would they differ

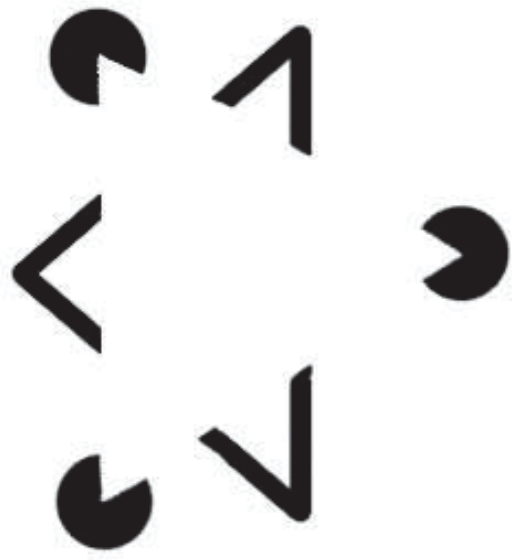
Two faces, an urn or both???



Young girl or old hag? Harder to
see both? Have to really try?



Gestalt theory – law of closure



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Woody Allen's Story



- When I was kidnapped, my parents snapped into action...
- (By now you have probably constructed your own story of what happened next)
- ... They rented my room out.

- Thank you

- Edna Sussman

- 914-472-9406

ednasussman@sussmanadr.com