

## CHAPTER 2

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### Perception, Fairness, Psychological Traps, and Emotions

#### A. The Role of Perceptions

“We do not see things as they are. We see things as we are.”

— *The Talmud*

The key to understanding and mastering negotiation is to be aware that those in conflict and who want something from one another see the situation differently. It is these differences that give root to conflict and to the need to negotiate, as well as to the possibility of agreement. We assess conflict and evaluate a case or the worth of an item differently because of differing perceptions. Our individual perceptions determine how we view ourselves, others, and the world. No two views are exactly the same. For example, we may selectively perceive or differ in our perceptions of the following:

- facts
- people
- interests
- history
- fairness
- priorities
- relative power
- abilities
- available resources
- scarcity
- timing
- costs
- applicable law or rules
- likely outcomes

Our view of each of these elements, as well as our perceptions of other variables, shape how we see the world and how we form differences. It is because of such differences in perceptions that people bet on horse races, wage war, and pursue lawsuits.

### *Rashomon Effect*

The *Rashomon effect* is the name given to contradictory perceptions of the same event by different people. The phrase derives from a classic Japanese story, on which the film *Rashomon* is based, illustrating the subjectivity of perceptions and how the truth through one person's eyes may be very different from another's, as seen through the prism of the individuals' own perceptions. The story and the film explore how perceptions distort or enhance different people's memories of a single event, in this case, the death of a Samurai warrior. Each tells the "truth" but perceives it very differently. The film, like the story, is unsettling because, as in much of life, no single truth emerges.

Similarly the parable of blind men, each touching a different part of an elephant and from that experience describing what an elephant is, has been used to illustrate that there is a range of "truths" based on where you are in relation to what you are experiencing and differing perceptions. The parable implies that one's subjective experience can be true, but that such experience is inherently limited by its failure to account for other truths or a totality of a single truth.



And so these men of Hindustan  
Disputed loud and long,  
Each in his own opinion  
Exceeding stiff and strong,  
Though each was partly in the right  
And all were in the wrong.

*"The Blind Men and the Elephant" by John Godfrey Saxe (1816–1887)*

The *Rashomon effect* is more recently illustrated in *The Girl on the Train*, a best-selling novel by Paula Hawkins (2015). The story is told from three character's perspectives. Each person's account is very compelling, but each person perceives the same events through a different prism of their own reality, creating a suspenseful tale where the "true" picture only emerges at the end after the three separate versions are contrasted.

As a new lawyer negotiating a dispute, it may seem puzzling when those on the other side of the conflict insist that your earnest client is misstating the facts and is wrong. Lawyers are often presented only their client's factual account, which may be very different than what is told to opposing counsel by their client. Each client may well be stating the situation truthfully as they perceive it. The following reading further develops the theme that conflict is subjective and flows from different perceptions in people's minds. Rummel's "subjectivity principle" may help to explain many conflicts that would otherwise defy understanding and resolution.

R.J. Rummel, *THE CONFLICT HELIX*

13 (Transaction Publishers, 1991)

### The Subjectivity Principle

Perceived reality is your painting. You are the artist. You mix the colors, draw the lines, fix the focus, achieve the artistic balance. Reality disciplines your painting; it is your starting point. As the artist, you add here, leave out there; substitute color, simplify; and provide this reality with a point, a theme, a center of interest. You produce a thousand such paintings every moment. With unconscious artistry. Each a personal statement. Individualistic.

Now, most people realize that their perception of things can be wrong, that they may be mistaken. No doubt you have had disagreements with others on what you all saw or heard. And probably you have heard of eyewitnesses who widely disagree over the facts of a crime or accident. Some teachers who wish to dramatically illustrate such disagreement have staged mock fights or holdups in a classroom. A masked man rushes in, pointing some weapon at the teacher; demands his wallet; and with it hastily exits, leaving the class stunned. Then each member of the class is asked to write down what he saw and heard. Their versions usually differ widely.

But, of course, such are rapidly changing situations in which careful observation is difficult. Surely, you might think, if there were time to study a situation or event you would perceive it as others do. This is easy enough to test. Ask two people to describe in writing a furnished room, say your living room, or a car you may own. Then compare. You will find many similarities, but you should also find some important and interesting differences. Sometimes such differences result from error, inattentiveness. However, there is something more fundamental. Even attentive observers often will see things differently. And each can be correct.

There are a number of reasons for this. First, people may have different vantage points and their visual perspectives thus will differ. A round, flat object viewed from above will appear round, from an angle it will appear an ellipse, from the side a rectangle. This problem of perspective is acute in active, contact sports such as football or basketball. From the referee's line of sight there is no foul, but many spectators (especially the television audiences who see multiple angles and instant replays) know they saw an obvious violation.

But people can compare or change perspectives. Were this all, perception would not be a basic problem. The second reason for different perceptions is more fundamental. You endow what you sense with meaning. The outside world is an amorphous blend of a multitude of interwoven colors, lights, sounds, smells, tastes and material. You make sense of this complex by carving it into different concepts, such as table, chair, or boy. Learning a language is part of learning to perceive the world.

You also endow this reality with value. Thus what you perceive becomes good or bad, repulsive or attractive, dangerous or safe. You see a man running toward you with a knife as dangerous; a calm lake as peaceful; a child murderer as bad; a contribution to charity as good. And so on.

Cultures are systems of meanings laid onto reality; to become acculturated is to learn the language through which a culture gives the world unique shape and

evaluation. A clear example of this is a cross, which to a Christian signifies the death of Jesus for mankind as well as the whole complex of values and beliefs bound up in the religion. Yet, to non-Christian cultures a cross may be meaningless: simply two pieces of wood connected at right angles. . . .

Besides varying perspectives and meanings, a third reason for different perceptions is that people have unique experiences and learning capacities, even when they share the same culture. Each person has his own background. No two people learn alike. Moreover, people have different occupations, and each occupation emphasizes and ignores different aspects of reality. Simply by virtue of their separate occupational interests, the world will be perceived dissimilarly by a philosopher, priest, engineer, union worker, or lawyer.

Two people may perceive the same thing from the same perspective, therefore, but each through their diverse languages, evaluations, experience, and occupations, may perceive it differently and endow it with personal meaning. Dissimilar perspective, meaning, and experience together explain why your perception will often differ radically from others.

There is yet an even more basic reason: what you sense is unconsciously transformed within your mental field in order to maintain a psychological balance. This mental process is familiar to you. People often perceive what they want to perceive, what they ardently hope to see. Their minds go to great pains to extract from the world that which they put there. People tend to see things consistent with their beliefs. If you believe businesspeople, politicians, or bureaucrats are bad, you will tend to see their failings. If you like a person, you tend to see the good; hate him and you tend to see the worst. Some people are optimists, usually seeing a bottle half full; others are pessimists, seeing the same bottle half empty.

Your perception is thus the result of a complex transformation of amorphous sensory stimuli. At various stages your personal experience, beliefs, and character affect what you perceive. . . . Independent of the outside world's powers to force your perception, you have power to impose a perception on reality. You can hallucinate. You can magnify some things to fill your perception in spite of what else is happening. . . .

No wonder, then, that you are likely to perceive things differently from others. Your perception is subjective and personal. Reality does not draw its picture on a clean slate—your mind. Nor is your mind a passive movie screen on which sensory stimuli impact, to create a moving picture of the world. Rather, your mind is an active agent of perception, creating and transforming reality, while at the same time being disciplined and sometimes dominated by it. . . .

### Notes and Questions

Rummel's subjectivity principle explains how we process the information and stimuli around us through the filters of our experience, needs, culture, and biases. The complexity of our environment and our minds prevents us from taking it all in whole, so we focus selectively on some stimuli and ignore others. We develop shortcuts in our perceptual systems that allow us to function and process information more quickly and make timely

decisions. These shortcuts, known as *heuristics*, can serve us well. However, mental shortcuts create the risk that our selectivity will distort reality as seen by others. The different ways we process information can lead to conflict based on our different realities.

A key concept in understanding the cause of disputes is *selective perception* or what is known as the *confirmation bias*. We tend to unconsciously notice information that confirms our already existing views and disregard conflicting information that doesn't support what we think. The offspring of selective perceptions is *self-fulfilling prophecies*, which occur when our behavior is influenced by our selective perceptions, which causes others to behave toward us in a way that further confirms the "truth" of our thinking.

In an escalating conflict, we tend to see what we want to see and to distort information to support our expectations. One way we do this is by selectively testing hypotheses. We form a hypothesis about the adversary such as, this person is nasty. Then we gather information to confirm our hypothesis and ignore information that does not support it. In selective perception we have only dealt with perceptions. When behavior is introduced, we have a self-fulfilling prophecy, which connects attitudes and behaviors. I have an expectation of you that leads me to behave in a way that produces a response in you that confirms my expectation. My prophecy about the kind of person that you are is fulfilled. (Rubin 1993)

1. Can you recall a conflict you have experienced that might be better understood in light of the subjectivity principle or selective perceptions?
2. John Milton, in *Paradise Lost*, poetically stated: "The mind is its own place, and in itself can make a heaven of Hell, a hell of Heaven" (Milton 1909). In explaining his subjectivity principle, is Rummel just restating Milton?
3. If a conflict between people is the result of different perceptions, what might be of help in resolving the conflict?
4. Is there a connection between Rummel's subjectivity principle and the distinction made in Chapter 1 between the manifest conflict and the underlying conflict? Can you articulate an explanation of manifest conflict or underlying conflict based on Rummel's subjectivity principle?

## B. Heuristics—Thinking Fast and Slow

There are two methods by which we make decisions. One is fast and the other is slower. Intuition based on experience and the functioning of the reptilian part of our brain allows us to make quick "gut" decisions using instinctual shortcuts that can be convenient, if not life-saving. The more deliberate, rational process of decision making is what we are trained in law school to utilize, commonly referred to as "thinking like a lawyer." This method takes in and processes more information and slows down decision making through the use of our cerebral

cortex. The two decision systems modulate one another and can be in conflict, with the instinctive approach initially predominating because of its speed and utility.

Malcolm Gladwell popularized the benefit of nurturing quick, experience-based decisions not encumbered by deliberation in his best-selling book *Blink* (2007). Nobel prize winning psychologist Daniel Kahneman utilizes decades of research in explaining and labeling decision-making shortcuts, or cognitive heuristics, and the errors we can make when depending on intuitive judgment and how they can interfere with more rational, information-based decision making. (*Thinking Fast and Thinking Slow*, 2011) Kahneman, however acknowledges that our thoughts and actions are routinely guided by intuitive decisions that are generally on the mark and that we cannot live without them. Instinctive, fast judgments generally produce adequate solutions, but also create biases and flawed decisions if not monitored by rationality and more information.

#### Problem

Students at your school, who had expected to attend a required lecture without charge, are told after they arrive that they will each have to pay \$20 to cover unexpected expenses. They can, however, spin a roulette wheel with four chances in five of paying nothing and one chance of having to pay \$100. Which will most choose and why? (Hint: The answer is within the list below.)

#### *Top Ten Psychological Traps*

The following is an alphabetical list of the top ten common mental traps that can create disputes or make them more difficult to resolve. Some are interrelated; some have multiple labels. We return to these cognitive shortcuts and expand the list later when we examine why negotiations fail. They also come into play in a later chapter on how mediators can move negotiations through an impasse to settlement.

- *Anchoring*: A dispute over the value of an item often arises because we form an estimate of an unsure value by comparing it to something we know or to a number to which we are exposed that is then planted in our brain. The number you are exposed to as a value anchors your calculation and influences your thinking. When a client is burnt by hot soup at a restaurant, she may think the restaurant is to blame and her claim is worth millions because she read about a multimillion-dollar verdict against McDonald's for coffee that was served too hot. You, as a sophisticated lawyer, understand that this case is distinguishable from the McDonald's case, which was reduced on appeal as excessive, and that this client's case is much weaker and worth less than that one, so you adjust from the McDonald's verdict downward. The question is whether you adjust far enough. Research suggests that you will not adjust sufficiently because of

the anchoring effect of the headline verdict, which distorts your analysis and expectation.

- *Confirmation bias*: We tend to give credit to information that is consistent with our preexisting beliefs and wishes rather than information that challenges or contradicts them. This can dig us deeper into conflict when dealing with those who have different beliefs or values. We read and believe articles that confirm dark chocolate and red wine are good for us, and skim past articles that question the studies.
- *Consensus error (projection)*: We tend to falsely believe that others think the way we do or have values similar to ours. We also believe that others like what we like and want what we want. Those who enjoy loud music assume that everyone will enjoy their amplified radio selections. Conflict can be created when we find out we were wrong.
- *Framing*: Our thinking about an issue and our answer to a question are affected by how the question is presented. For instance, asking a priest if you can smoke while you pray is likely to result in a different answer than asking if you can pray while you smoke.
- *Loss aversion (status quo bias)*: Losses tend to be felt more than equivalent gains are relished, so that the pain from the loss of a dollar is felt greater than the joy of a dollar gain. We tend to overvalue what we have to give up relative to what we might get. Most will not give up a "bird in the hand for two in the bush." In other words, we are willing to take more risk to avoid a loss than to obtain a gain. As a corollary, negotiating parties are more likely to view their own concessions (losses) as more valuable than equivalent concessions they get from the other side (gains).
- *Naive realism*: We tend to think that the way we see the world is the way it really is and anyone seeing it differently is naive. We each see the world through the lens of our own experience and culture, believing what we see is reality. This bias is in play when your idea or offer is rejected with the preface that in the "real world" things are different.
- *Overconfidence (egocentric bias)*: We tend to rate our abilities, chance of being right, and good luck more highly than is warranted. Why else would people buy lottery tickets? We are also overconfident about our ability to assess uncertain data and tend to give more weight to what we know than what we don't know. As a matter of fact, we are overconfident about ourselves in general. As examples, surveys have found that 70 percent of all drivers believe that they are more competent than the average driver, and 80 percent of lawyers think that they are more ethical than the average attorney (Fox and Birke 2000). In negotiation, overconfidence can be compounded by positive illusions we have about the relative righteousness of our case or cause and how much we deserve.
- *Reactive devaluation*: Whatever proposal comes from the other side cannot be good for us. Anything done or suggested by them is suspect. For example, if Democrats propose legislation, Republicans are likely to reject it, and vice versa. Also, any information or offer received is perceived as less valuable than what might be withheld. This tends to escalate conflict.
- *Selective perception*: Whenever we encounter a new situation, we must interpret a universe of unfamiliar, often conflicting data that is more than we can process. We respond by instinctively forming a hypothesis about the situation,

then organizing what we see and hear with the help of that premise. Our hypothesis also operates as a filter, by automatically screening out anything that doesn't support it—which in turn reinforces the belief that our initial view was correct. Henry David Thoreau was probably thinking about this when he said, "We see only the world we look for." Selective perception is also the basis of self-fulfilling prophecies and stereotyping. For example, if you are negotiating with a lawyer you believe is hostile and not to be trusted, you may dismiss his initial friendly greeting as manipulative and selectively see him scrutinizing you with suspicion. Your stilted behavior toward him will likely result in him seeing you as antagonistic. Mutually reinforced surly behavior will be selectively observed and remembered to the exclusion of overtures of civility. You will feel that your own insight and keen ability to "read" others is confirmed, and your self-fulfilling prophecy will be realized.

- *Self-serving bias (attribution error)*: We are our own best friend in justifying our actions while seeing the same behavior in someone else as a shortcoming. For instance, we know that we are personally responsible for our successes, but our failures are the result of bad luck or circumstances beyond our control. When we are late it is for good reason; others keep us waiting because of their bad planning and insensitivity. Our miscalculation or misstatement is a simple mistake, but our opponent's similar error is attributed to deception. We also tend to take more credit for favorable results than others attribute to us.

Some of the psychological factors and biases described above may work against one another when making tactical decisions driving a negotiation. For example, as will be discussed later, there are differing views about the advantages and disadvantages of making the first offer in a negotiation. Making the first offer, particularly if the values involved are uncertain or without ready comparisons, could take advantage of the anchoring bias set by your offer. However, reactive devaluation, which may be at a peak near the beginning of negotiations, could cause the other side to radically discount your first offer because of their suspicion. (For a more extensive catalogue of psychological principles impacting negotiation and decision making, see Birke, "Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications," 25 Ohio St. J. on Disp. Resol. 477 (2010).)

### *The Myth of Professional Objectivity*

Studying the perceptions and psychological traps that immerse people in conflict helps us better understand clients' disputes. Although lawyers advocate and negotiate on behalf of clients, we are less subject to the selective perspectives that can skew our client's perceptions. As lawyers, without a direct stake in the outcomes of our client's disputes, we tend to believe we can think more clearly and rationally. After all, we have been educated to think like lawyers, right? This is the common wisdom, but is it true?

We can often recognize our clients' partisan perceptions, but we are easily fooled by our own ingrained biases and distortions. By definition, what we believe is our reality. The longer we work with a client on a case or a deal, the more we share the same reality—distorted or not. We might be no more

able than our clients to objectively analyze the weaknesses of their case or the strengths of the other side's arguments. It can be very helpful for you to recognize that the psychological factors likely to affect your client's thinking and decision errors can also affect your own assessment of case value and the attractiveness of offers to settle. (See Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* (2010).)

#### Questions

5. Does knowing about the potential of these perceptual biases and cognitive errors result in not being affected by them? How can you best guard against them or overcome your own cognitive errors?
6. What is your role if you are aware of your client's perception biases and cognitive distortions? Must you agree to a desired goal or an outcome acceptable to your client if you are aware that the goal or acceptance is the result of a misperception or cognitive error?
7. How might you counter cognitive error and perceptual distortion that may result in your negotiating counterpart rejecting a settlement that is otherwise acceptable? For example, how would you handle the anchoring problem, where your opponent is fixed on what you regard as an unrealistic outcome in another case, or the tendency of your opponent to reject your truly generous offer because of suspicion of any offer coming from you?

### C. The Impact of Fairness

Our list of selective perceptions at the beginning of this chapter included "fairness." Differing views of fairness are at the heart of many litigated conflicts and failed negotiations. Fairness, like other perceptions, is in the mind of the beholder. A client may hire you to negotiate on her behalf because she feels she has been treated unfairly and that you, as a lawyer, can help her obtain what is fair. Fairness, as perceived by clients, can also become central in assessing whether to accept or reject a negotiated settlement or deal.

An outcome that appears to be fair can be more important than winning or losing. Fairness may define for some whether they have won or lost. Offers may be rejected even though they are economically advantageous because in the client's mind the result is not fair.

Classroom experiments with "ultimatum games" illustrate the importance of perceived fairness in negotiation. In these games, Player 1 is given a fixed sum of money or chips (e.g., \$100) as a windfall that she might have found on the street and is asked to propose a division of that sum with Player 2 (e.g., \$75 to Player 1 and \$25 to Player 2). Player 1 has complete discretion to divide the money as she wishes; Player 2 can choose only whether to accept or reject Player 1's proposal. If Player 2 accepts the offer, both players will keep the money as allocated. If Player 2 rejects the offer, neither player will receive anything.

Economic theory dictates that Player 1 should offer only a little more than zero to Player 2, and that Player 2 should accept this amount as better than nothing. In fact, in classroom experiments Player 1 generally offers 30 to 50 percent of the sum to Player 2, and when less than 50 percent is offered, many Player 2 recipients will reject the offer, preferring to walk away with nothing rather than accept what they perceive to be an unfair result. The results of this game reflect the importance of our innate value of being treated fairly.

Perceptions of fairness consist of two components. Distributional fairness is a quantitative notion of material outcome—what you get as the result of a negotiation. Procedural fairness relates to the process used to reach the outcome—how you were treated during the negotiation. Both of these components shape people's willingness to accept settlements and their feelings of how well attorneys represented them in the negotiation process. (See Robbenholt and Sternlight, *Psychology for Lawyers* (2012).)

#### Problem—The Home-Run Ball Catch

More than 40,000 fans were at the ballpark to see the San Francisco Giants' last game of the season. Most had come to see Barry Bonds add another home run to his already record-breaking total of 72. Alex Popov and Patrick Hayashi, who did not know one another, were two fans in the right-field arcade standing-room section, hoping to catch a Bonds home-run ball. Sure enough, Bonds's 73rd home-run ball came sailing over the right-field bleachers into Popov's outstretched glove. Within seconds, Popov fell to the ground as a rush of people converged on him and the ball. Madness followed before security officers arrived. When Popov was pulled from the pile of fans, the ball was no longer in his glove. Patrick Hayashi emerged with the ball in hand.

Both men claimed ownership of the valuable home-run ball, temporarily in Hayashi's possession. Both thought the ball was worth more than \$1 million, based on the sale of Mark McGwire's 70th home-run ball a couple of years earlier for more than \$3 million. Each man offered the other less than \$100,000 to relinquish any claim on the ball. Each expressed strong public views that he was entitled to complete ownership and was making a generous offer to the other. Both Popov and Hayashi cited principles of fairness and baseball fan culture entitling them to the ball. Popov argued that first possession controls, and Hayashi believed the fan who ended up in possession owned the ball. They insulted one another as liars and thieves. They both hired lawyers and filed suit in the California Superior Court.

Newspaper editorials, letters, talk show hosts, Barry Bonds, and several mediators all suggested that the ball be sold and the proceeds be split by the men or that the money be given to charity. Neither Popov nor Hayashi thought that evenly splitting what they were individually entitled to was fair, nor did they feel that they could concede anything in light of the insults cast on them by the other. Following 18 months of public bickering and litigation about what was fair, the judge ordered that the ball be sold and the

proceeds evenly split. Twenty months after it was hit into the bleachers, the ball, resting on black velvet and encased in glass, was sold at auction to a comic book impresario for a final bid of \$450,000. Popov and Hayashi each received \$225,000, minus auction expenses, and each incurred attorneys' fees exceeding that amount. Popov was sued by his attorney for fees and expenses of \$473,530, and also for \$19,000 by a law professor who served as an expert witness. (The whole sorry story and background is captured in the 2004 film *Up for Grabs*.)

1. Did the fact that the entire home-run ball melee was televised and that both men made boastful and insulting public statements influence the negotiation? How might you explain this in terms of the conflict/negotiation triangle presented in Chapter 1?
2. Neither Popov nor Hayashi appeared to be guided by rational self-interest in making decisions about how to maximize their ultimate economic outcome. What do you think got in the way? Might the negotiation result have been different if they had been friends or at least had not publicly insulted one another?
3. Do any of the psychological traps listed above help explain why both men were not happy to evenly divide the economic windfall?
4. Did both men suffer from the litigation curse of being in a lawsuit in which they were absolutely convinced fairness was on their side?
5. If you were representing Popov, how might you have approached the negotiation in terms of the fairness issues? What fairness criteria might you have suggested?

Fairness perceptions are significant in understanding clients' expectations and the negotiation behaviors of participants in negotiating deals and litigation settlements, as illustrated by the above example of the home-run ball. The following reading examines the criteria that people use to judge fairness and the variables that determine perceptions of fairness.

**Nancy A. Welsh, *PERCEPTIONS OF FAIRNESS IN NEGOTIATION***

87 Marq. L. Rev. 753 (2004)

**Distributive Fairness Perceptions**

As is obvious from reading judicial opinions in appellate cases, even impartial and educated people can review the identical record and reach widely disparate yet equally principled conclusions regarding what constitutes a fair outcome. The definition of distributive fairness is, therefore, inevitably subjective. This realization leads to the following questions: What criteria do people—including negotiators—use to guide their judgments regarding distributive fairness? What variables influence people's selection among different criteria, and why do people find it difficult to reach agreement even when they share a commitment to achieving an equitable outcome?

### A. *Competing Criteria for Judging Distributive Fairness*

The various criteria for judging outcomes' fairness can be distilled into four basic, competing principles or rules—equality, need, generosity, and equity. The equality principle provides that everyone in a group should share its benefits equally. According to the need principle, "those who need more of a benefit should get more than those who need it less." The generosity principle decrees that one person's outcome should not exceed the outcomes achieved by others. Finally, the equity principle ties the distribution of benefits to people's relative contribution. Those who have—contributed more should receive more than those who have contributed less. The closer that the actual outcome of a negotiation is to the outcome a negotiator anticipated based on the application of one of these principles, the greater the likelihood that the negotiator will perceive the outcome as fair.

Imagine the application of the four principles described supra to a negotiation between two individuals who are establishing a joint venture and negotiating the distribution of income. The first negotiator, who has little capital, is contributing the idea and the time and energy to implement the idea. The other negotiator is supplying the needed funds for the development and marketing of the idea. If these individuals are guided by the equality principle, they will distribute the income from the joint venture equally. If they use the need principle, the poorer negotiator who is contributing "sweat equity" will receive a greater share of the income. Under the generosity principle, neither negotiator would want his income to exceed the income of the other. Last, and perhaps most difficult, is the application of the equity principle. Both contributions are needed. Whose is more valuable? . . .

### B. *Variables Affecting Negotiators' Selection Among Competing Fair Allocation Principles*

Research has shown that several variables influence negotiators' selections among the various fair allocation principles that could apply to a particular negotiation. These variables include self-interest, social relationships, and the interaction between cultural norms and situational needs.

#### 1. *The Influence of Self-Interest and Relationships Between Negotiators*

If no relationship exists between negotiators, self-interest will guide their choice of the appropriate allocation principle to use in negotiation. A negotiator who does not expect future interactions with the other person will use whatever principle—need, generosity, equality, or equity—produces the better result for her. When a negotiator has a negative relationship with the other person, she will aim to gain more than the other negotiator, even if this requires undertaking a risky strategy. She certainly will not worry about achieving an outcome that is fair for that other, despised negotiator. Thus, "[n]egative affect within the context of potential relationships can remove fairness barriers."

On the other hand, the existence of a positive relationship with another negotiator makes the attainment of a fair outcome relevant. Further, positive social relationships influence negotiators' selection of the particular fair

allocation principle that will anchor their negotiations. If a negotiator is dividing a resource with someone else and expects future, positive interactions with that person, the negotiator tends to use the equality principle to define distributive fairness. . . . Relationships obviously matter in negotiators' definitions of fair outcomes. . . .

## 2. The Influence of Situational Needs and Cultural Norms

As commerce has become increasingly global, cross-cultural negotiation has also become more commonplace. Some cultures are known for placing greater emphasis upon maintaining social relationships than attaining individual objectives. Many believe, therefore, that the cultural dimension of collectivism-individualism should have great salience in the negotiation context. Simply, "individualism refers to a tendency to put a stronger emphasis on one's personal interest and goals, whereas collectivism refers to a stronger emphasis on the interests and goals of one's in-group members." Collectivist negotiators ought to be more likely than individualists to choose harmony-enhancing principles for the distribution of benefits (e.g., equality, need, or generosity principles).

Research indicates, however, that negotiators' choices among the various allocation principles are not so predictable. First, and consistent with the importance of relationships noted above, it is only when collectivists are negotiating with other in-group members that they are more likely to use a harmony-enhancing principle. If they are not closely related to the other negotiators, collectivists behave like individualists and tie fair allocation to contribution, thus leading to their use of the equitable principle. . . . .

## Procedural Fairness Perceptions

Procedural fairness is concerned with people's perceptions of the fairness of the procedures or processes used to arrive at outcomes. Researchers have found that people's perceptions of procedural justice have profound effects. First, people who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair. In effect, a person's perception of procedural fairness anchors general fairness impressions or serves as a fairness heuristic. Second, people who believe that they were treated fairly in a dispute resolution or decision-making procedure are more likely to comply with the outcome of the procedure. This effect will occur even if the outcomes are not favorable or produce unhappiness. . . .

## Conclusion

Lawyers and clients rely upon their assessments of fairness to make all sorts of decisions during negotiation: What offer shall we make? How should we respond to the other side's demand? Should we settle or make a counteroffer? Is the other side being so ridiculous that it is time to call an impasse?

Each one of these questions requires consideration of fairness, and it should now be quite clear that fairness is largely a matter of perception. Perhaps what is most interesting about the research that has been done regarding fairness perceptions is the extent to which it undermines the iconic image of two rational negotiators locked in a battle of logic, economics, and will. Rather, the research

reveals that negotiators' aspirations and moves will be significantly influenced by the culture and context within which they are negotiating, their own self-interest, and most intriguing of all, their sense of connection to each other. Ironically, as negotiations become increasingly global and virtual, it is the development of those old-fashioned relationships that may matter most.

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#### **D. The Role of Emotions, Emotional Intelligence, and Neuroscience**

Many of us are attracted to the study of law because we value a rational approach to issues rather than emotional responses that seem to get in the way of logic and problem solving. The conventional wisdom is that lawyers should leave their emotions behind in their professional roles, including negotiating. This is easier said than done, and might not always be wise.

None of us are automatons, even though we may try to appear so. Nor are those with whom we negotiate without emotional content that helps shape their conduct. We all have emotional needs and reactions that contribute to the creation of conflicts and are part of how we interact and deal with others. Recognizing and mastering these emotions is usually more helpful than denying and ignoring them.

More important, our clients have emotional needs that they might not readily express to us. As you learned from the readings in Chapter 1, emotional concerns, as well as substantive needs, may be critical factors that have to be satisfied to reach a settlement. Learning to recognize emotions and understanding their role in creating conflict and resolving it can be an important key to negotiation success.

Negotiation effectiveness depends, in part, on interpersonal competency and a type of emotional intelligence. Emotional intelligence is the capacity to monitor our feelings and read the feelings of those whom we encounter. This then serves as a guide to our actions and responses. (See Mayer 2001.) The theme of emotional intelligence and its role in success, although not new, was brought to public attention by Daniel Goleman in his popular book *Emotional Intelligence: Why It Can Matter More Than IQ* (1995). An emotionally intelligent negotiator has an advantage in controlling her own emotions and understanding the emotions of an opponent to better control the negotiating process. Emotional intelligence has been found to contribute to successful negotiator behavior. (See Barry et al. 2004.) However, the ability to read the emotions of others may be on the decline. A meta-analysis study found that today's college students score 40 percent lower than their predecessors in the 1970s in their ability to understand what another person is feeling. (See Konrath 2011.)

Randall Kiser, an attorney who has empirically studied how lawyers make decisions regarding settlement of lawsuits and measured the frequency and cost of not settling, has identified and interviewed many of the most successful lawyer negotiators in California and New York. One of the qualities that appeared

to distinguish these lawyers from others was emotional intelligence. Kiser summarizes some of his findings and quotes from the interviews in the article that follows.

❖ **Randall Kiser, *THE EMOTIONALLY ATTENTIVE LAWYER: BALANCING THE RULE OF LAW WITH THE REALITIES OF HUMAN BEHAVIOR***

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15 Nev. L.J., 2015

Although the law may denigrate the role of emotions, the successful practice of law requires a high level of emotional intelligence. The traits that comprise emotional intelligence (self-awareness, self-management, social awareness, and relationship management skills) are essential to superior attorney performance. These traits also are essential to developing the sense of personal meaning, responsibility, and fulfillment that distinguish expert performers. . . .

At the most elemental level of law practice, emotional intelligence appears to be necessary for attorneys to avoid malpractice liability. Malpractice claims data show a significant and persistent conflict between client expectations and attorney performances in “soft” skills requiring judgment, discernment, awareness, and perspective: case evaluation, risk assessment, strategy development, client communication, and settlement negotiations. According to the American Bar Association’s “Profile of Legal Malpractice Claims,” . . . more than one-third of all malpractice claims allege errors relating to professional skills required in pre-trial evaluations, discovery, procedures, counseling, negotiations, and settlements. These skills necessarily entail an integration of substantive legal knowledge with a broader range of competencies embraced by emotional intelligence—listening, understanding, communicating, conceptualizing, anticipating, simulating, and perspective-taking. . . .

**Attorney Views of the Role of Emotions in Law Practice**

Seventy-eight leading litigation attorneys were interviewed for the book *How Leading Lawyers Think: Expert Insights into Judgment and Advocacy*, Kiser (2011). These attorneys were selected from a dataset of 8,114 attorneys in New York and California based on superior performances in predicting case outcomes. Among the topics addressed in the attorney interviews was the role of emotions and the relative importance of technical legal competence and “soft” skills like empathy, maturity, judgment, and self-awareness.

When asked whether other attorneys’ errors in case evaluation are attributable to errors about the law or intangible factors like witness appeal and credibility, the attorneys generally point to subjective judgments as being the culprit:

- [O]f course you have to know the law. But when lawyers fail, it’s the subjective that they do not take into account. The law is not as critical as the guts that go into the [case evaluation].
- The emotional component that a good plaintiff’s case has is something that is not considered by [medical malpractice] defendants because they get more attuned to the medicine. There is an emotional component that some defendants lose sight of as it relates to a juror’s sympathy. . . .

- They don't understand how these personal factors, the intangible factors, will evolve through the process, how the facts will unfold. It comes full circle. '
- We never know the truth; we know the perception. The law is the simplest part of it. . . .

### **Risks of Emotional Involvement**

When asked whether emotions interfere with case evaluation and, specifically, whether emotions promote or hinder sound judgment and effective trial advocacy, the attorneys made some critical distinctions and highlighted the ongoing tension between emotional commitment and professional objectivity. Referring to the role of emotions in case evaluation, some attorneys remarked:

- A lot of attorneys can't take the emotion out of it. That can be a good thing but you have to be able to stand back. . . .
- There are times when you need to be emotional. There are times when you have to use some emotions to decide what to do. I'm probably more emotional than my male partners, but I think that's to my advantage.
- There are cases that benefit from a more passionate approach, some from a dispassionate approach. Whatever approach you take, you still have to be very professional.
- There has to be a fire in the guts for the attorney and the client. . . .

Another attorney who had changed his career from a defense practice to a plaintiffs' practice noted that an attorney has to understand his own emotions very well. "You should know where your emotions are and how to stop that emotional train," he commented. Asked whether he was emotionally more mature now than when he started practicing law, he responded immediately, "Undoubtedly. I know myself better. You learn things about yourself, if you're paying attention."

### **Effect of Emotions on Clients, Adversaries, Jurors and Insurers**

Apart from knowing how emotions could affect their own judgment and advocacy, the [most successful] attorneys repeatedly pointed to the importance of understanding how emotions affect clients and adversaries, especially in settlement negotiations:

- When I started representing plaintiffs, my first case settled for \$900,000. That's a case I would have paid \$75,000 for if we represented the defendant. Everybody is afraid—plaintiffs and defendants laying out all of this money. You have to manipulate the other side's fear and have none yourself. Fear equals the perception of risk—not even risk, but the perception of risk . . . .
- People do not realize the emotional effect litigation has on clients. Young attorneys do not realize the damage that is done by having to relive the trauma of an emotionally devastating event like wrongful death. Humans have a capacity to mend, to recover over time, and litigation reopens memories that people are trying to recover from. They do not realize the damage they will do to their own clients even if they win. They [clients] have to relive

all the painful events they are trying to put behind them. Most attorneys do not realize that winning is resolving a case earlier rather than winning at trial.

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Joshua Rosenberg, a law professor and psychologist, weaves together our previous readings on perception and self-fulfilling prophecies with emotional intelligence and their impact on negotiating.

❖ Joshua D. Rosenberg, *INTERPERSONAL DYNAMICS: HELPING LAWYERS LEARN THE SKILLS, AND THE IMPORTANCE, OF HUMAN RELATIONSHIPS IN THE PRACTICE OF LAW*

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55 U. of Miami L. Rev. 1225 (2004)

Basically, most lawyers and academics vastly overestimate the importance of reason and logic. We tend to view them as both the primary motivator of our own behavior and the primary tool to change the thinking and behavior of others. Although they are important, they are only one part of the puzzle. There are important differences between the kind of dispassionate reasoning and analysis in which lawyers and law students engage while sitting at desks at home, in the office, or in the library, and the kind of activities in which we engage when we are dealing in real time with real people. Real time, real life interactions implicate emotions, learned patterns of behavior, habituated perspectives and frames of reference, and other human, but not reasoned, responses.

The reactions to emotions occur whether or not the person is aware of either the reaction or the emotion, and they significantly impact the outcome of most negotiations and most other interpersonal interactions. People who become anxious may tend to over-accommodate the other by inappropriately giving in on the substance of the discussion, or may tend to talk too much (or too little) in an unconscious effort to forestall that anxiety. People who become irritated may tend to become slightly belligerent or withdrawn in ways that can harm their interactions. Any feelings are likely to trigger unconscious patterns of thought and behavior that will inevitably influence an interaction. . . .

It is not just how we think about what we perceive that is tainted by our feelings. Our very perceptions themselves are determined, in part, by our feelings (and thoughts). As an initial matter, emotions precipitate changes in the autonomic nervous system. These changes include increasing the heart rate, changing breathing patterns, skin changes such as perspiration or blushing, and redirecting blood flow (anger has been found to direct blood to the hands, presumably for combat; fear has been shown to redirect blood to the legs, presumably for running). At a micro level, these changes in the autonomic nervous system change not only our ability to think, but also our ability to act and perceive. Along with our thoughts, our blood flow, and our energy, the focus of our attention and our ability to take in data are significantly changed by our emotional state. Not only our behavior, but also our perceptions become both differently focused and less accurate. . . .

### The Result: Interacting Systems and Self-Fulfilling Prophecies

Basically, our thoughts, feelings, behaviors and perceptions influence each other. We react to our perceptions of the world around us while our own behavior impacts on the world. Of course, the patterns of our behavior, thoughts, perceptions and feelings are far from random. We tend to learn patterns of thought, feeling, and behavioral reactions in childhood. In adulthood we tend to engage in those patterns we learned as children, often resulting in "self-fulfilling prophecies" that tend to reinforce those same old patterns. Basically, because of our particular frame of reference (thoughts, feelings, etc.), we expect people to act in certain ways, and we act toward them in ways that tend to precipitate the behaviors we expect. When people do act in the ways we expected, we interpret that behavior in line with our expectations, and we react in certain predictable ways (which tend to confirm to us the validity of our earlier expectations).

Negotiation experts are aware of the significant impact of self-fulfilling prophecies on negotiations, but the actual impact of these patterns extends well beyond "negotiations," to encompass most of our interactions in life. . . . [S]elf-fulfilling prophecies and other generally unconscious learned responses significantly impact the outcome of most negotiations and most other interpersonal interactions.

### Human Communication: Colliding Systems

As all of the above suggests, despite our typical estimation to the contrary, we are often unaware of the actual causes (and unintentional consequences) of our own behavior, thinking, emotions, and perceptions. We are not sufficiently self-aware to realize how many of our patterns of acting and thinking are ingrained, unconscious or triggered by our autonomic nervous system rather than by reason. Communication, of course, is a two-way street, and much of the time we are even more misguided about what is headed toward us than we are about where we ourselves are going. Just as we incorrectly believe that we understand our own behavior better than we do, we also (and to a much greater degree) wrongly believe that we understand others much better than we actually do. . . .

As an initial matter, researchers have concluded that the single greatest weakness of most negotiators is that they too often fail to even consider the thinking and emotions of others. Perhaps even more significantly, when we do attempt to consider the thinking and feelings of others, we usually get it wrong. We often attribute to them moods, goals or motivations that simply are not there, or we exaggerate the significance of one of many reactions they may be having and forget that, like our own, their reactions might be both dynamic and complex.

While we tend to be accepting of situational factors that impact our own behavior, we tend to be unaware of, and inattentive to, the impact of such situational factors on others. As a result, we tend to think of ourselves as more sympathetic, as having a better case, or as being a better person than the one with whom we are dealing. In turn, this often leads us to devalue the other's case and proposals, and to fail to reach agreements that are available and would have been in our client's (or our own, as the case may be) best interest.

**Questions**

8. Do you agree that we vastly overestimate the importance of reason and logic?
9. How would you describe the connection between emotional intelligence and successful negotiation?
10. Can emotional intelligence be taught?
11. Thinking back to the most important decisions you have made, can you honestly say that emotions played no part?

***Neuroscience and Negotiation***

The Rosenberg article you just read explains how emotions precipitate changes in the autonomic nervous system, which result in physiological reactions like sweating and blushing. Our emotions are also manifested by increased oxygen to specific parts of our brains that effect how we respond to stimuli and make decisions. Neuroscientists have recently been able to use brain imaging (functional magnetic resonance imagery, or fMRI) to map areas of the brain that show increased oxygen supply during decision making and other brain functions. These brain maps give clues to the effect of emotions in various types of decisions. Through brain imaging or brain mapping, it can be understood how anxiety, disgust, fear, and joy can influence decision making. We think that our decisions are logical, based on our perceptions and our conclusions about what is. What we think is logical may not seem logical to others who perceive, interpret, and react to the same information. Brain mapping demonstrates that it is not just about how things are, but also about how they feel. In short, don't underestimate the role of emotions in the decisions made by our clients, lawyers on the other side, and by us in our representational roles. The more you understand how the brain works and about the role of emotions in decision making, the better you can apply it to your mastery of negotiation. (See Richard Birke, "Neuroscience and Negotiation: What the New Science of Mind May Offer the Practicing Attorney," 17 *Disp. Resol. Mag.* 4 (2011).)