



FROM THE IUSTORIA BLOG

Statutes Are Just the Foundation: Psychology and Tactics in a Legal Dispute

Why the best lawyers don't read only the statute book — a popular-science look at what behavioural economics and the Harvard Negotiation School tell us about negotiation, cognitive biases, and the psychology of disputes.

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Two companies, two disputes, two identical sets of provisions. Same judge. Equally seasoned counsel. Contractual positions like carbon copies of each other. Outcome? One client walks away with 78 percent of what they wanted. The other with 12 percent — and a feeling of "having lost in something I don't entirely understand." Anyone who has run civil litigation knows this scene. Few statute books explain it.

After years of procedural practice, I have grown comfortable with an unpopular thesis: substantive law is a necessary condition, not a sufficient one. Whoever has only the provisions has only grammar. Winning — or, more accurately, achieving good outcomes for clients — requires being able to *speak* with that grammar. And speaking is about psychology, tactics, negotiation, and no small amount of self-knowledge.

This article is deliberately long and popular-science in tone. I want to weave together what people like Daniel Kahneman, Amos Tversky, Roger Fisher, William Ury, Robert Cialdini, Robert Mnookin, and Chris Voss have written about negotiation and conflict over the past five decades. No magic tricks — just concepts that have saved me in practice more often than reading another commentary.

Part One: Behavioural Economics Came to the Courtroom

Let's start with what revolutionised the social sciences over the past four decades. Daniel Kahneman and Amos Tversky, in their work on heuristics and cognitive biases (Tversky & Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, Science, 1974), showed that human decision-making systematically departs from the rational model. A few years later they formulated **prospect theory** (*Prospect Theory*, *Econometrica*, 1979), which explains why people behave differently in the loss domain than in the gain domain.

The key insight for legal disputes: **loss aversion is roughly twice as strong as the desire for an equivalent gain**. An equivalent dispute over one hundred thousand plays out in a different psychological register on the side of the defendant (who is losing) than on the side of the plaintiff (who is gaining). Kahneman summarised it systematically in *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011): people in expectation of loss take more risks — even when rational calculation tells them to step back.

The practical implication is fundamental. A defendant facing a loss is psychologically more willing to enter into costly litigation, even when the math runs against them. A plaintiff facing a gain is, by contrast, typically more risk-averse. This creates an asymmetry that classical legal analysis does not reflect at all — and that an experienced negotiator will exploit.

The second major discovery is the so-called **endowment effect** (Thaler, *Toward a Positive Theory of Consumer Choice*, *Journal of Economic Behavior & Organization*, 1980): what we have, we value more highly than what we would be willing to pay for it. In legal terms: a claim that the client already mentally "owns" is harder to give up than a claim that they would have to acquire. That is precisely why the pre-litigation question "how much would I be willing to pay just to acquire this claim in the first place?" is so healthy — it returns evaluation to a plane that the endowment effect distorts.

Richard Thaler and Cass Sunstein expanded the entire theme in *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale University Press, 2008), focusing on how the architecture of choice affects outcomes. For a lawyer this means one thing: **the way you present a choice to the other side changes their decision as strongly as the content of that choice itself**. Three different formulations of an offer can lead to three different reactions — even when, on the surface, they offer the same thing.

A sharp aside: most civil disputes would be shorter and cheaper if lawyers were required to study behavioural economics rather than dismiss it as a "soft discipline for psychologists."

Part Two: Anchoring in Courtrooms and at the Negotiation Table

The best-documented effect in this area is the **anchoring effect**. Tversky and Kahneman described it as early as 1974: once a number is mentioned in the decision process, it influences subsequent estimates, even when it is itself entirely irrelevant.

In the legal context, the sharpest demonstration comes from Birte Englich and Thomas Mussweiler. In *Sentencing under Uncertainty: Anchoring Effects in the Courtroom* (*Journal of Applied Social Psychology*, 2001) they showed that the prosecutor's sentencing recommendation influences the sentence proposed by the judge. In a follow-up experiment, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making* (Englich, Mussweiler & Strack, *Personality and Social Psychology Bulletin*, 2006), they proved an even stronger thesis: **even a randomly generated number (a roll of dice) influenced the sentence proposed by experienced judges**. Judges who got a higher anchor proposed a higher sentence. Statistically significant. They were not consciously aware of being influenced.

This has fundamental implications for civil litigation:

- the prayer for relief in the statement of claim carries an anchor for any subsequent reduction by the court,
- the first settlement proposal sets the range within which negotiations move,
- an expert opinion with a higher range influences the final conclusion,
- even argumentative rhetoric ("courts in similar cases have awarded five million") functions as an anchor.

Practical takeaway: whoever puts the first number into play, with at least minimal justification, gains a psychological advantage. Conversely, whoever "doesn't want to overshoot, so starts low" cuts their own negotiating branch.

Part Three: The Harvard School — BATNA and Principled Negotiation

In 1981 a book was published that changed modern negotiation: Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin, 1981; in expanded editions also with Bruce Patton). Out of the Harvard Negotiation Project grew **principled negotiation** with several pillars:

1. **Separate the people from the problem.** Attacking a position is not attacking a person.

2. **Focus on interests, not positions.** "I want two million" is a position. The real interest may be "I want my company to survive next year."
3. **Look for options for mutual gain.** Most disputes have more dimensions than they appear.
4. **Insist on objective criteria.** Not "I want," but "this is how it is done in the industry."

And the book's most important concept: **BATNA — Best Alternative to a Negotiated Agreement**. Your negotiating power is not what you want; it is what happens if no agreement is reached. A client with a strong alternative negotiates calmly. A client without an alternative is a hostage.

Robert Mnookin, Scott Peppet, and Andrew Tulumello developed these principles specifically for the legal context in *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Harvard University Press, 2000). Their central thesis: legal negotiation takes place on three simultaneous levels — **distributive** (who gets what slice), **integrative** (how to grow the shared pie), and **relational** (how to preserve the ability to work together later). An experienced lawyer recognises and switches between all three. A novice stays exclusively in the first.

Howard Raiffa, in the classic *The Art and Science of Negotiation* (Harvard University Press, 1982), formalised this approach mathematically — and paradoxically thereby proved how little negotiation outcomes depend on the "strength of argument" and how much they depend on structural preparation.

Before entering a negotiation, know your BATNA so concretely that you can speak about it in numbers and months. Without it, you are a hostage.

If you are negotiating from "I want 100 percent," you are losing. Look for interests — yours and the other side's. Often it turns out that 100 percent of what you want is not what you actually need.

Most civil disputes have at least one hidden integrative dimension (timing of performance, instalments, public statement, references, confidentiality) that a purely distributive lens overlooks.

Part Four: Cialdini's Six Principles of Persuasion

No popular-science text on negotiation can skip Robert Cialdini. *Influence: The Psychology of Persuasion* (William Morrow, 1984; revised 2006) distilled decades of social-psychological research into the **six principles of persuasion**: reciprocity, commitment & consistency, social proof, authority, liking, scarcity. He later added a seventh — *unity* — in *Pre-Suasion* (Simon & Schuster, 2016).

For the legal context, three examples are everywhere in practice:

Reciprocity in process. A small concession from counsel creates psychological pressure on the other side to concede in turn. It is not a coincidence that experienced negotiators learn how to offer something insignificant in order to obtain something substantial. If you are not prepared, you easily reciprocate where you should not have.

Commitment & consistency in written exchanges. As soon as the other side has written something — say in pre-litigation correspondence — they are psychologically resistant to reversing course. That is why the positions the other side takes **in writing** in the early phase of a dispute matter so much. That is where the scope of later negotiation room is decided.

Authority in evidence. An expert opinion carries weight not just substantively but through the authority of its author. Whoever has better experts has not just better facts — they have a better anchor for the court.

An interesting critique came from **Daniel Pink** in *To Sell Is Human: The Surprising Truth About Moving Others* (Riverhead Books, 2012). Pink showed that the traditional "power to persuade" (built on information asymmetry) is weakening in the digital era. What works instead is "attunement" (calibrating to the other side), "buoyancy" (resilience after rejection), and "clarity" (the ability to find the actual problem). For civil litigation that means: fewer clever arguments, more empathy and structural analysis.

Part Five: Tactical Empathy — Chris Voss and the FBI

A relatively new reference among lawyers is Chris Voss, the FBI's former lead international kidnapping negotiator. In *Never Split the Difference: Negotiating As If Your Life Depended On It* (Harper Business, 2016) he summarised techniques the FBI has used for decades in crisis negotiation. Some are controversial for lawyers (Voss explicitly rejects "splitting the difference" as laziness) — but several are remarkably effective in a legal dispute:

- **Mirroring.** Repeating the last one to three words of the other side with rising intonation. It looks simple, but achieves a surprising effect — the other side will keep elaborating their thought and often reveals motivations they would otherwise have concealed.
- **Labeling.** Naming the emotion you see in the other side: "It looks like you're worried this deal won't be sustainable." Voss's thesis: a named emotion loses intensity.
- **"No-oriented" questions.** Instead of "do you agree?" (yes-oriented), phrasing things so the other side can say "no" without ending the conversation. "Would it be wrong to...?" People feel safer when they can say no.
- **Calibrated questions.** Open questions starting with "how" or "what," that pull the other side into the solution. "How are we supposed to do this so it works for you?"

For legal practice, the important point is that Voss's techniques **require training and precision**. Badly used mirroring sounds manipulative. Badly used labeling sounds like amateur psychology. Used well, they dramatically improve the quality of information you get from the other side — and that is more valuable in civil litigation than most rhetorical tricks.

Part Six: When Ego Beats Strategy — Reactive Devaluation and Sunk Cost

One of the best-documented effects in the negotiation literature is **reactive devaluation** — the discounting of a proposal merely because it came from the opponent. Lee Ross, the Stanford social psychologist, described it in *Reactive Devaluation in Negotiation and Conflict Resolution* (in: Arrow, Mnookin, Ross, Tversky & Wilson eds., *Barriers to Conflict Resolution*, W. W. Norton, 1995). The same proposal is rated more positively when it comes from a neutral party than when it comes from an adversary.

Two practical implications:

1. **Mediation works** for a reason — it neutralises reactive devaluation. A proposal the other side sweeps aside when it comes from counsel may be accepted when a mediator reformulates it.
2. If you want the other side to accept your proposal, sometimes you cannot put it forward yourself. Let it "emerge" from the joint discussion, or wait for the other side to put it forward as their own idea — even if that is a manipulation, it leads to agreement.

The second great enemy of a sensible dispute is the **sunk cost fallacy**. Invested time, money, and emotion create psychological pressure to continue — even when rational calculation says stop. Hal Arkes and Catherine Blumer described it in *The Psychology of Sunk Cost (Organizational Behavior and Human Decision Processes, 1985)*. I have seen it many times in long disputes: a client who has already spent three million in litigation costs refuses a fifty-percent settlement that would return two million. Because "I've put too much in to back down now." Logically nonsense. Psychologically a very real trap.

Max Bazerman and Margaret Neale, in the classic *Negotiating Rationally* (Free Press, 1992), mapped the whole spectrum of these biases — escalation of commitment, overconfidence, mythical fixed pie, framing — specifically for the negotiation context. Bazerman and Deepak Malhotra extended the theme in *Negotiation Genius: How to Overcome Obstacles and Achieve Brilliant Results at the Bargaining Table and Beyond* (Bantam, 2007). The conclusion: **most negotiation mistakes do not result from a lack of information, but from how our own mind handles the information we have.**

Key Concepts at a Glance

Nine concepts from behavioural science that change strategy in civil disputes — who cites them and how they play out in practice

Concept	Author / source	Use in civil disputes
Loss aversion	Tversky & Kahneman, 1979	The defendant takes more risk than the plaintiff — affects strategy and timing.
Endowment effect	Thaler, 1980	The client values "their" claim more than they would pay to acquire it.
Anchoring	Tversky & Kahneman, 1974; Englich & Mussweiler, 2001/2006	The first number (prayer for relief, settlement, expert opinion) shapes both court and counterparty.
BATNA	Fisher & Ury, 1981	Without knowing your alternative to agreement, you cannot negotiate sensibly.
Three negotiation levels	Mnookin, Peppet & Tulumello, 2000	Distributive / integrative / relational — all three at once.
Six principles of persuasion	Cialdini, 1984	Reciprocity, authority, social proof and others — even in formal pleadings.
Tactical empathy	Voss, 2016	Mirroring, labeling, no-oriented questions improve the quality of information.
Reactive devaluation	Ross, 1995	A proposal from the opponent is systematically undervalued — a reason for mediation.
Sunk cost fallacy	Arkes & Blumer, 1985	Invested costs push people to continue a dispute that no longer makes sense.

Part Seven: When to Bargain with the Devil, When Not To

In 2010 Robert Mnookin published another major book — *Bargaining with the Devil: When to Negotiate, When to Fight* (Simon & Schuster, 2010). The question in the subtitle is central for every lawyer. Mnookin offers four criteria:

1. What are the parties' interests?
2. What are the alternatives to agreement?
3. What is the projected cost-benefit profile of the various scenarios?
4. What is the moral dimension of the decision (the legitimacy of the deal itself, the impact on third parties)?

Only after answering these four questions can one say whether a deal makes sense. In practice we often stop at the third — and miss that the second (what the real alternatives are) was poorly assessed, or that the fourth (the legitimacy of the counterparty) intervenes so strongly that rational arithmetic does not apply.

William Ury extended the topic in *Getting Past No: Negotiating in Difficult Situations* (Bantam Books, 1991) and in *The Power of a Positive No* (Bantam, 2007). His thesis: the ability to say "no" with discipline, without aggression, while opening room for an alternative, is a negotiating skill ninety percent of professionals lack. Lawyers included.

Ethical Limits — Where Tactics End and Manipulation Begins

This question deserves its own discussion. Tactical empathy, mirroring, labeling, anchoring — all of these are techniques with their place in professional negotiation. The boundary between tactic and manipulation is not sharp, but a few criteria hold:

- **Truthfulness of information.** You may decline to disclose everything you know. You may not assert untruth. That is the difference between a hidden negotiating position and fraud.
- **Respect for rational consent.** You may present a choice so the other side sees its consequences. You may not exploit affective state or information asymmetry to obtain consent that an informed party would not have given.
- **Client interest versus opponent interest.** Legal ethics (both Czech and Anglo-American) generally vests fiduciary duty in the client, not the opponent. But that is no license for arbitrary conduct — the ABA Model Rules' ethical duty of "candor toward the tribunal" shows that even the otherwise hard-edged adversarial American practice draws a line.

For Czech practice, **Roger Fisher** captured the ethical dimension best, with his distinction between the "hard bargainer" and the "principled negotiator" — the first sees the other side as adversary, the second as co-creator of the solution. Both can win a particular dispute. The second wins reputation, long-term relationships, and professional integrity.

The worst thing a lawyer can do to themselves is to learn negotiation techniques without parallel ethical grounding. Voss himself warns in his book that tactical empathy without integrity becomes cynical manipulation — and that comes back, both professionally and personally.

Conclusion: Statutes as Grammar, Negotiation as Language

Coming back to the opening scene — two companies, two identical sets of provisions, very different outcomes — the explanation lies precisely in what we have just covered. It is not about who had "the better legal brief." It is about who:

- knew their BATNA,
- correctly timed the first anchor,

- saw all three negotiation levels at once,
- knew when to be silent and let the other side talk,
- did not succumb to reactive devaluation or sunk cost,
- and had the ethical discipline not to cross the line, even when they could.

This is not a soft, alternative view of law. It is the hard core of what high-level litigation means today. **Statutes are grammar** — without them no sentence makes sense. But the real language of disputes is written with tactics, psychology, and empathy. And that language is not learned by studying commentaries. It is learned through working with people, reading behavioural science, and — unromantically — through one's own mistakes, reflected on as you go.

This text opens a series of companion popularization-science pieces: on **who actually decides anything in a legal dispute and what is going through their heads** (judge fatigue, theory-in-use, demonization effect); on **what to do when the other side is someone unreachable by rational argument** (irrational adversary, dark triad, asymmetric defence); on **when the legal route is not the right route at all** (therapeutic jurisprudence and triage of the problem); and on **why most disputes are lost by playing the wrong game** (chess, poker, Monopoly and Snakes and Ladders in law).

For practical applications: I have written about **what litigation and business negotiation have in common** as the practical application of the same ideas; **not every battle is worth fighting** is BATNA from another angle; **when to go to court and when to mediate** treats the choice of forum as a negotiation decision itself; and **what you can ask for in a civil lawsuit** adds the procedural lens on how to respond to anchoring and sunk cost during proceedings themselves.

Facing a dispute or negotiation where the statutes are clear but the strategy isn't? In our **dispute resolution practice**, every major case begins with a psychological and strategic analysis — not with drafting a pleading. **Get in touch**, ideally before you've put the first number on paper in correspondence.

Recommended reading

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This article is popularisation, not academic work. Citations are faithful to the original works; the interpretation for legal practice is mine and should not be conflated with the views of the cited authors. If a concept catches your interest, go to the primary source — that is itself the difference between the surface of negotiation and a deep grasp of it.

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