FRAMES, CLAIMS AND BIASES: PSYCHOLOGICAL PITFALLS IN NEGOTIATION AND DECISION MAKING

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Frames, Claims and Biases: Psychological pitfalls in negotiating and decision-making.

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I. INTRODUCTION

Negotiation has been described as the art of persuading, but this is just half of the equation. Equally important skill is the skill of decision-making: Knowing when to be persuaded. This article identifies common psychological pitfalls that lead to less than optimal decisions and suggests strategies to help collaborative clients overcome their biases and perceptual errors.

II. COMMON DECISION-MAKING BIASES

Collaborative practitioners guide clients’ to identify interests, communicate concerns, and generate options – a generally straightforward process. But does this process necessarily lead to good decisions? In many cases, probably not. If every divorcing spouse remained forever cool headed, funds would not be expended to punish the other, proposals would not be rejected solely because the other party made them, and settling for the status quo would never be a knee-jerk reaction when faced with uncertain options. The problem is biases – the cognitive shortcuts and perceptual errors that lead to suboptimal decisions when spouses' emotions run hot or when negotiators over-rely upon intuition to settle the deal. Psychologists, including as Max Bazerman, Amos Tversky and Daniel Kahneman, have identified many ways that biases influence decisions. Collaborative practitioners will commonly observe eight such bias: anchoring, preference for the status quo, sunk costs, confirmatory evidence, framing, reactive devaluation, overconfidence, and availability.

A. Anchoring bias

When contemplating a decision, we tend to give disproportionate weight to the first information we receive about the issue. The information may be overt, such as the list price of a house for sale or it may be subtle, even pernicious, such as a person’s skin color, accent, or mode of dress. As a result, our assessments can become anchored to the first, weighted, information. This may result in a bias that overlooks alternative perspectives, minimizes subsequent information, and shapes responses.

In a divorce negotiation, asserting facts or making a proposal at the very outset can anchor all subsequent discussion. Anchors include family code guidelines regarding child support, definitions of standard parenting-time, or an initial proposal for how property will be distributed. Savvy negotiators use anchors to guide the discussion towards a favorable agreement – for themselves. The unwary negotiator can become anchored on an unfavorable shore.

Consider the unfortunate experience of a father initially seeking a shared parenting time schedule for his two teenage daughters. The mother opened the discussion by proposing that the children stay with her every night to provide continuity of place for homework and continuity of relatedness to her, a stay-at-home mom, and that the children see their father every other Saturday afternoon if they didn't have an extracurricular activity. She suggested that the father could also join her and their daughters for Sunday brunch after church. Although the mother’s offer was very one-sided, the father let the offer anchor his thinking: he made a conciliatory counter-proposal for the children to stay with him
overnight on Saturday every other week and have dinner with him one time during the school week. The father could have been more assertive--asking for significantly more time or rejecting her proposal outright as not worthy of discussion--but his thinking was so influenced by his wife’s proposal that he settled for far less than what he wanted or his daughters needed. He reasoned: “I wanted to be collaborative.”

B. The status quo bias

People show a strong tendency to make decisions that do not upset the status quo. Think of all the times, for example, that you have said or heard others say: “Let’s not rock the boat.” The preference for the status quo is easily seen in divorce negotiations. Divorcing couples often say: “We should have done this years ago, I guess we just kept on keeping on.” Parents assert that the parenting plan should maintain continuity of school, activities, schedules and relatedness as much as possible – without assessing the possible gains offered by changes. Some argue that the approximation rule sponsored by the American Law Institute reflects a bias for the status quo.

The source of the status quo’s special appeal is that we know its advantages and disadvantages—it’s a known quantity. In contrast, choosing an alternative risks uncertainties and the possibility that our judgments may be wrong. As one mother said when the father proposed moving their son to a different high school: “He’s doing well where he is. He has friends, he’s involved in school activities, he has good grades. Why fix what isn’t broken? We really don’t know how a new school will work out for him.” Further, having more rather than fewer choices doesn’t offset this preference. Indeed, the more choices available, the more people are inclined to choose the status quo to end the confusion.

C. Sunk costs bias

Another decision-making bias is to choose a course of action that justifies past choices. Almost everyone has fallen into this trap. An investor delays selling a declining stock, despite the availability of better options. A husband or wife resists divorce because “we’ve put so much time and effort into this, it seems a shame to waste it.” Economists call past decisions sunk costs – past expenditures of time and money that can’t be recovered. Although these unrecoverable costs should not, objectively, influence current decision-making, they do.

Why? Because selling a losing stock or filing for divorce implies that we were wrong to begin with, that our use of time or money was wasted, that we made a mistake, that our judgment was faulty, that we acted rashly. Holding onto a losing position allows us, for the moment, to avoid the awareness that our original decision didn’t work out. Consider the experience of one divorcing father anticipating mediation after a year of contentious litigation. He was steamed, ready to fight the final battle, and out to prove that he was not the despicable father and husband that his wife had portrayed him to be. He had invested just about everything he owned as well as considerable time and emotional energy into preparing for the final trial. But when his lawyers spoke optimistically about the potential of mediation to reach a deal, he reacted involuntarily: “I’ve come this far, I might as well go all the way.” Objectively, he knew that a trial could easily lead to unanticipated consequences, but he wanted to proceed: “I’ve put everything I’ve got into taking this to court, I can’t let that go and just accept some worked out deal. What a waste that would be.”

D. Confirmatory evidence bias

You know what you want, so now you go about systematically collecting data that supports your decision and nullifies alternatives. This is called confirmatory bias, selectively attending to information that supports a prior conclusion and rejects evidence that refutes it. We read articles or listen to commentators whom we find engaging (they are smart like me) and turn away from commentary that we don’t (they’re obviously idiots and not worth my time). Prejudice and elitism are two of the
many social manifestations of confirmatory bias.

Emotionally charged parents negotiating a parenting plan are particularly vulnerable to confirmatory bias. A parent who wants to enroll their child in a specific school gives other schools only a cursory look, gathers information largely from other parents who like it and parents who don’t like other schools, notes the problems with the current school and minimizes its strengths, and becomes defensive and oppositional when anyone presents contradictory data.

E. Framing biases

A popular term in the family therapy and negotiation literature is reframing—defining a situation from an alternate perspective, thus opening up new ways to see and solve the problem. Frames define the problem to be solved; the way a problem is initially framed can profoundly affect the final choice.

1. Frames as gains or losses

Framing an option as a potential gain or a potential loss can dramatically affect people’s choice tendencies. In one case, for example, a divorcing husband spoke with his lawyer about partitioning the proceeds from selling the couple’s $900,000 home. Based on the facts, his lawyer presented two strategies, both of which would cost the same in legal fees:

Strategy One: Mediation – Based upon his and his wife’s differing contributions to the home and his prior conversations with the wife’s lawyer, his lawyer was confident that he would receive $300,000 of the proceeds.

Strategy Two: Arbitration – Based upon uncertainties in the law and the facts of their particular situation, his lawyer estimated that he had a one-third chance of receiving the entire $900,000 and a two-thirds chance of receiving nothing.

Like the majority of people facing such a choice, this husband chose Strategy One—the plan with less risk that insured him $300,000. But what if his lawyer had framed his choices differently:

Strategy One: Mediation – This strategy will likely result in the loss of $600,000.

Strategy Two: Arbitration – This strategy has a two-thirds chance of resulting in the loss of the entire $900,000 but has a one-third chance of losing no money at all.

Framed this way, the majority of people are likely to choose the second strategy – despite the fact that the strategies are exactly the same in both scenarios. Why? Because people tend to be risk averse when a problem is framed in terms of gain (proceeds received) but risk seeking when a problem is framed in terms of avoiding losses (proceeds lost). The wise lawyer would present the client his choices using both frames to offset the gains versus loss bias.

It is particularly important for the collaborative practitioner to understand a related bias: loss aversion. People are more averse to loss than drawn to potential gain. As a result, people generally assess losses as “weightier” than a comparable set of gains (Kahneman & Tversky, 1999). When discussing a parenting plan, for instance, a

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1 After learning about the loss aversion bias, Greg Otis wrote: “One evening about 8:30 I remembered that we’d rented a movie the day before; if I didn’t get it back before the store closed I’d be charged a $3 late fee. It happened to be raining. On the way to the store it occurred to me that if someone offered me $3 to walk the 3 blocks each way in the rain I would have refused—the trip was not worth the $3 gain. Yet here I was making the trip, in the rain, so as not to lose $3. Avoiding loss. I decided that if it were a question of gain, I wouldn’t do it for less than $20, leading me to conclude that a potential gain has to be 6 and 2/3 greater that a potential loss in order to entice me. Interestingly, many horseplayers won’t bet on a horse unless the odds are at least 6 to 1.”
parent asked to concede two parenting-time days to the other parent is likely to view giving up two days as a much greater loss than the other parent would experience receiving the two days as a gain. In this case, two does not equal two.

2. Framing reference points

A story told with several variations captures the power of frames of reference. Two Brothers, one a Franciscan and one a Jesuit, felt ashamed about occasionally succumbing to what they perceived to be a personal weakness, smoking, when they prayed in their private chambers. The Jesuit asked his superior: Can I smoke while I pray? His superior immediately and emphatically said: No! The Franciscan asked his superior: Is it acceptable for me to pray during moments of personal weakness? His superior said: Of course! Objectively, the Brothers asked the same question. But the alternate ways they framed their dilemma yielded opposite answers.

An example from a family law matter illustrates how frame of reference can drive and confuse choices. A divorced father with a five-year-old daughter and a 12-year-old son sought a modification to his divorce decree, saying he wanted his son to live with him rather than with the mother. He was, however, agreeable to his daughter remaining in the mother’s primary residence. He reasoned that his mother’s gay partnership was not a good example for his adolescent son and that the son needed the day-to-day guidance of his father, his closest male role model. That was his frame of reference. The mother’s frame of reference was her history as a fulltime parent and homemaker; she believed the son benefitted from her continuing to be in that primary role. The mediator, who had the added authority of being a psychologist, presented an entirely different frame of reference. She suggested that the critical issue was determining what effect the father’s proposal would have upon the sibling relationship between son and daughter. And it was from this vantage that the parents made a decision. But was this necessarily the best frame of reference? Should it have been balanced with others?

F. Reactive devaluation

Just about every collaborative practitioner has seen reactive devaluation: An offer is rejected specifically because it comes from the opposing party (Ross, 1999). Rather than accepting the proposal at face value, distrusting parties view the other’s ideas skeptically: “If it’s good for him then it can’t be good for me.” Or: “She knows something I don’t know.” Rather than take the risk of accepting a proposal with unknown but suspected costs (“she isn’t going to make a fool out of me”), the offer is rejected. It can be particularly frustrating for lawyers when their clients reject a concession freely offered by the other party, even by a trusted one. In these instances, the underlying psychological mechanism may be a human tendency to value what we don’t have and to devalue what is freely available.

One mother, for example, anticipated a tough negotiation about child support. But she subsequently rejected the father’s proposal to pay more than standard support and far more than she initially expected. Her reasoning? She concluded that his generous proposal, easily gained, indicated he was hiding something and that she risked losing even more if she didn’t hold out. Her husband, offended by her reaction, withdrew his offer and walked away from further discussion.

G. Optimistic overconfidence

Another source of biased decision-making is overconfidence—an unrealistic belief in our ability to predict the likelihood of future events. One source of overconfidence is to underestimate the importance of factors in the situation about which we know relatively little (Kahneman & Taversky, 1999). A lawyer’s client, for example, may confidently assert that she is likely to obtain a favorable ruling from the judge, but said without knowledge of the relevant case law.

Another source of overconfidence is the tendency to base predictions about a
likely outcome solely upon the features of the situation at hand rather than upon a wider view across many situations. Referred to as the “inside view” (Kahneman & Tversky, 1999), this approach contrasts with the “outside view” that considers data from past similar scenarios. Thus, the client in the prior example may find her own position compelling based upon her knowledge of her family situation. But if she had her lawyer’s wider experience of past similar cases her confidence might be tempered.

In adversarial situations, a source of overconfidence is to underestimate the strength of the other side’s position. Such optimism has value – instilling hope in the underdog and persistence in the face of adversity – but can also contribute to unsound decisions and strategies. Optimistic overconfidence, for example, can lead lawyers to urge unsound litigation, clients to insist upon unrealistic settlements, and parents to take-on too many responsibilities.

H. Availability

An additional factor that is particularly important to clients’ risk assessments is availability—the tendency of easily imagined or remembered events to play an outsized role in reasoning and decision-making (Slovic, Fischhoff & Lichtenstein, 1982). Although frequent events are generally easier to remember, rare but emotionally charged events such as a relative’s or friend’s unpleasant divorce, the media’s coverage of unusual family violence event, or even a vivid film, such as War of the Roses, can dominate clients’ awareness and distort risk judgments. One mother, for example, had such a vivid memory of her brother’s tragic motorcycle accident that she hovered protectively over her three boys, restricted their involvement in normal activities, and frequently interfered with her ex’ access, asserting that he was not sufficiently attuned to the boys’ safety.

III. WHY DO BIASES MATTER?

The issue of biases is more than academic. Biases affect decisions, profoundly so. Indeed, the history of family law is marked by efforts to overcome various biases. In areas of judicial philosophy and psychological theory, the law has confronted biases such as: children are property, owned by fathers; children have one psychological parent; the tender years presumption; children can’t be coached to make false allegations. In areas of practice, alternate dispute resolution methods, such as mediation and collaborative law, had to overcome a status quo bias favoring litigation. For specific families, decisions flawed by judgment biases can yield poorly designed parenting plans, financial agreements with costly tax consequences, lingering acrimony, and needless litigation. The risk is even higher when the couple’s financial and child-related issues are complex and heightened emotions interfere with sound reasoning.

IV. HOW CAN THE INFLUENCE OF BIASES BE REDUCED?

A. Education is not a panacea

Initial efforts to improve biased decision-making relied upon educational strategies: alerting people to the potential of biases to affect their decision-making, describing how particular biases operate, and providing feedback and coaching to decision makers. These strategies, however, have not proven to be particularly effective (Fischhoff, 1982). To illustrate, consider one divorcing man’s reasoning. Although saddled with a heavy mortgage and high utility and tax bills in a declining real estate market, he resisted selling the family home to reduce expenses and settle the estate. The mediator then explained the sunk cost bias and pointed out that taking what equity money he could now and moving to a less expensive home was likely to yield a better return than leaving it in the present house. But the strength of the bias’ grip was evident in the man’s response: “But if I wait three or four years, I can recapture my initial investment.” His judgment had been entirely uninfluenced by the mediator’s instruction; his reasoning perfectly reflected the sunk cost bias.
**B. Dual process model**

Although biases lead to flawed decision-making, they have their benefits. What cognitive biases sacrifice in accuracy they make up in efficiency—a marked asset when a situation demands quick action. Biases protect self-esteem, promote optimism and diligence, and inform quick risk assessments. But psychologists have an incomplete understanding of the cognitive mechanisms underlying biases and, by extension, how to develop strategies to minimize their influence on important decision-making tasks.

Stanovich and West (2000) have proposed a dual process model of reasoning to organize what psychologists know about how biases influence judgment and to strategize ways to improve decision making.\(^2\) They hypothesize two cognitive processes, System 1 and System 2. System 1 is fast, largely automatic, outside conscious awareness, emotional, and undemanding of cognitive effort. System 1 is intuitive, experienced as gut instinct. System 2 is analytic, explicit, and largely conscious. It is relatively slower and more controlled and is characterized by logical reasoning. Biases likely operate in both systems, but they are assumed to have less influence on System 2.

The two systems are thought to operate independently. An experienced driver taking a familiar route, for example, makes minor adjustments with the steering wheel and turns towards her destination “without thinking” (System 1 processing), while simultaneously remaining consciously alert to and prepared to stop or slow for the children walking to school (System 2 operations). System 1 is highly personalized and automatic whereas System 2 is more controlled and deliberative. System 2 depersonalizes problems and takes them out of the immediate context. Our driver might say: “I can drive to the store without thinking about it; but driving today at this particular time I must be alert to children walking to school.”

In addition to familiar tasks, however, people tend to rely upon System 1 processing when they lack information, are under time pressure, feel distracted by other demands, feel emotionally wrought, or have no clear idea about how to analyze the problem at hand. Rather than grapple with seemingly unsolvable problems with uncertain outcomes, people are inclined to rely upon their gut instinct to make decisions, thereby binding their anxiety and allowing them to move on. For a divorcing couple or negotiators, however, relying upon System 1 thinking to resolve issues is likely to lead to less optimal, potentially costly, decisions. Collaborative practitioners should develop strategies that help overcome specific decision biases by shifting clients from automatic System 1 thinking to reflective System 2 thinking.

**C. Shifting from System 1 to System 2 Thinking**

1. **Using an Outsider’s lens**

   A couple was not sure what upgrades and repairs to make to their house before putting it up for sale. Before investing in any improvements, they asked a local realtor to inspect the house and give them an expert’s view on what changes would make the house more appealing to buyers. Her assessment surprised them. She saw things that they did not see and marked as irrelevant several that they did. What did this couple learn? That the insider’s lens and the outsider’s lens yield different views and different decisions (Kahneman & Lovallo, 1993). People use an insider’s lens when deeply involved in a particular situation or context. They rely heavily upon intuition and emotion based judgments: System 1 thinking. In contrast, people use an outsider’s lens when they stand apart from the immediate situation; they use System 2 thinking to integrate what they know across many situations. The couple saw their house standing alone; the realtor saw their house in comparison to hundreds of others.

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\(^2\) See also: Malhotra & Bazerman, 2007; Milkman, Chugh, & Bazerman, 2008; Bazerman & Malhotra, 2006.
For couples negotiating divorce, the outsider’s lens will prompt more System 2 thinking and yield better decisions. But it is hard to invoke System 2 thinking in the midst of conflict and heightened emotions. What can be done to help divorcing clients adopt an outsider’s view as they negotiate important issues? First, of course, they can call upon the perspective of the lawyers and neutral professionals just as the couple preparing their home called upon the realtor. They can also be encouraged to carefully consider involving others, such as family members or friends or additional consultants, who are not emotionally engaged in the issues for additional objective views.

When clients are not open to consulting with others, they can be encouraged to view their situation from others’ perspectives. This instruction is sometimes phrased as go to the balcony to encourage clients to step back and view their situation more objectively. Alternatively, the practitioner might ask: “How would a wise elder in your community view your situation?” “What would your children say as adults looking back on the way you and the other parent are negotiating your divorce now?” “If several people were listening and watching on video, what would they think about the issues?” Alternatively, the practitioner might ask: “How do you want to feel about these decisions five years from now?” “If another couple was presenting these issues for your feedback, what would you say?”

A third strategy is to put the client in the position of an outsider observing others grappling with the same issues. If a couple is having difficulty with their negotiation process, the practitioner can direct the couple to watch movies (E.g., The War of the Roses) or instructional DVDs (E.g., Barriers to Divorce Resolution) to have them see, from an observer’s position, what works and doesn’t work. If they are having difficulty objectively analyzing various options, they can be encouraged to do further research by asking other divorced couples their assessment of the advantages and disadvantages of various alternatives.

2. Playing the opposite

Collaborative practitioners ask clients to list their goals, their interests, and their concerns when mapping the couple’s divorce landscape. But what if the first question wasn’t “What are your concerns?” but rather, “Let’s start with the other side. What are your spouse’s concerns?” This simple shift encourages clients to momentarily suspend their inside view in order to consider the situation from their spouses’ vantage. This approach is designed to minimize the effects of the overconfidence, selective attention, and anchoring biases. If the client cannot do so, particularly in the early stages, then the practitioner learns that the client will need additional help disengaging from the immediacy of their situation in order to assess their circumstances objectively.

Another approach used by mental health professionals is to enact role plays – having the client assume another’s place by using a variation of the “empty chair” technique. Simply, the client is directed to take on the persona of the other party by sitting in the other party’s “chair” and speaking as the other party, in the first person, about the issues of concern. Again, this requires the client to suspend their embedded inside view to see – and experience – the issue from the other’s perspective. Similarly, clients can be asked to present and justify a proposal – as though prepared by the other party. This latter technique has been found to be a particularly useful empathy building tool for parties in international disputes.

3. Estimating individual contributions

Like marriages, why do so many creative groups, such as rock bands, break up? Is it due to creative differences—or something more interpersonal? One possibility is peoples’ tendency to overestimate their personal contribution to joint tasks, a mechanism underlying the overconfidence bias, and thus underestimate others’ contributions. Stated more simply, people tend to take more than their fair share
of the credit on joint endeavors. Ask the members of a project group to estimate their contribution to the task relative to the other members, the sum of their individual estimates typically exceeds 100%. As a custody evaluator, I saw this dynamic repeatedly—adding up the parents’ claims regarding their respective parenting contributions often yielded a sum closer to 200% than 100%. This pattern stems partly from people being more aware of their own contributions, easily brought to mind, as well as a tendency not to view the other members of a task group, or the other parent, as a distinct, contributing individual (Savitsky, Van Boven, Epley, & Wight, 2005).

This bias can have serious effects on team cohesiveness, co-parent functioning, and divorce negotiations. For example, when the recognition a parent receives does not match his or her private estimation of their contributions, resentment and animosity can build. Additionally, if a parent propounds an estimate of his or her contribution, the other parent may view those estimates as inflated and self-serving and feel unappreciated. In both instances, collaborative functioning and co-parenting may suffer, as feelings of resentment and lack of appreciation build.

Fortunately, this tendency to overestimate one’s own and to underestimate others’ contributions can be unpacked relatively easily by simply asking people to consider the contributions of each person separately (Savitsky et al., 2005). Encouraging divorcing clients to identify the specific contributions made by each family member separately may alleviate tensions and prompt more mutual appreciation.

4. Analogical reasoning

Collaborative divorce practitioners are legal, mental health, or financial professionals by training—and teachers in practice. They inform their clients about negotiation principles, relevant law, available parenting plans, and the tax consequences of various property allocations. How, then, can collaborative practitioners most effectively convey what they have learned so that their clients can overcome System 1 biases with System 2 wisdom?

One way to do so is with analogical reasoning—comparing different situations to find common principles. In a series of studies (Thompson, Gentner & Loewenstein, 2000; Loewenstein, Thompson & Gentner, 2003), one group of negotiators was directed to read descriptions of complex negotiation cases and then describe what they had learned, one case at a time. A second group read the same descriptions but were directed to state how the cases were similar and what overriding lessons they had learned. The results indicated that more members in the group that compared cases accurately identified the important lesson—and then more effectively transferred this learning to a subsequent negotiation problem. The group that considered the cases one at a time attended to surface elements of the cases; the other group recognized common mechanisms underlying the cases. Generalization of what they learned was enhanced when the negotiators recognized the underlying principles.

Consider, for example, a couple thinking about their protracted divorce. Looking back solely on their situation, they might conclude that the best way to resolve a divorce is to get before a judge as quickly as possible for a decision. On its own, this conclusion is simply incorrect; many divorces are handled efficiently with a judge’s intervention. In contrast, a disinterested lawyer, looking over the course of many divorces, may identify an underlying association between the length of a divorce and the number lawyers, experts, family members, and witnesses that become involved. This lawyer may decide to use experts and witnesses judiciously and to caution her clients about involving others.

To help clients use analogical thinking, consider the following approaches:

a. Debrief with the clients the process and outcomes of several joint sessions simultaneously rather than each session individually (Malhotra & Bazerman, 2007). Note what worked and didn’t work across sessions rather than assessing factors unique
to each session. Alternatively, ask the clients to compare a joint session with negotiation experiences they’ve had in other contexts, such as at work or in community activities. The intent is to help the clients identify principles common to negotiations.

b. During a debrief, speak in the abstract (“when people criticize during a negotiation, the other party often reacts negatively and devalues any proposals”) rather than about the case at hand. The goal is to identify principles and concepts that are common to negotiations rather than factors focused solely on this negotiation.

c. Provide brief written case synopses or show DVDs of negotiations (E.g., Barriers to Divorce Resolution) to facilitate discussions and comparisons between situations.

5. Presenting Questions

Classroom teachers use questions to trigger critical thinking in their students, a System 2 response. In contrast, lectures often evoke passivity and counter argument, System 1 reactions subject to bias. Like teachers, collaborative practitioners can use carefully crafted questions to prompt their clients’ System 2 thinking (Rose & Fong, 2009) to:

a. Focus on the future;
   - How would things be if you could solve this without arguing?
   - Is financial security in the long run or readily available cash in the short run more important to you?

b. Divert attention from heightened negative emotions;
   - What type of person would you be if you didn’t argue with him?
   - What do you see as the likely outcomes of that option?

c. Challenge assumptions;
   - Is it possible he is concerned about his financial security rather than intending to hurt you financially?
   - Rather than being mad, might she be scared and anxious?

d. Think about their thinking;
   - Let’s imagine your spouse’s proposal was suggested by a trusted friend. Would you still reject it?
   - You anticipate having time to keep the children every day after school. Can you imagine any circumstances that would not allow you to do so?

e. Disengage their thinking from the immediate context and most available information
   - When you compare your situation to other families, what similarities and differences do you see?
   - Rather than comparing your situation exclusively to your sister’s, can you consider other people’s situations as well?

f. Negotiate their process.
   - What do you think would be the most effective way to reach an agreement?
   - What could your spouse do right now that would be most helpful to you?

g. Challenge optimistic overconfidence.
   - What will happen if your house does not sell for the price you expect?
   - Might your view change if you were offered a significant promotion requiring a relocation?

6. Analyzing—not intuiting—tradeoffs: Even swaps and adjusted winners

Divorcing couples are trying to meet multiple objectives when they make decisions about choosing a settlement
process, setting up a parenting time schedule, and determining a fair financial settlement. An even division of the property may be important—but so is protecting the retirement funds, having cash available now, finding affordable health insurance, and reducing any tax liability. When juggling multiple concerns and objectives, it is necessary to make thoughtful trade-offs amongst objectives to decide upon the best alternative.

The decision is further complicated by the difficulty assessing the relative importance of different objectives. Some can be measured precisely, such as funds in an account or the number of overnights with the children. Other objectives must be measured impressionistically, such as the quality of one’s scheduled time with the children. Furthermore, people often consider their important objectives as “deal breakers” while viewing others as less important but still relevant to a decision. Faced with such a complicated set of factors, people often rely upon intuition, their gut instinct, when trying to balance objectives they can’t readily compare. There are several methods, however, that provide practical ways to rationally assess rather than intuit the best trade-offs between objectives across an array of possible solutions. In one, called even swaps, the decision-maker first builds a consequences table to compare objectives across the available choices (Hammond, Keeney, & Raiffa, 1989). Once the information has been collected, the table allows for easy comparisons and the elimination of any choices that are “dominated” by others. To pair down the remaining alternatives to a final choice, the authors invented an “even swaps” method of weighing and trading off one objective against another until a winning choice emerged.

More recently, Brams and Taylor (1999) introduced a weighting method called the adjusted winner procedure that divides shares in a way that minimizes envy and maximizes equitable divisions. In essence, this method directs each party to privately allocate points across a list of goods. Each party assigns a value to each item and submits it to an arbiter. The arbiter (or computer program) allocates each item to the high bidder. If the parties’ final point totals are not equal, the party with the higher total gives its least valuable item to the other party; this procedure is repeated until the parties have equal totals.

These procedures incorporate several of strategies that encourage System II thinking: comparing multiple alternatives at one time, creating a linear decision making procedure.

7. Designing roundabouts: System 2 architecture

Traffic roundabouts are known as “circles of death.” But in point of fact, fewer accidents occur in roundabouts than in traditional intersections. Two reasons account for this difference. First, roundabouts eliminate left turns against traffic—a leading cause of intersection accidents. Second, roundabouts, which offer fewer cues about when to enter and how to maneuver to exit, require drivers to be more conscious about what they are doing. Roundabouts, by design, demand System 2 thinking.

Like traffic engineers, collaborative practitioners understand the importance of creating a procedural architecture that requires System 2 thinking. Scheduling multiple sessions insures participants will not succumb to impatience and time pressure and make hasty decisions. By scheduling a series of sessions and communications and information sharing in between, the parties have a chance to carefully consider new information or unforeseen issues without feeling pressured to resolve matters quickly. The presence of neutral financial and child specialists institutionalizes the outsider’s perspective, a System 2 function.

In practice, collaborative practitioners can use additional procedures to encourage System 2 thinking. For example, when people consider options one at a time, they tend to analyze their decision by comparing their outcome to the other party’s, often along lines of perceived fairness. But fairness assessments are influenced by many factors and are very subject to bias. As a
result, their subsequent decisions often place fairness considerations ahead of maximizing gain. However, when people consider more than one option at a time, they are less concerned with comparing their outcome to the other party’s and more focused on comparing their own outcomes across the various options – fairness considerations between the parties is a lesser factor in their assessments than maximizing personal gain (Bazerman, White, & Loewenstein, 1995). Financial planners and child specialists, then, might develop displays (e.g., spreadsheets, power points) that enable the clients and lawyers to see alternative plans all at once rather than one at a time in series. By presenting multiple options at one time, collaborative practitioners reduce the influence of fairness considerations as the parties assess their options.

Another design approach can be used during the information gathering stage. Questionnaire items can be included to prompt System 2 thinking, such as taking an alternate perspective (What are your spouse’s primary concerns?), assuming an outsider’s view (How do you want your divorce process to look to others?), reducing the influence of readily available memories or experiences (Is your thinking heavily influenced by a family member’s or friend’s divorce?), and reducing overconfidence (Please list all the things that might create barriers to resolution.).

D. Choice architecture

Choice architects arrange the context in which people make decisions (Thaler & Sunstein, 2009). Choice architects include parents who present alternatives to their children (wash your clothes this evening or wear soiled ones in the morning), physicians who describe alternative treatment strategies, and collaborative practitioners who present options to their divorcing clients. Although people remain free to choose, choice architecture is never neutral; contextual arrangements strongly influence the actual choices people make. For instance, simply varying the source of and the order in which options are presented significantly influences negotiators’ final decisions. And the effects are not small. As noted in the section on framing, presenting an option as a set of gains or a set of losses can yield opposite decisions by negotiators. In another situation, nutritionists carefully arrange how food is presented in a school cafeteria line, knowing that doing so affects students’ nutritional choices. State governments expand the pool of potential organ donors by making it easy to opt in (automatic at driver’s registration) and time costly to opt out (filling out a special form). Similarly, collaborative law clients always have the choice to opt out— but collaborative law’s architecture makes it unattractive to do so.

Ironically, choice architecture often builds upon people’s biases to influence their behavior. My credit card company, for example, recently sent a letter announcing significant and costly changes in its terms and fees. The letter assured me that I can maintain my account by doing nothing but that I can opt out by requesting and then filling out and sending in a form. This company understands that our bias for the status quo and for taking the least effortful way to manage a problem will likely lead me do exactly what it wants me to do: nothing. Had the company said it was automatically closing customers’ accounts unless they went to the effort of opting in, it would have seen a significant drop off in account holders.

Within family law, collaborative practice has created a unique choice architecture. The requirement for joint sessions opens the possibility of transformational change between the parties; the restriction on the lawyers following the parties to litigation creates incentives for settlement; the protection afforded by the alternate dispute statute encourages transparency. In other respects, however, collaborative practice is similar to the architecture of traditional practice. The pay-by-the-hour fee structure, for example, creates incentives for practitioners to do more, talk more, write more, meet more—which may or may not be in the clients’ interests but is clearly in the practitioners’ financial interest. And once the parties are deep into a collaborative process, their “sunk
costs” may make it difficult for them to feel they can freely opt out even if progress is not forthcoming.

What else can collaborative law do to create a structure of choices that are in its own and its clients’ interests? Some suggestions follow:

- **Use a flat-fee structure benchmarked to progress and defined by scope.** Mental health and financial professionals might consider using a flat fee for specific services or products, such as developing a parenting plan or financial plan.

- **Make follow-up a standard.** Collecting long-term outcome data (e.g., one year follow-up) on collaborative cases is essential to improve practice. Two ways to increase clients’ cooperation with follow-up data collection are: 1. Provide financial incentives (part of the practitioners’ initial retainers deposited in an account and returned to the clients when they complete follow-up questionnaires or interviews), 2. Include and define follow-up interviews in the initial contract as one-year reviews or “tune ups” as standard features of collaborative cases.

- **Develop instructional DVDs.** One of collaborative law’s great strengths is its educational and training function by informing clients about the law, child development, financial matters and training them to be negotiators. A cost effective and efficient way to insure that all collaborative clients receive this benefit is to create instructional DVDs to be watched at home between sessions and discussed at the start of joint sessions.

- **Create cost-benefit tables for different family law processes.** Informed clients make informed choices. Clients will be able to use more System 2 thinking if they have the means to compare, simultaneously, the costs and benefits of litigation, settlement process, and collaborative law. A table that summarizes the tangible and intangible factors of each approach will enable them to make a decision less influenced by their own (or the practitioners’) biases. To offset any bias that a collaborative practitioner might bring to such a table and to insure an outsider’s lens is also in play, it would be important for dedicated litigators, mediators, and settlement lawyers to contribute to such a table.

**V. SUMMARY**

Complex problems require carefully considered, carefully crafted solutions. Relying upon intuition, our gut instinct, does not meet that standard. It is subject to bias, perceptual error, emotionally charged needs in the moment, and untoward influence. Although collaborative divorce practice emphasizes structures and procedures that encourage System 2 thinking by its practitioners and clients, it can further reduce the influence of unrecognized biases with additional practice techniques.
VI. REFERENCES


Thompson, L, Gentner, D, & Loewenstein J (2000) Avoiding missed opportunities in managerial life: Analogical training more powerful than individual case training. Organizational Behavior and Human Decision Processes: 82, 60-75.