FROM THE CHAIR

by Michael R. Diliberto

In his bestselling book, *Influence: The Psychology of Persuasion,* Robert Cialdini, PH.D., an expert in the field of influence and persuasion, explains the psychology of why people say yes and how to apply these principles ethically in business and everyday situations. He also developed the six universal principles of influence and how to use them to be a skilled persuader, namely: Reciprocity, Scarcity, Authority, Consistency, Liking, and Consensus. Successful mediators and negotiators draw from one or more of these principles every day in settling cases.

Trial lawyers use psychology to win large jury verdicts. In the 1960s, neuroscientist Paul MacLean introduced a theory of the mind that held that the brain could be divided into three regions, the oldest of which was responsible for human's primal fears, urges, and bodily functions. He called it the "reptile brain." Later, psychologist Clotaire Rapaille developed the theory and applied it to a number of successful national marketing campaigns, including those of Nestlé and Chrysler. Notably, he suggested reptile theory could be helpful for plaintiff's attorneys operating in civil trials.

Don Keenan, a trial lawyer, and David Ball, a jury consultant, published *Reptile: The 2009 Manual of the Plaintiff's Revolution*. They claimed the theory could be used against defendants who could have a potential impact on every single juror—healthcare providers, manufacturers, and anyone who transports goods on public roadways. The reptile approach is very effective because it challenges people to make decisions in a deeper section of the brain that involves the instinct to survive. The authors suggest the primary goal in any trial should be to demonstrate the immediate danger of what the defendant did and how fair compensation can diminish that danger. To awaken the reptile one must establish that the defendant's act or omission established a community danger. Defense attorneys have challenged the reptile theory, asserting that it is a prohibited "Golden Rule" argument that asks jurors to put themselves in the place of the injured party.

Anchoring is another tactic, which is used in negotiations as a relevant opening offer to pull our judgment of the offer's value towards that number. Trial lawyers employ jury anchoring by asking the jury for a specific amount of damages. This figure can significantly influence jurors' perceptions of what constitutes a reasonable award.

Experts are not immune to the anchoring effect. A 2001 study tested the effect on federal magistrates by providing them with a description of a serious personal injury suit in which liability was clear but the amount of damages was in dispute.* Half the judges were asked to indicate what they thought an appropriate damage award would be in light of the plaintiff's extensive injuries. The other half were asked the same question but not until after they ruled on a motion to dismiss the case on the ground that the plaintiff failed to meet the $75,000 jurisdictional minimum for a diversity case.

The motion had no merit, but the study found it had an effect on the judges' damage awards. Those who did not rule on the motion awarded, on average, $1,249,000, but judges who ruled on the motion awarded, on average, only $882,000. The frivolous motion to dismiss, which forced judges to consider whether the case was worth more than $75,000, lowered damage awards by 29 percent. The results indicate that judges are affected by anchors, even those that seem unrelated to the likely value of the case. ■

* Chris Guthrie et al., *Inside the Judicial Mind*, Cornell Law Faculty Publications (2001), *available at* https://scholarship.law.cornell.edu/facpub/814.

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