

GETTING TO THE TRADING ZONE
LESSON #6:
CONTROLLING THE FLOW OF INFORMATION
TO GET THE BEST POSSIBLE RESULT

In economist Daniel Kahneman's best-selling book, "Thinking, Fast and Slow", he describes two systems of thinking which are commonly observed in most every mediation. System 1 is fast, automatic, frequent, emotional, subconscious and stereotypic and System 2 is slow, effortful, infrequent, calculating, conscious and logical.

You can trigger both systems to achieve best results by doing this.

The System 1 mind would expect to have you produce the already discovered evidence, which supports your client's position. Litigators operating under system one will always have the highlighted deposition testimony, key documents which have been produced by you or the other side, the already-prepared Points and Authorities supporting your intended Motion for Summary Judgment and those smoking gun email exchanges which you believe are key to your case. These are generally already known by and have been carefully considered before the mediation in evaluating the prospects for success or failure at trial.

But System 2 thinkers (those that are thinking "slow") will also come prepared with videotaped interviews (even if they are on the lawyer's cell phones!), signed Declarations which have been prepared solely for the mediation and solely if necessary, a carefully prepared Excel spreadsheet detailing damages (again best if brought electronically, so that you can send it to the Mediator to share, but not leave with your opposing counsel as your work product in case the matter does not settle), and email correspondence that has not yet been produced. These are the carefully calculated and conscious hallmarks of System 2 thinking.

I recommend that the System 1 information--thinking fast and automatically, be shared at the very outset of the mediation or perhaps referenced in the mediation brief itself. But the System 2 information—the effortful, logical materials should be deliberately and intentionally

dripped out slowly as needed in order to trigger a loss aversion response. Kahneman explains it this way:

People are generally loss-averse: they are more likely to act to avert a loss than to achieve a gain. For example, people appear to place greater value on a change from 90% to 100% (going from high probability to certainty) than from, say, 45% to 55%, and place the greatest value of all on a change from 0% to 10% (going to a chance of winning from no chance). This is despite that all three changes give the same increase in utility. Consistent with loss-aversity, the order of the first and third of those is reversed when the event is presented as losing rather than winning something: there, the greatest value is placed on eliminating the probability of a loss to 0.

Next time you are in a mediation, consider thinking slow and presenting evidence specifically targeted to trigger the other side's loss aversion response. All it takes is that 0-10% to move the parties towards a realistic negotiation.