



THE ADVOCATES' JOURNAL



the valleys and how you are feeling in those moments. Focus on the positives and the opportunities you wish to welcome into your life.

Never accept defeat. Instead, use a difficult situation as a learning opportunity, not only to develop better coping and problem-solving skills, but also to strategize and implement solutions. This is also a great opportunity to practise asking for help, which at the same time can strengthen your interpersonal relationships. Learning to take action will help restore balance by allowing you to regain control over your circumstances.

Tips: *In the middle of your day, during a stressful situation or at a moment of uncertainty, stop, take a deep breath, go for a walk, change your mindset. If you are still overwhelmed, perhaps ask a friend or mentor for support.*

Give yourself credit. Often, we forget just how far we have come and all the obstacles we have surpassed to get to this spot. Positive reinforcement is crucial as it will give you that extra boost of energy necessary to keep going. Take a moment of recognition for yourself; be proud of everything you have accomplished and keep pushing to be the best you can be.

Tips: *Truly take time to celebrate your success by going to dinner, calling a friend to share the joys in your life or enjoying a glass of champagne. Make the moment special and focus on that feeling of accomplishment.*

Exercise and work/life balance. It is so important to take care of yourself. If our bodies and minds are not maintained, our ability to manage and work through challenging situations effectively will be impaired. This is one area where we have complete control: taking the time to rest, following a healthy diet, exercising regularly (even as little as 15 minutes a day can have outstanding benefits),⁷ and making time to enjoy the simple pleasures that life has to offer. Toronto, for example, has so many wonderful activities when it comes to enjoying life: outstanding restaurants, fine arts, a beach close by, cycling trails – the list goes on. It's important to develop healthy ways to manage stress, to relax and to take a deep breath.

Tips: *Develop a routine that works for you. Enjoy an early morning workout, going for a walk at lunch hour or reading for pleasure during your commute. Take 20 minutes each day to take care of yourself. Scheduling this time on your calendar will help you stay committed.*

The journey: Keep moving forward

In my personal journey, a change in city, surroundings and bar may have been a step backward in many respects, albeit temporarily. Each day, however, sees improvements: I am developing new daily and weekly routines, discovering new places and meeting wonderful people. Overall, I feel challenged and I feel alive. On the subject of personal accomplishments, long-distance swimmer Diana Nyad said, "When you achieve your dreams, it's not so much what you get, it's who you become."⁸ I agree with her. While I did get many wonderful things by moving to Toronto, they are simply the cherry on top. The most significant part of this journey is who I have become as a result. In the last few months, I have had more personal growth than I have experienced in years, and that is the accomplishment of which I am most proud.

This path, somewhat like the PATH that lies beneath the downtown core of Toronto, has always been about the journey and the growth which comes along the way. It's about continuing to move forward and embracing change; enjoying the peaks and working through the valleys. I am excited to continue my journey and am

hopeful that my career in law will continue to develop and flourish no matter where this path may lead. Let us continue to cultivate resilience so we may persevere in overcoming obstacles and succeed in conquering our goals. 📖

Notes

1. J Semley, "Ask Torontoist: Who You Calling 'The Big Smoke'?" *Torontoist*, May 13, 2010; online: <http://torontoist.com/2010/05/ask_torontoist_who_you_calling_the_big_smoke/>.

In his book *Naming Canada: Stories About Canadian Place Names*, Alan Rayburn suggests that the term may have its roots in an Australian Aboriginal comment regarding industrial Australian cities, which was then applied to Toronto by Allan Fotheringham, in his long-running column for *Maclean's*. Famously controversial, Fotheringham was never at a loss for cutesy nicknames, or "Fotheringhamisms." He was known to refer to Ottawa as "Coma City" and to former PM Joe Clark as "Jurassic Clark." As far as "The Big Smoke," Fotheringham used the term as a means of describing Toronto as a city with "big reputation, little to show for it." To him, any status the city might have as "Toronto the Good" or "the Athens of the Dominions" was all smoke and mirrors. While some other Canadian cities are also referred to as "The Big Smoke," such as Sudbury for its towering INCO smokestacks and Vancouver for its heavy fogs, once again Toronto suffers another snarky potshot from outsiders. Maybe now we'll think twice before cheerily self-applying the moniker. Still, it is better than "Cowtown" or "Pile O' Bones" or "Coma City." It's also way catchier than Montreal's "*la ville aux cent clochers*" (the city of a hundred belltowers).

2. SD Alinsky, quoted in E Saperston, *Live in Wonder: Quests, Quotes & Questions to Jumpstart Your Journey* (2d ed) (Venice, CA: Live in Wonder Press, 2012).

3. PATH, downtown Toronto's (mostly) underground walkway, links 30 km of shopping, services and entertainment and provides an important contribution to the economic viability of the city's downtown core. The system facilitates pedestrian linkages to public transit, accommodating more than 200,000 business-day commuters and thousands of additional residents and tourists on their way to sports and cultural events.

4. Caroline Myss, an American author of books on spirituality.

5. Homewood Health, "Building Your Resilience." *Life Lines*, 58 (2015); online: <<http://www.lians.ca/sites/default/files/documents/00083506.pdf>>.

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6. Homewood Health, "Building Your Resilience." *Ibid.*

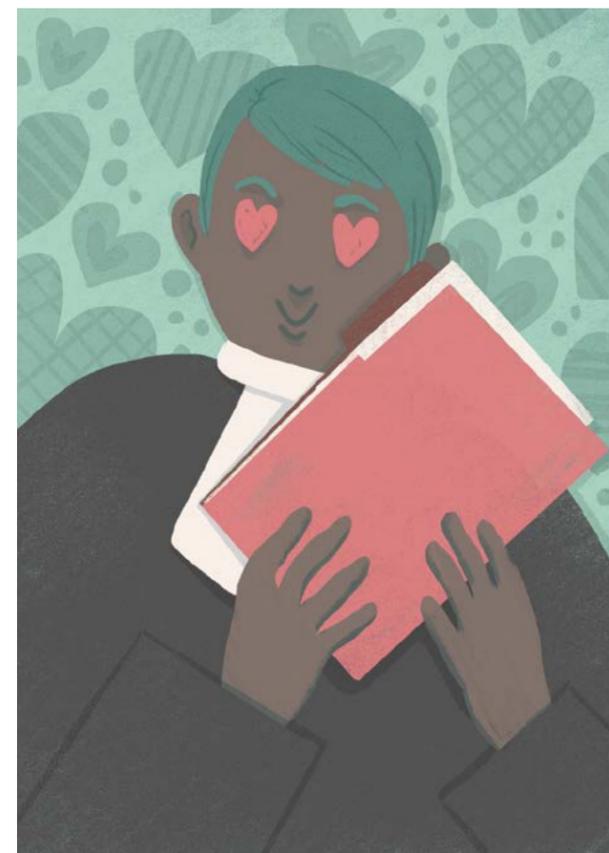
7. A Sifferlin, "15 Minutes of Exercise a Day May Be Just Enough: Study." *Time* Health, June 14, 2016; online: <<http://time.com/4367344/15-minutes-of-exercise-benefits/>>.

8. Diana Nyad, quoted in Lisa Iannucci, "Just Keep Swimming: Diana Nyad Shares Lessons Learned on Treks Across Dangerous Waters." *CTW Features*, September 26, 2015; online: <http://elkodaily.com/just-keep-swimming-diana-nyad-shares-lessons-learned-on-treks/article_89022130-950f-5a00-bdb2-7dd91a404bc2.html>.

Why we fall in love with our cases

– and how that love blinds us

Paul Fruitman



This infatuation brings benefits as well as challenges. We are better barristers when we believe in our cases. Conviction is a huge part of persuasion. However, confidence in our cases can blind us to their weaknesses. In addition, because Canadian litigators deal directly with clients, we must remain able to give them objective advice.

Provided we recognize fairness bias, we can mitigate its risks and exploit its benefits. We can force ourselves to view the case through our adversaries' eyes, revealing the flaws in our own arguments. Confronting these flaws can keep us objective when advising clients. It also offers us the chance to account for those flaws in our impassioned advocacy. To be our best, we must fall in love with our cases, see their flaws and then fall in love again.

Emotions drive our decisions

To appreciate how and why we fall in love with our cases, we first need to consider how we make decisions and, in particular, moral judgments. There are, according to New York University psychology professor Jonathan Haidt, three schools of thought that have guided Western philosophy and psychology on human decision-making.

The Platonic school argues that our decisions are guided by reason. In contrast, former United States President Thomas Jefferson claimed that reason and emotion are engaged in a constant game of tug of war over control of our decision-making. Finally, Scottish philosopher David Hume deemed reason a "slave of the passions," arguing that we make decisions based on our emotions and then use reason to justify those judgments to ourselves, and others.¹

The current consensus is that Hume was right. Haidt recounts studies he conducted questioning the rational basis for cultural taboos. Participants were told stories designed to cause visceral disgust but in which none of the characters caused or experienced harm. These included eating rather than burying a dead family dog and privately desecrating a flag. Rather than admit that the disgust-inducing conduct was harmless, participants invented victims. They speculated the family could get sick by eating their dead pet or that flag pieces might clog a toilet and cause a flood. Moral reasoning is, in Haidt's words, "mostly just a post hoc search for reasons to justify the judgments people had already made."²

Haidt's research will not surprise those who believe the learned judges deciding our cases determine their preferred outcomes before conjuring reasons to support them. The format of judicial decisions – "here are my facts and here is my law, now watch as the learned judge applies the latter to the former to divine the 'right' decision" – is quasi-scientific. However, law is not about science, but morality. Judicial reasons purport to be a disinterested application of law to

In 1995, *U.S. News and World Report* conducted a revealing poll on the loser-pay costs regime. Rather than ask whether the United States should adopt an English- or Canadian-style costs system, the magazine divided its readers into two groups and asked each one separate but complementary questions.

The first group was asked, "If someone sues you and you win the case, should he pay your legal costs?" Eighty-five percent answered yes. The question for the second group was, "If you sue someone and lose, should you pay his costs?" Only 44 percent in the second group answered in the affirmative. The poll shows how "fairness" is a subjective concept. Readers thought a loser-pay regime was quite fair – so long as they were not the loser.

Advocates are not immune from this phenomenon, which psychologists call "fairness bias." Once we become engaged on one side of a dispute, we unconsciously emphasize the good parts of our side and downplay its bad facts. In short, we fall in love with our cases.

facts but are really a post hoc assessment of right and wrong, good and bad, and above all, “fairness.”

How we fall in love with our cases Of course, what is “fair” depends on one’s viewpoint and interests. The findings of the *U.S. News* poll on loser-pay costs are echoed in several studies of employee compensation, including one aptly titled: “Performance-based Pay is Fair, Particularly When I Perform Better.”³

Fairness bias is also endemic to sports fans, who naturally think referees and commentators are biased against their favoured team. During one game of the 1986 World Series between the Boston Red Sox and the New York Mets, the switchboard at NBC, which was broadcasting the game, received 1,800 complaint calls. Approximately 1,000 callers complained that announcers Vin Scully and Joe Garagiola were biased against the Mets. The other 800 or so complained that Scully and Garagiola were biased against the Red Sox. The slightly increased number of complaints from New York was attributed to that city’s larger population and the fact that NBC was a local call for New Yorkers but a toll call for Bostonians.⁴

Closer to the courtroom are litigation studies by economists Linda Babcock and George Loewenstein. Participants were divided into pairs, with each pair having a “plaintiff” and a “defendant.” The participants were asked to guess the award from a real personal injury trial and each pair was then tasked with trying to negotiate a settlement. Guesses by the plaintiffs were, on average, twice as high as the defendant guesses, and the pairs with the more disparate guesses were less likely to reach resolution.⁵ This is fairness bias at work.

As advocates, we allege bias among judges (rarely), witnesses (occasionally) and experts (often). There are dozens, if not hundreds of cases discussing the importance and tenuousness of expert impartiality. The Supreme Court of Canada spent 12 pages of a 2015 decision summarizing and pronouncing on this jurisprudence.⁶ More recently, a finding of expert bias risked sinking the prosecution of former Ontario Liberal Party staffers alleged to have destroyed government documents. The court in the “gas plants trial” disqualified the Crown’s key expert witness because he had worked too closely with police investigators to remain impartial.⁷

I have on numerous occasions witnessed experts morph into partisans for the party

paying their fees. Sometimes it happens consciously. Most of the time, however, it is the natural result of being on one side of a case. Fairness bias is highly infectious, and there is nothing so special about advocates that would make us immune to it.

When we take on a matter, we naturally become partial to it. We quiet the counter-arguments like we do the cognitive dissonance that accompanies our own decisions. We begin to equate our side of the dispute with what is “fair.” This may be an unwelcome reality for the advocates who pride themselves on the ability to remain detached while engaged in litigation’s cut and thrust, but love is blindness.⁸ Think of the last time you received a decision that rejected the “obvious truth” of your argument. Consider the possibility that “truth” may not have been obvious and your own bias clouded the objective reality that drove the judge’s decision.

Conviction makes our arguments more compelling

Falling in love with our cases is not necessarily a bad thing. In fact, overall it makes us better advocates. U.S. president Lyndon B. Johnson is famous for having said, “What convinces is conviction. Believe in the argument you’re advancing. If you don’t you’re as good as dead. The other person will sense that something isn’t there, and no chain of reasoning, no matter how logical or elegant or brilliant, will win your case for you.”

Studies of persuasive speaking back up Johnson’s assessment. Based on research he conducted in the late 1960s, University of California Los Angeles professor Albert Mehrabian concluded that perception of speakers depends mainly on their presentation: 55 percent body language and 38 percent tone of voice; and only 7 percent based on choice of words.⁹

Though Mehrabian’s methods and results have been subject to criticism, those critics still acknowledge the importance of non-verbal communication. Subsequent studies show that in the case of an important presentation – such as in-court submissions – the importance of the words chosen rises to 53 percent. Nevertheless, non-verbal communication in that context still accounts for 47 percent of persuasion (32 percent body language and 15 percent tone of voice).¹⁰

Non-verbal communication is difficult if not impossible to fake. An enduring belief in our cause is essential to convincing others.

Why we need to remain objective, and how we can do that

For advocates, that enduring belief must be reconciled with the need to respond to the arguments of our adversaries. The counterweight to Lyndon Johnson in this regard is English philosopher John Stuart Mill, who in 1859 wrote in *On Liberty*, “He who knows only his own side of the case knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.”

In our fused bar, where the advocate directly advises clients, she or he must also be able to advise them properly of both the strengths and weaknesses of their claims. Clients are too invested, financially and emotionally, to see their cases clearly. Counsel’s advice and direction must be tempered by objectivity.

How do we revisit objectivity when we are naturally biased toward our side of the dispute? I believe we need to imagine regularly the case through the eyes of our adversaries. This goes beyond setting out the facts our adversaries need to prove and the evidence that can prove those facts. To truly counter our fairness bias, we need to assume the role of our adversaries and “argue” the case from their standpoint.

Indeed, the studies conducted by Babcock and Loewenstein show that simply telling people about fairness bias does little to help them counter it. While study participants thereafter generated more accurate predictions about what the *other party* to their mock negotiation would guess was the trial judge’s award, their own predictions did not change. Participants accepted that fairness bias would affect their counter-parties but believed that they themselves were immune to it. However, when participants were asked to “think carefully” about the weakness of their own cases, the discrepancy between their award predictions significantly narrowed and their rate of resolution significantly increased.¹¹

Harvard psychology professor Joshua Greene suggests that we can challenge our biases by switching from our “automatic” mental mode to our “manual” one. Greene draws an analogy between our brains and modern cameras whose automatic settings work well for typical portrait and landscape shots but need to be turned off under certain lighting and backgrounds.¹² This idea of a dual-process brain echoes the System 1 and System 2 theory popularized

by psychologist-economist Daniel Kahneman and explained in his 2011 bestseller, *Thinking Fast and Slow*.¹³ System 1, our automatic mode, is driven by our emotions. System 2 is our manual mode. It allows us to think rationally and make calculated decisions.

Of course, we rely heavily on System 2 in crafting arguments supporting our own side of the case. However, we need to consider that our carefully crafted arguments are influenced by our emotions and that we need to go full manual to see the case from the other side – and from the standpoint of an objective third party. This is a difficult, but highly revealing exercise. By “tricking” our brains to assume the other side of a dispute, we can better understand the flaws in our arguments and develop ways to respond to them. I have had the most success with cases that afforded the time, and budget, to engage in full mock cross-examinations of my own witnesses.

Controlling our bias for maximum benefit

Being predisposed to our side of the dispute is, on the whole, very helpful. We must believe in our cause to convince others it is right. Sy Sperling made a fortune with his Hair Club for Men based on the company’s famous, if kitschy, tag line, “I’m not only the Hair Club president. I’m also a client.”

However, we are better advocates, and we serve our clients better, when we are able to occasionally put bias aside and see cases from the standpoint of our adversaries. By truly adopting the other side, we will better understand the flaws in our own arguments. The key is to be able to turn our bias on and off. The last thing we want is self-doubt when making submissions. If we do not love our cases, judges will not care for them at all. 

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