# It's Not What You Think: Defeating Cognitive Bias

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## Introduction

1. Ian Weinstein, *Don't Believe Everything You Think*, 8 Clinical L. Rev. 783 (2002-2003)

"They took a bag from me, but this paper says it was a box," Mr. Worth repeated. "They have no case against me. No jury will send me away when the prosecutor is lying and saying the drugs were in a paper bag. A paper bag is not a box."

"I will argue that," I assured him again, "But what do you think the prosecutor will say about the bag or box business? Like I said before, I think the agent will just say it was a mistake on the complaint. The prosecutor will say that the drugs inside are what matters. I don't think the jury will focus the whole case on that."

"But it was a bag." He insisted.

"I hear you." I replied, nodding.

2. LSUC, Rules of Professional Conduct (2014), Rule 3.2-1, 3.2-2, 3.2-9

A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

When advising clients, a lawyer shall be honest and candid.

When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

3. LSUC, Rules of Professional Conduct (2014), Rule 5.1-1, and Commentary [1]

When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary [1]: In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

## What is cognitive bias?

4. Professor Daniel Kahneman, *Thinking, Fast and Slow*, pp. 41-43

A series of surprising experiments by the psychologist Roy Baumeister and his colleagues has shown conclusively that all variants of voluntary effort - cognitive, emotional, or physical - draw at least partly on a shared pool of mental energy. Their experiments involve successive rather than simultaneous tasks….

The most surprising discovery made by Baumeister's group shows, as he puts it, that the idea of mental energy is more than a mere metaphor. The nervous system consumes more glucose than most other parts of the body, and effortful mental activity appears to be especially expensive in the currency of glucose. When you are actively involved in difficult cognitive reasoning or engaged in a task that requires self-control, your blood glucose level drops.

## Common types of cognitive bias

5. Lederman and Hrung, *Do Attorneys Do Their Clients Justice?*, Articles by Maurer Faculty. Paper 483. (2006)

Litigants do not always-or perhaps even typically-make decisions as the rational actors contemplated by the basic economic model of suit and settlement. Korobkin & Guthrie, supra note 21, at 79-81; Jeffrey J. Rachlinski, Gains, Losses, and the Psychology of Litigation, 70 S. CAL. L. REV. 113, 116-18 (1996); see also Larry T. Garvin, Adequate Assurance of Performance: Of Risk, Duress, and Cognition, 69 U. COLO. L. REV. 71, 145 (1998) ("Cognitive psychology and experimental economics have found a smorgasbord of cognitive errors, which collectively falsify most of the axioms of rational choice theory.").

6. Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 778 (2000-2001)
In one early study of anchoring, Professors Amos Tversky and Daniel Kahneman asked participants to estimate the percentage of African countries in the United Nations. Before asking for this estimate, they informed the participants that the number was either higher or lower than a numerical value identified by the spin of a "wheel of fortune." Tversky and Kahneman had secretly rigged this "wheel of fortune" to stop either on ten or sixty-five. When the wheel landed on ten, participants provided a median estimate of 25%; when the wheel landed on sixty-five, participants provided a median estimate of 45%. Even though the initial values were clearly irrelevant to the correct answer, the initial values had a pronounced impact on the participants' responses.

7. Rabbi Daniel Z. Feldman, *False Facts and True Rumors*, pg. 68
This [anchoring] effect is blamed for all kinds of irrational impacts on thinking. For example, participants in a wine auction who were asked to write down the last two digits of their Social Security numbers before bidding were found to bid higher numbers if the Social Security numbers were higher.

8. Talmud, Shevuot 31a
מנין לשנים שבאו לדין, אחד לבוש סמרטוטין ואחד לבוש איצטלית בת מאה מנה, שאומרין לו "לבוש כמותו או הלבישהו כמותך"? ת"ל "מדבר שקר תרחק"... מנין לדיין שלא ישמע דברי בעל דין קודם שיבא בעל דין חבירו? ת"ל "מדבר שקר תרחק." מנין לבעל דין שלא יטעים דבריו לדיין קודם שיבא בעל דין חבירו? ת"ל "מדבר שקר תרחק."
How do we know that where two litigants come for judgment, one wearing rags and the other wearing a 100-maneh coat, we say to him, "Dress as he does, or dress him like yourself"? The Torah teaches, "Distance yourself from falsehood."… How do we know that a judge shall not hear the words of a litigant before the other litigant arrives? The Torah teaches, "Distance yourself from falsehood." How do we know that a litigant shall not sample his words with the judge before the other litigant comes? The Torah teaches, "Distance yourself from falsehood."

9. Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 778 (2000-2001)
Suppose that you are presiding over a personal injury lawsuit that is in federal court based on diversity jurisdiction. The defendant is a major company in the package delivery business. The plaintiff was badly injured after being struck by one of the defendant's trucks when its brakes failed at a traffic light. Subsequent investigations revealed that the braking system on the truck was faulty, and that the truck had not been properly maintained by the defendant. The plaintiff was hospitalized for several months, and has been in a wheelchair ever since, unable to use his legs. He had been earning a good living as a free-lance electrician and had built up a steady base of loyal customers. The plaintiff has requested damages for lost wages, hospitalization, and pain and suffering, but has not specified an amount. Both parties have waived their rights to a jury trial.
We randomly assigned the judges to either a "No Anchor" condition or an "Anchor" condition. We provided judges in the No Anchor group with the paragraph above and asked them, "how much would you award the plaintiff in compensatory damages?" We provided the judges in the Anchor group with the same information. In addition, we informed them that "[t]he defendant has moved for dismissal of the case, arguing that it does not meet the jurisdictional minimum for a diversity case of $75,000." We asked these judges to rule on the motion, and then asked them "[i]f you deny the motion, how much would you award the plaintiff in compensatory damages?" Because the plaintiff clearly had incurred damages greater than $75,000, the motion was meritless.
The results showed that ruling on the motion had a large effect on damage awards. The 66 judges in the No Anchor condition indicated that they would award plaintiff an average of $1.25 million while the 50 judges in the Anchor condition awarded an average of $882,000.

10. Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 778 (2000-2001)
Several studies have demonstrated that the hindsight bias influences judgments of legal liability. Kim Kamin and Jeffrey Rachlinski, for example, compared foresight decisions regarding whether to take a precaution against flooding with comparable hindsight evaluations of whether the failure to take this precaution was negligent. They instructed participants judging in foresight to recommend the precaution if they believed that the flood was more than 10% likely to occur in any given year (which was based on a cost-benefit comparison of the precaution and the damage that a

flood would likely cause). The researchers told the participants judging in hindsight that the precaution had not been taken and that a flood causing $1 million in damage had occurred. They instructed these participants to find the defendant liable for the flood if the likelihood of the flood, from the perspective of the defendant before the fact, was greater than 10% in any given year. Although both sets of participants reviewed identical information about the likelihood of a flood, the participants reached different conclusions about appropriate defendant behavior. Only 24% of foresight participants concluded that the likelihood of a flood justified taking the precaution, while 57% of the hindsight participants concluded that the flood was so likely that the failure to take the precaution was negligent.

11. Rabbi Yisrael Meir Kagan (19th-20th century Poland), Chafetz Chaim, Laws of Lashon HaRa 9:1

המספר בשבחו של חבירו בפני שונאיו גם כן בכלל אבק לשון הרע הוא, דזה גורם להם שיספרו בגנותו.

One who praises another in front of his enemies is guilty of "dust of harmful speech", because this causes them to speak degradingly of him.

12. Mishnah Sanhedrin 5:4 (40a)

אמר אחד מן העדים "יש לי ללמד עליו זכות"... משתקין אותו

[Even] if one of the witnesses says, "I can argue to exonerate him"… we silence him.

13. Rassin, Eerland & Kuijpers, *Let's find the evidence*, J. of Investigative Psychology 7:3 (2010), Abstract

In three studies, participants read a case file, and were subsequently instructed to select additional police investigations. Some of these additional endeavours were guilt-confirming (i.e. incriminating), whereas others were disconfirming (i.e. exonerating). Results suggest that additional investigation search was guided by an initial assessment of the suspect's guilt (Study 1). Furthermore, participants' tendency to select incriminating investigations increased with increased crime severity, and with the strength of the evidence present in the case file. Finally, the selection of incriminating investigations was associated with conviction rates (Study 3). However, in general, participants did not favour incriminating endeavours. That is, in the three studies, the percentages of selected incriminating endeavours did hardly or not exceed 50%.

14. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law, Choshen Mishpat 7:7

אסור לאדם לדון למי שהוא אוהבו, אף על פי שאינו שושבינו ולא ריעו אשר כנפשו; ולא למי ששונאו, אף על פי שאינו אויב לו ולא מבקש רעתו, אלא צריך שיהיו השני בעלי דינים שוים בעיני הדיינים ובלבם

One may not judge a friend, even where he is not a *shushvin* or his closest friend, or one he hates, even where he is not an enemy and he does not seek to harm him. The litigants must be equal in the eyes and hearts of the judges.

15. Talmud, Sanhedrin 17a

אמר רב כהנא סנהדרי שראו כולן לחובה פוטרין אותו מאי טעמא כיון דגמירי הלנת דין למעבד ליה זכותא והני תו לא חזו ליה

Rav Kahana said: If the court rules unanimously to convict, we free him. Why? Since we have learned that we need to wait overnight to find reasons to exonerate him; these judges will never see on his behalf.

16. Talmud, Ketuvot 105b

היכי דמי שוחד דברים?

- כי הא דשמואל הוה עבר במברא, אתא ההוא גברא יהיב ליה ידיה, אמר ליה: מאי עבידתיך? אמר ליה: דינא אית לי, א"ל: פסילנא לך לדינא.
- אמימר הוה יתיב וקא דאין דינא, פרח גדפא ארישיה, אתא ההוא גברא שקליה, א"ל: מאי עבידתיך? א"ל: דינא אית לי, אמר ליה: פסילנא לך לדינא.
- מר עוקבא הוה שדי רוקא קמיה, אתא ההוא גברא כסייה, א"ל: מאי עבידתיך? א"ל: דינא אית לי, א"ל: פסילנא לך לדינא.

What is a verbal bribe?

- Like when Shemuel crossed a river, and someone extended his hand to him. Shemuel asked, "Why are you here?" He replied, "I have litigation." Shemuel said, "I am disqualified to judge for you."
- Ameimar was judging, when a feather landed on his head. Someone removed it. Ameimar asked, "Why are you here?" He replied, "I have litigation." Ameimar said, "I am disqualified to judge for you."
- Mar Ukva spat before himself, and someone covered it. Mar Ukva asked, "Why are you here?" He replied, "I have litigation." Mar Ukva said, "I am disqualified to judge for you."

17. Sigall and Ostrove, Beautiful but Dangerous, J. of Personality and Social Psychology 31:3 (1975)
The physical attractiveness of a criminal defendant (attractive, unattractive, no information) and the nature of the crime (attractiveness-related, attractiveness-unrelated) were varied in a factorial design. After reading one of the case accounts, subjects sentenced the defendant to a term of imprisonment. An interaction was predicted: When the crime was unrelated to attractiveness (burglary), subjects would assign more lenient sentences to the attractive defendant than to the unattractive defendant; when the offense was attractiveness-related (swindle), the attractive defendant would receive harsher treatment. The results confirmed the predictions, thereby supporting a cognitive explanation for the relationship between the physical attractiveness of defendants and the nature of the judgments made against them.

18. Talmud, Bava Kama 50a

כל האומר הקב"ה ותרן הוא יותרו חייו

Anyone who said G-d is forgiving – his life will be 'forgiven'.

19. Talmud, Bava Metzia 3a-b
מפני מה אמרה תורה מודה מקצת הטענה ישבע? חזקה אין אדם מעיז פניו בפני בעל חובו, והאי בכולי' בעי דנכפרי' והא דלא כפרי' משום דאין אדם מעיז פניו, והאי בכוליה בעי דלודי לי' והאי דלא אודי אשתמוטי הוא דקא מישתמט מיניה, סבר עד דהוו לי זוזי ופרענא לי'.
Why does the Torah say that one who admits part of a claim must swear? We presume that one will not be brazen before his creditor. He wants to deny it all, and he doesn't because he cannot be brazen. He wants to admit it all, but he doesn't admit because he is trying to avoid it, thinking, "Eventually I will have money and I will pay him."

20. Ian Weinstein, *Don't Believe Everything You Think*, 8 Clinical L. Rev. 783 (2002-2003)
The problem of egocentric bias is our tendency to think many of our own common, ordinary skills and experiences are exceptional. When we last left Mr. Worth, he had also expressed his belief that the jury would not convict him.
I had replied, "I'm not sure the jury will see it that way, but there is still a lot we don't know about the evidence."
"I know," he responded, smiling, "But I know myself. People like me. No jury will convict me. They don't convict people they like, do they?"
"You're exactly right about that." I told him, "If someone likes you, they believe you and they will try to think of reasons why you are right. But we will have to think long and hard about how to let the jury get to know you. A trial is very different from a social event and even liking some people isn't enough to get over strong evidence."
"They'll like me." Mr. Worth said to himself, as much as to me, "They won't convict me."

21. Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 778 (2000-2001)
Framing also has influenced the development of legal doctrine. When ownership of a commodity is in doubt, the courts traditionally favor those who hold possession of the good–even when possession is arbitrary. For example, if a seller contracts to sell a car to two different buyers, courts will often award permanent ownership to the party holding possession at the time the suit is brought.

22. Cohen & Knetsch, *Judicial Choice*, Osgoode Hall Law J. 30:3 (1992)
A further illustration of the differing valuations of gains and losses is provided by responses to recent automobile insurance legislation in two American states. In both jurisdictions people are given a choice between cheaper policies, which limit rights to subsequent recovery of further damages, and a more expensive policy permitting such actions. Importantly, the default option differs: the reduced rights policy is offered in New Jersey unless it is given up; and full rights policy is given in Pennsylvania unless the less expensive option is specified. Given the minimal costs in both states of choosing either option and the large amounts of money at issue, the results have been dramatic. At last count over 70 per cent of New Jersey automobile owners have adopted the reduced rights policy, but fewer than 25 per cent of Pennsylvanians have done so.

Mitigation

23. Rabbi Daniel Z. Feldman, *False Facts and True Rumors*, pg. 77

Attempting to correct for these biases, while a necessary first step, is only helpful to a point. Another frailty of the human psyche is the lack of awareness as to when these biases are present, even those that are theoretically known. Our awareness is itself blinded by bias, known, appropriately, as "bias bias." In the words of Dr. Robert A. Burton, "Our mental limitations prevent us from accepting our mental limitations."

24. Lederman and Hrung, *Do Attorneys Do Their Clients Justice?*, Articles by Maurer Faculty. Paper 483. (2006)

Korobkin and Guthrie admit that experts generally are as prone to cognitive biases as lay people are. However, they counter those findings with an argument that the analytical skills of lawyers, combined with their legal training, might lead them "to analyze legal conflicts carefully and unemotionally rather than to react to them viscerally."... Perhaps, then, lawyers approach decisions from a different perspective than most other people or are better able to learn from their experiences than other professionals, or both.

Question 1: Taking advantage of bias when addressing a client

25. Ian Weinstein, *Don't Believe Everything You Think*, 8 Clinical L. Rev. 783 (2002-2003)

The authors compared settlements rates between those who received advice from a lawyer and those who did not and among the different styles of advice. The study found differences related to both the kind of advice that was offered and the nature of the framing bias. Overall, the simple assertion of authority by the lawyer, an unadorned recommendation to accept the offer, had the biggest impact in encouraging settlement… The suggestion that advice alone, without explanation, is more potent in overcoming bias is broadly consistent with other studies on "debiasing," or overcoming cognitive illusions.

26. LSUC, Rules of Professional Conduct (2014), Commentary 8-9 to Rule 3.1-2

[8] A lawyer should clearly specify the facts, circumstances, and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

[8.1] What is effective communication with the client will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

[9] A lawyer should be wary of bold and over-confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

27. Canadian Medical Association Code of Ethics (1868), Articles 1:1, 2:6

1:1 - Physicians should unite tenderness with firmness, and condescension with authority, and thus inspire their patients with gratitude, respect and confidence.

2:6 - The obedience of a patient to the prescriptions of his physician should be prompt and implicit. He should never permit his own crude opinions as to their fitness to influence his attention to them. A failure in one particular may render an otherwise judicious treatment dangerous, and even fatal. This remark is equally applicable to diet, drink and exercise. As patients become convalescent they are very apt to suppose that the rules prescribed for them may be disregarded, and the consequence, but too often, is a relapse.

28. Jonathan F. Will, *A Brief Historical and Theoretical Perspective*, Chest 139:6 pg. 1493

While physicians did develop a more consistent practice of obtaining patient consent in the early 20th century, the medical literature indicates that the practice was fueled more by a desire to respond to lawsuits than by a moral imperative to respect patient autonomy. In a 1911 article, physician George W. Gay suggested that "careful and explicit explanations of the nature of serious cases, together with the complications liable to arise and their probable termination,... be given to the patient ... for our own protection."…

In *Schloendorff v Society of New York Hospitals*, Justice Cardozo planted the seed for what would become the informed consent doctrine when he wrote, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."

29. CPSO Policy #4-05
Respect for the autonomy and personal dignity of the patient is central to the provision of ethically sound patient care. Through the translation of these ethical principles to law, the Supreme Court of Canada has confirmed the fundamental right of the individual to decide which medical interventions will be accepted and which will not.

30. Ian Weinstein, *Don't Believe Everything You Think*, 8 Clinical L. Rev. 783 (2002-2003)
The idea is to replace the details that currently define the category of trial evidence for Mr. Worth with different details that I, as the lawyer, believe will result in a more accurate characterization of the evidence… This strategy adds another kind of option to the four suggested by Korobkin and Guthrie. In addition to telling the client about the heuristic, urging the client to consider other details, telling the client what outcome the lawyer recommends with an explanation of the error in reasoning, and simply telling the client what outcome the lawyer recommends, this fifth strategy attempts to use the heuristic.
Some may think a direct discussion of the heuristic is more respectful of the client. Using the heuristic may seem manipulative, akin to using persuasion and hiding our actual reasons and ideas. But cognitive science urges us to consider how we process information, not just what information is provided. What we tell our clients matters much less than what they understand and conclude from the information they actually attend to and process.

31. Lederman and Hrung, *Do Attorneys Do Their Clients Justice?*, Articles by Maurer Faculty. Paper 483. (2006)
Korobkin and Guthrie argue that there are two different ways in which attorneys can work to reduce psychological barriers to the settlement of lawsuits: "First, they can attempt to negotiate in a manner that prevents the barriers from being constructed in the first place. Second, because it is highly unlikely that attorneys will successfully avoid all psychological barriers, attorneys can work to minimize the effect of already-erected barriers on settlement behavior." For example, because people generally are risk-averse when choosing between options framed as "gains" but risk-seeking when choosing between options framed as "losses" and have a stronger reaction to losses than to gains, an attorney representing a defendant may reframe the litigation for the client to help the client perceive settlement opportunities as gains rather than losses.

32. Rabbi Joseph Caro (16th century Israel), Shulchan Aruch Orach Chaim 618:1
חולה שצריך לאכול, אם יש שם רופא בקי אפילו הוא עובד כוכבים שאומר: אם לא יאכילו אותו אפשר שיכבד עליו החולי ויסתכן, מאכילין אותו על פיו... אפילו אם החולה אומר: אינו צריך, שומעים לרופא
If a patient needs to eat, and an expert doctor – Jewish or not Jewish – says that without eating his illness may worsen and he may be endangered, we feed him… Even if the patient denies needing it, we listen to the doctor.

<u>Question 2: Taking advantage of bias when seeking settlement or addressing a jury</u>
33. Trevor Farrow, *The Negotiator-as-Professional*, Pepperdine Dispute Resolution Law Journal 7.3 (2007)
As Wiggins and Lowry have argued, "there is a clear potential for conflict between the attorney's own values and the perceived duty of single-minded zealous advocacy on behalf of the client's interests."' Shockingly, this impoverished state of affairs - that results in a "confounding [of] the boundary of professional responsibility and negotiation ethics" - apparently makes it "difficult to ... make prescriptive statements about truth telling and lawyers."' These acknowledgments amount, in my view, to a remarkably sad state of affairs. If lawyers cannot be counted on, or at least mandated to tell the truth, who can? What we are left with then is a relatively barren ethical terrain that leaves the representative negotiator without adequate guidance for ethical negotiation. Current practices encourage Gross and Syverud, for example, to ask questions such as: "Under what circumstances should a party make a sincere offer? An outrageous demand? An insincere threat to go to trial?" Further, for example, Norton comments that "the concept of truthfulness in negotiation raises unique ethical questions because in most circumstances candor is not necessarily required." Silver articulates that representative lawyers "can be misleading, can bluff and can threaten action at will." Further, Boulle and Kelly argue that, even for lawyers governed by professional codes of conduct, "in negotiation... exaggeration and sheer puffery are tolerated." As such, Wiggins and Lowry question whether "the profession should attempt to police lying in negotiation" at all. This ethically questionable state of affairs in representative negotiation should not be tolerated, particularly for representative negotiators who are also members of the bar and subject to professional obligations.

34. Mishnah Sanhedrin 4:1 (32a)

דיני נפשות מתחילין מן הצד.

In capital cases, the judges begin to vote from the side.

35. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law, Choshen Mishpat 33:1

כל הפסולים לדון פסולים להעיד, חוץ מאוהב ושונא שכשרים להעיד, אף על פי שפסולין לדון.

All who are disqualified to judge are disqualified to testify, other than a friend or enemy, who may testify even though they may not judge.

36. Rabbi Moses Maimonides (12th century Egypt), Laws of Testimony 16:4

דברים אלו אינן תלויין אלא בדעת הדיין ועוצם בינתו שיבין עיקר המשפטים וידע דבר הגורם לדבר אחר ויעמיק לראות, אם ימצא שיש לזה העד צד הנאה בעדות זו אפילו בדרך רחוקה ונפלאה הרי זה לא יעיד בה

These matters depend only upon the judge's mind and his great comprehension, to understand the essence of the relevant laws and to know what leads to other things and to examine deeply. If he sees that this witness has some way to benefit from this testimony, even distantly and remarkably, he shall not testify in the matter.

37. Rabbi Joseph Caro (16th century Israel), Shulchan Aruch, Choshen Mishpat 232:7

כל הלוקח סתם, אינו לוקח אלא הדבר שלם מכל מום. ואם פירש המוכר ואמר: על מנת שאין אתה חוזר עלי במום, הרי זה חוזר, עד שיפרש המום שיש בממכרו וימחול הלוקח, או עד שיאמר לו: (כל מום) שימצא במקח זה הפוחת דמיו עד כך וכך קבלתי אותו, שהמוחל צריך לידע הדבר שמוחל לו בו ויפרש אותו

One who purchases an item is assumed to intend to purchase a whole, unblemished item. If the seller specifies, "No returns even for blemishes," the purchaser may still return it, unless the seller specifies the blemish and the purchaser forgives it, or the purchaser says, 'I accept any blemish found in this purchase which reduces the value by up to X,' so that the forgiver knows and specifies that which he is forgiving.

38. Talmud, Pesachim 113b

שלשה הקב"ה שונאן: המדבר אחד בפה ואחד בלב והיודע עדות בחבירו ואינו מעיד לו והרואה דבר ערוה בחבירו ומעיד בו יחידי

Gd despises these three: A person who speaks one way with his mouth and another with his heart; one who knows testimony on behalf of another and does not testify; and one who witnesses impropriety by another and testifies alone.

39. Talmud, Bava Metzia 80a

המוכר פרה לחבירו ואמר לו "פרה זו נגחנית היא, נשכנית היא, בעטנית היא, רבצנית היא," והיה בה מום אחד וסנפו בין המומין, הרי זה מקח טעות. מום זה ומום אחר אין זה מקח טעות.

If one sells a cow and says, "This cow gores, bites, kicks and sprawls," and it only has one of those defects, which he included among these defects, that is grounds for claiming it was an erroneous purchase. If he names this defect and one other, it is not an erroneous purchase.

40. Rabbi Dr. Aaron Levine, *Moral Issues of the Marketplace in Jewish Law*, pg. 53-54

[Speaking one way while thinking another] is prohibited because such conduct sends out a false signal. In the case at hand, no false signal is sent out by the pleasantries Pelt and Wineman exchange before the bargaining session begins. This is so because each party does not mistakenly take his opposite number's inquiries about family as a gesture of friendship. Instead, these inquiries are taken as conversation for the sake of signaling to each other that they desire to be on speaking terms.