

The Lawyer's Mind: Decision Fatigue

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Do You Suffer From Decision Fatigue?

John Tierney,

The New York Times Magazine, (August 17 2011).

The short answer for lawyers and judges is: Yes. This occurs when you are working a block of time without sufficient breaks practicing a core function of lawyers—making choices what to say or do next. Preparing for hearings, drafting documents, and participating in remote video proceedings is the daily life of the legal profession. Decision making occurs not only by individuals working alone, but also in groups, such as committees, client counseling, and administrative or judicial panels issuing findings and determinations.

In 2011, two professors studied outcomes in over 1,100 cases decided by a panel of judges on two Israeli parole boards, which consisted of a judge, social worker, and a criminologist. What was surprising is that the grant or denial of parole was correlated with the time of day of the decision! The process of hearing and deciding cases in a serial manner resulted in “decision fatigue,” (coined by journalist, John Tierney), with the board being more likely to deny parole later in the day. The researchers concluded denying parole was simpler than using the energy to make a tougher or more complex decision; keeping the status quo left risk-free options to eliminate the potential that former prisoners might harm others.

What Is It

Wikipedia states that decision fatigue “refers to the deteriorating quality of decisions made by an individual after a long session of decision making” because of low mental energy or the volume of decisions in the assembly line. Decision fatigue may stem from having to make additional choices tires the brain in such a way that each subsequent choice becomes increasingly taxing. The brain creates shortcuts to conserve energy. When it is depleted, fast and careless choices may occur without much reflective analysis. The brain becomes lazier, impatient, or impulsive. It is easier to do nothing by avoiding change. This is commonly referred to as decision paralysis. There are other variants, including delegating the decision to others or being passive while others decide and going along with those choices.

A related, but not identical concept, was developed by Professor Roy F. Baumeister, a social psychologist at Florida State University in Tallahassee, Fla., called “ego depletion.” The theory derived from many experiments contends that there is a finite store of mental energy for exerting self-control and that the brain is like any muscle which become fatigued with use. It may arise from low glucose levels. Decision fatigue has been hypothesized to be a symptom, or a result of ego depletion.

Prof. Carol S. Dweck of Stanford University, on the other hand, challenges ego depletion theory based upon research from a 2010 study suggesting that “a person’s mindset and personal beliefs about willpower determine how long and how well they’ll be able to work on a tough mental task.”

The Bad & Ugly

Decision fatigue may derive from unconscious, psychobiological processes, in the context of a persistent cognitive, emotional and decisional loads. It is not a trait or character deficiency or immutable. It comes and goes dependent on the decision making paradigm.

The more decisions made at one “session” reduces the ability to concentrate and critical thinking. Making multiple decisions in a continuous manner is stressful. It can be exhausting and cause people to mentally shut down. The responsive phrase “whatever” comes to mind when people do not want to engage, dialogue, and debate a point—just move on. This is commonly referred to as “defaulting” to a standard option or choices made by others.

My own, and anecdotal, experience is that the shift from paper documents to computer screens is more physically and mentally taxing. There is little opportunity to daydream or pretend to be engaged when you face is plastered on multiple screens without any idea of what participants are looking into your eyes. Staying motionless and stoic are Zoom-skills being learned in a continuous, and likely, mindless, manner. Screens emit lights across a broad spectrum; paper is bland in comparison. I can participate in a full calendar day mediation process or arbitration hearing with the fraction of the energy expended in video conferencing, regardless of the number of screen-breaks. In person, we are able to move more, fidget, turn out heads about, and recover quickly when our minds wander to far-off places or across time. Of course, if you can just blank the screen and mute yourself while superficially engaging, personal energy is conserved. If you are the advocate, or neutral running the meeting, zoning-out while zooming-in is highly problematic.

What To Do

It has been said that President Barack Obama, Steve Jobs, and Mark Zuckerberg and other leaders have been known to reduce their own everyday clothing to one or two outfits in order to limit the number of decisions they make in a day. I recall a story told about Justice Thurgood Marshall who had tomato soup and grilled cheese in his chambers on a regular basis. When asked by the journalist xx Williams, about it, he replied that he was comforted by the simplicity and reliability of the routine. Busy people, when a choice does not really matter in the long, or even short, term, often fall into predictable behavior to minimize decision making. When I am in a group of people choosing an eatery or other social event, I usually do not want to clutter my mind or waste energy, so I say any consensus is “fine with me.” This also avoids potential conflict and empowering passive-aggressive types.

Sleep is important to sound decision making, so go to bed and stay there long enough. One Pennsylvania Supreme Court former Justice told me she sleeps 8 hours a night before any work day.

Break work periods into shorter sessions, ideally no longer than 90 minute stretches without a break. I find it odd that lawyers will prepare to present a case for days and then discount the importance of an lunch or other break away from all other participants. Standing, walking, and engaging with others for short periods of time is good for you. Small talk is healthy because it takes the lawyer out of a calculating and strategic mindset. Playing mental chess and games of chance with opponents is taxing. Eating or even replenishing by sipping or tasting sweet drinks, usually quickly restores glucose levels.

Develop your own methods and processes to make and confirm critical decisions. One method when confronted with multiple factors or issues, is to create a series of handwritten pie-charts to allocate importance between competing interests. Start by creating a list of all of the elements and aspects of the problem. Draw a circle and start placing them inside of it by creating slices of various sizes for each element. Adjust the sizes, including obtaining input from the client or colleagues. When you think you are done, put it aside, take a break and revisit the reasons for the allocation. You can also have clients or co-counsel do the same process

independently and compare results. Effective lawyering requires a measure of proportion by identifying priorities and relative challenges.

Another method is side-by-side comparisons, where only two items are analyzed at time, with one being selected as preferable to the other. This is a multiple round process with winner of a round facing the new challenger. This is what eye-doctors routinely do when fitting lenses by showing you two in a row and asking which one is better for you. Of course, it becomes more complex if you have more than one person as your client since they may differ, but it can still be useful to narrow the field by mutual elimination.

Every lawyer and judge should make deliberate choices on how they can best reduce decision fatigue. One of the benefits of the work-anywhere-anytime provided by smart phones, is that tasks can be spread out over a longer number of days and tackled in smaller bits. Perhaps you will have an insight while waiting for your table or in the car wash—take out your electronic self-extension and go to it!

Summary

It's about the energy levels. Sleep well.

Takeaways

- Marathon working sessions results in suboptimal decisions.
- Work at most 90 minutes before taking a break.
- Use methods such as pie charts, side-by-side comparisons to help focus.
- Exploit the upside of being phone-leashed to the ability to work anytime.

Notes

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