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Psychology and Persuasion in Settlement

By Stacie Feldman Hausner



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Back in the late 1800s, the great U.S. historian James Harvey Robinson observed that “most of our so-called reasoning consists in finding arguments for going on believing as we always

do.” Since then, many cognitive and behavioral studies have emerged to confirm Robinson’s observation and to explain that

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numerous cognitive biases exist that prevent people from accurately assessing the value of new and contrary information. These cognitive biases can have a large impact on whether negotiators are able to settle their disputes.

What are cognitive biases?

Our brains are complex machines that process enormous amounts of data each day. Because our brains don't often have the capacity to slow down and fully analyze all of this data, they tend to take mental shortcuts, called heuristics. Heuristics allow us to navigate millions of daily decisions with minimal cognitive effort. Heuristics are at play when you sense your "gut reaction," make a quick "common sense" decision, or when you somehow arrive at a location with very little thought in getting there. However, sometimes we use heuristics when we should in fact slow down our thinking and analysis before making a decision. In such scenarios, these heuristics can create predictable errors in rational decision-making called cognitive biases.

Of the hundreds of cognitive biases that exist, this article focuses on some of those that obstruct settlement negotiations by preventing people from accurately analyzing new and contrary information. Specifically, this article addresses the cognitive biases of selective perception and memory, confirmation bias, reactive devaluation, and fundamental attribution error. These cognitive biases lead people to automatically discount and devalue newly introduced, contrary information, and instead, to erroneously base their decisions on previously held values, preferences, and beliefs. In turn, these biases impede settle-

ment because they prevent accurate analysis of information that could shift perspective about the nature of their adversaries, the value of their cases, the risks of trial, and the benefits of settlement.

Selective perception and selective memory occur when people remember and see what they are preconditioned to believe that they will remember and see, and, in turn, discard events and information inconsistent with these preconceptions. Confirmation bias is similar in that it causes people to evaluate new information in a way that favors their pre-existing beliefs and ignore or devalue information that challenges or disconfirms those beliefs. This occurs because people are psychologically uncomfortable considering data that contradicts their viewpoints. These biases can explain why a plaintiff in an automobile accident case, who was in the intersection at the time of the accident, will honestly remember that they had a green light to enter the intersection, even when the defendant introduces witnesses and an array of contrary information.

Reactive devaluation also shares similar qualities to the others in that this cognitive bias occurs when people discount an adversary's ideas and information simply based on distrust of the adversary. In settlement negotiations, we often see this when a person rejects a settlement idea that can benefit everyone simply because it originated from an adversary. Mediators can effectively counteract reactive devaluation simply by presenting settlement options and contrary information as though they have originated from the neutral mediator, rather than the distrusted adversary.

Finally, fundamental attribution error can impact settlement negotiations because it

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also prevents people from accurately considering new information. It occurs when people ignore the actual events and factors con-

tributing to litigation, and, instead, blame their adversary’s ulterior motives for the conflict. We see this in settlement when a defendant complains that a plaintiff is asking for large settlement amounts only because he is greedy, or, alternatively, when a plaintiff complains that an insurance company is not offering enough money because it is uncaring and stingy. In both scenarios, the parties blame the perceived characteristics of an opponent, rather than slowing down to analyze why the other is valuing the case at such numbers. Unfortunately, fundamental attribution error also can prevent the parties from reaching creative resolutions because the lack of trust can make it difficult to believe in true win-win settlement agreements.

To enhance settlement opportunities with cognitively biased people, we can and should try to weaken the interference of these biases on people’s rational and realistic evaluation of their cases. We can look to the seminal work of Robert Cialdini who, in 1984, wrote *Influence: The Psychology of Persuasion*. In this book, Cialdini analyzes social scientific experiments to determine how people can persuade others to make decisions that they ordinarily would not make. He found some basic principles of persuasion. Like many marketers who borrow these principles to capitalize on the predictable buying patterns of potential customers, we can use these same principles to persuade people to engage in productive negotiation behavior that will marginalize cognitive biases and improve the chances of reaching favorable settlement results.

The first Cialdini principle of persuasion that can diminish cognitive biases in negotiation relates to the principle of “affinity” or “liking.” Cialdini found that people tend to be most persuaded by people with whom they can relate, connect, and cooperate. In short, people tend to be persuaded by people they “like.” Despite the clear indications that you can get more from someone who “likes” you, oftentimes attorneys will enter into settlement negotiations with a genuine hostility towards opposing counsel. Because disputants generally dislike each other due to their conflict, it is essential that opposing counsel maintain a respectful and cooperative relationship that creates this “liking” social obligation. Counsel should work together to grant discovery extensions and accommodations, when feasible, and to avoid toxic communications. By doing so, counsel can create a “liking” dynamic that will increase the chances of getting what they ask for during litigation and settlement negotiations. Additionally, if the other side likes them, it will naturally counteract some of the fundamental attribution error distrust and reactive devaluation that comes from being on opposite sides. This “liking” dynamic can also help opponents work collaboratively to focus on solutions and problem-solving, thereby marginalizing the impact of confirmation bias and selective perception/memory. Conversations will focus on the future where the cognitive biases are less strong, rather than assessments of fault and blame in which new information commonly is introduced to change perspectives about events surrounding the conflict. Accordingly, the biases triggered by new, contrary, informa-

tion will be marginalized if negotiators strategically use the principle of “liking” to their advantage.

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Second, settlement negotiators can use Cialdini’s Rule of Reciprocity to minimize the impact of reactive devaluation on settlement

negotiations. This rule states that when people receive value from others, they feel socially obligated to repay the favor by giving something in return of equal or greater value. That means, in settlement negotiations, if you treat biased people respectfully, they likely will reciprocate respectful behavior, and in turn, you can lessen the impact of reactive devaluation and fundamental attribution error. Similarly, if you treat biased people's introduction of new, contrary, information with a slow-thinking analysis that gives it proper consideration, you may receive reciprocation of the same slow-thinking analysis that weakens the impact of selective perception/memory and confirmation bias by diminishing the automatic discounting of this type of information.

The Rule of Reciprocity can also be used strategically to enhance settlement results. Negotiators can make generous concessions and hope that the rule will socially obligate the other negotiators to do the same, thereby moving the negotiators into a closer range of settlement. You can also use the rule to help find creative win-win resolutions in settlement that are often difficult to find with people that have reactive devaluation and fundamental attribution error because of their automatic rejection of settlement ideas from adversaries. Consider what interests underlie the positions in the negotiation. In other words, consider what is important to you and what is important to the other side. If you act generously by agreeing to give the other side something important to them that is less important to you, they likely will repay the favor by acquiescing to your settlement request, thereby creating a win-win

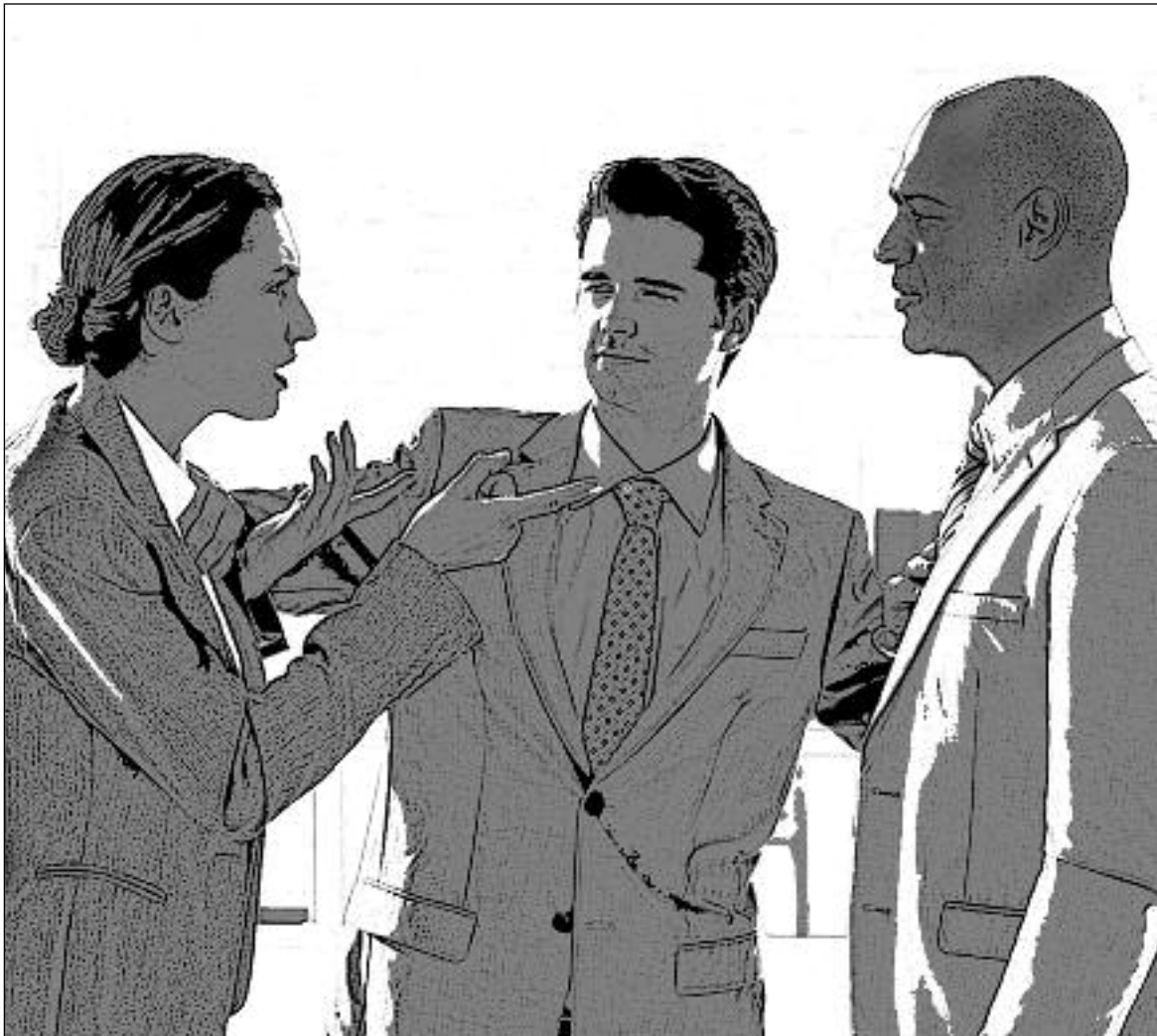
resolution. Similarly, if you work to collaborate with them to find areas for agreement where your interests overlap, they too will reciprocate the negotiating behavior and look to do the same. As a result, you will have a win-win settlement agreement, despite cognitive biases that could have otherwise prevented you from doing so.

Third, settlement negotiators can use Cialdini's principles of consensus/social proof to counteract some of the cognitive biases. Cialdini found that people tend to observe what others are doing in order to decide how to act. This can explain why a child who cannot ride a bike one day, can master the skill the next day after watching his neighborhood friends ride. Using this principle, you can encourage the negotiators to engage in productive settlement behavior by finding areas for agreement early on regarding unimportant issues, or even with regard to the process of the negotiation. Once people are working to find agreement on issues, the social obligation of consensus will encourage the parties to continue to put effort forth toward settlement. This consensus toward finding settlement is particularly helpful in diminishing the cognitive biases because it puts people in the problem-solving mindset, instead of getting bogged down in discussions about fault and blame.

Similarly, as with the rule of reciprocity, if biased people are exposed to other's slowed-down and analytical thinking about new information, they may become more inclined to do the same. You can help slow down the analysis and marginalize the cognitive biases' automatic discounting of contrary information through the following techniques: ask-

ing the biased person to summarize the position of opposing counsel, asking questions

providing objective, raw data that is more difficult to disprove, or using analogous situ-



that force the biased person to analyze the situation (rather than directly attacking a biased person with contrary information),

ations to demonstrate new information (because biased people have difficulty accurately assessing contrary information as it

relates to their own situation).

Fourth, Cialdini's concepts of commitment and consistency also can impact settlement negotiations. People value consistency and will often take positions consistent with their earlier positions just to avoid looking untrustworthy. Therefore, this social concept actually can enhance confirmation bias in that people are unwilling to consider other perspectives and give weight to contrary information. Early settlement discussions may be beneficial to counteract this principle because it allows parties to make concessions and reach an agreement before they become entrenched in a position. If the settlement discussions occur later in the litigation process, you can counteract the impact of the cognitive biases and social concept of consistency by not giving absolute valuations of your case. Instead, think of the litigation process and settlement discussions as a fluid process in which evaluations of the case are supposed to be refined and updated as the process reveals new information, challenges, and risks. In fact, you can frame the language of settlement negotiations as commitment and consistency in problem-solving and finding a reasonable resolution to the case, rather than framing it in a way that could create a perception that a person is acting inconsistently with previously held positions.

Finally, Cialdini settlement negotiators can use the concept of scarcity to overpower any negative impact of a cognitive bias on settlement. Scarcity essentially states that fleeting offers and scarce commodities are more desired than those that are plentiful and readily available. This explains why settlement agreements are often reached at the

end of the day or right before trial, as time is expiring. You can use this to your advantage by avoiding conversations about fault and blame that impact the cognitive biases, and instead, by invoking the scarcity principle by making settlement offers with a time-expiration. The fact that the settlement offer will not be open after the day may be enough pressure for a cognitively biased person to ignore pre-conceived beliefs and accept an offer before it's too late.

Henry David Thoreau expressed the importance of considering different viewpoints when he asked, "Could a greater miracle take place than for us to look through each other's eyes for an instant?" It is exceptionally important that people understand conflicting perspectives in a dispute so that they can resolve their disputes effectively and move forward in their lives. Yet, as demonstrated here, cognitive biases prevent people from actually considering each other's viewpoints. We can and should work to identify cognitive biases that interfere with this important task and use Cialdini's principles of persuasion to counteract their adverse impact. In turn, hopefully we will improve our chances of reaching favorable settlement outcomes when bargaining with cognitively biased people.

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Stacie Feldman Hausner spent 15 years as a litigator at both a defense and plaintiff law firm, and is now a mediator at ADR Services, Inc. She specializes in business, personal injury, employment, real estate, construction defect, and entertainment law disputes. She has an LLM in Dispute Resolution from the Straus Institute at Pepperdine University School of Law, where she also teaches.