



## Cognitive biases in mediation

### WHAT LAWYERS MUST KNOW ABOUT BIASES IN ORDER TO OPTIMIZE MEDIATION OUTCOMES

Whether we realize it or not, we are *all* biased in some way and to some degree when making decisions. Decades of research by cognitive psychologists and behavioral economists have revealed that human beings are significantly influenced in their decision-making by psychological impediments known as cognitive biases. To most readers, many of these biases may feel familiar, intuitive even. But, the impact that they can have in settlement negotiations is substantive and the best ways for dealing with them may not be as intuitive. This article will help explore the most prevalent, and troublesome, cognitive biases in mediation and offer guidance and recommendations for minimizing their impact on settlement outcomes.

#### What are cognitive biases?

The human brain is a complex and effective machine that processes an enormous amount of sensory data daily for decision-making. But it cheats a little because it lacks the capacity to fully analyze all of this information. The fancy term for this is “heuristics.” Perhaps some of the more common terms you may associate with this is “gut instincts,” “first impulses,” or even “common sense.” Essentially, heuristics are mental shortcuts that allow people to make judgments quickly and efficiently with minimal cognitive effort. As you may imagine, the mental shortcuts use little information and fast reasoning to arrive at decisions. Generally speaking, these shortcuts work well in helping people navigate the millions of decisions that they make each day.

However, sometimes heuristics get in the way. When situations are complex, the brain needs to slow down a moment and

delve more deeply into an analysis. The brain’s failure to do so leads to predictable errors in rational decision-making called cognitive biases. Cognitive biases are troubling because they cause people to make decisions based upon the inferences and assumptions common in heuristics, rather than a slow, rational analysis. Effectively, cognitive biases cause people to make decisions based upon their previously held values, preferences and beliefs, regardless of any new and conflicting ideas and information. Sir Winston Churchill clearly understood this when he stated, “Where you sit depends upon where you stand.”

#### Cognitive biases in mediation

In mediation, cognitive biases frequently corrupt the rational decision-making of the attorneys and their clients because a slower analysis is necessary given the complexity of disputes. Specifically, biases tend to impact how clients and their counsel perceive the character and motivations of their adversaries, the causes of the dispute, the value of their cases, the impact of new evidence, and even chances for success at trial. In fact, the biases may be exaggerated in mediation because the heightened emotions common in conflict often cause people to react impulsively rather than slow down to analytically think and communicate.

Psychologists have identified hundreds of cognitive biases and heuristics that impact rational decision-making. Some of the most common in mediation include confirmation bias, reactive devaluation, fundamental attribution error, selective perception

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and memory, risk aversion, loss aversion, anchoring bias, sunk cost bias and optimistic overconfidence. By recognizing these biases and learning tools to minimize their impact, attorneys can optimize outcomes for their clients.

### **Biases that prevent accurate assessment of new information**

#### ***Confirmation Bias***

Confirmation bias causes people to evaluate new information in a way that reinforces their pre-existing beliefs and ignores or devalues information that challenges or disconfirms those beliefs. This is similar to the idea of cognitive dissonance, which essentially means that it is psychologically uncomfortable for people to consider data that contradicts their viewpoints.

The parties and their attorneys fall prey to this bias in litigation because of the very nature of litigation. Litigation is designed for each side to work to justify their positions legally and factually, while discounting their opposition's position. In fact, lawyers are trained to take this gladiator-like, competitive approach in litigation, which often enhances confirmation bias. This bias specifically impacts settlement discussions because lawyers and their clients may believe that they are making competent and fair decisions when evaluating their cases for settlement, but in reality, they may be discarding or diminishing contrary data that would help produce a more accurate assessment of the case value.

When confirmation bias is present, contrary information that usually tends to shift an opponent's perspective no longer has that effect. Rather, it can further entrench biased people in their settlement postures because they tend to discount contrary information, making them feel even stronger about their case evaluation. You may recognize this as the impulse to "dig in."

#### ***Selective perception and selective memory***

Psychological experiments have shown that people with selective perception and selective memory often see and remember what they are preconditioned to believe they will see, and discard events that are inconsistent with these

preconceptions. This bias can negatively impact settlement discussions because it impacts how people see and recall information during litigation and settlement discussions. During settlement discussions, depositions, or even when explaining a case informally to an attorney, biased people tend to recall events surrounding the conflict in a way that supports their position. They will not see or remember information that may support the other side, thereby leading to an inaccurate assessment of case value for settlement purposes.

#### ***Reactive devaluation***

Reactive devaluation occurs when people discount an adversary's ideas simply because of a general distrust for an adversary. This bias can have a significant impact on settlement discussions when a neutral is not present because all of the opposition's ideas and information that could shift perspectives is discounted as originating from the adversary. Mediators can diffuse much of this bias by messaging, asking questions and providing ideas without attachment to a source. But in general, reactive devaluation often has a strong presence in conflict, and accordingly, in settlement discussions.

#### ***Fundamental attribution error***

Jeffrey Zaslow, a senior writer for the Wall Street Journal warns, "we blame because we lack skills to problem solve... creating hostilities, scapegoats and an avoidance of hard decisions that could actually solve problems."

Fundamental attribution error is just that. It occurs as a rapid, quick-thinking response when people ignore the actual acts, events and conditions that may contribute to litigation, and instead, blame adversaries' ulterior motives for a conflict. This bias is prevalent in mediation. We see it when settlement discussions focus on the presumed motives of the opposition rather than an analysis of the facts of the case. In turn, this is problematic for settlement because it causes parties to unrealistically evaluate a case for settlement. This bias can be particularly problematic for cooperative or collaborative settlements

because biased people's general distrust about the motivations of an adversary makes it difficult for them to collaborate with the other side to create win-win settlement outcomes.

### **Minimizing the impact of the cognitive biases**

Attorneys can minimize the impact of these biases on settlement outcomes by recognizing when they exist and developing the skills to minimize their adverse impact.

First, because these cognitive biases are often caused by quick, reactive-thinking heuristics, the best strategy is to try to slow down the thinking and analysis of biased people. Try asking open-ended questions about the case so some slow-thinking analysis is required, rather than "yes" and "no" answers. Essentially, draw things out a bit. It can also be helpful to ask for a summary of positions and evidentiary support because it also triggers a slower analysis of the case. It is important to avoid direct attacks of the biased person's position because that often triggers quick-thinking defensive behavior that may actually strengthen, or reinforce, the bias.

Second, because biased people instinctively discount contrary new information, the type of new information offered will matter. Use objective raw data when possible because there is less subjectivity and room to discount the veracity of the information. Try using comparative verdicts or analogous situations when presenting new information. Biased people, who discount new information that directly conflicts with their preconceived beliefs, may be able to consider it in an analogous situation. Ideally, the analogy will cause a biased person to slow down the thinking and apply the analogy to the evaluation of the case.

Third, attorneys can shift the conversation to a forward focus of problem solving. Conversations about the past, as analyzed when discussing fault and blame, are the exact type of conversations that biased people discount when conflicting with their own beliefs, values and notions about what happened in the

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past. There is no problem settling a case without consensus or mutual understanding as to fault and blame. Henry Kissinger acknowledges the ability to do so when he stated, "We agree completely on everything, including the fact we don't see eye to eye." Therefore, focus on problem solving to avoid the cognitive bias trigger. Besides, problem solving conversations have the added benefit of making both sides view one another as collaborators, rather than adversaries. These collaborative conversations avoid the competitive arousal and the need to win that can lead to these biases.

Fourth, when contrary information is not persuasive at changing a perspective and there are no fruitful discussions about settlement options, try to frame discussions in terms of emotions. Discuss the terrible emotional hardship of the conflict and the psychological benefit in resolving the case at the mediation. However, tread cautiously when discussing suffering because it can trigger a negative and toxic environment when one side feels that they are the only victim to the conflict.

### Share the mediation brief

Fifth, attorneys should share their mediation briefs with opposing counsel prior to mediation because of cognitive biases. The sharing of a mediation brief is not a favor to opposing counsel, but rather, an enhancement of an attorney's influence at the mediation. Amongst other things, in mediation, both sides attempt to get the other side to understand their perspective in hopes of evaluating the case more similarly. A mediation brief is an exceptionally effective tool for doing so, because it clearly and persuasively lays out the legal and factual strengths of one's position outside the context of the mediation. It allows for biased readers to slow down, analyze and understand the oppositions' positions in a quiet environment before the conflictive, emotional and reactive environment of the mediation that often emboldens cognitive biases. After all, it is much more difficult for a mediator to change a person's perspective during a mediation

when the person is learning of a legal argument, applicable case law, or new evidence for the first time in the mediation. Therefore, use the mediation brief as a tool to optimize your settlement outcome.

Furthermore, a well-written brief can be an opportunity to garner additional settlement authority from ultimate decision makers who are not present at the mediation, such as the senior decision makers for insurance carriers and board members of a company. These people are not privy to the information and positions learned as the mediation unfolds, so these briefs can be strategic for improving client outcome. Oftentimes, attorneys are reluctant to share their briefs because of concern that they will disadvantage their cases by revealing too much of their position to the opposition. However, this need not be a concern because confidential information, "smoking guns" and legal arguments can be removed from the brief and provided privately to the mediator.

Sixth, mediators can be particularly helpful when the cognitive biases of reactive devaluation and fundamental attribution error are strong. Naturally, mediators can combat some of the negative impact of these biases simply because of the fact that they are neutral. Their messaging and presentation of new information is not automatically discounted in the way it may be when communicated by an adversary. Mediators ask questions and propose ideas as though they originated from the mediators themselves, rather than the adversary. In fact, skilled mediators can ask questions in a way that makes biased people believe that an idea originated from them, which is even better, because people tend to favor their own ideas.

### Learn from marketers

Finally, attorneys can use some of the tools employed by marketers who are trying to influence behavior. In 1984, Dr. Robert Cialdini wrote a seminal book about influence in marketing, called *Influence: The Psychology of Persuasion*. Within this book, Dr. Cialdini described

several behavioral triggers that induce people to behave in automatic, predictable manners. One of the triggers he describes involves the Rule of Liking. Dr. Cialdini studied women at a Tupperware party and found that the women were more likely to purchase Tupperware when they "liked" their hostess. He further concluded that people tend to like others based upon similarities, contact and cooperation.

This concept can be utilized to induce others to behave in advantageous ways during litigation and settlement. Simply put, they should try to make the opposing side "like" them so that the cognitive biases associated with distrust for an adversary become marginalized. They should treat the other side during litigation with respect and dignity, including during depositions and court hearings. They should have contact with the other side in a respectful manner and act cooperatively when possible. They should offer extensions to the other side and produce informal discovery when requested if its not detrimental to their case. They should also act cooperatively in settlement by taking an attitude of problem solving and resolution, rather than fighting. After all, recognizing the importance of collaboration in settlement is helpful because people are unwilling to settle if they feel like they are losing something by entering an agreement. They should look to create these win-win settlements. Therefore, it is exceptionally helpful to optimizing settlement outcomes if you are "liked" by the other side of the conflict.

Additionally, attorneys can use Dr. Cialdini's Rule of Reciprocity to prevent reactive devaluation from negatively impacting settlement optimization. The Rule of Reciprocity states that when people receive value from someone, they feel the need to return the favor by giving back equal or larger value. That means, if an attorney grants extensions and informal document production to the other side, they are likely to be treated with the same kindness. Similarly, if an attorney makes generous concessions during settlement discussions, it is likely that opposing counsel will do the same.

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Respect begets respect. Kindness begets kindness. Therefore, use this influential tool to minimize the negative impact from reactive devaluation and the lack of trust associated with viewing someone as a true “adversary.”

### Risk aversion/loss aversion

Behavioral economic studies have revealed that people make different decisions regarding risk depending upon their perception of whether the risk involves a gain or a loss. People tend to be risk averse when they want to protect a sure gain and risk seeking when facing a sure loss. This can negatively impact a mediation, as a defendant may prefer the risk of trial to the sure loss of money from a settlement payment, whereas a plaintiff may prefer the sure gain of a settlement payment, rather than the risk of trial.

Mediators work tenaciously to frame language so that parties perceive settlements as “gains” rather than “losses.” They help defendants view concessions made by plaintiffs during settlement negotiations as tangible “gains” to the defense. Brackets also can help because they reenergize stale negotiations that are moving toward an impasse by providing settlement offers and demands within a reasonable range. Once the range is reasonable, both sides view concessions made by the opposition as “gains.” This explains why many cases tend to settle at the end of the day, when the settlement range is relatively close. After all of the work, neither party wants to walk away from the “gains” made during the negotiations. Therefore, to prevent risk and loss aversion from creating an impasse to settlement, use language that frames settlement in terms of gains, frames litigation costs in terms of losses, and be open to using brackets to reenergize a stale mediation.

### Anchoring bias

The anchoring bias occurs when people make assessments and drive decisions based upon earlier numbers that have been used, despite their accuracy.

This appears in mediation when the opening “anchor” number offered in the negotiation is used to drive concessions and serve as a reference point to an acceptable final settlement amount. This anchoring can be problematic because it need not be attached to any real evaluation of the case. Accordingly, some lawyers react strongly when the opposition begins with an outrageous anchoring number in the negotiation.

It is best to take a deep breath when this occurs. The anchoring number usually has very little bearing on the final settlement figure. Cases tend to settle at the midpoint between the first “reasonable” offer and demand, not the midpoint of anchoring numbers. People who make outrageous anchors tend to make equally absurd and large concessions to prevent an impasse in the negotiations. These concessions message as much, if not more, about the ending settlement figure, so it is best for you to just devise your own negotiation strategy and not be overly concerned with the opposition’s strategy.

Anchor at a number that is extreme enough to allow you to make concessions but not too extreme as to insult the opposition. When the opposition is insulted, they tend to want to leave the negotiation or reciprocate by negotiating in bad faith. Therefore, it is best to make a reasonable and flexible negotiation plan and not worry too much about the opposition’s anchor.

Nonetheless, if you are particularly concerned about the opposition’s extreme anchor and its impact on settlement, ask questions. Ask the opposition to explain the basis for the anchor and to attach it to recoverable damages at trial. Even if these questions do not persuade a change in the anchoring number, it will slow down the thinking to perhaps minimize this cognitive bias. Consequently, it may allow you to extract larger future concessions and a more favorable ultimate settlement number.

### Sunk-cost bias

Sunk-cost bias occurs when people decide to spend more money in order to

justify an earlier unsuccessful decision. In business, it is the common notion of “throwing good money after bad.” Logically, people should not consider past money spent when making decisions about the future. Yet people with this bias in mediation may reject a reasonable settlement amount and proceed to trial simply to justify the amount of the money already spent in pursuing the litigation. Intuitively, to prevent this bias from creating an impasse, simply do not speak about past money spent when negotiating settlements. But rather, focus conversations on the future, including settlement options and required future expenditures should the case proceed to trial.

But this can become more complicated when the case allows for the potential recovery of attorney fees because oftentimes plaintiffs want to include them in settlement discussions and valuations of the case. If these discussions are creating an impasse, lawyers can ask to bifurcate the discussions so that a reasonable settlement amount is first negotiated and then, separately, a settlement amount for attorney fees is negotiated. The positive feelings from settling the underlying dispute may then encourage a more expeditious and cooperative settlement of attorney fees.

### Optimistic overconfidence

Most psychologists and law professors believe that optimistic overconfidence is the reason for the most significant decision-making failures. It occurs in litigation when one side attributes its litigation skills as the reason for past favorable litigation outcomes, and therefore, overestimates its chances of winning at trial while underestimating the opposing case. This bias tends to become more exaggerated when lawyers have less information about their cases. Unfortunately, the result of this bias in mediation is that people have too extreme of settlement positions based upon an unrealistic analysis of risk at trial. In other words, they think that they are so skilled that they overestimate their chances for success.

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When this bias is present in the opposing side, avoid discussions about likely outcomes at trial and the litigation skills of the biased person. Instead, discuss the facts surrounding the case. Factual discussions help give attorneys more information about the case and slow down the thinking and evaluation, both of which are helpful in combatting this bias. Additionally, contrary factual information can minimize the bias to the extent it causes attorneys to view the case with more pessimism. Pessimism is a great antidote to optimistic overconfidence because it triggers a negative mood that may stimulate an examination of the facts and generate the type of creative thinking that can help resolve cases. Finally, try minimizing the bias by focusing discussions on solutions, rather than the skill of competition at trial. It certainly would be helpful to reaching a settlement if these biased people apply their optimistic

overconfidence views to being expert problem solvers.

### Conclusion

Over 150 years ago, long before any cognitive studies emerged, famed historian James Harvey Robinson observed that “most of our so-called reasoning consists in finding arguments for going on believing as we already do.” He knew then what we have proven now, that cognitive biases exist and can influence the way we make decisions. Identifying them and minimizing their impact on settlement can assist in optimizing client outcomes and the unnecessary difficulty in getting there.



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