

The Role of Cognitive Bias in Settlement

By Amy Lieberman

As lawyers, we like to think that our analyses and judgments that guide our advice to our clients are based on sound logic and objective evaluation. The reality, however, is that our thinking is influenced by *cognitive biases*. While this is true for individuals generally, there are certain biases that affect lawyers in particular. These biases influence our view on resolving a case, rejecting an offer and pressing forward to trial.

What is a Cognitive Bias?

This is a mental shortcut we take, based on our fundamental desire to simplify processing of complex information. Cognitive biases are reactive rules of thumb we employ to help us make decisions quickly. Such shortcuts can be *positive*, allowing us to process information and make quick decisions. But they can also

be *negative*, causing us to make mistakes when we act on information assuming we are acting logically and appropriately, when we may be reacting instead based on a cognitive bias. Cognitive biases limit our thinking, and cause us to have flaws in judgment, leading us to overstate risks, or underestimate them.

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While there are more than a dozen cognitive biases identified by psychologists, here are a few examples particularly applicable to resolving legal disputes.

Confirmation bias causes us to favor information that confirms or validates our existing opinion, and to discount information that does not do so. As a general rule, we like people who are like us and who think like us (ever notice how many of your friends are lawyers?); and, we like people who agree with us. Conversely, we tend to avoid people who disagree with us or make us

insecure about our views because this creates cognitive dissonance.

For lawyers this bias is ingrained. From the beginning, we are trained to gather information that validates and supports legal positions. We find cases to serve as precedent or otherwise be persuasive when we write and argue motions to the court, and distinguish those that are not supportive. We review and select facts that support our case to argue, persuade, and ultimately, to win for our clients; we minimize facts that may be harmful.

This training becomes habit and influences the way we think in other venues. In mediation, this bias can cause an attorney to quickly reject arguments that the other side presents or views contrary to the analysis that the mediator offers. It is important to remind ourselves to take a step back when we are vehemently resisting arguments.

Sunk-cost bias refers to the feeling a person may have when they have already invested so much money or time into a lawsuit. While one effect of this investment can be the strong desire to just be done, this bias creates the opposite feeling and can lead a lawyer or client to ignore the potential likelihood of an adverse outcome, and refuse to consider a reasonable settlement.

Halo-effect bias refers to our tendency to make biased judgments because we are influenced by someone that we perceive as likable. If we perceive a person as attractive and successful, we are more likely to assume they are intelligent, experienced

Amy L. Lieberman is a full-time professional mediator of employment and business conflict. She has repeatedly been listed in the Best Lawyers in America, Southwest Super Lawyers, and Arizona's Finest Lawyers in alternative dispute resolution, and is the author of the book, "Mediation Success: Get it Out, Get it Over, Get Back to Business." Visit her website at www.insightmediation.com, or call Amy at (480) 246-3366.





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and knowledgeable – and that their opinion or evaluation is correct.

If a lawyer has a great track record in court, clients and even opponents may believe that lawyer is likely to win their case. While highly-skilled and experienced lawyers have a better chance to win in court than those who are not, every good lawyer has lost a case.

This bias is a positive factor in mediation. Assuming the parties have reviewed the background of their selected mediator, they will perceive the mediator as being highly experienced and successful, and should be more receptive to input and guidance.

Fundamental attribution bias, also known as the self-serving bias, refers to our tendency to take personal credit for our success, while blaming outside sources for our failures. We believe that our successes are due to our own internal talents, whereas our failures are caused by variables outside of our control. If a lawyer wins a case at trial, he may state that it was because he was a great advocate. However, if he lost, he would say the loss was due to the political climate, bad jury instructions, or the terrible job that a witness did on the stand.

While attribution bias works positively to preserve our self-esteem, it also allows

us to absolve ourselves from personal responsibility. In mediation, if a case did not resolve, was it because the other side was uncooperative or unrealistic? Or, upon closer reflection, might there be something more we could do to move the process forward?

The Bottom Line

One of the reasons mediation is so often successful is that the neutral third party does not have the cognitive biases of the advocate. When it comes to evaluating cases for settlement, be mindful of the influence of your own cognitive biases, and enlist the mediator’s help to accomplish a more objective reality check.