



Recognizing and embracing cognitive bias in mediation

IF YOU CAN MASTER ONLY ONE MEDIATION SKILL, UTILIZING COGNITIVE BIASES WOULD BE AN EXCELLENT CHOICE

A trial lawyer's career will likely involve dozens or hundreds of mediations. The facts of each case will be different. The applicable law will change. Different parties, attorneys, judges, and jurisdictions will be encountered. The one constant that impacts all mediations is the existence and operation of cognitive biases. If only one mediation skill can be mastered, utilizing cognitive biases would be an excellent choice.

Nature of cognitive biases

A cognitive bias is a subconscious error in the human thinking process that influences decision-making. For example, confirmation bias – the tendency to only consider information that aligns with our preconceived ideas – limits the information we consider when making decisions. Have you ever found yourself only reading news stories that support what you already think?

As discussed below, other cognitive biases in mediation lead to self-defeating overconfidence, undervaluing the strength of an opposing argument and missed opportunities. Because distortions caused by cognitive biases operate on *everyone* in negotiations, it is essential to perceive impacts not only on an opponent but also on *oneself*.

Origin of cognitive bias – heuristics

A natural, organic process of the human brain is the development and use of mental shortcuts in decision-making. The human body does this because it is hard-wired to protect and conserve resources, especially energy. Psychologists call these mental shortcuts “heuristics.”

The brain uses these shortcuts to automatically and quickly make decisions based on little information with minimal cognitive effort, thereby preserving energy. For example, you see a person in a dark alley with their face concealed and intuitively decide to walk past a bit faster. These shortcuts are beneficial for making the millions of decisions people make in daily life that don't require deep thinking.

Heuristics save time by instantly drawing upon information that is stored in the brain rather than evaluating each decision as new and different. This process, however, also results in cognitive biases, which cause us to draw incorrect conclusions

about *new* information and circumstances. (*Daniel Kahneman et al.*, Judgment Under Uncertainty: Heuristics and Biases (1982).)

Cognitive biases in mediation

Cognitive biases influence our decision-making process by drawing us to conclusions. Information gathered and stored in our brains predisposes us to these conclusions. Our decisions are subconsciously based upon information our brain selects that meets our preconceived ideas, prior decisions on a similar issue, self-interest, and emotional distractions – regardless of any new or conflicting ideas and information. Too often, the result is poorly informed and poorly reasoned decisions.

There are hundreds of cognitive biases that impact analytical, rational decision-making. Among the most common in mediation are confirmation bias, reactive devaluation, anchoring bias, frequency bias, and optimistic/overconfidence bias. (*Munsinger and Philbin*, The Psychology of Relational Disputes, *Cardozo Journal of Conflict Resolution*, Vol.18:311 (2017).)

Confirmation bias

Confirmation bias causes us to seek out or consider only information that supports our preconceived desires or conclusions; we “cherry pick” instead of considering information available from all sources. (*Kahneman et al.*, *supra*.) It is related to cognitive dissonance, the psychological discomfort from confronting data that conflicts with our viewpoint.

We use confirmation bias when making decisions for multiple reasons. It is easier and faster than carefully processing all the information. It relies upon information pre-stored in our brains, saving time and energy. It protects our self-esteem when our preconceived ideas are validated.

Anchoring bias

Often, parties are heavily influenced by expectations formed at the beginning of the mediation; opening numbers are important. Anchoring bias operates to influence parties throughout the mediation based upon earlier numbers that have been initially put out regardless of their merit or realism. It arises in mediation when the opening “anchoring” offer is the starting point for negotiations.

Anchoring bias arises because of our need for a starting point in our decision-making and the convention of “demand and offer” in negotiations. (*Thaler and Sunstein*, *Nudge* (2008).) The initial “anchoring” number can substantially impact the outcome of mediations, even when the ‘anchoring number’ is inaccurate or viewed by the recipient as extreme.

Reactive devaluation bias

The generally hostile litigation environment fosters reactive devaluation, discounting an opponent's information or argument simply because it came from the opponent. The unspoken premise is that the opponent is inherently manipulative and untrustworthy. Hence, reactions like, “That can't be right because it came from them,” or, concerning a proposed solution, “It's a trick if they offered it.”

A Cold War experiment by social psychologists Lee Ross and Constance Stillingr described in their 1988 book *Psychological Barriers to Conflict Resolution*, quantified the magnitude of this reactive devaluation bias. The leader of the Soviet Union, Mikhail Gorbachev, proposed reducing nuclear warheads by one-half, followed by further reductions over time. Ross and Stillingr took turns attributing the proposal to U.S. President Ronald Reagan and Gorbachev. The surprise was not that the group reacted differently to the same proposal depending on its source, but the wide degree of difference. When attributed to the U.S. president, 90% responded favorably. That favorable reaction dropped by over half to 44% when attributed to the Soviet leader.

Frequency bias

Frequency bias is at work when something you've recently learned or become aware of appears to be happening more frequently than it is. In psychology circles, it is also known as the Baader-Meinhof Phenomenon, named after the German terrorist group of the 1970s.

Frequency bias occurs because your brain becomes more attuned to noticing things you've just learned about, leading you to perceive them as more common or frequent in your environment. In reality, the frequency of occurrence remains unchanged; it is perception that has

changed because of the influence of new knowledge. For example, when people hear about a string of robberies or vandalism in their community, they are more likely to believe that a national crime wave is occurring. Another example that plays out at mediation is when a party repeatedly references a recent verdict in their favor to create the negotiating environment they want.

Optimism and overconfidence bias

The optimism element of this bias helps us believe that most things will work out and we can look forward to a good outcome. Optimism is generally good, motivating us to create a better life and future. At the same time, optimism can impair our ability to see a legal dispute accurately by overestimating strengths and underestimating weaknesses.

The overconfidence aspect of this bias occurs in litigation when one side believes its legal skills primarily account for past favorable outcomes instead of the facts. This bias also leads to overestimating the chances of prevailing at trial and downplaying success for the opposition.

Combining these elements in the optimism/overconfidence bias can be fatal to mediated outcomes. Many scholars and scientists who have studied this believe that optimism/overconfidence bias is the primary cause of the most significant breakdowns in the decision-making process, which leads to failure. It is even more of a factor when attorneys know less about their cases, resulting in more extreme settlement positions based on an unrealistic view of trial outcomes.

Working with cognitive biases in mediation

The nature of cognitive biases is that they arise out of fast and automatic thinking with little information and minimal consumption of effort and energy. To counteract cognitive biases, slow things down and employ deliberate, conscious processes that solve problems by analyzing, weighing, and judging all the evidence. Mediation gives you the time and space to do this. For example, when you suspect your opponent is suffering from confirmation bias, through the medium of the mediator, inquire whether all the evidence is being

considered regardless of its source, who it favors, and if it has been objectively evaluated. You will likely need to supply the missing evidence and articulate its objective impact. Open-ended questions you can formulate for the mediator work very well to that end.

Remember that cognitive biases are not selective, they operate on everyone. Therefore, while investigating cognitive biases impacting your opposition and what you can do to overcome them, the same analysis should be conducted on yourself.

Beginning with yourself, use the cognitive biases discussed above as a checklist or grid and run your positions and valuations through them. Are you sure you are not unwittingly employing unwarranted thinking shortcuts? Are your positions and valuations the product of a conscious, deliberate thought process that considers all of the evidence? If your answer to either question is anything other than an unqualified "yes," you probably have distortions about how you see yourself, your opponent, and/or the subject matter.

Do the same thing with the positions and valuations of your opponent. If cognitive bias is detected, engage in a deliberate process of comprehensive thinking and try to accomplish the same with your opponent through the mediator. The following are a few tested suggestions for addressing specific biases that can be perceived to affect an opponent:

Confirmation bias

In addition to bringing the slower, more deliberate thinking into play through the mediator and open-ended questions, try to ascertain what information is *not* being considered and focus on that, again through the mediator. Bring in new information from objective sources. Are there comparable verdicts or analogous situations to draw upon?

Frequency bias

Be prepared to distinguish the current case from the verdicts or other information the opposition provides. Also, remember to check the ultimate disposition on appeal or post-trial motions of a verdict cited by the opposition. In any event, attending the mediation with recent data or examples can create a negotiation atmosphere beneficial to you.

Anchoring bias

Consider being the first to set out a negotiation number and explain its basis.

It will help create a reasonable negotiation framework and a good first impression. If the response is an outrageous demand, a very small move is appropriate the second time.

Plan a response if an opponent is expected to make an absurd first offer. Counter with a reasonable number. Explain why it is reasonable. If there is no good response, continue with a smaller move. It is worth recalling that in most cases, no matter how far apart the parties are, real bargaining in earnest cannot begin until *both* sides are in a reasonable bargaining position for the case.

Reactive devaluation bias

Trying to convince an adversary during a mediation that you are not inherently manipulative or untrustworthy, if that is their view, is a big hill to climb. The quick fix is to have the mediator neutrally present your argument or offer as though it is coming from the mediator. We all have experience with the desirability of having something come from the mediator instead of a party.

Optimism/overconfidence bias

For opponents suffering from overconfidence in their legal ability as the reason for their prior success, it is a mistake to attack their abilities. Instead, present the facts and the story the facts tell, keeping the focus there. Often, an unprepared and overconfident opponent may become familiar with all the facts for the first time.

Conclusion

Beyond the world of mediation, acquiring expertise in recognizing and working with cognitive bias offers additional benefits. Just as cognitive bias is not selective regarding who it influences, its impact on decision-making is not limited to mediation or business pursuits. It is at work in every situation where decision-making is occurring.

Ed Oster was a trial lawyer for 38 years before becoming a full-time mediator in 2014. As a trial lawyer, he handled the kinds of cases that he focuses on now: bad-faith insurance coverage, ERISA, healthcare industry, life, health and disability, commercial, property and casualty and professional liability. As a neutral with Judicate West, he mediates throughout the United States. He presented the subject of this article at a conference earlier this year, and the submitted article is a modified version of the handout for that presentation. ed@ostermediation.com.