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Know (and Use) the Cognitive Biases of Mediation

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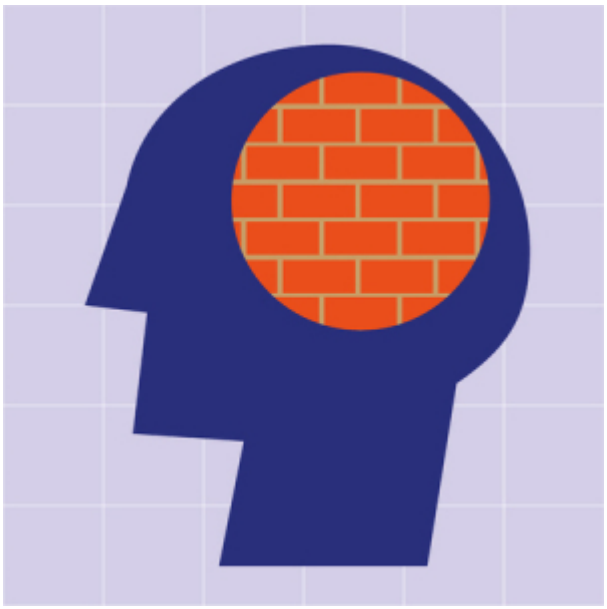

Most civil cases these days will end, not in a courtroom, but at a settlement table. Many will do so after just the right amount of time and resources invested during discovery to discover the case's true worth. But for many other cases, that investment of time and resources won't be ideal, and attorneys and especially clients will find themselves wondering, "Why couldn't we have just gotten that same result three months ago? Or two years ago?" Sometimes there are good reasons for that: pending discovery and expert evaluations, motions not yet resolved by the court, etcetera. But sometimes the reason is that for too long, the other side was blinded, unrealistic, and stubborn...or you were.

Cognitive bias is not just a factor in jury persuasion, it is also a factor in mediation and settlement. Some very well documented habits of thinking cause us to persist in an overly favorable view of our chances or an overly pessimistic view of theirs. An article in the current issue of the *Cardozo Journal of Conflict Resolution* (Munsinger & Philbin, 2017) is entitled "Why Can't They Settle? The Psychology of Relational Disputes," and offers a useful overview of some of the problems caused when we bring those habits of thinking to mediation. Those wanting to expand their understanding of the mediation dynamic should read the article in full. The authors' audience

is mediators, and the article offers advice on how they should handle the sources of bias carried by the parties. In this post, however, I am going to borrow from their list of biases, but focusing on how advocates can avoid them on their own side, or address them when they seem to be coming from the other side.

The Cognitive Biases: Stopping Yours and Leveraging Theirs

Optimism and Confirmation Bias

What It Means: There are some pessimists among us, but for the greater number, individual psychology tends to favor good results, and our expectations are generally skewed in that direction. We also tend to notice and remember facts that support rather than threaten our current beliefs and opinions. That can be particularly true for legal advocates who are looking for reasons to buttress and not overturn their cases. As the authors write, "Rose-colored glasses can inhibit our ability to see a legal dispute through a disinterested lens."

How to Avoid Yours: Use your early preparation time to make yourself more realistic. Discovery, case assessment, and trial preparation can help you make sure that your expectations are grounded, not in your own estimated skill as an advocate, but in as many external indications as possible. Get opinions from non-involved lawyers and others in your office, use research on similar cases, and conduct mock trial or focus group research on your case. Bottom line, try to see your case through other side's eyes.

How to Leverage Theirs: When the other side seems to be overly optimistic, or focused disproportionately on their strengths and not their weaknesses, share that with the mediator. Instead of just being an advocate for your case, become a reasonable critic of your adversary's case assessment. If you have information that grounds your own valuations, consider sharing those with your mediator. Let your mediator know *how* you know what you know. Contrast that knowledge with a lack of grounding on their side. When your case assessments are based on reasons and data and their assessments are based on optimism, you have the better posture.

Anchoring Bias

What It Means: We tend to anchor negotiations around expectations that we have formed during the opening stages of negotiations. Our earlier offer becomes the reference point, and the psychology of "anchor and adjust," means that we are likely to distort the absolute value of subsequent positions by considering them relative to that initial position.

How to Avoid Yours: Choose your initial position with care. Don't just throw a number out there, but base it on something. It should be aggressive (since the starting point won't be the ending point), but still realistic. At the same time you share your initial number, have an expected

target — what you would actually accept — and of course that shouldn't be the same as your initial position. That expected target should be based on an analysis of how similar cases fare in or around your venue. These "local conventions," as the authors term them, provide a better assessment than your initial numbers when it comes to assessing the merits of a proposed settlement.

How to Leverage Theirs: Ask for the reasons behind the other side's numbers: How do the local conventions formed in similar cases support that number? When they are taking a position that is at odds with those conventions, call it out to the mediator. If they are starting out with an extreme and ungrounded request, try to reset the mediation on a range that the relevant experience would support. As the authors write, "The party making an extreme offer is often forced to make larger concessions later to avert an impasse."

Sunk Costs Bias

What It Means: An economist will tell you that sunk costs — those costs that cannot be recouped — should not be taken into account when making a rational decision about the future. Non-economists will rely on the metaphorical "water under the bridge," to say the same thing. But psychologists know that those sunk costs are still considered.

How to Avoid Yours: Focus on future expenses, not past expenses. The more you are explicit in grounding your numbers, the easier that will be to do. Also, you should be explicit with your mediator. Identify what the *future* costs are likely to be for both sides to continue from this point through trial and any appeals, and consider that as an explicit factor in a settlement that would let those costs be avoided.

How to Address Theirs: This is one cognitive bias that you don't necessarily want to leverage in mediation, since attention to past expenses could just lead parties toward more extreme positions. As you do with the mediator, focus on future costs, encouraging the party on the other side to count the immediate and long-term legal expenses as a factor in assessing the settlement.

Loss Aversion and Endowment Bias

What It Means: We tend to apply disproportionate value to things we already have (endowment), and as a result pay more attention to losses rather than gains (loss aversion). In experimental settings, even simple manipulations like giving someone a coffee cup causes them to practically apply more value to that cup than they otherwise would. Similarly, in gambling experiments, avoiding a loss should count exactly as much as achieving a same-sized gain, but avoiding the loss is actually valued more.

How to Avoid Yours: A perceived loss elicits a strong psychological reaction, so be aware of that reaction. And it is not just defendants who can focus disproportionately on losses. If, for example, a plaintiff who expects a ten million dollar gain in a case is asked to settle for seven million dollars instead, they might naturally see it not as a seven million dollar gain but as a three million dollar loss. Being aware of the psychology is a first step. In assessing your position, work to keep it framed on the net result, not on the "loss."

How to Leverage Theirs: Understand that no one wants to leave with what feels like a loss. Applying the principle of reciprocity, consider that if the other side is (in their own minds at least) being asked to give up something, what are they getting in return? It could be substantial, like avoiding a greater future loss, or it could be small or symbolic. In some cases, for example, a plaintiff feels more comfortable coming down off of a higher position if the defendant is willing to commit to some kind of public acknowledgment or steps to reduce the chances of a future plaintiff in the same situation.

Those are just a few of the biases, of course, and there is a lot more to learn about the complex dynamic of a mediation. Ultimately, parties and mediators do better to remember that it is not just a legal exercise, but a psychological one as well.

Other Posts on Mediation:

- Bring the Jury Into Your Mediation
- Frame Your Arguments for Mediation
- Break Through the Barriers: The Settlement Series, Part One

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Munsinger, H. L., & Philbin Jr, D. R. (2017). WHY CAN'T THEY SETTLE? THE PSYCHOLOGY OF RELATIONAL DISPUTES. *Cardozo J. Conflict Resol.*, *18*, 311-489.

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