



BY LAURA A. ATHENS

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Top ten cognitive biases and distortions in mediation

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"You can't always get what you want, but if you try sometimes, you get what you need."

The Rolling Stones, "Let It Bleed," 1969

The success of a mediation lies in the willingness to collaborate. Understanding each other's perspective, needs and interests is key. But how do you alter another person's viewpoint when they appear glued to a particular stance or steadfastly cling to an opening number? How about when your own prior experiences with a party or their legal counsel lead you to distrust them? Sometimes, we need to reexamine long-held beliefs and hit the refresh button.

Preconceived notions and automatic associations are examples of cognitive bias and distortion. To effectively negotiate, we need to be aware of cognitive bias and distortion and how each adversely affects judgment and decision making.

Cognitive biases involve a tendency to be inclined in favor or against something. When they are at play, a person lacks a neutral viewpoint. Cognitive distortions are thinking errors. They can lead to inaccurate perceptions of reality and illogical inferences. Both are automatic and occur in everyone to some degree and both can result in irrational decisions. This article will address the ten most common cognitive biases and distortions that arise during mediation and will help you to understand and deal with them.

Why do Cognitive Biases and Distortions Occur?

Cognitive biases and distortions cause individuals to make erroneous assumptions, instinctively categorize people and things and rely on mental shortcuts when making decisions. When someone speaks in terms of what "should" be said or done, it is a clue that a cognitive bias or distortion is influencing their perspective. They may mistakenly believe their feelings about a situation are a reliable indicator of reality.

In mediation, the deleterious effects of cognitive biases and distortions can be minimized by identifying the specific bias or distortion, explaining how it impacts judgment and encouraging thoughtful and thorough consideration of a range of options.

Anchoring Bias

Anchoring bias occurs when individuals over rely on the first piece of information they receive. This information becomes a reference point, or anchor, which affects subsequent judgments and decisions. A fact or figure becomes anchored in the mind.

When negotiating a monetary settlement, what is considered reasonable can be greatly influenced by the first offer. Whoever makes that first offer generally has an advantage because anchoring bias essentially causes the parties to place excess weight on the initial offer during subsequent negotiations. The first offer acts as an anchor establishing the range of acceptable counteroffers.

Anchoring bias also impacts non-monetary negotiations. For instance, in the case of personal injury, anchoring can influence decisions about the amount of psychological services to which an individual is entitled to address emotional distress. In the criminal law context, an original excessive charge may persuade a defendant to accept a plea bargain to a charge much more serious than a probable jury verdict because of the anchoring effect.

Anchoring bias can be diminished by suggesting consideration of a range of possibilities rather than a fixed number or a specific solution. Mediators also can stimulate critical thinking and challenge the assumptions underlying the anchor. A useful exer-

cise may involve writing down an original offer, followed by three or four potential alternatives.

Confirmation Bias

Confirmation bias is the tendency to value and focus on ideas that affirm preexisting beliefs. This leads individuals to discount facts and reject information that contradicts their preconceptions. Like an echo chamber, confirmation bias reduces objectivity and reinforces preexisting beliefs.

People may become blinded to potential alternatives. For example, if the plaintiff demonizes the defendant and believes the defendant is untrustworthy, the plaintiff will look for and internalize information that confirms that negative view. Confirmation bias shapes not only how information is gathered, but also how it is interpreted and recalled. It can lead to faulty choices based on incomplete information.

In mediation of a guardianship matter, confirmation bias may influence a family member to become disenchanted with and overly critical of a guardian who has done something to upset them. They may search for evidence supporting their belief the guardian is doing a poor job and discount any evidence to the contrary. An isolated, negative experience may become magnified beyond what is warranted by the overall situation.

Confirmation bias can be countered by encouraging consideration of all relevant facts, not just those that confirm preexisting beliefs, and scrutinizing the accuracy of the memory of pivotal events. The mediator may ask a party to consider if any empirical evidence or principled basis exists for the other party's perspective. The bias can be challenged by creating a chart listing the belief, the evidence supporting and refuting the belief and the probable outcome if the case proceeds to trial.

Labeling and Overgeneralization Distortions

Labeling is a cognitive distortion in which people reduce themselves or others to a single, typically negative, characteristic, like a "liar" or "cheat." Rather than viewing the person's behavior objectively, there is a tendency to globally label the person in a derogatory manner. As a result, any information that does not support the label is filtered out. Making a broad assumption about a person based on an isolated behavior or event, is almost always inaccurate.

Overgeneralization is a related cognitive distortion that involves drawing overbroad conclusions based on limited information. People may reach a conclusion based on one or two experiences, then see patterns where they do not exist and incorrectly draw sweeping conclusions about unrelated events.

In a mediation, a party may predict settlement will never occur because of a previous unsuccessful attempt to resolve a matter with the opposing party. They may unreasonably expect the unpleasant experience to occur repeatedly.

This distorted thinking can be addressed by asking a party to define the terms they are using and itemize the evidence that supports, as well as contradicts, their belief or prediction. Mediators can foster logical thinking by inquiring whether conclusions are based on a substantial amount of relevant data or merely one or two pieces of evidence. Mediators may want to gently raise the possibility that feelings, rather than logic, are guiding the party. Distinguishing between opinions and facts also can diminish the ramifications of this cognitive distortion.

When someone engages in labeling, one simple approach is to ask them to objectively describe the behavior. If they

view the behavior as the problem, rather than the person, it becomes easier to discuss interests and concerns and reach a meaningful resolution.

Mediators can urge parties to assume good intentions and give the other party the benefit of the doubt. Remind the participants a first impression is merely an initial impression that is incomplete and often inaccurate. If they would like to test this theory, suggest they watch an episode of the "To Tell the Truth" game show and try to guess the correct contestant based on their first impression of the mystery guests.

Negativity Bias

Negativity bias is a tendency to focus on and remember negative rather than positive experiences. The human brain is naturally attuned to negativity and perceives adverse incidents as more influential than positive ones. Negativity bias can influence perception as well as memory. When a person concentrates on the potential downsides of a decision, they also tend to avoid risk.

Negativity bias has an evolutionary genesis. Humans are hardwired with a negativity bias based on our pre-historic ancestors who needed to be keenly aware of potential dangers to protect survival of the species. Neuroimaging research has demonstrated negative stimuli lead to a surge of electrical activity in certain areas of the brain. Negative events and experiences imprint more quickly and linger longer than positive ones according to Washington University professor and researcher Randy J. Larsen, Ph.D. Therefore, people are more likely to remember and dwell on an insult or unpleasant event than a compliment or a joyful event.

Because of the negative feedback instinct, there is a tendency to spot flaws first. In mediation, negativity bias may result in a perfectly reasonable offer being rejected summarily without careful consideration.

Negativity bias can be reduced by reflecting on good things that have occurred, listing approaches that have been successful, and considering the best-case scenario as well as the most realistic scenario. The mediator may encourage participants to focus on the positive features of a proposed settlement. Asking them to put themselves in the shoes of the other party also may promote a different perspective.

Optimism Bias

The reverse of negativity bias is optimism bias, also known as the illusion of invulnerability. Optimism bias causes individuals to overestimate the probability of a positive outcome and underestimate the risks. Unduly positive assumptions can lead to disastrous results. A related concept is the ostrich effect, which is the tendency to ignore apparent weaknesses.

In mediation, optimism bias may lead participants to believe their case is stronger and their chance of success at trial is greater than reality would suggest. Optimism bias can be curtailed by suggesting participants moderate optimism and proceed with caution to consider the strengths and weaknesses of their case, potential risks of proceeding forward and probability of a negative outcome.

In caucus, the mediator may ask the participants to consider the worst-case scenario. Creating a matrix, which sets forth the best, worse and most likely outcomes and the probabilities of each occurring, may be helpful. The mediator can guide them through realistic weighing of the evidence to reach a balanced and sensible decision.

Polarized Thinking Distortion

Polarized thinking, also known as dichotomous thinking, is a cognitive distortion in which people view things in two distinct categories rather than on a continuum. It involves all-or-nothing thinking, viewing things as black or white, good or bad, with no gray zone or middle ground. Thinking in the extremes does not promote compromise and is unrealistic because the truth generally lies somewhere between the two extremes. A sign of polarized thinking is the use of absolute words, such as "always", "never", "all", and "nothing". Sometimes a fallacy of fairness

is at play. An individual may believe life should be fair and when things do not work out the way they think is fair, they may become resentful. The assumption that life is fair is a fallacy not based on reality.

In mediation of a university dispute, a faculty member with dichotomous thinking, who has been denied tenure, may believe the only viable outcomes would be immediate granting of tenure or leaving academia entirely, not recognizing many alternatives exist between these extremes.

Polarized thinking can be ameliorated by consideration of objective evidence and other information that would support different conclusions. The mediator can stimulate conversation about exceptions and shades of gray. In caucus, the mediator can help individuals to expand their thinking and recognize a continuum by placing potential outcomes on a probability scale of 1 to 10. Alternatively, the mediator may suggest a break to evaluate a multitude of feasible options and reconsider crucial decisions.

Endowment Effect Bias

Endowment effect, also known as divestiture aversion, is the tendency for people to ascribe a higher value to something they own and expect more money to relinquish it than they would be willing to pay to acquire it. The mere fact of possessing an object can heighten perception of its value.

Loss aversion involves people being more interested in avoiding loss than in obtaining gains. The pain of losing is experienced more acutely than the pleasure of winning. People sometimes make flawed decisions based on an aversion toward loss.

In mediation of a partnership dissolution, a party may overestimate the value of their partnership share and discount the benefits of a proposed buyout. They may be more concerned about giving up rights or assets than they are interested in obtaining fair compensation.

The endowment effect may be reduced by asking a party to suppose the right or asset was on the market, to consider the factors an average person would find relevant in ascertaining its value and then determine the amount that average person would be willing to pay for it. Another approach would be to ask the party to imagine they were the other partner, what would they be willing to pay to acquire the partnership interest. Alternative views also may be fostered by asking the party to consider the consequences of adhering to the endowment effect.

Functional Fixedness Bias

The functional fixedness bias involves seeing or using an object or idea in only the way it is typically used. This bias can lead to being stuck and viewing a problem in one specific way. It impedes the ability to think "outside of the box" to find innovative solutions.

In mediation, a participant may become fixated on a precise remedy, rather than recognizing a variety of options may meet their underlying interest or concern. For example, in a special education dispute, the parent may believe individual speech therapy for one hour three times per week, which the school has previously provided to their child, is the only means of improving their child's speech and language. Not recognizing that speech and language consultation to the teacher, a social skills group overseen by a social worker or speech therapist, paraprofessional support, and time in the general education classroom with peers may also contribute to reaching the desired goal.

Functional fixedness can be overcome by inviting participants to brainstorm a plethora of possibilities. Divergent thinking can be enhanced by asking participants to cite as many options as possible, without critique, prior to engaging in more convergent thinking to select acceptable solutions. A reluctant party may be asked to play Devil's Advocate and challenge their adherence to one particular outcome. The mediator also may urge participants to genuinely listen to each other, be curious about other

points of views, set aside preconceptions and suspend judgment before making a final decision.

Status Quo Bias

Status quo bias is the tendency to want things to stay relatively the same as they have always been, following the path of least resistance. People tend to prefer the familiar and often fear the unknown. Maintaining the status quo minimizes the risks and costs associated with change, but it also may result in people missing out on potential benefits that may outweigh the risks. Loss aversion is a primary reason underlying status quo bias.

Some people are overwhelmed by too many options and suffer from "choice overload." This phenomenon can amplify the sense that change is complex and costly and should be avoided. In mediation, status quo bias may be at play if a party steadfastly insists on keeping things exactly as they are and resists any proposed change.

Status quo bias can be countered by helping a party to perform a realistic cost/benefit analysis of maintaining the status quo and making a change. A discussion of the pros and cons of staying on the same path or moving in a new direction may also be useful. The mediator could suggest they consider whether they would give the same advice to a good friend in their situation. The experience can also be normalized by acknowledging that everyone has biases that affect their decision making and can benefit from new experiences.

Sunk Cost Bias

Sunk cost bias, also known as escalation of commitment, involves continuing to do what an individual has been doing merely because they have invested time, resources or energy into it. For example, an individual might stay at a concert even when they are not enjoying the music because they paid a substantial amount for the ticket. A sunk cost is a cost that has already been paid for and cannot be recovered.

In mediation of an employment matter, an employee may demonstrate sunk cost by seeking reinstatement to their job, even though they dislike their work, simply because they have spent so much time at the job and with their co-workers they cannot see themselves in a different job.

Another example of sunk costs would be when a party resists settlement because they are upset about the amount of time, money and energy they have spent litigating the dispute and believe they must see it through until the end.

As with several other biases, loss aversion underlies this bias. Having strong emotional connections and a drive to preserve investments can lead to poor decisions not based on current realities.

Sunk cost bias can be diminished by pointing out that although time and money may have already been expended, where time and money is spent in the future is within their control. The mediator can encourage parties to consider the bigger picture, their ultimate goals and vision for the future. A bird's eye view facilitates objective analysis of the case strengths and weaknesses and realistic assessment of the chance of success. It may be helpful to point out the ability to accept mistakes and learn from them is an important part of making better decisions in the future. While calling it quits can be painful, it frees up energy and resources to pursue new opportunities.

Framing Effect

Mediators often employ the framing effect, which is a cognitive bias, to help parties draw more favorable conclusions from essentially the same information. Perception of a situation can be significantly influenced by how information is presented. Judgments and reactions can change depending on whether issues are framed in a positive or negative light.

Prior to mediation, while working with parties individually, the mediator can coach the parties to frame their concerns in a manner the other party is likely to hear. During the perspective sharing portion of mediation, the mediator

can reframe caustic statements in more neutral and constructive terms to improve the other party's understanding and receptivity to the underlying message. Reframing is also useful in converting deeply entrenched positions into underlying needs and interests.

When presenting a reasonable settlement offer, the mediator may wish to focus on what each party gains, rather than loses, to increase the participants' receptivity to the offer. Because of loss aversion, a loss often is perceived as more significant, and worthy of avoiding, than an equivalent gain. Mediators can present an offer or proposal in a manner that makes it more attractive. For instance, with permission of the plaintiff, the mediator may take a proposal of \$79,500, rather than \$80,000, to the defendant to make the figure more palatable.

Word choice also impacts perception. A dispute may be reframed as an opportunity. A crisis may be viewed as a challenge. Even the pronoun selected can influence the listener's experience and the outcome. Kenneth Cloke, a nationally recognized mediator, trainer and author has pointed out the pronoun "we" tends to foster collaboration and build consensus. The word "it" may facilitate problem solving because the participants can attack a thing rather than each other. Conversely, "they" may promote stereotyping and prejudice. "You" is more likely to result in accusations, denials and counter-attacks.

Professor Robert Cialdini has pointed out the choice of financial terms can shape how people perceive a situation. For instance, "purchase" or "investment," which are associated with gain, are more likely to be received as a positive reception than "cost" or "price," which are associated with loss.

Parties may also react to the context in which something is embedded, not just to the thing itself. A trial may seem distant and unlikely when the parties are engaged in early stage mediation, however, it looms large on the eve of trial and frequently involves much more than the parties anticipate. The mediator can help the parties and their legal counsel consider the demands of trial by discussing the realistic time, money and energy that will be required.

Conclusion

Cognitive biases and distortions are automatic and universal. Mediators can help parties and their legal counsel to effectively and compassionately address cognitive biases and distortions that impede rational decision making. Recognizing the bias or distortion involved, understanding its impact and employing strategies to reduce its negative effects on negotiation can greatly enhance the resolution process and promote mutually satisfactory and enduring outcomes.

Laura A. Athens is an attorney, mediator, facilitator and arbitrator in Farmington Hills, Michigan. Ms. Athens provides alternative dispute resolution (ADR) services in a variety of matters, including general and special education, higher education, university faculty grievance, employment, automotive class action settlement, vocational rehabilitation, guardianship and disability rights cases. Athens previously served as a hearing officer in special education and vocational rehabilitation due process hearings and currently serves as an arbitrator in automotive warranty disputes. As an adjunct professor at Wayne State University Law School, Athens taught education law, health law and bioethics. She also taught Legal Research and Writing at Washington University School of Law. She is an associate of Professional Resolution Experts of Michigan, LLC (PREMI, <https://premiadr.com>) and has served on the State Bar of Michigan Alternative Dispute Resolution Council and as a former chair of the Oakland County Bar Association ADR Committee. Athens has published numerous articles on education law, mediation, facilitation and arbitration and frequently lectures and appears on cable TV programs regarding ADR and school-related topics.

Law school to host virtual event looking at America

Western Michigan University Cooley Law School's Wellness Committee will host historian James Kratsas as he explores the momentous events that unfolded in America in 2020 during a virtual event, "It Was the Best of Times, It Was the Worst of Times: America in 2020," on Tuesday, February 9, beginning at noon via Webex.

Exploring the lessons of the past, Kratsas will present what was different about the United States in 2020 from previous crises and what has not changed. Although nobody can predict the future, there are many reasons the nation will endure.

To register for the Webex event, www.cooley.edu/events.

'Drafting and Enforcing Contracts' in COVID-19 era

The Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan along with the Bankruptcy Committee of the Federal Bar Association for the of Michigan Eastern District are co-sponsoring a webinar titled "Drafting and Enforcing Contracts in Light of COVID-19" on Thursday, February 4, from noon to 1:30 p.m.

The panel will address drafting considerations and practical implications relating to contracts in the COVID-19 era, including issues such as earn outs, force majeure provisions, material adverse change provisions, deferrals of obligations, insurance implications, and equitable doctrines such as impossibility, impracticability, frustration of purpose, and enforcement within and outside of the bankruptcy context.

The panel will include:

- U.S. Bankruptcy Court Judge Joel D. Applebaum, Eastern District of Michigan
- Michael S. Khoury, partner at FisherBroyles LLP
- Bradford S. Moyer, partner at Plunkett Cooney
- Shanna M. Kaminski, counsel at Varnum LLP
- Steven G. Howell, member and executive director of Community and Client Relations at Dickinson Wright PLLC

The webinar will be moderated by Judith Greenstone Miller, partner at Jaffe, Raitt, Heuer, & Weiss PC.

There is no charge for this webinar. To register, visit <https://connect.michbar.org/businesslaw/home> and click on "events."

'Tubman Virtual Social Justice Forum' offered Feb. 4

The Black Women Lawyers Association of Michigan (BWLAM) will host the "Harriet Tubman Virtual Social Justice Forum: Michigan Criminal Expungement" on Thursday, February 4, online from 8 to 8 p.m.

The Harriet Tubman Social Justice Forum is a bi-annual event hosted by BWLAM. This year the online event focuses on Michigan's new criminal expungement law.

This three-part event will begin with a panel discussion by Michigan legislators and lawyers providing a breakdown of Michigan's criminal expungement law. The second part will honor lawyers making a difference in their communities. The final portion will be a panel discussion by people who have gotten or are in the process of getting criminal expungements.

The Harriet Tubman Social Justice Forum is an event geared towards members of the general public and those in the legal community. Additionally, as a way to help participants who attend the event because of their need for expungement services, there will be a random giveaway of a free expungement consultation to a participant in need.

To register for this free online forum, visit <https://blackwomenlawyers.org> and click on "events."

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