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When Strategies Go Awry: Part I In A Series On Cognitive Biases And Their Impact

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Commentary

When Strategies Go Awry: Part I In A Series On Cognitive Biases And Their Impact

By
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[Editor's Note: This is part 1 of a series of articles on Cognitive Biases and their impact on Litigation and Negotiation. Laura A. Frase, Of Counsel with Cantey Hanger LLP in Dallas, serves as Negotiation/Settlement Counsel for a number of her clients, having resolved thousands of matters generating significant cost savings. In addition to her law degree from St. Mary's School of Law, in 2013 she earned a Master's Degree in Dispute Resolution from Southern Methodist University, concentrating on Negotiation. Ms. Frase is also a trained Mediator and serves as an Adjunct Professor at UNT Dallas College of Law. She is recognized as a Top Woman Lawyer in Texas and AV Peer Preeminent rated. Any commentary or opinions do not reflect the opinions of Cantey Hanger LLP or LexisNexis® Mealey Publications™. Copyright © 2017 by Laura A. Frase. Responses are welcome.]

We make decisions every day. With simple questions, we normally rely upon intuition, feelings, instincts or automatic reactions to make a decision (ex: do I turn left or right?). Our brains make thousands, if not millions, of these types of decisions, with seemingly little effort or analysis. "Judgment pervades human experience."¹ These intellectual shortcuts save time, take less effort and allow us to choose quickly. We do not take the time, for example, to decide which foot to put forward when we walk; we decide automatically or on "gut instinct". If we fully analyzed every simple decision, we would be paralyzed and unable to function in our daily lives.

We traditionally believe that we make rational and logical decisions; we "absorb information, process it, and come up with an optimal answer or solution."²

Yet, the fact that we err is undisputed. Our missteps sometimes come when we use these same intuitive shortcuts (known as heuristics) to make complex decisions, particularly when we are dealing with uncertain or unknown information. Countless qualitative studies demonstrate that our ability to analyze intricate facts or numbers is involuntarily thwarted by various cognitive, social and emotional responses which may ultimately force us toward illogical reasoning. As lawyers, we are not immune. Why, for example, do some parties reject generous offers? Why do we invest significant resources into "losing" cases? How does the first demand, even if it is outrageous, tilt negotiations? Why do our brains play these games?

Psychological obstacles, or **Cognitive Illusions/Biases**, are some of the causes of our errors. When we are making decisions without all of the facts, particularly while evaluating complex information and questions, these biases fill in the gaps of information for us, by encouraging us to use emotions, instinct and intuition rather than critical analysis. When we apply "causal thinking inappropriately to situations that require statistical reasoning"³ we miss details, overweigh the importance of facts that support our client's story and allow our emotions to drive our thinking. These illusions or biases steer us away from the logical.

Cognitive Biases are ubiquitous. These reactions occur subconsciously and in a split second. They influence our assessment of risk, our evaluation of probability, and our appraisal of the credibility of disputed facts, all impacting our litigation/negotiation plans. Unique to human thinking, these biases can play havoc with

our decision-making process. Consequently, "...we are the most advanced species in how elaborately and extensively we can get things wrong."⁴ Cognitive biases can impinge judgment to such an extent, without our ever noticing, that we finally ask "where did we go wrong?"

There are hundreds of identified cognitive biases. In this series of articles, I will introduce a few that occur during case analysis and specifically during negotiations. I will also suggest tools to help overcome these "brain blunders." Ultimately, the goal with this series is to inspire further curiosity into a fascinating subject; the beautiful complexity that is the human mind.

Confirmation Bias: Litigation and Negotiation through Rose Colored Glasses

Our clients pay us to be right. We are asked to predict, judge, and assess facts, ideally dispassionately. We are objective when we need be and, at other times, are zealous in our spin of the evidence. Which brings us to one of the most common entries in the Cognitive Bias catalogue: **Confirmation Bias**. It is the "natural tendency for people to search for and believe facts that support their opinions and ignore facts that contradict their beliefs."⁵ In Confirmation Bias, we fail to search for and rely upon objective, evenly weighted, evidence. Rather than test our theories or assumptions critically, we instead seek, subconsciously, to prove them, paying little attention to those facts that counter our arguments.⁶ Thus, in Confirmation Bias, we may be less concerned with "finding the truth as much as [we] are hell bent upon justifying [our] own views and thoughts."⁷

This breakdown happens potentially in two scenarios: first, in the manner in which we search for information, and second, the degree to which we rely on corroborating-only data. For a theory to work, a hypothesis must be tested to see if it can be falsified; if it withstands the effort, it will prove to be a solid.⁸ When researching any new theory, the overwhelming volume of information can, however, bog us down. "A systematic search through the 'whole universe' for [data] that could falsify the hypothesis can, from a pragmatic point of view, scarcely be accomplished."⁹ So, in the name of efficiency, we subconsciously gravitate toward confirming-only information, since it supports our already held assumptions and beliefs.¹⁰ This short-circuiting approach hinders critical evaluation of facts, probability

and case value.¹¹ For example, we may give more credence to deposition testimony that agrees with our client's position than testimony that conflicts. We may discount a particular expert's theories because they do not fit with our views. By discounting or ignoring contradictory information, we may get a false sense of the plausibility of our theories and trust that contrary authority is minimal. "While there is nothing inherently wrong in seeking information to confirm a hypothesis, such an approach becomes problematic when it is done at the expense of ignoring any other possibility."¹²

Even if we succeed in finding balanced information, Confirmation Bias may still trip us up when we explore the results, by giving greater weight and credibility to the confirming information we gathered. Contrasting information is devalued or even wholly dismissed. Additionally, we challenge the information differently; confirmatory evidence is more often "taken at face value while potentially disconfirmatory evidence is subjected to highly critical and skeptical scrutiny."¹³ This mistake often occurs, for example, in the interpretation of scientific studies or state-of-the-art evidence - we magnify studies that agree with our theories and demote others as "junk science". We even cherry-pick statements from within scientific studies or expert reports that support our theories while dismissing the rest of the findings. Or we may dismiss a good settlement offer because we think our case is stronger than others would view it. Similarly, we may recommend not trying a good case because of reliance upon decades-old history of high verdicts (that we easily recall) and do not consider demographic changes that could impact that potential verdict.

Confirmation bias is of significant concern when science is involved in litigation. For example, "scientists may use a theory 'to design experiments and analyze data, and then interpret the results,' in a rather circular fashion, to confirm the original theory. Furthermore, scientists may work backward from a theory, never actually conducting the necessary falsification that the true scientific process requires."¹⁴ One example of Confirmation Bias in science played out in the infamous study that attempted to connect autism to vaccines.¹⁵ Even in the face of overwhelming evidence to the contrary and the withdrawal of the study, vaccine-hesitant parents became non-receptive to accurate evidence that contradicted their already held beliefs.¹⁶ The bias is

generally stronger when more emotionally valuable beliefs are at stake. “Data relevant to a belief are not processed impartially.”¹⁷ It was as if they were blind to the science.

Studies suggest that lawyers are particularly susceptible. It is, after all, our job to marshal evidence that supports our clients’ positions; we are actually encouraged to engage in Confirmation Bias.¹⁸ For example, we may insist on more discovery than is actually needed because we believe sheer volume makes the case stronger¹⁹ or clarifies a position we have already taken.²⁰ Over-discovery may also occur because we are escalating our commitment to a particular strategy or course of action, another consequence of Confirmation Bias.²¹ Research has shown that such misguided efforts to obtain only confirmatory evidence also hardens our confidence in our strategies, often to the detriment of us and our client.²² Even random, irrelevant evidence can reinforce Confirmation Bias.²³ What is critical in this process is our failure to regularly reevaluate the evidence germane to our assumptions, even when we recognize that our initial theories could be challenged. We simply label those challenges as irrelevant.²⁴ We resist changing our stance because, after all, the “facts” back us up.²⁵ Certainly, a zealous “magnification” of the facts that support our client’s positions is vital when advocating on their behalf. However, turning a blind eye to the divergent facts can cause errors in the very strategy we so enthusiastically promote.

Closely associated with Confirmation Bias is **Illusory Correlation** - seeing patterns where none exist.²⁶ It is a fundamental rule in science that correlation does not equal causation. Yet in this form of Confirmation Bias, we overweigh the evidence that supports that cause/effect relationship we desire or we arrive at conclusions that simply are not warranted. For instance, we hear of a story of a pit-bull dog that bit someone. We then assume that all pit-bull dogs are vicious or that other stories concerning dog bites automatically implicate pit-bulls. If we want a relationship to exist, we give greater credibility to those facts that support the pattern we wish to see, and ignore those facts that don’t match the pattern; even to the point of operating beyond what logic justifies.

Recognizing Confirmation Bias

To see if you are operating within Confirmation Bias, ask yourself this question: Do I want my particular

theory/assumption/strategy to be true before I begin my investigation? In a class room experiment at UNT Dallas College of Law, I asked my students to look at the number sequence 2, 4, and 6. They had to then guess what sequence rule I had in mind by coming up with other sequences that satisfied the rule. With each turn they were told whether their proposed set satisfied my rule and whether they had correctly guessed the rule. Generally, the students assumed that the rule involved even numbers so, invariably, they proposed even number sequences but did not guess the rule correctly. It wasn’t until they started proposing a sequence of numbers that *disproved* the various imagined rules (such as 1, 3, 5 or 11, 10, 9) did the students finally guess correctly that my rule was that the numbers ascended. By attempting to prove a theory rather than disprove it, they developed a form of tunnel vision and it was harder to come up with the correct answer. That is the essence of Confirmation Bias.

Taking off the Glasses; Thwarting Confirmation Bias

As part of this series, I will later write about general ways to battle against various cognitive biases (“de-biasing”). As for Confirmation Bias, there are a couple of specific ways to diminish its impact:

- Become comfortable with disconfirming information.²⁷ Engage in a deliberate effort focused “toward hypothesis-inconsistent information”²⁸ by purposefully looking for information that disagrees with your theories. For example, one of the main prongs in a *Daubert* expert challenge is “falsifiability”; a theory that has not been thoroughly tested and the results not reproducible should not be admitted - a direct challenge to Confirmation Bias.²⁹ Apply the same logic to your research and assessment of your findings. Try not to necessarily “resolve” the conflict; focus instead on weighing the evidence more evenly. If struggling, try to overweight the confounding information and see if a better balance is achieved.
- Ask those who are not part of the trial team to serve separately as blunt and honest devil’s advocates.³⁰ Have them concentrate on the merits of the other side’s case and poke holes in yours. Similarly, create “Red Teams” - a tactic borrowed from war game theory and popular in the tech industry. When a new product or software is

developed, the Red Team is charged with proving that the product will *not* work. Be willing and able to expose your evaluation to rigorous questioning and critique. Articulating the reasons why impressions may be wrong or why an idea may fail tempers Confirmation Bias.³¹

Conclusion

We all want to be right. Confirmation Bias hinders because it misdirects our ambition to prove we are right. That is why our brains, naturally and subconsciously, give more weight to the evidence that supports our convictions and dismisses the contrary. Relying only upon that which confirms can lead to an exaggerated confidence in the positive findings of our research and interpretation of the results. As long as the alternative explanation is not given equal weight during litigation or negotiation planning, “an overestimation of the importance of facts or events that match our hypothesis occurs.”³² We can become so rigidly connected to our initial opinion that we may miss the import of the other side’s theory. We may misinterpret even accurate information. Our assessment can then be skewed and we miss opportunities to negotiate those matters that should be settled, and try those that shouldn’t. Confirmation Bias, along with other cognitive biases, ultimately lead us “to a perception, judgment, or memory that reliably deviates from reality.”³³ We are literally evaluating our theories and goals from a different set of facts from those of our counterpart, viewing our case through rose colored glasses. However, with a purposeful focus on disconfirming information, and by creating systems that challenge our theories, we have a better chance of overcoming Confirmation Bias.

Endnotes

1. Thomas Gilovich, Dale Griffin, Daniel Kahneman, *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* (Daniel Kahneman, Paul Slovic & Amos Tversky, eds. 2002), Preface, xv.
2. DAVID EAGLEMAN *THE BRAIN: THE STORY OF YOU*, 135 (2015).
3. DANIEL KAHNEMAN, *THINKING FAST AND SLOW*, 77 (2011).
4. DANIEL BOR, *THE RAVENOUS BRAIN: HOW THE NEW SCIENCE OF CONSCIOUSNESS EXPLAINS OUR INSATIABLE SEARCH FOR MEANING* 36 (2012).
5. Harry L. Munsinger & Donald R. Philbin, *Why Can't They Settle? The Psychology of Relational Disputes*, 18 CARDOZA J. CONFLICT RESOLU. 311, 327 (Winter 2017). See also *City of Mequon v. Haynor*, 330 Wis. 2d 99, 2010 WL 34891302010 (Sept. 8, 2010) fn.7 (we are “unwittingly selecting and interpreting evidence to support a previously held belief.”). See e.g. *Ex Parte Cathey*, 451 S.W. 3d 1, fn.65 (Tex. Crim. Appeals, 2014).
6. Margite E. Oswald and Stefan Grosjean, *Confirmation Bias*. *COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT AND MEMORY* 79, 93 (Rydgiger F. Pohl, ed. 2nd ed. 2012).
7. Cory S. Clements, C., *Perceptions and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win the War of Words* 2013 B.Y.L. Rev. 319, 353 (2003) citing *Robinson v. State*, 702 A.2d 741, 750 [Md. 1997].
8. KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* 112 (1997) (explaining that scientific evidence must be reproducible to be considered reliable).
9. Margite E. Oswald and Stefan Grosjean, *Confirmation Bias*. *COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT AND MEMORY* 79, 81 (Rydgiger F. Pohl, ed. 2nd ed. 2012).
10. DANIEL KAHNEMAN, *THINKING FAST AND SLOW*, 81 (2011).
11. Aaron J. Wright, *Rendered Impracticable: Behavior Economics and the Impracticability Doctrine* 26 CARDOZO L. REV. 2183, 2206 (2005).
12. Brian Reichart, *Tunnel Vision: Causes, Effects, and Mitigation Strategies* 45 HOFSTRA L. REV. 451, 458 (Winter 2016).
13. Lee Ross & Craig Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*. *JUDGEMENT UNDER*

- UNCERTAINTY: HEURISTICS AND BIASES 129, 149 (Daniel Kahneman, Paul Slovic & Amos Tversky, eds. 1982). See also Charles G. Lord, Less Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098, 2099 (1979).
14. Janet Howe, *De-Junking MSBP Adjudication* 59 ARIZ. L. REV. 201, 207-208 (2017).
 15. <http://geraldguild.com/blog/2010/08/20/illusion-of-cause-and-autism/>.
 16. Frej Klem Thomsen, *Childhood Immunization, Vaccine Hesitancy, and Provaccination Policy in High-Income Countries* 23 PSYCHOL. PUB. POL'Y & L. 324, 328 (August 2017).
 17. Charles G. Lord, Less Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098, 2099 (1979).
 18. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises* VOL. 2 REV. OF GEN. PSYCH. NO. 175 (1998).
 19. Andrew J. Wistrich & Jeffery J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation* 86 S. CAL. L. REV. 571, 597-602 (March, 2013).
 20. Richard Birke and Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements* 4 HARV. NEGOTIATION L. REV. 1, 23 (1999).
 21. Id.
 22. Andrew J. Wistrich and Jeffery J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation* 86 S. CAL. L. REV. 571, 602 (March, 2013).
 23. Lee Ross & Craig Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*. JUDGEMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 129, 150 (Daniel Kahneman, Paul Slovic & Amos Tversky, eds. 1982).
 24. Id.
 25. Margite E. Oswald and Stefan Grosjean, *Confirmation Bias*. COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT AND MEMORY 79, 90 (Rydgiger F. Pohl, ed. 2nd ed. 2012).
 26. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises* VOL. 2 REV. OF GEN. PSYCH. NO. 175, 183 (1998).
 27. Cory S. Clements, C., *Perceptions and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win the War of Words* 2013 B.Y.L. Rev. 319, 353 (2003), citing *Robinson v. State*, 702 A.2d 741, 750 (Md. 1997).
 28. Carl Symborski, Meg Barton, Mary Quinn, Carey K. Morewedge, Karim S. Kassam, K. and James H. Korris, *Missing: A Serious Game for the Mitigation of Cognitive Biases*. INTERSERVICE/INDUSTRY TRAINING, SIMULATION AND EDUCATION CONFERENCE (ITSEC). Paper no. 14295, (2014). http://www.iitsec.org/about/Publications_Proceedings/Documents/BP_TRNG_14295_Paper.pdf.
 29. David M. Flores, James T. Richardson, Mara L. Merlino, *Examining The Effects of the Daubert Trilogy on Expert Evidence Practices in Federal Civil Court: An Empirical Analysis*, 34 S. ILL. U. L.J. 533, 556 (2010); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993).
 30. Robert S. Adler, *Flawed Thinking: Addressing Decision Biases In Negotiation* 20 OHIO ST. J. ON DISP. RESOL. 683, 764 (2005).
 31. Asher Koriat, Sarah Lichtenstein, & Baruch Fischhoff, *Reasons for Confidence* 6 J. OF EXPE. PSYC.: HUMA. LEAR. & MEMO. NO. 2, 107-118 (March 1980).
 32. Margite E. Oswald and Stefan Grosjean, *Confirmation Bias* COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT AND MEMORY 79, 90(Rydgiger F. Pohl, ed. 2nd ed. 2012).
 33. RYDIGER F. POHL, COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT AND MEMORY 2 (Rydgiger F. Pohl, ed. 2nd ed. 2012). ■

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