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by
Laura A. Frase

Cantey Hanger L.L.P
Dallas, Texas

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Commentary

When Strategies Go Awry: Part 5 In A Series On Cognitive Biases And Their Impact

By
Laura A. Frase

[Editor's Note: This is part 5 of a 6-part series of articles on Cognitive Biases and their impact on Litigation and Negotiation. Laura A. Frase, Of Counsel with Cantey Hanger L.L.P. in Dallas, has over 30 years' experience in Insurance Defense Litigation. She also serves as Negotiation/Settlement Counsel for a number of her clients, having resolved thousands of matters generating significant cost savings. Ms. Frase earned 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 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 © 2018 by Laura A. Frase. Responses are welcome.]

I Gotta Be Me! Self-Enhancing Cognitive Biases

"I hate to go on tryin' your patience like this – but well, I'm either dead right or I'm crazy."
– George Bailey, a.k.a. Jimmy Stewart¹

Finally, we come to our internal Biases – those that intersect with our egos and our sense of self. Many of life's most important decisions start with self.² Self-confidence and optimism motivate us to get through our days – even to accomplish great things.³ The self-focused thinking that generates the Cognitive Biases discussed in this commentary are normal, healthy responses.⁴ They are hard-wired within us. They help us exude the confidence our clients demand when

they seek representation. Yet excessive self-esteem and overconfidence generate a wide variety of decision-making mistakes.

The distinctions in these Biases are subtle. They influence our perspective. They implicate our perceptions of who we are and how we fit within our worlds. Yet during negotiation and litigation management, these internal "yes men" can impede our objective assessments of facts and cause us to neglect "the reality that is outside of ourselves."⁵ In risk assessment and decision-making, when confronted with ourselves, these Biases can lead us astray.

I Am Always Right: Overconfidence Bias

Confidence in ourselves is a necessary part of our practices. The **Overconfidence Bias**, however, is born from our extreme conviction of our own rightness.⁶ We may have "an 'inflated belief in the accuracy of [our] knowledge,' resulting in a miscalibration between confidence and accuracy that then hampers judgment."⁷ We are simply more confident than the facts warrant.

For example, participants in one study were given nonsensical symbols and later asked to recall them. For those who were 100% confident in their recall ability, they were only right 85% of the time. If the participants were 80-90% confident, they were correct only 55% of the time.⁸ "Often wrong but rarely in doubt."⁹

This Bias has a peculiar twist. Studies have shown that people are the most confident about circumstances in which they possess the least amount of information.¹⁰ For example, people believe the chances of good things

happening to them are higher than reality presupposes. Similarly, we are overconfident that bad things are less likely to happen than they really do.¹¹ And we are often overconfident in believing we can control forces that are beyond our control. Overconfidence “is most pronounced for difficult tasks, where the individual feels [in error] that he possesses a degree of control over the risk.”¹² One commentator suggests that for lawyers, in particular, when a case is “unusual or outside the lawyer’s experience, her overconfidence actually increases.”¹³

In one large study, 481 attorneys were asked to describe one of their cases which they expected would go to trial within the next year. Then they were asked, “What would be a win situation in terms of your minimum goal for the outcome of the case?”¹⁴ As you may imagine, 65% of the attorneys generally overestimated the probability that their goals would be met.¹⁵ Lawyers with more experience were no less overconfident than those with less experience.¹⁶ Most interestingly, 64% of the attorneys were pleased or very pleased at the outcome of the case, even though only 57% of them actually achieved their stated goals.¹⁷ As you know, when operating in Hindsight Bias, our memories, and thus the definition of a success, can be altered.

Scholars still debate the cause of this Bias. Some theorists believe Overconfidence Bias is a result of the Anchoring Effect or Confirmation Bias - clinging to and remembering selectively recalled data increases our certainty in our correctness.¹⁸ This Bias may also be driven by the Availability Bias – we more readily recall our successes rather than our failures.

Others suggest Overconfidence Bias is related to environmental circumstances; we are raised to believe we can do anything, no matter the facts. As a self-fulfilling prophesy, some even suggest Overconfidence Bias works to our advantage because we may attempt tasks which we might not likely attempt if “reality” set in.¹⁹

It is easy to see how this Bias affects our clients and the decisions they may make. In another study, 413 litigants were evaluated as to their confidence levels of a jury trial win. In this study, 57% of the litigants believed they had a 90% chance of winning their trial. Amazingly, 24% believed they had a 100% chance of winning.²⁰ Thus, the Overconfidence Bias can cause unrealistic expectations and push our clients toward the

more risk-prone and expensive option of trial. The Bias can also manifest in estimations of the business value of our client’s projects and the potential for positive outcomes.²¹ The CEO client, for example, may believe that she can turn the company around by the sheer force of her talent.

Overconfidence can hinder us personally as we evaluate our client’s disputes. It may impede our ability to predict the behavior of others, causing us to listen poorly and overlook key facts or social cues.²² In Overconfidence Bias, we may unconsciously avoid recognizing our mistakes.²³ It may lead a mild form to what some call the “true-believer” syndrome – an inability to recognize and acknowledge facts that counter our clients’ narrative. It may cause us to inflate settlement demands or overestimate the probability that the other party will accept our contact terms.²⁴

Confidence enhances our practices. Clients hire us to predict outcomes assuredly. We need to feel convinced of our abilities and knowledge to attract new clients. “Confidence controls action.”²⁵ Yet, the Overconfidence Bias skews the accuracy of our predictions. Coupled with other Biases such as Confirmation Bias (relying on that which agrees with us) and Loss Aversion (taking more risk to prevent a loss) our excessive sureness may drive us to advise our clients to make more risky moves in litigation or negotiation approaches. Our confidence alone should not be the foundation of our decision-making.

What is Important to Me Must Be Important to You: Egocentric Bias

We are egocentric thinkers. “We have considerable difficulty casting aside [our] own unique perspective when attempting to take the perspective of another.”²⁶ This Bias is often confused with, and even incorporated into, the other Biases discussed in this commentary. For our purposes, the **Egocentric Bias** is the assumption that what is important to us must be important to the other side. And equally, what we believe is unimportant is also unimportant to our opponent.²⁷ Since we are rational in our perceptions,²⁸ our choices and priorities are thus rational and logical (as are all things we conceive ourselves). Therefore, we believe another’s interests and perceptions must be identical to our own. “Self looms large in judgements that require people to take others into consideration, resulting in predictable judgment errors.”²⁹

The Egocentric Bias is amplified by other positive self-illusions, including an exaggerated perception that we have control over outcomes controlled by others or even chance events. Our egos push us to make unrealistic forecasts of our own future.³⁰ The Bias may also cause us to alter facts “to make oneself appear more worthy or competent than one actually is.”³¹ Basically, when we are presented with “multiple conceptions of what is fair, or faced with competing potential resolutions to a problem or conflict, people will tend to choose the most self-serving one.”³²

While we have the responsibility to recommend options that serve our client’s best interests, this self-focused perspective may cause us to advocate options that also serve our own best interests. For example, a CEO must operate her company in a manner that benefits the company, not her own personal interests. In this Bias, we assume that the best personal priority is automatically in the best interest of that company. “The human psyche has a powerful ability ‘to rationalize as right that which is merely personally beneficial.’”³³

Failing to consider others’ interests and priorities can breakdown our litigation and negotiation plans. We may put together a line of attack that in no way suits our client’s goals. We may believe, for example, that the testator automatically wants an even division of the assets without understanding that circumstances suggest another plan is more beneficial to all heirs. Disparate negotiating parties may believe that the gaps between their common interests is wider than it really is. Even when both sides have identical information, we still tend to measure the strength of the other side’s case using our own self-interested priorities. We may think that a neutral party will favor our client’s case over the others.³⁴

One commentator applied this Bias to the art of statutory interpretation. He suggests that when determining the “plain meaning” of a statute, a “Justice may stubbornly attribute his own ‘meaning’ to a passage of statutory language – even being unconscious about his stubbornness. He may sincerely believe that he merely is attributing the ‘meaning’ which a reasonable reader would attribute to the words.”³⁵ What is a reasonable interpretation of meaning for the Judge is automatically the statute drafters’ intent.

A healthy devotion to our self-interests is a laudable survival skill. Yet in negotiations and litigation strategy,

failure to appreciate and work within the other side’s facts and priorities can cause miscalculation of the outcome or missed opportunities for negotiable trade-offs that could satisfy the interests of both. What is “logically and rationally” good for us is not necessarily good for our clients.

Superior to All Others: Above Average Effect

Sometimes referred to as the “Illusionary Superiority Bias” or, more popularly, the “Lake Wobegon effect,”³⁶ the Above Average Effect means we believe that our abilities and capacities are superior to those of others. In other words, we believe we are above average in tasks and thinking when compared to the typical individual.³⁷

This tendency to greatly inflate our own abilities and skills cuts across numerous domains and populations. We all can fall prey to this Effect - it impacts no matter our sex, age, occupation, or level of education.³⁸

In a study conducted in 1981, 93% of the U.S. drivers polled believed they were better than the average driver.³⁹ More recent studies suggest that 80% of those studied believed they were above average or average drivers while texting.⁴⁰ In a study involving over 1 million high school students, 70% rated themselves as having above-average skills in leadership, 60% said they were above the median in athletic ability, and 60% placed themselves in the highest category in the ability to get along with other students.⁴¹ Clearly all of these expectations are mathematically impossible.

Additional studies have shown that we believe we are “smarter, . . . better leaders, better managers, better workers, healthier, more socially skilled, more sensitive, more ethical, more charitable, more likely to vote, more productive and (ironically) less susceptible to optimistic Biases.”⁴² One can easily see how, in the grand scheme, this self-serving Bias can eventually become a “springboard to social disharmony.”⁴³

We also tend to believe we are less likely to experience a negative event than the average person.⁴⁴ We believe that we are “less likely than others to experience heart attacks, heart disease, strokes, skin cancer, alcoholism, car accidents, divorces, unemployment, unwanted pregnancy, and criminal victimization.”⁴⁵ The more pronounced the perception of control over the event, the more pernicious the effect.⁴⁶ Problematically, being

told the true average chance of the event occurring does little to blunt the effect. People just assume they are better at taking preventative measures, thus reducing their personal risk.⁴⁷

Examples of this Bias are replete throughout our practices. While spouses may accurately predict the rate of divorce (50/50), most predict that their chances of getting a divorce is about 10%.⁴⁸ Similarly, 98% of divorcees believe that they personally will collect every penny of court-ordered child support, even though they expect that generally only 40% of ex-spouses collect the court-ordered funds.⁴⁹ A survey of 155 Judges found that 87.7% of them “believed that at least half of their peers had higher reversal rates on appeal.”⁵⁰

One interesting study addressed whether International Arbitrators are susceptible to various Biases, including the Above Average Effect. Some have argued that Arbitrators are inferior to “independent judges” in international trade disputes, despite the many studies that traditional judges are equally susceptible to a variety of Biases.⁵¹ In 2014, attendees at the prestigious Congress of the International Council for Commercial Arbitration in Miami were asked to participate in a survey. The study leaders selected 262 Arbitrators and asked them to evaluate their own skills and the skills of their fellow attendees. After answering multiple questions, almost 85% of those surveyed said that they ranked themselves superior in arbitrator skills than the median arbitrator attending the conference.⁵² Most interestingly, 92% of those surveyed said they were superior in procedural efficiency to the median of those attending.⁵³ These participants were also asked to determine whether, like judges, they were impacted by other cognitive illusions, such as Anchoring and the Framing Effect. A very high percentage denied they were similarly impacted. “Whether appointed by the state and appearing in robes, or selected by parties and appearing in business suits, adjudicators are human beings, and human beings make predictable judgement and decision-making errors.”⁵⁴

In the negotiation and litigation context, this Bias causes us to err because we may exaggerate our ability to achieve desired results. We may formulate plans that are unrealistic, based solely on our “extraordinary capabilities,” dismissing our colleague’s skills. Trial results may be cock-eyed if we operate under the assumption that we are better than opposing counsel. We may

attempt to hold out for a better offer “because of our superior talent,” creating the setting for impasse. We may believe, erroneously, that we are more flexible, fair, competent, honest or cooperative and thus dismiss the talent of our counterparts.⁵⁵

Assuming we are always “above average” in our skills and talent impacts objectivity and risks underestimating our opponent. In pride and arrogance, we will miss opportunities for our clients.

Bad Behavior Speaks Volumes: Fundamental Attribution Error

Our belief in our superiority is not limited to our own proficiencies. We may also believe we are superior at judging the foundation of another’s personality. When confronted with another’s perceived undesirable behavior, we immediately assume that character flaws motivate that behavior.⁵⁶ Prevalent in American culture, with **Fundamental Attribution Error (FAE)**, we assign (often negative) personality traits to explain socially unacceptable or harmful behavior.⁵⁷ We assume bad behavior equates to inherent negative personality traits.⁵⁸ Contrarily, we underestimate how outside or situational factors explain that same negative behavior.

FAE is not about social or racial prejudices.⁵⁹ This is an internal shortcut our brain takes when we judge behavior. For example, if a person doesn’t complete a task, we may say the person is lazy or unmotivated. We may not consider that perhaps the other person was given incomplete instructions or had an intervening family crisis. If someone does not respond to our offer right away, we may believe they are playing games or trying to gain improper advantage. Instead the other side may simply be delayed in discussing the offer with her client.

Conversely, when someone demonstrates a socially acceptable response, we do not believe that personality traits are the reason they acted in that fashion. We automatically assume external dynamics explain the positive behavior. For example, if someone completes a task ahead of a deadline, we may assume that the person had help or the assignment was too easy. We are less inclined to assume the other person was simply responsible, organized, or dependable. We evaluate behavior using incomplete information.⁶⁰

Remarkably, when explaining our own negative behavior, we tend to attribute that behavior to environmental

or situational constraints rather than accept that our character drives our behavior. A classic example is “my dog ate my homework.” We judge our incentives as pure and selfless and the other side is wrong to believe otherwise. We give ourselves the benefit of the doubt but are less charitable with others.

In this Bias, we can easily see how conflict ensues. When someone’s behavior harms us, our anger motivates us to believe the other person is not just “bad” – they are acting with malevolence.⁶¹ We then react with heightened anger.⁶² The other party thinks our reaction is unjustified because no harm was intended or (in their perception) even occurred. These reactions build on each other, escalating conflict - all because of supposed motivations that simply do not exist. One need only read the comments sections in on-line news stories to see how this Bias plays out (with or without the help of “internet trolls”).

In an interesting opinion involving FAE, an inmate argued that conducting a civil commitment hearing via live video violated his due process rights because the camera was to be focused solely on the inmate. He argued that if the camera was focused in that manner, the Judge might assume that his reactions were part of the inmate’s personality, diminished mental health or innate character and not caused by other witnesses’ testimony, the surrounding environment, or other stimuli which would not be visible to the Judge.⁶³ While the Court did not specifically address FAE in its ruling, it held that conducting the hearing remotely did not violate the inmate’s rights.⁶⁴

One can clearly see how FAE impacts jurors, particularly when they must determine “intent, foreseeability, mens rea, malice and scienter.”⁶⁵ For example, one commentator argues that FAE negatively impacts the criminal law defense of entrapment. Factfinders must determine whether a person was predisposed to commit a crime or whether the police improperly induced the Defendant to commit a crime.⁶⁶ With FAE’s assumption that personality flaws explain bad behavior, the entrapment defense become ineffective in supporting reasonable doubt as to whether, but for the police sting operation, a Defendant would have still committed the crime.⁶⁷ Clearly connected to Hindsight Bias, character defects means the Defendant had the requisite intent.

FAE can also play a confounding role in negotiations. For example, each party may “attribute negative aspects of the conflict to the dispositions and evil motives of the other party”⁶⁸ while minimizing their own role in the dispute. Now the parties are arguing not about the terms of a potential contract but about their superior character while in combat with a “reprobate.” Assuming our opponent is malicious does little to promote the potential for agreement.

FAE can be diminished. The reaction occurs “unintentionally and without conscious awareness.”⁶⁹ Studies have shown that once we have the time or the interest to think about the behavior, we can adjust or “correct” our assumptions as to the cause of that behavior.⁷⁰

“[P]eople are willing to make quick and confident judgements of a subject’s personality trait based on a very limited data sample.”⁷¹ Making those quick judgements about the motivations of others solely based on observed behavior may lead to judgment errors.

The Messenger Matters: Reactive Devaluation

As Groucho Max once said, “Your proposition may be good but let’s have one thing understood – Whatever it is, I’m against it!”⁷² In **Reactive Devaluation**, who conveys offers or information impacts how we value what we receive. The messenger becomes intertwined with the value of the message. If the offer comes from an antagonistic adversary or someone who we do not respect, that offer may be devalued.⁷³ If the exact same proposal is offered by a neutral or a friend, that proposal is treated with more deference.⁷⁴ In this non-rational reaction, the more we dislike our opponent, the stronger the reaction.⁷⁵ We “see enemies where none exist.”⁷⁶

This phenomena was famously studied in the 1980s. Participants were asked whether they supported a nuclear disarmament plan in which the U.S. and Soviet Union would immediately reduce their weaponry by 50%. When the participants were told that President Ronald Regan proposed the idea, 90% believed the proposal was advantageous or even-handed for the U.S. When told that Soviet President Mikhail Gorbachev proposed the very same idea, only 44% of the participants saw the idea as positive.⁷⁷

Social scientists suggest different stimuli cause this Bias. It may be triggered by fear that the opponent has access

to undisclosed information.⁷⁸ Some suggest the Bias is caused by cynicism.⁷⁹ Spite may also explain the reaction; we reject a proposal because we view the opponent with such malevolence that declining even the most beneficial terms keeps our opponent from obtaining what she wants.⁸⁰ Aspiration may also be a cause. We devalue an offer because we believe it is a signal that additional concessions may be forthcoming.⁸¹ Whatever the cause, we react because the person making the offer or conveying information is so distrusted that the value of the message is lost.

In negotiations, Reactive Devaluation is amplified when we view an offer as against the best interests of our counterpart. The offer is therefore suspect and ultimately dismissed.⁸² What is good for our counterpart must be automatically bad for us.⁸³ We fail to understand that our counterpart may value terms of a potential agreement differently from us. The “possibility for trades that benefit both sides would simply not be recognized.”⁸⁴ Reactive Devaluation can even cause us to reject very beneficial terms because the messenger is so detested.

The same reaction can occur in litigation. Despising the opponent may mean we miss acting on helpful facts or documents produced by the other side. We wait for the other shoe to drop – what are they holding back? Information from adversaries lacks significance.

As litigators and negotiators, we are trained to assume that our opponents propose solutions or produce information that are in their own self interests. Yet in this Bias, the messenger overpowers the value of the message. As with many other Biases, our assumptions about the motivations and priorities of another may cause us to miss opportunities. We must work to separate the message from the messenger.

Battling Ourselves

These self-serving Biases are perhaps the most difficult for us to face. We pride ourselves on our logic and our rational approach to our clients' problems. We believe our strategies are the best options to shepherd them through their legal troubles. How do we get out of our own way?

Self-Assessment: Most of the Biases in this group can be challenged by challenging ourselves. In analyzing and deciding, we should pause and reflect on our motives

and our perspectives. Check to determine if our fundamental and psychological desire to be right is driving our litigation or negotiation plans. If we cannot self-assess, we may not recognize our mistakes in the future.⁸⁵

Talk about Randomness and Lack of Control: If clients believe they have even the smallest amount of control over the circumstances at issue (i.e. jury verdict), the Above Average Effect is rarely mitigated.⁸⁶ Discuss with them early in the process what we truly can and cannot control and the financial and emotions costs involved.⁸⁷ Understanding that something is truly random helps. Discussing lack of control also mitigates the Overconfidence Bias. Some scholars have even suggested using other Biases, like the **Availability Effect** discussed in Part 4 of this series, to mitigate self-serving Biases.⁸⁸ Yet the consequence of such manipulation and fine-tuning of the narrative can create more problems than it solves.⁸⁹

Embrace Mistakes: They will happen. Recognizing mistakes may feel embarrassing, demeaning, and even traumatic, yet we learn from our mistakes. Remember that “the anxiety that accompanies any realization that we are wrong perfectly ‘reflects the urgency of our desire to be right.’”⁹⁰ Analyze the results of your predictions to calibrate Overconfidence. Accountability may also reduce other Biases.⁹¹ We cannot let our egos keep us from improving in our craft.

Separate the Message from the Messenger. Consider how you would evaluate an offer, concession or information if conveyed by a colleague rather than foe. Does that change the assessment of value of the information? As part of your strategy, consciously chose the best person to convey any offer or information to your opponent so the message will be well received.

Talk in Groups. In battling FAE, studies have shown that discussing the behavior among a group attenuates the Biases' impact.⁹² A group can provide different perspectives in analyzing ambiguous behavior and enforce the idea that facts may be interpreted differently.⁹³ Delaying your assessment of a causal connection between behavior and personality also reduces FAE's effect.⁹⁴ Give yourself the time and space to consider alternative explanations that involve outside factors rather than character.

Conclusion

We all want to be right. “It is ego-gratifying, imperative for survival, and ‘one of life’s cheapest and keenest satisfactions.’”⁹⁵ Our clients seek out our assuredness. “Confident lawyers who fundamentally believe in their theory of a particular case, and the significance of their larger role in the system, will surely have more success. . . than those plagued by self-doubt and indecision.”⁹⁶ Less extreme forms of these Biases are a part of normal, healthy psychological human condition.

Yet in the litigation and negotiation context, our “normal” reactions can get in the way. Relying on our “superior” and “correct” views can directly and detrimentally impact our clients’ positions. Because we “are inclined to hold the misguided conviction that [we] somehow see the world, and evaluate divisive issues, in a uniquely clear, unbiased, and unmediated fashion” we may misjudge.⁹⁷ These self-enhancing Biases can also magnify other flaws in our reasoning.⁹⁸ We therefore should adjust our evaluations away from ourselves, acknowledge the persuasive sway of these very normal and healthy Biases and, consciously challenge our reactions.

Endnotes

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Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: mealeyinfo@lexisnexis.com

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