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When Strategies Go Awry: Part 6 In A Series On Cognitive Biases And Their Impact

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**A commentary article
reprinted from the
April 17, 2018 issue of
Mealey's Emerging
Toxic Torts**



Commentary

When Strategies Go Awry: Part 6 In A Series On Cognitive Biases And Their Impact

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[Editor's Note: This is the final segment 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.]

Refining Our Thinking About Thinking: Battling the Sway of Cognitive Biases

“They will get it straight one day at the Sorbonne. We shall return at twilight from the lecture pleased that the irrational is rational.” - Wallace Stevens (1942)¹

It begins with how we deliberate. Decades of scientific studies have established that Cognitive Illusions or Cognitive Biases impact our decision-making.² “[M]aking decisions under conditions of complexity and uncertainty is to invite biases and errors” into our choices.³

Over the last five commentaries, I introduced several Cognitive Biases – briefly described below - that influence decisions-making.⁴ There are many more.⁵ Some Biases are generally viewed as the cause of flawed thinking while other Biases are said to be a result of that thinking. Some scholars suggest that these Biases should not even be defined as errors. They are, instead, helpful – such as remembering the past in an overly positive manner.⁶ Rather than engage in that theoretical debate, my goal in this series was to introduce to you those particular effects that impact our practices.

By having this full list before you, I hope you now perceive how these Biases can exacerbate decision errors when combined with or stacked upon each other. As an example, we know that Hindsight Bias causes jurors to believe that a certain unfortunate outcome (such as a business going bankrupt) is predictable. When coupled with Fundamental Attribution Error (FAE), jurors may believe, instinctively, that dispositional factors (such as greed, incompetence or malfeasance) caused the business tragedy. They are certain of this finding because they are immodest about their conclusions (Overconfidence Bias). In fact, they actually remember other examples of corporate fraud (Availability Bias) and they rely upon and indeed inflate those memories to confirm their expectations (Confirmation Bias).⁷

In another example, if FAE and Reactive Devaluation are combined in corporate merger negotiations, “Decision-makers will both incorrectly expect their adversaries to see benign motives in their own actions and also assume the worst about ambiguous signals sent by their adversaries.”⁸ The combinations are endless.

Given the state of behavioral research, we no longer need to question whether we suffer from these illusions in our thinking.⁹ We do. To quote Winnie-the-Pooh, “When you are a Bear of Very Little Brain, and you think of Things, you find sometimes that a Thing which seemed very Thingish inside you is quite different when it gets out into the open and has other people looking upon it.”¹⁰ We simply do not think like we think we do. And we do not think like we think others think.¹¹

SUMMARY OF COGNITIVE BIASES

Above Average Effect. We believe we are superior in our aptitudes and talent when compared to the capacities and skills of others. This Bias is also called the Illusionary Superiority Bias or the Lake Wobegon Effect.

Anchoring Effect. We endow early information or the first number with greater weight and credibility when compared to subsequent numbers or information. We fail to adjust our assessment sufficiently away from that first number or information, thus, skewing our litigation and negotiation plans.

Availability Bias. We believe that events we easily recall happen more often than reality proves. This Bias can also result in **Availability Cascade** – when a minor event blooms into a major crisis, often facilitated by constant media coverage.

Confirmation Bias. We search for and rely upon only that which confirms our previously conceived intuitions or wishes. We ignore or devalue that which does not agree with our beliefs or interpretation of the facts.

Egocentric Bias. We assume that what is important to us must be equally important to our client, our counterpart or our adversary. Conversely, we think what is unimportant to us is automatically unimportant to others.

Endowment Effect. We believe that what we own is more valuable than others do, even though we would not pay that amount if purchasing that same item from another.

Framing Effect. We are driven toward choices by the words used to describe the alternatives rather than by

what is in our’s or our client’s best interests. Irrationally, “cosmetic differences in the descriptions of substantially identical options. . .cause people to prefer one over the other.”¹²

Fundamental Attribution Error (FAE). We automatically believe that perceived bad behavior is caused by negative personality traits. We underestimate how outside forces may be triggering the negative behavior. Conversely, when someone displays socially acceptable behavior, we do not believe that personality traits are the reason they acted in that fashion. Only external dynamics explain the positive behavior. Additionally, we rely on external factors to justify our own bad behavior rather than chalk it up to our character flaws.

Hindsight Bias. In the “I-Knew-It-All-Along” Bias, when we know the outcome of an event, we overestimate our ability and ease with which we would have predicted that outcome. The Bias can also be manifested visually in the **Visual Hindsight Bias**, or the “I-Saw-It-All-Along” Effect.

Illusory Correlation. In this form of Confirmation Bias, we see patterns where none exist, violating the scientific axiom that correlation does not equal causation.

Loss Aversion. We so loathe loosing that we may take more risk to avoid losses than we will to attain gains. Framing triggers this Bias.

Negativity Bias. We tend to remember negative information or events more readily than positive ones.

Outcome Bias. In this form of Hindsight, a bad outcome is blamed solely on poor decisions. We fail to take into account how changing circumstances, surprises or events outside of our control impacted the outcome.

Overconfidence Bias. We operate with an extreme conviction of our own rightness. We are simply more confident in our opinions, assessment and ability to control events than the facts warrant.

Reactive Devaluation. We value a message or information based upon who delivers it. If the offer or information comes from someone we dislike or disrespect, the importance or credibility of the information is devalued or dismissed.

Status Quo Bias. A form of risk aversion, we fundamentally prefer our current state of affairs over risking improving our position, even to our detriment.

Sunk Cost Fallacy. In determining the value of an offer, sale or acquisition, we erroneously incorporate the project's spent resources into future goals of recovery.

As stressed in earlier commentaries, these Biases are natural, normal responses in thinking. Indeed, they help us move through our day. To analyze every alternative to every simple question would be paralyzing. These short cuts (heuristics) make our lives easier.

Yet when they are employed to resolve complex matters or answer questions having only limited information, these same short cuts may cause us to stumble. These Biases occur instantaneously and involuntarily, prompting us to predictably deviate from rational thought. Appreciating that these Biases can wreak havoc with our decision-making process is the first step to countering their effects.

A CAVEAT

Before we congratulate ourselves on our ability to recognize Cognitive Biases, there is one more Bias to introduce. **Bias Blind Spot** explains that we think we are better at recognizing and preventing the influence of Biases than we actually are. We also have the tendency to perceive Cognitive Biases more often in others than in ourselves.¹³ Those of you who pointed out biased thinking to your colleagues or (bravely) your spouse, may have been on the receiving end of "But you do it too!" Even while engaging in introspective assessment, we err in our reasoning about the very Cognitive Biases we are trying to avoid. As several studies have suggested, "Being free of the bias blind spot does not help a person avoid actual classic cognitive bias."¹⁴

DE-BIASING TACTICS

Conceding that these Biases impact our thinking does not diminish their influences. Some scholars even suggest that general awareness is "absolutely worthless because people are, for the most part, oblivious to the influence of heuristics and biases on their decision-making processes."¹⁵ Failing to acknowledge their impact can be perilous, particularly in high stakes problem-solving. We must do something affirmatively to thwart their sway.

De-biasing is harder than it sounds, particularly for lawyers. We are solution-oriented creatures. We are hyper-focused on conclusion and finality. Delving into our psychological temperament and ruminating on our thinking is not a natural part of our practices. As one professor overheard one law student say, "If I'd wanted to learn about feelings, I wouldn't have gone to law school."¹⁶

Do not despair. "There are indeed cognitive pills for cognitive ills."¹⁷ I have outlined strategies below – some as Self-Directed (what we can do ourselves) and others as Systemic (how outside systems can assist) which may help recalibrate our psychological responses. Some of these ideas were explained in more detail earlier in this series. Hopefully by seeing them together, you will be encouraged to practice and even combine the methods for more effective responses.

These strategies require single-mindedness, planning, and a conscious intention to implement them. With effort, these approaches can change the rules of "the brain game."

SELF-DIRECTED DE-BIASING TECHNIQUES

Self-Awareness. "Self-awareness is the foundation for wise action."¹⁸ Key to altering the manner in which we deliberate, self-awareness allows us to become more comfortable with our flawed thinking. What hot buttons push our reactions? What life stories limit our attitudes? How do our beliefs and experiences impact our assumptions? Engage in self-inquiry. "Through self-awareness and conscious choices we become the authors of our leadership contribution rather than allowing the [process] to trigger us into defensive, unwitting responses."¹⁹

"Intellectual humility will serve us well in helping us remember that there may be weaknesses in our views that we ourselves fail to recognize, that our views are hardly likely to be the last word on the subject, and that others may have insights that have escaped our attention."²⁰

By developing self-control, humility and emotional intelligence, we can better analyze our decisions rationally.²¹

Think Slowly, Pause and "Go to the Balcony". Literally pause. Hesitate. Slow down, step back, and

collect yourself. Look at the case or negotiation dispassionately. “Becoming alert to the influence of bias requires maintaining keen vigilance and mindfulness of one’s own thinking.”²²

To envision this disconnection, negotiation expert William Ury suggests the concept of “going to the balcony.”²³ Imagine yourself at a theater watching the play from the balcony. Become an observer of the conflict.²⁴ As the old adage advises, “Don’t stand too close to the elephant.” Detaching from the conflict allows the more judicious portions of our brains to engage.

Conflict Facilitator Larry Dressler recommends another mental technique called “standing in the fire.”²⁵ While the “fire” of conflict or intense negotiations engulfs others, our goal is to stand in the middle of the fire and “maintain calm, clarity, curiosity and resoluteness, even as others become adversarial, confused, or resigned to ‘another failed attempt to resolve the issue’.”²⁶ In our roles, whether litigator, negotiator or counselor, we must stand “in the face of high-heat interactions and not get knocked off balance, even as others around [us] do.”²⁷ We maintain composure and focus while the flames surround us.

If acronyms work for you, the Stress Reduction Clinic at the University Massachusetts Medical School suggests a mindfulness technique called STOP – “Stop; Take a breath or breaths; Observe what is happening in terms of your bodily sensations, emotions, and thoughts; and Proceed.”²⁸ Be intentioned in your thinking and reactions.

Delaying a decision also helps diminish the influence of a number of Biases. Recall these Biases are often triggered because we sacrifice accuracy in the name of speed and efficiency. Reduce or eliminate any time constraints in decision-making.²⁹

Set a Trip Wire. One commentator suggests creating a reminder or “trip wire” to snap us off autopilot and back to our plans. One example of an effective “trip wire” was a clause built into rock group Van Halen’s touring contract during the 1970s and 1980s. Buried within the contract was a clause that absolutely forbade brown M&Ms[®] anywhere backstage, upon pain of full contract forfeiture. If band members saw any of those wonderful chocolate candies backstage, they knew that the entire contract had not

been read carefully. Consequently, they were alerted that venue management may not have complied with all contractually required safety measures and technical specifications.³⁰

Craft a trip wire to remind yourself to focus and gather your thoughts while you are negotiating or strategizing. Set a timer on your smart phone to buzz after a certain amount of time. Have an associate or colleague pass you a glass of water or interrupt should you begun to stray from the plan or default to autopilot. One Mediator I know touches the door frame before entering a room to remind himself to focus and appreciate that the mediation is not about him. Use some external cue or gesture to prompt yourself to be attentive in the moment. Anything that disrupts a reflexive mode of thinking – to get you to pause – may help.

Become Comfortable with Conflicting Information and Perceptions. Cognitive dissonance and thus the triggering of Biases occurs because our brains are trying to resolve conflicting perceptions or ideas. Rather than attempt to hold the two or more opposite ideas in our brains at the same time, we try to reconcile the incongruities, creating the opportunity for biased thinking. We must learn to embrace two incompatible ideas in our brains at the same time without artificially resolving the conflict.

Ask Questions. Be sincerely curious. Everyone has a story to tell and most stories are very interesting. Step away from cross-examination.³¹ By asking open-ended, non-judgmentally framed questions, we are able to gather important information about the other side’s issues, concerns and goals. Seek clarity. With questions, “[W]e learn, connect, observe, and invent. . . [W]e push boundaries and we discover secrets. We solve mysteries and we imagine new ways of doing things.”³²

In fact, two of the most powerful questions to ask our clients or opponents are “What do you think?” and “Can you tell me more about that?”³³ Be cognizant, though, that questions that begin with the word “Why” may trigger a defensive response.³⁴

Listen. Engage in deep, active listening.³⁵ Focus on the speaker (which includes turning away from computers and smart devices). We gather more insight when we listen purposefully. Listen “for hidden or unexpected places to explore and connect.”³⁶ Listen to not only

what is said but how the choices and narratives are framed. We will see opportunities to reframe issues to either enhance our position or make an agreement more appealing. If our opponent is conveying significant anger, take time to assess the source of the anger rather than challenge it directly. Responding in kind escalates the dispute.

Acknowledge Randomness and Lack of Control. Surprises upset the best-laid plans. Remember that the future is not linear but made up of endless alternative outcomes and possibilities, most of which are driven by events out of our control. Preparing ourselves and our clients for disruptions helps us be more nimble when faced with those eventualities.

Prepare to Be Wrong. Humbly concede limitations. Mistakes will happen. "Open-mindedness flourishes in the context of a suitably fallibilistic view of human inquiry."³⁷ Glossing over or ignoring mistakes can lead to even more problems, including an unconscious motivation to engage in unethical conduct.³⁸

Facilitating the recognition of mistakes and crafting an effective apology is a topic for another day.³⁹ Importantly though, create a business environment that promotes "early recognition and acceptance of mistakes . . . avoiding one mistake building incrementally on another, discouraging denial and cover-up, and facilitating learning for professional growth."⁴⁰ Accept error rather than justify it. It is less painful in the long run.

Separate the Message from the Messenger. Simply disconnect the two. Also consider what narrative you wish to convey by the choice of your messenger.

Seek Objective Criteria. Studies suggest that once we are given objective data upon which we can base opinions, several biases are moderated and correctness increases. Do research rather than rely on memory. Ask the question: Do I want my particular theory/assumption/strategy to be true before I begin my investigation? Welcome information that challenges your assumptions. Carefully assess whether your goals are supplanted by an effort to recover sunk costs. A word of caution - recall that the definition of "objective" is subjective.

Reframe. As William Ury famously put it, "To change the game, change the frame."⁴¹ Be conscious of narrative

choices. Use "gain language" rather than "loss language." Transform the narrative of your opponent to language that promotes constructive discussion. Frame problems and decisions using positive words. Help clients identify their Framing issues and work with them on reframing their narratives to their advantage. Use the pronouns "us" and "we" in your narratives.⁴² As discussed before, Framing can be a Cognitive Bias and a De-biasing technique. Reframing "can weaken the force of an arbitrary frame."⁴³ Language matters.

Consider the Opposite. Compel yourself "to consider plausible alternative scenarios in which the same facts resulted in different outcomes."⁴⁴ "Consider the Opposite" is more than generating information that challenges perspective. It is about questioning fundamental assumptions. Assess why your judgment may actually be wrong. Write down the alternative scenarios and calculate probability estimates of them occurring. Come up with legitimate reasons why those outcomes should be expected.⁴⁵ We are, in essence, anchoring ourselves to the alternatives.⁴⁶ Discuss with clients the consequences of these potential alternative outcomes and the seriousness of their choices. Understanding that there is the potential for other, and perhaps distasteful, outcomes to occur heightens everyone's appreciation of the difficulty of the decision.⁴⁷

One author suggests an extreme version of "Consider the Opposite." "[D]o what you believe will be a deliberate mistake, meaning to purposely do something that should fail if your assumptions are true. . . . [A]sk questions that are likely to produce disconfirming information. . . . [M]ake it easier for others to disagree with you."⁴⁸ It is easy to see how this method will diminish a number of Biases, particularly Overconfidence.

Similarly, "Consider the Other" - in other words, consider the viewpoint of the opponent. Step into her shoes. We may then be drawn toward information that, while inconsistent with our views, expands our perspective and our understanding of the problem to be solved.

Replace the Anchor. Recall that many Biases are caused by or arise from a form of Anchoring. Ignoring the Anchor is ineffective. Instead, use this Bias to your advantage. Replace the Anchor with a more

well-reasoned and powerful one. Lean into that new reference point. Use it as the focus of the litigation narrative or negotiation plan. Have objective criteria that is consistent with your Anchor. Challenge the underlying facts your opponent uses to justify their Anchor. Locate information that explains why their Anchor is inappropriate or inconsistent with the facts.⁴⁹ By challenging the Anchor itself and replacing it with our own, we may diminish its influence.

Simplify. Minimize the number of choices presented. Then the person making the decision is less likely to choose the status quo. If overwhelmed by the number of available choices, the default option often wins.

WRAP. As a summary of these techniques, use this wonderful acronym, suggested by others, to help with decision-making –WRAP. It stands for “(1) **W**iden your options, (2) **R**eality-test your assumptions, (3) **A**ttain distance before deciding and (4) **P**repare to be wrong.”⁵⁰

SYSTEMIC DE-BIASING TECHNIQUES

Hire an Expert Negotiator/Settlement Counsel. All lawyers negotiate. Few are trained in the art of negotiation.⁵¹ Settlement Counsel (sometimes called Negotiation or Resolution Counsel) serves in a unique expert role, separate from Trial or Corporate Counsel. She is a fierce advocate for problem-solving and resolution.⁵² Her fresh approach can help identify creative options or terms that claim more value in a negotiation. She can develop the strategy, suggest what offers to make, when and in what order, and dilute any biased entanglements the case or corporate strategy generates. As an “outsider,” she is focused only on what is relevant to promote settlement.⁵³ She also lays “the groundwork for-improving communication and relationships between the adversaries, focus[ing] . . . the litigation on key issues and reducing litigation costs.”⁵⁴

Some may wonder –“Why do I need one more attorney working on my case or acquisition?” This query misses the point. Settlement Counsel is not hired to duplicate the work of others. She is a highly skilled expert in negotiation and you hire her just as you would hire any other subject matter expert to strengthen your case or strategy.

Settlement Counsel proffers a separate and distinctive persona to the other side – one seeking to assist rather

than to impede. She enhances the perception that Trial Counsel is dedicated only to fervent preparation for trial. She diminishes the impact of the conflicting narrative Trial Counsel often has to tell –“I absolutely will win this case but, oh by the way, do you want to talk settlement?” Finally, she functions as ultimate leverage. Deal with her or she withdraws and Trial Counsel is unleashed.

Develop a System/Structure that Promotes Quantitative Assessment of Decisions. Similar to the “Moneyball”⁵⁵ philosophy preeminent in baseball today, create a quantitative model or process that assigns hard, equally-weighted values to the factors that impact decisions. Literally give the facts numerical values. For example, certain troubling jurisdictions or law firms are given higher values than others. Readily agreeable contract terms are assigned lower values. Such quantitative models have been shown to surpass even expert judgments in a wide range of scenarios.⁵⁶ More simply, rely on a checklist of necessary contractual or negotiable terms rather than on your memory.⁵⁷

Of course, these quantitative models are only as good as the variables used. If the inputs are skewed or fraught with cognitive errors, (for example, overweighting the credibility of your client’s story vs. the opponent’s), then the solutions will be just as erroneous, if not more so. The goal is to create a process that impedes the blind acceptance of an assumption or intuition and systemizes decision-making.

Red Team. Create a team that articulates reasons why the initial impression may be wrong or why an idea or plan may fail.⁵⁸ Find a blunt, honest skeptic among your colleagues.⁵⁹ Be willing to expose plans and judgments to arduous questioning. Have these devil’s advocates concentrate on the merits of the other side’s case or plan while poking holes in yours.⁶⁰

Predict with an “Outside View.” Rather than attempt to predict the outcome of your specific project, case or complex merger, ignore the details before you. Instead, use “reference-class forecasting.”⁶¹ Collect and examine the outcomes of similar projects, cases or complex negotiations, whether yours or others. When selecting the reference-class, determine what similarities are meaningful to help you predict outcomes. Select with equal vigor similar triumphs and debacles. “The key is to choose a class that is broad enough to be statistically

meaningful but narrow enough to be truly comparable to the project at hand.”⁶²

Arrange the reference-class outcomes from successes to failures. Then position your current project within that outcome range, ideally at the median. You now have the average potential outcome for your project. If not your preferred outcome, what adjustments can you make to achieve the average outcome? Studies have shown that this “outside view” in forecasting yields more realistic future outcomes. “In the outside view, managers are not required to weave scenarios, imagine events, or gauge their own levels of ability and control – so they can’t get all those things wrong.”⁶³ Basically, you are using precedent to your advantage.

Create a Feedback System. Ask the decision-makers to estimate their confidence in the accuracy of each decision they make at the time it is made. Then inform those decisions-makers of the discrepancies between their confidence levels and the accuracy of the actual outcomes.⁶⁴ This is not about performance feedback alone but about the divergence between accuracy and confidence level.⁶⁵ With regular and timely feedback, confidence is regulated and we may more accurately predict outcomes, thus enhancing performance.⁶⁶

Mock Negotiations. Just as Mock Trials give practitioners and clients a more realistic view of probable verdicts, an informal “mocking” of complex settlement negotiations can assist in refining the negotiation plan. Submit your negotiation scenario to an unbiased group and ask them to generate creative terms or options. Listen to their processing. Negotiation priorities may change. Or conduct “small-scale experiments, pilot programs or trial runs”⁶⁷ that sample various options or strategies. Our goal is to generate legitimate experimental data. Then you “discover instead of forecast.”⁶⁸

Claim-Sanitize. Limit the information provided to your decision-maker.⁶⁹ Reveal information only when necessary. Some scholars have called this technique “sequential unmasking,”⁷⁰ or “hide-the-answer.”⁷¹ For example, in jurisdictions that protect consulting expert opinions, ask the consultant to review a case, providing only the facts that lead up to the outcome, but not the actual outcome itself. Ask the expert to predict possible outcomes and rate their likelihood. Have her assess, for example, whether the facts suggest negligence

or a violation of standards of care. Ask the expert to provide her confidence level of the various outcomes actually occurring. See if your outcome is predicted. You may then decide whether or not that report should be provided to your testifying expert.

The central goal is to open our minds to alternative ways of thinking. We should become comfortable with the idea that perhaps our initial impressions cannot be sustained in the light of independent and objective evidence. Unstructured, non-parallel thinking helps overcome errors.

CONCLUSION

As lawyers, we work in two fundamental arenas: deal-making and dispute resolution. “To state the obvious, the legal world is fraught with uncertainty.”⁷² And it is our maneuvering within this environment of uncertainty that triggers Cognitive Biases.

Battling these robust influences is tough. “No decision-maker ever has both perfect information and an unlimited amount of time at his or her disposal.”⁷³ Sustaining a laser focus on our decision process requires intention and energy. It can be exhausting. We are, in essence, fighting against human nature. Yet, we are not powerless. We start by acknowledging our humanity. In combatting these Biases’ sway, we must “[r]ecognize the signs that [we] are in a cognitive minefield,”⁷⁴ slow our thinking, and deliberately alter our perception. Using one or more of these De-biasing techniques can be game-changing.

I hope this series prompted further curiosity into the exquisite complexity that is human thought. Thank you for traveling with me on this journey through our minds.

“Mischief managed.” – Fred & George Weasley.⁷⁵

Endnotes

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MEALEY'S: EMERGING TOXIC TORTS

edited by James Cordrey

The Report is produced twice monthly by



1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

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ISSN 1089-0882