
Kluwer Mediation Blog

Cognitive Bias In Mediation

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Introduction

“A great many people think they are thinking when they are merely rearranging their prejudices.”
William James

Whether as mediators, advisors or parties in dispute, we consider ourselves rational, open minded thinkers. We make decisions in an objective, non-biased fashion, don't we? Sadly, not often. We are all susceptible to a swarm of cognitive biases that affect our decisions in mediations, but being aware of these potential prejudices gives us an opportunity to address them and arrive at better outcomes.

What is Cognitive Bias?

Cognitive biases are errors in our thinking that influence our decision-making process. They are patterns of behaviour that draw us to particular conclusions. Our brains form these conclusions based on information gathered and stored from the past. Our decisions are subconsciously based upon:

- (a) previous decisions involving similar subject matter;
- (b) information we have selected that suits our preconceived ideas;
- (c) emotional attachments; and/or
- (d) self-interest.

Pattern recognition and emotional tagging are two processes that contribute to cognitive bias. Both relate to the idea that our brains resort to information that is already stored rather than evaluating each decision as an individual and fresh task. Heuristics encompass this idea, being mental shortcuts which aim to simplify our decision making processes. Heuristics save time when reaching conclusions but result in cognitive biases as we make false assumptions about new information and circumstances.

While cognitive biases can be good survival tools – making sure we stay safe – they can detract from logic, leading to suboptimal and poorly informed decisions.

Two Way System of Thinking

Psychologists Amos Tversky and Daniel Kahneman developed the term ‘cognitive bias’ to

illustrate flawed patterns of responses to decision making and judgement problems. They determined that people make decisions based on heuristics and common sense principles, not rationality or logic.

Tversky and Kahneman's experiments resulted in the development of the "Two Way System of Thinking". System one (thinking fast) is the intuitive, faster thought process which can be said to be the 'gut reaction' way of making decisions. In comparison, system two (thinking slow) is the more idealised way of decision making that involves critical and analytical thinking. Most people that were tested thought they were system two thinkers but were in fact system one.

The pair's findings deconstruct ideas about the quality of our thinking – demonstrating that although we believe we are making careful decisions, our brains are merely post-rationalising decisions that have been made previously using cognitive biases. Identifying these flaws in our thinking can improve our decision making.

Examples of Cognitive Bias

Confirmation bias, the anchoring bias and the overconfidence effect, are three key biases that can be used to explain poor decision making and appear frequently in mediation.

Confirmation Bias

"A man sees what he wants to see, and disregards the rest". Paul Simon

American psychologist Raymond Nickerson defined confirmation bias as *"the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand"*.

This occurs when we 'cherry pick' information that supports our preconceived beliefs, rather than researching and evaluating information from a range of sources and viewpoints.

There are two key reasons why we use confirmation bias when making decisions:

1. The human brain cannot carefully process all the information at hand. Confirmation bias is instinctive, acting as a reflex in tough situations like a mediation. Selecting and basing our decisions on information we have pre-stored in our brains saves time and energy.
2. Protection of self-image. It is important for our self-esteem that our preconceived ideas are shown to be correct. This can be especially important when we are in dispute and have reinforced our preconceived ideas over months or possibly years. Being proven wrong is a blow to our confidence and our egos. We seek to find information that justifies our preconceptions in order to achieve self-gratification and protect our identity in a conflict situation.

Anchoring Bias

Anchoring is where we tend to rely on only one piece of data we have received, using this to shape our decision making. We do this rather than looking for and adopting a wider range of inputs. The primary cause of anchoring bias is our need for a starting point in our decision making. It is easier for us to start with a figure or idea and work from that – rather than to explore and research a variety of factors, without preconception, in order to reach a conclusion.

Anchoring appears in mediation when the opening ‘anchoring’ offer is used as a starting point for further discussion. Problems arise in this situation when the anchoring point is not an accurate valuation based on the facts of the case.

Studies have shown that the initial ‘anchoring’ number set out in negotiations has a substantial impact on the outcome of the negotiation. Those who make the first offer – setting the ‘anchor’ – end up being more successful by ‘anchoring’ the discussions in their favour. This occurs even when the ‘anchoring number’ is seen by the other party(s) as being extreme.

Overconfidence Bias

We think confidence is an admirable characteristic – a sign of strength, control and leadership. Overconfidence can result in ignorant decision making. A consequence of overconfidence includes a strong belief that our opinion is superior, displaying an inability to see the potential risks or negative aspects of our decisions.

This occurs in mediation when a party or the advisors are over-confident of their position, leading at times to rash decisions or demands.

Negative Consequences of Cognitive Bias

Without recognising cognitive biases in our decision making, irrational and illogical judgements are made.

Our brain’s focus on certain specific memories, predictions, and information causes us to ignore other important factors when making decisions. Furthermore, our decision-making process is tainted because we struggle to make decisions by drawing from a range of different viewpoints and sources, instead letting personal influences take control.

Positive Consequences of Cognitive Biases

Our brain’s storage of previous emotions and memories of experiences can act as positive guides when making decisions. We can learn from our mistakes. The memories of our previous bad experiences warn us against making similar decisions again.

So, it is not all bad news for our biases: for example, a bias against the presence of a sabre tooth tiger did wonders for our ancestors. And research shows there are benefits in being biased towards optimism.

Optimism Bias

This bias encompasses the idea that people overestimate the probability of positive events, ignoring any possibility of negative incidence occurring. Optimism bias can be defined as the difference between our expectation and the outcome.

Neuroscientist Tali Sharot evaluated whether optimism bias is healthy, and established that it is, based on three reasons:

1. Interpretation matters.
2. Anticipation is satisfying.
3. Optimism changes reality.

When making decisions, the optimism bias can be useful as it encourages hope as well as promoting a success mentality. However, it is important to recognise the pitfalls of the optimism bias in order to ensure our decision-making process is realistic.

Optimism bias can be a useful positive tool in mediation – helping the parties (and occasionally the mediator and advisors) to “stay the course” when they would otherwise want to call an end to the mediation process at the first sign of roadblocks or following a particularly difficult conversation. Being optimistic that a resolution can be reached will help during the inevitable delays and stumbling blocks the parties will encounter.

How to Improve our Decision-Making in Mediation

Awareness

Recognising that you demonstrate cognitive biases improves your decision making. Once we accept that our decisions are affected by biases then we can work towards minimising their impact.

Data

In the absence of data, the stories that we tell ourselves are a combination of our fears and beliefs (Brene Brown). In mediation we need to fill the gaps in our thinking with data (facts) not pre-conceived ideas or assumptions. Data analysis requires system two thinking (thinking slow).

Availability

We must be open to the ideas and opinions of others and balance these against our preconceptions. Diversity is essential to good decision-making.

We must include outside knowledge and views in our thought processes. We should challenge our preconceptions and ask for advice. Our preconceptions and the views of others can coexist if we properly consider the merits of both.

Environment

Do not rush into making decisions. If you are hungry, angry, lonely or tired, do not make that decision (“HALT”).

Reflection

Ask yourself how you came to your conclusion? What influenced your decision? What data did you use? With more data/facts would your decision have been made differently? Slow down your thinking and decision making.

Relational Impact

Ask yourself who will be affected (or not) by your decision. This will help you evaluate whether you are making the right choice.

Conclusion

It is crucial that we recognise and negate cognitive biases in our decision making. In mediation we

need to ensure our decisions are a result of objective and broad system two thinking.

Awareness of our biases and how they affect others enhances the success of making good decisions when under pressure during a mediation. We can increase the quality of our decision-making by expanding the scope of our cognitive processes to include the factors above, especially the search for facts with which to challenge our fears and beliefs.

French Philosopher Henri Bergson famously said; “the mind only sees what the mind is prepared to comprehend”. When making decisions, be humble, be prepared to accept your mistakes and seek out new perspectives.


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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with a magnifying glass positioned over one of them, suggesting a search or analysis function. The text is arranged in a clean, modern layout, with the main title in a large, bold font and the company logo at the bottom left.

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