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REFINING OUR THINKING ABOUT THINKING: BATTLING THE SWAY OF COGNITIVE BIASES IN NEGOTIATION

LAURA FRASE*

ABSTRACT

Over a half-century of research and experimental testing confirm that, when making complex decisions, humans engage in predictable and irrational errors in thinking. Known as “cognitive illusions” or “cognitive biases,” these normal reactions in thinking may cause fundamental errors in how lawyers advise clients and negotiate with opposing counsel. Numerous negotiation, mediation, and client interview books and articles describe these cognitive illusions. A few articles recognize strategies, or de-biasing techniques, that challenge these errors but rarely are multiple strategies discussed together. The purpose of this article is to amalgamate some of the vast literature on cognitive biases, particularly those that impact negotiation planning and execution (Part I). Should a particular idea intrigue, significant references are cited to permit the reader to do a deeper dive into the subject. Finally, this article endeavors to consolidate potential strategies that may diminish these biases’ influences (Part II) so that readers may be encouraged to experiment with these methods to help recalibrate these automatic, normal psychological responses. Ultimately, the goal is to point readers toward potential ideas that may help challenge thinking and inspire further curiosity about a fascinating subject: the beautiful complexity that is human thought.

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INTRODUCTION

Conventional wisdom presupposes that we make rational and logical decisions.¹ Yet the fact that we err is undisputed. Psychological obstacles, or “cognitive illusions” or “biases,”² cause some of our thinking errors. Decades of scientific studies have established that these illusions impact decision-making.³ When we make decisions without all of the facts, particularly while evaluating complex information or in an uncertain environment, some biases encourage us to use emotion, instincts, and intuition to fill in the information gaps rather than apply critical analysis.⁴ Other biases prime us with information that is either not relevant or points us in the wrong analytical direction. Other biases are motivational and promote self-interested judgments.⁵ When lawyers “apply causal thinking inappropriately, to situations that require statistical reasoning,”⁶ we miss details, overweigh the importance of facts that support our client’s story, and allow our emotions and egos to drive our thinking.⁷ These subconscious

¹ We “absorb information, process it, and come up with an optimal answer or solution.” DAVID EAGLEMAN, *THE BRAIN: THE STORY OF YOU* 135 (2015).

² The author approaches this discussion as separate from cultural or implicit biases, which can be a cause of or result in cognitive biases.

³ Paul Bennett Marrow, *Behavioral Decision Theory Can Offer New Dimension to Legal Analysis of Motivations*, 74-AUG N.Y. ST. B.J. 46, 46 (2002); see also James H. Stark & Maxim Milyavsky, *Towards a Better Understanding of Lawyers’ Judgmental Biases in Client Representation: The Role of Need for Cognitive Closure*, 59 WASH. U. J.L. & POL’Y 173, 176–77 (2019).

⁴ Jeremy Lack & François Bogacz, *The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution?*, 14 CARDOZO J. CONFLICT RESOL. 33, 41 (2012) (stating that the human brain instinctively assesses new information through emotions first and within a few milliseconds, before the brain can logically assess the information).

⁵ Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1219 (2003).

⁶ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 77 (2011). Daniel Kahneman received the 2002 Noble Prize in Economics for his pioneering work on the study of heuristics and their impact on decision-making. See Daniel Kahneman, Nobel Laureate, Prize Lecture: Maps of Bounded Rationality: A Perspective of Intuitive Judgment and Choice (Dec. 8, 2002).

⁷ While not addressed in this article, cognitive biases are also culturally influenced. See generally Atsuo Murata, *Cultural Influences on Cognitive Biases in Judgment and Decision Making: On the Need for New Theory and Models for Accidents and Safety*, in MODELING SOCIOCULTURAL INFLUENCES ON DECISION MAKING 103 (Joseph V. Cohn et al. eds., 2017); Pei-Luen Patrick Rau et al., *The Cognitive Bias in Cross-Cultural Design, in MISTAKES, ERRORS AND FAILURES ACROSS CULTURES* 455 (Elisabeth Vanderheiden & Claude-Hélène Mayer eds., 2020).

thinking shortcuts cause us to “neglect the reality outside of ourselves”⁸ and lead us to make mistakes.

Lawyers work in two fundamental arenas: deal-making and dispute resolution. In those endeavors, we are trained to start from a position of doubt and even distrust.⁹ “[L]awyers are valued, in part, for the accuracy and objectivity of the advice they provide their clients. Partisanship and zeal are expected of lawyers as well, but partisanship may poorly serve a client’s interests if the lawyer’s advice is distorted by biases of which he or she is unaware.”¹⁰

“To state the obvious, the legal world is fraught with uncertainty.”¹¹ Negotiation planning and execution are conducted within significant levels of uncertainty. There is generally limited knowledge about the opponent’s interests and bargaining zone. During dialogue with our counterpart, our obligation of zealous advocacy may create an atmosphere of unfounded distrust. Evidence is often interpreted by using a self-interested narrative. Our client’s emotionally laden goals may run counter to sound resolution strategy. It is our maneuvering within this complex lawyering environment that triggers cognitive biases. “[M]aking decisions under conditions of complexity and uncertainty is to invite biases and errors” into our choices.¹² 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? How can our reasoning be so mistaken?

Part I of this article briefly describes various cognitive biases, illusions, and heuristics that may impact negotiation planning and tactics, including the manner in which we advise clients. Part II of this article is devoted to proactive, concrete ideas on how to challenge the cognitive biases within ourselves and those we may recognize in others. Just as these cognitive biases may combine to compound error in judgment, directly confronting our thinking and practicing the strategies described may assist us, at least, in minimizing the errors or, at best, eluding some of the consequences of those errors.

⁸ Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683, 713 (2005).

⁹ Robert A. Creo, *The Art of Persuasion: The Written Word—Asking Adversaries*, PENNSYLVANIA LAWYER, Jan./Feb. 2018, at 14, 14.

¹⁰ Stark & Milyavsky, *supra* note 3, at 210.

¹¹ Robert H. Mnookin, *Tales of a True Mensch*, 33 NEGOT. J. 351, 351 (2017).

¹² Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 33 (2016).

Cognitive biases are ubiquitous. These reactions occur subconsciously and instantaneously. The thinking that generates many of these cognitive biases is a normal, healthy response to our everyday challenges. They influence our assessment of risk, our evaluation of probability, and our appraisal of the credibility of disputed facts, all of which impact our negotiation plans. The literature sometimes muddles the definitions of these biases. The distinctions are subtle—often one bias explains how another bias operates. Some biases are motivated by self-interest while others result from our effort to organize complex data. They define our perception of who we are and how we fit within our worlds. As Nobel Laureate Isaac Bashevis Singer eloquently declared, “Of course I believe in free will. I have no choice.”¹³ And these illusions steer us away from rational, logical choices.

PART I – BIASES THAT IMPACT NEGOTIATION

“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 at it.” – Winnie the Pooh¹⁴

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

Many of life’s most important decisions start with self.¹⁵ We have “considerable difficulty casting aside [our] own unique perspective when attempting to take the perspective of another.”¹⁶ The “egocentric bias” means we assume that what is important to us or to our clients logically must be important to the other side; equally, what we consider unimportant is also unimportant to our opponent.¹⁷ Because we believe we are rational in our perceptions, our priorities are thus also rational and logical (as are all things we conceive), and other rational perceivers, sensibly, will share our vision and goals. Assuming our negotiation goals are the same as another’s is a ripe opportunity for significant miscalculation.¹⁸

¹³ Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 177 (2004).

¹⁴ A.A. MILNE, *THE HOUSE ON POOH CORNER* 102 (1992).

¹⁵ John R. Chambers & Carsten K.W. De Dreu, *Egocentrism Drives Misunderstanding in Conflict and Negotiation*, 51 J. EXPERIMENTAL SOC. PSYCH. 15, 23 (2014).

¹⁶ *Id.*

¹⁷ *Id.* at 16.

¹⁸ *Id.* at 23 (“[S]elf looms large in judgments that require people to take others into consideration, resulting in predictable judgment errors.”).

The egocentric bias is amplified by other sanguine motivational thinking. We may have an exaggerated perception that we control outcomes controlled by others or even that we control chance events.¹⁹ Our egos push us to make unrealistic forecasts of the future.²⁰ When we are presented with “multiple conceptions of what is fair, or faced with competing potential resolutions to a problem or conflict, [we] tend to choose the most self-serving [conception].”²¹

While we have the duty to recommend options that serve our client’s best interests in the negotiation process, this self-dedicated perspective may cause us to unintentionally advocate for options that we would personally prefer rather than what is in the best interests of the client. We may assume, for example, that a corporate client seeks specific tax advantages when we craft buy/sell agreements. We may put together a negotiation line of attack that in no way suits our client’s objectives or, worse, damages discussions because we fail to spot that the other side values options differently. Disparate negotiating parties may believe that the gap between their common interests is wider than it really is, leading to impasse. Even when both sides have identical information, we still tend to measure the strengths of the other side’s case using our own self-interested posture; our case is stronger because we positioned it to be so. We may go so far as to imagine that even a neutral party will favor our client’s case over the opponent’s.²² “The human psyche has a powerful ability ‘to rationalize as right that which is merely personally beneficial.’”²³

A healthy devotion to our self-interests is a laudable survival skill. Yet in negotiation strategy, failing to grasp our client’s or the other side’s priorities may cause miscalculation in our negotiation plans. We may miss opportunities to create or claim value that could

¹⁹ Aaron J. Wright, *Rendered Impracticable: Behavioral Economics and the Impracticability Doctrine*, 26 CARDOZO L. REV. 2183, 2208 (2005).

²⁰ Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 18 (1999); see also DANIEL L. SCHACTER ET AL., *PSYCHOLOGY* 254 (2d ed. 2010) (“[B]iases color memory and make people feel that they behaved more bravely or courageously than they actually did.”).

²¹ Zachary Bray, *The Hidden Rise of ‘Efficient’ (De)listing*, 73 MD. L. REV. 389, 446 (2014).

²² Birke & Fox, *supra* note 20, at 14–15.

²³ *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 459 (Del. Ch. 2011) (quoting *City Capital Assocs. v. Intercor Inc.*, 551 A.2d 787, 796 (Del. Ch. 1988)).

promote the interests of all parties.²⁴ This imbalanced thinking can clearly impact strategies for building solutions.

B. I Am Always Right: Overconfidence Bias

As Jefferson Smith said, “I hate to go on tryin’ your patience like this—but well, I’m either dead right or I’m crazy.”²⁵ The “overconfidence bias,” sometimes subsumed within the egocentric bias, is born from our extreme conviction of our own rightness.

This motivational bias presents interesting challenges. Our clients want to hire confident counsel. As attorneys, we must feel assured in our own skills and knowledge to attract clients. Confidence is in an attorney’s DNA. However, when we replace gaps in information with extreme confidence, we fall prey to this bias. We may have “an ‘inflated belief in the accuracy of [our] knowledge,’ resulting in a miscalibration between confidence and accuracy that can hamper judgment.”²⁶ We become more confident in our or our client’s positions than the facts warrant.²⁷ “[O]ften wrong, but rarely in doubt.”²⁸

The overconfidence bias has a peculiar twist. Studies show that people are the most confident about circumstances in which they possess the least amount of information.²⁹ One commentator suggests that for lawyers in particular, when a case is “unusual or outside the lawyer’s experience, her overconfidence actually increases.”³⁰ Clients

²⁴ ROGER FISHER & WILLIAM URY, *GETTING TO YES* 55 (Bruce Patton ed., 2d ed. 1991) (suggesting a party in a negotiation demonstrate appreciation of the other side’s interests so they understand yours).

²⁵ MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939).

²⁶ Elizabeth J. Reese, *Techniques for Mitigating Cognitive Biases in Fingerprint Identification*, 59 *UCLA L. REV.* 1252, 1261 (2012) (quoting Catherine Hackett Renner & Michael J. Renner, *But I Thought I Knew That: Using Confidence Estimation as a Debiasing Technique to Improve Classroom Performance*, 15 *APPLIED COGNITIVE PSYCH.* 23, 24 (2001)); see also Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 *OHIO ST. J. ON DISP. RESOL.* 281, 284 (2006) (discussing that people believe the chances of bad things happening to them are higher than reality presupposes).

²⁷ See generally Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 229 (Thomas Gilovich et al. eds., 8th prtg. 2009) (describing various studies in which participants exhibited overconfidence).

²⁸ *Id.* at 230; see also Catherine Gage O’Grady, *A Behavioral Approach to Lawyer Mistake and Apology*, 51 *NEW ENG. L. REV.* 7, 19 (2016). Those who have little understanding that they lack the skill and fail to recognize their mistakes are said to have “meta-ignorance.” Psychologist have dubbed this syndrome as the Dunning-Kruger Effect.

²⁹ Adler, *supra* note 8, at 726.

³⁰ Michael Palmer, *Which Is Better? The Deal or the Ordeal? An Examination of Some Challenges of Case Valuation*, 36-FALL *VT. B.J.* 34, 35–36 (2010); see also Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*,

believe we know the law, and know all of it, and it is sometimes hard to admit that our knowledge may be limited or out of date. Overconfidence supplants those gaps in our knowledge.

Scholars still debate the cause of the overconfidence bias. Some theorists believe the bias is a result of clinging to and remembering selectively-recalled data, which increases our certainty in our correctness.³¹ Others suggest the bias is related to environmental circumstances; we are raised to believe we can do anything, no matter the facts. As a self-fulfilling prophecy, some even suggest overconfidence works to our advantage because we may attempt tasks we might not otherwise attempt if “reality” set in.³²

It is clear to see how this bias could affect our clients and the decisions made throughout the negotiation process.³³ The overconfidence bias may encourage unrealistic expectations, drive hard bargaining, inflate settlement demands, or push us or our clients toward the more risk-prone and expensive option of trial. The bias may impede our predictions and cause us to overestimate the probability that the other party will accept our proposed contractual terms.³⁴ The bias may cause us to listen poorly and overlook key facts or social cues³⁵ or exaggerate our perception of the strengths of our client’s case.³⁶ Excessive certitude may drive us to advise our clients to reject otherwise generous offers or terms and derail productive negotiations.

16 PSYCHOL. PUB. POL’Y & L. 133, 139–47 (2010) (describing a study in which 481 attorneys were asked to describe one case that they expected would go to trial within the next year and win; 65% of participants generally overestimated the probability of that win; further, 64% were pleased or very pleased at the outcome of the case, even though only 57% of them actually achieved the goal of winning). Judges are not immune from this phenomenon. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 818 (2001).

³¹ Ulrich Hoffrage, *Overconfidence*, in COGNITIVE ILLUSIONS: INTRIGUING PHENOMENA IN THINKING, JUDGMENT AND MEMORY 291, 292 (Rüdiger F. Pohl ed., 2d ed. 2017).

³² *Id.* at 307.

³³ See, e.g., Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 682 (2014) (discussing that, in study of the confidence level of a jury win of 413 litigants, 57% believed they had a 90% chance of winning their trial; amazingly, 24% believed they had a 100% chance of winning).

³⁴ Max H. Bazerman, *Negotiator Judgment: A Critical Look at the Rationality Assumptions*, in NEGOTIATION: THEORY AND PRACTICE 224, 227 (Melissa L. Nelken ed., 2d ed. 2007).

³⁵ Daniel S. Medwed, *The Good Fight: The Egocentric Bias, the Aversion to Cognitive Dissonance, and American Criminal Law*, 22 J. L. & POL’Y 135,145 (2014); see, e.g., O’Grady, *supra* note 28, at 18 (explaining that in overconfidence bias, we may unconsciously avoid recognizing our mistakes).

³⁶ Rachlinski, *supra* note 5, at 1192.

Self-confidence and optimism motivate us to get through our days and even accomplish great things. In overconfidence our errors may become, instead, a false foundation upon which we build our decision-making process.

C. Grander than All Others: Above-Average Effect

Sometimes referred to as the “illusionary superiority bias” or the “Lake Wobegon effect,” the “above-average effect” means we believe that our abilities and capacities are superior to those of others.³⁷ It is not just about confidence (or overconfidence, for that matter). This effect means that when we compare ourselves to others, we believe we are above average in talent, tasks, and thinking.³⁸

This motivational effect impacts us no matter our sex, age, occupation, or level of education.³⁹ In a study conducted in 1981, 93% of U.S. drivers polled believed they were better than the average driver.⁴⁰ A later study reported that 80% of participants believed they were above-average or average drivers while texting.⁴¹ In a study involving over 1 million high school students, 70% of participants 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.⁴² Clearly all of these expectations are not mathematically possible.

In the above-average effect, we hold that we are “smarter, . . . better workers, healthier, more socially skilled, more sensitive, more ethical, more charitable, more likely to vote, more productive, and

³⁷ Stoyan V. Sgourev, *Lake Wobegon Upside Down: The Paradox of Status-Devaluation*, 84 SOC. FORCES 1497, 1497 (“The tendency to overstate one’s positive features and relative standing is well-documented in the social sciences. In the social-psychological literature, this tendency is known as the ‘Lake Wobegon’ bias, alluding to Garrison Keillor’s fictitious land where ‘all the women are strong, all the men are good looking and all the children are above average.’”).

³⁸ Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, in HEURISTICS AND BIASES, *supra* note 27, at 636, 640.

³⁹ Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NORTE DAME L. REV. 733, 754 (2009).

⁴⁰ Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 146 (1981).

⁴¹ Aaron Crowe, *24% of Drivers Admit to Coming Close to Causing an Accident While Texting*, CHEAP CAR INSURANCE (July 15, 2013), <http://www.cheapcarinsurance.net/24-of-drivers-admit-to-coming-close-to-causing-an-accident-while-texting/> [<https://perma.cc/R5J2-XKM6>].

⁴² David Dunning et al., *Ambiguity and Self-Evaluation: The Role of Idiosyncratic Trait Definitions in Self-Serving Assessments of Ability*, in HEURISTICS AND BIASES, *supra* note 27, at 324, 324.

(ironically) less susceptible to optimistic biases.⁴³ We also tend to believe we are less likely to experience a negative episode than the average person.⁴⁴ Remarkably, telling ourselves or others the true probability of a random event occurring does little to blunt the effect. People merely assume they are better at taking preventative measures, thus reducing their personal risk.⁴⁵

Our practices are replete with examples of this effect.⁴⁶ Our clients may think that their case is superior to similar cases and thus demand greater recompense. We may formulate negotiation plans that are unrealistic based solely on our perceived extraordinary capabilities. We may hold out for a better offer because we think we are more talented, which may create the setting for negotiation impasse. We may erroneously believe that we are more flexible, fair, competent, honest, or cooperative and thus ignore the demonstrated skillfulness of our counterparts.⁴⁷ Assuming we are always above average impacts objectivity and risks underestimating our opponent. In pride and unearned arrogance, we may miss opportunities for our clients to get the resolution they desire.

D. Bad Behavior Speaks Volumes: Fundamental Attribution Error

Our motivational belief in our superiority is not limited to our own proficiencies or confidence. We may also believe we are superior at judging the foundation of another's personality and character. In "fundamental attribution error" ("FAE"), when confronted with another's perceived undesirable behavior, we may immediately assume

⁴³ Williams, *supra* note 39, at 742–43.

⁴⁴ Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCH. 806, 806 (1980).

⁴⁵ Williams, *supra* note 39, at 748–49.

⁴⁶ *Id.* at 758 (citing Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 443 (1993)) (describing that while spouses may accurately acknowledge the general rate of divorce (50/50), most predict that their own chances of getting a divorce is about 10%; 98% of divorcees believe they will collect every penny of court-ordered child support, even though they know that generally only 40% of ex-spouses collect). *See also* Guthrie et al., *supra* note 30, at 814 (showing 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"); Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1165 (2017) (discussing a survey of arbitrators in which 85% said they were superior to colleagues in arbitrator skills and 92% superior in procedural skills). "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 decisionmaking errors." *Id.* at 1173.

⁴⁷ Birke & Fox, *supra* note 20, 17–18.

that character flaws motivate that behavior.⁴⁸ Contrarily, we underestimate how outside or situational factors explain that same negative behavior.⁴⁹ For example, if a person does not 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 completes a task ahead of a deadline, we may assume that the person had help or the assignment was too easy. In FAE, we evaluate behavior using assumptions and incomplete information, often about individuals we do not even know.⁵⁰ “[P]eople are willing to make quick and confident judgements of a subject’s personality trait based on a very limited data sample.”⁵¹ 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.⁵² 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.

FAE can play a confounding role in negotiations. For example, if the opponent does not respond to our offer right away, we may believe she is playing games or trying to gain strategic advantage. Instead, she may simply be delayed in discussing the offer with her

⁴⁸ Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 173, 184 (Leonard Berkowitz ed., 1977). See also Douglas N. Frenkel & James H. Stark, *Improving Lawyers’ Judgment: Is Mediation Training De-Biasing?*, 21 *HARV. NEGOT. L. REV.* 1, 22 (2015); Korobkin, *supra* note 26, at 299; see also Drew E. Walker et al., *The “Fundamental Attribution Error” Is Rational in an Uncertain World* 2547 (37th Annual Meeting of the Cognitive Science Society 2015). Some researchers compound FAE with the psychological impact of implicit racial and other biases. See generally L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 *ARIZ. ST. L.J.* 267 (2012). My goal is to solely address a purer form of this bias.

⁴⁹ Victor D. Quintanilla, *(Mis)Judging Intent: The Fundamental Attribution Error in Federal Securities Law*, 7 *N.Y.U. J.L. & BUS.* 195, 200 (2010) (“Social-psychological research, moreover, has shown that decision-makers systematically misattribute blame and intent, . . . underestimating the role of social influences.”).

⁵⁰ Frenkel & Stark, *supra* note 48, at 14.

⁵¹ Andrew E. Taslitz, *Police are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 *OHIO ST. J. CRIM. L.* 7, 17 (2010).

⁵² See, e.g., Hanson & Yosifon, *supra* note 13, at 93; Jerry Kang, *Trojan Horses of Race*, 118 *HARV. L. REV.* 1489, 1565–66 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1205 (1995).

client.⁵³ Similarly, we may “attribute the negative aspects of the conflict to the dispositions and evil motives of the other party”⁵⁴ while minimizing our own role in the dispute. Now the parties are not arguing about the terms of a potential contract but rather about their own superb character while in combat with the opposing “reprobate.” Such assumptions can change the entire tenor of the negotiation.

Assuming our opponent is malicious does little to promote the potential for agreement. Making quick judgments about the motivations or character of others solely based on observed behavior may lead to missed resolution opportunities and judgment errors. We are not as we may appear.

E. The Messenger Matters: Reactive Devaluation

As Groucho Max once crooned, “Your proposition may be good but let’s have one thing understood. Whatever it is, I’m against it!”⁵⁵ In “reactive devaluation,” we judge the value of a message or offer based on our perceptions, typically negative, of the conveyor of the message or offer.⁵⁶ The more we dislike our opponent, the stronger the reaction.⁵⁷ Our unfavorable opinion of the messenger becomes inextricably intertwined with the import of the message.

Social scientists suggest different stimuli cause reactive devaluation. The bias may be triggered by fear that the opponent has access to undisclosed information.⁵⁸ We may devalue an offer because we believe it is a signal that additional concessions may be forthcoming.⁵⁹ Some suggest the bias is caused by cynicism.⁶⁰ Spite may also explain the reaction; we reject a proposal because we view the opponent with such loathing that declining even the most beneficial terms keeps our

⁵³ See Quintanilla, *supra* note 49, at 200 (suggesting that FAE can impact jurors, particularly when they must determine “intent, foreseeability, *mens rea*, malice, and scienter”). See also *United States v. Baker*, 836 F. Supp. 1237, 1242 (E.D.N.C. 1993) (involving an inmate who argued that conducting a civil commitment hearing via live video violated due process rights because the judge might assume that his reactions were part of the inmate’s personality and not caused by other witnesses’ testimony, the surrounding environment, or other stimuli which would not be visible to the Judge).

⁵⁴ Adler, *supra* note 8, at 723.

⁵⁵ HORSE FEATHERS (Paramount Pictures 1932).

⁵⁶ Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOT. J. 389 (1991).

⁵⁷ Creo, *supra* note 9, at 14.

⁵⁸ Korobkin, *supra* note 26, at 316.

⁵⁹ *Id.* at 317.

⁶⁰ Eyal Ert et al., *Cynicism in Negotiation: When Communication Increases Buyers’ Skepticism*, 9 JUDGMENT & DECISION MAKING 191, 191 (2014).

opponent from obtaining what she wants.⁶¹ Whatever the cause, we react because the person making the offer or conveying the information is so distrusted that the value of the message is lost.

In negotiations, if an offer comes from an unrespected adversary, that offer may be undervalued.⁶² We may “see enemies where none exist.”⁶³ Conversely, if the exact same proposal is offered by a neutral party or a friend, that proposal may be treated with more deference. And if the offer or information comes from someone we highly regard, we may overvalue the benefits of the offer or information, thus failing to weigh its credibility and adjust our counteroffer.⁶⁴

Reactive devaluation is amplified further when we believe an offer is against the best interests of our counterpart; what is good for our counterpart must be automatically bad for us.⁶⁵ We fail to understand that our counterpart may value terms of a potential agreement differently than we do, in part because we are mired in our own egocentric bias.⁶⁶ The “possibilities for trades that benefit both sides would simply not be recognized.”⁶⁷

As negotiators, we are trained to assume that our opponent proposes solutions or produces information that serves their own self-interests and must be viewed with suspicion. This bias takes that presumption further. Here, the contempt or esteem we hold for the messenger overwhelms the worth of the message. As with many of these other biases, our automatic and subconscious assumptions about

⁶¹ Korobkin, *supra* note 26, at 317.

⁶² The Honorable Bernice B. Donald & Sarah Redfield, *Arcing Toward Justice: Can Understanding Implicit Bias Help Change the Path of Criminal Justice?*, 34-SUM CRIM. JUST. 18, 25 (2019).

⁶³ Ganesh Sitaraman & David Zions, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 553 (2015). This phenomenon was famously studied in the 1980s. Participants in the study 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 Reagan 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. Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 26, 29 (Kenneth J. Arrow et al. eds., 1995).

⁶⁴ Jean R. Sternlight, *Pouring a Little Psychological Cold Water on Online Dispute Resolution*, 2020 J. DISP. RESOL. 1, 22–23 (2020) (explaining that a persuader’s likeability, demonstrated expertise, trustworthiness, and clarity of message positively influence decision-making). See also KAHNEMAN, *supra* note 6, at 82 (discussing the “halo effect,” wherein if we like someone, we may imbue them with undeserved positive character traits without observing behavior).

⁶⁵ JONATHAN BARON, THINKING AND DECIDING 438 (4th ed. 2008).

⁶⁶ Chambers & De Dreu, *supra* note 15, at 16.

⁶⁷ BARON, *supra* note 65, at 439.

the motivations and priorities of another may cause us to reject terms that could benefit our clients.

F. "Draggin' the Line"⁶⁸: Anchoring Effect

One of the most well researched cognitive biases is the "anchoring effect," or "the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information—the 'anchor.'"⁶⁹ In attempting to make a decision, this mental shortcut starts with our selecting an initial known number or information and adjusting from that initial point until we reach the realm of what we think is a plausible answer. For example, we want to purchase a quart of cream but do not know the price. We know the price of a quart of milk, so we adjust from that number to estimate the cost of cream. If we want to buy a particular car, we may recall prices for similar models and use those numbers to estimate the cost of the car we want to purchase. The numbers or information we start with and use as comparisons are anchors.

The problem arises when we make more complex judgments or decisions and have little information. We pick a known data point, adjust our analysis from that anchor until we are uncomfortable with the probability of the answer, stop adjusting, and then use that new data point to reach a decision. "There is nothing wrong (in principle) with forming an estimate by starting with one value and then adjusting it successfully as each new piece of information comes to mind. The mistake that [we] make is not adjusting enough."⁷⁰ Our final estimate is subconsciously biased toward the anchor,⁷¹ "dragged" back to that initial number or information.⁷²

⁶⁸ TOMMY JAMES, *Draggin' the Line*, on CHRISTIAN OF THE WORLD (Roulette Records 1971).

⁶⁹ Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. LAW & CRIMINOLOGY 489, 495 (2014).

⁷⁰ BARON, *supra* note 65, at 380. Amos Tversky and Daniel Kahneman referred to the bias as the anchoring-and-adjustment heuristic, focusing on our failure to sufficiently adjust away from the anchor. See Nicholas Epley & Thomas Gilovich, *The Anchoring-and-Adjustment Heuristic: Why the Adjustments are Insufficient*, 17 PSYCH. SCI. 311, 311 (2005).

⁷¹ Nicholas Epley & Thomas Gilovich, *Anchoring Unbound*, 20 J. CONSUMER PSYCH. 20, 21 (2010). See also Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1339–40 (1995).

⁷² Daniel Kahneman and Amos Tversky first identified this effect during their famous "Wheel of Fortune" experiment. They created a spinning wheel with seemingly random numbers on the wheel. It was, however, rigged so that anyone who spun the wheel had it land on the numbers 10 or 65. After spinning the wheel, the participants were then asked

The anchoring effect is subtle yet pervades in a variety of judgments we make, “from the trivial . . . to the apocalyptic.”⁷³ The effect occurs within “general-knowledge questions . . . , price estimates . . . , estimates of self-efficacy . . . , [and] probability assessments.”⁷⁴ Sentencing guidelines,⁷⁵ policy limits,⁷⁶ jurisdictional limits,⁷⁷ and damage caps⁷⁸ may all serve as anchors.⁷⁹ This effect is so powerful (and insidious) that the anchor need not be logically connected to what we are trying to determine. Studies show that an anchor sways judgments and influences our final estimation even though it is arbitrary,⁸⁰ outrageous,⁸¹ or “incomplete, inaccurate, irrelevant, implausible or random.”⁸²

to guess the percentage of African nations that were members of the United Nations. Participants whose spin landed on the number 10 guessed an average of 25%. Those who got the “wheel-chosen” number of 65 guessed 45%, on average. KAHNEMAN, *supra* note 6, at 119.

⁷³ Thomas Mussweiler et al., *Anchoring Effect*, in *COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGEMENT AND MEMORY* 183, 185 (Rüdiger Pohl ed., 2004).

⁷⁴ *Id.* at 185.

⁷⁵ *See* Peugh v. United States, 569 U.S. 530, 543–44 (2013).

⁷⁶ Thoens v. Safeco Ins. Co. of Oregon, 356 P.3d 91, 95 (Or. Ct. App. 2015) (in which a defendant argued disclosure to the jury of the amount of the plaintiff’s UIM coverage was prejudicial because the amount produced an anchoring effect that would drive the verdict higher than it would be without evidence).

⁷⁷ Hodge v. State Farm Mut. Auto. Ins. Co., 884 N.W.2d 238, 244–45 (Mich. 2016) (in which the court considered whether litigating a circuit court case in district court constitutes an inappropriate anchor).

⁷⁸ Kodiak Island Borough v. Roe, 63 P.3d 1009, 1016 (Alaska 2003) (revealing a damage cap to the jury produced an anchoring effect that limited the jury’s ability to independently assess damages).

⁷⁹ *See* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1291 (discussing a study showing judges are influenced by numbers discussed during settlement talks to which they are privy).

⁸⁰ LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 190 (6th ed. 2015).

⁸¹ Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 799 (2004). *See also* SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 146 (1993) (citing an unpublished study in which subjects were asked to guess the average annual temperature in San Francisco; some were first asked whether it was higher or lower than 558°, while others were not so primed; those who were “exposed” to the improbable 558° figure guessed a higher average temperature than those who were not).

⁸² Bennett, *supra* note 69, at 495. *See also* Fritz Strack & Thomas Mussweiler, *Heuristic Strategies for Estimation Under Uncertainty: The Enigmatic Case of Anchoring*, in *FOUNDATIONS OF SOCIAL COGNITION: A Festschrift in Honor of Robert S. Wyer, Jr.* 79, 80 (Galen V. Bodenhausen & Alan J. Lambert eds., 2003) (showing anchoring is a form of confirmation bias).

The anchoring effect also impacts how we assess information. The first information collected is often afforded greater importance, merely because it is the first piece of data received.⁸³ In any subsequent analysis, we continually harken back to the first information, comparing it to the new information and testing the latter's credibility when weighed against the anchor.⁸⁴

While we know the anchoring effect impacts decision-making, scholars still debate how it accomplishes its influence. Some argue the anchor's power comes from our inability to sufficiently adjust from the starting point set by the anchor.⁸⁵ Because the adjustment is insufficient, the anchor then has greater influence over the final number than is warranted.⁸⁶ Others suggest that the anchor serves to subconsciously prime us with the correct information.⁸⁷ Some point to "cognitive laziness" as the cause; calculating a correct estimate or researching the answer is too great of a time or intellectual burden.⁸⁸ Still others believe the anchor is powerful because we "treat [the] anchor as a reliable guide,"⁸⁹ or because the anchor implies a purposefully calculated representation of value of the item.⁹⁰ No matter the cause, this cognitive effect is potent in its impact.

Anchoring is particularly prevalent during negotiations. The party that goes first has more impact and control over the final agreed-upon number, because the anchor characterizes the conversation and

⁸³ See Robert W. Emerson & Steven A. Hollis, *Bound by Bias? Franchisees' Cognitive Biases*, 13 OHIO ST. BUS. L.J. 1, 42–43 (2019) (explaining that potential buyers of franchise anchored to brand and marketing of franchise).

⁸⁴ One of my law students described a terrific example of how the anchoring effect works with information. She had friends who were represented by an attorney who drafted a litigation plan for them but, unfortunately, did not follow through and eventually ceased returning phone calls. Her friends then hired another attorney who created a totally different litigation plan—a plan he actually implemented. Nevertheless, her friends began to question the suitability of second attorney's strategy. They kept comparing it to the ineffectual plan created by their first (and less responsive) attorney. Even knowing the second attorney was doing a better job, her friends still questioned his judgment because they were anchored to the strategy of the first attorney.

⁸⁵ Chris Guthrie & Jeffrey Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 VAND. L. REV. 2017, 2026 (2006).

⁸⁶ *Id.*

⁸⁷ KAHNEMAN, *supra* note 6, at 122.

⁸⁸ Guthrie & Rachlinski, *supra* note 85, at 2026.

⁸⁹ *Id.*

⁹⁰ Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 602 (2006). An example might be the MSRP of a new car—the suggested retail price is not the real price but anchors all the same.

defines the bargaining zone.⁹¹ The more precise the number (e.g., \$19.99 versus \$20.00), the stronger the anchor's influence, as the number implies credibility.⁹² The effect also sways evaluations as we prepare our negotiation plans.⁹³ Information received at the beginning of the transaction or dispute process may carry greater weight or importance merely because it was first.⁹⁴ The anchor weighs down negotiations.⁹⁵

The power of the anchor can also be employed to our advantage. Research shows, for example, that those who open with extreme or even outrageous demands obtain better settlements.⁹⁶ Another effective strategy is to anchor the opponent on some extraordinary or dramatic piece of information that allows us to influence the course of a negotiation. Salient stories are better remembered; the more dramatic the story, the more powerful the anchor.⁹⁷ Some thoughtfulness should be exercised with this negotiation strategy. If the opponent is aware of our attempt to anchor, she may strike back with a more powerful one. The negotiation process could then devolve into anchor and counter-anchor gamesmanship rather than resolution.⁹⁸

We are creatures of contrast. Anchors provide the baseline from which we compare. Anchors not only impact the demand/offer process, they sway us the instant we begin our planning and

⁹¹ Other experts suggest that in monetary negotiations, we should let the other side go first because we often lack sufficient information to open with confidence. See CHRIS VOSS, *NEVER SPLIT THE DIFFERENCE: NEGOTIATING AS IF YOUR LIFE DEPENDED ON IT* 129–31 (2016).

⁹² Malia F. Mason et al., *Precise Offers Are Potent Anchors: Conciliatory Counteroffers and Attributions of Knowledge in Negotiations*, 49 *J. EXPERIMENTAL SOC. PSYCH.* 759, 759 (2013).

⁹³ *Id.* at 603.

⁹⁴ Adam Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 81 *J. PERSONALITY & SOC. PSYCH.* 657, 658 (2001).

⁹⁵ I conducted my own anchoring effect experiment. I showed my students a photo of an unnamed restaurant that I said served American cuisine. I then had them draw slips of paper from an envelope. Half of the class drew slips that asked, "How much are you willing to spend for a meal at Bistro 17?" The other half drew slips that asked the same question, except the restaurant name was changed to Bistro 97. I literally changed one digit. No other information was given. When the results were tallied, those with the restaurant named Bistro 97 wrote a higher amount, on average, than those who had Bistro 17. Their decisions were anchored by the irrelevant numbers 17 and 97. This experiment was suggested by Nicholas Epley and Thomas Gilovich. Epley & Gilovich, *supra* note 71, at 22.

⁹⁶ Galinsky & Mussweiler, *supra* note 94, at 658.

⁹⁷ KAHNEMAN, *supra* note 6, at 347. Unfortunately, the story need not be true to influence. *Id.* Birke & Fox, *supra* note 20, at 40.

⁹⁸ Birke & Fox, *supra* note 20, at 41.

evaluations. We must recognize and appreciate the full power of the subconscious anchoring effect. Otherwise, we may become moored by errors in judgment.

G. Words Matter: Loss Aversion and Framing Effect

Losing is one of the more distasteful consequences of participating in life, society, and the economy.⁹⁹ Losing can challenge our feelings of power, self-worth, and self-preservation. Losing can also be motivational. Yet, ingrained within our psyche is this automatic repugnance to losing. We are thus laser-focused on averting and avoiding the potential of suffering losses.

Known as “loss aversion,” multiple psychological studies prove that when deciding a course of action, we make different decisions when faced with a chance we will achieve a gain or sustain a loss.¹⁰⁰ And most illogically, we will take more risks to avoid losses than we will to attain gains.¹⁰¹

Seeking out heightened risk to overcome a loss rather than risking more to achieve a gain makes little rational sense. What triggers this reaction? Traditional/rationalist economic theory suggests that an individual’s choice should be made independently from the wording used to describe those choices. It should not matter how the choices are phrased. Is a food product more enticing when marketed as 90% fat free rather than as containing 10% fat? It is the same reality described differently.¹⁰² Yet, we know the former phrase has greater

⁹⁹ “I hate [losing]. I hate losing even more than I want to win.” MONEYBALL (Columbia Pictures 2011).

¹⁰⁰ Robert A. Prentice, *Behavioral Ethics: Can it Help Lawyers (and Others) Be Their Best Selves?*, 29 NOTRE DAME J. L., ETHICS & PUB. POL’Y 35, 49 (2015).

¹⁰¹ Historic economic theories hold that rational actors choose options by assessing the utility and probability of each outcome. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055 (2000). Decision-makers were assumed to “have stable, well-defined preferences and make rational choices consistent with those preferences.” Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON PERSPS. 193 (1991). In 1979, Amos Tversky and Daniel Kahneman turned these historic economic theories on their heads by proposing the ground-breaking Prospect Theory. See generally Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (1992); KAHNEMAN, *supra* note 6, at 278–88. Tversky and Kahneman hypothesized that we base decisions not upon the probabilities and efficacy of the final outcome, but on the psychological and emotional value of changing our current position and the potential of a loss or a gain occurring because of that change. *Id.*

¹⁰² Anton Kühberger, *Framing*, in COGNITIVE ILLUSIONS: INTRIGUING PHENOMENA, *supra* note 31, at 79, 79.

impact,¹⁰³ because numerous experiments prove that how we frame or describe the choice drives decision-making.¹⁰⁴

In loss aversion, if an option is framed as a gain, we take less risk. If an option is phrased as a loss, we take more risk.¹⁰⁵ This “framing effect” has been demonstrated in situations including gambling, purchasing, making medical decisions, and declaring assets on tax returns.¹⁰⁶ When strong emotions are involved, loss aversion is exacerbated. “[L]osses ‘compounded by outrage are much less acceptable than losses that are caused by misfortune or by legitimate actions of others.’”¹⁰⁷ Anger seems to promote riskier choices.

Finally, the perspective we choose in tackling a problem greatly impacts decision-making. In one tragic example, leaders with Morton Thiokol, the manufacturer of the booster rockets for the space shuttle Challenger, recommended launching when asked to decide “like managers” rather than framing the decision as a safety issue.¹⁰⁸ Framing is

¹⁰³ See KAHNEMAN, *supra* note 6, at 303–04 (suggesting that a golfer putts better when trying to avoid a bogey rather than going for a birdie).

¹⁰⁴ Ian K. Belton et al., *Lawyer and Nonlawyer Susceptibility to Framing Effects in Out-of-Court Civil Litigation Settlement*, 11 J. EMPIRICAL LEGAL STUD. 3, 578–600 (2014). Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 739 (2003) (discussing that we are driven toward choice by the way choice is phrased); see also Sternlight, *supra* note 64, at 23.

¹⁰⁵ Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias In Legal Decision Making*, 9 CLINICAL L. REV. 783, 797 (2002). “When decision options are perceived as ‘gains’ relative to the reference point, individuals are risk averse; that is, they prefer more certain options to gambles with the same expected value. But when decision options are perceived as ‘losses’ relative to the reference point, the same individuals will be risk-seeking; that is, they will prefer a gamble to the certain option when both have the same expected value.” Korobkin & Ulen, *supra* note 101, at 1104–05.

¹⁰⁶ Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 124–25 (1996).

¹⁰⁷ Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 245 (1993) (quoting JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982)).

¹⁰⁸ ALLAN J. McDONALD & JAMES R. HANSEN, TRUTH, LIES, AND O-RINGS: INSIDE THE SPACE SHUTTLE CHALLENGER DISASTER 228 (2009); see also Chris Bergin, *Remembering the Mistakes of Challenger*, NASASPACEFLIGHT.COM (Jan. 28, 2007), <https://www.nasaspaceflight.com/2007/01/remembering-the-mistakes-of-challenger/>. See also Tammy L. MacLean, *Framing and Organizational Misconduct: A Symbolic Interactionist Study*, 78 J. BUS. ETHICS 3, 9–10 (2008) (describing a life insurance company’s improper inducement of customers to cash-in their equity on existing policies to fund purchasing larger policies when the company told its employees they were helping underinsured customers, thus resulting in potentially unethical behavior).

not just about positive or negative language; it is also about the viewpoint from which we challenge another to choose.¹⁰⁹

For lawyers, loss aversion and framing have ethical implications. Studies show that people choose differently when a question is posed through an ethical rather than a business lens.¹¹⁰ Some attorneys may rationalize violating ethical rules by framing the choice as zealous advocacy.¹¹¹ In this slippery slope of “ethical fading,” lawyers “trying to avoid a loss are more likely to draw upon lower-road ethical choices than [those] trying to attain a gain.”¹¹² An abhorrence of losing may serve to rationalize, subconsciously, poor ethical choices.

Loss aversion and framing clearly impact negotiations during several stages. We may unknowingly infuse loss aversion into our negotiation plans if we phrase our problem using loss language or accentuating a negative mental framework; for example, “How do I keep my client from going out of business?” versus, “How may I help improve my client’s business?” Stressing the negative consequences of a plan of action may accentuate the attractiveness of the risk-seeking options.¹¹³

How risk is framed may tilt the preferences of parties in negotiation.¹¹⁴ Does resolution mean surrender or desired closure? A “defendant protecting his assets [may] prefer[] riskier options than . . . the plaintiff trying to add to her own wealth.”¹¹⁵ Litigation plaintiffs generally choose between a sure option (settlement) and an uncertain but potentially more lucrative option (verdict). Because plaintiffs are choosing between two perceived gains, studies demonstrate that they

¹⁰⁹ In choosing a negative frame, we may also stimulate the negativity bias. Generally, we are more likely to process and remember negative information rather than positive information. See Roy F. Baumeister et al., *Bad is Stronger than Good*, 5 REV. GEN. PSYCH. 323, 355 (2001). See also Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain’s Negativity Bias and Persuasion*, 15 NEV. L.J. 605, 606, 624 (2015) (explaining that our brains are “like Velcro for negative experiences and Teflon for positive ones.” (quoting RICK HANSON, *BUDDHA’S BRAIN: THE PRACTICAL NEUROSCIENCE OF HAPPINESS, LOVE & WISDOM* 41 (2009))).

¹¹⁰ See e.g., Prentice, *supra* note 100, at 50 (discussing a study in which, when asked whether it was ethical to sell a drug that caused just under a dozen unnecessary deaths (and when there was a safer alternative), 97% of subjects said it was unethical to continue selling the drug; when asked the same question while in the role of the company’s directors, overwhelmingly participants decided to leave the drug on the market.).

¹¹¹ *Id.* at 48.

¹¹² Mary C. Kern & Dolly Chugh, *Bounded Ethicality: The Perils of Loss Framing*, 20 PSYCHOL. SCI. 378, 381 (2009).

¹¹³ Kühberger, *supra* note 102, at 83–84.

¹¹⁴ Rachlinski, *supra* note 106, at 144.

¹¹⁵ *Id.* at 144.

make the less risky choice (settlement). Defendants, on the other hand, choose between a sure loss (settlement) and a potentially more substantial loss (verdict). Consequently, as defendants are essentially choosing between two losses, they prefer the more risk-seeking option (trial).¹¹⁶ The frame defines the end game.

Finally, during negotiations, offers tied to the consequence of rejection (“We will take you to trial if you say no”) are more often rejected than offers using gain language (“Here is what you will achieve by agreeing”). Looming losses are perceived as more painful than certain gains.¹¹⁷

Communicating negotiation choices to our client can be a difficult dance. We want to ensure our client is fully involved in the decision-making—it is their case after all. Yet how the choices are described can focus attention on divergent aspects of the message (a glass is half empty versus half full) and on the motivations of those conveying the choice (a choice means security or potential problems).¹¹⁸ In the framing effect—whether positive, negative, or neutral—one reality is presented as more palatable. If that reality is expressed in negative terms or consequences, loss aversion may be sparked and the decision-maker may be tempted to select the riskier option, to her detriment. How we frame choices has consequences. Words matter.

H. Looking Through Rose-Colored Glasses: Confirmation Bias

One of the most common illusions that lawyers face in the cognitive bias catalogue is “confirmation bias”—the “tendency of people to search for and believe facts that support their opinions and ignore facts that contradict their beliefs.”¹¹⁹ In confirmation bias, rather than test our theories or assumptions critically, we seek, subconsciously, to prove them.¹²⁰ Beliefs are “transmute[d] into evidence.”¹²¹ Thus, in confirmation bias, we are less concerned with “finding the truth as much as [we] are hell bent upon justifying [our] own views and

¹¹⁶ *Id.* at 118–19.

¹¹⁷ Kahneman et al., *supra* note 101, at 203.

¹¹⁸ See Kühberger, *supra* note 102, at 94.

¹¹⁹ Harry L. Munsinger & Donald R. Philbin, Jr., *Why Can't They Settle? The Psychology of Relational Disputes*, 18 *CARDOZO J. CONFLICT RESOL.* 311, 327 (2017). See also *City of Mequon v. Haynor*, 2010 WI App 145, ¶ 24 n.7, 330 Wis. 2d 99, 791 N.W.2d 406 (Wis. Ct. App. 2010) (“[Confirmation bias] involves unwittingly selecting and interpreting evidence to support a previously held belief.”).

¹²⁰ Margit E. Oswald & Stefan Grosjean, *Confirmation Bias*, in *COGNITIVE ILLUSIONS: A HANDBOOK*, *supra* note 73, at 79, 93.

¹²¹ Daryl Lim, *Predictive Analytics*, 51 *LOY. U. CHI. L.J.* 161, 216 (2019).

thoughts.”¹²²

This breakdown affects us in two ways: the manner in which we search for information, and the degree to which we rely on corroborating-only data. When researching any new theory, the volume of information can overwhelm. “A systematic search through the ‘whole universe’ for [data] that could falsify the hypothesis can, from a pragmatic point of view, scarcely be accomplished.”¹²³ So, in the name of efficiency, we subconsciously gravitate toward confirming information that supports our preconceived beliefs. This short-circuiting approach hinders critical evaluation of facts and case value.¹²⁴ For example, as we create our negotiation plan, 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 valuation of a business because that valuation does not fit with our views. By discounting or ignoring contradictory information, we may get a false sense of the plausibility of our theories and minimally trust contrary authority. “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.”¹²⁵

Even if we succeed in gathering balanced information, confirmation bias may still trip us up when we afford greater weight and credibility to the confirming information gathered. Additionally, we may challenge the research results differently; confirmatory evidence is more often “taken at face value while potentially disconfirmatory evidence is subjected to highly critical and skeptical scrutiny.”¹²⁶ This skewed perspective may cause us or our client to dismiss a good

¹²² Cory S. Clements, *Perception and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win the War of Words*, 2013 B.Y.U. L. REV. 319, 353 (2003) (quoting Dr. A. Q. Khan, *Mentality, Self-Deception and Psychology*, THE NEWS (Dec. 5, 2011), <https://portal.riphah.edu.pk/newspaper/mentality-self-deception-and-psychology/> [<https://perma.cc/ZVC8-B3S8>]).

¹²³ Oswald & Grosjean, *supra* note 120, at 81. “[I]n an information-rich world, the wealth of information . . . creates a poverty of attention and a need to allocate that attention efficiently among the overabundance of information sources . . .” Herbert A. Simon, *Designing Organizations for an Information-Rich World*, in COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 40–41 (Martin Greenberger ed., 1971).

¹²⁴ Wright, *supra* note 19, at 2206.

¹²⁵ Brian Reichart, *Tunnel Vision: Causes, Effects, and Mitigation Strategies*, 45 HOFSTRA L. REV. 451, 459 (2016).

¹²⁶ Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 107, at 129, 149. See also Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098, 2099 (1979).

proposal because we think our facts are stronger than others view them. Similarly, we may recommend our client not litigate a strong case because of reliance upon decades-old history of high verdicts and do not consider demographic changes of the jurisdiction.

To test whether confirmation bias is impacting our or our client's strategy, ask: Do I want my particular theory/assumption/strategy to be true before I begin my investigation? If the answer is yes, that response is at the heart of confirmation bias.

Studies suggest that lawyers are especially susceptible to confirmation bias. It is, after all, our job to marshal and magnify evidence that supports our client's positions. In telling our client's story, we are emboldened to engage in confirmation bias.¹²⁷ We are tasked "to seek evidence that increases one's confidence in a hypothesis regardless of whether it should."¹²⁸ What is critical to this process is our failure to methodically evaluate the conflicting evidence germane to our assumptions. We resist challenging our intuition because, after all, the "facts" back us up.¹²⁹

As long as the confounding facts are not given equal weight during negotiation planning, "an overestimation of the [importance and] relevance of events congruent with the hypothesis occurs very rapidly."¹³⁰ Turning a blind eye to the divergent facts can cause us to create flawed strategies that we then enthusiastically promote.¹³¹ We can become so rigidly connected to our initial opinion that we miss the import of the other side's theory or negotiation posture. We are literally evaluating our theories from a self-serving perspective that may have little basis in fact. The story we believe is not the "real" story.

¹²⁷ Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998). See also Andrew J. Wistrich & Jeffery J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 602 (2013) (claiming that misguided efforts to obtain only confirmatory evidence hardens confidence in strategies, often to the lawyers' detriment).

¹²⁸ Nickerson, *supra* note 127, at 186.

¹²⁹ Oswald & Grosjean, *supra* note 120, at 90.

¹³⁰ *Id.*

¹³¹ Closely associated with confirmation bias is illusory correlation—seeing patterns where none exist. Nickerson, *supra* note 127, at 183. In this subcategory, we violate the scientific proposition that correlation does not equal causation and overweigh evidence that supports the cause/effect relationship we want, thus arriving at conclusions the facts do not warrant. *Id.*

I. I Like Where I Am: Status Quo Bias

Evolutionarily, survival demanded we pay attention to bad outcomes.¹³² Changing our circumstances implies a potential for loss. As a consequence, when making decisions, we sometimes become human sloths. When in doubt, do nothing. The “status quo bias” is our inflated preference for our current state of affairs over the risks associated with improving our position through change.¹³³ For example, we regularly elect incumbents,¹³⁴ purchase the same food brand, or stay in less-than-satisfying jobs.¹³⁵ Our legal system protects the status quo through the use of restraining orders—courts either temporarily restore the parties to their original status or restrain the parties from changing their posture.

We maintain the status quo because of “convenience, habit or inertia, policy . . . or custom, [or] fear.”¹³⁶ When we contemplate change, we concentrate more on the possible negative consequences rather than the uncertain, positive probabilities; the disadvantages outweigh the advantages of change.¹³⁷ Ruminating on the consequences of change within this bias means the potential for loss is so repellant that we may eschew altering our position even when it may be more emotionally and economically beneficial to do so.

The status quo bias is magnified when complex or conflicting choices are presented, particularly if the person deciding holds weak preferences¹³⁸ or the prospect of better alternatives seems bleak.¹³⁹ Choosing to remain with the status quo option stimulates the illusion that we are in control of our circumstances, even when we are not.¹⁴⁰

¹³² Baumeister et al., *supra* note 109, at 325.

¹³³ See e.g., Christopher J. Anderson, *The Psychology of Doing Nothing: Forms of Decision Avoidance Result from Reason and Emotion*, 129 PSYCH. BULL. 139, 143 (2003) (“[S]tatus quo choices can be quite ‘rational’ when . . . there are costs for change or . . . there is uncertainty regarding the consequences of non-status quo options.”).

¹³⁴ William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 9 (1988) (demonstrating that political incumbents have a margin of victory of 59% to 41%; when more than two candidates run, the chances the incumbent will win increase.).

¹³⁵ *Id.* at 8.

¹³⁶ *Id.* at 10 (“In day-to-day decision making, . . . a decision maker may not even recognize the potential for a choice.”).

¹³⁷ Kahneman et al., *supra* note 101, at 197–98. Resistance to change is also compounded by the potential for regret. Anderson, *supra* note 133, at 143.

¹³⁸ Wendy Netter Epstein, *Nudging Patient Decision-Making*, 92 WASH. L. REV. 1255, 1294 (2017); see also Samuelson & Zeckhauser, *supra* note 134, at 39.

¹³⁹ Anderson, *supra* note 133, at 140.

¹⁴⁰ Samuelson & Zeckhauser, *supra* note 134, at 40.

Eventually, the default status becomes the choice for those who refuse to choose.¹⁴¹

The bias regularly plays out in negotiations, particularly if the debate surrounds changing relationships or statuses of the parties, such as with labor union contracts, divorces, and global trade deals.¹⁴² For instance, in settlement discussions, “[t]he typical person losing from his pocket a thousand dollars of past earnings feels more aggrieved than a person losing . . . a thousand dollars meant to compensate lost future earnings. A person palpably possesses the former and palpably feels the loss.”¹⁴³ Because concessions may be viewed as losses (and thus trigger loss aversion), unaware clients may express preferences for leaving things as they are to their detriment.

The status quo bias is powerful because the current posture is known and comfortable. Change produces unknown futures. The emotional consequences of an uncertainty shaped by choice can be unnerving. Resistance to change may confound the client’s desire for resolution. The bias coerces us to “choose” inaction. Yet, doing nothing eventually becomes the least optimal choice.

J. Mine is Worth More Because It’s Mine: Endowment Effect

Rationally, the value of an item should not change whether we own it. But because of our unwillingness to sustain losses (and our love of inertia), our subconscious reactions suggest otherwise. As a consequence of loss aversion and the status quo bias, under the “endowment effect” we believe that property we own is more valuable than others do.¹⁴⁴ We may also demand more to sell something we own than

¹⁴¹ Epstein, *supra* note 138, at 1293.

¹⁴² KAHNEMAN, *supra* note 6, at 304.

¹⁴³ Schwade v. Total Plastics, Inc., 837 F. Supp. 2d. 1255, 1279 (M.D. Fla. 2011); *see also* Korobkin & Ulen, *supra* note 101, at 1107–13.

¹⁴⁴ *See, e.g.*, Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw. U. L. REV. 1227, 1229 (2003). Additionally, “[a] consequence of the endowment effect is the ‘offer-asking gap,’ which is the empirically observed phenomenon that people will often demand a higher price to sell a good that they possess than they would pay for the same good if they did not possess it at present.” *Id.* at 1228. Some argue the endowment effect is a consequence of loss aversion while others believe is it a cause. *See* Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935, 1950–53 (2008); O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1016 (10th Cir. 2004) (citing JUDD HAMMACK & GARDNER M. BROWN, JR., WATERFOWL AND WETLANDS: TOWARD BIOECONOMIC ANALYSIS 26 (1974) (discussing a study showing hunters demanded an average of \$1,044 to give up the option of hunting on a specific wetland development but would only pay an average of \$247 to continue hunting on the same land)).

we would pay to buy that same item from others.¹⁴⁵ Our emotional attachment artificially increases our opinion of the value of our property.¹⁴⁶ Further, if the property is acquired because of the demonstration of a skill or talent (e.g., awarded versus received by chance), the effect becomes even stronger.¹⁴⁷ If the item at issue is rare or scarce on the market, the effect intensifies.¹⁴⁸ This effect impacts decision-making even if the ownership of the item is hypothetical.¹⁴⁹ Simply, owning stuff is less risky than giving up stuff.¹⁵⁰

Our legal system is infused with the endowment effect. For example, the concept of adverse possession provides a remedy to those

¹⁴⁵ Korobkin, *supra* note 144, at 1228 (“A consequence of the endorsement effect is the ‘offer-asking gap,’ which is the empirically observed phenomenon that people will often demand a higher price to sell a good that they possess than they would pay for the same good if they did not possess it at present.”). One possible exception to the endowment effect occurs when homeowners are notified of the property taxes they owe.

¹⁴⁶ *Id.* at 1251.

¹⁴⁷ *Id.* at 1236. In an experiment with my UNT Dallas College of Law students, I passed out pens embossed with the name of a prominent law firm (something I hoped law students believed had value) to half of my class. The other half were given the opportunity to handle the pen and assess its quality. The first group was asked to write down the highest amount for which each would sell the pen, while the second group was asked to write down the least each would pay for the pen. Recall these pens were gifts, so under traditional economic theory, anything over a penny would be a profit. The results showed the average seller price was higher than the average buyer price despite the fact that the students were studying the very bias that drove their choices. At the end of the experiment, all students were given a pen—fairness is also highly valued. See Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1330–31 (1990) (mirroring an experiment suggested by the authors, who used coffee mugs).

¹⁴⁸ In an interesting study, violinists attending an international competition were asked in a double-blind study to determine which of a variety of violins provided the best sound. Multiple violins were tested, including three new violins and two rare Stradivarius violins. Musicians were blind-folded, asked to play the instruments, and asked to pick the violin they preferred. A surprising number of the musicians chose the newer violins over the old masters. Claudia Fritz et al., *Player Preferences Among New and Old Violins*, 109 PROCEEDINGS NAT’L ACAD. SCIS. 760, 761 (2012), <http://www.pnas.org/content/109/3/760.full> [<https://perma.cc/8TX5-CL9X>]. “The joy of owning and playing a Stradivarius comes not from any objective advantage in its sound, but simply from the knowledge that it is a Stradivarius. . . . [It] carries status in its name, gravitas in its price tag, and the weight of centuries in its wood.” Ed Yong, *Violinists Can’t Tell the Difference Between Stradivarius Violins and New Ones*, DISCOVER (Jan. 2, 2012), <https://www.discovermagazine.com/the-sciences/violinists-cant-tell-the-difference-between-stradivarius-violins-and-new-ones> [<https://perma.cc/V2B7-J3D8>]. This perspective is the essence of the endowment effect.

¹⁴⁹ Korobkin, *supra* note 144, at 1235–36.

¹⁵⁰ Jones & Brosnan, *supra* note 144, at 1950–53.

who believe they acquired property rights over time.¹⁵¹ Quantifying “good will” into a sales price may recognize the seller’s intangible value of “a well-known and well conducted business.”¹⁵²

This effect clearly impacts negotiations. Emotional attachments may cause divorcing couples to fight over items of limited value. In cases with questionable liability, a plaintiff may dispute the notion that she may not recover all of her out-of-pocket expenses or get her job back. An entrepreneur may demand more than fair market value for selling a company because she invested her valuable time, energy, and emotion into what she built. The effect, at its essence, is tied psychologically to our “normatively defensible entanglement of personal property with selfhood”¹⁵³ or, as described by Oliver Wendell Holmes, Jr., is reminiscent of “the deepest instincts of man.”¹⁵⁴

Ownership, whether supposed or real, boosts perceived value. During negotiations, if the gap between the offer and the professed value seems large or unsubstantiated by independent evaluations, the endowment effect may be impacting the dialogue.

K. Losing More to Recuperate Losses: Sunk-Cost Fallacy

Most understand that future investments must be justified by the probability of future returns and not as a means of recuperating past expenditures. The “sunk-cost fallacy” may cloud that logic.¹⁵⁵ This fallacy causes us to incorporate a project’s spent resources into future goals of recovery. The United States’ continued involvement in the

¹⁵¹ *But see* Korobkin, *supra* note 144, at 1260 (stating that the endowment effect is an attractive explanation of adverse possession only when the adverse possessor feels entitled to the property *and* the real owner does not).

¹⁵² Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 287 (1991).

¹⁵³ Govind Persad, *When, and How, Should Cognitive Bias Matter to Law?*, 32 L. & INEQ. 31, 53 (2014); *see also* Korobkin, *supra* note 144, at 1250 (explaining psychologists believe that emotional impact of conceptually losing what is ours hurts more than potentially receiving something in future).

¹⁵⁴ Oliver Wendell Holmes, Jr. stated:

A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

¹⁵⁵ *See, e.g.*, Wistrich & Rachlinski, *supra* note 127, at 615 (discussing basketball teams’ tendency to pay higher draft choices more despite better performing lower draft choices).

Vietnam and Afghanistan wars are classic examples of the sunk-cost fallacy.¹⁵⁶

We continue to invest in losing propositions for a variety of reasons. Maybe we are trying to delay cognitive realization of the loss. Perhaps we want to prove that our original plan was appropriate.¹⁵⁷ Or we want to avoid appearing stupid or foolish¹⁵⁸ or wasting resources.¹⁵⁹ Alternatively, we may be willing to pay more for vindication rather than compromise.¹⁶⁰ Economically, none of these reasons justify throwing good money after bad or doubling down on commitment to an inferior plan.

This fallacy almost certainly impacts negotiation planning and choices for resolution. “[L]itigation is the perfect storm for creating sunk-cost bias.”¹⁶¹ As a lengthy trial process increases emotional costs, a greater probability exists that sunk costs will impact settlement decision-making.¹⁶² In all-day mediations, parties may feel that their investment of time, emotional energy, or other resources necessitates a deal, even a poor one. An aggressive litigation stance may mean that attorney fees outpace the value of a case and make resolution more challenging.¹⁶³ The original objective of recovery is altered. It now includes a new incentive of recapturing already spent fees, which may provoke a client to select the riskier and more uncertain gamble of trial rather than settlement, further increasing the outlay of additional funds. Attempts to secure sunk costs can become a vicious circle of spending.

¹⁵⁶ BARON, *supra* note 65, at 305. See also Peter Coy, *America’s War in Afghanistan Is the Mother of All Sunk Costs*, BLOOMBERG BUSINESSWEEK (April 19, 2021), <https://www.bloomberg.com/news/articles/2021-04-19/america-s-war-in-afghanistan-is-the-mother-of-all-sunk-costs>.

¹⁵⁷ Wistrich & Rachlinski, *supra* note 127, at 615 (positing that honoring sunk costs may support an individual’s reputation for commitment or ability even when faced with mounting costs).

¹⁵⁸ Adler, *supra* note 8, at 739.

¹⁵⁹ Wistrich & Rachlinski, *supra* note 127, at 615.

¹⁶⁰ Rachlinski, *supra* note 106, at 122.

¹⁶¹ Robert H. Barron, *Early Mediation: Pros, Cons and Strategies for Improved Outcomes*, 41-OCT PA. LAW. 42, 44 (2019).

¹⁶² *Id.* at 44–45.

¹⁶³ Wistrich & Rachlinski, *supra* note 127, at 616–17 (In a hypothetical breach of contract case, attorneys presented with identical facts were asked to evaluate the attractiveness of \$480,000 settlement offer. They were told the maximum recovery was \$1,000,000 and contract did not permit recovery of attorneys’ fees. They were told that it would take \$70,000 in fees through trial. One group was told that they already spent \$90,000 in fees while the other group was told they already spent \$420,000. Of those who learned they had already spent \$90,000, 76% suggested settlement. Of those told of the greater amount of fees spent, only 45% recommended settlement.).

As attorneys, we are naturally reluctant to concede or be perceived as “giving up.” To concede is to lose. The sunk-cost fallacy “piles on” to other loss aversion biases, affecting risk tolerance and choices in negotiation. In loathing loss, the overarching desire to recoup may increase expenses and diminishes opportunities for resolution, all to the detriment of the client.

L. An Admonition: Blind Spot Bias.

Before we congratulate ourselves on our new ability to recognize some cognitive biases that impact negotiation, there is one more bias to introduce. Robustly researched, the “blind spot bias” explains that we think we are better at recognizing and preventing the influence of biases than we actually are.¹⁶⁴ We also have the tendency to perceive cognitive biases more often in others than in ourselves.¹⁶⁵ Even while engaging in introspective assessment, we err in our reasoning about the very cognitive biases we are trying to avoid. Overconfidence in our ability to recognize biases creates that blind spot loop.¹⁶⁶ As we often perceive our world through our own self-interested lens, we do not recognize the erroneous judgments we make while more readily recognizing the same errors in others.¹⁶⁷

As several studies suggest, thinking we are free from bias does not help us avoid actual classic cognitive bias.¹⁶⁸ General familiarity with cognitive biases is “absolutely worthless” because people are, for the most part, oblivious to the influence of heuristics and biases in their decision-making processes.¹⁶⁹ We simply do not think like we think

¹⁶⁴ David Yokum et al., *The Inability to Self-Diagnose Bias*, 96 DENV. L. REV. 869, 901–02 (2019) (discussing the possible causes of this bias, including that reasoning is self-serving (egocentric bias), observations of others generate incomplete data about the character of that person (FAE), and the ability to consciously self-reflect is illusory because biases occur subconsciously).

¹⁶⁵ Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of Bias Blind Spot*, 43 J. EXPERIMENTAL SOCIAL PSYCH. 565, 575 (2006); see also Stark & Milyavsky, *supra* note 3, at 178.

¹⁶⁶ Gregory S. Parks & E. Bahati Mutisya, *Hazing, Black Sororities, and Organizational Dynamics*, 43 L. & PSYCH. REV. 25, 66 (2019) (citing study that shows more cognitively sophisticated individuals may display larger bias blind-spots).

¹⁶⁷ Rachlinski, *supra* note 5, at 1220.

¹⁶⁸ Richard F. West et al., *Cognitive Sophistication Does Not Attenuate the Bias Blind Spot*, 103 J. PERSONALITY & SOC. PSYCH. 506, 515 (2012).

¹⁶⁹ Hal R. Arkes, *Impediments to Accurate Clinical Judgement and Possible Ways to Minimize Their Impact*, 49 J. CONSULTING & CLINICAL PSYCH. 323, 326 (1981).

we do, and we do not think like we think others think.¹⁷⁰ But all is not lost.

PART II – DE-BIASING TACTICS

“Toto, I have a feeling we’re not in Kansas anymore.” – Dorothy Gale¹⁷¹

Given the state of behavioral research, we can no longer question whether we suffer from these cognitive illusions that cause our irrational thinking.¹⁷² We do.¹⁷³ Conceding that these biases impact our thinking does not diminish their influences. Yet failing to accept that they can impact us may be perilous, particularly in high-stakes negotiation. We must attempt to do something affirmatively to thwart their sway. “We can’t solve problems by using the same kind of thinking we used when we created them.”¹⁷⁴

De-biasing is harder than it sounds, particularly for lawyers.¹⁷⁵ We are solution-oriented creatures. Part of our job is to tell self-serving stories on behalf of our clients. Delving into our psychological temperament and ruminating on our thinking is not a natural or comfortable part of our practices. As one law student stated, “If I’d wanted to learn about feelings, I wouldn’t have gone to law school.”¹⁷⁶

Do not despair.¹⁷⁷ I have outlined some strategies below that may recalibrate our psychological responses—some are self-directed strategies (what we can try to do ourselves) and others are systemic

¹⁷⁰ Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67, 105–06 (2002).

¹⁷¹ WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

¹⁷² Günter Molz & Rüdiger F. Pohl, *Suggestions and Cognitive Illusions*, in COGNITIVE ILLUSIONS: INTRIGUING PHENOMENA, *supra* note 31, at 467, 478.

¹⁷³ Wikipedia identifies over 200 different biases. *List of Cognitive Biases*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_cognitive_biases [https://perma.cc/ZDZ8-UQW3] (last visited Feb. 2021); *see generally* William Friend & Deepak Malhotra, *Psychological Barriers to Resolving Intergroup Conflict: An Extensive Review and Consolidation of the Literature*, 35 NEGOT. J. 405, 407 (2019) (identifying multiple biases that fuel conflict). Robert Adler suggested twenty-nine cognitive biases that particularly impact negotiation. *See generally* Adler, *supra* note 8.

¹⁷⁴ Katherine L. Milkman et al., *How Can Decision Making be Improved?*, 4 PERSPECTIVES ON PSYCH. SCI. 379, 382 (2009) (quoting Albert Einstein).

¹⁷⁵ Some studies show that lawyers fall victim to the same errors in thinking as the lay person, while other studies suggest that we may avoid at least some of the mistakes. Rachlinski, *supra* note 5, at 1217.

¹⁷⁶ Melissa L. Nelken, *Negotiation and Psychoanalysis: If I’d Wanted to Learn About Feelings, I Wouldn’t Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 422 (1996).

¹⁷⁷ “[T]here are, indeed, cognitive pills for cognitive ills.” Pat Croskerry, *The Importance of Cognitive Errors in Diagnosis and Strategies to Minimize Them*, 78 ACAD. MED. 775, 776 (2003).

strategies (how outside systems may assist).¹⁷⁸ Several of these ideas are recommended in the cognitive bias literature or by those who work in conflict management. Some strategies require further scientific study to confirm they weaken biased thinking. While cognitive biases are rarely fully overcome, with practice we may diminish their impacts. The overall goal is to be fully present and focused as we engage in this brain battle.¹⁷⁹

A. Self-Directed De-Biasing Techniques

1. Develop Self-Awareness, Self-Assessment, and Humility

“Self-awareness is the foundation for wise action.”¹⁸⁰ An understanding of ourselves and our motivations is key to altering the manner in which we react and deliberate. As a first step, accepting that our thinking may be flawed may help.¹⁸¹ Understanding how the potential of cognitive forces unintentionally shape our negotiation evaluation and planning, “while no panacea, can help lawyers develop appropriate strategies to counteract biased decision-making.”¹⁸² Which hot buttons trigger your reactions? What life stories limit your attitudes? How do your beliefs and experiences impact your assumptions? “Through self-awareness and conscious choices we become the authors of our leadership contribution rather than allowing the [processes] to trigger us into defensive, unwitting responses.”¹⁸³

Self-inquiry is a demanding process. “Becoming alert to the influence of bias requires maintaining keen vigilance and mindfulness

¹⁷⁸ Most of these skills are influenced by client-centered counseling approaches. See Robert J. Condlin, *ADR: Disputing with a Modern Face, or Bargaining for the Bargaining Impaired?*, 21 CARDOZO J. CONFLICT RESOL. 291, 324 (2020).

¹⁷⁹ Many of these strategies may also help abrogate these biases in conflict management, client counseling, and advocacy settings, as well as in our personal lives and relationships.

¹⁸⁰ LARRY DRESSLER, *STANDING IN THE FIRE: LEADING HIGH-HEAT MEETINGS WITH CLARITY, CALM, AND COURAGE* 38 (2010).

¹⁸¹ Self-awareness is often associated with emotional intelligence; the ability to understand, monitor, and control the motivational and emotional responses that support more rational decision-making. Adler, *supra* note 8, at 756–57. “[T]he best protection against . . . psychological traps is awareness. . . . Even if you can’t eradicate the distortions . . . , you can build tests and disciplines . . . that can uncover and counter errors in thinking before they become errors in judgment.” *Id.* at 763 (quoting JOHN HAMMOND ET AL., *SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS* 214–15 (1999)).

¹⁸² Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757, 799 (2016).

¹⁸³ DRESSLER, *supra* note 180, at 29 (attributional biases that drive spontaneous reactions, such as reactive devaluation and FAE, are particularly attenuated by engaging in more deliberative rather than reflexive mode of thinking).

of one's own thinking."¹⁸⁴ By employing self-discipline, humility, and emotional intelligence, you can detect when you might be in an environment of uncertainty in which biases may be triggered and better recognize and analyze your reactions and decisions.¹⁸⁵ If you do not self-assess, you may not recognize the potential for mistakes in judgment.¹⁸⁶

2. Think Slowly, Pause, and "Go to the Balcony"

Literally pause. Hesitate. Slow down your reaction, step back, and collect yourself.¹⁸⁷ Try to separate from the emotions embedded in conflict or negotiation. To visualize this disconnection from conflict, negotiation expert William Ury suggests "go[ing] to the balcony."¹⁸⁸ Imagine sitting in the balcony of a theater watching the play below. Try to become an observer of the conflict occurring before you.¹⁸⁹ As the old adage advises, "Don't stand too close to the elephant." Detaching from the conflict may allow the more judicious and deliberative portions of your brain to engage.

Conflict facilitator Larry Dressler recommends a similar mental technique called "standing in the fire."¹⁹⁰ While the "fire" of conflict or intense negotiations engulfs others, your goal is to stand in the middle of the fire and "maintain [your] calm, clarity, curiosity, and resoluteness, even as others become adversarial, confused, or resigned to

¹⁸⁴ Pat Croskerry, *From Mindless to Mindful Practice—Cognitive Bias and Clinical Decision Making*, 368 N. ENGL. J. MED. 2445, 2447 (2013).

¹⁸⁵ Adler, *supra* note 8, at 756. See also Pat Croskerry et al., *Cognitive Debiasing 1: Origins of Bias and Theory of Debiasing*, BMJ QUALITY & SAFETY 2013 ii58, ii62 (2013). The authors outline three distinctive steps in debiasing: (1) be aware of the strategies to overcome the biases, (2) be able to recognize the need to overcome the biases, and (3) be capable of doing so. *Id.*

¹⁸⁶ O'Grady, *supra* note 28, at 19.

¹⁸⁷ Scientists who have studied cognitive biases describe two systems of thinking. System 1 is our intuitive, rapid, emotional thinking that occurs in a flash. System 2 thinking refers to slower reasoning and conscious, effortful thinking. Most biases occur because we use intuitive System 1 rather than deliberative System 2 thinking. Slowing down and pausing, among other strategies discussed here, may allow us to engage our more cool-headed, intentional, and calculated thinking. Milkman et al., *supra* note 174, at 380; see also Carey K. Morewedge et al., *Debiasing Decisions: Improved Decision Making with a Single Training Intervention*, 2 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 129, 131 (2015) (stating that biased thinking can be corrected by engaging in more controlled and effortful thinking). For an excellent discussion of these modes of thinking, see generally KAHNEMAN, *supra* note 6.

¹⁸⁸ WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 183 (1993).

¹⁸⁹ *Id.* at 38.

¹⁹⁰ See generally DRESSLER, *supra* note 180.

‘another failed attempt to resolve this issue.’”¹⁹¹ In our roles, whether as 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.”¹⁹² Maintaining composure and focus while in the midst of conflict may facilitate slower thinking.

If acronyms work for you, the Stress Reduction Clinic at the University of Massachusetts Medical School suggests a mindfulness technique called STOP—Stop; Take a breath; Observe what is happening in terms of your bodily sensations, emotions, and thoughts; and Proceed.¹⁹³ Be as intentional as you can about your thinking and reactions.

3. Set a Trip Wire

Perhaps create a reminder, or “trip wire,” to snap yourself off of autopilot and return to your plans.¹⁹⁴ One example of a trip wire was a clause built into rock group Van Halen’s touring contract during the 1970s and 1980s.¹⁹⁵ Buried within the contract was a clause that absolutely forbade brown M&Ms[®] anywhere backstage, upon pain of full contract forfeiture.¹⁹⁶ If band members saw any of those wonderful chocolate candies backstage, they knew that the entire contract had not been read carefully and that venue management may not have complied with all contractually-required safety measures and technical specifications.¹⁹⁷

Craft a trip wire to remind yourself to focus and gather your thoughts while you are negotiating or strategizing. Perhaps set a timer on your smart phone to vibrate so you remember to take a mental break. Have a colleague pass you a glass of water or otherwise quietly interrupt should you begin 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 to appreciate that the mediation is not about him. Anything that disrupts a reactive mode of thinking and causes you to pause may help.

¹⁹¹ *Id.* at 28–29.

¹⁹² *Id.* at 28.

¹⁹³ See Peter H. Huang, *How Improving Decision-Making and Mindfulness Can Improve Legal Ethics and Professionalism*, 21 J.L., BUS. & ETHICS 35, 61 (2015) (citing Leonard L. Riskin, *Knowing Yourself: Mindfulness*, in *THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 239, 247 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006)).

¹⁹⁴ *Id.* at 51.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

4. Learn to be More 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. It happens in an instant and often without our even recognizing that we are rationalizing away the conflicting information. Rather than attempt to hold two or more opposite ideas in our brains at the same time, we try to reconcile the incongruities (often relying upon these shortcuts in thinking) and create the opportunity for biased reactions. Lawyers are particularly talented at justifying and reconciling conflicting facts. Instead, try to hold two incompatible ideas in your brain at the same time without artificially resolving the conflict.

Apply the same logic to your negotiation planning. Try not to necessarily resolve the factual conflicts; focus instead on acknowledging the conflicting facts and work to weigh the evidence more evenly. If struggling, try to outweigh the confounding information and see if a better balance is achieved. This strategy may diminish a number of biases, particularly confirmation bias.

5. Ask More Questions and Listen

Ask more open-ended questions. Step away from cross-examination, whether you are talking to your client or counsel opposite.¹⁹⁸ With sincere curiosity, “[w]e learn, connect, observe, and invent We push boundaries and we discover secrets. We solve mysteries and we imagine new ways of doing things.”¹⁹⁹ Tackle a negotiation “as a mystery to be solved.”²⁰⁰ Discover that which challenges assumptions. The more diverse the information collected, the less likely you may be sidetracked by biased reactions and thinking.²⁰¹ One of the best questions to ask may be “Could you tell me more about that?” Be cognizant,

¹⁹⁸ I believe we may be doing a disservice to law students and young attorneys by telling them “Never ask a question unless you already know the answer.” There are many exceptions to this mantra.

¹⁹⁹ FRANK SESNO, *ASK MORE: THE POWER OF QUESTIONS TO OPEN DOORS, UNCOVER SOLUTIONS, AND SPARK CHANGE 1* (2017). Mr. Sesno’s book is marvelous in that its chapters are divided by the goal of the questions: diagnostic, strategic, or to get others talking, among other strategies.

²⁰⁰ DEEPAK MALHOTRA & MAX BAZERMAN, *NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND* 173 (2007).

²⁰¹ Adler, *supra* note 8, at 760–61.

though, that questions that begin with the word “why” may trigger a defensive response.²⁰²

As you ask questions, engage in deep listening. We all have stories to tell, and most stories are very interesting. The goal is to learn rather than think of the next question to ask. Focus on the speaker (which includes turning away from computers and smart devices) and the moment. Listen “for hidden or unexpected places to explore and connect.”²⁰³ Listen to not only what is said but how the narratives are framed. We may, for example, see opportunities to reframe choices (and thus challenge loss aversion) to those which enhance our negotiation position or make an agreement more appealing to our counterpart. As the adage says, be more interested than interesting.

6. Embrace Your Lack of Control

The future is not linear but made up of endless possibilities, most of which are driven by events outside of our control. Preparing yourself and your client for disruptions makes you more nimble when faced with the eventuality of surprise. For example, if clients believe they have even the smallest amount of control over the circumstances at issue (e.g., a jury verdict), the above-average effect may not be mitigated.²⁰⁴ In preparation for the negotiation, discuss with your client what you truly can and cannot control and the financial and emotional costs involved in attempting to gain that control (thus challenging the sunk-cost bias).²⁰⁵ Preparing for and accepting lack of control also mitigates the overconfidence bias. Surprise is always an element of our representation of others. Plan for it.

7. Prepare to Be Wrong

Try to humbly concede limitations. Try to be open to the idea that you may be wrong. Mistakes will happen. Recognizing mistakes may feel embarrassing, demeaning, and even traumatic; yet mistakes foster learning. Open-mindedness and humility may ameliorate a number of cognitive biases by supporting more modest thinking.²⁰⁶

²⁰² ANDREW SOBEL & JEROLD PANAS, *POWER QUESTIONS: BUILD RELATIONSHIPS, WIN NEW BUSINESS, AND INFLUENCE OTHERS* 134 (2012) (“[‘Why?’] can sound critical, carping, and nagging.”). This book goes into great depth suggesting questions in a variety of scenarios and is highly recommended.

²⁰³ SESNO, *supra* note 199, at 129.

²⁰⁴ Williams, *supra* note 39, at 744.

²⁰⁵ Shestowsky, *supra* note 33, at 683.

²⁰⁶ Peter H. Huang, *Boost: Improving Mindfulness, Thinking, and Diversity*, 10 WM. & MARY BUS. L. REV. 139, 176–77 (2018); see also Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORG. BEHAV. & HUM. DECISION PROCESSES 124, 125 (1985)

“[I]ntellectual humility will serve us well in helping us to 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.”²⁰⁷ Self-interested thinking may also ebb when stress is tempered, such as through meditation.²⁰⁸ As demonstrated throughout this article, emotions play a key role in decision-making.²⁰⁹ “[A]nxiety that accompanies any realization that we are wrong perfectly ‘reflects the urgency of our desire to be right.’”²¹⁰ We cannot let our egos keep us from refining our craft.

Importantly, we must create a business environment that promotes an “early recognition and acceptance of mistakes [in order to] avoid one mistake building incrementally on another, discourage denial and cover-up, and facilitate learning for professional growth.”²¹¹ Glossing over or ignoring mistakes can lead to further problems, including an unconscious motivation to engage in unethical conduct.²¹² Facilitating the recognition of mistakes and crafting an effective apology is a topic for another day.²¹³ Accepting rather than justifying error will be less painful in the long run. “In peace there’s nothing so becomes a man as modest stillness and humility.”²¹⁴

(stating that mindfulness reduces escalation of commitment that causes sunk cost). See also NICHOLAS RESCHER, *THE LIMITS OF SCIENCE* 34 (1999) (discussing that open-mindedness flourishes in the context of a suitably fallibilistic view of human inquiry)

²⁰⁷ William Hare, *Helping Open-Mindedness Flourish*, 46 J. THOUGHT 9, 15 (2011).

²⁰⁸ Greta B. Raglan & Jay Schulkin, *Decision Making, Mindfulness, and Mood: How Mindfulness Techniques Can Reduce the Impact of Biases and Heuristics Through Improved Decision Making and Positive Affect*, 4 J. DEPRESSION & ANXIETY 168, 172 (2014); see also Fadel Zeidan et al., *Mindfulness Meditation Improves Cognition: Evidence of Brief Mental Training*, 19 CONSCIOUSNESS & COGNITION 597, 603 (2010) (stating that twenty minutes of mindfulness meditation per day improves attention, executive functioning, and working memory).

²⁰⁹ Anna Spain Bradley, *The Disruptive Neuroscience of Judicial Choice*, 9 UC IRVINE L. REV. 1, 31–32 (2018) (discussing studies that show emotions change neural circuits, neural activity, and molecular or genetic pathways and influence capacity for reasoning and logic).

²¹⁰ O’Grady, *supra* note 28, at 17. Accountability may also reduce some of these biases. Jan-Philip Elm, *Behavioral Insights into International Arbitration: An Analysis of How to De-Bias Arbitrators*, 27 AM. REV. INT’L ARB. 75, 136 (2016).

²¹¹ O’Grady, *supra* note 28, at 10.

²¹² *Id.* at 8–9.

²¹³ See LAUREN M. BLOOM, *ART OF THE APOLOGY: HOW, WHEN, AND WHY TO GIVE AND ACCEPT APOLOGIES* xi (2008) (“Apology is a lovely perfume; it can transform the clumsiest moment into a gracious gift.”).

²¹⁴ WILLIAM SHAKESPEARE, *HENRY V* act 3, sc. 1, l. 3.

8. Separate the Message from the Messenger

Simply disconnect the message from the messenger. Consider how you would evaluate an offer, concession, or information if it was conveyed by a colleague rather than a foe. Does that change the assessment of the worth of the information? Moreover, as part of your negotiation strategy, consciously choose the best person to convey any offer or information to your opponent so the message will be well received and found credible.²¹⁵ Bring in a neutral agent, such as a mediator, to convey the offer or demand.²¹⁶ This simple strategy may diminish FAE and reactive devaluation biases.

9. Consider the Opposite

Compel yourself “to consider plausible alternative scenarios in which the same facts result in different outcomes.”²¹⁷ “Considering the opposite” is more than generating information that challenges perception. It is about questioning fundamental assumptions. Consider what other probabilities could occur, particularly those outcomes that are at direct odds with your current goals.²¹⁸ Write down the weaknesses of your case and how a neutral, impartial judge or jury might respond to those weaknesses.²¹⁹ Hire an expert to value any property being exchanged in the negotiation to counter the endowment effect. You are, in essence, anchoring yourself to the alternative interpretation of your negotiation strategy.²²⁰ Think of reasons why external or situational

²¹⁵ Robert A. Creo, *It's No Surprise: Empathy and Humor Can Help—or Hurt—at the Mediation Bargaining Table*, 36 ALTS. TO HIGH COST LITIG. 163, 163 (2018) (suggesting the impact of new or surprise information can be neutralized by the supplier of the information).

²¹⁶ Lack & Bogacz, *supra* note 4, at 49–50 (positing that the presence of skilled, non-evaluative facilitators may immediately alter subconscious stimuli that cause biases).

²¹⁷ Maggie Wittlin, *Hindsight Evidence*, 116 COLUM. L. REV. 1323, 1364 (2016).

²¹⁸ Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOCIAL PSYCH. 1231, 1231–32 (1984).

²¹⁹ *But see* Stark & Milyavsky, *supra* note 3, at 202 (showing that in studies when students asked what a fair settlement amount would be, the technique was less effective); *see also* James Fallows Tierney, *Contract Design in the Shadow of Regulation*, 98 NEB. L. REV. 874, 923 (2020) (explaining counter-framing works with policy makers if the counter-frame is important to the policy maker). *But see* Frenkel & Stark, *supra* note 48, at 47 (social science experiment suggesting a single instruction of listing weaknesses did little to de-bias in real world).

²²⁰ Lord et al., *supra* note 218, at 1241. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2523–24 (2004) (considering the opposite tears one away from the anchor).

factors explain behavior, to counter FAE.²²¹ Discuss with clients the real probabilities and consequences of these potential alternative outcomes and the weightiness of their choices.²²² In planning your negotiation strategy, consider what might happen if your predicted outcomes are opposite to the actual outcomes. This strategy may also reduce overconfidence²²³ in the accuracy of your plan and improve evaluation of the complex data driving decisions.²²⁴

Confirmation bias is particularly challenged by changing the manner in which we approach the investigation and analysis of facts. Search for and welcome information that is opposite to and challenges your assumptions. Engage in a deliberate effort focused “toward hypothesis-inconsistent information”²²⁵ by purposefully looking for material that disagrees with your theories. Take the question you are searching and flip it. For example, instead of asking whether a cause of action is available under your facts, rephrase your query to ask why the cause of action is not available. Frame your search in the negative.²²⁶ Counter-framing or focusing on direct rebuttals may help de-

²²¹ Douglas S. Krull, *Does the Grist Change the Mill? The Effect of the Perceiver's Inferential Goal on the Process of Social Inference*, 19 PERSPS. SOC. PSYCH. BULL. 340, 345–46 (1993) (explaining that an interest in a person may allow considering situational factors in explaining behavior first).

²²² Amy V. Hall, *Which Self Should the Law Target? An Analysis of Behavioral Biases in Criminal-Punishment Regimes*, 98 TEX. L. REV. 163, 167 (2019) (explaining that attenuating the above-average effect is particularly challenging because, when presented with information about the real probabilities of something occurring, the average person will continue to assume that their experience will be different because of the very bias we are trying to correct).

²²³ Asher Koriat et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCH.: HUM. LEARNING & MEMORY 107, 108 (1980); see Stark & Milyavsky, *supra* note 3, at 179–80.

²²⁴ See generally Laura J. Kray & Adam D. Galinsky, *The Debiasing Effect of Counter-Factual Mind-Sets: Increasing the Search for Disconfirmatory Information in Group Decisions*, 91 ORG. BEHAV. & HUM. DECISION PROCESSES 69 (2003); Thomas Mussweiler et al., *Overcoming the Inevitable Anchoring Effect: Considering the Opposite Compensates for Selective Accessibility*, 26 PERSPS. SOC. PSYCH. BULL. 1142 (2000) (suggesting the technique may also reduce the anchoring effect in an expert's judgment of value); Yaacov Trope & Ruth Gaunt, *Processing Alternative Explanations of Behavior: Correction or Integration?*, J. PERSONALITY & SOC. PSYCH. 344 (2000). See also Frenkel & Stark, *supra* note 48, at 26; Quintanilla, *supra* note 49, at 224–25 (citing Douglas S. Krull, *Does the Grist Change the Mill? The Effect of the Perceiver's Inferential Goal on the Process of Social Inference*, 19 PERSPS. SOC. PSYCH. BULL. 340, 345–46 (1993) (explaining that an interest in a person may allow considering situational factors in explaining behavior first)).

²²⁵ Carl Symborski et al., *Missing: A Serious Game for the Mitigation of Cognitive Biases* 4 (Interservice/Indus. Training, Simulation & Educ. Conf. (I/ITSEC), 2014 Paper No. 14295, 2014).

²²⁶ Clements, *supra* note 122, at 352–53 (citing *Robinson v. State*, 702 A.2d 741, 750 (Md. 1997)).

bias decision-makers.²²⁷ “[T]he more elaborate the causal connection that [we are] asked to create when explaining an alternative hypothesis, or the more vividly [we are] asked to imagine a future outcome,” the more successful the strategy may be.²²⁸ Understanding that there is the potential for other, and perhaps distasteful, outcomes heightens everyone’s appreciation of the difficulty of the decision, which challenges casualness in our thinking.²²⁹

10. Take Perspective

Similarly, try to consider the viewpoint of the opponent. Step into her shoes.²³⁰ This technique is not about an empathetic response to the opponent. This cognitive process is about grasping how the world is perceived from the vantage point of another.²³¹ If negotiations reach an impasse because of the assumption of conflicting positions, perspective taking may break that impasse.²³² Also, the anchoring effect may be blunted by perspective taking.²³³ “Overall, the research suggests that deliberate efforts at considering the perspective of others can enhance objectivity in thought.”²³⁴ With objectivity may come an

²²⁷ Dennis Chong & James N. Druckman, *Counterframing Effects*, 75 J. POL. 1, 13–14 (2012).

²²⁸ Frenkel & Stark, *supra* note 48, at 27.

²²⁹ Hal R. Arkes et al., *Eliminating the Hindsight Bias*, 73 J. APP. PSYCH. 305, 307 (1988).

²³⁰ See generally Hannah M. Tuller et al., *Seeing the Other Side: Perspective Taking and the Moderation of Extremity*, 59 J. EXPERIMENTAL SOC. PSYCH. 18 (2015). But see Rhia Catapano et al., *Perspective Taking and Self-Persuasion: Why “Putting Yourself in Their Shoes” Reduces Openness to Attitude Change*, 30 PSYCH. SCI. 424, 433 (2019) (explaining that taking perspective is less effective in de-biasing when seeking attitudinal change if values conflict).

²³¹ See generally Andrew R. Todd et al., *When Focusing on Differences Leads to Similar Perspectives*, 22 PSYCH. SCI. 134 (2011). But see Rachlinski, *supra* note 5, at 1222 (explaining that attorneys may be less motivated to adopt an unbiased belief in the strength of client’s case as the effort may actually produce lower settlements).

²³² Galinsky & Mussweiler, *supra* note 94, at 666. See, e.g., Theresa K. Vescio et al., *Perspective Taking and Prejudice Reduction: The Medial Role of Empathy Arousal and Situational Attribution*, 33 EUR. J. SOC. PSYCH. 455, 455 (2003); Robert Gould & Harold Sigall, *The Effects of Empathy and Outcome on Attribution: An Examination of the Divergent-Perspectives Hypothesis*, 13 J. EXPERIMENTAL SOC. PSYCH. 480, 480 (1976).

²³³ See, e.g., Amos Tversky & Daniel Kahneman, *Judgment and Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974); Gregory B. Northcraft & Margaret A. Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 94–95 (1987).

²³⁴ Frenkel & Stark, *supra* note 48, at 35 (citing Adam D. Galinsky et al., *Using Both Your Head and Your Heart: The Role of Perspective Taking and Empathy in Resolving Social Conflict*, in *THE PSYCHOLOGY OF SOCIAL CONFLICT AND AGGRESSION* 103, 111 (Joseph P. Forgas et al. eds., 2011)). Indeed, in distributive bargaining, perspective taking and

understanding of what automatic reactions are impacting decision-making.

11. Reframe the Narrative

“To [c]hange the [g]ame, [c]hange the [f]rame.”²³⁵ Think about making deliberate narrative choices.²³⁶ Try to frame choices using gain language rather than loss language.²³⁷ Describe choices so that they are easy to understand and the benefits are easy to identify.²³⁸ For example, discuss with the client how settlement has the advantage of closure.²³⁹ Use the pronouns “I,” “us,” and “we” in your narratives rather than “you” and “they.” Rather than “Your offer is unfair,” try “I don’t understand the basis of that offer.” How we phrase the deal may also determine whether our opponent will accept our proposal.²⁴⁰ Transform the narrative to one that promotes constructive discussion. Help clients recognize their troubling framing language and assist them in altering their narratives to their advantage. If sunk costs are impeding evaluation or negotiation goals, change the narrative from recovering previously spent funds to acknowledging that spent funds were an investment. Spent is spent. Let bygones be bygones. Be cautious; the consequence of any overt manipulation of the narrative can create more problems than it solves.²⁴¹ Be transparent in your narrative choices.

Given our predisposition to recall the negative, phrasing options positively and in terms that focus on good results may also make our negotiation plan more effective.²⁴² Presenting a negotiation offer in a light that demonstrates to the other side all she will certainly gain with agreement may help her moderate her own cognitive biases (such as loss aversion) and help her choose the option that maximizes her

awareness can allow the negotiator “to extract concessions in situations in which the main interest of one’s opponent is not consequential for the perspective-taker.” Galinsky & Mussweiler, *supra* note 94, at 666.

²³⁵ URY, *supra* note 188, at 177.

²³⁶ Lack & Bogacz, *supra* note 4, at 47 (“Our desire to avoid uncomfortable cognitive dissonances and post-choice rationalization means that the use of a single word as opposed to another can trigger entirely different neural pathways and forms of behavior before we have had the time to consciously realize this and make a fully informed decision.”).

²³⁷ Rachlinski, *supra* note 106, at 119. For a discussion on choice architecture, see Cass R. Sunstein, *The Ethics of Nudging*, 32 YALE J. ON REG. 413, 420–22 (2015).

²³⁸ Morewedge et al., *supra* note 187, at 130.

²³⁹ As easily as an attorney can frame settlement as an improvement of the client’s position, she also has the power to encourage costly irrationality by phrasing a settlement as a significant loss. Wistrich & Rachlinski, *supra* note 127, at 594.

²⁴⁰ Adler, *supra* note 8, at 742.

²⁴¹ Williams, *supra* note 39, at 752.

²⁴² Chestek, *supra* note 109, at 606.

recovery, which also benefits your client.²⁴³ Emphasize the advantages of certainty. “People tend to simplify their thinking about probability into categories of sure thing (certain), possible, or impossible.”²⁴⁴ Gain language may turn “possible” into “yes.”

12. Simplify Choices

Minimize the number of choices you present to your client or your opponent.²⁴⁵ “Choice overload,” occurs wherein the option eventually selected is governed by the number of choices offered. If presented with too many choices, clients or opponents may become overwhelmed and want to end the ordeal by either avoiding choosing or choosing the least threatening option, which is often the status quo.²⁴⁶ Studies also suggest that when the status quo posture is overtly included as an option, there is a greater chance that it will be selected over other options.²⁴⁷ Finally, if the choices conflict with each other, a client is also apt to select the status quo. Phrase your alternatives to minimize those conflicts and reduce the status quo bias.

To counter loss aversion, experts Richard Thaler and Cass Sunstein suggest “nudging” a decision-maker to better choices by changing the default choice to the choice that maximizes benefits.²⁴⁸ For example, frame participation in mediation as the default phase of the negotiation plan (“*When we go to mediation. . .*”). “Choice architects can use this insight to improve decision making by ensuring that the available default is the option that is likely to be best for decision makers and/or society.”²⁴⁹ Be thoughtful and transparent about framing the new default choice so that the decision-maker does not feel maneuvered.

²⁴³ Rachlinski, *supra* note 106, at 120.

²⁴⁴ BARON, *supra* note 65, at 270.

²⁴⁵ Sheena S. Iyengar & Mark R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCH. 995, 996 (2000). Interestingly, this study demonstrated that having more choices increased dissatisfaction and regret after the choice was made. *Id.* at 1003.

²⁴⁶ Anderson, *supra* note 133, at 158.

²⁴⁷ Samuelson & Zeckhauser, *supra* note 134, at 8.

²⁴⁸ See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); see also Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, SCI. MAG., Nov. 21, 2003, at 1338, 1339 (explaining that when required to opt-out of organ donation, participation increased significantly); Gretchen B. Chapman, *Opting In vs Opting Out of Influenza Vaccination*, 304 J. AM. MED. ASS'N 43, 44 (showing students were more likely to get a flu shot if they had to opt-out of an email appointment).

²⁴⁹ Milkman et al., *supra* note 174, at 382.

13. Replace the Anchor

Many biases are caused by or arise from a form of the anchoring effect. Anchors are inescapable. Diminishing their power is difficult. Awareness alone is not enough to battle against them.²⁵⁰ Discussing or disputing the anchors empowers them.²⁵¹ Anchors influence even if we are explicitly told to ignore them.²⁵² So what can you do?

Part of the power of the anchor is that we rarely consider whether the anchoring information or number itself is reasonable or credible. As a first step, locate objective information that explains why your opponent's anchor is inappropriate or inconsistent with the facts.²⁵³

Challenging their anchor is not enough. As a next step, replace their anchor with a more well-reasoned and powerful one of your own.²⁵⁴ Lean into your newly chosen reference point. Use it as the focus of the negotiation plan. Center the negotiation conversations around your anchor and away from theirs. Justify your new anchor with objective criteria that is consistent and supported with facts. In essence, you are working within this bias by anchoring to the narrative you created. Do not, however, continue to compare your new reference point back to the opponent's original anchor. Doing so may weaken the strategy. By challenging the anchor itself and replacing it with your own, you may diminish its influence.²⁵⁵

14. Seek Mediation or Conflict Management Training

Most law schools now incorporate mediation or some form of conflict management training into their curriculum.²⁵⁶ Students (and lawyers, for that matter) should take advantage of these courses or

²⁵⁰ Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, in *HEURISTICS AND BIASES*, *supra* note 27, at 119, 124–25.

²⁵¹ Orr & Guthrie, *supra* note 90, at 625.

²⁵² Chapman & Johnson, *supra* note 250, at 124–25.

²⁵³ Galinsky & Mussweiler, *supra* note 94, at 659. *See also* Orr & Guthrie, *supra* note 90, at 626 (“If the negotiator generates reasons not to reach agreement on the basis of the terms proposed by his counterpart, the negotiator may be able to resist the effects of anchoring.” (citing J.D. Trout, *Paternalism and Cognitive Bias*, 24 *LAW & PHIL.* 393, 420 (2005))).

²⁵⁴ *See* THOMPSON, *supra* note 80, at 190 (discussing the arbitrary nature and long-term impacts of first anchors).

²⁵⁵ *Id.*

²⁵⁶ Clearly the National Conference of Bar Examiners recognized the importance of skills training for law students. Recently, the NCBE approved the addition of negotiation, client interviewing, and conflict resolution as subjects to be tested on the Uniform Bar Examination. Testing Task Force, *Overview of Recommendations for the Next Generation of the Bar Examination* 4, NAT'L CONF. OF BAR EXAM'RS (2021).

training. While most lawyers may never mediate a case, “placing law students in the role of the neutral can improve their professional judgment by reducing cognitive and motivational biases to which lawyers are prone.”²⁵⁷ Among other de-biasing skills, often, mediation training focuses on understanding yourself, helps explore improved interpersonal relationships, and enhances effective communication.²⁵⁸ With training, you can harness these skills and positively impact judgment and decision-making, thus enhancing your ability to battle against several thinking errors and biases.

15. WARP

As a summary of these techniques, use this wonderful acronym, recommended by a colleague,²⁵⁹ to aid in your decision-making: **WARP**—**W**iden your options; **R**eality-test your assumptions; **A**ttain distance before deciding; and **P**repare to be wrong.

B. Systemic De-Biasing Techniques

How legal institutions and systems contribute to cognitive biases is beyond the scope of this article. Below are some suggested organizational or systemic strategies which may help diminish cognitive biases.

1. Hire Expert Negotiator/Settlement Counsel

All lawyers negotiate. Few are trained in the nuanced art of negotiation.²⁶⁰ “Settlement counsel” (sometimes called “negotiation counsel” or “resolution counsel”) serves in a unique expert role, separate from trial or corporate counsel. As a highly-skilled subject matter expert, the settlement counsel is a fierce advocate for problem-solving and resolution.²⁶¹ She can develop the negotiation strategy; suggest what offers to make, when, and in what order; and dilute any biased

²⁵⁷ Frenkel & Stark, *supra* note 48, at 35. Education in statistical reasoning and probabilistic sciences (medicine, economics, and psychology) also appear to increase effective de-biasing. Morewedge et al., *supra* note 187, at 131.

²⁵⁸ Kathy Kirk, *Mediation Training: What’s the Point, Are the Tricks Really New, and Can an Old Dog Learn?*, 37 WASHBURN L.J. 637, 647–48 (1998).

²⁵⁹ Shared with me by John Potter, O.D., M.A., Clinical Associate Professor, Department of Dispute Resolution & Counseling, Southern Methodist University.

²⁶⁰ Some may suggest that “sufficient training” means a short Continuing Legal Education seminar or a basic negotiation class. Negotiation is far more complex and refined. In 21st century practice, value, culture, and identity are embedded in a significant number of negotiations, and any expert negotiator should be trained in those subtle concerns.

²⁶¹ William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 380–82 (1999).

entanglements the case has generated. As an outsider, she focuses only on what is relevant to promote resolution and brings a fresh perspective to the dispute or deal.²⁶² She may lay “the groundwork for later settlement, improving communications and relationships between the adversaries, focusing the litigation on key issues, and reducing litigation costs”²⁶³ She also diminishes the impact of the conflicting narrative the 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. Negotiate with her or she withdraws, and the trial counsel is unleashed.

2. Conduct Negotiations through a Mediator

Conduct your negotiations through a well-trained mediator. It is not just the presence of a mediator that may assist in limiting the biases. Mediators, in the role of a neutral, are trained to view the dispute from all parties’ perspectives.²⁶⁴ They take into account any underlying narratives escalating the dispute and any barriers to resolution. They use the art of inquiry to further understand interests and goals. “The skill of mediators in framing issues and alternatives may diminish the problem of ‘loss aversion’ if proposed settlement terms accentuate the gains to be made rather than losses.”²⁶⁵ Mediators are also trained to “help the parties ‘reframe’ the issues in dispute in ways that can improve understanding”²⁶⁶ and increase potential for cooperation.²⁶⁷ Studies have shown that an intervention of a mediator in settlement talks has been shown to ameliorate multiple biases, including the

²⁶² Wistrich & Rachlinski, *supra* note 127, at 597–603.

²⁶³ John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 83, 114–15 (2008).

²⁶⁴ Mediators are not immune to the biases of which they are unaware. One such bias is the default choice a mediator may make as to the style of mediation used—evaluative, facilitative, transformative, or a hybrid of the three. By regularly selecting one mediation model over others as the default process, the mediator is engaging in biased thinking by not considering which model best suits the dispute or the parties to it. Mark B. Baer, *The Amplification of Bias in Family Law and Its Impact*, 32 J. AM. ACAD. MATRIM. LAW 305, 322–24 (2020). See also Korobkin, *supra* note 26, at 325–26. See generally CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (2003).

²⁶⁵ Mnookin, *supra* note 107, at 248.

²⁶⁶ Jonathan M. Hyman, *Slip-Sliding into Mediation: Can Lawyers Mediate Their Clients’ Problems?*, 5 CLINICAL L. REV. 47, 63 (1998).

²⁶⁷ Mediation may also hinder overcoming biased thinking. Overconfidence, in particular, has been cited as “the most significant psychological impediment in settlement in mediation.” Elizabeth E. Bader, *The Psychology and Neurobiology of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 363, 380 (2016).

overconfidence bias, the framing effect, and reactive devaluation, among others.²⁶⁸

One should be prudent with this option. Some parties may abuse the mediation process. Rather than engage in a good faith effort to settle, mediation may be used as an opportunity to drag out litigation, to conduct free evidentiary discovery or to increase costs for the opponent.²⁶⁹ Parties who are victims of this approach may experience heightened loss aversion or sunk costs biases if the expense of mediation outweighs its potential for success.²⁷⁰

3. Red Team Your Strategies

Create a team, known as a “red team,”²⁷¹ that articulates reasons why the negotiation plan may be wrong or why an idea will fail.²⁷² Find a blunt, honest skeptic among colleagues.²⁷³ Be willing to subject your evaluation, planning, and strategies to arduous questioning and critique from others.²⁷⁴ Have these devil’s advocates concentrate on the merits of the other side’s negotiation position while poking holes in yours.²⁷⁵ Articulating the reasons why impressions may be wrong or why an idea may fail could temper several biases, particularly confirmation bias,²⁷⁶ egocentric bias, overconfidence bias, and the above

²⁶⁸ See generally Korobkin, *supra* note 26.

²⁶⁹ John Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. REV. 69, 71 (2002) (discussing a study that showed mediation is used to “smoke the other side out”).

²⁷⁰ Brian M. Spangler, *Heads I Win, Tails You Lose: The Psychological Barriers to Economically Efficient Civil Settlement and a Case for Third-Party Mediation*, 2012 WIS. L. REV. 1435, 1458 (2012).

²⁷¹ A red team is often used in the gaming industry. When a new product or software is developed, the red team is charged with proving that the product will not work. For cyber security concerns, a red team is formed for the purpose of hacking into the company to test effectiveness of the company’s barriers. Kelly Sheridan, *Think Like an Attacker: How A Red Team Operates*, DARKREADING (Sept. 20, 2018), <https://www.darkreading.com/threat-intelligence/think-like-an-attacker-how-a-red-team-operates/d/d-id/1332861> [<https://perma.cc/SXP2-M4MU>].

²⁷² Koriat et al., *supra* note 223, at 117.

²⁷³ Adler, *supra* note 8, at 765.

²⁷⁴ *Id.* at 764.

²⁷⁵ Gwen M. Wittenbaum & Garold Stasser, *The Role of Prior Expectancy and Group Discussion in the Attribution of Attitudes*, 31 J. EXPERIMENTAL SOC. PSYCH. 82, 84 (1995). See also Fabrizio Cafaggi & Giacomo Sillari, *Behavioural Insights in Consultation Design: A Dialogical Architecture*, 9 EUR. J. RISK REGUL. 603, 628 (2018) (suggesting the use of “devil’s arguments” to hinder polarization of groups and pressure others to drop ineffective process).

²⁷⁶ Koriat et al., *supra* note 223, at 117.

average effect.²⁷⁷ Red teams can widen perspective and perhaps catch errors in thinking.

4. Mock Negotiations

Just as mock trials give practitioners and clients a more realistic view of probable verdicts, an informal “mocking” of complex settlement negotiations may assist in refining the negotiation plan. Submit your negotiation scenario to an unbiased group and ask them to generate creative terms or options. Conduct “small-scale experiments, pilot programs, or trial runs”²⁷⁸ that sample various options or strategies. Ask outsiders to evaluate your plans.²⁷⁹ Watching how others interact with your strategy can be eye-opening.

The central goal in all of these strategies is to open our minds to alternative ways of thinking. We should strive to become more comfortable with the idea that perhaps our initial impressions cannot be sustained in light of independent and objective information. Unstructured, non-parallel thinking may help overcome cognitive errors.

C. Potential for Success in De-Biasing?

Research suggests that a number of these biases are difficult to diminish, even while employing these strategies. Efforts such as generating counter-arguments or taking perspective can be a struggle for attorneys. We are trained to persuade and advocate for our client’s positions over those of our opponent’s.²⁸⁰ Some studies suggest that “de-biasing in the real world, with real motivations and real stakes, is more difficult to achieve than in the simulated world of the laboratory.”²⁸¹ For instance, relying on contrary data may be ineffective in some instances.²⁸² If conflicting values are interlaced with considering a counter-argument, perspective taking may be less effective.²⁸³

²⁷⁷ Adler, *supra* note 8, at 765.

²⁷⁸ Huang, *supra* note 193, at 48 (citing CHIP HEATH & DAN HEATH, DECISIVE: HOW TO MAKE BETTER CHOICES IN LIFE AND WORK 135–40, 153 (2013)) (describing a technique called “ooching”).

²⁷⁹ See also Milkman et al., *supra* note 174, at 381.

²⁸⁰ See generally Linda Babcock et al, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913 (1997).

²⁸¹ Frenkel & Stark, *supra* note 48, at 47.

²⁸² Sternlight, *supra* note 64, at 25 (“The mere provision of data will often fail to change peoples’ minds precisely because human brains do not process data as a computer would. Rather, people are very skilled at interpreting new data in the way most favorable to them.”).

²⁸³ Catapano et al., *supra* note 230, at 433. For example, in one study, participants were asked to negotiate a fair wage in an experimental labor dispute. Despite having identical

Several of these suggestions also necessitate a stance of open-mindedness. Self-assessment and a willingness to change our thinking can be a challenge for those who have a high need for “cognitive closure” (an aversion to ambiguity or ideas that lack clear meaning). In striving for clearer and certain knowledge, these individuals are driven to eradicate cognitive uncertainty.²⁸⁴ Those with a high need for cognitive closure typically “make more stereotypical judgments, rely on early information in impression formation, [and] resist persuasion when firm knowledge is already held”²⁸⁵ These individuals need an answer, any answer, and struggle to embrace and accept conflicting or incompatible information. Therefore, several of the strategies described may be ineffective or present intolerable effort for some.

Finally, the Blind Spot Bias significantly challenges our ability to even recognize when a de-biasing strategy should be employed. Indeed, one study demonstrated that even those with “cognitive sophistication” failed to recognize several biased reactions in themselves, including the framing and anchoring effects.²⁸⁶ While these de-biasing strategies were generally effective in laboratory applications, more research is needed to determine effectiveness in real-world lawyering environments.

CONCLUSION

We all want to be right. “It is ego-gratifying, imperative for survival, and ‘one of life’s cheapest and keenest satisfactions.’”²⁸⁷ Less extreme forms of these cognitive biases embody our normal, healthy, psychological human condition. Our clients seek out our confidence and assuredness. Yet in the negotiation context, our “normal” reactions can get in the way. Because we “are inclined to hold the misguided

information, the participants’ definition of a “fair wage” was biased toward their own self-interested stance (employer or employee), even when asked what a neutral party would view as fair. See generally Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 176 (1992).

²⁸⁴ Małgorzata Kossowska et al., *Motivation Towards Closure and Cognitive Resources: An Individual Differences Approach*, in HANDBOOK OF INDIVIDUAL DIFFERENCES IN COGNITION: ATTENTION, MEMORY, AND EXECUTIVE CONTROL 369 (Aleksandra Gruszka et al. eds., 2010).

²⁸⁵ *Id.* at 370. See also Arie W. Kruglanski & Donna M. Webster, *Motivated Closing of the Mind: “Seizing” and “Freezing”*, 103 PSYCH. REV. 263 (1996). See generally Arie W. Kruglanski & Shira Fishman, *The Need for Cognitive Closure*, in HANDBOOK OF INDIVIDUAL DIFFERENCES IN SOCIAL BEHAVIOR 343 (Mark R. Leary & Rick H. Hoyle eds., 2009).

²⁸⁶ West et al., *supra* note 168, at 515.

²⁸⁷ O’Grady, *supra* note 28, at 15.

conviction that [we] somehow see the world, and evaluate divisive issues, in a uniquely clear, unbiased, and 'unmediated' fashion,"²⁸⁸ we may misjudge. We must adjust our evaluations away from ourselves, acknowledge the persuasiveness of these biases, and consciously challenge our reactions.

Battling these robust influences is demanding. "[N]o decisionmaker ever has both perfect information and an unlimited amount of time at his or her disposal."²⁸⁹ These biases occur "unintentionally and without conscious awareness."²⁹⁰ Some studies have shown, however, that once we take the time to think about our reaction, we can consciously adjust or correct our assumptions and behavior.²⁹¹ Sustaining a laser focus on our evaluations, reactions, and decision-making during the negotiation process requires intention and energy. It can be exhausting. Yet, we are not powerless. In combatting these biases' influence, we must try to "recognize the signs that [we] are in a cognitive minefield,"²⁹² slow our thinking, and confront our reactions. By thinking about our thinking, we may challenge the sway of these meddling cognitive biases.

"Mischief managed." – Fred & George Weasley²⁹³

²⁸⁸ Pronin et al., *supra* note 38, at 641.

²⁸⁹ Reese, *supra* note 26, at 1260.

²⁹⁰ Richardson, *supra* note 48, at 270.

²⁹¹ See generally Daniel T. Gilbert, *Ordinary Personology*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 89, 112–13 (Daniel T. Gilbert et al. eds. 1998).

²⁹² KAHNEMAN, *supra* note 6, at 417.

²⁹³ J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN 194 (1999).