



*Reduce communication-
related claims*

by understanding cognitive biases

Understanding cognitive biases can help reduce communication-related claims, which are the biggest source of malpractice claims. While many cognitive biases are dealt with by following some common sense principles, others are not as obvious. From anchoring effect to decision fatigue, knowing how your client makes decisions can help you build rapport with your clients, effectively give recommendations, and help ensure you and your client are on the same page.

1. Let your clients make a good decision – decision fatigue

Decision fatigue has perhaps the highest profile of any cognitive bias – Facebook founder Mark Zuckerberg famously wears the same outfit every day as part of his bid to stave off decision fatigue. Your clients' ability to make good decisions may fade throughout the day or even during a meeting with each decision made, no matter how small or large. At the end of a long day, as decision fatigue settles in, irrationality and weakened self-control can take hold.

An end of the day client meeting discussing complex issues can make an already-difficult conversation even more fraught with dangers. Aside from physical fatigue, decision fatigue can cause clients to act impulsively, make unwise trade-offs in negotiation, or retreat into a conservative shell. If difficult choices are anticipated, it may serve everybody better to book such meetings in the morning.

Similarly, making a bunch of decisions in one sitting can also cause decision fatigue. In a study where participants made a series of choices in buying a car – selecting colour, engine size, rust-proofing, trim level, etc. – it was found that the more choices that were made available, the more likely the default or recommended choice was selected once decision fatigue set in. The selection could then be manipulated to ensure more expensive choices were selected as the default, resulting in a higher bottom line for the seller. Clients facing multiple decisions may be better off making fewer decisions at a time – you may wish to break the decisions up into segments or give your clients time to think over and sleep on such decisions, when possible.

While we're on the topic of helping your client make good decisions, research has shown that people are more likely to pay heed to anecdotes rather than bare probabilistic assessment. It is one option to say that "A is more likely than B;" it is more compelling to tell a story

explaining why. The risks involved with a decision can be better illustrated by recounting a lesson learned or describing what the world would look like. Word choice can also play a role – using words that rhyme, or putting points in terms of threes (e.g., “the three main points are...”), has been shown to be an effective way to help people memorize and focus.

2. Shaping client expectations – anchoring effect

Your clients may have a tendency to be heavily influenced by the first piece of information you feed them – the anchoring effect. If you set an expectation from the beginning, this can set the measuring stick by which your client judges the outcome of a file and ultimately your performance. A client anchored to an outcome or a number far out of reach can send a client and a file off the rails when the expectation is not met. Consider setting a wide range where appropriate. In some circumstances it may be unwise to establish any expectation at all, if the matter is unpredictable.

Civil litigators are often pushed to give the client a value for the case at intake. But litigation is full of ups and downs, and during the life of a file the initial valuation may change. In a personal injury case, if the client recovers well, resulting in plummeting damages, the client anchored to a high number is more likely to be dissatisfied with the outcome despite the improvement in health, and no matter how reasonable the resolution. It may be better to provide a wide range of values from the beginning, or, in the majority of cases, none at all – the outcome of a case depends on a number of factors ranging from the client’s long-term prognosis, pre-morbid history, expert analysis, and unpredictable juries.

Another place to be wary of the anchoring effect for litigators is at mediation. The first offer is typically not close to the last. A client anchored to the first offer will be sorely disappointed at the end of the mediation. Setting expectations before the mediation – explaining that the first offers on both sides can be multiples of what the final result may look like – can help emotionally prepare the client for what’s to come.

Solicitors who fail to communicate expectations clearly can also end up with clients anchored to unreasonable outcomes. A client looking to complete a commercial or real estate deal may need to complete a series of investigative steps before closing. Sunny optimism may not serve the client well if fees, permits, taxes, and costs are not known and out of the lawyer’s control prior to closing. Discussion at the initial stages should establish a range that is close to the final numbers insofar as the lawyer is capable of doing so. The old adage to under-promise and over-deliver is an effective way to deal with the anchoring effect.

3. Building rapport with affinity bias and authority bias

Studies have shown that people who present a professional look and are well groomed are perceived to be more honest and credible than those who are less so. Fortunately, looking professional is something all lawyers can control. Photofeeler.com, a website where people can judge each other’s photographs on measures such as influence and competence, has found in its research that simple steps such as wearing a suit and grooming well can take your level of influence up a notch. People tend to defer to the appearance of status and wealth.

If improving attractiveness seems like a superficial way to build rapport, perhaps just as effective is to take advantage of affinity bias, the tendency in people to like and trust those that are similar to them. Like attractiveness, similarity starts with appearances. A client coming from the same age demographic, racial, religious, or cultural background may be more likely to trust you right off the bat. But how can you build rapport with a client that is obviously different at first blush, whether in culture, temperament, or education level? The answer lies in matching body language, pace and volume of speech, and to use words familiar to your clients. Matching body language is perhaps more art than science. It is probably not helpful to respond to a client sitting in a closed position with arms folded and facing away from you by doing the same thing. Instead, consider maintaining an open position with palms facing up, but refrain from making gestures and other overt signals. Similarly, a client that is yelling at you and speaking quickly is unlikely to trust you more if you do the same. And if you speak in the same local vernacular as your client, you may be perceived as patronizing or even insulting. Matching is about stepping slightly outside of your comfort zone to make your client feel comfortable. It is not about changing who you are.

Building rapport is important to the overall goal of better client communications. But getting your client to like you is not a goal in itself. Malpractice claims can also occur when a lawyer goes overboard trying to appease a client, overlooks red flags, or skips necessary steps.

Conclusion

Working around or taking advantage of cognitive biases can help you communicate better with your client. The goal is to ensure your client understands the risks involved with legal decisions, whether it’s coming to terms with an agreement or taking a step in litigation. You can supplement good practice habits with these insights to manage your clients relationships better and avoid malpractice claims. ■

Ian Hu is Counsel, Claims Prevention and practicePRO at LawPRO.