

Negotiation Blind Spots: Identifying Cognitive Biases and Their Impact

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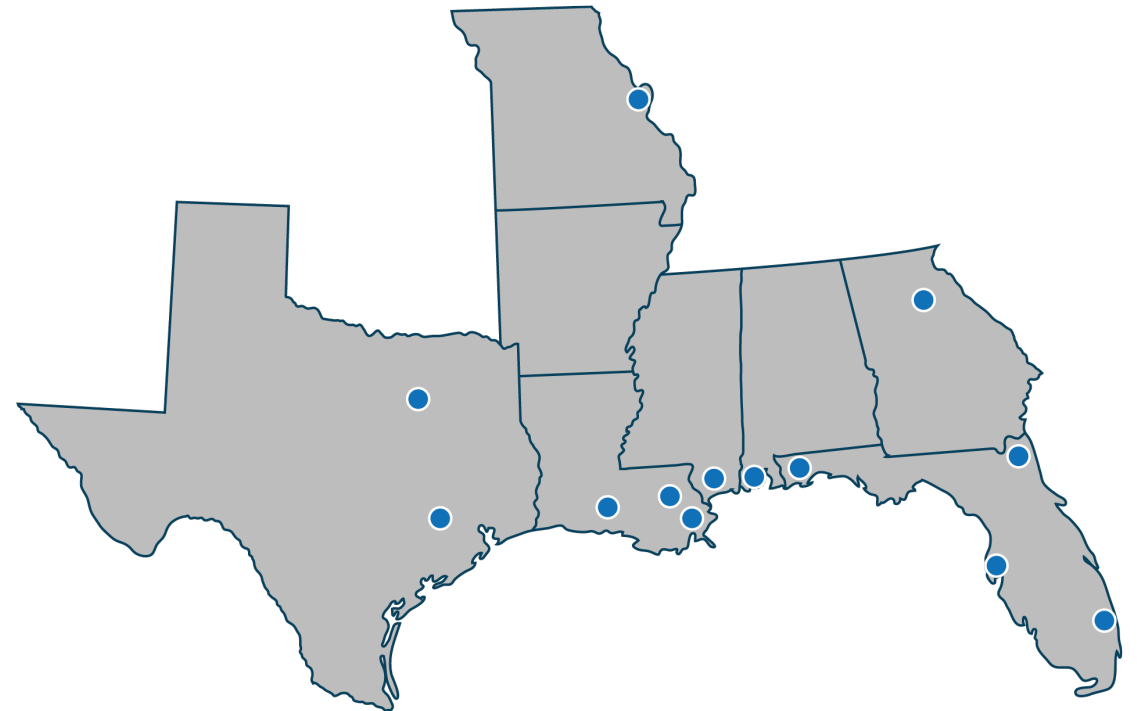
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Today's Presenters



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INFORMAL NEGOTIATIONS:

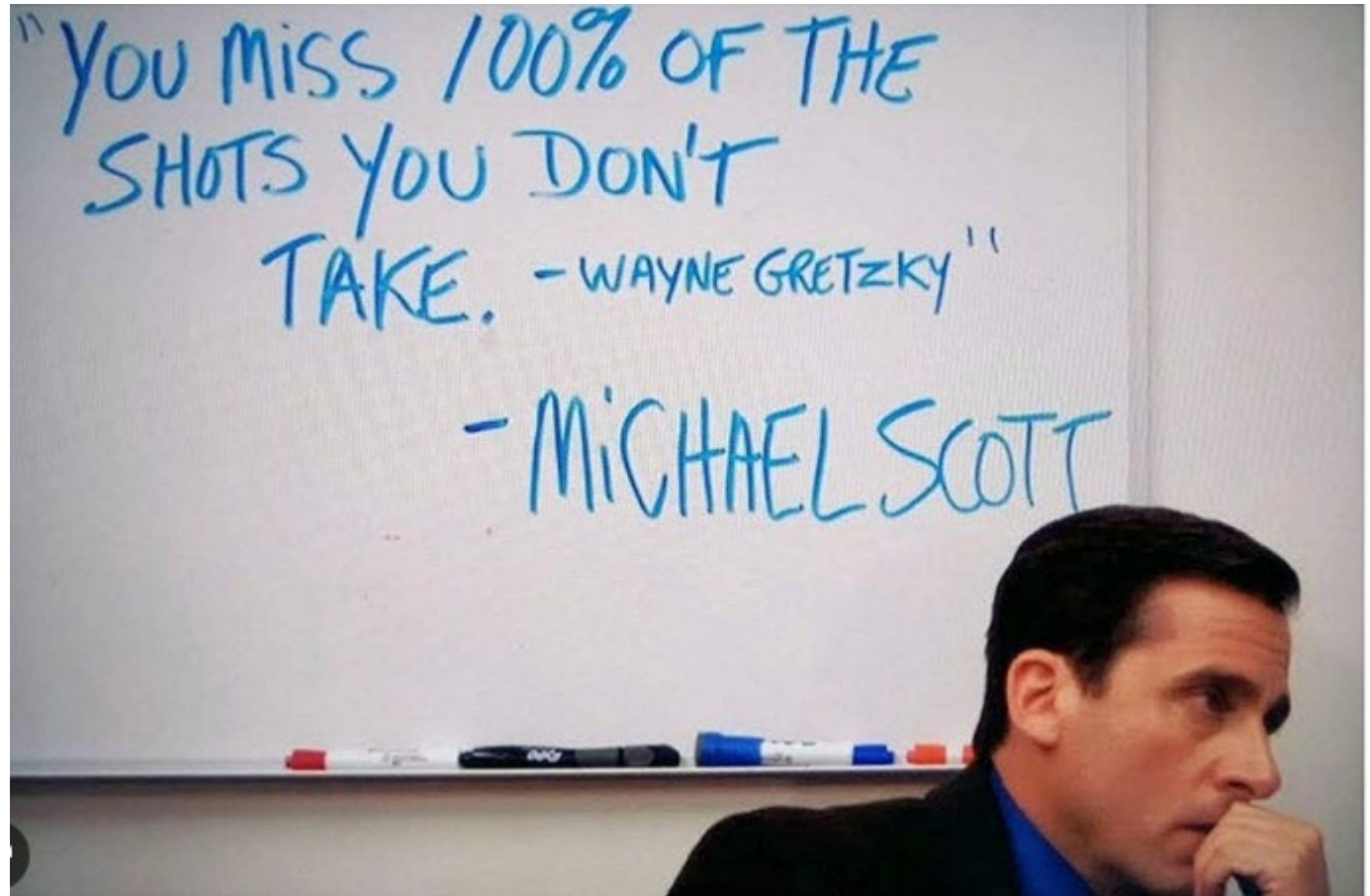
Negotiation Strategies

- Consider each case and whether it requires a different strategy for resolution
 - Multi-Party Claims
 - Substantial Damages
 - Time Limited Demands

INFORMAL NEGOTIATIONS:

Starting Low

- Opponent cannot say “Yes” if you do not ask
- Read the room
- Is it appropriate?



Heuristics

- Mental shortcuts that allow people to solve problems and make judgments quickly and efficiently
- Rules of thumb that help us navigate the world

Biases

- predictable, but flawed pattern of response to a problem
- Overlap with heuristics, often used as synonym

Examples

- **Confirmation bias:** we overvalue information that confirms our belief and dismiss all contrary information
- **Availability bias:** tendency to think that examples of things that readily come to mind are more common than what is actually the case

Examples

- **Loss Aversion bias:** the tendency to prefer avoiding a loss to acquiring an equivalent gain. The pain of losing is psychologically twice as powerful as the pleasure of gaining
- **Status Quo bias:** doing nothing or maintaining one's position and opposing change; related is Escalation of Commitment
- **Egocentric bias:** the tendency to rely too heavily on one's own perspective and/or have a different perception of oneself relative to others; tendency to overestimate the accuracy of one's judgments

Bonus biases

- **Attribution bias:** attribute another's actions to their character or personality, while attributing one's own behavior to external situational factors outside of their control. In other words, you tend to cut yourself a break while holding others 100% accountable
- **Cookie Cutter bias:** when the defense team lapses into treating every case the same, discounts the unique features of each case, and is so focused on the facts that it misses the story

MEDIATION:

Using Surveillance in Mediation

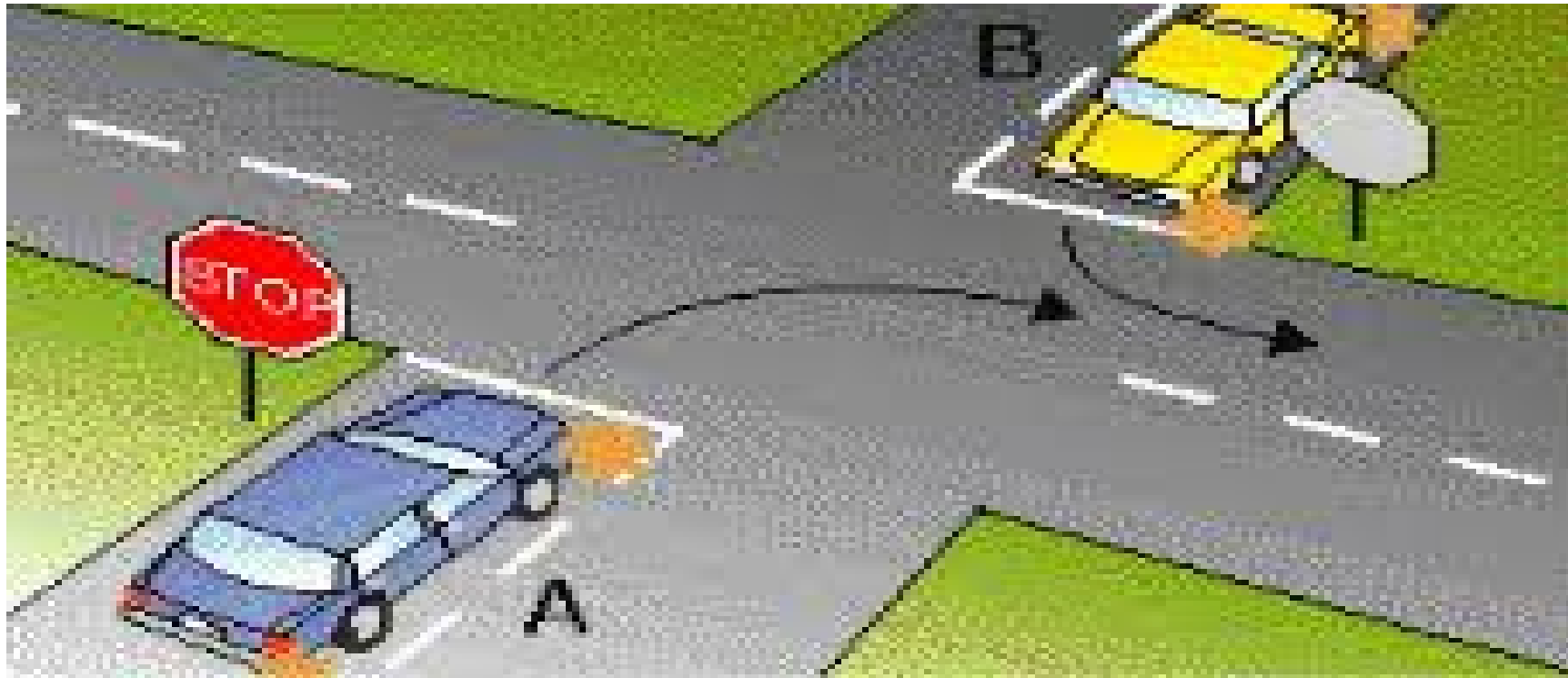


ANSWER: Plaintiff sustained injuries to his neck, knee and shoulder. He experienced constant soreness, pain when moving or walking and it caused him pain to sleep.
Client likes to golf and was unable to play after the wreck.

Case Study: Polly Plaintiff v. Tiger Trucks

- MVA in the State of Orion, Judicial Hellhole
- Midnight, truck from out of state, w/double trailers stops at intersection, then goes the wrong way down a one-way road
- Disregards opportunities to change direction
- Speculation he is taking shortcut to the yard
- Plaintiff in car with her 11-year-old son
- Plaintiff comes over overpass, collides with truck
- Car impacts toward the center/rear of the first trailer

Case Study: Polly Plaintiff v. Tiger Trucks



Injuries & Treatment

- Lumbar: L3-4 herniation, multiple ESIs, 2 RFAs, discectomy
- Cervical: L3-6 herniations, multiple ESIs, 2 RFAs
 - more RFAs or fusion likely
- Hip: pain, injection
- Past meds: \$140,000
- Future meds: \$50,000 - \$200,000
- No lost wage claim; future loss of earning capacity claim coming

Plaintiff is pristine

- 42 y/o single mom
- Small business owner
- No claim, litigation or criminal history
- No record of prior treatment to neck or back
- No depositions have been taken

Factors that influenced positions

- Intersection where truck turned is poorly marked
- It appears that at the last second, the car turns into the truck
- Truck driver said plaintiff could have easily steered around him
- Police officers are on bodycam implying crash done for money
- Plaintiff does not appear injured at the scene
- ~\$2,600 damage to plaintiff's vehicle
- Plaintiff went to doctors that her lawyers recommended

What is the
settlement value
range for this case?

IMPACT OF BIASES ON ASSESSMENT OF INFORMATION:

INFORMATION	BIAS LENS	CONCLUSIONS
Plaintiff has not been deposed	Confirmation bias	Plaintiff can say nothing that affects our exposure
Streets poorly signed	Confirmation bias	We will be found 0% liable
Truck driver pled guilty to ticket	Bias or Rules of Evidence?	The jury will never hear that
On video it looks like plaintiff veers into truck	Attribution Bias Availability Bias	Plaintiff is at fault and we could get a defense verdict; OR, plaintiff will bear +50% of fault
P/O said the accident was all about \$\$\$	Bias or Rules of Evidence?	PO wil say that at trial
Plaintiff has no claim, litigation, medical or criminal history	Cookie Cutter Bias Availability, Confirmation	Her history means nothing
Recent staged accidents	Availability Bias	She staged the accident
Plaintiff's treater will say all Tx secondary to crash	Confirmation Bias	Treater is a liar; we will have our own liar for hire
We try cases!	Loss Aversion; Ego	Let's charge off the cliff, on principle
We will pay \$___?___ to settle the claim	Status Quo Bias; Ego; Escalation of Commitment	Case does not settle

IMPACT OF BIASES ON ASSESSMENT OF INFORMATION:

THEORY OF DEFENSE	COGNITIVE BIAS OPERATING	INFORMATION IGNORED/DISMISSED
Plaintiff is 100% at fault	Cognitive Bias	Your driver going the wrong way Your driver paid the ticket Your driver drove past others before plt
Plaintiff hit the truck on purpose	Availability Bias	Clean plaintiff; 11 year old son in car; car to plaintiff's rear right
Plaintiff is a liar	Attribution Bias	No claim hx, no suit hx, no med hx
We will not adjust our settlement range	Status Quo; Ego; Loss Aversion	Plt may get neck surgery; will develop LCP

IMPACT OF BIASES ON ASSESSMENT OF INFORMATION:

G.I. JOE BIAS

- the tendency to think that knowing about cognitive bias is enough to overcome it.

Key Takeaways

- We are all subject to cognitive biases
- We cannot think them away
- The key is to be alert to and minimize their impact
- Fresh eyes, critical analysis, no group think
- Endeavor to look at things from multiple perspectives
- Explicitly identify risks and likelihood of outcome

Key Takeaways

- Drill down on facts
- Understand the plaintiff's story
- Understand what the case looks like at trial
- Surround yourself with a team who will challenge the status quo, play devil's advocate, ask challenging questions, and tell you what you may not want to hear

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