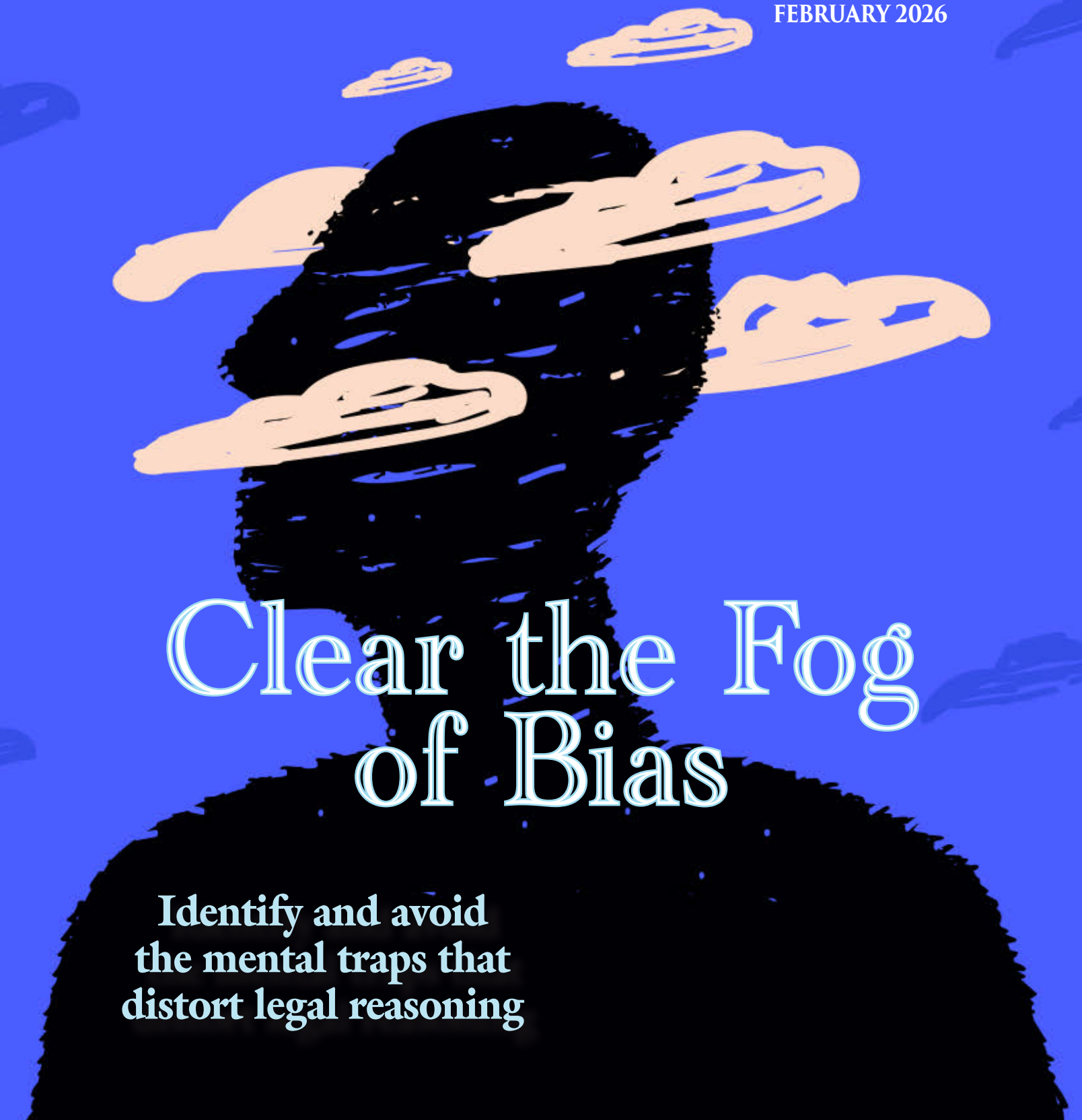
SPOUSAL LIABILITY (p. 26) REPRESENTING LICENSEES (p. 30)

www.azbar.org/AZAttorney

ARIZONA ATTORNEY

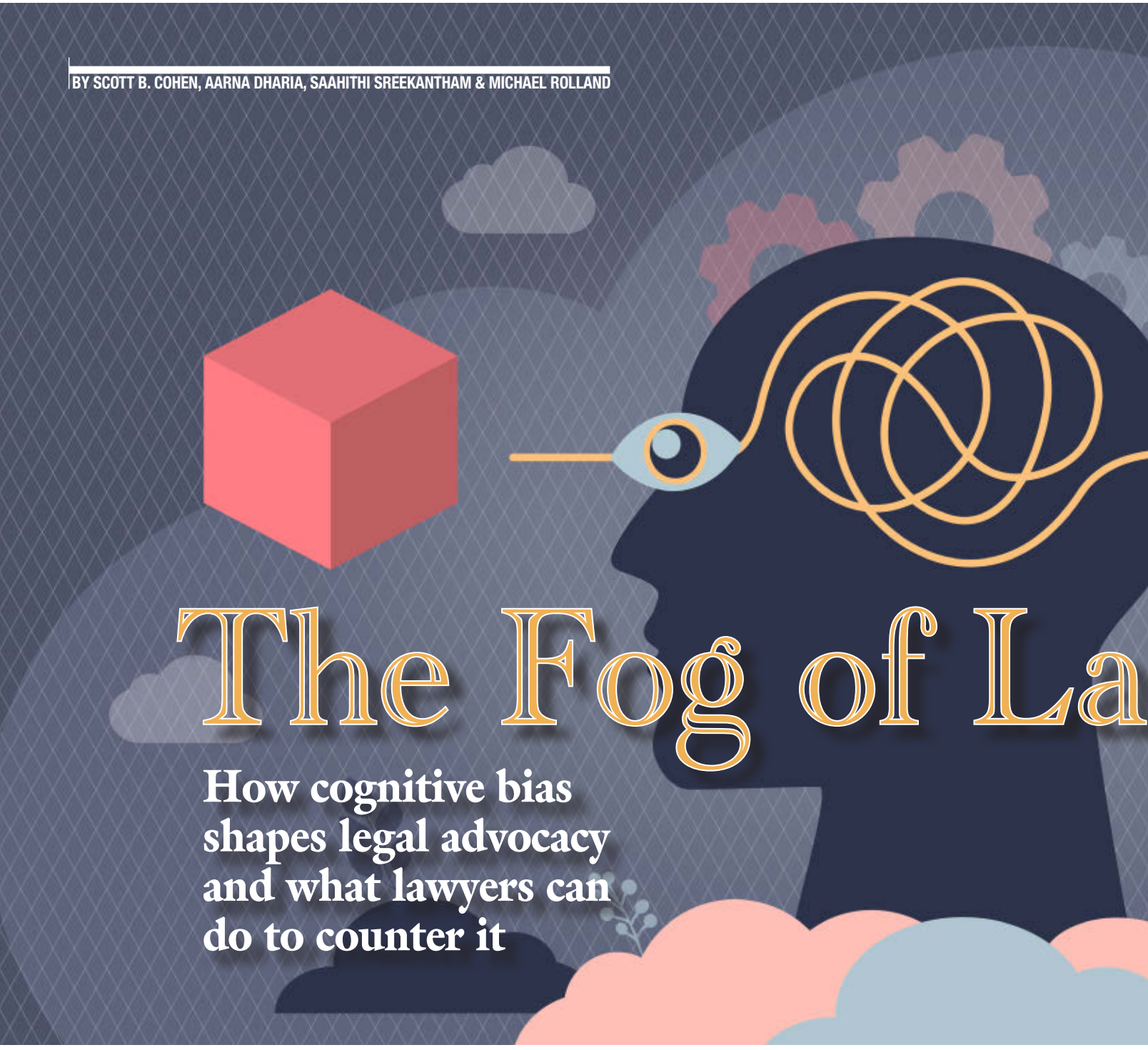
FEBRUARY 2026



Clear the Fog of Bias

Identify and avoid the mental traps that distort legal reasoning

BY SCOTT B. COHEN, AARNA DHARIA, SAAHITHI SREEKANTHAM & MICHAEL ROLLAND



The Fog of La

How cognitive bias shapes legal advocacy and what lawyers can do to counter it

Real World Bias in Litigation

Two longtime friends built a life and a business together around a rural Arizona ranch they owned equally. When the friendship collapsed, the ranch became more than land. It was the last thing binding them together and the only meaningful asset to divide. At mediation, each side made the same offer: buy the other out or sell their share. On paper, the numbers should have worked either way.

In reality, neither partner could tolerate the idea of "losing" the ranch to the other. The emotional weight of that loss overwhelmed its objective value, turning a solvable financial problem into a stalemate. We advised our client to separate emotion from economics, but without reciprocity, reason never took hold. This is loss aversion at work.

Lawyers see it all the time, especially when an asset carries personal meaning. What is less common are strategies to counter it. The predictable outcome is prolonged litigation and legal fees that exceed the property's value.

Introduction

Revolutionary mathematician and physicist Blaise Pascal observed in *L'Art de Persuader* that "people almost invariably arrive at their beliefs not based on proof but based on what they find attractive."

Today, this psychological phenomenon is described as cognitive bias—the way the human mind filters information through personal preferences, emotions and lived experiences. In litigation and in deals, these biases can subtly and sometimes profoundly shape how parties interpret facts, evaluate

risk and make decisions.

This article examines six main types of cognitive bias and how each directly influences the practice of law:

- **Confirmation bias**: Interpreting new information in a way that supports one's established beliefs while discounting conflicting evidence.
- **Narrative fallacy**: Creating false or overstated causal connections to maintain a coherent storyline.
- **Binary thinking**: Oversimplifying complex issues into rigid categories and ignoring the "gray" areas where most legal disputes actually reside.
- **Attribution bias**: Crediting successes to oneself while assigning failures to external factors.
- **Loss aversion**: The tendency to avoid a painful outcome more strongly than pursuing an equivalent gain.
- **Experience bias**: Relying too heavily on one's own or another's personal experience in ways that distort judgment.

Together, these biases shape how litigants

SCOTT B. COHEN is a shareholder in the law firm of Engelman Berger, P.C. He is licensed to practice law in Arizona, California and New Mexico. He is a specialist in business bankruptcy law through the American Board of Certification and a past president of the bankruptcy section of the State Bar of Arizona. He has enjoyed solving client problems for over 33 years. In his spare time, he is honored to serve as the attorney coach for the Mock Trial at BASIS Chandler High School, where he has had the opportunity to coach article co-author Dharia.

AARNA DHARIA is a senior at BASIS Chandler and a legal intern with Engelman Berger, P.C., where she conducts case research and prepares legal materials. A National Merit Semifinalist and Academic All-American, she also serves as the youth representative for Moms Clean Air Force's Arizona chapter, advancing youth engagement on climate and air-quality policy. She is particularly interested in the intersections of law, policy and community impact.

SAAHITHI SREEKANTHAM is a sophomore at Rice University, where she is pursuing a bachelor's degree in political science and government. She is the Mock Trial Team Captain at Rice University. She has worked as a legal intern or law clerk at Engelman Berger, P.C., the law office of Anuj A. Shah, P.C. in Houston, Texas, and the Colin County Criminal District Attorney's Office in McKinney, Texas.

MICHAEL ROLLAND is a shareholder in the law firm of Engelman Berger, P.C. He is a business law attorney who actively represents individuals and business clients in commercial litigation, real estate, water law, contracts, receiverships and debtor-creditor law generally. Rolland is on the Board of Directors for Rosie's House, a Music Academy for Children. He is a four-time Arizona State old-time fiddling champion.

and their counsel often act, with significant consequences for strategy, negotiation and resolution. Here, we weave an explanation of the bias with examples and some tools to address these biases. While the academic literature on biases creates categories, some distinctions are artificial, as many biases share common attributes.

Confirmation Biases

Confirmation bias is the tendency to interpret information in ways that support one's established beliefs and to ignore information that contradicts them.[1] Renowned British philosopher Karl Popper puts it best, explaining, "Once your eyes were thus opened, you saw confirmed instances everywhere: the world was full of verifications of the theory. Whatever happened always confirmed it."[2]

In legal settings, this tendency can lead jurors or attorneys to selectively process evidence that aligns with preconceived perceptions.[3] Confirmation bias or tunnel vision can prey on initial assumptions about a situation, restricting individuals to a single-faceted view of the evidence.[4] Furthermore, when presented with evidence contrary to initial assumptions, individuals tend to reject it entirely.[5]

The Central Park Five case is a stark illustration of confirmation bias in action. Once law enforcement and prosecutors settled on a theory of guilt, every subsequent decision was filtered through that assumption.[6] Five teenage boys from Harlem were arrested for the brutal assault and rape of a white female jogger in Central Park.[7] They were interrogated for hours without lawyers or parents present and ultimately gave false, coerced and internally inconsistent confessions. Those statements were treated as proof, even though they lacked DNA or physical evidence and contradicted key facts. Exculpatory information was minimized or ignored because it did not fit the prevailing narrative. In 2002, the convictions were vacated after a serial rapist serving a life sentence confessed to the crime and DNA evidence confirmed his guilt. Although the case is often remembered, racial bias and media sensationalism, at its core, demonstrates how early commitment to a theory can distort judgment and override objective evidence.

Combating cognitive bias, like other forms of bias, begins with recognizing how pervasive confirmation bias truly is. Aligning with our preconceived notions reduces cognitive dissonance and makes us feel "right."

The second check or step should be to adopt a falsification mindset. Sir Karl Raimund Popper coined the term "critical rationalism" and called upon the scientific community to falsify theories by testing them, rather than attempting to verify them. The third step may be to seek diverse perspectives. When preparing for a trial, one of my colleagues regularly tested themes with staff members. If you have ever watched a mock jury deliberate, you will see that many of your preconceived notions about your case are not shared by the mock jury.

> Bias rarely announces itself. More often, it operates quietly, steering judgment just enough to alter the outcome.

Finally, challenge your assumptions. Ask whether there are facts or data your theory overlooks.

The consequences of tunnel vision are severe. One suspect in the Central Park Five—later called the Exonerated Five—had already served 13 years in prison because he was tried as an adult. The four other teens served between six and seven years in juvenile detention.

The Exonerated Five settled with New York City for $41 million and with New York state for $3.9 million.[8]

Narrative Fallacy

It is a natural tendency to view information in a logical story or pattern. When overwhelmed with information—such as in a trial—individuals consider evidence in a story format, even leaving out factors that contradict the story they are piecing together.

To help create a sequence of events that easily explains their argument, individuals tend to construct a cause-and-effect timeline from random details to lend cohesiveness to their argument, falling into the narrative fallacy.[9]

For example, during their closing statements, attorneys attempt to tell the story of events they would like juries to believe. Another example is drawn from mock trial, in which the plaintiff's opening statement implied causation by presenting a chain of events that made for a compelling story but implied rather than proved causation. By misconstruing facts as connected, the attorney forces simplicity in the story and sells their version of events. Litigators often exploit the narrative fallacy by crafting coherent but overly simplistic stories to persuade the trier of fact.

With the narrative fallacy, it is imperative that you ask for links. Are there unstated assumptions linking or causing the events to be described in that manner? Demand proof or evidence that the first event caused the second. Demand proof that two events occurring together are causally related. Ask yourself whether you have oversimplified a complex situation. While Occam's Razor demands that we accept the simplest explanation among competing hypotheses, it does not compel us to assume facts not demonstrated.

Binary and Attribution

By believing there are only two choices, individuals can often feed into their binary bias. Binary bias is best defined as a tendency to dichotomize evidence, viewing and comparing two ends of a spectrum rather than what lies in the middle. This bias creates problems when strict categorization of evidence into only two groups leads to oversimplification and glosses over essential nuances. In addition to binary bias, individuals also experience attribution bias, which can lead to poor decision-making.

When confronted with binary bias, ask yourself, "Can both things be true?" In high school and college debate, you will hear a

proponent argue that two policies or positions are not mutually exclusive. More recently, philosophers have said that those two ideas do not compete.

In real life, a witness's testimony or credibility is nuanced. They are neither completely credible nor completely unreliable. Similarly, clients tend to view settlements as either a complete "win" or a total "loss," without regard to the numerous variables at play. Attorneys may also reject a perfectly sound offer simply because of one minor complication, categorizing the entire offer as bad.

To combat this, we sometimes describe the situation as a continuum and place the outcome on a spectrum as it relates to each variable. Clients who evaluate outcomes on an element-by-element basis are better able to counter the binary bias.

Attribution bias is the tendency to attribute successes to competence and intelligence and failures to external factors to excuse them, with little in between.[10] Grouping individuals or offers into only two categories robs them of their nuances and impedes rational reasoning that could lead to a better negotiated or litigated solution.[11]

For example, a juror might assume that a driver who was involved in multiple accidents is inherently reckless, an internal trait. A lawyer may have to ask the jurors to consider situational and contextual factors, such as poor road conditions, mechanical failure or another driver's fault, to avoid wrongful attribution. In this regard, attribution bias is similar to binary bias, as the presumption is that the other party or actor is behaving poorly due to a moral failing, while one's own actions are justified by unique circumstances and a nuanced evaluation.

Loss Aversion

The loss aversion fallacy is the tendency to feel the pain of a loss more than the pleasure of a win.[12] As such, individuals and attorneys can engage in unethical behavior—sometimes unknowingly—to avoid reeling from the pain of loss.[13] This win-lose situation is a game of risk that litigators balance in their cases, where an outcome is seen as a gain or a loss. In everyday interactions, people tend to tell "white lies," small, twisted versions of the truth to appeal to their audience and "win" the interaction.[14]

Take mediation, for example. When two sides are locked in a mediation battle, it can be easy to fall into tunnel vision, focusing only on what a side is losing rather than potential gains. The purpose of mediation is to reach an offer both sides agree to that ends a dispute. The main goal of mediation is inherently disrupted when both sides fall prey to loss aversion and cannot settle because of the pain of losses.[15]

To counter loss aversion, reframe the reference point. Rather than asking a party to move up or down from the status quo, ask whether a specific dollar amount is worth avoiding extended litigation, fees and uncertainty. Shift the focus from what is being lost to what is being gained. Is that amount worth the certainty of resolving the matter now or in the near future?

It is easy to lose sight of objective measures of success. Dr. Annie Duke, a former poker champion turned psychology PhD, argues in *Quit: The Power of Knowing When to Walk Away* that decision-makers should establish clear "kill criteria" in advance to signal when a strategy needs to change. She

also recommends seeking input from people who are not emotionally invested and using an accountability coach to reinforce rational decision-making.

We apply this approach by asking clients early in the representation to define what a "win" looks like, knowing that the definition of success almost always shifts as the case unfolds.

Experience Bias

Individuals connecting to their own experiences is so common that researchers coined the term experience bias. At its core, experience bias refers to the human tendency to relate more strongly to situations that resemble our own. People judge how likely an event or story is to happen based on whether they have experienced or know of something similar. In *Williams v. Pennsylvania*, the U.S. Supreme Court held that Chief Justice Ronald Castille's failure to recuse himself from a case he had previously handled as District Attorney (Terrence Williams's capital case) demonstrated how a decision-maker's past experiences can bias outcomes.

This illustrates experience bias, as judges' prior involvement or familiarity with a case can skew their impartiality.[16] In repetitive litigation, it is easy to employ a specific trial strategy because it succeeded in a previous case.[17]

Before extrapolating from personal experience and applying it to new or different facts, pause to ask a non-exhaustive set of questions:

- Are there material factual differences?
- Is this the same jurisdiction?
- Does the same body of law apply?
- Is it before a different judge?
- Have changes in the law or broader social trends emerged that could affect the strategy?

In sum, we should use data to ground our strategies, not war stories, no matter how heroic we appear in them.

As with other biases, it is critical to draw on others' experiences to empower them to speak "truth to power," and then properly weigh their input. We frequently ask colleagues whether they have had more recent experience with that judge. It is important to slow down and apply a structured analysis.

We also conduct a premortem, asking, "If this approach fails, why would that happen?" Behavioral economists recommend premortems to counter overconfidence.[18] Humility appears to be at the center of many of these strategies to defuse cognitive bias.

Prisoners of Our Own Perception

Avoiding cognitive bias can be difficult, but a few small changes in thinking and behavior can help. Cognitive bias can distort critical thinking, leading lawyers and others in a legal context to make irrational decisions. Attorneys should simulate opposing arguments during case preparation to challenge their own assumptions and become more aware of their preferences and personal beliefs.

> Litigation is rarely won or lost solely on the facts. It often turns on how clearly those facts are perceived.

In philosophy, you will hear someone say they are "steel manning" an argument, which is the opposite of the straw man most often used in arguments. By practicing intellectual humility, individuals may avoid multiple cognitive biases.

Attorneys are responsible for educating themselves and gaining exposure outside the courtroom to the complexities of individual character. By practicing binary thinking outside the courtroom, attorneys are less likely to view people and evidence as one-dimensional.

Practicing media literacy is also valuable for combating bias. This skill enables individuals to evaluate the information they encounter critically and actively note how language and the framing of individuals and actions can influence one-dimensional perceptions. Encourage new experiences and consider adopting a new outlook on an issue or on life. In law, anecdotes often work as well or better than real data. By prioritizing quantitative data over qualitative data, attorneys can shift their focus and interpretation of evidence away from their perception and toward a more objective lens.

Individual action, however, may not be enough. Dr. Gleb Tsipursky, a cognitive neuroscientist and behavioral economist, wrote in *Michigan Lawyers Weekly* that understanding and addressing cognitive biases is foundational to a fairer legal system. He advocates practical debiasing tools such as blind procedures, structured deliberation, and expert testimony to help legal professionals minimize bias and achieve more impartial outcomes.[19]

Meanwhile, Back at the Ranch

In the ranch dispute that opened this article, neither party lacked intelligence, resources or legal representation. Rather, they lacked perspective. Their decisions were shaped not by the property's market value but by the personal meaning each attached to "winning" or "losing" it. That single distortion, rooted in loss aversion, turned a solvable financial disagreement into an intractable conflict and ultimately cost both sides more than the asset itself.

Bias rarely announces itself so clearly. More often, it operates quietly, steering judgment just enough to alter the course of negotiation, strategy or settlement. When lawyers recognize how these mental shortcuts shape perception not only in clients but also in themselves, they gain the ability to interrupt those patterns before they harden into consequences.

The real work, then, is not simply naming the biases but learning to detect their subtle signatures in the heat of practice. Look for the stubborn position that feels "right" without evidence, the narrative that snaps too neatly into place or the impulse to react rather than analyze. These moments are where cognitive bias exerts its strongest pull and where legal judgment is either strengthened or compromised.

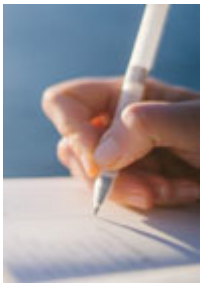
Returning to the ranch dispute, one truth becomes unavoidable. If both parties

had been able to view their decisions without the fog of bias, they likely would have reached a resolution that preserved time, money and dignity. Litigation is rarely won or lost solely on the facts. It often turns on how clearly those facts can be perceived.[20]

endnotes

1. Raymond S. Nickerson, "Confirmation Bias," *Review of General Psychology*, vol. 2, 1998, pp. 175–220.
2. Karl R. Popper, *The Logic of Scientific Discovery*, Routledge Classics ed., 2002.
3. Scott O. Lilienfeld et al., "Psychological Science and the Law," *Psychological Science in the Public Interest*, vol. 10, 2009, pp. 1–85.
4. Belén Lowrey-Kinberg et al., "Pathways to Suspicion: Causes and Consequences of Innocent Suspects' Origin of Implication," *California Western Law Review*, vol. 54, 2017, pp. 1, 32.
5. Charles S. Taber and Milton Lodge, "Motivated Skepticism in the Evaluation of Political Beliefs," *American Journal of Political Science*, vol. 50, 2006, pp. 755–769.
6. Donet, Donet and Aran, "Confirmation Bias in Criminal Cases," *Miami Criminal Defense Blog*, Oct. 26, 2020.
7. Elizabeth Vulaj, "From the Central Park Five to the Exonerated Five: Can It Happen Again?" *New York State Bar Journal*, August 2019.
8. "Consequences of False Confessions: Case Examples," *Litigation Handbook of Forensic Medicine and Psychology*, vol. 2, § 12:11.
9. Daniel Kahneman, *Thinking, Fast and Slow*, Farrar, Straus and Giroux, 2011.
10. Lee Ross, "The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process," *Advances in Experimental Social Psychology*, 1977, pp. 173, 183–185.
11. Keith E. Stanovich and Richard F. West, "Individual Differences in Reasoning: Implications for the Rationality Debate," *Behavioral and Brain Sciences*, 2000, p. 645.
12. Amos Tversky and Daniel Kahneman, "Loss Aversion in Riskless Choice," *Quarterly Journal of Economics*, vol. 106, 1991, p. 1039.
13. Russell Korobkin, "Bounded Rationality," *University of Chicago Law Review*, vol. 70, 2003, p. 1203.
14. Daniel Kahneman and Amos Tversky, "Prospect Theory: An Analysis of Decision Under Risk," *Econometrica*, vol. 47, 1979, p. 263.
15. Jennifer K. Robbennolt, "Behavioral Science and Settlement: Individual, Institutional, and Collective Contributions to Dispute Resolution," *Indiana Journal of Law and Social Equality*, vol. 6, 2018, p. 249.
16. *Williams v. Pennsylvania*, 579 U.S. 1 (2016).
17. Georges Clemenceau, commonly attributed quotation: "Generals always prepare to fight the last war, especially if they had won it."
18. Robert C. Port, "Behavioral Economics and the Practice of Law," *South Carolina Lawyer*, September 2019, pp. 44, 48.
19. Gleb Tsipursky, "Commentary: How Understanding Cognitive Biases Can Lead to a More Just Legal System," *Michigan Lawyers Weekly*, Nov. 21, 2024.
20. This article grew from a presentation that Cohen and Rolland gave at LEGUS International entitled "What Non-Lawyers Can Teach Lawyers About the Practice of Law." The authors thank Ashley Kim, Sanjana Balaji and Hayley Sayrs for their work on that presentation. Special thanks to Drs. Daniel Lieberman, David Notrica and John Bass for their input on best practices and risk management. Any remaining errors are the authors' own.

CONTRIBUTORS



February 2026

Contributors

Highlighting the lives and work of select authors

Scott B. Cohen has been thinking a lot about how cognitive bias affects legal work. “Since researching cognitive bias, I’ve spent more time slowing down, questioning my assumptions, seeking diverse viewpoints, and looking for ways to understand my clients better,” he says. The best professional advice he’s received is simple but enduring: “Value your reputation. Stay on the right side of the line. Integrity is all we have.” When he’s not working, you can find Scott on the tennis court, where he’s spent the last 15 years taking lessons “to become mediocre” and give his mind a break. His father, a skilled litigator who passed away over a decade ago, remains a guiding influence. “I regularly do things so that he would be proud of the person and lawyer that I am.” Scott’s work with co-authors Aarna Dharia and Saahithi Sreekantham grew naturally out of his decade-long role as attorney Mock Trial Coach at Basis Chandler High School, a program that has produced multiple interns and now-practicing lawyers.