medicine, its utility in the ADR field is limited, because most mediation practices are small in terms of number of practitioners. Also, delegation of personalized neutral work is not often practical because of the professional values of independence and non-delegation of decision-making authority (see Velikonja at 22–23, bit.ly/18LfWLe).

There are other emerging indicia of adverse ADR market conditions for neutrals. Examining work flowing through ADR provider organizations on an annual basis in relation to the size of their neutral panels, the ratio of matters actually sent to panel members to the total number of panel members is low. As of August 2012, for example, FINRA reported, for its mandatory arbitration program for the securities industry, approximately 5,000 arbitrations filed annually for 2009–2012 ("PLI Securities Arbitration 2012: What's New?" (Aug. 2, 2012), available at bit.ly/157HfOt). FINRA's arbitrator panels have about 6,000 members, so on average, each arbitrator would be appointed to about 1.2 arbitrations a year. In "Making Peace and Making Money," however, Ms. Velikonja points out that Florida's court mediation program has about 6,000 mediators, ten percent of whom do ninety percent of the mediations (Velikonja at 21, bit.ly/18LfWLe).

The relative dearth of ADR business can also be inferred from a decrease in neutral participation on ADR provider organization panels, especially as those providers have increasingly imposed panel membership fees and expensive and time-consuming training programs. If there were plenty of ADR work flowing to panelists from ADR providers, ADR professionals might be more willing to pay fees and take training in order to stay on the panels. On the other hand, if panelists leave panels due to this imbalance, the ratio may become more favorable to the remaining panelists.

### Ripe for Reexamination

These recent circumstances may present an ideal time to reexamine the practical, professional and public policy underpinnings of the ADR field and marketplace in the context of four decades of experimentation and experience. These matters are increasingly being addressed by professional, scholarly, and promotional discourse and activities within the legal, ADR and judicial communities and professions (see box).

The ADR field has matured. Marketplace and related professional trends have emerged from experience, studies and anecdotal evidence. It is appropriate for ADR professionals, educators, commentators and policymakers to try to make sense of this, and to evaluate how well ADR is meeting the expectations and needs of those who use or provide it. It is also perhaps an occasion to use the lessons of the past to prompt the ADR profession, where reasonably possible, toward a future in which the appropriate number of experienced and qualified professionals deliver a well-designed, effective and value-oriented array of ADR processes and products to informed and willing ADR consumers in reasonable fidelity to the administration of justice, be it public or private. An overarching question might be whether ADR, as we know it, is sustainable without addressing its economics and practical limitations, and other professional, ethical, regulatory, demographic, technological, delivery of justice, and consumer concerns.

*This article will be continued in a forthcoming issue of* Alternatives*, with an exploration of the future of ADR.*

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The Master Mediator

# Looking My Way: It Is What It Is! Really?

**BY ROBERT A. CREO**

### THE SCIENCE AND THE THEORY

Many of us have attended educational programs where a video is shown of two teams of students playing basketball. The audience is tasked to count how many times the ball is passed between players of one team. At the end of this short video the presenter asks the audience for the count. Answers vary widely. Next the audience is asked if anyone saw anything unusual. Many raise their hands and state that a gorilla walked through the court during the basketball play. Sure enough, when the video is replayed there the gorilla is, plain as day.

Professors Daniel Simons of University of Illinois at Urbana-Champaign and Christopher Chabris of Harvard popularized the "Invisible Gorilla" experiment by expanding research first started by Professor Ulric Neisser in 1975 (see bit.ly/19X5Avr). The Invisible Gorilla and its variations have been repeated numerous times, with video clips readily available online, including on YouTube (see, e.g., youtu.be/vJG698U2Mvo). This phenomenon has been called "Inattentional Blindness" (Professors Arien Mack and Irvin Rock in 1992; see box), cognitive capture, or cognitive tunneling. An individual is so focused on the task, internal thought, or an aspect of the visual environment that he or she fails to observe an unexpected stimulus. Professor Simons defines Inattentional Blindness as "the failure to notice a fully-visible, but unexpected object because attention was engaged on another task, event or object" (see bit.ly/KEP47m)

In repeated experiments, at least 50% of the observers fail to see the gorilla. This included me when first shown the video at a conference

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## The Master Mediator

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at Harvard in 2006. Further research has led to what has been dubbed "Change Blindness," which involves experiments in which one person hands the subject a form and, while the subject momentarily glances at it, a different person is substituted. In this and similar experiments, usually 75% of the subjects do not notice that a different person is now interacting with them.

Another related characterization has been coined as Somebody Else's Problem (SEP). SEP involves an individual or group disassociating from an issue or stimuli, despite its having an effect upon them. This can result from a number of factors, including Optimism Bias: when unrealistic positive assumptions or expectations lead to poor decisions or inaction. Information Fatigue Syndrome, often called "information overload," may confuse or paralyze decision making. This may also lead to a failure to decide anything, especially when there is no perfect solution to the problem. This "perfect solution fallacy" (Nirvana Fallacy) leads people to maintain the status quo, even though it is costly, detrimental or rife with uncertainty. The Nirvana Fallacy results from an expectation of achieving unrealistic, idealized alternatives to what is likely to occur.

The brain's attention system is excellent at focusing us on tasks, which often leads us to miss or ignore other actions or events that are in plain sight. These failures to observe are not a result of defects in vision but are caused by the inability of humans to pay attention to all that is happening around them. This includes a person looking directly at an object and still not perceiving it. There is a related perception issue called "Attentional Blink," which is when the second of two visual targets cannot be detected or identified when it appears close in time to the first.

There are different theories to explain the causation of these visual processing omissions, based, among other things, on how conspicuous the object is, the amount of each person's cognitive resources and short term memory, expectations and the capacity to focus attention to complete a task at a particular time. These factors are contextual and are influenced by anticipation, and physical factors such as age, fatigue, mood, alcohol or drugs.

### WHAT IS?

We register as true anything our senses tell us, which makes us ripe for optical illusions, omissions, misinterpretation, inaccurate memory and decision error. In law, however, the adjudicatory system is based upon the premise that there are ascertainable facts that are immutable. Consistent and predictable decisions result by application of the conclusions of law to the findings of facts after the navigation of the maze of procedural and evidentiary rules of litigation. Litigation does create an "is," which may or may not change prior to the exhaustion of appeals or based on new information that may or may not be deemed sufficient evidence to change a prior verdict or criminal conviction. There is not a day that goes by without a wrongfully convicted person being released from prison or settling a civil action.

### NEGOTIATION AND MEDIATION PRACTICE

In negotiations and mediation, however, the facts are often unresolved, and those that are indisputable are subject to distortion and dismissal as not being determinative of the outcome. The perception and processing functions described above are alive and well as precursors to the mediation table and at the table itself. I observe Inattentional Blindness both literally and figuratively during the mediation process.

After the conclusion of a joint session, which I insist on having even if it is delayed until after a round of caucuses, the first question I often ask when we go back into caucus is what the participants just saw and heard from the other parties. This is a productive approach, since it enables all of us to check our observations and interpretations. Although only one person should be speaking at a time in joint session, there is much other activity going on, as people react with their body movements and facial gestures. Usually, some of the participants, including myself, have failed to see the gorilla in the room. Consistent with the research, 25 to 50 percent of the people did see something invisible to the others and raised it in the comfort of the confidential caucus.

Often new insights are generated from the rich discussion that follows, launched from the platform of human emotion, values and

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behavior. These insights, which might not have arisen from a mechanical consideration of the facts and the strengths and weaknesses of the legal case, often quickly get us to the interests of the participants. These interests may have been obscured by the distortions inherent in human perception and cognitive bias and other psychological limitations.

Inattentional blindness is also a metaphor for when a person resists accepting what may be an adverse fact, conclusion of law or bad outcome. Classical mediation training frames a key role of the mediator in terms of reality testing. I eschew the term by rejecting the premise that the one and only objective reality that exists, if it were magically captured on video and replayed, could harmonize individual "what is" perceptions and conclusions. I prefer a frame that is an exploration of uncertainty and, when possible, quantifiable risk. Mediators are educated to ask challenging questions to disrupt assumptions and expectations of a party. By creating doubt in the beliefs or predictions of participants, vision is enhanced to see what might be an alternative reality of the facts, impact or outcome of the dispute. Often I do this in a transparent manner by explaining the concepts of Inattentional Blindness, Attentional Blink, Change Blindness, Optimism Bias, Somebody Else's Problem, Information Fatigue Syndrome, and the Nirvana Fallacy as a preamble to my question or comment.

## BEST PRACTICE TECHNIQUES

Dialogue intending to transform positions should be done with great empathy and respect. I sit close to the participants, look directly at them and speak from my heart in plain and understandable terms. I explain that from my observation or experience they are perhaps hindered by cognitive influences common to all of us. I may tell them of a poor decision that I personally made that was inordinately influenced by a specific cognitive weakness. Participants are given permission to change their mind, minimizing a loss of face and a compromise of core values.

A recent case involved a professional who had nurtured a business that employed dozens of people. The enterprise was threatened with closure for over two years because of a dispute with an insurance carrier. A final proposal was on the table from the insurer, which was not "perfect" for the professional. We discussed my concerns about the influence of Optimism Bias, Information Fatigue Syndrome and the Perfect Solution Fallacy on decision making. After reflection, and a recommendation from counsel and colleagues, the deal was accepted and finalized. During the signing of the Memorandum of Understanding, the professional asked to make a statement. All counsel decided to wait until the document was fully signed! The professional understood and waited before speaking elegantly and with emotion. A positive vision was articulated for the parties to move forward in the relationship. All counsel and the mediator were thanked profusely for the opportunity to address the issues in a candid manner in the safe environment provided by mediation.

## MEDIATOR SENSE

Mediators are not issued a special exemption from Inattentional Blindness and the other psychological phenomena. Effective mediators should make accommodations and engage in best practices that are grounded in a healthy respect for our natural limitations and the vagaries of human behavior. Be always mindful that the stress and uncertainty inherent in conflict may lead to decision error. The mediation day, however, can be a good one, where disputes and disputants are transformed, and the closure transcends the boundaries of the conflict.



# CPR News

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available at http://bit.ly/18X2lh7. For more information contact Mara Weinstein at mweinstein@cpradr.org or +1.646.753.8230.

- **Feb. 20–22 CPR Institute's 2014 Annual Meeting** "Through the Looking Glass: Divergence in Global ADR Practice" will take place at Charleston Place, Charleston, South Carolina. The keynote address will be given by retired U.S. Supreme Court Justice Sandra Day O'Connor. The latest information, including sponsorship opportunities, is available at http://bit.ly/UGixzt. The full conference brochure is available at http://bit.ly/1e4Gicz. For more information contact Mara Weinstein at mweinstein@cpradr.org or +1.646.753.8230.

## FEATURED PANELS: TECHNOLOGY PANEL

Neutrals on the Technology Panel, one of about two dozen CPR institute Panels of Distinguished Neutrals, have experience in all aspects of scientific disputes. They have backgrounds in natural sciences, computer science, electronics, engineering and similar technologies. Most have backgrounds in patent and other intellectual property disputes.

Our Technology Panelists are vetted through a stringent peer-review committee of industry leaders. They hold Bachelors and Masters of Science degrees and PhDs in such fields as: Applied Science, Biochemistry, Biology, Cell Physiology, Chemistry, Computer Science, Chemical Engineering, Electrical Engineering, Mechanical Engineering, and Zoology from top science and technical universities, including Case Western, Lehigh, Carnegie-Mellon, Rensselaer Polytechnic Institute, Dartmouth, Tufts and Johns Hopkins.

**Dr. Cheryl H. Agris,** principal of the Law Offices of Cheryl H. Agris, PhD, PC, is a member of the Technology, Biotechnology, Trademark and Healthcare panels. She has applied to dispute

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