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

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THE SCIENCE AND THE THEORY

Many of us have attended educational pro-
grams 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 audi-
ence 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 Chris-
topher Chabris of Harvard popularized the
“Invisible Gorilla” experiment by expanding
research first started by Professor Ulric Neis-
er in 1975 (see bit.ly/19X5Avr). The Invisible
Gorilla and its variations have been repeated
numerous times, with video clips readily avail-
able online, including on YouTube (see, e.g.,
youtu.be/vJ698U2Mvo). This phenomenon
has been called “Inattentional Blindness” (Pro-
fessors Arien Mack and Irvin Rock in 1992; see box), cognitive capture, or cognitive tun-
neling. 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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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 perceiv- ing 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...
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.

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