

The Master Mediator

Part I: Right? Wrong? Who Cares? I Do Want to Be Right!

BY ROBERT A. CREO

Fallor, ergo sum (I err, so I am).

—Augustine, (354–430),
Bishop of Hippo Regius (Annaba, Algeria)

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St. Augustine preceded the pronouncement of Rene Descartes, *Cogito, ergo sum*, by more than 1,200 years. Both expressions are integral to the human condition. We think!

Sometimes the conclusions we draw vary with external objective reality. Some conclusions—including knowledge—are based upon belief, faith or values, which are either subjective or otherwise not provable in a consistent and objective manner. Usually, when we discard a belief, especially a subjective or internal one, we substitute replacement beliefs to overwrite it. We now know something different than before and there are no gaps in our internal truths or values.

We make our decisions and conduct our affairs according to these beliefs within the parameters defined by physics, environment, health, economics, law, identity, culture, norms or other constraints.

Erring is an evolutionary process that is essential to creation, innovation, and individual and society progress. This month, the *Master Mediator* column looks at the human tendency—and lawyers' drive—to validating

beliefs, and dealing with errors, including how error fits into mediation efforts. Next month, specific practice techniques to get past mediation party beliefs that may or may not be based on mistakes are explored.

RIGHT OR WRONG?

We may believe that the sun rotates around the earth. This internal knowledge is not a subjective value but reflects our knowledge of external reality. It is also objectively wrong. We may believe that hot dogs should not be eaten with mustard as only ketchup, preferably Heinz, is right. No one can contend this is objectively wrong.

Both objective and subjective beliefs are malleable to new information or experiences. Being wrong is being inaccurate about objective reality, or holding a belief or engaging in conduct, which later is thought to be mistaken or otherwise disavowed. Epistemology, the study of knowledge, deems being wrong as believing what is true is false, or what is false is true.

No matter what the dictionary definition, we hate to be wrong.

We crave being right. This dawned on me when I was at a baseball game and during the seventh-inning stretch four characters dressed in costumes prepared to race around the empty field. On the larger-than-life video screen, each was introduced and fans were asked to select one as their personal mascot to root for to win the contest.

Although this was completely random, those fans who predicted the outcome were not only visibly cheerful but expressed an air of superiority as winners over those of us who were losers. The winners predicted the future of a random event and felt good about it.

Similarly, we all regale in knowing the answer when playing trivia games or watching Jeopardy. Being wrong is equated with being a loser, and we all know losers are inferior in all ways.

RIGHTFUL MEMORIES

This inability to admit error extends deep into our psyche and is reflected in our memories of significant events. Wikipedia notes that the term “flashbulb memory” has evolved in the science and literature for autobiographical memory involving “elements of personal importance, consequentiality, emotion and surprise.”

Common flashbulb memories involve the assassination of John F. Kennedy (1963), the Challenger Space Shuttle (1986), the O.J. Simpson murder trial verdict (1995), and Sept. 11, 2001. I suspect research also will include the moment individuals learned that Osama bin Laden was dead.

Scientists often refer to these as *episodic memories*. There are differences between these and a memory of a traumatic event stemming from the personal nature of the fear and injury of the trauma. Usually, in situations involving traumatic injury, the memory dampens peripheral information and minor detail which are often characteristic of flashbulb memories.

Prof. Ulric Neisser (1928-1912), a founder of the field of cognitive psychology, performed experiments on flashbulb memory. They included people writing details of what they recall when they learned of the Challenger disaster.

Three years later, he asked the same people to recount the memory without reviewing the earlier recorded narratives. Not only was there false memories and inaccuracies, some of the participants insisted that the current recollec-

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tion was right, and that what they had handwritten before was in error.

Journalist Kathryn Schulz in “Being Wrong, Adventures in the Margin of Error” (2010), refers to this as *error blindness*, which is an unjustified feeling of being right.

She coined the phrase from the medical condition of “refractive error blindness,” which involves a visual impairment arising from refractive impairment, which often can be easily corrected with glasses. She concludes from her research that we are educated from childhood that success in life is based upon never being wrong. See also, Kathryn Schulz: On Being Wrong (TED.com, 2011)(available at <http://bit.ly/gD0kPm>).

THE STAKES OF MISTAKES

My belief is that legal training, both in law school and in practice, reinforces and magnifies the importance of being right. This “righteousness” becomes one of lawyers’ core values. It is part of the ability to project confidence and enhance credibility.

Goals drive lawyers’ thinking and behaviors. The accuracy goal is primordial.

I am always struck by the detail in the voicemails I receive from lawyers who have pending cases with me. Most of them take the time to delineate specific names, courts, and dates of the hearing as a preamble to identify the matter even though I may have emailed or spoken to the lawyer yesterday about it.

Interestingly, this same tendency is not displayed in email and written communications, where often a few words in the reference or subject line are deemed sufficient to avoid error. Perhaps this is true because of the perceived permanency of the writing, as distinguished from the oral message, which is abstract—oral words are comprised of, well, air

tones, not anything solid. (This has changed somewhat because voicemail can be mailed after being transmitted into words on a screen. And voice messages also can be saved long term or transcribed.)

DETACHED ERROR

Lawyers, like many professionals, fear errors and the perception of exposing human defect and shortcomings for being wrong.

To avoid being losers, we refuse to admit

My Bad

The discussion: The deep desire to be correct.

The problem: The point of mediation is resolution, not vindication.

The assessment: Attorneys’ ‘primordial’ accuracy goal sure is admirable. But that thing your client is absolutely right about? He or she might be very, very wrong.

an error, or pass it onto a phantom self-identity by speaking in the third person or otherwise deflecting it away. *Mistakes were made*. The surgeon negligently wielding the knife notes, “*The outcome was unfortunate.*” The driver of the speeding car that ran the red light says, “*Things did not turn out well.*”

The many ways human inventiveness has discovered to disassociate oneself or an organization from responsibility grows as varied as the ways we communicate. Spin may be the new norm. Although perhaps lamentable from a communal or normative perspective, this is not all bad from the mediator’s perspective.

Many mediators, myself included, have cited Jelaluddin Rumi for inspiration: “Out beyond ideas of rightdoing and wrongdoing, there is a field. I will meet you there.” (Editor’s note: Robert Creo discussed Rumi in his debut Master Mediator column, which appeared at www.cpradr.org in April 2005; available here: <http://bit.ly/18LXvEO>.) The art and science of mediation embraces an agreed-upon resolution without the necessity to attribute blame.

Indeed, that might be what puts the capital “A” in Alternative Dispute Resolution, since the adjudicatory system is premised on findings of facts and conclusions of law that place blame or allocate responsibility upon which to base the verdict or award. Unlike how we choose, these involuntary determinations are imposed on litigants from societal norms based upon the goal of applying concepts of right and wrong objectively.

DECISION ERROR

In his excellent books, “How Leading Lawyers Think: Expert Insights into Judgment and Advocacy” (Springer, 2011), and “Beyond Right and Wrong, The Power of Effective Decision Making for Attorneys and Clients” (Springer, 2010), Randall Kiser provides a wealth of research and insight into how and why lawyers make good decisions.

As a field in the applied science of decision studies, Kiser articulates and applies the concept of “decision error” to categorize and explore effective counsel, specifically in the context of choosing when to settle rather than take a case to verdict. The academic research and theory is robust on how cognitive bias contributes to decision error.

Future columns in the pipeline explore the most common cognitive biases and mediation, but for now, we start with the dynamics and choices involved in addressing right and wrong in the mediation process.

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Next month, Master Mediator columnist Robert Creo discusses how to get past parties’ “irrational” commitment and mediator errors in the face of the need to “be right,” and drive to a resolution. ■

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