

## The Master Mediator

## Bias, Fallacies &amp; Decision Errors: Information

BY ROBERT A. CREO

There are “irrational” heuristics and behavior that are somewhat predictable over a large population base. These have been studied and documented over the years, and a number of excellent and comprehensive treatments of cognitive processing and bias are referred to in the box, below. I will focus on many of them and related issues in upcoming columns. Professor Kahneman states that the “technical definition of *heuristic* is a simple procedure that helps find adequate, though often imperfect, answers to difficult questions. The word comes from the same root as ‘*eureka*’ (*Thinking, Fast and Slow* 98 (Farrar, Straus and Giroux, 2011)). Common parlance calls these “rules of thumb.” Some of my own mediation guidelines may be framed as:

- People prefer closure; yet most people tend to procrastinate and wait until the last available moment to make important or irrevocable decisions.
- People appreciate and respect candor and authenticity.
- People respect sympathy but react positively to an “engaging empathy” from the other side and/or the mediator.
- People are motivated by self-esteem and seek or expect personal dignity. The legal system generally works against personal and human dignity by applying broad concepts and converting people into claims and precedents.

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- People prefer certainty over uncertainty. A bird in the hand is worth at least two in the bush.
- People have different levels of risk tolerance.
- People react to reciprocity. It is a powerful dynamic, especially for risk professionals (lawyers, adjustors, managers), and concessions are expected to be met in kind.
- People not present or outside the process may influence choice.

This column will start by examining “information,” and we will look at other cognitive processes in upcoming columns.

## INFORMATION

People process information in more than one way. Some rely primarily on visual input, some auditory and some kinetic. There are proponents of Neuro-Linguistic Programming who utilize it in negotiations and mediation (see, e.g., Mariam Zadeh, “The Missing Link – Enhancing Mediation Success Using Neuro-Linguistic Programming,” 9 *Pepp. Disp. Resol. L.J.* 527 (2009); [bit.ly/1p9jmhe](http://bit.ly/1p9jmhe)). People make choices in a holistic manner. This involves traditional concepts of rationality (e.g. Enlightenment, Age of Reason, self-interest, reasonably prudent man, etc.). There is, however, a complex mix of emotion, intuition, cognitive bias, memory, risk tolerance, values, expectations, goals and sense of timing that interact within their personal narratives.

My experience is that some people are “macros,” that is, focused on big pictures and bottom lines, while others are “micros” who want detail and piece-by-piece building blocks before making choices. The mediation table generally hosts both types of people, so the mediator must be flexible enough to present ideas in a multitude of ways in order to reach everyone. Obviously, in any litigated case or commercial transaction there

are unknowns and, as phrased by former Secretary of Defense Donald Rumsfeld, “unknown unknowns” that may be dealt with by contingencies—the proverbial “Plan B” or “wiggle-room”—



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or ignored in the decision-making process. There are other types of influences on what information becomes the platform for a decision. Professor Kahneman describes a cognitive bias and decision error he calls “What You See Is All There Is” (WYSIATI). He defines this as a willingness to jump to a conclusion or to attribute certain characteristics to a person or a problem based on limited information (see, e.g., the short video “Nobel Laureate Daniel Kahneman on Making Smarter Decisions,” at [inc.com's Idea Lab; bit.ly/UFGhaZ](http://inc.com's_Idea_Lab_bit.ly/UFGhaZ)).

Kahneman’s thesis about dual systems of thinking is that System 1 excels in processing information about one thing at a time. Information that is not retrieved, even from memory on an automatic or unconscious level, does not exist as a factor in making decisions. System 1 operates to incorporate all active data and concepts, but is unable to allow for unknown information to make a coherent story. The *quantity* of information available to System 1 is immaterial, so when information is scarce or lacking, it picks the best answer or action based on what it has available. If not moderated by System 2, which filters and reflects upon what System 1 inputs, or if System 2 is in a lazy mode, this may lead to “jumping to conclusions,” and an inaccurate or poor decision. System 2 may simply endorse the coherence-seeking System 1 if it fails to

deliberately seek or consider all the information and evidence.

Coupling the WYSIATI dynamic with Confirmation Bias is the welcome mat of mediation that has to be crossed over in every case. Confirmation Bias results in selective perception and processing of information. Conflicting information, including undisputed facts and law, are discounted, as we focus on information that confirms or ratifies an opinion or course of action. Professor Kiser (see box) notes at page 127 that in litigation, “the confirmation bias produces an illusion of decision-making competence and fairness,” while distorting crucial information, and creates a “conviction that information discarded by the decision maker is imperceptible to the adjudicator.”

Perhaps ironically, the confidentiality of mediation may inadvertently promote both of these cognitive processes that weaken decision making. In an informal process, especially in the predominant caucus model, advocates and clients can say whatever they like without much downside to their own credibility or reputation. This reminds me of grade school, where my cousin was repeatedly sent to the principal’s office, only to emerge unscathed. He confided in me that the key was to say—in a polite and remorseful way—whatever the principal wanted to hear and no more or less. My observation is that it seldom works for me to challenge conclusions that are directly based on the confluence of WYSIATI and Confirmation Bias, since this could devolve into a tug of war between the mediator and the caucus participants. One approach that has proven helpful is to ask the advocates to create the version of Proposed Finding of Facts that the *other* advocate would offer to a court or arbitrator. There are usually enough points that are either not disputed or are sufficiently grey that the element of doubt creeps in via the back door.

### WHEN TO MEDIATE?

The relationship of information affects the decision to mediate. There has been significant debate on the best time to mediate the litigated case. One school of thought is to mediate early before there have been substantial expenditures on discovery and motions. Some of the early innovators in the corporate arena have been John Deere Company and Toro Company (see J. Stratton Shartel, “Toro’s Mediation

Program Challenges Wisdom of Traditional Litigation Model,” 9 *Inside Litigation* 10 (No. 6, 1995), [bit.ly/1nK2Bc](http://bit.ly/1nK2Bc); and Michael T. Burr, “The Truth about ADR—Do Arbitration and Mediation Really Work?” *Corporate Legal Times* (Feb. 2004), [bit.ly/1i1caoh](http://bit.ly/1i1caoh)).

I mediated a significant number of claims across the country under the Deere Early Resolution Program. The Deere program, developed by the late Steven R. Frankel, identified claims suitable for resolution as soon as they were filed. Deere counsel contacted the claimant’s counsel to establish a mediation framework. Usually, a limited discovery schedule would be agreed upon, which often consisted of a Deere engineer inspecting the product, submission of a plaintiff’s expert opinion, medical records, and a deposition of the claimant and sometimes of a Deere representative. There might also be an informal exchange of documents. The mediators were not directly involved in this pre-mediation information exchange. The parties, however, prepared detailed narratives of the case, usually with photos and videos, prior to the mediation session. The program was extremely effective, with very few cases failing to settle in mediation.

The United States District Court for the Western District of Pennsylvania has a mandatory ADR referral program in which each case must undergo an ADR process within four months of filing ([1.usa.gov/1i1e20k](http://1.usa.gov/1i1e20k)). There is often limited or no discovery before the mediation session. Critics of the timing contend that there is often insufficient information to make an accurate assessment of the claim. Proponents counter that the critical information is usually known to at least one party and that laborious discovery does not often radically change the collective initial view of the claim.

As a mediator, I prefer to be there early, before information becomes hardened by the Confirmation Bias. While what the parties see at this point (WYSIATI) is certainly not all there is, the time and expense favor a resolution. The cost of learning everything often consumes the delta in the final positions of the parties. The big-picture “macros”—especially plaintiffs’ counsel working on a contingent fee basis—are frequently willing to reduce their percentage fee for an early resolution. Many times the fee is on a sliding scale, with a higher percentage for trial and appeal. In my experience, very few mediated cases involve impor-

tant principles or precedents, since claims that do tend to be self-selected toward trial.

What mediators point out to counsel is that regardless of the extensiveness of the discovery, there are key pieces of information that become clearer only during trial. Certainly the composition of the jury, the ultimate decision maker, happens only after almost all information is exchanged. Evidentiary rulings happen at each stage of the trial. Even after all the evidence and arguments are completed, parties settle cases or enter into “high-low” agreements during jury deliberations. Parties also mediate when cases are on appeal, and the federal circuit courts have employed salaried staff mediators with success. A former judge whom I trained as a mediator once told me that as a judge you are never certain your decision is right or wrong, but the goal is for it to be wise, and the best decision based on the record.

This is an excellent heuristic for mediation. Self-determination is promoted by the parties making the wisest and best decision based on the “record” as it exists on the mediation day. When at impasse, additional discovery or passing of time before another attempt is made at direct negotiations or mediation often works. Mediators are often re-engaged or are the second or third neutral on a case. When circumstances, expectations or interests change, the time may again be ripe to mediate. ■

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### REFERENCES AND ADDITIONAL READING

Max H. Bazerman, *Judgment in Managerial Decision Making* (2d ed. John Wiley & Sons, 1986).

Richard Birke, “Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications,” 25 *Ohio St. J. Dis. Res.* 477 (2010).

David A. Hoffman & Richard N. Wolman, “The Psychology of Mediation,” 14 *Cardozo J. Conflict Res.* 770 (2013).

Randall Kiser, *Beyond Right and Wrong, The Power of Effective Decision Making for Attorneys and Clients* 89–139 (Springer, 2010). ■

## International Arbitration

(continued from front page)

All signs, however, indicate that conflicts of interest are arising with greater frequency in the arbitral process, due to the growth of the third-party funding industry. In spite of this growth, however, the current arbitral rules do not sufficiently address the independence of arbitrators, namely, the independence of the arbitrator with respect to his relationship with the parties involved in the dispute, including a third-party funding corporation that provides financing to one of the parties in an arbitration.

### THE NATURE OF THIRD-PARTY FUNDING

Third-party funding occurs when an unrelated third party provides monetary support to a party involved in a legal claim; in return, that third party receives a portion of the proceeds resulting from that claim—or nothing, if the claim is unsuccessful. Also known as “claim funding,” “alternative litigation funding,” and “third party litigation finance,” third-party funders may provide funding to a defendant or, more frequently, to the party bringing the claim.

The third-party funding relationship involves a contract between the third-party funding corporation and the claimholder. The funder provides money to allow the claimholder to pursue the claim in exchange for a share of a successful claim, whether by settlement, a court’s judgment, or an arbitrator’s award. After being reimbursed for its costs, the funding corporation generally receives between one-third and two-thirds of the claim. As a nonrecourse loan, however, the claimholder does not have to repay the third-party funder for its investment if the claim is unsuccessful.

A survey of Australian funding corporations revealed that funders exercised different levels of control, ranging from receiving regular progress reports to receiving detailed reports with timelines and budgets, appointing attorneys, and conducting settlement talks. The earlier the funder made its investment in its claim, the more involved it was in case management. When the funder exercised greater control over the claim, it did so to monitor its investment—not to pursue the interests of the claimholder.

Third-party funding is but one source of financing available to a claimholder. Con-

tingent fees—defined as any arrangement whereby the lawyer’s fee depends in whole or in part on the success of the claim—are common throughout the United States, with lawyers generally receiving between one-third and one-half of any successful claims in exchange for the lawyer’s services.

Third-party funding is also distinguished from legal expenses insurance, which covers a party for risks associated with a lawsuit, and may be purchased either before or after the occurrence of the incident that gives rise to the litigation. Finally, third-party funding as referred to here is differentiated from “litigation loans,” largely based on the size of the loans offered to a litigant. The litigation loan market is most frequently used to provide small loans to needy plaintiffs in exchange for a portion of a successful claim. In contrast, third-party funding generally involves disputes with larger claims arising between corporations.

### THE GROWTH AND AVAILABILITY OF THIRD-PARTY FUNDING

Third-party funding is most commonly used in Australia, England and the United States. Australia boasts the largest third-party funding industry, having generally permitted some form of the practice for over fifteen years. Although at first limited to bankruptcy cases, the use of funding has since spread to civil litigation, and may be more pronounced because Australia does not allow contingent fee arrangements. In 2006, the Australian High Court, in *Campbells Cash & Carry Pty, Ltd. v. Fostif Pty, Ltd.* (bit.ly/1peJZFK), further opened the door to the use of such funding and allowed third-party funders to exercise a large degree of control over the litigation. In 2011, the Federal Court of Australia issued Practice Note CM 17, which requires parties to disclose a third-party funding relationship at or prior to the initial case management conference.

England follows closely behind Australia in its use of third-party funding. The English funding industry has dramatically expanded since a 2005 decision by the English Court of Appeal. In *Arkin v. Borchard Lines, Ltd.* (bit.ly/1mCrq7g), the court upheld the use of third-party funding as long as “[s]uch funding [leaves] the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the

litigation.” In November 2011, the Association of Litigation Funders of England and Wales released a code of conduct for the industry (bit.ly/1ikkVF1), which was revised in January 2014. The code is the first effort at self-regulation by litigation funders in any country and may apply to funders when the seat of an arbitration is located in that jurisdiction.

The third-party funding industry in the United States lags behind those in Australia and the United Kingdom. The industry began to develop in the 1990s as funding for small-scale consumer cases and has since developed a market for commercial investments. The American Bar Association has started to pay attention to issues arising from third-party funding in litigation, commissioning a Working Group (bit.ly/1oQDe8y) to address the impact of such funding on the attorney-client relationship, and the ethical and professional duties of attorneys. The potential market for litigation funding in the United States is vast, with some estimates that it could be a billion-dollar industry.

Given the rise of third-party funding in the domestic courts of Australia, the United Kingdom and the United States, the use of such funding will likely increase in commercial arbitration as well. This is particularly true given the frequent use of commercial arbitration throughout the world, with arbitral institutions administering thousands of cases per year. In the international context, the ICC (bit.ly/SvbHia) registered an average of 800 cases per year from 2009 through 2011. Of the disputes heard in 2009, 29.4% involved amounts over \$10 million, while less than a quarter of the disputes involved amounts less than \$1 million. The ICDR (bit.ly/TF706y), a branch of the American Arbitration Association has also seen an increase in its caseload over the past five years; 621 cases were administered in 2007, rising to 994 cases in 2011. In 2011, parties and arbitrators came from ninety countries, with caseloads ranging from small manufacturer/supplier claims to claims of over \$1 billion.

Although international arbitration has been touted as a way to minimize the costs of resolving a dispute when compared to domestic litigation, parties often incur substantial costs during the arbitral process. In addition to legal fees, expert fees, and discovery costs associated with domestic litigation, parties in