

actual damages, a foreign forum is likely to find this a palatable approach—unless such liquidated damages are void as against public policy in the forum.

And, *finally*, a restrictive agreement can provide that an employee who is found to have violated his or her covenant will be liable to pay the company's legal fees and costs. Such cost and fee shifting is relatively common outside the United States, and can lead to a fees award that dwarfs actual or liquidated damages.

* * *

In sum, in the global setting, unless local law makes one or more of these provisions unlaw-

ful or otherwise inappropriate, a restrictive agreement should contain (i) a permanent proscription on violating confidentiality, (ii) a reasonable temporal prohibition on solicitation of key customers and customer prospects with whom the signatory employee has had a nexus in the year or two preceding his or her departure, and (iii) a reasonable temporal proscription on the solicitation of employees with whom the signatory has had personal interaction in the year or two before he or she leaves.

But the company should understand that injunctive relief will likely only issue to protect its confidential and proprietary information, and that the non-solicitation prohibitions are better protected by the alternative means discussed above.

Further, the company should recognize that the sought-after enforcement results are probably easier to obtain in international arbitration than in foreign courts. This will of course have an effect on the dispute resolution provisions of the restrictive agreement. A restrictive agreement that will be used in the international context should always provide for international arbitration in lieu of resort to any court. Even interim remedies can be obtained from an arbitrator and, indeed, there is a greater likelihood of obtaining such remedies outside the United States from an arbitrator than from a court. ■

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The Master Mediator

It's Not a Video Recording, Part II: Mediation and Memory

BY ROBERT A. CREO

Last month, Master Mediator columnist Bob Creo looked at the physiology of memory. Here is Part II of a three-part series where he explores brain processes in the context of how advocates and mediators might use recent advances in the science of memory to improve their presentations, documents and outcomes.

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Everyone is entitled to his own opinion, but not his own facts.

—Daniel Patrick Moynihan

* * *

Memory is an evolutionary coping tool to help make decisions that efficiently use our limited biolog-



ical resources. Memory guides how we react to familiar cues in our environment. We plan and decide by using recognizable signs and patterns to predict future consequences of natural and human behavior.

Memory is a history of our experiences.

Although useful for recounting past events and to store information, memory has its limitations. Memory is not a single process. It consists of several sub-processes involving different areas of the brain.

The senses take in the information that is processed by various operations in the neural system, where the brain changes its form and content in order to store and generate responses. Scientists usually refer to the gathering process as “encoding.” The holding of information is “retention,” and to recall is “retrieval.”

People encode stimuli from short-term memory to long-term memory. Different parts of the brain are involved in short-term memory, working memory and long-term memory.

Short-term memory, often called “primary” or “active” memory, relates to holding



Robert A. Creo

information in mind in an active and available state for short periods, usually measured in seconds. Long-term memory has the capacity to indefinitely store unlimited amounts of information over a lifetime. Working memory, which is distinct from short-term memory, refers to brain structures and biological systems for temporarily storing and processing

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information. Episodic memory is the ability to recall specific events.

Princeton University Prof. George A. Miller published “The Magical Number Seven, Plus or Minus Two: Some Limits On Our Capacity For Processing Information,” 63 *Psychological Review* 81 (1956), which gave rise to Miller’s Law: The average human can hold only seven items in working memory, give or take two.

His research concluded that there are natural limits on the number of one-dimensional informational stimuli that can be processed when a specific corresponding response is demanded of each separate item. For example, if the stimulus is “cat” and the correct response is the number three, this is referred to as “absolute judgment.”

Subjects were given a list of common items or different tones varying only in pitch and the appropriate response word. Miller’s findings were that people were excellent or perfect up to five or six different stimuli, but deteriorated when more were added.

Memory span refers to the longest list of items a person can immediately repeat back in order. What is also interesting about his findings is that memory is retained in “chunks” rather than by “bits,” with the chunk being the largest meaningful unit that the person recognizes.

In other words, binary digits (1-9) have one bit each, decimal digits have a little more than three bits and words tend to have about 10 bits. A “chunk” is a meaningful unit such as words, numbers, faces, or even chess positions. A common example is remembering a telephone number in three chunks consisting of the three-digit area code, the next three digits, and then the final four numbers. Three chunks are easier to handle than 10 random digits.

Prof. Miller concluded that the correspondence of the number seven to each of these two different types of tests is a coincidence because only the first limit involving absolute judgment uses roughly the same number of bits for each item. Subsequent research refined the theory and application of short-term

and working memory spans, concluding that chunking works best to categorize information already familiar to the brain, and that memory span may vary depending on the length of the words and other factors.

Other researchers, including University of Missouri Prof. Nelson Cowan, suggest that a more accurate limitation of cognition may be four chunks and noted that it may be variable according to the sound patterns and length. Some research indicates it is the size, rather than the number of chunks, that accounts for enhanced short-term memory in some

Handling ‘Chunks’

The subject: How memory works and its impact on the law and ADR.

The challenge: Mediating facts, and who remembers what. And how they remember it.

A caucus technique revealed: Ask the parties to think about the parts of their narrative that might be hard to prove to a jury.

people. See Cowan, N., Chen, Z. & Rouders, J.N., “Constant Capacity in an Immediate Serial Recall Task: A Logical Sequel to Miller (1956),” 15 *Psychological Science* 634 (2004) (available at <http://bit.ly/Zy1HnQ>); Chen, Z. & Cowan, N., “Chunk Limits and Length Limits in Immediate Recall: A Reconciliation,” 31 *J. Experimental Psychology: Learning, Memory, and Cognition* 1235 (2005) (available at <http://bit.ly/XfG2Sj>).

LAW & MEMORY

Lawyers, scientists and researchers have long recognized the limits of eyewitness accounts. The legal system recently has begun to respond to the issues created by the pitfalls of memory. The New Jersey Supreme Court recognized memory limits by promulgating new rules for criminal cases last year. The

language from the new jury instruction states in part:

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex. *State v. Henderson*, 208 N.J. 208, 245 (2011). The process of remembering consists of three stages: acquisition—the perception of the original event; retention—the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval—the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors. *Id.* at 245-246.

The New Jersey procedures go into great detail on a variety of instructions involving eyewitness identification, and cautions jurors to carefully weigh and consider the methods used and the testimony in the context of the limitation of memory. See Criminal Model [Jury] Charges, “Identification: In-Court Identification Only” (Revised July 19, 2012; Effective Sept. 4, 2012) (available at www.judiciary.state.nj.us/criminal/juryindx.pdf).

Even when testifying under oath, it is not perjury to make an inaccurate statement unless it involves a material matter that the witness does not believe to be true. See 18 U.S.C. Sec. 1621 for the federal definition. There must be the intent—*mens rea*—to have committed the act.

Witnesses testify to contrary facts all the time in legal proceedings. They are not prosecuted for perjury since making mistakes or having a different perception or recollection of events is common.

INSIGHTS AND APPLICATIONS

In the 1990s I began mediating catastrophic loss and death cases for a large equipment manufacturer that had created one of the first early resolution programs for product liability claims.

One senior counsel, Steve, who handled all of the mediation sessions nationwide, devel-

Core memories, especially those with emotional content, are not simply ‘vented’ and set aside: They are the platform for how we decide.

oped an approach over time that focused on resolving the case in a respectful manner to the injured plaintiffs and their families. Steve spent a substantial amount of time thinking about and discussing mediation with his colleagues and mediators; he created guidelines for himself on what to say and do in mediation to be effective.

The liability of these cases usually involved highly technical engineering and mechanical issues, and often focused on the operator’s use of the equipment. Misuse and contributory negligence was frequently at issue.

One of the principles that evolved was not to directly challenge the injured party’s story and recall. Steve deftly attempted to create uncertainty in the plaintiff’s version without directly attacking the credibility of the injured person or the witnesses. He had a stockpile of key words and phrases that either he or his counsel would use during the defense opening statement.

He recognized that the plaintiff narrative should not go unchallenged, but to debate it or rebut it in a tit-for-tat manner would be counterproductive and polarizing. He also understood that to have the mediator carry the challenge as a surrogate might weaken the rapport and trust necessary for the mediator to be fully effective. Steve spoke slowly and maintained eye contact with the claimant and the family members while he talked and set forth the themes:

I sympathize with your loss and do not claim to be able to place myself in your shoes. You underwent an unexpected and traumatic event. I do not believe you are lying or embellishing what you remember about the accident. People are poor historians under the best of circumstances and here you underwent the worst of circumstances that has changed your life and that of your family forever.

Our investigation raises questions about your recollection of what actually hap-

pened that day. We have provided these documents and reports to your counsel who has also shared your expert reports with us.

Although the mediator also has all of this information, mediation is not the forum to resolve factual disputes. That is for a jury in a trial. We hope that we all can avoid a trial where a jury would be asked to do its best to decide what may or may not have happened and who was at fault for your injury.

The mediator is here today to talk about uncertainty and risk and all of the possible outcomes when he meets in caucus with each of us. I will keep an open mind and I ask, and believe, that you will too.

I thank you for hearing me. I will be pleased to discuss any matter with you, your counsel and the mediator.

Steve delivered this in a calm and non-threatening manner without being condescending or patronizing. This set the stage for non-confrontational discussions on disputed facts.

DEVELOPING ‘MEDIATOR SENSE’

There were many lessons learned during this early stage of development of my “Mediator Sense” and mediation communication methods. After studying the brain and neuroscience, I realize there is a scientific basis in many of these tenets and guidelines. Steve and I came to the recognition that frontal attacks disputing the case facts when a person had suffered grievous injury or death of a family member would not only fall on deaf ears, but would cause resentment and a loss of credibility for the defense representative and the mediator.

The model that evolved legitimized the opposing narrative while explaining that

there was a competing narrative. This competing narrative had already been communicated to counsel for the plaintiff before the mediation date.

As mediator, instead of deconstructing the plaintiff narrative, I asked counsel in the presence of the clients what elements of their narrative might be a challenge to prove before the jury. This is always done in caucus and not in joint session.

Counsel, who was almost always highly competent because these were high-stakes product liability cases, might list the specific elements from the defense narrative and discuss the uncertainties in a candid manner.

I frame the dialogue in terms of what might be presented to the jury who faces difficult choices. I have not shied away from offering opinions, but only when I hold a high degree of comfort in my assessments. My opinions are always framed in terms of risk rather than absolutes.

For example, I might say that it is likely that the jury will have a great deal of discussion about the plaintiff’s explanation of the speed just before the accident in light of the photos of equipment damage. The query is in terms of what consequences flow from a failure to meet the burden of persuasion on establishing a critical fact of the claim.

It may be counterproductive to settlement negotiations to be dismissive of the version of events held by key participants. An indirect challenge framed in terms of uncertainty of outcome in a contested hearing makes disputants less defensive and more open to compromise.

I do not subscribe to the application of Sen. Moynihan’s statement as being applicable during mediation.

* * *

Next month, the discussion continues on the importance of sharing and vindicating participants’ memories while the mediator avoids the trap of becoming the “Memory Umpire.” Specific tips will advise the representatives and the parties the best format to convey information to the mediator and other participants in the process. ■

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