

THE CRITICAL ROLE OF DISPUTE RESOLUTION SKILLS IN LEGAL DECISION MAKING

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The ABA JOURNAL recently ran an article entitled “*Cognitive biases: The elephant in the room.*”ⁱ It highlighted how “emotions drive us much more than rationality even though we continue to believe that we make decisions on the basis of pure, detached, objective logic.” Mediators, of course, have known this for years – nothing exaggerates this condition more than bargaining under the stress and uncertainty of litigation.

Cognitive biases are nothing more than shortcuts. As a species, we’ve survived by recognizing patterns – quickly. Those who couldn’t quickly differentiate between danger and dinner have been removed from the gene pool. Even now, we make quick, instinctive judgments that keep us from having fatal car wrecks and suffering other maladies. Malcolm Gladwell popularized these instantaneous gut reactions in his best-selling book *BLINK THE POWER OF THINKING WITHOUT THINKING* (2005).

But we’re not solely creatures of instinctive habit. We do have the capacity for reflective, logical thought. It takes more time, is systematic and effortful. Through a system of learned deliberate steps, we construct logical frameworks that help us make tough decisions. Nobel-laureate Daniel Kahneman and long-time experimental psychology partner Amos Tversky pioneered much of the work in this area. The highlights were recently published by Kahneman in *THINKING, FAST AND SLOW* (2013).

These two processing patterns have been described by Kahneman as a “psychodrama with two characters.”ⁱⁱ and labeled simply as System 1 and System 2 thinking. System 1 is associated with “impressions, intuitions, intentions, and feelings.” It “operates automatically and quickly, with little or no effort and no sense of voluntary control.”ⁱⁱⁱ It’s a blink. System 2, in contrast, is deliberative – slow, conscious, logical, systematic, and effortful. Only System 2, Kahneman asserts, “can construct thoughts in an

orderly series of steps.” And although System 2 “believes itself to be where the action is,” most of our decision making actually occurs when “System 2 adopts the suggestions of System 1 with little or no modification.”^{iv}

These seemingly clean labels should not be taken to suggest that these two systems work independently or in isolation. Like the “left-brain / right-brain” labels, which fMRI brain scans have debunked, these are analytical constructs. We don’t operate solely in one or the other “system” any more than speech only comes from the right side of the brain. In fact, neurologist Antonio Damasio observed that it took a brain tumor patient who lost the ability to experience emotion five-hours to decide between a blue pen and a black pen. Conversely, we’ve all had to learn tasks the “hard way” with System 2 processes that later became instinctive.

Learning to drive – especially parallel parking – can be tortious at first. Yet it becomes so rote that many report making it through an hour-long commute only to wonder how they got home. Great athletes take this to the extreme. Long hours of intense, effortful practice lead to highly precise, instinctive reactions in milliseconds. Baseball players are apparently swinging at projections of where the ball will likely cross the plate based on the wind-up because there is insufficient time to actually calculate where a 90-mile an hour pitch will actually end up.

Mediators help people who are making tough decisions under stress and uncertainty daily. As the ABA JOURNAL article suggests, humans are mainly making emotional System 1 decisions, but we are good at giving ourselves the illusion that they are the product of a logical System 2.

Since these responses are deeply ingrained, they are highly predictable. Trigger fear and people make risk-adverse choices based on more pessimistic risk assessments. But step over the line into anger and they will take more risk based on more optimistic risk assessments. Reactive devaluation tells us that we instinctively devalue what the other side proposes by half just because nothing they offer can be good for us – even if it’s a great idea. Mediators don’t carry that baggage. They are almost as credible as the home team, unless they blow that positional credibility.

Because word choices and framing problems matter, mediators are in an excellent position to use what we know about psychology and neurology to help parties frame and make optimal decisions. In *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS*, Richard Thaler and Cass Sunstein popularized “choice architecture” as a way of nudging people toward rational choice.

These advancements in mapping how the mind works predictably led to progress in practical training for lawyers and mediators even before the organized bar and academy became focused on practical skills training. Bob Creo and Monique McKay pioneered the Master Mediator Institute, a roving master course that has visited Duke University and Claremont Graduate University learning about how the brain leads us to good and bad decisions from marketing professors, neurologists, and even the dissection of human brains.

Pepperdine’s Straus Institute for Dispute Resolution has pioneered the area with both professional skills and academic courses. Since 2011, Doug Noll and Don Philbin have taught “Preventing Bad Settlement Decisions and Impasse: Using Brain Science, Game Theory, Animated Communication, and Micro-Interventions” at Pepperdine’s East and West Coast intensive CLE programs, and through a number of other programs. The subject matter was instantly popular enough to start developing a deeper-dive through a longer length academic course.

Decision analyst Randall Kiser has done some large scale empirical work in analyzing how lawyers make decisions. The *NEW YORK TIMES* covered the results he published in the *JOURNAL OF EMPIRICAL STUDIES* on the front page of the business section in 2008. Kiser and Philbin have teamed up to teach “Decision Making Under Conflict” at Pepperdine since 2013. The course explores the psychology and neuroscience of decision making, shows how biases and heuristics impede effective decision making, and explores methods to improve personal, group and organizational decision making. The student-written articles that follow this introduction exemplify the rich knowledge and deep analysis that today’s law students display when applying decision-making research, concepts and skills to the dispute resolution field.

Like other “skills” courses, our legal judgment and decision making (JDM) course reflects the modern trend in law school education to move beyond the doctrinal curriculum and develop practical skills that enhance law students’ employment prospects and accelerate their professional performance. In addition to Pepperdine, law schools that currently offer JDM courses include Stanford Law School, University of Washington School of Law, Duquesne University School of Law, University of Miami School of Law, University of Nevada School of Law and Osgood Hall Law School (Canada). Consistent with the innovative nature of these courses, the instructors in JDM courses are an eclectic bunch – esteemed mediators, a business school professor, a former law school dean, a psychologist, and a decision analyst.

In Kiser and Philbin’s JDM course at Pepperdine, students demonstrate their understanding of core decision-making principles by submitting a 25 page research paper. These papers are either (1) a case study of effective or ineffective decision made under risk and uncertainty; or (2) an analysis of a method, approach, technology or technique that improves decision making under risk and uncertainty. Two of the pieces that follow represent both types of papers from the JDM course. The third paper is from an Employment Disputes course that Philbin teaches at Pepperdine with mediator Mark Travis.

The first paper, “Give Back My Toy,” is a riveting case study of the litigation between Mattel, Inc. and MGA Entertainment over the Barbie-doll competitor, Bratz. The second paper, “Techniques in Mediation,” thoroughly analyzes the benefits of decision trees and the circumstances in which mediators’ employ decision trees; it includes the fascinating results of the author’s survey of 57 mediators and in depth interviews of three top-tier mediators. The third paper, “Working With Cognitive Errors Caused by Heightened Emotion in Employment Mediations,” probes not only the emotionally induced shortcuts we take under the stress of relational mediations involving job loss, but what mediators can do in the moment to work with those known and predictable responses.

The purpose of these papers is to focus the students’ attention on the key elements of effective decision-making and to facilitate their identification of suboptimal decision-making

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practices. The ultimate goal is to enhance students' legal judgment, problem-solving and prediction skills through improved perception, perspective taking, communication, analysis and forecasting.

The authors point to "System 1" and "System 2" thinking as critical factors in effective decision making. As discussed above, System 1 is intuitive – rapid, instinctual, effortless, automatic and associative. System 2 is deliberative – slow, conscious, logical, systematic, and effortful.⁹

Although we tried to emphasize System 2 thinking in proposing these papers for publication in the *AMERICAN JOURNAL OF MEDIATION*, we hope that the students' keen insights into human behavior will resonate with System 1 readers and that their rigorous analysis will impress System 2 readers.

		Trial Lawyers Overall	With Mediation Training	Improvement
Plaintiff	Error Rate	60.0%	48.5%	12%
	Cost of Error	\$73,400	\$68,400	\$5,000
Defendant	Error Rate	25.0%	21.5%	4%
	Cost of Error	\$1,403,654	\$889,200	\$514,454

We know that mediation training helps advocates make better decisions. In Kiser's studies, trial attorneys with mediation training made fewer errors when deciding whether to take the last offer or proceed to trial and the errors they did make cost less money. Plaintiff's attorneys with mediation training made 12% fewer errors and they cost \$5,000 less. Defendant's attorneys made 4% fewer errors and they cost \$514,454 less after mediation training.

We expect the practical, science-informed training our students receive to improve their decision making as advocates and to make them more effective decision architects as they help others frame and make important decisions under risk and uncertainty.

*Don Philbin was named the 2014 “Lawyer of the Year” for Mediation in San Antonio by Best Lawyers®, was recognized as the 2011 Outstanding Lawyer in Mediation by the San Antonio Business Journal, is one of seven Texas mediators listed in The International Who’s Who of Commercial Mediation, and is listed in Texas Super Lawyers. He is an elected fellow of the International Academy of Mediators, the American College of Civil Trial Mediators, and the Texas Academy of Distinguished Neutrals.

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ⁱ Cognitive biases: The elephant in the room, <http://www.americanbar.org/publications/youraba/2015/january-2015/cognitive-biases--the-elephant-in-the-room.html> (ABA 2015).

ⁱⁱ Kahneman, Daniel. (2011). *Thinking, fast and slow* (p. 21). New York: Farrar, Straus and Giroux.

ⁱⁱⁱ *Id.* at 20, 24.

^{iv} *Id.* at 21, 24.

^v *Id.* A

t 20-30.