

The Lawyer's Mind: Attribution

ROBERT A. CREO practiced as an in-house corporate lawyer and a solo and small firm general practitioner before becoming a full-time neutral. He has acted as a mediator and arbitrator in thousands of cases, including as a salary arbitrator for Major League Baseball, a grievance arbitrator for the National Football League, and a hearing officer for the US Senate Select Committee on Ethics. He has been on the mediator roster of the Court of Arbitration for Sports, Lausanne, Switzerland, which provides ADR services for international sports, including the Olympics. He serves as adjunct professor at Duquesne University School of Law and was an adjunct for many years at the University of Pittsburgh School of Law. He is the 2018 recipient of the PBA ADR Committee Sir Francis Bacon Alternative Dispute Resolution Award. He is annually named as a Super Lawyer and included in Best Lawyers in America where he was recognized as the mediator of the year in 2014 and 2017, and for arbitration for 2021 for Pittsburgh. He has a passion for storytelling and is the principal of Steel City Storytellers, LLC (www.steelcitystorytellers.com). He is also the principal of Happy! Effective Lawyer LLC (happyeffectivelawyer.org). His website is www.robertcreo.com.

This article was originally published in The Pennsylvania Lawyer

In the olden days, the umpire didn't have to take any courses in mind reading. The pitcher told you he was going to throw at you.

-Leo Durocher, baseball player, manager, coach, 1905-91

Theory of Mind

Theory of mind is a construct about how we see others and interpret social cues based on context, behavior, substantive content, tone, body language and facial composition. Theory of mind attempts to explain the human capacity to interpret the mental states of others. Some researchers refer to it as mind-reading. By adolescence, our brains and cultural awareness have taught us how to engage with others with the knowledge that others' mental states are different from what we, ourselves, perceive, process and experience. This encompasses beliefs, thoughts, desires, hopes, emotions, intentions, and expectations of reactions and conduct. Although the brain is observable and mapped by neuroscientists, the mind and its thoughts are unobservable.

Theory of mind is based on directly observing the conduct and demeanor of others, including what they say, how they say it, their expressions, body language, movement or dress. It may include experience or expectations from prior interactions or connections with

them, including how they self-identify or affiliate with groups that share common values or goals. The goal is to understand motivations and intentions, to respond appropriately and to predict or explain conduct.

People communicate by more than the content of their language. Aspects of facial expressions, tone, movement, physical closeness and context all form what is referred to by researchers as social cues. These are the ways in which we communicate without using words. Research estimates that over 60% of understanding in conversation comes from social cues. See, G.N. Foley and J.P. Gentile, "Nonverbal communication in psychotherapy," 7 Psychiatry (Edgmont) No. 7, (6): 38, (2010).

The six basic emotions — anger, disgust, fear, happiness, sadness and surprise — are conveyed by facial expressions. People usually focus on the eyes and mouth during conversation. See generally, Robert A. Creo, "The Effective Lawyer: Navigating Emotions — Emotional Intelligence Competency," Pa. Lawyer (July/August 2018).

Our physical proximity to others is also an important social cue. This was coined "proxemics" in 1966 by anthropologist Edward Hall, whose research indicated

that in American culture there are four proxemic zones. These relate to the level of comfort or intimacy between people:

- Intimate (18 inches or less): Parents and children, lovers, spouses and partners
- Personal (18 inches to 4 feet): Close friends
- Social and consultative spaces (4 feet to 12 feet): Friends, co-workers, routine business or social interactions with acquaintances and strangers
- Public (12 feet or more): Strangers, impersonal, relatively anonymous social situations

Proxemic norms vary greatly among cultures.

Social cues are dependent on culture, context and individual personality. There are medical disorders that may limit the ability to interpret common social cues. These may include attention deficit hyperactivity disorder (ADHD) and other diagnosis along the autism or other cognitive disorder spectrums. See, Heather Jones, "Types of Social Cues," (Dec. 20, 2021, <https://www.verywellhealth.com/social-cues-5204407>).

Deception Detection

There is no surefire method to discern truth from lies in oral statements or testimony. A bedrock principle of the legal system is the concept of determining the credibility of witnesses, which is within the sole purview of the trier of fact and is not subject to reversal except under the rarest of circumstances. The term of art is "demeanor of the witnesses" in findings of fact and credibility, which will be explored in future columns on honesty, misrepresentations and omissions by lawyers and clients. The context to be explored is in a simple contest of "he said, she said" without corroborating direct or circumstantial evidence and how good people are at interpreting the array of "social cues" to discern accurately what happened. I do not like to frame it as truth versus lies because there are many statements and beliefs provided in good faith that are inaccurate. An assertion does not have to be an intentional lie to be false. People genuinely misremember what was said or done, especially in startling or panicked situations. People are not perfect historians and recollection can be impacted by emotions, values or the stakes at hand.

The short "answer" is that people vary in their ability to accurately label oral statements as truth or lies. There are no universal tells. Failure to look someone in the eyes may or may not be indicative of truthfulness. Some of the best liars are artists of deception who can make sincere eye contact, turning others into true believers with their uttered falsehoods. There is a wide range in the innate and learned ability to interpret social cues and the accompanying language for accuracy.

Paul Ekman has for decades studied deception, body language, facial expressions and interpreting emotions. His research found that people can make over 10,000 facial expressions, with about 3,000 relevant to emotion. He and his colleague Maureen O'Sullivan conducted a massive, multiyear survey of over 20,000 people to learn more about how well people could identify truth from falsity by interpreting inconsistencies in emotion, body language and the spoken word. The test benchmark was an 80% threshold — those who could be correct more than 80% of the time were deemed to be "Truth Wizards," besting the performance of 50% which would occur randomly over a large number of trials. Only 50 people of the more than 20,000 met this standard. The best performers were secret service agents; law enforcement personnel and psychiatrists did not outperform other groups. The research also found that experienced arbitrators and mediators were top performers, but not in the same class as Truth Wizards. During communications I had with Professor Ekman in 2005, he opined that the better performance of arbitrators may result from their baseline of objectivity, having an open mind and the reserving of judgment inherent in the being a successful arbitrator or mediator.

We do not see things as they are, we see things as we are.

-Anais Nin, writer

Attribution Bias or Error

Fundamental attribution error occurs when people create their own inferences of the causes of events or the behaviors of others. Attributions can be internal or external, based on the situation. Social psychologists have broadly categorized these as follows:

- Interpersonal Attribution: Placing yourself positively in the story.
- Predictive Attribution: Creating a pattern based on weak correlations to influence future choices or behavior.
- Explanatory Attribution: Two basic or default personal perspectives: optimistic or explanatory style.

People with an optimistic style attribute positive events to stable, internal and global/macro causes, and negative events to unstable, external and specific/micro, causes. Those with a pessimistic style attribute negative events to internal and global causes and positive events to external and specific/micro causes.

There are several theories exploring attribution error. One developed in 1965 is Correspondent Inference Theory: People make inferences about others in cases where their actions are intentional rather than accidental. The inferences are based on the amount of perceived choice t, plus the expected behavior and its effects. Another theory is Common Sense Theory: People observe and analyze the behavior of others and explain it by their own common-sense explanation and views. Fritz Heider developed this model around 1958, postulating that people group these explanations into either external or internal attributions: External attributions stem from situational forces, while internal attributions are blamed on individual characteristics, traits or flaws. In examining ourselves, the tendency is to blame suboptimal outcomes on external forces rather than on our personal characteristics. One explanation for this cognitive bias is that we have asymmetrical information: We know more about ourselves and our circumstances than about others. The more you know about the beliefs, experiences, affiliations, values and proclivities of another person reduces the probability of attribution error.

Application to Lawyers

From the start of representation to the post-mortem of a case, lawyers assess information provided by clients, adversaries, colleagues and third parties as part and parcel of creating and refining the theory of the case or negotiating, memorializing and implementing a transaction. Integral to gathering the facts are oral communication and interactions with people. Although

email, electronic meetings, texting and other forms of indirect communication have reduced face-to-face and telephone interactions, to obtain the 360-degree perspective, best practice mandates human interaction.

Awareness of theory of mind and attribution error provide a framework for consideration of how we receive, perceive and process information from interviews, conversations and the casual observation of others. Clients come to a lawyer in an aggrieved state of mind. They often portray themselves as victims of others or circumstances while diminishing their own personal responsibility. We have all heard it before: The perpetrator is acting against them because of bad motives or personal flaws; the client is unlucky and has a problem or legal wound that was not self-inflicted. Even when there is an acknowledgement or acceptance of blame, the client may ask the lawyer to find a legal loophole in order to be absolved and not be found accountable. This is the essence of attribution error, which is often a default dynamic hard-wired into our brains as an evolutionary defense mechanism.

The ability to discern, interpret and understand how to assess and respond to the bundle of subjective feelings of clients, opponents and others is a core soft skill for lawyers. Doing what you have done in the past may not work since every person and circumstance differ, despite common patterns. Follow your gut? Why? Because it worked in the past? We suffer from other cognitive biases, such as confirmation and overconfidence, which unconsciously guide our decision-making processes. Cognitive biases do not operate in silos but act in tandem. Social scientists who have researched judgment under uncertainty conclude that the most striking feature of intuitive judgment is not its occasional brilliance, but its rampant mediocrity. See J. Edward Russo and Paul J. Shoemaker, *Decision Traps* (Simon & Schuster, 1990). See also, Robert A. Creo, "The Effective Lawyer: Making Decisions: Overconfidence," Pa. Lawyer (May/June 2022).

A study of attorneys found that the majority of them conform to the role of advocate to frame clients' desires, positions and goals into a legal frame for an adjudication or for deal-making. The default frame is an adversarial rather than a problem-solving model. Lawyers may

unwittingly enhance the effect of attribution error by defaulting to Us v. Them.

The intuitive mind is a sacred gift and the rational mind a faithful servant.

-Albert Einstein

What To Do

1. Do not rely solely upon your gut or first impression, interpretation or assessment. Your gut conclusion must be tested and retested as a hypothesis in context of all the objective and uncontested facts. Be cognizant of the fact you are not a Truth Wizard.
2. Consider asking you and your client the following types of questions to accommodate the theory of mind and attribution error that apply to not only your client, but also to yourself and any opposing party or counsel.
 - What are the motivations to see things certain ways?
 - What expectations are brought to the problem or situation?
 - What are the current and past relationships of the stakeholders?
 - How do differing outcomes affect future relationships?
 - How will the law consider or process motivations and expectations?
 - If the case is lost or the goal unrealized, what will be the impact on the motivations, expectations, beliefs, values or economics of the stakeholders?
3. Actively listen in an empathetic manner to the responses and to your own internal feelings and considerations.
4. When feasible, confirm emotional states by simply asking or labeling your interpretation of mental states in an affirming manner framed as a question. "Were you or are you now angry?" "Did you or do you feel betrayed?" "Are you seeking revenge?" Say no more than the question. Do not be judgmental. If a response disgusts you, consider responding with the bland: "I see." See Robert A. Creo, *The Effective Lawyer, Navigating Emotions – De-escalating Intense Emotions*, Pa. Lawyer, (Sept/Oct 2018).
5. An early line of examination involves the existing documentation, including emails and text messages that are contemporaneous with the underlying events at issue. While interviewing clients, consider asking them to review their smartphone in your presence to show you any relevant text messages, email or social media posts. People often post their moods or activities at the time they occur or soon afterwards.
6. Ask to be added to their social media platforms such as Facebook and Instagram to monitor future posts.
7. If the text or email stream shows frequent communication with a friend or family member on the subject, ask the client if you may interview that person separately from the client.
8. To help understand context, create a chart with a chronological timeline using the date (When) as the first column. You can start with the remaining four Ws (who, what, where and why) as the other headers going across. Modify it to fit the circumstances of the case. It is a living document that will grow and change as the case or transaction progresses. You may want to add a column to note which items are contested and the strength of the evidence or proof. Include notations if the evidence is solely unsupported oral testimony.
9. For transactions, the headers will differ and likely will include a column on Risks and a companion column on Risk Allocation. There may be a column for third-party involvement, reports, or approvals or public relations issues to complement the "Who" of the deal. Economics and cost projections by be important to include. Sometimes this is in the form of a roadmap or critical path; commercial software is available in some fields like construction projects.
10. If it is helpful, place the theory, hypothesis, goals, pitfalls and challenges at the top of the page or in headers so that they appear on subsequent pages.

A useful exercise may be to switch your thinking to the other side to "debias" judgment or to play devil's advocate in a more formal manner to mimic the adversary process. Another technique is to have a colleague pretend that he or she is an investigative reporter interviewing you as counsel. How do you truthfully and objectively answer the questions without compromising your representation of the client. "No comment" is not an answer!

Summary

Best practice is to make bottom-up decisions rather than start with the desired outcome and then construct facts, laws and support from the top downward. It is axiomatic that lawyers start with reasonable doubt, combined with curiosity, to gather information, identify stakeholders and witnesses. Lawyers should not be the prime accomplice in obtaining questionable or unrealistic client objectives. Communicate with clients in a direct and transparent manner to educate them so that when you counsel them on what to do, they may decide to do it.

Takeaways

- Pay attention.
- Respect cognitive biases.
- Context, context, context.
- Create useful charts and roadmaps.
- Be agile, creative, and flexible.

Notes

Max H. Bazerman and Don A. Moore, Judgment in Managerial Decision Making, 8th Ed., (Wiley, 2012).

Paul Ekman, Emotions Revealed: Recognizing Faces and Feelings to Improve Communication and Emotional Life (Henry Holt & Company, 2003).

Roger Kreuz and Richard Roberts, Getting Through: The Pleasures and Perils of Cross-Cultural Communication (The MIT Press, 2018).

Maureen O'Sullivan and Paul Ekman, Wizards Project (Psychology DB.com post: June 12, 2023) <https://www.psychologydb.com/wizards-project>.

C.M. Tipper, G. Signorini, and S.T. Grafton, Body Language in The Brain: Constructing Meaning From Expressive Movement. 9 Front Human Neuroscience, No. 9, 450 (2015).