

CURRENT LITERATURE IN ADR

By Sherman D. Fogel

Listening to the radio while driving back to the office one day, I heard Nicholas Epley, who I had never heard of, being interviewed about his new book, *Mindwise*. Before the interview was over, I had already turned the car around and was headed more than five miles out of my way to the nearest bookstore (there are not too many left) to buy the book. I'm glad I did. Although *Mindwise* is neither about mediation nor written specifically for mediators, it is extremely relevant to what we do and how we do it. Were it not for the fortunate happenstance of catching Mr. Epley's interview that day, I probably never even would have heard of this fascinating book.

If your idea of mediation is that it is just about analyzing and evaluating possible litigation outcomes, and maybe doing a cost-benefits analysis, you won't find much of interest in this book. If, on the other hand, you think understanding how the minds of the disputants work, maybe even how your own mind is working, and how the workings of all of those minds impact the dispute and possible avenues to resolution, *Mindwise* is for you. The title, *Mindwise*, doesn't give much away, but the book's subtitle, *How We Understand What Others Think, Believe, Feel and Want*, is part of what caught my attention during Mr. Epley's interview.

Nicholas Epley is not a lawyer, but a psychologist. He received his PhD in psychology from Cornell in 2001, and was an assistant professor at Harvard until 2005. He is currently the John Templeton Keller Professor of Behavioral Science at the University of Chicago Booth School of Business. He has published numerous articles regarding his research in professional journals, has written for the New York Times and the Chicago Tribune, and is the recipient of several awards for his work.

Mindwise begins with a discussion about how we all intuitively read the minds of others, so that our daily interactions with those around us are the result of inferences we draw about what they are thinking, feeling, believing and wanting. Mr. Epley has done extensive research and experimentation to examine not only how, but how well, we actually read the "thoughts, motives, attitudes, beliefs, and emotions of others."

Looking at *Mindwise* from the prospective of a mediator, one of the most important findings of Mr. Epley's work is the disconnect between how well we think we understand what is going on in the minds of others, and how well we actually do. We tend to believe we accurately understand what others are thinking and feeling much better than we really do. In fact, he demonstrates that we don't even understand our own minds as well as we think we do. The inferences we draw about the minds of others are frequently mistaken, but we tend to act upon them as if they were true. In the context of conflict management and dispute resolution, Mr. Epley's observation is spot on:

That we cannot read anyone's mind perfectly does not mean we are never accurate, of course, but our mistakes are especially interesting because they are a major source of wreckage in our relationships, careers, and lives, leading to needless conflict and misunderstanding.

As mediators, we understand that, unlike a fact finding trial, our goal is not necessarily to find the “truth,” but to examine, and help the parties to examine, each of the parties’ perceptions of the facts from their individual perspectives. Each party’s perception is his or her reality. But frequently, certain of those perceptions are so removed from objective reality that they can only properly be characterized as misperceptions. It is those misperceptions that often are at the root of the dispute, and need to be defused as a predicate to any meaningful negotiation of resolution. For example, a misperception encountered in almost every conflict involves a party’s inference of bad motive and/or bad faith on the part of the other. Although ill motive or bad faith may exist, it is relatively unusual, and more often than not, each party is acting in good faith and in what they simply believe to be their own best interests, without any evil intent. These misperceptions are the result of misreading the mind of the other, but thinking one has read it correctly.

Mr. Epley divides the mistakes we make trying to understand the minds of others into two categories: (i) mistakes of engagement, and (ii) mistakes of inference. With regard to mistakes of engagement, he gives us two very interesting chapters, one describing the dehumanizing effect of failing to engage the mind of another, and the second discussing the reality problems resulting from attributing a mind to the mindless. Probably more relevant to our work as mediators, however, is his discussion of mistakes of inference, or as he labels this section of the book: “What State Is Another Mind In?”.

When trying to understand the mind of another, Mr. Epley notes that we tend to use three strategies:

We project from our own mind, use stereotypes, and infer a mind from a person’s actions. Each strategy provides insights but can lead to predictable mistakes.

He devotes one chapter to each of these strategies, and particularly focuses our attention on the kinds of mistakes each of these strategies can produce. This is of particular relevance to us as mediators, because the better we are able to understand how the parties are misreading each other’s minds and why, the more effectively we are able to select the appropriate interventions that get everyone past the impasses and to resolution. Also, the more introspective we are as a result of what Mr. Epley teaches us, the more we will come to understand how our own mistakes that result from our misreading the minds of the disputants and their representatives can actually cause the process to fail. Hopefully, the better we understand how even our own minds are working during the process, the more likely we will be able to reduce the number and kind of mistakes we make while conducting a mediation.

In the last chapter, “How, and How Not, to Be a Better Mind Reader,” Mr. Epley, although not necessarily intending to talk to mediators, provides invaluable guidance for us. We have probably all been taught at one time or another that one useful technique is to have the parties each put themselves in the other’s shoes and see things from the other’s perspective. Mr. Epley points out, however:

What’s more problematic is that if your belief about the other side’s perspective is mistaken, then carefully considering that person’s perspective will only magnify the

mistake's consequences. This is particularly likely in conflict, where members of opposing sides tend to have inaccurate views about each other.

Instead, we must first actually find out what the other's perspective is (perspective getting), before we can carefully consider it, and that "requires asking and listening, not just reading and guessing."

The mediation process is uniquely suited to actually learning the other's perspective. When you read the last chapter of *Mindwise*, you cannot help but think about the safe environment mediators create, in which there is confidentiality and a facilitator with no power to adversely affect the parties. As Mr. Epley says:

The secret to understanding each other better seems to come not through an increased ability to read body language or improved perspective taking [which he distinguishes from perspective getting discussed above] but, rather, through the hard relational work of putting people in a position where they can tell you their minds openly and honestly.

Mindwise: How We Understand What Others Think, Believe, Feel and Want is filled with engaging explanations of experiments conducted by Mr. Epley, as well as real life stories, to illustrate his conclusions. As a result, the book is not only thought provoking and educational, but eminently readable. I highly recommend it to anyone who wants to improve their mediation skills without reading another "how to do it" book on mediation.

© 2015, Sherman D. Fogel. After 40 years as a trial lawyer, Sherman Fogel is now a full time mediator and arbitrator, and is a former Chair of the Alternative Dispute Resolution Section of the State Bar of Arizona. He frequently speaks on arbitration and mediation at programs sponsored by the American Arbitration Association, the American Bar Association and the State Bar of Arizona. He has been selected for inclusion in the 2008 - 2015 lists of *The Best Lawyers in America* in Alternative Dispute Resolution. Mr. Fogel can be reached at 602-264-3330, mede8@msn.com or through www.shermanfogel.com.