PROGRAM MATERIALS
Program #3021
June 1, 2020

Effective Mediation Part 3 - Overcoming Unrecognized Emotions in Mediating Commercial Disputes

Leslie Berkoff, Esq. – Moritt Hock & Hamroff LLP
Elizabeth Shampnoi, Esq. – Shampnoi Dispute Resolution and Management Services, Inc.

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 180, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

Overcoming Unrecognized Emotions In Mediating Commercial Disputes

Presented by:

Leslie A. Berkoff

Moritt Hock & Hamroff LLP

&

Elizabeth J. Shampnoi

Shampnoi Dispute Resolution & Management Services, Inc.

June 1, 2020

Overview

Emotions are not relegated to personally identifiable disputes, such as employment, personal injury or matrimonial. Oftentimes, the parties to a commercial dispute are harboring unrecognized emotions arising from the dynamics of the events leading up to the dispute, the interactions between the parties as well as the impact of the subject matter of the dispute at hand. Failing to identify and recognize these emotions impedes the ability of the parties to address them in a way that allows the parties to focus on the overarching business dispute. By recognizing and addressing emotions, the parties can move towards a more level playing field of negotiation and adequately address the dispute between them. As long as these emotions remain unnamed and unmanaged, getting to "yes" or some form of resolution may be impossible

This program will explore the means to identify and recognize emotions in commercial disputes, and provide tools to foster the sharing of those emotions in a productive manner to allow the parties to adequately negotiate and focus on the business terms. This program aims to help advocates have a deeper understanding of the emotion that all parties, including business representatives such as executives and senior leadership have and provide tools to manage and address such emotion in a productive manner to set the right tone and foundation for success.

Introduction to Topic/Learning Points:

- Identifying and Recognizing Emotion
- The Impact of Unrecognized Emotion
- Classifying Positive and Negative Emotions
- Tools to Manage and Address Emotion Productively
- Q&A

SHAMPNOI
Dispute Resolution & Management Services, Inc.

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

Identifying & Recognizing Emotions

A. Sources of Emotion: Where does this come from?
   i. Interactions Between the Parties
   ii. Impact of Subject Matter of Dispute & Settlement
   iii. Underlying Motivations
   iv. Human Aspects

SHAMPNOI
Dispute Resolution & Management Services, Inc.

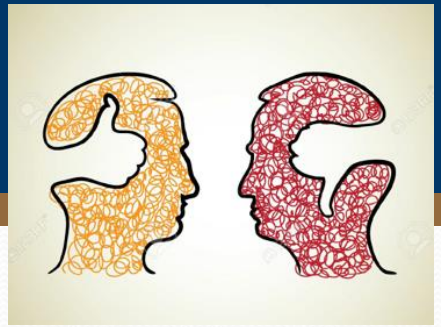
Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

The Impact Of Unrecognized Emotions

A. Interferes & Impedes Ability to Focus on Substantive Disputes
B. Unlevel Playing Field in Negotiation
   - How this impacts the process
C. Impasse
   - How to address and get past

SHAMPNOI
Dispute Resolution & Management Services, Inc.

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW



Classifying Positive & Negative Emotions

A. Body Language, Verbal & Non-Verbal Displays of Emotion
B. Distinction Between Behavior & Feelings
C. Neuroscience: Emotion & Cognition
D. Emotional Intelligence
   - What is this and how does understanding this impact the process

SHAMPNOI
Dispute Resolution & Management Services, Inc.

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

Tools To Manage & Address Emotion Productively

A. Normalize Emotions
   i. Promote Emotional Literacy (not therapy)
   ii. Acknowledge the Emotion of Parties/Counsel/Attendees/Decision Makers/Mediator

SHAMPNOI
Dispute Resolution & Management Services, Inc.

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

Tools To Manage & Address Emotion Productively

B. Tailor the Process to Meet the Needs of the Parties
   - i. Importance of Pre-Mediation Work
     - Understanding the dynamics
   - ii. Who Should Participate?
     - How do you decide and when?
   - iii. Joint Session v. Caucus
     - One size does not fit all
   - iv. Opening Remarks-Catharsis v. Inflammatory
     - How to manage, control and channel
   - v. Building Safety & Trusts
   - vi. Making Parties Comfortable

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

Tools To Manage & Address Emotion Productively

C. When Emotion Takes Over
   i. Test Assumption
      - How to do this?
   ii. Focus on Process
   iii. Focus on Present
   iv. Reframe the Narrative

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

Questions?

Leslie Berkoff, Esq.
Moritt Hock & Hamroff LLP
lberkoff@moritthock.com
516-873-2000
www.moritthock.com

Elizabeth J. Shampnoi, Esq.
Shampnoi Dispute Resolution & Management Services, Inc.
elizabeth@shampnoiadr.com
914-522-0174
www.shampnoiadr.com

LESLIE A. BERKOFF

Practice Areas - Dispute Resolution / Bankruptcy & Creditors' Rights / Litigation

- Leslie A. Berkoff is a Partner with the firm where she serves as Chair of the firm's Dispute Resolution Practice Group. A skilled mediator having handled mediations in bankruptcy courts for all phases of bankruptcy-related litigation, as well as, commercial mediations in the state and federal courts and arbitration as a panel arbitrator through the American Arbitration Association. Ms. Berkoff is the past Chair of the firm's Creditors' Rights and Restructuring Department and is also involved in all aspects of creditors' rights and insolvency matters, as well as, bankruptcy cases nationwide and related litigation, including creditor, debtor, committee, and trustee representation, as well as corporate liquidations, reorganizations and out-of-court restructurings and assignments for benefits of creditors. Various concentrations including equipment and asset based lending and healthcare industries.

- Prior to joining Moritt Hock & Hamroff LLP, Ms. Berkoff served as a law clerk to the Honorable Jerome Feller, United States Bankruptcy Judge in the Eastern District of New York, from 1991 to 1993 and to the Honorable Allyne R. Ross, Federal Magistrate Judge in the Eastern District of New York, from 1990 to 1991.

- Ms. Berkoff speaks and publishes extensively and is a recognized leader in her field.

Education - Hofstra University School of Law, J.D. 1990
Editor in Chief, Hofstra Labor Law Journal
State University of Albany, B.A. 1987 *cum laude*
Admissions - Ms. Berkoff is admitted to practice in New York and Connecticut.

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

SHAMPNOI
Dispute Resolution & Management Services, Inc.

ELIZABETH J. SHAMPNOI

Elizabeth J. Shampnoi is President of Shampnoi Dispute Resolution and Management Services, Inc. and serves as a mediator, arbitrator, consulting expert and trainer. With 20 years of experience in the field of alternative dispute resolution (ADR), Ms. Shampnoi works with in-counsel, law firms, and executives providing strategic advice to develop and implement strategies to avoid and resolve disputes quickly and efficiently while achieving successful outcomes. Ms. Shampnoi regularly serves as a mediator and arbitrator in commercial and employment disputes and has successfully mediated and arbitrated over 200 disputes. She also provides trainings for companies concerning best practices in all areas of ADR. Ms. Shampnoi's dedication and focus in the area of ADR began early in her career when she served as the District Vice President of the New York region of the American Arbitration Association (AAA). Following her tenure at the AAA, Ms. Shampnoi served as a litigator and in-house counsel. Ms. Shampnoi is based in New York City and can be reached at (914) 522-0174 or elizabeth@shampnoiadr.com.

Neuro-Literacy for Collaborative (and Other) Lawyers

By Pauline H. Tesler

1. What Is Neuro-Literacy and Why Should You Care About It?

A flood of neuroscience research studies (including imaging technologies as well as animal and human studies) is yielding remarkable discoveries about the workings of the human brain, discoveries that challenge core beliefs about human consciousness and rationality imbedded in our legal institutions and jurisprudence. This growing body of evidence carries potentially revolutionary implications for our day-to-day work as lawyers, depicting a brain that is driven not by reason, but by emotion—a brain that has changed little in 20,000 years. This article aims to introduce the practical value of this burgeoning knowledge, and the importance for lawyers of developing basic "neuro-literacy."[1]

"[Neuroscience] carries potentially revolutionary implications for our day-to-day work as lawyers, depicting a brain that is driven not by reason, but by emotion—a brain that has changed little in 20,000 years."

The sheer volume of game-changing discoveries about the workings of the human brain means there is no orderly body of knowledge for lawyers to absorb and reduce to proven practical applications. But there is plenty of evidence to suggest that the impact of these new understandings will be transformative for dispute resolution practice. Even without definitive proof, we can put these new findings to good use if they pass our personal "smell test": if they appear plausible and potentially helpful, and if we see no likelihood of harm. The questions we need to ask before incorporating practical neuroscience applications into our daily work are straightforward and simple:

- Does this research finding sound plausible in terms of what I know about human behavior during conflict, negotiations, and decision making?
- Can I devise a practical way to apply this finding?
- Do I think the application might be helpful?
- Would trying out my idea be unethical, dishonest, improperly manipulative, or otherwise inconsistent with highest standards of practice?

2. Practical Neuro-Literacy Replaces "Naïve Realism" with "Neuro-Realism"

Emerging understandings about the workings of the human brain can (1) enrich the lawyer-client relationship, (2) enhance interactions with clients and colleagues during negotiations, and (3) facilitate achieving clients' goals during negotiations through techniques we can weave into every stage of representation. This vast terrain of potential applications cannot be explored in any depth in an introductory article. It *is* possible, however, to give readers a glimpse of what we have learned about some harmful effects flowing from unexamined assumptions that rational thought should be the primary way to attain clear understanding of external realty and arrive at truth. Those assumptions go to the heart of our professional identity as lawyers, and we now know that biologically speaking, they are simply wrong. We also can look briefly at how a more scientifically sound understanding of the role of emotions in our work with clients might play out in two of those three potential areas of application: the lawyer-client relationship, and interactions during negotiations.[2]

Re-tooling for neuro-literacy begins with facing the implications of "naïve realism," a seductively simplistic habit of mind found in abundance among lawyers. Naïve realism, simply put, holds that:

- I see reality as it actually is. My actions and beliefs are based on a sound rational interpretation of reality.
- Other people would share my view and actions and opinions if they had access to the same information that I have and if they have processed that information in a reasonable way, as I do.
- If others don't share my views, it's because:
  - they have insufficient or incorrect information; if they will pay attention to my information we can reach an agreement;
  - they are lazy or stupid—i.e., not making rational decisions based on the right information;
  - they are biased by ideology, self-interest, or some other distorting influence.[3]

In reality, research confirms that our sensory perceptions and the thinking we base on those perceptions are inherently limited and fallible. Our brains select only a very small sliver of incoming sensory data and make meaning by attempting to match the limited data to similar prior experiences. The brain approximates reality; it tells a story about the incoming data that fits with what we have encountered before. Thus, the human brain is not like a camera, but more like a film editor, making a coherent movie out of unrelated bits and pieces according to a pre-existing script. What our senses do *not* register is vastly greater than what they do register; before any thoughts

or perceptions even hit our conscious awareness, they have been edited to cohere to the most likely similar pattern our brain has stored, minus everything that is unnecessary for the pattern to match up. In a sense, then, we perceive what we expect to perceive, and we notice as new only that which confounds our expectations in a way that triggers an emotional response. We notice the slavering dog racing toward us down the beach; we notice our own name spoken in passing in a nearby conversation that until then was meaningless buzz. We do not notice the man in the gorilla suit strolling slowly across the basketball court, because he's not part of the game where our attention is fixed. Thus, our mantra as we embark on becoming neuro-literate might be the words of Nobel prizewinning physicist Richard Feynman: "The first principle is that you must not fool yourself and you are the easiest person to fool." We have a lot to learn, and even more to unlearn, if we are to move into 21st Century lawyering based on an accurate understanding of how we, our clients, and our colleagues apprehend reality and make decisions.

Our interaction with our clients is deeply influenced by the jurisprudence in which we work. In turn, jurisprudence is founded on a theory of how people think and act—and thus, on a theory of the mind. Our legal culture is infused with a belief that the human mind is, or should be, entirely rational when it is functioning properly, and that each client is a bounded rational individual who owns a bundle of rights and entitlements that sometimes conflict with the bundle belonging to someone else. Reasoning is how the law resolves those conflicts, based on orderly presentation of sensory facts whose meaning ultimately is decided by a third party authority. Therefore, our jurisprudence is deductive, rules- and norms-based, and hierarchical.

Our professional identity and habits are honed to function well within that system; we work every day with assumptions about informed consent, choice, and decision making grounded in beliefs about the primacy of reason and cognition so pervasive as to be virtually invisible. This is called "thinking like a lawyer," and when we do it, our clients and even we ourselves take on an archetypal quality in which complex individuality is subordinated. The welter of confused impressions, hopes, fears, and desires that constitute the client's narrative and our own sensory experience of that incoming narrative are abstracted by the thinking layer of our brains into legally framed arguments based on individual rights and entitlements.

Our focus on individual rights, our reliance on argumentation, and our conviction that considerations in the emotional and relational realm have no place in our work arise from an 18th Century rationalist jurisprudence that is tone deaf to the spectrum of non-justiciable concerns that our clients care mightily about. Equating strong advocacy with strong assertion of positional arguments about rights and entitlements makes good sense in a rules-based third party decision-making model, but makes far less sense in client-centered, interest-based out-of-court modalities like collaborative law because collaborative law (like some modes of mediation[4]) aims exclusively at finding acceptable solutions based on client interests and values, entirely outside the courts, without any involvement of third party decision makers. We are by definition working in the realm of human (as distinct from purely legal) conflict.

It turns out Adam Smith was just plain wrong about rational self interest as the driving force for human decision making. Contrary to the assumptions of thinkers since Plato, functional MRI studies confirm that complex rational thought does not drive our behavior. Rather, every choice we make arises not from our uniquely human cerebral cortex, but from the limbic brain, the seat of emotions and a brain structure we share to a degree with all other mammals.[5] Even the choice of Cheerios or Corn Flakes for breakfast is driven by and cannot be made without emotion, the moving force and sine qua non for thought. Thus, to the extent that we rely upon 18th Century enlightenment bargaining techniques based on a naïve realist model of decision making as our frame for negotiations in a client-centered interest-based model, we are using a hacksaw to do brain surgery.

"We have a lot to learn, and even more to unlearn, if we are to move into 21st Century lawyering based on an accurate understanding of how we, our clients, and our colleagues apprehend reality and make decisions."

3. Practical Neuro-Literacy Enriches How We Relate to Our Clients

No client, asked when the divorce began and when it ended, will ever answer by naming pieces of paper (petitions, complaints, settlement agreements, judgments). Every divorce lawyer knows that our clients experience divorce as an extended human transition of operatic dimensions, with emotionally exhausting peaks and valleys involving betrayals, bad faith, and narcissistic wounds that call into question identity, core values, and even the will to survive. At the forefront of attention for most clients are concerns fraught with emotional content (grief, loss, disappointment, anger, fear, mistrust, and the like). But for lawyers locked in an 18th Century naïve realist model for legal dispute resolution, the sole focus of negotiation is abstract legal "containers" stripped of the emotional context in which clients experience divorce-related conflict. The containers are labeled alimony, child custody, child support, and property division. For the client, an exchange of quantifiable positions about the issues under

these legal rubrics leaves unnamed, unventilated, and unresolved the underlying emotional forces that drive the conflict. Our clients frequently leave such settlement processes with little or no sense of the closure or "ownership" that are the hallmarks of deep conflict resolution.

Our brains organize memory in neural pathways that include sensory data saturated with intense emotions; these patterns shape incoming sensory data to fit the pre-existing template. Every time our client recalls the bad experiences surrounding separation and divorce, a pattern in her implicit memory system is reactivated, strengthened, and altered, so that today's painful experience merges contextually with every other similarly painful relationship experience extending back into childhood, gathering force and in a sense rewriting the story of the marriage—not only now but as it was lived previously—through the lens of pain, disappointment and betrayal. Each reactivation of this increasingly emotion-saturated narrative trope triggers involuntary physiological events throughout the body as it prepares to defend against attack. Blood pressure rises, heartbeat speeds up, cortisol floods the bloodstream. As a direct result the newer cognitive centers of the brain—located in the neocortex, which engages in cause and effect thinking and in imagining new solutions to old problems—go offline for as long as several hours after a triggering memory while the "fight, flight, or play dead" response plays out in body and mind. Some studies have suggested a substantial temporary drop in I.Q. of 30 points or more when a spouse experiences rejection by the former partner. Our divorcing clients are required (perhaps for the first time in their lives) to make complex and far-reaching decisions about finances and parenting at a time of unprecedented and sustained stress, and for many of them, deep and wounding rejection is the context in which this decision-making must take place. We are, in other words, representing clients who may for much of the time we work with them be experiencing transient states of diminished capacity.

We cannot erase their pain, and we cannot rewrite their history; but I believe we do have a professional responsibility to understand how unrealistic, unhelpful, and biologically incorrect a rationalist decision-making model really is for distressed clients. What might change for the better if we brought practical neuroliteracy into the picture? Quite a lot. For instance, if we appreciated the reality that for the emotional brain there is little or no difference between experiencing something, imagining it, remembering it, and recounting it, and if we also appreciated the inescapable neurobiological reality that in the presence of strong emotion, the rational thinking brain will be switched "offline" for perhaps hours at a time, we would understand the importance of ensuring that no client is encouraged to make "rational" decisions soon after re-experiencing the intense emotional states invoked by recounting or recalling intense divorce-related narratives. The artistry of when and how we attend to our clients' pain-saturated stories, and how we encourage clients to envision the goals of their divorce separate and apart from the pain of the marital breakup, can be greatly enriched by a grounding in practical neuroscience.

We can also be clear about the difference between empathy and destructive alignment or identification as we fulfill our responsibilities as effective advocates. We can reconsider how we respond when a client retells the painful history of the divorce or the most recent spat with the "ex." If, like a litigator constructing a winning theory of the case, we align with and magnify the unhappy story, we are in a literal sense altering our client's brain for the worse, diminishing the ability to remember anything positive, foreclosing the capacity for clear thought, and reducing the ability to entertain constructive options for the future. Instead, as neuro-literate advocates, we can learn new skills for reframing the emerging narrative into one more congruent with the client's best hopes for the future.

When we consider new neuroscience understandings about how pain-saturated stories diminish our clients' capacity to plan effectively for their own future and the future of their children, it is difficult to escape the conclusion that neuro-literacy is no longer optional. We do not need to be psychotherapists to learn better and more effective empathic skills that allow us to form alliances that help rather than harm angry or distraught clients; we do not need to be neuroscientists to learn how to work constructively with pain-saturated narratives to help clients return more quickly to higher-functioning cognitive states. Skills like these should constitute vital parts of the core professional education of divorce lawyers—especially those of us who choose to work in consensual out-of-court models that depend on full client engagement, and that promise a deeper and fuller kind of resolution than is available from a court

4. Practical Neuro-Literacy Enhances Interactions with Clients and Colleagues During Negotiations

In the 1990s Marco Iacoboni, an Italian researcher, accidentally discovered a previously unknown neuronal function in the brains of macaque monkeys, and subsequently in human brains, called "mirror neurons," which most evolutionary neuroscientists now believe are the key to our capacities for empathy, language, and self-awareness. Subsequently, a Stanford psychologist named Paul Ekman took Iacoboni's work to the next level by demonstrating that human beings across all languages, cultures, and levels of sophistication express and understand emotions through mirroring and reading facial expressions that are universal. Thought to be a key evolutionary advantage, mirror neurons enable all of us to "know" without engagement of any of the higher cognitive brain centers whether a person is friend or foe, happy or sad,

flirtatious or disgusted, truth-teller or liar. We know what others feel by assuming the same expression and thereby simulating or mirroring in our own bodies the sensory output. We feel one another's pain and joy in the most literal way, as an evolved biological mechanism for rearing infants and for forming and sustaining relationships and communities built on trust and cooperation—the evolutionary advantage that has allowed us to develop complex cultures. Moreover, we don't merely read the emotional language of others; the emotional states of each of us are contagious to everyone in proximity to us, without us usually being conscious of the phenomenon.

It follows that every communication between and among the lawyers and the parties in a case necessarily carries a biologically wired emotional substratum. Lawyers unsophisticated in the workings of mirror neurons may make the well-intentioned error of allowing distressed clients to unload on one another at settlement meetings, believing there is something constructive in what they call "catharsis." Not so, neuroscience tells us. Each client, and everyone else in the room, will simulate via their own mirror neurons the intense emotions being expressed, and will experience in their own bodies and brains the "fight or flight or play dead" evolutionary defense program that strong emotion triggers. The possibility of creative problem solving disappears, neurally speaking, for quite some time following such a "catharsis." For clients, another round of the same old fight also reinforces the implicit memory attractor patterns that register every shred of evidence confirming the other's unworthiness of trust and respect, while diminishing the brain's ability to notice disconfirming evidence of good faith that does not match the increasingly charged negative pattern.

If catharsis is counterproductive, should we instead instruct clients to "suck it up," or adopt that strategy ourselves when frustrated or angry at someone else in the negotiating room? It turns out that won't work well, either. Our facial muscles, body language and the timbre of our voices speak louder than words, communicating our actual feelings and contaminating the environment at the table. If the feelings are there, they will be read by every brain in the room and can silently undermine trust and cooperation.

How might practical neuro-literacy help us address more effectively the eruption of negative emotion during case-related communications?

- We can learn "self scanning," a technique for becoming aware of how various emotions express themselves uniquely in our own bodies. This can become an early warning system, alerting us that we are becoming anxious or irritated before the emotion reaches a volume that shuts down higher level cognitive processes like planning, creative imagination, and cause-and-effect analysis.
- With a more nuanced awareness of our emotions as they play through body and mind, we can invoke self-soothing techniques that operate at the neural level to abort emotional "hijacking" of higher brain functions. Functional brain imaging studies show that meditation and similar awareness practices can modulate the effects that otherwise accompany negative emotional states.
- We can teach clients simple techniques to soothe and avert emotional meltdowns, many of them involving sensory inputs associated with implicit memory patterns of relaxation, trust, and other desired states. Some of those associations may be uniquely personal, such as listening to a particular piece of music or experiencing a scent associated with a particular positive memory or looking at a photograph of a beloved child, while others may be shared by most of us—the positive effects of deep breathing, soothing touch, or of endorphins generated by taking a break for a short brisk walk.

Collaborative lawyers have employed these and similar techniques for nearly two decades. Now, hard science confirms that far from being touchy-feely ideas, these techniques work because of how our brain works. Strong emotions should neither be allowed to contaminate the safe space of the negotiating room, nor be excluded from the negotiation process. Learning how to manage them constructively is part of becoming neuro-literate.[6]

5. Conclusion

At this point, you may wonder, "what on earth does this stuff have to do with lawyering?" The answer is, quite a lot. Chief Justice Warren Burger famously observed, "The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?"[7] In the same vein, Robert Benham, the first African American to serve as Chief Justice of the Georgia Supreme Court, has spoken of three fundamental professions found in all civilized societies—medicine, which heals the body; the clergy, which heals the soul; and law, which properly understood heals breaches in the social fabric.[8] Justice Benham went on to describe the law codified in statutes and reflected in appellate decisions as the "floor" for acceptable behavior in a society: go below it and you encounter trouble with the law. He lauded the collaborative practice movement for encouraging our clients to explore the space between the floor—their legal rights and entitlements—and their own highest values. The emerging neurosciences offer us a rich harvest of understandings and tools to support the work these distin-

guished jurists have encouraged us to embrace as healers of breaches in the social fabric.

No act of will can force us, or our clients, to cease operating according to the deeply wired biological programs that are our evolutionary legacy, and there is no simple checklist of "ten easy ways to help your client stop being emotional at inconvenient times." Becoming neuro-literate in conflict resolution work means embarking on a long and very personal process of recognizing when we are in the throes of unhelpful naïve realism, and gradually developing nuanced new skills to replace positional argumentation based on deductive logic. This is a tall order. Such retooling cannot be done alone.[9] In this regard, collaborative law, which is inherently collegial and which is built on protocols and roadmaps for sophisticated professional teamwork, represents one of the cutting edge methods for reshaping our understanding of what it means to be effective advocates in the 21st century.

"Becoming neuro-literate in conflict resolution work means embarking on a long and very personal process…"

Endnotes

1. Collaborative lawyers work outside the court system in interdisciplinary teams that transform how the lawyers participating in them deliver services to clients. See, Pauline H. Tesler, "Informed Choice and Emergent Systems at the Growth Edge of Collaborative Practice," Family Court Review, Volume 49, Issue 2, pages 239–248, April 2011, available online at http://onlinelibrary.wiley.com/doi/10.1111/fcre.2011.49.issue-2/issuetoc. See, also, Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 Ariz. L. Rev. 289 (2008).
2. An overview of the third area, facilitating achievement of clients' goals, will have to wait for another article.
3. From Lee Ross and Andrew Ward, "Naive Realism: Implications for Social Conflict and Misunderstanding," Working Paper No. 48, Stanford Center on Conflict and Negotiation (May 1995), accessible at https://www.law.stanford.edu/program/centers/scicn/papers/naive_realism.pdf, last consulted May 25, 2011.
4. Many points in this article also apply to the facilitative and transformative ends of the mediation spectrum. The focus here is on how lawyers can provide new styles of advocacy and counsel to clients. Others may want to explore these ideas in the context of practice as a neutral.
5. Thomas Lewis, Fari Amini, and Richard Lannon, A General Theory of Love (2000).
6. Interdisciplinary collaborative team practice provides an elegant, skillful solution to the challenge of working with strong emotions, providing licensed mental health professionals in a coaching role who prepare each client for negotiating difficult issues in an emotionally intelligent manner. See, Pauline Tesler and Peggy Thompson, Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move On with Your Life (2006). The team model also provides a context in which unexamined habits of naïve realism in dispute resolution work can be highlighted and altered.
7. Warren Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 66.
8. Unpublished keynote address at International Academy of Collaborative Professionals annual Forum, Atlanta, Georgia, 2005.
9. If you are interested in embarking on that retooling process, the place to start is in an extended experiential workshop.

Pauline Tesler is a Certified Specialist in Family Law (State Bar of California Board of Legal Specialization); fellow, American Academy of Matrimonial Lawyers; co-founder and first President, International Academy of Collaborative Professionals; and recipient of first ABA "Lawyers as Problem-Solvers" award. Ms. Tesler wrote the first treatise on collaborative law. She writes, speaks, blogs, and trains internationally about interdisciplinary collaborative practice, and about practical neuroscience applications in conflict resolution work, and consults with lawyers and law firms about expanding competency in these areas. Contact Ms. Tesler at: teslercollaboration@lawtsf.com or go to her firm's website, www.lawtsf.com.

Reprinted with permission from: *New York Dispute Resolution Lawyer*, Fall 2011, Vol. 4, No. 3, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.

Neuroscience and Law: Is Neuro-Literacy Optional Anymore?

By Pauline Tesler and Norman Solovay

Most civil matters—some say more than 90%—now settle without a full trial to judgment, thus making settlement the actual job of advocate lawyers.[1] Settlement modalities that enhance the quality of settlement practice and increase client satisfaction with legal representation (notably mediation and collaborative law) have grown exponentially in recent years, with ample statutory support.[2] Yet neither the vanishing trial nor the popularity of out-of-court settlement practice nor the low regard felt by the public toward the legal profession[3] have diminished the vigorous opposition of the organized litigation bar to these new and evolving ways of protecting clients from the escalating financial and emotional costs and collateral damage resulting from litigating personal disputes.[4] So although there is wide acknowledgment that litigation and courthouse steps settlements by their nature serve the human needs of both lawyers and their clients poorly,[5] we still are far from victory in the battle to establish scientifically valid understanding of our biological human nature as a core competency of lawyers who work with clients whose legal problems arise out of fractured human relationships.

Fortunately, change is pressing in upon our conservative profession from many directions, thanks to an explosion of new research discoveries about how humans experience and resolve conflicts. Reports coming our way daily from the fields of decision science, evolutionary neuroscience, neuro-economics, and positive psychology explicate discoveries that "challenge core beliefs about human consciousness and rationality imbedded in our legal institutions."[6] Until recent years, cutting edge scientific research was typically regarded by policymakers and professionals as obscure or esoteric, and seldom led directly to significant societal impact. But thanks to popular science writers whose articles and blogs make the fruits of this research accessible to policymakers and the general public, and thanks to some major governmental, think-tank, and foundation initiatives to translate neuroscience discoveries into terms that can be understood and applied by judges and law school professors, even the most diehard defenders of the legal status quo at this point have little ground to stand on when they ignore the large and still-growing evidence that traditional legal premises about the primacy of rational processes in our clients' as well as our own decision-making are just plain wrong. For proof, look at the *New York Times* of June 25, 2013, a date significant only because it is the date this article is being written. Three articles in that issue address the growing impact of neuroscience and its close cousins, positive psychology and neuro-economics, on our changing understanding of how biology drives human behavior.

The first, a very favorable review of a new book entitled *Touching a Nerve*, begins: "'You cannot understand the mind without understanding how the brain works,' writes the philosopher Patricia S. Churchland in this marvelous book, which uses recent findings from neuroscience and evolution to illuminate deep questions about human nature."[7]

The second reports on the opening of a museum exhibition on illusions, stating: "There will also be some good old-fashioned tricks, with a pair of neuroscientists, Stephen Macknik and Susana Martinez-Conde, co-authors of *Sleights of Mind* on hand to explain their cognitive underpinnings. 'Illusions allow us to study how and why the brain fills in missing or ambiguous information,' said Paul Gleeson, a researcher for the show who is also a magician.'"

"[A]lthough there is wide acknowledgment that litigation and courthouse steps settlements by their nature serve the human needs of both lawyers and their clients poorly, we still are far from victory in the battle to establish scientifically valid understanding of our biological human nature as a core competency of lawyers who work with clients whose legal problems arise out of fractured human relationships."

The third is an article on a 3D Map of the Human Brain called "Big Brain," which gives "unprecedented detail" 50 times better than anything previously seen, and is being made "available to researchers everywhere." In the article a prominent neuroscientist describes "Big Brain" as a "technological tour de force," linking it to the even more significant new brain initiative recently announced by the Obama administration. That mega-billion dollar national research project to map the brain carries its own much publicized and much repeated message about the importance of neuroscience. *The New York Times* (February 23, 2013) described the initiative as "a breathtaking goal…that would lead to a much deeper understanding of how the brain works," and, according to the President, would "involve a level of research and development not seen since the height of the space race."

It's likely that similar reports from the front lines of neuroscience research could be found in almost any is-

sue of the *Times*, and every week sees the publication of new books and articles translating statistical evidence from reports in scientific journals into practical, accessible understandings and tools for business, professions, and ordinary folks. Given the elevated place held by classical enlightenment theories about human behavior in our jurisprudence and traditional legal dispute resolution practice, it would be difficult to find a more appropriate audience for this new knowledge about the brain and the body-mind continuum than the legal profession. There is consensus on that point in some very influential places. For instance, consider the Gruter Institute, a private think tank located in the heart of Silicon Valley since 1981. The Institute's current mission, which grows out of its founder's belief that "human legal behavior is both facilitated and constrained by our biological nature," is to foster education and communication among "law professors, judges, lawyers, economists, scholars from...other social sciences, and behavioral biologists, including evolutionary biologists and neuroscientists."[8] Because biological advances in our understanding of human behavior are unfolding faster than the legal profession or our broader legal culture can incorporate, Gruter has partnered with some heavy hitters to help lawyers put this science to practical use. Its newest project, The Law Lab, is based in the Center for Internet and Society at Harvard University, where its interdisciplinary scholars will "investigate and harness the varied forces—evolutionary, social, psychological, neurological and economic—that shape the role of law and social norms as they enable cooperation, governance and entrepreneurial innovation." The aim of The Law Lab is nothing less than to bring a laboratory approach to legal scholarship in order to "fundamentally transform law."

In partnership with the MacArthur Foundation, Gruter has taken an active role in their ongoing "Neuroscience and Law" project. (Baylor Medical College, in Houston, operates a similarly named program, "The Initiative on Neuroscience and Law.") While most of the MacArthur project's activity involves scholarly research about the brain science of criminal culpability, the Gruter Institute's focus in the project is on educating federal and state court judges and legal scholars about law, human nature, and biology. Since 2007, the Dana Foundation has provided grants to the American Association for the Advancement of Science to conduct seminars for federal judges on emerging issues in neuroscience and the law as they affect legal determinations. Law professors from Vanderbilt and the University of Minnesota have written the first legal textbook on the intersection of law and neuroscience, to be published later this year. The book, like the MacArthur Foundation project and the Baylor program, focuses primarily on defects, injuries, and dysfunctionalities in the human brains of criminals, drug addicts, the mentally ill and brain damaged, and persons with character disorders, looking to provide new perspectives on longstanding challenges in criminal trials and dispositions. In other words, the focus in these high-profile initiatives is largely on "them" (clients who commit criminal offenses), not us, the part of the legal profession charged with resolving civil disputes between individuals.

But fortunately, the impact of neuroscience and biology-based social sciences is also beginning to be felt on our ground, where dispute-resolution lawyer meets client. At the think-tank level, scholars supported directly by the Gruter Institute are investigating such topics as the evolution in primates of reconciliation behavior during conflict; the biological basis for our seemingly innate sense of right and wrong, and our human capacity for moral reasoning and for trust. Among the more accessible products of research supported by Gruter are two books by Paul Zak (the economist who invented the term "neuro-economics), *Moral Markets*[9] and *The Moral Molecule*[10] (a very readable account of how the neurotransmitter oxytocin may be central to our moral capacities as human beings).

We lawyers who focus on resolving fundamentally personal disputes are in the vanguard of our profession in embracing the fruits of this research. It is no coincidence that at the 2012 annual ABA Dispute Resolution Program there were six separate programs dealing with neuroscience.[11] Nor should it be a surprise to find that collaborative lawyers—whose work by definition takes place entirely outside the courtroom, far from litigation template thinking about settlement negotiations—are leading the way in adapting these "revolutionary implications for our day to day work with clients, depicting a brain that is driven not by reason, but by emotion…[which are] already beginning to transform dispute resolution practice."[12] A movement to bring awareness of neuroscience and positive psychology into mainstream dispute resolution practice is being spearheaded by the Integrative Law Institute at Commonweal ("ILI"),[13] a nonprofit program that is taking the discoveries gleaned from sophisticated collaborative interdisciplinary team practice further and deeper, adding to the mix immersion in neuroscience, decision science, and positive psychology, seasoning the mix with new values-based transactional methods for making and memorializing deals, and icing the cake with communications skills training, body-mind awareness practices, coaching aimed at strategic practice transformation, and much more—all aimed not just at family lawyers, but at all of us who help clients embroiled in the legal fallout from fractured human relationships.

ILI's aim is to teach lawyers to become more intentional, self aware and self reflective in our legal work with both colleagues and clients, offering continuing education courses that examine dispute resolution habits through the lens of biological realities about being human primates. ILI's requirements for earning certification as an integrative lawyer include learning sophisticated communication techniques that go below content to explore the subtle, biologically driven meta-communications that cannot be suppressed and often elude self-awareness; expanded understanding of the conscious and unconscious, constructive

and harmful, therapeutic and anti-therapeutic impacts of every interaction we have with another person during our workday; basic grounding in brain science and decision science as they relate to negotiations and informed choice; basic education in neuro-economics, focusing on the biologically driven irrational side of choices that cannot be explained by classical economic theory; neuro-ethics and neuro-morality as they relate to disputes arising from broken relationships; and information from cognitive, social, and positive psychology, systems theory, and body-mind awareness practices, all aimed at making lawyers more conscious of the systems-based and biology-driven nature of our work—all toward the end of making us better at our job—settling disputes.

We have seen "touchy-feely" efforts to transform testosterone-poisoned litigators into crunchy granola peacemakers before, and we know that the impact of those approaches seldom extends beyond the already converted. What's different about the Integrative Law movement is its emphasis on hard science about the biological realities of human nature and human behavior as reflected in legal conflict resolution practice. You can argue with a guru in ways that you can't argue with lab results or brain scans. ILI has developed an array of courses aimed at the needs of lawyers working in the trenches of personal dispute resolution. These courses explore the intersection of many of the biologically informed behavioral sciences, translating research findings into practical concepts and tools for lawyers. Topics include: "Law, Money, and Values in Negotiations and Settlements," "Neuro-Economics, Neuro-Morality and Distributive Negotiations," and "Neuro-Literacy 101: Introduction to Brain Science for Lawyers, Judges, and Mediators." Workshops on these and similar topics have been presented at the annual Forum of the International Academy of Collaborative Professionals and the annual gathering of Collaborative-Practice California, and at the Vancouver (Canada) Collaborative Roster Society, as well as under the auspices of the New Hampshire State Bar Association and the Texas chapter of the Association of Family and Conciliation Courts, and to commercial and legal aid lawyers in Cape Town and Johannesburg, South Africa.

What does all this mean? We, the authors, submit that our culture is experiencing the early days of a scientific revolution as enormous in its implications as the shift from medieval to renaissance thinking about the place of science in human affairs. We lawyers will not anytime soon have a clear roadmap telling us step by step how we can apply these changed understandings of how our brains actually function in service of better, evidence-based ways of dealing with colleagues and clients—but that is no excuse for willful blindness.[14] Our choices right now are to act from unexamined habit or to become aware and self reflective; and to be conscious or to be willfully unconscious about the probable impact of our methods on the people we are ethically obliged to assist as skillfully as we are able. Our conclusion: neuro-literacy is no longer optional. It's part of what our human (as distinct from corporate) clients need from us when we help them settle disputes, and if our law schools have not yet caught up with the policy implications of this dramatic convergence of thinking about law and brain science, we lawyers will simply have to educate ourselves by enrolling in high quality integrative law and neuroscience workshops and trainings wherever we can find them. Our clients deserve no less.

Endnotes

1. Julie Macfarlane, The New Lawyer: How Settlement is Transforming the Practice of Law, UBC Press, p. 1.
2. Macfarlane, p. 7.
3. "You're giving a speech about lawyers and conflict resolution? Huh. I don't usually connect lawyers with conflict resolution." Macfarlane, p. 1.
4. The Uniform Collaborative Law Act ("UCLA") was approved by a unanimous vote of the Uniform Law Committee and a number of states and courts, including California, Florida, North Carolina, Louisiana, Minnesota, Ohio, Utah, New York and Hawaii, have enacted collaborative law statutes and/or provided court rules for the use of collaborative law. Moreover, the UCLA is supported by the Ohio Bar Association, South Carolina Bar Association, Tennessee Bar Association Board of Governors, Vermont Bar Association Board of Managers and the Association of the Bar of the City of New York, as well as the Family Law Sections of the Minnesota Bar and New Mexico and Wisconsin Bar Associations and the ADR Sections of the Virginia and Wisconsin Bar Associations. However, the opposition of the Litigation Section in the ABA House of Delegates—on the asserted ground that collaborative law is unacceptably risky for clients—has consistently prevented official ABA support for the UCLA to date.
5. See, e.g., Mary E. O'Connell and J. Herbie DiFonzo, "Family Law Education Reform Project Final Report," *Family Court Review*, October 2006, the fruits of a blue-ribbon study of the failure of law schools to prepare students for the reality of family law practice. The report is available at http://www.afccnet.org/ResourceCenter/CenterforExcellenceinFamilyCourtPractice/ctl/ViewCommittee/CommitteeID/15/mid/495, last consulted June 30, 2013.

   > As this sea of change has occurred, however, law school curricula and teaching have remained relatively static. The result, predictably, is that lawyers entering family law practice regularly find themselves unprepared for what they encounter. A substantial and growing gap between family law teaching and family law practice undermines the best efforts of new family lawyers to assist parents and children in separation, divorce, abuse and neglect, dependency, and delinquency actions Lawyers need to think about—and law students need to talk about—how one helps a client in emotional turmoil to engage in effective planning despite the fact that it is difficult.

   Although this study was confined to education of family lawyers, the problem of poor preparation for the actual job of helping distressed clients resolve their disputes is not.
6. From program description of British Columbia Collaborative Roster Society program: "The Next Step: How Integrative Law is Reclaiming the Healing Heart of Legal Practice; A Day with Pauline Tesler," March 4, 2013.
7. Patricia S. Churchland, Touching a Nerve: The Self as Brain. W.W.Norton, p. 1:

   > Every day brings new discoveries about the brain: here is your brain on drugs, here is our brain on music, on jokes, on porn; here is your brain on bragging, on hating, on meditating. Sometimes it seems that neuroscience knows more about myself than I do.
8. www.gruterinstitute.org/about_us.html, last consulted June 27, 2013.

9. http://press.princeton.edu/titles/8657.html, last consulted June 30, 2013.
10. http://www.moralmolecule.com/, last consulted June 30, 2013.
11. They were: "This is Your Brain on Mediation: Reflections on Neuroscience and Practical Implications for Mediators as Well as Negotiators"; "The Neurobiology of International and Inter-Cultural Dispute Resolution"; "Overcoming Cognitive Illusions to Provide Procedural and Substantive Justice Arbitration"; "The Embodied Brain of Peacemaking: It's Not Just In Your Head"; "Brain Based Listening: A Key to Successful Mediation"; and "The Transformative Master Practitioner: The Social Brain-Conflict Transformation and Trauma in Intractable Clients."
12. From program description of New Hampshire Bar Association program: "Practical Neuro-Literacy: Where Divorce Practice, Neuroscience, and Legal Conflict Resolution Intersect," June 14, 2012.
13. http://www.commonweal.org/program/integrative-law-institute/.
14. As noted in Churchland, p. 32:

> My take on the roster of sensitive issues [generated by neuroscience] is that although much is still unknown about the nervous system and how it works, what is known begins to free us from the leaden shackles of ignorance. It makes us less vulnerable to flimflam and to false trails. It grounds us in what makes sense rather than in the futility of wishful thinking. It adds to the meaningfulness of life by enhancing the connections between our everyday lives and the science of how things are. Harmony and balance in our lives are deepened and enhanced by that connectedness.

Pauline Tesler is a Certified Specialist in Family Law (State Bar of California Board of Legal Specialization); fellow, American Academy of Matrimonial Lawyers; co-founder and first President, International Academy of Collaborative Professionals; and recipient of first ABA "Lawyers as Problem-Solvers" award. Ms. Tesler wrote the first treatise on collaborative law. She writes, speaks, blogs, and trains internationally about interdisciplinary collaborative practice, and about practical neuroscience applications in conflict resolution work, and consults with lawyers and law firms about expanding competency in these areas. Contact Ms. Tesler at: teslercollaboration@lawtsf.com or go to her firm's website, www.lawtsf.com.

Norman Solovay, while a very full-time litigator, authored several books on arbitration and mediation, which led to his heading the ADR practice of a well-known law firm. Most recently, however, after being asked to form the U.S. branch of the Indo-American Chamber of Commerce, he established his own practice (http:www.solovaypractice.com), now able to handle on a conflict-free basis domestic and international mediations, arbitrations and med-arb proceedings.

Reprinted with permission from: *New York Dispute Resolution Lawyer*, Fall 2013, Vol. 6, No. 2, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.

This Is Your Brain on Mediation: What Neuroscience Can Add to the Practice of Mediation

By Daniel Weitz

Introduction

A group of undergraduate students at New York University were chosen for the experiment.[1] Everyone was given a list of five word sets and asked to make a grammatically correct four word sentence out of each set. These are called scrambled sentence tests. For example, students are presented with the following: "feels weather the hot patience." This five word set could be unscrambled to read "the weather feels hot." However, students in this experiment were actually given one of two different lists containing words meant to "prime" them to behave in a specific way. Mixed into one list were words associated with being polite; mixed through the other list were words associated with being rude. When the students were soon placed in an experimental situation to measure the degree to which they would act polite or rude, their behavior correlated with the words with which they were primed.

After completing twenty variations of the scrambled sentences the students were instructed to take the completed lists down the hall to the Professor's office where they were to be collected and scored. When the students arrived at the Professor's office, there was another student standing in the doorway asking the Professor a series of questions. The real test was to see how quickly the students would interrupt or how long the students would wait before interrupting to hand in the completed test. The students who were primed with polite words waited longer on average than the students who were primed to be rude. In fact, the overwhelming majority of the students primed to be polite never interrupted at all.[2] Simply priming them with words associated with being polite made them wait longer than those students who were primed with words associated with being rude.

Advances in neuroscience have given us an unprecedented look at the human brain and human behavior. Discoveries have followed in disciplines ranging from cognitive-behavioral psychology to molecular biology. To what extent these discoveries impact other fields, including the dispute resolution profession, is now a hotly pursued topic. While a quick survey of recent studies of the brain opens a flood of connections to the practice of mediation, even neuroscientists caution against the certainty of their findings. There is still more research to be done and many of these studies provide evidence of correlation but not necessarily causation. Perhaps we too should resist the temptation to champion a long sought after scientific basis for all that we do. However, there is no denying the fascination with what we are learning about the human brain and how it guides our behaviors and impacts the way we make decisions. At a minimum, it is cause for great reflection.

Our Negative View of Conflict

Mediation training programs often begin with a conflict word association exercise to explore the nature of conflict. Trainees typically produce a list of similarly negative words including argue, fight and disagreement. This list propels a lively discussion of why we tend to view conflict as something negative. We point to television, our past experiences and even our parents. After encouraging reflection, sometimes through small group exercises, mediation trainers ask if anything positive ever comes from conflict. Trainees list a number of positives including clarity, recognition, understanding and improved relationships. The trainer then hopes the group will come to appreciate that conflict is not inherently good or bad but that the nature of conflict is instead a function of how it is handled.

Recent discoveries in neuroscience shed even greater light on our negative associations with conflict. For example, significant research has been done on the importance of sleep.[3] This research supports the position that we consolidate learning and store memory during sleep. In *Nurture Shock*, Po Bronson and Ashley Merryman report that negative memories are stored in the Amygdala (an area of the brain associated with strong emotions such as fear) while neutral and positive memories are stored in the Hippocampus (an area of the brain not only associated with storage of memory but conversion of short-term to long-term memory as well). Furthermore, lack of sleep is harder on the Hippocampus than it is on the Amygdala. So, when sleep deprived, we have a harder time remembering neutral or positive feelings and events since our Hippocampus is adversely affected by the lack of sleep. Meanwhile, the less-affected Amygdala has little trouble helping us to recall negative feelings and events. Therefore, since people often lose sleep during periods of conflict or crisis, could this explain why we so often judge people with whom we are in conflict by their most negative potential? How often have you heard people in conflict say "I can't think of one good thing to say about him!" Other studies have shown that stress can cause a similar effect on the Hippocampus. During situations of stress, hormones called glucocorticoids are released in the brain.[4] Glucocorticoids are known to cause damage to the Hippocampus. In fact, under extreme conditions, glucocorticoids can kill brain cells in the Hippocampus. This

suggests that stress, and the brain chemistry connected with it, is not only related to our negative view of conflict but perhaps our negative view of those with whom we have conflict. Furthermore, it is not a far stretch to connect our negative view of conflict with our propensity toward competitive approaches to conflict. Is it possible that our negative view of conflict not only impacts how we approach it but also increases the likelihood that we will adopt a competitive style when a collaborative style would be optimal? The perception that conflict is inherently negative quite possibly precludes many disputing parties from even trying mediation when it would otherwise be helpful to them.

We Can Change

During much of the twentieth century, the prevailing theory was that our brains were pretty much completely formed and unchanging after childhood. However, recent discoveries have provided evidence of neuroplasticity, which challenges the assumption that our brains are done developing once we reach adulthood.[5] For example, studies have shown that physical exercise can improve cognitive function and even brain physiology.[6] Exercise also appears to stimulate a protein known as BDNF or Brain Derived Neurotrophic Factor, which aids in the development of healthy tissue. In *Brain Rules,* molecular biologist John Medina refers to BDNF as having a powerful fertilizer-like growth effect on certain neurons in the brain. According to Medina, BDNF not only keeps neurons young and healthy, which enables them to better connect with one another but it also encourages the formation of new cells in the brain.

If our negative view of conflict is indeed largely a conditioned response, perhaps we can change it. Mediation not only provides help with resolving the conflict at hand, it provides an opportunity to develop constructive conflict resolution skills that can be used well into the future.

Application of Neuroscience to Mediator Skills

Discoveries in neuroscience can be associated with a variety of mediator skills including the delivery of an opening statement and framing negotiable issues. The application of these skills relate to a number of discoveries including the psychological phenomenon of "priming" and the "framing effect."

The Psychological Phenomena of Priming and the Utility of Mediator Opening Statements

Most mediators begin the initial meeting with an opening statement. This is particularly true of mediators who deal with interpersonal conflict including divorce or community or workplace mediation. The goals of an opening statement include educating the parties about the process, developing rapport and trust, and setting the tone for a collaborative negotiation. Despite the apparent benefits of providing an opening statement, some mediators question its utility. Critics of a mediator opening statement say it takes too long and much of it is a waste of time as the parties are too distracted to absorb the content. While some openings may go on longer than necessary, the phenomenon of priming lends support for the use of mediator opening statements.

Recall the priming experiment, discussed above, conducted by Professor John Bargh and colleagues at New York University. There is an enormous body of research demonstrating the ability to prime subjects with subtle words to act in a seemingly limitless variety of ways. Research has shown that priming can make us slow or fast or even good or bad at math.[7] But before I tell you about math, let us finish the discussion of opening statements.

Think about the words mediators emphasize in their opening statements. Most give meaningful emphasis to words such as listen, understand, comfortable, confidential, freely, and informal. Mediation trainers and teachers often discuss the benefits of a good opening statement in order to set the tone for mediation. We want to establish an atmosphere of cooperation and open dialogue and in doing so distinguish mediation from its adversarial alternatives. While most mediators have always appreciated the power of a good opening statement, we now have reason to believe there is a scientific explanation for its effectiveness as well. According to the phenomenon of priming, we are a lot more susceptible to outside influences and our unconscious than we realize.[8] When we deliver opening statements, we have the potential to prime the parties to act in a manner consistent with the words we use. Furthermore, given our tendency to associate conflict with that which is negative, parties are likely primed to behave poorly in conflict. At a minimum, they are primed to adopt a competitive and adversarial approach to conflict. Therefore, a mediator's opening statement is not only an important aspect of establishing a collaborative atmosphere but perhaps it plays a role in neutralizing the way in which parties are negatively primed as they enter the process.

The Framing Effect and the Utility of Framing Negotiable Issues

The research that shows we can be made to perform better or worse in math ties the priming phenomenon with another psychological phenomenon known as the Framing Effect. In a study conducted by Sian L. Beilock from the University of Chicago,[9] a group of female undergraduates were given a series of relatively simple math problems known as modular arithmetic. Students were given horizontal math problems, represented by a left-to-

right linear equation as well as vertical math problems represented by numbers above and below one another forming the equation. Then, half of the female students were reminded of a negative stereotype, for example, that "women do not do as well as men on math." This form of priming is called the "stereotype threat condition" in which simply reminding people of a stereotype can induce anxiety which in turn decreases performance. This allowed Beilock and her colleagues to explore how a high-stress situation creates worries that compete for the working memory normally available for performance. After all, if we are stressed out and anxious, there is going to be less working memory available to deal with solving the math problems.

Jonah Lehrer, a frequent writer in the field of Neuroscience, described the results of Beilock's study on his blog *The Frontal Cortex.* As it turned out, the activation of the stereotype led to decreased performance, but only on the horizontal problems. The reason has to do with the local processing differences of the brain. The horizontal problems depended more on the same area of the brain (the left prefrontal cortex) associated with anxiety and would likely be preoccupied worrying about our math performance. In contrast, performance on vertical problems was unaffected. The vertical math problems are perceived primarily as visual spatial problems which are associated with a different area of the brain (the right prefrontal cortex) which is not distracted by our anxieties or threatened by stereotypes. In other words, according to Lehrer, "merely changing the presentation of the problem can dramatically alter how the brain processes the information."[10]

Beilock's study should also remind mediators of a classic skill we call framing negotiable issues. Mediators are trained to frame issues in neutral language to invite interest-based discussion rather than adversarial positional bargaining. This is done in order to avoid adopting the position of one side or the other and to create an inviting agenda that encourages meaningful dialogue. We frame issues neutrally to take the sting out of the topic. Thanks to Sian Beilock, we now know it also changes the way in which the brain actually processes the information. Perhaps it even mitigates the anxiety produced by conflict.

Conclusion

> It is the rule of thumb among cognitive scientists that unconscious thought is 95% of all thought.… Moreover, the 95% below the surface of conscious awareness shapes and structures all conscious thought.
>
> **George Lackoff**[11]

We have only seen the tip of the iceberg when it comes to the application of Neuroscience to the world of dispute resolution. We have seen how the psychological phenomenon of "priming" and the "framing" effect can be correlated with mediator skills including the delivery of opening statements and framing negotiable issues. However, there is much more to learn. But unlike 95% of our unconscious thoughts, advances in neuroscience make it possible for us to consciously appreciate that which we continue to learn about the brain and to think and reflect about how it applies to the field of mediation.

Prolific author Malcolm Gladwell wrote in *Outliers* that "Plane crashes are much more likely to be the result of an accumulation of minor difficulties and seemingly trivial malfunctions." This serves as a useful metaphor for any discussion of mediator skills. Focus on or use of any one skill will not by itself change the nature of the dialogue between the parties in mediation. In order to help the parties land their conflict safely, we need to use an accumulation of skills that may seem trivial when viewed in isolation. When explored in the context of Neuroscience, we can begin to see how these individual skills, utilized in conjunction with many others, can have a dramatic impact on conflict resolution and human behavior.

Endnotes

1. See Malcolm Gladwell, *Blink*, Paperback ed. (New York: Back Bay Books/ Little, Brown and Company, 2007), 55 (describing a study conducted by John Bargh, Mark Chen and Lara Burrows at New York University).
2. *Id.*
3. Po Bronson and Ashley Merryman, *Nurture Shock* (New York, Boston: Hatchett Book Group, First Edition 2009), 35.
4. John Medina, *Brain Rules* (Seattle: Pear Press, 2009), 179.
5. See Norman Doidge, Md., *The Brain that Changes Itself* (London: Penguin, 2007).
6. John Medina, *Brain Rules* (Seattle: Pear Press, 2009), 14.
7. See Iain McGilchrist, *The Master and His Emissary* (New Haven, London: Yale University Press 2009).
8. Malcolm Gladwell, *Blink*, Paperback ed. (New York: Back Bay Books/ Little, Brown and Company, 2007), 58.
9. Sian Beilock, *Math Performance in Stressful Situations*, Current Directions in Psychological Science, Volume 17-Number 5 (Association for Psychological Science).
10. Jonah Lehrer—The Frontal Cortex http://scienceblogs.com/cortex/2010/04/dont_choke.php (posted April 13, 2010).
11. G. Lackoff and M. Johnson, Philosophy in the Flesh (New York: Basic Books, 1999), 13.

Dan Weitz is the Statewide ADR Coordinator for the NYS Unified Court System. The views expressed in this article are his alone and do not reflect those of the Unified Court System. Amy Sheridan, Senior Counsel in the UCS ADR Office, assisted with the preparation of this article.

Reprinted with permission from: *New York Dispute Resolution Lawyer*, Spring 2011, Vol. 4, No. 1, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.