

# ADR LAW NOTES



## Legal Developments, Issues and Other Matters of Interest Concerning Alternative Dispute Resolution

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#### MEDIATION AND THE SCIENCE OF THE MIND

Mediators have technical process skills and oftentimes, are subject matter experts. Most likely, however, few are well versed in the neuroscience of conflict. Information derived from research on the interplay between the science of the mind, conflict, and negotiation can greatly add to a mediator's knowledge bank, which in turn, can assist parties to find resolution. Below are just a few examples of the ramifications of neuroscience to mediation.

Dr. Jeffrey Schwartz states that the mind physically affects the workings of the brain; that changes in a person's intentional focus changes the chemistry of the brain. He states that the mental act of focusing attention on the mental experience maintains the brain's state arising in association with that experience. But, if the mind reappraises the experience, the brain state will be of the new interpretation of the scene.<sup>1</sup> For example, selected parts of the brain are activated when a person identifies a scene as threatening. However, if the person reappraises the scene as beneficial, this mental state activates different parts of the brain. Mediators could use this information in a variety of ways. For example, a mediator might ask a party to focus not on his or her particular emotion, but instead, view the situation from a third person perspective. By doing so, he or she could activate parts of their executive brain function which could help them see an issue in a more objective manner.

Stephanie West Allen similarly distinguishes between a reflective mind which is more consciously controlled and a reactive brain which is more stimulus

driven.<sup>2</sup> A reflective mind enlists self observation and reflection, both of which provide opportunities for improved focus and cognitive ability. Consequently, emphasizing the use of the reflective mind instead of the reactive brain can lead to more effective negotiations.

The principles of emotional contagion and mirror neurons are relevant to mediations. With emotional contagion, the emotions and moods of one person can have a ripple effect on another.<sup>3</sup> Mirror neurons are brain cells that are said to facilitate, among other things, quick comprehension of human experiences such as empathy.<sup>4</sup> Using both concepts, a smile from a mediator during a session could result in a participant adopting the same feeling as the mediator. Or, if a mediator is functioning more from the reactive brain instead of the reflective mind, it could negatively effect negotiations between participants.

It has been reported that the neurochemical oxytocin (not to be confused with OxyContin, a oxycodone prescription pain reliever drug), which is secreted by the pituitary gland, promotes positive caring emotions such as trust, compassion and empathy, and that positive emotions facilitate creative problem solving.<sup>5</sup> Consequently, promotion of oxytocin could lead to less impasse and more resolutions during negotiations. Douglas Noll reports that shaking hands, working together, eating together,

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<sup>1</sup> The Mind and the Brain: Neuroplasticity and the Power of Mental Force; Jeffrey M. Schwartz, Sharon Begley; HarperCollins Publishers, October 2003

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<sup>2</sup> The Science of the Mind and the Brain: New Insights for Negotiators; Dr. Jeffrey Schwartz and Stephanie West Allen; Presentation at SCMA, November 2008

<sup>3</sup> The ripple effect: emotional contagion and its influence on group behavior; Administrative Science Quarterly, December 2002 by Sigal G. Barsade

<sup>4</sup> Interdisciplines: What do Mirror Neurons Mean?; <http://www.interdisciplines.org/mirror>

<sup>5</sup> Bringing Oxytocin Into the Room: Notes on the Neurophysiology of Conflict; Kenneth Cloke

and other physical contacts have been shown to raise the level of oxytocin.<sup>6</sup> Golnaz Tabibnia and Peter Carnevale report that oxytocin levels go up when we act trustworthy or if others think of us as trustworthy.<sup>7</sup> Therefore, if a central reason for relationship problems between parties is a lack of trust, then it might be useful to minimize the use of private caucuses and instead, initially work on obtaining mutual agreements on a variety of low level issues.

Douglas Noll also states that people look at the same data in different ways, depending on which cognitive operative is working. Cognitive operators provide a means to interpret confrontation. The operators include: abstractive, quantitative, causal, binary, emotional, and holistic. Therefore, rational people can see things differently depending upon which cognitive operator is dominant at the moment. Consequently, getting a person to start operating from a different cognitive operator could change the outcome of a negotiation. Techniques of reframing and summarizing back are considered tools that engage multiple operators.<sup>8</sup>

As stated by Kenneth Cloke, "Most conflicts are triggered by external experiences and information regarding them is conveyed to us by sensory inputs that have been gathered from our environment. Our conflicts therefore seem to us to take place externally, yet everything we understand about the meaning of what happened, and all of our responses to the actions of others are initiated and coordinated internally by our brains...Basic neurological processes provide all of us with alternative sets of instruction that lead either toward impasse or resolution, stasis or transformation, isolation or collaboration."<sup>9</sup>

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<sup>6</sup> Sex, Politics & Religion at the Office, The New Competitive Advantage; John F. Boogaert, Douglas E. Noll; [www.sprattheoffice.com](http://www.sprattheoffice.com)

<sup>7</sup> Let's make a deal: The Neurobiology of Fairness; Golnaz Tabibnia and Peter Carnevale; Presentation at SCMA, November 2008

<sup>8</sup> Sex, Politics & Religion at the Office, The New Competitive Advantage; John F. Boogaert, Douglas E. Noll; [www.sprattheoffice.com](http://www.sprattheoffice.com)

<sup>9</sup> Bringing Oxytocin Into the Room: Notes on the Neurophysiology of Conflict; Kenneth Cloke

### **Mediation as a Possible Preventive Measure – Meeting with a Repetitive Protester**

I recently hosted a partnering-type meditation with a contractor that has been trying unsuccessfully for the past six months to do business with the Federal Government. The contractor, which has never received a Government award, had submitted offers in response to various DSCC solicitations, chiefly for code and part numbered items. After months of failed attempts to receive an award, the contractor became frustrated and began filing protests of new solicitations with the GAO. While DSCC successfully defended the protests, the bases of the protests indicated the contractor's general lack of understanding of the Government procurement process. The representative for the contractor met with me, a DSCC Product Specialist, a representative from the DSCC Small Business Office, three DSCC Contracting Officers, and a DLA mediator for a one-day mediation session.

While there was no particular protest or issue in dispute at the time of the mediation, I pursued the offer of ADR with the contractor to provide the contractor with basic information on how to do business with DSCC and to provide an opportunity for the contractor's representative to ask questions regarding the Government procurement process in the hope of preventing future disputes. The mediation provided a forum where the contractor was able to ask numerous questions and have them answered by subject matter experts, and the contractor was quite appreciative for this opportunity. Prior to the end of the session, DSCC also provided the contractor with a list of some pending procurements for items other than code and part numbered items, for which the contractor might be able to compete.

Whether this mediation truly was a "success" remains to be seen. After defending six protests before the GAO, however, I believed it was worth the time and resources invested in the one-day mediation. I think the contractor would agree.

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### **ADR IS CHANGING IN THE EYES OF THE WORKFORCE**

Alternative dispute resolution has changed and expanded over the last several years. Many areas that

at one time never used ADR, use it today. Mediation, an ADR technique, has become an important first step in the dispute resolution process. Mediators have an important role in resolving disputes. We have to be neutral in the process. This alone can increase the chances for the parties to reconcile their differences.

At one time, many employees walking the halls of a building would resist the use of mediation to resolve their issues because they didn't view it as genuine or fair. More and more, employees are now willing to use it. They sometimes seek out the assistance the ADR structure provides. The changing view is due largely in part to mediators developing the listening skills that are necessary to be effective. Another big factor is the neutrality that good mediators are able to provide.

When participants enter into mediation, they are apprehensive and may be distrustful of the process. When they leave, they should feel as though they have been, in what I call, "the no judgment zone". When we are able to create that environment, there is an increased chance of having a successful resolution.

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### **INTEREST BASED NEGOTIATION MEETS INTELLECTUAL PROPERTY: A CASE STUDY**

Recently I had the chance to assist an interest-based negotiation exercise being run at the George Washington University Intellectual Property class for Government Contracts LLM students. Aside from the post-traumatic stress flashbacks I had walking my old law school campus, it was very rewarding to see how a key topic like interest-based negotiation was woven into a specialty class, for the overall benefit of the profession.

Faculty member and IP expert Richard Gray (OSD Office of Counsel) teaches the semester-long LLM course on IP. Midway during the year, he had Army ADR expert Linda Myers present a two hour block on interest-based negotiation. Later in the course, the students had to conduct a mock contract negotiation for the purchase by the Government of a new generation of unmanned aerial vehicles (with attendant data rights issues related to flight and power control systems). The small class (7 students) was divided into two groups, Government and

contractor, and directed to apply their negotiation skills and IP knowledge as they negotiated the contract. In Linda's absence, I provided coaching assistance related to the negotiation (carefully avoiding the alien terrain of IP and data rights!)

Overall, I thought the students had learned their negotiation skills well, often re-stating what the other side said to ensure points were understood—especially critical due to the technical nature of the subject and the fact that several students were not negotiating in their primary language. They also tried to understand the underlying interests of each side, though perhaps not surprisingly they tended to focus more on stating their own position than truly listening to the other side. The "contractor" came in way too high for initial negotiations, and later dropped much too low—leaving millions on the table—perhaps a product of the "rush to closure" one sees in structured negotiations with imposed time limits. But I was heartened to see that interest-based negotiation was part of this specialized class, and that the students came away from the exercise better informed about *interests* as well as *rights*.

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