Neuroscience Reshapes Legal Practice

An Essay by an Attorney, Mediator, and Court Administrator

By David Levin

Author's Note: I have had the privilege of working with Martha McClintock and Jill Tanz on their continuing education programs for the last several years. My work as a long time attorney, mediator, trainer, and court administrator has been changed and improved by the experience. I am grateful for the opportunity. In this essay, I would like to describe how their work was helpful for me. My purpose is to share the opening of a new door of understanding for us all: How insights from neuroscience can make us all better practitioners.

The "reasonable man" concept has long dominated law. Legal procedures, case analysis, and practices are based upon this model: Distill the material facts, identify the relevant legal theories, determine the available remedies, and negotiate or advocate for a result. The capacity and competency of a client is measured by being "reasonable." This model is based upon reason, not biology or emotion. Neuroscience, as gleaned from working from Martha McClintock and Jill Tanz, suggests that this simple perspective is too one dimensional.

The practical implications are substantial. For example, settlement conferences, negotiation sessions, and mediation might be handled differently. Traditional legal norms are often translated as "leave your emotions at the door, tell me your bottom line, and let's cut a cost-beneficial economic deal – let's just get it done."

Neuroscience findings suggest the influence of biology and emotion can compromise, and sometimes negate, the ability to make an informed, durable decision. Counter-intuitive strategies for a traditional practitioner may be necessary to achieve a good result: conduct the process based on both reason and biology and emotion. This perspective means timing, pacing, and attention must address other dynamics than reason. This essay will explore the specifics and the implications of these understandings.

A note of caution: This author is neither a neuroscience expert, nor a researcher of the literature. The neuroscience discussed here is based upon learning from the experience and expertise of renowned scientist, Martha McClintock, and her collaboration with mediator, Jill Tanz, to probe the intersection of neuroscience and practice. As an attorney, mediator, and court administrator, this author's observes that the implications of the evolving field of neuroscience for how the legal profession does business will likely be highly significant.

A starting point for discussion is the capacity for the brain to think flexibly and creatively. These qualities enhance decision making and dispute resolution. Laboratory results indicate that the brain needs more time to think flexibly and creatively. Mediators are often trained to slow down the process, which often frustrates participants driven to push for a quick solution. Science now validates the benefits of a slower process. The implications for the "pacing" of a dispute resolution process are real.

Neuroscience findings regarding the stress response are also relevant for pacing. Stress can be helpful to focus a person's attention on solving a problem. However, if a person experiences repeated stress triggers over a relatively short period of time, then the substance cortisol can flood the person. Cortisol flooding decreases the brain's ability to function efficiently, and recovery time is required for the cortisol level to come down. The laboratory validates the need for time to "cool off," such as by taking a break or by adjourning until the next day.

These findings pose challenges and offer opportunities. Time is a precious and expensive commodity. Court processes are overburdened. Legal services by the hour are expensive. There is a pressure to move rapidly. Paradoxically, more might be accomplished sometimes by slowing down: the brain will think more flexibly and creatively, and/or the brain will function more efficiently given time to recover from a stress response.

The lesson is that neuroscience has identified additional dynamics that are at work in the crucibles of settlement conferences, negotiation sessions, and mediation. Practitioners need to be aware how these dynamics may influence the interactions during the process.

The discussion of pacing suggests that a practitioner should include neuroscience dynamics in planning. Design the decision-making process to anticipate stress responses. For example, (1) a pre-mediation session dealing with the family's anguish arising from an alleged wrongful death may make a later joint session more productive, and (2) after a stressful period take a break or adjourn overnight.

Neuroscience also validates the importance of the early stages of mediation. These stages are intended to build a working relationship between the mediator and those in the room. Participants, who would prefer to jump to deal-making, may be impatient. Neuroscience suggests that there is value to be gained by taking the time.

Consider the mediation practices like building trust and rapport, making sure parties understand they have control over the decision, the benefits of acknowledging emotions, and having the parties feel being heard and understood by the mediator. Stress and emotional triggers can be avoided and if experienced, can be less damaging.

Mediators are trained to take the time to build a safe environment. Parties in conflict are already stressed. Coming to mediation by itself can be a trigger. In an unfamiliar environment with an unfamiliar mediator, a party is anticipating a confrontation with their opponent. The party may already be triggered. There are also many potential stress triggers present, and the effect of additional triggering will accumulate within the party. Neuroscience validates the importance of the early stages of mediation.

In the beginning, each party will state their position, why they are right, and why the other party is wrong. After the initial "story telling" or "opening statements," the conflict comes to the fore. Differences are emphasized. The situation may seem intractable. Common interests and mutual solutions seem impossible. This is a moment when parties can become stuck and stalemate can result. There is a temptation to jump to finding options and solving the problem. Yet, the parties

are experiencing a mine field of stress triggers and may not be in a position to think through their options clearly.

Stress and strong emotions can diminish the capacity to participate in a decision making process. Triggers evoke stress and emotion. Can decision-making processes be designed to minimize triggering a response? Time is required for a stress or emotional response to dissipate. Can decision-making processes build in dissipation time?

Mediators are trained to ask each party to "tell me more about" their situations. With the goals of unearthing more information and identifying underlying needs and interests will surface. The purpose is to bring more to the table than the opening positions. Neuroscience indicates additional benefits. Stress may be dissipated. Additional stress triggers may be minimized. The slowing down may also enhance flexibility and creativity. Neuroscience is validating the process.

Contract law illustrates the importance of these concerns. Among the elements for assessing whether a contract is enforceable is whether a party was competent to enter into the contract. If stress and emotion can compromise capacity, then what are the implications for creating a "competent" contracting environment?

Emotional responses are the subject matter of this workshop. However, observations from the laboratory regarding stress responses are helpful. A further discussion of stress responses fits the purpose of this essay: to understand how neuroscience reshapes traditional legal practice.

A stress response can be invisible. The affected person may not be able to detect and to report a stress response. An observer may not detect the presence of a stress response at all. And, the response may be escalating. A cortisol stress response takes time to dissipate. An additional cortisol stress response builds on the first one. The impact goes higher and takes longer to dissipate. The resulting incapacity to participate in decision-making is both invisible and longer.

Practitioners are not expected to take blood samples to monitor the stress levels of those in the room. The message is different: Be mindful that difficult moments during a session may require recovery time, even if overt symptoms are not apparent. Further, the old adages: "keep them in the room until they agree" and "do not let them out before they sign, to prevent them from backing out" may be counterproductive.

The bottom line message is: science is showing that common assumptions for legal processes may be misleading, if not potentially problematic, and other common assumptions for mediation are being confirmed. Martha McClintock and Jill Tanz's work suggests that legal practitioners may need to revisit how they do business and learn from emerging neuroscience how to adapt legal processes to new information.

The discarded "Triune Brain" Theory is illustrative. During the mid-twentieth century, there was a belief that there were three separate, independently functioning parts of the brain: (1) the cortex for reasonable and rational thinking, (2) the amygdala for emotions, and (3) the brain stem for physical functions like breathing. Legal processes were only for the cortex: "Check your emotions at the door."

Martha McClintock teaches us that the brain is an integrated organ. Yes, there are different and identifiable parts. However, everything is inter-related. Activity in one area affects other areas. The Triune Brain concept is too simplistic. Rational thought, emotion, and body functions cannot be neatly segregated. Legal processes need to be aware. The thoughts of the reasonable man are directly tied to "his" emotions.

Self-determination is a cornerstone of settlement conferences, negotiation sessions, and mediation. The parties make their own decision how to resolve the dispute. In arbitration or trial, another makes the decision for the parties. Neuroscience considerations have significant implications for self-determinative processes:

- The process itself should be designed to enhance and support competent decision-making;
- The process should avoid triggers which compromise or constrain decision-making;
- The capacity of the brain to competently participate should be maximized.

Emotional responses are key components. Martha McClintock's presentation at this workshop will illustrate how handling emotional responses can create an "effective" or "disruptive" brain state for participation in decision-making. Venting, a commonly used technique, is a prime example.

For purposes of this essay, this author terms an "effective" or "disruptive" brain state as whether the scientifically measureable state of the brain that facilitates or impairs decision-making. The focus here is the implications of these findings for practice. The underlying science is left for Martha McClintock.

Venting. Pent up and unexpressed emotions can impair the capacity for good decision-making. A traditional view is to "let the party get it off his or her chest." Let the kettle blow off its steam. How "venting" is accomplished can be critical. Just letting the volcano rage can backfire, because rather than to deescalate emotions, aggression may actually be increased.

Practitioners, such as Jill Tanz and this author, believe that (1) venting can escalate the feelings within the person venting, and (2) trigger an emotional response in the other party. These observations are not the final argument for avoiding joint sessions. To the contrary, mediation training offers more nuanced ways to handle emotion which help to reduce its intensity, while still helping opposing parties to see the depth of emotion involved.

Again, an essential technique is "acknowledgement," taking the time to hear and to reflect back a party's needs and interests. The technique, which is commonly taught in mediation and dispute resolution trainings, allows the person with the pent up emotions to more safely let them out. After the person has been truly heard, typically the person relaxes and slows down, strengthening brain creativity and flexibility.

If someone feels unheard, observed less helpful behaviors include (1) "yelling" louder again and again to get attentions, (2) listening to what is happening solely for the purpose of counter

attacking, and (3) repeatedly insisting upon the same points. Brain creativity and flexibility is compromised.

For the other party listening to the interaction between the neutral and the venting party, there can be benefits, including (1) seeing a threatening situation handled in a safe manner, reducing the listener's emotional triggers, (2) gaining a understanding of the other party, which may widened the possibilities for a productive discussion, and (3) experiencing a de-escalation of the emotions in the room and the emergence of a safer and more constructive environment.

The laboratory adds a new finding. Brain studies indicate that if a person verbally names his or her own emotion, then the emotional flooding more fully dissipates. Naming the emotion for yourself is more powerful than hearing another acknowledge your emotion. This finding suggests that rather than to have the neutral name the emotion, the dynamics of discussion should support self-naming. This is an important paradigm shift for how dispute resolution techniques are taught and practiced.

There is a transdisciplinary approach for dispute resolution emerging, neuroscience aware mediation. Laboratory results are pivotal. Practitioners can move from intuitive and experienced based approaches to scientifically based techniques. The laboratory findings can both confirm intuition and be counter-intuitive. Neuroscience is also rapidly evolving. New findings support and/or contradict current understandings, and/or open new doors.

In summary, dispute resolution, including settlement conferences, negotiation sessions, and mediation, is based upon understanding how humans work in the presence of conflict. Neuroscience is offering new insights for human dynamics. The findings are valuable both for dispute resolution and for all endeavors, including the operation of other aspects of the legal system. The challenge, and the exciting opportunity, is to build going forward better and more effective dispute resolution systems using the emerging information from neuroscience.