Neuroscience and Mediation – Is it all lavender and lemons?

It sounds miraculous. Using the scent of lavender or lemon and serving hot drinks to parties can help them solve problems more creatively and act more reasonably. Some legal commentators claim the integration of mediation and neuroscience[1] will revolutionise the process of settling cases. But is this touting of neuroscience research just the latest fad in the field, the phrenology of the 21st century? What does it add to practice of mediation?

A new survey of Australian mediators aims to answer this question, by asking practitioners about their use of neuroscience research in mediation. Bond University postgraduate law student Jean Di Marino carried out the research as part of a thesis for a family law mediation subject.

She contacted 30 Registered Mediator Accreditation Bodies (RMAB). Several of the Directors and CEOs gave interviews, as did other practitioners. The responses of a representative sample of mediators were set out in her thesis.

Most said neuroscience research had deepened their understanding of what occurs in their clients' brains in high-conflict situations and how to better manage those. Some felt it had bettered their own ability to remain calm and functional in the eye of the storm.

But one practitioner voiced concerns, calling for greater testing of the research in the mediation setting and mandated accreditation.

Shaping the process: 'Once you step into the mediation, neuroscience becomes everything'

Lorraine Lopich, Director of Mediate Today, commented that once parties step into the mediation, "the neuroscience becomes everything. How you've assessed them as individuals may bear no relationship to what happens when you see them interacting," she said. "It's at that point you have to think, 'How do I now work with these people to keep them able to use that rational brain to do what they have to do?'"

She added this often prompts her to start a mediation from a positive point of view. "If it's a workplace dispute, the first thing that I'll get the parties to do is to tell me, 'What is it about this job that makes you want to work out the problems that you're facing? What are the things that you feel that are happening that are making it less of a good place?'"

"So instead of being the problem themselves," she explained, "they're identifying what the problem is and using their rational brain to resolve the problem."

Ms Lopich said she also tries to promote discussions in joint session, at the expense of private sessions. "You want people to feel as trusting of the process as possible. If people feel suspicious about what you're doing, then they're moving into the part of the brain that is all about self-preservation, rather than being able to logically look at something that is going to provide a good future."

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[1] The neuroscience is the study of the neurological processes taking place during conflict, specifically the discovery that the brain possesses two systems for responding to stress, creating a dual pathway that permits reason to override an emotional response. Many studies focus on factors converting a self-protective fight/flight response into reasoned collaboration.

Some mediators are using their knowledge of this research to coax clients into solving their problems more creatively, rather than reacting instinctively to ensure their own survival.

Changing techniques: 'It … gets me into the inner circle a little faster'

Emily Dewberry, who practices in commercial litigation mediation, said neuroscience training has led her to moderate her approach. "My area tends to be very hard-nosed. There's a lot of bluster," she explained.

"Rather than meeting it head-on, now I sometimes take a less head-on approach. So rather than saying, 'You said this. I need to challenge you on that,' I might only work up to that, after trying another couple of things first."

She has also adopted her instructors' suggestions that parties be kept physically comfortable at mediation, "One of the things that stuck with me from the course was the study around 'holding a warm cup makes you feel warmer.' I've really taken it to heart and encouraged drinking of warm drinks as opposed to cold water for example. I understand that. I feel that when I have a warm drink, I feel better."

Ms Dewberry said the neuroscience training has reinforced other techniques she already used instinctively, such as encouraging greater personal contact and the use of inclusive language in mediation. "Rather than getting the worst out of the lawyers, sparking the fight-flight reactivity, I try to appeal to their kinder side," she explained. "I make contact with each of the parties and their legal representatives before the mediation. When they've heard my voice, I'm not a stranger any more so it kind of gets me into the inner circle a little faster."

Respect, Respect, Respect

Coordinator Elizabeth Woods wrote that many of the clients, who present to the Conflict Resolution Service (CRS) in the ACT, have long-term habits of using combative language and blaming others when in conflict.

She said she and her colleagues have discovered that the attitude of the mediator is crucial. "We have learned to be calm, warm and empathic in manner and tone of voice, even when we are sometimes experiencing stress ourselves," she elaborated. "Even when we are under attack from a client ... Quite simply, the 'madder', the more irrational, upset or angrier the client, the more we need to do this."

Elizabeth Woods said the results have been positive: "Many very upset people will calm down eventually and begin to sound more reasonable," she explained. "When this happens, reality testing, problem solving and even coaching become possible. Not before."

Educating the mediator

Emily Dewberry said she believes the neuroscience training may have helped improve her own performance. "When things get heated, I can see it a bit more clinically than otherwise I would have done, which gives me then the ability to find more tools to try to deal with it," she explained.

"And I can talk people down off the cliff a bit faster," she added. "I can say, 'Look, I know that person is upsetting you but my experience is, we've got them backed into a corner and of course, that's how they're going to respond, and we have to see how we can get them out of that frame of mind.'"

Cautionary words

Unlike many of the others surveyed, mediator and educator Dr Rosemary Howell has not been tempted to change her techniques to incorporate neuroscience findings. “The problem for most mediators is that we are not scientists, most of us. We only know a little bit about what we read.”

She is calling for greater research into neuroscience findings. “I think it's quite a young science, and it's like pop psychology. I think everyone's getting on the bandwagon, and I think we have to be more thoughtful about it and have some more evidence on it.”

She is also calling for more rigorous training for mediators who intend to incorporate it as a tool. “I use Myers-Briggs quite heavily in my coaching practice with lawyers,’ she explained. “I have studied it. I am certified. If I were going to have a huge reliance on neuroscience, I would need to do the same in terms of study and accreditation.”

But she suggested, even with this, that mediators employ their knowledge with great care: “I have come to realise that when you are considered to be a successful mediator, people want your good opinion. So, you have to be particularly careful about the signals you are giving or you can get them to do all kinds of things without realising that you are actually manipulating them.”

“It is a position of great privilege and power, and we have to exercise it with care and restraint …rather than enjoying the game of being so clever that we can read everybody and know what to do in every circumstance.”

Jean Di Marino was qualified as a solicitor in Queensland in 1993. After 20 years in journalism, she’s returning to the law and studying for a Juris Doctor to refresh her legal knowledge.