



Eleanor Barr

Neuroscience and negotiation

Our state of mind changes often under the stress of negotiation. Response to these changes may determine success

What can neuroscience teach litigators and negotiators? It can show us that our state of mind changes often, particularly under pressure, and that we will be able to perform better when we become more aware of our own – and others’ – changing mind states.

Let’s face it, as lawyers, we encounter many stressful circumstances – whether we’re making sure we don’t miss a statutory filing deadline, dealing with an obstreperous opposing counsel or an unsatisfying client, preparing for trial, or negotiating a settlement in mediation. Developing an awareness of our own brain states will enable us to operate from a brain state that promotes optimal performance, rather than simply letting circumstances determine our state of mind.

For the purpose of this discussion, I use the terms “brain” and “mind” interchangeably, although there is not a consensus on a single definition for these terms. Regardless, most of the research agrees that brain states tend to vary depending upon the level of stress we encounter and that the goal is to act from an integration of our various brain states.

When we’re able to choose how we respond to the challenges and demands of our life, we are operating from what scientists call “neural integration,” where all parts of the brain are working together. “The key... is collaboration across (mental) states, not some rigidly homogeneous unity.” (Siegel, Daniel, M.D., *Mindsight*, 2011.)

Let’s look at some examples of how neuroscience can help us develop new neural connections to respond more effectively in our work as lawyers, and more specifically, in our negotiations.

Helping clients make a good decision

You’ve agreed to mediate a case after becoming aware of newly discovered facts

that substantially lower the value of the case. Your client, however, hasn’t been able to absorb that these facts drastically reduce case value, despite your efforts at explaining this. During the mediation, the defense opens with a very low offer and your client, who is not familiar with the haggling that can occur during the negotiations, becomes extremely disheartened. In fact, she shuts down – literally. Her whole body goes limp and she can only talk in fragmented sentences. She is expecting the defendants to acknowledge their wrongdoing and offer her a half million dollars. Here, your client’s emotional brain dominates and she is unable to think rationally.

Realizing that she hadn’t listened to your advice that her case has very little value, you get angry at her, and she gets upset and overwhelmed and walks out of the mediation.

Two days later, you both are calmer and you speak with her about the problems with her case. She is now able to listen to you and absorb the information. What changed? Your client was acting out of her limbic (i.e., emotional) brain at the mediation, and once she heard the extremely low offer by the defendant and the anger from her lawyer, she felt fearful and left the mediation.

Put another way, during the mediation, your client’s brain was hijacked by the amygdala’s fight/flight/freeze response.

When people experience stress, the emotional brain takes over and it’s difficult for them to “be reasonable” or “act rationally.” At that precise moment, they don’t have access to the rational part of their brain – the neocortex. The neocortex is the thinking brain and it forms abstract thoughts, analyzes information and helps us make good decisions.

Two days later, however, plaintiff’s prefrontal cortex kicked in and calmed down the amygdala and she was able to

keep her emotions in balance, and access her neocortex as she rationally discussed the case with you.

Here are some suggestions to assist a very emotional client during mediation:

- Take time before the scheduled date of the mediation to discuss difficult issues about the case, especially those that will adversely affect case value. Clients shouldn’t be surprised to learn this information on the day of the mediation. Difficult news needs to be delivered over time so the person can absorb the information and then appropriately act upon it.
- Have your client bring a trusted and thoughtful friend or relative to the mediation to help your client evaluate settlement options.
- Explain the situation to the mediator to see if the mediator can frame the discussion and the negotiation to promote thoughtful responses on both sides. An extreme opening demand or opening offer can be unproductive, especially when dealing with clients who are not familiar with how negotiations unfold in litigated cases.

Neuroscience and joint sessions

Thanks to a recent discovery called mirror neurons, neuroscientists have shown us that brain states are contagious. Simply put, mirror neurons enable us to pick up signals from the internal states of other people surrounding us. (Iacoboni, M., *Mirroring People: The Science of Empathy and How We Connect with Others* (2009).)

How do contagious brain states play out in a negotiation? If we come to a mediation agitated and angry, those surrounding us will pick up on this state, and may even mimic it. If, however, we come to a mediation calm and curious, we will be more receptive to others and will likely have more influence on them than if we are angry and agitated.

See Barr, Next Page

People often reject the joint session in mediation because they fear that each side will offend the other and this will prevent a productive negotiation. However, with strategic planning – and a receptive state of mind – I’ve seen progress occur much more quickly in a joint session than in private sessions.

Here are three examples:

A focused joint session

Plaintiff, a minor, alleged sexual harassment and wrongful termination against her employer, a family-owned company. The case had not yet been filed and therefore no discovery occurred. The parties began the mediation in separate rooms. Defense had an insurance adjuster present. After listening to each side in private sessions, I thought it would be helpful for the defense to meet plaintiff and hear her side of the story. We had a very short and focused joint session where the plaintiff told her perspective. The attorneys did not make any arguments on behalf of their clients. Defendants thanked plaintiff for sharing her story and went back to their private room.

Shortly after the joint session, the insurance adjuster offered the policy limits and the case settled quickly.

This use of a joint session was helpful in allowing the defendants to understand plaintiff’s point of view. Plaintiff was able to share her experience – not in a histrionic way, but simply to explain her perspective. The insurance adjuster was then able to evaluate the case, not only by doing a standard risk analysis, but also by observing firsthand the plaintiff’s experience. The interaction in the joint session had an emotional impact on the insurance adjuster which, in turn, encouraged the adjuster to negotiate much more cooperatively than she would have had she stayed in her own private room the entire day.

Perhaps the adjuster would have offered the policy limits at some point later in the mediation, but by connecting with the plaintiff early on, the adjuster was able to justify her decision more authentically and more quickly. From a brain state perspective, the adjuster’s

limbic area was activated when, during the joint session, she saw the pain in the minor plaintiff’s face as she described in her own, unscripted words what had happened to her.

A lesson in respecting each side’s perspectives

In a false imprisonment case, the plaintiff, a teenage boy sued a store that accused him of shoplifting and held him against his will. From the plaintiff’s perspective, he walked into the store with merchandise to return and had left the receipt in the car. He spent time perusing the store and then exited the store with the merchandise in hand. The store’s loss prevention detective accused the plaintiff of theft and didn’t let him get the receipt. Instead, the detective called the police and a subsequent, unsuccessful, prosecution ensued.

Instead of immediately recounting the facts favorable to the defense, the defense lawyer began his opening statement as follows:

I grew up in this area and went to the same store when I was your age. I know what it feels like for store clerks to think that you look like a potential shoplifter when you walk into these kinds of stores, because they did the same thing to me when I was your age. So I can imagine how you felt when the loss prevention detective stopped you and assumed that you stole the merchandise.

The defense lawyer created a connection between him and the plaintiff by identifying with the plaintiff and expressing empathy to him. He let the plaintiff know that he understood him. By doing so, and establishing the connection, the plaintiff was able to listen to the defense lawyer explain his client’s side of the story in a way the plaintiff could really grasp:

But let’s think for a moment how the situation could have been perceived from my client’s perspective. When you entered the store, you did not go directly to the checkout counter to explain that you were seeking to exchange the merchandise. Instead, you walked around the store looking at merchandise for quite some time. Can you see how my client could have believed that

when you walked out of the store with the merchandise, you stole it?

As a result of this discussion, the plaintiff was able to listen to the defendant’s position with an open mind. This, in turn, encouraged the defense to be more open when listening to the plaintiff’s perspective. When the parties began to discuss numbers, the lawyers for both the plaintiff and the defendant negotiated competitively. However, because both sides had taken time to truly listen to each other at the beginning, they were able to stay calm and thoughtful even during a competitive negotiation.

From a brain state perspective, the defense lawyer’s connection with the plaintiff in the opening joint session set the stage for plaintiff to reciprocate in his behavior. Positive mirror neurons were influencing each other’s behavior and each party was more responsive and less reactive to the other party even when they negotiated competitively.

An effective joint session when at impasse

When we reach an impasse in a negotiation, we often feel stuck and stressed out. The more stress we experience, the more the brain gets stuck in a loop of reactivity during which we produce more stress hormones; this, in turn, locks us in a reactive state of mind. When the stressed state becomes our default neural wiring, we have no other option but to react.

How does this play out when we reach impasse? We become overly competitive or we shut down or we leave the mediation. In short, the amygdala’s fight/flight/freeze response takes over.

But let’s reframe the impasse as an opportunity instead. In order to do so, we need to think about the negotiation in terms of process and substance. *Process* is the *manner* in which we interact with the other side – our tone of voice, our empathy for their position, in short, our attitude. *Substance* is the *content* of the negotiation, or put another way, the deal points.

If we are overly competitive, both in our manner and content of our negotiations, then the other side will likely react

See Barr, Next Page

from their amygdala, the highly emotional part of the brain. However, if we think about being cooperative with the other side through the *manner* in which we interact with them while simultaneously remaining competitive about the *substance* of the negotiation, we increase the chances for a successful negotiation.

Here is an example

I recently mediated an employment case and there were two lawyers on the defense side. One was the litigator and the other was the defendant's general counsel. The litigator framed the case aggressively and began the negotiation with very low offers. Plaintiff and her counsel were discouraged and responded by making very small moves down from their opening demand.

Toward the end of the day, the general counsel said he had to go but that he wanted a short joint session to talk to plaintiff and her lawyer. He entered the plaintiff's room very calmly and spoke softly and respectfully. He apologized for having to leave an hour early and explained very nicely that his client would not pay more than a certain amount to settle the case. He said that he understood if this settlement amount didn't work for the plaintiff, and he was sorry that the parties were unable to reach an agreement. Plaintiff and her counsel were more open to listening to the defendant's general counsel because his interaction with them was respectful and cooperative even though the general counsel was taking a competitive position on the settlement number.

In brain state terminology, the general counsel's cooperative manner of interaction kept the plaintiff's state of mind calm. Had the general counsel

taken an aggressive approach, then the plaintiff and her counsel would have been reacting from their amygdala and unable to listen to his settlement position. The result: an exchange of receptivity. When the plaintiff showed receptivity to the defense counsel, then the defense counsel was more receptive to the plaintiff, and this reciprocity was the glue that kept the parties on track even while they continued a competitive negotiation to reach settlement.

Mediators can get caught up in their own agenda

Even mediators need to be aware of how their state of mind can affect a dispute. Recently, I was mediating a complicated case that involved complex agreements between the parties regarding their respective environmental cleanup obligations. One side appeared to be ignoring the agreements, and this became troubling to me over the course of multiple mediation sessions. At one session, I decided to focus on the contract's obligations, gave my evaluation and expressed my frustration to the recalcitrant party.

When I prepared for the next session a week later, my brain state was anchored to what happened in the last session. I had prepared again to have a lengthy discussion on the contract obligations with the party who appeared to be ignoring them.

However, at the next session, I saw everyone calmly assemble into the joint session and noticed that they were relaxed and spoke to each other with ease. They came to the mediation ready to talk about making a deal and were well beyond a detailed discussion about the complicated agreements. I, however, needed to catch up with them. I walked

out of the room and sat for a moment by myself and I consciously focused on being open to everyone in that room, because it was clear that my agenda of continuing a forceful evaluation of the contracts was the wrong approach.

Why was the approach I took a week earlier entirely ill-suited a week later? The participants' brain states changed. Last week, they needed me to be a nonsense evaluator; this week, they needed me to be a facilitator. I almost missed the cue, because I came to the mediation session with my amygdala primed for a fight about the contracts, but luckily I was able to change course before I acted out of my reactive state.

Conclusion

We increase the likelihood of optimal performance in our negotiations when our minds are receptive rather than reactive. Through receptivity, we can discern how to respond by drawing upon an integration of brain states. By doing so, we are increasing the likelihood of not only an optimal settlement, but also an optimal settlement process for our clients.

Eleanor Barr began practicing law 27 years ago litigating in the areas of environmental, employment, business and First Amendment law. In 1999, she opened her mediation practice, Barr Mediation, and for the past 17 years, she has mediated well over 1300 matters in a variety of areas, including employment, environmental, business, insurance coverage and personal injury. She graduated Phi Beta Kappa from Indiana University and received her J.D. from Indiana University Law School in Bloomington. She can be reached at eleanor@eleanorbarr.com.

