

MCLE: Using
Email at Trial

Gender-Neutral
Writing

Social Media Reins
in Harassment

False Claims
Roundtable

ADR Resource
Guide

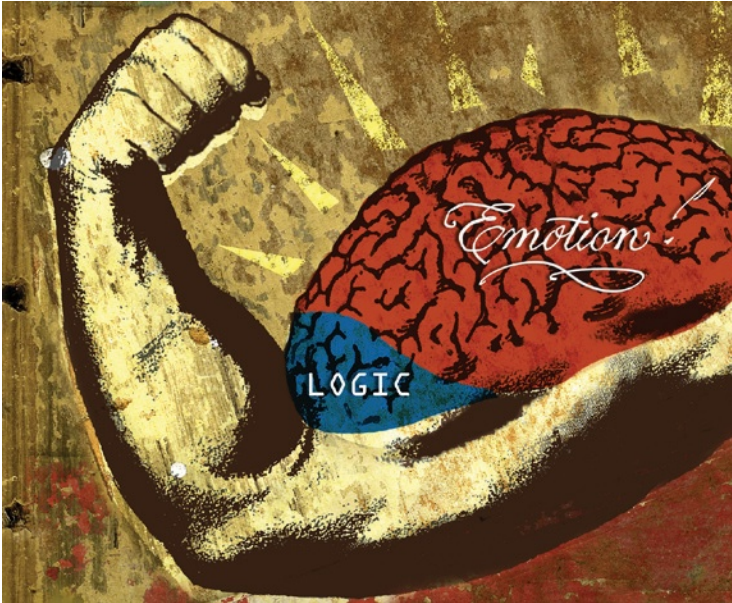
California LAWYER

callawyer.com | AUGUST 2015 \$9

Vergara v. California



Legislating a
Right to Die



MEDIATION

Feelings in the Fray

Mediators increasingly take brain science into account.

Think you make most decisions rationally?

Think again: Brain science shows humans are hard-wired for emotion, even in professional settings. Litigators and their clients are no exception, but traditional court procedures don't leave much room for this reality.

Many mediators, in contrast, do incorporate elements of psychology into their process, and there's growing evidence that understanding

Verbatim

“Few witnesses want to testify, and if given the choice, almost none would. Answering embarrassing questions or reliving a traumatic event is a miserable experience, and people surely have better things to do with their time. But much like jury service, witness testimony is not optional in our justice system—it is essential.”

—Ninth U.S. Circuit Judge John B. Owens, writing in *Barnett v. Norman* (782 F.3d 417, 424–25 (9th Cir. 2015)).

“The willingness to forgo a benefit in order to exact a price for perceived unfairness can interfere with parties’ ability to reach a successful resolution.” —**JAMIE JACOBS-MAY**, MEDIATOR

the role emotions play in legal disputes can help smooth negotiations. Because neutrals serve as an increasingly important safety valve in the overburdened state and federal court systems, this could have broad application.

JAMS Chief Operating Officer Kim Taylor says mediators manage emotions in every case they handle, and more have begun applying principles of neuropsychology. She notes that mediators must be creative, interpret body language and expressions, and understand what drives decision making.

Neil Smith is a neutral with Rimon in the Bay Area. “In some ways, the science reinforces what good mediators already do, focusing on the emotions of the parties,” he says. “But now we have the evidence of what really goes on.”

Pivotal to this shift has been research by University of Southern California neuroscientists indicating that people with a damaged amygdala who couldn’t feel emotions also made poor decisions. Team leader Antonio Damasio is now studying the role of the nerve coating myelin in modulating emotion. But such findings have only recently been applied in legal settings.

“I always thought people were rational and logical,” says Phyllis Pollack, a Southern California mediator who special-

izes in “Lemon Law” consumer product cases and has conducted more than 1,400 mediations. “Now that I have studied some neuroscience, I’ve learned decisions are 99 percent emotional and 1 percent logical. ... There are chemical reactions in the brain we weren’t previously aware of.”

Humor and trust can trigger powerful chemical reactions. “So I crack jokes to get those endorphins firing,” says Pollack. “And oxytocin, the trust chemical, floods the brain with positivity, building rapport and relationship between the party and the mediator.”

Similarly, neuroscientists at UCLA found that the region of the brain associated with rewards became active when study participants got a fair deal in a game, while the region associated with moral disgust was activated by unfair treatment.

“The willingness to forgo a benefit in order to exact a price for perceived unfairness can interfere with parties’ ability to reach a successful resolution,” says retired judge Jamie Jacobs-May, now with JAMS. To mitigate and help parties transcend their emotional reactions, she offers them respect, transparency, and the opportunity to be heard and understood.

Such elements make the mediation equation even more complicated, says San Fran-

cisco-based mediator Elizabeth Bader, who writes widely about incorporating neuroscience into mediation. Bader says people who have experienced trauma sometimes see litigation as a new trauma, but they may not reveal that. So mediators must be perceptive. For instance, traumatized parties may be less able to modulate their fight-or-flight responses and therefore more likely to argue or stop participating in a negotiation. “We are really in the Stone Age when it comes to telling the differences between different types of people and their biological and psychological needs and responses,” she says.

Counterproductive neurally based responses may even be provoked by a desire

to maintain self-esteem, or by the common phenomenon of exaggerated positivity, in which people overemphasize their good qualities, University of Texas professor Jennifer Beer found. This means mediators must develop “gentle modalities,” Bader says, to keep rationality front and center. For instance, mirroring—imitating minor physical actions of another person, such as picking up a coffee cup, leaning back, gesturing, touching one’s face or hair—builds trust. “When you build rapport by mirroring, in which your body affects their body, the nervous system has a chance to regulate again,” Bader says. “It’s not so much what you say, but what you do.” —SUSAN KOSTAL

TRAFFIC COURT

Just the Ticket for Citations

By next month, all California courts must update their forms and websites to clarify that drivers do not have to pay a traffic fine before disputing the related ticket.

Chief Justice Tani G. Cantil-Sakauye of the state Supreme Court called for the change in May to help improve access to justice. Legal and civil rights groups reported the month before that traffic fines have soared in recent years and can be crippling for poor people.

Advocates say drivers often feel forced to plead guilty and pay the fine because they’re unfamiliar with the legal process or have limited time and money; hiring a lawyer to dispute a ticket can cost more than paying it quickly.

But it turns out there’s an app for that, called GetDismissed. For \$79, GetDismissed promises to produce, within 48 hours, a defense statement for you to send the court to request a trial by declaration. The statement is based on photos of your license

and ticket plus information you provide about what happened. The company said it doesn’t know how often its declarations are successful. By July, there was only one online review of GetDismissed, but a similar service—TicketBust.com, from the same people—averaged 1.5 stars (out of 5) in 197 reviews on Yelp. At TicketBust.com, help fighting a minor violation costs \$99; help with more serious violations is \$249.

More important, perhaps, is the fact that you don’t forfeit your right to attend traffic school—and erase violation “points” from your record—by contesting a ticket, as California Lawyer has reported [“Ask for Traffic School!” Practical Tips, April]. That right depends on your alleged offense, your record, and what type of vehicle you were driving. And it remains in force even if you’re found guilty. Of course, none of this changes the fines that can be levied. It just may be a bit easier now to keep them in check. —LAURA IMPELLIZZERI