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Don't let advocacy in mediation be as futile as a political conversation

Have you ever had a conversation with someone from an opposing political point of view in which you articulately and passionately laid out several unassailable reasons why he or she was wrong and the person responded by admitting the error of his or her thinking?

If not, you are not alone.

In this situation, as in a mediation session, you are up against a brain "heuristic," or shortcut, known as confirmation bias, which simply means that humans look for and find evidence to support already existing beliefs while ignoring evidence to the contrary.

Confirmation bias, which has been extensively documented by Nobel laureate in economics Daniel Kahneman, was applied to political discourse in the experiment run by psychologist Drew Westen at Emory University during the 2004 presidential election — as described in his book, "The Political Brain."

Thirty self-described "strong" Republicans and Democrats were put inside a functional magnetic resonance imaging (fMRI) machine and asked to review statements by George W. Bush and John Kerry in which the candidates clearly contradicted themselves.

As participants lay in the scanner they were shown a series of slides containing statements from the candidates and six politically neutral individuals. The first slide presented a quote from the candidate, the second slide provided a contradictory statement, the third slide gave them some time to think by asking whether the statements were contradictory and the fourth slide asked them to rate the extent to which they agreed that the statements were contradictory.

Not surprisingly, the participants easily recognized the opposition candidate's contradictions, saw far less for their own candidate and showed no difference in their responses to the contradictions of politically neutral figures.

The most interesting result, however, was observable in the parts of the brain that showed increased activity on the fMRI screen. The more primitive brain areas involved in emotions lit up as the participants predictably let their own candidates off the hook and the areas of the brain involved in reward were also activated as the participants reached the conclusions they were most comfortable with.

Importantly, the more evolved areas of the brain normally involved in reasoning and creative problem-solving stayed dark.

Most of us can instantly recognize this failure to use the ability to reason in the behavior of our brother-in-law or neighbor from the "wrong" political party or the opposing counsel who we deem frustratingly hard-headed. (It is a bit harder to acknowledge our own brains might be doing the same thing, particularly after we have been in a political party or worked on a case for a long period of time.)

Confirmation bias is used quite effectively in communications with juries and even judges, and as Houston defense lawyer Mark Bennett controversially argues in his blog, may be particularly useful for prosecutors and plaintiff attorneys who want to engage the primitive parts of the brain by telling a simple story that evokes immediate associations and networks in the brain. But in mediation, where the decision-maker is the opposing party and you



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need him or her to be reasonable and creative in coming to a resolution, using certain trial advocacy skills may backfire.

So how do you avoid engaging the "reptile brain," as psychologist and author Martha Beck calls it, and more productively engage reasoning circuits?

Your opening presentation in mediation is an excellent opportunity to get the other party into a helpful "frame of mind." Before getting into the nuts and bolts of the merits, try acknowledging the other party in some way, gently asking nonthreatening questions

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or presenting yourself as just a lawyer doing his or her job to help the other side look at the uncertainty inherent in going forward with the alternative of a trial.

Some lawyers have started skipping opening presentations, as they have sensed from past experience that things go downhill if lawyers make arguments at the beginning of a mediation. But this is shortsighted because it does not take into consideration that unlike a trial, there are no rules about what can be included in an opening presentation in mediation and there is an opportunity to defuse emotion that may not come up again later in the session.

The use of humor, surprise or complexity may also be effective in moving someone out of "reptile brain" thinking and can be used at any point in the mediation. And noticing your own emotional reactions can help you snap out of an emotional response and use the more rational part of your own brain, which will go a long way in encouraging cooperative behavior from the other side.

In short, the more you approach mediation as a joint problem-solving session among a group of people who each have something important to add to the discussion, the less risk you will have of finding yourself embroiled in an argument between brains where the prefrontal cortex has "gone dark."

Having awareness of confirmation bias will not only improve your effectiveness in mediation, it may also improve the collegiality you enjoy in your practice as you recognize that all of our brains work in this way to one degree or another. It might also make Thanksgivings, and those inevitable political discussions, more enjoyable.