Theodore Roosevelt American Inn of Court

"Resolving Disputes through Mediation:

Helping Your Clients Navigate the Courts in a Pandemic "

Thursday, October 29, 2020 at 6:00PM

via zoom

Presenters: Jess Bunshaft; Hon. Marilyn Genoa; Ira Slavit; William Croutier; Rachel Harris; Danielle Marino; and Dallas Park

Special Guests: Dan Weitz, Director of the Division of Professional and Court Services and Statewide Coordinator of the Office of ADR Programs for the New York State Unified Court System and Yvonne Marin, Nassau County ADR Coordinator

THEODORE ROOSEVELT INN OF COURT
ADR PROGRAM – OCTOBER 29, 2020

Fact Pattern

The case is an action to recover damages for personal injuries sustained by a 37-year old woman who was injured in an accident which occurred on August 18th, 2017 while she was in the course of her employment as a sanitation worker for a municipality.

The plaintiff was part of a 3-person crew assigned to a garbage truck that collected garbage from dumpsters at residential and commercial locations along a route that the plaintiff had worked on for a number of years. One of the locations was a private apartment complex that they went to three times per week to empty three dumpsters that were situated in the rear corner of the parking lot behind the complex. The dumpsters were owned by the apartment complex and were used by its tenants and employees.

The garbage truck was of the typical type with a rear opening to a hopper into which trash is placed. Each dumpster had a metal trunnion bar (arm) on each of its sides that extended horizontally out from the dumpster. In order to empty the contents of a dumpster into the rear of the garbage truck, both of the dumpster's trunnion bars would be attached to a mechanism located on the back of the garbage truck. The mechanism would lift the dumpster off of the ground, turn it upside down so its contents emptied into the truck, and return it down to the ground. During this process, the attachment between the truck's mechanism and each trunnion bar was secured with a latch.

On the date of the accident, plaintiff and a co-worker attached the trunnion bars of one of the dumpsters to the mechanism at the rear of the garbage truck. But because one of the trunnion bars was bent, it was difficult to close the latch on one side of the truck's mechanism.

Once plaintiff and her co-worker were able to close the latch, a third worker operated the truck's mechanism to empty the dumpster while plaintiff stood on the ground near the truck waiting for the dumpster to be lowered back to the ground. The dumpster was lifted and emptied without incident. However, as the dumpster was being lowered back to the ground, the latch holding the bent trunnion bar in place broke open, causing the dumpster to fall to the ground. As it was falling, the dumpster's bent arm struck plaintiff's left arm, wrist and hand causing serious injuries.

The plaintiff had first noticed that the dumpster's arm was bent approximately 2 months prior to her accident. She alleged that another member of her crew had verbally complained to the apartment complex's superintendent that the dumpster arm was bent and made it difficult to close the latch. But the plaintiff did not have any records of any such complaints, and none were uncovered through discovery proceedings. It is uncertain whether the complaining co-worker is available to testify at trial.

The dumpster involved in the incident was removed from the parking lot soon after the incident occurred. Before it was removed, however, plaintiff was able to take photographs of the dumpster and the bent trunnion. She also took photographs of the other two dumpsters that did not have bent arms which show a clear difference between what the arms are supposed to look like and the one that was bent.

Plaintiff retained a Professional Engineer to review the matter. The engineer was not able to examine the dumpster because it was no longer at the complex. She also could not examine the garbage truck involved in the accident because the plaintiff was unsure of exactly which truck was involved. However, the expert did conduct an in-person inspection of a garbage truck of the municipality that had a dumpster emptying mechanism similar as the one involved in the accident.

Based upon her inspection and review of deposition transcripts and photographs, the expert concluded that the latch broke open because the angle of the bent trunnion bar put excessive stress on the latch as the dumpster was being lowered to the ground. The expert opined that the dumpster and trunnion bar were maintained negligently in that the bent trunnion bar rendered the dumpster defective, unsafe and unfit for its intended purpose, that the owner should have removed the dumpster from service before the accident or at the least straightened or replaced the trunnion bar, and that the owner's negligence was a substantial factor in causing plaintiff's accident.

In its defense, the defendant apartment complex denies having ever received any complaints from any sanitation worker or anyone else about the condition of the dumpster. The defendant also argues that since the sanitation crew had been able to empty the dumpster without any difficulty for the entire 2 month period that the plaintiff had supposedly observed that the trunnion bar was bent, the accident occurred simply because plaintiff and her co-worker failed to properly close the latch. Defendant contends that the accident could not have and did not occur as the plaintiff described. They contend that the trunnion bar became bent when it hit the ground in the incident, and that it was not bent before it. They also question the credibility of plaintiff's co-worker.

As a result of the accident, plaintiff sustained injuries to her left arm, right wrist, right elbow and right hand. Her more significant injuries included fractured wrist and a right ulnar nerve entrapment neuropathy localized at the left elbow, confirmed by electromyography testing. She was required to undergo three (3) surgeries including for a left ulnar shortening osteotomy with bone grafting and with a plate and screws, a left ulnar nerve transposition, and removal of the hardware.

Plaintiff asserts that as of the present time she experiences constant severe shooting pain in her right wrist with clicking on movement of the wrist, pain in her elbow and painful parathesias and hyperthesias of the left fingers, hand, wrist and forearm. She complains of difficulty engaging in activities of daily living including fulfilling her parental activities like carrying her own children to playing with them and taking care of them as she used to. Her physicians have recommended that she not lift anything over five pounds. Her sleep pattern is interrupted due to pain and discomfort.

The plaintiff has not returned to work in the three years since the accident and claims to be totally disabled. She had a work-life expectancy at the time of the accident of approximately 23 years. Plaintiff claims lost earnings estimated to be $850,000.00.

The defendant had the plaintiff examined by an orthopedist who concluded that the fracture had healed well and that to the extent that the plaintiff had abnormal sensation in her arm, hand and fingers it was not due to the accident. Prior to working for the sanitation department plaintiff had for years played bass guitar in a professional heavy metal rock band. According to the orthopedist, guitar playing can lead to cubital tunnel syndrome of the elbow of the guitarist's fretting hand and arm, and that is why she needed the ulnar transposition surgery.

The plaintiff received benefits pursuant to the Workers' Compensation Law in the total sum of $169,225.00 for lost wages and medical treatment. The workers' compensation carrier is asserting a lien pursuant to section 29 of the Workers' Compensation Law, requiring the plaintiff to repay the lien out of her share of her recovery in the lawsuit. (In reality she will repay approximately two-thirds of the lien amount due to a mandatory reduction of the lien under WCL §29, unless a lesser amount is negotiated by plaintiff's counsel with the workers' compensation insurance carrier.)

The plaintiff still receives workers' compensation benefits. Under the law, if she settles her case with the apartment complex owner without first obtaining either the consent of the workers' compensation carrier or a court order, she forfeits further workers' compensation benefits to which she may be entitled.

The lawsuit is pending against the apartment complex owner and is pending in Nassau County Supreme Court. The limit of insurance coverage is $1,000,000.00. The plaintiff cannot maintain a lawsuit against her employer or a co-employee because as to them her exclusive remedy is through workers' compensation.

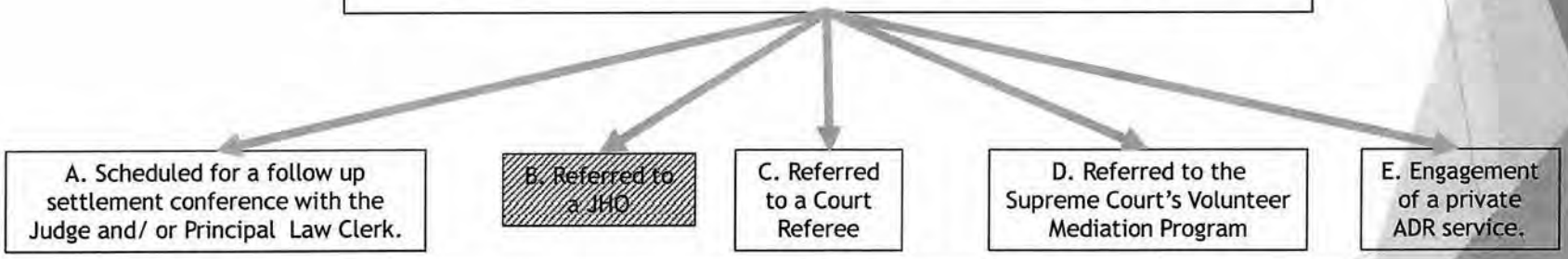
NASSAU COUNTY SUPREME COURT
Torts/ Medical Malpractice ADR

Preliminary Conference Order will have a directive that the parties must appear before the assigned Judge within forty-five (45) days of the Conference for initial settlement conference. Attorneys with settlement authority will be directed to appear. The parties can appear or be reachable by phone conference.

On first settlement conference date, the assigned Judge and/or Principal Law Clerk will conduct settlement discussions.

If Not Settled

Judge and/or Principal Law Clerk will determine an ADR track for the case.



Once case is referred to an ADR track, progress will be communicated to assigned Judge every forty-five (45) days. Discovery will not be stayed and the case will simultaneously proceed on its normal track.

All Cases will be again referred to settlement conference before the assigned Judge within sixty (60) days after the filing of a Note of Issue.

NASSAU COUNTY SUPREME COURT
Commercial Division ADR

Commercial Division Rule 8(a)
Counsel in Commercial Division matters are to confer prior to the Preliminary Conference in an attempt to identify a mutually-agreeable ADR plan.

Agree on one of the following plans:

A. The appointment of a mediator from the Administrative Judge's roster.

B. The appointment of a JHO in Nassau County to preside over a settlement conference/ mediation within 30 days.

C. The appointment of a Judge not assigned to the case to preside over a settlement conference/ mediation within 30 days pursuant to Commercial Division Rule 3(b).

D. Settlement conference/ mediation within 30 days before the assigned Judge.

E. Engagement of a private ADR service at the parties' expense.

Can't agree on a plan?

A. The Preliminary Conference Order will set an ADR date within forty-five (45) days. ADR will be conducted by one of the methods outlined above.

B. Within sixty (60) days after the filing of a Note of Issue, a joint ADR/ Pre-Trial Conference will be held.

NASSAU COUNTY SUPREME COURT
Matrimonial Center ADR

Preliminary Conference will take place in front of the Principal Law Clerk for the assigned Judge who will conduct settlement discussions between the parties.

If no settlement is reached, the Judge and/or Principal Law Clerk will determine a ADR track for the case. The matter will be referred to one of the following to take place within forty-five (45) days:

A. A mediation program at Hofstra.

B. A Special Master's Neutral Evaluation program.

C. Mediation by other Court personnel and/ or Judge.

On each Court date, the Court will conduct further mediation to assess the potential for settlement of the matter.

At the pre-trial conference, the Court will conduct further discussions to facilitate settlement or to limit the issues for trial.

Finally, any Post - Judgement Order to Show Cause will direct the appearance of all parties for ADR on the return date of the motion.

Matrimonial Matters exempt from ADR shall include Domestic Violence Cases and other cases where safety is a concern.

NASSAU COUNTY SUPREME COURT
Guardianship ADR

Upon the return date of the petition, the Court will hold a hearing to determine capacity.

If the Court finds incapacity, the Guardianship Judge and/ or Principal Law Clerk will conduct settlement discussions between the parties regarding who should serve as the guardian.

If the Court and parties conclude that continued ADR will be productive, the Judge and/ or Principal Law Clerk will refer the case to further ADR through the Nassau County Bar Association's Alternative Dispute Resolution Committee's Court - Referred Guardianship Mediation Pilot Project.

The ADR will continue parallel to the Article 81 procedural requirements of the petitioner.

NASSAU COUNTY
Family Court ADR

On the first date of a Family Court matter, an adjudicator (Judge, Court Attorney, Support Magistrate, or Court Referee) will conference the case for early settlement.

If no settlement is reached, the Judge and/ or Court Attorney will schedule the case for further ADR within forty-five (45) days utilizing one of the following :

- Private Mediation or CDRC (custody/visitation)
- A mediator who is a Family Court Employee
- One of two Volunteer Hofstra University Mediators

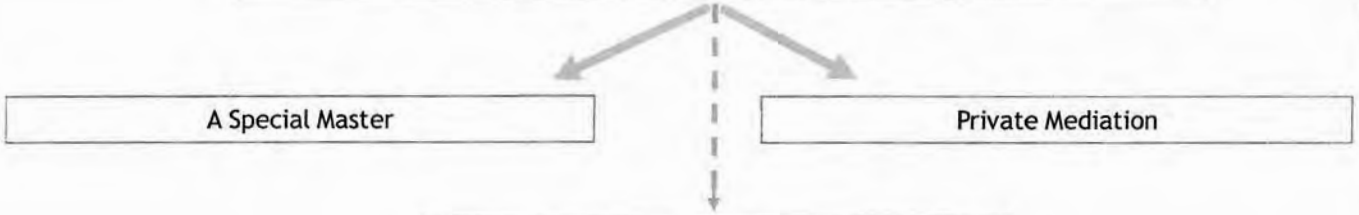
Family Court matters which may be exempt from ADR:

1. PINS & JD Cases
2. Abuse & Neglect Cases
3. Family Offense Cases with Violence
4. Jailed Pro Se Litigant Component

NASSAU COUNTY
Surrogates Court ADR

All adjudicators (Court Referee, Court Attorney, Principal Law Clerk, and the Chief Clerk) will conduct an initial settlement conferences on assigned cases. If not settled, the court will determine an ADR track for the case.

The Surrogate will order mediation on the proceedings that are not otherwise exempt from ADR.



[in progress]
Surrogate's ADR Court Roster Mediation

Matters exempt from ADR shall consist of:

1. Guardianship (17A)
2. Adoption
3. Appointment of Guardian Ad Litem
4. Kinship Hearings

District Court ADR

Small Claims

First time cases calendared for mandatory mediation.

Parties sent to volunteer mediators from the EAC Network that are present daily at the Courthouse.

Existing mandatory arbitration matters with claims under $600 will receive letter notification that the case is scheduled for mediation.

Civil Parts

First time cases calendared for settlement conference on the initial court date by the assigned Judge.

ADR calendars will be created for each civil trial part. Cases will remain in ADR until Judge determines that cases cannot be resolved through ADR.

Firms with highest volume of existing No - Fault cases awaiting arbitration will have specific "Blockbuster" days assigned.

Landlord & Tenant

ADR calendars have been created.

Cases will be calendared and adjourned for settlement conference until Judge determines that cases cannot be resolved through ADR.

In addition to the two Landlord & Tenant Judges, a third Judge has been designated to assist with ADR cases.

NASSAU COUNTY
City Courts ADR

Long Beach City Court

All Civil Actions under $6000 are sent to Nassau County District Court for mandatory Arbitration

All Civil Actions over $6000, all Summary Proceedings, and all Small/ Commercial Claims are conferenced for settlement by the Court Attorney on the initial Court date.

If there is no settlement, at the next Court date the Judge will conduct additional settlement conferences.

If, after second settlement conference there is no settlement, the case is scheduled for trial.

Glen Cove City Court

The Judge conducts settlement conference for every case on each date.

In his absence, trained mediators and arbitrators from the OCA Panel or the Bar Association will be requested.

Name of ADR Program	How Cases Are Referred	When are Cases Referred	Pre-Mediation Discovery Requirements	Cost of Mediation	Mediator Assignment
Nassau County Commercial Division ADR Program	Judicial Referrals and Party Requests	Cases shall be referred to the ADR Program as early as is practicable.	No specific discovery requirements. ADR does not stay discovery. At least one (1) week before the initial session, each party shall deliver to the neutral a memorandum of not more than three pages setting forth that party's views as to the nature of the dispute, and suggestions as to how the matter might be resolved. This memorandum is not served on the adversary or filed in court, shall be read only by the neutral, and shall be destroyed by the neutral immediately upon completion of the ADR proceeding.	Free four (4) hour initial ADR session. Subject to full disclosure at the beginning of the initial session, the mediator may apply up to one (1) hour of preparation time toward the initial session, in which case the initial session shall last for no more than three (3) hours. If the parties choose to continue the ADR process beyond the initial session, compensation for the mediator shall not exceed $300 per hour for time spent in mediation and up to $150 hour for any additional preparation time needed beyond the initial session. All mediator fees and expenses shall be borne equally by the parties unless the Court determines otherwise.	The parties select an agreed-upon mediator from the Court's Roster within five (5) business days from receipt of the Order of Reference. Within such time, the parties complete and return to the Court and to the selected mediator the Mediation Initiation Form. If the parties cannot agree on a mediator, they submit two (2) names from each side to the Court for the Court to select from.
Nassau County Blockbuster Settlement Conference Days	Cases are selected by participating insurance carriers with the consent of Plaintiff's counsel. Participating insurance companies include: Chubb, IAT, Geico, Starr, State Farm, Travelers and USAA.	Cases can be referred to a Blockbuster Settlement Conference at any time after issue is joined. A Blockbuster Conference Day will be scheduled several times per year with each participating insurance company.	No specific discovery requirements.	No cost	Cases are heard virtually by one of two Supreme Court Justices currently assigned to hear Blockbuster Settlement Conference Calendars.
Nassau County Part 137 Attorney-Client Fee Dispute Resolution	Attorneys are required to serve the client with notice of the right to Part 137 FDRP arbitration. Client has 30 days to request arbitration. Client may initiate the FDRP on their own. Parties may agree in advance in writing to resolve fee disputes through arbitration program.	Upon receipt of Client Request for Fee Arbitration form. Generally, must be initiated within two years from the last date the attorney rendered services.	Exchange of all evidence to be submitted at arbitration.	No cost	Arbitrators are assigned by the Court. Disputes involving $10,000 or more are assigned to a panel of at least one non-attorney, unless panel waived; disputes less than $10,000 are assigned to one attorney arbitrator.
Nassau County Mandatory Foreclosure Settlement Conferences	Pursuant to CPLR 3408, all foreclosure actions on a home loan, in which the defendant is a resident of the property subject to foreclosure, must undergo a mandatory foreclosure settlement conference.	Cases are referred to a settlement conference within 60 days of service on the defendant.	Parties are required to bring to the foreclosure settlement conference specific loan and payment documents set forth in CPLR 3408(e).	No cost	Mediators are assigned by the Court on appearance date.

Nassau County Matrimonial Special Master/ Neutral Evaluation Program	Judicial Referrals of appropriate cases	Judge may refer ongoing cases at any time, including at the preliminary conference, if deemed appropriate for ADR.	Submit to neutral a concise 2-page summary of the issues presented, relevant facts, and applicable law, if appropriate. Exchange of client's sworn statement of net worth. Discovery not stayed.	Free initial session of up to three (3) hours. If parties choose to continue beyond the initial session, the Special Master may be compensated as agreed upon in writing, but shall not exceed a rate of $300 per hour.	The Program Coordinator randomly selects the names of three Special Master's from the Court's Roster. Within five (5) business days of receiving the Notice of Confirmation from the Program Coordinator listing the three names, the parties shall select one of the three proposed Special Masters, and inform the Program Coordinator of their selection. If the parties cannot agree, each side shall have the right, within said five (5) business days, to object to one of the selected names. The remaining named Special Master shall serve as the neutral, provided there is no conflict of interest.
Nassau County Matrimonial Mediation Program *[IN DEVELOPMENT, ALL INFORMATION SUBJECT TO CHANGE]*	Judicial Referrals and Party Requests	TBD	Exchange of affidavit of net worth and the prior year's tax returns with supporting W-2s, 1099, and K-1 forms (unless waived). Pre-mediation statements if requested. Discovery not stayed.	Free initial session of set duration TBD. If parties choose to continue beyond the initial session, the Mediator may be compensated as agreed upon in writing, but shall not exceed a rate to be determined per hour.	TBD, mediator assignment likely to remain similar to current Special Master/Neutral Evaluation Program's selection process.
Nassau County Surrogate's Court Neutral Evaluation Program	Party Requests	Cases may be referred upon consent of parties at any time, but usually after the issues have been clearly identified.	At discretion of Neutral Evaluator.	Free initial session of ninety (90) minutes. If the parties choose to continue beyond the initial session, the Neutral Evaluator may be compensated as agreed upon in writing between the parties and the Neutral Evaluator.	Parties may select a Neutral Evaluator from a list of approximately 4 retired Judges.
Nassau County Surrogate's Court ADR Program *[IN DEVELOPMENT, ALL INFORMATION SUBJECT TO CHANGE]*	Party Requests	Cases referred upon consent of the parties at any time.	TBD	TBD	Parties may select a Mediator or Neutral Evaluator from a Court Roster of neutrals who have substantial experience in the area of Surrogate's Court Practice.
Nassau County District Court Small Claims Mediation	Mandatory judicial referrals	All first time on Small Claims cases are calendared for mediation. Cases continue to appear for mediation until the Judge determines that the case cannot be resolved through mediation. Thereafter, the case is calendared for Judicial Settlement Conferences.	None	No cost	Mediators are provided by EAC Network, a Long Island Community Dispute Resolution Center, who is present in District Court Monday through Thursday.
Nassau County District Court Mandatory Arbitration of Civil Actions	Judicial referrals based upon demand amount up to $6000.	Cases are referred to Mandatory Arbitration following Judicial Settlement Conferences, when the court has determined that the case cannot be resolved through further Judicial Settlement Conferences.	None	No Cost	Arbitrators are assigned by the Court from a panel of Arbitrators from the Nassau County Bar Association ADR Panel.
Nassau County Family Court Mediation Center	Judicial referrals. Parties may opt-out after attending the initial session.	All eligible cases, primarily custody, visitation and child support, are referred to Mediation as early as practicable.	None	No Cost	Cases are virtually mediated by a dedicated court Mediator.

Synergist Mediation

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The Importance of Your Mediation Statement

It's hard to overstate the importance and power of a well-drafted mediation statement. Done right, it can frame the entire approach to mediation, for you and the mediator, structuring things so you get the most out of the process. So let's talk about what a good mediation statement looks like.

Your mediation statement is a tool that gives you an opportunity to provide essential information to the mediator at the outset. The statement, along with a pre-mediation call, isn't just about a recitation of facts and arguments you think are important. Rather, it sets the tone for the mediation and begins to establish your rapport and credibility with the mediator, showing you to be someone who takes the mediation process seriously.

The mediation statement is an important opportunity to tell the mediator who your client is, who your adversary is, what the matter is about, and explore the stakes and the opportunities.

What to expect: You should look at mediation as distinct from traditional litigation, in terms of expectations and approach. If you're used to litigating matters, you may take a litigation approach and feel you have to strike first and strike hard, but is that really the first impression you want to make with your mediator who will be looking for opportunities to find common ground and options that might work for all parties? More importantly, will that approach help you get the most out of mediation?

The goal: Remember, this is a process designed to be forward-looking and find positive outcomes, even if you are in the midst of an ongoing adversarial proceeding. For that reason, it is important that advocates remember that the mediation statement is different from other documents you may be used to drafting. It is not a brief. Neither is it a motion. There is definitely an advocacy component that may contribute to what you want to tell your mediator, but what's the overall approach you want to take?

- Do you want to advocate and try to set the tone for why your client's position is the right one?
  - Maybe, but showing the validity of your client's position shouldn't crowd out the opportunities for finding mutually acceptable solutions
- You may want to discuss strengths and weaknesses from a more neutral point of view, showing recognition of both sides' strengths and weaknesses
- Do you want to confidentially share what might be palatable settlement options? That's wise, since it helps guide the mediator in where he/she can look for opportunities to move things forward
- Do you want to share with the mediator what roadblocks you see to a negotiated settlement? You should, as that will best prepare your mediator to seek out options.

Remember, the mediator is neutral, but the mediator isn't without a voice. In fact, the power of the mediator comes from facilitating a discussion between the parties while also distilling the parties'

interests into routes toward fruitful outcomes. To do that, your mediator needs to understand your situation as much as possible. Consider these things, and be as frank and open as possible, remembering that this is a confidential statement:

- What are your greatest strengths? If you are in litigation, what are the facts and arguments that you look forward to using in court?
- What are the things that worry you? What keeps you up at night?
    - If you are in litigation, what would you be stressing if you were opposing counsel?
        - Share those things with the mediator confidentially! Also, share how you plan to counter them.
- For the good and the bad, what are your odds of success or failure?
    - Put numbers to it. What is your best estimate of the percentage chance of success?

Your mediator hasn't lived with the case/dispute like you have. So lay it all out for the mediator as you see things. No mediator will be able to have your depth of knowledge about a matter you have dealt with for months or maybe even years. It is up to you to give as thorough and frank an overview as you can. Once you have laid out strengths and weaknesses, positions and arguments, consider the value of a chart in evaluating the case, both for you and your mediator:

Cause of Action	Defenses	Likelihood of surviving motions	Provable damages	Likelihood of success at trial	Estimated net value
Harassment/ Hostile work environment	Failure to use administrative remedies	50%	$80,000	80%	$32,000
Gender discrimination	Valid business reasons for promotional decisions	75%	$40,000	60%	$18,000
Retaliation	Legitimate, non-discriminatory reasons	80%	$100,000	60%	$48,000
				Total=	$98,000

This type of analysis, when done objectively, helps you review your case and make sure you have a reasonable view of its value. It also gives the mediator a clearer picture and lends validity to the arguments you plan to make as things move forward.

Next, consider the expenses that will be incurred if you have to pursue a matter through trial. In the case of a matter that you are trying to work out before the risk and expense of litigation, consider the

other burdens, such as disruption of your client's business, damage to morale if a dispute goes unchecked, reduced efficiency, and so on. Taking the above litigation example, it's all well and good that you can lay out a reasonable case value of $98,000, but if your client may well spend $60,000 litigating the matter, what's the real present value of the case? And what about lost time, stress, business disruption, etc.? You can build litigation costs and some of these other elements into your chart, as well.

As attorneys, we have a duty to do what's in the best interests our clients. If the mediator can help you work through the probabilities and potential outcomes with the other party and their counsel, and you can get your client $50,000 to walk away right now, you would be hard pressed to argue that's not the best outcome for this matter, wouldn't you?

From the above analysis and discussions you have with your client, you will be able to formulate a potential settlement range that you can share with the mediator confidentially. By determining and sharing a reasonable settlement range, you have the opportunity to equip your mediator to move forward effectively in facilitating discussions designed to bring the parties together, as well as positioning yourself to make your best case in mediation. Of course, alternative proposals and non-monetary opportunities may play an important role, as well (*e.g.*, job reinstatement, future business opportunities in commercial matters, etc.), but a firm grasp of the monetary component is vital.

As part of your review, it's also important to share with the mediator all prior settlement discussions and proposals, including any prior mediation efforts, in addition to what you think may be potential settlement opportunities for your upcoming mediation.

Use mediation for all it is worth. That includes this important component. Take a step back, analyze your case, and then share it confidentially with the mediator. Then go into mediation with your eyes open. Being ready to present, at the right time, a reasonable overview of your case doesn't show weakness to the other party(ies). Rather, it says, ***"I know my case, and I know its true value. I don't think it's a slam dunk, because nothing is absolutely certain, but I'm confident in where I can win. Rather than waste time and money on beating you, I'm willing to work with you to find an outcome that's fair and reasonable for all concerned."***

Remember, mediation statements are meant to guide the mediator. A good mediation statement will help the mediator bring your case to a successful conclusion.

PLAINTIFFS' PRE-MEDIATION MEMORANDUM

This is an action to recover damages for personal injuries sustained by the plaintiff, then 42 years of age, resultant from an incident which occurred on May 11th, 2017 while she was horseback riding on a trail ride of defendant.

Approximately one week prior to the incident, the plaintiff made a reservation to go horseback riding with two of her teenage children at the defendant's horseback riding facility. Upon arrival at the defendant's horseback riding facility, the defendant assigned horses for each of them to ride. Plaintiff was assigned to ride a horse named "Spice".

The incident occurred approximately 15 minutes after the trail ride had begun while the group was riding through some tall grass on their way towards the beach. At that time Spice suddenly and without warning went down on the "elbows" of his two front legs and then rolled onto his right side. Plaintiff was able to free her left foot from the stirrup, but she could not free her right foot which was then pinned under the horse when he rolled onto his right side.

Immediately following the incident, the trail guide then used either a walkie-talkie or a cell phone to contact the defendant's office. Plaintiff testified at her examination before trial that the guide stated "Spice rolled again." Her daughter testified at her non-party deposition that the guide said something about it happened again. The guide then put the plaintiff back onto Spice and they completed their ride.

As a result of Spice rolling, the plaintiff sustained a displaced unstable right ankle Weber B lateral malleolus oblique fracture necessitating surgery for an open reduction and internal fixation performed May 22nd, 2017.

Prior to the horseback ride, the plaintiff was required to and did sign the defendant's standard Horse Rental Agreement and Liability Release Form. Although this form indicated generally that horseback riding involved certain risks, the possibility that the horse would roll while she was riding on it was not specifically set forth in the document. Additionally, at no time was the plaintiff or her children warned that their horses might roll, nor were they given any instructions as to what they should do in the event that their horse started to roll.

Plaintiff's cause of action is based upon the grounds that the defendant is liable for: (1) providing a horse that was an inappropriate and unsuitable mount because the defendant knew that the horse had the dangerous propensity of rolling while mounted and because the horse was not properly maintained and cared for; (2) failing to provide necessary instructions and warnings regarding their horses' dangerous propensity to roll while mounted; (3) providing dangerous, inadequate, unsafe, unsuitable, unserviceable, improper equipment to their horse; and (4) failing to provide necessary and proper supervision of the trail ride.

All of plaintiff's contentions are supported by an expert in the field of equine riding safety and facility management who opines that the defendant did not follow basic industry standards, and that its multiple failures to do so were all substantial factors in causing the plaintiff to sustain serious and avoidable injuries.

According to plaintiff's expert, it is established in the horse industry that a well-trained, well-maintained horse does not roll with a rider on his back. Horses are trained to respect the rider. It is dangerous, abnormal and inappropriate behavior of a horse to roll when being ridden.

Plaintiff's expert also opines that a horse's dangerous propensity to roll with a mounted rider is not an inherent risk of horseback riding. A horse that has a tendency to roll while mounted poses an enhanced risk over and above the usual dangers inherent in recreational horseback riding and is not an appropriate mount for any rider. Thus assumption of risk is not a valid defense in this matter. *Owen v. RJS Safety Equipment*, 79 N.Y.2d 967 [1998].

The owner of the defendant riding stable testified at his examination before trial that probably all of their horses have rolled with riders mounted on them. He thus concedes that the defendant had knowledge of Spice's dangerous propensity to roll while mounted. The owner also conceded that a horse that has rolled while being ridden should not be used in future trail rides unless and until that behavior was corrected because it could be unsafe to the clients.

Plaintiff alleges that the defendant provided dangerous, inadequate, unsafe, unsuitable and improper equipment, including Spice's bridle, grazing muzzle and stirrups. Tacking up Spice with a grazing muzzle impaired the function of the bit and reins and impaired the horses' breathing. Considering the owner's testimony that holding the reins will keep a horse from rolling, the impairment of the rein's functioning is significant. Further, in plaintiff's expert's opinion, the combination of the defendant's failure to provide Western Safety Stirrups and to allow the plaintiff to ride the horse while wearing sneakers instead of a boot with a heel created an unreasonably unsafe condition that increased the chance that the plaintiff would not be able to readily get her right foot out of the stirrup before Spice rolled on top of it.

With respect to the defendant's inadequate supervision of the trail ride, plaintiff's expert opines that an assistant trail guide was not but should have been

provided considering that the riding stable's owner is aware that all of the stable's horses roll when ridden on trails. Also, the guide did not provide the riders with a skills test as good and accepted industry standards require. A skills test at all gaits helps determine if a rider can handle a particular horse prior to riding on the trails.

It is significant that the defendant has failed to produce any of its records concerning Spice, including records that it is mandated by law to keep pursuant to the New York City Rental Horse Licensing And Protection Law (NYC Administrative Code § 17-326 *et. seq.)*. The statute requires owners of rental horse business to maintain records pertaining to the certificate of license; a consecutive daily record of the movements of each licensed horse; veterinary records documenting examinations, which must be performed no less frequently than every eight months; a record of any injury, disease, or deficiency observed by the veterinarian at the time, together with any prescription or humane correction or disposition of the same; and a signed health certificate by the examining veterinarian. Additionally, Administrative Rules of the City of New York require that daily logs of rental work horses be maintained.

It is the defendant stable's duty to keep a record on any horse that rolls with a rider on his back. Nevertheless, he testified that he does not keep records of a horse rolling while on the trails. He does not maintain any records of which horses roll and when they roll and as such he does not follow basic industry standards. *Standards for Equestrian Program* under Incident Reports: "Documenting incidents and injuries for clients, staff and horses is essential for safety, program management, insurance, and litigation purposes. Even if no injury or fall occurs, an effort should be made to document any incident that causes concern or any event out of the ordinary."

The riding stable's owner testified that, pursuant to his custom and practice, he would not retain records on any particular horse for more than a year. He further testified that even upon receipt of a letter from an attorney instructing him to preserve records, or even a summons and complaint, he would not preserve records related to a particular horse for more than one year. He testified that, upon receipt of a letter from an attorney or a summons and complaint, he would review his files to see if there were any documents he had kept regarding the subject horse. He testified that he would throw the documents away if no one asked for them.

However, on June 10th, 2014, less than a month after the accident, plaintiff's counsel sent the defendant a spoliation letter via certified mail, return receipt requested and commenced this action shortly thereafter. (Letter, Ex. G). Thus, within one month of the accident, He was aware that a claim was being made yet he chose to dispose of all of the documents that he was required to maintain regarding Spice.

The law is well-settled that an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities when such proclivity results in the injury giving rise to the lawsuit. In *Vanderbrook v Emerald Springs Ranch*, 109 AD3d 1113 (4th Dept. 2013), during a horseback ride the horse that the plaintiff was riding brushed up against a tree, plaintiff was unable to push away from the tree, and the tree caught her leg allegedly injuring her leg and hip. The defendant admitted that they told their guides to instruct riders to push off of the trees if the horses rode too closely to them.

The *Vanderbrook* court held that liability could be established by virtue of the defendant's knowledge of their horse's propensity to walk too closely to the trees, the

behavior that allegedly caused plaintiff's injury. The court also noted the well-established legal principal that participants in a recreational activity are not deemed to have assumed unreasonably increased risks of that activity.

Defendants do not, and cannot, argue that the Liability Release Form is adequate on its own to shield them from liability for claims arising out of its own negligence because General Obligations Law § 5–326 renders such agreements unenforceable as against public policy. Rather, defendants argue that the Liability Release Form present some evidence as to the risks that plaintiff consented to when agreeing to ride Spice.

However, the Liability Release Form does not specifically mention rolling as a risk of horseback riding, and thus bears no relevance on the assumption of risk argument. Courts have excluded such agreements from evidence where they have no probative value as to the specific risk that plaintiff assumed. (*Boland v Riding High Dude Ranch, Inc.*, 2016 NY Slip Op 50455[U], *1 (Sup Ct, Warren County 2016).

PLAINTIFF'S INJURIES

The plaintiff sustained a displaced unstable right ankle Weber B lateral malleolus oblique fracture and accompanying widening of medial joint space necessitating surgery for an open reduction and internal fixation with placement of a plate and screws with application and wearing of short-leg cast. A second surgery was performed on November 3, 2018 for removal of the plate and screws. She has suffered and continues to suffer from pain, weakness and limitation of motion of her right ankle, peroneal tendonitis, and scarring resultant from the surgical procedures.

In addition, and importantly, the most recent x-ray of her right ankle revealed post-traumatic degenerative changes/arthritis at the distal tibia-fibula joint. The plaintiff

has been informed by competent medical authority, and believes, that the arthritis is progressive in nature, the full extent of which is indeterminable.

At the time of the incident, the plaintiff was employed as a Surgical Coordinator a neurosurgery practice. Due to the sedentary nature of her work, she was out of work for approximately 10 days. Her salary was paid by her employer, and, accordingly, no claim for loss of earnings is being made herein.

PROCEDURAL STATUS

This action is presently on the trial calendar at Supreme Court, Kings County. The defendant has filed a motion for summary judgment. Plaintiff will not only be opposing this motion in part upon but will be cross-moving for summary judgment on the issue of liability based upon the opinions of equine riding safety and facility management expert as well as the testimony and concessions of the defendant's owner.

Plaintiff's cross-motion also requests that the defendant's answer be stricken on the ground of spoliation of evidence due to the riding stable's owner's blatant disregard of his obligations to keep and retain records in accordance with New York City law and in willful disregard of plaintiff's spoliation letter in the face of his knowledge that a claim was being made against his company.

SETTLEMENT NEGOTIATIONS

The plaintiff's settlement demand is $250,000.00 (based upon defendant's counsel's advice that the defendant's insurance coverage limit is $250,000.00 and that defense costs are included within that coverage limit). The defendant has offered $25,000.00. Plaintiff is not aware of any liens.

Dated: New York, New York
October 23rd, 2020

Respectfully submitted,

LEVINE & SLAVIT, PLLC

BY: _____
IRA S. SLAVIT
Attorneys for Plaintiff
60 East 42nd Street, Suite 2101
New York, NY 10165-6233
212 687-2777

MEDIATION AGREEMENT

This mediation agreement is entered into voluntarily by the Mediators, Marilyn K. Genoa and Jess A. Bunshaft ("collectively referred to as the Co-Mediators and individually referred to as the Mediator(s)), and the undersigned parties: XXXXXXXXXXXXXXXXXX, (collectively referred to as the "Parties" and individually referred to as a "Party"), and the Parties' Counsel.

The Parties, their Counsel, and the Mediators agree to engage in a confidential Mediation, with the intent that the mediation shall be entitled to all common law and statutory protections afforded to meditations as more fully described below.

This process shall further be governed by New York State Unified Court System: Rules of the Alternative Dispute Resolution Program; Commercial Division -Nassau County

THE MEDIATION PROCESS

1. Mediation is a collaborative process. The Parties and their Counsel agree to negotiate their dispute in good faith and to actively participate in searching for a mutually acceptable negotiated resolution of their dispute.

2. All decisions are made by the Parties and their Counsel. The Mediators neither represent, nor is an attorney for, any of the Parties and will make no binding decisions or rulings. The Parties are not obligated to agree to any proposals that are made during the mediation. During (and prior to) the course of the mediation, Parties are encouraged to express their positions; consider the strengths and weaknesses of those positions while seeking to understand the other Parties' perspectives and positions; identify and explore all of the issues and interests affected by and relating to the dispute and its possible resolutions; and identify and explore creative options for resolving the dispute. Although the Mediators' role does not include rendering a binding decision, mediation is a binding process to the extent that mediation produces an agreement of the parties with the binding effect of any contract.

3. The Parties, the Parties' Counsel and the Mediators have agreed to the use of online dispute resolution using the Zoom Video Platform ("Zoom") technology in the mediation. The Mediators shall host the mediation using their Zoom Pro account without additional cost to the parties. Similar to an in-person mediation, the Mediators will meet with the Parties either jointly or in caucus (where the Mediators meets with each side separately). Prior to the first mediation session, and thereafter, the Mediators and one or more Parties and their Counsel may communicate by telephone, via Zoom conference, or through written correspondence. The content of each meeting, phone call, Zoom, and any other communication is confidential and may not be disclosed unless authorized by all Parties involved in the communication in question (whether such communication occurred in joint session, caucus, by telephone, Zoom, or otherwise).

3(a): The following terms are agreed to with respect to the conduct of the mediation via Zoom: The Parties agree that the mediation shall be a 'mediation' for the purposes of all applicable legislation, regulations, and rules; the Parties acknowledge that they have made their own inquiries as to the suitability and adequacy of Zoom for its proposed use in the mediation and of any risks in using Zoom, including any risks in relation to its security, privacy or confidentiality and request the mediators to proceed with the use of Zoom; the Parties agree that they will inform the Mediators and each other in advance of the mediation of the names of all persons attending, participating, or who are able to hear any communications in the mediation using Zoom and agree that no persons will attend, participate or be allowed to listen in on the mediation without the prior consent of all Parties and the Mediators; the Parties agree that they will not record or permit the recording of all or any part of

the mediation; the Parties will ensure that each additional attendee at the mediation for which that Party is responsible also acknowledges and agrees to this.

4. The Parties agree that all parties necessary to the resolution of the dispute shall be present at the mediation. This means that people with knowledge of the dispute and with the necessary authority to settle shall attend and remain throughout the mediation. Any exceptions to this rule must be discussed with the Mediators, the Parties and their Counsel. Parties are encouraged to consult with the Mediators in advance of the mediation session to identify the most appropriate persons to attend the mediation session.

THE MEDIATOR'S ROLE

5. The Mediators' task is not to decide the matter for the Parties, but rather to facilitate discussions and negotiations among the Parties and to assist them to reach a settlement which all Parties feel is reasonable under the circumstances. The Parties acknowledge that the Mediators are not acting as attorneys or providing legal advice on behalf of any Party.

6. The Parties are advised to consult with their own professionals, such as attorneys or accountants, for substantive advice in areas where such advice is rendered by professionals.

DISCLOSURE

7. The mediation process works best when parties participate as fully as possible and freely exchange information, thoughts, feelings and ideas. This maximizes the possibility of the creative generation of options. Parties are therefore encouraged to share information with one another to the greatest extent to which they are comfortable during the mediation process.

8. If Parties are uncomfortable sharing information with other Parties, they can entrust this information privately to the Mediators and are encouraged to do so. Sharing this information enables the Mediators to uncover possibilities for settlement that Parties might not otherwise recognize and to help generate settlement options (without disclosing any confidential information). All personal written records, including notes taken by the Mediators and any and all records and documents provided to the Mediators during the course of the Mediation, are not subject to discovery by the parties to this Agreement, or their successors and may, in the Mediators' sole discretion and judgment, be disposed of by the Mediators at any time.

CONFIDENTIALITY

9. In order to promote communication among the Parties, Counsel and the Mediators, and to facilitate settlement of the dispute, each of the undersigned agrees that the entire mediation process is confidential. All statements made during the course of the mediation are privileged settlement discussions, are made without prejudice to any Party's legal position, and are inadmissible for any purpose in any legal proceeding. Any and all privileges and rules of evidence regarding confidentiality of settlement discussions shall apply to all discussions and documents prepared for the purpose of, in the course of, or pursuant to this mediation. No offer, promises, conduct or statement shall be disclosed to third parties except persons associated with the Parties in the process, and they shall remain privileged and inadmissible for any purposes, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions. The entire mediation process is, and will be viewed by the Parties as, part of private and confidential settlement discussions intended to compromise disputed claims.

10. The Parties agree that no audio, video, digital or visual recordings will be permitted or taken of or during the mediation process.

11. The exchange of information in any format during the mediation process shall not constitute a waiver of: (a) the attorney-client privilege; (b) attorney work product privilege; (c) the status of information as confidential; or (d) the status of information as a trade secret. No information exchanged or communication made in the mediation process shall constitute an admission for purposes of any applicable rule of evidence. Evidence of anything said or any admission made in the course of the mediation is not discoverable or admissible in evidence and disclosure of any such evidence shall not be compelled in any civil action or arbitration in which, pursuant to law, testimony can be compelled to be given.

12. The fact that a statement or communication is made in mediation does not, however, insulate an otherwise independently discoverable fact or independent admission from discovery or use as an admission in a later court or adjudicative proceeding. Evidence that is otherwise admissible shall not be rendered inadmissible in any subsequent proceeding as a result of its use in connection with this mediation.

13. Each Party has provided, or shall provide, a mediation statement, setting forth their current position and any relevant information or data regarding the status of the matter. This mediation statement is provided to the Mediators, as a confidential document, for the Mediators' eyes only. The information in the Mediation statement shall be considered confidential and shall not be shared with other parties, absent express authorization by the party to the Mediators.

14. Parties shall not subpoena the mediators or the mediators' records or call for the mediators to testify in any court or other adjudicative proceedings. The Mediators shall have the same immunity as judges and arbitrators from suit for damages or equitable relief and from compulsory process to testify or produce evidence based on or concerning any action, conduct, statement or communication in, during or concerning the mediation conducted pursuant to this agreement. The Parties agree that the Mediators are not necessary parties in any arbitral or judicial proceeding relating to the mediation or to the subject matter of the mediation or to provide any materials from the mediation in any proceeding of any nature between the Parties.

FEES AND EXPENSES

15. All Mediators' fees shall be borne by the parties in accordance with the ADR rules of the Commercial Division which provides that mediators assigned by the Commercial Division shall be compensated by the parties at the hourly rate of $300.00, after four hours without charge, inclusive of pre-mediation preparation time.

16. The Mediators typically speak with Parties, or their representatives or Counsel, prior to the first mediation session. In addition, the Mediators may speak with Parties, or their representatives or Counsel, jointly or in caucus, by telephone, or via Zoom between in-person mediation sessions, or in follow-up to mediation. Any time spent by the Mediators on the telephone, or in a Zoom meeting, is billed at the Mediators' hourly rate set forth above.

17. The Mediators typically receive information from Parties prior to the first mediation session, and may receive additional information for review at or following the mediation session. Time spent by the Mediators reviewing information or legal research is billed at the Mediators' hourly rate as set forth above.

18. All Parties will share equally in the above fees and expenses, regardless of the relative time spent by the Mediators in communications or review of information with the parties.

MISCELLANEOUS

19. If the dispute is resolved, a written agreement shall be drafted and signed by the Parties and Counsel. If a legal or administrative proceeding is currently pending, plaintiff's or petitioner's counsel shall be responsible for filing the necessary papers with the clerk of the appropriate court or agency to dismiss, withdraw or settle the legal or administrative proceeding with prejudice.

20. The Parties agree that, in the event the Mediator is called to testify concerning matters relating to the mediation, the party seeking such testimony shall indemnify the Mediator for any attorneys' fees and expenses incurred by the Mediator in opposing or seeking to quash any subpoena or other judicial compulsion to testify or disclose information concerning same.

21. The Mediators shall not be liable to any Party for any act or omission in connection with theadministration and mediation of this dispute or any subsequent court proceeding.

22. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned acknowledge that they have read, understood, and agree with all matters stated in this Mediation Agreement and that they agree on behalf of themselves, their firms, partners, agents and employees, to obey and be bound by the confidentiality provisions of this Agreement.

_____

Marilyn K. Genoa, Esq.
Mediator

_____

Jess A. Bunshaft, Esq.
Mediator

_____

Signature Lines for all parties and their counsel as well as any other participants to the Mediation

Commercial Division – Nassau County

Rules of the Alternative Dispute Resolution Program

INTRODUCTION

Alternative dispute resolution ("ADR") refers to a variety of processes other than litigation that parties use to resolve disputes. ADR offers the possibility of a settlement that is achieved sooner, at less expense, and with less inconvenience and acrimony than would be the case in the normal course of litigation. The principal forms of ADR include arbitration, neutral evaluation and mediation.

The Court will offer mediation as the default ADR option. Mediation is a confidential, informal procedure in which a neutral third party helps disputants negotiate. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome. Although parties are not obligated to settle during mediation, the process frequently concludes with a written agreement.

Mediation is particularly appropriate for the resolution of complex commercial cases. Mediation offers the parties a confidential, structured forum in which to explore practical business concerns and develop tailor-made solutions beyond those that a Judge can often provide. Moreover, a mediator will not impose a solution on the parties or attempt to tell them what to do; if the parties cannot reach agreement, the case will be returned to the referring Justice.

The following Rules shall govern cases sent to mediation by Justices of the Commercial Division and other authorized Justices in Nassau County, as well as cases referred upon consent of the parties. Parties whose cases are the subject of an order of reference are free at the outset to use the services of a private ADR provider of their choosing in lieu of taking part in this court's program. After a case has been submitted to the court's program, parties can terminate the process and proceed to ADR elsewhere.

Rule 1. The Program:

The Commercial Division of the Supreme Court of the State of New York, Nassau County, operates the Alternative Dispute Resolution Program ("the Program"). The Program shall be applicable to cases referred by Justices of the Commercial Division, the District Administrative Judge of the Supreme Court, Nassau County ("the Administrative Judge"), and the other Justices of the Supreme Court, Nassau County upon authorization of the Administrative Judge; and commercial cases referred by consent of the parties.

Rule 2. The Roster:

(a) The Administrative Judge shall establish and maintain a roster of mediators ("the Roster") who shall possess such qualifications and training as required by Part 146 of the Rules of the Chief Administrative Judge (see http://www.nycourts.gov/rules/chiefadmin/146.shtml).

(b) Every member of the Roster, and any other person who serves as a mediator pursuant to these Rules, shall comply with the Code of Ethical Standards for Mediators of the Commercial Division upon its issuance. Continuing presence on the Roster is subject to review by the Administrative Judge. Mediators may be removed from the Roster at the discretion of the Administrative Judge in consultation with the Unified Court System Office of ADR Programs.

(c) The Roster will be available through the Nassau County Supreme Court or on the Commercial Division website (at http://www.nycourts.gov/courts/comdiv/nassau.shtml).

Rule 3. Procedure:

(a) Cases shall be referred to mediation as early as is practicable. If the Justice or the Administrative Judge decides to refer a case to the Program or if the parties consent to a referral at a conference or in a written stipulation, the Justice shall issue an Order of Reference requiring that the case proceed to mediation in accordance with these Rules. A case not deemed appropriate for referral at its outset may be referred to the Program later in the discretion of the Justice.

(b) Within five (5) business days from receipt of the Order of Reference, the parties shall confer and select an agreed-upon mediator from the court=s roster. During this time, the parties shall also complete and return to the court and selected mediator the Mediation Initiation Form. Copies of the Mediation Initiation Form can be obtained from the Nassau County Supreme Court or on the Commercial Division website (at http://www.nycourts.gov/courts/comdiv/nassau.shtml).

(c) If the parties are unable to agree on a mediator, the parties shall within the same five (5) business days from receipt of the Order of Reference, submit to the Court the Mediation Initiation Form with four (4) names from the roster (two names from each party if necessary without indicating who picked which mediator). The Court will select a mediator from among the four (4) names submitted by the parties. Once a mediator is agreed upon or selected by the Court, the parties shall contact the mediator to schedule an initial session. Any mediator selected pursuant to this rule must comply with the conflict check procedures in Rule 8 below.

(d) The parties may agree on a mediator other than one listed on the Court=s roster, if they so desire. For a substitution to be made, the parties must contact the other mediator directly, make arrangements for that person to conduct the mediation, and submit a Mediation Initiation Form to both the Court and the selected mediator. Mediators selected from outside the Roster must comply with the deadlines set forth in these Rules and the confidentiality and immunity rules set forth herein as well.

(e) The initial mediation session must be conducted within 45 days from the date of the Order of Reference. This deadline is important and must be met. In the event of any extraordinary difficulties, the mediator shall contact the Court and, if necessary, intervention will occur to expedite the process. The mediator may initially request a conference call with both parties regarding any preliminary matters.

(f) At least one week before the initial session, each party shall deliver to the mediator a memorandum of not more than three pages, (12 point font, doubled spaced) setting forth that party's views as to the nature of the dispute, and suggestions as to how the matter might be resolved. This memorandum shall not be served on the adversary or filed in court, shall be read only by the mediator, and shall be destroyed by the mediator immediately upon completion of the proceeding.

(g) Unless exempted by the mediator for good cause, every party, including counsel must attend the initial mediation session either in person or, in the case of a corporation, partnership or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and authorized to settle the matter. Any attorney who participates in the mediation process shall be fully familiar with the action and authorized to settle.

(h) Parties and their counsel may be referred to mediation for a free four (4) hour initial session. Subject to the mediator=s discretion and full disclosure to the parties at the beginning of the initial session, the mediator may apply up to one (1) hour of preparation time toward the initial session, in which case the initial session shall last for no more than three (3) hours. At the conclusion of the initial session, the parties and mediator may (but are not required to) agree to continue the mediation. Mediator compensation for any additional mediation time beyond the initial session is governed by Rule 6, below.

(i) Within seven (7) days after the mediation process has concluded-whether by agreement, or the refusal of one or more parties to continue, the mediator shall complete the Mediation Disposition Form indicating settlement or lack thereof and transmit the Form, along with any written agreement, to the Court. If the mediation process results in a settlement, the parties shall submit an appropriate stipulation to the Part of the Justice assigned.

(k) At the end of an initial session mandated by subdivision (h) of this Rule, any party or the mediator may terminate the mediation process. If the mediation process has been terminated by one party only, the identity of that party shall not be reported.

(l) Notwithstanding the foregoing, if a party or counsel fails to schedule an appearance for a mediation session in a timely manner, appear at any scheduled session or otherwise fail to comply with these Rules, the mediator may advise the Court and the Court may impose sanctions.

Rule 4. Confidentiality:

(a) The mediation process shall be confidential. All documents prepared by parties or their counsel and any notes or other writings prepared by the mediator in connection with the proceeding-as well as any communications made by the mediator, parties or their counsel, for, during, or in connection with the mediation process-shall be kept in confidence by the mediator and the parties and shall not be summarized, described, reported or submitted to the court by the mediator or the parties. No party to the mediation process shall, during the action referred to mediation or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the mediation process, or seek to compel the testimony of any other party concerning the substance of the mediation process. Any settlement, in whole or in part, reached during the mediation process shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. Such an agreement shall be kept confidential unless the parties agree otherwise, except that any party thereto may thereafter commence an action for breach of this agreement. Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because the documents and information are submitted or referred to in the mediation process (including, without limitation, any documents or information which are directed to be produced pursuant to Rule 7b herein).

(b) No party to an action referred to the Program shall subpoena or otherwise seek to compel the mediator to testify in any legal proceeding concerning the content of the mediation process. In the event that a party to an action that had or has been referred to the Program attempts to compel such testimony, that party shall hold the mediator harmless against any resulting expenses, including reasonable legal fees incurred by the mediator or reasonable sums lost by the mediator in representing himself or herself in connection therewith. However, notwithstanding the foregoing and the provisions of Rule 4 (a), a party or the Court may report to an appropriate disciplinary body any unprofessional conduct engaged in by the mediator and the mediator may do the same with respect to any such conduct engaged in by counsel to a party.

(c) Notwithstanding the foregoing, to the extent necessary, (i) the parties may include confidential information in a written settlement agreement; (ii) the mediator and the parties may communicate with the Court about administrative details of the proceeding; and (iii) the mediator may make general reference to the fact of the

services rendered by him or her in any action required to collect an unpaid, authorized fee for services performed under these Rules.

Rule 5. Immunity of the Neutral:

Any person designated to serve as a mediator pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity to the extent permitted by law.

Rule 6. Compensation:

Parties shall not be required to compensate the mediator for services rendered during the initial session, or for time spent in preparation for the initial session. Should the parties choose to continue beyond the initial session, mediators shall be compensated at a maximum rate of $300/hour for time spent in mediation, and up to $150/hour for any additional preparation time needed beyond the initial session. All mediator fees and expenses shall be borne equally by the parties unless the court determines otherwise.

Rule 7. Stay of Proceedings:

(a) Unless otherwise directed by the Justice assigned, referral to mediation will not stay the court proceedings in any respect.

(b) Parties committed to the mediation process who conclude that additional time is required to fully explore the issues pertaining to their case may request a stay of proceedings. Regardless of whether a stay is granted by the Assigned Justice, if informal exchange of information concerning the case will promote the effectiveness of the mediation process and the parties so agree, the mediator shall make reasonable directives for such exchange consistent with any pre-existing disclosure order of the court and in compliance with the deadlines set forth herein.

(c) If the matter has not been entirely resolved within the 45-day period as provided in these rules (See Rule 3 (e)) but the parties and the mediator believe that it would be beneficial if the mediation process were to continue, the process may go forward. However, the mediation process should be completed within 75 days from the date of the Order of Reference unless the assigned Justice specifically authorizes the process to continue beyond the 75 days.

Rule 8. Conflicts of Interest:

In order to avoid conflicts of interest, any person tentatively designated to serve as a mediator shall, as a condition to confirmation in that role, conduct a review of his or her prior activities and those of any firm of which she is a member or employee. The mediator shall disqualify him or herself if the mediator would not be able to participate fairly, objectively, impartially, and in accordance with the highest professional standards. The mediator shall also avoid an appearance of a conflict of interest. In the event that any potentially disqualifying facts should be discovered, the mediator shall fully inform the parties and the Court of all relevant details. Unless all parties after full disclosure consent to the service of that mediator, the mediator shall decline the appointment and another mediator shall promptly be selected by the parties or the Court in a manner consistent with Rule 3 (b). Any such conflicts review shall include a check with regard to all parents, subsidiaries, or affiliates of corporate parties.

Rule 9. Communication with Assigned Justice:

The mediator may communicate with the assigned Justice or the assigned Justice=s staff about administrative details of the processing of any case referred to the Program by that Justice, but shall not discuss any substantive aspect of the case. Upon termination of the proceeding by a party pursuant these rules, the mediator shall not reveal to the Court which party brought the proceeding to an end. The mediator shall report to the Court at the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part.

Rule 10. Further ADR:

(a) While early attempts at mediation may not necessarily result in settlement, follow up attempts at a later date are consistent with the goals of this Program. Accordingly, upon request of a party or upon its own initiative, the Court may in its discretion issue an order directing subsequent referrals to the Program.

(b) Any case subsequently referred shall proceed in accordance with these Rules. For example, the parties shall not compensate the mediator for services rendered during an initial session or for time spent in preparation for an initial session conducted pursuant to a subsequent Order to the Program.

(c) Nothing in this Rule shall prohibit the parties from proceeding to mediation or other ADR, without Order of the court, and at their own expense.

Rule 11. Administration of Program:

The Program shall be supervised by the Hon. Thomas A. Adams, Administrative Judge, Tenth Judicial District – Nassau County.

September 2010
THE COMMERCIAL DIVISION
SUPREME COURT, CIVIL BRANCH
NASSAU COUNTY

ww2.nycourts.gov/ip/adr/index.shtml

NYCOURTS.GOV

ALTERNATIVE DISPUTE RESOLUTION

Overview

Mission Statement

The NYS Unified Court System is committed to promoting the appropriate use of mediation and other forms of alternative dispute resolution (ADR) as a means of resolving disputes and conflicts peacefully.

About Us

The Office of Alternative Dispute Resolution is part of the Division of Professional and Court Services in the New York State Unified Court System Office of Court Administration. We invite you to learn more About Us.

Presumptive ADR

In 2019, Chief Judge Janet DiFiore announced the Presumptive ADR Program, a statewide initiative in which the majority of civil cases would be referred to ADR processes for the opportunity to resolve matters early and efficiently. As a part of our Chief Judge's Excellence Initiative, Presumptive ADR builds on prior successes of *appropriate* dispute resolution in New York State, and in other jurisdictions, by referring cases to mediation and other forms of ADR earlier in the life of a contested matter. This Presumptive ADR Program is supported by the Chief Judge's Statewide ADR Advisory Committee, which was established in 2018, and which released an interim report of its findings and recommendations for how Presumptive ADR could be implemented.

Implementation of the Presumptive ADR initiative is overseen by the offices of the Deputy Chief Administrative Judges for Courts inside and outside New York City, the Honorable George J. Silver and the Honorable Vito Caruso, respectively.

To assist local Judicial Districts in implementing Presumptive ADR, the Statewide Office of Alternative Dispute Resolution created a central on-line location for court staff to share resources that can be helpful in developing local rules, orders, forms, and tools that can be tailored to the needs of individual courts and case types. Access Sharepoint Site (court staff only).

Statewide Mediator Application

To assist with onboarding qualified neutrals to serve as mediators for court cases, there is now a **Statewide Mediator Application** – a single application that mediators can use to apply to join any of the mediation rosters in the trial courts across the state.

Statewide Mediator Directory

To assist court users with locating a mediator that might be appropriate for their case, we have created the **Statewide Mediator Directory**, which lists mediators who are approved to mediate in courts throughout New York State.

Mediation & other ADR processes are available throughout New York State

Click on one of the links below to learn more.

Involved in a CONFLICT?

Information for ADR PRACTITIONERS

THE BRAINS BEHIND MEDIATION: REFLECTIONS ON NEUROSCIENCE, CONFLICT RESOLUTION AND DECISION-MAKING

*Daniel Weitz**

INTRODUCTION

On September 13, 1848, an explosives charge sent a three-foot tamping iron about an inch in diameter through the head of Phineas Gage.[1] Although Gage survived, the tamping iron, which entered just under the left eye and exited through the frontal portion of his head, destroyed his prefrontal cortex.[2] Prior to the accident, Gage was a popular foreman of a railroad construction crew.[3] After the accident, he was a tactless, profane, and impulsive man with a dramatically altered personality.[4]

It is through extreme examples of severe deficits in the brain that scientists were able to develop our earliest descriptions of how the brain affects behavior. Today, advances in neuroscience have given us unprecedented insights into the workings of the human brain.[5] A great deal has been discovered in disciplines ranging from cognitive-behavioral psychology and neuropsychology to molecular biology. To what extent these discoveries impact other fields, including the dispute resolution profession, is now a hotly-pursued topic. While a quick survey of recent studies of the brain produces a flood of connections to the practice of mediation, even

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1 *See The Phineas Gage Information Page Maintained By Malcolm Macmillan*, http://www.deakin.edu.au/hbs/GAGEPAGE (last visited Feb. 14, 2010).

2 *Id.*

3 *Id.*

4 *Id.*

5 For a great explanation of functional magnetic resonance imaging (fMRI), see MARCO IACOBONI, MIRRORING PEOPLE, THE SCIENCE OF EMPATHY AND HOW WE CONNECT WITH OTHERS 59 (2009). For a description of transcranial magnetic stimulation (TMS). *Id.* at 90. Other brain imaging techniques include electroencephalography (EEG) and magnetoencephalography (MEG). *Id.* at 162, 163.

neuroscientists caution against the certainty of their findings.[6] There is still more research to be done and many of these studies provide evidence of correlation but not necessarily causation. Perhaps we should resist the temptation to champion a long sought-after scientific basis for all that we do as mediators. However, there is no denying the fascination with what we are learning about the human brain, how it guides our behaviors, and how it impacts the way we make decisions. At a minimum, it is cause for great reflection.

I. OUR NEGATIVE VIEW OF CONFLICT

Mediation training programs often begin with a conflict word association exercise to explore the nature of conflict. Trainees typically produce a list of similarly negative words including argue, fight and disagreement. This list propels a lively discussion of why we tend to view conflict as something that is always negative. We point to television, our past experiences and even our parents. After encouraging reflection, sometimes through small group exercises, mediation trainers ask whether anything positive ever comes from conflict. Trainees list a number of positives including clarity, recognition, understanding, and improved relationships. The trainer then hopes the group will come to appreciate that conflict is not inherently good or bad but that the nature of conflict often depends on how it is handled.

Recent discoveries in the field of neuroscience shed even greater light on our predominantly negative view of conflict. In *Nurture Shock*, Po Bronson and Ashley Merryman discuss the work of Dr. E. Mark Cummings at the University of Notre Dame.[7] Cummings studied the impact that everyday parental conflict may have on children. Cummings found that the typical married couple had about eight disputes each day and that spouses were roughly three times more likely to express anger to each other as they were

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[6] *See* Edward Gandolf, *Cautions About Applying Neuroscience to Batter Intervention* 3 (citing NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE (Brent Garland & Mark Frankel, eds. 2004)), *available at* http://www.nationalcenterdvtraumamh.org/lib/File/Neuroscience%20and%20batterer%20programs-FINAL.pdf (last visited Mar. 6, 2011); *see also* Nigel Eastman & Colin Campbell, *Neuroscience and Legal Determination of Criminal Responsibility*, 7 NATURE REV. NEUROSCIENCE 311 (Apr. 2006), *available at* http://www.nature.com/nrn/journal/v7/n4/full/nrn1887.html.

[7] PO BRONSON & ASHLEY MERRYMAN, NURTURE SHOCK 184 (2009).

to show affection.[8] Children are witnesses to these conflicts forty-five percent of the time.[9] Cummings staged experiments to see what impact this type of conflict had on children. Ultimately, what he found was that witnessing the conflict itself did not result in any negative change in the child's behavior, provided the child was allowed to see the resolution of the argument.[10] It was only when the argument was stopped in the middle before resolution that it had a negative effect on the child's behavior.[11] Cummings has even shown that being exposed to marital conflict can be good for children provided it is constructive and resolved with affection.[12]

Think for a moment about our own childhood experiences with conflict. Did our parents fight? If so, was it constructive conflict? And as to a more subtle point, as Bronson and Merryman highlight, did our parents ironically make matters worse by taking the fight upstairs or into the other room, thus sparing us the exposure? If so, did they remember to tell us that they worked it all out?

Bronson and Merryman also point to a body of research on the nature of conflict among siblings.[13] Dr. Hildy Ross of the University of Waterloo found only about one in every eight conflicts between siblings ends in compromise or reconciliation.[14] In the other seven conflicts, the siblings withdraw usually after the older child bullied or intimidated the younger child.[15] Scottish researcher Dr. Samantha Punch concluded, "Sibship is a relationship in which the boundaries of social interaction can be pushed to the limit. Rage and irritation need not be suppressed, whilst politeness and toleration can be neglected."[16] Children made seven times as many more negative and controlling statements to their siblings as they did to their friends, according to Dr. Ganie DeHart of SUNY Geneseo in New York.[17]

Bronson and Merryman wonder what siblings learn from the thousands and thousands of interactions that they have with each other when, no matter how the conflict is handled, they will still be

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8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 BRONSON & MERRYMAN, *supra* note 7, at 120.
14 *Id.*
15 *Id.*
16 *Id.* at 121.
17 *Id.* at 120–21.

together the next day. They suggest perhaps that children learn poor social skills from those interactions, just as often as they learn good ones. They learn of conflict, but not necessarily constructive conflict.[18]

Bronson and Merryman also provide support for those who claim that we get our negative view of conflict, and perhaps our poor conflict resolution skills, from children's television. Citing studies involving comparisons of educational television with more violent children's shows, we now know that while children may be less violently aggressive after watching educational television, they are far more relationally aggressive.[19] Bronson and Merryman explain that while physical aggression can include pushing or hitting, and verbal aggression often involves name calling, relational aggression involves ignoring or telling lies about another child. The more children watched educational television, the more controlling, manipulative and bossier they became. Bronson and Merryman point out that one possible explanation for this phenomenon may be that educational television spends most of its time establishing conflict between characters and very little time resolving it. Preschoolers, for example, are said to be less able to connect the information from the end of the show to what happened earlier. They tend to learn from the individual behaviors shown rather than the overall lesson.[20]

Bronson and Merryman not only provide us with insights into our views on conflict, but they also provide us with food for thought on why we behave the way we do in conflict.[21] For example, significant research has been done on the importance of sleep, which supports the position that we consolidate learning and store memory during sleep.[22] Bronson and Merryman report that according to these studies, negative memories are stored in the amygdala (an area of the brain associated with strong emotions such as fear) while neutral and positive memories are stored in the hippocampus (an area of the brain associated with storage of memory and conversion of short term to long term memory).[23] Furthermore, lack of sleep is harder on the hippocampus than it is on the amygdala, so we may remember negative feelings and events more

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18 *Id.* at 119.

19 BRONSON & MERRYMAN, *supra* note 7, at 180.

20 *Id.*

21 *Id.* at 35.

22 *Id.* at 33–35.

23 *Id.* at 35.

so than neutral or positive ones. Could this explain why we so often seem to judge people in conflict by their most negative potential? Other studies have shown that stress can cause a similar effect on the hippocampus.[24] During situations of stress, hormones called glucocorticoids are released in the brain.[25] Glucocorticoids are known to cause damage to the hippocampus. In fact, under extreme conditions, glucocorticoids can kill brain cells in the hippocampus.[26] This suggests that stress, and the brain chemistry connected with it, is not only related to our negative view of conflict but perhaps our negative view of those with whom we have conflict and how we interact with them.

What can we learn from the field of neuroscience and these studies of the brain, conflict and even educational television? The above research suggests that our predominantly negative view of conflict is shaped by our experience dating back to early childhood. This further suggests that our negative view of conflict is perhaps a conditioned response. Did any of us have positive role models for dealing constructively with conflict when we were children? And even if we did, were those lessons as frequent or as powerful as the negative ones?[27] Did our parents let us watch educational television thinking we were learning something good about conflict resolution? The jury may still be out on exactly what it was we were learning, but it appears evident in the way in which so many of us behave in conflict situations that we developed more destructive than constructive skills. Furthermore, our negative view of conflict undoubtedly impacts how we approach it and increases the likelihood that we will adopt a competitive style when a collaborative style would be optimal. The perception that conflict is inherently negative quite possibly precludes many disputing parties from even trying mediation when it would otherwise be helpful to them. However, if our negative view of conflict is indeed largely a conditioned response, perhaps we can change it. If our destructive behavior in conflict is further influenced by the unconscious effects of stress or lack of sleep, perhaps we can mitigate these effects by simply becoming aware that they exist. Therefore, the integration of mediation and neuroscience not only provides help with resolving the conflict at hand, it provides an opportunity to develop con-

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24 JOHN MEDINA, BRAIN RULES 178 (2009).

25 *Id.* at 179.

26 *Id. See also* NORMAN DOIDGE, THE BRAIN THAT CHANGES ITSELF 248 (2007).

27 For an interesting discussion of the psychological phenomenon of "negativity bias," which means that the human mind is wired to magnify the negative, see JONAH LEHRER, HOW WE DECIDE 81 (2009).

structive conflict resolution approaches and skills that can be used well into the future.

II. NEUROPLASTICITY AND REASON FOR HOPE

During much of the twentieth century, the prevailing theory was that our brains, at least for the most part, were almost completely formed and unchanging after childhood.[28] However, recent discoveries have provided evidence of neuroplasticity, which challenges the assumption that our brains are done developing once we reach adulthood.[29] For example, studies have shown that exercise can improve cognitive function and even brain physiology.[30] Exercise also appears to stimulate a protein known as Brain Derived Neurotrophic Factor ("BDNF"), which aids in the development of healthy tissue.[31] In *Brain Rules,* molecular biologist John Medina refers to BDNF as having a powerful fertilizer-like growth effect on certain neurons in the brain.[32] According to Medina, BDNF not only keeps neurons young and healthy, rendering them much more willing to connect with one another, but it also encourages the formation of new cells in the brain.[33]

Another revolutionary scientific discovery is the neural insulator known as myelin. In *The Talent Code*, Daniel Coyle describes how myelin wraps itself around the nerve fibers in our brain that serve as the basis of skill, making them stronger and faster.[34] The thicker it gets, the better it insulates and the faster and more accurate our movements and thoughts become. Coyle tells us that we continue to grow myelin well into our fifties and beyond, after which we still make myelin even though we start to lose more than we make.[35]

These are amazing discoveries. No matter how prior experience may have shaped our perception of conflict, if we can always acquire new skills and improve our brain function, it is not a far stretch to believe we can improve the way in which we perceive

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28 DOIDGE, *supra* note 26, at i.

29 *Id.* at xix.

30 *See* MEDINA, *supra* note 24, at 7–27. *See also* DOIDGE, *supra* note 26.

31 *See* MEDINA, *supra* note 24, at 22.

32 *Id.*

33 *Id.*

34 *See generally* DANIEL COYLE, THE TALENT CODE (2009).

35 *Id.* at 6.

and deal with conflict. As Coyle puts it, maybe you *can* teach an old dog new tricks; it just takes "deep practice."[36]

III. Mediator Skills and Decision-Making

In my journey through numerous books and studies dealing with neuroscience, a number of associations with conflict resolution and mediation emerged. Studies of the brain have produced major insights into how we make decisions. When viewing these insights from the perspective of a conflict resolution professional, it does not take much to connect aspects of mediation and mediator skills to neuroscience and what we have been learning about the brain.

Fundamental mediator skills include the delivery of an opening statement, framing negotiable issues, and generating movement between parties who are stuck in their positions.[37] The utility of these skills can be connected to a number of findings including the psychological phenomenon of "priming," "the framing effect," the role of mirror neurons, and the functions of the left and right hemispheres of the brain as they impact cooperation, empathy, and problem solving.[38] Additional studies in behavioral economics and cognitive-behavioral psychology provide explanations for how our adult views of conflict are shaped, discussed *supra*, and reasons why mediator skills and reflective practice are so helpful to people in conflict.

Malcolm Gladwell wrote in *Outliers* that, "[p]lane crashes are much more likely to be the result of an accumulation of minor difficulties and seemingly trivial malfunctions."[39] The same is true for any discussion of the impact of specific mediator skills. Focus on the use of any one skill or nuance of process will not by itself typically change the nature of the dialogue between the parties in me-

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36 *Id.* at 47–53. "Deep practice" as used by Coyle is comparable to the term "deliberate practice" used by psychologist Anders Ericsson, who described deliberate practice as "working on technique, seeking constant critical feedback, and focusing ruthlessly on shoring up weaknesses." *Id.* at 51. Ericsson is known in part for his groundbreaking work, which included the central tenet that "every expert in every field is the result of around ten thousand hours of committed practice." *Id. See also* Malcolm Gladwell, Outliers 40 (2008).

37 *See Mediation Training Curriculum Guidelines*, New York State Unified Court System, http://www.nycourts.gov/ip/adr/Part146_Curriculum.pdf (last visited Mar. 6, 2011) [hereinafter Mediation Training Guidelines].

38 *See infra* Part IV.

39 Gladwell, Outliers, *supra* note 36, at 183.

diation. The true difference between whether or not the parties' conflict lands safely or crashes to the ground is the accumulation of skills and nuances of process that may seem trivial when viewed in isolation.

IV. THE PSYCHOLOGICAL PHENOMENON OF PRIMING AND MEDIATOR OPENING STATEMENTS

Most mediators begin the initial meeting with an opening statement. This is particularly true of mediators who deal with interpersonal conflict including divorce, community, or workplace mediation.[40] The goals of an opening statement include educating the parties about the process, developing rapport and trust, and setting the tone for a collaborative negotiation. Despite the apparent benefits of providing an opening statement, some mediators question its utility.[41] Critics of a mediator opening statement say it takes too long and much of it is a waste of time as the parties are too distracted to absorb the content. However, the research of John Bargh on the "priming effect" may provide new insights.

John Bargh, a psychology professor at Yale University, has published many books and papers on the "priming effect," in which prior presentation of a word or concept can influence behavior.[42] One of the most well known priming studies involves two groups of undergraduate students at New York University who were asked to read a long list of words.[43] Everyone was given a list of five-word sets and asked to make a grammatically correct four-word sentence out of each set. These are called scrambled sentence tests. For example, students are presented with the following: "feels weather the hot patience." This five-word set could be unscrambled to read "the weather feels hot." However, students in this experiment were actually given one of two different lists containing words meant to "prime" them to behave in a specific way. Mixed into one list were words associated with being polite; mixed into the other list were words associated with being rude. When the students were soon placed in an experimental situation to measure the

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40 *See* Mediation Training Guidelines, *supra* note 37.

41 This is based on my own experience working with mediators.

42 *See* MALCOLM GLADWELL, BLINK 53 (2007).

43 *See id.* at 55 (describing a study conducted by John Bargh, Mark Chen and Lara Burrows at New York University).

degree to which they would act polite or rude, their behavior correlated with the words with which they were primed.

After completing twenty variations of the scrambled sentences, the students were instructed to take the completed lists down the hall to the professor's office where they were to be collected and scored. When the students arrived at the professor's office, there was another student standing in the doorway asking the professor a series of questions. The real test was to see how quickly the students would interrupt or how long the students would wait before interrupting to hand in the completed test. The students who were primed with polite words waited longer on average than the students who were primed to be rude. In fact, the overwhelming majority of the students primed to be polite never interrupted at all.[44] Simply priming them with words associated with being polite made them wait longer than those students who were primed with words associated with being rude.

There is an enormous body of research demonstrating the ability to prime subjects with subtle words to act in an almost limitless variety of ways.[45] Research has even shown that priming can make us slow or fast, or even good or bad at math. But before we explore math, I will conclude the discussion of opening statements.

Think about the words mediators emphasize in their opening statements. Most give meaningful emphasis to words such as "listen," "understand," "comfortable," "confidential," "freely," and "informal." Mediation trainers and teachers often discuss the benefits of a good opening statement in order to set the tone for mediation because we want to establish an atmosphere of cooperation and open dialogue and in doing so, distinguish mediation from its adversarial alternatives. While most mediators have always appreciated the power of a good opening statement, we now have reason to believe there is a scientific explanation for its effectiveness as well. According to the "priming effect," "the way we think and act . . . are a lot more susceptible to outside influences than we realize."[46]

When we deliver opening statements, we have the potential to prime the parties to act in a manner consistent with the words we use. Furthermore, given our tendency to associate conflict with that which is negative, parties are likely primed to behave poorly in conflict. At a minimum, they are primed to adopt a competitive

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[44] *Id.*

[45] *See* IAIN MCGILCHRIST, THE MASTER AND HIS EMISSARY 167 (2009).

[46] GLADWELL, BLINK, *supra* note 42, at 58.

and adversarial approach to conflict. Therefore, a mediator's opening statement is not only an important aspect of establishing a collaborative atmosphere, but perhaps also plays a role in neutralizing the way in which parties are negatively primed as they enter the process.[47]

V. THE FRAMING EFFECT AND THE UTILITY OF FRAMING NEGOTIABLE ISSUES

The research showing that we can be made to perform better or worse on mathematical problems ties the "priming effect" with another psychological phenomenon known as the "framing effect."[48] In a study conducted by Sian L. Beilock from the University of Chicago, a group of female undergraduates were given a series of relatively simple math problems known as "modular arithmetic."[49] Students were given horizontal math problems, represented by a left to right linear equation as well as vertical math problems represented by numbers above and below one another forming the equation. Then, half of the female students were reminded of a negative stereotype, for example that women do not do as well as men on math.[50] This form of priming is called the "stereotype threat" condition in which simply reminding people of a stereotype can create anxiety, which in turn decreases performance.[51] This allowed Beilock and her colleagues to explore how a high-stress situation creates worries that compete for the working memory normally available for performance. After all, if we are stressed out and anxious, there is going to be less working memory available to deal with solving the math problems.

Jonah Lehrer, a frequent writer in the field of neuroscience, described the results of Beilock's study in his blog, *The Frontal Cortex*.[52] As it turned out, the activation of the stereotype led to decreased performance, but only on the horizontal problems.[53]

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47 For a related discussion on the power of "anchoring," a commonly used negotiation technique, see LEHRER, *supra* note 27, at 156–58.

48 *See id.* at 106.

49 *See* Sian Beilock, *Math Performance in Stressful Situations*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 3395 (2008).

50 *Id.* at 339.

51 *Id.*

52 Jonah Lehrer, *The Frontal Cortex* (Apr. 13, 2010), http://scienceblogs.com/cortex/2010/04/dont_choke.php.

53 *Id.*

of studies, which show that emotional habits and patterns and expectations of rewards are difficult to break.[61] Burton also makes a compelling case for how this same argument applies to thoughts: "Once firmly established, a neural network that links a thought to a feeling of correctness is not easily undone. An idea known to be wrong continues to feel correct."[62]

In *How We Decide*, Jonah Lehrer points to studies that show people with strong affiliations, for example, partisan voters, when confronted with inconsistent information, recruit the prefrontal cortex to filter the information to fit what it already believes and to ignore inconsistencies.[63] Once this is done, they get a positive emotional response (through the release of dopamine) and are rewarded—to Lehrer, this is the definition of rationalizing.[64]

Marco Iacoboni and colleagues conducted research that revealed how political sophisticates, in answering political questions, rely on memory and a "default state network" or the region that is most active when we are resting.[65] In order to better understand the default state network, Iacoboni refers to the state you are in when you are daydreaming.[66] You were certainly conscious but not necessarily engaged in any form of conscious deliberation. Sophisticates think about politics all the time so they do not need to employ conscious deliberation to the political statements—they just rely on memory. Political novices show activity in the regions of the prefrontal cortex associated with cognitive attention and in doing so shut down the default state network.[67]

Think about parties in conflict who have invested a lot of time, energy and thought to their positions. How much of their behavior in conflict is driven by their default state network and retrieval of memory? The research on political sophisticates suggests that perhaps a great deal of conflict is driven by processes other than conscious deliberation.[68] Colin Powell's approach to thinking, for

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[61] *See generally* ROBERT A. BURTON, ON BEING CERTAIN, BELIEVING YOU ARE RIGHT EVEN WHEN YOU'RE NOT (2008).

[62] *Id.* at 97–98.

[63] LEHRER, *supra* note 27, at 205. For another example of cognitive dissonance, see BURTON, *supra* note 61, at 13.

[64] LEHRER, *supra* note 27, at 205.

[65] *See* IACOBONI, *supra* note 5, at 252–53.

[66] *Id.* at 253.

[67] *Id.* at 252.

[68] For a related discussion on the phenomenon of "confabulation," in which the mind "makes up" information to resolve ambiguities, see MCGILCHRIST, *supra* note 45, at 81.

The reason for these results has to do with the local processing differences of the brain.[54] The horizontal problems depended more on the same area of the brain (the left prefrontal cortex) associated with anxiety, which would likely be preoccupied worrying about our math performance. In contrast, performance on vertical problems was unaffected.[55] The vertical math problems are perceived primarily as visual spatial problems, which are associated with a different area of the brain (the right prefrontal cortex), which is not distracted by our anxieties or threatened by stereotypes.[56] In other words, according to Lehrer, "merely changing the presentation of the problem can dramatically alter how the brain processes the information."[57]

Beilock's study should also remind mediators of a classic skill we call "framing negotiable issues."[58] Mediators are trained to frame issues in neutral language to invite interest-based discussion rather than adversarial positional bargaining. This is done in order to avoid adopting the position of either party and to create an inviting agenda that encourages meaningful dialogue. We frame issues neutrally to take the sting out of the topic. Thanks to Sian Beilock, we now know that neutral framing also changes the way in which the brain actually processes the information and may even mitigate the anxiety produced by conflict.

VI. PRISONERS OF OUR PRECONCEPTIONS[59]

"Tell me what you know . . . Then tell me what you don't know, and only then can you tell me what you think. Always keep those three separated."

Colin Powell[60]

Robert Burton's fascinating work, *On Being Certain, Believing You Are Right Even When You're Not*, discusses an impressive line

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54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *See* Lela P. Love, *Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreements*, 38 FAM. & CONCILIATION CTS. REV. 27, 30 (2000).

59 This phrase is borrowed from University of California at Berkley psychologist Philip Tetlock referring to political pundits who, according to Tetlock, are particularly prone to dismissing dissonant or contradictory possibilities. Or as Jonah Lehrer puts it, they "[p]erform elaborate mental gymnastics to avoid admitting error." *See* LEHRER, *supra* note 27, at 209.

60 *Id.* at 248.

of studies, which show that emotional habits and patterns and expectations of rewards are difficult to break.[61] Burton also makes a compelling case for how this same argument applies to thoughts: "Once firmly established, a neural network that links a thought to a feeling of correctness is not easily undone. An idea known to be wrong continues to feel correct."[62]

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64 LEHRER, *supra* note 27, at 205.

65 *See* IACOBONI, *supra* note 5, at 252–53.

66 *Id.* at 253.

67 *Id.* at 252.

68 For a related discussion on the phenomenon of "confabulation," in which the mind "makes up" information to resolve ambiguities, see MCGILCHRIST, *supra* note 45, at 81.

instance, is a possible way to avoid becoming prisoners of our preconceptions.

VII. Mirror Neurons

Conflict escalation is a universal experience. We have all been involved in conflicts and we have all experienced firsthand how conflict has a tendency to escalate. One person speaks and the receiver raises an eyebrow. The speaker continues and suddenly an insult is hurled. Mediators allow venting as a means to let off steam. Mediators also frequently and repeatedly summarize the concerns raised by the parties as a way to de-escalate conflict and encourage discussion of interests instead of positions.[69] But what really is at the core of the escalation? Is it just poor word choice or tone? What did that raised eyebrow really mean and were there other expressions communicated that we perhaps failed to consciously appreciate?

According to Marco Iacoboni, Italian scientists were among the first to discover mirror neurons while researching the macaque monkey in a laboratory in Parma, Italy.[70] Macaque monkeys were given grasping tasks, for example, picking up a raisin or a peanut.[71] Meanwhile, the researchers tracked the firing of neurons in the motor areas of the monkey's brain through implanted electrodes.[72] One day, researcher Leo Fogassi casually picked up a peanut and discovered that the monkey's brain reacted as if the monkey had grasped the peanut himself.[73] The area of the brain that reacted was the same area that reacts when the monkey performs the grasping action.[74] Only this time it happened based solely on observing Fogassi as he performed the task.[75] Soon enough, researchers discovered these same mirror neurons in human beings.[76]

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69 Love, *supra* note 58, at 28.

70 *See* Iacoboni, *supra* note 5, at 10 (According to Iacoboni, there are several recorded observations of mirror neurons claiming to be the first but none are confirmed as such. However, through many subsequent controlled experiments over a period of twenty years, the existence of mirror neurons was indeed confirmed).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 Iacoboni, *supra* note 5, at 10.

Anyone who has ever spent time with a baby knows how easily they can imitate and how this simple action can easily bring a smile to your face. But what researchers are beginning to conclude is that babies do not only learn to imitate, they imitate to learn.[77] In one study, a baby imitated facial expressions as early as forty-one minutes after birth.[78]

According to Iacoboni, this ability to imitate is the result of special neurons known as mirror neurons. These mirror neurons are not just about copying, but are also a means of understanding another's intentions.[79] In fact, the mirroring of other people's speech is necessary for us to perceive it.[80] Mirror neurons send signals to the limbic system, which allows us to feel the emotions associated with the observed facial expressions. Only after we feel these emotions internally are we able to explicitly recognize them.[81] Mirror neurons also learn to predict the actions of other people and to code them for intention, which suggests that mirror neurons are shaped by our experience.[82] Mirror neurons help us reenact in our brains the intentions of other people, giving us a profound understanding of their mental states.[83]

The discovery of mirror neurons has had widespread implications for many disciplines. For example, Iacoboni and others have begun to connect deficits in mirror neuron function to conditions such as autism.[84] Is there a connection between our unconscious imitation or mirroring of others and the way in which conflicts escalate? How much of our anger or frustration, or dismissive tone is derived from the other as opposed to our own free will or autonomy?

Iacoboni also discusses the interdependence of self and other when he says, "the more we learn about mirror neurons, the more we realize that we are not rational, free acting agents. . . . Mirror neurons in our brains produce automatic imitative influences of which we are often unaware and that limit our autonomy by means of powerful social influences."[85] He even points out that "imita-

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77 *Id.* at 48.

78 *Id.*

79 *Id.* at 58.

80 *Id.* at 105.

81 *Id.* at 112.

82 IACOBONI, *supra* note 5, at 162.

83 *Id.*

84 *Id.* at 172.

85 *Id.* at 209.

tion and 'liking' tend to go together as well."[86] Is that why we hate it when people make faces at us or roll their eyes when we speak? Are we unconsciously looking for mirroring and instead receiving explicit rejection? How much of our response to conflict begins as an unconscious mirroring of the other? And if mirroring plays a role in the escalation of conflict, can it play a similar role in the de-escalation of conflict? According to Iacoboni, "mirroring is a pervasive form of communication and social interaction among humans."[87]

We now know that parties in conflict have to deal with brains that may be wired to amplify the negative in conflict and are subject to the unyielding power of our preconceptions and the escalating potential of mirror neurons. At the same time, mediators can use opening statements and summarizing skills to encourage the parties toward a more collaborative conflict approach, de-escalate conflict, and perhaps discuss their interests instead of just their positions. The reflections on the neuroscience surrounding conflict and decision-making are endless. But for now, I have only one more observation.

VIII. MEDIATING ON THE RIGHT SIDE OF THE BRAIN

In 1979, Betty Edwards published the bestselling book *Drawing on the Right Side of the Brain*, in which she illustrated how suppressing the left side of the brain and enabling the right side of the brain can bring out the true artist in anyone.[88] She believed that the left hemisphere is too narrowly focused on details to see the big picture. However, by using techniques to suppress the left hemisphere, she allows the right hemisphere to see the whole picture and put the pieces together.[89]

A common theme in the neuroscience literature surveyed for this article involves the differences between the left and right hemispheres of the brain. While the left hemisphere of the brain is critical to decision-making, particularly for its ability to engage in sequential logic, it is the right hemisphere upon which we rely for

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[86] *Id.* at 114.

[87] *Id.* at 245.

[88] *See generally* BETTY EDWARDS, DRAWING ON THE RIGHT SIDE OF THE BRAIN (1979).

[89] *Id.* For an interesting interpretation of the applicability of Edwards' book, see DANIEL H. PINK, A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE 15 (2006).

matters of cooperation, empathy, and the types of problem solving associated with a shift toward collaboration.[90]

If we are to accept some of the differences between the left and right hemispheres as accurate, then mediators should find ways to activate the right hemispheres of the parties in mediation. By doing so, we maximize the parties' ability to engage in collaborative dialogue. According to the research reported by Iain McGilchrist and others, there are quite a few commonly accepted differences between the left and right hemispheres of the brain. For example: "the left hemisphere delivers what we know, rather than what we actually experience"[91]; or the right hemisphere is concerned with the whole context while the left hemisphere is concerned with the parts and naming.[92] According to McGilchrist, "we must learn to use a different kind of seeing, to be vigilant not to allow the right hemisphere's options to be too quickly foreclosed by the narrower focusing of the left hemisphere."[93]

Most mediators likely recall the Prisoner's Dilemma model in game theory, which has served as a basis for training mediators in the benefits of collaboration over competition.[94] According to McGilchrist, scientists have studied the brains of humans as they played this Prisoner's Dilemma game.[95] In Prisoner's Dilemma, subjects that achieve mutual cooperation with another human being show activity in the pleasure centers of the brain, including the

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90 *See generally* MCGILCHRIST, *supra* note 45. Additional differences between the left and right hemispheres cited by McGilchrist include: "When we put ourselves in others' shoes, we are using the right inferior parietal lobe and the right lateral prefrontal cortex, which is involved in inhibiting the automatic tendency to espouse one's own point of view." *Id.* at 57; "In circumstances of right hemisphere activation, subjects are more favourably disposed towards others and more readily convinced by arguments in favour of positions that they have not previously supported." *Id.*; "The right hemisphere plays an important role in 'theory of the mind,' a capacity to put oneself in another's position and see what is going on in that person's mind." *Id.*; "Ultimately, there is clear evidence that when it comes to recognising emotion. . .whether it is expressed in language or through facial expression, it is the right hemisphere on which we principally rely." *Id.* at 59; "The one exception to the right hemisphere's superiority for the expression of emotion is anger." *Id.* at 61; the right hemisphere is partial to emotions that deal with bonding and empathy while the left hemisphere is partial to competition, rivalry and self belief. *See id.* at 62–63; an extensive body of research now indicates that insight, whether mathematical or verbal, is associated with activation in the right hemisphere." *See id.* at 65; "Denial is a left hemisphere specialty." *See id.* at 85; "Our sense of justice is underwritten by the right hemisphere, particularly by the right dorsolateral prefrontal cortex." *Id.* at 86.

91 *Id.* at 164.

92 *See id.* at 70.

93 *Id.* at 164.

94 For a detailed description of Prisoner's Dilemma, see MCGILCHRIST, *supra* note 45, at 147.

95 *Id.*

dopamine system, striatum, and orbitofrontal cortex.[96] They do not, however, show activity when cooperation is with a computer.[97] When playing with a human being, the majority of regions showing cooperation are right-sided whereas when playing with the computer the regions are mainly left-sided.[98] McGilchrist goes on to say that "[i]t is mutuality, not reciprocity, fellow-feeling, not calculation, which is both the motive and reward for successful cooperation."[99]

The research on the Prisoner's Dilemma scenario provides support for the theory that relationship building and direct communication between the parties is a critical component of establishing a cooperative negotiation environment. This research also has implications for the use of caucus in mediation. Mediators are frequently taught to caucus less if the parties have an ongoing relationship; the parties need to learn to work things out themselves.[100] The research on Prisoner's Dilemma supports the theory that the parties, particularly those with the potential for an ongoing relationship, may do better together in joint session than apart in caucus. At a minimum, caucus should be used sparingly in order to give the parties the greatest opportunity to develop the mutuality and fellow feeling necessary for cooperation.

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96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 355 (2d ed. 2005).

IX. OLD LADY YOUNG LADY[101]

The above image has been used extensively by mediation trainers. Through elicitive dialogue trainers might ask the trainees to look at the image and describe what they see. Some trainees would say they see an old lady. Others would say they see a young lady. And some would say they see both. The trainer might then ask those who see the young lady to help those who do not and vice versa. Trainees draw attention to the mouth of the old lady and encourage the viewer to see the mouth as a choker on the neck of the young lady. They point out that the young lady is looking off to her right revealing a profile of her left jawbone. The jawbone is

101 This picture known as "My Wife and My Mother-in-Law" was originally published in 1915 by the cartoonist W.E. Hill.

also the nose of the old lady. Eventually, everybody will see both images. The lessons learned may include the fact that two people can look at the same thing and see it in dramatically different ways. One might say the image reflects the importance of being open to looking at a situation from another point of view. However, if anyone doubted that the other was telling the truth about what they see, they might only be willing to look at the image from their own point of view. What neuroscience now tells us about this exercise takes these lessons one step further.

McGilchrist argues that the right hemisphere will not prematurely resolve ambiguities such as the "old lady young lady image" because studies of the brain involving images like this one reveal that such ambiguities can be seen in one way or another, but not simultaneously.[102] This means you cannot hold onto your own point of view and simultaneously see the other. You have to suspend your point of view or toggle points of view for a brief moment in order to see the other perspective. This is easier said than done. With images such as the old lady young lady, "[w]e remind ourselves that this is pure biology on display, and move on to other thoughts. But with unstable mental images that are personally meaningful, this is far more difficult."[103] The key to this challenge may reside in the abilities of the right hemisphere. "So the left hemisphere needs certainty and needs to be right. The right hemisphere makes it possible to hold several ambiguous possibilities in suspension together without premature closure on one outcome."[104]

CONCLUSION

"It is the rule of thumb among cognitive scientists that unconscious thought is 95 percent of all thought—and that may be a serious underestimate. Moreover, the 95 percent below the surface of conscious awareness shapes and structures all conscious thought."[105]

Phineas Gage and his horrible accident provided us with some of our earliest insights into the connection between our brain and the way in which we behave. Advances in technology now enable

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102 *See* MCGILCHRIST, *supra* note 45, at 82.

103 BURTON, *supra* note 61, at 199.

104 MCGILCHRIST, *supra* note 45, at 82.

105 GEORGE LACKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH 13 (1999).

us to observe the brain in unprecedented ways. This has led to a wide array of discoveries in neuroscience with potentially broad application to the dispute resolution profession. Researchers who have studied the role of conflict in the lives of children have taught us that we learn as many if not more ineffective conflict management skills growing up as effective skills. From glucocorticoids to cognitive dissonance and the discovery of mirror neurons, we have reason to believe our perceptions of conflict and those with whom we have conflict may be influenced as much, if not more, by our unconscious thoughts than our own free will. We have explored how the "priming effect" and the "framing effect" can be correlated with the utility of certain mediator skills, including the delivery of opening statements and the framing of negotiable issues. We have learned there are many differences between the tendencies of the left and right hemispheres of the brain. These differences may provide new clues in how to best use mediation to foster collaborative dialogue. Yet we have only seen the tip of the iceberg when it comes to the application of neuroscience to the world of dispute resolution and mediation. More discoveries are surely on the horizon.

Jess A. Bunshaft

Principal

Synergist Mediation

Jess Bunshaft is mediator & arbitrator, and is a principal of Synergist Mediation, bringing over 15 years of mediation experience to the practice. His experience as a trial lawyer, trying major cases in tort & civil rights matters in both state and federal courts, combined with his experience as a business executive, make him uniquely positioned to handle business disputes, employment matters, tort cases, and a host of other issues found in an active ADR practice.

In addition to his legal and ADR experience, Jess has worked in senior municipal management, as a healthcare system vice president, hospital vice president, and executive vice president of one of the largest not-for-profit organizations in New York.

Recognized for his skill in mediation, Jess:

- Is a mediator for the United States District Court for the Southern District of New York (SDNY)
- Serves as a Special Master for the Appellate Division, Second Department of the New York State Supreme Court, in its mandatory mediation program
- Is a member of the Commercial Division mediation panel of the NYS Supreme Court, Nassau County
- Has led mediator training programs and served as a facilitator for New York State Bar Association commercial mediator training programs
- Created and led in-house employee relations mediation programs, resolving hundreds of employee-management disputes for over 15 years
- Has extensive experience in employment law, tort actions, civil rights matters, business management and commercial litigation
- Has worked as an employee advocate in diverse settings
- Co-chairs the Alternative Dispute Resolution Committee of the Nassau County Bar Association (NCBA)
- Served in the management of hospital/healthcare organizations throughout the New York metro area
- Has taught law students studying mediation, including serving as mediator for the mediation advocacy program at the St. John's University School of Law, for the ABA mediation advocacy competition at Cardozo Law School, and for the FINRA Dispute Resolution Triathlon.
- Co-chaired the 2019 NYSBA/NCBA Advanced Commercial Mediator Training program and taught as a facilitator in the 2020 Basic & Advanced Mediator programs

Jess also is a mediator and arbitrator for Part 137 fee dispute arbitrations, including chairing panel arbitrations in New York and Bronx counties and as a solo arbitrator in Nassau County, and is an arbitrator for the Financial Industry Regulatory Authority (FINRA), as well as being on multiple courts' mediation panels.

With extensive training and over 15 years of experience in mediation, over 20 years of corporate management experience, as well as having served as Nassau County's Senior Trial Attorney in Tort & Civil Rights Litigation, combined with 28 years of legal practice in a diverse array of specialties,

including personal injury, civil rights, labor & employment law, and corporate litigation, Jess brings a broad base of experience and skill now focused on helping parties resolve a variety of matters.

William J. Croutier, Jr., Esq.
33 Judson Place
Rockville Centre, New York 11570

EDUCATION

St. John's University School of Law
J.D. - June 1978
Admitted to NY Bar 1979.
Admitted to Practice:
New York State Courts
US District Court, Eastern District
US District Court, Southern District

Iona College
New Rochelle, New York
B.A. - May 1975

LEGAL EXPERIENCE

Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C.
Syosset, New York
February 1979-present
Senior Partner
Trial Attorney
Verdicts in all facets of personal injury trials (liability and damages) including but not limited to: Labor Law, motor vehicle, pedestrian knock down, trip and fall, commercial, products liability, homeowner cases.
Special Prosecutor for the Village of Rockville Centre 1992-2007
Deputy Village Attorney for Village of Rockville Centre 1992-2007
Village Justice for Village of Rockville Centre - June 2007-present

PROFESSIONAL AFFILIATIONS

New York State Bar Association
Nassau County Bar Association
Nassau-Suffolk Trial Lawyers Association
New York State Trial Lawyers Association
Association of Trial Lawyers of America
Defense Association of New York
Defense Research Institute

PROFESSIONAL PRESENTATIONS

Lecturer for Nassau County Bar Association on Litigation, Trial Strategy
Lecturer for New York Business
Institute on Litigation Topics, Trial of a Case, Jury Selection, Openings & Summations, Cross Examination of Experts and defending damages
Lecturer for Nassau Academy of Law on Litigation and Trial Strategy
Lecturer for defendants and plaintiffs round table at Nassau County Bar Association
Lecturer on litigation and discovery for Touro Law School
Lecturer for St. John's University School of Law on Litigation Tactics
Moot Court Judge for St. John's Law School Moot Court Competition
Moot Court Judge for Polestino Trial Advocacy Institute
Judge for National Civil Rights Trial Competition
Prepared written outlines, pamphlets, contributed chapters to seminar books and materials as part of lecture presentations
Speaker for New York State Bar Association on various topics including: Practical skills-basic civil practice; The Trial - how to handle the trial of neck and back injury cases; Preparing and defending damages; Practical skills - civil practice.

PROFESSIONAL HONORS

Chairman Nassau - Suffolk Trial Lawyers Association
Director Nassau - Suffolk Trial Lawyers Association
Defendant's Round Table - Nassau County Bar Association – Chairman 2013-2015
Judiciary Committee Member - Nassau County Bar Association
Supreme Court Committee - Nassau County Bar Association – Chairman 2007-2008; 2008-2009
Public Relations Committee Nassau County Bar Association
Jurisperitus Award Court Officers Benevolent Association of Nassau County, 2004
Distinguished Service St. John's Civil Trial Institute Award
Certificates of Appreciation - St.-John's Civil Trial Institute

PERSONAL HONORS

Eugene J. Murray Citizen of the Year Award 2012
Molloy College Caritas Medal for Service to the Community 2003
Person of the Year - Rockville Centre, New York 2002
President St. Agnes School Board
Member Rockville Centre Planning Board (20 years)
Chairman Rockville Centre We Care September 11th Committee
Chairman Rockville Centre September 11 Memorial Committee
CYO Basketball Coach Boys and Girls (20 years)

Rachel Harris is a rising third year law student at St. John's University School of Law. Throughout her law school career, Rachel has demonstrated a passion for Alternative Dispute Resolution (hereinafter ADR) as evidenced by the ADR leadership positions she holds. Born and raised in Kentucky, Rachel brings a Southern charm to her ADR skills. In January of 2020, she was honored to be chosen as the New York State Bar Association's Dispute Resolution Section's Law Student Liaison for St. John's University School of Law. In May of 2020, Rachel was selected to be an Executive Board Member and Overall Coordinator of St. John's Law School's Dispute Resolution Society, the student arm of the Hugh L. Carey Center for Dispute Resolution.

At St. John's, Rachel continued to distinguish herself in her ADR competitions, externships, and as an ADR teaching assistant. In January 2019, Rachel served as a teaching assistant for Lawyering, a required first year course on negotiation fundamentals. In 2019, Rachel was also a member of the St. John's Law's Arbitration team, which placed Third in the Judith S. Kaye Arbitration Competition. During the Fall 2019 semester, Rachel served as an intern in the Mediation Office at the Southern District of New York. There she received the invaluable experience of observing various mediations, creating mediation training materials, and assisting with relevant projects.

Theodore Roosevelt American Inn of Court

Resolving Disputes through Mediation: Helping Your Clients Navigate the Courts in a Pandemic

Agenda-October 29, 2020

Panel intro/bios (6:00-6:05pm) Rachelle Harris/ Marilyn Genoa

Nassau County Court Presumptive Mediation Programs (6:05 -6:20pm) Yvonne Marine

Mediation from the Plaintiff's Perspective (6:20-6:25) Ira Slavit and Danielle Marino

Mediation from the Defendant's Perspective (6:25:-6:32) William Croutier and Dallas Park

Mediation

Mediator Opening (6:32 to 6:40) Marilyn Genoa

Plaintiff's Opening (6:40 to 6:45) Ira Slavit

Defendant's Opening (6:45 to 6:55) Bill Croutier

Joint sessions and caucuses (6:55 to 7:20) Jess Bunshaft, Marilyn Genoa, Ira Slavit, William Croutier, Dallas Park; Danielle, Marino

Neuroscience in Mediation and Negotiation: Daniel Weitz (7:20 to 7:50)

MARILYN K. GENOA

Genoa & Associates, P.C
And
Synergist Mediation

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Marilyn K. Genoa is a principal of Synergist Mediation, Center, Inc., a boutique dispute resolution firm, as well as a principal in the law firm of Genoa & Associates, P.C., where she concentrates in the areas of real estate and closely-held and family owned business representation. She serves on the roster of mediators for various commercial and private mediation panels.

The elected Village Justice for the Village of Old Brookville, Marilyn is the immediate past President of the Nassau County Magistrates Association. Prior to being elected Village Justice, she was a Trustee of the Village and a former Deputy Police Commissioner for the Old Brookville Police Department.

Having served two terms as a Director of the Nassau County Bar Association, Marilyn sits on its We Care Advisory Board and is a member of the House of Delegates of the New York State Bar Association. The current Co-Chair of the NCBA ADR Committee, Marilyn was the founding Chair of the Advisory Council for the Mediation & Arbitration Panels of the Nassau County Bar Association, and the Chair of the NCBA ADR Committee at the time the present Mediation and Arbitration Panels were reconfigured. During her three year tenure as ADR Chair she oversaw the revision of the Panels' structure and Rules. She has served as Chair of the NCBA Business and Corporation Committee as well its Animal Law and House Committees and has co-chaired the Nassau County Bar Association's Mock Trial Program for the past 15 years.

A past president of the Theodore Roosevelt American Inn of Court and of Yashar, the Attorneys' and Judges' Chapter of Hadassah, she continues to actively serve on the Board of Directors of both organizations, as well as on the Board of the Safe Center LI (formerly the Nassau County Coalition Against Domestic Violence).

Marilyn is admitted to practice in the Courts of the State of New York, the United States District Courts for the Eastern and Southern Districts of New York, and the Supreme Court of the United States of America. She received her law degree, *cum laude*, from Hofstra University School of Law, her B.A. from Boston University, and her MSW from Adelphi University. She has received extensive training in the areas of Mediation and Arbitration over the past twenty years, and is a frequent lecturer in the areas of: mediation; real estate; the purchase and sale of businesses and of real property; and contract law.

Well regarded for her fairness, diligence and efficiency, as the former CEO of a national manufacturing and distribution company with over thirty years of experience representing clients in the areas of real estate, corporate, and municipal matters, Marilyn's pragmatic approach to problem solving has effectively resolved difficult and complex situations.

YVONNE R. MARIN, ESQ.

Yvonne Marin is currently a Court Attorney Referee for the New York State Unified Court System and the Alternative Dispute Resolution Coordinator for the 10th Judicial District – Nassau County. She is also a newly appointed Small Claims Assessment Review Hearing Officer. In her role as ADR Coordinator, Ms. Marin is responsible for providing technical assistance to the Administrative Judge in the development and implementation of ADR protocols and guidelines, maintenance of mediator and evaluator rosters, communication of available resources to court personnel and serving as a direct point of contact for ADR matters within the district. Ms. Marin also serves as a liaison between the court and Community Dispute Resolution Centers, volunteer law school clinics and volunteer mediators and evaluators.

Prior to her appointment as ADR Coordinator in March 2020, Ms. Marin was appointed as Principal Court Attorney under the NYS Unified Court System's Excellence Initiative where she was assigned to the Supreme Court, Bronx County, Law Department for three years. As a Principal Court Attorney, Ms. Marin disposed of hundreds of substantive dispositive motions, and conducted pre-trial settlement and discovery conferences.

Before her appointment in April of 2017, Ms. Marin served from 2007 until 2017 as Principal Law Clerk to the Hon. Gloria M. Dabiri, in New York Supreme Court, Kings County. During this time, Ms. Marin assisted in every facet of managing an all-purpose/medical malpractice part of the Supreme Court, Civil Term.

Prior to entering the court system, Ms. Marin worked for the New York City Administration for Children's Service as a Special Assistant Corporation Counsel and Team Leader for the Foster Care Review Team, handling all stages of child abuse and neglect matters, in Manhattan Family Court.

Ms. Marin has served as a Small Claims Court Arbitrator, in both Kings and Nassau Counties, on a volunteer basis.

She is a proud alumna of St. John's University School of Law and received her undergraduate degree from State University of New York at Binghamton. She resides in Nassau County with her husband and two children.

BIOGRAPHY

Ira S. Slavit is a member of the law firm Levine & Slavit, PLLC, a third-generation law firm representing plaintiffs in all facets of personal injury and medical malpractice litigation, including trials and appeals, with offices in Manhattan and Mineola. He presently serves as a Special Master in the Mandatory Civil Appeals Mediation Program of the Appellate Division, Second Department, the Court's alternative dispute resolution program aimed at settling appeals that have already been perfected.

Mr. Slavit has served on the Board of Directors of the Nassau County Bar Association and is a past-Chair of the NCBA's Plaintiff's Personal Injury Committee Community Relations and Public Education Committee. He presently serves as an NCBA Delegate to the New York State Bar Association House of Delegates. He is admitted to the New York, Florida and New Jersey Bars, and to the Eastern and Southern Districts of New York.

Daniel Weitz, Esq.

Daniel M. Weitz, Esq. is the Director of the Division of Professional and Court Services and Statewide Coordinator of the Office of ADR Programs for the New York State Unified Court System. Dan oversees the statewide responsibilities of alternative dispute resolution, attorney for the child contracts, judiciary civil legal services contracts, office of language access, criminal disposition reporting, office of grants and contracts, guardianship and fiduciary services, legal information, office of the court record, parent education and awareness program, records management, the federally funded child welfare court improvement project, the court appointed special advocates assistance program, the children's centers program, and operational issues related to the Americans with Disabilities Act. As ADR Coordinator, Dan oversees a statewide program of court-annexed ADR initiatives involving mediation, arbitration, neutral evaluation, parenting coordination and collaborative law. He also directs the Community Dispute Resolution Centers Program.

Dan serves as Co-Counsel to the Board of Governors of the New York State Attorney-Client Fee Dispute Resolution Program. He is a past Chair of the New York City Bar Association ADR Committee and past Co-Chair of the ABA Dispute Resolution Section, Court ADR Committee. Dan has also served on the NYC Bar Domestic Violence Committee and Science and Law Committee. Dan was appointed by New York's Chief Judge to serve on the Unified Court Systems Matrimonial Commission for which he Co-Chaired the Subcommittee on The Use of Experts. He also served as Counsel to the Technology and Case Management Subcommittee of the New York State Judicial Advisory Council

Dan has over eighteen years of experience as a court administrator and twenty-six years of experience in the field of ADR, serving as an administrator, professor, trainer and practitioner. He is an Adjunct Clinical Professor of Mediation at Cardozo School of Law, an Adjunct Professor of Clinical Law at NYU School of Law and has taught ADR and conflict resolution related courses at Vermont Law School, Mitchell Hamline School of Law, John Jay College of Criminal Justice and Long Island University. Dan is an international ADR speaker having presented across the United States and beyond including Japan, China, Thailand and South Africa. He has also served as mediator in a wide range of matters including, general civil, family, employment, human rights, community and police conduct cases.

Dan received his law degree from the Benjamin N. Cardozo School of Law, where he participated in the Mediation Clinic and was a Teaching Assistant in Legal Negotiation. He has worked at JAMS, the United States Court of Appeals for the Second Circuit (The Civil Appeals Management Plan), and served as an original member of FutureLinks Inc., working in South Africa with youth leaders from all backgrounds to conduct workshops in non violent social change, conflict resolution and community development.

DANIELLE MARINO

117 Memorial Pkwy, Atlantic Highlands, NJ 07716
(732) 615-8295 • daniellermarino@gmail.com

EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Candidate for J.D., June 2021

Academics: G.P.A.: 3.66 (Rank: 21/206; Top 11%)

Honors: *Research Editor, St. John's Law Review*; *Recipient,* Dean's Scholarship (full tuition); *Second Place,* Hon. William C. Conner Writing Competition; *First Place,* Dispute Resolution 2L/3L Internal Competition; *Recipient,* 2019 New York State Court of Appeals Judicial Fellowship; *Third Place,* Judith Kaye Arbitration Competition; *First Place,* Dispute Resolution Society 1L Internal Competition

Activities: *Education Coordinator,* Dispute Resolution Society; *Teaching Assistant,* Professor Robin Boyle-Laisure, Legal Writing I & II; *Teaching Assistant,* Professor Elayne Greenberg, Alternative Dispute Resolution; *Teaching Assistant,* Professor Marc DeGirolami, Constitutional Law I; *Member,* Intellectual Property Law Society; *Member,* Historical Society of the New York Courts

Study Abroad: Rome, Italy (Summer 2019)

QUINNIPIAC UNIVERSITY, Hamden, CT
B.A., *magna cum laude,* English with a minor in International Business, May 2017

Academics: G.P.A.: 3.80

Honors: Dean's List (eight out of eight semesters); Academic Scholarship; Sigma Delta Tau, International English Honor Society

Activities: *President,* Sigma Delta Tau; *Member,* Kappa Delta Sorority

LEGAL EXPERIENCE

PROFESSOR TINA L. STARK, New York, NY
Lead Research Assistant, Fall 2020
Conduct legal research and assist with editing and developing the Third Edition of textbook, *Drafting Contracts*. Manage team of fellow student research assistants.

MAYER BROWN, New York, NY
Summer Associate, Summer 2020
Drafted various agreements, including a non-competition, non-solicitation agreement and several amendments to credit agreements. Created a register of a limited liability company's membership interests and assets. Performed comprehensive legal research. Drafted several memoranda, including one regarding Securities and Exchange Commission resolutions with companies in violation of the Foreign Corrupt Practices Act and another to help with preparation of an expert witness regarding residential mortgage backed securities litigation. Observed a variety of proceedings, including expert witness deposition and client conferences.

PROFESSOR ELAYNE GREENBERG, ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Research Assistant, Spring 2020
Researched an upcoming chapter on the negative effects of using a caucus in mediation, including how mediators may be affected by information they learn in caucus, how a caucus can undermine party self-determination, and how a mediator may use caucus to manipulate the parties.

HONORABLE JOEL M. COHEN,
NEW YORK STATE SUPREME COURT, New York County (Commercial Division), New York, NY
Judicial Intern, Summer 2019
Performed extensive legal research and drafted multiple bench memoranda on topics including the Court's jurisdiction over a foreign defendant in a dispute involving ownership claims of artwork and a statute of frauds issue in the context of an indemnification clause for attorney's fees. Prepared draft opinion ruling on a pending motion to compel to discovery. Drafted jury instructions for upcoming trial. Observed court proceedings, including a settlement conference.

OTHER EXPERIENCE

CHRISTINE'S ITALIAN RESTAURANT, Atlantic Highlands, NJ
Social Media Manager/Server, November 2012 – Present

RACHEL HARRIS
164-24 75th Road, Apt. 2 · Queens, NY 11366 · (502) 418-8177 · harris.rach@icloud.com

EDUCATION

St. John's University School of Law, Queens, New York
Candidate for Juris Doctor, June 2021
Honors: *Executive Board Member and Overall Coordinator*, Dispute Resolution Society; *Third Place*, Judith S. Kaye Arbitration Competition; *Teaching Assistant*, Lawyering (Spring 2020)

Activities: *Dispute Resolution Section Law Student Liaison*, New York State Bar Association; *Diversity & Inclusion Committee*, St. John's Law Student Bar Association; *Member Eastern District of New York Chapter;* Federal Bar Association; *Assistant Director of Intersectionality*, Women's Law Society; *Staff Writer*, The Forum (School Newspaper); *Member,* New York City Lawyer's Association

Western Kentucky University, Bowling Green, Kentucky
Bachelor of Arts, *magna cum laude*, Advertising with minor in Art History, December 2017
GPA: 3.76
Honors: President's List (four of seven semesters); Dean's List (two of seven semesters)
Activities: *Vice President - Student Services*, Potter College Dean's Council of Students; *University Chapter President*, International Justice Mission; National Society of Collegiate Scholars; *Writer and Digital Contributor*, WKU Talisman (Yearbook)

LEGAL EXPERIENCE

Equitable Financial Life Insurance Company, New York, New York
Senior Associate – Law Department Intern, May 2020-August 2020
Created contractual amendments, reviewed and updated existing contract templates, analyzed relevant regulatory insurance bulletins, observed depositions, connected weekly with Legal Practice Groups to discuss potential projects. Assisted the Litigation group in drafting responses and preparing arbitration statements.

Hon. James L. Cott, U.S. District Court for the Southern District of New York, New York, New York
Judicial Intern, January 2020-May 2020
Prepared draft Reports and Recommendations on pending motions. Observed settlement conferences in disputes involving claims of copyright infringement, the Fair Labor Standards Act, and the American Disabilities Act.

U.S. District Court for the Southern District of New York Mediation Office, New York, New York
Alternative Dispute Resolution Intern, August 2019-Deceember 2019
Created original mediation simulation materials for use in the New York Surrogate's Court. Assisted with case management by maintaining and updating internal docket database program. Observed numerous mediations.

Prof. John Q. Barrett, St. John's University School of Law, Queens, New York
Research Assistant, May 2019-August 2019
Completed periodic legal research and editing tasks for inclusion in forthcoming book addressing the Nuremberg Trials. Conducted ongoing review of Supreme Court decisions addressing targeted topics. Assisted in sorting and curating historical materials for future preservation at U.S. Library of Congress and at other repositories.

Hon. Deborah Stevens Modica, Queens County Supreme Court, Criminal Term, Queens, New York
Judicial Intern, June 2019-August 2019
Observed court hearings and legal proceedings; discussed merits of competing arguments with Judge Stevens Modica. Participated in the NYC Criminal Court 2019 Summer Internship Program, which consisted of informal lunches, and tours of facilities such as the New York Office of Chief Medical Examiner.

Dallas S. Park

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EDUCATION

St. John's University School of Law, Queens, NY
Candidate for Juris Doctor, June 2021

Honors: Alumni Scholarship; *Member*, Moot Court Honor Society, Hon. Milton Mollen Moot Court Competition – *Winner: Best Oral Advocate; Regionalist,* Thomas Tang National Moot Court Competition (National Asian Pacific American Bar Association Law Foundation) – *Northeast Regionals*; *3rd place,* NYSBA Arbitration Competition

Activities: *Research Assistant,* Professor Renee Allen ("Role of Xennials in Legal Education"); *Senior Member*, Asian Pacific American Law Students Association; *Member,* Dispute Resolution Society; *Associate Director of Duberstein Competition,* Moot Court Honors Society

The George Washington University, Columbian College of Arts and Sciences, Washington, D.C.
Bachelor of Arts in Psychology, December 2017

Activities: *Member,* Sigma Phi Epsilon, 2013 – 2017; *Volunteer/Tutor,* Petey Green Program, 2016 – 2018

EXPERIENCE

MISCHEL & HORN, P.C. May 2020 – August 2020
Legal Intern
Researched and drafted internal memos and briefs on a range of personal injury matters, including: threshold injury analysis; *Res ipsa loquitur*, and municipal liability.

NASSAU COUNTY DISTRICT ATTORNEY – APPEALS BUREAU, Mineola, NY
Legal Intern January 2020 – May 2020
Researched and drafted statement of fact and insufficiency point for motion.

VALE INSURANCE PARTNERS, New York, NY
Legal Intern September 2019 – January 2020
Reviewed and submitted offers from brokers to underwriters, learning insurance terminology and the industry from reviewing purchase agreements, underwriting drafts, and negotiations. Redlined and executed NDAs, NRLs between brokers and the underwriters; Processed premium invoices, and fees for both rep & warranty and excess coverages.

HON. PAUL A. GOETZ, NEW YORK STATE SUPREME COURT, CIVIL TERM, New York, NY
Judicial Intern May 2019 – August 2019
Researched and drafted bench memoranda and decisions on motions on a range of civil matters, including: threshold injury analysis; "Graves Amendment" analysis; a summary judgment motion founded upon *res ipsa loquitur* in a personal injury case; and application of qualified immunity. Attended trials and oral arguments.

CONGRESSMAN CHARLES B. RANGEL, New York, NY/Washington, D.C.
Congressional/Press Intern May 2014 – Jan 2015
Drafted policy and event briefings, press releases, media advisories, congressional records and memorandums on various legislative topics and congressional events. Was first a congressional intern, then offered a position as a press intern in D.C. Served as constituents' in advocate on cases involving federal agencies such as Housing Urban Development, Department of Labor, and Citizenship & Immigration Services.

VOLUNTEER

Public Interest Center Spring Break Service Trip, San Antonio, TX, March, 2019

- *Volunteer*, Assisted RAICES provide legal assistance to asylum seekers at ICE's Residential Detention Center in Karnes, TX.

The Petey Green Program, Washington D.C./Prince George County, MD, September 2016 – May 2018

- *Tutor,* Created and led lesson plans for incarcerated adults in the GED and incarcerated youths.

Special Program and Resources Connection (SPARC, Inc.), Westchester, N.Y., July 2008-August 2015

- *Group Leader & Coordinator,* Provided socializing model and guidance to groups of young adults with severe developmental disabilities.

LANGUAGES

Native Fluency & Bilingual Proficiency, Korean

SKILLS & INTERESTS

- Codecademy Certified – Python & SQL – Level 2
- Sustainability & Renewable Energy
- Nutrition and Fitness