The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution?

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We do not see things as they are. We see things as we are.—Anais Nin

We have to start by defining the process as part of the problem—David Plant

I. INTRODUCTION

The cover of the American Bar Association’s Summer 2011 Dispute Resolution Magazine was dedicated to the topic of “Neuroscience and Negotiation”.¹ In it, Professor Richard Birke starts off by observing that “Neuroscience is everywhere”. Indeed, as the science for measuring brain activity advances, and new breakthroughs are made in electroencephalography (EEG), magnetoencephalography (MEG), Functional Magnetic Resonance Imaging (fMRI), transcra-

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nial magnetic stimulation (TMS), positron emission tomography (PET), and single photon emission computed tomography (SPECT), there is a confusing arsenal of new and convoluted, high-tech-sounding imaging technologies, by which scientists are seeking to penetrate the various layers, regions and neural assemblies of the human brain, to decipher our behavior and the essence of our very being as a highly evolved and unique species of animal. This runs the danger of becoming the 21st Century’s new phrenology, as the science is still rife with errors. On the other hand, the research does raise intriguing new insights into the brain, conscious decision-making processes, the role of emotions, and the ways in which our neurobiological “hard wiring” might be impacting our behavior in dispute resolution processes.

The bulk of these findings to date supports Anaïs Nin’s quotation given above, whereby we do not perceive things as they really are (i.e., objectively) but as we are (i.e., subjectively). This raises important new implications for lawyers, judges, arbitrators, in-house counsel, mediators, conciliators, and a variety of other ADR professionals. It has an impact on how we should start to interpret evidence, weigh witness testimony and (re)consider findings of “facts”. Prof. Birke argues that lawyers ought to care accordingly about neuroscience, and gives several examples of why this is the case. The purpose of this paper is not, however, to delve into the implications of neurobiology from the perspective of advocacy or judicial appreciation. Nor is it to support Prof. Birke’s premise (which is self-evident) that understanding human perception is likely to be of great importance to trial attorneys and judges. Rather, the purpose of this paper is to focus on current processes by

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2 For a good primer on neuroimaging, see http://en.wikipedia.org/wiki/Neuroimaging.

3 See, for example, C. Bennett et al., (2009), “Neural correlates of interspecies perspective taking in the post-mortem Atlantic Salmon: An argument for multiple comparisons correction”, http://prefrontal.org/files/posters/Bennett-Salmon-2009.pdf, which shows how the data generated in an fMRI experiment could either suggest that a dead salmon was still engaging in conscious perspective-taking tasks, or that the technology itself can yield spurious results that need to be corrected when doing data analysis.