

A mindful approach to evaluative mediation

‘Evaluative mediation’ appears to be a contradiction in terms for many mediators. As many mediators start non-evaluatively, they unconsciously shift to an evaluative stance nonetheless. In this article, Jeremy Lack explores some of the reasons for this phenomenon. To be evaluative appears to be part of human nature; our brains just work that way, as recent discoveries in neurobiology suggest. There are also social and professional pressures to be evaluative. Using Riskin’s mediation grid, Lack explains how mediators can move around the quadrants, being from directive to facilitative and from evaluative to non-evaluative. This can lead to a more mindful understanding of the role of the mediator.

By Jeremy Lack

This article deals with the thorny issue of ‘evaluative mediation’, which appears to be a contradiction in terms for many mediators. For many mediators, mediation is a non-evaluative process, where the mediator should refrain from ever providing an opinion. The mediator’s job is to facilitate a negotiation or discussion, as part of a social process. The word ‘facilitative’ is often used, as a result, to distinguish a mediator from an evaluative neutral (i.e. someone who gives an opinion, as in Early Neutral Evaluation or in conciliation). Although I see myself primarily as a facilitative mediator and believe that mediation should usually be conducted as a non-evaluative process, it often happens that mediators (myself included) are asked to provide an opinion, to do some ‘reality testing’ in private sessions with the parties, and sometimes even to provide a mediator’s proposal as a possible solution for a settlement. It is easy to drift into such an evaluative mode, especially where the neutral is a lawyer or expert who is used to providing an opinion and being evaluative. The danger, however, is that this shift from a non-evaluative stance to an evaluative stance often occurs unconsciously, affecting the parties in ways that may not have been predicted. In this article, I will explore some of the reasons for this phenomenon, and explain why I view this as a matter of ethical responsibility for a mediator that requires mindful attention.

‘Facilitative’ does not mean ‘non-evaluative’

Mediators often describe themselves as facilitative, in the sense that they are not evaluative. They wish to help disputants reach their own outcomes by focusing on their future interests as opposed to their positions and what happened in the past.

Most of these mediators will have read and been convinced by interest-based negotiation theory (sometimes referred to as a ‘problem-solving approach to negotiation’), which has been enshrined in the book called *Getting to Yes*.¹ They understand that positional negotiations often lead to ‘lose-lose’ outcomes, and that it is better to seek ways of ‘enlarging the pie’ by focusing on subjective interests, rather than trying to force a compromise between disputants’ positions. The use of the word ‘facilitative’ in this context, however, allows mediators to fudge the question of how evaluative they may really be and ignore certain universal human traits we all have, which is that we are naturally evaluative animals. As a result, although they remain ‘facilitative’ at heart, mediators can find that they start acting evaluatively at some stage. Is there something wrong with this? It seems that this is natural and part of human nature, but it requires self-awareness and self-management.

The human tendency to be evaluative

Recent discoveries in neurobiology suggest that it is almost impossible for human beings not to be evaluative. We have evolved and are conditioned as animals to be judging things around us at all times, mainly in terms of fear or reward.² This is simply part of our hard (and soft) wiring as *Homo sapiens*, and it is not something specific to lawyers or experts. Our brains are complex pieces of biological hardware that operate using three operating systems simultaneously, which integrate with one another with varying degrees of success. Imagine having to run Microsoft, Apple OS2 and Linux software simultaneously on your home or office computer! Some sort of executive decision-making centre is needed to decide which

operating system should be given precedence at any given time, or the system is likely to melt down. Our brains try to filter everything through an emotional operating system, a social operating system, and a rational or higher-order cognitive operating system. The emotional system kicks in first, seeking to do rapid data triage within milliseconds. We receive terabytes of data from our five senses, and we need to sort out what is relevant before we become conscious of them. Otherwise we would be cognitively depleted within thirty minutes of waking up in the morning. An area in our brain called the amygdala is primarily responsible for this rapid screening system.³ In addition to our emotional system, we are highly gregarious and social creatures, who have evolved to work in large groups. We have thus also developed a very rapid and unconscious socialisation system, which subconsciously assesses and judges whether other people are 'in our group' or 'out of our group', 'similar' or 'different', and whether they are likely to try to dominate us or are trustworthy.⁴ These emotional and social systems share a common physiology, and the amygdala, once again, appear to be involved in rapidly screening who is 'safe' and 'similar'. Our interpersonal relations are thus determined to a large degree by basic patterns of perception

unconsciously. We are therefore evaluative and biased, even when we think we are not.

Social and professional pressures to be evaluative

Not only are we wired to be unconsciously evaluative at all times by our subconscious emotional and social systems, but humans also naturally seek safety in building coalitions. We not only tend to unconsciously categorise people as 'us' versus 'them', but we also seek to create comfortable social situations for ourselves within our communities, aligning ourselves with leaders, or taking on such roles ourselves.⁸ Human beings are willing to attribute superior status to others, especially decision-makers. Judges, arbitrators and kings were historically believed to be imbued with religious or super-human abilities to determine 'the truth', not realising that we do not perceive things as they are (i.e. objectively), but as we are (i.e. subjectively). If a person's decision is perceived as being balanced and fair (which is often a euphemism for 'likely to agree more with us than with them' or as being divinely inspired), we tend to trust them. However, even if a situation is in fact objectively impartial, we will tend to attribute biases to the decisions of people we do not know, and whose social status has been

Humans judge constantly and unconsciously

that are neurobiological and tribal, where we subconsciously judge others before we have even met them or had the time to have any conscious interaction with them.⁵

Humans thus judge constantly and unconsciously, triggering pro-social or antisocial behaviour based purely on neural substrates using a social operating system that is shared and activated simultaneously with our rapid-screening emotional operating system. This explains why our abilities to use our rational, highly cognitive system depend purely on how our emotional and social systems are faring. It explains how empathy and mentalising skills help us to understand the feelings and thoughts of others through different neural networks, and how we are incapable of using these skills at times when we feel afraid or in an uncomfortable social setting. Our ability to think consciously and rationally sadly does not depend so much on how well we actually think, but on such random issues as what time of the day it is, or what we had for breakfast that day.⁶ Even when we think we are being objective, neutral and impartial, it seems that we are being unconsciously judgmental, being influenced and primed by prior subliminal stimuli, unconscious biases, somatosensory priming and our environments, which affect our choices and decisions without our ever being aware of them.⁷ These three operating systems are constantly making evaluations – both consciously and

imposed on us.⁹ The corollary to this hard and soft wiring of our brains is that not only do humans tend to be positional and try to dominate, but conflicts also have a tendency to push us to be even more evaluative, to decide who is 'right' and who is 'wrong', leading the conflict to escalate (but not to de-escalate). This tendency has been captured by Friedrich Glasl in his 9-step scale, which seems to be fully supported by recent findings in social neurobiology.¹⁰

The tendency to seek evaluative mediators is thus part of human nature. This is paradoxically driven by our erroneous belief that human beings are capable of being neutral, impartial and independent, whereas neurobiology suggests otherwise. Many conflict resolution experts do not believe that their decisions can be shaped by their emotions or social standing, as they are unaware of their presence. Although emotions and subjective, unconscious biases will always interfere, lawyers, arbitrators or judges often believe that the opinion of an expert, or witness testimony (which is based on subjective encoding, storage and retrieval of memories, whose purpose is not to predict the past but predict more rapidly, using patterns), will help to resolve a dispute. There is often pressure, therefore, on mediators to be evaluative, or to be willing to become so. Some mediators, despite their preference to remain 'non-evaluative', will find themselves making a 'mediator's

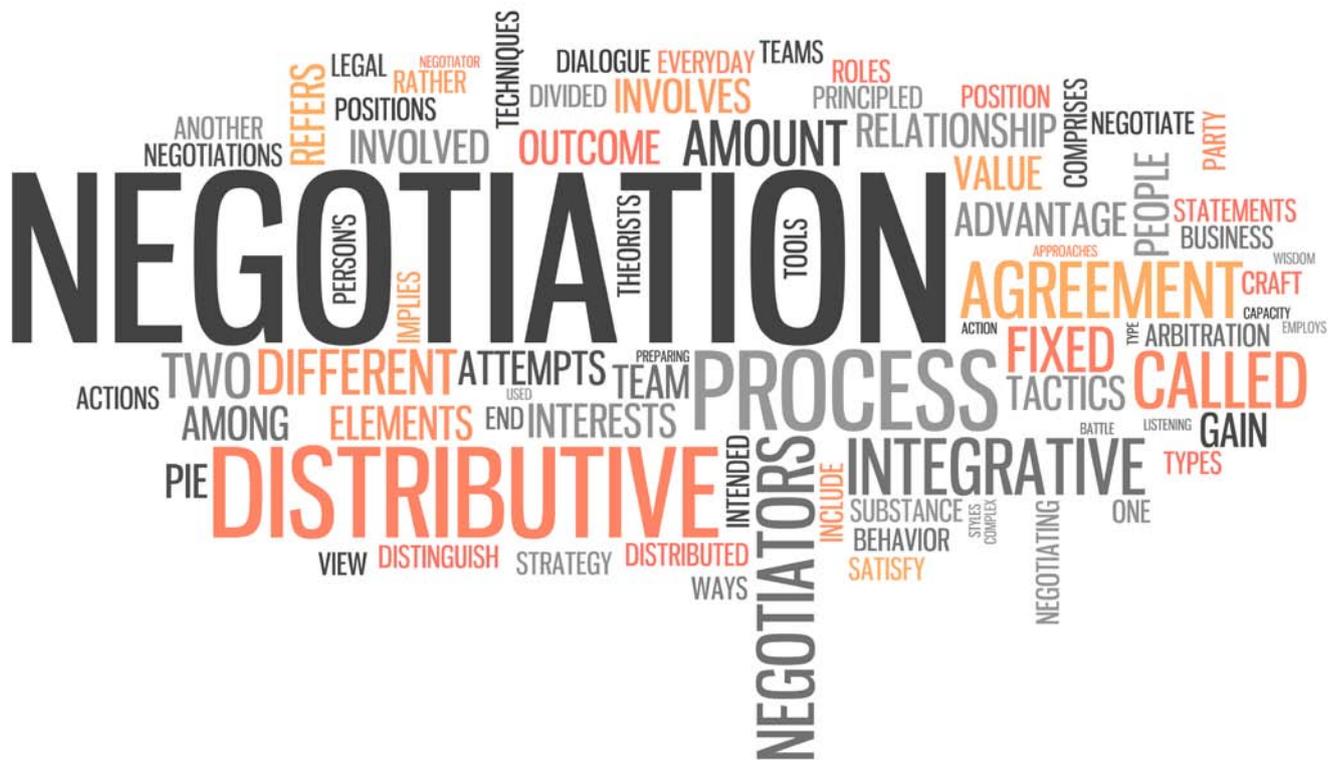


Foto: Shutterstock/Mindscanner

proposal' as the parties, or their lawyers, may have requested them to do so. This is often a testament to the mediator's social skills and perceived 'added value' as a person who can be trusted. Even when their opinion is in favour of one party as opposed to another.

Although mediators are often trained to put positions aside, and to encourage parties to focus on their future interests instead of the past, and explore possible outcomes for mutual gain, parties may resist going down that road. They seek reassurance from the neutral, as a person of high status, that they are 'right' and that they will help 'the other side' to understand the errors in their reasoning. Seeking to create coalitions with the neutral is more natural and emotionally pleasing to them, than sitting with a person they do not trust and devalue, and who often conjure up negative emotions. This also explains a preference by many parties and lawyers to carry out mediations primarily through caucuses. After a while, if the mediators cannot get the parties (or one of them) to move, they start to feel the need to become more evaluative, to voice their opinions and expertise, and to set aside the many hours of training received on active listening, probing for interests, and being non-evaluative. It is, after all, not only our human nature to behave in this way, but the parties and their lawyers seem to be expecting this as well.

The impact of process on outcome

Not only are people likely to be evaluative and pressured to become increasingly so in conflicts, but the word 'mediation' also suffers from another problem: a lack of clear definitions and precise meaning. It appears that many different styles (sometimes contradictory ones) hide behind the same word. In a recent book edited by Manon Schonewille and Fred Schonewille, the authors compiled a unique collection of how mediation is practised in sixty states.¹¹ It describes many types of national mediation styles, where a neutral is always helping disputants to reach their own agreement, but using different tactics on issues of process as well as of substance. The book reveals that some countries have legislated a form of mediation that is not only directive on procedural issues (mandating when the parties must appear, for how long, and what they must prepare as documents) but also on substantive issues, where the mediator must give an evaluative assessment or a 'mediator's proposal' at the end of the process, which will be read by a judge handling the matter if the case does not settle. This proposal can be used to sanction a party for unreasonably having declined it. It is difficult not to view mediation as being a substantively evaluative process in such a case. Based on the range of different national styles of mediations that emerged while editing that book, Manon Schonewille and I sought to find a framework in which various national and culturally-shaped forms of mediation could be characterised. A modified

Riskin Grid was used to do so, and two axes were identified: a procedural axis, indicating how facilitative or directive a neutral was expected to be on procedural issues; and a substantive axis, indicating how non-evaluative or evaluative the neutral was expected to be on matters of substance.¹² They are represented in the diagram (figure 1) and create four quadrants, which characterise at least four different types of mediation.

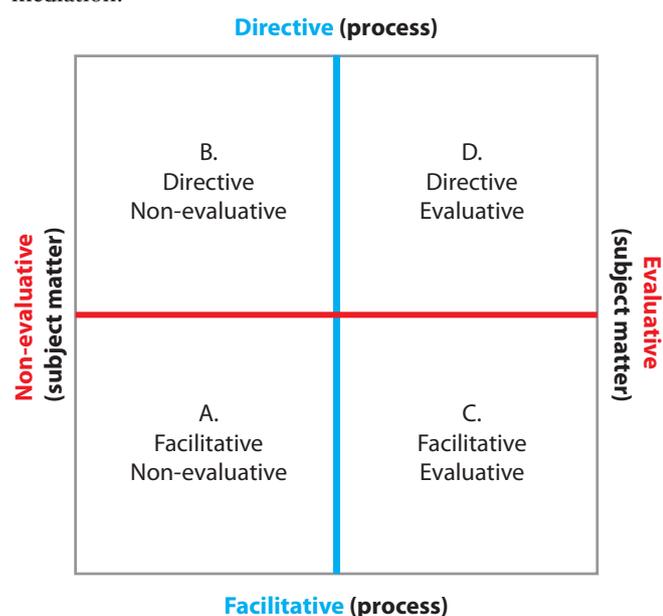


Figure 1 Four different types of mediation: process versus substance
Source: based on Riskin, Decisionmaking in mediation

1. Quadrant A (facilitative on process and non-evaluative on substance)
2. Quadrant B (directive on process and non-evaluative on substance)
3. Quadrant C (facilitative on process and evaluative on substance), and
4. Quadrant D (directive on process and evaluative on substance).

Using this grid, it is clear that mediators are commonly asked to be evaluative as part of national mediation systems. Even in quadrants A and B in figure 1, which are labelled 'non-evaluative' on substantive issues, they still involve a mediator making decisions on procedural issues. As it is, the process itself is likely to have an impact on the outcome, even if a mediator abstains from giving an evaluation. And there is another kind of evaluation at stake here: all styles require judgement calls, self-analysis and self-evaluation regarding how not to be perceived as substantively evaluative and regarding the degree of how directive or non-directive to be on procedural issues when mediating. Thus, all forms of mediation require some degree of evaluation. The question is whether it is up to the

mediator to be making these assessments and decisions, or to the participants. The moment a mediator starts to act more or less directly, even on purely procedural issues, it is likely to have an impact on the parties' behaviour towards one another. There will be a systemic effect on the constellation of people present. The mediator may seem to become more dominant (but no less trustworthy), and the parties may start to seek to create coalitions with the mediator on procedural issues, and procedural issues can become emotive and divisive in and of themselves, causing disputants to lose trust in the mediator. Doing nothing to shift the process, however, may also not be helpful, as the parties may become stuck and entrenched on procedural issues (e.g. whether or not to have caucuses or to share documents and information with the mediator before a first meeting) and may then turn to the mediator to direct these procedural issues, on the grounds that procedural issues are the mediator's responsibility. The key point to understand here is that whatever a mediator chooses to do is likely to have an impact on the parties' social behaviour and possibly on their ability to function as one group based on 'in-group' social patterns, or as competing groups, based on 'out-of-group' (us versus them) tribal patterns of behaviour. Where to mediate in the grid and how to move around it requires self-awareness, which involves not only the mediator being mindful of the situation, but the parties and their advisors as well, and allowing them to make genuine choices on issues of process as well as of substance. If the role of a mediator is to influence and help the parties to reach their own outcomes using in-group social scripts rather than out-of-group scripts, where empathy and the ability to do cognitive perspective-taking can occur as part of a social process, then it is important to discuss with the parties any procedural steps they may take that may unconsciously trigger us versus them tribal behaviour. A decision on procedural issues can thus have an impact on outcome as well.

The impact of group identity on perception and cognition

There is an area in the prefrontal cortex of the brain associated with cognitive decision-making that classifies another person as being 'similar' when consciously mentalising about them. This area has direct connections with another area of the brain, the anterior insula, where certain fundamental emotions, such as notions of fairness, are modulated. However, when a person is consciously classified as being 'different', another part of the prefrontal cortex is activated. That area has no neural connections with the insula. By getting a person to focus on whether they are similar to or different from another person, a person is thus more or less likely to be able to empathise.¹³ Thus, group dynamics will impact the disputants' natural abilities to empathise, trust and bond, and how they will perceive what another person tells them. Similarly, there are certain neurons

in the brain, called mirror neurons, which are involved in non-verbal communication and empathy as well. They may become more or less sensitive depending on whether in-group or out-of-group recognition patterns are activated.¹⁴ Humans also secrete a simple neuropeptide called oxytocin, which is sometimes referred to as a 'trust hormone'. Production of oxytocin can drive close cooperation and bonding (e.g. between a mother and a new-born infant), but this same hormone can also drive adversarial behaviour and aggression if a person is perceived as dissimilar or out-of-group.¹⁵ A mediator's influence on group dynamics is therefore likely to greatly affect the parties' abilities to communicate and perceive effectively in a mediation. This relates to procedural issues as well as to substantive issues. A mediator can activate in-group patterns of social behaviour, generating empathy, collaboration and willingness to reciprocate, but a mediator can just as easily trigger out-of-group patterns, by priming parties to think in terms of 'position papers', 'the other side', 'opening statements' and by seating them in separate rooms for much of the day. This may drive more adversarial behaviour, competition, aggression, loss of empathy, and an inability to communicate

act in an evaluative manner, the parties' fear mechanisms are often activated. They may try to build coalitions with the neutral (a classical 'Phase 4' step in the Glasl escalation scale). This, in turn, can trigger out-of-group (us versus them) scripts of social behaviour, as opposed to in-group scripts. The other party will be perceived as the 'other side', coming from another tribe and as a potential threat due to their desire to influence the mediator to provide evaluative feedback.

The perception of a person as being in-group as opposed to out-of-group can thus trigger fundamentally different behaviour and outcomes in mediation, activating different senses of what is fair or unfair, and sensitivity. These are extremely subtle, but impactful, nuances. Mediators can often unconsciously trigger these patterns and cascades of events, by changing from one mediation quadrant to the other, or by changing styles unconsciously. Even when it is clear to mediators who know how to operate in all four quadrants where they are at any given moment, and when they are aware of their own behaviour when crossing the line from one quadrant to another, it may not be possible for the parties to

It is necessary for mediators not only to be self-aware but also to check whether the parties are self-aware as well

effectively non-verbally. Priming parties to prepare for a mediation by encouraging them to perceive one another as their 'negotiation partner' rather than as the 'other side', and helping them think in terms of mutual interests instead of positions, getting them to do cognitive perspective-taking, thinking through what their negotiation partner's interests and needs may be before they meet, can have a strong pro-social impact. This is something a mediator and the parties should think about and discuss carefully when setting up, designing and preparing for a mediation process.

The importance of mindfulness in mediation

Skilled and experienced mediators often know how to operate in all four quadrants of the Riskin grid (figure 1), and/or how to co-mediate with other mediators who prefer to work in a complementary manner in other quadrants. A mediator may also move around the different quadrants, and may provide more choice, and hybrid processes can also be combined to maximise the pros and minimise the cons. Which quadrant in a Riskin grid a mediation process starts off with, however, will unconsciously influence group dynamics and individual behaviour, and often lead to the creation of constellations and systemic effects that can have unconscious knock-on effects on the parties themselves, and trigger an escalation or spiralling of positional and evaluative behaviour. When a neutral starts to

do so. They may easily get confused and start to form coalitions, reinforcing antisocial behaviour. For this reason, it is necessary for mediators not only to be self-aware but also to check whether the parties are self-aware as well. This is what I mean by calling for 'mindfulness' when using evaluative mediation, and understanding that all mediations are likely to be 'evaluative' at some level – whether consciously or unconsciously. It is not only a matter of knowing where in a grid the mediator is, but also verifying whether the parties appreciate the possible impacts of procedural issues on the emotional, social and cognitive systems of the participants, and whether they are willing to change the social dynamics of the process. Although it may be possible to lead the parties into a given style of mediation, this is ultimately a matter of ethics. Are the parties cognitively aware of the possible impacts of certain procedural choices on their relationships and social patterns? Being mindful means being cautious, about oneself and about the disputants' emotional and social patterns, and ensuring that there is a full understanding of potential impact on group dynamics by all participants whenever a procedural decision is made.

Mindfulness as a matter of ethics

Ethical mediation is based on three pillars: (i) party autonomy, (ii) procedural fairness, and (iii) substantive fairness.¹⁶ Party

autonomy requires transparency about process, and understanding of the possible impacts of process on outcome. The issue with evaluative mediation, therefore, is not the mediator's skills, but the type of process the parties understand that they are entering into from an emotional, social and cognitive perspective. Mindfulness requires that the mediator, the parties and all of the participants in the mediation not only have a clear and common understanding of which part of the grid they are in at all times, but also of why they are in that part of the grid, and of the possible consequences of shifting. It is important to also understand, in so doing, who the clients are in the mediation, and who the mediator should focus on when discussing these matters. The true issue lies in the collective mindfulness of the mediators and the participants, and it needs to be discussed and thought through with the participants on a case-by-case basis. One recent and attractive way of doing this is proposed in a recent award-winning article on Guided Choice ADR.¹⁷ This type of ADR requires first facilitating a discussion on procedural options and their possible impact (e.g. on social behaviour, relationships and outcomes) before discussing substantive topics, and deciding whether or not – and if so, how – to evaluate them. The question in this process is not whether a neutral may be evaluative, but whether and how procedural issues are raised with all the participants early on, seeking to ensure not only that they may reach their own outcome, but that they design their own process based on a mindful understanding of the impact of the process on the possible outcome. Once that is done, any form of mediation or combination of ADR can be used.

Notes

- 1 Fisher, R., Ury, W., & Patton, B. (1991). *Getting to Yes: negotiating agreement without giving in*. New York: Penguin Books.
- 2 For a rapid review of the neurobiology of heuristics, perception, rapid evaluation and relevance assessment, and how they impact decision-making in negotiation and mediation, see: Lack, J. & Bogacz, F. (2012). The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution? *Cardozo Journal of Conflict Resolution*, 14:33, 33-80, also published in A.W. Rovine (eds.) (2012). *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2011*, Brill Nijhoff, 341-382.
- 3 Sander, D. et al. (2003). The Human Amygdala: An Evolved System for Relevance Detection. *Reviews in the Neurosciences*, 14, 303-316.
- 4 Todorov, A. et al. (2008). Understanding evaluation of faces on social dimensions. *Trends in Cognitive Sciences*, 12, 455-460; and Oosterhof, N., and Todorov, A. (2008). The functional basis of face evaluation. *PNAS*, 105, 11087-11092.
- 5 Klimecki, O. et al. *Neural bases of emotional, social and cognitive interactions – challenges and future avenues*, a review paper currently in preparation, seeking to assess neural correlates and patterns of emotional, social and cognitive behaviour involved in conflict, negotiation and peace-building.
- 6 Danziger S. et al. (2011). Extraneous factors in judicial decisions. *PNAS*, 108, 6889-6892.
- 7 Williams L., & Bargh, J. (2008). Experiencing Physical Warmth Promotes Interpersonal Warmth. *Science*, 322, 606-607.
- 8 For an excellent recent review of human tribal behavior, see: Greene J. (2013). *Moral Tribes: Emotion, Reason and the Gap between Us and Them*. Penguin Press. See also Meyer, M.L. et al. (2013). Empathy for the social suffering of friends and strangers recruits distinct patterns of brain activation. *Social Cognitive and Affective Neuroscience Advance Access*, 8, p. 446-454.
- 9 See Bediou, B. et al. (2011). Effects of outcomes and random arbitration on emotions in a competitive gambling task. *Frontiers in Psychology*, 2, 1-10.
- 10 Glasl, F. (1997). *Konfliktmanagement. Ein Handbuch für Führungskräfte, Beraterinnen und Berater*. Bern: Paul Haupt Verlag. See also www.trigon.at.
- 11 Schonewille, F., & Schonewille, M. (2014). *The variegated landscape of mediation: A comparative study of mediation regulation and practices in Europe and the World*. Utrecht: Bju/Evenen.
- 12 This grid is named after Leonard L. Riskin, the author of 'Decisionmaking in mediation: the new old grid and the new new grid system', *Notre Dame Law Review*, 79, 2003, 1-53, on which this grid is based.
- 13 Meyer, M.L. et al. (2013). Empathy for the social suffering of friends and strangers recruits distinct patterns of brain activation. *SCAN*, 8, 446-454.
- 14 Calvo-Merino B. et al. (2005). Action Observation and Acquired Motor Skills: An fMRI Study with Expert Dancers. *Cerebral Cortex*, 15, 1243-1249.
- 15 De Dreu, C.K.W et al. (2010). The Neuropeptide Oxytocin Regulates Parochial Altruism in Intergroup Conflict Among Humans. *Science*, 328, 1408-1411.
- 16 These three requirements are introduced and described in E. Waldman's book *Mediation ethics: Cases and commentaries* (San Francisco: Jossey-Bass 2011), the first textbook on ethics in mediation that also includes several different national views.
- 17 Lurie, P. (2014). Guided Choice: Early Mediated Settlements and/or Customized Arbitrations. *Journal of the American College of Construction Lawyers*, 7, 167-175.



About the author

Jeremy Lack is a common-law and civil-law lawyer and ADR Neutral who specializes in the prevention and resolution of international commercial disputes and related processes, including hybrid proceedings and cross-cultural disputes. He is a Door Tenant with Quadrant Chambers in London and of counsel to Charles Russell LLP in Geneva. He is also an IMI certified mediator, a certified mediation advocate and a panelist with various ADR institutions, including JAMS International, ICDR/AAA, CPR, SCCM, CMA, WIPO, INTA, and is a partner and co-founder of www.neuroawareness.com. His preferred style of mediation is non-evaluative.

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