The Socially Intelligent Mediator

By Kay Elkins-Elliott

Until 1995, the term emotional intelligence (EI) was not in general use by psychologists or the media. Daniel Goleman brought it into the spotlight that year with his book on the subject. In 2006, his book Social Intelligence (SI) amplified our understanding of these types of intelligence. One important part of EI and SI, empathy, is now the subject of the 2019 publication, The War for Kindness: Building Empathy in a Fractured World, by Jamil Zaki, a Stanford Psychology professor and neuro-science researcher. Previously, as late as the 1950s, David Wechsler’s widely used measure of IQ was the gold standard for measuring any kind of human intelligence, yet Wechsler dismissed social intelligence (SI) as merely intelligence used in social situations. Currently we are in an era where neuroscience and social science research have legitimized and clarified these concepts, creating demand for more knowledge and skills training in these critically important areas, particularly for attorneys, mediators and doctors. A fundamental revelation of the new science is that we have social brains: we are wired to connect.

Using Connection to Ensure a Better Mediation Practice

Mediators have unique opportunities to use EI and SI in their work as conflict specialists. Disputes that have boiled for years, often reaching the threshold of trial or even global warfare, are often resolved after only a relatively brief intervention process with a mediator. What skills and techniques do mediators need to achieve such impressive results? Certainly, intellectual ability and subject-matter expertise are important, but does that explain the many settlements that result in restored relationships, healthier environments and creative outcomes? In most situations, the mediator is brought in as a complete stranger to work intensely with people who may refuse to even be in the same room. What magic does a mediator use to create peace? How does a mediator awaken the social brain within the parties so that peace is even possible? How do mediators get parties to connect peacefully?

Social intelligence, the science of human relationships, is being mapped by neuroscientists to help us understand the areas of the brain that are active in the regulation of interpersonal dynamics. We know that humans have always had to engage in social reasoning—particularly cooperation and collaboration— that drove the evolution of our larger brain size and intelligence generally. The major functions of the social brain are interaction synchrony, empathy, social cognition, compassion, and interaction skills. Psychologist Howard Gardner in 1993 pointed out that we have multiple intelligences, not just intellectual ability, but also visual, linguistic, interpersonal, intrapersonal, musical, kinesthetic and naturalistic intelligences. Many mediators naturally demonstrate linguistic, interpersonal, and abstract logical ability, but we are not limited to these. We can add EI and SI, as well as empathy: our genes are not our destiny.
The Importance of Training and Other Best Practices

Only recently have any courses, trainings or workshops been offered in law schools and medical schools. Have you taken one of them? I recommend that, based on the findings of social neuroscience, mediators should at least read books and articles on EI and SI to increase their professional toolkit. There are fifteen competencies included in these concepts and I will explore two: emotional self-awareness and empathy.

Emotional self-awareness sounds easy – don’t we all know what we are feeling when we are having an emotion? Well, actually, no. Our bodies may indicate we are feeling something, that an emotion has been triggered by the amygdala, our neurological burglar alarm, but many of us lack the acuity and vocabulary to correctly name it. For mediators, many emotions could be triggered in the course of a mediation that are unexpected, intense, and distracting. In a family case I mediated recently, the husband suddenly shouted at his wife: “You know why I do these things! You know that when I was five years old my mother and father shot each other dead right in front of me!” After a short, shocked silence I escorted the husband back to his caucus room. As I came back to the wife she said: “I don’t want you as the mediator anymore. I saw your face when he talked about his parents killing each other in front of him. You felt sorry for him!” I was completely unaware that my face had registered anything, but her lawyer and I agreed we should adjourn the mediation session, which we did. I had fallen victim to emotional contagion in a nano-second but was consciously unaware of what my micro-expression had been! When the fight or flight amygdala is activated, bodily response occurs in 1/20th of a second, long before the frontal cortex can process it. A family judge I consulted after this case said when she hears startling things from the bench she immediately looks down and starts rapidly writing, to hide her face from view. Mediators need to practice not revealing sudden, intense emotions that interfere with the parties’ ability to achieve settlement.

How do we make decisions? There are two systems in the brain, according to Daniel Kahneman, author of the 2011 book Thinking Fast and Slow. The low road (System 1) operates automatically and rapidly with no sense of voluntary control and little or no effort. The automatic activities of this system include the following: attending and orienting to a sudden sound, making a “disgust face” when shown a gory picture, driving a car on an empty road, and responding to the sad picture of an abandoned dog. System 2 “allocates attention to the effortful mental activities that demand it, including complex computations,” according to Kahneman. The highly diverse operations of System 2 are disrupted when attention is diverted by strong emotions or other distractions. Examples of System 2 include searching memory to identify a surprising sound, parking in a narrow space, filling out a tax form, and validating a complex logical argument. We spend most of our waking hours in System 1, not System 2!
Using Self-reflection as a Tool

Reflect on your own mediations. Do you believe you were in System 1 more than in System 2? Actually, mediation is an interesting example of sustained use of System 2, at least for mediators and advocates, who are not influenced by the emotional currents swirling inside the parties. For this reason, mediators who can give parties an opportunity to experience their feelings before engaging in problem-solving are demonstrating more EI and SI than those who rely predominately on abstract thinking and computation of damages. Parties need to be in the emotional low road long enough to gradually move toward the high road of System 2, where grounded, appropriate decisions can be made. Mediators can facilitate this brain shift by showing empathy for the parties’ conflict stories. In giving empathy the mediator meets an important party need: to be really heard. This perspective-taking by the mediator is too often overlooked in the drive to settle the legal and financial disputes.

Recently I consulted with a team of lawyers representing the parents in a wrongful death lawsuit. The case had been mediated but had reached impasse and the attorneys hoped that adding a consultant would break the deadlock. After going through all of the evidence and the financial data, a settlement figure was proposed but the parents hesitated. I asked them this question: “What did you say at the mediation about this tragedy?” They told me their lawyers had told them not to speak at all in mediation. I invited them to tell us about their son and in tears they painted a loving portrait of him and the tragedy of his young life cut short. I suggested that in addition to the final settlement number they create a research study into the safety of motorcycle helmets named for their son. After a few minutes the parents told their lawyers they would accept the last financial settlement offer provided the research project could also be initiated. The lawyers did not understand what these parents needed before they could let go of the case – empathy for their loss and compassion for their tragedy. Any of the lawyers could have provided it, but no one saw the importance of it. Decisions are made not only with the rational mind but also with the heart.

Part of the magic of mediation is the empathetic listening that mediators give parties. The ability to listen kindly and attentively, shown by verbally respecting their feelings and by empathetically displaying facial and bodily expressions, can be much more effective than suggesting clever ways to allocate scarce resources. Many parties need to be really heard even more than they want the conflict to end. Often, only after they have expressed their feelings and received empathic feedback can they move into System 2 and engage in problem-solving. Interestingly, research is now showing that by giving empathic feedback, the mediator actually increases her own capacity for empathy. Empathy is the superpower that shrinks the distance between parties and mediators. Humans do this with mirror neurons that reflect back on actions or feelings we observe in another person. Mediators help parties identify and articulate their anxiety, anger, pain, fear and frustration, which allows them to move into System 2 and engage in problem-solving. By looking into the parties’ eyes and closely analyzing their non-verbal behaviors we can sometimes actually feel their feelings even without words. Mirror neurons explain emotional contagion, social synchrony, and how infants learn, according to Goleman. We can improve these abilities
through training. The FACS (Facial Action Coding System) created by Dr. Paul Ekman has been used to identify which of six basic emotions is showing on the face: joy, anger, fear, sadness, surprise or disgust. In his 2019 book, Talking to Strangers, Malcolm Gladwell explains how cultural differences complicate the task. Training on the system is available online. It can be part of achieving a new professional goal: to be a more empathic, kinder, smarter mediator. Empathy’s most important role in life is to inspire kindness and this is especially important in mediation. When a party feels no one really “gets it,” the mediator can be that person who not only “gets it” but gives compassion. Kindness is one of the human species’ most vital survival skills.

Over millennia of human evolution, sapiens changed to make connecting easier and to insure sustained kindness for newborns, as well as to bond families, tribes, clans and nations. Through that interactive system we achieved more safety, food, better tools, and sophisticated cultures. Our brains evolved over many centuries to give us more precision in understanding the thoughts and feelings of others. As a result of all these changes, we developed vast empathic abilities. We can now travel into our own minds as well as the minds of friends, foes, strangers, even fictional characters. We are now the kindest species on earth.

In a recent study, Dr. Tania Singer of the Max Planck Institute in Germany, worked with seventy researchers and teachers over a two-year period, running about three hundred participants through thirty-nine weeks of compassion training. In repeated three-day retreats and daily guided meditation practice, they honed their empathic-compassion abilities, using metta or loving-kindness meditation. The students practiced giving goodwill to themselves, then to friends and finally to strangers. Tests and brain scans, performed at the beginning and throughout the study, showed that behaviors and the actual brains of the participants changed. They were more patient, tolerant, kind, and acted more generously. They recognized more acutely their common humanity. The fMRI scans during this period showed that empathy-related parts of the brain actually increased in size after kindness training. Practiced empathic compassion can change our behavior and our biology.

Transforming Conflict

Our social brains are malleable but need intention, practice and focus. The scientifically grounded pointers included above show it is possible for improvements in EI and SI to be achieved by targeted training, particularly in compassion. We can unleash our creativity in the service of peace by improving our ability to know ourselves, to know others’ emotions, and to offer empathetic responses to hostile people gripped by conflict. This life skill is important for everyone but essential for mediators. Emotional intelligence is the ability to be highly self-aware in the moment and to manage our own emotions. Social intelligence requires primal empathy, empathic accuracy, active listening, synchrony with others, confident self-presentation, and compassion. All of these abilities can be enhanced through practice and intention. They work magic in mediation. We can become highly intelligent in these areas and we should. We can transform conflict to positivity and have faith and hope that as mediators and peacemakers we make a positive difference.
Kay Elkins-Elliott, J.D., LL.M., M.A., has mediated over 2500 cases to resolution. She is the 2018 Texas Mediator Credentialing Association Outstanding Distinguished Mediator, a Super Lawyer since 2012, a coach for the ADR teams at Texas A&M School of Law, ADR coordinator for Texas Woman’s Conflict Resolution Certificate program for over 10 years, and has taught Negotiation, Mediation, Family Mediation and Client Counseling at Texas Wesleyan and Texas A&M since 1989. She is a partner in Elliott Mediation, a law firm specializing in mediation in Fort Worth, Texas.