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# INTERNATIONAL DISPUTE RESOLUTION CONFERENCE 2019

**New Era of Global Collaboration**

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and Exhibition Centre

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# Using Neuroscience Insights to Overcome Reluctance to Mediate International Intellectual Property Disputes

*Donald C. Peters*  
*Professor of Law Emeritus and Director Emeritus, Institute for Dispute Resolution, Levin College of Law at the University of Florida*



“I said mediation. Not medication!”

- Choosing dispute resolution option is very important
- It requires selecting from our limited human dispute resolution menu of
  - Avoidance
  - Consensual via negotiation or mediation [assisted and enhanced negotiation]
  - Adjudicative [formal alternative to force] via arbitration or litigation
- My presentation focuses on company’s lawyers [both in house and external] who typically
  - Are heavily involved in this decision
  - Often play dominant or exclusive role in this decision
  - Control presentations and arguments in adjudicative options

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## **PLUG INTO NEUROSCIENCE**

- Specifically, the cognitive and behavioral dimensions of neuroscience, the study of how psychological functions and resulting behaviors are produced by neural circuitry
- Our human brain contains 5 cups of tofu-like tissue nestled inside our head and spinal connections that
  - Contain a trillion support cells
  - Encompass almost half a quadrillion synaptic connections
  - Generate incredibly fast, complex, and dynamic neural activity
- What happens here influences what we perceive, feel, think, do and say
- All our feelings, sights, sounds, thoughts, meanings, and memories flow from this neural activity



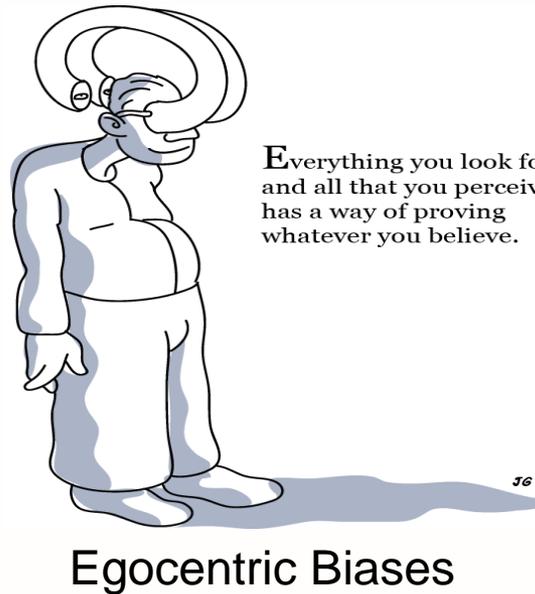
- All human cognitive activity starts with perception
- Everything felt, thought, and done starts with meanings humans attribute to their perceptions
- Portions of these perceptions are first processed by brain systems which generate emotions
- Part of the sensory stimuli coming from eyes and ears pass through brain regions for automatic, emotion-linked processing
- This occurs before other portions reach other neural systems for slower, more cognitive analysis by our pre-frontal cortex
- The first and most basic response to any stimulus is filtered through our brain's emotion-connected assessment systems

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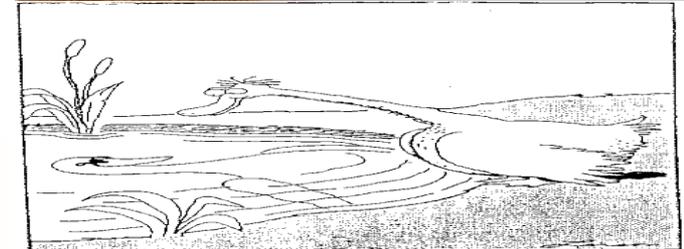


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## Overconfidence Biases

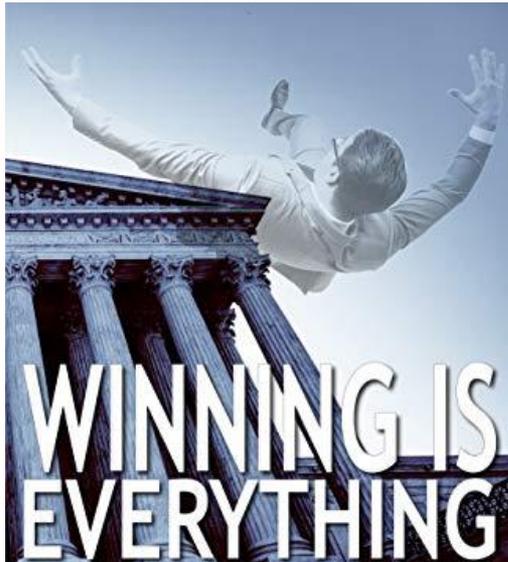


- Adding disputing & conflicting changes selective perception to partisan perception which
- Aggravates egocentric biases narrowing information acquisition by
    - Seeking only confirming evidence [confirmation bias]
    - Discounting disconfirming evidence
  - Triggers strong emotions and hardens commitments
  - Makes other views threatening and generates harsher communication
  - Stimulates overconfidence biases regarding your skills and legal case's merits



### **Next exercise [and DO NOT START UNTIL MY SIGNAL]**

- Turn to face a neighbor next to you in your row
- Sit comfortably
- Place elbow of your preferred hand on the surface before you [if one exists]
- Grasp the hand of your counterpart whose arm and hand are similarly placed
- One point is scored each time the back of your counterpart's hand touches the surface before you in the 30 seconds after starting
- Do not strain, over-exert, or sue!



## Win-Lose, Fixed Pie, and Loss Aversion Biases

- ❑ Selective perception brain tendencies, coupled with partisan perception resulting from disputing and conflicting, creates a powerful, pervasive win-lose bias
- ❑ This mindset frames all dispute resolution activity as exclusively or primarily involving gain-maximizing thinking and behavior
- ❑ This is augmented by a mental shortcut assuming that subjects comprising disputes are limited and that all participants value all of them equally, the fixed pie bias
- ❑ A powerful tendency to value avoiding loss more than achieving gain [loss aversion bias] completes this cognitive troika of biases influencing resolution option choice

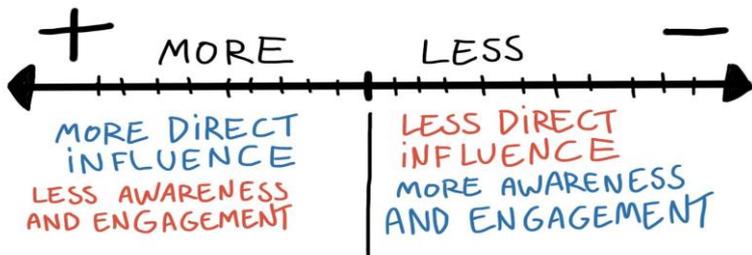
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# CONTROL

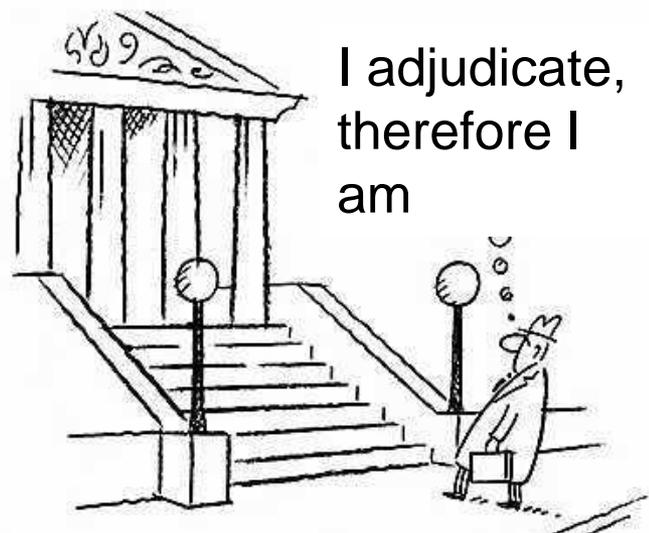


**Lawyers should beware these three Cs derived from legal culture which can bias their explanations regarding DR option choices**

- ❑ Humans store culture-linked beliefs and values which guide cognitive brain activity and influence decisions-making
- ❑ Lawyers [and other professionals] possess an abstract knowledge base along with shared educational experiences and norms that derive from and reinforce their core knowledge
- ❑ Three factors, control, comfort, and cash, present potential biases that may incline lawyers to encourage adjudicating rather than mediating international intellectual property disputes

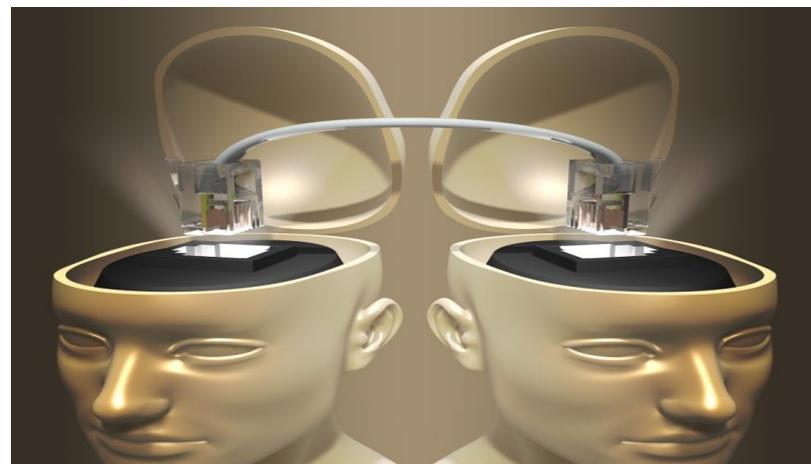
## Lawyers have less process control in mediating than in arbitrating or litigation

- ❑ Mediating emphasizes negotiation done in presence of clients
- ❑ Effective mediating gives clients equal or primary roles discussing business interests, future commercial potentials, and other solutions that transcend win/lose adjudicative outcomes
- ❑ Lawyer's law-related and persuasive advocacy skills are not central to many, if not most, effective mediations
- ❑ Mediating requires more following and less leading



## Mediating may push lawyers out of their comfort zone

- ❑ Mediating demands constant perception, a portion of which is first handled by the human brain's emotional processing system
- ❑ Effective mediating often generates and requires dealing with complicated, dynamic emotions and strong expressions and actions they influence
- ❑ Studies of US lawyers and law students suggest that they often possess relatively underdeveloped emotional and interpersonal capacities and display low interest in and knowledge of empathy
- ❑ Developing comfort with and skills at recognizing and empathizing with strong emotional moments and everyone's core emotional negotiating concerns of appreciation, affiliation, autonomy, and status is essential





## Mediating international intellectual property disputes probably involves less fee-generating opportunities than adjudicating them does

- ❑ Flip side of the time savings mediating usually brings
- ❑ External lawyers may still earn hefty fees for
  - ❑ Researching the full legal context of adjudicative options
  - ❑ So clients can weigh advantages, disadvantages, risks, and costs of options based on what is known
    - ❑ When a DR option is selected
    - ❑ When new information learned during a mediation
- ❑ Preparing clients for mediation also requires more time and effort although it may be shared with in house counsel
- ❑ Making clients aware of potential brain biases and busting them provides an important component of mediation preparation that is often overlooked



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# Busting our Biases



Expand pie beyond legal frames

# CHANGE your MINDSET

