

THE JOURNAL OF



CECM

CANADIAN COLLABORATIVE FOR
ENGAGEMENT & CONFLICT MANAGEMENT

Volume 1
(August 2020 – July 2021)

MEDIATION DESIGN IMPLICATIONS OF THE COVID-19 PANDEMIC

Dave Wakely
BA, C.Med

Shadow of the Law Publications

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Volume One

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ISBN 978-0-9958842-2-9 (ebook)

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ABSTRACT

COVID 19 has had a lasting impact on how mediations may be conducted. This paper compares Online Dispute Resolution (ODR) to In Person Mediation (IPM) in a post COVID 19 world. Public health and occupational health and safety guidance is reviewed and integrated with neurophysiological and psychological research on nonverbal communication and human stress. Evidence informed best practices for both ODR and IPM are developed and the paper concludes that ODR is a superior choice until the precautions around COVID 19 are either no longer required or until widely accepted norms around physical presence develop.

ABOUT THE AUTHOR

Dave Wakely is a Chartered Mediator who offers online and in person mediations. His practice focuses on labour and workplace issues.

Dave also serves as an Advanced Care Paramedic in Peel Region.

During the COVID 19 Emergency, Dave was the labour representative on Peel Paramedics Services' Command Group and Emergency Operations Centre. Dave led the development of Peel's specially equipped COVID 19 High Risk Response Team.

Dave holds a BA in labour studies from York University and recently completed the academic requirements for a Master of Laws in Dispute Resolution from Osgoode Hall Law School.

Previous works have evaluated the utility of online dispute resolution (ODR). When evaluating ODR, it is typically compared to in person mediation (IPM). Since the declaration of a worldwide pandemic and the rise of COVID-19 in countries across the globe in March 2020, the return to what we knew as a typical IPM is in question. Considering the utility of ODR against a normal that can no longer exist is not useful. This paper will compare the design challenges of ODR and the design challenges of what IPM will look like in the post COVID-19 world. I will begin by exploring the design implications of current public health recommendations on IPM. I will then compare ODR and post COVID-19 IPM in three dimensions drawing on neuroscience, and dispute resolution and negotiation literature: the impact of threats to physical safety and stress response, the impact of physical distancing and online parallels and the impact of facial affect and kinesics. Having considered the limits created by the response to the current public health crisis and limits and opportunities inherent in the use of video based ODR, I will propose a group of evidence informed best practices for both video based ODR and post COVID-19 IPM.

PUBLIC HEALTH BACKGROUND

On December 31, 2019, a cluster of atypical pneumonia was reported in Hubei China. A month later there were 7818 confirmed cases of what would eventually be called COVID-19. March 11, 2020 WHO, the World Health Organization, declared a pandemic.¹ On March 17, Ontario declared a province wide emergency and ordered a shutdown of non-essential services. The next day the Canadian government closed its borders.² Public life ground to a halt as malls, schools, courts, parks and virtually all other public spaces were closed. Even gathering in a private dwelling with more than four other people was prohibited by law.³ Public health authorities and elected leaders briefed the public daily.

Initially those briefings sought to inform the public about epidemiologic data and measures to address the economic and other consequences of the closure. As time progressed, Public Health authorities, led by Dr Tam and Dr Lo with support from a phalanx of regional medical officers of health, changed focus

¹ World Health Organization, “WHO Timeline – COVID-19” 27 April 2020, online: <<https://www.who.int/news-room/detail/27-04-2020-who-timeline---COVID-19>> [perma.cc/PWP7-TSLA].

² Lauren Vogel, “COVID-19: A timeline of Canada’s first-wave response” 12 June 2020, online: CMAJ <<https://cmajnews.com/2020/06/12/coronavirus-1095847/>> [perma.cc/SBA5-FNP3].

³O Reg 52/20, s. 1.

from reporting case counts and mortality to how to stay safe beyond just staying in your house. Public health recommendations have varied based on the level of disease and the ability of public health to respond in a given area.

At the onset, the emergency orders required many services to switch to alternative delivery methods. The government enacted a regulation suspending limitation periods.⁴ Courts adjourned criminal matters,⁵ suspended residential evictions,⁶ and expanded their virtual hearing capacity.⁷ The court also all but mandated virtual mediation in a consolidated notice to the profession: “The Court also calls upon the cooperation of counsel and parties to engage in every effort to resolve matters. For civil proceedings, this includes attendance at mediation – whether prescribed or not – where a mediator is willing to engage in a virtual mediation.”⁸ As case counts stabilized and much of the economy reopened, the public health measures required to safely reopen have become clearer.

I say clearer because there are a number of competing organizations who are writing the rules. Health care officials, public health officials, elected officials at all three levels of government and the Ministry of Labour and associated health and safety organizations have all provided comment and guidance. Whereas the mediator and lawyers participating in any potential mediation are workers, the guidance outlined herein is the guidance provided by the Ministry of Labour and associated health and safety organizations.⁹ There is no standard written for IPM or legal proceedings generally.

⁴ O Reg 72/20, s. 1.

⁵ Ontario, SCJ, *Adjourning Criminal Matters*, (Chief Justice Court Order), 15 March 2020, online: <<https://www.ontariocourts.ca/scj/by-order-of-chief-justice-morawetz/>> [perma.cc/74DW-SMSB].

⁶ Ontario, SCJ, *Suspending Residential Evictions*, (Chief Justice Court Order), 19 March 2020, online: <<https://www.ontariocourts.ca/scj/chief-justice-court-order-susp-resid-evict/>> [perma.cc/PG3A-AN9C].

⁷ Ontario, SCJ, *Memo to the Profession*, (Chief Justice Court Order), 27 March 2020, online: <<https://www.ontariocourts.ca/scj/notices-and-orders-COVID-19/memo-to-the-profession/>> [perma.cc/2S3H-CEL9].

⁸ Ontario, SCJ, *Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media*, (Chief Justice Court Order), 13 May 2020, online: <<https://www.ontariocourts.ca/scj/notices-and-orders-COVID-19/consolidated-notice/>> [perma.cc/V5J4-CBH4] s. 1.

⁹ For discussion on how organizations with competing mandates cannot be trusted to ensure worker safety see the SAR Commission report online: <http://www.archives.gov.on.ca/en/e_records/sars/report/v2-pdf/Vol2Chp4x.pdf> [perma.cc/ZVD3-RR5P].

IPM is a process where two or more parties, usually with lawyers engage with a third party neutral. In order to do this successfully, often everyone is required to be in a room together for a period of time. Additionally, the various combinations of party-lawyer, lawyer-mediator-lawyer and so forth will meet in rooms and hallways throughout the mediation. Five people is the minimum number of people in a two party IPM where both parties have lawyers. The reality often sees higher number of parties with a need to attend the mediation. So, while there is no COVID-19 health and safety standard on mediation, the interactions are not unlike the physical interactions with adults in a training seminar. Accordingly, that is the standard I will assume IPMs will be held to with modifications where it seems prudent.¹⁰

Both the Public Services Health and Safety Association and the Infrastructure Health & Safety Association have published standards on classroom health and safety. While the PSHSA standard is broadly applicable to the education sector, the IHSA standard focuses more a single day multi participant training. Accordingly, the IHSA standard has been selected as the most applicable health and safety standard to IPM. The IHSA standard makes recommendations about the things you can do before and during an event to maximize safety. If the recommendations are taken into account while the mediation process is being designed, IPM can be performed in a way that minimizes the risk to the mediator and the participants.

When scheduling the IPM, the mediator needs to communicate with the parties and the venue. The parties need to be canvassed to gain an understanding of who will be participating in the mediation; the mediator will need to book rooms based on this information. When scheduling room booking the mediator should also coordinate with the venue in an attempt to schedule a different start and end time. This staggering of start and end times will decrease the chances of crowding at the doors and in the elevators. When communicating with the venue, mediators should ensure the venue is following public health guidance about the addition of signs and physical distance markings is also required.

Prior to the mediation the mediator would need to ensure the parties were aware of the COVID-19 related requirements. The most pressing pre mediation requirement would be the need for all parties to complete a self-screening¹¹

¹⁰ Where I deviate from the published standard due to a dissimilarity, I will explicitly note my departure from the standard and the supporting evidence in a footnote.

¹¹ The Ontario self-screening is available online <<https://COVID-19.ontario.ca/self-assessment/>> [perma.cc/U73X-7WBM].

prior to attending. The provincial self-screening tool is designed to give people advice on what to do based on their symptoms, age and medical history. It is not designed to tell people if they are healthy enough to attend a mediation. Accordingly, the premediation instructions for using the tool need to include guidance on what triggers would prevent participation in mediation. As an example, a person without symptoms or exposure but with diabetes would be advised they are at high risk if they contracted COVID-19 and told to consult with a doctor prior to attending any public gathering. A mediator who sends out the screening tool to participants without further guidance the night before an IPM invites trouble. Mediators should use the screen tool to detect people who are at risk of having COVID-19, so direction should be given for a participant to not attend an IPM if the result directs them to get tested as they have symptoms or may have been exposed to COVID-19.

Physical distancing and hand hygiene are key on the day of the IPM. The setup of the mediation room should consider the need for physical distance between the parties, their representatives and the mediator. Use of alcohol based hand wash should be encouraged by signage and the mediator. Food, often present at mediations, does not pose a health hazard. “[T]here have been no cases reported of [food based] transmission with COVID-19.”¹² Neither the IHSA or PSHSA standard require masks when physical distance can be maintained. Mediations are typically convened in rented public spaces. While not universal, most Ontario municipalities, including Toronto require the use of masks in all public spaces without regard to the ability to maintain physical distance.¹³

Participant safety is a core function of the mediator. There is no standard for conducting COVID-19 safe mediations; however, the IHSA classroom safety standard meets many of the challenges posed by IPM. Proper mediation planning will ensure that self-screened participants can participate in an environment that allows for as much physical distancing as possible. While masks are not mandated by the IHSA standard, they have become law throughout most of Ontario. Any IPM will likely be conducted with participants and the mediator wearing masks. The prohibition of physical closeness and the

¹² British Columbia Centre for Disease Control, “Food Safety”, BCCDC n.d, online:<<http://www.bccdc.ca/health-info/diseases-conditions/covid-19/prevention-risks/food-safety>> [perma.cc/QS6B-HM5R].

¹³ Don Mitchel, Global News, July 17, 2020, “Coronavirus: Hamilton joins regional municipalities in passing mandatory mask bylaw” online: <<https://globalnews.ca/news/7188243/coronavirus-hamilton-passes-mask-bylaw/>> [perma.cc/S74A-GJC7].

requirement to cover faces will impact nonverbal communication between the parties.

NONVERBAL COMMUNICATION

This paper makes the assumption that the key differences between IPM and ODR relate to the physicality of the surroundings and to nonverbal communication. Nonverbal communication can be divided into haptics, kinesics, vocalics, and chronemics. The role of all four elements of nonverbal communication is well established in mono-cultural and cross-cultural negotiations. This section is a foundational discussion on how nonverbal communion triggers psychologic and neurophysiological reactions in people receiving the communication and cues.

Haptics

Haptics is the role of touch in nonverbal communication. Handshakes, back patting, and other touching sends messages to the person being touched and to anyone observing the touch. While few of these touches are appropriate for use during mediation, the use of appropriate and inappropriate touch is a factor in many IPMs. Touch communicates intent, power relations, and triggers the release of oxytocin.

A handshake is often the first deal done. Handshakes are heavily associated with doing deals and often parties to a mediation will even start the mediation with a handshake. Handshakes are a nonverbal cooperation; they require the “participants co-operate so that their hands actually meet.”¹⁴ But handshakes can be more than just the first successful negotiation of the day. In the Mid 90’s Allen Konopacki found that the act of just shaking hands upon first contact could increase the chances of honesty.^{15,16} Touching another party has been found

¹⁴ Peter Collett, *The Book of Tells: From the Bedroom to the Boardroom: how to Read Other People*. (Toronto: HarperCollins, 2005) at 131.

¹⁵ Adam Bryant, “A Ritual Loses its Grip”, *New York Times* (1997 July 6) online: <<https://www.nytimes.com/1997/07/06/weekinreview/a-ritual-loses-its-grip.html>> [perma.cc/PG3E-Y7KG].

¹⁶ Konopacki left a quarter in a phone booth and then sent a student to ask the phone user if they had seen the quarter. He repeated this with the interaction starting with a handshake and the number of liars was reduced significantly.

to increase their gratitude^{17,18} and gratitude has been shown to increase economic cooperation: “gratitude can be seen as an emotional state that decreases the probability of selfish economic action, most likely in the service of fostering trust and stable economic exchange[.]”¹⁹ Touch is a psychologically powerful medium that triggers the release of oxytocin.

Oxytocin is an important neurochemical in the negotiation process. In addition to increasing affiliative behaviour, it has been found to enhance group decision making processes by causing participants to focus on contributing unique information to the discussion.²⁰ Touch increases social connectivity by triggering gratitude and the release of oxytocin.

Kinesics

Kinesics is the study of body movement and gestures. It is the visual information we exchange during communication, things like eye contact, head position and gesticulations. “Visual information tends to be less ambiguous and more focussed than auditory information.”²¹ How and when we make eye contact sends messages as does how we hold our head, scrunch our nose or raise our eyebrows. For the purpose of discussion, this paper will subdivide kinesics into eye contact, gestures and facial affect. While all three of these fit into kinesics as originally conceived of in the 1960s, our understanding of how they impact communication has grown since then and the interventions of ODR or IPM impact these three areas in markedly different ways.

Eye contact

Teachers and presenters are trained to use eye contact to engage with their listeners. In person, we shift our gaze around a room while speaking and the audience responds with increased attention as eye contact is made with

¹⁷ C. Simão & B. Seibt, “Friendly touch increases gratitude by inducing communal feelings” (2015) 6. *Frontiers in psychology*, 815.

¹⁸ A. H. Crusco & C. G. Wetzel “The Midas touch: The effects of interpersonal touch on restaurant tipping” (1984) 10:4 *Personality and Social Psychology Bulletin*, 512.

¹⁹ D. DeSteno, M.Y. Bartlett, J. Baumann, L.A. Williams, & L. Dickens, “Gratitude as moral sentiment: emotion-guided cooperation in economic exchange” (2010) 10:2 *Emotion*, 289.

²⁰ T.R. W. Wilde, *et al*, “The Neuropeptide Oxytocin Enhances Information Sharing and Group Decision Making Quality” (2017) 7 *Sci. Rep.*, 40622; doi: <10.1038/srep40622>.

²¹ Edward T. Hall, *The hidden dimension*, (Garden City, NY: Doubleday, 1969) at 43.

them.²² If we stop our gaze for a period of time, they will direct their attention to where we are looking.²³ If we ask a question to the audience, our gaze can select someone to speak and let them know it is their turn. The audience's gaze awareness forms part of their understanding about the message being communicated and of the expected next steps. In group interactions eye contact and gaze awareness are important elements in communication.

Facial Affect

The face and its features illustrating the emotional condition of the sender has been long established.²⁴ Once received, the emotional illustration is used by the receiver to react. Happy emotions like amusement and friendliness are mirrored, while emotional states of hesitancy and uncertainty are, in dyads, responded to with support and friendliness.²⁵ Kinesics of facial expression improves understanding and can help determine the next steps in a negotiation. Positive emotions can be mirrored to create a relationship and negative emotions can be detected to create a supportive response.

The ability for the receiver to mirror the expressions of the sender is an important feedback element. Mirroring "facial expressions, [is] common in social interactions and [is an] important social cognitive mechanisms since they enable the observer to understand not only the goal of an observed motor act, but also the intention behind it"²⁶ Specialized "[m]irror neurons ...discharge both when an individual executes a motor act and when he observes another individual performing the same or a similar motor act."²⁷

²² A. Senju, & T. Hasegawa, "Direct gaze captures visuospatial attention" (2005) 12:1 Visual cognition, 127.

²³ A. Palanica, & R.J. Itier, "Attention capture by direct gaze is robust to context and task demands" (2012) 36:2 Journal of Nonverbal Behavior, 123 at 123ff.

²⁴ See generally Charles Darwin. *The Expression of the emotions in man and animals*. Murray: London 1872.

²⁵ C. Navarretta, "Mirroring facial expressions and emotions in dyadic conversations". In Nicoletta Calzolari, Khalid Choukri, Thierry Declerck, Sara Goggi, Marko Grobelnik, Bente Maegaard, Joseph Mariani, Helene Mazo, Asuncion Moreno, Jan Odijk, & Stelios Piperidis, eds, *Proceedings of the Tenth International Conference on Language Resources and Evaluation* (Portorož, Slovenia: European Language Resources Association, 2016) 469 at 473.

²⁶ *Ibid* at 469.

²⁷ S. Acharya & S. Shukla, "Mirror neurons: Enigma of the metaphysical modular brain" (2012) 3:2 Journal of natural science, biology, and medicine, 118 at 119.

These mirror neurons hold value for both the receiver and the sender. The receiver can use the effect of mirror neurons to understand the intentions of the sender.²⁸ The sender, who already benefits from being understood, can also utilize the effect of motor neurons to better establish rapport. Dale Carnegie was right when he advised readers to smile. Happy emotions are mirrored more than negative emotions,²⁹ and people who are emotionally satisfied are more likely to feel as though their interests have been satisfied.³⁰ Chris Voss, a former FBI hostage negotiator and negotiation trainer, describes mirroring as “a sign that people are bonding, in sync, and establishing the kind of rapport that leads to trust.”³¹ In Voss’s world, the mirror was not genuine, nor did it claim to be, but still enabled the building of rapport in high stress situations. Mirror neurons are powerful allies in negotiations.

Gestures

Gestures trigger brains. Observing exactly what areas of the brain are being triggered is possible using functional magnetic resonance imaging (fMRI). In the speaker and the receiver, gestures were shown to trigger the areas of the brain responsible for socialization.³² Triggering the social areas of the brain increase cooperative behaviors and makes people less competitive. When common gestures were used, they triggered the same area of the brain as the words themselves.³³ Gestures are used both to communicate in combination with speech and in the absence of it.³⁴ Additionally, gestures activate mirror neurons in the sender and receiver.³⁵

Kinesics offer the ability to guide the discussion and foster better relations in the receiver. How a speaker looks at a receiver can let the receiver know when

²⁸ *Ibid* at 118.

²⁹ Navarretta, *supra* note 25 at 472.

³⁰ Gary Furlong, *The Conflict Resolution Toolbox*. (Mississauga, ON: Wiley, 2005) ch 2

³¹ Chris Voss & Tahl Raz. *Never split the difference: Negotiating as if your life depended on it*. (New York, NY: Random House, 2016) at 35.

³² M. Lotze, et al., “Differential cerebral activation during observation of expressive gestures and motor acts.” (2006) 44:10 *Neuropsychologia*, 1787 at 1793.

³³ J. Xu, et al., “Symbolic gestures and spoken language are processed by a common neural system” (2009), 106:49, *Proceedings of the National Academy of Sciences* 20664ff.

³⁴ Erica A. Cartmill and Susan Goldin-Meadow “Gesture” in D. E. Matsumoto, H. C. Hwang, & M. G. Frank, eds., *APA handbook of nonverbal communication*. (Washington DC: American Psychological Association, 2016) Ch 12.

³⁵ K. J. Montgomery, N. Isenberg, & J. V. Haxby, (2007). “Communicative hand gestures and object-directed hand movements activated the mirror neuron system” (2007), 2:2, *Social cognitive and affective neuroscience*, 114ff.

they are expected to respond. Happy facial expressions can trigger mirror neurons leading to receiver happiness and negative facial reactions can alert a receiver to the need to adapt their response. Gestures, even in the absence of speech, can lead to understanding.

Vocalics

The non-speech sounds we make as well as the way we say the words we do during communication are vocalics. These paralinguistic cues communicate emotion and help the receiver understand the context of the message. While speech is processed in the left hemisphere of the brain, a location usually associated with analytical thinking, vocalics trigger the right hemisphere of the brain and help the receiver understand the emotion in the speech.³⁶ Vocalics sent by the receiver also send signals to the speaker. Saying “uh-hun” as the speaker is speaking encourages them to continue. Receivers, by decreasing the frequency of affirmative paralinguistic cues or by switching to neutral or negative cues, signal that they are ready for the speaker to stop so the receiver can become the speaker.³⁷

Chronemics

How people use and perceive time is culturally dependant. Two major views of time emerge: monochronic time and polychronic time. The dominant view in the western world is oriented to monochronic time. Monochromic time is considered linear and things happen at a time. In polychronic cultures time happens but it is the things and relationships that determine the pace. The use of time in monochronic cultures IPM is rarely considered. People show up promptly, take turns speaking, and finish towards the end of the day.

Different cultures deal differently with time. Within a culture and within a conversation the way time is used matters to how conversation happens. Pauses in speech or paraverbal cues, termed psycholinguistic silences, can modify how the receiver is experiencing time.³⁸ In negotiation training, learners are often advised to use silence to invite a response.³⁹ When the speaker stops, the time seems to stretch, and the pause becomes uncomfortable. In the right

³⁶ Victoria L. Harms & Lorin J. Elias, “Examination of Complementarity in Speech and Emotional Vocalization Perception” (2014) 5 *Psychology*, 864 at 865.

³⁷ Collett *supra* note 14 146.

³⁸ T. J. Bruneau, “Communicative silences: Forms and Functions” (1973) 23:1 *Journal of communication*, 17 at 23.

³⁹ For examples see Voss *supra* note 31 at 72.

context, such a pause, rather than inviting a response, can also serve to help the receiver make sense of what was said and remember the points of the speaker.⁴⁰

Words are only a part of communication. Nonverbal Communication including touch, distance, gestures, facial expression, paralinguistic sounds, and time have a great impact on how communication is received. This impact includes the triggering of mirror neurons and neurotransmitters like oxytocin which can enhance the behaviour essential to negotiating integrative deals. At times, negative messages can also be sent through haptics, proxemics, kinesics, vocalics and chronemics. The processing and impact of these negative messages will be expanded in the following sections.

PHYSICAL SAFETY AND STRESS RESPONSE

Mediations create a safe space, but in the post COVID-19 world the safety of all public spaces is in question. It is simply beyond the ability of a mediator to guarantee the safety of mediation participants. The stress that results from this uncertainty should be considered when making process choices that involve IPM versus ODR. Beyond being an ethical imperative of mediators, safety is an important element in negotiation. The perception of threat by a party or by the environment can release neurotransmitters that activate the participants SNS and stimulate the fight or flight response.

Consider what the future state would need to look like to conform to health recommendations:⁴¹

- Pre-meeting Screening
- Spaces large enough to allow for physical distancing of two metres
- Access to hand washing or alcohol-based hand sanitizer

⁴⁰ L. J. MacGregor, M. Corley, & D. I. Donaldson, "Listening to the sound of silence: Disfluent silent pauses in speech have consequences for listeners" (2010) 48:14 *Neuropsychologia*, 3982 at 3991.

⁴¹ While Ontario Health and Safety Associations do not, at the time of publication, have guidelines for mediations the IHSA guidelines for classroom training respond to many of the same hazards and have been used as a proxy. Online: <<https://www.ihsa.ca/pdfs/alerts/COVID19/guidance-on-in-class-training-during-covid-19.pdf>> [perma.cc/9SQ9-3MAM].

- Posters in room
- Markings on floor to remind participants about physical distancing
- The wearing of masks

Mediation is an unfamiliar process to most disputants. It is an unfamiliar process that takes place in an unfamiliar place and it is being conducted because of a conflict. These are sources of stress in IPM. Added to post COVID-19 IPM is the stress of potentially being exposed to COVID-19. Participants are primed and reminded about the risk of COVID-19 by the omnipresent measures to control the disease. The mediator, adhering to best practices, would send all parties a health questionnaire the day prior to the mediation: a reminder that there is a risk of contracting the disease. When a party arrives, they are greeted by signs mandating a mask and screening them once again for symptoms. Prior to entering the room, they are encouraged to wash their hands because they are in danger if they do not. Once seated in the room, in case they shifted their attention to managing the stress caused by the uncertainty of negotiation, they are faced with posters on the walls and stickers on the floor. Everywhere a party looks they are reminded that a bad deal is only one of the hazards of this mediation.

When physical or psychological safety is threatened, the fight or flight reflex is stimulated. The stress response begins a cascade in the amygdala which stimulates the hypothalamus directly through the autonomic nervous system. The hypothalamus activates the sympathetic nervous system and secretes peptides which stimulates the anterior pituitary. In turn the anterior pituitary releases hormones that stimulates the adrenal cortex. The adrenal cortex then releases cortisol and other glucocorticoids. When the stress cascade is initiated, individuals may lose their ability to participate meaningfully in the mediation.

Mediations require executive function on behalf of the participants. Executive functions are “the mental processes that enable us to plan, focus attention, remember instructions, and juggle multiple tasks successfully.”⁴² Focus or cognitive inhibition is the brain’s ability to tune out unrelated information.

⁴² Center on the Developing Child at Harvard University, “Executive Function & Self-Regulation” (2020, March 24), online: <<https://developingchild.harvard.edu/science/key-concepts/executive-function/>> [perma.cc/G42T-NSMZ].

Cognitive inhibition is decreased in stressful conditions.⁴³ Stress, even experienced acutely for a short period, impacts your ability to recall information in your short- and long-term memory⁴⁴ and makes switching from task to task difficult.⁴⁵ As ability to focus, store things in working memory and move between items under consideration becomes impaired a successful mediation becomes beyond reach. In extreme cases the stimulation will be so great, it can cause an amygdala hijack.

Amygdala hijack is a phenomenon that occurs when a person is overwhelmed by stress. It is focused on avoiding the stressful stimulus. From an evolutionary perspective there was no survival advantage to thinking slowly and rationally or creatively when faced with a bear. The fight or flight system is so named because it provides a binary choice: fight or flight. For the most part, the fight or flight system is a vestigial system, it is still in charge when it is activated. When a party to a negotiation becomes Amygdala hijacked, they will have trouble considering the possible outcomes and engaging creatively in the process. They will seek to end the negotiation by walking away, making a sub optimal deal or they will dig into a position for fear of losing anything.

In neutral conditions, people value potential losses twice as highly as potential gains.⁴⁶ This hyper valuation of potential losses is called loss aversion. In normal conditions, people are as happy about gaining ten dollars as they are sad about losing 5 dollars. Under stress, people become even more focused on avoiding losses than on making gains. Using a fMRI, participants under stress performed a series of games to determine how they valued loss. The fMRI linked increased loss aversion to increased activity in the amygdala.⁴⁷ Integrative deals are difficult without objective criteria⁴⁸ and objective criteria are impossible to develop with party whose amygdala is multiplying their losses.

In a recent case report from Italy, Doctors observed evidence of amygdala hijack in fMRI imaging when a patient was shown images associated with

⁴³ G. S. Shields, M.A. Sazma, & A. P. Yonelinas, "The effects of acute stress on core executive functions: A meta-analysis and comparison with cortisol." (2016) 68 *Neuroscience & Biobehavioral Reviews*, 651 at 666.

⁴⁴ R.S. Stawski, M. J. Sliwinski, & J. M. Smyth, "The effects of an acute psychosocial stressor on episodic memory" (2009) 21:6 *European Journal of Cognitive Psychology*, 897ff.

⁴⁵ Shields *supra* note 43 at 666.

⁴⁶ Russell Poldrack "What Is Loss Aversion?" (2016, July 01), Online: *Scientific American* <<https://www.scientificamerican.com/article/what-is-loss-aversion/>> [perma.cc/342F-LRBF].

⁴⁷ C. J. Charpentier et al. "Emotion-induced loss aversion and striatal-amygdala coupling in low-anxious individuals" (2016) 11:4 *Social cognitive and affective neuroscience* 569 at 569ff.

⁴⁸ Roger Fisher, William Ury, & Bruce Patton, *Getting to yes: Negotiating agreement without giving in*. (Toronto, ON: Penguin, 2011) at 89.

COVID-19.⁴⁹ It is an open question as to how people in non-medical scenarios will react to IPM. The answer will likely vary from person to person and vary with time. As people emerge from months of physical isolation wearing masks to IPM, their stress levels will be hard to account for in mediation planning. While amygdala hijackings will be a rare occurrence, every IPM participant and mediator will be impacted by the novel stress of the physical environment in a post COVID-19 world.

In ODR when the mediation is online and when the physical location is familiar to the participants, other sources of stress can be created by the medium. The platform itself can cause stress to novice users. Hardware or software differences can create cognitive load. Even in experienced users, Zoom exhaustion is real⁵⁰ and explained by the brain's attempts to meter stimuli when focusing; it can even make problems harder to solve. By default most mediums also present self-images that can serve as an additional source of stress. Beyond the medium, the comfort of home also carries with it the stresses of home. While the virtual world avoids the threat of contracting a deadly virus, it imposes novel stresses on mediation participants that the process needs to be designed to take into account.

In person, when someone is speaking, the speaker and the listeners share a common understanding of what is happening in the room. The listeners focus on the speaker and observe other actors in the room via peripheral vision. As the information received gets more complex and cognitive load increases, the listeners' field of acute vision drops by half to focus on the speaker or the visuals presented.⁵¹ The listeners' peripheral vision becomes less acute. In effect, the brain filters out the peripheral vision which lowers the cognitive load. In a videoconference that displays multiple video feeds simultaneously, like Zoom's gallery view, feeds are provided in the central area of focus, so the brains attempt to direct resources to the complex subject matter is thwarted.

The brain is taking steps to drop the cognitive load by offloading things in the periphery, but the technology is grouping the source of the non-important load,

⁴⁹ Nicola Morelli et al., "The Hidden Face of Fear in the COVID-19 Era: The Amygdala Hijack" (2020) *European neurology*, 1 at 1ff.

⁵⁰ Julia Skylar, "'Zoom fatigue' is taxing the brain. Here's why that happens" (2020, April 24), online: National Geographic <<https://www.nationalgeographic.com/science/2020/04/coronavirus-zoom-fatigue-is-taxing-the-brain-here-is-why-that-happens/>> [perma.cc/XZ2T-NP3P].

⁵¹ L. J. Williams, "Cognitive Load and the Functional Field of View" (1982) 24:6 *Human Factors*, 683.

the listeners and their reactions, to the central area of focus. There is no relief from the excessive cognitive load. This challenge can be addressed by a mediator using education, interjection or interruption. In the opening statement or in the electronic invite, mediators can instruct parties to set the software to display the speaker view. Depending on the software and hardware set up, this limits the view to the speaker and the last one or two people who spoke. This view limits the cognitive load. For participants who want or need to view the group, an additional monitor can be set up to display the galley view. When this monitor is placed outside the area of central focus and cognitive load increases, it will be tuned out. If the mediator perceives the subject matter is placing a cognitive burden on the participants, they can ask the speaker to enable the whiteboard, share their screen taking notes on the idea or in Zoom, use the spotlight function, which pins the video feed selected by the host for all participants. Anyone enabling the whiteboard or sharing screen has the effect of focusing attention on the shared screen. The participants will see a small feed of the speaker and the majority of the focus area will be on the shared document or whiteboard. Like an IPM, sometimes participants will need a break. The mediator should use this strategy with caution as it can disrupt flow. In addition to the stress caused by the medium, being able to monitor one's self with continuous video can put more stress on participants. Self-view has been shown to further increase cognitive load⁵² and to increase negative responses to problems encountered during the videoconference.⁵³ Conversely, when a video conference goes well, participants who had access to their self-view increased their positive responses.⁵⁴ Despite the higher highs of self-view, lower lows combine with increased cognitive load to tip the balance against enabling self-view.

The stress response can be triggered by physical or psychological stimuli. The conflict that brought the parties to mediation and the stress of the method of meeting need to be considered when designing and conducting the mediation. Parties under stress lose executive function and value their losses more than their gains. For the foreseeable future IPM, even when safety measures are in place, are likely to offer stimulation to the amygdala and SNS. The stress caused by ODR is at least somewhat attributable to its novelty. Other sources of stress in ODR can be mitigated by the mediator with education, interjection,

⁵² John Storck, Lee Sproull, "Through a Glass Darkly: What Do People Learn in Videoconferences?", (1995 December) 22:2 *Human Communication Research* 197.

⁵³ J. Wegge, "Communication via videoconference: Emotional and cognitive consequences of affective personality dispositions, seeing one's own picture, and disturbing events" (2006) 21:3 *Human-Computer Interaction*, 273 at 314.

⁵⁴ *Ibid* at 314.

and interruption. Environmental challenges in ODR relate to the home environment. These challenges are difficult to identify prior to the mediation and may be difficult challenges to meet.

PHYSICAL DISTANCE & ONLINE PARALLELS

Haptics

In a traditional IPM the use of touch helped the process by triggering the release of oxytocin. Oxytocin would counter the sympathetic nervous system's (SNS) response to stress and calm the amygdala. "The response pattern... could be regarded as an antithesis to the well-known fight-flight response."⁵⁵ It has been shown to directly lower the level of activity in the amygdala in response to stress.^{56,57} In the post COVID-19 world, physical distancing is of paramount importance to stopping the spread of the virus, and physical interaction with non-household members should be discouraged. IPM will no longer be able to rely on haptics to provide the benefit of oxytocin during mediations.

While the use of touch may not be a practical source of oxytocin, other triggers are available. "Vocal cues may be a viable alternative to physical contact"⁵⁸ but evidence of vocalization alone being able to trigger oxytocin is limited to vocal communication with *trusted* individuals.⁵⁹ Herein lies a paradox, in order to be able to trigger the neurochemical to build trust, one must be trusted. Mediators or representatives should consider how to structure interactions before the mediation to build as much trust as possible prior to the mediation.

⁵⁵ Kerstin Uvnäs-Moberg, (1997). "Physiological and endocrine effects of social contact" (1997) 807:1 *Annals of the New York Academy of Sciences*, 146 at 158.

⁵⁶ D. S. Quintana et al. "Low dose intranasal oxytocin delivered with Breath Powered device dampens amygdala response to emotional stimuli: A peripheral effect-controlled within-subjects randomized dose-response fMRI trial" (2016) 69 *Psychoneuroendocrinology*, 180.

⁵⁷ G. Domes, et al. "Oxytocin attenuates amygdala responses to emotional faces regardless of valence" (2007) 62:10 *Biological psychiatry* 1187.

⁵⁸ L.J. Seltzer, T. E. Ziegler, & S.D. Pollak,(2010). "Social vocalizations can release oxytocin in humans" (2010) 277:1694 *Proceedings of the Royal Society B: Biological Sciences* 2661

⁵⁹ L. J. Seltzer, et al. (2012). "Instant messages vs. speech: hormones and why we still need to hear each other" (2012) 33:1 *Evolution and Human Behavior* 42.

Proxemics

The distance at which people feel comfortable varies from culture to culture and from interaction type to interaction type.⁶⁰ Hall identified the intimate, personal, social and public ranges. In North America, less than 18 inches,⁶¹ 1.5-4 feet,⁶² 4-12 feet,⁶³ and more than 12 feet respectively.⁶⁴ When expectations of distance are violated it can create discomfort; violating someone's space expectations can cause stress.⁶⁵ Generally speaking, IPM and negotiation takes place in the personal and social range. Mandating physical distance of at least six feet, social and public distances will violate the expectations of more experienced participants. In joint sessions, rooms will need to be large enough to have everyone at least six feet apart. The ability for a client to slip a note to a lawyer or for a lawyer to employ haptics to encourage a client to stop will be absent.

Proxemics is not absent in ODR. Consider how uncomfortable an interaction is when the speaker is too close to their camera. While a close up can draw in the listener and bring focus to facial expressions, an extreme close up, moving our visual field into the intimate space of less than 18 inches, violates our expectations and makes the conversation uncomfortable.

When communicating, people have certain expectations around how close those that they are communicating with will be to them. When these expectations are violated it can cause stress. These expectations are present in both the online and in person environment, but with the advent of physical distancing requirements and the rapid growth of video conferencing, norms have yet to develop around the new normal. Until norms around proximity develop, they may become source of stress for mediation. Being explicit about the expectations around space and camera placement can help prevent this stress.

⁶⁰ Hall supra note 21 at 116.

⁶¹ *Ibid* 116.

⁶² *Ibid* 119.

⁶³ *Ibid* 121-2.

⁶⁴ *Ibid* 123.

⁶⁵ Judee K. Burgoon (2015). Expectancy Violations Theory. In *The International Encyclopedia of Interpersonal Communication* (eds C.R. Berger, M.E. Roloff, S.R. Wilson, J.P. Dillard, J. Caughlin and D. Solomon). Online:

<<https://onlinelibrary.wiley.com/doi/full/10.1002/9781118540190.wbeic102>>

doi:<10.1002/9781118540190.wbeic102> [perma.cc/CX9B-EW8X].

AFFECTIVE EXPRESSION & KINESICS

The fMRI study by Charpentier discussed in a previous section used pictures of happy and angry people to induce an emotional state in study participants. The ability of people to perceive emotions in other people's faces is well established and emotional awareness of one's other in negotiation is essential to the negotiation process. Negative facial expressions are processed and reacted to more quickly than neutral or positive expressions.⁶⁶

Masked faces impede the perception of emotions.⁶⁷ While this may have a positive impact on the amygdala when faced with a party who is angry under their mask, negotiation needs the parties to understand and attempt to satisfy the emotional state of the participants.⁶⁸ Masks serve as a reminder of a psychologically stressful condition (the pandemic) and impede the ability of participants to perceive and react to facial gestures. When possible, priority should be given to processes that allow for the observation of facial cues.

Online video mediation offers an opportunity. In order to control variables for the experiments, all of the above fMRI research on facial affect was done with standardized sets of images. The parts of your brain that react to faces do so even when those faces are two dimensional and presented on a screen. That is the good news for video based ODR.

Gestures help message receivers clarify meaning and build understanding both online and in person.^{69,70} Much of the research on the utility of gestures in promoting understanding involved the manipulation of a pre-recorded video.⁷¹ The usual format for such research was to show the receivers a video that

⁶⁶ M. M. Strauss et al. "fMRI of sensitization to angry faces" (2005) 26:2 *Neuroimage* 389 at 389ff.

⁶⁷ M. Zotto, & A. J. Pegna, "Processing of masked and unmasked emotional faces under different attentional conditions: an electrophysiological investigation" (2015) 6 *Frontiers in psychology* 1691 at 1691ff.

⁶⁸ Furlong *supra* note 30 ch 2.

⁶⁹ Melissa Singer, Joshua Radinsky & Susan R. Goldman, "The Role of Gesture in Meaning Construction" (2008) 45:4-5, *Discourse Processes* 365 doi: <10.1080/01638530802145601>

⁷⁰ A. Kendon, "Do gestures communicate? A review" (1994) 27:3 *Research on language and social interaction*, 175 at 179.

⁷¹ See for example M. G. Riseborough, "Physiographic gestures as decoding facilitators: Three experiments exploring a neglected facet of communication." (1981) 5:3 *Journal of Nonverbal Behavior*, 172. And

William Rogers, "The contribution of kinesic illustrators toward the comprehension of verbal behavior within utterances." (1978) 5.1 *Human communication research* 54.

included scripted or spontaneous gestures and then score the receivers' understanding of the message. Gestures increased the receivers' understanding even when the audio was intentionally degraded. Similar studies were performed in person by Berger and Popelka. Gestures were found to double in person accuracy of received speech in challenging conditions.⁷² As long as the gestures can be seen, the research suggests that without regard to if it is being seen in person or on a screen, the message has a better chance of being heard and understood by the receiver. Commonly used gestures have been shown to trigger the same areas of the brain as speaking the words associated with the gestures.

BEST PRACTICES

Given the challenges and opportunities posited by the post COVID-19 world, this section will propose a group of best practises for performing ODR and IPM. These practises are informed by the evidence that preceded this section. At this point there is no direct research on how COVID-19 has impacted parties to a mediation or a negotiation. These practices also make the assumption that the public health and occupational health and safety advice will remain relatively unchanged.

Online Dispute Resolution

ODR Recommendation #1: Where bandwidth allows, all participants should have cameras on

Being able to see the mediator and parties during a mediation is beneficial. Facial affect and gestures offer the opportunity to trigger oxytocin release and mirror neurons in the receiver. Both oxytocin release and the stimulation mirror neurons can have positive effects on negotiations.

Beyond the advantage of understanding the emotions behind the words, video based ODR offers another advantage over audio only ODR. In an audio conference call with multiple parties decoding when it is your turn to speak can be challenging and parties can end up speaking over each other. Video conferences participants interrupt each other less and have informal

⁷² Kendon *supra* note 70 at 178.

discussions more.^{73,74} This natural flow of speech and informal discussion benefits the process.

ODR Recommendation #2: Mediation agreements should specify that cameras will start on.

Mediation is a consensual process. Seeking a clear agreement on how people will participate with the online medium is important because it avoids the surprise of needing to appear on video and the bias introduced by asymmetrical participation. During the mediation, the parties' comfort with being on camera should be monitored by the mediator. If the process is better served by one or more parties shutting of their cameras, the mediator should make space for the mediation to continue with some participants participating without video.

ODR Recommendation #3: Offer a practice session

Since lack of familiarity with the online environment can trigger stress, getting users familiar with the platform ahead of the mediation can help. Additionally, the online practice session will help build familiarity between the mediator and the parties.

ODR Recommendation #4: Use Visuals and exclusive focus on the speaker for complex topics.

Complex topics consume the brain's energy. In an in person encounter the brain would adjust its field of acute vision to take in less information. Even with a significantly narrowed field of acute vision, the gallery of faces would still be visible and causing cognitive load. In ODR there are a number of options to lighten the cognitive load. Individuals can use "pin" to show the speaker in full view. The mediator hosting the meeting can force users to this view by using the spotlight function. Alternatively, the speaker or the mediator can use share screen to review documents or keep notes on the whiteboard, "displaying a variety of images may ease the burden of searching for social information."⁷⁵

⁷³ O. Daly-Jones, A. Monk, & L. Watts, "Some advantages of video conferencing over high-quality audio conferencing: fluency and awareness of attentional focus" (1998) 49:1 *International Journal of Human-Computer Studies* 21 at 31.

⁷⁴ E. A. Boyle, A. H. Anderson, & A. Newlands, "The effects of visibility on dialogue and performance in a cooperative problem solving task" (1994) 37:1 *Language and speech*, 1 at 16.

⁷⁵ Storck *supra* note 52 at 215.

ODR Recommendation #5: Shut off self-view

Narcissus was so intent at looking at himself that he fell into a lake and drowned. Video conference self-view offers participants the chance to relive this classic Greek adventure. People with higher levels of anxiety⁷⁶ and novice users will be especially taxed by the presence of self-view. Even in experienced users, self-view can impede problem solving and increase cognitive load. Once participants check their view in frame and their lighting, self-view should be off.

ODR Recommendation #6: Consider schedule and the need for breaks

This ODR recommendation services the needs of the clients and the mediator. “Interactive video users often say that video meetings are more tiring than face-to-face meetings.”⁷⁷ In an IPM, the mediator has a temporary respite when walking from room to room. In virtual settings the jump from room to room happens instantly. Mediators should consider returning to the main room to collect their thoughts before going into the other party’s room. There is a balance to taking breaks. The goal is to time them so the parties regain their energy without losing their momentum. Depending on the topic matter and the stage of negotiation parties and the mediator should consider booking shorter blocks of time for mediations if they find longer sessions unmanageable.

ODR Recommendation #7: Consider camera and window placement

Set up the camera in a way that allows the speaker to look towards it, “the camera should be set up in such way that not only the face but also the rest of the body with part of the surroundings.”⁷⁸ This allows the viewers to better receive the nonverbal communication appropriately. Even with optimal camera placement parties should expect to lose some of the natural flow of face to face communication.

Where parties place their camera and the windows they are interacting with, impacts how they appear to others on video. Where on the computer screen the user places the active window will change where the subjects look. Eye contact and gaze are important. While hardware has been developed to

⁷⁶ *Ibid* at 212.

⁷⁷ *Ibid* at 213.

⁷⁸ P. Slovák, “Effect of videoconferencing environments on perception of communication” (2007) 1:1 *Cyberpsychology: Journal of Psychosocial Research on Cyberspace* Online <<https://cyberpsychology.eu/article/view/4205/3246>> [perma.cc/42EH-VVQF].

replicate the shifting gaze in the virtual environment, it requires each participant to have a video conferencing suite that involves a separate computer and infrared eye tracking camera. As a simpler alternative, Mediators should consider advising people to place the active window near the camera. A party who uses a webcam that sits atop their monitor and who places the video chat full screen will be seen by observers to be looking down. A laptop with a built-in webcam placed on the dinner table may make a participant looked hunched over. A smaller window placed near the camera with the software set to speaker view will allow the speaker to simulate looking directly into the camera in a more natural position.

ODR Recommendation #8: Consider how else you can lower the cognitive load on participants

- **Set display names to visible and ensure the names are correct**⁷⁹
This will aid in communication and relieve the participants and the mediator from needing to attempt to remember everyone's names.
- **Mute participants upon entry**
Muting participants upon entry decreases the technical demand on the participants being muted and decreases the cognitive demand on the people who may otherwise need to listen to unintended streaming audio.
- **Have instructions ready to deal with poor connectivity**
If the quality of a participant's audio or video is poor, other participants are using cognitive energy trying to decode what is being said. Have audio call in instructions ready. In many platforms, connecting the audio after joining via your computer may have a different set ID codes. The instructions should detail how to obtain the call in number and ID code. They should not contain the codes the mediator sees. If they do, parties connecting via the distributed instructions will cut off the mediator's audio.

In Person Mediation

For the immediate future, IPM can serve as a source of risk to the participants and measures must be taken to ensure the mediation is conducted in a safe manor. Unfortunately, many of the safety measures that help stop the spread

⁷⁹ Storck *supra* note 52 at 215.

of COVID-19 will also serve to remind participants about the threat created by the virus. The result is that to some extent the sympathetic nervous system and the amygdala of the parties and the mediator may be engaged.

Usually a mediator would be able to use both verbal and nonverbal cues to detect and respond to a party who they perceived as feeling threatened. With the requirement for distance and face coverings the mediator needs to be especially attuned to the condition of the participants. When they detect stress, they need to be ready to respond in a way that may not yet form part of their typical repertoire. While moving into personal space or a warm smile may have, in a pre COVID-19 mediation, provided the oxytocin needed to calm the situation these tools are not available today. Most of the recommendations for IPM are recommendations on how to safely plan and conduct the mediation.

IPM Recommendation #1: Be clear about safety expectations

It is part of the mediators work to provide a safe environment. Mediators should set clear expectations around expected safety measures with the participants and the venue. Being clear about how that safety is being ensured may risk reminding people about the inherent risks of such a meeting but having a safety plan should, on the balance, help make participants feel safe. Participants in an IPM that takes place in a private venue may not be legally required to wear masks; however providing clarity around what the expected level of PPE is will allow participants to come prepared and help avoid conflict around PPE.

IPM Recommendation #2: Consider start time

Mediators need to plan for safety. Coordinating the start time of the mediation to not be the same time as other in person mediations or meetings at the same venue will avoid congregation at the doors and elevators. Decreasing the amount of physical closeness with others will improve safety.

IPM Recommendation #3: Book big enough rooms

Getting a list of people attending the mediation is essential prior to booking mediation rooms. Rooms should be booked to allow at least six feet of distance between participants. When booking caucus rooms, do not forget to consider the mediator's need to meet with the parties in their rooms.

IPM Recommendation #4: Encourage self-screening

Participants to a mediation should be encouraged to self-screen for symptoms or potential exposure to COVID-19. If using a third-party tool like the one provided by the government of Ontario, mediators should be aware that the tool provides advice beyond just screening for symptoms and exposure. Mediators should clearly identify the screening outcomes that would preclude participation in an IPM.

IPM Recommendation #5: Consider the experiences of the participants

Moving a workplace mediation online where the parties may be side by side the day before and the day after, may not make sense. Participants stress levels will be based on their prior experiences, so co-workers may not perceive stress caused by COVID-19 and its associated precautions.

IPM Recommendation #5: Have a plan for cancelling

Knowing what will happen if one or more of the participants cannot safely attend will benefit everyone. As a practical matter failing to notify parties about the absence of someone critical to the process may further inflame the process. Plans can include:

- Rebooking for another day
- Moving the entire process online with the same schedule
- Deciding to proceed with the mediation with a modified in person group

The option to forge ahead with a modified group should be exercised with extreme caution as should options that have high cost consequences for the parties. The priority is ensuring that sick people do not feel compelled to attend.

IPM Recommendation #6: Eat and be merry

Sharing of food is common in many mediation venues. Lots of the comforts provided by in person meeting will be limited by the precautions that need to be taken to prevent the spread of COVID-19. Thankfully there is no, COVID-19 related reason to forego communal food. While there is a need to control the volume of people lining up for food, so adequate physical distance can be allowed. The food itself does not create a risk of passing COVID-19.

The nature of these recommendations seeks to maximize the benefits of ODR and limit the risks of IPM. When maximized, the benefits of ODR closely replicate many of the important elements of pre COVID-19 IPM. Post COVID-19 IPM exposes participants to risks, and while steps can be taken to control these risks, the steps can serve as a source of stress that handicaps the mediation process.

CONCLUSION

Most of the discussion above deals with how the process design choices will impact the participants in the mediation process. For the time being how IPM will occur must change. And it must change in a way that strips it of many of the benefits IPM used to have. While it is possible to conduct an IPM safely, in the short term it is probably a better choice to mediate online. As participants become more accustomed to ODR and the precautions around IPM they will become part of a new sensory world and they will develop different filters and cues.⁸⁰ Once that new normal is established the choice may need to be revisited.

Participating in ODR can be fatiguing in ways natural conversation is not. Taking steps to structure the interaction to maximize participants' natural abilities to focus on important information helps address the sources of fatigue. Having an understanding of the psychology and neurophysiology that is causing the fatigue allows the mediator to work throughout to monitor and address cognitive load.

⁸⁰ For a discussion of development of culturally significant filters and cues see Hall *supra* note 21 at 2ff.