



DR Currents

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FROM THE CHAIR

It probably shouldn't, but it does, surprise me that during the past couple of years I have been asked by several lawyers who practice where mediation is not mandatory "Why should I mediate?" And, "If I do mediate my case, how should I handle it?" For those of you who serve as neutrals you may be asked the same two questions. For those of you who practice you may be asked the "Why should I mediate?" question by clients.

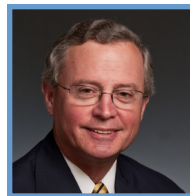
Why mediate? The reasons I emphasize are control of one's own destiny, certainty of result, costs involved in pursuing litigation and getting a timely resolution of the case. There is nothing original in this. These are points all mediators typically comment on when conducting a mediation. I also like to point out that any lawyer who has tried enough cases is likely to have won a case they thought they would lose, or lost a case they thought they were going to win. There is great unpredictability as to what those strangers in the jury box will do.

As to cost, on more than one occasion I have had parties tell me they wish they had mediated earlier because of the cost of litigation versus what they paid to settle the case (if a defendant) or what they received (if a plaintiff).

As for the question about how to handle a mediation, there are several articles I direct attorneys to on the Internet dealing with preparation, presentation and negotiation.

Further, I suggest they could Google "mediation," "preparing for mediation," "mediation negotiations," and "mediation tips." The amount of information that comes up can be overwhelming but picking some articles to read can provide useful guidance and valuable suggestions. Even attorneys who have previously mediated cases may find this material useful.

We know that very few cases ever go to trial. Mediation provides a way to resolve a case without waiting until the Friday before the trial is to begin or doing so on the courthouse steps. "Sooner" is better than "later" for many, if not most, clients.



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THE ROLE OF BIAS IN MEDIATION

By Jay Frank Castle and Dedra Newman Dogan © 2011

“The greatest deception men suffer is from their own opinions.” Leonardo da Vinci

Most mediators take seriously their responsibility to create a neutral environment for the participants. When someone in caucus announces that “we just can’t negotiate with those kind of people,” the mediator readily recognizes the challenge she now faces.

Yet we mediators rarely recognize many of our own biases nor do we actively seek to manage them. There is a growing body of evidence that a mediator’s implicit biases and stereotypes – the subconscious thought activities that we use to process information and develop opinions and actions – can have a significant impact in mediation, and that this impact can be extremely harmful due to the unique nature of mediation.

Research in the field of cognitive social psychology reveals that unconsciously held attitudes and stereotypes can affect our interaction with others and may predict behavior.¹ Researchers exploring implicit social cognition have conducted experiments that demonstrate a causal relationship between subconscious stereotypes and biases, on the one hand, and perception and memory, on the other.² This research should be a wakeup call and motivate mediators to better understand implicit bias due to the pervasiveness of this phenomenon.

Furthermore, and as compared to litigation and arbitration, a mediator’s implicit bias can be particularly dangerous because it is harder to detect and counteract. The effects of implicit stereotyping - for race, gender, age, socioeconomic status, etc. - exert a greater influence in mediation due to the informality of mediation and the lack of universally accepted norms or symbols of fairness and impartiality. As a result, female and minority parties tend to experience less favorable outcomes than others in the mediation process.³ Simply stated, implicit bias can and will undermine the mediator’s role as a “neutral.”

This article will be the first in a series to tackle the practical problems of implicit bias in mediation. We will begin with implicit biases that may flow from the mediator’s race/ethnicity. We will then explore biases that may flow from the mediator’s gender/gender identification, age, and socioeconomic identification.

We do not purport to exhaust the issues that may be relevant to this discussion. There is substantial academic literature already written on these topics and research in the area of implicit social cognition continues to yield powerful

new insights.⁴ Instead, we seek to start a dialogue amongst practicing mediators, and to suggest some practical tools that have allowed us to recognize our own implicit biases and to begin to manage them.

The Scenario

The complainant was an African-American female. The respondent was the former employer/supervisor of the complainant. The mediator, a Caucasian female, assumed that the former supervisor was also a Caucasian because she bore the features typically identified with that race. The complainant originally registered her charge of race discrimination with the EEOC. The EEOC issued a Right to Sue determination. Complainant and respondent elected to pursue pre-suit mediation. The mediator had substantial experience mediating claims of race discrimination. The mediator also self-identified as a “progressive” who supported civil rights, affirmative action, and other political programs intended to counteract the effects of race discrimination.⁵

During a separate pre-mediation session, the mediator, respondent and respondent’s counsel discussed the dispute. The mediator was encouraged by the demeanor of the respondent. The former supervisor communicated precisely and directly. The mediator noted the confidence in the supervisor’s tone, eye contact and posture. She also recognized the compassion that tempered the supervisor’s comments about the former employee/complainant. The mediator was impressed by the command and professionalism demonstrated by the former supervisor – in short, she “liked” her.

As the parties introduced themselves during the opening joint session, the former supervisor volunteered that she, like the complainant, was African-American and self-identified as such on her EEO-1, but generally did not disclose that fact unless she was asked. The mediator and other participants were shocked by this announcement. Furthermore, the mediator was bothered by her surprise - the person she previously believed to be “white” was, in fact, “black” notwithstanding her physical appearance. However, the mediator did not understand at the time why this bothered her.

After this announcement, however, the mediator paid closer attention to the interests and positions of both sides of the dispute, and encouraged a robust discussion of whether the adverse employment action complied with the employer’s internal guidelines and practices, whether the employer had a reasonable basis to terminate the employee,

whether the employee was informed of the expectations and that failure to perform could result in the termination of her employment, whether other employees were disciplined or terminated for similar reasons, and whether the termination communication was handled such that it clearly expressed the reasons for the decision.

After the mediation, the mediator performed an exercise whereby she responded in writing to the following questions and statements:

- What is my subconscious mind telling me when I interact with someone who is African-American?
- How would my children respond if I were to verbalize racial bias in their presence - how would I explain it to them?
- Define the relationship, if any, between my professional experiences as a mediator and my implicit stereotypes and biases.
- Can I be neutral and impartial the next time I mediate a matter in which any one of the parties is African-American?

What Happened and Why Is It Important?

In our scenario, the mediator was shocked by the announcement of the supervisor. She felt annoyed and uncomfortable. The mediator experienced “disassociation” between her implicit bias and her consciously-held beliefs. She subconsciously identified with the supervisor during the separate session. Among other things, this scenario demonstrates automatic activation of implicit stereotypes – one of the primary (but subconscious) reasons the mediator quickly “liked” the supervisor was because she considered her a part of her group. The characteristics of the supervisor that the mediator found to be encouraging were consistent with the stereotypes associated with a Caucasian. The supervisor’s announcement collided without warning with the mediator’s mental construct, and this caused the mediator to reevaluate – in the blink of an eye - the parameters of the budding relationship.

The good news is that the mediator adjusted/corrected her response in a non-discriminatory manner. Her conscious mind took over in the mediation, and she then methodically examined the issues without regard to either side’s race/ethnicity. She also engaged in post-mediation behaviors (i.e., reflective self-examination and journaling) that were designed to expose and manage her implicit race biases.

Four Tools to Recognize and Manage Implicit Race Bias

Acknowledge and Understand Your Implicit Biases.

As mediators, we seek to better understand implicit social cognition and the role it plays in our

lives. Notwithstanding our conscious disavowals of prejudice (and as demonstrated in the real life scenario above), our subconscious minds automatically activate implicit stereotypes and biases as soon as we come into contact with others. However, actual application of the stereotypes can be managed, but only if we are aware of this phenomenon and avail ourselves of some of the other tools discussed below.

Plan and Prepare To Break the Cycle.

Even though implicit bias activation is subconscious, we plan deliberate actions to reduce or eliminate biased responses (i.e., the application of such bias). Such actions include simply repeating - out loud - “I will be fair and non-discriminatory even though I am subject to implicit bias” before the start of each session. Our pre-mediation preparations also include explicitly considering the potential issues/pitfalls that may arise in an interracial dispute and developing reaction plans to avoid or escape traps if they should arise. For example, if the mediator in the scenario had understood the racial dynamics in advance, she could have prepared a plan (rather than proceeding ad hoc) by which she could explore the issues in the case using a beginner’s mind.⁶

Journaling and/or tracking our experiences, feelings, and attitudes (as demonstrated in the scenario) can also lead to race-neutral responses. The questions that the mediator asked of herself effectively focused her attention on the cause of her dissociation, but other journaling techniques can be equally helpful. The exercise of writing out our thoughts surrounding our implicit biases compels us to think about those biases and how we might manage them, thus lessening their influence in our thought patterns. Similarly, gathering periodically with our colleagues to discuss bias and to confront it directly help us to replace automatic activation of stereotypes with conscious decisions to behave in accordance with our non-discriminatory beliefs.

Get Out of Your Office and Relax.

Research (and common sense) indicates that one of the most powerful ways of managing implicit race bias is to increase the diversity of your social network. We cannot emphasize this enough. As the depth and breadth of our network grows, and as it becomes more representative of our diverse society, we continue to gain better understanding. We encounter a wide variety of personalities and attitudes – many of which are inconsistent with our implicit stereotypes for these groups.

However, it is not enough simply to make the acquaintance of people not in our racial/ethnic group. The most powerful changes come from intergroup contacts in settings that promote respect, equality and openness. We aggressively seek out exposure to positive examples of

out-group members, because we believe that this gives us a better chance of deconstructing the implicit biases that our subconscious minds have created for us.

We also consciously try to relax and relate, on a deep personal level, with our diverse network. It is sometimes intimidating to be the only “[fill in your race/ethnic identifier]” in a room full of strangers; however, we try to reach out to these folks honestly and with a healthy dose of good natured, and often self-deprecating, humor. We believe that this helps to alleviate tension and allows us to move beyond the guarded behaviors that tend to leave untouched a group’s implicit stereotypes.

Practice Mindfulness.

The task at hand is difficult because we are attempting to change subconscious thought patterns/habits that have developed over many years. We use mindfulness techniques because these can be powerful tools to break such habits. Mindfulness techniques seek to bring to our conscious minds greater awareness – mindfulness – of the various thoughts darting in and out of our brains as well as our attitudes about those thoughts.⁷ Such techniques help us to view our thought processes more objectively and at a distance. This creates greater awareness of the “white noise” inside our minds - including our implicit biases - which subconsciously intrudes upon our thinking.

Conclusion

Implicit race/ethnicity stereotypes and biases can be difficult to recognize, and even harder to break. However, we use these simple but powerful tools on a daily basis to help us to better recognize and manage our implicit biases, and to use our conscious minds to set aside race/ethnicity and to think more impartially about our cases and the participants.



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(Endnotes)

- 1 *Greenwald & Krieger, Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 954–55 (2006).
- 2 *See, e.g., Greenwald & Banaji, Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOLOGY REV. 4 (1995); *Banaji & Greenwald, Implicit Stereotyping and Prejudice*, 7 THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 55, 56 (Zanna & Olson, Editors 1994).
- 3 *Broda-Bahm, Litigation PostScript – No Blank Slate (Part 3): With Judges, Arbitrators and Mediators, Don’t Assume They’re Neutral*, http://www.litigationps.com/litigation_postscript_per/2011/09/judges-arbitrators-and-mediators-dont-assume-theyre-neutral.html. (Sept. 12, 2011) (citing *Izumi, Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. UNIV. JOURNAL OF LAW & POLICY 71 (2010) (“Izumi”)).
- 4 *See Izumi at 85-109.*
- 5 *This scenario is derived from an actual case in which Dedra participated.*
- 6 “Beginner’s mind”, or “shoshin”, is a concept borrowed from Zen Buddhism. It refers to having a child-like attitude of openness, eagerness, and lack of preconceptions when studying a subject, even when studying at an advanced level.
- 7 *See, e.g., Siegel, THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING* (2007); *Germer, Siegel & Fulton, MINDFULNESS AND PSYCHOTHERAPY* (2005); *Tolle, THE POWER OF NOW: A GUIDE TO SPIRITUAL ENLIGHTENMENT* (1999); *Kapleau, THE THREE PILLARS OF ZEN: TEACHING, PRACTICE AND ENLIGHTENMENT* (1989); *Langer, MINDFULNESS* (1989).