Thumb on the Scale

How Unconscious Bias Can Affect the ADR Process and What to Do About It

By Sean C. Griffin

Neutralizing unconscious bias to the extent that you can in various ways will only assist your clients.

Sam Wainwright wasn't going for subtlety. The first day of the arbitration, he wore his class ring—Harvard, same as the arbitrator's—and he drenched his opening statement with strained analogies to the "Big Dig" and more references to Faneuil Hall than someone would typically expect in a construction contract dispute. His client had brought a Robert B. Parker novel to peruse conspicuously during breaks.

No, Wainwright wasn't going for subtlety. But in light of the enthusiasm with which he and the arbitrator, Judge Potter, were discussing Kevin McHale's post-up game, subtlety had little to offer.

Ellery King looked at his client, Mary Bailey. She had worn her own class ring—State University of New York. For reasons that remained unclear, she had walked into the arbitration wearing her Yankees cap, which, to be fair, matched nicely with the New York Giants T-shirt that King could see through her worn white blouse.

It was going to be a long day.

The Importance of Third-Party Impartiality

In The Art of War, Sun Tzu wrote, "If you know the enemy and know yourself, you need not fear the result of a hundred battles." Upon receiving a new case, most litigators ask three questions: (1) Who is the judge? (2) Who do I know who knows the judge? (3) What do I know about the judge? Not to say that the judge is the enemy, but most litigators believe firmly that the more a litigator knows about the judge, the more the litigator will be able to employ that knowledge to achieve a favorable result.

The same is true in arbitration. A study of American Arbitration Association reports in employment arbitration concluded that employers facing a larger number of claims win more often, and when they lose, they have a lower mean arbitration award level. The study concluded that when the same arbitrator hears several cases involving the same company, the arbitrator tends to develop more understanding of and identification with the company, which tends to improve the company's win rate and lower

■ Sean C. Griffin is a partner in Garvey Schubert Barer's Washington, D.C., office. Formerly a trial attorney with the United States Department of Justice, Mr. Griffin now assists clients in mediations and arbitrations involving commercial litigation and professional liability disputes.

the size of the awards against it. Alexander Colvin, An Empirical Study of Employment Arbitration: Case Outcomes and Processes, Journal of Empirical Legal Studies, Volume 8, Issue 1, March 2011.

This is also true in mediation. Surveys show that mediators often take into account "personal bias and evaluations of the worthiness of particular claims and disputants," and they tend to try to direct the mediation process toward outcomes that they find favorable. Other research shows that gender, race, and ethnicity affect mediation even more than other forms of adjudicated disputes, due to the informality of mediation and the lack of a court's norms. As a result, female and minority parties tend to experience less favorable outcomes than others in the mediation process. Carol Izumi, Implicit Bias and the Illusion of Mediator Neutrality, 34 Wash. U. J. L. & Pol'y 71 (2010).

These findings create substantial tension because neutrality is integral to idea of alternative dispute resolution (ADR). The Model Standards of Conduct for Mediators states: "Mediation is a process in which an *impartial* third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute." (September 2005) (emphasis added). This definition has been adopted by the American Arbitration Association, the Association for Conflict Resolution, and the American Bar Association.

This neutrality makes ADR possible. Obviously, no one would choose to participate in an ADR governed by a biased arbitrator or mediator. To the contrary, parties enter into the ADR process precisely to find an impartial third party with which to share information freely and candidly, to help negotiate with the opposing party in a balanced manner, and to evaluate fairly each party's case. If the parties think that the mediator is impartial, they will trust him or her to understand and to care about the parties and their dispute. They will trust his or her skill in leading them to a negotiated settlement. They will assume his honesty and seek his or her protection from the opposing counsel's unwarranted aggression. Only when trust has been established can the parties be expected to be candid with the mediator, disclose their real interests, and value the mediator's reactions. Nancy Rogers & Richard Salem, *A Student's Guide to Mediation and the Law*, 7–39 (1987), as reprinted in Stephen B. Goldberg *et al.*, *Dispute Resolution Negotiation, Mediation, and Other Processes* 113 (4th ed. 2003).

The same is true in arbitration. As with a judge, parties expect—and pay for—an impartial arbitrator to evaluate each party's argument fairly and to reach an informed and fair decision. Indeed, because an arbitrator's award is nigh unappealable, ensuring a fair and impartial arbitrator may be even more important than obtaining a fair trial judge.

To maintain neutrality, mediators must be aware of their assumptions, biases, and judgments about the participants in the process, particularly in cases that evoke strong reactions to one of the parties. Achieving impartiality requires mediators to have insight into their own perspectives and experiences and to understand the effect that these have on their relationship with the parties in mediation.

Mediator partiality is manifested in subtle ways. Two studies reveal a significant disconnect between the articulated practice goal of neutrality and the actual techniques and strategies of mediators. In the first study, empirical research into community mediation in neighbor disputes showed that mediators—paid staff and trained volunteers—found it difficult to ignore personal bias and evaluations of the worthiness of particular claims and disputants. Mediators confessed to being so angry or frustrated with a disputant that on occasion they felt that they could not even sustain a pretense at remaining neutral. Instead of being a rare occurrence, mediators stated that their reactions were common. Their mediation training assumed that they could keep such negative evaluations of disputants at bay. However, the mediators felt constrained by an expectation of neutrality, and the expectation was impossible to achieve and made them feel as though they were constantly doomed to failure. Linda Mulcahy, *The Possibilities and Desirability of Mediator Neutrality—Towards an Ethic of Partiality?*, 10 Soc. & Legal Stud. 505, 510–11 (2001).

A second study showed that mediators influence the content and the outcome of mediations by instigating party engagement at certain times in the process to make certain outcomes more likely. David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 Law & Soc'y Rev. 613 (1989). This study looked at divorce mediations, analyzing data from 45 mediation sessions that covered 15 cases handled by three mediators. Researchers found that mediators directed the process toward the outcomes that they favored. Mediators direct this pressure by subtly encouraging the participants to discuss the favored option rather than the disfavored option.

Surveys show that mediators often take into account "personal bias and evaluations of the worthiness of particular claims and disputants," and they tend to try to direct the mediation process toward outcomes that they find favorable.

Bias: Explicit and Implicit

King could have done with some impartiality. Apparently, Wainwright's witnesses all "pahked their cahs in Hahvard Yahd" on their way to Fenway Park, and Judge Potter was eating it up with a spoon—probably the same spoon he used for clam "chowdah." As for the chance that Potter would grant King's witnesses the same friendly reception… "fuhgeddaboudit." As Wainwright's witnesses rambled and speculated to their hearts' content over King's objections, King's client caught his eye and gave him a look. She could see what was happening, and she was wondering what King was going to do about it.

We do not always have conscious, intentional control over the processes of perception, the forming of impressions, and the judgments that motivate our actions. This bias can be explicit or implicit, and often, a wide variance exists between the two, and the implicit biases often predict our behavior more accurately than the biases to which we admit. Moreover, researchers have found that there is a discernable, pervasive, and strong favoritism for our own group, as well as for socially valued groups. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, Cal. Law Rev., Volume 94, Issue 4 (July 2006).

Achieving impartiality requires mediators to have insight into their own perspectives and experiences and to understand the effect that these have on their relationship with the parties in mediation.

An *attitude* is an evaluative disposition—the tendency to like or dislike, or to act favorably or unfavorably toward, someone or something. Implicit attitudes are unidentified (or inaccurately identified) feelings toward certain people. For example, physically attractive men and women are judged to be kinder, more interesting, more sociable, happier, stronger, of better character, and more likely to hold prestigious jobs because their attractiveness influences others' perception of them. K. Dion, E. Berscheid, & E. Walster, *What Is beautiful Is Good,* 24 Journal of Personality and Social Psychology 285–90 (1972).

A stereotype is a mental association between a social group or category and a trait. Stereotyping is the application of beliefs about the attributes of a group to judge an individual member of that group. For example, someone might believe cheerleaders to be pretty but unintelligent. Stereotypes guide judgment and action to the extent that a person acts toward another as if the other possesses traits included in the stereotype. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 Psychol. Rev. 4 (1995)

Stereotypes activate without conscious thought. A person does not intend to favor or to discriminate against the stereotype's object; it just happens. Automatic activation of stereotypes set the foundation for implicit stereotyping, or the unconscious attributions of qualities to members of a social category. Greenwald & Banaji at 4. For example, one study found that people more likely falsely identified male names as belonging to famous individuals than female names. The false-fame effect was substantial when the names were male but weaker when the names were female, demonstrating an implicit indicator of the stereotype that associates maleness with fame (and achievement). Researchers observe that stereotypes are often expressed implicitly in the behavior of people who expressly disavow the stereotype. Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. Personality and Soc. Psychol. 181 (1995).

From a litigant's perspective, a "stereotype threat" is being in a situation where a negative stereotype about your group could apply. A person who finds him- or herself in this situation could be judged in terms of that stereotype or treated in terms of it or worried that he or she might inadvertently do something that would confirm the stereotype. If the situation is one in which the person cares about doing well, such as taking a college admissions test (or engaging in an arbitration), the prospect of being treated stereotypically there will be upsetting and disturbing. Unfortunately for the object of the stereotype, merely encountering a member of a stereotyped group primes the trait constructs associated with and, in a sense, constituting, the stereotype. Once activated, these constructs can function as implicit expectancies, spontaneously shaping the perceiver's perception, characterization, memory, and judgment of the stereotyped target. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 Journal of Personality and Social Psychology 797–811(1995).

The existence of stereotypes and biases does not mean that a person necessarily holds consciously prejudicial beliefs. We all react to implicit stereotyping and prejudice. Still, research shows that even the best intentions cannot override unconscious biases because they fall outside our conscious awareness and control.

In large part, implicit social cognition research has advanced because of the development and accessibility of the Implicit Association Test (IAT), an instrument that produces an implicit attitude measure based on response speeds in two four-category tasks. Since 1998, self-administered IAT demonstrations have been available online. The most widely used version is the Race IAT, which measures implicit attitudes toward African Americans relative to European Americans. Using the IAT, social scientists have found that most Americans exhibit a strong and automatic positive evaluation of white Americans and a relatively negative evaluation of African Americans.

More specifically, some have concluded that members of the majority are most likely to show prejudicial behavior in informal ADR settings. Richard Delgado *et al.*, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359. The informality of the proceedings serves to encourage a looseness of thought that seems conducive to the conscious or unconscious assertion of biases. Further, arbitrators and mediators do not have an appeals court to oversee their behavior, so there is no effective recourse for a party that feels unfairly treated.

Research indicates that ADR is most apt to incorporate prejudice when a person of low status and power confronts a person or institution of high status and power. In such situations, the party of high status is more likely than in other situations to rely on conscious or unconscious prejudices. Similarly, the low status person is less likely to press his or her claim energetically. The dangers increase when the mediator or other third

party is a member of the superior group or class because they are more likely to identify with the high status litigant than the lower status party. *Id.* at 1402–03.

What to Do About It

The question for a litigant is not what to do if faced with a mediator or arbitrator with unconscious biases. The question is *what* to do when those biases surface.

Select your mediator or arbitrator with an eye toward potential unconscious biases. The battle against unconscious bias begins well before the ADR process does. Wainwright had clearly profiled Potter before the arbitration. And he hadn't merely completed an Internet search and called it a day. He had availed himself of resources such as CourtLink and parallel sources for arbitrators and mediators. Wainwright clearly knew his audience.

Wainwright knew his audience because he picked the audience. In particular, Wainwright had just picked the arbitrator who most resembled him from a geographic and educational perspective. Not only had they gone to the same college and law school, but Potter and Wainwright physically resembled each other. In light of his weak claim and general lack of engineering expertise, Wainwright was gaming the system to get the arbitrator most likely to give him the benefit of the doubt.

But King had done his own research. Rather than banking on implicit bias to carry the day, he considered his case and tried to determine which arbitrator would best appreciate his case and his client. His case relied heavily on knowledge of engineering; his client was an engineer; and importantly, Judge Potter had majored in engineering before going to law school. King's research into his background showed that Potter had happily taken on IP cases from his peers on the bench that his fellow judges thought tedious and unglamorous, purely for the pleasure of keeping up with the latest engineering trends. King needed an arbitrator who understood his case, and he figured that the risk of Potter and Wainwright hitting it off was worth having a knowledgeable arbitrator deciding his case.

Avoid direct confrontation. King knew what he wasn't going to do. He wasn't going to confront the arbitrator. Few people react positively to having their unconscious biases revealed, and King doubted that Potter was one of those few. Additionally, the relatively informal tone of ADR often creates social pressure against confronting the person in authority. King figured that calling out the Grontkowski-sized elephant in the room would hurt more than it would help. This problem was too big for King to take head on. Instead, he had to… do what I will next recommend that you do.

Position your case to appeal to known biases and predispositions. For example, if your arbitrator is a stickler for strict construction, lead with the language of your contract. If your mediator has screaming toddlers at home, make sure that you're not the one yelling and interrupting your opposing counsel.

Wainwright positioned his case by bringing several Boston-based witnesses to testify and by emphasizing his client's Boston roots. This worked well; Potter was naturally inclined to favor his witnesses.

Two could play that game, however. Knowing that Potter loved engineering and engineers, King had Bailey testify slowly and methodically about her extensive engineering background. When she testified about her high school engineering awards, Potter showed interest. When she mentioned her exemplary college career, Potter's eyebrows shot up. By the time that she got to the engineering process at issue, Potter had taken over the examination from King, and he and Bailey were chatting like old friends.

People have an array of unconscious biases. Some are stronger than others. In an ADR proceeding, an attorney must determine the biases of the mediator or arbitrator and discern which biases predominate. An arbitrator who loves to golf but hates disorder will likely respond well to a non-golfer attorney who presents witnesses in a crisp, organized fashion. A mediator who distrusts big corporations but appreciates philanthropy might react favorably to your client's work in the community. As with selecting the arbitrator in the first instance, completing research about the arbitrator before you begin is indispensable to identifying potential biases before they hurt you in ADR.

In this case, King made an effort to seek common ground between his client and the arbitrator. Potter liked people from Boston, but through more thorough research, King learned that he liked to talk about engineering even more. King researched the arbitrator, determined where his affinities lay, and structured his case to appeal to them.

Confront the elephant in the room. Bailey had impressed Potter, but King had another problem. His second witness, Giuseppe Martini, was a working-class construction worker, which would trigger each and every one of Potter's unconscious biases. King had to lessen or eliminate Potter's biases so that Potter would sufficiently credit Martini's testimony.

> **Moreover, researchers** have found that there is a discernable, pervasive, and strong favoritism for our own group, as well as for socially valued groups.

Different situations require different approaches. In a mediation context, it might be useful to talk to the mediator and the opposing counsel ahead of time about your client's concerns. Doing so poses risks to your standing with the opposing counsel, but a skilled mediator will react with increased sensitivity to your concerns and react accordingly. *See generally* Frederick Hertz, *Bias in Mediation and Arbitration*, http://www.samesexlaw.com/html/articles_by/bias_mediation.pdf.

Here, King would not directly confront Potter, but he still addressed the issue directly. "Your Honor," he said, "I beg your indulgence for bringing a Yankees fan into these proceedings."

Luckily, Potter laughed. "I've already docked you 10 points, counsel."

"Well, it hasn't been so easy this year," Martini said. Wainwright watched his strategy dissolve in the ensuing laughter.

Yes, that is fighting fire with fire. As with most things in life, ADR is only as fair as you make it.