Implicit Bias and Prejudice in Mediation

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ABSTRACT

Mediators aspire and endeavor to meet their ethical duty of “neutrality” in mediation. Yet their ability to actually conduct mediations without bias, prejudice, or favoritism toward any party is extraordinarily difficult, if not impossible. Research shows that unconscious mental processes involving stereotypes and attitudes affect our judgments, perceptions, and behavior toward others. Implicit bias, the automatic association of stereotypes and attitudes with social groups, may produce discriminatory responses toward parties despite a mediator’s best efforts at creating an outwardly even-handed process. Even the most well-intentioned and egalitarian mediators must actively engage in bias reduction strategies to mitigate prejudice in mediation.

I. INTRODUCTION

FIRST, I want to thank Michael Green, Richard Delgado, the symposium organizers, the SMU Dedman School of Law community, and other panelists. I am very honored and pleased to be participating in this symposium and particularly in this Prejudice in Mediation session. The issues raised in Professor Delgado’s article are as important today as they were thirty years ago.

I would like to spend my limited time on recent social science research, the third theory of prejudice referred to in the article, and apply those

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1. This presentation distills and updates an earlier article on the effect of implicit bias in mediation. For a much deeper analysis of this topic, see Carol Izumi, Implicit Bias and the Illusion of the Mediator Neutrality, 34 WASH. UNIV. J.L. & POL’Y 71 (2010).


3. Id. at 1380–91 (Section 3: Social Psychological Theories of Prejudice).
discoveries to mediation. My commentary today centers on the research findings related to implicit bias, or unconscious bias. While we cannot address all facets of prejudice in alternative dispute resolution on an individual mediator level, reducing mediator bias should be one strategy in the larger reformation. Structural and institutional challenges require commitment from many motivated stakeholders. Without robust mediator self-monitoring, external process maneuvers and programmatic changes will not be as effective. Given what we know in 2017, I would argue that we should be even more concerned about prejudice in mediation. I say that for three reasons: the past 20-plus years have yielded new scientific revelations about prejudice, the use of mediation has proliferated, and little has changed in terms of mediator training, the practice of

4. Alternative dispute resolution as used in this article includes negotiation, mediation, arbitration, and other consensual dispute resolution processes. The acronym “ADR” will be used hereafter.


meditation, and the lack of diversity within mediator ranks.7

Let me preface my remarks with a disclaimer. I am not a social scientist, just a curious lawyer with a little bit of knowledge. My convictions about mediation stem from thirty years in the trenches directing law school mediation clinics and mediating cases in a variety of contexts on a pro bono basis.8 This presentation will unfold as follows. First, I discredit the notion of mediator neutrality in practice. Second, I describe implicit bias and conditions that allow discrimination to occur in mediation. Lastly, I offer thoughts on how mediation can be practiced with more attention to bias reduction.

II. MEDIATOR NEUTRALITY

A core value of mediation is the notion of mediator neutrality.9 I identify four elements of what is commonly thought of as mediator neutrality:

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7. Bush & Folger, supra note 6, at 26–27 (asserting that there is a lack of diversity among mediators and barriers to encouraging more diversity in mediation); Leah Wing, Whither Neutrality? Mediation in the 21st Century, in RE-CENTERING CULTURE AND KNOWLEDGE IN CONFLICT RESOLUTION PRACTICE 93–107 (2008) (study of 100 individuals from various minority groups who felt shut out of the “gated mediator community”); Weatherspoon, supra note 6, at 800–01 (noting “lack of diversity in the pool of potential neutrals” that “stems from a system of exclusion and invisibility.”).


no conflict of interest; procedural equality; outcome-neutrality; and lack of bias, prejudice, or favoritism toward any party. The fourth element is often stated as the mediator’s duty to avoid actual bias or the appearance of bias. Another common definition is “freedom from favoritism and bias in word, action and appearance.”

The neutrality requirement, however, is neither practicable nor attainable in real life. Studies reveal a disconnect between the aspiration of neutrality and actual techniques and strategies of mediators. It is undeniable that mediators influence parties, using various degrees of persuasion and even outright manipulation to obtain results. They push and “sell” proposals and selectively facilitate or manage the process toward favored outcomes.

Moreover, conducting a mediation without bias or favoritism requires that mediators be conscious of their assumptions, biases, and judgments about the participants. Necessarily, mediators would have to have a high degree of self-awareness about their impact on the parties and the pro-


11. Hilary Astor, Mediator Neutrality: Making Sense of Theory and Practice, 16 SOC. & LEGAL STUD. 221, 223 (2007); William Lucy, The Possibility of Impartiality, 25 OXFORD J. LEGAL STUD. 3, 8, 11 (2005); Model Standards of Conduct for Mediators, supra note 9, at VI(A). See also Alfini, supra note 9, at 418.


14. Astor, supra note 9, at 77.


19. See Greatbatch & Dingwall, supra note 17. See also Cohen, supra note 18; Mulcahy, supra note 9, at 512.
cess. Neutrality in practice is illusory because of the operation of implicit, or unconscious, bias.20 Let us move now to a discussion of implicit bias and how it might operate in the mediation context.

III. IMPLICIT BIAS IN MEDIATION

No doubt many of you know about implicit bias, but I will briefly summarize some basic findings so we share a common understanding. Just as our brains help us categorize objects based on characteristics, our brains use schemas to sort people into groups, such as male or female, young or old.21 Mental processes that operate outside our conscious awareness are implicit, or unconscious.22 The big reveal of this research is that we do not always have conscious, intentional control over our mental associations, perceptions, and impressions.23 Simply stated, implicit bias refers to automatic associations of stereotypes and attitudes with social groups.24 Implicit stereotypes and attitudes that result from repeated exposure to cultural stereotypes in our society form the basis for implicit racial, gender, ethnic, and other biases.25 Research shows that stereotypes are automatically activated merely by encountering a member of a social group.26 This “automaticity” of...

20. Greenwald & Banaji, supra note 5, at 4; Greenwald & Krieger, supra note 5, at 946; Lane, Kang & Banaji, supra note 5, at 427, 428, 431.


22. Godsil & Powell, supra note 21; Kang, Dasgupta, Yogeeswaran & Blasi, supra note 5, at 887; Kang & Banaji, supra note 21, at 1064; Kang & Lane, supra note 5, at 467–468, 469–70; Kang et al., supra note 5, at 1126; Richardson & Goff, supra note 5, at 295, 297; Tropp & Mallett, supra note 5, at 6–7; see Banaji & Greenwald, supra note 5, at 56–58; Banaji, Hardin & Rothman, supra note 5, at 272; Greenwald & Krieger, supra note 5, at 945–46; Lane, Kang & Banaji, supra note 5, at 428; Krieger & Fiske, supra note 5, at 1032–33; see generally Kirwan Institute, supra note 5, at 16.


24. Rachel D. Godsil, Why Race Matters in Physics Class, 64 UCLA L. Rev. 40, 51–52 (2016); Kang, Dasgupta, Yogeeswaran & Blasi, supra note 5, at 1; Kang & Lane, supra note 5, at 469–70; Kirwan Institute, supra note 5, at 16; Richardson & Goff, supra note 5, at 301–02.

25. Jerry Kang, Bits of Bias, in IMPLICIT RACIAL BIAS ACROSS THE LAW 1, 3–7 (Justin Levinson & Robert Smith eds. 2012); Godsil, supra note 24, at 52–53; Greenwald & Krieger, supra note 5.

stereotype activation influences our judgments, actions, and decisions. Despite our best intentions and explicit beliefs, implicit biases can produce behavior that diverges from our endorsed principles. So, a mediator may espouse egalitarian beliefs, but her implicit biases produce discriminatory responses toward the parties.

You probably know about the Implicit Association Test (IAT). By measuring the strength of associations based on response speeds in categorization tasks, the IAT produces an implicit measure. Millions of people have taken the IAT; you can go to the Harvard Implicit website and select from a menu of IATs. The Race IAT is the most widely used. Most Americans, around 75%, exhibit a strong and automatic positive evaluation of white Americans and a relatively negative evaluation of African Americans. Similarly, 68% of heterosexuals manifest implicit bias in favor of straights over gays and lesbians. Implicit ageism measures are quite strong; both older and younger subjects tend to have negative implicit attitudes toward the elderly and positive implicit attitudes toward the young. These results contrast sharply with self-reported attitudes.

Four main conclusions are drawn from implicit social cognition research: (1) there is variance, sometimes wide, between implicit and explicit cognition; (2) we show a pervasive and strong favoritism for our own social group, as well as for socially valued groups; (3) implicit cogni-

27. Blair, supra note 26, at 242–43; Kang, Dasgupta, Yogeeswaran & Blasi, supra note 5, at 1; Kang & Lane, supra note 5, at 467; Richardson & Goff, supra note 5, at 301–02; L. Song Richardson & Phillip Atiba Goff, Implicit Racial Bias in Public Defender Triage, 122 YALE L.J. 2626, 2629 (2013).

28. Godsil, supra note 24, at 52; Greenwald & Krieger, supra note 5, at 951; Kang & Lane, supra note 5, at 469; Richardson & Goff, supra note 5, at 295.


32. Kang & Lane, supra note 5, at 474 n. 33 (citing Brian A. Nosek et al., Pervasiveness and Correlates of Implicit Attitudes and Stereotypes, 18 EUR. REV. SOC. PSYCHOL. 1, 3–4 (2007)).

33. Lee, supra note 30, at 861.

34. Lee, supra note 30, at 860–61 n. 140 (citing Brian A. Nosek et al., Pervasiveness and Correlates of Implicit Attitudes and Stereotypes, 18 EUR. REV. SOC. PSYCHOL. 1, 19 (2007)).

35. Becca R. Levy & Mahzarin R. Banaji, supra note 21, at 50–52, 54–55, 64; see Greenwald & Krieger, supra note 5, at 949.

36. Kang & Lane, supra note 5, at 488.
tions predict behavior; and (4) implicit cognitions can be changed. 37

Significantly, implicit bias often predicts individually discriminatory behaviors more than explicit attitudes. 38 Here are a couple of research examples. Doctors with stronger anti-black attitudes and stereotypes were less likely to prescribe a medical procedure for African Americans compared with white Americans with the same medical profiles. 39 In another study, white subjects with stronger levels of implicit racial bias found a facial expression happy or neutral if the face was white, but angry or neutral if the face was black. 40 Nonverbal behaviors are also shaped by unconscious attitudes and stereotypes. 41

In mediation, well-meaning practitioners who hold explicit egalitarian attitudes and views experience automatic stereotype activation upon encountering parties. 42 Mediators are highly likely to favor their own in-group and be biased against out-group members, especially less socially valued ones. 43 This bias can play out in spontaneous behaviors such as eye contact, seating distance, blinking, and smiling. 44 White male mediators, the predominant racial and gender group in the field, may unconsciously ascribe negative traits to parties of color relating to work ethic, honesty, criminal propensity, and competence. 45 A study about lawyers is instructive here. Partners at a law firm were given an identical memorandum written by “Thomas Meyer,” identified as an associate who

37. Lane, Kang & Banaji, supra note 5, at 431–38.
39. Lane, Kang & Banaji, supra note 5, at 430.
41. Id. at 26 (citing Carl O. Word et al., The Non-Verbal Mediation of Self-Fulfilling Prophecies in Interracial Interactions, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109, 113–119 (1974)).
42. Blair, supra note 26, at 242–43.
43. Lane, Kang & Banaji, supra note 5, at 431–438.
44. Greenwald & Krieger, supra note 5, at 955, 961–62 (citing Word et al., supra note 41, at 113–119); Lane, Kang & Banaji, supra note 5, at 436; Evan M. Rock, Mindfulness Mediation, the Cultivation of Awareness Mediator Neutrality, and the Possibility of Justice, 6 CARDOZO J. CONFLICT RESOL. 347, 358 (2005).
graduated from NYU Law School. Half of the partners were told Meyer was white; on average, they found 2.9 of the 7 spelling/grammar errors in the memo. The partners who were told that Meyer was black found 5.8 of the 7 errors. Qualitative evaluations of the memos were equally striking.

In-group bias or preference may not seem as pernicious as out-group discrimination, but the effect can be the same. Treating a favored group more positively still results in a discriminatory outcome. We might think of hiring practices that result in predominantly male work forces. In Silicon Valley, for example, Google is overwhelmingly male. A few years ago the company began requiring implicit bias training, and by 2015, more than half of its 49,000 employees had attended.

In addition, bias can cause racial anxiety. Social scientists have observed that we may feel more anxious when we interact with out-group members than with our in-group members. Research on racial anxiety shows that for some people interracial interactions may trigger physical and cognitive indicators of anxiety. People of color often fear discrimination and hostile treatment; white individuals may fear being perceived as racist and being treated with distrust. This can result in unsatisfactory

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46. Godsil et al., supra note 40, at 36–37 (citing Dr. Arin N. Reeves, Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills, NEX- TIONS 1, 3–8 (2014)).
47. Id.
48. Id.
49. Id.
50. Id. at 23 (citing M.B. Brewer, The Psychology of Prejudice: Ingroup Love or Out-group Hate?, 55 J. SOC. ISSUES 405, 429–444 (1999)).
51. Id. at 23.
53. Id.
interaction and a negative feedback loop—their respective fears seem to be confirmed by each other’s behavior. People experiencing racial anxiety have shorter interactions, maintain less eye contact, use a less friendly tone, and feel more awkward. A 2014 report by The Perception Institute, a consortium of leading social scientists, documents the adverse effects of implicit bias and racial anxiety in education and health care. For example, patients of color may perceive discrimination on the part of white health care professionals, which leads to distrust and avoidance of health services.

Combined with implicit bias and racial anxiety, other phenomena may foster discrimination in mediation. Confirmation bias reinforces mediator judgments formed by implicit attitudes and stereotypes. By seeking and over-relying on evidence that merely confirms our beliefs, contradictory information is ignored. In other words, mediators may see more stereotype-congruent than counter-stereotypical evidence.

Also, the lack of normative certainty in mediation may play a role. Studies show that “situations that include clear indications of right and wrong behavior . . . tend to lessen the likelihood of discrimination.” Normative ambiguity arises when appropriate behavior is not clearly defined in a particular context and where negative behavior can be justified on a basis other than race. With scant normative consensus in the ADR field regarding appropriate mediator behavior, mediators can rationalize...
discriminatory actions on neutrality or other grounds. 68

IV. BIAS REDUCTION STRATEGIES

The good news is that implicit biases are amenable to change. 69 Suppression of stereotyped associations and engagement of non-prejudiced responses requires “intention, attention, and effort.” 70 What might this look like for mediators?

Intention requires Awareness and Motivation. 71 Acknowledging one’s own biases is a necessary first step. 72 Court programs and service providers should require mediators to take the IAT and engage in other bias reduction efforts to receive case referrals. Once mediators become aware of their biases, they are more likely to muster the two kinds of motivation necessary to reduce their biases: external (appearing non-prejudiced to others) and internal (appearing non-prejudiced to oneself). Studies show that both types of motivation are important for bias reduction success. 73

Attention entails Salience and Cognitive Resources. 74 While stereotypes are automatically activated, the application of those stereotypes in our

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68. Izumi, supra note 1, at 108 (applying normative ambiguity theory to mediation).
70. Armour, supra note 5, at 741 (quoting Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERS. AND SOC. PSYCHOL. 5, 16 (1989)).
72. Kang, supra note 71, at 1529.
73. Plant & Devine, supra note 71, at 825–27 (citing David P. Ausubel, Relationships Between Shame and Guilt in the Socializing Process, 62 PSYCHOL. REV. 378, 378–90 (1955)). Later studies determined the importance of internal motivation, finding that the measure of implicit bias was lowest among individuals with high levels of internal motivation and low levels of external motivation. See Patricia G. Devine et al., The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice, 82 J. PERS. & SOC. PSYCHOL. 835 (2002).
74. Bruce D. Bartholow et al., Stereotype Activation and Control of Race Bias: Cognitive Control of Inhibition and Its Impairment by Alcohol, 90 J. PERS. & SOC. PSYCHOL. 272 (2006); Blair, supra note 26, at 243; Blair & Banaji, supra note 71, at 1159; Lee, supra note 30, at 861–63; Wang, supra note 63, at 1038, 1043.
judgments, decisions, and interactions may be moderated.\textsuperscript{75} By confronting their implicit biases, rather than ignoring them, mediators can actively monitor and inhibit stereotype-consistent responses. On this point, in August 2016, 250 immigration judges attended mandatory anti-bias training, and the United States Department of Justice announced that 28,000 more employees would take the training.\textsuperscript{76} Mediators should be required to undergo rigorous anti-bias training, much more than a one-hour Elimination of Bias class.

For example, mediators could be taught two effective debiasing strategies: (1) using discrepancy experiences to enhance motivation and inhibit prejudiced responses;\textsuperscript{77} and (2) goal-directed behavior.\textsuperscript{78} A discrepancy experience is when you become aware of a response or reaction that runs counter to your explicit beliefs and attitudes.\textsuperscript{79} Developing an “implementation-intention” plan for bias reduction is expressed as follows: “If I encounter X, I will do Y.”\textsuperscript{80} Also, mediators can suppress stereotype application more effectively with sufficient cognitive resources. This means eliminating distractions, stress, fatigue, time-pressures, and other circumstances that lead to decision-making shortcuts and less thoughtful, deliberate responses.\textsuperscript{81}

Effort involves \textit{Exposure and Enhanced Practices}. Implicit social cognition research shows that bias and racial anxiety can be attenuated through interpersonal interactions with people of different social groups.\textsuperscript{82} A meta-analysis of studies found that intergroup contact correlates negatively with prejudice.\textsuperscript{83} Also, exposure to counter-stereotypical exemplars decreases implicit bias.\textsuperscript{84} People who increased their exposure to positive examples of social groups showed decreased implicit bias to-
ward blacks, women, gays, and Asian Americans in various studies.  

To this end, I urge use of a co-mediation model. Given the dismal level of mediator diversity, I would go so far as to require mixed race and gender mediator teams. I am rethinking my initial aversion to race matching in mediation because we need a way to mentor and employ more mediators of color. Studies show that minority mediators are underrepresented in the field and encounter significant barriers to gaining access. In an implicit bias presentation to the International Academy of Mediators last year, the co-presenter and I showed statistics obtained from seven mediation service providers. The percentage of mediators of color within these organizations ranged from a low of 3% to a high of 14%. Even when they are on lists, mediators of color report difficulty receiving appointments. While the use of mediation has increased, the use of minority mediators has not. At a minimum, if every court-connected mediation included at least one mediator of color on a two-person team, the diversity picture would change.

Having diverse mediators matters to participants. A recent study by the State Justice Institute of Maryland surveyed ADR participants in district court day-of-trial mediation. Of note, having at least one ADR practitioner’s race match the race of the reporting participant was positively associated with: (1) parties feeling that they listened and understood each other and jointly controlled the outcome; (2) an increase in a sense of self-efficacy (i.e., ability to speak and make a difference) and an increase in the sense that the court cares.

I would also require regular observations and evaluations of mediators. Having periodic oversight would offer some review of interactions with the parties. Official oversight of spontaneous actions and decisions has been shown to reduce implicit bias.

And finally, effective bias reduction practices include using protocols

85. Godsil et al., supra note 40, at 45 (referencing Margaret J. Shih, Rebecca Stotzer & Angelica S. Gutierrez, Perspective-Taking and Empathy: Generalizing the Reduction of Group Bias Towards Asian Americans to General Outgroups, 4 ASIAN AM. J. OF PSYCHOL. 79 (2013) (watching The Joy Luck Club reduced implicit bias toward Asian Americans)).

86. Bush & Folger, supra note 6, at 1, 26–28; Weatherspoon, supra note 6, at 800–01.

87. Carol L. Izumi, Presentation at the International Academy of Mediators Conference in San Francisco, CA (May 7, 2016) (data on file with author).

88. Id.

89. Bush & Folger, supra note 6, at 1, 26–28; Weatherspoon, supra note 6, at 800–01.

90. See note 89 and accompanying text.

91. I suggest court-connected mediation programs due to public funding and required anti-discrimination policies.

92. STATE JUSTICE INSTITUTE AND MARYLAND JUDICIARY, What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes (2016).

93. Id. at 34.

and tools to track evaluations, decisions, and outcomes.95 Data collection, checklists, rubrics, and the like are ways to detect and reduce discrimination.96 More consistent and granular data collection and analysis by courts, service providers, and mediators could reveal troublesome patterns or practices in mediation. As seen in the Maryland Court report and the New Mexico MetroCourt studies from the late 1990s, information on the race of the mediator and the participants can yield important information and help us see if racial disparities are evident.97

95. Casey, supra note 81, at 70; Richardson & Goff, supra note 27, at 2645 (citing Carol Isaac, Barbara Lee & Molly Carnes, Interventions That Affect Gender Bias in Hiring: A Systematic Review, 84 ACAD. MED. 1440, 1444 (2009); Eric Luis Uhlmann & Geoffrey L. Cohen, Constructed Criteria: Redefining Merit to Justify Discrimination, 16 PSYCHOL. SCI. 474 (2005)).

96. Casey, supra note 81, at 70; Richardson & Goff, supra note 27, at 2645.

97. See STATE JUSTICE INSTITUTE AND MARYLAND JUDICIARY, supra note 92; see also Gary LaFree & Christine Rack, The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases, 30 LAW & SOC’Y REV. 767 (1996) (revealing outcome disparities for minority parties in mediated and adjudicated cases); Christine Rack, Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study, 20 HAMLINE J. PUB. L. & POL’Y 211, 212 (1999) (concluding that mediators showed “Anglo-protective bias” in this study).