

Combating Implicit Bias In Alternative Dispute Resolution

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Implicit associations, also known as bias, are the attitudes or stereotypes that reside in our subconscious or unconscious mind and can influence the way we think and act.

No one is immune from their influence, which often manifests at a very young age. Implicit associations have become a growing focus within our legal system, as lawyers and judges are increasingly aware of their potential impact on legal outcomes.

Implicit associations reside deep in the recesses of our minds. An individual may not even be aware that they exist. These ideations differ from known biases that individuals may choose to hide or conceal from others in order to display what they deem socially or politically correct behavior.

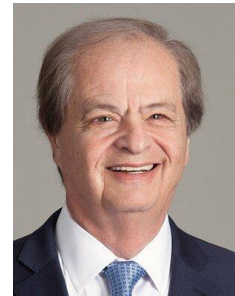
But these implicit associations are at times so deeply hidden that they may not be accessible even through introspection or cognition. Many of these hidden implicit associations can cause us to have attitudes, feelings and subjective biases based on other people's ethnicity, age, race, appearance or other features.

But there is a way to reveal these biases. In 1998, Anthony Greenwald, Debbie McGhee and Jordan Schwartz of the University of Washington developed an implicit association test that is regarded as an effective tool for identifying bias.

The test introduces stimuli in the form of words and pictures to an individual who is then asked to instantaneously choose between different races, ethnicities, sexual orientations, religions, sexes, ages or other categories.

The responses are scored based on the strength of associations between different groups of individuals and subjective characteristics or stereotypes. The stronger the associations are, the stronger the implicit bias is.

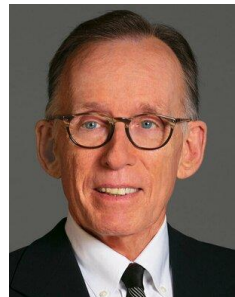
As the courts continue to wrestle with the effects of implicit associations, the field of alternative dispute resolution, or ADR, is paying closer attention to this form of unintended influence in mediation and arbitration.



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Implicit Associations and Their Impact on ADR

ADR in general, and arbitration more specially, requires a high degree of trust in the process and belief that proceedings will be fair and that neutrals won't bring any bias that might affect the outcome.

The implementation of alternative dispute resolution ultimately rests on the consent of the parties. That's not true in the court system, where you can be hauled into court. In the ADR system, there has to be credibility in the eyes of the people that use it.

The parties must believe it is a fair venue for the resolution of disputes. That is why confronting implicit associations is even more important in the ADR world, because we need people to have confidence in the system.

Related to these concerns over implicit associations is the need for greater diversity within the legal profession. This need was illustrated in a 2018 [arbitration dispute involving Jay-Z](#), a well-known Black rapper and entrepreneur.[1]

In *Shawn C. Carter v. Iconix Brand Group Inc.* in the New York County Supreme Court, Jay-Z challenged the arbitration clause as discriminatory because the arbitrators who were listed and available included few Black arbitrators. Jay-Z's suit argued that the lack of Black arbitrators on the complex commercial arbitration roster was a violation of his constitutional rights to equal protection of the laws and equal access to public accommodations.

Ultimately, the [American Arbitration Association](#) compromised and offered Jay-Z additional Black arbitrators to choose from. While litigation and arbitration were settled before any final judgment was rendered, Jay-Z's protest brought the lack of diversity in ADR to the fore, and shone a light on the lack of diversity among neutrals.

The industry has responded to this case, taking action to improve diversity among neutrals. Efforts, such as diversity and inclusion clauses, have been introduced that commit the contracting parties to seek to appoint diverse arbitrators and request the arbitration administrator to include a fair representation of diverse candidates.

Education is also being undertaken across the industry to foster greater cultural sensitivity among neutrals. It has been shown that cultural competency training makes mediators more effective in settling disputes.

Organizations in general benefit from having employees from diverse backgrounds, whether they're associates or neutrals. It's important because we all come from different backgrounds, and we were all raised differently. It always helps when you can share your perspective with a colleague.

The Important Role Attorneys Play in Ensuring Diversity in ADR

Attorneys have an important role to play in ensuring greater diversity in ADR. The provision of diverse panels by arbitration institutions is important, but the selection of panelists from diverse backgrounds rests with corporate counsel, in-house counsel and outside counsel.

Law firms are increasingly setting their own diversity goals, which is a positive sign for the industry.

More and more firms are placing a greater emphasis on diversity and want their attorneys' efforts to reflect their values in our society.

Best Practices for Combating Implicit Associations

Beyond systemic efforts to improve the diversity of the entire profession, combating implicit associations is a matter that everyone in the industry can address at a personal level.

While many legal professionals scoff at the notion that they might themselves be biased, a surefire way to put that to the test is by taking the implicit association test, which is a simple way to begin the process of revealing and then addressing the issue.

Awareness is one of the keys to addressing implicit associations. Being mindful of the stimuli you are facing is an important first step. Slow down and be aware.

All too often, people are so rushed that they don't really stop to think about what they're doing. But if you take the time to conceptualize what's happening, then you'll be better able to recognize signs of bias and address them.

Another best practice is to keep a checklist of things that affect every arbitration. Such a list can go a long way toward ameliorating implicit associations.

Just as judges write legal opinions to justify a ruling, a written opinion expressing the reasons for a decision in arbitration is a good safety check against the presence of implicit biases. There's a lot we can do once we've accepted that there are inherent biases, even in the ADR world.

Another thing people can do is acclimate themselves to other cultures and diverse backgrounds, other races, other ethnicities and other sexual orientations.

The more we read about them and become attuned to them, and maybe even befriend people from different backgrounds, the more we'll be able to overcome our own subconscious or unconscious biases.

The more you share experiences with others and learn from them, the more open and accepting you will be.

As neutrals, this only makes us better when we are trying to resolve arbitration cases, because we are less prone to drawing conclusions based on stereotypes. We are also more apt to listen carefully before reaching a conclusion on a case.

For arbitration in particular, where the neutral is the final word, one of the keys to combating implicit associations is to slow down the decision-making process, taking a more structured approach that allows time for reflection. Introspection often leads to a more reasoned and fair decision.

Implicit associations are a major concern for the legal profession, as they are for our broader society. The ADR industry should take this concern to heart and take steps to mitigate their effects on the arbitration and mediation process.

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[1] Shawn C. Carter et al. v. Iconix Brand Group, Inc. et al., Index No. 655894/2018, Supreme Court of the State of New York County of New York.