



# Overcoming bias in mediation

## UNDERSTANDING AND IDENTIFYING THE UNCONCIOUS BIASES OF MEDIATION PARTICIPANTS

*“He flattered himself on being a man without any prejudices; and this pretension itself is a very great prejudice.”*

– Anatole France, *The Crime of Sylvestre Bonnard*, pt. II, (1881)

*“It is never too late to give up our prejudices.”*

– Henry David Thoreau, *Walden* (1854)

*“Everyone’s a little bit racist.”*

– From *Avenue Q*, music and lyrics by Robert Lopez and Jeff Marx

The quotes above are all based on the premise that, at one level or another, we are all biased or prejudiced. A very experienced mediator, for whom I have a great deal of respect, read an earlier draft of this article and criticized it for emphasizing the concept of *overcoming* bias in mediation as opposed to *recognizing* the existence of bias and controlling it within the mediation process. To a large extent, that criticism is valid. Few if any people exit a mediation by leaving

their prejudices behind. That is true for the parties and for the mediator. Few, if any, “neutrals” are truly neutral. An experienced and ultimately effective mediator will develop opinions and construct evaluations as a mediation progresses, and that in itself becomes a type of bias in favor of a particular argument, or even in favor of one participant or the other. And, it is often, if not close to always, necessary for a mediator to form these opinions to assist the parties in reaching a resolution of their dispute. However, the bias I am discussing here is of a different type.

It is “common knowledge” (a term loaded with assumptions) that Caucasians are sometimes biased against African Americans, and the opposite is also sometimes true. Even within clearly defined racial and socio-economic and sexual orientation groups, inherent bias exists (i.e., “old money” vs. “new money;” etc.). And whether or not these biases or prejudices are either controlled or overcome during the mediation process, their existence should be recognized by the mediator

and, if possible, addressed in a manner that moves the process toward a solution that is acceptable to both sides.

There can be little dispute that today mediation is a well-established and widely accepted procedure by which a substantial number of civil lawsuits, if not a recognizable majority, are resolved. To understand the impact of bias in mediation, one must accept the foundational principle that the purpose of participating in mediation is to, in fact, reach a resolution of a dispute. Mediation is neither an effective discovery tool, nor is it acceptable to employ it to harass an opponent. It is a case resolution tool. Controlling bias during the mediation process is an important, if not critical, step in assisting your clients in reaching their mediation goal. The analysis of a claim or defense through a lens that is impacted by a pre-existing biased view of a person or a party, or of a claim or defense, may adversely impact the ultimate ability to resolve a case. Simply put, bias can present a significant roadblock to case resolution at mediation.

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### Conscious prejudice

Conscious prejudice is much easier to recognize and much easier to overcome during the relatively short time span of a mediation. While a defense counsel may be keenly aware of his dislike or disdain for members of the LGBTQ community, being consciously aware of this makes it easier to move past his personal feelings to a more objective analysis of the value of a claim being presented. By consciously putting aside his prejudice temporarily, a “neutral zone” can be created to move a case forward.

### Unconscious bias

Unconscious bias presents a much more significant and troubling problem in the context of mediation. While few of us easily admit to being biased in almost any way, even fewer of us are able to achieve that lofty standard. And those unconscious biases, absent an effort to control them, can impact a clear-headed and factually grounded analysis of a case by the mediator, counsel and the parties.

Psychologists tell us that our unconscious biases are simply our natural people preferences. Biologically we are hard-wired to prefer people who look like us, sound like us and share our interests. Social psychologists call this phenomenon “social categorization” whereby we routinely and rapidly sort people into groups.

This preference bypasses our normal, rational and logical thinking. We use these processes very effectively (we call it intuition) but the categories we use to sort people are not logical, modern or perhaps even legal. Put simply, our neurology takes us to the very brink of bias and poor decision making. (Doyle, Jarrett: *Prezi.com*; *Conscious vs. Unconscious Bias*, 27 July 2016.)

In the article quoted above, Doyle goes on to argue that,

Unconscious bias operates at a very subtle level, below our awareness. It results in almost unnoticeable behaviors (micro behaviors) such as paying less attention to what the other person says, addressing them less warmly or

talking less to them.” Behaviors resulting from unconscious bias are insidious. Unless they are recognized by the participants in the mediation, they will almost imperceptibly impact, if not control, the outcome of the mediation. Thus, while it is difficult to recognize bias in our clients, the mediator, opposing counsel or (most importantly) ourselves, overcoming them is a challenge that should be addressed by the effective practitioner.

So, who are these people who don’t “look like us, sound like us and share our interests?” In many ways, the law has already defined classes of people protected by our comprehensive Civil Rights laws. Speaking in broad terms, the groups comprise racial minorities, religious minorities and majorities, those with non-American national origin, sexual identity minorities, and elderly individuals. This information should not come as a surprise to anyone reading this article. We all know the broad range of people against whom prejudice is directed, even if we are steadfastly sure it is not exhibited by ourselves. And, if we know that, and if we are sure we are not unconsciously biased, why should an attorney be concerned with bias creeping into the mediation process?

### Unconscious bias can lower settlement value

Primarily because whether an attorney represents a plaintiff or a defendant, unconscious bias can lower the realistic value of a claim or the strength of a defense in the eyes of either the opposition or the mediator. Mediation is a process of movement in which the parties are encouraged by an effective mediator to modify their positions and re-examine their positions over time. The introduction of bias into the process often creates unrealistic “stopping points,” the very “micro behaviors” mentioned above. Offering a Latino plaintiff far less than a claim is worth because a defendant believes Latinos are used to being underpaid and undervalued, will likely result in the mediation failing. Assuming defense counsel and the defendant representative came to mediation with the intention of settling for a satisfactory sum, the failure

is a loss for both. Failing to recognize and accept that a female attorney is leading her “team” at mediation by addressing comments to her male co-counsel does not go unnoticed, again limiting the effectiveness of the mediation.

The experienced mediator I mentioned at the beginning of this article posed this question:

Isn’t the issue at the end of the day “process fairness vs. substantive fairness?” In other words, even if there is bias in the mediator, the lawyers, etc. does it really matter if the parties get a fair outcome and feel the process was fair?

There is an assumption in this question that I believe is untrue. The question assumes that a fair outcome can be reached in the situation where bias or prejudice actively impacts the demands and offers by attorneys, and the case analysis by the mediator. I do not agree with that assumption. While there certainly may be the occasional mediation where a party believes the result was acceptable and the process fair despite bias and prejudice exhibited by the other side, I think that would be a rare situation indeed. And, I would not accept the argument that a skilled mediator should use the prejudices of the parties or of counsel as a tool in resolving a case.

Apart from the fact such actions engender moral disapproval, they simply rarely work. Other than what occurs during joint sessions (which are far from common), what is said in separate caucus rooms does not necessarily get conveyed to the other side by the mediator. While mediators, almost without exception, will filter what is said in a private caucus to soften or even eliminate the biased or prejudiced comment that has been made, an unrealistically low evaluation of a claim, or the unjustified dismissal of a valid defense based on whose behalf it is presented is entirely counter-productive. But, that is far from a resolution of the problem since the holder of the bias is often the holder of the bank account, or of a signature on a dismissal with prejudice. Thus, it falls to the attorneys and

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the mediator to control the spoken and unspoken prejudices that are aired in private sessions, and to make sure they do not become roadblocks to settlement.

### Recognizing bias

Recognizing bias in opposing counsel, the mediator or the other party can sometimes be relatively straightforward. Caucasian attorneys who attempt to speak “urban slang” to African American or Latino parties are easy to spot. Overly exuberant expressions of a lack of prejudice against gays and lesbians usually fall within the realm of, “Me thinks the lady doth protest too much.” But often, bias can be subtler. Using sexual jokes or innuendos which make female counsel or parties uncomfortable is not uncommon, but is certainly unwelcome. Asking an attorney if his Asian client can speak English based on an assumption the client is an immigrant can be insulting. Actions such as these should create immediate red flags that something other than the value of a claim or the efficacy of a defense appears to be at issue for the speaker.

Many times, however, bias can be substantially subtler and thus more insidious. By example, a mediator influenced by implicit biases can create barriers to resolution resulting from (1) the insult and/or anger felt by the victim of the bias which may impact his or her trust of the mediator, and (2) the failure of the mediator to obtain important information, knowledge or insight held by the victim of such conduct. The same is true of the attorneys and parties participating in the mediation. Hidden bias, although often difficult to spot, is corrosive to a satisfactory settlement.

### Examples of common prejudices

No doubt, there are other examples of this more elusive bias. The attorney who addresses all comments and questions to the male attorney in a joint session, ignoring the female counsel present, is probably one of the most common problems faced today as more women take their rightful place at the top levels of litigation firms. An assumption of dishonesty when dealing with Muslim

parties is frequent in today’s tense world. Or, the defense counsel who acts surprised that a Latino plaintiff’s attorney graduated from a prestigious law school. An overweight person must be slovenly in thought and deed. An economically disadvantaged party must be in that position due to a lack of initiative, as opposed to other more realistic socio-economic causes. The list could go on for some time.

### Steps to avoid bias in negotiation

The question becomes: what steps should be taken at mediation to avoid the insertion of bias into the proceeding? Here are some suggestions:

(1.) Rely on your mediator. It is the mediator’s responsibility to respond to and address roadblocks to resolution, including the existence of expressed or implied bias. If he or she does not appear to be sensitive to it or to recognize its expression in your session, say something. There is no benefit to your client to remain silent.

If you believe that bias is impacting demand, offers or other aspects of the mediation, address them clearly and directly with your mediator. It is his or her job to keep these out of the process, not yours. The worst thing you can do is directly confront the person who you believe is the source of the problem. Direct confrontation will only lead to anger and denial. Your interest should be to remove the roadblock caused by the bias. It is not to change the overall attitude of the other side.

In relying on your mediator to assist in controlling bias in the mediation process, do not confuse a mediator’s opinion or analysis that is contrary to your client’s position to be a sign of prejudice. Despite the use of the term “neutral,” mediators do and must form opinions on the validity of each side’s positions, arguments, etc. Some experienced and scholarly mediators have proposed eliminating the term neutral as being confusing. (See, Robert Benjamin, *The Risks of Neutrality - Reconsidering the Term and Concept*, Mediate.com (Sept. 12, 2016).)

(2.) Examine your own conduct, statements and beliefs. Simply put, try and step back and listen to yourself with a critical ear. While you do not have to be judgmental, you must be willing to examine your words and actions to determine if they would be different if you did not hold certain inherent beliefs.

In addition, watch how the mediator and others with whom you come in contact react to your words. What you perceive as a joke to break the tension between the parties may be perceived by someone else as insulting. If you feel you have stepped over the line, talk to your mediator and, if necessary, ask him or her to smooth over the situation with your apology.

(3.) Listen carefully to your client. While it may be difficult, reminding your client that the purpose of mediation is to resolve a case, and that his or her bias is getting in the way, may be necessary. And, again, turn to your mediator for assistance. There is nothing wrong with seeking your mediator’s help in redirecting and refocusing your client.

(4.) Listen to your mediator. While experienced mediators work to overcome their own set of acknowledged and unacknowledged bias, like any other person, they will hold unconscious biases that must not be permitted to impact your mediation. Thus, if your mediator is exhibiting bias that is impacting the resolution of your case, you have a duty to your client to address this directly, and probably separately, with your mediator.

Finally, do not attempt to use a mediator’s prejudice in your favor. If your intent is to resolve your client’s case – as it should be – you need a knowledgeable and truly neutral mediator. Again, do not confuse a mediator whose knowledge of the law would cause her to lean toward one position or the other with a mediator whose racial or similar prejudice will impede the mediation process.

In conclusion, the practitioner is urged to be on guard against both explicit and implicit bias in mediation. Whether one speaks of controlling bias,

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or eliminating it during mediation, the fact is that prejudice or bias has no value in resolving a case in mediation.

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