

FOR YEARS NOW, AND IN PARTICULAR AFTER THE LAST PRESIDENTIAL ELECTION, IMPLICIT BIAS HAS BECOME QUITE THE “BUZZ” IN DIVERSITY AND INCLUSION CIRCLES – AND FOR GOOD REASON.

Not only are academics and experts in that field having a renaissance, but the general public is now more aware of how implicit bias permeates situations such as receiving medical treatment, labor and management interactions, voting, sentencing, and community policing.

To review, let's begin with what implicit bias is: the bias in judgment and/or behavior that results from subtle cognitive processes, namely implicit attitudes and implicit stereotypes that often operate at a level below conscious awareness and without intentional control. It is the brain's automatic, instant association of stereotypes or attitudes toward particular groups, without our conscious awareness. The processes involved are used by the subconscious mind to make logical sense of all the information we perceive. For example, the brain may sort various sensory inputs into convenient categories or buckets of information; create associations between things that, in reality, may not exist; and fill-in gaps when we receive incomplete information. These processes frame what information we perceive and how we perceive it, assisting our brains to understand and navigate our world. As a result, the brain relies on these processes to make judgments efficiently and quickly, which can sometimes be wrong or, at least, less optimal.

There are scientific methods that measure the extent of implicit bias, such as computerized tests that measure the direction and strength of a person's implicit attitudes by assessing their reaction time, physiological measures recording the amount of sweat produced and facial muscle movements, and functional magnetic resonance imaging techniques. The most commonly known computerized test is

the Implicit Association Test (or IAT, available at projectimplicit.com) developed by Professors Anthony Greenwald, Mahzarin Banaji, and Brian Nosek in 1995 initially as a laboratory tool to understand unconscious attitudes and biases and first adapted for use on the web in 1998. It is designed to detect the strength of a person's automatic association between mental representations of objects (concepts) in memory by measuring the time differences between various pairings of objects. In general, IAT scores predict behavior more accurately than explicit attitudes.

By definition, we are generally unaware of our implicit biases. Moreover, our conscious commitment to equality – and the belief that we strongly adhere to that commitment – can actually impair our ability to recognize and address these unconscious mental short-cuts. That is, a person can have deeply held conscious beliefs that all people should be treated fairly and still possess implicit biases or associations. As we addressed in the last column, corporations persist in outsourcing both the drafting of dispute resolution clauses and the selection of arbitrators and mediators to outside counsel, abdicating these fundamental strategic decisions to others outside of the company. Outside counsel, in turn, place far too much reliance on established networks, word-of-mouth, and the recommendations of the same “usual suspects,” leading to lost opportunities to broaden a company's roster of preferred neutrals. In exercising that decision making – whether by company counsel or outside counsel – there is a general failure to acknowledge and address the effects of implicit biases. Thus, for example, a person who is engaged in selecting an arbitrator or mediator – or even the ar-

bitrator or mediator herself – who holds the belief that they conduct themselves as fair and impartial, or that they exhibit a demonstrated commitment to increasing diversity in the ADR field, may still possess some form(s) of implicit bias. Members of one community (e.g. women, African-Americans, Muslims, people who live in the South, etc.) may even be implicitly biased against members of their own group. In fact, stubbornly clinging to the presumption that one is objective actually increases the role of implicit bias and its adverse impacts. Implicit biases are unconscious to you, and they could be either explicit or unknown to others. And just because you do not know about them does not mean that they are not an issue, or that they are not having some impact, adverse or otherwise.

Everyone possesses implicit biases; it is a natural function of the way in which our brain works. Because they can be perceived to have a negative connotation, I prefer to call them “implicit associations.” An even better term for them is “mindbugs,” which was recently coined by Professors Banaji and Greenwald. Moreover, discussing implicit bias and advocating for its reduction and changes in behavior are not a condemnation, nor is it meant to blame. Everyone should be more aware of this phenomenon and how it impacts our ability as neutrals to be fair and impartial towards the parties that appear before us. By acknowledging the presence of implicit biases, being concerned about their adverse effects, and making a commitment to change, we can actively work on measures to counter their impact, while also being cognizant that, sometimes, particularly in the case of racial implicit bias, it can lead to “racial anxiety,” which refers to the heightened levels of stress and emotion that may be experienced when interacting with people of other races.

Aside from becoming more aware of the implicit biases that might be present, decision-making ought to be undertaken more mindfully, with the intent of being thoughtful and engaged in self-reflection. This would include a better understanding of your own pet peeves and dislikes so that you do not overly weight those dislikes when they are perceived in others.

Other countermeasures could include:

- Try recognizing when a response is based on a stereotype, reflect on why the response occurred, and consider how this response could be avoided in the future.
- Search for and identify counter-stereotypic examples of group members, thereby consciously contrasting negative stereotypes with specific counter-examples.
- Find opportunities to encounter, interact with, and engage members of groups different from your own.
- Refrain from applying group characteristics to individuals and seek specific information about the individual.
- Demand greater use of data, rather than relying on instinct or assumed facts.
- Assume the perspective of someone outside of your own group and ask what that person’s perspective might be if you were in the other’s situation.
- Be alert to the impact that cultural differences – racial, gender, age, geographic, etc – may play in assessing credibility or making determinations.

The literature and continuing studies on the effects of implicit biases in the courtroom, in arbitration and mediation proceedings, and in basic negotiations are rich and abundant. They are undoubtedly having an impact on the continuing dialogue about how implicit associations permeate the decision-making process regarding the manner in which neutrals are selected, particularly with respect to women and people of color. There is every reason to remain hopeful that our current dismal state of diversity in ADR will improve.



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