Bias in Mediation and Arbitration

BY FREDERICK HERTZ

Bias based on race, ethnicity, gender, or sexual orientation remains a problematic challenge throughout the legal profession. In the informal and supposedly neutral settings of mediation and arbitration, however, bias and prejudice are especially difficult to identify, let alone remedy.

Consider the following scenarios.

■ An African-American attorney defending a black man who has been sued for assault by his girlfriend wonders whether a white female mediator will be able to see past his client's race and embrace the possibility of his innocence.

■ A lesbian in a contentious dissolution of a long-term relationship asks her attorney if the straight Catholic arbitrator hearing her case will be able to understand how manipulated she felt as the dependent partner, paying half the mortgage on the house yet never getting her name added to the title.

■ A retired judge who has recently gone through her own nasty divorce ponders whether she can be fair in arbitrating a claim for spousal support by a dependent man that raises issues similar to those she's just battled.

■ An elderly Asian couple is so intimidated by the condescending behavior of defense counsel in a mediation that they are unable to tell their story—and their lawyer is so angered by the attorney's behavior that she has trouble marshaling the facts to support the case.

THE FALLACY OF NEUTRALITY

Mediation can never truly be a neutral process. For example, a study by Trina Grillo, "The Mediation Alternative: Process Dangers for Women," (*Yale L.J.*, April 1991), concluded that women generally place a higher priority than men do on maintaining ties to people close to them—even those who cause them harm. They therefore may face daunting emotional challenges in a setting that forces them to choose between arguing a point or nurturing an intimate relationship. Similarly, immigrants without legal working papers who share ownership of property with family members informally and mask their investments to help their relatives obtain legal immigration status are likely to appear dishonest in the face of a law-abiding arbitrator.

Indeed, the very informality of alternative dispute forums can be burdensome for those who are uncomfortable in fast-moving, unstructured settings—especially when the casual style of the interaction without a presiding judge leaves them no opportunity to frame responses calmly and compose thoughts without interruption. People with physical disabilities such as hearing or sight impairment or mobility limitations face even more daunting challenges.

Mediation, despite its image as a neutral procedure in which all values are honored equally and all parties are free to express their points of view, can often be skewed by bias. Mediators often make quick judgments and proffer strong statements infused with their biases, which, though not legally binding, can powerfully impact the outcome of a settlement. That is especially true when the mediator is a revered attorney or a judge who is imbued with power. Moreover, bias on the part of any mediator can creep into the process in even more subtle ways, such as in the subjective matters of how questioning occurs and how and whether private caucuses are conducted.

Compounding the problem, it is nearly impossible to accurately observe or address issues of bias in the informal consensus-building environment of

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mediation, especially because there is an unspoken taboo against acknowledging it. Criticizing a mediator or an opposing counsel for making an offensive comment during the course of a mediation, for example, is at odds with the affable tone most mediators try to create. Many are hesitant to point out a derogatory comment by an attorney or party simply because doing so may worsen an already tense situation or cloud the conciliatory atmosphere. Under these circumstances, it is not surprising that the people who come to the room intimidated or fearful often remain silent, leaving the attorneys and mediators unaware of the dynamics their prejudices can cause.

Establishing neutrality in arbitration can be a great challenge, too, as it lacks most of the protections offered by the more formal judicial process. Parties cannot easily learn about an arbitrator's prior rulings, and typically there is very little personal information available about a proposed arbitrator. There have been some attempts in both the regulatory and academic realms to identify an arbitrator's bias against one side or another in medical malpractice or brokerage claims; however, hardly any attention has been paid to the issue of bias against particular racial or ethnic groups.

The actual hearing process of arbitration raises additional problems. It is rare that anyone is allowed the floor for an extended time in such a setting, and testimony often flows as a narrative or a response to questions from the arbitrator. Parties in arbitration rarely have been deposed, nor are they thoroughly prepared to the extent that parties prepare for a trial.

The slower, more deliberate process of court examination—followed by cross-examination—can facilitate a more careful elucidation of the facts, with a formality that often allows even the most intimidated witnesses to tell their stories. In addition, the training and experience of trial judges encourages them to focus on the particular facts of a case and not rush to judgment based on first impressions and summary recitations. As a result, educated and confident witnesses often have an advantage in the informal setting of arbitration, whereas a court trial can minimize these advantages to a remarkable degree.

THE PROBLEM OF THE PROBLEM

Addressing problems of bias begins with recognizing the importance of human differences and backgrounds—not an easy challenge for lawyers who are accustomed to only doing what is legally required and who resist most calls to step outside the familiar dimensions of the practice. Compounding the unspoken fears of being labeled a prejudiced person while taking on this challenge is the legal profession's broader reluctance to openly address the greater social problems wrought by bias.

The problems in the realms of ADR mirror the larger social context of the practice of law. Judges are regularly evaluated on their legal abilities, their promptness, and even their demeanors but not on their prejudices. Though the State Bar now mandates that active attorneys have some education on bias issues (MCLE Rule and Reg. 2.1), the requisite one hour per three years isn't sufficient to meet the need; there is no parallel education requirement for mediators and arbitrators. Also, antibias education isn't an important factor in evaluating accredited law schools; ironically, the emphasis on law school admissions and faculty hiring criteria may actually have distracted us from the essential issue of conducting the practice of law.

Few attorneys talk openly with their clients about discrimination and prejudice when preparing them for a mediation or arbitration. And those who devalue these issues discourage any remedy of these matters from the outset, reducing competence in the practice.

The vague standards that are supposed to address these issues don't really fit the task. The Judicial Council's recently enacted rules require disclosure of family and financial relationships with a party, focusing on personal relationships with particular individuals rather than the larger issues of diversity and prejudice. (Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 7.)

The long-standing Code of Ethics for Arbitrators in Commercial Disputes (Canon II) also treats bias as favoritism toward a party because of a past personal relationship with that person. Such rules, however, completely ignore the more problematic issue of avoiding racial or religious bias.

Likewise, among the limited grounds for vacating an arbitrator's decision is that of corruption, fraud, or other "undue means" (Cal. Code of Civ. Proc. § 1286.2), but the relevant case law makes it clear that gender stereotypes and negative impressions about racial groups are not considered in applying this rule. These cases focus on alleged favoritism toward or against particular clients or plaintiffs or defendants in particular areas of law as evidenced by a history of serving as an arbitrator for one party in the past. (*Neaman v. Kaiser Found. Hosp.*, 9 Cal. App. 4th 1170 (1992).) Missing is any mention of cultural or racial discrimination. Because the very definition of bias in most arbitration cases is limited to situations in which an arbitrator's preexisting business or social relationship with one of the parties would influence his or her judgment (*Luster v. Collins*, 15 Cal. App. 4th 1338 (1993)), racial or ethnic bias isn't even on the courts' radar screens.

THE SEEDS OF A SOLUTION

The first steps in addressing the impact of bias in the alternative dispute process are to:

- accept that everyone has biases based on group or general stereotypes, and
- acknowledge that the only way to get valid information about individuals is to ask them questions and listen to their responses—without being judgmental or defensive.

The emphasis on the individual does not require a negation of ethnic and racial dimensions. Don't be afraid to note the mix of ethnic, racial, cultural, and gender compositions that

you, your client, and the mediator or arbitrator all bring to the table. But at the same time, pay attention to your reactions and responses as you focus on the character of the particular person in front of you.

Have the courage to ask your clients about their personal backgrounds and ethnicities and be open about sharing your own personal history with them, but understand that every person is an individual, not just a type or group representative. Getting to know colleagues and clients more deeply is not the same as exhibiting or fostering prejudice; in fact, often it's the fear of biases that inhibits curiosity and openness and limits effectiveness.

For example, if you think that anti-Semitism might be a factor in one of your cases that is heading into arbitration, ask your Jewish clients about it and be open to learning from their experiences. If you are mediating a civil rights claim involving a police officer and alleged hate crimes against a gay man, ask the openly gay judges in your county about their lives as they were growing up to learn how they might respond to possible testimony by a police officer. And ask your local bar association to question potential arbitrators about their sensitivity to other cultural or ethnic groups, specifically inquiring into what training they have had in this area to back up claims of objectivity. As awkward as these questions may feel at first, the more you show an openness and genuine interest in the lives of others, the more comfortable you will become with this process.

LOOKING BEYOND THE WORDS

Once you've opened the door to learning about differences, you can begin to think critically about how these issues affect you and your client in the particular situation you are facing. For example, if your client is an immigrant and is extremely afraid of authorities, don't discount those fears—and consider using a mediator of the same ethnic background as your client. Pay attention to the location of the mediation and how, for example, meeting in a posh downtown office could affect your low-income client. Spend some extra time preparing your clients for situations they may experience as hostile or foreign. Talk with the mediator and your opposing counsel ahead of time about particular fears your client has—and if you are the mediator, be open to discussing these issues informally with the attorneys. Read about the particular pressures African-American men are under in today's society, even those who are corporate executives, so that you can be better prepared to counsel your clients on dealing with the stress of a mediation. And learn about how particular subcultures approach making contracts so that you can do a better job in arguing your case in an arbitration.

When you encounter bias in the comments or actions of mediators or arbitrators, have the courage to call them on their behavior.

Turn to your clients as resources. They are likely to have valuable ideas on how to best address painful questions of bias. If you know that your client is afraid to talk about his "wifely" role during his relationship with another man, ask for his permission to raise the topic at the outset of the mediation. Such a gesture could defuse the tension and demonstrate that your client is safe to express his experience from his personal point of reference. If you are representing an Arab-American who is facing a fraud claim, talk openly about the post-9/11 prejudice that Arab-Americans have faced.

LESSENING THE BLOW

Perhaps most important, work actively on behalf of your clients to lessen the negative impacts of biased sentiments. Talk with the arbitrator about your concerns and ask for references who will speak honestly about their past experiences with him or her. Seek out others who may have experienced the negative side of a proposed mediator and ask them what happened. When you encounter bias in the comments or actions of mediators or arbitrators, have the courage to call them on their behavior—if not immediately, then shortly after it occurs, and speak with others about what you have experienced.

If you are serving as a mediator or arbitrator, be alert to your own tendencies to be distracted from the facts and influenced by your own stereotypes and prejudices. In accordance with a recently amended rule, judges must disclose their memberships in discriminatory organizations such as the Boy Scouts in any case in which sexual orientation is an issue. (Cal. Code of Jud. Ethics, Canon 3E.) Though such rules don't apply to mediators and arbitrators, there's no prohibition against someone voluntarily disclosing this information.

Show up at the annual dinners of minority bar associations—not just to create the appearance of neutrality but to get to know others in their own communities and to learn more about the challenges they face. Enroll in diversity programs and take the time to meet people inside and outside the legal profession whose personal experiences and backgrounds are different from yours.

Recognizing the power that stereotypes and prejudices have in interactions with other people, even in the supposedly neutral settings of mediation and arbitration, will transform your approach to these alternatives to litigation. Taking the next step and actively working to reduce the impacts of bias will not just improve the lives of those with whom you work, it will also make you a better lawyer. CL

Self-Assessment Test

SELF TEST

NOVEMBER 2003

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1. Rules recently enacted by the California Judicial Council require some arbitrators to disclose a financial relationship with a particular individual that may bias him or her.
☐ True ☐ False

2. Asking a client about his or her ethnicity in preparation for a mediation or arbitration constitutes an act of legally prohibited discrimination.
☐ True ☐ False

3. The confidentiality provisions of mediation prohibit one attorney from disclosing to another attorney a racially derogatory comment made by a retired judge in a prior mediation.
☐ True ☐ False

4. An arbitrator who is active in the Boy Scouts of America must disclose that before serving in a dispute alleging antigay discrimination.
☐ True ☐ False

5. California appellate courts have ruled that discriminatory statements regarding a particular racial or ethnic group by an arbitrator can result in vacating an arbitration award.
☐ True ☐ False

6. Disputants with physical limitations such as a hearing loss can often handle the informality of mediation better than the formality of a court trial.
☐ True ☐ False

7. The applicable civil procedure statute expressly invalidates any arbitration award in which the arbitrator demonstrates bias against a racial or ethnic group.
☐ True ☐ False

8. The Rules of Judicial Conduct require judges to disclose their memberships in discriminatory organizations in any case in which sexual orientation is an issue.
☐ True ☐ False

9. Because former judges have experience presiding over trials, and because they are not issuing rulings in mediations, the issue of bias doesn't arise when they handle mediations.
☐ True ☐ False

10. Most California lawyers must study bias in the profession to remain on active status.
☐ True ☐ False

11. As a general proposition, arbitration offers well-educated and verbally skillful parties a greater advantage than they might have in a trial setting.
☐ True ☐ False

12. There are no specific course requirements for arbitrators or mediators that cover the issues of racial or ethnic bias in conducting mediations and arbitrations.
☐ True ☐ False

13. Because mediators use a rote formula for questioning participants and conducting caucuses, there is little opportunity for bias to invade the process of mediation.
☐ True ☐ False

14. Cases on bias in arbitration focus on alleged favoritism toward or against plaintiffs or defendants as evidenced by the arbitrator's historical treatment of participants of similar ethnicity.
☐ True ☐ False

15. The Code of Ethics for Arbitrators in Commercial Disputes does not directly cover the issue of bias against ethnic or racial groups by an arbitrator.
☐ True ☐ False

16. During mediations, most participants feel free to criticize a mediator's words or actions they perceive as discriminatory to help level the playing field and ease the way for resolving the underlying dispute.
☐ True ☐ False

17. Prospective parties to an arbitration can easily check an individual arbitrator's past rulings as a way of determining possible historical bias.
☐ True ☐ False

18. A study of parties in mediation found that women generally place a greater priority than men do in maintaining ties to those with whom they have intimate relationships.
☐ True ☐ False

19. Judges are evaluated periodically for possible biases and prejudices by the California Judicial Council, unlike mediators or arbitrators, who are not formally reviewed for this possibility.
☐ True ☐ False

20. The formalized setting of a courtroom, with its rules and hierarchical feel, discourages most litigants from telling their stories clearly.
☐ True ☐ False

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