



YUEH-MEI KIM NUTTER

The minute the mediator first meets the parties, there is a bias. When the attorneys and mediator first meet there is a bias. That's if the bias didn't start earlier, when the mediator read the names of the parties or read the summaries and information provided by the attorneys or parties. It doesn't matter how experienced the mediator is, the mediator has bias. It doesn't matter that the mediator doesn't know any of the parties or attorneys, the mediator has bias. And the mediator doesn't even know of this bias, it's implicit.

But what about when the mediator knows of a bias? Does it make a difference if the mediator is conscious of a bias? Can a mediator really overcome her admitted bias to effectively and ethically mediate a case? Or must that mediator decline or terminate the mediation? If the mediator knows she is biased against people with nose rings, can she mediate a case where one of the parties is wearing a nose ring? Must that bias be disclosed? Can the parties waive that bias to proceed with mediation? If both parties wear nose rings does that "neutralize" the bias?

And those are just a few of the torrent of ethical questions that arise when a bias is known. But what about the unknown bias, when your bias is implicit? Implicit bias refers to the way the mind attributes particular stereotypes to certain groups of people in thoughts that pass spontaneously and without any conscious knowledge but that directly affect one's understanding, actions and decisions. The implicit thoughts are a result of learned associations influenced by gender, race, social status, upbringing, schooling, environment and life experiences. An example of an implicit bias is associating all Doberman pinchers as mean dogs without even realizing you are doing it.

Now knowing that implicit bias exists, how does a mediator assure she is mediating with fairness and neutrality? The internet is replete with articles on implicit bias and with online tests to check your implicit bias. These tests are psychological instruments known as IAT, for implicit association test. There are a variety of IATs, some test for race and others are non-

Yes, the Mediator is Biased

race. The internet is flooded with articles of jurors being cautioned about implicit bias, of police recruits being trained about implicit bias, grants to study implicit bias and corporations tackling the issue with mandatory classes. Probably, the most well-known test for implicit bias is Harvard University's Project Implicit, implicit.harvard.edu/.

Implicit bias shows that we discriminate without the intent and without the awareness to discriminate. Implicit bias is our brains' automatic processing and association of stereotypes based on our experiences. Then will taking an implicit bias test once or even every 6 months provide assurance of neutrality? Many of the online articles assert that a person can take the same implicit bias test many times and come up with different results each time. That is come up with different implicit biases each time!

So can our brains be retrained to not automatically process stereotypes? There is a belief that people can learn about their implicit bias and retrain their brain to see others differently but it takes intentional, consistent and concerted efforts.

As mediators, we must always be aware of our own bias. Now we must be aware that we and everyone has implicit biases. A mediator must be aware and careful that their body language, that the way an offer is conveyed or bantered about is being picked up by the parties and their attorneys and affecting how they respond to you, the mediator, and the mediation process. While you can't stop and take an IAT test in the middle of a difficult mediation to see how you are doing, you can be mindful of the fact you are impacted by implicit bias. As the mediator scurries from caucus to caucus from group meetings to caucus, all while acutely aware of how much time is being spent with each party, the mediator can and should take moments throughout the mediation process to stop and gauge if she and how she is reacting to the mediation participants.

I am sure we will be hearing more about Implicit Bias and, as mediators, we need to pay attention to any and all potential biases.

For additional ADR tips and resources, go to <http://www.palmbeachbar.org/adr/>

Yueh-Mei Kim Nutter is a Florida Bar board certified specialist in Marital and Family Law with more than 20 years of experience. She is a Fellow of the American Academy of Matrimonial Lawyers, concentrating her practice in the areas of family law, civil litigation, guardianships, and probate and estate litigation. She is also recognized by the Florida Supreme Court as a certified Family Mediator, certified Appellate Mediator, and certified Guardian Ad Litem. Additionally, she is a founding member of the Collaborative Family Lawyers of South Florida, Inc., a charter member and officer of the South Palm Beach County Collaborative Law Group, a Master Member of the Susan Greenberg Family Law American Inn of Court of the Palm Beaches, co-chair of the Alternative Dispute Resolution Committee of the South Palm Beach County Bar Association, and also serves on the Boards of Directors for Impact 100 Palm Beach County and the Florida Chapter of the Association of Family and Conciliation Courts (FLAFCC).



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