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When Choosing the Right Mediator Don't Overlook Implicit, Cognitive Biases

Selecting the right mediator is a critical element to improving settlement outcomes. However, many advocates miss the opportunity to select a mediator who will increase the likelihood of a more favorable settlement.

By **Robert H. Barron** | September 14, 2018

ADR

Selecting the right mediator is a critical element to improving settlement outcomes. However, many advocates miss the opportunity to select a mediator who will increase the likelihood of a more favorable settlement. This article will discuss the basic principles of implicit and cognitive bias and strategies practitioners can use to leverage those biases to produce more favorable settlements.



Robert H. Barron, Mid-Atlantic ADR

Over the past 10 years there has been a significant amount of research on the existence and impact of implicit bias on decision-making. Implicit bias theory maintains that we all have unconscious biases that cause us to pre-judge people in a more positive or negative light. Studies have shown that because these biases are unconscious, they can impact our decision-making without our realizing we are being influenced.

One of the most common types of implicit bias is “in-group bias,” the predisposition to be attracted to and persuaded by people with similar backgrounds. Conversely, “out-group” bias is the predisposition to have negative feelings toward and discount advice from people with dissimilar backgrounds. Studies confirm that we are drawn to and influenced by like-minded people, and that people who are dissimilar are less able to influence our opinions.

Cognitive biases, like implicit biases, can influence how we view people. Cognitive biases help explain why we make poor decisions based on unconscious, flawed predispositions. “Familiarity bias” is one type of cognitive bias. Familiarity bias is the concept that we are more attracted to and prefer people and things with which we are familiar. Familiarity bias is frequently relied upon in advertising as illustrated by the frequent online pop-up ads for products we have searched and is often cited as the reason investors sometimes mistakenly prefer to invest in stocks with which they are familiar.

What do in-group bias, out-group bias and familiarity bias have to do with selecting a mediator? Many advocates prefer mediators with backgrounds similar to their own and mediators with whom they have a prior relationship. They trust those mediators, they understand and like those mediators, and they are more likely to be persuaded by those mediators. And that is the point. Advocates are rarely selecting a mediator to be persuaded. In most cases advocates try to select a mediator they think can persuade the other side.

One of a mediator’s core roles is to persuade the parties to assess and reassess their assumptions about their positions and what they each need to resolve the dispute. A mediator with a similar background or who has previously built rapport and trust

possesses a built-in shortcut to persuasion. Conversely, since we are unconsciously predisposed to distrust people who are dissimilar and we are less drawn to unfamiliar people, a mediator with a dissimilar background or no prior experience with a party may have to overcome negative biases before he can effectively persuade. The power of the biases is illustrated by answering a simple question. If you are told your position is weak by a mediator who is your like-minded friend versus a mediator from the opposite bar who you just met, which mediator is more likely to cause you to reassess your view? The like-minded friend!

There are strategies for harnessing the power of in-group and familiarity biases. Selecting mediators from the opposite side of the bar or a mediator the other party knows is the easiest way to leverage the other side's in-group and familiarity biases as a persuasive tool for the mediator. An even more effective approach is to ask opposing counsel to suggest three mediators, reserving the right to select among the three or to reject all three and ask for additional options. In many cases opposing counsel will suggest mediators that conform to the advocate's in-group bias and who already have a level of rapport with the advocate. This approach has the added benefit of beginning the mediation process by making the concession of allowing the other side to suggest the potential mediators; a concession you should be glad to make.

Additionally, understanding the other party's decision makers can also help you select a mediator who will be more effectively persuasive. Mediators with similar backgrounds to decision makers, whether based on business experience, education, background or other factors have a quicker path to building trust and rapport and may be able to reach an opposing party who is reluctant to consider objectively reasonable settlement options.

These same psychological principals can also help advocates with difficult clients. In this case you are looking for a mediator who reflects your client's in-group bias rather than the other side's. Understanding a difficult client's background will allow you to consider a mediator who has a better chance of connecting.

Finally, understanding that you may have an implicit bias against members of your out-group can help you avoid the trap of discounting an out-group mediator's valid insights about your case or position. While you select a mediator to persuade the other side, the mediator is there to persuade you too. You do not want an out-group bias to cause you to reject a mediator's insight that might allow you to view your case in a different light and consider a potentially advantageous resolution.

In summary, recognizing the existence of in-group, out-group and familiarity biases will help you to select mediators and structure a mediation environment that is more conducive to an advantageous resolution, and will also help you avoid making decisions that are unconsciously influenced by your own biases.

Robert H. Barron, of *Mid-Atlantic ADR*, is a full-time arbitrator and mediator who focuses his practice on labor, employment and commercial disputes. Prior to his ADR practice Barron was general counsel and subsequently ran the Canadian division for NFI, one of the largest logistics companies in North America. Contact him at rhbarron@MidAtlanticADR.com.

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