

Implicit Bias and the Case for Testing and Redress Prior to Mediation

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ABSTRACT

Mediation is rapidly becoming one of the most preferred processes for individuals who wish an expeditious, fair, and autonomous resolution to disputes. Mediator neutrality and impartiality are the cornerstones of the mediation process and are often why individuals seek it as an alternative to litigation. With neutrality and impartiality being so important in the mediation process, it is equally important that the parties trust that the mediator has no biases which will compromise their neutrality and negatively impact the process. Explicit biases may be easily identified through contact with the mediator. But what about biases which the mediator herself is unaware of? Similarly, what about the personal biases which the parties and their advocates themselves are unaware of? Those biases, referred to as unconscious or implicit, can have a significant impact on the mediation process and can alter the outcome of the mediation. This paper will look at what implicit bias is, how it affects the mediation process, and why implicit bias testing and redress should be sought by mediators and parties prior to mediations.

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I. INTRODUCTION

The American Heritage Dictionary of the English Language defines “bias” in the following ways: “A preference or an inclination, especially one that inhibits impartial judgment”; “An unfair act or policy stemming from prejudice”; “To influence in a particular, typically unfair direction”; and “Prejudice.”¹ The same dictionary defines “partiality” as: “Favorable prejudice or bias”; “A special fondness”; or “A predilection.”²

These definitions have somewhat negative connotations, particularly if considered in the context of conflict resolution; however, they are not wholly negative. According to Howard J. Ross, founder and Chief Learning Officer of Cook Ross, Inc., a diversity consulting company, “[i]f you are human, you are biased.”³ Ross explains that biases exist in every aspect of life, not just in relationships to people or by prejudice, and that they likely are a result of factors such as social conditioning, learned or experienced belief systems, memories of particular incidents, or other “assumed truths” developed over a lifetime.⁴ Biases can determine an individual’s preferences in situations as significant as where one chooses to live, and as minor as what somebody chooses to eat.⁴ Ross also explains how the development of biases has been essential to the evolution of the human species and works as an “unconscious danger detector.”⁵ To explain this, Ross uses the example of a primitive man using bias to determine whether or not to join a group of others near a river drawing water, as the wrong decision could result in death.⁶ It turns out that not only are biases not wholly negative, they are in some instances necessary.

A. *Are Biases Negative?*

Some find it acceptable to be biased in favor of at least some of the smaller ingroups to which one belongs (siblings, children, schoolmates, and friends) and that bias is only negative when it is directed *against* a particular

¹ *Bias*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

² *Partiality*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

³ HOWARD J. ROSS, EVERYDAY BIAS: IDENTIFYING AND NAVIGATING UNCONSCIOUS JUDGMENTS IN OUR DAILY LIVES, 1, 1 (Rowman & Littlefield 2014).

⁴ *Id.*

⁴ *Id.*

⁵ *Id.* at 5 (describing Psychologist Joseph LeDoux’s explanation of bias as an “unconscious danger detector that determines the safety of a person or situation, before we have a chance to cognitively consider it”).

⁶ *Id.*

ingroup.⁷ This feeling or idea of acceptability typically does not extend to biases favoring a larger ingroup, such as race, sex, or ethnicity, as many find those biases to be inappropriate.⁸ As a result, a bias in favor of smaller ingroups usually does not raise a question of possible discrimination against others.⁹ Typically, biases are unacceptable when they create barriers that impede access to opportunity across many critical life domains, such as housing, education, health, and criminal justice.¹⁰ Likewise, one would not argue that biases are acceptable when they have an impact on behavior that causes a biased individual to respond in a discriminatory manner towards the object of their bias.

B. *Implicit Bias*

Implicit bias is defined in various ways. In this paper, I will provide what I have found to be one of the most comprehensive explanations of implicit bias. One Kirwan Institute publication explains implicit bias as: “[T]he attitudes or stereotypes that affect an individual’s understanding, actions, and decisions in an unconscious manner.”¹¹ “The biases” encompass both favorable and unfavorable assessments, and are activated involuntarily and without an individual’s awareness or intentional control.”¹² They reside “deep in the subconscious,” and are distinguishable from biases an individual might be self-aware of and has the ability to control in order to be perceived as socially or politically correct.¹³ An individual generally cannot readily access implicit biases through introspection.¹⁴ Implicit and explicit biases are generally regarded as related but distinct mental constructs and, because of their relatedness, they are not mutually exclusive and often reinforce each other.”¹⁵

That same Kirwan Institute publication further explains the evolution of implicit biases: Implicit biases harbored in the subconscious cause an

⁷ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006).

⁸ *Id.*

⁹ *Id.* at 952.

¹⁰ Cheryl Staats et al., *State of the Science: Implicit Bias Review 2015*, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY 1, 59 (2015), <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf>.

¹¹ *Id.* at 62

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 63.

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individual to develop feelings and attitudes about others based on characteristics such as race, ethnicity, age, and appearance.¹⁶ These associations develop at an early age as a result of exposure to direct and indirect messages, and have the potential to last a lifetime.¹⁷ Early life experiences are not the only contributors to implicit biases, as the media and new programming are also often-cited origins of such biases.¹⁸ Although implicit biases in favor of one's ingroup are most common, research has shown that it is also possible to develop and hold implicit biases against one's ingroup.¹⁹ "The implicit associations we hold arise outside of conscious awareness; therefore, they do not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse."²⁰ In sum, implicit biases are developed early in childhood, cultivated, and often reinforced by numerous sources over time. They usually are in favor of our "ingroups" or those with whom we can relate and identify.

Implicit bias has been studied as an area of our cognition for decades.²¹ In fact, implicit biases (which are discriminatory) are based on implicit attitudes or stereotypes²² and are a direct effect of our cognition.²³ Implicit cognition indicates that individuals may not always have a conscious ability to control their social perception, impression formation, and judgment that motives their actions.²⁴ While early information created the belief that we have conscious control over our behavior, these "theoretical conceptions" have been dwindling during the past two decades.²⁵

Scientific developments surrounding unconscious mental processes have resulted from an evolving and accumulating body of reproducible findings of research.²⁶ In *Implicit Bias: Scientific Foundations*, Anthony G. Greenwald and Linda Hamilton Krieger cite work inspired by Leon Festinger's cognitive dissonance theory as the starting point for modern interest in a person's inability to identify the causes of their own thought and behavior

¹⁶ *Id.* at 62.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 63.

²⁰ *Id.*

²¹ See, e.g., Greenwald & Krieger, *supra* note 7 (referring to works from as early as 1957 as foundational for the study of implicit bias).

²² Greenwald & Krieger, *supra* note 7, at 951.

²³ *Id.* at 947

²⁴ *Id.* at 946.

²⁵ *Id.* at 945.

²⁶ *Id.* at 946.

processes.²⁷ Richard E. Nisbett and Timothy DeCamp Wilson revealed the inadequacies of introspective explanations of behavior, marking “a noticeable starting point of the modern revolution” in research and leading to a greater understanding that the self-report measures of conscious mental processes that were once used in psychological research are now considered highly suspect.²⁸ Daniel M. Wegner's *The Illusion of Conscious Will* and John A. Bargh's *The Automated Will: Nonconscious Activation and Pursuit of Behavioral Goals* reveal the regularity with which voluntary actions, which seem ordinary, are controlled in ways that elude conscious scrutiny.²⁹ Wegner and Bargh's findings further undermine the idea that maintaining a conscious mind effectively controls most human behavior.³⁰

In *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, Anthony G. Greenwald and Mahzarin R. Banaji found that evidence supports the view that social behavior frequently operates implicitly and separate from our conscious intent, and that past experiences often influence judgment in a way the actor knows introspectively.³¹ They further found that an individual's attitudes, self-esteem, and stereotypical beliefs operate implicitly, and that there is recent evidence that suggests discrimination on the part of those that simultaneously and explicitly disavow prejudice is often consistent with theorized ordinariness of implicit stereotyping.³² This only reveals to a minor extent the amount of research which has been done on our cognitions, and how much conscious control we actually have on our behavior. However, this information has major implications for attitudes towards others and how we act based upon the biases we hold, particularly as it relates stereotyping and discrimination.

Greenwald and Banaji define implicit attitudes as “introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects.”³³

²⁷ *Id.* at n.4 (referring to LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (Stanford University Press 1957)).

²⁸ *Id.* at n.2 (citing Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977)).

²⁹ *Id.* (citing DANIEL M. WEGNER, THE ILLUSION OF THE CONSCIOUS WILL (Massachusetts Institute of Technology 2002); John A. Bargh et al., *The Automated Will: Nonconscious Activation and Pursuit of Behavioral Goals*, 81 J. PERSONALITY & SOC. PSYCHOL. 1014 (2001)).

³⁰ *Id.*

³¹ Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4(1995).

³² *Id.*

³³ *Id.* at 8.

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These attitudes cause people to take action in favor of, or, conversely, against an object, while not realizing that they are expressing that attitude through their action.³⁴ For example, my favorite teacher in elementary school had red hair and freckles, and as a result, I have developed an affinity for people who have those features. I couldn't understand where that came from until I spoke with a friend who was in that class with me and she brought it to my attention and made the connection.

Greenwald and Kreiger's research has also shown that explicit and implicit attitudes toward a particular object may differ (dissociations).³⁵ These differences are commonly seen in an individual's attitude towards certain stigmatized groups; groups often defined by race, age, ethnicity, disability, or sexual orientation.³⁶ For instance, a person may outwardly express no particular issue with a stigmatized group, but their implicit attitudes may cause behavior toward a member of that group that is contrary to that outward expression. Interestingly, these dissociations, or mutually inconsistent ideas which are the product of our rational mind on one hand, and our intuitive mind on the other, occur even in those who would suffer disadvantage by the bias they carry, i.e. a gay person being implicitly biased against other gay individuals.³⁷

Implicit stereotypes are defined as "introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category,"³⁸ or a "mental association between a social group or category and a trait."³⁹ Studies have shown that when people evaluate members of a stereotyped group, they pay more attention to information that fits the stereotype while disregarding information that does not fit the stereotype.⁴⁰ Studies have also shown that people in fact seek out information which fits the stereotype and are better able to remember information that fits the stereotype, thus preventing stereotypes from being changed.⁴¹ These stereotypical qualities can be favorable, or unfavorable.⁴² For example, that tall people make great basketball players or suspecting all

³⁴ *Id.* at 8–9.

³⁵ Greenwald & Krieger, *supra* note 7, at 949.

³⁶ *Id.*

³⁷ MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE*, 58 (2013).

³⁸ Greenwald & Banaji, *supra* note 31, at 15.

³⁹ Greenwald & Krieger, *supra* note 7, at 949.

⁴⁰ Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 357, 371 (D.T. Gilbert, S.T. Fiske, & G. Linzey eds., 4th ed. 1998).

⁴¹ *Id.*

⁴² Greenwald & Krieger, *supra* note 7, at 950.

Arabs may be terrorists, whether considered to be favorable or unfavorable, can lead to discrimination.

Attitudes and stereotypes differ in that at the core of stereotypes is the content of the imputed trait, while at the core of attitudes is the degree of attraction or aversion that the individual feels toward the object.⁴³ In any event, as stated above, both are especially relevant to bias and discrimination, as implicit biases are discriminatory biases based on those attitudes or stereotypes.⁴⁴ Implicit biases are also “pervasive,” meaning many people act according to them, even people who openly declare their impartiality, such as judges.⁴⁵ This extensive pervasiveness is problematic because of the substantial effect on people’s behaviors, from the mundane, such as whether we observe someone engaging in simple acts of courtesy, to the consequential, such as how someone evaluates the quality of another person’s work product.⁴⁶

At least one study has shown that the more we attempt to deny that we have biases, the more we tend to be influenced by, and therefore act on those biases.⁴⁷ This lack of awareness of a problem, discomfort about inquiring into the unconscious mind, and individual fear of being labeled a discriminator make it difficult to address implicit bias.⁴⁸

C. *Implicit Bias vs. Discrimination*

Because implicit bias often appears in nebulous situations which provide room for judgment, choice, and interpretation, it is often difficult to distinguish when an implicit bias is at play or whether a person is being consciously discriminatory.⁴⁹ Discrimination is defined as “[t]reatment or consideration based on class or category. . . rather than individual merit; partiality or prejudice.”⁵⁰ Arguably, then, discrimination may also be deliberate, explicit, and, in this context, done with ill intent, whereas implicit

⁴³ *Id.*

⁴⁴ *Id.* at 951.

⁴⁵ Staats et al., *supra* note 10, at 63.

⁴⁶ Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 561 (2012).

⁴⁷ Nicole E. Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”*: *A Call for Self-Reflection*, 15 NEV. L.J. 930, 944 (2015) (citing the results of a study from 18 DUKE J. GENDER L. & POL’Y 1, 9 (2010)).

⁴⁸ Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and ‘Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 86 (2015).

⁴⁹ *Id.* at 87.

⁵⁰ *Bias*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 1.

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bias is generally performed at a subconscious level. While implicit bias should be distinguished from actual discrimination, as noted above, implicit attitudes do produce discriminatory behavior.⁵¹ According to Kimberly Papillon, who teaches implicit bias identification, implicit bias does not always appear in the form of old-fashioned prejudice, or racism that is reminiscent of a time when segregation was acceptable, but reflects attitudes or beliefs that are a result of the subconscious and are not always something the actor would openly approve.⁵² In sum, while the party acting in a discriminatory manner is aware of their own conscious discriminatory behavior, they may be unaware of any discriminatory behavior which is brought about by implicit bias. For this reason, it is pertinent that those who are in decision-making positions be aware of implicit biases which may lead to discriminatory behaviors. This includes mediators.

II. IMPLICIT BIAS CAN SIGNIFICANTLY IMPACT MEDIATION PROCESSES AND OUTCOMES

There are various types of biases, but all of them are often based on either warmth (whether or not we consider a person likeable, someone we feel comfortable around) or competence (assessment of another's ability to carry out intentions).⁵³ Of the two, warmth appears to be the primary indicator of how an individual will respond to people.⁵⁴ In other words, a person's first response will be emotionally driven based on how much the individual likes the other person and the secondary response will be based off on an assessment of their competence.⁵⁵ One study suggests that responding emotionally first before responding based on competence results in more active facilitation.⁵⁶ The study shows that perceptions of warmth will result in active behaviors, meaning groups perceived as warm usually elicit active facilitation (i.e., help), whereas a lack of perceived warmth usually results elicitation of active harm (i.e., attack).⁵⁷ Furthermore, perceptions of competence generally result in passive behaviors meaning that groups perceived as competent elicit passive facilitation (i.e., obligatory association and convenient cooperation), whereas

⁵¹ Greenwald & Krieger, *supra* note 7, at 961.

⁵² Hana Maruyama, *Implicit Bias Training Comes to Wyoming*, THE WYO. LAW., June 2014, at 39.

⁵³ ROSS, *supra* note 3, at 11 (describing data gained from a study conducted by Amy Cuddy, Susan Fiske, and Peter Glick).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 11–12.

⁵⁷ *Id.*

those perceived to lack competence usually elicit passive harm (i.e., feeling neglected or ignored).⁵⁸ Biases are likely to present themselves in different ways depending on which dimension (warmth or competence) elicits a reaction from an individual.⁵⁹

Consider warmth and competence in a mediation context. If a party has a bias against women, that party will likely not consider the woman mediator (or opposing party or counsel) as "warm." According to research, this perceived lack of warmth will have a secondary effect on that party's view of her competence, therefore causing the biased party to be less cooperative in the mediation.⁶⁰ Arguably, then, such lack of cooperation and facilitation will affect a difference in the mediation outcome. Also consider this idea of warmth and competence when it comes to the parties themselves. The parties are in mediation because there has been a conflict, and many times any warmth which may have existed before no longer exists. Think of the impact this can have on their dealings. Now throw attorneys in the mix and this could mean a very difficult resolution process.

Consistent with the arguments made above, one can argue that because implicit biases affect how we view each other, it follows that they also affect how we make decisions based on our interactions with each other. Implicit biases, then, may be considered particularly relevant in the mediation context because mediation often involves a process of interaction and decisionmaking between the parties. Research indicates that cognitive biases affect the way all people process information⁶¹ and, when they occur in the area of decisionmaking, they can cause individuals to remember information in biased ways (biased memories distort incident facts and cause us to deal in a biased manner towards others).⁶² Confirmation bias in particular can have an impact on decisionmaking, specifically where the disregard of critical information may have led to different or even better outcomes.⁶³ Confirmation bias will be discussed further below.

We can see that implicit biases and partiality reflect ideals which can benefit one side of a mediation, while harming the other. Therefore, parties or mediators who operate under the influence of these factors may compromise the mediation process, and a compromised mediation process likely

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347–348 (2007).

⁶² *Id.* at 353 (discussing the impact of memory errors in jurors, and citing that this conclusion is drawn from research in social cognition and human memory).

⁶³ Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 COLO. LAW. 45, 45 (2016).

diminishes the benefits of mediation. Take, for example, a mediation conducted by Thomas J. Stipanowich, as mentioned in his article *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*.⁶⁴ After mediating a construction case which he describes as "straightforward" and "highly productive," he and the attorneys on both sides of the discussion were extremely surprised when the claimant turned down the defendant's offer.⁶⁵ It turns out that the claimant, who was the only black man in a room full of white men, "had great trouble identifying with and trusting the process" and ultimately rejected the process.⁶⁶ What is clear in that example is that the claimant's biases prevented him from trusting the process, but what is not clear is whether Stipanowich (or any of the others in the room) were operating under any implicit biases that contributed to the claimant's distrust of the process. According to Professors Douglas N. Frenkel and James H. Stark, "[m]ediators are trained to employ a range of interventions in order to bring about a reduction and, ideally, a resolution of a conflict."⁶⁷ Where mediators are unable to employ the tools of their training or otherwise bring a resolution of a conflict because of biases (whether their own or those of the parties involved), then, one would necessarily argue that mediation is no longer a benefit for the parties to use as a dispute resolution process.

A. Party Implications

As noted above, implicit biases affect all of our behaviors, so it follows that they would have implications on the behavior of parties to a mediation as well.⁶⁸ These biases, then, can be said to have the potential to affect everything from selection of the mediator, or thoughts about the mediator, to how parties negotiate with each other.⁶⁹ For example, a party who has an implicit bias against a particular stigmatized group may view a member of that group as an incompetent mediator and therefore decline to hire that person as a mediator. If, on the other hand, the party does hire that particular mediator, the party may question the outcome based upon bias against the mediator. Additionally, if a party gets the impression that a mediator is biased, they are less likely to freely express ideas, thus jeopardizing resolution of the

⁶⁴ Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 CARDOZO J. CONFLICT RESOL. 513, 525 (2017).

⁶⁵ *Id.* at 526.

⁶⁶ *Id.*

⁶⁷ Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1, 17 (2015).

⁶⁸ See *supra*, notes 16–20 and accompanying text.

⁶⁹ See *supra*, notes 52–59 and accompanying text.

conflict.⁷⁰ While bias can and often does occur explicitly, in my opinion, there is a heightened danger when it occurs implicitly, as the lack of intentionality may make it difficult to redress inappropriate actions.

The same can arguably be said about the way parties interact with one another. The general notion is that parties who have biases (implicit or explicit) toward the other party in the mediation may, based upon that bias, negotiate differently than they would with a party against whom they are not biased. Research has shown that these biases can negatively influence the judgments made about identical actions or objective states (such as nebulous acts or facial expressions) based upon the group to which one belongs.⁷¹

Pedestrian observation shows that there are many types of biases, including, but not limited to, those based on race, age, sexual orientation, and gender. For the purposes of this paper, I will highlight the following biases: confirmation bias, attribution bias, and affinity bias. These biases are unconscious, likely to manifest themselves through the behavior of the parties, and, I believe, based upon other biases.

Confirmation bias occurs when a person has a tendency "to gather information or respond to a circumstance that confirms their already established beliefs or ideas."⁷² This bias causes the person to focus on information that confirms their existing beliefs while disregarding contradictory information.⁷³ For example, suppose a party believes that the other party to a mediation is untruthful, and the latter innocently misstates something, the biased party will likely then use the misstatement to bolster their position that the other party is a liar and should not be trusted in the mediation. Studies show that not only do biased individuals ignore or disregard contradictory information (i.e., when the "untruthful" party immediately corrects the mistake), they actually critically examine it in an effort to undermine the information, which occurs even where the contradictory evidence is more probative.⁷⁴

Empirical data supports the existence of confirmation bias in many judgment contexts, including "economics, criminal investigations, medical decision-making, political beliefs, logical problem solving, forensic analysis,

⁷⁰ Richard S. Mark et al., *Alternative Dispute Resolution Can Beat Litigation*, 67 PRAC. TAX STRATEGIES 227, 239 (2001).

⁷¹ Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 134 (2002).

⁷² ROSS, *supra* note 3, at 49.

⁷³ Nalty, *supra* note 63, at 45.

⁷⁴ Ashley Lattal, *The Hidden World of Unconscious Bias and its Impact on the "Neutral" Workplace Investigator*, 24 J.L. & POL'Y 411, 436 (2016).

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and social interaction.⁷⁵ Confirmation bias also has the potential to occur when someone receives information about the demographic traits or qualities of another prior to meeting them.⁷⁶ For example, a study conducted on MIT students showed that when they received information that a particular instructor was a cold or warm person prior to his arrival, they rated that instructor consistent with the information they received after having class with them.⁷⁷ This type of confirmation bias arguably has an impact on the mediator; a party may base their experience with the mediator on information received prior to the mediation, as opposed to how the mediator actually performed.

According to Russel Korobkin, “[a]ttribution theory considers how people attribute causal meaning to behavior.”⁷⁸ Individuals can either attribute an event to dispositional characteristics (such as personality traits) of the actor, or situational characteristics.⁷⁹ Specifically, a person will usually make more favorable assessments of behaviors and circumstances for individuals in their “in-groups” (by giving them second chances and the benefit of the doubt) while judging people in their “out-groups” by less favorable group stereotypes.⁸⁰ For example, put into perspective, if an individual has an appointment with someone of their “in-group,” and that person arrives late due to traffic, the former will likely understand the traffic as a valid (situational) reason for being late. Conversely, if the late person is a member of an “out-group,” the other will attribute the lateness to some (dispositional) character trait of the late person.

In a mediation, imagine that one of the parties has an unconscious bias against young, white, males, believing them to be arrogant and self-entitled. If the other party, or even the mediator, fits this description, the biased party will view any act of confidence or request for concession on the part of the young, white, male as fitting the stereotype. On the other hand, if the other party or the mediator share the same profile or demographic traits as the biased party, the biased party is likely to see the same behavior as mere confidence.

Affinity bias occurs when an individual tends to favor people who are more like them and who share similar interests and backgrounds, thus leaving others out.⁸¹ This bias is described as an “innate tendency” and a “motivational

⁷⁵ *Id.* at 435.

⁷⁶ *Id.* at 436.

⁷⁷ ROSS, *supra* note 3, at 46.

⁷⁸ Russell Korobkin, *Psychological Biases that Become Mediation Impediments Can Be Overcome with Interventions that Minimize Blockages*, 24 ALTERNATIVES TO HIGH COST LITIG. 67, 69 (2006).

⁷⁹ *Id.*

⁸⁰ Nalty, *supra* note 63, at 47.

⁸¹ *Id.* at 46.

driver for all of us."⁸² This causes us to want to surround ourselves with people who make us feel comfortable.⁸³ For example, a party to a mediation who views the mediator as more "like them" may be more willing to work with that mediator than with another. I can recall co-mediating with my Arab colleague where the parties were Arab and African-American. Initially, I spoke with the Arab party regarding whether he wanted to mediate his dispute. He was adamant that he did not want to mediate. My colleague spoke with him, and he decided that mediation could provide a better outcome for him. I was unable to get very far with the Arab party while my Arab colleague was not only able to get him to the table, but also to make concessions. The same was true for me when working with the African-American Party. Ultimately, the parties came to an agreement. It is my belief that it had to do with each party's individual level of comfort and therefore trust, with working with a mediator who was "like them."

B. Mediator Implications

Mediators are tasked with understanding the roots of conflict as well as the "various strategic, structural, cultural, psychological, and cognitive barriers" to resolving conflict.⁸⁴ This understanding allows them to use the appropriate tool from their mediator arsenal to overcome these barriers when they surface.⁸⁵ In my experience, parties choose mediation because they want to be able to resolve their dispute with assistance from someone who has no "stake in the outcome" except to help facilitate the outcome. It has also been my experience that parties expect that each side will be treated fairly by the mediator and that a space will be created where they can come to a mutual and satisfactory agreement. It follows from this general knowledge of mediation that a mediator operating under influence of an implicit bias is likely to be partial to one side; she may even slant the conversation toward or away from possible creative solutions. Therefore, I argue that if a mediator's biases impact their ability to provide a balanced process, this imbalanced process leads to unnatural outcomes.

The presence of bias or partiality in a mediator is contrary to the process and is of no moral benefit to the parties; however, mediation has proven a difficult profession to regulate and as a result, some practicing

⁸² Sidney Calloway & Dominique Bright-Wheeler, *Business Acumen for Diverse Attorneys: The Invitation's out but Can We Dance?*, 56 No. 8 DRI FOR THE DEF. 73, Aug. 2014, at 76.

⁸³ *Id.*

⁸⁴ Frenkel & Stark, *supra* note 67, at 18.

⁸⁵ *Id.*

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mediators may not be taught ethical standards or have any requirement to follow ethical rules absent an affiliation with an organization which has its own ethical rules.⁸⁶ While some states, court rules, and provider organizations have established standards of ethics for mediators, the most common sources of ethical standards for mediators are mediation organizations such as the American Bar Association Section of Dispute Resolution, The Association for Conflict Resolution, and the American Arbitration Association, all of which have adopted the Model Standards of Conduct for Mediators.⁸⁷ There is some legal oversight in the form of liability for mediator malpractice, which often stems from ethical violations including bias,⁸⁸ as mediators do have an ethical duty to refrain from explicit bias and partiality in mediation.⁸⁹

Mediator ethics stress neutrality and freedom from bias⁹⁰ so much so that ethical rules generally require mediators to do the following: (1) engage in self reflection to determine whether they are biased; “(2) disclose the bias to the parties; and (3) withdraw under the appropriate circumstances.”⁹¹ Arguably, these rules are a step in the right direction, but they are designed to address explicit bias. Recall that implicit bias is unconscious, and self-reflection may not adequately identify implicit biases a mediator may have.⁹² It is therefore imperative that mediators learn more about implicit biases, specifically their own, in order to maintain their ability to provide a balanced process. According to Kimberly Papillon, implicit bias may even cause one to “empathize more for one person versus another”⁹³; this would clearly compromise neutrality and neutrality is key to preventing a mediator from building a process which would privilege any particular party or point of view. Accordingly, neutrality assures that the process is fair and open, and that each party is able to participate fully and in a meaningful way. Because we all have

⁸⁶ Kristen M. Blankley, *Is a Mediator Like a Bus? How Legal Ethics May Inform the Question of Case Discrimination By Mediators*, 525 GONZ. L. REV. 327, 351 (2016).

⁸⁷ *Id.* at 352 (citing the Model Standards of Conduct for Mediators as the leading authority on the standards of ethics for mediators).

⁸⁸ *Id.* at 351–52.

⁸⁹ *Id.* at 352, *see* AMERICAN BAR ASSOCIATION SECTION OF DISPUTE RESOLUTION, AM. BAR. ASS'N, http://www.americanbar.org/groups/dispute_resolution.html; ASS'N FOR CONFLICT RESOL., <https://www.acrnet.org/>; MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. ARB. ASS'N; AM. BAR ASS'N; ASS'N FOR CONFLICT RESOL. 2005).

⁹⁰ *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. ARB. ASS'N; AM. BAR ASS'N; ASS'N FOR CONFLICT RESOL. 2005).

⁹¹ Blankley, *supra* note 86, at 354 (citing the Uniform Mediation Act (UMA) and Model Standards of Mediation in regard to withdrawal due to impartiality as well as the California and Florida court rules).

⁹² *See supra* note 10 and accompanying text.

⁹³ Hana Maruyama, *Implicit Bias Training Comes to Wyoming*, THE WYO. LAW., Jun. 2014, at 38.

biases (both explicit and implicit) and therefore in my view are incapable of being neutral, the use of the word neutrality in this paper means providing a process which does not show favor to one side or the other.

III. IMPLICIT BIAS TESTING AND EFFORTS TO ADDRESS IT SHOULD BE CONSIDERED PRIOR TO MEDIATION

According to Kimberly Papillon, “[a]ll of us are responsible for our implicit and explicit biases . . . [and] we need to learn about them and work to make sure they don't affect our decisions.”⁹⁴ The latest scientific studies show us how.⁹⁵

Research has shown that the best way to combat implicit bias is to become aware of the bias and take steps to improve it.⁹⁶ Some suggest that an effective method is to (1) become aware of our implicit bias; (2) be concerned about impact of the bias; and (3) learn to replace biased responses with “non-prejudiced” ones, or those that match more closely with the values that people believe that they intentionally hold.⁹⁷ In attempting to address implicit bias, we should take care to avoid any discussion of blame, or derogatory labeling, and instead support the development of heightened awareness.⁹⁸ Below I will discuss the most common way to identify implicit bias.

A. *Implicit Bias Testing*

While other implicit measures have been developed and used in research, the Implicit Association Test (IAT) has been the most widely used.⁹⁹ It has been extended into various areas and applied to a wide variety of groups and social categories, with more investigation being given to implicit attitudes than to implicit stereotypes.¹⁰⁰ In an effort to test the validity of the IAT, many studies utilize IAT attitude measures in addition to a measure of one of more social behaviors thought to be related to attitude or stereotype measures.¹⁰¹ As a result of studies conducted, examined behaviors varied, and data was

⁹⁴ *Id.* at 39.

⁹⁵ *Id.*

⁹⁶ See Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U.J.L. & POL'Y 71, at 141–42 (2010).

⁹⁷ See Bridget Murray Law, *Retraining the Biased Brain*, 42 MONITOR ON PSYCHOL., Oct. 2011, at 42, 43.

⁹⁸ Greenberg, *supra* note 48, at 88–89.

⁹⁹ Greenwald & Krieger, *supra* note 7, at 952 n.23.

¹⁰⁰ *Id.* at 953–54.

¹⁰¹ *Id.* at 954.

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analyzed to determine whether individual differences in implicit attitudes or stereotypes measured by the IAT correlated with individual differences in behavior.¹⁰² In a meta-analytic review of 61 of the studies, Poehlman, Uhlmann, Greenwald, and Banaji appraised the value of IAT measures by “assessing the relevant body of research in the aggregate.”¹⁰³ What was found was that “[b]oth the implicit (IAT) and the parallel explicit measures displayed *predictive validity*, meaning that both type measures, on average, were significantly correlated with measures of behavior, as expected.”¹⁰⁴ Additionally, “within the critical group of studies that focused on prejudicial attitudes and stereotypes—in other words, within the studies of implicit biases—predictive validity was significantly greater for the IAT measures.”¹⁰⁵ More importantly, in socially sensitive settings, where impression management processes restrain people from making negative remarks about a group or stereotyping, implicit measures of bias generally have greater predictive validity than explicit measures.¹⁰⁶ In addition, spontaneous behaviors, such as eye contact, seating arrangement decisions, and other behavior that communicate social warmth or discomfort also tend to be validly predicted at a greater rate when implicit measures are used.¹⁰⁷

The IAT measures a wide variety of group-valence and group-trait associations that are often found underlying an individual’s attitude or propensity to stereotype.¹⁰⁸ It is considered an implicit measure because such group-valence and group-trait associations are inferred from associations respondents to the test are not aware of.¹⁰⁹ Research that compares the IAT implicit measures with otherwise comparable self-reported explicit measures has found systematic variations in the connection between implicit and explicit measures.¹¹⁰

There is substantially greater agreement between the two types of measures when implicit and explicit attitudes have been shaped by the same experiences, which is likely to be the case for attitudes toward

¹⁰² *Id.*

¹⁰³ *Id.* See also Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009).

¹⁰⁴ Greenwald & Krieger, *supra* note 7, at 954 (emphasis in original).

¹⁰⁵ *Id.* (emphasis in original).

¹⁰⁶ *Id.* at 954–55.

¹⁰⁷ *Id.* at 955.

¹⁰⁸ Greenwald & Krieger, *supra* note 7, at 952.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 953.

consumer brands, sports teams, and political candidates.¹¹¹ When implicit and explicit measures of attitudes or stereotypes disagree—for example, when a Race IAT shows preference for EA and self-report measure shows impartiality—there is said to exist a dissociation between the two.¹¹²

Testing to make oneself aware of implicit bias seems to be a daunting and uncertain task, as no one wants to admit that they engage in discriminatory behavior, especially when we make conscious efforts to avoid engaging in such behavior. Despite the fact that implicit bias research shows that these biases are not about being a good person, or a bad person, most people don't want people to believe that they are a discriminator.¹¹³ It seems, then, that when confronted with the inconsistency between what we consciously express as our values and the implicit biases we hold, individuals react in a number of ways. Some repress or deny that bias exists; others engage in defensive rationalization where they fortify their bias by example of supportive evidence for their biased reaction; while others still alternate his/her actions based on the situation; there are also those who are so uncomfortable with the inconsistency (implicit bias and explicit expression) that they endeavor to develop consistency between the two.¹¹⁴ These varying responses appear to reflect the difficulty most find in accepting that they have biases; however, acceptance that we have biases is the only way to address them and prevent them from causing us to engage in negative behavior.

B. *Ways to Address Implicit Bias*

Mere knowledge of implicit biases is of no consequence if the biased party has no plans to address the bias. Once testing has identified specific biases, training and other debiasing strategies should be utilized to address them and prevent inappropriate behavior based upon them.

Many trainings have been developed to address the issues presented by implicit bias.¹¹⁵ In order to be effective, however, training programs must contain relevant content, and must be consistent, ongoing, and long term.¹¹⁶

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Greenberg, *supra* note 48, at 88.

¹¹⁴ *Id.*

¹¹⁵ Staats et al., *supra* note 10, at 39.

¹¹⁶ Lattal, *supra* note 74, at 453.

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Some of the effective trainings include: mindfulness meditation to decrease the participant's implicit biases; individual training which increases the ability to distinguish different objects using other-race faces; and diversity training (not focused specifically on race or ethnicity).¹¹⁷ Because of the lack of regulation of the mediation field, trainings may not be a feasible approach for addressing any biases prior to mediation, however, both parties and the mediator alike can employ other strategies for debiasing which have shown to be effective.¹¹⁸ There is also apparently nothing preventing mediators from discovering their implicit biases through testing and obtaining training to address them as a general practice. Additionally, mediators need to be observant of how the implicit biases of the parties manifest themselves during the process, so that we can employ appropriate techniques to combat them. As we have seen, while implicit biases are not consciously had by the individual, it does not mean that they cannot be observed by others through their behavior. Testing to identify our own implicit biases may help us to be able to recognize when those of the parties are affecting our process.

One Kirwan Institute publication refers to debiasing as “reprogramming” our existing cognitive associations.¹¹⁹ Because of the malleable nature of implicit biases and the complex structure and organization of our brains, unlearning implicit associations will take time and requires a variety of debiasing techniques.¹²⁰

During the past thirty years, social scientists have investigated how “mental simulation” prompts may help reduce bias.¹²¹ These prompts may be described as interventions that prompt the subject to generate alternative beliefs, hypotheses, explanations, or predictions they would have otherwise focused on, and then to explain the alternatives.¹²² One such method which has been given much attention in research is “consider the opposite” prompts, where the subjects must “list, explain or imagine in detail reasons why their answer, their hypothesis, their prediction of future events, or their proposed decisions might be wrong.”¹²³ Several studies have shown that these prompts can mitigate bias.¹²⁴

The development of the capacity and propensity for perspective-taking is another method of reducing biases, specifically egocentric biases,

¹¹⁷ See generally, Staats et al., *supra* note 10.

¹¹⁸ Lattal, *supra* note 74, at 39–43.

¹¹⁹ Staats et al., *supra* note 10, at 39.

¹²⁰ *Id.*

¹²¹ Frenkel & Stark, *supra* note 67, at 22.

¹²² *Id.*

¹²³ *Id.* at 23.

¹²⁴ *Id.* at 23–28 (describing the various studies).

hostile attributions, and other motivated and perceptual distortions that are done subconsciously.¹²⁵ This requires the individual to place himself in the shoes of another and to actively image that person's point of view.¹²⁶ This process differs from empathy in that it is seen as the cognitive process of attempting to understand how the world perceives or treats another person, whereas empathy requires one to feel what another is experiencing emotionally.¹²⁷ Research has shown that when individuals make deliberate efforts to consider the perspective of others, they can enhance the objectivity in their thought processes.¹²⁸ Some additional findings on the effects of perspective-taking include: reduction in stereotyping; recognition of the "self in others;" more positive evaluation of out-group members; and reduction of negative evaluations based on race.¹²⁹

Challenging your own thinking can also be used as a debiasing technique.¹³⁰ When becoming aware of the fact that you make negative, stereotype-based judgments about others, immediately ask yourself why you are bothered by people in that particular group or why you think all members of a particular group engage in a certain stereotype.¹³¹ After asking these questions, actively challenge your belief by a "conscious act of will" to eliminate the stereotype.¹³² Some additional debiasing strategies include: inter-group contact (with those outside of your immediate in-group); emotional expression; counterstereotypical exemplars (seeking examples who do not fit your own biased stereotype);¹³³ self-education; and "Courageous Collaboration."¹³⁴

Some recommended ways you can work on your own to overcome biases include: retraining your brain; actively doubting your objectivity; opposing your own stereotyped thinking; deliberately looking for and exposing yourself to counter-stereotypical models and images; reminding yourself that you have unconscious biases; engaging in mindfulness exercises before participating in activities which may trigger stereotypes; finding commonalities; and cultivating relationships with people of different social

¹²⁵ *Id.* at 34.

¹²⁶ *Id.*

¹²⁷ Frenkel & Stark, *supra* note 67, at 34.

¹²⁸ *Id.* at 35.

¹²⁹ *Id.* at 36 (citing Andrew R. Todd, et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011)).

¹³⁰ Nalty, *supra* note 63, at 47.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Staats et al., *supra* note 10, at 51–53.

¹³⁴ WHAT IS COURAGEOUS COLLABORATION?, <http://courageouscollaboration.mobar.org/> (last visited Sept. 22, 2017).

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identities.¹³⁵ Some even believe that you should avoid ignoring differences, and instead “acknowledge differences and work to ensure that they aren't impairing your decision-making—consciously or unconsciously.”¹³⁶

Some argue that debiasing techniques often only have temporary results that only reduce and do not eliminate implicit biases.¹³⁷ These individuals point to research indicating that the most effective way to have long-term changes in implicit biases is to develop a personal connection with a member of the devalued outgroup.¹³⁸

C. Party Implications

Some studies have shown that debiasing can have an effect on how parties negotiate with each other.¹³⁹ For example, when perspective-taking is used as a strategy in negotiation, it has a “curative” effect on “anchoring” and “fixed-pie” biases.¹⁴⁰ These biases are believed to be the most prevalent ones in negotiations.¹⁴¹ If debiasing can have a curative effect on these particular biases in terms of negotiation, they are also likely to have a curative effect on other implicit biases (i.e. confirmation, attribution, affinity) which may occur during negotiations.

D. Mediator Implications

Understanding perspectives is a cornerstone skill used by mediators. As a neutral party, whose responsibility it is to guide the participants to an acceptable resolution, mediators must be able to see how each participant in a dispute views and experiences it.¹⁴² Perspective-taking is necessary to produce the change required to resolve the conflict and/or improve the parties' understanding of each other.¹⁴³ Mediators who understand how important perspectives are to mediation should be able to see the benefit in using perspective-taking as a way to debias (once biases have been identified).

While I could find no documented evidence that unconscious biases of mediators have had an impact on the settlement of cases in mediations,

¹³⁵ Nalty, *supra* note 63, at 48–49.

¹³⁶ *Id.* at 49.

¹³⁷ Greenwald & Krieger, *supra* note 7, at 962–64.

¹³⁸ *See id.* at 964 (stating that this personal connection may lead to dramatic and rapid changes in implicit attitudes).

¹³⁹ Frenkel & Stark, *supra* note 67, at 40.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 43.

¹⁴³ *Id.*

because of all of the research discussing how implicit biases affect our behavior, it follows that those biases likely do have some impact on mediators. The question then becomes, if mediators are settling cases at a rate of 90%, does it matter whether they have unconscious biases? Should we place more value on the settlement of the cases, or the way in which a mediator's biases affect their interactions with the parties and their architecture of the process?

Some would argue that since mediators are only decisionmakers in mediation to the extent of how they craft their processes, their biases aren't relevant. According to attorney, mediator, and arbitrator, Douglas Noll, mediator implicit biases can only impact mediation if the mediator utilizes a process where the parties do not have complete self-determination.¹⁴⁴ In this type of process, the decisions made by the parties, whether based on implicit or explicit biases, are not the concern of the mediator.¹⁴⁵ The parties are free to agree to whatever terms they are comfortable with, despite the impetus behind the term.¹⁴⁶ Others would argue that they are very relevant and, at a minimum, mediators should be aware of their unconscious biases. Mediators are constantly tasked with checking themselves to avoid compromises in neutrality, so perhaps that is enough to negate the impact of any implicit biases. I believe that mediator unconscious biases are important, but if they are truly unconscious, is there any true way to quantify the impact that they have on mediators and therefore the mediation process?

IV. IMPLICIT BIAS TESTING AND TRAINING WILL CHANGE THE OUTCOME OF MEDIATIONS BECAUSE THESE TOOLS IDENTIFY BIASES WHICH THE MEDIATOR AND PARTIES ARE UNAWARE OF AND ALLOW THEM TO DEVELOP TOOLS TO COUNTER THOSE BIASES

We have learned through research that implicit bias testing can identify unconscious biases. Additionally, once those biases are identified, training and debiasing strategies can be used to provide tools to counter them. Because implicit biases are learned sociological and neurological habits, just like other habits they may be broken with added awareness and specific strategic interventions.¹⁴⁷ Awareness and tools are only the beginning; as with

¹⁴⁴ Interview with Douglas E. Noll, Esq., Mediator and Arbitrator, Noll Associates, in Clovis, California (July 24, 2018).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Greenberg, *supra* note 48, at 89.

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all habits, in order for any intervention to be successful, the individual must have a desire to break the habit.¹⁴⁸

It is also important to understand that interventions to reduce the influence of implicit bias are “more likely to be successful if they are accompanied by information about how implicit bias and racial [or gender, or culture, or sexual orientation, etc.] anxiety work.”¹⁴⁹ Without this information, many will not recognize that these biases affect their behavior toward the marginalized party (no self-awareness); and with no awareness, the issue will not be fully addressed.

Research and data has shown us the following: (1) implicit biases affect our behavior towards each other; (2) testing can identify implicit biases; (3) trainings, strategies, and tools have been developed to address implicit bias; and (4) the testing, training, strategies and tools have been proven effective. It follows then that identification and countering of unconscious biases can have an impact on mediation outcomes. Arguably, this change will come in the form of trust and fair dealing in the mediation process. Therefore, a lack of bias can in turn effect a trust understanding and a trust understanding in mediation allows the parties to have faith in the competence of the mediator (absent some other reason to distrust the mediator). This trust understanding will also allow the parties (representative counsel included) to be more willing to negotiate fairly with the other side. Fair negotiation will lead to fairer outcomes, the data on which is likely currently skewed because of the role which implicit bias plays in out interpersonal interactions.

V. CONCLUSION

Implicit bias affects us in all areas of our lives including in our conflicts. People come to mediation hoping to get some resolution in their conflicts, but also bring their biases into the process. Additionally, the mediator herself comes to the mediation with biases which will no doubt affect the way in which she facilitates the process. While the role of mediator inherently prepares the mediator with ways to combat bias (trust building, rapport building, etc.) these ways may not be enough. With knowledge that we have biases which we are unaware of and that we know can negatively affect our behavior towards one another, it is important that we attempt to identify and address those biases prior to mediation. Mediation is designed to be an autonomous, cooperative process with the goal in mind to work together for

¹⁴⁸ *Id.*

¹⁴⁹ Rachel D. Godsil, *Answering the Diversity Mandate: Overcoming Implicit Bias and Racial Anxiety*, N.J. LAW. 25, 26 (Feb. 2014).

resolution of the conflict. If implicit biases are not identified and addressed, that designation could be seriously undermined.

None of the methods provided in this paper are proposed to be the best and only way to combat implicit bias, but they are a step in the right direction. If the formula for conquering implicit bias is to become aware of your own biases, have concern for the consequences of the bias, and replace the biased responses with non-biased responses it is imperative that we look to the testing, training and techniques as avenues for accomplishing this goal. Mediation outcomes can only benefit from addressing implicit bias so mediators and parties alike should take the responsibility of purifying their process.