

Implicit Bias in Mediation: Strategies for Mediators to Engage Constructively with “Incoming” Implicit Bias

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I. INTRODUCTION

“You are not who I expected as the mediator. . . .” Hearing those words from a party in my employment discrimination mediation surprised me, not so much for the thought itself, but that he chose to articulate it so directly. It confirmed a hunch I had that some parties might be surprised to find me—a younger, Asian woman—as their mediator. While this exchange occurred a few years ago, it has stayed with me as I am periodically reminded of my relatively unique status as a non-white, younger, female mediator.

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In our currently polarized political climate and communities, where identities and biases have permeated the mainstream consciousness and conversation, it is an apt time to consider how implicit bias may impact a mediator, whose task is to be perceived and act in a neutral manner. If we can accept that research has demonstrated that we all hold implicit biases,¹ it is a natural extension to consider how these social cognition stereotypes may play out in a mediation: (1) as the subject matter of the mediation; (2) from party to party; (3) from the mediator toward a party; and (4) from a party toward the mediator.

While other articles² have explored how a mediator may become aware of and work with her own implicit biases in mediation, this article will explore how a mediator may account for and engage with implicit bias directed toward her in her role as mediator. Specifically, the focus of this article is implicit attitudes or social stereotypes participants might have toward mediators that would not comport with their professed egalitarian views. Just as mediators receive training on identifying interests, exploring options with parties, and working with their own biases, this article provides reflections and guidance on how a mediator can consciously consider and approach implicit biases that might impact how the parties interact with the mediator and the overall course of the mediation. While this is an important issue for all mediations, it has heightened significance in workplace and employment discrimination cases where the underlying claim is related to alleged bias; that will be the context for cases explored in this article.

1. See *infra* Section II.

2. See Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71 (2010); Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681 (2017). See generally Kristen M. Blankley, *Is a Mediator Like a Bus? How Legal Ethics May Inform the Question of Case Discrimination by Mediators*, 52 GONZ. L. REV. 327, 360–65 (2017) (arguing that mediators should withdraw from cases in which their bias against a party may jeopardize their neutrality as mediators). The impact of implicit bias on mediator neutrality has also become a popular topic for continuing education programs for mediators. See generally Laura A. Josephson-Bernat, *Imperfect Impartiality: Implicit Bias in Mediation*, International Academy of Dispute Resolution World Mediation Congress, Loyola University Chicago (March 6–7, 2018), <http://www.inadr.org/wp-content/uploads/2018/03/Implicit-Bias-Laura-Josephson-Bernat.pdf> [<https://perma.cc/V2RC-KYEV>]. Mediation participants have also begun to share advice on how to counteract implicit bias in mediation as participants. See generally Sean C. Griffin, *Thumb on the Scale: How Unconscious Bias Can Affect ADR Process and What to Do About It*, 57 FOR THE DEFENSE 28 (May 2015), <https://www.foster.com/assets/htmldocuments/pdfs/ForTheDefenseGriffin.pdf> [<https://perma.cc/UG53-BMG5>].

This article will be organized as follows: (1) a brief overview of social science research on implicit bias; (2) a review of how implicit bias has manifested in the workplace and factored into employment discrimination cases; and (3) strategies for mediators to engage with the inevitable implicit biases parties may carry into the mediation, specifically related to (a) mediator selection; (b) co-mediator roles; and (c) parties' identity-related comments in the mediation.

II. BRIEF OVERVIEW OF IMPLICIT BIAS RESEARCH

While the term "implicit bias" has become ubiquitous in recent years, psychologists have been researching unconscious bias for decades.³ In recent years, research has confirmed and made more widely understood the idea that we all carry hidden, implicit biases.⁴ In contrast to explicit bias,⁵ implicit bias may be defined as positive or negative "attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner,"⁶ as compared to explicit bias, defined as self-reported, conscious bias or prejudice.⁷

3. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013); Jerry Kang, *Implicit Bias: A Primer for Courts: Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts*, National Center for State Courts (Aug. 2009). See generally John T. Jost et. al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORG. BEHAV. 39, 39–69 (2009) (describing current implicit bias research as the latest extension of social psychological research on implicit bias from the last thirty years).

4. *Id.*

5. See Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. C.R.L.J. 1, 22–23 (2015) (describing "explicit bias" as what "we typically think of as prejudice: ethnocentrism, racism, and other consciously endorsed attitudes, for example, positive or negative feelings or beliefs, like stereotypes, about people based upon their membership in a socially-defined group").

6. Cheryl Staats, Kelly Capatosto, Robin A. Wright & Danya Contractor, *Appendix A: Primer on Implicit Bias in Kirwan Institute for the Study of Race and Ethnicity, State of the Science: Implicit Bias Review 2015*, 62 (2015), <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>; see also Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006) (describing implicit bias as "discriminatory biases based on implicit attitudes or implicit stereotypes").

7. Likewise, "explicit attitudes" and "explicit stereotypes" are considered to be those you "deliberately think about and report," whereas an "implicit stereotype" is "relatively inaccessible to conscious awareness and/or control" and an "implicit attitude" is a positive or negative evaluation that is much less accessible to our conscious awareness and/or control. *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html#faq10> [<https://perma.cc/Z364-QVWS>] (last visited July 20, 2020).

“Implicit cognition,” or mental processing that functions outside “conscious attentional focus,” encompasses “implicit memory, implicit perception, implicit attitudes, implicit stereotypes, implicit self-esteem, and implicit self-concept.”⁸ In addition to being a topic of extensive academic research (psychological and legal), implicit bias has been the focus of countless mainstream media articles wherein researchers are able to bring the term to life in accessible and relatable ways for “lay” audiences,⁹ thereby increasing general awareness of implicit bias.

Curiosity about the “thumbprint of the culture on our brain”¹⁰ led to the creation of the Implicit Association Test (IAT) in 1998.¹¹ Three social psychologists—Harvard University Professor Mahzarin R. Banaji, University of Washington Professor Anthony Greenwald, and University of Virginia Professor Brian Nosek—developed the IAT to measure “the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy).”¹² The main idea behind the test is that test takers are able to more quickly respond when two closely related

8. Greenwald & Krieger, *supra* note 6, at 947 (contrasting the layperson’s “psychological conception of social behavior” with the “science of implicit cognition [which] suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions”).

9. See *How the Concept of Implicit Bias Came into Being*, NATIONAL PUBLIC RADIO (October 17, 2016), <https://www.npr.org/2016/10/17/498219482/how-the-concept-of-implicit-bias-came-into-being> [<https://perma.cc/G79A-GZTJ>] (interviewing Mahzarin Banaji regarding the origin of the term “implicit bias”). In this interview, Professor Banaji describes implicit bias as a theory based on a combination of two factors: (1) how our brains pick up information and (2) the culture around us. To understand how these two components work in concert, we can take the example of medical professionals. If we repeatedly see doctors who are male and nurses who are female, our brain will learn that association. However, going to the second component, if we live in a culture where more men were nurses and more women were doctors, we would have the opposite bias.

10. *Mahzarin Banaji on Implicit Bias*, SOCIAL SCIENCE BITES (Aug. 2, 2018), <https://www.socialsciencespace.com/2018/08/mahzarin-banaji-on-implicit-bias/> [<https://perma.cc/R6HY-MT3K>]. See also Jennifer Schmidt et al., *The ‘Thumbprint of the Culture’: Implicit Bias and Police Shootings*, WBUR (June 5, 2017), <https://www.wbur.org/npr/531578107/the-thumbprint-of-the-culture-implicit-bias-and-police-shootings> [<https://perma.cc/ZJ3R-5GZV>] (quoting Mahzarin Banaji describing implicit bias).

11. The IAT was created in 1995 as a laboratory tool and first began to be used on the web in 1998. See *Frequently Asked Questions About the IAT*, UNDERSTANDING PREJUDICE, <https://secure.understandingprejudice.org/iat/faq.htm> [<https://perma.cc/Q929-Y3NV>] (last visited July 20, 2020).

12. *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html> [<https://perma.cc/K46Q-JL4Y>] (last visited July 20, 2020).

or associated items share the same computer response key. For example, someone would demonstrate an “implicit preference” for straight people relative to gay people if they were able to more quickly pair “Straight People + Good” / “Gay People + Bad” as compared to the opposite pairing (“Gay People + Good” / “Straight People + Bad”).¹³

Countless people who have taken the IAT¹⁴ have experienced the unsettling realization that they might have biases against certain social groups (typically those that have been stigmatized) and biases in favor of others (typically “socially valued groups”).¹⁵ And despite receiving the computerized results of an IAT (or many IATs), some people may still disagree with the results, wanting to view themselves as fundamentally “good” people with positive motivations who treat others from diverse backgrounds with equal respect. This exact response was in fact experienced by one of the co-creators of the IAT, Mahzarin Banaji. As a South Asian woman who has devoted her professional work to understanding bias and how our minds acquire them, she was particularly struck by her initial results on the race IAT, which indicated that she had a “preference” for White over Black.¹⁶ Initially doubting the test, she and IAT co-creator Anthony Greenwald (who shared the same result) re-examined the test’s design to find whatever bug must have given rise to her surprising test result; they found no such bug.¹⁷ Instead, they concluded that the test was set up properly, confirming their conclusion that we all carry “mind bugs”¹⁸—even despite our professed egalitarian views—based on socially created stereotypes and past experiences. While earlier interpretations of the IAT’s results raised the prospect of predicting individual discriminatory behavior, it is now widely seen as a way to understand predictive behavior in the aggregate based on the prevailing attitudes in our society.¹⁹

13. *Id.*

14. *Id.*

15. *Id.*

16. Carolyn Y. Johnson, *Everyone Is Biased: Harvard Professor’s Work Reveals We Barely Know Our Own Minds*, BOSTON GLOBE (Feb. 5, 2013), <https://www.boston.com/news/science/2013/02/05/everyone-is-biased-harvard-professors-work-reveals-we-barely-know-our-own-minds> [https://perma.cc/YC8G-KH5P].

17. *Id.* See also BANAJI & GREENWALD, *supra* note 3, at 45–52.

18. BANAJI & GREENWALD, *supra* note 3, at 4. The authors define “mindbugs” as “ingrained habits of thought that lead to errors in how we perceive, remember, reason, and make decisions.”

19. While Greenwald and Banaji argued in their 2013 book, *Blindspot*, that the IAT may be predictive of individual discriminatory behavior, their current perspective on the research emphasizes predictive behavior in the aggregate. BANAJI & GREENWALD, *supra* note 3. See Patrick S. Forscher et al., *A Meta-Analysis of Procedures to Change Implicit Measures*, 117(3) J. PERSONALITY & SOC. PSYCHOL. 522, 543 (2019)

Along with research to better understand implicit bias, social scientists have identified specific ways in which people can decrease the impact of implicit bias on their behavior. Two of the most promising strategies identified by researchers include (1) individual awareness and internal motivation to not act in a prejudicial way,²⁰ and (2) exposure to counter-stereotypical exemplars.²¹ Other strategies that have been shown to have a positive impact on reducing the undesired impact of implicit bias on our actions include individuation,²² in-the-moment reminders,²³ and meditation.²⁴ Given that the “individual

(concluding that changes in “implicit measures” or “response bias on implicit tasks” may not consistently correspond to changes in behavior); Tom Bartlett, *Can We Really Measure Implicit Bias? Maybe Not*, CHRON. HIGHER EDUC. (Jan. 5, 2017), <https://www.chronicle.com/article/Can-We-Really-Measure-Implicit/238807> [<https://perma.cc/MDZ2-UHZ7?type=image>] (discussing critiques of the use of the IAT as a tool to predict behavior); Samuel R. Bagenstos, *Implicit Bias's Failure*, 39 BERKELEY J. EMP. & LAB. L. 37, 45 (2018) (making the case for the existence and pervasiveness of implicit bias in spite of possible “methodological weaknesses in the IAT”). *But see* CALVIN K. LAI & MAHZARIN R. BANAJI, *The Psychology of Implicit Intergroup Bias and the Prospect of Change*, in DIFFERENCE WITHOUT DOMINATION: PURSUING JUSTICE IN DIVERSE DEMOCRACIES, 8–9 (Danielle Allen & Rohini Somanathan eds., 2020) (reviewing studies using the IAT to predict behavior in multiple contexts).

20. See E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811, 811 (1998); Devin G. Pope, Joseph Price & Justin Wolfers, *Awareness Reduces Racial Bias*, 64 MGMT. SCI. 4988, 4988–95 (2018) (finding that a previously documented “own race bias” in foul call rates by NBA referees disappeared after a period of highly public media scrutiny following the initial study documenting the higher foul call rates when games were officiated by opposite-race refereeing crews). See also David Berri, *What NBA Referees Can Teach Us About Overcoming Prejudices*, TIME (Dec. 16, 2014), <https://time.com/3635839/implicit-bias-nba-referees/> [<https://perma.cc/M56R-5JAP>] (reviewing the findings of the initial 2007 study identifying differential foul call rates by NBA referees, the NBA’s response, and a follow up study reviewing referee foul calls after media scrutiny of the 2007 study).

21. See Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXPERIMENTAL PSYCHOL. 1765, 1771 (2014).

22. See Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1270–71 (2012) (finding positive results from a multi-faceted “prejudice habit-breaking” intervention strategy including stereotype replacement, counter-stereotypic imaging, individuation, perspective taking and increased opportunities for contact).

23. The “Thumbprint of the Culture:” *Implicit Bias and Police Shootings*, *supra* note 10 (explaining research finding that giving doctors the opportunity and reminder to exert cognitive control over their unconscious associations may reduce the impact of implicit bias which may otherwise result in prescribing painkillers to white patients more frequently than for black patients reporting the exact same levels of pain). In this radio interview, Banaji also describes a possible mechanism whereby doctors are provided graphical information in the hospital computer system noting the average pain killer dosage given to white men and to black men reporting the same

mind sits in society,”²⁵ it perhaps is unsurprising that reductions in implicit biases related to race, skin tone and sexuality have been measured and attributed to the fact that these specific biases have “received more societal attention” in the last decade.²⁶

III. IMPLICIT BIAS IN THE WORKSPACE AND EMPLOYMENT DISPUTES

If it is difficult to recognize our own individual biases, one only has to turn to a range of psychological findings to see how these unconscious biases play out in the workplace, regarding both membership in protected categories²⁷ and attributes such as height, weight, introversion/extroversion, and extracurricular activities.²⁸ In addition to the negative impacts of implicit bias, studies have demonstrated the impact of our tendency to want to help others like us with respect to employment opportunities (e.g., to give a job interview to a neighbor’s child—a classic example of affinity bias).²⁹ These “positive” biases might be particularly likely to fly under our radar, thereby making them even more difficult to address (if we notice them at all).³⁰

amount of pain as an example of a built-in “in-the-moment” reminder to make a deliberate decision to combat implicit associations or bias that might otherwise influence the prescribing of pain killers.

24. See Yoona Kang, Jeremy Gray & John Dovidio. *The Nondiscriminating Heart: Lovingkindness Meditation Training Decreases Implicit Intergroup Bias*. 143 J. EXPERIMENTAL PSYCHOL. 1306, 1310 (2013).

25. See Parth Shah et al., *The Mind of the Village*, NPR (March 9, 2018), <https://www.npr.org/2018/03/09/591895426/the-mind-of-the-village-understanding-our-implicit-biases> (quoting IAT co-creator Mahzarin Banaji’s contextual recommendation for understanding a person’s implicit bias as measured by the IAT).

26. Matthew Hutson, *Implicit Biases Toward Race and Sexuality Have Decreased*, SCI. AM., Apr. 1, 2019, <https://www.scientificamerican.com/article/implicit-biases-toward-race-and-sexuality-have-decreased/> [<https://perma.cc/36LF-T7EP?type=image>] (analyzing over four million adult IAT results collected in the US between 2007-2016).

27. See *infra* notes 31–42.

28. See Dalton Conley & Rebecca Glauber, *Gender, Body Mass and Socioeconomic Status: New Evidence from the PSID*. 17 ADVANCES IN HEALTH ECON. SERV. RES. Vol. 17 253, 255, 271 (2007) (finding that for every 1% increase in a woman’s body mass, there was a .6% decrease in family income obese women “pay a 17.51% wage penalty and a 25.06% family income penalty”); see also David W. Johnston, *Physical Appearance and Wages: Do Blondes Have More Fun?* 108 ECON. LETTERS 10, 11 (2010) (finding that blond women earned 7% more than brunette women, equivalent to the return for an extra year of education). Dana Wilkie, *Rooting Out Hidden Bias*, SOC’Y FOR HUM. RESOURCE MGMT. BLOG, (Dec. 22, 2014), <https://blog.shrm.org/workforce/rooting-out-hidden-bias> [<https://perma.cc/N8ER-2896>].

29. See ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 148–49 (5th ed. 2009).

30. BANAJI & GREENWALD, *supra* note 3, at 140–44.

A wide range of studies demonstrates the pervasiveness and broad reach of implicit bias within the workplace across industries. A 2000 landmark study analyzed the impact of implementing “blind” auditions for symphony orchestras.³¹ Beginning in the 1970s, orchestras began using physical screens to conceal the identities of their musician candidates.³² To determine the impact of screens on female musician hires, the authors of the study analyzed audition and roster data from eight major symphony orchestras from the 1950s through 1995; their final analysis included 7,065 individuals and 588 audition rounds.³³ While acknowledging some inconclusive statistical results, the researchers concluded that, through the use of orchestra roster data, the switch to blind auditions could explain 30 percent of the increase in the proportion of female musicians among new hires and “possibly 25 percent” of the increase in the percentage of female musicians in the studied orchestras from 1970 to 1996 (with variance depending on the gender composition of the orchestra and other factors).³⁴

The experience of the Metropolitan Opera Orchestra (“MET Orchestra”), the orchestra with the longest standing use of “fully screened” auditions (from start to finish), may also be instructive.³⁵ Whereas other orchestras may include screens for preliminary rounds of auditions, the MET Orchestra does not distribute resumes and uses only a voting system (without discussion) during the audition process. Significantly, the MET Orchestra only allows the Music

31. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of ‘Blind’ Auditions on Female Musicians*, 90 Am. Econ. Rev. 715, 716 (2000).

32. *Id.* at 716.

33. *Id.* at 724–25.

34. *Id.* at 738. Cf. MICHAEL J. HISCOX, TARA OLIVER, MICHAEL RIDGWAY, LILIA ARCOS-HOLZINGER, ALASTAIR WARREN & ANDREA WILLIS, BEHAVIOURAL ECON. TEAM OF THE AUSTRAL. GOV’T, GOING BLIND TO SEE MORE CLEARLY: UNCONSCIOUS BIAS IN AUSTRALIAN PUBLIC SERVICE SHORTLISTING PROCESSES 6 (June 2017), <https://behaviouraleconomics.pmc.gov.au/projects/going-blind-see-more-clearly-unconscious-bias-australian-public-service-aps-shortlisting> [<https://perma.cc/A4RR-QUJP>] (finding that the introduction of a gender/ethnicity-blind approach to reviewing applications for shortlisting purposes did not yield a more diverse result because study participants exhibited “positive” discrimination towards female and minority candidates).

35. Meredith Snow, *Implicit Bias*, SENZA SORDINO (Dec. 2018), <https://www.icsom.org/senzasordino/2018/12/implicit-bias/> [<https://perma.cc/7UJT-6LF5>] (arguing for musicians, through their collective bargaining agreements and in collaboration with orchestra management, to advocate for changes to the audition process to reduce implicit bias and enhance orchestra member diversity).

Director one vote, which is weighed the same as other panel members' votes.³⁶ The results are both telling and encouraging: in recent years, the orchestra hired three African-American players within two years and had a majority female French horn section.³⁷ Given the extremely small increase in African American and Latino representation in orchestras—from 1.4% to 1.8% for African Americans and from 1.6% to 2.5% for Latino musicians between 1975 and 2014³⁸—the MET's experience with fully screened auditions suggests it may mitigate against implicit bias in this selection process.

Apart from the music world, numerous studies have documented implicit bias in the job search process.³⁹ Even in an industry in which decisionmakers are trained to be "objective," a 2012 study examining the hiring decisions of biology, chemistry and physics professors yielded similar results. When given two identical applications to evaluate that varied in only one way, the applicant's gender, professors preferred "John's" application over "Jennifer's." Science professors—trained to be objective in their work—rated the male applicant as more competent, offering him more mentoring and a higher salary. Perhaps even more troubling, the finding was consistent across gender and age.⁴⁰ As the lead researcher of this study noted, "We're all fairly equally exposed to these pervasive messages about who is most

36. See Nathan Kahn, *A Look at Both Sides of the Audition Process*, MUSICIAN, (Sept. 25, 2015), <https://internationalmusician.org/a-look-at-both-sides-of-the-audition-process/> [<https://perma.cc/RX9G-4XBP>] (noting typical significant influence of Music Directors and/or audition committees who sometimes express "they feel the need to see, as well as hear" candidates, resulting in the removal of audition blinds).

37. See *id.*

38. NICK RABKIN & MONICA HAIRSTON O'CONNELL, LEAGUE OF AMERICAN ORCHESTRAS, FORTY YEARS OF FELLOWSHIPS: A STUDY OF ORCHESTRAS' EFFORTS TO INCLUDE AFRICAN AMERICAN AND LATINO MUSICIANS 13 (Sept. 2016) (citing orchestral musician community data collected by *The New York Times*, the Music Assistance Fund Narrative, and the League of American Orchestras). But see Anthony Tommasini, *To Make Orchestras More Diverse, End Blind Auditions*, N.Y. TIMES (July 16, 2020) <https://www.nytimes.com/2020/07/16/arts/music/blind-auditions-orchestras-race.html> [<https://perma.cc/FR3A-3U23>] (advocating for the end of blind auditions to enable orchestras to take race and gender into account to racially diversify orchestras).

39. See, e.g., Marianne Bertrand & Sendhil Mullainathan, "Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination," 94 AM. ECON. REV. 991, 997–98 (Sept. 2004) (finding a 50% "racial gap" in callback interviews attributable to the "name manipulation" of resumes used in the experiment).

40. Corinne A. Moss-Racusin, John F. Dovidio, Victoria L. Brescoll, Mark J. Graham & Jo Handelsman, *Science Faculty's Subtle Gender Biases Favor Male Students*, 109(41) PROC. NAT'L ACAD. SCI. U.S. 16474, 16477 (Oct. 9, 2012), <https://doi.org/10.1073/pnas.1211286109> [<https://perma.cc/63HP-WEDN>] see also Todd Henneman, "You, Biased? No, It's Your Brain," WORKFORCE (Feb. 9, 2014), <https://www.workforce.com/2014/02/09/you-biased-no-its-your-brain/> [<https://perma.cc/>

fit to do science . . . When we imagine a scientist, we imagine a man.”⁴¹

Finally, studies in the legal profession have demonstrated that this industry is not immune to the reach of implicit bias in employment settings. In one study, law firm partners were asked to evaluate a legal writing memo by an associate. The memo was written to intentionally include mistakes. Half the partners were told the associate was African American and the other half were told the associate was Caucasian. Despite the memo being identical in every way aside from the disclosure of the associate’s race, the partners found 41% more errors in the memo “written” by the African American associate. Overall comments also differed by race, with partners commenting that the Caucasian associate had “potential” and was seen as “generally good” while the African American associate was described as “average at best.”⁴²

Given the increased prevalence of implicit bias generally,⁴³ it is not surprising that it has also surfaced in employment discrimination disputes. Since the early 1990s, academics and advocates have grappled with the changing nature of discrimination to include more subtle, unconscious discrimination in which traditional “animus” might be lacking.⁴⁴ For example, much has been written about “implicit discrimination” wherein a “triggering event” “activates implicit bias and

8HWT-BD5Q] (discussing the study’s findings along with comparable studies with similar conclusions related to the prevalence of implicit bias in the workplace).

41. Henneman, *supra* note 40.

42. Executive Summary, American Bar Association’s Commission on Women in the Profession and the Minority Corporate Counsel Association, *You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession* at 22 (2018), *citing to* Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS YELLOW PAPER SERIES (Apr. 4, 2014), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf> [<https://perma.cc/Y3TB-XUJ9>].

43. *See, e.g.*, Mark Berman, *Pence Suggests Implicit Bias Can’t Be Involved When a Black Officer Shoots a Black Man*, WASH. POST (Oct. 4, 2016, 10:22 PM) <https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-fact-checking-and-analysis-of-the-vice-presidential-debate/pence-suggests-implicit-bias-cant-be-involved-when-a-black-officer-shoots-a-black-man/> [<https://perma.cc/BS4E-69US>] (discussing presidential and vice presidential candidates’ discussion of implicit bias in 2016 election debates).

44. *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819–20 (1991). In Ian Ayres’s groundbreaking 1991 study of gender and race discrimination in car negotiations, he describes the challenges of naming the type of discrimination his study revealed—in which white women paid 40% higher markups than white men, black men had to pay more than twice the markup, and black women had to pay more than three times the markup—as a type of discrimination that results in car sellers taking race and gender into account and treating testers differently based on their identities, but noting that the

leads to a negative consequence,” often with no remedy given the challenges of demonstrating intent or purposefulness under either Title VII or the Equal Protection Clause, respectively.⁴⁵ Others argue for the use of “behavioral realism” as a way to guide legal advocates’ efforts to reform anti-discrimination doctrine to include implicit bias.⁴⁶

While not fully embracing theories advocated by academics and advocates, courts and the Equal Employment Opportunity Commission (“EEOC”) have acknowledged the pervasiveness of implicit bias. The EEOC, the federal agency charged with enforcing the nation’s anti-discrimination laws, has directly spoken on this topic. Dating back to 2006, the EEOC defined “intentional discrimination” to include “unconscious stereotypes about the abilities, traits, or performance of individuals of certain racial groups.”⁴⁷ The agency has also issued guidance on implicit bias in various forms, acknowledging that “biased treatment is not always conscious,” noting that EEO laws extend to protections for decisions driven by animosity as well as “decisions infected by stereotyped thinking.”⁴⁸ The EEOC has also entered

term as used in the article did not imply “any animus based on race or gender.” See also Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005).

45. See generally L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CAL. L. REV. 1359, 1363 (2012) (arguing for the use of environmental statutes like the National Environmental Policy Act as models for regulatory reforms to effectively address the systemic “social pollution” caused by implicit bias).

46. See Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. C.R. L.J. 1, 36–48 (2015). “Behavioral realism is a prescriptive jurisprudential method or approach based upon the proposition that judges ought not to speculate about human behavior. Rather, to the extent possible, judges have the affirmative responsibility to base their assumptions about how people act on a solid evidentiary, that is to say, scientific footing.” See *id.* at 43.

47. U.S. Equal Employment Opportunity Commission, *Questions and Answers About Race and Color Discrimination in Employment* (May 16, 2006), https://www.eeoc.gov/policy/docs/qanda_race_color.html [https://perma.cc/2QQ9-YZA6].

48. See, e.g., U.S. Equal Employment Opportunity Commission, *EEOC Informal Discussion Letter Re: Video Resumes* (Sept. 21, 2010), <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-213> [https://perma.cc/3RCY-ERSJ]; U.S. Equal Employment Opportunity Commission, *EEOC Partners with Memphis CEOs to Address Race and Color Bias Issues* (Apr. 11, 2008), <https://www.eeoc.gov/eeoc/newsroom/release/archive/4-11-08.html> [https://perma.cc/6K5N-CNVL] (describing efforts to promote the agency’s E-RACE Initiative, a campaign focused on tackling the “role of hidden and subtle bias” in the 21st century workplace); U.S. Equal Employment Opportunity Commission, *E-RACE Goals and Objectives*, <https://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm#goal3> [https://perma.cc/H6PR-X9TE] (describing plans to include implicit bias in employment in future public meetings under the agency’s Eradicating Racism and Colorism from Employment [“E-RACE”] initiative). See also *EEOC*

into agreements with employers wherein the terms include required implicit bias training.⁴⁹ Implicit bias has also entered the mainstream legal discourse, with some judges citing it as a factor to contend with in their analysis or recommending implicit bias training in their decisions.⁵⁰

Given the growing psychological research on implicit bias and its implications in the workplace and employment disputes, how should mediators respond? The forum of mediation has long been heralded as a flexible process to fit the forum to the fuss,⁵¹ one which should be better able to adapt to changes in our scientific understanding of how humans act as compared to the judicial sphere. If we accept this mantle, the question before us is, “How can mediators incorporate the current, prevailing social science as they approach mediation, particularly mediations involving allegations of bias (explicit or implicit)?” Below, I offer ideas for how mediators can approach three likely opportunities in which implicit bias might surface in their practice.

IV. STRATEGIES FOR MEDIATORS TO ACCOUNT FOR AND ENGAGE WITH IMPLICIT BIAS IN MEDIATION

In the life cycle of a mediation, mediators can take pro-active steps to prepare for and engage with “incoming” implicit bias, just as a mediator would consider how she would approach a range of “traditional” issues in mediation (such as identifying the parties’ interests and coaching the parties on offers/counteroffers, etc.).

Targets ‘Unconscious Bias’, L. J. NEWSL. (July 2007), <https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2007/07/30/eeoc-targets-unconscious-bias/?slreturn=20191108152803> [<https://perma.cc/M4RC-QGKL>] (noting EEOC’s April 2006 guidance’s emphasis on “unintentional discrimination [that] can arise in subtle ways” with respect to race and color).

49. See U.S. Equal Employment Opportunity Commission, *Furniture Retailer Rooms to Go Adopts Revised Criminal Background Check Procedures In Cooperation With The EEOC* (Sept. 24, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/9-24-18.cfm> [<https://perma.cc/JQT9-3P62>] (announcing conciliation agreement terms that include mandatory implicit bias training to accompany revised criminal background procedures related to hiring and screening).

50. See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (Harvard Corporation), No. 1:2014cv14176 (D. Mass. Oct. 1, 2019) (acknowledging implicit bias may have been a factor in how admissions officers assessed Asian American applicants and recommending implicit bias training for admissions officers).

51. See Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

A. *Mediator Selection: Reframe the Conversation on Mediator Identities in the Selection Process From “Identity Matching” to “Cultural Expertise”*

“It may be helpful to have an Asian mediator.”

“We’re looking for a [30-something] white, female mediator.”

In my mediation practice, I have received both of the above requests in conversations during the mediator selection phase. Each request landed differently, but both left me uncomfortable.

Is a mediator’s identity (race, gender, sexual orientation, age, etc.) a necessary or determinative factor to consider with respect to whether she is a “good fit” or qualified to mediate a particular case? Or—zeroing in on charged employment and workplace disputes, where actual or perceived bias may be at issue—is the approach of “matching” a mediator’s race and/or gender with one or both parties an effective and preferable one? Individual mediators (or persons conducting intake) might come to different conclusions on this question,⁵² and as a profession, it is worth considering this issue and its possible ramifications.⁵³

The fact that a decisionmaker makes an instinctual decision regarding who would be a “good fit” for a particular mediation makes intuitive sense. And, because the “individual mind sits in society,”⁵⁴ it may be helpful to consider how implicit bias may be influencing that initial leaning. It is easy to understand the rationale of an identity-matching approach to mediator selection, given social science research on implicit bias and in-group preferences.⁵⁵ In addition to the

52. See Izumi, *Implicit Bias and Prejudice in Mediation*, *supra* note 2 at 692 (noting that she is “rethinking [her] initial aversion to race matching in mediation because we need a way to mentor and employ more mediators of color”).

53. See *id.*

54. See *supra* note 25.

55. See LAI & BANAJI, *supra* note 19, at 8–9; see also Maria Konnikova, *How ‘Impermanence’ Can Help Us All Get Along*, BOSTON GLOBE (Oct. 6, 2013), <https://www.bostonglobe.com/ideas/2013/10/05/how-impermanence-can-help-all-get-along/toVYLPzXVUwdTLOabhhq7L/story.html> [<https://perma.cc/EWP8-HPY6>] (noting a 3-month old baby shows a “marked bias towards faces of those who share her race” and that the preference “translate[s] into negative attitudes toward outgroup members” at age 4); Pope, Price & Wolfers, *supra* note 20, at 1 (discussing finding of racial in-group favoritism in study of NBA foul call rates).

potential increased comfort a participant may experience with a mediator of the same race and/or gender,⁵⁶ some studies of community mediation court programs have shown minority parties received better outcomes with minority mediators.⁵⁷

That said, mediator selection experiences have left me questioning the “intuitive” initial thinking on mediator selection. I had the opportunity to engage in a conversation with a hiring individual who expressed a preference for an Asian mediator for a dispute between two Asian coworkers. After the HR manager shared the background of the situation with me—a friendly professional working relationship turned sour based on an alleged comment one coworker made regarding the other’s ethnicity—I raised the issue of the stated preference for an Asian mediator: “I heard [from the intake] that the thinking was that it might be helpful for the mediator to be Asian. Could you say more about that?” I learned that she was simply passing along the suggestion of her colleague, the organization’s chief diversity officer. In speaking directly to the parties later, however, I learned that some of the issues for the mediation included differing perspectives on the immigrant experience, how one’s lived experiences (based on a person’s identities) should be valued and leveraged in the workplace, and concerns regarding minority representation within leadership.

As trained professionals, mediators should be well-equipped—and seen by the public—to mediate a variety of disputes, regardless of the mediator’s identity. In some instances, to be sure, subject matter expertise or past experience is relevant; for cases such as a multi-party construction dispute or an ERISA matter, parties will likely

56. See David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 DISP. RESOL. J. 37, 42 (2008) (“While we are not advocating that every mediation and arbitration involving a claim of race discrimination have a neutral who is a person of color, we believe that the opportunity to choose a neutral of color will instill a higher degree of confidence in the process and the outcome.”); Robert A. Baruch Bush & Joseph P. Fogler, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 27 (2012) (citing substantive fairness concerns for minority mediation parties because “one side—probably the cultural minority party—will be harder for the mediator to understand than the other” despite a mediator’s best intentions).

57. See MICHELLE HERMANN ET AL., *An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation*, in MEDIATION THEORY AND PRACTICE 373 (1993) (finding that “having two minority mediators eliminated the negative impact on the size of monetary outcomes for minority claimants in mediation” in a study of small claims mediations in the Bernalillo County Metropolitan Court in Albuquerque, NM).

look for mediators with experience in these areas, and for good reason, as they are more specialized subjects for which facility with technical terms or law is valuable. And there may be some instances in which a mediator's lived experiences—based on race, gender, sexual orientation, age, disability, etc.—may constitute the “cultural expertise” being sought by a given party.⁵⁸

Mediators could take steps to reframe the conversation on mediator identities from “matching” the parties to one of “cultural expertise.” For example, in a case involving allegations of race discrimination, the inquiry could be, “Does the mediator have experience in race discrimination matters or other related expertise?” as opposed to defaulting to the (perhaps unconscious) question, “Is the mediator the same race or ethnicity as the party alleging race discrimination?” In the example above, if a broader approach had been taken to identifying a mediator, other mediators may have risen to the top of the list based on their lived, personal and/or professional experiences related to immigration or addressing perceived bias in a hierarchical workplace. Revisiting the other opening selection request for a younger, white female mediator, the application results in a similar question, namely, “What are the experiences or areas of expertise needed for this mediation with these mediation parties?” In the end, parties may end up with the same mediator, regardless of selection approach; however, in broadening the (sometimes unspoken) criteria for an “appropriate” mediator, mediators can take proactive steps to reframe the selection discussion to one in which all relevant experiences are considered.

B. Assigning Roles in Co-Mediation: Prepare Counter-Stereotypical Roles for Co-Mediators

If a case will be co-mediated and the co-mediators are diverse from one another, what roles should be given to the two co-mediators? If the two mediators are approximately equally experienced, a co-mediation approach might provide an opportunity to promote counter-stereotypical images of a “typical” mediator.

Much has been written about the fairly homogeneous demographic nature of the mediation field in which a “typical” mediator is an older, white man;⁵⁹ this may even be the image a given mediator

58. See, e.g., Carol Liebman, *Mediation as Parallel Seminars: Lessons from the Takeover of Columbia University's Hamilton Hall*, 16(2) NEGOT. J. 157 (April 2000).

59. See Maria Volpe et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URB. L.J. 119, 139 (2008) (finding that a

herself might conjure up when asked to think of a mediator. Efforts to diversify the mediator field have not yielded substantial changes.⁶⁰ If a mediator (or mediation panel) were interested in taking steps to counterbalance the prevailing “thumbprint of our society” on how mediators are seen, the role of co-mediators provides one such opportunity.

As discussed earlier, research has shown that one effective strategy to reduce implicit bias toward a social group is to embrace counter-stereotypical images or exemplars.⁶¹ For example, Professor Banaji employed this strategy in surrounding herself with images of famous, notable leaders of diverse racial backgrounds as one way to combat the IAT race results she initially received.⁶² The same strategy could be applied to mediation. In the case of co-mediators, mediators could include this issue as part of their preparation. The mediators could allocate roles to one another in a way that would counter traditional ideas of a mediator’s identity. For example, the younger, minority or female co-mediator could initially greet parties, open the mediation, and/or take the lead in drafting a Memorandum of Understanding, and purposefully not take an administrative role (i.e., getting drinks, making photocopies, taking notes, etc.).

In co-teaching mediation and related programs, the same type of preparation may be useful insofar as these trainings provide another opportunity to project counter-typical images of mediators or mediation “experts.” In a diverse co-teaching team, considering who should open the day, creating equitable roles for each instructor (i.e., in both substance and time) and debriefing divergent perspectives on the shared experience of co-teaching can all serve as meaningful steps toward this goal.

C. *In the Mediation: Address Comments Based on Your Identities as a Mediator*

Imagine you are the mediator sitting down for your first private session and the party turns to you and says, “You are not who I expected as the mediator. . . .” All other parties in the mediation—counsel and clients—are white,

majority of the 100 minority mediators or aspiring mediators interviewed perceived ADR as a “gated community”).

60. See Hoffman & Stallworth, *supra* note 56, at 1 (arguing that the objectives of the ADR movement will be better served if minority workplace neutrals were better utilized).

61. BANAJI & GREENWALD, *supra* note 3, at 151–52; Lai et al., *supra* note 21, at 7.

62. *Id.*

male and middle aged, and you are a non-white, female, younger mediator.”

I have presented this scenario to mediation students in a variety of settings—from law school to executive education—and the reaction is typically one of surprise quickly turning into ambivalence over how to respond effectively. Suggested responses have ranged from attempts at humor (“Who were you expecting?”) to emphatic declarations of one’s role (“Yes, I *am* your mediator.”).

How should mediators approach moments in a mediation when a party articulates what seems to be an implicit bias they are carrying toward the mediator, where she may be called upon to combat a first impression based on her identities (versus tackling deep-seated attitudes which may endure)? In other words, if we, as mediators, have the sense that a party might be ascribing certain attributes to us based on our visible identities, and that there is a disparity between those and attributes of the “typical” mediator⁶³ (e.g., younger mediators lack experience), what should a mediator do?

Despite having an awareness of the prevalence of implicit bias and how the parties’ pre-existing attitudes may influence their perceptions, it can still be surprising, even unbalancing, to encounter direct comments related to your identity in a mediation. Some mediators will interpret such a comment as a micro-aggression,⁶⁴ while others will have a different interpretation, wholly aside from what the speaker may have intended.⁶⁵ For example, it could be the case that the speaking party had a completely unrelated reason for making such a statement, such as mixing up mediators (“I thought the mediator was going to be Jane or John Doe; I must have confused the paperwork for this mediation with another case.”). If a mediator

63. See Sharon Press, *Court-Connected Mediators and Minorities: Has Any Progress Been Made?*, 19 DISP. RESOL. MAG. 36 (2013) (describing the decline in mediator diversity as the field of mediation has become more professionalized).

64. DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE 8 (2nd ed. 2020) (defining microaggressions as “verbal and nonverbal interpersonal exchanges in which a perpetrator causes harm to a target, whether intended or unintended. These brief and commonplace indignities communicate hostile, derogatory, and/or negative slights to the target.”). See also Derald Wing Sue, *Microaggressions: More Than Just Race*, PSYCHOL. TODAY (Nov. 17, 2010), <https://www.psychologytoday.com/us/blog/microaggressions-in-everyday-life/201011/microaggressions-more-just-race> [https://perma.cc/V2F8-RQTT].

65. In examples like this, “de-coding” the speaker/party’s message requires both the transcript and the score: a mediator must consider both the verbal and non-verbal cues in choosing how to respond. As with any exchange in a mediation, the mediator may “get it wrong” and have misread a party’s statement, in which case she will continue to adapt and respond to the unfolding dynamics of the mediation, as a mediator would for any topic that arises in a mediation.

did, however, hear the comment as a micro-aggression or was simply caught off guard, an understandable response would be to simply acknowledge it, without going deeper.

Potential responses by mediators to the broader underlying issue of possible bias, in addition to a simple acknowledgement, might include: (1) addressing the comment directly or (2) addressing the comment indirectly. While a direct "response" (e.g., "What did you mean by your comment?") might productively challenge the speaker's thinking, there is a substantial risk that it could backfire, making that party defensive and therefore complicating the mediator's role in bringing peace and resolution into the room.⁶⁶ Even if a mediator were to marshal a genuinely curious stance to learn more from the mediation party, the risk of the party hearing the comment in an accusatory way warrants hesitation.⁶⁷ As a result, the indirect approach may hold the most potential. An indirect approach might take two forms: (1) the mediator may address and strive to meet the party's unspoken interest, or what might underlie the implicitly biased comment, or (2) the mediator could reframe the statement into a (genuinely) curious question to gather more information from the party. This might take the following form of a mediator response: "You are asking a very important question. That is, to what extent am I the right mediator for your discussion today? Is there anything I can do that would be helpful to you for our work together today?" As always, the mediator should also make conscious efforts to build trust and rapport with each person⁶⁸ in the mediation room, a goal which is all the more important where the mediator may feel she is starting out at a "deficit" with certain mediation parties.

66. However, it may be within the generally accepted role of the mediator to tactfully challenge a stereotype one side may have of the other insofar as the stereotype may impede the ability of the parties to meet their interest in reaching a resolution.

67. If a mediator does choose to address the issue directly, thought should be given as to the most productive time (i.e., in the moment or toward the latter part of the mediation, after the mediator has had the opportunity to develop more trust and rapport with the party) and place (in private session, private 1-1 conversation, or joint session if the comment was made in joint session). A mediator's decision regarding these topics might involve considering the impact on "bystander" parties and counsel, as well as the speaking party. With respect to the bystander parties and counsel, a mediator ideally would strive to determine whether further engagement would help create a respectful environment conducive to productive settlement discussions, or if a given comment would be counterproductive to address publicly and is better left unaddressed.

68. The common advice given to mediator trainees to build trust and rapport with parties by identifying affiliations or commonalities must be balanced against the recognition that doing so may cause the mediator to develop an affinity bias in favor of one party.

In my own mediation, I fell in the “caught off guard” category of mediators upon hearing I was not the “expected” mediator, as I had not yet incorporated a consideration of implicit bias into my mediation work. My initial reaction of “acknowledgement” took the form of responding with an attempt at humor (plus honesty) in saying, “Yes, if you had come tomorrow, you would have had my colleague, who has been here [at the agency] for almost 30 years.” After that quick exchange, I continued the mediation with the “indirect option” in mind, specifically the form of striving to better understand and meet the party’s unspoken interest.⁶⁹ My best guess was that the party’s “concern” stemmed from my age and their sense that it might equate with inexperience. As a result, I focused on how to satisfy this concern in two ways: first, by demonstrating my competence in moving the mediation along, and second, by purposefully building a trusting, individualized working relationship with each party and attorney. When working with the four individuals representing the company, I spoke directly to the parties, asked each person individual questions and made sure to follow up on any questions posed to the other side. With the three individuals representing the plaintiff, I worked with each in the way that seemed most fitting. The plaintiff’s son chose to communicate with me in private sessions both orally and by passing short notes to me, and I accepted his preferences as to our mode of communication. His sister appreciated acknowledgement of her contributions to the care of her father in his last days and otherwise did not seem especially interested in the specifics of any particular outcome. The mediation ended in success, conventionally defined—a resolution including a 6-figure settlement—and seeming satisfaction regarding the matter’s closure, including a sincere statement of appreciation by the plaintiff’s son.⁷⁰

69. The other indirect approach of reframing the statement to a question may have also been a useful strategy, even in the case here of an assigned mediator. If that approach had been taken, I might have learned additional specific ways to best assist this party and/or considered the possibility of the case being assigned to another mediator—basing such a decision not only on mediator identities, but also on areas of expertise, including cultural, for which another mediator might be better suited.

70. As a practitioner interested in improving my skills and ability to work with diverse mediation parties, I have reflected on what additional steps might have been productive in working with the party who shared his surprise that I would be serving as his mediator. There may have been an opportunity, once the parties had arrived at a settlement, to revisit the party’s opening comment and to learn what was meant by it and if he was satisfied with his experience. Depending on the dynamics at that point in the mediation, it might have also been an opportunity to share the impact, or possible interpretation, of his comment and to engage in a shared learning conversation.

V. CONCLUSION

I recently led a mediation skills workshop for leaders within an organization who informally mediate disputes that arise within their departments. As we brainstormed challenges they encounter in their mediations, one participant shared that as a white man, mediation participants had begun to challenge his suitability as a mediator in cases involving issues of alleged discrimination—that given his race and gender, they did not believe he could be an effective mediator for these disputes. His comment underscored that many of us are influenced by a default assumption that someone with a shared identity will “get” us and perhaps therefore be more effective as the “neutral.” While this may be true in some instances,⁷¹ it may not be in others, and as conflict resolution professionals charged with helping people better understand one another, unpack assumptions and resolve differences, it should not be our instinctive practice. Instead, we can reframe the conversation on mediator identities and address implicit biases that may be influencing behavior or comments in a mediation. In taking these steps, mediators can realize a practice of engaging with implicit bias in mediation.

71. See HERMANN ET AL., *supra* note 57, at 373.