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Your Bias is Showing!

Tips for identifying and overcoming unconscious biases in settlement negotiations

There is little dispute that mediation is an established and accepted procedure through which thousands of civil claims and lawsuits are resolved. To truly understand the impact of bias in mediation, one must understand that the primary purpose of mediation is resolution. Occasionally, it is used as discovery tool but the efficacy of same is limited. Much like a dispositive motion, mediation is just another arrow in your quiver of case resolution tools. Unlike a dispositive motion though, the biases of you, your claim team, your client, your opponent, and your mediator can have a significant impact on the outcome of your case.

There are enumerable studies analyzing unconscious bias and offering tips for neutralizing the impact of all of our inherent biases on our every day life. For lawyers and claims professionals controlling bias during the mediation process is critical step in accomplishing the mediation goal. Analyzing a claim or defense through a lens that is impacted by a pre-existing biased view of a person or a party, or of a claim or defense, undoubtedly impacts the outcome. Simply put, an unconscious bias held by a lawyer or claims professional can present a significant roadblock to case resolution at mediation.

What is unconscious bias?

Bias is a prejudice in favor of or against one thing, person, or group compared with another usually in a way that's considered to be unfair. Biases may be held by an individual, group, or institution and can have negative or positive consequences.

For our purposes there are two primary types of biases: Conscious bias (also known as explicit bias) and Unconscious bias (also known as implicit bias). Biases, whether conscious or unconscious, are not simply limited to ethnicity, race or gender. Though racial and gender bias and discrimination are well documented, biases may exist toward from any social group. One's age, education level, socioeconomic status, appearance, religion, political leanings and many other characteristics are subject to bias.

Unconscious biases are social stereotypes about certain groups of people that individuals form outside their own conscious awareness. Everyone holds unconscious beliefs about various social and identity groups, and these biases stem from one's tendency to organize social worlds by categorizing. Unconscious bias is far more prevalent than conscious prejudice and can be seemingly incompatible with one's conscious values. Certain situations activate unconscious attitudes and beliefs.

Unconscious bias is particularly problematic in the context of mediation. In 2018, it is rare to hear anyone speak openly or admit a particular bias yet we all have them. Absent an effort to control them, unconscious bias can impact the effectiveness of the resolution process.

How do you identify unconscious bias?

Recognizing bias in opposing counsel, the mediator or the other party can sometimes be relatively straightforward. Use of urban slang or colloquialisms with African American or Latino parties is fairly obvious. Overly exuberant expressions of a lack of prejudice towards a particular group of people is translated by the listener with the opposite effect anticipated. Often times the bias is displayed with a

certain subtlety. Perhaps, its an unintentional disregard of the senior female attorney's role in the mediation by directing questions to the male attorney only. Actions such as these should create immediate red flags that something other than the value of a claim or the efficacy of a defense appears to be at issue for the speaker

What can you do to minimize the impact of unconscious bias on the negotiation process?

Use your mediator!

It is the mediator's responsibility to respond to and address roadblocks to resolution, including the existence of expressed or implied bias. If he or she does not appear to be sensitive to it or to recognize its expression in your session, say something. There is no benefit to your client to remain silent.

If you believe that bias is impacting demand, offers or other aspects of the mediation, address them clearly and directly with your mediator. It is his or her job to keep these out of the process, not yours. The worst thing you can do is directly confront the person who you believe is the source of the problem. Direct confrontation will only lead to anger and denial. Your interest should be to remove the roadblock caused by the bias. It is not to change the overall attitude of the other side.

In relying on your mediator to assist in controlling bias in the mediation process, do not confuse a mediator's opinion or analysis that is contrary to your client's position to be a sign of prejudice. Despite the use of the term "neutral," mediators do and must form opinions on the validity of each side's positions, arguments, etc.

Look in the Mirror

Examine your own conduct, statements and beliefs. Simply put, try and step back and listen to yourself with a critical ear. While you do not have to be judgmental, you must be willing to examine

your words and actions to determine if they would be different if you did not hold certain inherent beliefs.

In addition, watch how the mediator and others with whom you come in contact react to your words. What you perceive as a joke to break the tension between the parties may be perceived by someone else as insulting. If you feel you have stepped over the line, talk to your mediator and, if necessary, ask him or her to smooth over the situation with your apology.

Listen

Listen carefully to your client. While it may be difficult, reminding your client that the purpose of mediation is to resolve a case, and that his or her bias is getting in the way, may be necessary. And, again, turn to your mediator for assistance. There is nothing wrong with seeking your mediator's help in redirecting and refocusing your client.

Listen to your mediator. While experienced mediators work to overcome their own set of acknowledged and unacknowledged bias, like any other person, they will hold unconscious biases that must not be permitted to impact your mediation. Thus, if your mediator is exhibiting bias that is impacting the resolution of your case, you have a duty to your client to address this directly, and probably separately, with your mediator.

Conclusion

No matter how enlightened, neutral, and free thinking you believe you are, biases are always at work whether you realize it or not. Unconscious biases are the focus of countless studies and unless you take steps to identify and suppress that bias, it will come through. It will show itself through your choice of language, tone of voice, and the frequency with which you blink. These unconscious biases extend beyond the obvious stereotypes associated with gender, age, or race and can even extend to certain types of plaintiffs, defendants, and cases.

You've prepared for the upcoming mediation. You've evaluated the facts, good and bad. You've considered the legal issues. You've vetted your strategies with your client, partners, and claims professional. You've carefully selected an appropriate neutral to help facilitate a resolution. And hopefully, you've considered your opposing party's point of view and likely strategy. Don't let unconscious biases creep in to the process to a negative end.