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PERSPECTIVE

Strategies for addressing discrimination in civil disputes

By Jan Frankel Schau

The subtleties of both implicit and explicit biases are not limited to our streets and neighborhoods, boardrooms or courthouses. As Nelson Mandela said, in an address to the UN General Assembly in 1994: "All of us know how stubbornly racism can cling to the mind and how deeply it can infect the human soul."

In the context of mediation, even in cases that are not arising out of claims of race, gender, age or disability discrimination, there are many ways that these long-held biases can be seen. For example, in the case of a victim of sexual harassment, the defense may raise as evidence that she failed to report the sexually explicit text messages from her supervisor to the human resources manager for over two years, implying that she must have consented to the "relationship". If the mediator learns through the plaintiff that in her family most all of her aunts and cousins were sexualized at a young age and that it is an unspoken norm that women who want to remain employed don't protest, the conduct might be viewed differently by the Employer, with concerns that a jury may appraise their defense more critically, particularly if they identify with the cultural experience of the Plaintiff . When the mediator points this out to the defense lawyer, he may better appreciated the underlying nuances that involve racial or cultural bias and recommend to his clients to settle in a more meaningful range. The defense will, of course, still be considered, but the possibility that a Judge or jury may not excuse the misconduct will be more clearly understand too.

While mediators are engaged to act as "neutrals" in resolving conflict, there is a difference between "neutrality" and "impartiality." The Model Standards of Conduct for Mediators requires that a mediator decline a case "if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice." "Neutrality," according to Dwight Golann and Jay Folberg's excellent textbook, "Mediation: The Roles of Advocate and Neutral," "requires that the mediator not take sides with either party. Judgments of right and wrong are not within the mediator's role." There are, however, differences between "not taking sides" and "not pointing out the strengths and weaknesses of the case to each side." The neutral, as devil's advocate, is often engaged to play that very role.

Increasingly, as the practice of mediation matures, advocates and their clients turn to mediators to conduct the mediation in a more evaluative manner than a simple message carrier. By engaging the neutral as "devil's advocate," the mediator is put into the role of helping the parties predict the outcome of a matter and looking at the facts of the matter in a more expansive and perhaps more critical way than a judge or jury would. That is, some of the appearances of impropriety, which may not meet the standards of pretext or each of the elements of a particular cause of action may nevertheless be compelling and apparent during the mediation process.

We may be asked to provide a reflection of how something may be perceived, even if it is not technically evidence. The simple example would be of a memo that exists in an employee file that says: "She doesn't fit in" when she is the only young, female of a particular ethnic group in a department that is otherwise comprised of older, white men. If she is frustrated because she is not promoted despite performing adequately for many years, there may be a racist element to the claim. The memo may be a veiled "dog whistle," which calls for ethnic discrimination that the mediator can see more clearly than the defense team. In that event, the mediator can assist the defendant and his counsel in assessing the risk of relying upon "good cause" as a defense to such a lawsuit when members of the "out" group may so easily connect the dots in what would otherwise appear to be an innocuous bit of evidence.

Some biases can be addressed by the neutral in a rhetorical, light-hearted way, but one that is designed to "call out" the individual or entity who makes the comment or acts in ways that feel unbalanced or even misogynist. For example, where the lawyer makes comments suggesting that the "real decision-maker" was not consulted (and all of those present are female except the CEO, who is male), the mediator can point out that such a comment might create an appearance of gender bias which could adversely impact his client's own claims. Where the lawyer jokes about the lack of experience of his opposing counsel and, in response, the other lawyer reminds him that this very senior attorney dozed off during his own client's deposition, the mediator can remind the attorneys that this kind of behavior won't bode well in the possible trial of their pending age discrimination claim.

Because mediation takes place without a record and in strict confidentiality, the mediator may find herself privy to biased comments or conduct which, under the Model Standards of Conduct and California Evidence Code, can never be revealed to the other side or to the court or the public. However, the mediator is not constrained from modeling decent and civil conduct and demanding that the ground rules established at the outset of the mediation require treating one another with respect.

It is also worth pointing out that these casual comments may be offensive beyond what appears obvious. Although the comments may be said to someone who looks like the offending party, it is likely that the recipient of such comments has family members or close friends and colleagues who are people of color, different ethnicities or sexual orientations, whom they are insulting. In much of California, for example, there are few families that remain entirely within their ethnicity of origin in 2021.

The mediator has an opportunity, though not a duty, to help each side to see or call out the underlying biases as they arise. We do that by reframing the statement so that its intended meaning is less hurtful, but also put into context, encouraging genuine apologies where applicable and

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attainable, and even simply by acknowledging the limits of our own understanding of an experience which we have not lived.

In an environment in which so few cases get to trial, the mediator can even serve a key role in allowing the victims of discriminatory behavior to tell their narrative fully to a person who can acknowledge, not deny that experience. For some, this will be the first time since they engaged a lawyer where a third party listened to them without judgment. It is a very different experience for the victim than a deposition or a cross-examination in court, where each statement is scrutinized to set them up for a challenge as if it were a lie.

In the case of a successful mediation (and most of them are), this may be the only time the victims of discrimination can be heard fully — both because of confidentiality (which will disallow their talking about their complaints after the settlement) and because they will not get their case to a judge or a jury if they settle the case, meaning it will be settled privately, not in the public domain. Therefore, this "telling" may be a crucial component to achieving satisfaction. Conversely, the defendant has a unique opportunity to explain and, where appropriate, apologize for the behavior in mediation. At the time of trial, no such efforts would be made.

In mediation training, we teach students about two forms of negotiation: distributive bargaining and integrative bargaining. Distributive bargaining describes the common back and forth of monetary offers and demands. Integrative bargaining, however, takes into account the parties' underlying interests in the dispute. This is an aspect that is simply not addressed in court but may be the key to resolving disputes in a satisfactory way through mediation.

For example, a company whose EEO policies are woefully out of date may promise that they will update them and include people of color on the committee to redraft those policies. In another example, where pregnancy discrimination is implicated, the company's new female CEO may agree to recommend a new policy for paid maternity leave with the board at the next board meeting, so that no young woman has to choose between having a child and taking an unpaid leave of absence in the middle of a promising career.

Today's environment of Zoom mediations provides some heightened challenges, too. Both lawyers and their clients are viewed in their homes where something of their personalities can be seen in ways that the conventional mediation or law office would not reveal. The logo on their T-shirt or the opulence or shabbiness of their background can provide context to their personal framework. The books on their bookshelf, the paintings behind them, all tell a story, and often reveal hints at their heritage or identity or even political leanings. Though it is certainly never evidence of anything, it does give the mediator an opportunity to "know" parties in ways that may not otherwise be as apparent.

Journalist and award-winning author Amanda Ripley recently published a book, "High Conflict: Why we get trapped and How we get Out" (Simon & Schuster 2021). In her search for solutions, she shows that the process of escaping these most pernicious conflicts involves five steps. First, participants need to investigate the understory that made them so invested in the first place. This is commonly done in mediation, both in the initial caucus meetings and in the context of integrative bargaining that comes later in the process.

Next, Ripley suggests the parties "reduce the binary." When mediators point out the shared values and interests of both parties, which invariably eclipse their differences, she brings some humanity to the negotiating table. The concepts of respect, civility, "teamwork" and inclusion are generally mutually held values across the board.

Third, the mediator needs to "marginalize the fire starters." In other words, the bully doesn't get the final word. This can be done diplomatically by a self-aware mediator by minimizing the chances to dominate the dialogue (a splendid use of the mute button in Zoom), but can also be accomplished by the next step, which is "buying time and making space."

Even the most experienced mediators can be triggered by the flames of fury that can erupt during the heat of negotiation. At those times, a simple time out, a five minute "breather" or a change of rooms may be effective in minimizing or eliminating the danger of escalating the conflict instead of resolving it. Whether or not the mediator herself is "triggered," separating the parties and giving some space and time to cool off can be an effective way to reduce the conflict.

Finally, Ripley considers the most important response to what would otherwise seem to be intractable conflict is to "complicate the narrative." When a conflict is presented as purely good and evil, right and wrong, it's hard to get to a compromise, because the party who is certain they are right or wrong has no incentive to move from their position. Yet there is no litigated case which presents all heroes or all villains. No lawyer has ever participated in a mediation in which they represent to their clients that the odds of winning or losing are 100%. There are always nuances and there is always more to the story. By taking the time to truly listen to both sides, there is usually a window which can be opened towards a satisfactory resolution. It is not mere artifice, but a crucial way to expand the parties' view of the conflict before it can be resolved effectively.

If we are to respond to the challenges of deeply seated acts of discrimination, we must, as Mandela suggested, look not just to the mind, but to the soul. It may be accomplished through these techniques and strategies in mediation in the right circumstances and ultimately help to guide the way towards meaningful change. ■