

ADR Best Practices: Mediating with LGBTQI Parties

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Implicit Bias in Mediation and Suggestions for Practical Ways to Inoculate Against Its Affects

I. Understanding Implicit Bias

- Implicit Bias is a term of art that refers to a “relatively” unconscious and “relatively” automatic feature of prejudicial judgment and social behavior. (Brownstein)
- For example, explicitly, a judge may have a belief that men and women are equally suited to work as a lawyer, for example. Yet implicitly, the judge might have an association or schema about women and home that could lead that judge to have a higher trust level of a male in an oral argument – an “innate,” or “gut-level reaction,” that influences the judge’s decision making.
- Implicit Bias is a lower level of consciousness and not as accessible to the individual as is explicit bias.

A) Association or Schema of Beliefs

Association

- Alief – a mental state that is associative, automatic and arational. They are typically affect-laden and action-generating. (Brownstein)
- Think about this as being similar to having a belief, but more automatic. E.g., “Black man! Scary! Avoid!” (Brownstein)

Schema

- Cognitive schemas are not evaluative attitudes. They are clusters of shared concepts and beliefs.
- They are abstract knowledge structures, “coldly” cognitive and are tools for social categorization.
- They should be distinguished from a straightforward antipathy toward members of socially stigmatized groups. (Brownstein).
- We all articulate a collection of attributes associated with “mother,” for example.

B) Community driven

Sociological Understanding

- Some research shows that implicit bias may be understood on a sociological level.
- Certain areas of the country or even whole countries will have stronger associations or schemas than others. It is like a thumbprint of the culture on the minds of individuals in the community. (Hidden Brain NPR Podcast).
- Where studies have shown a higher than average proportion of implicit racial bias in a community (based on voluntary IAT of individuals in the community), there is a strong correlation of higher than average police shootings of African American people.
- The study was based on an aggregate of data where the vast majority of people taking the IAT are not police officers.

The Community Of Self-Identified Legal Professionals

- Despite what may be a common impression that law is a common profession for the LGBT community, in fact, the percentage of LGBT attorneys is low compared with the percentage of this community in the general population. Explicit and implicit bias are likely contributors to this outcome. (Courson).
- Since the 2011 NALP report cited in the Courson article, the NALP report of LGBT percentages of lawyers in law firms has risen from 1.9% to 2.6%. (NALP Bulletin 2018).
- The population, however, appears to have increased in the percentage of Americans that self-identified as lesbian, gay bisexual or transgender from 3.8% to figures estimated between 4.1% of the population. (Gates).
- Recognize that these are Americans who are willing to self-identify. Populations born after 1980 self-identify at a much higher rate, over 7%. (Gates)

C) Conscious Control Can Mitigate Stereotypical/Implicit Associations

- In time reminders can mitigate the bias.

At times we act in ways that are seemingly unconscious. We do it without realizing what we are doing.

For example, studies have shown that some physicians tend to prescribe more pain killers to white patients than black patients, even when the level of pain is the same. The only difference is skin color.

If the bias is implicit, a tiny reminder can interrupt that bias and give that physician the ability to assert control over the bias. E.g. “please note in our hospital system, “this” is the average amount we give to black men, “this” is the amount to white men, with the same pain level.” (Hidden Brain, NPR Podcast).

- Promoting an appreciation of group differences has a positive impact.

A color blind approach has a negative impact and produces greater implicit bias. (Casey et al 2012)

- Promoting a mindful and deliberative process increasing perspective.
- Promote an individuating process to reduce reliance on stereotyping.
- Encourage Note taking. (Case et al. 2012)
- Reduce time pressure for deliberation. One example is to avoid Friday afternoon mediations.
- Exposure to stigmatized group members can mitigate the associations. (Casey et al. 2012) This is especially true for exposure to stigmatized group members in socially valued roles.
- People who are concerned about discrimination and open to self-examination are showed the greatest reduction in implicit bias when using implicit bias reduction strategies.

D) Factors that can exacerbate implicit bias

- Anxiety (Hidden Brain, NPR)
- Stress (Hidden Brain, NPR)
- Sleep deprivation (Hidden Brain, NPR)
- Ambiguity (Hidden Brain, NPR)(Casey et al. 2012)
- Color-blind approach (avoiding or ignoring race, not being aware or sensitive to differences between social groups) (Casey et al. 2012)
- Feedback mechanisms that apply coercive pressure to comply with egalitarian standards can elicit hostility from some types of individuals. Hostility can generate backlash in the form of increased explicit and implicit prejudice. (Casey et al. 2012) (Backlash) Studies show that overt attempts by someone to suppress the implicit bias in another, causes the implicit bias to be stronger.

E) The Dangers of Attempting to Directly Suppress Implicit Bias

- Studies show that overt attempts by someone to suppress the implicit bias in another, causes the implicit bias to be stronger.

F) Blameworthiness

- At least one study has shown that subjects were considerably more willing to ascribe blame to an actor who was described as “acting in discriminatory ways against blacks despite thinking that people should be treated equally, regardless of race, compared to when the actor was described as acting in discriminatory ways despite having a “subconscious” dislike for African Americans that he is “unaware of having.”
- This speaks to cautious use of the concepts of implicit bias in your arguments, as it could back fire if your audience believes that implicit bias is “subconscious,” and one is not aware of the bias. (Brownstein)

G) Potential Origins of Community Implicit Association

- In 1929, after a wave of molestations of children in St. Paul, Minnesota enacted psychopathic offender law.
- Psychopathic Offender was defined to be any person of such conditions or emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his act, or a combination of any such conditions, as to render such a person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons.
- While the law references “dangerous people,” the law was, in fact, historically mostly used for persons charged with consensual homosexuality.
- This was a civil commitment with no sentence, no timeline, and does not require a criminal standard of proof.
- Thus, implicit biases against LGBT people can include false associations with pedophilia, promiscuity, and failure to have sexual impulse control. An example of this was a question heard seen on twitter that was sent upon hearing that a same sex couple was legally married. “Why bother getting married if you don’t have the same moral constraints to be monogamous as other people?” Yes. 2018.

II. Mediator

As a mediator, how will you be seen? Do you take mitigating measures if you are of a group that is not perceived positively in the implicit bias of the community? What techniques can you use to get a positive cognitive response if your listener has implicit bias that would hold you in a negative light?

III. Participants

What measures would you take for participants, if participants are not perceived positively in the implicit bias of the community?

Connecting with participants so they know enough about each other to lessen the chance of resorting to stereotypes.

Reducing ambiguity to the extent possible by articulation of salient facts to justify an issue so gut-level reactions do not kick in.

Actions to minimize stress in the decision-making process, helps to keep the process less susceptible to implicit bias.

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