

BECOMING A CULTURALLY COMPETENT NEUTRAL

By Felicia Farber

Now, more than ever, it is critical for ADR practitioners to understand how to work with people who appear before them from myriad backgrounds. The ability to recognize and effectively manage the cultural differences of the participants in any dispute resolution forum is essential to maintaining a bias-free atmosphere and ensuring an equitable proceeding. One cannot discount the importance of an impartial, unbiased dispute resolution process in advancing fairness and justice in the legal system.

In our current society it seems that there is little tolerance for mistakes or faux pas in relation to disrespecting other people's cultures. Those that do or say things perceived as inappropriate can be judged harshly: fired from their jobs, publicly canceled, and/or eviscerated on social media platforms. How can ADR practitioners ensure they remain neutral and transgression-free in the cases they preside over? How can they conduct themselves and their proceedings in a culturally competent fashion?

BIAS

First and foremost, ADR professionals need to make sure that they do not personally or professionally harbor biases for or against the people appearing before them. Biases are tendencies, inclinations, or prejudices toward or against individuals or things.¹ They can be positive or negative and can result in prejudgments that lead to rash decisions or discriminatory practices.²

Identifying biases is extremely important for neutrals because they affect how mediators and arbitrators perceive others and make decisions about them. Mediators need to be objective when conducting pre-mediation conference calls, interacting with parties and counsel, and establishing a fair mediation process. Arbitrators need to be impartial when presiding over preliminary hearings, deciding discovery and dispositive motions, assigning weight to evidence, and assessing the credibility of witnesses at evidentiary hearings.

Biases can arise from many factors such as cultural conditioning, media portrayals, life experiences, and upbringing.³ They are categorized as explicit—those that are known at a conscious level, or implicit—those that operate at a level below our conscious awareness.⁴ Explicit biases are easy to recognize because we are aware of and can control them, whereas implicit biases can be difficult to manage because we may not be consciously aware we have them.

Fortunately, there are various self-assessment tests that have been developed in order to help us determine whether we have any implicit or hidden biases. The most well-known is the Implicit Association Test (IAT) created by social psychologist Anthony Greenwald in 1995, which has become the global standard for assessing implicit attitudes, stereotypes, and self-concepts.⁵ The IAT was designed to measure attitudes, beliefs and stereotypes that people have but of which they may be unaware. The test assesses and measures the strengths of automatic mental associations between different concepts, evaluations, and stereotypes utilizing timed responses.⁶

The results of the IAT are not accessible to anyone except the self-tester and can be very useful in determining whether we possess favorable or unfavorable implicit biases toward a wide variety of groups, categories, types of people, and characteristics. It is critical to learn about our own unconscious biases as neutrals because our underlying good and bad thoughts and feelings could impact our attitudes or behaviors and surface in unintended ways at mediation and arbitration proceedings. To maintain our objectivity and ensure a fair forum, we need to be continually diligent and steadfast in our efforts to uncover our own hidden biases that could lead to discriminatory or prejudicial behavior.

What actions can be taken if the results of self-assessment tests show we hold deep-seated, unknown biases?

The good news is that research has shown that prejudice is fluid and changes in our implicit biases are possible.⁷ In one study, it was observed that even deeply ingrained implicit biases that might have been present for many years could be instantly updated by a single new piece of information that presented reasonable arguments for change.⁸ Another study revealed that, if certain deliberate steps are taken to combat implicit bias, the brain can be retrained.⁹ Specifically, once an individual becomes aware of their implicit bias, their concern about the consequences of their bias can help lead them to replace their biased response with non-prejudiced responses that are more in line with the values they consciously believe they hold.¹⁰

Some practical ways to reduce implicit bias and adopt new attitudes are as follows:

- Focus on seeing people as individuals rather than using stereotypes to define them; gather and keep photographs of successful and admirable people from all nationalities, races, religions, genders and sizes.
- Work on consciously changing your stereotypes, especially if you realize your response to a person might be rooted in biases or stereotypes.
- Adjust your perspective to try to see things from another's point of view.
- Increase your exposure by spending time with people from different racial backgrounds and learn about their culture.
- Practice mindfulness to become more aware of your own thoughts and actions.¹¹

CULTURAL COMPETENCE

The United States is truly a melting pot with more immigrants than any other country in the world.¹² According to the 2020 Current Population Survey, immigrants and their U.S.-born children comprise 26% of the U.S. population.¹³ In New York City alone, nearly 40% of residents are foreign born¹⁴ and immigrants account for almost one quarter of the state's total population.¹⁵ Nationally, there are approximately 45 million people living in the U.S. who were born in a foreign country, and there are over 350 languages spoken.¹⁶ There are also over 300 different religions and denominations in this country along with a myriad of races, ethnicities, ages, gender identities, disabilities, and education and income levels.¹⁷

With such a diverse population, ADR practitioners need to attain a high level of cultural competency and awareness in order to ensure they are conducting the fairest, most equitable processes possible. In their mediations, arbitrations, and negotiations, neutrals must recognize

that cultural issues can influence both the proceedings and the results. They cannot simply ignore the cultural differences at the table and continue as usual—as if those differences do not exist. They must instead strive to heighten their awareness of the unique needs and concerns of the people in the room, working to understand their individual characteristics and communication styles. Neutrals need to appreciate the cultural differences in how the participants convey and interpret information in order to conduct effective proceedings where they minimize misunderstandings and achieve the fairest outcomes.

What Does it Mean to be Culturally Competent?

Becoming culturally competent means being able to interact effectively with people of different races, ethnicities, and socio-economic backgrounds from one's own.¹⁸ It encompasses a willingness to learn about others' cultural customs, practices, and worldviews. It includes being open-minded and positive toward other's cultural differences, and making an effort to understand, accept, and respect them.

In recent times there has been a significant focus on diversity and inclusion in the areas of academia, government, business, and law. Diversity and inclusion—including people with a range of differing backgrounds, traits, and characteristics¹⁹—is interrelated with cultural competency in that they are both built on the principles of equity, fairness, and social justice. They also intersect on beliefs, policies, and practices. Being inclusive and culturally sensitive in the field of ADR means being aware of other cultural behaviors, acknowledging them, and reflecting that understanding back to the disputants.

There are self-assessment tests for cultural competency, just as there are for implicit bias. One such online test is offered by the consulting firm of Rowland & Associates and allows you to rate your own cultural competency through answering ten short questions.²⁰ Another by the Greater Vancouver Island Multicultural Society utilizes a Cultural Competency Self-Assessment Checklist designed to test your knowledge, skills, and awareness of yourself in your interactions with others.²¹ Questions include challenging your own stereotypes, recognizing social justice issues, and valuing diversity.

Once you have evaluated your individual strengths and weaknesses and identified personal areas of low cultural understanding, you will be able to work on building your cross-cultural skills. The ability to understand one's own and others' cognitive biases and to engage across cultural lines, adjusting one's behaviors to others' cultural norms, is called *cultural adaptability*.²² As important as it is to embrace cultural diversity and to be open to learning new and different communication approaches, it is equally important to be able to adapt and make modifications along the way.

A fundamental skill in effective cross-cultural communication is being able to clearly and confidently express yourself to people from dissimilar backgrounds in a way that they understand. It does not matter how brilliant your message is if it is not received as intended. Other key skills include obtaining background knowledge on cultural norms, customs, and practices, making efforts to understand cultural differences, and demonstrating cultural sensitivity and awareness. Being able to communicate and interact with people

across cultures has become an essential part of having a successful mediation or arbitration practice.

Microaggressions and Coded Language

Neutrals should listen for and be careful not to use microaggressions or coded language. Microaggressions are indirect or subtle slights, indignities, or insults against members of a marginalized group, such as a racial or ethnic minority.²³ They can be intentional or unintentional and can sometimes even be well-meaning, but they come across as derogatory or negative to the receiver.

Microaggressions can be verbal, non-verbal, facial, or environmental:²⁴

- Verbal microaggressions occur when words deliver the wrong message and the intent of what is said and the impact of what is heard are two different things. They can sound innocent and harmless but contain hidden messages. Examples of verbal microaggressions are: “You speak English very well,” “You don’t look like a lawyer,” and “Were you born here?”
- Types of non-verbal microaggressions are: Leaving someone out of a meeting; Not including them in an email chain; or Holding your purse tighter / Checking your wallet in your back pocket.
- Facial micro-expressions occur when your words and tone are not aligned. For instance, your facial cues and emotions do not match the words you are saying or the message you are sending. This kind of facial misalignment can lead to trust and credibility issues.
- Examples of environmental microaggressions are controversial bumper stickers on your car, political signs on your lawn, or hanging the confederate flag on your house.

Coded language is the use of words that trigger racial stereotypes and other negative associations.²⁵ The specific words by themselves could be benign, but it is the context in which they are used that carries layers of meaning. Examples of coded language can be referring to “those people” or “the community” when discussing a socio-economically disadvantaged group or racial minority, such as using the term “thug” when referencing a black man.

Use of microaggressions and coded language can have powerful detrimental consequences. They can alienate people and make them feel like they do not belong. It is critical for the neutral to make everyone feel comfortable and valued and provide a quality process. In mediations in particular, it is not enough for the mediator to tell people they are in a safe space; the mediator must make them *feel* that way.

What Actions Should a Neutral Take if Microaggressions or Coded Language Surface in a Proceeding?

It is best to deal with any type of rude, insensitive, or nuanced language as soon as it surfaces and not let it fester. By ignoring or overlooking an indignity, the neutral could give the impression that s/he agrees with it or it was not important enough to address. Any perceived

microaggression should be directly acknowledged, otherwise the danger is that a party might feel demeaned or discriminated against, and it will be hard for them to be open to a productive session.

Ideally, if there may have been a microaggression, the neutral should speak to the parties separately in caucus to ascertain their thoughts, discuss sensitive issues, and talk through difficult situations. Through the use of questions, the neutral can obtain clarification of comments or actions and make the offending party aware of the impact on the other party. For example, the neutral could ask, “What did you mean when you said *that*? Do you think it was an appropriate remark? Can you see how that might have offended the other person? What led you to make that assumption?”

As for the offended party, the neutral could get their suggestions on how they would like to get past the incident and move forward. By understanding their thoughts and preferences, the neutral will ensure they are invested in the process and use their input to neutralize the situation and proceed.

If coded language is suspected, such as where someone was alleged to be “difficult to deal with” or told they “didn’t fit in,” clarifying questions can be utilized to elicit further information. A neutral could explore the reasons for these statements, asking whether they were intended to be offensive or how they were perceived. Exploratory questions can uncover whether the statements were evidence-based or whether they stemmed from personal feelings. For instance, the neutral could ask, “How was this person difficult? What makes someone a ‘good fit’? Were steps taken to include this person?”

If a mediator learns of cultural tensions or bias prior to the mediation session they can use pre-mediation meetings to address them. Once the mediation has started it can be helpful at the outset if a mediator aids the parties in finding shared interests or similarities in order to minimize the impact of bias and cultural differences. Recognizing the common elements in one another can help the participants to transcend the dispute and place them on the path toward resolution. Building rapport and making them feel comfortable with both you and each other will help them focus on problem-solving and negotiation, rather than underlying cultural concerns or biases.

It might also be beneficial to an aggrieved party who is highly emotional to have a support person present. A friend or family member can help them remain calm, centered, and in control so they can focus their attention on the matter at hand. If a situation is too much for the mediator to handle alone, the mediator could consider having a co-mediator who has a similar background or characteristic as the party, or who is familiar with the cultural issues at play. A primary goal of the mediator is to ensure a fair and just process so the parties feel they are mediating in a safe environment. Emotions are important, and if a party believes they were slighted, it will be hard for them to get past it and be productive.

As for arbitration, every aspect of the process can be affected if there are cultural issues involved or there is an uncomfortable undertone. By understanding the disputants’ communication styles and attitudes, an arbitrator can ensure s/he is being perceived as a role model for equitable treatment of all stakeholders and never allow demeaning behavior in the proceedings. An

arbitrator's knowledge and respect for the cultural differences of the parties and the way negotiation works in their cultures can give them insights into how the dispute ensued, where the breakdown of communication occurred, or what cultural practices may have contributed to their conflict.

Nonverbal Communication

Neutrals need to acknowledge not only what disputants are saying, but their non-verbal behaviors and communication as well. Perhaps cross-cultural issues are causing a problem at a mediation session, evidenced by the way the participants are reacting to each other. Or perhaps a witness at an arbitration comes from a culture, like Japan, where neutral facial expressions are intended to avoid burdening others with emotions and are not signs of dishonesty.²⁶

Just as neutrals use interactive dialogue and active listening to better understand parties and cultivate relationships with them, they also need to stay attuned to parties' nonverbal communications. They need to understand participants' facial expressions, posture, eye contact, gestures, and body movement, in a cultural context.

Without saying a word, participants can deliver clear messages to mediators and arbitrators through their actions and mannerisms. An eye roll, oblique glance, or narrow squint can be quite telling of someone's disapproval. Folded arms, pursed lips, or a tight jaw can indicate anger. A furrowed brow, mouth pulled to one side, or tapping of fingers can be evidence of unease or agitation. By "reading the room," neutrals can quickly gauge the disputants' feelings to determine whether they should capitalize on positive reactions or intervene to rectify difficult situations.

Attention must also be paid to nonverbal communication differences between cultures. Very often, simple gestures viewed as positive in one culture may be seen as inappropriate in another. For instance, in the United States, giving someone a thumbs-up is a positive sign indicating approval, but in Greece, Russia, Iran, and parts of West Africa the gesture is offensive.²⁷ Forming a circle with the forefinger and thumb conveys "okay" in the U.S. and the U.K., but is an indecent symbol in Spain, Turkey and Brazil.²⁸ And in some Asian and Middle Eastern cultures, pointing at people, using the left hand to shake instead of the right, making direct eye contact, touching, or expressing emotions can be considered impolite or inappropriate.²⁹

High-context and Low-context Cultures

In general, neutrals should be aware of whether they are working with people from a high-context or a low-context culture. In high-context cultures, there is greater reliance on "reading between the lines" and nonverbal communication than in low-context cultures.³⁰ High-context cultures rely on personal relationships, social hierarchies, and cultural knowledge to convey meaning.³¹ Messages are subtle, nuanced, and layered, where the true intent is not communicated verbally but must be interpreted through shared cultural context. Examples of high-context cultures are India, China, Korea, Japan, Iran, Saudi Arabia, and Russia.³²

In low-context cultures, such as the United States, Canada, and Australia, communication is clear, explicit, and straight forward. Hierarchies are relaxed and strong emphasis is placed on the

literal meaning of words rather than the context surrounding them. There is a focus on the facts and the accuracy of messages. Intent is conveyed in the words themselves rather than the interpretation of unspoken cues. Other examples of low-context cultures are the Netherlands, Germany, Denmark, Finland, and the United Kingdom.³³

Learning the distinctions between communication styles and patterns of high-context and low-context cultures can help neutrals reduce conflicts and misunderstandings in their dealings with disputants. Gaining an understanding of and appreciation for cultural diversity and the nuances of nonverbal communication are key to building trust and rapport and achieving effective communication amongst varying groups of people.

Steps Toward Gaining Cultural Competency

Understanding the unique values, beliefs, and practices of other cultures cannot happen unless you are open to learning about them. The following are some suggestions to gain practical information on cultural norms and customs and to help identify and overcome biases and increase empathy, which can lead to transformative thinking and heighten cultural competency:

- Be curious and invest the time in learning about other people's traditions and heritages;
- Research cultures you are unfamiliar with and contact friends and colleagues from those cultures;
- Reach out to members of peer groups and professional organizations;
- Take implicit bias, anti-oppression and anti-racism trainings;
- Travel and learn firsthand about other people's customs and cultures;
- Spend time with individuals from different backgrounds and build relationships with them;
- Reflect upon the cross-cultural encounters and conversations you have had;
- Expand your sources for news and information
- Join specialty bar association and affinity groups

Conclusion

Cultural competency for ADR practitioners means having the knowledge and ability to recognize the unique needs and communication styles of each individual disputant to make sure they are fairly treated. It means digging deeper, stepping outside our comfort zone and established way of thinking to broaden our cross-cultural awareness and skills.

Given the diverse world in which we live, cultural competency will continue to play an increasingly important role in the ADR profession. As neutrals, even if we are unfamiliar with certain cultural norms, we can still be attentive, respectful, empathetic, and kindhearted toward others. Participants in mediation and arbitration will always appreciate a neutral who is positive, courteous, and impartial.

Endnotes

1. <https://www.psychologytoday.com/us/basics/bias>
2. *Id.*
3. <https://www.verywellmind.com/implicit-bias-overview-4178401>
4. <https://www.simplypsychology.org/implicit-bias.html>
5. <https://implicit.harvard.edu/implicit/takeatest.html>
6. <https://implicit.harvard.edu/implicit/aboutus.html>
7. <https://www.psychologytoday.com/us/blog/spontaneous-thoughts/201912/can-we-change-our-implicit-bias>
8. *Ibid*
9. <https://www.apa.org/monitor/2011/10/biased-brain>
10. *Id.*
11. *See supra* note 1
12. <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/>
13. <https://www.census.gov/programs-surveys/cps.html>
14. https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report_2018_final.pdf
15. <https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york>
16. <https://www.census.gov/newsroom/press-releases/2015/cb15-185.html>
17. <https://undergod.procon.org/religions-and-denominations-in-the-us/>
18. <https://www.apa.org/monitor/2015/03/cultural-competence>
19. <https://dictionary.cambridge.org/us/dictionary/english/diversity>
20. <https://www.international-excellence.com/blog-1/318-test-your-cultural-competence-2>
21. <http://rapworkers.com/wp-content/uploads/2017/08/cultural-competence-selfassessment-checklist-1.pdf>
22. <https://www.igi-global.com/dictionary/of-chalk-and-chai/54050>
23. <https://www.merriam-webster.com/dictionary/microaggression>
24. <https://diversity.nih.gov/sociocultural-factors/microaggressions>
25. <https://neadjustice.org/social-justice-issues/racial-justice/coded-language/>
26. <https://online.pointpark.edu/business/cultural-differences-in-nonverbal-communication/>
27. <https://www.businessinsider.com/hand-gestures-offensive-different-countries-2018-6>
28. *Id.*
29. *Id.*
30. <https://www.techtello.com/high-context-culture-vs-low-context-culture/>
31. *Id.*
32. *Id.*
33. *Id.*