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Zooming in on Neutrals' Implicit 'isms

Professor Elayne E. Greenberg

The Issue—Zooming in on Neutrals' Implicit 'isms

Video conferencing, extolled for its economic and efficiency benefits, has now become an accepted option in the “new normal” of dispute resolution practice. Consequently, our professional discussions about video conferencing have advanced from sharing the mechanics of “how to” conduct an arbitration or mediation on Zoom to more nuanced explorations about the appropriate use of video conferencing.¹ This column contributes to this exploration by questioning how dispute resolution processes conducted via video conferencing might trigger the implicit biases of arbitrators and mediators and compromise a neutral's ethical obligation to be impartial. *When a neutral conducts their dispute resolution processes via video conferencing, how might communicating via video conferencing amplify a neutral's existing implicit biases or create new implicit biases that shape a neutral's assessment of the participants?* Colleagues, please join me in this evolving conversation.

My expanded interest in the ways video conferencing might trigger our implicit biases was piqued when prudence during the pandemic compelled me, along with the rest of the world, to shelter-in-place and conduct much of our professional, personal and entertainment connections via video conferencing. As neutrals, we all pride ourselves in neutrality and objectivity. Yet, when video conferencing, I became aware of how my assessments of the individuals participating were based on different cues than those that influence me in person. For example, I observed that many of the respected news commentators appearing on news shows via video conferencing had the book *The Power Broker* strategically displayed in their backgrounds, and I wondered whether, for different observers, the book triggered different implicit biases about the commentators. I also noted how my assessments of colleagues with whom I was virtually meeting for the first time via video conferencing were influenced depending upon their video conference background: whether their bedroom, a well-appointed office, a kitchen, a resort, or a virtual background. How were professional perceptions of colleagues either reinforced or challenged when video conferencing blurred the established personal and professional boundaries and allowed entry into their personal space? Were reactions to the merits of participants' contributions on video conferencing adversely affected if they had inadequate lighting,

participated showing only the top of their head, or engaged only on audio? Hmm. Do these cues affect our impartiality when we are serving as neutrals and if so, how?

Impartiality is the foundational ethical tenet for arbitrators² and mediators.³ Yet, even the most ethical neutrals have been surprised to learn that their ethical commitment to impartiality may be unintentionally compromised by implicit biases that are contrary to their stated beliefs. After all, our implicit biases may include our mental absorption of the discriminatory messages communicated in our broader society and media. Many neutrals, as part of their professional training, may have taken implicit bias training to learn debiasing strategies that help mitigate their implicit biases when conducting in-person dispute resolution processes. However, emerging research and anecdotal reports reveal that video conferencing, as a different communication channel, may also trigger implicit biases, albeit in a different context.⁴

One glaring example about how context matters took place in March 2020, when the court, in response to COVID-19 health concerns, shifted those court-connected dispute resolution processes previously conducted in-person to video conferencing. Those participants who did not have computers, reliable access to broadband, and technological competence had to participate via their cell phones.⁵ In this unfamiliar context, were different biases evoked than those that might be anticipated if the dispute resolution process took place in-person? Chief Judge Janet DiFiore had adopted a “zero tolerance” policy for discrimination and a commitment to equitable justice for all in the New York State courts and responded quickly to these concerns.⁶ The chief judge appointed the



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Honorable Edwina Mendelson to serve as deputy chief administrative judge for justice initiatives, who, with the chief judge's support, took affirmative steps to narrow this digital divide and ensure meaningful participation in dispute resolution processes for those participants who needed it.⁷ Could this fix address unconscious reactions and implicit bias?

How might we address the other implicit biases that may be triggered when conducting dispute resolution processes via video conferencing? This discussion proceeds in three additional parts. Part Two explains how conducting dispute resolution processes via video conferencing creates different contexts than in-person dispute resolution processes that are likely to trigger a neutral's implicit biases. Part Three discusses what initial steps arbitrators and mediators who conduct dispute resolution processes via video conferencing might consider to maintain their ethical integrity and the integrity of these processes. In Part Four, the discussion concludes with thoughts on how we can build and strengthen the benefits of video conferencing in our new normal.

Part Two: Video Conferencing Contexts

When mediators and arbitrators conduct their dispute resolution processes via video conferencing, neutrals are more susceptible to having their implicit biases emerge and compromising their objectivity. First, the cognitive overload, or Zoom fatigue, experienced on video conferencing makes neutrals more susceptible to their implicit biases. Second, the limited visual presentation of participants on video conferencing incentivizes neutrals to "fill in the gaps" with their implicit biases. This section discusses how participation via video conferencing creates different contexts for neutrals' implicit biases to emerge.

Zoom Fatigue and Implicit Biases

Video conferencing as a communication channel allows all participants to see each other from the shoulder up. However, as neutrals try to equate this video conference "seeing" with the "in-person" seeing, neutrals experience a depletion of their cognitive resources, or Zoom fatigue.⁸ As one illustration, neutrals make eye contact with the participants on video conferencing by looking at the camera, not directly at the parties on the screen. Many neutrals, including this author, still find looking into the camera instead of directly in the eyes of the participants counterintuitive, requiring conscious energy. A second cognitive burden is that the mediators and arbitrators observe themselves and adjust their reactions when they are participating via video conferencing. Third, we have all experienced the added energy drain of trying to discern participants who are in poor light or have uneven connections. If participating in video conferencing creates Zoom fatigue, neutrals may find they have less energy available for combating implicit biases.

Limited Visuals, "Filling in the Gaps," and Implicit Biases

As stated above, when neutrals conduct their dispute resolution processes via video conferencing, they only see participants in square boxes from the shoulder up. Neutrals are unable to see the rest of the body and all the non-verbal communications that are out of sight. This incomplete picture of the participants creates an opportunity for neutrals to "fill in the gaps" with their implicit biases. In a variation of that scenario, when a person participates with audio only, and they appear on the screen as a black box with a number, there is an ample opportunity for the neutral to fill in the gap with implicit biases.

Another visual that might trigger a neutral's implicit biases is the background that participants are using, whether virtual or the participant's natural backgrounds.⁹ When we are all together in a conference room, we all have the same "background." One neutral acknowledged that when a mediation participant uses a virtual background, the mediator can't help but wonder what that person is hiding. In another example, my esteemed colleague Edna Sussman reported on how affiliation and affinity might be unconscious drivers that influence an arbitrator's decision-making in the previous issue of *New York Dispute Resolution Lawyer*.¹⁰ The question deserving further exploration is how cues or other visuals in a participant's background might trigger a neutral's implicit biases.

Part Three: Maintaining the Integrity of the Process While Maintaining Your Impartiality

Impartiality is not only a foundational tenet of our ethical roles as neutrals, but it is also one of the criteria participants in dispute resolution processes consider when they assess the legitimacy of process.

One unanswered question among the many about the impact of video conferencing on implicit bias is: do those participating in our dispute resolution processes via video conferencing assess *us as impartial*? Proceduralist Tom Tyler reminds us that even when participants in dispute resolution processes receive an unfavorable outcome, they are still more likely to be satisfied with process if *inter alia* they found the neutral overseeing the process to be impartial.¹¹ Professor Donna Shestowsky reinforces the importance of learning from the process users whether they perceive the process as fair.¹² Given all these unanswered questions, how might a neutral who has scheduled a mediation or arbitration via video conferencing tomorrow ethically proceed?

In many ways, you've taken the first step. Awareness and acknowledgement. Hopefully, by reading this column, you will continue to heighten your sensitivity and awareness about how your implicit biases might be triggered by different cues and contexts when conducting dispute resolution processes via video conferencing, As part of that awareness

and acknowledgement, you can make sure to schedule mental breaks before and during the dispute resolution process to help avoid the cognitive depletion that will make it more likely for your implicit biases to compromise your ethical mandate of impartiality.

As part of a more reflexive practice, I welcome your insights about whether you have noted new implicit biases or have observed your pre-existing biases amplified when you have conducted your dispute resolution processes via video conferencing. What affirmative steps have you taken to mitigate these implicit biases?

Part Four: In Conclusion

As we go forward in the new normal, neutrals and dispute resolution participants may decide, depending on the matter at hand, to meet in-person or via video conferencing. Neutrals, as part of their professional training for conducting in-person dispute resolution processes, have already become sensitized to the implicit biases that may inadvertently compromise their ethical mandate of impartiality in the in-person context. However, emerging research questions whether conducting a dispute resolution process via video conferencing may amplify a neutral's existing implicit biases or create new ones. This column expands the discussion and zooms in on how a neutral's implicit biases might be triggered when conducting dispute resolution processes via video conferencing.

Yes, video conferencing will continue to play a prominent role in the new normal because of the economic and efficiency benefits it affords neutrals and participants. This column raises questions about a little explored area that warrants more research. *How, as dispute resolution professionals, might we build on the economic and efficiency benefits of conducting dispute resolution processes via video conferencing and continue to reinforce our ethical mandate for impartiality?* Let's continue this important exploration.

Endnotes

1. See, e.g., Harry B. Truehart, *Virtual Arbitration: A Two-Year Retrospective Survey of the Fellows of College of Commercial Arbitrators* (April 2022) at https://www.ccarbitrators.org/wp-content/uploads/2022/04/2022_Virtual-Arbitration-Report-to-CCA.pdf; Mark Bunim, *Insurance Mediation: Is It Time to Return to the Good Old Days?*, NYLJ (April 19, 2022), <https://www.law.com/newyorklawjournal/2022/04/19/insurance-mediation-is-it-time-to-return-to-the-good-old-days/>.
2. See, e.g., https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/commercial_disputes.pdf; http://ww2.nycourts.gov/courts/comdiv/ny/ADR_ethicsforarbitrators.shtml#1 (See Standard I Impartiality).
3. See, e.g., https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf (See Standard II Impartiality); <https://www.nycourts.gov/LegacyPDFS/courts/comdiv/PDFs/NYCounty/Attachment3.pdf> (See Standard II Impartiality);
4. See, e.g., Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Process*, 71 DePaul L. Rev. at 746 (2022 forthcoming); Jyothi Marbin, MD, Y-Vonne Hutchinson, JD, & Sarah Schaeffer, MD, MPH, *Avoiding the Virtual Pitfall: Identifying & Mitigating Biases in Graduate Medical Education Videoconference Interviews*, Academic Medicine, Vol. 96, No.8, 1120 (Aug. 2021) (“... VCI's may also introduce new biases and amplify existing biases . . .”)
5. See, e.g. Donna Erez-Navot, *Reimagining Access to Justice: Should We Shift to Virtual Mediation Programs Beyond the COVID-19 Pandemic, Especially for Small Claims?* NY Disp. Resol. Lawyer, Vol.15, No. 1, 42, (2022) (trumpeting New York courts efforts to ensure meaningful participation in small claims court).
6. Chief Judge Janet DiFiore, *Equal Justice In the New York State Courts, 2020-2021, Year In Review* at https://www.americanbar.org/content/dam/aba/administrative/child_law/atj22-materials/d5/2021-equal-justice-review.pdf.
7. See, e.g., https://nycourts.gov/LegacyPDFS/accesstojusticecommission/A2J_2D_Transcript.pdf (highlighting the collaborations and partnerships the court established to narrow the digital divide and provide participants who needed it the technological support needed to meaningfully participate in court hearings and court-connected dispute resolution processes conducted via video conferencing).
8. See, e.g., Noam Ebner & Elayne E. Greenberg, *Designing Binge-Worthy Courses: Pandemic Pleasures and COVID-19 Consequences*, Negot. J, 535 (2020); Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes* at 708, 71 DePaul L. Rev.701 ('22 forthcoming).
9. See, e.g., Elayne E. Greenberg, *Moving Your Mojo Online*, New York Disp. Resol. Lawyer, Vol. 13, No. 2 (2020) (questioning what neutrals communicate when they use a more authentic background when participating via video conferencing).
10. Edna Sussman, *Affiliation and Affinity: Unconscious Drivers of Arbitrator Decision-Making*, NY Disp. Resol. Lawyer, Vol. 15, No. 1 at 27 (2022).
11. See, e.g., Tom R. Tyler, *Procedural Justice and the Courts*, 26, 30, Court Review Vol. 44, No. 1/2: The J, of the American Judges Assoc (2007). See also, Rebecca Hollander-Blumoff & Tom Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, J. Disp. Resol. (2011).
12. See Professor Donna Shestowsky interview at *Researchers Can Help Courts Understand Whether Litigants Think the Civil Legal System Is Fair—and Why (or Why Not)*, The Pew Charitable Trusts (pewtrusts.org) on June 14, 2021.

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