Fine-Tuning the Arbitration Panel: How to Avoid Experiential Bias

How to Avoid Experiential Bias

David Waddell

David Waddell has been licensed to practice law since November of 1986, sitting first chair in a jury trial one week after being sworn in. After more than three decades as a trial lawyer, David turned his attention to studying human judgment. He is the founder of ProActive Arbitration, which develops active strategies for identifying pre-judgments and enhancing impartiality. The author thanks the many people who reviewed and commented on early drafts of this article and, in particular, thanks Andrew Duncan Waddell, a writer and educator based in Los Angeles, for his input and support.

In arbitration conferences, trade publications, and continuing education presentations, consistent and appropriate emphasis is placed on the importance of selecting the right arbitrator(s). But few pragmatic metrics are offered for how to do so. One well-respected arbitrator's sole suggestion was to telephone him for names. Over the course of my career, the two most common suggestions I have encountered from arbitrators and advocates alike are: (1) select arbitrators with knowledge and experience in the industry; and (2) be sure the arbitrators on your panel can get along.

I aim to show that this advice is not well-considered. While using these criteria may increase the *efficiency* of the arbitral process, it is not likely to result in the most *neutral* arbitral process. Seeking arbitrators with similar industry experiences, backgrounds, and knowledge-bases produces a group of arbitrators who share numerous assumptions based on the similarity of their own experiences. Such a homogenous panel lacks the diversity of experience and outlook that can enhance the panel's critical-thinking, open-mindedness, and ability to truly hear an advocate's case and consider their client's position.[1]

I propose making impartiality the most significant factor in selecting an arbitrator, and the most important skill an arbitrator can develop. Impartiality is not often discussed as a "skill," or as a variable to be considered in the context of selecting an arbitrator. Why not? Perhaps it is assumed that all arbitrators are neutral by dint of their profession, or that there is no practical method for assessing the neutrality of potential arbitrators. I dispute both of these assumptions. All arbitrators are not equal in their neutrality, and there are simple, common sense methods for assessing arbitrator neutrality and enhancing the overall neutrality of an arbitration panel.

In the following pages, "neutrality" and "impartiality" are used as synonyms. This article will demonstrate why neutrality is the most essential characteristic of a sound arbitral process and outline practical considerations and strategies for advocates and arbitrators to create a panel that is as impartial as possible in its judgments and decision-making.

I will focus specifically on construction panels, but the framework is applicable to arbitration in any industry. All of the examples that follow reflect my experience as a student, advocate, and arbitrator.

---

1 For a rigorous look at the concrete effects of diversity on group performance see Scott E. Page, *The Diversity Bonus: How Great Teams Pay Off in the Knowledge Economy* (2018).

I. THE IMPORTANCE OF A NEUTRAL NEUTRAL

Arbitrators, like all humans, are subject to cognitive errors and biases that influence decision-making. In the last several decades, there has been a wealth of research into human decision-making across the disciplines of psychology, neuroscience, and behavioral economics. While there is still much to learn, there is general agreement when it comes to the prevalence of certain cognitive errors. Additionally, many studies have demonstrated that the prevalence of certain errors can be diminished through various methods.2

However, few, if any of these findings have been formally integrated into education and training for arbitrators or resulted in procedural changes in arbitration. Rather than assuming all arbitrators are equally impartial, an advocate should ask a potential arbitrator why she believes she is impartial, and what strategies and practices she uses to enhance the impartiality of the arbitral process.

What makes "impartiality" such an important factor that it merits a direct inquiry into an arbitrator's approach? Simply put, "impartiality" is the foundation upon which the whole arbitral process rests. A client wants her side of the story to be heard in its entirety, without pre-judgments, assumptions, or biases. Impartiality should not be confused with a lack of conflicts. An arbitrator's disclosure is not an imprimatur of neutrality. If contemporary science tells us that human decision-making is never completely free from cognitive errors and bias, and that specific strategies exist which can reduce the prevalence and influence of such biases, then it is an arbitrator's duty to pursue such strategies.

For an arbitrator, true impartiality means doing everything in one's power to listen to the testimony without pre-judgment based upon how the testifier looks or sounds (physical appearance, accent, age, dress, level of education, etc.) or whether similar testimony has been heard by the arbitrator in a previous case.

The goal is to strip down the testimony to its core, the raw data: the individual words being spoken. Once a neutral has done everything in her power to listen to the witness impartially, to receive the raw data as a "blank slate," then she can apply her knowledge and experience regarding the law and circumstances. But before the experience layer is applied, the neutral owes it to the parties, and the process, to do everything in her power to receive the testimony as raw data, without judgment or critique.

Statutorily, the evidence is required to be heard. One of the few statutory bases for overturning an award is *failing* to allow the parties to put on their case. If an arbitrator makes assumptions and pre-judgments about what is said**,** without hearing—*really* hearing—the testimony, have the advocates truly had an opportunity to put on their case?

This is why it is so important to select arbitrators who, rather than operating on the assumption that they are already sufficiently neutral, have developed and implemented active strategies for assessing and enhancing their own impartiality. In order to make such a selection, an advocate

---

2 The work of Nobel Prize-winning economists Daniel Kahneman and Amos Tversky—from their landmark work *Judgment Under Uncertainty: Heuristics and Biases* (1974) to Kahneman's recent *Thinking Fast and Slow* (2013)—provides a good starting point for understanding the prevalence of cognitive errors in human decision-making.

must have a basic understanding of how bias operates, and how arbitrators can mitigate it. Armed with a firm grasp of the way cognitive errors and biases influence decision-making, as well as strategies for guarding against these errors, an advocate will be able to make an informed analysis of a potential arbitrator's investment in impartiality and select arbitrators accordingly.

An arbitrator with an active strategy for enhancing impartiality is more likely to truly hear every detail of the case presented, and consider each piece of evidence as new information without making assumptions based upon similar cases. She is more likely to spot her own cognitive errors and pre-judgments. She is more likely to introduce procedures to reduce opportunities for unconscious bias to influence the proceedings.

The role of biases and cognitive errors in human consciousness is a vast and complex subject, our understanding of which is continually growing and evolving. What follows is meant to serve as an introduction to the subject, and a catalyst for further conversations about impartiality among advocates and arbitrators alike.

II. PREVALENT COGNITIVE ERRORS

While many psychologists, scientists, and behavioral researchers have developed terms to describe common cognitive errors, there is not a universal taxonomy of errors. Many cognitive errors work in tandem with others. In the context of an arbitration, several common cognitive errors stem from the tendency to make pre-judgments about the case based on one's own past experiences, rather than the facts of the specific case at hand.

Our brains are meaning-making machines. They perform the complex and unconscious work of cobbling together "mental models" from all of our past experiences. These mental models are the sources of our intuitions and quick decisions.3 It is natural—indeed, often necessary—for humans to rely on past experiences when faced with a decision. We do this every day when we decide what to eat, decide which route to take to work, and make countless other small decisions. We would not be able to function if we treated every single decision as an entirely new one.

Our mental models also help us make sense of the unknown when we are faced with an unfamiliar situation. But they present a danger to an arbitrator if her goal is to truly listen to testimony impartially, without making assumptions or judgments based on past experiences.

Consider the case of an arbitrator who has years of experience on construction panels and/or professional experience as an architect or contractor. This arbitrator brings many things to the process: a wider knowledge of industry-specific practices and norms, a deeper technical understanding of building processes, and personal familiarity with disputes similar to the case at hand. Such knowledge can help the arbitrator grasp certain aspects of the dispute more quickly and precisely than an arbitrator with less professional experience in the industry. However, this knowledge alone will not lead to a fair, impartial process. In fact, the arbitrator's wealth of

---

3 For a concise, academic overview of mental models see Lynn Westbrook, *Mental Models: A Theoretical Overview and Preliminary Study*, 32 J. of Info. Sci. 563 (2006). For a more exhilarating and popular look at the role of mental models in real-world, high-stakes decisions, see Laurence Gonzales, *Deep Survival: Who Lives, Who Dies, and Why* (2003).

experience can give rise to all sorts of theories or assumptions about the case at hand. His mental models will work to suggest facts about the case that have not actually been stated or proven.[4]

An arbitrator invested in mitigating pre-judgments must be vigilant about when he is inferring or assuming something based upon past experience. He must actively keep assumptions in abeyance and strive to keep an open mind, so that he does not automatically fall back on his ingrained mental models.

We can all appreciate that experience can give rise to complacency. We all know to look both ways before we cross the street, but street-crossers are still injured crossing the street. An adult knows intellectually that crossing the street is dangerous and he should remain vigilant, but his years of street crossing without incident have taught him the opposite. How many of us have been staring at the navigation directions on our phones, eating, texting, or relying on a crowd, and failed to look both ways prior to crossing the street? The sum of our past experience can exert a stronger influence on our actions than a simple abstract truth we purport to accept: crossing the street is dangerous. An arbitrator with ample industry experience must consistently cultivate an awareness of how her experiences influence her judgment and allow her to grow complacent in her assumptions. (See section IV below.)

What follows are descriptions of several common cognitive errors in which an arbitrator's mental models inhibit his ability to listen and judge impartially. The goal is not to provide an exhaustive accounting of human consciousness and all its deviations from impartial reasoning (such an undertaking would be impossible), but rather to identify clear opportunities for enhancing impartiality in the arbitral process. An advocate invested in impartiality would do well to ask potential arbitrators how they mitigate the influence of these biases. Impartiality could also be improved on a panel by appointing arbitrators with diverse professional and personal experiences, who will not all bring the same mental models and assumptions to bear on the case; someone who normally crosses the street in downtown Chicago will have developed a different mental model than someone who crosses the street in suburban Houston. (See section III below.)

A. The Law of Small Numbers

The Law of Small Numbers refers to the tendency to draw broad conclusions from a small number of cases. For example, consider the case of an arbitrator with a decade of experience on construction panels and a previous career as an architect. She may be inclined to believe she has a large sample size of cases that entitles her to a certain amount of confidence in her intuitions. While this might not be an unreasonable belief for someone running her own business or offering advice to a friend, it is an inappropriate attitude for an arbitrator whose chief duty is to consider the case at hand impartially, without pre-judgments. The truth is that, even if the arbitrator has several hundred construction design cases under her belt, those cases would still represent only a small percentage of all total construction design cases. One's own experiences also make up an unrepresentative sample, because they all relate to . . . how to say this . . . oneself!

---

4 This is the logical consequence of relying on a familiar and comfortable mental model to make sense of a case, rather than listening to each case as if one has never heard one like it. *See* Westbrook, *supra* note 3, at 565 ("Although it is possible to develop or correct a model by repeatedly using and revising it, people are quite likely to use a model without regard to its efficacy simply because it is emotionally comfortable and deeply familiar.").

Statistically, it is a mistake to draw conclusions or make pre-judgments about a case based upon our own experience, and yet this is precisely what our meaning-making brains do. Even trained statisticians and researchers have been known to fall victim to this fallacy, erroneously intuiting that the conclusions gleaned from a small sample size can be applied to the general population. This is why it is essential for an arbitrator to have an active strategy for guarding against pre-judgments and enhancing impartiality.

B. Attachment to a Single Explanation

When presented with an unfamiliar scenario or puzzle, our minds naturally use our mental models to generate possible explanations or hypotheses, as well as an intuition about which hypothesis is the most likely. We fear what we don't know; causing us to make sense out of what initially appears senseless. From a survival standpoint, this is highly desirable. It allows us to solve novel problems quickly, and to move decisively toward a course of action. Having assimilated the novel situation into our already existing theories about the world, we believe we have avoided the unknown.

Statistically, however, human beings drastically overestimate the likelihood of their preferred explanation or hypothesis. Due to our natural desire for clarity, we become attached (many times unknowingly) to a single explanation for a phenomenon and intuitively discount competing hypotheses, or explanations that might function in tandem with our original hypothesis.5

When confronted with a novel scenario, an arbitrator with substantial industry experience will naturally look to his repertoire of personal experience for an explanation that could apply to the novel case at hand, and overestimate the likelihood that this familiar explanation is valid and sufficient to explain what is unfamiliar and novel.

This problem is exacerbated when an arbitrator is reluctant to interrogate his own thinking, assumptions, and pre-judgments during the arbitral process. This reluctance can stem from countless sources: he believes he is already impartial by dint of experience; he fears that reflecting on his pre-judgments will undermine his appearance of professionalism, competency, and neutrality; or, he assumes he understands the testimony and avoids asking for confirmation or clarity so that others will not doubt his knowledge about the matter at hand.

Advocates should seek arbitrators who are eager to consider challenges and counterpoints to their own theory of the case, and arbitrators who question witnesses and counsel to ensure that what is heard is what is meant to be communicated. Such inquiry may lengthen the hearing, but works to minimize the potential for an error of misunderstanding. It is not uncommon for two people to understand and use the same word differently. An arbitrator who recognizes this is far more professional, competent, and neutral than her colleague who is afraid to admit when an assumption or bias has influenced his thinking, or is more concerned about the perception of his knowledge than the clarity of communication. When practiced, this is a significant advantage of arbitration: a dialogue with the arbitrator(s) to insure the client's position is less likely to be misunderstood.

---

5 *See* Khaneman et al., *Judgment Under Uncertainty*, *supra* note 2. For an entertaining popular introduction to the work of Khaneman and Tversky, see Michael Lewis, *The Undoing Project* (2016). Attachment to a Single Explanation is discussed at pages 205-08 in Lewis' book.

To assist me in this endeavor, I've adopted a mantra: *always keep the door open that you may be wrong.* If an arbitrator adopts a similar mantra and questions a witness about the definition of common industry terms she uses, it increases the likelihood of a shared understanding of what the witness means to communicate.

Attachment to a Single Explanation is not limited to arbitrators; it can also lead an advocate to overvalue his theory-of-the-case and prevent him from considering the counter-theories. This hurts his ability to anticipate possible arguments and inquiries from both the opposing party and the arbitrators during the process; not to mention the opportunity to misevaluate the case to the client. Understanding and learning the habits of the mind discussed below will not only help the arbitrator enhance his impartiality, it will also assist the advocate in better evaluation and presentment of his case.

C. In-Group Bias

We all belong to countless groups or communities—families, neighborhoods, nations, ethnicities, religions, alma maters, professional associations, etc. In-group bias occurs when an individual's allegiance to a group is activated and he shows favor or preferential treatment—consciously or unconsciously—to another member of that group. In the context of an arbitration, this might look like giving more credence to an expert witness who graduated from your alma mater, harboring skepticism about the capabilities of an advocate who belongs to an organization you dislike, or listening less intently to the testimony of a witness of an ethnicity different from your own. Studies have shown that, even when people disavow any in-group bias for a particular group, their allegiance to that group may still operate subconsciously, outside the sphere of their own awareness.6

For this reason, arbitrators should minimize the flow of information that might trigger an in-group bias when such information is irrelevant to the arbitral process. Arbitrators with an active strategy for enhancing impartiality will have practical procedures in place to accomplish this goal. They may also be implementing regular exercises and habits into their daily routines to mitigate their own in-group biases. (See section IV below.) An advocate should ask an arbitrator what sorts of strategies he employs to address in-group bias.

III. DYNAMICS OF GROUP DECISION-MAKING

In addition to selecting neutrals with active strategies for guarding against the pre-judgments described above, it is important to consider how the neutrals on your panel will work together to enhance impartiality.

A. Diversity of Professional Experience and Personal Background

Arbitrators who possess similar professional or personal backgrounds, or who frequently serve on panels together, may be less likely to disagree or hold conflicting viewpoints regarding the case at

---

6 The existence of in-group bias has been widely researched and documented across many disciplines for decades. For a concise primer on the functioning of subconscious or "implicit" in-group bias, see UCLA law professor Jerry Kang's 2013 speech Immaculate Perception at TEDx San Diego 2013.

hand. This can make it easier for them to reach an award. But it can also compromise the impartiality of that award.

Diverse perspectives, respectful disagreement, and the freedom to voice conflicting interpretations of the facts all serve to enhance impartiality. A team of alpine mountaineers can serve as an illuminating analogy. Alpine mountaineers have long been taught to tether themselves to one another with a rope, so that if one person falls, the others can stop his fall by driving their ice axes into the ground. What often happens instead, is that the falling person drags his team members off the mountain, all of them falling to their deaths together. Today, many mountaineers question the wisdom of this traditional safety method and advocate forgoing the tethers. However, old habits are hard to break, especially when the alternative increases the time required to reach the goal. Just as mountaineers are eager to reach the top and return home safely, arbitrators can be compelled to expedite a resolution.

In arbitration, a neutral often believes he will be able to spot bias if it occurs in his own thinking, or in the thinking of the other neutrals on his panel. He will "arrest the fall" by noticing the pre-judgment or cognitive error, and reflecting on its effect on decision-making. But if all the neutrals on a panel are tethered to one another by substantial shared experience (professional and/or personal), they are much less likely to notice a bias and question its impact than a panel composed of arbitrators with different backgrounds. This can be exacerbated when one or more of the arbitrators have been arbitrators for an extended period of time—providing support for their image as impartial: "I wouldn't have been chosen to be a neutral if I wasn't impartial."

Consider the distinct professional backgrounds of the following hypothetical construction panel:

- a neutral with a professional background in construction, engineering, architecture, or another building science;

- a neutral with a professional background in litigation who often sits on construction panels; and

- a neutral with a professional background in litigation who does NOT often sit on construction panels.

Each will bring different sets of knowledge, mental maps, and modes of thinking to the case, each opening up distinct avenues of inquiry and sharing distinct insights with the panel.

Similarly, panels that reflect a diversity of ethnicities and genders are likely better equipped than a homogenous panel of three white men (who currently make up the majority of arbitrators) to identify pre-judgments based upon ethnicity or gender.

Be aware that the influence within and among the panelists is complex and can be palpable. Advocates should pay attention to the disclosure that reveals the prior relationship between the potential panelists.

B. Appointing a Chair

The most experienced arbitrator is often appointed the chair of the panel. To many, this is common sense: why wouldn't you want the most experienced sailor steering the ship? The downside of such a practice is that it reinforces a hierarchy in which the most experienced arbitrator is seen as the "boss," diminishing the likelihood that the less-experienced arbitrators

will voice perspectives that conflict with the boss' judgment or interpretation of the facts. And in such cases, this can increase the likelihood that the chair or the "expert" will drag the panel to an award that is based upon a misunderstanding or mistaken assumption.

An arbitrator's reputation among her fellow arbitrators is important for securing future appointments. Her work, and perhaps her income, are linked to the frequency with which her colleagues recommend her to serve on panels. Thus, agreement with or deference to more-experienced arbitrators is incentivized, or is at least hovering over the panel.

To combat this dynamic, advocates and arbitrators can consider appointing a less-experienced arbitrator the chair (assuming she has experience serving on a panel). The result is that the less-experienced arbitrator is more empowered to speak her mind. The more-experienced arbitrator still feels free to share her perspective and judgment, but is cast in a role closer to that of a mentor than of a boss.

When selecting arbitrators with ample experience, an advocate should seek those who strive to fill this role of "mentor" with an open mind, remaining aware that the student is often simultaneously the teacher. A novice, though lacking much of the knowledge gained from experience, can also be free from the ingrained habits or assumptions that limit the thinking of the experienced.

A child often sees a simple solution where an adult cannot, for the simple reason than the child is unencumbered by the limitations of the adult's mental model. It is the same reason youth is often associated with a bold willingness to break with convention, while old-age is associated with deference to traditional methods. A new/young arbitrator may be able to see and (with the proper confidence) ask questions the more-experienced neutrals may not allow themselves to ask, because they cannot imagine the question needs to be asked. They have already decided how it should/must be in the mind of the witness. Better to ask and confirm than to assume in error.

C. Openness to Acknowledging Bias

Even if one assembles a panel of diverse arbitrators and appoints the lesser-experienced arbitrator as chair, impartiality will not be much improved if the arbitrators are disinclined to admit that their thinking can be influenced by bias or cognitive error. The whole point of having arbitrators with diverse backgrounds and professional experiences is that they will be more likely to possess different perspectives and assumptions, which become more apparent to themselves (and to each other) when seen in relief against one another. For an arbitrator with an impartiality practice, it is easier to "catch" one's own pre-judgments when the pre-judgments stand out, rather than being mirrored in fellow arbitrators. But such "catches" are unlikely if the arbitrators are reluctant to consider other panelists' perspectives or the possibility that their own may be influenced by pre-judgments. This is why it is important that every arbitrator on the panel be willing to reflect on her own assumptions or expressions of bias throughout the process, and to be receptive to the feedback of his fellow panelists.

Expression of a bias is often equated with being a bad person. Freedom from bias is often equated with being a good person. Such a mindset is counterproductive to the arbitral process, as it encourages arbitrators to deny any manifestation of bias in their thinking. All humans commit cognitive errors. All humans make snap judgments based upon past experiences or faulty assumptions. All humans are influenced by their environments and develop biases as a result. The arbitrator's goal is not to scrub his consciousness clean of all biases or cognitive errors, but rather to become better acquainted, through self-reflection and habitual exercises, with the workings of

his own mind, and the way that particular biases or errors manifest themselves. Then, he can become more adept at recognizing and correcting for his own cognitive errors and the errors of his fellow arbitrators. An advocate should not seek an arbitrator who claims to be free from bias, but an arbitrator who is committed to identifying and mitigating his own biases, and who is committed to speaking honestly and openly with his co-panelists about the role of bias in decision-making throughout the arbitral process.

Advocates should seek out arbitrators who value self-reflection and humility. They should appoint a chair who will actively encourage respectful disagreement and dialogue throughout the process. The goal is to create a culture in which every arbitrator on the panel is encouraged to raise questions about assumptions, pre-judgments, cognitive errors, and biases, so that they may work together to reach the most impartial decision. An advocate may also request that the arbitrators agree to a written protocol for impartiality. This may be as simple as a stated goal or intention that the panelists draft together. (See the sample protocol in Appendix B.)

IV. MITIGATING COGNITIVE ERRORS, ENHANCING IMPARTIALITY

Given the prevalence of cognitive errors in individual judgment and group decision-making, how should an arbitrator go about enhancing her impartiality? And how should an advocate go about identifying arbitrators committed to mitigating bias?

Since every individual is unique, there is no single method or "silver bullet" that every arbitrator should adopt in pursuit of impartiality. Keeping this in mind, I identify three broad domains in which every arbitrator can pursue her own individual strategies and exercises for enhancing impartiality. *I recommend that every advocate ask potential arbitrators questions pertaining to all three domains, in order to get a comprehensive sense of an arbitrator's ongoing investment in and pursuit of impartiality. (See Appendix A.)*

The three domains are: Baseline Awareness, Practical Procedures, and Personal Patterns of Pre-Judgment.

A. Baseline Awareness

An arbitrator's baseline awareness is the default mindset with which she listens to testimony and presides over the arbitral process. At its core, enhancing one's baseline awareness is about becoming practiced at observing the object of one's attention—simply *noticing* the contents of one's mind.

When listening to testimony, an arbitrator should strive to make the content of the testimony itself—the words coming out of the witness's mouth—the sole object of her attention. The goal is to strip down the testimony to its core, the raw data; the individual words being spoken.[7]

---

7 Mark Epstein's *Thoughts Without A Thinker* (1995) has been essential for my understanding of this quality of awareness and listening, which he identifies with the Buddhist concept of "bare attention" (see pages 109-28). In the last decade, there has been a substantial increase in scientific research into reducing biases through meditation and other "mindfulness" practices meant to cultivate bare attention. *See, e.g.*, Adam Lueke & Bryan Gibson, *Mindfulness Meditation Reduces Implicit Age and Race Bias*, 6 Soc. Psychol. and Personality Sci. 284 (2015).

This may sound obvious. But how many arbitrators devote time and energy to actually practicing this skill of *filtering out* reactions and pre-judgments in order to cultivate a moment-to-moment awareness of what is being said? It is not as easy or straightforward as it is often assumed to be.

To grasp why this is so, it's useful to divide our thinking into two distinct processes: System-1 and System-2. The distinction is often used in psychology, and has been recently popularized by Daniel Kahneman in his book *Thinking, Fast and Slow*:

> System-1 operates automatically and quickly, with little or no effort, and no sense of voluntary control.
>
> System-2 allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System-2 are often associated with the subjective experiences of agency, choice, and concentration.[8]

"What is 2+2?" System-1 thinking automatically suggests the answer "4." It is automatic, requiring no conscious effort, because you have already learned to associate "2+2" with the answer "4."

System-1 thinking is also the source of our automatic pre-judgments, gut reactions, intuitions, and biases. These pre-judgments are informed by the sum of our past experiences, our "mental models." System-1 thinking operates automatically.

Anyone who has spent years working as a judge will inevitably accrue a set of pre-judgments and automatic impulses surrounding the law and its application. Judges with crowded dockets seek and rely upon System-1 thinking to get through the daily volume of cases assigned to their court. Rarely does a judge have the time required to understand and rule upon each case on its facts; judges may naturally seek to assign assertions and defenses into categories to permit "more efficient" and time-saving rulings.

Fortunately, System-2 thinking can influence and override System-1 impulses and associations. As children, we learn to look both ways before crossing the street, so that the practice becomes an automatic, System-1 impulse. But, when we travel to an unfamiliar city, perhaps where the traffic includes bicycles and is more chaotic, we need to engage our System-2 thinking and direct purposeful awareness to our actions. Should we fail to do so, an injury is more likely to occur. In the same manner that we look both ways when crossing the street, especially in a new environment, an arbitrator should listen to all witness testimony as if she is hearing it for the first time, since it is a new set of facts and witnesses.

This habit of engaging System-2 thinking—of seeing each routine crossing as a new experience requiring our active awareness—is achieved through regular cognitive exercises designed to replace automatic System-1 thinking with slower System-2 thinking. The exercises disrupt normal patterns of thought and train the arbitrator to notice when past experiences give rise to mental heuristics that compromise impartial decision-making. The arbitrator becomes more familiar with the way she receives information and the workings of her own mind.

---

[8] Kahneman, *Thinking Fast and Slow*, *supra* note 2, at 21-22.

Moment-to-moment awareness is an ideal toward which a neutral must perpetually strive. The goal is not to eliminate all assumptions and reactions to the testimony, but to notice when the mind has become distracted by such a reaction and return the attention to the testimony itself. The ability to filter out pre-judgments in this way is a habit of mind an arbitrator can perpetually cultivate and strengthen. For this reason, the best cognitive exercises are those designed to fit into an arbitrator's daily life and become a part of a regular routine.

For example, consider this awareness exercise that can be practiced during a daily commute to work. The arbitrator turns the radio to an unfamiliar station and listens to the broadcast as if it is a witness giving testimony. The arbitrator's goal is to simply notice the automatic reactions that arise, and then to return her attention to the "testimony" itself. Perhaps the radio station broadcasts music or conversations she finds uninteresting or irritating. Rather than allowing her attention to follow her own thoughts and feelings of irritation, the arbitrator practices the habit of simply observing those thoughts and feelings, and returning her awareness to her primary task: truly hearing the testimony.

Another awareness exercise involves performing a regular chore at half the speed one normally would, directing all awareness toward the sensory experience itself, and away from any judgment of the experience. For example, when most of us wash the dishes, we rush to complete the task as quickly as possible, the mind racing with thoughts of all the things we'd like to do as soon as we've finished washing. In this exercise, the mind is focused on the feeling of each dish in the hands, the heat of the water on the skin, the sound of the water coming from the faucet. This exercise can be applied to all manner of tasks, from physical exercises to domestic chores. The goal is to practice receiving information as a "blank slate," without judgment; to notice when one's awareness has been interrupted and to practice returning awareness to the "blank slate" with which testimony should be heard. The obvious "cost" of such an exercise is the extra time one spends completing a task. The benefit is in cultivating a discipline of awareness, a mental habit of directing one's conscious attention exclusively to a single stimulus. In the context of arbitration, the stimulus is the witness giving testimony.

B. Practical Procedures

In addition to enhancing her baseline awareness, an arbitrator can implement many practical procedures in the arbitral process to enhance impartiality. Many of these practices involve excluding the disclosure of irrelevant information about witnesses and advocates when that information gives rise to in-group and out-group biases.

For example, when expert witnesses cite their credentials, they often disclose the names of their alma matters. Such disclosures can influence, consciously or unconsciously, the weight that the arbitrator gives the testimony or the arbitrator's underlying attitude as she listens. But the prestige of a witness's alma matter does not automatically confer credibility on that witness. Any influence that a university name exerts on an arbitrator would be the result of a mental heuristic functioning to make a quick pre-judgment, based on a generalization about the quality or character of a large group of people (a particular alumni group). These are precisely the sorts of mental heuristics arbitrators must seek to avoid. Thus, an arbitrator should prohibit the disclosure, by a witness or an advocate, of their alma matter. The *type* of institution where a witness has conducted research *may* be relevant to their testimony, but the *name* of the institution is not.

Some people may object that an expert witness's alma mater is relevant information, because it speaks to the quality of their training, research, or critical thinking. It may feel jarring to adopt a practice that works against such ingrained intuitions about "better schools" producing "better

thinkers." But when we realize how easily we can make assumptions based upon a group-identity like alma mater, and how easily those assumptions can be completely wrong when it comes to the individual sitting before us, it is nothing less than common sense to eliminate the possibility for such an association to arise. Brand-name graduates may have been admitted as a result of financial donations or legacy status. A quick perusal of the alma maters of the perpetrators of this century's most serious financial crimes will demonstrate that a brand-name degree does not have any relationship to a witness's honesty or trustworthiness.

Other information that arbitrators might consider excluding from the arbitral process include:

- affiliations with religious organizations or social clubs,
- hometowns,
- hobbies or leisure activities, and
- marital or parental status.

A further safeguard against unnecessary information that might give rise to in-group bias is to avoid all interactions with advocates and witnesses outside of the arbitral process. When I am an arbitrator on a case out of town, I ensure I am not staying at the same hotel as the advocates so as to avoid any extraneous conversations. Even a small moment of intimacy, such as a friendly exchange in an elevator or hallway, creates the opportunity for sympathies or antipathies to grow. Many of us would like to believe that we are capable of disregarding or overriding the influence of such casual and seemingly minor interactions. But why would an arbitrator whose sole job is to serve as an impartial decision-maker want to open herself up to the risk of being swayed subconsciously by irrelevant interactions, especially when it is so easy to avoid them altogether by simply staying at a different hotel?

Similarly, I avoid all small-talk and side conversations with advocates during the arbitration. In a culture like ours that values cordiality and sociability among colleagues, it can initially feel rude or inappropriate to insist on a total prohibition of small-talk with advocates. But impartiality is the arbitrator's job, and an advocate should appreciate this commitment to duty. This is similar to the prohibition of contact between trial lawyers and jurors.

As an active investment in impartiality becomes more widespread among arbitrators, sociability between arbitrators and advocates will come to seem not only unnecessary, but unethical and counter to the arbitrator's mandate to uphold impartiality.

C. Personal Patterns of Pre-Judgment

An arbitrator can also engage in regular exercises aimed at identifying and mitigating his own recurring biases, or his own personal patterns of pre-judgment.

Arbitrators, like all human beings, are subject to biases, and these biases give rise to pre-judgments and automatic intuitions (System-1 thinking) that compromise impartiality. But a vocation as an arbitrator is a commitment to impartiality. Arbitrators have a professional and ethical imperative to undertake a rigorous and sustained investigation of how biases manifest themselves in their own minds and lives.

Many scientific studies indicate that, once an individual's biases are identified and articulated, the effect of the bias on decision-making can be mitigated. And once a bias is identified, additional ameliorative strategies, such as priming, can target that bias.9

For example, consider the case of an arbitrator who notices that, while he generally harbors a cautious skepticism when he hears a shocking statistic, his skeptical impulse is more likely to be activated when he hears a statistic cited by an African-American woman than when he hears one cited by a European-American man. The arbitrator has identified a pre-judgment linking racial and gender presentation to competence or trustworthiness in the realm of statistics or critical reasoning. Such a skepticism would be one manifestation of an anti-black bias not uncommon in many sectors of contemporary American society.

One of the simplest and quickest ways to mitigate such a pre-judgment is for the arbitrator to increase his exposure to examples running counter to the pre-judgment. Such strategies are known as priming. For instance, the arbitrator could set his computer background to images of African-American women who are accomplished and lauded in STEM fields. (For the arbitrator who is not aware of any, a bit of internet research is all it takes to begin remedying this blind spot in one's knowledge and mitigating one's bias.) Another method would be to create a twitter or other social media account to follow African-American women whose tweets are admired for their reasoning and intellectual rigor. Such an exercise could be targeted at any number of observed pre-judgments, whether they are tied to ethnicity, gender, age, religion, physical appearance, etc. The arbitrator creates a flow of information into his daily life, expressly designed to disprove and mitigate his System-1 assumptions and pre-judgments.

Additionally, many scientific studies have shown that communal and societal stereotypes can influence our thinking, even when we consciously reject those stereotypes as inaccurate, or grounded in long-standing collective prejudices. Thus, even the most sustained and attentive investigation of our pre-judgments may not result in a complete accounting of them. For this reason, an arbitrator might choose to adopt exercises and interventions designed to mitigate widespread societal stereotypes. Diversifying the viewpoints to which one is exposed in day-to-day life is beneficial, because one becomes accustomed to listening to, considering, and valuing the perspectives of a broad range of people.

Project Implicit is a nonprofit organization focused on implicit social cognition—thoughts and feelings outside of conscious awareness. The goal of the organization is to educate the public about hidden biases. Project Implicit's website features short, investigative computer-based assessments that provide immediate feedback to the test-taker of bias tendencies. It is a simple way to initiate an introspective view. Should the test reveal tendencies inconsistent with neutrality, the test taker has a place to begin working on mitigating such pre-judgments.10

D. Holistic Approach

---

9 *See* Cheryl Staats et al., *State of the Science: Implicit Bias Review 2017*, Kirwan Inst. For the Study of Race and Ethnicity (2017) (This annual round-up of the scientific research into subconscious or "implicit" bias provides recent insights from neuroscience, social science, and mind science research into the existence, malleability, and mitigation of subconscious biases.).

10 Project Implicit assessments can be accessed online at https://implicit.harvard.edu/implicit/takeatest.html.

While it is helpful to discuss each domain individually, it is also important to understand that all three domains are interrelated and overlapping. The exercises and approaches outlined in one area will naturally influence the pursuit of impartiality in the others. For example, regular awareness exercises that involve observing mental reactions to unfamiliar stimuli can only help an arbitrator in his efforts to identify his own individual pre-judgments and develop practical procedural guidelines for enhancing impartiality.

V. CONCLUSION

In the interest of space, I have provided only a few examples of the sorts of exercises and interventions one can undertake in pursuit of impartiality. My hope is that this article will inspire further reflection and conversation among advocates and arbitrators alike about strategies and exercises for enhancing impartiality.

On the next page (Appendix A), you will find a series of questions advocates and arbitrators might use to begin gauging the way arbitrators think about and develop their own impartiality—to learn, in other words, the concrete steps that each individual arbitrator takes in pursuit of their profession's fundamental *raison d'être*.

VI. APPENDIX A

A Checklist for Assessing Impartiality

Choosing an arbitrator committed to enhancing their impartiality, thoughtfully and consistently, is one of the most important steps you can take to ensure that your client receives a fair hearing. The simplest way to do this is to ask a potential arbitrator questions about their impartiality practices, so that you can gauge their investment and their process. Select the questions that ring true to you and your impartiality experience:

- With respect to impartiality, how would you describe **your goal or your ideal**? What does impartiality mean to you in the context of the arbitral process?
- Do you work to enhance your impartially? If so, what, when, where, and how do you do it?
- How often do you take concrete steps in pursuit of impartiality?
- How do you work with other arbitrators on a panel to bolster one another's impartiality?
- Do you have any specific procedural rules, protocols, or guidelines that you introduce into the arbitral process in order to enhance its impartiality or diminish opportunities for bias to arise?
- Do you have any habits or strategies in place for identifying your own biases or patterns of pre-judgment? If so, please describe your strategies.
- Do you mediate? If so, do you find the goals of mediation to be consistent with arbitration? Please explain.
- Can you provide instances/examples in which you realized your brain took a short-cut that pre-judged the witness, testimony, or case theory?

Questions for Advocates to Ask Themselves

- Do I understand neutrality to an extent that I can recognize a neutral who is working consistently to be impartial?
- Have I checked my own neutrality? Specifically, confirmation bias: Have I prejudged all the evidence in a neutral way or disregarded the evidence that does not support my theory of the case? Are there angles I need to rethink?

Appendix B

Sample Impartiality Protocol

Our chief goal is to arrive at a fair and impartial award. Since no arbitrator is wholly free from the human propensity for cognitive errors or biases, we encourage open communication with one another throughout the process regarding possible biases and assumptions that might influence our thinking. We aim to create an atmosphere of humility, open-mindedness, and respectful inquiry with regard to bias, free from accusations or defensiveness, based upon our shared understanding that open discussions of bias serve to enhance the arbitral process and the impartiality of the award.