

The Color of Money

Compensation Opportunities and Barriers

By Marvin E. Johnson and Maria R. Volpe

The Spring 2017 issue of *Dispute Resolution Magazine*, entitled “Show Me the Money,” shined the spotlight on an important aspect of neutrals’ work, namely compensation. It did an excellent job of identifying a multitude of economic realities, offering valuable tips for billing, and pointing out that there are no magical formulas for making a living as an ADR professional. In this article, we expand the conversation by focusing on the intangibles and subtleties that add another layer of concerns and barriers for people of color who experience all the more obvious concerns as well as those associated with being different due to race. While all neutrals’ work shares similar challenges, we are particularly interested in addressing mediation.

As is the case in many professions, an important component of mediation is trust. Parties need to trust their mediator. And how does that happen? Trust gets built through contact and communication — all of which comes under the general heading of familiarity. To trust, people need to know each other.¹ In our larger society, misunderstandings, faulty assumptions, and apprehensiveness increase when there is a lack of familiarity with people from different backgrounds. Mediation is a microcosm of that larger context. As a result, the lack of familiarity with people from different backgrounds can have significant outcomes.

Compensation Intangibles

In addition to all the traditional barriers encountered by anyone who pursues a career as a mediator, the very nature of the mediation process creates a context that is even more daunting for people of color. Central to mediation is the fact that it is a process that occurs behind closed doors. It is like a gated community, where someone on the outside will have a very hard time finding out what’s going on inside. And it is a process where trust is uppermost.

If the ADR marketplace were a perfect economic model, isolated from larger society, mediators who are more skilled would be selected more frequently and receive the highest compensation. However, as Deborah Rothman noted in her article “Trends in Arbitrator Compensation,”² the ADR economic market is affected by other factors, including the user’s perception of the neutral. Based on recent research,³ we now know that our perceptions are influenced by implicit bias, which refers to involuntary attitudes, feelings, and actions that are activated without our awareness or control. This new understanding of implicit bias lends credence to what we describe as the ADR user selection trilogy, more specifically, three themes related to perception and mediation selection:⁴



(1) the pool of people who are regularly called upon for mediation services is very lacking in diversity;

(2) many people who choose a neutral do so with the help of a close colleague, someone who can assure the selector that the neutral has the “perceived” requisite knowledge, skill, and experience;

(3) neutrals from racial and ethnic groups that are underrepresented in the ADR field, no matter how experienced they may be, are often unknown to those who are responsible for selecting mediators (gatekeepers).

Thus, knowing the importance of trust in mediation, it is understandable how mediators of color are excluded because gatekeepers select mediators with whom they are familiar, by reputation or because of a recommendation from a colleague. In “Show Me the Money,” Phillip Armstrong, one of two former ADR user-practitioners who wrote about how neutrals are selected for large firms, underscored this point by explaining that his company obtained information about mediators by calling people at law firms closest to where the dispute arose and asking them to identify the best mediators in the region.⁵

In her article about choosing neutrals in the same Spring 2017 issue, Deborah Masucci wrote that “Many companies make an effort to hire mediators with diverse backgrounds,” and she made a compelling case for women and people of color to “highlight their specific areas of expertise in their bios and cultivate references who have strong connections to corporations and law firms.”⁶ However, if access to those references is limited in general, it is even more limited for those in marginalized groups. The challenge is not wanting to meet the general counsel of major firms, but having the access to come into contact with them in the first place and the opportunity to cultivate a relationship.

The implications of *not* meeting “go to” people, the gatekeepers who can get one through the door, multiply. Repeat clients develop loyalties. For example, Jeffrey Krivis, who likened choosing a mediator to hiring a taxi or an Uber driver in his “Show Me the Money” article, noted that “many clients and their lawyers ending up taking the path of least resistance, working with a mediator they have used before.”⁷ Such repeat interaction is what builds familiarity — with the neutral herself/himself, with his

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or her work, and with how flexible he or she might be with billing. And that is associated with, leads to, or is a result of trust.

In 2004, after initial discussions about how to increase diversity within the Section of Dispute Resolution and the ADR field in general, one of us, Marvin E. Johnson, along with Homer La Rue, launched an effort called ACCESS ADR with funding from the Hewlett and JAMS Foundations to provide opportunities and increase access to higher markets for people of color.⁸ ACCESS ADR had an advisory board of notable ADR users and resource providers who hoped to solicit cases in high-level ADR markets for the experienced mediators of color in the ACCESS ADR program. Even though the board members were prominent practitioners with extensive personal and professional relationships, after almost two years of meetings, conference calls, and outreach, more than one board member expressed deep frustration with the futility of their efforts.

One of the lessons from ACCESS ADR is that while all mediators face challenges in the ADR marketplace, mediators of color must overcome these and many other obstacles in order to get higher-end, higher-paying cases. Even when the skill levels of a mediator of color and a “well-known mediator” are comparable, risk aversion, reputation, and perception can all sway the gatekeeper to select the mediator he or she is familiar with — which means selecting the “well-known” neutral. All neutrals who are new and not yet “known” as skilled mediators face this challenge of unfamiliarity, of course, but because people of color often lack “power networking” opportunities and other advantages, the problem of getting known

is especially significant. Even though this bias is not intentional, the mediator selection process preserves a process of exclusion, alters ADR markets and mediator compensation, and discourages experienced mediators of color.

How implicit bias affects compensated work

Central to the discussion about compensation is understanding how we think and see the world through the different lenses of our group affiliations. Those thoughts and feelings that we are unaware of, ones that operate below the conscious level but nonetheless affect our understanding, behaviors, and decisions, are called implicit bias. These biases, like explicit biases, are universal, widespread, and can be positive or negative. What this means for society and for the mediation field is that when we make assumptions about others, we may be unaware that we are doing so.⁹

In a 1998 plenary speech at the Center for Alternative Dispute Resolution's annual conference at Bowie State University in Bowie, Maryland, a leader of the American Arbitration Association, one of the country's largest ADR providers, in effect predicted the impact of what we have come to refer to as the ADR user selection trilogy (i.e., those three realities that the pool of mediator candidates is not diverse; that most people choose a neutral after consulting a colleague who tends to refer candidates he or she "knows"; and few neutrals of color are "known" to those who recommend or select mediators). He essentially noted that the elements of the trilogy would relegate certain mediators, particularly a large number of people of color, to lower ADR markets, while those having personal connections with gatekeepers would dominate the higher markets. Lower

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ADR markets, which are more accessible, are those that have relatively low barriers to entry, lower and sometimes fixed fees. In many of these lower markets, mediators are usually appointed (rather than selected by the parties), and there are more mediator sub-contractors, small nonprofit entities, and federal and public-sector parties. Higher ADR markets, which are less accessible, have higher barriers to entry, higher fees determined by the market, mediator selection by the parties, emphasis on mediator reputation and relationships, and more private-sector parties.

Many skilled mediators have developed solid practices in the lower ADR markets. The coauthors have mentored, counseled, and advised countless mediators of color and written on the history of race in ADR.¹⁰ In addition, one of the coauthors has been involved in and created programs to enhance the utilization of mediators of color including Mediators of Color Alliance (MOCA) and ACCESS ADR. Based on the anecdotal information we received from our interactions with mediators of color and our limited research, we have found a significant number of experienced mediators of color working in lower ADR markets. They work in the lower ADR markets because there are more opportunities to receive cases — albeit at a lower market rate and, at times, as subcontractors for ADR provider organizations led by individuals who have the necessary relationships and the appropriate contract connections.¹¹ For example, one of the coauthors is aware of a number of intellectual property lawyers of color who, after more than 20 years of handling intellectual property cases, have been unable to overcome the barriers to the higher ADR market in this area. Some have developed mediation practices outside of the intellectual property realm and work as subcontract mediators.

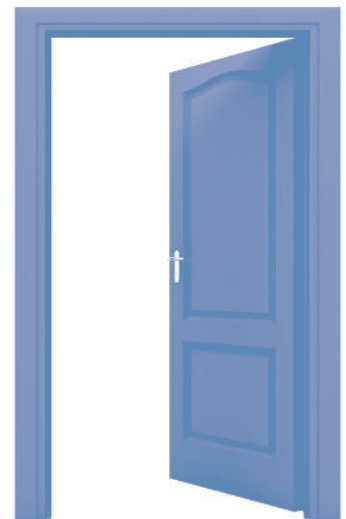
Because a significant number of people of color are relegated to the lower ADR markets, the rates charged by people of color often reflect the market in which they work. And, as noted in “Show Me the Money,” lawyers and neutrals in the higher-level markets often are skeptical of people who charge less than their colleagues, and they may consider a neutral of color who advertises a lower-market rate (because that is where s/he primarily practices) as not sufficiently competent to handle higher-market cases. The lower-market rate stigma, mixed with the ADR user

selection trilogy, can lead the ADR community in general and some people of color in particular to accept the “gated community” construct and conclude that neutrals of color should not charge higher rates and do not deserve cases that generate significantly higher compensation.

Theoretically, building relationships should be relatively easy for those in a field that professes to build bridges and to help individuals in conflict. Unfortunately, implicit racial bias exists virtually everywhere in our society today — including in the ADR field. Neutrals, advocates, gatekeepers, and clients all need to be mindful of this and understand its major influence on our behavior and decision-making. When existing structures reinforce our perceptions, the barriers become even more overwhelming. Studies show we can override our initial instincts,¹² and many efforts have begun to address the ways that implicit bias creates and reinforces barriers. In short, familiarity breeds trust and relationships matter — all significant to overcoming biases.

Moving Forward

Complicating the understanding of differential compensation is the dearth of hard data. Much of the experiential information is a result of anecdotal information. Much of what we have shared in this article is based on the collection of anecdotal experiences shared by our colleagues. Anecdotal information is often only as good as one’s information network, which consists of the individuals with whom one interacts and, as noted above, such networks may not be inclusive. The ADR field sorely needs much more systematic research focusing on location (where are the markets? where do practitioners provide services?), demographics (who is providing these services? who is using them?), and mechanics (how exactly does compensation work?).



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Such data would help us better understand differential compensation and the extent to which people of color are relegated to the lower end of the compensation spectrum, as is often portrayed.

So we end this article where we began, reminding ourselves that the conversation about compensation for mediators is complicated and challenging for all — but even more so for people of color. Before considering methods for billing, traditionally or creatively, what is needed is cases to bill for. Working on creative business plans as suggested by John Bickerman¹³ in his article “How to Succeed in Business” may be premature without understanding the ADR user selection trilogy. The oft-repeated suggestion that mediators should network, network, and network is easier said than done — as we saw with ACCESS ADR, where people with impressive personal and professional relationships were unable to open doors for experienced mediators of color.

To move forward as a more inclusive field, it will take the entire ADR village to work on building the familiarity with our colleagues of color. For sure, a variety of initiatives have been undertaken over the

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years by myriad organizations. However, if we are going to address the intangibles of compensation and all the other circumstances affected by the inherent complexities of the mediation process, such efforts require constant refueling, reminders, and monitoring in order to effectively transform the field into a truly welcoming and inclusive one. ■

Endnotes

1 Damian A. Stanley, Peter Sokol-Hessner, Mahzarin R. Banaji, and Elizabeth Phelps, *Implicit Race Attitudes Predict Trustworthiness Judgments and Economic Trust Decisions*, Proceedings of the National Acad. of Sciences of the United States of America, 108:19, (Daniel Kahneman, ed) 1710 (2011), Available at <http://www.pnas.org/content/108/19/7710.full.pdf?with-ds=yes>.

2 Deborah Rothman, *Trends in Arbitrator Compensation*, DISP. RESOL. MAG. Vol. 23 Issue 3, at 8.

3 For a broader discussion on the impact of implicit bias on mediator actions, see, Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71 (2010). See also, Damian Stanley, Elizabeth Phelps and Mahzarin Banaji, *The Neural Basis of Implicit Attitudes*, 17 CURRENT DIRECTIONS IN PSYCH SCIENCE 164 (2008).

4 The elements of the ADR user selection trilogy were discussed in Marvin E. Johnson and Homer C. La Rue's *The Gated Community*, DISP. RESOL. MAG, Vol. 15 Issue 3, at 17 (Spring 2009).

5 Phillip Armstrong, *Two Perspectives on Compensation from Corporate Counsel*, DISP. RESOL. MAG. Vol. 23 no.3, 2017, at 20.

6 Deborah Masucci, *Two Perspectives on Compensation from Corporate Counsel*, DISP. RESOL. MAG. Vol. 23 no.3, 2017, at 21.

7 Jeffrey Krivis, *A Commentary on Billing in Mediation*,

DISP. RESOL. MAG. Vol. 23 no.3, 2017, at 12.

8 Marvin E. Johnson and Homer C. La Rue, *Creating Access to Enhance Diversity*, JUST RESOLUTIONS NEWSLETTER, (August 2005). See also, *ACCESS ADR: A New Diversity Initiative Launched with the Support of the JAMS Foundation and the ABA*, available at <http://www.metrocorp.counsel.com/articles/3932/access-adr-new-diversity-initiative-launched-support-jams-foundation-and-aba>.

9 For information about a self-administered implicit attitude measurement test, go to Project Implicit, available at <https://implicit.harvard.edu/implicit/takeatest.html>.

10 Marvin E. Johnson and Maria R. Volpe, *Roots of Diversity in Dispute Resolution: Preliminary Observations*, 13:1 *ACResolution*, (Winter 2013).

11 Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson Jr., Christopher M. Kwok, Janice Tudy-Jackson, and Roberto Velez, *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing the ADR Field*, 35 *FORDHAM URB. L.J.* 119 (2008), available at: http://scholarlycommons.law.hofstra.edu/faculty_scholarship/113.

12 See, Wendy Hasenkamp. *Can We Change Racial Bias?*, MIND & LIFE INSTITUTE BLOG (July 19, 2016), <https://www.mindandlife.org/can-change-racial-bias>. See also, Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin, William T.L. Cox, *Long-term Reduction in Implicit Race Bias: A Prejudice Habit-breaking Intervention*, 48-6 *JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY* 1267 (November 2012); DANIEL GOLDMAN, *SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS* 303 (2006).

13 John Bickerman, *How to Succeed in Business*, DISP. RESOL. MAG, Vol. 23 no. 3, 2017, at 16.



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