Taking the Bias Out of the Neutral

By Anne Weisberg

Ten years ago, *Women in Law: Making the Case* (Catalyst, 2001), a study I directed, was released. Tracking the career experiences of three decades of graduates from the law schools at Harvard, Yale, Columbia, Michigan and Berkeley, the study found that over 90 percent of women were practicing, but they were underrepresented in the leadership of the profession. Women made up roughly 15 percent of partners.

That number hasn't budged. In 2011, women make up 15 percent of equity partners in large law firms, according to the ABA's Commission on Women in the Profession.[1] Similarly, there has been no progress in the number of women in arbitration, which has hovered around 5 percent since at least 2004.[2]

This flat line is perplexing, given the tremendous efforts law firms and other organizations have made to become more diverse and inclusive. Most law firms have women's networks; corporate counsel have demanded greater diversity among their law firm providers; CPR has had a task for diversity since 2006. The business case for greater gender diversity has been made. So, what is holding women back?

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The answer, I believe, lies in this simple assumption: "think leader, think male." The fact is that, in our society, most people ascribe the characteristics of leaders—decisive, assertive, ambitious—as male. This implicit assumption is powerful, precisely because it is implicit. We don't even realize we're making it. Similarly, clients want neutrals who are "experienced lawyers who project an image of gravitas,"[3] which is fraught with assumptions about both what qualifies as "experience" and what defines an "image of gravitas."

When we eliminate these implicit biases from decision making, the effect can be staggering. The best example of this is the dramatic rise in the number of women musicians in major orchestras. In 1970, roughly 10% of orchestra members were women. During auditions, although judges believed they were deciding based only on the talent of the musician, their brains were making other associations, including "think musician: think male." But the practice of putting a screen in front of the person auditioning, so judges couldn't see whether the musician was male or female, interfered with that assumption. By the 1990s, women were 50% more likely to pass the first round and 300% more likely to pass the final rounds, as reported in Margaret Heffernan book, *Willful Blindness: Why We Ignore the Obvious at Our Peril* (Walker & Co, 2011). Blind auditions are now standard practice for major orchestras in the United States.

This phenomenon is not limited to orchestras. In evaluating the qualifications of men and women assistant professors, reviewers were "four times more likely to ask for supporting evidence about the woman, such as a chance to see her teach or proof that she had won her grants on her own, than they were for the man."[4] However, when academic papers are blind peer reviewed (i.e., the names are taken off the top), the number of papers written by women that are accepted for publication goes up significantly.[5] Reducing bias not only improves gender representation, it improves performance. In analyzing over 1,000 major business investments, McKinsey found that "when organizations work at reducing the effect of bias in their decision-making processes, they achieved returns up to seven percentage points higher."[6]

I am not suggesting that clients blindly pick their neutrals. The very fact that you can choose who is going to decide your dispute is part of the value of mediation and arbitration. But it is precisely because of this high degree of choice in mediation and arbitration that those making the decision should try to do so with as little bias as possible. Isn't that precisely what a "neutral" is meant to be?

So, how can you as an individual get started understanding how bias is affecting your decisions? Here are three easy steps to take to do so:

- Attacking bias in any decision making process starts with learning about your own implicit assumptions. Take the Implicit Association Test (https://implicit.harvard.edu/implicit/demo/), which was developed by Dr. Majharin Banaji at Harvard University, and represents the most rigorous, world-wide database on bias. Once you have taken the test, have those you work with take the test, and discuss the results as a group.
- Keep a list of your "go to" people. If there are no women on that list, then make it a point to identify women who should be on the list. It may be harder to find them (because there are fewer women in senior roles) but don't use that an excuse not to search.

- Once you have identified a few women for your "go to" list, actively sponsor them. Research has shown that women tend to be over-mentored but under-sponsored.[7] Sponsorship ultimately is about the transfer of your credibility to your protégé, by introducing her to influential decision makers, by advocating for her when opportunities arise and by giving her honest feedback on how she can best position herself for success.
- Spend time with women leaders or in environments where women are in leadership positions. Take them to lunch, and get to know them. If there are no women leaders in your organization, go outside. Attend a women's conference; sign up to hear a woman leader speak. All too often, women leaders are taking to a room full of women, and they notice and appreciate the men in the room!

Besides what you as an individual can do, think about what your group or organization can do. Here are a few suggestions:

- Make sure you use the same criteria to evaluate women as you do for men. Always gather the facts—and the same facts for both men and women. So if women's personal circumstances are relevant, then make sure that men's personal circumstances are also relevant. In the absence of information, give women the same "benefit of the doubt" that you give men.
- If a neutral's experience is the qualification with the most weight, have a group conversation about what "experience" really means. Is it simply the number of years in practice? Or are there other outcomes or metrics that are relevant? What factors are not being considered that should be?
- Have a good gender mix among those who are making the decisions about who to hire, including on the client side, if possible.
- Engage with the client in a conversation about the value of having a diverse slate of neutrals. Many Fortune 500 companies understand the value of diversity and in fact have made diversity a key factor in their choice of outside counsel. It is not a big shift from that to discuss applying this same lens to the decisions on neutrals.

Taking the bias out of choosing neutrals will ensure that you are *actually* getting the best person for the job, rather than the person you know best, and, in the long run, make the entire system of alternative dispute resolution more performance based. And isn't that, in the end, best for everyone?

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Endnotes

1. See also Report of the Sixth Annual National Survey on Retention and Promotion of Women in Law Firms (The National Association of Women Lawyers and the NAWL Foundation, October 2011).
2. See Michael Goldhaber, *The Women of Arbitration: Why Are There So Few?*) (Focus Europe, American Lawyer Media Supplement, Summer 2004); Michael Goldhaber, Deciding Women (Focus Europe, 2009).
3. Goldhaber, 2009.
4. Beyond Bias and Barriers: Fulfilling the Potential of Women in Academic Science and Medicine (National Academy of Sciences, 2006) at 4-28.
5. Id. at 4-27.
6. Daniel Kahneman, Dan Lovallo, and Oliver Sibony, *Before You Make That Big Decision* (Harvard Business Review, June 2011).
7. See, e.g., Nancy Carter, Christine Silva, *Mentoring: Necessary but Insufficient for Advancement* (Catalyst, 2010); Sylvia Ann Hewlett et al., *The Sponsor Effect* (Harvard Business Review, 2010).

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