

GUEST COLUMN

The eyes of an immigrant

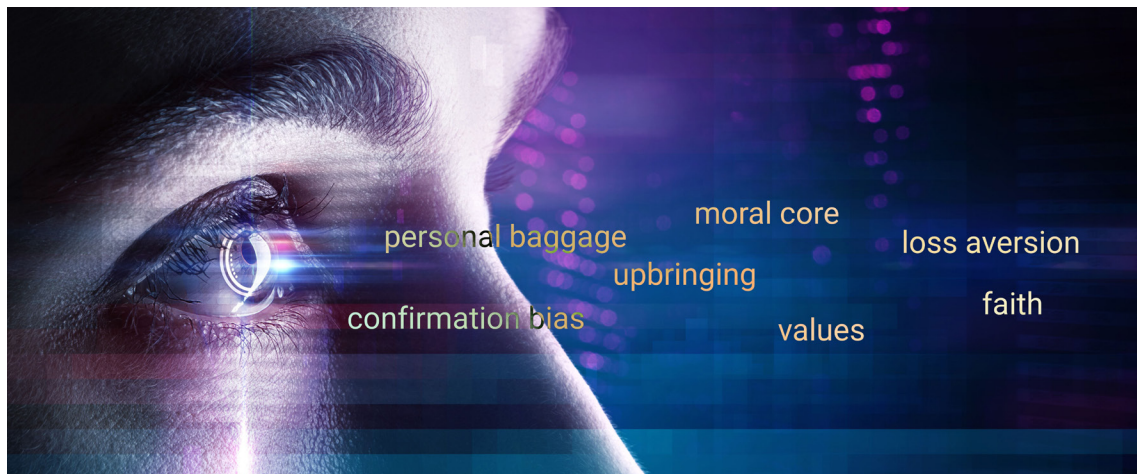
By Greg Derin

Many cultures relate versions of a parable in which a group of unsighted men encounter an elephant and seek to learn its qualities by touching it. Each feels a different part of its body; one touches its ear, another its leg, another its trunk and the last its side. They share their conclusions; it is a fan, a tree trunk, a thick snake, a wall – each reaching a conclusion based upon their limited experience and perspective.

How do you perceive the world? Law school reputedly teaches us to “think like a lawyer.” The presumption is that we try to be objective, analytical, logical, to understand the legal predicate of a client’s positions, and in litigation to assess the potential risks and rewards, gains or exposure. Yet we know that as human beings we are subject to a myriad of implicit and explicit biases.

For those of us who work as mediators, it has become fashionable to study social science literature to assist in recognizing and working with the forces being exerted during a negotiation. It is important to take account of these insights and share them with colleagues and mediation participants, directly or indirectly, to help them negotiate favorable resolutions without succumbing to inadvertent errors arising from natural inclinations.

For example, “confirmation bias” describes the tendency to filter information and select that which supports one’s positions while dismissing an opposing point of view and adverse evidence. “Loss aversion” is the preference of a party to avoid losing something more than



Shutterstock

taking a chance to gain rewards. This can manifest itself in dramatic swings in results depending upon how proposals are framed during a negotiation. Failing to recognize the irrationality of continuing to invest resources in an unprofitable venture (e.g., litigation which has proven to hold lower chances for success than originally imagined) represents destructive “sunk costs” reasoning. The list of cognitive biases that can impact success or failure in a negotiation is extensive.

However, I sometimes wonder if we focus too much on the mechanics or “science” of negotiation techniques and forget the moral core of the participants. People bring inherent biases and perspectives to every conversation and each decision in their lives. We each have a lens through which we see the world. This is not a judgment, merely the recognition of what it means to be human.

Just as I recognize my own biases, I am aware of the imperatives operating under the surface for litigants and their counsel. One of my first mediations, more than 22 years

ago, involved allegations that a business manager had misappropriated funds from a small business owner. The parties had become friends, and their lives were intertwined. After hours of discussion, with no clear resolution in sight, I looked the business owner in the eyes and asked him directly to tell me the truth, why was this so painful for him. He had been avoiding eye contact for much of the day, but finally met my gaze and said with a mixture of anger and pain, “[h]e stole my son’s bar mitzvah money!” With emotions flooding out, and the stakes clear in both rooms, a resolution followed.

Yes, trust had been established over the day, allowing an underlying roadblock to surface. Yes, the dispute was about money, not “principle” in a greater sense in which we hold that concept. But the business owner allowed me to see the controversy through his eyes in a way that had obscured the negotiation path, which permitted me to gain insight into a perspective that could be discussed and shared by both parties.

All stakeholders, including the

mediator, bring their personal baggage to a negotiation. I have learned to consciously “name” and recognize the things which might influence me. This purposeful act allows me as a mediator and arbitrator to strive to assure that they play no role in my conduct or decision-making. Those who claim to have no such influences are simply not being honest. Who is not influenced by what appears to be a more thoughtful, thorough, structured brief and legal analysis? Does not the witness who can, at first, articulate their story more fully and comprehensively have an advantage? How do we each judge credibility?

We each bring a lifetime of values to our work. I am the son of an immigrant; a proud first-generation American. I was raised to value people as individuals, and to believe in what many today mock as the “American dream;” to work hard, that anyone can achieve their ambitions, and to sacrifice for others – family above all. Does that background create a prism through which I view the world? Certainly. But are the results of using the eyes of an

immigrant to view factual and legal scenarios predetermined? Never. To deny that one's upbringing, faith and values affect one's perspective would be disingenuous. It is for those very values that many people select particular litigators, mediators or arbitrators. Who can they trust to assist with the resolution of a dispute important to their personal or financial well-being, and why?

Since my youth, I have found history, biography and philosophy to be rich sources for understanding the building blocks of character. It is a reminder that our experiences in life shape our approach to our

interactions in the workplace and marketplace. The same is true in the courtroom and related venues such as arbitral fora and mediations. No one need accept an adversary's version of events or perspective, but in negotiation it is helpful to be attentive to everyone's point of view and expressed interests. Aristotle noted that "[i]t is the mark of an educated mind to be able to entertain a thought without accepting it." Only by understanding the perspective of another can one seek to find accommodation likely to provide the greatest acceptable benefit.

Greg Derin is a mediator and arbitrator at Signature Resolution. He has been a professional mediator for more than 20 years. Greg is a Distinguished Fellow of the International Academy of Mediators and a Fellow of the Chartered Institute of Arbitrators. He assisted in teaching the Mediation Workshop at the Harvard Program on Negotiation. Greg can be reached at gderin@signatureresolution.com.

