

Implicit Bias and Mediator Neutrality

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As impartial mediators, we are expected to conduct our work in a manner which is objective and free of bias. We strive to be neutral. Yet, recent cognitive science research suggests this may be harder to do than previously believed. Of particular concern are the thought processes and behaviors in which we may engage and of which we are completely *unconscious*.

Discussed herein is a collection of recent cognitive science and psychology studies which relate to the skills we use in our mediation work. This non-exhaustive overview of implicit bias research along with its implications for mediation triggers reflection about our assumptions of neutrality and lack of bias within us as mediators. The research includes a discussion about age, race and gender and the ways these qualities may unconsciously impact us as mediators.

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Bias and Stereotype Defined



A **bias** is essentially a preference (also referred to in psychology as an “attitude.”) It is the tendency to like or dislike, or to act favorably or unfavorably toward, someone or something (e.g. an in-house HR mediator might be perceived to be biased in favor of the organization or a mediator originally trained as a plaintiff’s lawyer might be perceived to have a bias in favor of employees). Biases are normal cognitive processes which may create distortion and inaccurate perception; for example, we tend to be biased to perceive ourselves and those close to us in an unrealistically positive light.²

In-group bias refers generally to the “systematic tendency to evaluate one’s own membership group (the in-group) and its members more favorably than a non-membership group (the out-group) or its members.”³

A **stereotype** is “a mental association between a social group or category and a trait.”⁴ The association could reflect a statistical reality, but it may not. Example: “Mothers of young children are unreliable employees and cannot hold high-level, demanding jobs, because they will always put their children, not their work, first.”

The process of stereotyping people is as normal for the brain as categorizing groups of similar objects. Once in place, stereotypes affect our judgments of others. We create ‘schemas’ (or filters) based on stereotypes which profoundly affect:⁵

- how we perceive and interpret a person’s behavior,
- what we remember of that behavior, and
- how we judge them/their behavior later.

² von Hippel, W., Vargas, P., & Sakaquaptewa, D., *Attitudinal Process vs. Content: The Role of Information Processing Biases in Social Judgment and Behavior*, in J. P. Forgas, K. Williams, & W. von Hippel (Eds.), *Responding to the Social World: Implicit and Explicit Processes in Social Judgments and Decisions*. New York: Cambridge University Press (2003).

³ Hewstone, M., Rubin, M., & Willis, H., *Intergroup Bias*, *Annual Review of Psychology*, 53, 575 at 576 (2002).

⁴ Anthony G. Greenwald and Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 *California Law Review* 945 at 951 (2006).

⁵ Stereotype information adapted from Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stanford Law Review* 1161 (1995).

Implicit Bias Defined



How Stereotypes Work

We do not ignore evidence and choose to act instead on the stereotype. Rather, the stereotype biases the way we see and remember the information, without our being aware of its operation. “We thus recall, through the same cognitive processes that result in other forms of illusory correlation, stereotype-confirming instances as having occurred more frequently than they actually did.”⁶

Implicit (or Unconscious) Biases are normal, cognitive processes that operate - without any conscious intent - to favor or disfavor members of a particular social group.⁷ They are based on unconscious attitudes or stereotypes, and are particularly challenging because they may produce behaviors that diverge from a person’s stated beliefs or principles.⁸ Implicit bias is distinguished from explicit bias or **prejudice**, in that prejudice involves a *conscious* endorsement of negative attitudes and discriminatory behavior toward a person or group.

The **Implicit Association Tests (IAT)** are essentially social scientists’ attempts to measure unconscious or implicit bias.⁹ The IATs measure biases toward all types of advantaged and disadvantaged groups (e.g. young vs. old, thin vs. overweight, European American vs. African American, straight vs. gay, rich vs. poor). The IATs are computerized tests which measure the time it takes a participant to respond to images of, in the case of race, European American faces or African American faces in association with pleasant (joy, laughter) or unpleasant (agony, failure) words. The faster the test-takers’ response, the stronger their unconscious mental associations (or implicit biases) are assumed to be.

The IATs indicate that most people have unconscious biases against members of traditionally disadvantaged groups (e.g. African Americans or older individuals), and biases in favor of advantaged groups (e.g. European Americans or younger individuals). The IATs have been taken by thousands of people across many countries in Asia and Europe, in addition the U.S. and Australia; implicit biases have been found to exist among all people tested.

Impact of Implicit Bias and Unconscious Cognition: We do not always have conscious, intentional control over what we perceive, how we process our perceptions and the judgments we make (which affect our actions.)¹⁰ In fact, much of our thinking and decision-making is unconscious.

⁶ *Id.* at 1176.

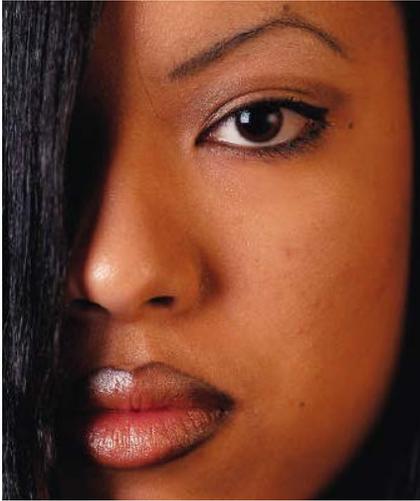
⁷ *Id.* at 1188-89.

⁸ Greenwald and Krieger *supra* at 954.

⁹ The IAT can be taken at <https://implicit.harvard.edu>. For in-depth discussion, see Greenwald and Krieger (2006) *supra*.

¹⁰ Greenwald and Krieger *supra* at 947.

Research Findings on Implicit Bias



I. Nonverbal Behavior and Race

The following studies illustrate that those who have implicit bias may unconsciously demonstrate this bias overtly in a variety of observable behaviors. The studies presented below focus exclusively on interactions between Black and White participants, however, research is being conducted on a multitude of other dimensions also.¹¹

For mediators, this research indicates that implicit bias could affect:

- the behavior of the mediator during the initial joint sessions or in private sessions, and
- the behavior of the parties, in response to the mediator or to the party's own implicit biases.

The IAT, Race and Interviewee Comfort¹²

When interviewed, White subjects (whose race IAT scores indicated strong implicit preference for European Americans as opposed to African Americans):

- spoke to and smiled more at the White experimenter than the Black experimenter and
- hesitated more and made more speech errors when speaking to the Black experimenter.

These spontaneous nonverbal behaviors on the part of the *interviewees* indicated greater comfort interacting with the White experimenter (their in-group member), as 'predicted' by the IAT scores.

Race and Eye Contact¹³

Similarly, White subjects with negative racial implicit bias scores showed higher rates of blinking (tension) and made less eye contact (less rapport) with the Black relative to the White interviewers. Researchers believe that eye contact and blinking are spontaneous behaviors which are difficult to control consciously, and may be overt expressions of implicit bias of which the subjects are unaware and which affect rapport.

¹¹ See e.g., Gonsalkorale, K., von Hippel, W., Sherman, J. W., & Klauer, K. C. *Bias and Regulation of Bias in Intergroup Interactions: Implicit Attitudes Toward Muslims and Interaction Quality*, *Journal of Experimental Social Psychology*, 45, 161-166 (2009).

¹² McConnell, Allen R., & Leibold, Jill M., *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 *Journal of Experimental Social Psychology* 435 (2001). For dissenting analysis on this study's conclusions, see Blanton, H., Jaccard, J., Klick, J., Mellers, B., Mitchell, G., and Tetlock, P., *Transparency Should Trump Trust: Rejoinder to McConnell and Leibold (2009) and Ziegert and Hanges*, *Journal of Applied Psychology*, Vol 94(3), 598-603 (May 2009).

¹³ Dovidio, John F., Gaertner, Samuel L., Kawakami, Kerry and Hodson, Gordon, *Why Can't We Just Get Along? Interpersonal Biases and Interracial Distrust*, *Cultural Diversity and Ethnic Minority Psychology* Vol. 8, No. 2, 88-102, at 95-6 (2002).

Research Findings



Race and Interviewer Behavior (pre-IAT)¹⁴

When interviewing Black and White job applicants, White *interviewers* unconsciously:

- sat further back and leaned away,
- gave shorter interviews to, and
- made more speech errors when speaking with the Black interviewees.

The researchers conducted a second study in which White interviewers were trained to control these subtle aspects of their behavior in their interactions with White applicants.

The White *interviewees* (applicants) then:

- performed worse in the interview,
- were more uncomfortable and distant in their interaction style, and
- judged the interviewer to be less friendly.

Removing the overt signs of implicit bias (favoring the in-group) from interviewer conduct created less comfort between interviewer and interviewee and negatively impacted rapport.

Implicit Bias Linked to Nonverbal Behavior¹⁵

White and Black subjects were rated on explicit and implicit biases, and then conversed about a race-neutral topic in inter-racial pairs.

Findings:

- Less implicit (unconscious) race bias meant more nonverbal friendliness to partner
- Less explicit (conscious) race bias meant more verbal friendliness

Tips for Mediators

Unconscious, nonverbal expressions of implicit bias may favor (or disfavor) certain parties during mediations and:

- may affect party's willingness to tell his/her story or to trust the mediator
- may impact mediator's sense of who is credible due to lack of rapport

Mediators should reflect upon their conduct during the mediation to ensure they are treating all parties alike in terms of sitting distance, eye contact, forward lean and general signs of friendliness. Conscious awareness of behavior may increase rapport with parties.

¹⁴ Carl O. Word, Mark P. Zanna and Joel Cooper, *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. Experimental Soc. Psychol. 109 (1974).

¹⁵ Dovidio *et al* at 96.

Research Findings



II. Race and Responses to Job Applications¹⁶

In this study, experimenters gave Black and White job candidates three different levels of qualifications: highly-qualified, moderately-qualified and unqualified.

The result was that White subjects rated:

- Black and White highly-qualified candidates equally, recommending the job be given to them,
- Black and White unqualified candidates equally – recommending the job *not* be given to them, but
- moderately-qualified Black candidates *as much less qualified*

than the moderately-qualified White candidates (although candidate qualifications were identical). Thus, for this candidate group, the subjects recommended that the job be given to Black candidates 45% of the time and to White candidates 76% of the time.

Researchers noted that “when given latitude for interpretation, as in the moderate-qualifications condition, Whites may give White candidates the ‘benefit of the doubt,’ a benefit that is not extended to out-group members (i.e., to Black candidates).”¹⁷ Mediators sometimes judge evidence of other’s decisions and must carefully deliberate to ensure unconscious bias has no effect.

Names and Race¹⁸

In another study, 5000 identical resumes were submitted in response to help-wanted ads in Boston and Chicago. The only differences were the names on the resumes. Some were submitted with traditionally African American names (e.g. Aisha Jackson) while others were given traditionally White names (e.g. Anne Baker).

The Result:

- Resumes with White names received 50 percent more responses, despite identical qualifications¹⁹
- “Subconsciously, you see the name [Aisha] and it’s going to bleed into your overall impression – it cues all the negative stereotypes you might have implicitly of African Americans.” – *Professor S. Mullainathan, MIT Researcher, on his study’s findings*²⁰

¹⁶ Dovidio, at 96.

¹⁷ *Id.* at 92 (also reporting similar findings for White subjects’ ratings of moderately-qualified college student applications – White subjects rated Black applicants with moderate qualifications lower than similarly-qualified White applicants. *Id.* at 93.)

¹⁸ Bertrand, M. and Mullainathan, S., *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, *The American Economic Review*, 94(4), 1-31 (2004) (also finding higher qualifications in resumes increased responses by 30% for White applicants, but only slightly for Black applicants.)

¹⁹ Bias is not always in favor of one’s in-group. Reviewers rated *identical* scripts, some submitted under male names and others submitted under female names. Female reviewers rated the script with the female name significantly lower, while male reviewers rated them the same. Patricia Cohen, *Rethinking Gender Bias in Theater*, *The New York Times*, June 23, 2009 *citing* Emily Glassberg Sands’ unpublished study available at: <http://graphics8.nytimes.com/packages/pdf/theater/Openingthecurtain.pdf>.

²⁰ MIT News, *What’s in a Name?*, January 24, 2003.

Research Findings

III. Forms of Everyday Bias

Some researchers believe that the following studies may be measuring implicit bias in a variety of everyday interactions.

Tipping for Cabs²¹

A study conducted in New Haven, Connecticut of 1000 cab rides found that:

- Passengers tipped White cab drivers over 60% more than drivers of other races
- Black and White passengers tipped White drivers approximately 48% more than Black drivers, while Hispanic passengers gave White drivers 146% more
- Asian Americans were the only group to give Black drivers more than White drivers (2% higher tip)
- Black drivers were 80% more likely to be stiffed than White drivers
- All passengers tended to round up for White drivers and round down for Black drivers

This study found no differences in tipping on the basis of passenger gender.

Tipping in Restaurants²²

A study conducted in one restaurant in the South found that customers of both races tipped White service providers more than Black service providers:

- White customers tipped White servers nearly 4% percent more than Black servers, and
- Black customers tipped White servers .5% percent more than Black servers

NBA Referees²³

Implicit bias towards one's in-group has also been found in research on referee calls in National Basketball Association games. This study found that:

- White referees called fouls against Black players more often than fouls against White players,
- Black referees called more fouls against White players, but the tendency was not as strong, and
- Players earned up to 4% fewer fouls and scored up to 2.5% more points on nights in which their race matched that of the refereeing crew.

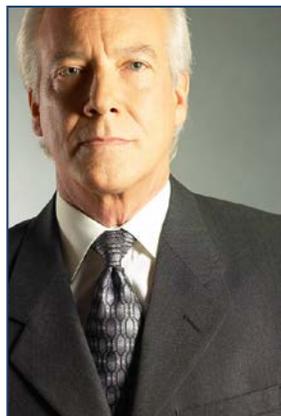
²¹ Ayres, Ian, and Vars, Frederick E., and Zakariya, Nasser, *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, The Yale Law Journal, vol. 114, no. 7, pp. 1613-74 (2005) (this study focused on 1000 cab rides given by 12 drivers (6 Black, 4 White, 2 Other; tipping figures were self-reported by drivers).

²² Lynn, Michael, Sturman, M., Ganley, C., Adams, E., Douglas, M. and McNeil, J., *Consumer Racial Discrimination in Tipping: A Replication and Extension*, Journal of Applied Social Psychology Vol. 38(4), 1045–1060 (2008).

²³ Joseph Price and Justin Wolfers, *Racial Discrimination Among NBA Referees*, Quarterly Journal of Economics, *forthcoming*, at pp. 29-30; also discussed in, Alan Schwarz, *Study of N.B.A. Sees Racial Bias in Calling Fouls*, The New York Times, May 2, 2007.

Research Findings

Researchers found the differences in numbers of fouls called to be significant enough to affect the outcomes of some NBA games. They noted that the high pressure, split-second decisions referees must make introduces the possibility for implicit bias to affect their decisions.



Baseball Umpires²⁴

Another study found that baseball umpires tend to call strikes more often when the pitcher and umpire were of the same race or ethnicity:

- the highest percentage of strikes were called when both the home-plate umpire and pitcher were White,
- the lowest percentage of strikes were called when the umpire was White and the pitcher was Black, and
- this effect disappeared when there was official oversight of umpire calls.

The researchers believe this effect is the result of split-second decisions which are affected by implicit biases in favor of the umpire's in-group.

Tips for Mediators

One commonality these studies have is that many of the decisions were made rapidly in a brief moment without much deliberative thought. Researchers believe that quick decisions of this nature allow implicit biases to affect conduct or decisions.

Thus, mediators should be sure to allow sufficient time for objective deliberation of all the evidence by the parties, especially new evidence which is introduced at the mediation. They might also help the parties contemplate alternate theories to what a party might initially hypothesize regarding the other party's motivations or intentions. A mediator may also assist with identifying and spending sufficient time reviewing information or evidence which works against a party's initial hypothesis about a situation.

²⁴ Parsons, C., Sulaeman, J., Yates, M., and Hamermesh, D., *Strike Three: Umpires' Demand for Discrimination*, American Economic Review, *forthcoming*.

Research Findings



IV. Bias and the Judiciary

Most people assume that judges are immune from the impact of implicit biases and are “arbiters of justice who assess the facts and interpret the law in a rational, more mechanical way consistent with well-established legal principles... Increasingly, however, scholars are acknowledging that judges have human inclinations and the ability to be objective is largely theoretical,”²⁵ at least in some circumstances.

One study noted that:

- Federally, less than 10% of all attorneys are of color,
- Approximately 17% of California attorneys are attorneys of color,
- Of the 12,000 state and federal judges nationwide, White judges constitute approximately 90% of the total, and
- While minorities constitute 30% of the U.S. population, only 10% of the judiciary is of color.²⁶

Racial Harassment Claims²⁷

One recent law review article analyzed federal workplace harassment cases over a 20-year period and determined that African American judges and White judges perceive racial harassment claims differently. In typical racial harassment cases at the summary judgment stage, plaintiffs are successful 22% of the time. When an African American judge is presiding, plaintiffs are successful 45.8% of the time. Thus, plaintiffs are *twice as likely* to avoid summary judgment on their claims if the case is adjudicated by an African American judge. This is true whether that African American judge is appointed by a Democrat or Republican (though White and Hispanic Republican-appointed judges grant summary judgment against the plaintiff substantially more often than White or Hispanic Democratically-appointed judges.)

Similarly, under the Voting Rights Act, African American judges are more than twice as likely as non-African American judges to vote for liability. Even just having an African American judge on a judicial panel predisposes colleagues to vote in favor of liability 20% more often.²⁸

This article also provides an interesting discussion and overview of studies on the impact of bias when sentencing criminal defendants.²⁹

²⁵ Pat K. Chew and Robert E. Kelley, *An Empirical Analysis of Racial Harassment Cases*, 86 Washington University Law Review 1117 at 1130-31 (2009).

²⁶ *Id.* at 1125-26.

²⁷ *Id.* at 1141-44.

²⁸ Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 Columbia Law Review 1 (2008).

²⁹ Chew *supra* at 1132-33.

Research Findings



Gender and Title VII Sex Harassment Cases³⁰

In a survey of federal appellate decisions, the author found that female appellate judges held for plaintiffs *twice as often* in sex harassment cases and 30% more often in sex discrimination cases than male judges.

Appellate panels with a female judge were more than twice as likely to find for the original plaintiff as panels without. The author found that male judges on panels were influenced by female judges to hold for plaintiffs; they did not dissent more often. Conservative judges were affected as much as liberal judges by having a female colleague on the panel.

Author's Explanations for Panel Decisions

³¹

- 1) when deliberating, the majority moves toward a compromise view which incorporates the female judge's more pro-plaintiff preference,
- 2) male judges defer to female judges because they are viewed as more credible and persuasive in cases involving gender,
- 3) male judges could be acting strategically to bargain with female judges for future gains (e.g. a female judge's support for the male judge's view on a later case), or
- 4) male judges may feel more constrained in what they assert when a female judge is present.

Mediation Outcome Studies – Impact of Race and Gender of Mediator

³²

Findings from a study done in a small claims court in New Mexico found:

- Disputants of color fared worse than did White disputants on objective monetary outcomes in adjudicated and mediated cases; more extreme in mediated cases
 - Received 18 cents/dollar less as claimants
 - Paid 20 cents/dollar more as defendants
- Mediator teams with at least one White mediator resulted in significantly higher monetary outcomes for White than for minority claimants
- Cases with two minority mediators resulted in similar outcomes regardless of the claimant's ethnicity
- Compared with other mediator dyads, Minority claimant cases mediated by two female mediators were more likely to end in nonmonetary outcomes.

³⁰ Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision-Making in the Federal Appellate Courts*, 114 Yale Law Journal 1759, 1767-1769 (2005).

³¹ *Id.* at 1778-1786.

³² LaFree, G. *The Effects of Participant's Ethnicity and Gender on Monetary Outcomes in Monetary Outcomes in Mediated and Adjudicated Civil Cases* 30 Law & Society Review 767 (1996) and Michele Hermann *Issues of Gender, Ethnicity, and Culture - New Mexico Research Examines Impact of Gender and Ethnicity in Mediation*, 1 Disp. Resol. Mag. 10-11 (Fall 1994).

Research Findings



Other Tips To Reduce Bias in Mediations

Research in the area of implicit bias is quite new (the IATs began in 1998) and ways to reduce this bias is an emerging area of study.

The following are some suggestions generated by the research:³³

- Increase awareness of your unconscious biases and of when they are triggered/operating
 - Self-reflect on your conduct in mediations, particularly in light of the research on unconscious non-verbal behavior in interviews
- “Prime” yourself through exposure to images which are at odds with common biases or stereotypes (e.g. screen savers or photos of respected strong women or African American leaders)
 - To the extent possible, form personal relationships/friendships with members of your “out-group”– this is reported to be the fastest and most effective way to reduce implicit bias (e.g. may occur naturally when a family member marries someone of his/her out-group)
 - Employ procedures during mediations that minimize the influence of bias:
 - Do not make assumptions – ensure complete understanding of each party’s perspective by using active listening throughout the mediation session
 - Increase transparency in mediator conduct throughout the process
 - Encourage parties to take sufficient time to deliberate and reflect on new information received and proposals regarding solutions made during mediation
 - Contemplate working in mixed race/gender teams and have others as witness to your work – research indicates that oversight lessens implicit bias
 - Include cultural awareness components in mediator trainings, when possible
 - Reflect on the importance (to you as a mediator) of achieving particular mediation outcomes to ensure an unbiased approach toward all parties

³³ See e.g. Bertrand M., Chugh D., Mullainathan S., *Implicit Discrimination*, American Econ. Rev. 95(2):94–8 (2005) and Joy-Gaba, J. A., & Nosek, B. A. *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, Social Psychology, 41, 137-146 (2010).

References

Web Sites:

<https://implicit.harvard.edu> (take the Implicit Association tests or read about them)

www.equaljusticesociety.org (research and commentary, Eva Paterson)

www.lpfi.org (research and commentary, Level Playing Field, Freada Klein)

www.workplaceempathy.org/library/research/bias (studies on implicit bias)

<http://reducingstereotypethreat.org> (research and commentary, bias in schools and beyond)

Recent Books:

Chabris, Christopher and Simons, Daniel, *The Invisible Gorilla and Other Ways Our Intuitions Deceive Us*, Crown Publishers (2010)

Vedantam, Shankar, *The Hidden Brain*, Spiegel & Grau (2010)



MEDIATION EXPERTISE

Claudia Viera is a dedicated and tenacious attorney-mediator who primarily focuses on employment, contract and business disputes. Ms. Viera draws on her years of legal experience as an employment attorney with Littler Mendelson, the largest employment and labor law firm in the nation, to promote effective communication and increased understanding between parties in conflict.

Ms. Viera has mediated about a thousand tough cases since 2001 and her most recent work includes race harassment and discrimination, retaliation, disability discrimination, wrongful termination, sexual harassment, business dissolutions of partnerships, age discrimination, wage and hour claims including class actions, and landlord-tenant disputes. Ms. Viera mediates in Spanish and has extensive experience with pre-litigation mediation in workplaces and among co-owners or business partners.

Ms. Viera works actively with both parties to help them achieve a better resolution than either would achieve in court. Ms. Viera believes that exploration below the surface of the dispute is often necessary to reach resolutions that have lasting value to her clients. To this end, she focuses on eliciting and clarifying each side's positions and then works closely to identify the interests and underlying concerns of each party. She simultaneously encourages true cost benefit analysis of litigation alternatives as she works to orient clients toward settlement.

LEGAL EXPERIENCE

Ms. Viera previously practiced employment law at Littler Mendelson, where she dealt with labor and employment issues, including disputes arising under Title VII, the Family and Medical Leave Act, the Americans with Disabilities Act, wage and hour laws, employment contracts and a variety of California state statutes. Ms. Viera worked with a variety of Fortune 500 companies in both state and federal court and later represented plaintiffs. Ms. Viera currently conducts investigations into complaints of workplace harassment and other claims, in addition to training supervisors on their management responsibilities under the law. Ms. Viera teaches Conflict Resolution at San Francisco State University and has taught Employment Law at Saint Mary's College of California.

Claudia Viera focuses on mediation of employment and other business disputes.

Mediation Areas of Expertise

- Employment Claims
- Harassment Claims
- Discrimination Claims
- Breach of Contract
- Business Disputes
- Partnership Dissolutions
- Landlord/Tenant
- Pre-litigation Disputes
- Spanish-Speaking Mediations

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