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YLD PRESENTATION

**FINDING SUCCESS
IN WORKPLACE INTERACTIONS**

MODERATOR:

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Ms. Coladonato joined Mills & Henry as an associate in 2017. She earned her J.D. from the University of Pittsburgh School of Law in 2016. During law school, she served as Managing Editor of JURIST, a web-based legal news and legal research service, where she received the Sutin Prize for outstanding commitment to JURIST. Ms. Coladonato also participated in the University of Pittsburgh's Immigration Law Clinic where she assisted clients with asylum applications, family-based petitions, and representation before the Immigration Court. Prior to joining Mills & Henry, Ms. Coladonato worked as In-House Counsel for a real estate development company, where she was involved in the preparation of company agreements and the completion of commercial real estate transactions.

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Implicit Bias

Understanding and reducing implicit bias in the legal profession has become a priority among many judges, lawyers, academics, and legal professional associations. This reflects the growing consensus that the legal community needs to know what implicit bias is, and that implicit bias among judges, advocates, litigants and jurors, interferes with the goals of fairness and impartiality in the civil and criminal justice systems.

In 2012, ten legal academics, scientists, researchers, and a sitting federal judge, wrote an article entitled “Implicit Bias in the Courtroom.” They asked the question “What, if anything, should we do about implicit bias in the courtroom?” That question has resonated through the profession.

In 2016, the American Bar Association (ABA) passed Resolution 116 which advocated that courts instruct juries on implicit bias, and take actions to reduce implicit biases of juries. In August 2017, the ABA passed Resolution 121 urging all courts to develop plans of action to make debiasing training an important part of both initial judicial training and continuing judicial education. Resolution 121 also urged state and local bar associations to work with courts to offer debiasing training to judicial officers free of cost and at the convenience of the courts.

In 2018, the ACBA responded by approving a project requested by its Women in the Law Division (WLD) to assist persons providing Continuing Judicial Education (CJE) programs in integrating implicit bias content in their programs regardless of topic. To accomplish this goal, the WLD recruited and trained a panel of ACBA members who work with CJE planners to generate ideas and offer resources for incorporating implicit bias content into their programs.

The WLD also convened a sub-committee to provide information and resources about implicit bias through the ACBA’s website. This Implicit Bias website contains this Introduction about what implicit bias is, why members of the legal profession have become interested in these implicit biases, the existence of tools for interrupting specific biases against various classifications of people; and strategies for accomplishing the debiasing of court proceedings and other activities occurring in the legal profession.

Following this Introduction is a section on Helpful Articles which contains summaries of articles and materials that the sub-committee selected as the most useful for judges and lawyers to learn about implicit bias.



What Is Implicit Bias

“Implicit bias” refers to bias which results from the automatic functioning of the brain. It includes attitudes or stereotypes that affect peoples’ understanding, decision-making, and behavior, without the people being conscious of their operation. Human brains need to make thousands of decisions each day. Brains utilize mental shortcuts for handling all of those decisions. They do this by developing mental maps or schema so that they can process information automatically. Most cognitions are implicit, meaning that our brains process most of the work to be done daily, using schema rather than a full deliberative process. Schemas apply to human beings. Our brains use schemas for various daily functions, including to classify people. Brain science has shown that many attitudes and stereotypes can affect the brain’s automatic functioning, which means the brains’ owners are unaware that those attitudes and stereotypes are being used in their decision-making. In other words, as a person interacts with other people, their brains are using attitudes and stereotypes in the processing of those interactions. In this context, an attitude is an association between some concept (in this case a social group) and evaluative feelings that are positive or negative. A stereotype is an association between a concept (here, a social group) and particular traits. Mind scientists have increasingly developed tools to demonstrate that implicit bias exists in the auto-pilot processing by the brain. Harvard’s Implicit Association Test (IAT) uses reaction time differences between two types of tasks to show what attitudes and stereotypes affect an individual’s brain processing. The IAT is able to compare reaction time between when schema-consistent pairings are used versus when schema-inconsistent pairings are matched. Millions of people have taken various forms of the IAT, and the test may be accessed online at <https://implicit.harvard.edu/implicit/takeatest.html> by any interested individual.

Implicit bias differs from explicit bias because in explicit bias the person is conscious that they are using biased attitudes and stereotypes in their decision-making, and they endorse their own biases. Explicit biases against certain categories of people have been regulated by the U.S. Constitution, many non-discrimination statutes, and through contracts, particularly collective bargaining agreements. The United States Supreme Court has long “recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.



If Implicit Bias is a Result of Unconscious Brain Operations, Rather Than Intentional or Purposeful Discriminatory Treatment, Why Bother to Talk About It?

Allowing important decisions, including recruitment of lawyers as employees, appointment and election of judges, treatment of participants in jury and non-jury proceedings, all may result in unfair biased results when implicit bias is not addressed. It is relatively easy to recognize that the results of the operations of implicit biases in the brain may be the same as the results of explicit bias. Persons are classified and treated with biased processes, based on stereotypes and assumptions about the group or groups they are members of, and thereby do not obtain the opportunities they would have received if the playing field were neutral. If one's goal is to make the court system less biased, impartial, fair and just, addressing only intentional or purposeful discrimination will leave implicit biases free to effectuate biased results. Once brain scientists learned that there are tools through which implicit biases may be interrupted, in order to secure less biased results, judges, lawyers, academics, brain scientists and others have recognized that it will increase the confidence of persons affected by court proceedings if players in the legal industry take steps to de-bias their operations.

Some of these debiasing strategies are included in "Achieving an Impartial Jury (AIJ) Toolbox." The AIJ Toolbox includes a "Mindful Courtroom Checklist," "Suggested Jury Instructions," and "Suggested Voir Dire." "You Can't Change" offers descriptions of the challenges in hiring, compensating and other actions through which implicit biases may occur together with proposed solutions for interrupting those biases.



Helpful Articles For Your Review

1. **Who, Me? Am I guilty of Implicit Bias?** In this 13 page article Judge Dana Leigh Marks, past president of the National Association of Immigration Judges, describes instances in which she made assumptions about individuals appearing before her based on their physical characteristics and manner of speaking. Upon reflection she realized that her assumptions had led her to distrust the individuals' veracity and motivations, possibly unfairly. In acknowledging her own implicit bias and distinguishing it from explicit bias, Judge Marks underscores the importance of minimizing the negative effects of implicit bias through consistent application of proven strategies. The Judges' Journal, ABA Publication, Vol. 54 No. 4, 2015.

2. **Judges: 6 Strategies to Combat Implicit Bias on the Bench,** is an ABA article from Sept. 2016 that provides a summary of a 10 minute training video for judges produced by the ABA Commission on Diversity and Inclusion 360. It highlights 6 strategies to counter implicit bias, mentioning first and foremost: becoming aware that it exists. Additional constructive suggestions include: taking the Implicit Association Test (IAT) and actively seeking out examples of positive images to counter stereotypic images.

3. **You Can't Change what you Can't See: Interrupting Racial & Gender Bias** in the Legal Profession, an executive summary (36 pages) of a longer report prepared for the ABA Commission on Women in the Profession and the Minority Corp Counsel Assn. by Joan Williams, Marina Multhaup, Su Li, and Rachel Korn at the University of California Hastings College of Law. The ABA Commission on Women in the Profession had conducted a survey in April 2016, which garnered responses from 2,827 attorneys, both in-house and at law firms. This article reviews common indicators of implicit bias that may ring familiar to many women and minorities, such as "PIA" or "provide it again" where the lawyers not only need to prove that they can do the job, but must provide prove it again, and again. The article includes specific steps that could be taken by both law firms and in-house corporate counsel to interrupt implicit bias. The importance of not only hiring diverse candidates but in providing them opportunities to work on meaningful assignments is also discussed.

4. **Implicit Bias in the Courtroom** is a lengthier UCLA Law Review article from 2012 (63 pages). This article covers the negative impact of implicit bias in both criminal and civil cases. In criminal cases, it elaborates upon the well-documented disparate treatment of minorities on such matters as the police encounter, seeing a weapon more readily (even if there is none), disparity in the charges being brought, plea bargaining, setting bail, ruling on admissibility of evidence, and sentencing. In the section on civil litigation, the article focuses on the context of filing suit in a federal employment discrimination case and how implicit bias can

impact that process. To those not familiar with such matters, the extent to which a judge's preliminary rulings can terminate a case prior to discovery may be startling, where the judge makes decisions based on the plausibility of the claim with only the existing, pre-discovery information. "How are courts supposed to decide what is Twombly [fn] plausible when the motion to dismiss happens before discovery, especially in civil rights cases in which the defendant holds the key information?" According to the Court, "determining whether a complaint states a plausible claim for relief will...be a context-specific and that requires the reviewing court to draw on its judicial experience and common sense."

5. **Implicit Bias in Employment Litigation** by Judge Nancy Gertner and Melissa Hart. This 28 page article from 2012 provides further insight into U.S.S.C. employment discrimination cases. It cites examples of when judicial discretion could play a crucial role, such as determining what is a mere "stray remark" made by an employer, what is an "honest belief" even when it's inaccurate, and a how a termination might be deemed acceptable where the "same decision maker" was involved who hired the plaintiff.

6. **Shadowing the Bar: Attorneys' Own Implicit Bias** a 2018 Berkeley La Raza Law Journal, by Chris Chambers Goodman (32 pages), details the results of various IAT experiments and the conclusions that can be drawn from them. "Research demonstrates that people frequently engage in motivated reasoning in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. In other words, as between two plausible candidates that have different strengths and weaknesses, we first choose the candidate we like – a decision that may well be influenced by implicit factors – and then justify that choice by molding our merit standards accordingly."



Who, Me? Am I Guilty of Implicit Bias?

November 01, 2015

By Judge Dana Leigh Marks

As I observe his testimony, I notice the witness is not looking me in the eye, making me begin to suspect that I am not being told the truth. I note my concern while the testimony continues. As his story comes out in a confusing jumble, with bits and pieces that are not firmly grounded in a chronological timeline, I am again plagued by doubts about his veracity.

Sitting in front of me is an extremely muscular, heavily tattooed man whose mere physical presence seems to presage danger. I am horrified by the life he has led and the violent stories he recounts. I struggle to remain focused on the present evidence and its relevance, but I am aware that I feel something is just “off.” After a few more minutes, I catch myself and remember that it is not culturally appropriate in many cultures to look an authority figure in the eye. Okay, discount that factor. Then I remember that rigid timelines and linear storytelling are not necessarily common or expected in all cultures. Okay, another factor must be discounted or minimized.

I am continuing to listen as I recall the devastating impact stress from trauma has on memory. During a traumatic incident, the brain functions differently, often causing a shocking memory to be inaccessible or an event to be stored in the brain in a random, illogical manner making it incapable of orderly retrieval. Yet another factor which troubled me now must be thrown out or re-examined.

Or maybe today’s witness is a shy young woman, one who tells her stories of religious observance or political activism in an effort to persuade me that her activities would cause her harm if she were to return to her homeland. But I find it hard to believe that someone who supposedly found those principles to be so central to her life as to run the risk of persecution would have such difficulty discussing doctrine—until I remember that I am viewing her stories through a completely different lens of circumstance and experience, that is, from the vantage point of my own privileged status as an American accustomed to freedom of religious and political expression. Now how do I assess credibility? How would a different judge have reacted if his or her personal history included being raised outside the United States? Does it matter that my personal values include a rather laissez faire interpretation of the religious doctrine of my childhood, but that I find issues of political theory and social justice sacrosanct?

Counteracting Implicit Bias: A Matter of Life and Death

So, as I adjudicate what in effect can be death penalty cases (when I may have to deport someone to a country so violent and/or poverty stricken that they may die) in a setting that most closely resembles traffic court in volume of cases and lack of resources, my thoughts turn to prejudice—implicit and explicit—fairly often. I hope to offer some practical ideas about how we can recognize our own implicit biases and expose them so we can all improve our decision making rather than allowing our unconscious to undermine our hard work. These are the kinds of dilemmas that judges face daily.

Understanding the influences of my assumptions (implicit biases) makes me be constantly on guard to bring my unconscious attitudes to a conscious level. Equally important, these daily challenges have made me be actively on the lookout for advice and solutions to prevent myself from being influenced by my own implicit bias.

My decisions are based on a mosaic of factors, and I must ensure that all are visible and none are distorted. Is there something I am taking so much for granted, something so embedded in my beliefs, that I don't even realize it is influencing my perceptions? Take the word *bias* for example. I am tempted to dismiss it from my personal reality; it is just plain hateful and wrong, but certainly not something that I am guilty of being influenced by.

Then I remember what I have learned about implicit bias, and the proven fact that it is quite pervasive. Studies have shown it to be so rampant that it has been found to exist in virtually every profession. Perhaps more surprising, it does not necessarily align with a person's declared beliefs. Indeed, by definition, implicit bias is bias that individuals are not even aware they have. Rather than be defensive and deny its existence, or delude myself by thinking that because I am not explicitly prejudiced, I don't have any implicit bias, I have discovered that I must "check my privilege" and take it into account. In essence, we must accept that we are all the product of environmental factors that imbue some degree of implicit bias and do our best to counteract its destructive effects.

I Thought I Knew

I remember thinking that, as a victim of bias myself, I would be particularly sensitive and skilled at detecting my own implicit bias and knowing how to neutralize it. You see, when I think about bias, explicit and implicit, I have found it ironic that I have spent my entire career in a legal field that is often the brunt of explicit prejudice—immigration law. When I began in the mid-70s, the field was widely assumed to be filled with second-rate lawyers and unethical cheats. I moved "up" to the bench in Immigration Court only to find that this negative prejudice persisted because we are "mere" administrative judges, not "real" judges, not to mention the fact that my legal preparation for the job was as a lowly immigration attorney.

Then I am struck by the fact that my current work environment does not project an image which inspires faith in our court's freedom from bias. This is because the immigration court system is housed in a law enforcement agency, the U.S. Department of Justice, which is closely aligned with those who are the prosecutors in our courts (Department of Homeland Security (DHS) trial

counsel). This structural arrangement has caused many members of the public we serve, and the attorneys who represent them, to doubt our decisional independence.

Indeed, when we are physically co-located, as is frequently the case, and dependent for our security needs upon the Federal Protective Service, a component of DHS, their presence is strongly evident in our courthouses and potentially can make us susceptible to unconscious overidentification with law enforcement. Due to our history and current position within an agency whose top priority is law enforcement, the perfect breeding ground for implicit bias exists.

We are constantly being sent messages from the DOJ framed in law enforcement terminology and are closely aligned with sibling law enforcement agencies. In fact, our own agency has failed to promulgate regulations implementing the contempt authority that was legislatively provided to our courts more than 15 years ago because of resistance by DHS. It is not hard to see why being in this law enforcement family can't help but to foster some bias, whether we always realize it or not.

The Antidote

Implicit biases are those automatic attitudes or stereotypes that affect our understanding, actions, or decisions in an unconscious manner. They are attributed to acquired associations, favorable and unfavorable, learned from an early age after continued exposure to direct and indirect messages—the essence of socialization in our modern communities. They reflect a national consciousness created by our media, history, news, and political policy. We are bombarded by images, attitudes, and assumptions daily, and we are bound to internalize some of them. Because implicit biases are activated involuntarily, they generally occur without our awareness or intentional control. Some are even so deeply embedded that they are not accessible through introspection alone. In fact, surprising to many people, it has been found that an egalitarian or “color-blind” approach can actually produce greater implicit bias. Because implicit bias has been learned, these beliefs can also be unlearned, and it is our responsibility to do that. If we don't discuss it, implicit bias operates unabated; it continues to influence us and affect our decisions. Rather than declaring ourselves immune, we must continually learn about group differences and multi-cultural viewpoints so as to foster true understanding, which is the antidote to reverting to stereotypes, particularly unconscious ones.

As a judge, I also feel a responsibility to recognize that by virtue of my visible place in the social structure, the attitudes that I project and the ramifications of the decisions I make can easily become threads in the fabric of the implicit biases of tomorrow. Our courts play an important role in shaping the national dialogue about many sensitive issues, such as the legality of same-sex marriages, the extent of abortion rights, the propriety of detention in civil immigration cases, or whether certain methods of executing a death sentence are allowable. All are examples of highly charged social policy questions in which the decisions rendered by courts are central. How we make our decisions as judges undeniably plays an important part in establishing the framework that will shape the implicit biases of tomorrow, and we as judges must always ensure that we are conscious of the influences which are at work, rather than allowing our opinions to be governed by unconscious attitudes or bias.

The Good News

While the task at times seems insurmountable, the good news is that implicit biases are considered by psychologists to be malleable and can be gradually unlearned. Thus I am reminded that we must endeavor to identify and understand our implicit biases, rather than simply denouncing them or denying they exist.

Explicit prejudice is obvious, easily identified, and hopefully rare in judicial settings. Because it is so direct and clear, the safety mechanisms of appeal should be adequate to cure any errors in judgment that may occasionally arise. In contrast, because implicit bias is automatic and functions below our conscious awareness, it is far more pernicious and dangerous. Complicating matters further, experts recognize that now, in the era of political correctness, unconscious negative feelings often get expressed in more subtle, indirect, and even seemingly logically rational ways—making them much more akin to avoidant reactions like discomfort, anxiety, or fear.

Implicit bias is a master of disguise, invoking unconscious reactions that may not align with our declared, conscious beliefs. The common judicial predicament of second guessing one's assumptions becomes all the more challenging in my courtroom.

Our nation's immigration courts are fast-moving dockets governed by intricate and sometimes almost incomprehensible statutes, teeming with diverse foreign languages and cultures, set in the context of a law whose very origins were explicitly discriminatory and prejudiced.

NCSC Studies

It is important that judges address the dilemma of implicit bias vigorously, and the National Center for State Courts (NCSC) has extensively studied the issue. The NCSC has recommended strategies to help combat implicit bias, and has set forth several concrete steps that can be undertaken by individuals and organizations. These strategies include raising awareness among judges, training judges to identify and consciously acknowledge implicit bias, making routine checks of one's thought processes and decisions, reducing or removing distractions and sources of stress, reducing sources of ambiguity in decision making, instituting feedback mechanisms, and increasing exposure to stigmatized groups. Clearly it would be impossible to delve into all of these recommendations in this brief article, however they provide a helpful basis for my suggestions.

Personal Effort and Structural Support Needed

Successful efforts to reduce implicit bias require both personal efforts and structural support. The common thread I find in all these suggestions is that they require time, education, and persistence. We cannot hide our heads or shirk our personal responsibilities just because we are good people, seriously committed to doing the best job we can, which can lead us to feel immune from these unconscious influences. Nor can individual efforts alone suffice; the structural

adjustments necessary to support judges' personal efforts must also be undertaken or the best of personal intentions are unlikely to be sustainable.

What You Can Do

On the personal front, the good news is that by reading this issue of *The Judges' Journal*, you have already taken the first step—to educate yourself about implicit bias. But, because of the unconscious nature of implicit bias, the most productive results come from augmenting our individual efforts with the support of the organizations in which we work. Training sessions employing focus groups with knowledgeable facilitators, educators, scientists, and judicial colleagues can help all of us broaden the scope of our understanding through examples drawn from the daily experiences we share. Hearing about the issues confronted by colleagues and listening to their insights, suggestions, and solutions are invaluable learning tools.

Personally, I found that taking the implicit association test (IAT) was a truly revealing assessment of my subconscious attitudes and provided concrete evidence that despite my best efforts and personal perception that I was bias-free; I am, after all, very typical and influenced by my upbringing and cultural norms. I frequently remind myself to honestly scour my own background for assumptions I might make and to ask myself: Would I rule differently if this person were from a different country, would I be more or less tolerant of past misbehavior, or would I find their story more plausible?

Avoidance of implicit bias requires that one routinely check one's thought processes and decisions for the influence of these unconscious biases. I have found it particularly difficult to devote the time this requires in light of my fast-paced docket. Yet it is clear to me that it is only through thoughtful, deliberative processing of the testimony and documentary evidence in the record that is before me that I can escape the seductive lure of stereotypes. In order to counteract those situations where I feel pressured by time or adrift due to ambiguity in the law, I must spend more time developing concrete criteria that will help me make more consistent decisions, free from stereotypes and implicit bias. That means I must find more analogous jurisprudence on similar facts and issues, and ensure I am knowledgeable about current events and politics in general.

For immigration judges, there has been some modest progress of late. Due in part to issues such as the ones discussed here, there have been increased numbers of judicial law clerks hired in recognition that the complexity of many of our cases require written decisions. As this improvement provides help in addressing our burgeoning dockets, some of the pressures faced in the immigration courts will be eased gradually. The benefits are enormous, as allowing the opportunity to review one's reasoning processes before publicly committing to a decision, and having the chance to critically assess a decision for implicit bias, help ensure that our reasoning will withstand scrutiny.

Receiving feedback has also been recommended as a helpful tool to aid judges avoid implicit bias. The most effective feedback is that which comes from a respected authority who addresses the decision-making process rather than any approach designed to achieve a particular outcome. With that in mind, I believe that judges should be encouraged to actively seek feedback from

colleagues and be provided the time and opportunity to discuss cases among themselves for all issues, not just matters of legal interpretation. I have found that weaknesses in my own reasoning or leaps in logic can become quickly apparent merely through the process of explaining the issue I am grappling with to a trusted colleague.

Having a dialogue can highlight implicit assumptions and hidden prejudices and allows for a sharing of viewpoints and experiences that reduce implicit bias. An opportunity for input from those who appear in court, including parties and the interpreters who serve regularly, can provide useful perspective and be helpful to ensure reasoning is transparent and decisions are perceived by all to be fair. Questions about possible implicit bias should be addressed routinely in judicial evaluation questionnaires, as they provided a necessary (albeit sometimes harsh) reality check as to whether our personal efforts to avert implicit bias are succeeding.

To help reduce the impact of implicit bias, it has also been suggested that we identify the sources of ambiguity in the decision-making context and endeavor to establish more concrete, tangible standards. Having only practiced in the field of immigration, I realize my views may be naive, but I have often found myself wishing that I had two witnesses to an incident when called upon to make a credibility determination so that my assessment would be more fact based rather than dependent upon my assessment of just one person's veracity.

It has always seemed to me exceedingly difficult to determine credibility when the proceedings are taking place through a foreign language interpreter across cultures and the testimony is about unfamiliar events and social or political practices in a country that I know little about. It seems that deciding if the young woman with 20/20 vision saw the accident more clearly than the elderly gentleman with cataracts would be a much easier task because despite the known unreliability of eye witnesses, at least I would have additional views on the issue. Finding ways to draw conclusions in the kinds of cases I routinely see, those with only one percipient witness to the contested events, has required me to guard against implicit bias by scouring legal precedent for similar fact patterns and pushing litigants to provide materials for the record that educate me and help provide more objective evidence upon which to base the essential rulings in cases where the factual contexts are inherently more difficult to document.

Studies support the personal anecdotal perception of many judges that commonly present stressors can adversely affect judicial performance. Time pressures caused by heavy caseloads filled with complex matters, fatigue from long hours and/or lack of sufficient support staff, distractions from multitasking or even threats to physical safety or security can all tend to provide fertile soil for reliance on intuitive or spur-of-the-moment decisions, which are far more prone to the inappropriate influence of implicit bias. Immigration judges in particular have been found to suffer from intense stress and burnout, higher than the rates experienced by prison wardens and busy hospital doctors, because of the heavy caseloads they carry with inadequate resources and staff support.

The antidote to this is to give judges the opportunity to reorganize their calendars so that they can reconvene if additional deliberation is needed and to provide sufficient resources to minimize the effects of fatigue and burdensome multitasking, while continually and realistically reassessing the amount of resources needed to handle continually rising dockets. Taking the time

to assess whether or not our personal experiences, with crime, discrimination, vicarious trauma, or a perceived lack of proper respect from parties (either directly or through lack of preparation), are unduly coloring our perceptions is crucial to avoiding implicit bias.

Structural Support Needed

However, this personal scrutiny cannot take place without structural support, which means more time off the bench through adjustment of dockets and reduced distractions. Judges need the structural support, which only their court managers and administrators can provide, to ensure that they have sufficient time on their dockets to address the constant fight against implicit bias. It has been found that an important way to reduce implicit bias is to create a clear and specific strategy to ferret it out, which takes time and advance preparation. Sharing tips and insights gained from experience by other judges in our own court systems and learning from varied judicial settings about how they address these issues are invaluable tools.

The positive effect of time off the bench to reflect and diffuse the pressures of a huge docket cannot be overstated. It is often the only antidote to unfounded assumptions creeping into decisions. Immigration judges in particular have to struggle to carve out this space since our courts have long been based on a model requiring oral decisions to be rendered immediately at the end of a hearing, leaving little time to step back and gain perspective. Because we make our decisions without any written transcript of testimony (our proceedings are only transcribed if appealed), we must rely on our contemporaneous notes and impressions of witnesses gleaned while we also serve as our own bailiffs, court clerks, and unofficial stenographers.

In this setting, the suggestion that distractions be avoided and that objective deliberation be enhanced to reduce stereotyping is a solution which seems constantly out of reach in times of fiscal austerity. Yet taking time upfront, before firmly committing to a decision, is judicially economic, as it reduces the likelihood of committing an error or facing reversal on appeal, which is far more time consuming (not to mention demoralizing) in the long run.

For immigration judges, one suggestion that would help to alleviate the implicit biases we may be acquiring because of our close alignment with law enforcement is the creation of an independent immigration court structured under Article I of the Constitution. Many organizations, including the National Association of Immigration Judges, the ABA, and the Federal Bar Association, among others, advocate this restructuring for a variety of reasons, including this one.

Conclusion

As I walk into court after all these years, I am very glad that there are still new challenges that face me. The variety of the people and their stories that come before me present an opportunity for learning and growth on my part. But I also risk falling prey to the burnout caused by the similarities their cases inevitably demonstrate.

Combatting implicit bias is one task in my work that starts anew each day and never remains the same. It is a struggle that I must wage alone in my private thoughts, as must each of my

colleagues, yet it is one that we cannot fully resolve without relying on each other for reality checks. It is a personal struggle which we all face, and one we cannot ignore.

The fact that a judge's job will always retain this quintessentially human aspect is both the good news and the bad news in my view. While it is frustrating to think my work on an issue will never be complete, I think that is the very reason why I love my job.



Strategies on Implicit Bias and De-biasing for Judges and Lawyers

September 20, 2016

A judge's task to be the most impartial member of the legal system is a great responsibility for any single person to carry, but nearly impossible when it comes to implicit bias. Implicit bias in judges may alter the way justice is delivered in a courtroom, including the ruling on the admissibility of evidence, sentencing, instructions or how they interact with others.

"Each of us in doing our jobs are viewing the functions of that job through the lens of our experiences, and all of us are impacted by biases, stereotypes and other cognitive functions that enable us to take shortcuts in what we do," said 6th U.S. Circuit Court of Appeals Judge Bernice B. Donald during a program held at the 2016 ABA Annual Meeting in San Francisco.

The program, "Implicit Bias and De-Biasing Strategies: A Workshop for Judges and Lawyers," sponsored by the [ABA Judicial Division](#), examined the problem of implicit bias and hosted an interactive session to help a gathering of state and federal judges from around the country to develop techniques and strategies to mitigate it.

"We all have biases – this is a way for us to process and organize information," said Johanna Wald, director of strategic planning at the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School. "Bias doesn't make you prejudiced, it makes you human."

The workshop featured a 10-minute training video for judges produced by the ABA Commission on Diversity and Inclusion 360. The video, "[Hidden Injustice: Bias on the Bench](#)," featuring the nation's top judges, law professors and experts, is the first tool of its kind to raise awareness and provide practical tips for America's judges on the damage caused by implicit bias and the necessary steps to combat it.

In November, Donald said, the ABA will publish a source book for judges titled "De-Biasing Strategies for the Judiciary," a joint effort of the association's Judicial Division, Criminal Justice Section and Litigation Section.

Techniques and strategies to mitigate implicit bias and successfully "de-bias," recommended on a weekly basis, include:

Become aware; take the Implicit Association Test. The first step to de-biasing is to identify the stereotypes that affect, often unknowingly, personal perceptions of the character and qualities of different races and ethnic groups. The IAT measures the ease and speed with which test participants can match concepts such as “violent” or “peaceful” with photos of people of different races.

Individuation. This strategy involves gathering very specific information about a person’s background, tastes, hobbies and family so that your judgment will consider the particulars of that person, rather than group characteristics.

Stereotype replacement. Modify your own approach and recognize when you are responding to a situation or person in a stereotypical fashion. Consider the reasons and factors leading to this response and actively replace this biased response with an unbiased one.

Counter-stereotypic imaging. After you detect a stereotyped response, think of examples of famous people that show the stereotype to be inaccurate. Thinking of counter-stereotypic people provides concrete examples that demonstrate the inaccuracy of stereotypes. For example, while watching a movie that portrays black people as unintelligent, you could think of Dr. Martin Luther King Jr., Barack Obama, Condoleezza Rice, Frederick Douglas or your own intelligent black friends or acquaintances.

Perspective-taking. Consider different perspectives and step into the shoes of a stereotyped person. This strategy can be very useful in assessing the emotional damage caused by stereotyping others. Think about how you would feel to have your abilities questioned, or to be viewed as lazy and potentially violent on the basis of your appearance. Perspective-taking can be used either proactively, without any prompting from outside sources, or reactively, after a stereotypic response or portrayal has been detected.

Increasing opportunities for contact. Actively seek out situations where you are likely to have positive interactions with stereotyped groups. This can involve joining particular clubs or participating in events that allow you to meet people who disconfirm stereotypes. In addition to seeking personal contact, you can modify your visual environment by watching movies, TV and news that portray stereotyped groups in non-stereotypical ways.