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## How unconscious bias can be a barrier to justice

By: Bill Cresenzo February 26, 2020

As someone who is young, black and female, Wake County District Court Judge Ashleigh Parker Dunston sees every day the biases that people harbor but think are hidden.

When she was a North Carolina assistant attorney general appearing in a rural county court, an opposing attorney told the presiding judge that the Attorney General's office hadn't sent anyone to argue a case. She was standing right there in the courtroom.

"I will never forget that experience. It was embarrassing," Dunston said. "Biases happen so subtly, but they are so impactful. Another thing I hear is 'You are so well-spoken, I didn't expect that.' And they don't see anything wrong with saying it. They think it's a compliment, but it's not. They aren't trying to intentionally be hurtful or harmful, but it is. That is what bias does—it's not just how it goes out, it's also how it is taken in."

To that end, she is one of a growing number of attorneys, prosecutors, and judges who are calling attention to implicit biases—those unconscious, preconceived notions that we all have about others but are hardly aware of, even as they cause us to make snap judgments about other people and situations that can lead to bad decisions and behaviors.

People unconsciously categorize others within a second of meeting someone. The brain then stores information about these categories from previous encounters, which accumulates over the years and influences how people interact with others in almost every situation.

"The way our brains process information typically involves shortcuts and some of these shortcuts involve schemas that are discriminatory," said James Drennan, an attorney and faculty member at the UNC School of Government who teaches implicit bias courses to North Carolina judicial officials. "It's a risk whenever a discretionary decision is involved."

While bias can be outward and obvious, particularly when it comes to race, implicit bias is much more nuanced—and everyone who has a brain has bias, said Megan Callahan, an attorney with Cardinal Law Partners in Greensboro who teaches a Continuing Legal Education class on unconscious bias.

Callahan said that while many law firms work hard to increase diversity, those efforts aren't worth much without being aware of unconscious bias and remedying it. If firms aren't "intentionally inclusive," they run the risk of being "unintentionally exclusive." A better understanding of how unconscious biases work can give attorneys a better sense for how to work towards intentional inclusion, Callahan said.

The challenge is that most people are reluctant to talk about biases.

"This is a very important topic to talk about within the legal community," she said. "Not just from a hiring perspective, but also dealing with our clients and serving as a judge."

Callahan said that while explicit or implicit racial discrimination might seem to be the most common type of bias, it also surrounds age, gender, gender identity and expression, physical abilities, religion, sexual orientation, weight,

appearance and other characteristics.

Unconscious bias can manifest itself in several ways, Callahan said. Affinity bias is the tendency to gravitate toward and develop relationships with people who are more like ourselves and share similar interests and backgrounds. This can lead people to invest more energy and resources in those who are in their “affinity group,” while unintentionally leaving others out.

Confirmation bias is a type of unconscious bias that causes people to pay more attention to information that confirms their existing beliefs and disregard information that is contradictory to them. Attribution bias causes people to look more favorably on the behaviors and circumstances for those who are part of their “in” groups—giving second chances and the benefit of the doubt more often—and more harshly judge people in their “out” groups.

Even the stereotypes that are applied to a group that are perceived to be positive—a belief that women are more ethical than men, say—can have detrimental impacts, Callahan said.

“You have to identify why you do what it is that you do, what you lean toward and away from,” Dunston said. “Once you identify it and you become aware of it, you need to equalize it so you don’t allow it to affect you in the courtroom.”

Parker Dunston said attorneys should be aware of their biases when dealing with clients. Do they have a particular client who may be poor or have poor hygiene, and so they avoid dealing with him above all the others? Do they spend more time on cases that come from paying clients versus those on the indigent defendant list?

When Andrew Murray was the district attorney for Mecklenburg County, his office sponsored unconscious bias training for judicial officials and attorneys. Murray is now the U.S. Attorney for the Western District of North Carolina, and he was so impressed by the class that he implemented it in his new office, inviting judges, probation officers, defense attorneys, and other legal professionals.

“As prosecutors we have to make choices, and there are things that can permeate the subconscious and you don’t want that to influence your decision on how you prosecute,” Murray said.

When he was a district attorney, Murray said there was a judge who had a reputation for being easy on people who were charged with breaking into cars, until someone broke into his car and stole several cases of expensive wine.

“Then all of a sudden it became much more serious to him when people came in front of him who were pleading to breaking into vehicles,” Murray said.

Lawyers should be aware that they aren’t immune to biases and examine their own experiences to see if they can identify their own blind spots, Drennan said.

“There is no blood test or litmus test, and since it involves unconscious thinking, it is hard to identify directly,” Drennan said. “Intend to be neutral in decision making. Make it a policy or a goal ... Slow down when important decisions are involved. Don’t make decisions that could be impacted by bias when tired, angry, or in a hurry.”

While there is no litmus test to identify unconscious bias, Dunston recommends that attorneys take a series of free tests online from Harvard University to help them identify their unconscious biases. The tests, available at <https://implicit.harvard.edu/implicit/takeatest.html>, cover biases on everything from skin tone to weapons to sexuality to religion. Some attorneys who have taken the test told Dunston they were “shocked” by their results.

“Implicit bias is detrimental to our entire justice system,” Dunston said. “I hope implicit bias and harassment training becomes a requirement for all attorneys on an annual or biannual basis.”

Murray said that it is important for people in the legal profession to acknowledge from the outset that they have unconscious bias, talk about it, and confront it head-on.

“It was something that we used to not talk about at all, and we never confronted it head on,” Murray said. “We all have our own tinted glasses based on our makeup and socioeconomic status and whether we are the minority or the majority. All of that impacts your decision making and your thought process.”

