

SECTION OF LITIGATION TACKLES IMPLICIT BIAS

Implicit Bias Can Be Eliminated by Awareness

Being born in 1956, I grew up in the television age of the Western. In those days, all cowboys were white and male, their cooks were usually Chinese, and the only visual difference between the cowboys was the color of their hats and horses. Good cowboys wore white hats and rode white horses. The bad cowboys wore black hats and rode black horses. Fifty-five years later, has this affected how I deal with race in the courtroom? New research suggests that it has.

The bad news is that most of us are biased. Even worse, the bias is unconscious. The good news is that this type of bias can be eliminated through awareness, and the Section of Litigation is leading the way.

"It is no exaggeration whatsoever to say that the research Professor Rachlinski and his colleagues are doing is probably the

most important research about the justice system that is being conducted anywhere in the country today," said Judge Delissa A. Ridgway of the U.S. Court of International Trade as she kicked off the plenary session on implicit bias at the Section of Litigation's January 2011 Winter Leadership Meeting. Ridgway is cochair of the Section's Task Force on Implicit Bias.

Professor Jeffrey J. Rachlinski of Cornell Law School took Section leaders through the current research on implicit bias. With the help of an electronic polling system, he instructed the leaders while they took a shortened version of the Implicit Association Test (IAT). The IAT is designed to uncover a variety of invidious associations such as white/good and black/bad or male/career and female/family. He followed

this with an eyewitness test in which subjects generally tend to pick more "stereotypically African-American" suspects out of a street scene, using considerations like darker skin, when they were told the crime was one of violence versus a crime of fraud.

"The plan all along has been to put together a 'tool box' of information by which initially our Task Force, and then others, would be able to go out and make presentations," says Hilarie Bass, Miami, FL, chair of the Section. "If we do nothing more than make people realize that, even though they think they are completely unbiased and race- and gender-neutral, all of us are unconsciously affected by subliminal biases we do not even know exist. The best cure thus far for this implicit bias is awareness."

The Section will partner with the National Center of State Courts to address implicit bias in the judicial system. The “tool box” will include such resources as how to administer the IAT, a video on the problem of implicit bias in the justice system, and a follow-up outline that can be tailored to specific jurisdictions.

“We wanted to get people the resources they need to present these issues to their firms, bar associations, or at judicial conferences,” adds Bass. “We are doing the final editing of the video so that our Task Force can go out and make presentations and eventually those in leadership and others can follow.”

Ridgway says that the video of the plenary session will be posted on the Section’s website for members to watch. “In addition to providing the ‘tool box’ on the website, our plan is to do four to eight showcase programs in high-profile venues to raise awareness.”

U.S. District Judge Bernice B. Donald of the Western District of Tennessee, a member of the panel at the Winter Meeting and cochair of the Section’s ABA Resource Committee, particularly focused on the need for detailed voir dire to probe these issues. She made the research come alive to the audience through a story from her courtroom about stereotyping.

“I remember selecting a jury once in a drug case,” recalled Donald. “A public defender stepped up with her African-American defendant seated behind her at the table. She asked, ‘How many of you know what a drug dealer looks like?’ and the hands shot up. She didn’t say anything else. Then, you could see the hands slowly go down as the people recognized what they were saying. The defendant sitting at the table looked like someone right out of central casting. If she had asked them to describe a ‘drug dealer,’ they would have described her client.”

So, given the fact that we have been fed a steady diet of white/good and black/bad or female/family and male/career, what do you do when confronted with these issues? What if your client is black and everyone else in the courtroom is white? What if you’re trying to get custody for a father and the judge is a woman?

Before I launch into this, I want tell you something about this particular column.

When I reach the practical advice portion of this column, I send out a request to seasoned trial lawyers for their advice. I have never had a problem getting great responses to my questions. Last week I sent a request posing these issues to five trial attorneys. For the first time in over a decade, no one responded before my deadline.

Am I reading too much into this, or are issues of race and sex truly “the third rail” of trial work? Are people so concerned about being misunderstood in even addressing these issues that they prefer to ignore them altogether?

Here’s the problem. You can hardly ask, “Your Honor, would you mind terribly asking the venire if they would take the IAT before jury selection?” Although it would be nice to know how well or poorly a potential juror, or the judge in a bench trial, might fare on the test, you simply cannot test them.

However, all of the research seems to indicate that once people are made aware of implicit bias, it disappears. So, how do you address the 800-pound gorilla in the room without making the 800-pound gorilla mad? People simply don’t like it when others accuse them of being biased, even if on an unconscious level.

One technique would be to do what the public defender did in Judge Donald’s courtroom. It certainly made the point crystal clear, but at the same time, there is the risk of embarrassing those potential jurors who raised their hands. Is there a step back from that technique?

From my perspective, here’s the dynamic. You want to make the trier of fact aware that implicit bias may be a factor. You are worried that addressing it will be misinterpreted as, “Counsel, are you implying I’m a racist?”

The added dynamic for the other side is that once implicit bias is raised, the pendulum will swing too far in the other direction. You fear that the judge or jury will ignore the facts and ignore the law just to make the point that they are not racist or sexist. A veteran prosecutor, who did not want to be quoted, told me that his experience with all-white juries and a minority defendant is that those juries tend to give the minority defendant the benefit of the doubt that they do not extend to a white defendant.

In most jurisdictions, judges begin with cautionary instructions that tell the potential jurors that they are not to consider a per-

son’s sex, race, religion, sexual orientation, or national ancestry in deciding the case. The problem is that you want to highlight your specific concern and not have it lumped in with everything else. One way would be to ask the judge to inquire on the specific concern, such as race. This avoids your having to do it.

If the judge declines to single out the factor of concern to you, you may opt for something gentle such as, “Ladies and gentlemen, as you can see, most of you are white, I’m white, the prosecutor’s white, and the judge is white. Mr. Smith is black. Will you promise to follow the judge’s instruction that a person’s race is not a factor in this case?” If permitted, you could ask potential jurors if they have taken the IAT and what they thought of it, with the hope of educating the entire venire through that one juror.

You have opportunities in opening and closing. Perhaps in a bench trial in which you are seeking custody for the father, you might begin with, “Your Honor, although the ‘tender years’ doctrine of young children always being awarded to the mother has been overturned, it appears to be alive and well in a few cases. In this case, the father is seeking custody based on the following factors.” Once again, a gentle reminder of bias, without a flat-out accusation of bias against this particular judge.

In closing, you could perhaps construct an argument based on the IAT such as, “Ladies and gentlemen, we are bombarded in society that black is bad and white is good. The bad cowboy always wore a black hat. We use phrases such as ‘black magic.’ Well, there is a reason that the figure of justice always wears a blindfold, and that is the race of a person simply does not, and should not, matter.”

RESOURCES

- 🔗 Implicit Bias in the Judicial System (Section of Litigation website), available at www.americanbar.org/groups/litigation/initiatives/good_works/implicit_bias_in_the_judicial_system.html.
- Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 Notre Dame L. Rev. 1195 (2009).
- 🔗 More details about the IAT are available at <https://implicit.harvard.edu/implicit>.