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Implicit Bias in Attorney Evaluation of Judges and Why it Applies to Everyone, Even You

by S. Grace Acosta

This fall, we can expect to receive surveys asking us to evaluate the performance of judges before whom we have appeared. It happens every other year. These surveys are an important professional duty to support a strong judiciary. Judges benefit from constructive feedback, and attorney surveys are a critical part of the Judicial Performance Evaluation Commission's (JPEC) evaluation of each judge. A constant source of concern to the bench and the Bar is the quality of evaluations completed by JPEC. Over the past several years, JPEC has changed its evaluations to minimize the potential impact of implicit bias. These changes are improvements. But as attorney-survey respondents, we can help too.

When we hear warnings about bias, we all may say, "That doesn't apply to me; I am not biased." Well, you very well might be but not in the way you might think. When one is called biased, one automatically assumes that the other person is calling one a "racist" or a "sexist," but this not what implicit bias is. Implicit bias is bias we do not even know we have and which is inherent in every human being.

We all bring life experiences and preconceived ideas to everything we do, even JPEC evaluations. Analyzing information and reaching a conclusion is exactly what lawyers do. But this critical thinking might have a hidden flaw: we may make assumptions that are based upon past experiences or stereotypes but that are not based on actual observations. And we often do it without even realizing that it has occurred. For example, when I am walking alone in the parking lot after work and I see a man by my car, I might assume that he is a threat to me, even if he is just waiting for a ride. If this same person is wearing dirty clothes or has a different skin color than mine, the perceived threat to me is greater. I do not have any credible information that I am under attack, but my past experiences and the experiences that others have shared with me drive me to make this assumption, even when I am not thinking consciously of those experiences.

This assumption has evolutionary benefit. It has most likely kept our ancestors alive for thousands of years. But we are not cavemen fighting off wooly mammoths. We are lawyers sitting in an office or battling in a courtroom. Yet, this same response occurs. If I allow an inaccurate assumption or stereotype to affect my behavior, my response is a type of implicit bias. Note that it is called implicit bias and not overt bias. This is because this type of bias occurs subconsciously. We do not mean to do it. It is a response based, in part, on our brain's tendency to use shortcuts to make decisions, but we can become more aware of those influences on our decisions in hopes of reducing implicit bias in our decision making.

I can recall a psychology professor saying to a class, "Now think about your toes." Suddenly everyone was aware of their toes in their shoes. This same professor said, "You always knew your toes were there, but they were dwelling in your subconscious. By asking you to think about them, we brought them to your consciousness." I am asking everyone to "think about your toes" and become consciously aware that we might bring implicit assumptions to our interaction with other lawyers and with judges.

We have all encountered "that" lawyer who has a bad reputation for not playing fair or not following the rules. Even though in your current encounter the lawyer has not done anything

S. GRACE ACOSTA is a partner with Lewis Hansen PC and primarily does family law, personal injury, and workers compensation defense.

wrong, you are on guard. At the end of the encounter, you might change your perception of the lawyer or, more likely, you view the lawyer's encounter with you as the anomaly. The same could be true of your interaction with a judge. Others' opinions and experiences might affect your perception of this judge when you are completing a JPEC survey.

In the truest sense, there is no clean slate. We all carry inside of us ideas about the world, things others have said, things we have experienced in the past, etc. So our answers on a JPEC evaluation might be a compilation of others' experiences, things we have heard and maybe our past experiences with people who have similar characteristics as the judge (e.g. women, minorities, Catholics, just to name a few). It is also possible that we might have viewed the same actions from another judge differently than we might from a judge who fits into one of our stereotypes.

So, how to do we stop and ensure that our evaluation of a judge is fair and accurate? Research shows that just because we have implicit associations does not mean that we necessarily allow those associations to affect our decisions in a biased way. This is a very hopeful thing! We are not just pawns to our own subconscious. We can consciously check ourselves to ensure that we are being fair.

The first step is to recognize the potential problem – "think about your toes!" Be mindful of how you are evaluating a judge. Ask yourself: What is the evidence to justify my rating? Who or what is influencing my assessment? Having these questions in the forefront of one's mind is essential to answering questions based upon one's own observations and experiences with the judge. In this way, we help to minimize the potential influence of implicit bias.

I attended my third grader's theater performance earlier this year. In that performance, a young girl played a doctor. After the performance I spoke with several of the students, including a precocious boy about eight years old. He commented to me that he thought it was silly that a girl had played the doctor. "They should have just called her a nurse." I told him that girls can be doctors too, and he just cocked his head at me and did not seem convinced. What surprised me was that such a young boy had absorbed – through his limited life experiences – that there were gender roles to which men and women were assigned. This boy could no more believe that a woman could be a doctor than he could believe that a man could be a nurse. If that young boy can hold this belief in 2019, then there is still a lot of work to be done for implicit bias. This conversation made me reflect on my professional experiences and question whether I had felt

Implicit Bias Reduction at the Judicial Performance Evaluation Commission (JPEC)

Since 2016, JPEC has taken on the substantial challenge of minimizing the potential impact of implicit bias on the judicial evaluation process.

Implicit bias training: JPEC conducted training using the same trainer engaged by the Utah State Courts, the Utah State Bar, and the National Conference of Bar Presidents. Giving commissioners, judges, and the legal community the same high-quality experience encourages a shared understanding of the problem and associated challenges.

Survey improvements: JPEC engaged a professional survey consultant to reduce the risks related to implicit bias and its evaluation surveys. Modifications followed best practices, including "focusing questions" to help respondents recall their most recent appearances before the judge. JPEC pretested all survey changes prior to their first implementation in October 2017.

Modified blind review: No longer do commissioners know the names (or demographic information) of the evaluated judges. Although commissioners eventually learn the identity of judges, an anonymous review helps minimize the impact of implicit bias.

Careful, systematic deliberations: JPEC redesigned deliberations to help commissioners reduce cognitive overload, engage clear decision points, and achieve efficiencies necessary to provide more time to evaluate each judge with care.

Continuing legal education: JPEC is developing an online CLE to address the potential impact of implicit bias on survey completion and other parts of judicial evaluation.

By Jennifer Yim, Executive Director
Judicial Performance Evaluation Commission

Implicit Bias Reduction: What Works?

Research shows that certain strategies and approaches can help guard against the effects of implicit bias. Consider taking these steps to structure your decision-making process.

Become aware: Knowing one's implicit associations is the first step to reducing their effects on decisions. The Harvard Implicit Association Test is a computerized assessment that tests the speed with which we connect ideas like math skills and men compared to math skills and women (https://implicit.harvard.edu/implicit/takeatest.html). Although we might know many women who are good at math, our implicit assumption may still be that men tend to be better at math than women are.

Slow down: Slowing down when you have important, deliberative decisions to make can help. Intentional conversations between the quick, intuitive part of the mind and the slower, deliberative part of the mind tend to yield less biased decisions.

Avoid overload: Avoiding cognitive overload, whether due to compressed deadlines or massive information amounts, can have a positive impact on reducing implicit bias.

Create decision clarity: Creating a systematic decision process by being clear about the decision criteria and decision points can help minimize implicit bias.

Seek equity: Finally, thoughtful self-reflection and mindfulness practices can help. When we consciously seek equity and consider multiple perspectives, especially those different from our own, we may consider options that cause us to question our assumptions and stereotypes in productive ways.

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Executive Director
Judicial Performance Evaluation Commission

bias before. What I realized is that bias does not have to be based upon race or gender, but it can be based upon age, religious beliefs, body size, practice area, firm size, and many other characteristics that are unique to people. So, if we all have implicit bias, then we all need to stop and think before doing something as important as filling out a JPEC evaluation.

Judge reviews are very important. They are important to the judge being reviewed and to the legal system as a whole. It is the only way we have to measure the performance of a judge. So please fill out your surveys when they are sent to you. The bigger the sample, the better the statistics. But as you fill out your surveys, ask yourself, what your evidence is for your ratings? Who or what is influencing you? As critical thinkers, we want evidence-based decisions to be made about the competency of our judiciary. If we all give our evaluations a second, considered thought, we can help make sure we are evaluating judges based on their merits and reduce the amount of implicit bias in the surveys. It is how we can help make Utah's judiciary even stronger, and please, tell your sons and daughters that girls can be doctors – and even judges.