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Judicial Division's Judges Journal issue highlights implicit bias

In this year when ABA President Paulette Brown has made implicit bias in the justice system one of her initiatives, and the subject is possibly the nation's most troubling issue, the ABA Judicial Division's Judges' Journal publication focused on various aspects of the subject for its Fall issue.



Judge Dana Leigh Marks

In one of the issue's articles, Dr. Itiel E. Dror, from the University College London; Michigan Supreme Court Justice Bridget M. McCormack; and Temple University Beasley School of Law professor Jules Epstein tackled the question of "Cognitive Bias and Its Impact on Expert Witnesses and the Court."

The authors make the point that the "human mind is not a camera," and humans have many mechanisms that enable them to process information. But those mechanisms are influenced by extraneous information and cognitive biases. Cognitive science can help the courts understand implicit bias issues and thereby enhance the contributions of expert evidence.

Dror, McCormack and Epstein ask the reader to consider the forensic science area of fingerprints, as one example. Since the pattern from the crime scene and that from the suspect are never identical, the human examiner decides whether they are "sufficiently similar" to conclude they are from the same source. Subjectivity is required because there are no objective criteria that determine what constitutes "sufficiently similar." The authors cite research indicating that when the same fingerprint evidence is presented to the same examiner but made to look like a new case and with different background information (such as whether the suspect confessed or was in jail on the day of the crime), the examiner may reach different conclusions from the original examination.

The authors suggest four steps toward the goal of increasing and improving the contributions expert witnesses make to the courts, while avoiding what they term "cognitive contamination":

- make sure expert evidence gets its proper and realistic weight within criminal proceedings
- best practices and standard operating procedures that strengthen expert evidence should be developed
- expert witnesses should receive training in cognitive bias and best practices to enhance objectivity
- a lab's quality management system should incorporate cognitive bias concerns

"Cognitive factors can affect what we might otherwise consider to be unbiased, objective science," Epstein explains. "Courts (and, of course, lawyers) need to consider systemic responses that will reduce that risk, ensure that when the risk is present it is discoverable and disclosed, and have appropriate courtroom presentation of both the scientific evidence and its vulnerabilities. This will allow proper fact-finding and evidence weighing."

Elsewhere in the Fall issue, Dana Leigh Marks, president of the National Association of Immigration Judges and longtime San Francisco immigration judge, offered her account of implicit bias in what in effect can be death penalty cases (deporting someone to a violent country) in a courtroom setting "which most closely resembles traffic court in volume of cases and lack of resources." Marks also noted that she works in an area of the law that is subject to its own negative prejudice, where the thought persists that immigration judges are "mere" administrative judges, not "real" judges.

Marks pictures herself observing the testimony of a hypothetical witness who will not look her in the eye, whose story comes out in a confusing jumble, and who recounts violent events. The judge catches herself a few minutes later and remembers that it is not appropriate in many cultures to look an authority figure in the eye, that rigid timelines and linear storytelling are not common in all cultures, and that the brain functions differently during a shocking event, often making it incapable of orderly retrieval.

Another hypothetical witness appearing before Marks tells stories of religious observance and political activism, actions that would cause her harm if she returned home. The judge finds it hard to believe that someone who would risk persecution for her principles would have difficulty discussing doctrine. And then the judge remembers that she is viewing her stories from the vantage point of an American accustomed to freedom of religious and political expression. How does the judge now assess her credibility?

Marks personally found taking an implicit association test to be a revealing assessment of her subconscious attitudes, and is supportive of many of the efforts for reducing bias in the judiciary, while also noting that they all require "both personal efforts and structural support" and "time, education and persistence" to work. She makes special note of strategies recommended by the National Center for State Courts (NCSC) that include raising awareness among judges, training judges to identify and consciously acknowledge implicit bias, making routine checks of one's thought

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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.

"With crushing dockets filled with cases involving distant exotic lands presented through foreign language interpreters more than 80 percent of the time, immigration judges such as me have to make life-altering decisions hundreds of times each year," Marks said. "Many of our cases involve just one witness whose credibility will determine his or her fate. Clearly we must avoid unfounded assumptions when we decide these matters, yet opportunities abound for implicit bias to creep in.

"My determination to do my best to avoid these pitfalls," she continued, "made me jump at the chance to explore this important issue in more depth, to learn more for myself and to share my journey of discovery in this important issue of The Judges' Journal."

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