

PART II: DETECTING AND OVERCOMING IMPLICIT BIAS

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We have all been there during jury selection, listening to a juror tell the court that they have a bias that may prevent them from fairly considering the evidence when a judge steps in and asks the juror to “set your bias aside.” More often than not, the juror is pressured to acquiesce that they can indeed set that bias aside. Where exactly do jurors place their bias so that it will not interfere with or influence their decisions? As our last Insights Newsletter on implicit bias explained, there is no such thing as “setting it aside.” Regardless of outward intentions, biased knowledge is always there, a ubiquitous weight on jurors’ every perception and decision.

As we discussed in Part I of this series, there are distinct forms of knowledge – explicit beliefs (knowledge we can verbalize and report, such as responses on a questionnaire) and implicit beliefs (knowledge that is nonconscious, and thus it cannot be reported because it is not cognitively available to the individual). Repeated exposures (e.g., Blacks are “bad,” women are “weak”) lead to associations that are expressed automatically (often cultural, not personal). Implicit knowledge impacts initial information processing and later directs behavior, in the absence of other knowledge, during spontaneous judgments and other common situations.

Implicit Beliefs and Knowledge Influence Behavior in Self and Others

In similar ways, beliefs about particular races, large corporations or the elderly can show strong positive or negative implicit associations. For example, people may say and truly believe they do not harbor any racial bias, but what if their nonconscious has strong negative associations toward African-Americans and they simply are not aware of it? It is important to note that implicit knowledge can impact outcomes at two different points – initial information processing (e.g., biased assimilation, hypothesis confirmation, self-fulfilling prophecies) and a direct behavioral impact in spontaneous decisions when a person is not invoking deliberate, conscious processes. And we know from psychological phenomena such as self-fulfilling prophecy and behavioral confirmation effects – whereby our expectations for ourselves or others unconsciously creates expectancy-matching behaviors in ourselves and others – how powerful initial biases are in a person’s information flow.

Mismatch Between Implicit and Explicit Beliefs Causes Cognitive Dissonance

Beliefs and feelings should predict people’s behavior and decisions, yet most of the time they do not. Social desirability may reduce the predictive utility of outward behaviors and responses, such as when a juror hiding racist feelings may make it difficult to anticipate prejudiced outcomes. But do such mis-predictions always reflect deception, bias, fatigue, poor question wording, etc.? Not at all. These behavioral mis-predictions are not indicators of deception. In fact, most people who hold an implicit bias, which is by definition unconscious, do not know about their bias or are unaware that their explicit responses are not accurate reflections of their underlying, dominant attitudes.

People can be ambivalent or hold multiple attitudes about one thing. When implicit and explicit attitudes do not match, people pay extra close attention to the information they are receiving and the judgments they are making because they feel cognitive dissonance. This internal, emotional uneasiness is notable to them when they experience it, but can also be detected by others through subtle, non-verbal behaviors. The effect can be magnified in situations, for example, when a juror is asked to “set aside” his or her knowledge or opinions about something, causing not only

an explicit-implicit attitude mismatch, but also leading to thought suppression that later results, paradoxically, in hyperaccessibility of the same attitude that was “set aside.” Moreover, the stronger and more ingrained the juror’s knowledge is on a topic (e.g., a seasoned firefighter with extensive knowledge about respirators seated on a mesothelioma case), the stronger the effect their implicit knowledge will have, particularly as they attempt to suppress invocation of that knowledge during trial.

Assessing Implicit Knowledge and Attitudes in Court

- *Pick up on subtle changes in jurors’ non-verbal cues.* As we discussed in Part I of this series, implicit biases reveal themselves in subtle, non-verbal behaviors. In a number of recent research publications, social psychologists showed that when a person interacts with a member of group for whom he or she holds a negative implicit bias, there are subtle, but noticeable shifts in non-verbal behaviors. These include closed body language (crossing arms across chest, etc.), reduced helping behaviors, talking less or more abruptly, making less eye contact and acting less friendly. Reverse engineering the relationship between non-verbal behaviors and implicit biases may help to identify jurors who cannot explicitly access or describe those attitudes. Without a means of comparison, it would be difficult to assess this bias for an individual juror without knowing their baseline for negative non-verbal behavior. So, assessment must be relative to other observed behaviors. For example, armed with the knowledge that jurors will reveal more negative, withdrawn behaviors toward a member of a group for whom (or in answering questions about a topic for which) they hold an implicit bias, look for shifts in non-verbal behaviors or increases/decreases the willingness of a juror to talk to a particular attorney or about a specific topic. In comparison to other attorneys or topics, has the juror’s behavior changed? If so, this may indicate that implicit biases are in play and there is more affecting that juror’s responses than he or she is able to express.
- *Watch for signs of dissonance (visible discomfort) due to implicit and explicit attitude mismatch.* As discussed above, when their implicit and explicit attitudes do not match, jurors will feel discomfort, even though they may not know why. Even though a juror may be saying all the right things, as an observer you may feel that something about their behaviors and emotions just “isn’t right.” Those subtle changes and discomfort cues are sending a message that there are opposing implicit beliefs under the surface.
- *Ask “back door” questions to assess related attitudes or biases.* Because people are not aware of some of the attitudes they hold, or because of social desirability pressures, they cannot report on their actual attitudes. As mock trial data will often reveal, some attitudes are predictive of pro-plaintiff or pro-defense leanings even though the attitudes themselves do not confront case issues head-on. Some of these important case-related attitudes can be assessed through peripheral, yet correlated, questions. For example, jurors have difficulty predicting how they will react to information. So if a juror is asked if they would be able to render a defense verdict and send a plaintiff home with no money, they may explicitly say they can – but is that really what their underlying wishes would be? While it would still be important to ask jurors about their feelings about damages, it is also helpful to ask about “entitlement” attitudes, such as “Do you agree that all U.S. corporations should be required to donate money to the needy?” or “If you were deciding how much money to award to an injured party, which would be more important to you – how much the injured party needs the

money or how much the injured party deserves the money?” Case-specific attitude correlations can be identified through pre-trial research, such as mock trials and focus groups to narrow down which questions will best identify implicit attitudes through a “back door.”

Offset the Impact of Implicit Knowledge

- *Do not tax people cognitively; present details slowly.* The more cognitively busy jurors are, the more they will have to rely on their implicit knowledge to pick up the slack. In opening, offer them an outline of where the case is going. Experts should present mini-tutorials on each major concept, both verbally and visually, to engage jurors more and avoid taxing their cognitive resources. The more complicated an explanation is, the less of your story jurors will actually hear. It is also helpful to divide witness testimony into “chunks” to help jurors categorize what they hear more easily using your categories rather than their own implicit ones.
- *Research community issues and biases, and economic, racial, etc. problems.* Before beginning trial, do a little research on the history of the communities surrounding the venues. Be aware of biases in the community that jurors learned through association of which they may not be consciously aware. Knowledge of local companies, government, culture, racial make-up, etc. is learned through the community and creates implicit and long-lasting attitudes. For example, in certain areas of any large city, there are “culture wars” between different racial or ethnic groups. If jurors were asked directly if they could serve on the same panel peacefully, they would express willingness to do so. However, if a member of both groups were on a deliberating panel, there would likely be clashes and disagreements merely because their learned experience is that their two groups do not agree, leading to suspicion of the other group member’s beliefs. Short-cut these biases by arming yourself ahead of time and researching a community’s living history before entering the courtroom.
- *Motivate people to think effortfully.* The more effortful attention that jurors offer, the less impact their implicit attitudes will have on their perceptions and decisions. If you can establish a positive rapport with jurors, they will like you. Social psychologists have shown that people will process what you tell them with more attention and effort if they like you. And more obviously, make the case as interesting as you can. By using graphics, visuals and interesting trial and witness themes, jurors will take more interest and put more effort into understanding what you are telling them, thereby reducing their reliance on implicit knowledge.

Conclusion

Implicit knowledge and attitudes will nearly always have a greater impact on judgments than explicit attitudes, but there are ways to carefully observe and identify when implicit bias may be in play. Recognizing potential areas for implicit bias among individual jurors and within their greater community can help a trial team to abate the unpredictable affects of that bias on jury discussions and decisions.