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PERSPECTIVE

Is focusing on perceived and actual biases misplaced?

By Mark Baer

When people think of bias, they tend to associate it with unfairness and injustice. While unchecked biases can and do often have such an impact, the focus on perceived and even actual biases themselves is misplaced, in my opinion.

Most people may not be familiar with Susie Marshall Sharp. She was the first female chief justice of the North Carolina Supreme Court. In 1956, as a superior court judge, she was responsible for desegregating the city-owned Bonnie Brae Golf Club. Knowing that, would it surprise you to learn that Sharp held segregationist views, expressed racist views about African Americans throughout her life, and was displeased with her ruling, even as she issued it?

In Presiding Justice Arthur Gilbert's article "Pandemic pandemonium, part 1," published in the July 7, 2020, edition of the Daily Journal, he stated: "To avoid recusals and the perception of bias, judges are cautioned not to publicly voice opinions regarding politics, religion or controversial subjects that could be the subject of lawsuits."

On July 31, 2020, the Daily Journal published an article by California Superior Court judges Monica F. Wiley and Noel Wise titled "Judicial ethics and independence must guide judges' responses to racial injustice" in which they stated: "Everything judges do in their personal and professional lives must demonstrate the absence of bias or prejudice, promote confidence

in the judiciary, and exemplify integrity, which the Canons define as 'uprightness, and soundness of character.'"

Fourteen other judges added their names to the article, stating, "We Concur."

On Sept. 10, 2021 the Daily Journal published an article by Hon. Wayne D. Brazil (Ret.) titled "For just outcomes the arbitration process can hold more promise than trial" in which he wrote, "Parties can eliminate the risk of getting a lazy or biased or incompetent judge by selecting an arbitrator who possesses the qualities that are most important to them; e.g., intellect, discipline, integrity, expertise."

It bears mentioning that Justice Sharp possessed an actual bias against African Americans and in favor of segregation. Yet, her integrity was such that she kept those biases in check because the Canons of Judicial Ethics require jurists to perform their duties fairly and impartially.

Unfortunately, the above sitting and retired judges and justices are not alone in their misplaced focus on people's actual and perceived biases.

The State Bar of California requires that attorneys receive at least one hour of credit every three years "in an area called the *Recognition and Elimination of Bias in the Legal Profession and Society*."

While perceptions may be real, they might also be exaggerated or completely imagined. And, as Justice Sharp demonstrated, even when *perceptions* of bias are real, does not necessarily mean that they are unchecked.

The problem with how we tend to view bias is set forth by Kathleen Woodhouse in her 2017 article "Implicit Bias — Is It Really?": "Recently, my business partner Lisa Mink and I had the opportunity to speak at the Harvard Business School on the topic of implicit bias in the workplace. We were addressing a second-year MBA class on the topic and introduced the very basic concept that if you have a brain, you're biased."

What does that mean?

It means that all of us — even the most seemingly aware, educated or socially conscious business people — still have biases."

If people keep their biases to themselves, does that mean they do not exist? If we lack the information from which to form opinions as to someone else's biases, does that mean those biases will not impact their decision-making?

Does the State Bar of California seriously believe that biases can be eliminated? If not, why does the bar speak of eliminating biases, rather than working to reduce and otherwise keep them in check?

This is not a philosophical discussion. Left unchecked, biases cause people to constrict and distort the information they receive, understand, and consider. The more constricted and distorted the information heard, understood, and considered, the more impaired will be the thinking involved.

Fortunately, in 1994, Timothy D. Wilson and Nancy Brekke provided scientific proof that bias could be avoided or eliminated in its impact:

- By becoming aware of the bias and why it exists;
- Having the motivation to overcome it;
- Awareness of the direction and magnitude of the bias; and
- The ability to apply an appropriate strategy to help reduce or otherwise manage the bias.

The necessary first step to reducing and otherwise managing biases involves awareness of their existence.

By definition, people are aware of their conscious (explicit) biases. For example, Justice Sharp was aware of her racial biases. Her motivation to overcome those biases in her capacity as a judge involved her integrity to comply with the law, including the Canons of Judicial Ethics.

However, the vast majority of people's biases are unconscious (implicit). How does one reduce and otherwise keep such biases in check? The answer involves

Mark Baer works as a mediator and conflict resolution consultant and teaches a course on implicit bias.



emotional self-awareness, the very foundation of emotional intelligence.

Our emotions impact our *perception* of fairness, among other things. Fear keeps us safe from perceived danger. Disgust (the emotion associated with perceptions of immorality) protects us from our perceived threat of being poisoned physically and socially. Anger is a response to a perceived injustice. And, sadness is a reaction to a perceived loss. While these perceptions may be real, they might also be exaggerated or completely imagined. As such, emotional self-awareness and bias management efforts go hand-in-hand. The opposite of self-awareness is self-righteousness.

As if engaging in unimpaired thinking, to the extent possible, is not sufficient reason for people to want to develop and hone their emotional self-awareness, emotional self-awareness is the mechanism through which human beings are able to calibrate their moral and ethical compasses.

In her recently published book “The Inclusive Leader: Taking Intentional Action for Justice and Equity,” Dr. Artika R. Tyner presents various studies which reveal that implicit bias is particularly prevalent in the legal field. This aligns with information set forth in a blog published by the American Bar Association in 2017 titled “How Emotional Intelligence Makes You a Better Lawyer” stated as

follows: “Studies show that lawyers score high in intelligence but below average in emotional intelligence.... And emotional awareness [of emotions in themselves and others] is the EI skill that lawyers usually score lowest in.”

The legal (justice) system is one of the three branches of our government. Some of us dispense legal justice from the bench. Others work to resolve disputes within the adjudicative process. Even those of us who help people in resolving conflicts and disputes through other dispute and conflict resolution processes and approaches possess biases which, left unchecked, can and do impact the outcomes.

Although emotions impact people’s decision-making, lawyers are trained to engage in dispassionate rationality through emotional detachment, as if that were humanly possible. This might explain the pervasiveness of implicit bias in the legal field.

The fact that emotional self-awareness and other skills that comprise emotional intelligence are considered feminine “soft skills” and that lawyers often refer to themselves as “warriors” engaged in “legal battles” cannot help in that regard.

If you find yourself feeling “morally superior to others,” that should signal your need to develop your emotional self-awareness. ■