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Narrative

## **Effects of Unconscious Bias on Investigation, Negotiations, and Litigation**

### **I. Defining “unconscious bias” for the purposes of this conversation: how we perceive and react to people.**

#### **Physical Brain Structure- extremely simplified-**

The thinking processes in our brain’s frontal lobe are rational, systematic, and slow. Its ability to analyze information can help us examine information from an investigation and make a well-informed decision about liability or damages. While some emotion is included in this process, the frontal lobe works too slowly to help us with immediate threats.

The amygdala and hippocampus are primary elements of our brain’s limbic system. The hippocampus is involved in the formation of memories. The amygdala play a central role in our emotional responses, and attaches the emotions to experience for the hippocampus to store as a memory. The limbic system produces hormones that trigger our “fight or flight” reflex. All of this happens at an unconscious level, and very quickly. Using mental shortcuts (heuristics), it recognizes patterns and directs our bodies how to respond. Thus, the chimp in the trees can immediately respond to the threat of a lethal snake. If the ape sat and thought about whether the snake was or was not a threat, his life would be quite short.

The limbic system bypasses the frontal lobe, and is responsible for some of our unconscious biases.

#### **Effects of unconscious bias**

When our ancestors were in the trees or savannah, the emotions of safety and fear needed to be instantaneous for survival. Those emotions are still with us. Conflict can trigger fear, even in a mild form, and affect both our perception of people, and our behavioral response, if we are not self-aware. The same impulses cause us to identify people who are part of our “group” (e.g. ethnic, racial, gender, political), and those who are outside our group. We are naturally more at ease with those we recognize as our “in-group.”

This unconscious process results in stereotypes, social structure inequities, and power differentials.

## **II. Word choice and microaggressions: how we communicate**

Microaggressions are “the constant and continuing experience of marginalized groups in our society” (Sue, 2010, p. 6). They can be verbal, physical, or structural; they are not the same as “political correctness.” For example, during a town hall in the 2008 Presidential Campaign, one of John McCain’s supporters said that Barack Obama shouldn’t be President because he was a Muslim. McCain contradicted her, saying that Obama was not a Muslim, that he was a fine, family man. McCain’s intentions supporting Obama’s integrity were admirable here, but this is an example of microaggression. His statement implied that a Muslim might not be a fine family man. Obama himself gave another example of microaggression from his youth. He would cross a street, and the stopped cars would activate their automatic locks. The occupants of the car saw a black man, and their unconscious bias (need for safety) caused them to lock the car.

These actions are informed by our individual experience and culture. They are natural, but unconscious. We need to learn the difference between the intent of what we say or do, and the impact it may have on another person. Intention v. impact works both ways. For successful communication in investigation or negotiations, we want to make sure that our words have the intended impact on the other person. That keeps communication open. At the same time, if we assume that the impact we experience from another person’s actions matches their intention, then we can shut down negotiations prematurely. In our work, it is wise to focus on someone’s intent rather than the impact. These fine communication issues have a real effect on the final disposition of a case.

## **III. Cognitive bias: errors in thinking**

Unconscious bias influences our perception of people and our reaction to them. Cognitive bias is also unconscious, but involves errors in our thinking process rather than inaccurate perception of people. For the purpose of this short round-table, we have selected a few cognitive biases that often appear in negotiations:

- Reference dependence/anchoring
- Loss aversion
- Responding to framing
- Negative entrapment
- Irrational commitment

## **IV. Managing bias in investigation, negotiation, and litigation**

### **The key to managing our own biases is building self-awareness**

People have used various techniques to accomplish this: mindfulness meditation; yoga; spiritual disciplines that align with a particular faith; exercise; washing dishes. These and other practices

help us to slow the thinking processes down so that our analytical and rational skills have time to be harnessed.

### **Let them tell their story**

The exercise of story-telling combined with active listening is one method of slowing down an investigative or negotiation process. When in negotiations, this honors the opposing party's experience, and provides an opportunity to identify the interests that lie behind their positions. Storytelling is difficult because it requires self-awareness, patience, and attention on the part of the listener. Another benefit is identifying potential power differentials between parties in a negotiation.

### **Success?**

It's up to you to define a successful investigation or negotiation. It's up to 6-12 strangers to tell you what success means in the courtroom.

If a case is to be tried, it is critical that the culture of the venue (not just verdicts, but the social dynamics behind them) be understood. During jury selection, questions that elicit stories will help identify the decision-makers that are most appropriate for the case. The extra time this requires should pay off at the end of the process. The same skills of self-awareness, word choice, and active listening apply to the process of jury selection, examination/cross-examination, and opening and closing arguments.