OPEN NINTH:

CONVERSATIONS BEYOND THE COURTRoom

HIDDEN IN PLAIN SIGHT:

BATTLLING BIAS

EPISODE 24

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HOSTED BY: FREDERICK J. LAUTEN
(Music.)

>> Welcome to another episode of "Open Ninth: Conversations Beyond the Courtroom" in the Ninth Judicial Circuit Court of Florida.

Now here's your host, Chief Judge Frederick J. Lauten.

>> CHIEF JUDGE LAUTEN: Welcome to "Open Ninth." I'm here today with Mr. Joseph Sawyer, who is a professor with the National Judicial College and has been with the National Judicial College since 1982.

And, Mr. Sawyer, maybe you can tell our listeners what is the National Judicial College and what's your role with that college?

>> JOSEPH SAWYER: Well, Judge, the National Judicial College trains and educates judges from around the United States and the world. It's an affiliate of the American Bar Association. It was started by Supreme Court Justice Tom C. Clark in 1963, who felt judges needed education. Before 1963, judges knew everything.

(Laughter.)

>> CHIEF JUDGE LAUTEN: There we go.

>> JOSEPH SAWYER: So it's our mission and purpose to educate judges, both of general jurisdiction, limited jurisdiction, your traffic court judge, as well as tribal court judges and administrative law judges.

>> CHIEF JUDGE LAUTEN: So when I became Chief Judge, I
went out to the college in Reno and took the Chief Judge or presiding judge's course, which was fabulous, a day -- a multi-day course and learned a lot.

How long have you been associated with the National Judicial College?

>> JOSEPH SAWYER: I've been working for the National Judicial College since June 28th, 1982.

(Laughter.)

>> CHIEF JUDGE LAUTEN: Just for a little while.

>> JOSEPH SAWYER: That's right.

>> CHIEF JUDGE LAUTEN: And what -- do you teach a variety of courses? Do you specialize in an area?

>> JOSEPH SAWYER: The National Judicial College has a variety of courses for both the new judge as well as the judge who's been on the bench for a number of years. So we have courses on evidence, on managing family law cases, courses for the administrative law judge, courses for the appellate judge, courses for new judges who have just been recently appointed or elected to the bench but haven't even shut down their law practice yet and how to do that in an ethical way.

And, of course, we have a variety of courses on ethics, as well as diversity and fairness issues as they affect the courts and judges.

>> CHIEF JUDGE LAUTEN: So Florida has a college for
brand-new judges called the Florida Judicial College, and for six years, I've served as -- we call it "dean," but it's sort of the administrative head of that college, which we probably stole the idea from you-all. But we do it locally too. And then Florida has a pretty robust statewide judicial education program.

But for our listeners, so there's statewide judicial education, and then there's national judicial education. And for judges who go to either, the exchange of ideas, not just from the faculty -- certainly from the faculty -- to the participants, but just among the participants is invaluable.

>> JOSEPH SAWYER: It absolutely is. So many judges from different states have the same problems, but you -- when you-all come together, you bring such a variety of solutions to those problems. And so we think national education, as well as local education, are both absolutely necessary to the success of a judge.

One of the great things is the sharing. We know from the work of Dr. Malcolm Knowles that professionals, like judges, like to share with their peers. So we often refer to the faculty members, while they're subject matter experts, they're also facilitators to get judges talking to each other.

And, of course, when it comes to certain legal issues, the Model Code only lets you talk to another judge.
>> CHIEF JUDGE LAUTEN: Correct. That's right.

And what did you do before you taught at the National Judicial College? I mean, I don't know if that was the beginning of your legal career?

>> JOSEPH SAWYER: It has not been. So I started as a college student at the University of Nevada, Reno, and continued. And I started teaching for the college in 1999. And my emphasis back then was in faculty development. We spent a lot of time teaching judges how to teach.

In fact, Kathleen Kroll has done that in the great state of Florida.

>> CHIEF JUDGE LAUTEN: Right.

>> JOSEPH SAWYER: And Scott Brownell has done that in the state of Florida. Because you can have brilliant subject matter experts, but it doesn't necessarily mean that they can get that information out in a digestible and understandable way.

>> CHIEF JUDGE LAUTEN: And Gordon Zimmerman --

>> JOSEPH SAWYER: And Gordon --

>> CHIEF JUDGE LAUTEN: -- who's on your faculty, came to Florida for the first college course on teaching judges to teach other judges.

And so we then have kind of -- I told him this when I saw him out there, we ask our judges before they teach that they get "Zimmer-ized" is the term we gave to him.
>> JOSEPH SAWYER: Indeed. And Professor Zimmerman still teaches for the National Judicial College. He's been teaching for the college since 1974, and we are delighted to have him on our faculty.

>> CHIEF JUDGE LAUTEN: I don't really know the answer to this question. I saw your presentation today. It was excellent, and we're going to get into that in a moment. But are you an attorney?

>> JOSEPH SAWYER: I am not an attorney. So my background is in economics and adult education. And as we talked about adult education, we've even done some workshops at the University of Nevada for professors in the College of Education to explain how to relate to adults. Because you can be a subject matter expert on how to teach mathematics to a 10-year-old, but how do you teach a 22-year-old to teach a 10-year-old mathematics? And so those principles are often ignored.

There's professors of adult education at the -- Harvard and at the University of Georgia, but many colleges simply do not have that expertise. We think it's important to have it at the National Judicial College, and really to educate our faculty, really to empower our faculty to be as brilliant as they can be on stage and making sure that judges aren't just listening to a subject matter expert, but they're actually using the information, interacting with their classmates.
>> CHIEF JUDGE LAUTEN: Great. Great. Great. And certainly every person I know who's been out there has said that the learning is so interactive and one of the key components of educating professionals and adults.

If I can, let me switch gears just a little bit. Because we invited you to come from Reno to Orlando to talk to the judges in this circuit about implicit bias in society in general, but in particular, for judges who preside over cases.

And in the past year in Florida, there has been a lot of conversation about bias on the bench, whether it's explicit bias or implicit bias. There is some controversy about a particular newspaper series that ran and whether the data was accurate or not, lots of questions about the underlying data.

But I think what no one can really question is that in society in general, we have issues about bias across all kinds of spectrums: Race, gender, and other -- other areas.

So you came and spoke to us today, and maybe we can open up by your telling the listeners a little bit about -- because I know you teach this to a number of judges. What is it that -- what are some of the salient points that you make to judges about implicit bias?

>> JOSEPH SAWYER: When we talk about implicit bias, we're talking about patterns that are built into the brain of each individual. We can't stereotype all of humanity. We
don't all have the same biases. But we do have these shortcuts when we might see a person of a particular -- particular ethnicity, and so we might view that person unfavorably, and that will be -- that will show itself in sentencing.

We might deal with people who have disabilities, and we might have an implicit bias against people with disabilities; people from the LGBTQ community or based on gender.

So some of the facts is that we need to analyze and discover our biases. And the way we can do that is by taking the Harvard Implicit Association Test, which is available online. And by taking that test, we can discover our propensity for bias. And it's an exercise that is reflective for the judge, reflective for the learner.

And when I use the word "learner" -- because I don't just think judges should take this test. I think all the members of the court staff should take the IAT as well.

And if you were to Google Implicit Association Test, that site will come up for you. And I urge you to take as many of those self-exams as you can.

It measures how quickly you can associate, for example, someone who's white with a concept of being good and can you do that as quickly as you can associate someone who is black with the concept of being good. And so we need to discover that, because 85 percent of Americans say they don't have any
bias. And data indicates that's simply not the case.

>> CHIEF JUDGE LAUTEN: I'm -- I'm hoping that particularly judges, as a subclass of American culture, are more conscious than other classes that their goal, their daily obligations, are to not be biased. And judges spend a lot of time in classrooms and in conversations about trying to achieve fairness and be neutral and be unbiased.

So I'm hoping there's not explicit bias on the bench. Although I said that recently in a community of color here locally, and I got a visceral reaction from the audience. So I realize my perception of the courts and that community's was different. Explicit bias. And I was trying to reach a point, but I know there's implicit bias.

So maybe if we can spend a minute, what's the difference between explicit bias and implicit?

>> JOSEPH SAWYER: Oh, that's a great question. Explicit bias is the bias that we are aware of that we have, and we can admit it and we don't mind admitting it.

To give you an example, there was a judge in Kentucky who recently recused himself from all adoption cases involving same-sex married couples. Because he said -- and I can't directly quote him, so I'm going to paraphrase, but he basically said that I -- there was no way that I could let a same-sex couple adopt a child.

That would be an explicit bias. That judge has admitted
it. It's out there.

> CHIEF JUDGE LAUTEN: And so, can I stop you for a moment?

> JOSEPH SAWYER: Sure.

> CHIEF JUDGE LAUTEN: So one of the images that I have is of America in the '50s and the '60s in the South, and I think this is a stereotype that's true, but there was explicit racial bias in the South in the '50s and '60s that led to the civil rights movement.

> JOSEPH SAWYER: Absolutely. If you look at signs over a water fountain, and you see one water fountain that says, "whites only" and another water fountain that says, "black only," that is absolutely explicit bias.

But it shows itself. Even explicit bias can be that, oh, I don't want to sit next to someone of color or I don't want to sit next to someone of the LGBT community. And people may have that reaction, but not actually admit -- they may have that feeling, that emotional response, but they're not admitting that they actually have that bias. And so if they're not admitting it, we would still consider it implicit, not explicit.

> CHIEF JUDGE LAUTEN: All right. So how -- it seems to me that if someone has an explicit bias and they're honest, that's one issue.

> JOSEPH SAWYER: Yes.
>> CHIEF JUDGE LAUTEN: If someone has an implicit bias, it's almost that you have to drill down deeper because maybe they're not even all that conscious of the bias, and so you have to first get them to be conscious of it. And is that what the association test helps with?

>> JOSEPH SAWYER: It absolutely helps with that. It helps to discover where you might be biased. Because you might believe, oh, as a judge, when women come before me, I treat them with fairness. But the test may indicate a propensity for being gender-biased against women.

You may take an IAT that says you have a propensity for implicit bias against people of color. It brings that to light. So it's not just your perception, it really is how fast your brain can react in making certain associations. And that is a clear indication of potential bias than your mere self-opinion of your own cognition.

>> CHIEF JUDGE LAUTEN: So if judges take the test and then they learn that, oh, I had an implicit bias that I wasn't aware of, is it -- since it's implicit, since it's sort of un- -- not conscious to them, I guess maybe the test makes it conscious. And then can they do things --

>> JOSEPH SAWYER: They can.

>> CHIEF JUDGE LAUTEN: -- to overcome those biases?

>> JOSEPH SAWYER: They can. There are studies that indicate that with racial biases, there are ways to dismantle
stereotypes by looking at what we would call
counter-stereotypes, by investigating and exposing yourself
to counter-stereotypes.

Another thing they can do is mindfulness. They should
be mindful of their decisions on the bench. They should slow
down and take time and ask themselves, interview themselves,
ask themselves certain questions such as, am I being biased?
Is -- have I -- am I assuming facts not in the record? Am I
assuming facts or are other facts going into my sentencing
that are not pertinent to this crime? Am I taking any
ethnicity or disability or competency or socioeconomic issues
into consideration without being aware of them?

So they need to analyze their own behavior, their own
decision-making process. They need to track their sentencing
patterns to determine whether they are -- are biased.

>> CHIEF JUDGE LAUTEN: About how many judges have you
taught in your career in this field of implicit bias in
judging, would you estimate?

>> JOSEPH SAWYER: Well, myself and the other members of
the faculty of the National Judicial College, I imagine it's
been several thousand judges. We have been teaching about
implicit bias with the faculty members, with -- Professor
Zimmerman also is involved in teaching these topics; Kimberly
Papillion, Kelly Tait, many of the professors who teach at
the college. And they've been teaching, oh, probably 10 to
15 years we've been talking about implicit bias.

>> CHIEF JUDGE LAUTEN: Outside of judges, are there other groups that you -- that you deliver this message to?

>> JOSEPH SAWYER: Well, the National Judicial College has done education with court staff, probation and parole officers, public defenders, prosecutors. Outside of other groups, many of the faculty who teach at the judicial college give their own presentations to church groups, schools, police officers.

Kimberly Papillion is very involved in teaching doctors and police officers about implicit bias because it affects doctors in how they diagnose and treat illnesses.

>> CHIEF JUDGE LAUTEN: So one of the issues that we face as a society today is -- well, there are a couple issues. One, America, the country with the greatest amount of freedom, I think in the world today, also incarcerates a larger proportion of its population than any other civilized society. And a disproportionate number of those who are imprisoned are minorities.

And so here we are with the freest society in the land, and yet we have this issue where we're disproportionately sentencing -- and is that because of implicit bias, explicit bias? Is that the only reason for it? Are there other reasons for it? What does the research show? I know that's a pretty -- pretty hefty question.
>> JOSEPH SAWYER: That's a big question, Judge. And I'm going to rely on some -- so some data, certainly on enforcement, for example, for marijuana crimes. We know that there are more African-Americans locked up for marijuana -- crimes involving marijuana than there are white people. With that said, we know there are far more white people who smoke marijuana.

So is it selective enforcement? Is it where the police go to patrol certain neighborhoods? Does it have socioeconomic factors? I think all of those are involved in how people start in the criminal justice system and work their way through the criminal justice system.

So there's an argument that's made that mass incarceration was an answer to the 13th Amendment, and there's a book out about that called The 13th. And I would urge anyone to read that book and make their own determination about that issue.

But that's a big question, Judge, and I almost don't feel -- I can talk about bias, but mass incarceration is getting a little bit out of my field of expertise.

>> CHIEF JUDGE LAUTEN: Right. So you were here today to talk to judges about implicit bias --

>> JOSEPH SAWYER: Yes, sir.

>> CHIEF JUDGE LAUTEN: -- to make us aware of -- that we may have implicit biases and to give us tools to identify
those biases and then work to overcome those biases and
manage them, and we're really grateful for that.

    My other question -- that's a pretty broad question.
And I was earlier to a panel this morning on diversity in the
judiciary, and one of the issues that came up was about
racism in the justice system. And I think a lot of the
people identified, well, it's policing, it's legislation,
it's judges, it's sentencing policies. It's -- there's no
simple answer to it.

    >> JOSEPH SAWYER: Right.

    >> CHIEF JUDGE LAUTEN: But systemically, we have an
issue, I think, in the justice system.

    >> JOSEPH SAWYER: I think we do. I think it's
absolutely systemic. And it starts with enforcement. It
starts with the -- it starts with the drafting of the laws.
It starts in the legislature. And I think laws can be
implicitly bias and the drafter is unaware of it. That's by
the very nature of being implicit.

    We saw that with laws dealing with cocaine as opposed to
crack cocaine. And so crack cocaine was -- the sentences
were much more severe, and that's where you had a systemic
bias based on legislation as different types of cocaine,
different types of manufactured cocaine, were treated.

    >> CHIEF JUDGE LAUTEN: And do you think maybe that was
more an effect than even the plan?
>> JOSEPH SAWYER: Oh, yes.

>> CHIEF JUDGE LAUTEN: In other words, I'm not sure that legislators sat around and said, oh, let's draft a law that we know when it's enforced will have a disproportionate impact on minorities. It just sort of -- it went down that road. I don't know if the legislature -- I doubt that the legislators --

>> JOSEPH SAWYER: I doubt -- I doubt that was their intent either --

>> CHIEF JUDGE LAUTEN: Right.

>> JOSEPH SAWYER: -- although Justice Scalia said we shouldn't worry about legislative intent. I have no merit for him, so ...

(Laughter.)

>> CHIEF JUDGE LAUTEN: Well, I'm not gonna speak ill of the dead --

>> JOSEPH SAWYER: Okay.

>> CHIEF JUDGE LAUTEN: -- so we'll move on.

So how often do you think judges as a group should meet to talk about the subject matter that we talked about today? I mean, you've come and you've talked to us, you know, almost all of the judges in the circuit -- not all, because some had dockets, but almost all of the judges -- about implicit bias, and it's something we've had training on in the past and the present, today. And my impression is chief judges, we need
to always have some training in this field.

>> JOSEPH SAWYER: I think so. I think it needs to be ongoing because it's an ongoing struggle. We will continue to take mental shortcuts. Those mental shortcuts will lead to unfairness. We'll start to continue to treat individuals as if they were just a member of a group, as opposed to being an individual defendant with their own personal story appearing in a courtroom.

And so I think we need to be constantly vigilant because the brain wants to classify individuals very, very quickly. And so it relies on stereotypes to do that. And so I think we need to be constantly vigilant with what -- the education that we offer today, but also with other types of education and with just peer-to-peer review, with having groups of judges in small groups discuss their sentencing patterns with each other, and really being that resource that the Model Code allows a judge to be for their colleagues.

>> CHIEF JUDGE LAUTEN: So you mentioned some of this earlier, but for our listeners, can you outline some of the tools that we helped identify -- and then you certainly helped identify for us -- for judges to address implicit biases that they might have?

>> JOSEPH SAWYER: Well, I'm gonna quote professor Jerry King -- Jerry Kang at UCLA School of Law when he says, first of all, be humble. Admit that you don't know everything. I
think that's very important for every judge.

The other thing that the professor said is that we should be mindful. We -- we can't, just because we have a heavy docket, because we have a high-volume docket, just have one case after another go through and -- without giving each case the sort of reflection that every defendant deserves and that due process really requires.

So we want to be humble. We want to be mindful. We want to try to de-stress, because stress can lead to implicit bias, so we need to deal with our stress. We need to deal with our time constraints.

But we also want judges to track their sentencing patterns. If we can track our sentencing patterns, maybe we can self-identify where there might be a pattern of implicit bias and we can correct that.

So those are some of the tools that we would have. How do you want to track your sentencing pattern? Kimberly Papillion has a technique out there. Many other judges have some techniques for self-tracking your sentencing pattern. But we would urge judges to find a tool that works for them and to utilize it.

>> CHIEF JUDGE LAUTEN: Well, Mr. Sawyer, I can't think of a topic that's more important for judges. Because I -- you identified earlier that 85 percent of the population thinks they don't have biases. I think -- I don't know if
judges are -- you know, would score higher on that, that they
don't have biases, but one of the core values for the
colleagues that I work with is that they want to be fair.
And fairness is part of our job. It's inherent in what we do
every day.

And so if we have implicit biases, it's critical that we
be able to identify them and work to improve them. And so
I'm very grateful for you -- to you for coming up from Reno
and spending all day with us in two different sessions and
working with judges so that we can achieve fairness in what
we do every day; so that we can recognize that as human
beings, all of us have implicit biases. And judges, as much,
if not more than anyone else, need to identify that, work on
it, and implement the tools that you shared with us to solve
that implicit bias.

So thank you so very much for coming.

>> JOSEPH SAWYER: It's been my honor, Judge. Thank
you.

>> CHIEF JUDGE LAUTEN: Thanks.

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Beyond the Courtroom," brought to you by Chief Judge
Frederick J. Lauten and the Ninth Judicial Circuit Court of
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