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OPEN NINTH:
CONVERSATIONS BEYOND THE COURTROOM
HIDDEN IN PLAIN SIGHT:
BATTLING BIAS
EPISODE 24
JUNE 5, 2017
HOSTED BY: FREDERICK J. LAUTEN

1 (Music.)

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

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

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

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

13 >> **JOSEPH SAWYER:** Well, Judge, the National Judicial
14 College trains and educates judges from around the United
15 States and the world. It's an affiliate of the American Bar
16 Association. It was started by Supreme Court Justice Tom C.
17 Clark in 1963, who felt judges needed education. Before
18 1963, judges knew everything.

19 (Laughter.)

20 >> **CHIEF JUDGE LAUTEN:** There we go.

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

25 >> **CHIEF JUDGE LAUTEN:** So when I became Chief Judge, I

1 went out to the college in Reno and took the Chief Judge or
2 presiding judge's course, which was fabulous, a day -- a
3 multi-day course and learned a lot.

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

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

8 (Laughter.)

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

10 >> **JOSEPH SAWYER:** That's right.

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

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

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

25 >> **CHIEF JUDGE LAUTEN:** So Florida has a college for

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

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

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

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

24 And, of course, when it comes to certain legal issues,
25 the Model Code only lets you talk to another judge.

1 >> **CHIEF JUDGE LAUTEN:** Correct. That's right.

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

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

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

12 >> **CHIEF JUDGE LAUTEN:** Right.

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

18 >> **CHIEF JUDGE LAUTEN:** And Gordon Zimmerman --

19 >> **JOSEPH SAWYER:** And Gordon --

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

23 And so we then have kind of -- I told him this when I
24 saw him out there, we ask our judges before they teach that
25 they get "Zimmer-ized" is the term we gave to him.

1 **>> JOSEPH SAWYER:** Indeed. And Professor Zimmerman
2 still teaches for the National Judicial College. He's been
3 teaching for the college since 1974, and we are delighted to
4 have him on our faculty.

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

9 **>> JOSEPH SAWYER:** I am not an attorney. So my
10 background is in economics and adult education. And as we
11 talked about adult education, we've even done some workshops
12 at the University of Nevada for professors in the College of
13 Education to explain how to relate to adults. Because you
14 can be a subject matter expert on how to teach mathematics to
15 a 10-year-old, but how do you teach a 22-year-old to teach a
16 10-year-old mathematics? And so those principles are often
17 ignored.

18 There's professors of adult education at the -- Harvard
19 and at the University of Georgia, but many colleges simply do
20 not have that expertise. We think it's important to have it
21 at the National Judicial College, and really to educate our
22 faculty, really to empower our faculty to be as brilliant as
23 they can be on stage and making sure that judges aren't just
24 listening to a subject matter expert, but they're actually
25 using the information, interacting with their classmates.

1 **>> CHIEF JUDGE LAUTEN:** Great. Great. Great. And
2 certainly every person I know who's been out there has said
3 that the learning is so interactive and one of the key
4 components of educating professionals and adults.

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

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

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

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

23 **>> JOSEPH SAWYER:** When we talk about implicit bias,
24 we're talking about patterns that are built into the brain of
25 each individual. We can't stereotype all of humanity. We

1 don't all have the same biases. But we do have these
2 shortcuts when we might see a person of a particular --
3 particular ethnicity, and so we might view that person
4 unfavorably, and that will be -- that will show itself in
5 sentencing.

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

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

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

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

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

1 bias. And data indicates that's simply not the case.

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

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

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

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

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

25 That would be an explicit bias. That judge has admitted

1 it. It's out there.

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

4 >> **JOSEPH SAWYER:** Sure.

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

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

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

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

25 >> **JOSEPH SAWYER:** Yes.

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

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

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

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

22 **>> JOSEPH SAWYER:** They can.

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

24 **>> JOSEPH SAWYER:** They can. There are studies that
25 indicate that with racial biases, there are ways to dismantle

1 stereotypes by looking at what we would call
2 counter-stereotypes, by investigating and exposing yourself
3 to counter-stereotypes.

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

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

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

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

1 15 years we've been talking about implicit bias.

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

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

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

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

20 And so here we are with the freest society in the land,
21 and yet we have this issue where we're disproportionately
22 sentencing -- and is that because of implicit bias, explicit
23 bias? Is that the only reason for it? Are there other
24 reasons for it? What does the research show? I know that's
25 a pretty -- pretty hefty question.

1 **>> JOSEPH SAWYER:** That's a big question, Judge. And
2 I'm going to rely on some -- so some data, certainly on
3 enforcement, for example, for marijuana crimes. We know that
4 there are more African-Americans locked up for marijuana --
5 crimes involving marijuana than there are white people. With
6 that said, we know there are far more white people who smoke
7 marijuana.

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

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

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

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

23 **>> JOSEPH SAWYER:** Yes, sir.

24 **>> CHIEF JUDGE LAUTEN:** -- to make us aware of -- that
25 we may have implicit biases and to give us tools to identify

1 those biases and then work to overcome those biases and
2 manage them, and we're really grateful for that.

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

10 >> **JOSEPH SAWYER:** Right.

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

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

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

24 >> **CHIEF JUDGE LAUTEN:** And do you think maybe that was
25 more an effect than even the plan?

1 >> **JOSEPH SAWYER:** Oh, yes.

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

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

10 >> **CHIEF JUDGE LAUTEN:** Right.

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

14 (Laughter.)

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

17 >> **JOSEPH SAWYER:** Okay.

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

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

1 to always have some training in this field.

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

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

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

23 >> **JOSEPH SAWYER:** Well, I'm gonna quote professor Jerry
24 King -- Jerry Kang at UCLA School of Law when he says, first
25 of all, be humble. Admit that you don't know everything. I

1 think that's very important for every judge.

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

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

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

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

22 **>> CHIEF JUDGE LAUTEN:** Well, Mr. Sawyer, I can't think
23 of a topic that's more important for judges. Because I --
24 you identified earlier that 85 percent of the population
25 thinks they don't have biases. I think -- I don't know if

1 judges are -- you know, would score higher on that, that they
2 don't have biases, but one of the core values for the
3 colleagues that I work with is that they want to be fair.
4 And fairness is part of our job. It's inherent in what we do
5 every day.

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

16 So thank you so very much for coming.

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

19 >> **CHIEF JUDGE LAUTEN:** Thanks.

20 >> You've been listening to "Open Ninth: Conversations
21 Beyond the Courtroom," brought to you by Chief Judge
22 Frederick J. Lauten and the Ninth Judicial Circuit Court of
23 Florida.

24 Please remember to follow us on Facebook and Twitter for
25 more information about the Ninth Judicial Circuit Court.

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