

Strength in Diversity

BY GREGORY BURRELL

Eliminating Implicit Bias in the Bankruptcy Process

Over the years, there has been research conducted and countless articles written on how to eliminate implicit bias. Businesses recognize the value in pursuing efforts to create a more inclusive working environment through the elimination of implicit biases. The world is becoming more diverse every day, but the thinking that welcomes all individuals into the work environment is not changing at the same pace as the demographics. For this reason and others, it is important that we adapt and determine ways to change our thinking about people and cultures, and how it influences the practice of bankruptcy law. We should examine our thinking from all different perspectives.

The debtor's attorney, trustee, creditor's attorney, U.S. Trustee's Office and the judge have a responsibility to be conscious that implicit biases exist and learn how to deal with those biases. According to one commentator, implicit or unconscious bias is defined as attitudes or stereotypes that affect our understanding, actions and decisions in an unconscious way.¹ It is important that all actors involved in the bankruptcy process not allow their decision-making to be guided by anything other than sound reasoning. In order to take this journey, one must always be conscious of their actions and examine oneself. This article briefly examines implicit bias from the debtor's attorney and trustee perspectives.

Eliminating Implicit Bias from the Debtor's Attorney Perspective

As a practicing debtor's attorney, some things became apparent early in my career. Figuring out how to maintain a healthy balance between zealously representing clients to meet their needs and receiving adequate compensation for services provided was a challenge. This is a reality with which many consumer bankruptcy attorneys are faced. There is the chapter 7 bankruptcy that allows for a debtor in a "clean" case to receive a discharge in under six months. In chapter 7 cases where a creditor demands a judgment of nondischargeability under § 523 or denial of discharge under § 727, discharge can be substantially delayed. A chapter 7 discharge is generally issued substantially sooner than in a chapter 13 case, in which a debtor will not receive

a discharge until they complete plan payments over a 36-to-60-month period, unless the court grants a motion requesting a hardship discharge. For some practicing consumer bankruptcy attorneys, the decision is easy and they place the debtor in the chapter that best suits the client's needs. However, for some attorneys, this process can be challenging.

As much as some consumer bankruptcy attorneys may not want to hear this, they might have an implicit bias toward the chapter choice they are making for their clients. For example, the decision to place a debtor in a chapter 13 bankruptcy versus a chapter 7 bankruptcy is sometimes based on the debtor's attorney's ability to utilize chapter 13 to pay attorneys' fees in installments.

If the decision to file a chapter 13 over a chapter 7 bankruptcy is made without giving any thought to the fact that the client is being committed to a 36-to-60-month plan that might accomplish the same outcome in under six months in a chapter 7, then there may be an implicit bias toward chapter 7. Of course, sometimes a client's needs will require stopping a garnishment and other circumstances that may warrant a chapter 13. However, to eliminate what may appear to be an implicit bias toward one particular chapter of bankruptcy, the attorney should carefully consider the impact of the chapter selection.

To examine and deal with the fact that debtor's counsel may have an implicit bias toward chapter 7, consider the following questions: (1) Does the attorney ask their clients to consider waiting until they can save enough money to file a chapter 7 bankruptcy; (2) does the attorney explain to the client the shorter time frame within which the debtor might receive their discharge by filing a chapter 7 versus a chapter 13; and/or (3) if no garnishment exists, there is no need to save a home or vehicle from foreclosure or repossession, and the debtor is current on all secured payments and would not benefit significantly from cramming down the value and/or interest rate on a vehicle, should the attorney encourage the debtor to save their money until they can file a chapter 7? If the answer to these questions is "no" and the client is still placed in a chapter 13, the attorney may have a bias toward chapter 7 (or the debtor).

One article² cited prior research stating that "African-Americans are statistically significantly more likely to file under chapter 13 than other similarly situated debtors, a result which one of this [a]rticle's authors linked to attitudes of bank-



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1 Charlotte Ruhl, "Implicit or Unconscious Bias," *Simply Psychology* (July 1, 2020), available at simplypsychology.org/implicit-bias.html (unless otherwise specified, all links in this article were last visited on Sept. 20, 2022).

ruptcy attorneys.” How do we explain this phenomenon? Could implicit bias be playing a role in the attorney’s decision to place an African-American debtor in chapter 13 over chapter 7? This is an important question that needs to be examined. If there does exist an implicit bias toward African-Americans when it comes to chapter selection, practicing consumer bankruptcy attorneys should be aware. As a practicing consumer attorney, some of the things you should take time to consider are whether you utilize the same standard and have the same consistency with all of your clients, regardless of their race. The following questions will be helpful in evaluating whether implicit bias exists:

1. If a non-African-American client comes into the office and cannot afford to pay attorneys’ fees, are they encouraged to come back after saving enough money to pay the attorneys’ fees for a chapter 7 bankruptcy?
2. Does it make it easier to place African-Americans or minority clients into a chapter 13 to pay attorneys’ fees due to a lack of connection versus with clients of other races?
3. Are African-Americans or minority clients provided the same advice as clients that are non-African-American?

These are important questions one must take into consideration. It is important to note that if the answers to the first two questions are “yes” and the answer to the third question is “no,” there may be implicit biases impacting one’s actions. This is exactly what having implicit biases is all about, and everyone has them in some shape or form. “We all have biases, and they manifest very early in life,” says Hon. Bernice Donald.³ According to the Kirwan Institute, “everyone is susceptible” to implicit biases, and those biases can be “either positive or negative.”⁴ The good news is that the impact of implicit biases can be minimized and eliminated. However, the issues created by implicit biases cannot be resolved until they are recognized or acknowledged as causing inconsistent and illogical thoughts and actions.

Eliminating Implicit Bias from the Trustee’s Perspective

Trustees serve a unique role in the bankruptcy process. It is important that trustees take into consideration that there sometimes exist implicit biases in the way they may analyze a particular case. A trustee must always be willing to examine his/her thinking and challenge certain thoughts to protect against implicit bias. For example, when it comes to challenging certain expenses as reasonable versus others, chapter 13 trustees should be aware that blind spots exist. A classic example would be a trustee who never owned a pet not being aware of the expenses associated with pet ownership, so they object to a debtor spending a certain amount per month on a pet. Such a bias could be further enhanced based on the trustee’s unwillingness to accept most pet expenses as reasonable. An implicit bias toward pet owners by the trustee

would look something like a strong objection to such expenses associated with a pet without the trustee understanding that pets, to most people, are family members who need to be cared for with the same level of love and support. If the trustee cannot get around seeing the pet as just a dog, then they will almost never agree to a reasonable expenditure for the care and maintenance of the pet.

As a trustee, it is important to understand different cultures in order to be effective and eliminate any implicit biases one may have because of lack of knowledge or exposure to a certain group of individuals. For example, trustees preside over § 341(a) hearings in places where the population is very diverse. It is not uncommon for a debtor to appear for a § 341(a) hearing with a hijab or in full body covering. This may sometimes create challenges for trustees trying to verify the identity of the debtor. It helps to understand the significance of the coverings and what they mean to the debtor before just asking them to remove them in an insensitive manner. Sure, the trustee has a job to do, and verifying the debtor’s identity is important. However, not understanding the details about the body coverings could lead to an insensitive attitude based on a split-second decision with a lack of knowledge as to how the request may impact a debtor’s thought process or beliefs. Understanding that the coverings for some women represent modesty and privacy from unrelated males may change how the trustee chooses to conduct the § 341(a) hearing. Trustees should consider options to accommodate and respect cultural differences, beliefs and observations.

Chapter 13 trustees also interview potential new employees for job openings in their offices. It is important to ensure that hiring practices are conducive to a fair and equitable process for all potential new employees interviewed. If an individual interviewing for a job in a trustee’s office is the leading candidate based on their application and considering their level of experience, references and phone screening, but has pink hair, which is discovered at the in-person interview, and the interviewer decides to not select the candidate after discovering the hair color, then the interviewer may have an implicit bias against people with pink hair. To examine this idea, the interviewer should consider why they did not select the person with the pink hair. If the answer is, “I just couldn’t get over the fact that the candidate had pink hair,” then the interviewer may have an implicit bias against people with pink hair. This example seems simple, but for most people, identifying and accepting the presence of implicit biases can be a challenge.

Debtors’ attorneys, trustees and judges come into contact with debtors who are at a point in their lives where they are facing financial challenges. It is important that debtors are treated with a high level of respect and dignity irrespective of their financial circumstances. Implicit biases should never play a role in decision-making on how to treat or interact with a debtor. The debtor’s attorneys’ decision to place them in a particular chapter of bankruptcy should be guided by sound reasoning. When making the chapter choice decision for a client, always consider the desired treatment of an individual in this situation, including oneself. Chapter 13 trustees should always be willing to examine their reasoning when it comes to making decisions about what are reasonable or necessary expenses. They should be open to learning about the culture and practices of the people they serve. **abi**

² See Pamela Foohay, Robert M. Lawless, Katherine Porter & Deborah Thorne, “‘No Money Down’ Bankruptcy,” 90 *S. Cal. Law Rev.* 1055 (2017) (citing Jean Braucher, Dov Cohen & Robert M. Lawless, “Race, Attorney Influence, and Bankruptcy Chapter Choice,” 9 *J. Empirical L. Studies* 393, 396-97 (2012)).
³ Hon. Bernice Donald, “Judges on Race: Reducing Implicit Bias in Courtrooms,” *Law360* (Dec. 6, 2020). See also Hon. Bernice B. Donald, “Implicit Bias: The Science, Influence, and Impact on Justice,” 22 *Sedona Conf. J.* 583 (2021).
⁴ Cheryl Staats, Kelly Capatosto, Robin A. Wright & Victoria W. Jackson, “State of the Science: Implicit Bias Review,” Kirwan Inst. for the Study of Race and Ethnicity (2016), available at kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf.