A recent issue of *The Arkansas Lawyer* was devoted to the topic of diversity in our state’s legal profession and law school. This article extends that examination to the Arkansas state court system — the judges, public attorneys, clerks and other court staff who comprise the “face” of our courts. This examination is based upon a convergence of three topics which have been of primary interest to those who study the courts in recent years: 1) the level of public trust and confidence in the court system and the system’s reliance upon that trust to carry out its mission; 2) the concept of procedural fairness and the factors which most influence the perceptions of parties to litigation; and 3) the developing neuroscience research which supports earlier social science research on implicit bias and its potential impact upon the courts.

**Public Trust and Confidence**

The ability of the court system to function is primarily dependent upon the trust and confidence which the public has in the system. There is a positive relationship between the respect for and trust in the court and the willingness to accept its findings and abide by its rulings.

Luckily, the public’s perception of our courts remains positive, despite a recent decrease in the trust in public institutions generally. In 1999 the American Bar Association co-sponsored the National Conference on Public Trust and Confidence in the Justice System. A centerpiece of the conference was a national survey commissioned by the National Center for State Courts on the public’s perception of the court system. While a majority of Americans expressed trust in American institutions overall, courts ranked somewhere in the middle, with the strongest support for the medical profession and law enforcement and the least support for legislative bodies and the media. There were several positive findings, with 79% of the respondents agreeing that judges are fair and honest in deciding cases and 74% agreeing that court personnel are helpful and courteous. In a separate survey commissioned the same year by the ABA, 80% of the respondents agreed that “in spite of its problems, the American justice system is still the best in the world.”

The more troubling findings of the NCSC survey concern perceptions of unequal treatment. Many Americans express doubt that all parties receive equal treatment from the courts. Almost half of all respondents stated their belief that blacks and Hispanics receive worse or far worse treatment by the courts than others. Only 23% of the black respondents believed that the court system treats blacks the same as others. In a 2005 study published by the California Administrative Office of the Courts, a majority of all respondents stated that blacks and Hispanics usually receive less favorable results in courts than others and among black respondents, 87% thought that blacks receive unequal treatment. These
general findings have been replicated in other state and national surveys since that time.

These perceptions are also shared by many members of the bench and bar. In a survey of 809 federal district judges, 83% of the white judges agreed that “black litigants are treated as fairly as others in the justice system,” a belief shared by only 18% of the black judges. In a joint research project initiated by the ABA and the National Bar Association, perceptions of unequal treatment in the justice system among lawyers of different races were similar to the perceptions within the general public.

No state-wide surveys have specifically addressed the issue in Arkansas, but the excellent series of annual reports published by the University of Arkansas at Little Rock have examined racial attitudes in Little Rock and Pulaski County. The 2013 report included questions concerning the judicial system. As to the issue of “trust,” approximately two-thirds of the white respondents reported that they had a “great deal” or “quite a lot” of trust in the judicial system, a view shared by only one-third of the black respondents. In response to questions about confidence that courts will treat all people fairly, white respondents were significantly more likely to have confidence than were blacks or Hispanics. As to a more specific question about whether the courts would treat blacks as fairly as others, more than one-half of black respondents reported “very little” or “just some” confidence. This compares with approximately twenty-five percent of white respondents.

Arkansas judges and other court leaders are dedicated and extremely sensitive to the issues of fair and equal treatment of all who come before them, without regard to such issues as race and ethnicity. Unfortunately, the public perception is different. To be viewed as fair and impartial is critical to public trust and confidence; and the public’s trust and confidence is critical to the legitimacy and effectiveness of the court as an institution.

In his 2010 State of the Judiciary address, Chief Justice Jim Hannah stated:

"In every speech I have given since becoming Chief Justice I have made the statement that the success and viability of our court system is dependent upon the trust and confidence of the public. It is important that our decisions are color blind. But it is equally important that our system be perceived as fair and impartial? we must take seriously the public’s perception and do all that we can to create and sustain a system which is fair and impartial, both in fact and in appearance."

Procedural Fairness

John Thibaut and Laurens Walker published their seminal work on the theory of procedural justice in 1975. Their findings that parties involved in litigation care more about how they are treated by and during the litigation than whether they won or lost the case were initially received with great skepticism ? especially by the legal community. Subsequent research over many years, however, has confirmed their initial theory.
"In the minds of litigants, the importance of a favorable outcome is consistently outweighed by the impact of an unfair process; in other words, a prevailing litigant might look back upon a recent court experience and say 'yes, I won the case, but I don’t know if it was worth it. It cost me too much, the judge wouldn’t let me speak, I didn’t understand what the judge was talking about, I was treated like dirt. I hope I never have to go through that again.' On the other hand, an unsuccessful litigant can leave the courtroom saying, ‘I lost my case but I had my day in court, I was treated fairly, I can move on.’"

The American Judges Association has brought the importance of procedural justice into the mainstream of judicial practice with the publication and adoption of the policy statement ‘Procedural Fairness: A Key Ingredient in Public Satisfaction.” Arkansas judges first included the topic as a part of their education conference in 2009. It can be difficult for judges and lawyers who are trained to believe that a thorough development of the relevant facts and correct application of the law will produce an outcome which is fair to discover or accept that other factors may have a greater impact on the public’s perception of what is fair.
The research now suggests that there are four factors which most affect a litigant’s belief that the proceeding was fair and make it more likely that the litigant will comply with the court’s order. They include

- Voice. People want an opportunity to participate in the process and to tell their side of the story.

- Neutrality. People need to see that the decision is based upon law, not personal opinions, and is applied consistently.

- Trust. People are just as concerned with the character as with the competence of the judge and form opinions about whether the judge cares about the litigants or the outcome.

- Respect. People need to feel that authorities take their concerns seriously and treat them with courtesy and politeness.

These factors have a direct impact upon the core mission of the judicial branch. They are also important in light of the distrust expressed within our minority populations. If it is true that attention to procedural justice issues can impact trust and confidence in the system, a review may prove helpful in responding to these concerns.

**Implicit Bias**

For many years social scientists have studied and documented the process by which humans form attitudes and stereotypes about a wide variety of people, objects and situations as a way by which to more efficiently navigate the world. Much of the research has centered on identifying areas of implicit bias and studying the ways in which such attitudes and stereotypes are formed. These issues have been noted and discussed within the context of judges, courts and the legal system for many years.

Much more recently, neuroscientists have entered the field. Advances in the study of the brain have made it possible to locate the areas of the brain and the physical processes by which the brain receives, sorts, calculates, and manages enormous amounts of incoming information needed by humans to constantly make routine decisions. It appears that the development of stereotypes and biases is not just a personal or cultural phenomenon but rather a way in which all humans are hard-wired to both remain safe and operate efficiently. Because these biases are automatic they can impact our behavior and our decisions without our even being aware. Last October members of the Arkansas judiciary heard a fascinating presentation by Kimberly Papillon, a lawyer and national presenter on the neuroscience and psychology of legal, judicial and medical decision making. With the growing and compelling body of scientific research which documents the existence of implicit bias in all humans, she argued that we can now move past arguments about whether such bias exists and focus instead on how we recognize it and guard against it in our roles as judges and lawyers. Other studies have shown that while implicit biases exist in all populations, including the judiciary, judges seem to be aware of the potential for bias in themselves and possess the cognitive skills necessary to avoid its influence.

The writing and research on implicit bias in the court system has centered on its potential impact upon judges; it may also be relevant to those on the other side of the bench. Imagine for a moment that you are a litigant in a courtroom and as you view the room you find
that you are of a different race or ethnicity than everyone else present. The judge, the lawyers, the bailiff, the court reporter, the court clerk, perhaps even the members of the jury? all appear different than you. The scientists who study the brain would tell us that this scenario would likely produce an unconscious reaction in the brain of our imaginary litigant, provoking feelings of fear and distrust. This response would result without the litigant having any actual knowledge about or experience with any of the other people in the room and would be similar if the litigant was white and the other participants black or vice versa. Thus, the mere ?face? of the court system may be very important to how a member of the community reacts and responds to the court system.

**Connecting the Dots**

How are these three areas of research ? public trust, procedural justice and implicit bias ? connected? The proposition is a fairly simple one. Arkansas? minority populations express less trust and confidence in the Arkansas court system and its ability to provide fair treatment to all persons. Two of the factors which impact the public?s perception of the court system are trustworthiness and respect. Studies on implicit bias indicate that our brains are much more likely to initially trust and respect people who look like we do. Public trust and confidence in the institution of the courts can be enhanced when members of the public can observe someone who is a part of the institution who looks and sounds like themselves. The courthouse environment becomes more welcoming and less threatening.

The bottom line is that one way those of us in the court system can respond to the distrust found among many in our minority communities is to insure that the ?face? of our court system is somewhat similar to that of the community it serves. So how are we doing?

**The Arkansas Survey**

For the purposes of this study, an attempt was made to collect demographic information about all persons who are likely to be seen by litigants during the court process and might be assumed to be a part of the court system. The racial and ethnic breakdown of employees of the Arkansas Supreme Court, Arkansas Court of Appeals, and Administrative Office of the Courts was received directly from those agencies.. Information about elected Prosecuting Attorneys and Deputy Prosecuting Attorneys was provided by the Prosecutor Coordinator Commission. Information about Public Defenders was provided by the Arkansas Public Defender Commission. In December 2012 a written survey was distributed to all Circuit Judges, Circuit Clerks, County Clerks, and District Clerks to obtain additional information about employees who work in these offices. Telephone follow-up with each office was attempted to supplement any data missing from the written surveys. All data collection and compilation was performed by Andrew Walchuk, then a Policy Analyst at the Administrative Office of the Courts and now a law student at Yale University.

The data includes a mix of state, county and local employees. Some of the elected officials and employees maintain an office in one location but are elected or appointed to serve multiple counties within a judicial circuit. The data analysis compares the racial and ethnic breakdown of the officials and employees by judicial circuit and by county to that within the general population of those areas.
Table 1 shows the racial breakdown of the Arkansas population as found in the 2010 U.S. Census. Arkansas has experienced... to only 0.8% of the court population. A similar comparison of appellate court judges and employees is found in Table 3.

Tables 4, 5 and 6 provide a geographic illustration of the comparison between the court population and the general... elected officials and court employees by each of Arkansas' counties as compared to the general population of the county.

What Now?

While these general comparisons seem to show there are differences between the face of the courts and some of the... and similar concerns provide sufficient reason to justify caution in drawing any specific conclusions from the data.

If nothing else, the information may provoke those of us who have some authority in the selection and employment of court... can and should work together toward a more diverse workforce which is reflective of the communities in which we work.

The importance of the issue has been noted by other state court leaders from across the country. A resolution of the... "make the courts more inclusive" and "make the courts more demographically representative of the community they serve."

Several state supreme courts have adopted specific plans for their court systems designed to support a more... the goal is not about legal hiring requirements but rather about increasing the public's confidence in the court system.

Arkansans have done an excellent job of electing talented and dedicated candidates to serve as judges and judicial branch... provide leadership toward the goal of insureing that the faces of our courts are reflective of the communities they serve.

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