THE NORTH CAROLINA STATE BAR

JOURNAL

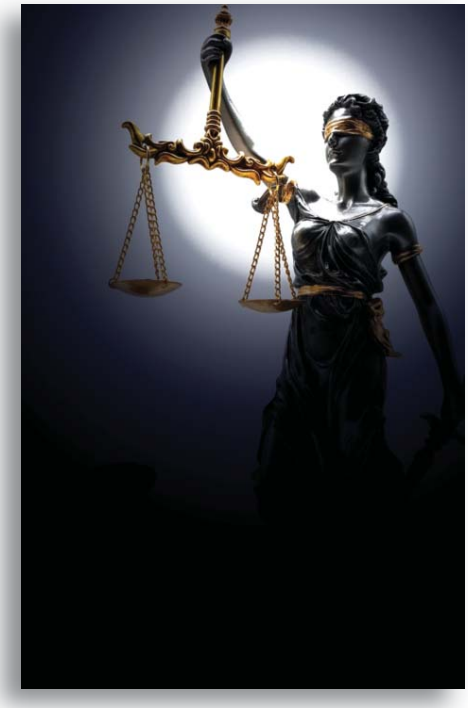
FALL
2020

IN THIS ISSUE

"Justice Isn't Always Blind"

By Judge Ashleigh Parker Dunston

As we navigate this new world of masks, social distancing, and quarantines, we are constantly reminded that there is a silent virus lurking that could infect each of us differently. Some people are asymptomatic, others are hospitalized, and at the time of authoring this article, over 126,000 people have lost their lives in the US alone.[1] Similar to COVID-19, there's another virus that has existed for over 400 years and has been exposed more prevalently in recent months and years, and it can no longer be ignored or swept under the rug. This virus is called systemic racism.



©iStockphoto.com/Denise Hasse

This virus not only affects Black people involved as parties in the criminal justice system from obtaining housing, education, healthcare, and employment opportunities, but it is also pervasive within our legal profession as a whole. So many times, we as attorneys pretend that we're immune to instances of racism because of our education, background, or experiences. Some of us even go so far as to say that we don't "see color;" however, to not "see color" is as much of a farce as it is to say that racism isn't a thing that we should be concerned about because it hasn't affected us directly.[2] This form of microinvalidation is hurtful and suppresses the experiences of our Black colleagues, such as these:[3]

• As a rookie prosecutor in the late 1970s, I quickly learned how to deal with one of the most racist judges I would ever encounter. Not only would this judge slap his .45 caliber handgun down on the bench, but once he even hung a hangman's noose in front of the bench during a murder trial. It didn't take long for me to notice a pattern when I had to appear before him. If I was prosecuting a white person, he would either find a way to dismiss the charge, continue the case, or find an excuse to not impanel a jury for trial. Most of the time, he wouldn't even look in my direction unless he just absolutely couldn't help it.

• I had only been at the District Attorney's Office for a month when a defense attorney came into the courtroom telling me that another ADA had made a deal on a previous court date. I informed him that I didn't feel comfortable dismissing the case because I was new, but that he could take the file to another courtroom and ask that ADA to dismiss it. As he was leaving out of the side door, he called me a "f*cking n*gger." I confronted him and told him that I heard what he said. I knew that I couldn't do anything because I would be fired for reacting, so I had to swallow my pride and continue to handle my docket. I've continued to have to work with this individual

who has yet to apologize.

• A white female judge would routinely ask my white male colleagues in open court during a hearing whether I was right on the law regarding legal arguments I made. She never asked me whether my white male colleagues were correct on the law—it was just presumed they were correct. In my worst hearing with this judge, my white colleague agreed that I was right on the law and she still refused to believe me. When she refused to allow my clients to speak, which was their constitutional right, I withdrew. She appointed the white attorney, and he represented the clients at the hearing the next week when I had secured leave.

• As a private defense attorney, I represented an African American female with a DWI and reckless driving charge. After she was found not guilty of the DWI by an African American judge, we decided to appeal the reckless driving charge due to ramifications with her employer. The original assistant district attorney told me that my client could do community service to have the case dismissed; however, a different assistant district attorney stated that I was "handed a gift" with the not-guilty of the DWI and that the offer was no longer on the table. The reckless driving charge was set in superior court and continued multiple times, causing my client to continuously have to take off work. My client ended up having to plea to a reduced charge and pay court costs, whereas other cases involving white defendants would have been dismissed.

• In the late 1990s I worked briefly as the only Black assistant district attorney in a small rural county. I dismissed a case for lack of evidence, due to an officer improperly charging a young, Black youth without probable cause. The officer went to my supervising attorney who stormed into the courtroom, demanded to know what happened, and attempted to shame me publicly by saying that he could have prosecuted that case blindfolded with his hands behind his back. I believe he felt comfortable doing this because of my race. This supervising attorney went on to become an appellate judge.

• When I first started practicing, I walked behind the courtroom to go in a side door and check the docket. A deputy chased me down the hallway and told me that this area was for attorneys only. When I told him I was an attorney, he did not apologize, but instead just walked into the courtroom as if nothing had happened. Mind you, I was in a suit and had my files with me. This is only one of many times that I have been told that I could not be somewhere or sit somewhere because I was not an attorney. In 2020, the assumption remains that if you are a person of color that is dressed up in a courtroom, you are the defendant or a litigant.

• When I was a young lawyer, I was working with a team of well-respected criminal defense attorneys. While out for an evidence viewing at the Sheriff's Department, we were joined by law enforcement and the district attorney prosecuting the case. I was the only Black person in our group. After the evidence viewing, at which I had remained silent, we were all walking out of the Sheriff's Office and there was a large chicken plant directly across the street. The district attorney, addressed me for the first time, pointed at the plant, and remarked, "Hey, if this law thing doesn't work out for you, you can always go get a job over there." The only response I could muster was a depressed and broken chuckle while everyone else joined in a laugh.

• At my first District Court Judge's Conference following my 2008 election to the bench, a white female colleague from another county said, "Honey, can ya get us some more napkins?" I replied, "No."

• I was applying for a job as an assistant public defender. During the interview, the attorney in charge of hiring was making typical small talk. He asked what I did over the weekend. I told him that I had gone to visit my brother in Raleigh. His immediate response was, "So how is Central Prison?" I just sat shocked and uncomfortably laughed. I've never been more thankful for not getting a job.

• When I was a new attorney, I practiced in an area where I was the only minority person in the entire district. Every week I was constantly referred to as the "social worker." A white client told the judge that she didn't know how she ended up with me as her attorney, but that she couldn't afford the white male attorney she wanted.

• I am an attorney who has done indigent defense for years. I have 15 years of experience, which includes working for the Public Defender's Office with extensive trial experience. I applied for another position doing the same thing and was offered a very low amount for the position. I had knowledge that a white female was recently hired for a similar position, with no experience, and given more pay than I was offered. When I asked for a higher salary, he stated in an indignant tone that, "the offer was reasonable based upon my experience." I declined the offer.

• As an attorney, I've been stopped at the "bar" and been told by bailiffs that only lawyers and court personnel can come any further. Although I've complained, nothing has been done about my treatment or likely the treatment of other lawyers who "look" like me.

• I'm a civil litigator and handle cases across the state. After being accosted by the bailiff when trying to enter the bar, the judge questioned me heavily about my case, although it was a motion for final judgment and no one answered the complaint or appeared from the other side. The judge did not question any other attorneys as much as I was questioned, nor did the judge spend as much time reviewing any other court files as he did mine. The judge eventually signed my order and I headed back home, but I still remember how disheartened I felt as I left that courthouse. Other non-Black attorneys were treated courteously and taken at their word; meanwhile, I was treated like an incompetent outsider. It's been years and the memory of this incident still stings.

• I worked for an office where the intake staff was hesitant to ask clients how they identify racially, so they thought the better option was to assign race based on how clients sound on the phone. They freely shared this and couldn't understand why this was a big deal to me.

• An assistant clerk of court said to me "So, who's girl are you?" (thinking I worked for an attorney).

• As a new judge, I was assigned court in a smaller county in NC. I arrived at work with my robe draped over my arm and greeted the deputies. After holding court for the morning session, we took our customary lunch break. I left for lunch and returned to the courthouse and decided to make some phone calls. I was parked in the assigned spaces for judges. At that time one of the deputies came outside and tapped on my window and told me that, "I could not park here because these spaces were reserved for judges only." I replied that, "The last time I checked I was a judge, but moreover you saw me this morning." She looked and I looked, then she replied, "Oh," and walked away. She

never apologized, but I realized that she couldn't conceive that I could even be a judge.

* * * * *

Chief Justice Cheri Beasley of the North Carolina Supreme Court said it best,

> Too many people believe that there are two kinds of justice. They believe it because that is their lived experience—they have seen and felt the difference in their own lives. The data also overwhelmingly bears out the truth of those lived experiences. In our courts, African-Americans are more harshly treated, more severely punished, and more likely to be presumed guilty…We must come together to firmly and loudly commit to the declaration that all people are created equal, and we must do more than just speak that truth. We must live it every day in our courtrooms.[4]

Across the nation, your Black colleagues and colleagues of color are being affected, and to do nothing is no longer an option. Despite obtaining the same degree and passing the same bar exam, due to our skin color we are held to different standards, scrutinized at higher levels, seen as illegitimate, and "given" our titles due to affirmative action. Our judgment and competency is always questioned.

And why does that matter? There are personal and professional ramifications to consider. On a personal level, this discriminatory behavior is demeaning, insulting, dangerous, and normalizes inequality among equal individuals. Furthermore, this disparate attitude and treatment towards our colleagues of color impacts not just our development as a lawyer and confidence to seek higher positions, but also affects the potential outcomes that can be achieved for the clients served.[5] This last point raises professional concerns for this behavior. In addition to our colleagues suffering from this unacceptable behavior, our clients suffer also due to the unequal, detrimental treatment of their lawyers. The very trust that we ask the public to place in the justice system is threatened and made weaker with each instance of discrimination experienced, witnessed, or learned of by the public. The Preamble to the Rules of Professional Conduct charges lawyers to "(6) further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[6] How can the public feel confident in the justice system if the primary participants in that system are often treated unequally based upon the color of their skin?

However, there is hope! Much like the preventative actions that we take daily to curb the spread of COVID-19, we must do the same to eradicate racial disparities. It's extremely important that we begin to understand that the legal profession is not immune to instances of racism—neither explicit nor implicit—and it's time to educate ourselves so that we can all exemplify the highest level of professionalism and competency. We must take an inner look at ourselves and our beliefs, and then outwardly work to facilitate those changes. We must educate ourselves on the plight of others, correct colleagues who say improper things and act inappropriately, check our implicit biases, and be willing to have difficult and uncomfortable conversations.[7]

Additionally, we can work on tangible things to prevent further instances of this behavior in our Bar. One way is to advocate for a mandatory bias/diversity/inclusion CLE requirement to be conducted on a semi-annual basis. Another way is to advocate for our State Bar to adopt ABA Model Rule 8.4(g) that renders it misconduct for an attorney to:

> engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[8]

I know that we will all rise to the call of action to make the necessary changes to our lives and profession. Our colleagues, clients, future generations of lawyers, and the general public are depending on us to do everything we can to prevent the spread of racism. ■

Judge Ashleigh Dunston is a district court judge in the 10th Judicial District, which encompasses Wake County. For more information about Judge Dunston or to request for her to present a CLE on this topic, please visit her website at JudgeAshleigh.com.

A Message from President Colon Willoughby

June 4, 2020

The death of George Floyd, combined with the nationwide call to action inspired by that death and the senseless deaths of too many other people of color, has brought to the forefront of our lives the historical inequities of our justice system and of our society. Much has been said about the issues surrounding racial inequality in America, and yet much more needs to be said. And, most importantly, the anguish that underlies the protests needs to be heard and acted upon.

The Preamble to the North Carolina Rules of Professional Conduct calls upon lawyers to "seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession." Further, the Preamble demands that lawyers "be mindful of deficiencies in the administration of justice" and devote our time and toil to ensure "equal access to our system of justice for all."

Tuesday, our Chief Justice pledged that our courtrooms will become an example of our shared commitment to the declaration that all people are created equal. North Carolina lawyers must heed and aid in the fulfillment of that pledge. We must dedicate ourselves to the ideals of our Preamble against the insidious injustice of racism, both implicit and institutional. If we truly believe in freedom and justice in this nation, then we need to embrace racial equality for all.

To the lawyers and citizens of North Carolina: The call to action has been heard; we stand with those who seek equal justice for all; and we promise to do our part to encourage, assist, and support lawyers in fulfilling their professional responsibility to do the same.

CONTINUED ON PAGE 17

techniques. The perspective of the collaborative process is forward looking—towards an agreed-upon solution to a common problem—and not backward looking to try only to assess fault or blame.

All of these protocols—the voluntary exchange of information, selection of mutually agreed upon neutral experts if needed, withdrawal of counsel if the case impasses and goes to litigation, the ability to withdraw at any time, and the obligation of counsel to impasse the proceeding if their client is unable or unwilling to comply with these protocols—are put in a written "Participation Agreement" signed by the parties and by counsel at the outset of the collaborative proceeding and makes the ground rules explicit.

A note here about collaborative practice as it relates to mediation: Collaborative differs significantly from mediation in its process, tone, and scope. It seeks not merely settlement, but also a measure of healing and mutual understanding. As someone else has said, "If you don't understand the other side of the problem, you don't understand the problem." A paradigm shift often occurs during the collaborative process that enhances creativity and empowers the parties to voice their underlying concerns and interests. It is a process that can transform the clients over a period of weeks, rather than further polarizing them as often results from a one-day mediation or prolonged litigation process, with or without a trial and appeal.

There are several international, national, and statewide organizations devoted to further spreading and developing collaborative practice. One international organization whose focus is on non-family civil collaborative is the Global Collaborative Law Council (GCLC), globalcollaborativelaw.com. It was established in 2004 and has members throughout the United States and abroad with a mission to advance the use of the collaborative process in resolving all types of civil disputes.

The first national organization to be established—and the largest—is the International Academy of Collaborative Professionals (IACP), collaborativepractice.com, an international, interdisciplinary organization that has promulgated a uniform definition of collaborative practice, standards for collaborative practitioners and trainers, a model interdisciplinary code of ethics, and public and professional education programs. While its resources are applicable to any collaborative matter, IACP has focused its attention on collaborative family law.

In North Carolina, the collaborative method first took hold in the early 2000s, and there are a substantial number of collaborative lawyers practicing in the family law area. In the spring of 2014, the Dispute Resolution Section of the North Carolina Bar Association formed a Collaborative Law Committee to explore expanding Collaborative to non-family matters. Among other things, the committee has sponsored eight 14-hour basic training sessions attended by over 250 attorneys across the state. A number of the lawyers who received that training came together towards the end of 2017 to form a non-profit, the North Carolina Civil Collaborative Law Association (NCCCLA), which works in cooperation with the North Carolina Bar Association to raise awareness about collaborative law practice among lawyers and clients, and to offer resources and develop standards of excellence for its members.

In 2009, the Uniform Law Commission promulgated a Uniform Collaborative Law Act to create uniformity in the advancement of collaborative law practice among the states that adopted it. Prior to the recent adoption by North Carolina, it had been adopted in 18 states and the District of Columbia, and there are eight more states where efforts are underway to consider adoption. The exact application of the act is in fact not uniform, with some states limiting its application to family law or with other variations; however, there is a trend developing for a uniform law governing collaborative practice. North Carolina has a collaborative law statute limited to family law that actually pre-dates the Uniform Act: N.C.G.S. 50-70 et seq. The North Carolina General Statutes Commission introduced the Uniform Act into the North Carolina legislature in 2018. It passed the House in both the 2018 and 2019 Sessions and passed the Senate on June 22, 2020. It was signed by the governor on July 1 and has an effective date of October 31, 2020.

Whether in the midst of COVID or on the other side of this crisis, the collaborative approach to dispute resolution allows the parties to proceed as though the crisis had never occurred. Having our courts close their doors for over two months is an occurrence that none of us have ever experienced before, and it has been disruptive for us and our clients. We certainly hope never to have to live through such a "waiting period" again, but if we do, we can offer our clients a method of resolving disputes that does not rely on external structures being open for business.

Now—more than ever—collaborative practice is open for business!

To learn more about collaborative law practice, visit nccivilcollaborativelaw.org. ■

Aida Doss Havel is a recovering litigator and experienced collaborative practice trainer and family law practitioner living on Hatteras Island, North Carolina, is co-chair of the Civil Collaborative Committee of the Dispute Resolution Section of the North Carolina Bar Association, and is a member of the Board of the Global Collaborative Law Council.

John Sarratt is an attorney with Harris Sarratt & Hodges in Raleigh, is co-chair of the Civil Collaborative Committee of the DR Section of the NCBA, and is the president of both the North Carolina Civil Collaborative Law Association as well as the Global Collaborative Law Counsel.

Justice Isn't Always Blind (cont.)

Endnotes

1. Centers for Disease Control and Prevention, 2020, Coronavirus Disease 2019 (COVID-19) in the US. Available at: bit.ly/Fall2020Journal1.
2. Vincenty, S., 2020. Being Color Blind Doesn't Make You Not Racist—In Fact, It Can Mean The Opposite, *Oprah Magazine*. Available at: bit.ly/Fall2020Journal2.
3. These stories have been edited for brevity and clarity.
4. Nccourts.gov, 2020, Chief Justice Beasley Addresses the Intersection of Justice and Protests around the State, North Carolina Judicial Branch. Available at: bit.ly/Fall2020Journal3.
5. Weiss, D., Majority of Minority Female Lawyers Consider Leaving Law; ABA Study Explains Why, *ABA Journal*. Available at: bit.ly/Fall2020Journal4.
6. Preamble: A Lawyer's Responsibilities, North Carolina State Bar. Available at: bit.ly/Fall2020Journal5.
7. Ruiz, R., 6 Ways to be Antiracist, Because Being 'Not Racist' Isn't Enough, *Mashable*. Available at: https://bit.ly/Fall2020Journal6.
8. Kubes, K., Davis, C. and Schwind, M., 2019, The Evolution of Model Rule 8.4 (G): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law, Americanbar.org. Available at: https://bit.ly/Fall2020Journal7.