

Implicit Bias in the Boardroom & the Courtroom

How to Recognize It and Deal With It

PRESENTED BY:

Gene Brockland

Partner, SmithAmundsen

John Finger

Partner, SmithAmundsen

Lisa Savoy

Assistant General Counsel, Equifax

PRESENTED TO



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Implicit Bias Defined

- Stereotype that is generally formed based on past experiences and learned associated behaviors
- Often holder of the bias is unaware of their own bias
- Affects how we respond to people

What Do I Look Like?

- CEO of a bank
- Lives in Town & Country
- Drinks fine wine
- Supports conservative causes



What Do I Look Like?

- CEO of a CORTEX company
- Lives in The Grove
- Drinks craft beer
- Supports liberal causes



What Are My Characteristics?



What Are My Characteristics?



Testing Yourself

www.implicit.harvard.edu/implicit

Tests how quickly you associate certain attributes with characteristics.

Caveat that it is for educational purposes only and is not definitive.

One Person's Test Results

- **No** automatic preference for White people over Black people
- **Slight** automatic preference for Straight people over Gay people (all respondents: 15% slight; 24% moderate; 25% strong; 36% little to no or other)
- **Moderate** automatic preference for Young people over Old people (all: 30% moderate; 30% strong; 17% slight; 23% little to no or other)
- **Strong** association of Male with Leader and Female with Supporter compared to the opposite (all: M:72%; F:71%)
- **Strong** automatic preference for Thin people over Overweight people (all: 31% strong; 28% moderate; 16% slight; 25% little to no or other)

Typical Subjects of Bias

- Women
- Minorities
- Sexual orientation
- Age
- Those with certain physical characteristics

Implicit Bias in the Boardroom

Why It Matters

“Your mind will take the shape of what you frequently hold in thought, for the human spirit is colored by such impressions.”

- Marcus Aurelius, *Meditations*, 5.16

Implicit Bias in the Boardroom

Why It Matters

“Throw out your conceited opinions, for it is impossible for a person to begin to learn what he thinks he already knows.”

- Epictetus, *Discourses*, 2.17.1

Implicit Bias in the Boardroom

Why It Matters

“A biased mind, which never sees the complete picture, cannot grasp the reality. And any action that results from such a state of mind will not be in tune with reality. As such it causes a lot of problems.”

- The 14th Dalai Lama, *A Biased Mind Cannot Grasp Reality*

The Problems

- Reluctance to ask the right questions.
- Inability to see the organization's problems and issues.
- Excessive adherence to tradition inhibits new initiatives.
- Unintentional discouragement of candor and constructive debate.
- Excessive deference to certain board members.
- Inability to involve new or independent board members.

The Solutions

“These are the characteristics of the rational soul: self-awareness, self-examination, and self-determination. It reaps its own harvest. ...It succeeds in its own purpose...”

- Marcus Aurelius, *Meditations*, 11.1-2

The Solutions

“You tell me it’s the institution, well you know, you better free your mind instead.”

- John Lennon, *Revolution*

The Solutions

Statutory

- California – Cal. Corp. Code §301.3(a): any “publicly held ... corporation whose principal executive offices ... are located in California shall have a minimum of one female director on its board.”
- Colorado – non-binding legislative resolution encouraging diverse gender representation.
- Maryland, Illinois and New York – statutes requiring certain entities to disclose board diversity.
- Hawaii, Massachusetts, Michigan, New Jersey and Washington – pending legislation requiring board diversity.

The Solutions

- Self-awareness.
- Training to enhance self-awareness.
- Regularly change board roles.
- Rules regarding board tenure and re-election.
- Separation of decision maker from performance monitor.
- Board meetings without management team.
- Board meetings with external auditor and other performance monitors.
- Separate meetings of the independent directors.

Implicit Bias in the Courtroom

- Opposing counsel
- Judges
- Jurors

Minimizing Courtroom Bias

- Eliminate your own
- Know it exists
- Listen for it in judge and opposing counsel
- For judge, be cognizant in briefs and argument
- For opposing counsel, use it to your advantage
- For jurors, address in *voir dire*

Voir Dire – Main Goals

- Identify jurors to be eliminated
- Educate those who will be on jury

Voir Dire – Main Components

- Background
- Experiences
- Opinions, Beliefs and Values

Opinions, Beliefs and Values

- Keep theory of case in mind
- Consider characteristics of parties
- Consider characteristics of key witnesses

Uncovering Juror's Implicit Bias

- Difficult
- People often don't recognize their own
- No one wants to admit it
- Focus on behavior instead of beliefs
- Focus on difficulty instead of ability
- Use “reflective” questions

Behavior vs. Beliefs

- NOT: Do you **believe** _____?
- INSTEAD: If _____, **would you need to see more evidence?**
- Age example: If you heard testimony from an 89 year old about how the financial markets work, would you need to see more evidence on that issue?

Difficulty vs. Ability

- NOT: Are you **able to believe** a witness who _____?
- INSTEAD: Would you find it **difficult to believe** a witness who _____?
- Age example: We all know mental capacity diminishes as we age. Would you find it difficult to believe testimony about financial markets from someone 89 years old?

“Reflective” Questions

- NOT: **Would** _____ affect your ability to decide this case fairly?
- INSTEAD: **How might** _____ affect your thinking about this case?
- Age example: How might the fact that my client is 89 years old affect your thinking about this case?

QUESTIONS? Thank You!

Gene Brockland

Partner, SmithAmundsen

gbrockland@salawus.com

John Finger

Partner, SmithAmundsen

jfinger@salawus.com

Lisa Savoy

Assistant General Counsel, Equifax

lisa.savoy@equifax.com



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