



Bias in the Workplace: What are the Political and Practical Risks and How Can Companies Mitigate Them?



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CA State Bar's New MCLE Requirements

Rule 2.72 of the Rules of the State Bar of California was amended effective September 24, 2020, to incorporate a new implicit bias education requirement. As such, on and after January 1, 2022, the total hours of required MCLE must now include no less than seven hours as follows:

- **At least four hours of legal ethics.**
- **At least two hours dealing with elimination of bias. *Of the two hours, at least one hour must focus on implicit bias and the promotion of bias reducing strategies.***
- **At least one hour of education addressing competence issues.**

What is Unconscious Bias?



What is Unconscious Bias?

- Our brains receive and process 11 million bits of information per second, but we can only consciously process 40 bits
- Two levels of thinking:
 - Level 1 – Thoughtful and Deliberate
 - Level 2 – Unthinking and Automatic
- Level 2 dominates much of daily life, making as much as 90% of your daily decisions



Level 2 – Unthinking and Automatic



- Automatic decision-making hard wired into everyone (e.g. fight or flight).
 - Used to assess whether an object, animal or person is dangerous. Not a negative trait. It is a necessary one.
- Bias is a subjective, predetermined preference towards a viewpoint about roles, behaviors or individuals
- Unconscious perceptions influence many of the most important decisions we make (hiring, mentoring, promoting, etc.)
- Social stereotypes about groups of people that impact our interactions, perceptions and beliefs about others that are outside of our consciousness.

Unconscious Biases

- Unconscious biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control.
- A Few Key Characteristics of Unconscious Biases:
 - Unconscious biases are pervasive. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
 - The unconscious associations we hold do not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse.
 - We generally tend to hold unconscious biases that favor our own ingroup, though research has shown that we can still hold unconscious biases against our ingroup.
 - Unconscious biases are malleable. Our brains are incredibly complex, and the unconscious associations that we have formed can be gradually unlearned through a variety of debiasing techniques.

Adapted from the Kirwan Institute

The Bias Test



Instructions

- With a show of hands, please identify whether you think the following people are successful



Woman #1



- **Successful**
- **Not Successful**

Man #1



- **Successful**
- **Not Successful**

Man #2



- **Successful**
- **Not Successful**

Woman #2



- Successful
- Not Successful

Man #3 and #4



- **Successful**
- **Not Successful**

Woman #1



Pratibha Patil

- Attorney
- Economist
- First female president of India, 2007-2012



Man #1



Phillip Markoff

- **Boston University Medical Student (2009)**
- **Craigslist Killer**

Woman #2



Tamika Cross, MD

- Chief OB/GYN Resident at the Harris Health Lyndon B. Johnson Hospital, University of Texas Health Science Center at Houston
- Delta Air Lines staff didn't believe she was a doctor during an in-flight medical emergency

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Tamika Cross, MD

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Education/Training

Medical School
Meharry Medical College School of Medicine, 2013

Residency
The University of Texas Health Science Center at Houston, 2017



★★★★★
4.8 out of 5 stars

[about our survey](#)

The New York Times

*Black Doctor Says Delta
Flight Attendant Rejected Her;
Sought 'Actual Physician'*

By Christine Hauser

Oct. 14, 2016



Man #2



Oscar Schindler

- *Schindler's List* starring Liam Neeson. Won 7 Oscars, including Best Picture and Best Actor.
- Served in the Nazi military running a weapons factory employing Jewish workers. Directly responsible for saving 1,200 Jewish people from Nazi concentration camps.
- Spent his entire fortune bribing Nazi officials to save his workers. Declared bankruptcy in 1958 and was supported for the rest of his life by assistance payments from Jewish relief organizations (aka *Schindlerjuden* – “Schindler Jews”)

Man #3 and #4



What Kind of Biases Might You Have?

Consider exploring your own implicit biases through Harvard's Project Implicit

Age	Gender	Gender-Career
Sexuality	Muslim	Race
Arab	Skin Tone	Weapons and Race
Asian	Disability	
Weight	Jewish	
Hispanic	Transgender	

<https://implicit.harvard.edu/implicit/takeatest.html>

The Impact of Unconscious Bias on the Workplace

Unconscious Bias in the Workplace

- **The potential influence of bias in the workplace is wide-ranging.**
- **Unconscious bias affects how we evaluate talent, performance, assignments, and promotions.**

Unconscious Bias in the Workplace

- **Center for Talent Innovation's report, Disrupt Bias, Drive Value, there are three major costs that companies experience when employees perceive bias:**
 - **Burn outs – Increased sense of alienation, reduced sharing of ideas, reduced sense of pride in work.**
 - **Bust outs – Attrition.**
 - **Blow ups – Increased expression of negative views of employer, intentional failure to follow through on important tasks, refusal to refer people to employer.**

What Does Unconscious Bias At Work Look Like?

- **What do you think?**
 - A manager and members on his team play a weekly game of basketball at the on-site gym.
 - A 55-year-old team member, Matt, who often wears a brace on his knee is never invited to join.
 - After the game, the group tends to go out for dinner or drinks.
 - Following one game, the manager announces that a select group of team members will be traveling to speak at a prestigious conference.
 - Matt never knew about the opportunity to speak at the conference and learns that it was discussed during the weekly basketball game.
 - Does Matt have a claim for age discrimination?

Unconscious Bias: Hair Discrimination

- Discrimination based on hair texture and style may be a form of race or national origin discrimination.
- Harvard Business review reported on a 2023 study of 2,990 female-identifying respondents between the ages of 25 and 64 who identified as Black, Hispanic, white, or multiracial/ multiethnic. According to the study:
 - Black women's hair was two-and-a-half times more likely to be perceived as unprofessional.
 - More than half of the Black women surveyed felt like they had to wear their hair straight in a job interview to be successful. Two-thirds reported that they had changed their hair for a job interview.
 - One-fifth of the Black women surveyed between the ages of 25 and 34 had been sent home from work because of their hair.
 - A quarter of the Black women surveyed believe they were denied a job because of their hair.
- Many states have laws in effect which already protect workers based on natural hair and hairstyle, including hairstyles in which hair is tightly coiled or tightly curled, or worn in locs, cornrows, twists, braids, Bantu knots or Afros.



What Do You Think?

- Amy is an African-American attorney at a law firm.
- She typically wears her hair in long braids.
- She has been the lead attorney handling a case that is set for a major hearing.
- The partner in the case has told her that he will need to argue the motion.
- The week of the hearing, Amy changes the way she wears her hair, and it is now smooth and straight.
- The morning of the hearing, the partner comments on her professional appearance and her hard work on the case, and tells her that she can argue the motion.

Civility



What is Civility?

Civility is about treating others with courtesy, dignity, and respect.



Rule 9.7 Oath required when admitted to practice law



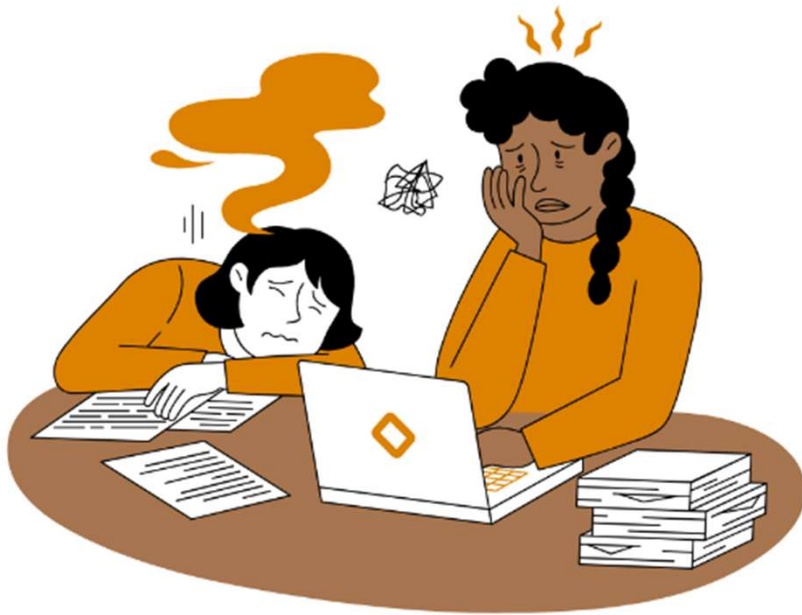
- In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

The High Cost of Incivility



- Incivility may violate the rules of professional conduct. Though lawyers are expected to zealously represent their clients, the rules forbid bullying and abusive conduct because that conduct delays or prolongs the proceedings and results in needless expense.
- Incivility increases the likelihood that a lawyer will face a legal malpractice or fee dispute claim, and it makes those claims harder to defend.

The High Cost of Incivility



- Incivility causes individuals to feel less satisfied with their work, to cut back on their efforts, and to experience greater job stress.
- When clients perceive bias perpetuated through civility in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law.
- Studies show incivility can result in adverse psychological effects such as stress, anxiety, depression, burnout, or a loss in self-esteem. (Cortina, *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013)).

The Intersection of Bias & Civility

Bias is not an entirely separate issue. It is a subcategory of incivility in the legal profession, resulting from expressions of explicit and implicit biases. All forms of bias-driven incivility negatively impact the workplace

Examples

- When the attorney being interrupted is a young woman, the attorney interrupting may be motivated by a combination of biases held against women and young attorneys.
 - A 2017 study conducted at the Pritzker School of Law at Northwestern University concluded that female US Supreme Court justices are interrupted three times as often as their male counterparts.
- Assuming people of color are non-lawyers.
 - An American Bar Association study found that women of color are mistaken for law firm, court, or janitorial staff at a rate 50 percentage points higher than White men.
- Attorneys subjected to bias-driven incivility often experience incivility in the form of being critiqued on their physical appearance and attire.
 - An attorney's choice to wear religious garb (e.g., a Sikh turban or a hijab) or to present in gender nonconforming ways may also increase the chances of being misidentified as a nonlawyer. (Cooper, The Appearance of Professionalism (2019) 71 Fla. L.Rev. 1, 9–14).

Impact of Bias-driven Incivility



Attorneys subjected to bias-driven incivility often expend emotional and mental labor to determine what role their identity played in their mistreatment, to process their mistreatment, and to protect themselves accordingly. (Torino et al., Everything You Wanted to Know About Microaggressions but Didn't Get a Chance to Ask in Microaggression Theory: Influences and Implications (2019)).



Protecting oneself from bias-driven incivility may result in additional identity performances by the affected diverse attorney that can further impact his or her psychological well-being. (See Carbado & Gulati (2015)).



Bias-driven incivility negatively impacts the entry, retention, and promotion of those impacted by biases and stereotypes in the workplace, which in turn affects the number of diverse attorneys remaining in the law or rising to supervisory and leadership levels within in-house legal departments. ([Proof That Positive Work Cultures Are More Productive \(hbr.org\)](https://hbr.org/2016/05/proof-that-positive-work-cultures-are-more-productive)).

Micro-aggressions

Examples:

- Complimenting someone for speaking “perfect English” or “being articulate”
- Male employee constantly interrupting a female colleague
- Repeatedly mispronouncing someone’s name
- Repeatedly using the wrong pronoun for a co-worker
- Unsolicited denial of bias (e.g., “I’m not a racist, I have lots of black friends”)
- Telling someone to “calm down”

Micro-aggressions

What do you think?

- ABC Company makes a water bottle sticker to promote its commitment to fighting various forms of bigotry and racism.
- Employee complains that anti-Semitism is not listed.
- Employee also notes one occasion where an “all staff” meeting was scheduled on a Jewish holiday.
- Employee asks management about creating an employee resource group for Jewish people.
- ABC Company has several other employee resource groups, including for Latino, Black and LGBT employees
- ABC Company raises concerns about creating a Jewish employee resource group and delays the approval process.
- Employee continues to follow-up on status of employee resource group for Jewish people.
- Weeks later, Employee is fired for alleged poor performance.
- What happens if Employee files a lawsuit?

Civility & Addressing Microaggressions



- Re-read your communications to others before you send them to eliminate demeaning statements, passive-aggressive verbiage, and unnecessary threats to seek sanctions.
- When someone acts inappropriately, and you have a personal rapport with the individual, addressing the issue can be a powerful way to advocate for the values of civility.
- Leadership and senior attorneys should strive to provide junior attorneys and staff with safe and effective mechanisms to report mistreatment.
- Being mindful of cultural and personal differences and respecting those differences in all interactions.

Implicit Bias in Artificial Intelligence



What is AI Bias?

- **Artificial Intelligence (AI) bias** refers to the tendency of algorithms to reflect human biases. In today's climate of increasing representation and diversity, this becomes even more problematic because algorithms could be reinforcing biases, and it's difficult to know about them until they've been programmed into the software.
- **What are the types of AI Bias?**
 - **Cognitive biases:** These are unconscious errors in thinking that affects individuals' judgements and decisions. These biases arise from the brain's attempt to simplify processing information about the world. Cognitive biases could seep into machine learning algorithms via either:
 - designers unknowingly introducing them to the model
 - a training data set which includes those biases.
 - **Lack of complete data:** If data is not complete, it may not be representative and therefore it may include bias. For example, most psychology research studies include results from undergraduate students which are a specific group and do not represent the whole population.

Real-Life Examples of Implicit Bias in AI

- In 2018, Amazon reportedly scrapped an AI and machine learning-based recruitment program after it was found that the algorithm was biased against women. Amazon's AI model was programmed to vet candidates by observing patterns in resumes submitted to the company over a 10-year period. The majority of those candidates had been men, which led the system to deduce that male candidates were preferred over female candidates.
- In 2019, researchers found that an algorithm used in US hospitals to predict which patients will require additional medical care favored white patients over black patients by a considerable margin. Because the expense of healthcare emphasizes an individual's healthcare needs, the algorithm considered the patients' past healthcare expenditures.
- According to a 2015 study, only 11 percent of the individuals who appeared in a Google pictures search for the term "CEO" were women. Research revealed that Google's online advertising system displayed high-paying positions to males much more often than women.

Employer Uses of Artificial Intelligence

- Employers now have a wide variety of computer-based tools available to assist them in hiring workers, monitoring worker performance, determining pay or promotions, and establishing the terms and conditions of employment. Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias.
- Examples include: resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; “virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or on a more traditional test.
- Employers must take care that their AI does not run afoul of federal, state, or local employment laws.



EEOC Guidance and Recommendations

- On May 12, 2022, the Equal Employment Opportunity Commission (“EEOC”) and the Department of Justice released technical guidance entitled The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees.
- Recommendations:
 - Employment technology should provide clear instructions for requesting accommodations
 - Employment technology should ensure that requesting a reasonable accommodation does not diminish the applicant’s opportunities
 - Provide staff training
 - Ensure the vendor complies with applicable regulations



Bias and the Political Landscape

What Happens to Bias Concerns In the Current Political Climate?

- In March 2025, EEOC issued guidance stating that DEI initiatives “may be unlawful” if they involve an employer taking an employment action motivated by race, sex, or other protected characteristic.
- Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee’s race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise “balancing” a workforce by race, sex, or other protected traits.
- Reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII.

Legal Risks of Implicit Bias

Lawsuits Based on Implicit Bias

These news anchors say their bosses are grooming younger women who look like them to take their jobs



DIVERSE-IT

By Sharon Florentine, Senior Writer, CIO | FEB 1, 2019 2:30 AM PST

NEWS ANALYSIS

Oracle the latest to face pay discrimination

Oracle allegedly withheld \$400 million in wages from racially underrepresented workers to a U.S. Department of Labor complaint filed last week.



PwC Lawsuit Alleges Older Applicants Were Target Of Collective Discrimination In Recruiting Efforts

After a recent court ruling against PricewaterhouseCoopers (PwC), companies will want to review recruiting efforts to ensure that older candidates are not being impacted by unconscious bias and discrimination. In *Rabin, et al. v. PricewaterhouseCoopers*, the federal court ruling granted collective action to plaintiffs who allege PwC discriminated against older applicants in its recruiting efforts.



NEWS

SHOWS

LIVE



A top flutist, paid \$70,000 less than a male oboist, sues for gender bias

BY AIMEE PICCHI

DECEMBER 12, 2018 / 4:02 PM / MONEYWATCH

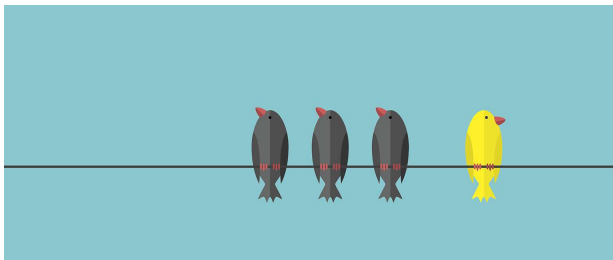


Evidence of Implicit Bias in Litigation

- Arguments are being made to courts and before juries that implicit bias can result in discrimination in even the most well-intentioned employer's workplace practices. Some courts have accepted implicit bias evidence. Some have not.
- A trend may be developing that permits judges and jurors to consider implicit bias theory and evidence as part of the overall proofs presented in employment discrimination cases.
 - *Kimble v. Wisconsin Department of Workforce Development*, 690 F. Supp. 2d 765 (E.D. Wis. 2010) – The court determined that implicit bias played a role in decision not to give plaintiff a pay raise.
 - *Samaha v. Washington State Dep't of Transp.*, 2012 WL 11091843 (E.D. Wash. 2012)- The court agreed with the plaintiff that testimony about implicit bias was relevant to the proof of intentional discrimination and could be “helpful to the jury” in understanding how implicit bias functions in the employment setting.
 - *Martin v. F.E. Moran, Inc.*, 2017 WL 1105388 (N.D. Ill. 2017) - A federal district court allowed expert testimony from an assistant law professor with a Ph.D. in social psychology concerning implicit bias in a race-discrimination case

Best Practices for Addressing Implicit Bias in the Workplace

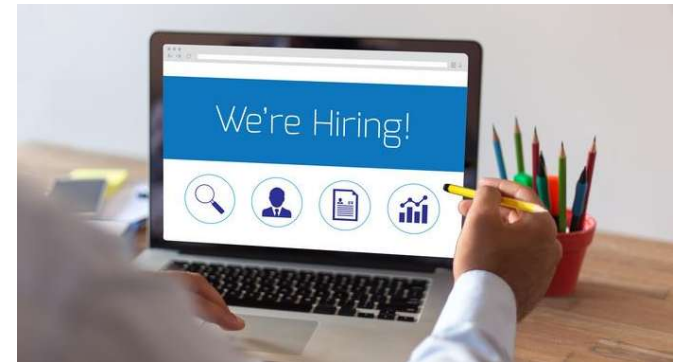
Recognizing and Addressing Implicit Bias in the Workplace



- Have a basic understanding of the cultures from which your clients/coworkers come
- Try to recognize situations that magnify stereotyping and bias
- Understand that it is a long-term endeavor
- Anonymize where possible
- Foster or create employee networks (e.g., resource/affinity groups)
- Be conscious of areas where bias can impact institutional decision making (hiring, discipline, work assignments, promotions)

How to Tackle Implicit Bias in Recruiting & Hiring

- **Job descriptions**
 - Requirements job-specific
 - Avoid problematic pronouns or age-specific language
- **Resumes**
 - Setting Process? Guidelines? Standardized?
 - Consider: blind review
- **Setting Salary Ranges**
 - Pay scales current and reflect actual practices?
 - Consider:
 - Market surveys
 - Standardized compensation bands
 - Criteria within bands i.e. 1-3 yrs of experience vs. 3-5 yrs
 - Avoid admonishments not to discuss compensation



How to Tackle Implicit Bias in Recruiting & Hiring

- All requests for information should be **related to the job(s)** for which the applicant is applying
 - Employers should not request information that is likely to elicit information about protected characteristics -- on application forms, job interviews, or in background or reference checks
 - Employers should not ask for a photograph of an applicant (If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.)
- Whenever possible, ask all applicants the same questions to **standardize** the interviewing process
- If the applicant volunteers information which would be illegal to request, the employer may not use that information as a basis for rejecting the applicant
- **Liability** for discrimination exists, regardless of whether the information was unlawfully solicited or volunteered!



Thank You