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The Ethical Implications of Implicit Bias and the Practice of Bankruptcy Law (Joint Session with Subchapter V Trustees)

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The Ethical Implications of Implicit Bias and the Practice of Bankruptcy Law

Saturday, August 19, 2023

10:30 – 11:30 Martin Luther King Jr. Memorial / DEI

Nothing says diversity, equity and inclusion like Martin Luther King Jr. and his memorial. Join our panel for a thoughtful and inspiring presentation covering diversity, equity and inclusion. “Make a career of humanity. Commit yourself to the noble struggle for equal rights. . .” 4/18/59.

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How can bankruptcy trustees and their professionals address implicit bias and set positive behavioral expectations with staff, courts, debtor’s counsel, debtors, or other counterparties.

Objectives of the Presentation

1. Understand what implicit bias means, how it may influence our decisions, and risk factors.
2. How implicit bias hurts the bottom line.
3. Understand that being implicitly biased does not necessarily mean we act in explicitly biased ways: micro aggressions matter.
4. Learn to recognize some behaviors that may suggest bias or differential treatment.
5. Learn some techniques that help debias perceptions and improve interactions.

The following outline is adopted from an article prepared by Chief Judge Frank J. Santoro and **Veronica D. Brown-Moseley, Esq.** titled *The Ethical Implications of Implicit Bias and the Practice of Bankruptcy Law* presented at the Richmond Bar Association, Bankruptcy Section on October 18, 2022.

Thank you both for allowing us to use it.

1) Ethics and Implicit Bias: Competence, Diligence, Communication, and Avoiding Prejudicial or Discriminatory Conduct

a. Ethics and Implicit Bias



- i. Implicit bias can impact an attorney’s ability to provide competent and diligent representation, to communicate effectively with a client, and to avoid conduct that is inadvertently prejudicial or discriminatory. The goal of this program is to bring awareness to members of the bankruptcy community about the ethical implications of implicit bias, the potential harms that implicit bias could have on the practice of bankruptcy law, and to provide practical solutions to reduce the impact of implicit bias in bankruptcy and to help attorneys avoid ethical pitfalls.

b. The Duty of Competence and Implicit Bias

- i. It is imperative that an attorney takes reasonable action to provide competent representation to a client. Competent representation involves thoroughness, preparation, and the maintenance of the requisite knowledge and skill required for the representation. In order to accomplish these objectives, an attorney must: (1) communicate with a client, (2) engage in inquiry to obtain the relevant facts and information, and (3) analyze the information obtained and the applicable legal standards. Implicit bias can impact an attorney’s judgment, the way in which he communicates with a client, the inquiry into relevant facts and information, and the manner in which the information and legal standards are analyzed. As such, continuing study and education on implicit bias and ways to reduce its impact are critical to an attorney’s maintenance of competence pursuant to Virginia Rule of Professional Conduct 1.1.

ii. Virginia Rule of Professional Conduct 1.1¹: Competence

1. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

iii. Virginia Rule of Professional Conduct 1.1 Comment: Maintaining Competence

1. To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in

¹ Virginia has adopted the American Bar Association’s Model Rule without change. A state by state chart of Variations of the ABA Model Rules of Professional Conduct can be viewed at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-1.pdf [last visited July 21, 2023].



which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

iv. **Virginia Rule of Professional Conduct 1.1 Comment: Thoroughness and Preparation**

1. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

c. **The Duty of Diligence and Implicit Bias**

- i. An attorney is required to act with reasonable diligence in the representation of a client pursuant to Virginia Rule of Professional Conduct 1.3. This entails making diligent efforts to obtain all information relevant to the representation and to engage in conduct reasonably necessary to zealously advocate on behalf of a client. Implicit bias can impact the judgment and decisions made by an attorney, which could negatively impact an attorney's ability to provide diligent representation as required under Rule 1.3.

ii. **Virginia Rule of Professional Conduct 1.3²: Diligence**

1. A lawyer shall act with reasonable diligence and promptness in representing a client.

² Virginia has adopted the American Bar Association's Model Rule with changes. A state by state chart of Variations of the ABA Model Rules of Professional Conduct can be viewed at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-3.pdf [last visited July 21, 2023].



2. A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
3. A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6³ and Rule 3.3⁴.

iii. **Virginia Rule of Professional Conduct 1.3 Comment 1**

1. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued

d. **The Duty of Communication and Implicit Bias**

- i. An attorney's duty to communicate with a client is an essential part of the representation and required by the Virginia Rule of Professional Conduct 1.4. An attorney must have the ability to communicate with a client in a manner that enables the attorney to obtain the information relevant to the representation and to explain the matter to the client in way that enables the client to make an informed decision regarding the representation. Implicit bias can impact the way an attorney communicates with a client and the way an attorney interprets the information communicated by a client. Therefore, being aware of implicit bias, the ways that it could impact communication, and strategies to reduce its impact can improve an

³ Virginia has adopted the American Bar Association's Model Rule with changes. A state by state chart of Variations of the ABA Model Rules of Professional Conduct can be viewed at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-6.pdf [last visited July 21, 2023].

⁴ Virginia has adopted the American Bar Association's Model Rule with changes. A state by state chart of Variations of the ABA Model Rules of Professional Conduct can be viewed at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-3.pdf [last visited July 21, 2023].



attorney's ability to communicate and to comply with the ethical requirements under Rule 1.4.

ii. **Virginia Rule of Professional Conduct 1.4⁵: Communication**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

e. **Virginia Principles of Professionalism**

- i. The Supreme Court of Virginia endorsed the Principles of Professionalism (the "Principles"). The Principles provide standards of civility that Virginia attorneys are encouraged to comply with. However, failure to comply does not give rise to a basis for disciplinary action or civil liability.
- ii. The Principles articulate that an attorney should "avoid all bigotry, discrimination, or prejudice" in conduct towards everyone the attorney deals with. This includes, but is not limited to, clients, opposing counsel, court personnel, staff, other members of the bar, and the members of the public that an attorney engages with. All attorneys should aspire to conduct themselves in an ethical manner and avoid prejudicial or discriminatory behaviors.

f. **ABA Model Rule of Professional Conduct 8.4(g)⁶ and Misconduct**

⁵ Virginia has adopted the American Bar Association's Model Rule with changes. A state by state chart of Variations of the ABA Model Rules of Professional Conduct can be viewed at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-4.pdf [last visited July 21, 2023].

⁶ Virginia has adopted the American Bar Association's Model Rule with changes. A state by state chart of Variations of the ABA Model Rules of Professional Conduct can be viewed at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf [last visited July 21, 2023].



- i. **Professional Misconduct-** Rule 8.4(g), which has not been adopted in Virginia, specifically prohibits an attorney from engaging in behavior that he knows or should know is harassing or discriminatory on the basis of race, sex, religion, and a variety of other characteristics when practicing law.
- ii. **Rule 8.4(g): Misconduct**
 1. It is professional misconduct for a lawyer 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.

g. Implicit Bias Education

- i. Legal professionals should seek to become educated on implicit bias to avoid ethical pitfalls and to ensure compliance with the Virginia Rules of Professional Conduct and the Principles.
- ii. The elimination of implicit bias is so important that the Supreme Court of Virginia, at the request of the Virginia State Bar and Bar Council, amended the Mandatory Continuing Legal Education Requirement 17(C) to recognize that a course on the topic of elimination of bias may count toward legal ethics requirements for Continuing Legal Education.

2) Ethical Implications of Implicit Bias: Implicit Bias & Ethical Harms

a. Implicit Bias

i. What Does it Mean?

1. A bias is a strong feeling in favor of or against a thing, person, or group as it is compared to another thing, person, or group, which is not often based upon fair judgment.⁷ Generally, a bias refers to a departure from a point that is considered to be neutral.⁸ Implicit

⁷ *Bias*, Oxford Advanced American Dictionary (10th ed. 2020).

⁸ Jerry Kang, Nat'l Center for State Courts, *Implicit Bias: A Primer for Courts* (Aug. 2009), <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf>.



bias refers to those biases that an individual is unaware of or mistaken regarding the reason for the thought or feeling.⁹

ii. Schemas & Implicit Cognitions AKA Mental Shortcuts

1. Our brains enable us to engage in various activities simultaneously, such as walking, talking, touching, smelling, and tasting all at the same time, by processing through schemas.
2. Schemas are various templates of knowledge that assist us in organizing specific examples into broad categories.¹⁰ This enables us to function without utilizing valuable mental resources, and generally these thoughts are automatic without us even being aware or conscious of them.¹¹
3. Implicit social cognitions direct how we think about social categories, which we by nature assign people to.¹² We assign people into a variety of social categories based upon traits, such as age, race, gender, etc.¹³
4. Schemas come from an individual's experiences in the world, experiences with other people, as well as vicarious experiences such as information relayed to individuals in books, movies, culture, media, etc.¹⁴ Additionally, some of the cognitions are stereotypes, which refer to traits an individual associates with a certain category.¹⁵
5. Examples of Mental Shortcuts
 - a. Attending Court

⁹ *Id.*; R. Zajonc, *Feeling and thinking: Preferences need no inferences*, 35 AMERICAN PSYCHOLOGIST 151 (1980).

¹⁰ Kang, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*



- i. Prior to making a court appearance, an attorney has a preconceived idea about what will happen in court, such as a judge being present, other attorneys being present, and attorneys advocating on behalf of their clients. The attorney doesn't know exactly what will actually happen at the court appearance, but the attorney has formed preconceived schemas about the court appearance based on prior experiences.

b. Personality Traits

- i. People often perceive the personality of a lawyer as aggressive and extroverted. However, it is not necessary that a lawyer be aggressive or extroverted. Rather, it is the schemas that define an individual's expectations of a lawyer. Similarly, with personality traits of a priest, a politician, or a kindergarten teacher.

c. Unconscious Associations and Connections

- i. Our brains make connections between things unconsciously as a result of mental short cuts.
- ii. For example, when you hear the word "bankruptcy" you are more likely to connect the word "debtor" than "turtle."
- iii. Or, when you are asked to picture a lawyer, you are more likely to picture someone in a suit than someone in space gear.

6. Mental shortcuts help us to function and get through our daily lives, but can cause discriminatory behaviors if we are not aware and mindful.

iii. **Result v. Conscious Intention**

1. When making decisions it is possible that an individual's implicit bias could lead to a result that differs from the individual's



conscious intention.¹⁶ This has been described by scientists as an action disassociated from a consciously held attitude and belief.¹⁷

2. This means that an individual can have two views at the same time.¹⁸ One viewpoint being conscious and the other being an implicit belief that the individual may not even be aware of having. Both viewpoints may influence decisions made and actions taken by the individual.
3. Dr. Mahzarin Banaji and Dr. Calvin Lai have described this discovery:
 - a. Using a variety of methods to get at these associations has led to a striking set of discoveries. Among the most central of these discoveries is that within the same individual mind there exists multiple actors: a deliberative decision-maker who aspires to egalitarian ideals and a less conscious partisan who is attentive to similarity, familiarity, and social standing of those who are judged.¹⁹

b. Ethical Harms

- i. Schemas, mental short cuts, and actions disassociated from a consciously held attitude and belief can result in an attorney unconsciously engaging in behaviors that are prejudicial or discriminatory, despite the attorney's intention to not engage in such behaviors. Implicit bias can impact an attorney's judgment, decisions made, and communications with a client. Prejudicial or discriminatory conduct in relation to the representation of client, even if unintentional, impedes an attorney's ability to provide competent and diligent representation, to effectively communicate, and to comply with the requirements of Virginia Rules of Professional Conduct 1.1, 1.3, 1.4 and the Principles.

¹⁶ Donald & Redfield, *supra* note 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Calvin Lai & Mahzarin Banaji, *The Psychology of Implicit Bias and the Prospect of Change*, HARVARD Kennedy School (May 8, 2019), <http://www.tinyurl.com/y27b6syq>.



- ii. Everyone has implicit biases. However, this does not mean that everyone will act explicitly biased or in a discriminatory manner.
 1. Explicit bias refers to understandings, actions and decisions that are deliberately generated.²⁰
 2. Research suggests that implicit biases are related, but differ significantly from explicit biases.²¹
 3. Evidence obtained through Implicit Association Tests (“IAT”), which measure implicit biases, suggests that implicit biases predict behavior in some instances.²²
- iii. Examples of potential harms that could result from implicit bias include, but are not limited to: unintentional racism, sexism, and the like, favoritism and/or prejudice to certain groups, microaggressions, and other forms of bias.
 1. Confirmation bias refers to the tendency of people to hear and pay more attention to information that confirms their own views and disregard or pay less attention to information that is not consistent with their views.²³
 2. Microaggressions refer to subtle, sometimes unintentional, verbal or nonverbal actions that are offensive to a marginalized group.²⁴ The negative message sent may unconsciously reinforce a stereotype.²⁵

3) Studies on Bias in Bankruptcy & Ethical Complications

²⁰ Hon. Bernice Donald & Sarah Redfield, *Disrupting Implicit Bias*, National Association of Bankruptcy Trustees (July 16, 2019), <https://www.nabt.com/news/461287/Disrupting-Implicit-Bias.htm>.

²¹ Kang, *supra* note 1.

²² *Id.*

²³ Donald & Redfield, *supra* note 10.

²⁴ Artika Tyner, *Unconscious Bias, Implicit Bias, and Microaggressions: What Can We Do about Them?*, American Bar Association (Aug. 26, 2019), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2019/july-august/unconscious-bias-implicit-bias-microaggressions-what-can-we-do-about-them/.

²⁵ *Id.*



a. Studies on Race, Attorney Influence, and Bankruptcy Chapter Choice²⁶

- i. **Study 1-** The study used data collected by the Consumer Bankruptcy Project (“CBJ”) in a large-scale survey from a national random sample of bankruptcy cases filed in 2007. The study suggested that African Americans were approximately twice as likely to file Chapter 13 as non-African American debtors.²⁷
 1. The data collected by the CBJ is obtained through official court records, a written questionnaire, and a telephone interview, with race being determined solely through the written questionnaire.²⁸
 2. The study controlled for a variety of factors including financial characteristics (such as income, assets, debts, homeownership, foreclosure threats, informal attempts to renegotiate debts), demographic characteristics (such as marital status, living situation, number of dependents, education), and local legal culture (such as chapter choice trends in various judicial districts).²⁹
 3. The racial gap in the filing of chapter 13 cases was reduced by the control variables, but did not eliminate the gap.³⁰
 4. Weaknesses of the Study- There was a 53% nonresponse rate from the surveys mailed. No race data on non-respondents.³¹
- ii. **Study 2-** An experimental vignette study which utilized a national random sample of attorneys practicing consumer bankruptcy suggested that attorneys were more likely to recommend a chapter 13 filing for a fictional couple when there were cues suggesting that the couple was African American.
 1. A mail survey was sent to a random sample of attorneys throughout the United States. The survey provided information

²⁶ Jean Braucher, et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393 (2012).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

about a fictional couple and their financial situation, and requested the attorney to make a recommendation on bankruptcy chapter choice. The facts regarding the couple's finances were the same in all surveys. However, there were differences in the name and church affiliation of the couples as follows: (1) in one-third of the surveys the fictional couple was named "Todd and Allison" who attended church at First United Methodist Church; (2) in one-third of the surveys the fictional couple was named "Reggie and Latisha" who attended church at Bethel A.M.E.; and (3) in one-third of the surveys the fictional couple's initials of "R. and L." were provided and they were said to attended a "church."³²

2. The results indicated that attorneys recommended chapter 13 for the fictional African American couple 47% of the time, the fictional white couple 32% of the time, and the fictional couple who no racial information 36% of the time.³³
3. Weaknesses of Study- There was a 56% nonresponse rate from surveys mailed. Respondents only received one set of facts for a fictional couple, which doesn't necessarily account for how an attorney would respond when confronted with a variety of circumstances faced by debtors or when meeting debtors in-person.³⁴ Additionally, the study only tests attorney guidance as a mechanism for the racial gap, not accounting for other mechanisms such as "client self-selection of attorneys; ethical, religious or economic values that might lead African Americans to more frequently choose chapter 13; the role of other actors in the system such as bankruptcy judges and trustees and whether they influence attorneys to make racially disparate recommendations concerning chapter choice, and so on."³⁵

b. ProPublica Data Analysis on Bankruptcy and Race³⁶

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, ProPublica (Sept. 27, 2017), <https://projects.propublica.org/graphics/bankruptcy-data-analysis>.



- i. The data used included information provided by the Administrative Office of the Courts for consumer bankruptcy cases filed from 2008 – 2015 and local datasets from the W.D. of Tennessee and the N.D. of Illinois.³⁷ The race of debtors was inferred by zip code or census tract.
- ii. In analyzing chapter 7 and chapter 13 cases from 2008-2010 filed by debtors that lived in zip codes categorized as either “majority black” or “non-Hispanic white” zip codes, ProPublica found that debtors in black zip codes were twice as likely to have their bankruptcy case dismissed as debtors who lived in white zip codes.³⁸ The report purports to control for court district, income, and the debtors’ financial characteristics.³⁹ Additionally, the study found that debtors who lived in black zip codes were twice as likely to file under chapter 13 as debtors who lived in white zip codes.⁴⁰
- iii. The report indicated that in the Western District of Tennessee the dismissal rate of debtors who lived in black zip codes was over two times as high as debtors who lived in white zip codes and approximately 70% higher in chapter 13 cases specifically.⁴¹ Additionally, the report indicated that debtors who lived in black zip codes were two and a half times more likely to file under chapter 13 than debtors who lived in white zip codes.⁴² The report purports to control for court district, income, and the debtors’ financial characteristics.⁴³
- iv. The report indicated that in the Northern District of Illinois dismissal rates of debtors who lived in black zip codes was over four times as high as debtors who lived in white zip codes and approximately 70% higher in chapter 13 cases specifically.⁴⁴ Additionally, the report indicated that debtors who lived in black zip codes were approximately four times more

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*



likely to file under chapter 13 than debtors who lived in white zip codes.⁴⁵ The report purports to control for court district, income, and the debtors' financial characteristics.⁴⁶

- v. The report indicated that the primary factors contributing to the higher rate of Chapter 13 filings of African American debtors were the types of debts that a debtor is faced with such as mortgage loan, auto loan, court debt, and utility debt and attorney guidance in chapter choice selection.
- vi. Weaknesses of the Analysis- Determination of race by zip code or census tract. Inability to determine the impact of the type of debt as well as other factors and circumstances that contribute to chapter choice selection.

c. Ethical Complications

- i. The studies indicate disproportionalities in race and bankruptcy chapter selection and bankruptcy outcomes. The studies also suggest that implicit bias may contribute to the disproportionalities.
- ii. Implicit bias could negatively impact an attorney's ability to competently and diligently represent a client, to communicate with a client, and to not engage in behaviors that are prejudicial or discriminatory. Particularly, the results of the studies suggest that an attorney's implicit bias could impact the advice provided to a debtor by an attorney and the outcome of a debtor's bankruptcy case.
- iii. In order to comply with the requirements of competence pursuant to Rule 1.1 an attorney must have the requisite legal knowledge and skills necessary for the legal representation. Further, under Rule 1.3 and the Principles, an attorney should act with reasonable diligence and avoid prejudicial or discriminatory conduct. Additionally, pursuant to Rule 1.4 an attorney must communicate with a client to the extent reasonably necessary to enable the client to make an informed decision. These studies demonstrate that legal advice and an attorney's communications with a debtor could be inadvertently influenced by implicit biases and that an attorney could unintentionally engage in behaviors that are ethically problematic.

⁴⁵ *Id.*

⁴⁶ *Id.*



- iv. Attorney awareness of implicit bias is important given the significance of an attorney’s role in the justice system and in the lives of people. It is reasonable to believe that implicit bias impacts the practice of bankruptcy. Everyone has implicit biases and unconscious viewpoints. As such, bankruptcy attorneys, trustees, and judges also have implicit biases. These members of the bankruptcy community have an enormous influence on a debtor’s access to bankruptcy remedies as well as case outcomes.
- v. It is important to emphasize that this does not mean that members of the bankruptcy community are acting with an intention to treat people differently and it certainly does not suggest that such members are racist or any other words ending with “ist.”
- vi. This program seeks to bring awareness to members of the bankruptcy community about the ethical implications of implicit bias, the potential harms that implicit bias could have on the practice of bankruptcy, and to provide guidance on steps that could be taken to help an attorney comply with ethical requirements.

4) Reducing the Impact of Implicit Bias: How Can We Avoid Ethical Pitfalls?

a. Education, Awareness & Mindfulness

- i. An individual being motivated to behave fairly makes a difference.⁴⁷ Acknowledging that implicit bias exists is the first step to eliminating the impact of implicit bias.
- ii. Get tested! Become aware and be mindful of your own implicit biases. Measure implicit biases that you have by taking the Harvard Implicit Association Test at <https://implicit.harvard.edu/implicit/>. Project Implicit provides a variety of tests that measure implicit bias in a wide range of categories such as age, race, disability, gender, and more.
 - 1. IAT testing is a quick and easy way to identify implicit biases that you may have and not know about. The tests only take about ten minutes to complete and the results are provided immediately upon completion of the testing.
 - 2. An IAT test measures the speed of your response in pairing words and pictures to determine how comfortable you are with the

⁴⁷ Kang, *supra* note 1.



association.⁴⁸ For example, measuring the speed in which you connect the word “lawyer” with another word such as “good” or “bad.”⁴⁹

- iii. Learn more about implicit bias. Seek ways to become more educated on the subject matter. The American Bar Association Section of Litigation has an implicit bias initiative, which offers an extensive amount of materials for reading and review on implicit bias and ways to eliminate its impact in the legal community. For additional information, you can visit the website below.

<https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/>.

- iv. Consider obtaining implicit bias training.

b. Exposure

- i. Seek to engage in social contact across various social groups. This can have a positive effect on explicit and implicit bias.⁵⁰
- ii. Exposure to positive exemplars or counter-typical exemplars can also decrease bias.⁵¹ Being around individuals who are counter-stereotypic help to reinforce counter-stereotypic associations in the brain and cause the more typical stereotypes to be less accessible for use.⁵²

c. Approach

- i. Consider implementing procedural changes that can assist in disrupting the connection between implicit bias and discriminatory behavior.⁵³

⁴⁸ Donald & Redfield, *supra* note 10.

⁴⁹ *Id.*

⁵⁰ Kang, *supra* note 1.

⁵¹ *Id.*

⁵² Pamela Casey, Roger Warren, Fred Cheesman & Jennifer Elek, *Strategies to Reduce the Influence of Implicit Bias*, Horsley Laboratory Yale University, https://horsley.yale.edu/sites/default/files/files/IB_Strategies_033012.pdf (last visited Jan. 17, 2022).

⁵³ Kang, *supra* note 1.



1. Consider instances in which discretion may be limited to reduce opportunities for implicit bias or stereotypes to impact outcomes.⁵⁴ This may not always be possible or practical, but there could be opportunities to limit unnecessary cues that might prompt responses that are implicitly biased.⁵⁵
2. Be aware of confirmation bias when information is ambiguous and there is an opportunity to exercise discretion. People are more likely to rely on stereotypes in instances where information is ambiguous and there is an opportunity to exercise discretion.⁵⁶ Ask more questions when the information is unclear or ambiguous. Take action to clarify ambiguity as opposed to relying on gut reactions or intuitions. Take action to slow down the decision making process.
3. Be mindful of messaging.⁵⁷ Attempt to avoid actions that could send negative messages. For example, if you shake hands with anyone, then shake hands with everyone.⁵⁸ Always strive to treat others the way you would want to be treated.

The attached slides were provided by Terrance J. Evans, Partner, Duane Morris LLP, San Francisco, CA for his presentation titled *Navigating the Complex Past, Present, and Future of Diversity, Equity and Inclusion*.

Thank you for allowing us to use them.

⁵⁴ Donald & Redfield, *supra* note 10.

⁵⁵ *Id.* .

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*



Navigating the Complex Past, Present, and Future of Diversity, Equity, and Inclusion

PRESENTED BY

TERRANCE J. EVANS

PARTNER AT DUANE MORRIS LLP, PAST-PRESIDENT OF THE CHARLES HOUSTON BAR ASSOCIATION; CO-CHAIR AND CO-FOUNDER OF THE CLA RACIAL JUSTICE COMMITTEE;
DIRECTOR OF REGION IX OF THE NATIONAL BAR ASSOCIATION

Written Materials Prepared by Terrance J. Evans, Esq.

June 8, 2023

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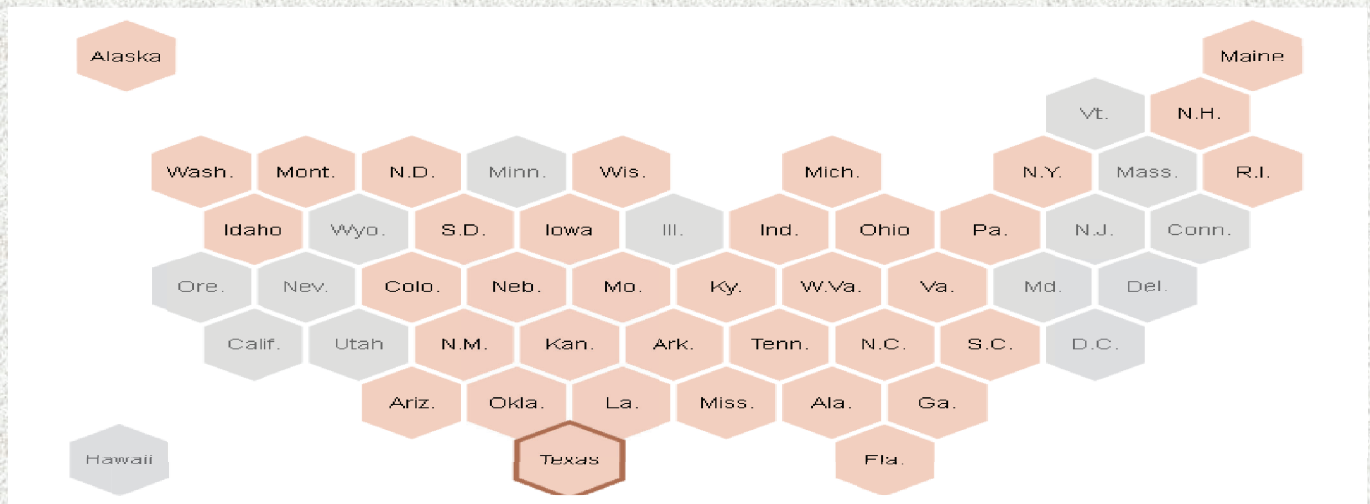
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Attempted Restrictions on Diversity and Inclusion Training as of May 5, 2023

The map below shows the 36 states where laws banning critical race theory and/or diversity and inclusion training have already passed or have been introduced in the state legislature

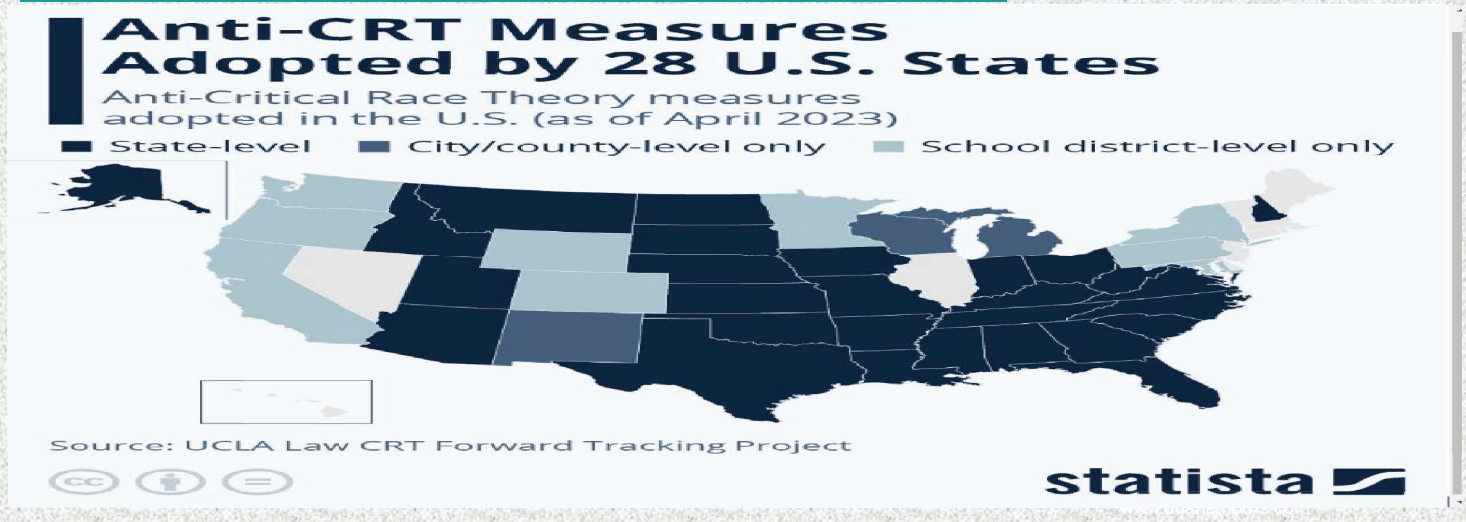
<https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism>



Actual Bans On Diversity and Inclusion Training as of June 8, 2023

The map below shows the 28 states where laws banning critical race theory and/or diversity and inclusion training have actually passed. It is worth noting that many of these laws have been expanded dramatically to include any discussion of LGBTQ issues, women's health issues or any subject that would make a certain group uncomfortable.

<https://www.statista.com/chart/29757/anti-critical-race-theory-measures/>



GOALS FOR TODAY'S DIVERSITY PROGRAM

- This program will explore the history of implicit bias in the legal profession and California jurisprudence, and will provide attendees with real life examples of implicit bias related to race, gender, sexual orientation and gender identity. Additionally, attendees will be provided with strategies for recognizing and addressing implicit bias when it arises.

What is Diversity & Inclusion?

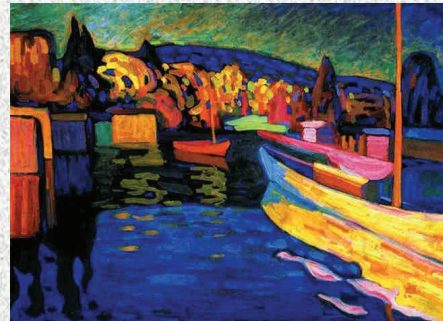
Diversity

Representation



Inclusion

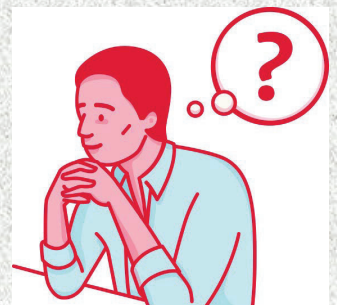
Equitable access to opportunities for success for all



Implicit Bias

What is implicit bias?

Implicit biases, also known as unconscious biases, underlie the attitudes and stereotypes that people may unconsciously attribute to another thing, person, or group that may impact how they understand and engage with a person or group.



Implicit Bias

What are types of implicit bias?

➤ *Examples (not exhaustive)*

Affinity bias is a tendency to connect with people who share similar backgrounds, experiences, or interests. In other words, people may act favorably toward those they know or who resemble them.



**Affinity
Bias**

Implicit Bias

What are types of implicit bias?

➤ *Examples (not exhaustive)*

Confirmation bias is an inclination to favor information that confirms beliefs. Individuals may draw conclusions about a person or situation based on personal beliefs or attitudes rather than on unbiased merit.



**Confirmation
Bias**

Implicit Bias

What are types of implicit bias?

➤ *Examples (not exhaustive)*

Gender bias is the tendency to prefer one gender over another gender or to make assumptions about people because of their gender.



Implicit Bias

What are types of implicit bias?

➤ *Examples (not exhaustive)*

Name bias is the tendency to judge or give preference to people with certain types of names.



Name Bias

Implicit Bias

What are types of implicit bias?

➤ *Examples (not exhaustive)*

Racial bias is the tendency to stereotype members of a particular race. Racial bias and name bias can sometimes be intertwined.



Racial Bias

Implicit Bias

What are types of implicit bias?

➤ *Examples (not exhaustive)*

Ageism is the tendency to have negative feelings or beliefs about others based on their age.



Ageism

Implicit Bias “In the News”

The difference between “looting” and “finding” is often Black and White . . .



“A young man walks through chest deep flood water after *looting* a grocery store in New Orleans on Tuesday.”
(AP/Dave Martin)



“Two residents wade through chest-deep water after *finding* bread and soda from a local grocery store after Hurricane Katrina came through the area in new Orleans, Louisiana.”
(AFP/Getty Images/Chris Graythen)

Judicial Cannons

- Canon 1-- Uphold the integrity and independence of the judiciary;
- Canon 2 - Avoid impropriety and the appearance of impropriety in all activities;
- Canon 2(a) - Respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;
- Canon 3 - Perform the duties of judicial officer impartially and diligently;

Implicit Bias May Be A Factor In Underrepresentation & Attrition

- Harvard University has thoroughly researched the concept of implicit bias through their program called “Project Implicit.” The Project Implicit program offers an online test that anyone can take to measure the extent to which they have implicit bias. The test is available at: <https://implicit.harvard.edu/implicit/takeatest.html> .

Implicit Bias May Be A Factor In Underrepresentation & Attrition

I encourage everyone to visit the Harvard University “Project Implicit” page to self-evaluate the extent to which you may have implicit bias. It is nothing to be ashamed of. Everyone has some level of bias. The important thing is to acknowledge it, and to develop strategies address it. We should never allow implicit or unconscious bias to negatively impact our workplace or business relationships. We will now explore the concept of “confirmation bias.”

Suggestions For Promoting Diversity And Inclusion Within The Judiciary And The Legal Profession

Now that we have come to terms with the possibility that everyone—even minorities—have some degree of implicit bias, we must look at possible solutions.

Affirmative Steps For Recognizing & Mitigating Bias

1. Don't Walk on Eggshells – provide feedback in a consistent fashion.
2. Colorblindness is not a solution – Saying “I don't see color” is not only disingenuous, it means you choose not to see the whole person.
3. Understand and appreciate other people's culture, differences, etc.
4. If you stumble...recover.
5. Be more deliberate in decision-making.
6. Before you make a decision, ask whether your bias is influencing you in any way.



Affirmative Steps For Recognizing & Mitigating Bias

7. Don't attribute the failings of one person to an entire group.
8. Cultivate cross-group relationships. Cross-group relationships change your attitudes about people from different groups.
9. Work to combat your own biases.
10. Be an ally, mentor, sponsor.



Recent Diversity & Inclusion Issue In The News

- **The Harvard and University of North Carolina Affirmative Action Cases Pending Before the U.S. Supreme Court.**
 - How should the Court rule on these cases? <https://www.diverseeducation.com/leadership-policy/article/15291988/affirmative-action-on-the-chopping-block>
 - Is there any danger to People of Color if Affirmative Action is declared unconstitutional by the U.S. Supreme Court? <https://lnkd.in/gNzuF4Pp>
- **The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization***
 - How does the *Dobbs* decision threaten other privacy rights? <https://www.wired.com/story/scotus-dobbs-roe-privacy-abortion/>
 - Should people in Blue States care about abortion access in Red States? Why? <https://www.axios.com/2022/05/10/blue-states-abortion-protection-roe-supreme-court>
- **Critical Race Theory Laws**
 - What is the danger in whitewashing American history? <https://www.usatoday.com/story/news/education/2021/06/11/florida-education-board-strict-guidelines-us-history-critical-race-theory/7652613002/>
 - How do we combat miseducation in public schools and society regarding systemic racism, sexism, homophobia, transphobia, etc.? <https://www.theguardian.com/us-news/2021/jul/01/aclu-fights-state-bans-teaching-critical-race-theory>

Recent Diversity & Inclusion Issue In The News

- **Moore v. Harper – North Carolina and the “Independent State Legislature Theory.”**
<https://www.npr.org/2022/06/30/1107648753/supreme-court-north-carolina-redistricting-independent-state-legislature-theory>
 - How could empowering state legislatures with the ability to nullify the popular votes in their states in federal elections undermine our democracy? <https://www.brennancenter.org/our-work/research-reports/moore-v-harper-explained>
 - Could this potentially be the most impactful or dangerous voting rights case in American history? <https://lawandcrime.com/supreme-court/election-law-experts-sound-the-alarm-about-extremely-dangerous-voting-rights-case-the-supreme-court-just-agreed-to-hear/>
- **Florida, Florida, Florida!**
 - Don't Say Gay Law – <https://www.nbcnews.com/nbc-out/out-news/floridas-dont-say-gay-law-takes-effect-schools-roll-lgbtq-restrictions-rcna36143>
 - Gerrymandered Redistricting Targeting Black voters <https://floridaphoenix.com/2022/05/12/revised-complaint-desantis-congressional-redistricting-plan-targeted-black-voters/>
 - Florida Governor Removes State Attorney Who Refuses to Enforce Unconstitutional Laws <https://www.wesh.com/article/andrew-warren-desantis-suspension-response/40833106>
 - Florida passes the nation's first law restricting how employers talk about race at work <https://www.usatoday.com/story/money/2022/03/10/florida-law-diversity-crt-work/6991516001/>
 - Florida medical board moves to block gender affirming treatments <https://www.politico.com/news/2022/08/05/florida-gender-affirming-medical-treatment-ban-00050174>

Terrance J, Evans, Esq.

Partner at Duane Morris LLP;

Director of Region IX National Bar Association; Co-Chair &
Co-Founder of the CLARacial Justice Committee

Terrance J. Evans is a Partner in the San Francisco and Los Angeles offices of Duane Morris LLP, where he serves as the Co-Leader of the firm's [Banking and Financial Services](#) Practice. Mr. Evans is also the Co-Chair of the Duane Morris San Francisco Diversity and Inclusion Committee. His practice is focused on representing clients in federal and state trial and appellate courts across the United States including the United States Supreme Court. Mr. Evans also regularly counsels clients regarding racial justice and diversity and inclusion issues. He has led dozens of diversity trainings for judges, lawyers, law students, and members of the community around the United States.

Mr. Evans is the Immediate Past President of the Charles Houston Bar Association, the oldest Black Bar Association in California. He is the Co-Founder and Co-Chair of the CLA Racial Justice Committee; Immediate Past Chair of the Litigation Section of the California Lawyers Association; Co-Chair of the American Bar Association ICLC Diversity & Inclusion Committee, Member of the Bar Association of San Francisco Judicial & Finance Committees; Director of Region IX of the National Bar Association, and he is the first Black man elected to serve as a statewide representative on the Board of the California Lawyers Association. Mr. Evans has spoken at more than 180 diversity, equity, and inclusion programs and civil rights programs in partnership with more than 65 law schools, bar associations, colleges, universities, high schools, law firms, churches, and other organizations. Mr. Evans also frequently appears on national and local television and radio discussing issues ranging from the United States Supreme Court and California courts to important legislation and civil rights issues.

In 2016, Mr. Evans was honored by the National Bar Association as one of the top African American attorneys in the USA under age 40. In 2017, he was honored by the Charles Houston Bar Association for his work promoting diversity and inclusion in the legal profession. In 2018, Mr. Evans was honored by the Minority Bar Coalition for his contributions to promoting diversity and inclusion throughout California. In 2019, Mr. Evans was honored by New Dawn Vallejo for his work promoting diversity and inclusion and pro bono legal services. In 2020, Mr. Evans was recognized by Chambers for his efforts to promote diversity and inclusion throughout the United States. In 2021, Mr. Evans was honored by the Bar Association of San Francisco and Justice and Diversity Center for his diversity and inclusion work in Northern California and throughout the United States. In 2021, Mr. Evans was also honored by American Lawyer Magazine as a Trail Blazer.

In 2022, Mr. Evans was honored by the Los Angeles Times as being one of the foremost leaders on diversity, equity, and inclusion issues in the State of California. In 2022, Mr. Evans was also honored by the Minority Bar Coalition for a second time for his efforts to promote diversity, equity, and inclusion throughout the United States. During his legal career, Mr. Evans has raised more than \$500,000 for scholarships for underprivileged students. Mr. Evans has also created five annual scholarship that have provided tens of thousands of dollars to under privileged students in the Asian, Black, Hispanic, Native American, and LGBTQ Communities.

