Ethics, Cultural Competence, and Implicit Bias in the Legal Profession

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Sherri Nicole Thomas, JD
Associate Dean of Institutional Climate and Equity
Law Library Assistant Director
Professor of Law Librarianship
University of New Mexico School of Law
Objectives

After participation in the session, learners should be better able to:

- Define areas in which lawyers should consider aspects of diversity and cultural values in their work
- Define implicit bias and how it may impact representation of clients
- Compare and contrast how implicit bias plays a role in the health and legal professions
- Discuss strategies for mitigating the effects of implicit bias
Ground Rules

For respectful discussions, can we agree to:

• Own our own actions
• Be respectful of others
• Be grateful to those who are willing to share their own biases
• Keep personal stories in this space
Diversity in the Legal Profession

- Remains one of the least diverse professions - “slow trickle upward”
- Lawyers of color continue to leave firms at a disproportionate rate
- Despite advances for minority lawyers, progress is uneven among the different racial/ethnic groups
- Minority women still have fewer successes than white women, even though women overall are taking more partnership and leadership roles

National: Minority Corporate Counsel Association – 2018 Diversity Report
22.7% of equity partners are women
2% of equity partners are women of color
NAWL (2017): “no appreciable progress” in the rate at which firms have been promoting women to equity partner since 2006
Gender pay gap: Women equity partners earn 90% of what a typical male equity partner makes
Why should we care about diversity statistics?
Diversity Makes You Brighter: NY Times Op-Ed

- Research shows that diversity improves the way people think
- Diversity "disrupts conformity" prompting people to scrutinize facts, think more deeply and develop their own opinions
- Stock study (calculate accurate prices for simulated stocks)
- Diverse groups were 58% more accurate; homogenous groups more likely to fall for the wrong idea
- "Ethnic diversity is like fresh air: It benefits everyone who experiences it"
How Diversity Makes Us Smarter: Scientific American

- Being around people who are different from us makes us more creative, more diligent and harder-working
- “[s]imply interacting with individuals who are different forces group members to prepare better, to anticipate alternative viewpoints and to expect that reaching consensus will take effort.”
- Diversity enhances creativity; leads to better problem-solving
- Solve the murder mystery exercise – groups with racial diversity significantly outperformed groups with no racial diversity
- ”Being with similar others leads us to think we all hold the same information….which hinders creativity and innovation”
Video & Discussion


• After watching this video, how would you define implicit bias?
• Was there anything that surprised you in the video?
• How do you think this video relates to your professional responsibilities?
Some Dimensions of identity that are important to consider

- Ethnicity
- Race
- Gender
- Gender Identity
- Sexual Orientation
- Religion
- Disability
- National Origin
- Immigration Status
- Language Barriers
- Age
- Marital Status
- Socioeconomic Status
- Thinking/Learning Styles
- Education Attainment
- Familiarity with Legal System
Important concepts for Lawyers to Understand

• Cultural Competence
  • Cultural and linguistic competence is a set of congruent behaviors, attitudes, and policies that come together in a system, agency, or among professions that enables effective work in cross-cultural situations.

• Microaggressions –
  • A statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group such as a racial or ethnic minority.
Important Concepts for Lawyers to Understand

• Cultural Humility –
  • ability to maintain an interpersonal stance that is other-oriented (or open to the other) in relation to aspects of cultural identity that are most important to the [person].”

• Language Access –
  • The understanding that English proficiency can act as a barrier to societal and governmental programs or activities.

• Disparity in Access to Courts –
  • The understanding that factors related to one’s culture can act as a barrier to an individual’s ability to use our court system to seek redress.
“The ability to distinguish friend from foe helped early humans survive, and the ability to quickly and automatically categorize people is a fundamental quality of the human mind. Categories give order to life, and every day, we group other people into categories based on social and other characteristics. This is the foundation of stereotypes, prejudice and, ultimately, discrimination.”

Tolerance.org, Hidden Bias: A Primer
Defining Implicit Bias

• Also known as unconscious bias or hidden bias.
• Explains why discrimination persists even though research clearly shows that people oppose it.
• Much of our social behavior is driven by learned stereotypes that operate automatically — and therefore unconsciously — when we interact with other people.
• Implicit biases often have a stronger effect on behavior than explicit biases.
• Malleable
• EVERYONE HAS THEM
Three Types of Racism

- Institutionalized racism
- Personally mediated racism
- Internalized racism
Institutionalized racism

- Initial historical insult
- Structural barriers
- Inaction in face of need
- Societal norms
- Biological determinism
- Unearned privilege
Personally mediated racism

- Intentional
- Unintentional
- Acts of commission
- Acts of omission
- Maintains structural barriers
- Condoned by societal norms
Internalized racism

- Reflects systems of privilege
- Reflects societal values
- Erodes individual sense of value
- Undermines collective action
Personally Mediated Racism - Bias

- Prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair
- Implicit and explicit biases are related but distinct
Implicit Bias & Institutionalized Racism

• Implicit biases, explicit biases, and structural forces are mutually reinforcing
• Create barriers that impede access to opportunity across many critical life domains such as employment, housing, education, health, and criminal justice
Implicit Bias in the LEGAL WORLD

Implicit bias can affect every decision point in your practice.

- Prosecutorial discretion
- Client selection
- Judicial opinions
- Sentencing
- Lending decisions
- Risk assessment
- Jury selection
- Witness credibility

- Recruitment, retention, promotion
- Relationships with colleagues
- Assessing policy
- Client communication
Humans have at least 2 cognitive systems:

- Conscious, controlled, and effortful processing of stimuli that produces explicit beliefs and attitudes
- Rapid, effortless and automatic application of implicit knowledge, beliefs, attitudes and skills that have been stored in long-term memory
Implicit Bias and CREDIBILITY

You are deposing a 56 year old Anglo female doctor. She explains that in June 2015, a 32 year old Latino male presented to her clinic as a new patient for “back pain.” The doctor states that she walked into the examination room and met a man that appeared to be his stated age. He was wearing baggy jeans and a t-shirt. He had multiple tattoos on his arms and neck and smelled of cigarette smoke. The doctor recalls that she asked, “How can I help you today?” She says that the patient responded, “Nobody wants to help me with this back pain, doc.” After a 15-minute examination, she told the patient to use over-the-counter medications and that she could not prescribe painkillers.
Implicit Bias and CREDIBILITY

• Do you have any conscious biases that you immediately recognize as you hear this testimony?
• Are any of your implicit biases stirring?
• Do you believe the doctor’s rendition of the story?
Diversity = Greater Client Trust

• When lawyers and clients come from different backgrounds and cultural viewpoints, they often have a more difficult time creating a trusting lawyer-client relationship in which both parties feel comfortable sharing honest and accurate information.

• Not only lawyers who work in pro bono settings, such as legal clinics, but also lawyers who work at law firms with paying clients would benefit from an increased cross-cultural competency.
  • Pro bono clients who have experienced trauma
  • International clients
Implicit Bias and the Potential New Client

- The first meeting = gaining trust, building rapport
- Implicit biases can impede an attorney’s ability to establish rapport through
  - Unevenness in eye contact
  - Leaning back
  - Looking down while taking notes
  - Tone of voice
  - Demeanor and body language
  - Facial expressions

The Potential New Client #1

A 62 year old African American female comes by to a law firm wanting to form a new nonprofit corporation to provide screen and education to people with asthma. The lawyer asks an exhaustive list of questions after which she recommends that the potential new client prepare a business plan, recruit board members, and then return to determine whether the firm will represent her.
A 62 year old White male comes by appointment to a law firm wanting to form a new nonprofit corporation to provide screen and education to people with asthma. The lawyer asks a few questions after which she offers the potential client a checklist for nonprofit formation and begins the paperwork for the firm to represent him.
Implicit Bias in the Courts

• Study of 1500 federal judges controlling for experience, partisanship, qualifications, and jurisdiction found that African American judges were 10% more likely to be overturned on appeal (Sen, 2015).

• Study of 2500 votes by 224 federal judges found judges with daughters have a 7% increase in the proportion of cases voted in a “feminist direction” (Glynn & Sen, 2015).

• Study of implicit bias in public defenders’ triage process found consequences to evidence evaluation, client interactions, and acceptance of punishments (Richardson & Goff, 2013).
Implicit Bias in Client Representation

• Libgober, 2019:
  Controlled experiment comparing criminal defense lawyers callback rates to potential clients with African American and White names who sent identical emails (Whites received 50% more callbacks than African Americans in California but not Florida)
Implicit Bias has Many Forms

Factors Activating Implicit Biases

- high ambiguity
- time constraints
- stress

Positive Bias
“Research about implicit bias helps us to better understand the disconnect between our society’s ideal of fairness for all people and the continued reality of its absence.”

– John A. Powell, Professor of Law, University of California Berkeley

Source: Kirwan Institute’s 2016 State of the Science: Implicit Bias Review
Implicit Bias in Hiring

• Bertrand & Mullainathan, 2004:
  Controlled experiment comparing interview callback rates for African American and White names with identical resumes (Whites received 50% more)

• Pager, Western, & Bonikowski, 2009:
  Field interview study comparing low-wage job offers for African American and White applicants (African American applicants with no criminal record offered jobs at the same rate as White applicants with criminal records)
Tools and Strategies for Addressing Implicit Bias

- Awareness
- “Feel” the bias
- Well-thought out behaviors and decisions
- Reflect with colleagues
Implicit Association Tests

- Collaborative research effort between researches at Harvard, University of Virginia and University of Washington

- Use reaction time measurement to examine unconscious bias

First step in decreasing discrimination and thereby decreasing health disparities is to recognize our individual biases. The IAT can be a starting point.
Preliminary Information

On the next page you'll be asked to select an Implicit Association Test (IAT) from a list of possible topics. We will also ask you (optionally) to report your attitudes or beliefs about these topics and provide some information about yourself.

We ask these questions because the IAT can be more valuable if you also describe your own self-understanding of the attitude or stereotype that the IAT measures. We would also like to compare differences between people and groups.

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Important disclaimer: In reporting to you results of any IAT test that you take, we will mention possible interpretations that have a basis in research done (at the University of Washington, University of Virginia, Harvard University, and Yale University) with these tests. However, these Universities, as well as the individual researchers who have contributed to this site, make no claim for the validity of these suggested interpretations. If you are unprepared to encounter interpretations that you might find objectionable, please do not proceed further. You may prefer to examine general information about the IAT before deciding whether or not to proceed.

You can contact our research team (implicit@fas.harvard.edu) or Harvard's Committee on the Use of Human Subjects (cuhs@harvard.edu) for answers to pertinent questions about the research and your rights, as well as in
What Can We Do About Unconscious Bias?

• Awareness of the concept of unconscious bias is the first step

• Begin to “feel” the bias and take steps to modify behavior

• Create an environment that allows for behaviors and decisions to be well-thought out and not time pressured

ADDRESSING IMPLICIT BIAS

- Mindset: Be humble
- Slow down: High emotional state + need for speed = reliance on implicit judgments
- Internal motivation: You actually just want to be fair
If I think about whether I am biased...

If-When I think about **whether** how I am biased...

Trust your gut       Verify with your brain
“FLIP IT TO TEST IT”

https://www.youtube.com/watch?v=Bq_xYSOZrgU
4 Steps for Busting Unconscious Bias

https://www.youtube.com/watch?v=K-n7el87Dmo
Practice Cultural Humility

- Tervalon & Murray-Garcia (1998)
- Make a lifelong commitment to self-evaluation and self-critique
- Recognize and address power imbalances
- Develop partnerships and work for systemic change
“If you asked me to name the greatest discoveries of the past 50 years, alongside things like the internet and the Higgs particle, I would include the discovery of unconscious biases and the extent to which stereotypes about gender, race, sexual orientation, socioeconomic status, and age deprive people of equal opportunity in the workplace and equal justice in society.”

Dr. Nancy Hopkins, Boston University’s 141st Commencement Address, May 18, 2014
Kirwan Institute State of the Science: Implicit Bias Review 2015 – Myth #1

MYTH: Implicit bias is nothing more than beliefs people choose not to tell others. They know how they feel; they just know they cannot or should not say those beliefs aloud, so they hide them.

- Implicit biases are activated involuntarily and beyond our awareness or intentional control. Implicit bias is concerned with unconscious cognition that influences understanding, actions and decisions.
MYTH: I am fully aware of my thoughts and actions, and I make all of my decisions based on facts and evidence; therefore, implicit bias does not affect my behavior.

- Researchers have found that sometimes implicit associations can more accurately predict behavior than explicit beliefs and thoughts.
MYTH: If bias is natural, there is obviously nothing we can do about it.

- Unwanted implicit biases can be mitigated. Researchers have demonstrated the efficacy of various intervention strategies, such as intergroup contact, perspective-taking, and exposure to counter-stereotypical exemplars. By taking the time to understand your personal biases, you can begin to mitigate their effects.
Reflection: What will you do differently after today’s session?