

# Minimizing Implicit Bias

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## Reducing Bias

1. Participate in training that acknowledges and promotes an appreciation for group differences and multi-cultural viewpoints.
2. Identify distractions and sources of distress in the decision making environment, and remove or reduce them.
  - a. Effective law office management
  - b. Effective meeting and conferring and other stress/work reduction techniques
  - c. Civility
  - d. Embrace effective caseload management efforts by the court
3. Identify sources of ambiguity in decision making and establish more concrete standards before engaging in the decision-making process.
  - a. Avoid subconsciously allowing shortcuts to affect decisions, e.g. stereotypes.
4. Institute feedback mechanisms that are objective, transparent and easily perceived as fair measures.
5. Seek familiarity by increasing exposure to stigmatized group members and counter-stereotypes, and reduce exposure to stereotypes. In other words, seek group members who contradict the social stereotype. Increase inclusivity in your recruitment and hiring process by having a diverse team engaged in the resume review and interview processes, for example.
6. Use, and maintain quality control of, your processes.
  - a. Start with a clean state
  - b. Challenge the status quo
  - c. Seek multiple perspectives
  - d. Search for more information and data
  - e. Play Devil's Advocate
  - f. Reflect on your own views and values

## Bias and the Law

### Rules of Professional Conduct

#### CA Rule of Professional Conduct 2-400

- ❖ ... (B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability, in:
  - (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
  - (2) accepting or terminating representation of any client

## Bias as an Element of Crime

CALCRIM 523 (First Degree Murder: Hate Crime (Pen. Code, § 190.03))

- ❖ “1. The defendant was **biased** against the other person based on the other person's actual or perceived (disability[,]/ [or] gender[,]/ [or] nationality[,]/ [or] race or ethnicity[,]/ [or] religion[,]/ [or] sexual orientation[,]/ [or] association with a person or group having (this/one or more of these) actual or perceived characteristic[s]);
- ❖ AND
- ❖ 2. The **bias** motivation caused the defendant to commit the alleged murder.”
- ❖ (Defines or clarifies *disability, gender, nationality, race or ethnicity, religion, sexual orientation, and association with a person or group with (this/one or more of these) actual or perceived characteristic[s]*, but **not bias**.)

CALCRIM 761 (Death Penalty, Duty of Jury [in Penalty Phase])

- ❖ “Do not allow bias, prejudice, or public opinion to influence your opinion in anyway.”

CALCRIM 902 (Assault on Military Personnel (PC § 240,241.8))

- ❖ “...bias caused the alleged assault.”

## Case Law Defining Bias.

### People v. Hughes (1961)

- ❖ “... the existence of a *state of mind* on the part of the juror in reference to the case, or to either of the parties, *which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party*,... [Emphasis added].” 57 Cal 2d 89, 95 (*former PC § 1073*; definition not replaced in CCP 228 – 230).

### Ensher, Alexander & Barsoom, Inc. v. Ensher (1964)

- ❖ “Bias or prejudice consists of a mental attitude or disposition of the judge towards a party to the litigation. In order for a judge to be disqualified, the prejudice must be against a party and sufficient to impair the judge's impartiality so that it appears probable that a fair trial cannot be held.” 225 Cal. App. 2d 318, 322.

### Marriage of Fenton (1982)

- ❖ “... fixed, anticipatory prejudgment...” 134 Cal.App.3d 451, 457

### People v. Hernandez (1984)

- ❖ “... bias or prejudgment...” 160 Cal. App. 3d 725, 747
- ❖ “Lacks and/or appears to lack “fairness”” *Id.*, at 747-748

## Federal Civil Rights Violations

- 42 U.S.C. § 1983
- Applies to government entities and employees.
- CACI Instructions 3000 – 3051.

## UNRUH Civil Rights Act, and Related Statutes

- Civil Code §§ 51 – 53.7
- “... all business establishments of every kind whatsoever” (§ 51(b).)
- CACI Instructions 3060 – 3069.
- Query: Is this liability insurable?

## Reading List

1. Casey, Warren, Cheesman, and Elek, *Helping Courts Address Implicit Bias: Resources for Education* (2012), Williamsburg, VA: National Center for State Courts (NCSC). (Full report of NCSC’s project on implicit bias and judicial education. For a summary, see “NCSC, Strategies [etc.], below on this list.) [www.ncsc.org/ibreport](http://www.ncsc.org/ibreport)
2. Harvard, *Implicit Attitudes Test [IAT]*, (Undated), Cambridge, MA: Harvard University. (Self-test from Harvard’s “Project Implicit.” Self-description: “The IAT measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)”.) <https://implicit.harvard.edu/implicit/takeatest.html>.
3. Karnow, Curtis E.A., *Cognitive Fallacies Reading List* (2015); *Deciding* (2015); and *The Adversarial System, Three Lemons, and Cocaine: The Role of Confirmation Bias* (2014), San Francisco, CA. All available at [https://works.bepress.com/curtis\\_karnow/](https://works.bepress.com/curtis_karnow/), find sub- title “Decision making,” select article of choice.
4. LexisNexis, Maggiore-Anet, David, *Elimination of Bias in the Legal Profession* (2013). (Presentation for educational purposes by LexisNexis.) <http://www.acc.com/chapters/sandiego/upload/elimination-of-bias-3.pdf>
5. NCSC, *Strategies to Reduce the Influence of Implicit Bias* (2012), Williamsburg, VA: NCSC. (Summarizes the’ (NCSC’s) project on implicit bias and judicial education.) [http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB\\_Strategies\\_033012.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx)
6. USC Marshall School of Business, *How to Reduce Bias in Decision-Making* (2014), Los Angeles, CA: University of Southern California. (One element of USC Marshall’s “Critical Thinking Initiative” training.) <http://info.marshall.usc.edu/faculty/critthink/Supplemental%20Material/Reducing%20Bias.pdf>

## Viewing List

If you have access to LinkedIn Learning via your firm or a Premium Account, they have a variety of courses on bias, inclusivity, and more. Here are a few to get you started.

1. Uncovering Unconscious Bias in the Recruiting and Interviewing Process, Dr. Tana Session  
<https://www.linkedin.com/learning/uncovering-unconscious-bias-in-recruiting-and-interviewing?u=0>
2. Unconscious Bias, Stacey Gordon  
<https://www.linkedin.com/learning/unconscious-bias?u=0>
3. Fighting Gender Bias at Work, LeanIn.org  
<https://www.linkedin.com/learning/fighting-gender-bias-at-work?u=0>
4. Becoming a Male Ally at Work, Emilie Aries  
<https://www.linkedin.com/learning/becoming-a-male-ally-at-work?u=0>
5. Confronting Bias: Thriving Across Our Differences, Verna Meyers & Arianna Huffington  
<https://www.linkedin.com/learning/confronting-bias-thriving-across-our-differences/introduction-by-arianna-huffington?autoplay=true&resume=false&u=0>
6. From Bystander to Upstander, Catherine Mattice  
<https://www.linkedin.com/learning/bystander-training-from-bystander-to-upstander?u=0>