

## Addressing implicit bias starts with looking at 'The man in the mirror'

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To be an active member of the bar, every California attorney must devote at least two hours every three years to the study of Elimination of Bias in the legal profession. As part of mandatory continuing legal education (MCLE), each of us must learn how to recognize and eliminate bias based on sex, color, race, religion, ancestry, national origin, physical disability, age, sexual orientation, or other protected characteristics.

We must also spend one MCLE hour focused on "implicit bias." This includes learning about bias-reducing strategies designed "to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system."

Whether intentional or implicit, bias can change the dynamics of the legal process. It can influence the way proceedings are handled, the way people are treated, and the way decisions are made. Bias can affect anything in the system that deals with people - essentially everything in the legal system. Those who believe themselves or others to be victims of bias will view the system as unjust and illegitimate.

Fighting against bias is always a noble pursuit. Lawyers are the embodiment of a system whose overarching purpose is to ensure that



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all people are treated fairly and that justice is done. Bias has no place in such a system. Justice cannot be achieved when the scales are not evenly weighted.

But here's the reality: Bias is an inherent part of the legal profession (and every other profession on this planet). It cannot and will not ever be eliminated. Even if the required MCLE bias hours were doubled or tripled, we would still have bias in the legal system. So do we continue trying to address bias within the system, or do we simply accept the fact that we operate within a flawed system?

The answers are yes and yes.

### Intentional bias - Bad

Unlike blood pressure or infection, no standardized test exists for bias. What happens inside a person's mind is usually a mystery to those around them, and often to themselves. We may make assumptions about a person's thoughts and beliefs based on behavior, facial expressions or body language, but unless they put out clear signals that bias is present, these can only be conjectures.

But sometimes bias is intentional and overt. When a person uses derogatory language toward others or treats them in a markedly different way, bias can be easy to identify

and address. A coworker who uses the "N" word toward another employee or who posts homophobic slurs on a company website is making clear his or her animus. Discipline against that employee should not be a difficult choice for the employer; a lawsuit by the targeted employee may be an easy decision.

Is intentional bias a problem in the legal profession? There may not often be offensive conduct or racial slurs, but intentional bias can show itself in other ways. When underrepresented groups are passed over for assignments, promotions, and professional advancements, or when there is a correlation

between disparate outcomes and identity, this may be evidence of intentional bias. Such conduct should be identified and promptly addressed. Intentional bias has no place in our system.

### **Implicit bias - Neither good nor bad**

Most bias is neither blatant nor clear-cut, however. It is implicit, residing in our subconscious without our knowledge or understanding. It derives from our life experiences, our relationships, our beliefs, and our exposure to the world in which we live. Each of us views the world through a unique lens that filters light in a distinct way and colors how we see things.

Implicit bias is an intrinsic and important part of the human condition, an evolutionary necessity. If humans did not develop biases, they would likely not survive. From infancy on, we are conditioned to avoid harm; biases are a natural outgrowth of that conditioning. A child taught not to engage with strangers who look different may grow into an adult with a subconscious mistrust of people who are unfamiliar or visibly different.

However and whenever these biases may arise, they are buried deep within us. Because they operate on a subconscious level, we are not aware of when and how they affect our daily lives. Implicit bias is hidden and subtextual. Those who observe it may question their perception; those who act on the basis of such bias may not recognize it even when it is brought to their attention. Unlike overt bias, implicit bias provides no clear markers to follow.

### **Addressing implicit bias**

When we witness comments or ac-

tions that appear to be biased, how should we respond? Should we confront the alleged offender? If it's a colleague whose words we've heard or whose conduct we've observed, we may feel safe sharing our observations but we do so at the risk of creating conflict, awkwardness, and hurt feelings. But what if it's a judge? Do we risk offending them and putting a target on our own backs or the backs of our clients?

Legal professionals - both attorneys and judges - pride themselves on adhering to standards of fairness. We have been trained to uphold the law; anything less than the highest level of conduct is beneath us. Being told that we are biased is anathema to this self-perception. Our response to a bias charge is likely to be defensive and resistant: "I can't possibly be biased; I'm always even-handed and open-minded."

The natural reaction to an allegation of bias can be visceral and highly charged. Such an allegation goes to the very core of who we are, how we see ourselves. Because we have been taught and trained that bias is a bad thing, we may not be able to countenance the idea that we ourselves could be "guilty" of it.

### **Acknowledging implicit bias**

But what if we changed the conversation around bias? What if, instead of labeling implicit bias "bad" and targeting it for elimination, we took a step back and acknowledged the reality that everyone - including ourselves - is biased. When bias is a natural part of the human construct, it is neither good nor bad: It is simply one of the many limitations that we all must endeavor to overcome.

Perhaps the focus for MCLE should therefore be "Addressing Bias" rather than "Elimination of

Bias." Instead of stigmatizing implicit bias, attorneys should understand that implicit bias will always be with us in some form. While it cannot be realistically eliminated, it can be recognized and dealt with appropriately.

Recall that when jurors are questioned about their eligibility to serve on a panel, they are never asked if they can eliminate their biases. They are asked if they are capable of setting aside their biases to render a fair and considered decision. This is the most we can ask of any judge, juror, witness, or attorney involved in the legal process. Can they move beyond their biases to promote justice and fairness?

### **Addressing implicit bias**

A juror, witness, attorney or judge whose impartiality is called into question may be unlikely to examine their own mindset. They may become defensive and angry. Those who raise the bias flag may become frustrated and resentful.

If we remove the stigma around implicit bias, we can change the way we convey and receive information about our biases. Those who observe potential bias can share their perspective in a non-confrontational, informative way. Those who receive the information can do so with grace and gratitude. When we understand that implicit bias is not a problem to be solved but a puzzle to be explored, we become open to engaging in self-reflection. Imagine asking jurors or witnesses about specific relationships or experiences in their own lives. As they think back, they may identify incidents or events that impacted the way they now see things.

Legal professionals are not immune from such influences. When questioned about possible bias, we can lower defensive barricades

and raise a mirror in front of ourselves. Taking time for self-reflection can yield critical insights into our own mindsets and beliefs; it can unearth latent biases that affect how we do our jobs.

### **Conclusion**

The goal of MCLE training on implicit bias should not be its elimination. Instead we should be training attorneys to accept their implicit biases with grace and engage in self-reflection.

Michael Jackson may have said it best:

*I'm starting with the man  
in the mirror  
I'm asking him to change his ways  
And no message could've been  
any clearer  
If you wanna make the world  
a better place  
Take a look at yourself and then  
make that  
Change*

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