



Online CLE

# The Risky Business of Implicit Bias: Mitigating the Impact of Implicit Associations in Litigation

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## Chapter 4

# **Presentation Slides: The Risky Business of Implicit Bias: Mitigating the Impact of Implicit Associations in Litigation**

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Portland Skyline  
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# Oregon State Bar

## 27<sup>th</sup> Annual Litigation Institute & Retreat

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## *The Risky Business of Implicit Bias:*

# Mitigating the Impact of Implicit Associations in Litigation

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## Outline:

- Delineating Ways to Reduce the *Impact* of Implicit Bias
- Detailing the *Influence* of Implicit Bias in Litigation



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## Reducing the *Impact* of Implicit Bias

*Recognizing and countering our biases*



## Implicit Bias Defined (continued)

- “By definition, implicit biases are those we carry ***without awareness or conscious direction.***”
- “We can think of implicit bias as a lens through which we view the world—a lens which ***automatically filters*** how we take in and ***act on*** information, a lens that is ***always present.***”
- “Think of unconscious thought as the ***snap judgments*** we make every day.”
- “Implicit bias ***differs from suppressed thoughts*** that individuals may ***conceal for social desirability purposes.***”

Source: Kirwan Institute

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## Key Characteristics of Implicit Bias

- ***Unconscious and Automatic*** ~ activated without intention or control
- ***Not always aligned with explicit beliefs***
- ***Real-world effects on behavior*** ~ impacts actions and decisions across domains (e.g., employment, education, healthcare, criminal justice, etc.)
- ***Pervasive*** ~ everyone has implicit biases, even people who claim to be “colorblind” or “impartial”
- ***Malleable*** ~ can be replaced with new associations

Source: Kirwan Institute

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## We're All Biased

- “Bias is a *natural phenomenon* in that our brains are constantly forming *automatic associations* as a way to better and more efficiently understand the world around us.”

Source: Kirwan Institute



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## We're All Biased (continued)

- “If something is happening outside of awareness, how on earth do you fix it? The answer is that *we are not helpless in the face of our first impressions.* ... [J]ust because something is *outside of awareness doesn't mean it's outside of control.*”

Source: Gladwell, “Blink”

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## Is It Possible to Reduce the Impact of Implicit Bias?

- Yes! We have to become **aware** of our **implicit biases** and the **conditions that foster** those biases
- One way to become aware of our implicit biases is by taking one or more versions of the **Implicit Association Test**—we **cannot uncover** our implicit biases **through mere introspection**

Source: Kirwan Institute



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## Recognizing Our Implicit Biases

- The **Implicit Association Test** (IAT) can help us identify our biases
  - Available through *Project Implicit* at <https://implicit.harvard.edu/implicit/>
- Did you take any of the tests? If so, which ones?
  - Were you surprised by the results?



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## Implicit Association Test

- “[O]ur attitudes toward things like race or gender operate on *two levels*. First of all, we have our *conscious attitudes*. This is *what we choose to believe*. These are our stated values, which we use to direct our behavior deliberately. ... But the IAT measures something else. It measures our *second level of attitude*, our racial attitude on an *unconscious level*—*the immediate, automatic associations that tumble out before we’ve even had time to think*. We don’t deliberately choose our unconscious attitudes.”

Source: Gladwell, “Blink”

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## What Does the IAT Measure?

- “The giant computer that is our *unconscious silently crunches all the data it can from the experiences we’ve had*, the people we’ve met, the lessons we’ve learned, the books we’ve read, the movies we’ve seen, and so on, and it forms an opinion. *That’s what is coming out in the IAT.*”
- “We make connections much more quickly between *pairs of ideas* that are *already related in our minds* than we do between pairs of ideas that are unfamiliar to us.”

Source: Gladwell, “Blink”

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## What Does the IAT Measure (continued)

- IAT measures *relative strength of associations* between pairs of concepts  
*Source: Kirwan Institute*
- IAT helps to identify implicit biases by *measuring reaction time*
  - Sorting speed (how quickly we sort concepts and images) reflects how tightly we associate any two concepts
  - Quicker sorting = stronger associations*Source: UCLA Implicit Bias Video Series*

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## Implicit Association Test

- “The disturbing thing about the [IAT] is that it shows that our *unconscious attitudes may be utterly incompatible with our stated conscious values.*”  
*Source: Gladwell, “Blink”*



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## Conditions Fostering Expression of Our Implicit Biases

- Certain *emotional states*
- *Ambiguity*
- More easily accessible *social categories*
- *Low-effort cognitive processing*
- *Distracted or pressured decision-making circumstances*



Source: National Center for State Courts

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## Conditions Fostering Expression of Our Implicit Biases (continued)

- *Limited exposure to those different from us* can *increase* likelihood of *reliance on stereotypes*, rather than experience, to make judgments
- *Overconfidence* in your ability to make objective or inclusive decisions may make it *hard to correct for prejudice or bias*
- When there is *cognitive strain*, “the lazy System 2 will adopt the suggestions of System 1 and march on”

Source: Kirwan Institute

Source: Kahneman, “Thinking, Fast and Slow”

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## Mitigating Implicit Bias

- “Having biases doesn’t make you a bad person—it only makes you human. Fortunately, our ***implicit biases are not permanent; they can be changed.***”
- Take Action!
  - “The ***key isn’t to feel guilty about our [implicit] biases—guilt tends toward inaction.***”
  - “It’s to become ***consciously aware of them, minimize them*** to the greatest extent possible, and ***constantly check in with ourselves*** to ensure we are acting based on a rational assessment of the situation rather than on stereotypes and prejudice.” ~ Neill Franklin

Source: Kirwan Institute

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## Mitigating Implicit Bias (continued)

- Some ***strategies for reducing*** implicit bias:
  - Become aware of your biases (e.g., take several IATs)
  - Try to understand the perspective of others
  - Have meaningful interactions with people who are different
  - Monitor the information you take in (e.g., are you watching TV shows that reinforce stereotypes?)
- Because we can have “***illusions of remembering,***” we should take notes during meetings/interviews (e.g., judges, jurors, and attorneys should take notes during trials/hearings)

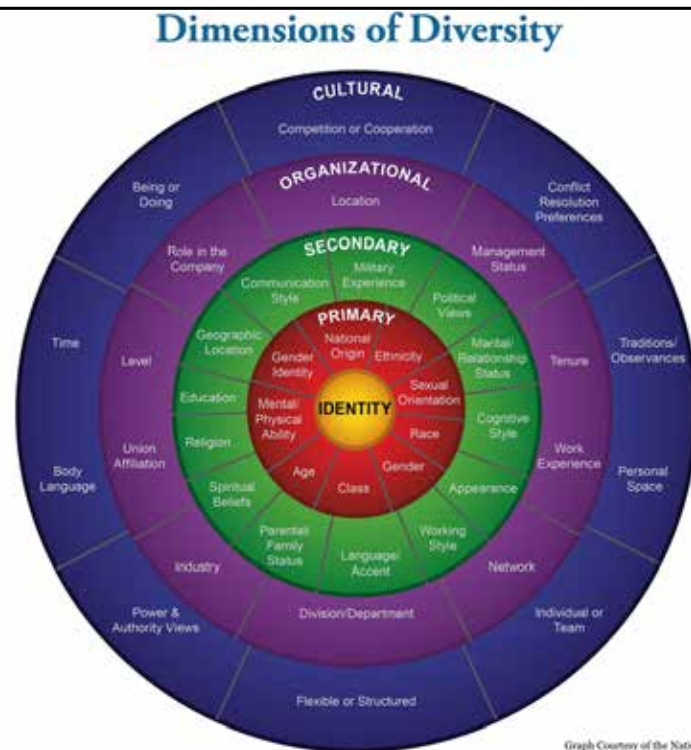
Source: Kirwan Institute

Source: Kahneman, “Thinking, Fast and Slow”

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# Mitigating Implicit Bias (continued)

- View others from the various *dimensions of diversity*



Graph Courtesy of the National Diversity Council and DiversityFIRST™ Certification Program

Source: Adapted from *Workforce America* by Marilyn Loden and Judy Rotener, 1991; *Diverse Teams at Work* by Lee Flannery and Judith Bopp, 2005; and *Global Diversity: The New Secret to Loden's Diversity Wheel* by Kristoffer Looi and Barbara Teare, 2010.

## Mitigating Implicit Bias ~ Practical Example

- Micro-affirmations ~ opposite of micro-aggressions
  - “Micro-affirmations are tiny acts of *opening doors to opportunity, gestures of inclusion and caring, and graceful acts of listening.*”
  - “Many micro-inequities are not conscious—but *affirming others* can become a conscious as well as unconscious practice that prevents unconscious slights.”

Source: *Mindfulness at Work*

## Mitigating Implicit Bias ~ Practical Example (continued)

- Examples of micro-affirmations
  - Saying hello
  - Introducing people to each other
  - Listening without interrupting
  - Acknowledging and making sure you fully understand someone's idea or opinion
  - Acknowledging someone's good work to others

*Source: Mindfulness at Work*

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## Models for Mitigating Implicit Bias

- **Mindset** = be humble; be mindful
- **Debiasing** = use counter-measures to scrub our brains of implicit biases, which are malleable
- **Decoupling** = breaking the causal link between bias and behavior

*Source: UCLA Implicit Bias Video Series*

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## Models for Mitigating Implicit Bias

- Raise awareness through **training**
- Acknowledge **differences**
  - Being “colorblind” does NOT address implicit biases
- Check your **decisions** and **thoughts routinely**
  - Do not rely solely on intuition/gut
- Eliminate **stressors** and **distractions** during the decision-making process
- Establish concrete standards **before** making decisions
- Increase your **exposure** to members of “out” groups
- Ask for **feedback**

Source: National Center for State Courts

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## Models for Mitigating Implicit Bias

### ● I.N.C.A.S.E.

- **I = Increase knowledge** ~ change implicit associations through education and exposure
- **N = Narrative guidance** ~ debunk stereotypical myths
- **C = Cultural humility** ~ seek self-awareness and recognize intersectionality of others
- **A = Active bystander** ~ challenge bias against others
- **S = Safe space** ~ be intentional to create safe spaces for critical conversations about race [and other dimensions of diversity]
- **E = Empowerment** ~ recognize others as experts regarding their own worlds

Source: Kirwan Institute

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# Models for Mitigating Implicit Bias

## ◎ P.A.U.S.E.

- ◎ **P** = *pay attention* to what's actually happening, beneath the judgments and assessments
- ◎ **A** = *acknowledge* your own reactions, interpretations, and judgments
- ◎ **U** = *understand* the other possible reactions, interpretations, and judgments that may be possible
- ◎ **S** = *search* for the most constructive, empowering, or productive way to deal with the situation
- ◎ **E** = *execute* your action plan

Source: Ross

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# *Influence of Implicit Bias in Litigation*

*How implicit biases may affect litigation outcomes*

## Implicit Bias in American Courts

- ◎ American Bar Association, *Hidden Injustice: Bias on the Bench*
  - ◎ <https://vimeo.com/165006635>
- ◎ Additional ABA Videos (for review at your convenience)
  - ◎ *Hidden Injustice: The Prosecutor's Paradox*
    - ◎ Available at <https://vimeo.com/176681786/5a69f94cf3>
  - ◎ *Hidden Injustice: Toward a Better Defense*
    - ◎ Available at <https://vimeo.com/175897153/891b9eacde>

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## Implicit Bias in American Courts (continued)

- ◎ Despite state court efforts to address racial and ethnic fairness, “**public skepticism** that racial and ethnic minorities receive consistently fair and equal treatment in American courts remains **widespread**.”
  - ◎ One explanation for this disconnect may be **implicit bias**

*Source: National Center for State Courts*

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## Implicit Bias in American Courts (continued)

- ◎ Implicit bias “leaves open the possibility that *even those dedicated to the principles of a fair justice system may, at times, unknowingly make crucial decisions and act in ways that are unintentionally unfair.*”

Source: National Center for State Courts

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## Implicit Bias in American Courts (continued)

- ◎ Some *judges*, who “have worked hard to eliminate *explicit bias* in their own decisions and behaviors, *assume that they do not allow racial prejudice to color their judgments.*”
- ◎ “[W]hen judges are aware of a *need to monitor* their own responses for the influence of implicit racial biases, and are *motivated to suppress* that bias, they appear able to do so.”
  - ◎ But they need more than motivation to be fair – they must take “*concrete steps*” to reduce the influence of implicit biases

Source: National Center for State Courts

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# Implicit Bias in American Courts (continued)

- Implicit Bias Bench Card
  - Available at <https://courts.michigan.gov/Administration/SCAO/Documents/General-Administrative/MN-ImplicitBias.pdf> (Minnesota)
  - See also <https://bostonbar.org/docs/default-document-library/combined-bench-cards.pdf?sfvrsn=2> (Massachusetts)
  - See also [https://courts.illinois.gov/CivilJustice/Training\\_Education/Achieving\\_Fairness\\_Free\\_of\\_%20Unconscious\\_Bias.pdf](https://courts.illinois.gov/CivilJustice/Training_Education/Achieving_Fairness_Free_of_%20Unconscious_Bias.pdf) (Illinois)
  - See also <https://njdc.info/wp-content/uploads/2018/07/Addressing-Bias-Bench-Card-1.pdf> (Juvenile Courts)

**IMPLICIT BIAS BENCH CARD**

**Act Consciously and Deliberately**

- Allow more time for cases in which implicit bias may be a concern.
- Avoid decisions under rushed, stressed, distracted or pressured circumstances.
- Engage in thoughtful information processing - objectively and deliberately consider the facts at hand. Avoid low-effort decisions or decision made on auto-pilot.
- Take special care in situations when you must respond quickly to avoid making snap decisions.
- Articulate the reasoning behind your decision before committing to a decision to allow yourself to critically review your decision-making process.

**Be Self-Aware**

- Analyze your emotional state. Do the negative or positive emotions you are feeling pertain to the case?
- Consider whether you are requiring more or less from a person than you would from others.
- Ask yourself if your opinion of the parties, witnesses, or case would be different if the people presenting belonged to a different social/racial group.
- Consider how the person is different from others in his/her same social/racial group or gender.
- Be mindful of your decision-making process, not just the resulting decision.


**Create Processes to Serve as a Check on Unintended Bias**

- Take notes and rely on those notes over memory.
- Consider what evidence supports the conclusions you have drawn and how you have challenged unsupported assumptions.
- Seek feedback from others. Would others perceive or handle the situation differently?
- Track your decisions and periodically examine them for any pattern of bias.

Sources: Kenneth M. Cohan, et al., *Addressing Implicit Bias in the Courts*, 41 Court Review 88 (2011); National Center for State Courts, *Strategies to Reduce the Influence of Unconscious Bias*, [www.nscj.org](http://www.nscj.org) (2014); *Implicit Bias in the Courts*, 49 U.S. 1131 (2012); National Council of Juvenile and Family Court Judges, *Right from the Start: The ICC Restorative Justice Training Manual*.

Issued by the Committee for Equality and Justice of the Minnesota Judicial Branch, April 2013

Guidance Document Committee for Equality and Justice, copyright 2013. See us at <http://www.mnjudicial.org>

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# Final Suggestions for Reducing Implicit Bias in Litigation

- Educate judges, attorneys, jurors, and court staff on implicit bias
- Evaluate jury selection techniques
- Analyze litigation outcomes
  - Collect data and analyze trends





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