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**Workshop 7**

**But, I'm Not Biased! Solving Intentional and Unintentional Bias in the Workplace**

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*Most organizations consider bias in the workplace to be unacceptable, and have policies against bias of any kind. So, why is bias still experienced? These written materials supplement our planned live group session discussion with your peers, covering both polling questions and other lessons-learned about workplace bias, sharing ideas for what you might want to take back to tackle bias in your workplace.*

**I. Leading Lawyer Ethical Rules Relating to Workplace Bias**

Several Model Rules of Professional Conduct apply to bias that might arise in a legal profession workplace. In addition to these model rules, always consult the ethics rules applicable to the jurisdiction in which you are practicing law.

**A. Rule 1.1: Competence**

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

An attorney's implicit bias can impact the competent representation of a client. An attorney must assess what automatic assumptions they have towards a client with different characteristics, such as ethnicity, political ideology, income level, or other factors discussed above. If the bias blinds the attorney from being able to adequately analyze the objective facts, they may have an ethical conflict and may be obligated to withdraw representation. Likewise, if an attorney's bias shapes their advice to the client or how much advice they offer, they may need to withdraw from the representation. The better we understand our unconscious biases, the better we can competently serve a diverse set of clients and their diverse needs.

**B. Rule 1.3: Diligence**

"A lawyer shall act with reasonable diligence and promptness in representing a client."<sup>2</sup>

Like Rule 1.1, an attorney's implicit bias may hinder their responsibility to diligently represent their client. An attorney likely fails to represent their client diligently where their bias causes them to put the client's work on the back burner or spend less time than reasonably necessary on the project. Before accepting a client, the attorney has a duty to assess whether their implicit bias would prevent them from dedicating the proper amount of attention to the client's matter.

### C. Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

"A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."<sup>3</sup>

Partners and other individuals in leadership roles should ensure that all attorneys are complying with the Rules. In other words, the firm may be responsible for heavy bias of lawyers throughout the firm that materializes into discrimination or ethical violations. To prevent this, it is important to give attorneys high-level education opportunities to limit the effects of implicit bias in the workplace.

### D. Rule 8.4(g): Misconduct

"It is professional misconduct for a lawyer to: [...]

- (g) 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. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules."<sup>4</sup>

Rule 8.4 is a catch-all rule that instructs attorneys to not engage in conduct that adversely reflects on their fitness to practice law. Subsection (g) itself prohibits attorneys from engaging in any act that they reasonably know to be discrimination in conduct related to the practice of law. As stated in comment [3]<sup>5</sup>, any verbal or physical conduct that manifests bias or prejudice toward others constitutes discrimination or harassment and will undermine an attorney's ability to practice law. This broad definition instructs that attorneys have a duty to be aware of their bias and ensure that any implicit bias in no way hinders an attorney's ability to practice law in compliance with the Rules.

## II. What Is Unconscious Bias?

Unconscious bias is the tendency to make quick judgments or assessments about other individuals without noticing that we are making assumptions. Bias can stem from social norms and stereotypes, information we learn over time, and personal life experiences. Though we are often not aware of ourselves making these automatic judgments, our subconscious biases can seriously hinder our reactions and behaviors.<sup>6</sup>

In the first seven seconds we meet someone, we make 11 judgments about them, including about their dress, the way they speak, the way they shake your hand, their stare (or lack of eye contact). Malcolm Gladwell describes this as follows: "All of us have implicit biases of some degree. This does not necessarily mean we will act in an inappropriate or discriminatory manner, only that our first "blink" sends us certain information. Acknowledging and understanding this implicit response and its value and role is critical to informed decision-making and is particularly critical to those whose decisions must embody fairness and justice."<sup>7</sup>

When we hear bias talked about in the news, we often associate it with severe acts of discrimination and prejudice. However, cognitive science shows that everybody is biased in some way, just by virtue of having a brain that is constantly seeking efficient ways to sort the constant intake of information we receive.<sup>8</sup> Biases are automatically triggered by our brain making quick judgments about people and situations based on our background, cultural environment and our experiences. We naturally assign people to social categories and these can be based on stories, books, movies, media and culture. Having a bias does not make us bad people, it only makes us human.

Shortcuts or shorthand ways of thinking are efficient. We have to make decisions daily about what is safe or not, and an unconscious bias can operate as a "danger detector."<sup>9</sup> We have to filter about 11 million pieces of information that we are exposed to at any one time because our brains can only functionally deal with about 40.<sup>10</sup>

We can only manage bias; unconscious biases are a fact of life. We prefer to connect with people who look and behave like us. This is known as "similarity bias," just one of the many different forms in which bias can materialize.<sup>11</sup> We have each created mental categories that we use to quickly sort information. How fast can you scroll through a

web site of items on sale? We “cherry pick” information that supports our opinions and views.<sup>12</sup> When we do this, we validate and reinforce our biases, making it that much harder to structure our thinking to be neutral. We all have reactions which can be negative or positive based on past experiences that become our bias (both conscious and unconscious). Unconscious bias is far more prevalent than conscious prejudice and often incompatible with one's conscious values.<sup>13</sup> Certain scenarios can activate unconscious attitudes and beliefs. These incredibly quick judgments and assessments of people and situations impact our decisions and actions without us even realizing it. The danger of similarity bias is that the human brain will sometimes use superficial proxies to decide who is “one of us,” and these proxies may extend to wrongful things such as gender, race, ethnicity, etc.<sup>14</sup>

### III. Unconscious Bias Research and Testing

Research supports that often we unknowingly make unintended biased decisions that result in undesired consequences.

Robert Rosenthal's Research in 1963 was one of the first studies to recognize that how you treat others affects what they think of themselves and their ultimate success.<sup>15</sup> In the first part of the study, three children were picked at random and the teachers were told three children were very smart (bloomers) but not to tell the children. The bloomers performed much better than other students in their class. In fact, the teacher picked the bloomer children at random and not based on higher test scores. The teachers did not treat the bloomer children differently. In the second part of the study, Rosenthal filmed the class. When the identified bloomer child said something good, the teacher would nod three times. When the bloomer child said something bad, the teacher would encourage the student to try again. The teacher would blame the mistake on a situation such as the bloomer child had not slept well. As you can likely predict, the children who received positive affirmation from the teacher performed at higher rates than the children who did not.<sup>16</sup>

Another study of how unconscious decisions impact business decisions was the Resume Study.<sup>17</sup> Researchers sent out 13,000 fake resumes for 3,000 job postings using names that were “typically white” or “typically black.” Resumes with “typically white” names received 50% more callback than “typically black” names and average “typically white” named candidates received more callbacks than highly skilled “typically black” named candidates. Whereas the highly skilled candidates received more callbacks than average candidates if the names were “typically white”, but if the names were “typically black” there was no difference in call backs between highly skilled and average candidates. In a 2017 study, those with Chinese, Indian or Pakistani-sounding names were 28% less likely to get invited to an interview than fictitious candidates with English-sounding names, even when their qualifications were the same.<sup>18</sup>

However, this method of sending employers fake resumes and measuring bias based on the employer's reaction would sometimes fail due to the fake information and the fact that employers may not respond to unsolicited resumes. A new study, incentivized resume rating (IRR)<sup>19</sup>, was conducted from 2016 to 2018 and involved 72 employers of different sized companies and real resumes from nearly 800 recent graduates. The recruiters were primarily white females. Each recruiter knowingly reviewed the fake resumes and rated them on how much they liked each candidate. Among other discoveries, the results showed that female and minority candidates received less credit for prestigious internships in all fields, receiving about half the credit white men received.<sup>20</sup> This result may stem from some employers' belief that a female or minority's prestigious internship was given based on the previous employer's preference for diversity, not actually based on the candidate's abilities.<sup>21</sup> The recruiters also rated female and minority candidates as less likely to accept a job offer – possibly due to the prevalence of diversity initiatives or thinking the candidate will not fit into the firm culture.<sup>22</sup>

Certain characteristics impact our perceptions about an individual's competence and ability. A study of whether employers had bias in the perceptions of writing skills of white and African American law firm associates revealed that partners apply formal requirements more rigorously to low status groups. Researchers gave 60 partners at 22 major law firms a memo with numerous mistakes to review. When the partners thought the author was white, the memo scored a 4.1 with one comment noting the memo's “potential.”<sup>23</sup> When the partners thought the author was black, the memo scored a 3.2 with one comment stating “I can't believe he went to NYU.”<sup>24</sup>

Unconscious bias likely is prevalent in legal industry workplaces. According to many experts, legal profession unconscious bias may explain some of the following statistics:<sup>25</sup>

- Although the 2010 census indicates that women make up 51% of the US population, women only made up 36% of legal profession lawyers in 2016.
- Women only made up 21.5% of firm partners and 17.4% of equity partners.
- Although minorities make up 30% of the population, they made up only 14.5% of attorneys in 2015.
- Minorities made up only 7.5% of partners and 5.6% of equity partners.

- At the beginning of the careers of young attorneys, law firm hiring rates of women and other minority have generally mirrored the graduation rates from law school, but despite first year associates in the same firm starting at the same salary, median pay for women is only 77.4% of the pay of their male equivalents, and it drops to 69% when it comes to partners. Women of color fair even worse.
- Women tend to be billed out at lower rates than men, and seem to be unrepresented in practices associated with higher salaries.
- Origination credit indicates the effects of implicit bias: white male decision makers appear to have a disproportionate effect on who is credited with origination.
- The findings of various studies indicate that merit and achievement do not necessarily correlate to compensation, and there may be race and gender effects on compensation regardless of billable hours and origination.

But, bias extends to all characteristics that may lead a workplace decisionmaker to favor one person over another, not just the protected classes under Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). For example, is there such a thing as height bias? Only 14.5% of American men are six feet or over, yet almost 60% of corporate CEOs are six feet tall or over.<sup>26</sup> Why does this happen? We do not think we treat taller people any differently from shorter people. However, evidence suggests that height, particularly in men, triggers a set of very positive, unconscious associations. What is being tall worth? Research shows that when corrected for age and gender, an inch of height is worth approximately \$789 per year in salary.<sup>27</sup> In other words, a person who is six feet tall would earn \$5,525 more each year than someone who is 5'5".<sup>28</sup>

On the positive side, if you wear glasses, there may be a bias that you are smarter. In fact, a recent research study suggests there may be a genetic association of greater cognitive function with myopia.<sup>29</sup>

Research suggests that having a foreign accent also elicits unconscious bias. University of Chicago psychologists hypothesized that struggling to understand accented speech affects the speaker's credibility that was unrelated to stereotype about foreigners.<sup>30</sup> Native and non-native English speakers recited a trivia statement such as, "A giraffe can go without water longer than a camel can" that the subjects were told was written by the researchers. The subjects tended to doubt the statements' validity when recited with an accent. In the second part of the study, the researchers explicitly told the subjects that the research goal was to learn how the difficulty of understanding people's speech might affect the perceived credibility of their statements. The subjects still judged the accented statements as less truthful than the alternative. However, cognitive disfluency prompts people to slow down and think more critically.

Specific to the real estate industry: in one commercial real estate industry study, 65% of professionals surveyed said they had experienced or observed gender bias against women in their commercial real estate workplace in the last five years.<sup>31</sup>

There are tests to help determine an individual's hidden or unconscious bias. One is the Implicit Association Test ("IAT")<sup>32</sup>, conducted by Harvard University's Project Implicit Social Attitudes<sup>33</sup>. Over a million people have taken IAT tests to measure preferences in connection with age, weight, sexuality, race, skin tone, disability, religion, Asians, Native Americans, and Arab-Muslims. The results are interpreted based on research from the University of Virginia, Yale University, the University of Washington and Harvard. 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). The main idea is that making a response is easier when closely related items share the same response key. The IAT score is based on how long it takes a person on average, to sort the words. A person has an implicit preference for thin people relative to heavier people if they are faster to categorize words when Thin People and Good share a response key and Fat People and Bad share a response key, relative to the reverse. As of 2018, 75 % of people prefer thin people and only 9% prefer heavier people. The researchers have seen no evidence that handedness influences the scores.

But there are some limitations of the IAT results. First, test takers tend to score very differently, even if they take the test just a few weeks apart. The correlation between test scores and actual behavior may be small. A second issue is a misreading of the test. The IAT score does not tell whether an individual will discriminate on any particular occasion, but will tell you in the aggregate how a group of people will act on average. The test will not tell you how a particular individual will behave in a particular circumstance. None of the foregoing, however, means that implicit bias is not real.<sup>34</sup>

## **IV. Reasons to Combat Workplace Bias**

It's no secret – people want to work at and do business with organizations that have shared values. Clients, strategic partners, lawyers, and employees are looking to associate with organizations that espouse those same shared values. We take our unconscious biases into the workplace. And these unconscious biases in the workplace can unknowingly shape our organizations.

The danger of bias affects every profession. At its worst, unconscious bias can lead to illegal discrimination. For example, denying a candidate with an ethnic-sounding name or dismissing an older job candidate because they do not “fit the culture” could be unlawful discrimination stemming from implicit bias.<sup>35</sup> A recent survey shows that over sixty percent of U.S. employees have witnessed or experienced workplace discrimination based on age, race, gender or LGBTQ status.<sup>36</sup> This is fairly consistent with a 2016 study showing that 65% of professionals surveyed in one real estate industry study said they had experienced or observed gender bias against women in their commercial real estate workplace in the past five years.<sup>37</sup> Workplace discrimination is obviously wrong and could lead to costly litigation, and employers should take all measures to eliminate workplace discrimination.

Preventing illegal discrimination is only a first step in the right direction. Employers must actively seek diversity and inclusion methods to overcome unconscious bias and realize the benefits of diversity in the workplace.<sup>38</sup> Even where bias does not rise to the level of discrimination, it can materially hinder effective collaboration and may lead to high turnover rates among employees who feel like they are not a valued member of the team.<sup>39</sup> As discussed in the above research section, implicit bias can affect how we evaluate and promote people despite their talent and performance, causing some individuals to have to work harder than others before receiving commensurate attention, praise, or credit for their work.<sup>40</sup>

Unconscious bias can also impact a business's productivity and profits. Bias can impair diversity, hinder recruiting, hiring, and retention efforts, and undermine employee development, cause businesses to lose out on job applicant referrals, and cause an organization to incur increased financial costs of talent turnover and training.<sup>41</sup> Surveys show that if diverse employees have experienced unfairness, they are strongly discouraged from recommending their employer to other employees.<sup>42</sup> In a labor market with low unemployment, missing these recommendations can harm your ability to recruit top-notch talent.

What is at stake is not just people, but also profits, creativity, and different perspectives. According to a report by McKinsey, companies with the most ethnically diverse executive teams are 33% more profitable.<sup>43</sup> Another study found that companies with more women in executive positions have a 34% higher return to shareholders than those that do not.<sup>44</sup> Additionally, 37% of employees believe that workplace diversity leads to better business results.<sup>45</sup>

## **V. Solutions to Mitigate or Resolve Workplace Bias Effects**

The first solution to combating implicit bias at your workplace is for you individually to lead efforts toward more inclusive and intentional workplace culture and actual results. First, you must train yourself to remain aware and reminded of your own biases, and your individual plan to overcome them, and then you must take on broader bias within your workplace.

This is a voluntary process. In fact, studies show a backlash when diversity programs are mandatory for employees to attend, generating anger, resistance and frustration, often causing more animosity toward minority groups.<sup>46</sup> Organizations succeed more at bias mitigation when they increase contact among different groups, and people are engaged. Small and consistent actions have a huge impact. In fact, one study reflected that 96% of participants in unconscious bias training leave with the intent to change behaviors and reduce bias.<sup>47</sup> But, to change behaviors and outcomes, organizations and individuals must set specific realistic goals, and formulate tactics and plans to reach those goals and evaluate progress. Below we selected to share several potential solutions specific to the legal industry, recognizing that many other solutions also exist.

### **A. Resumes**

Based on the research, diverse candidates do not get as many call backs without a system in place to sort out name and identity information.<sup>48</sup> Some suggest using artificial intelligence in order to embrace ideological diversity.<sup>49</sup> As the pandemic has progressed, companies have become increasingly innovative with technology; thus, it may be the proper time to introduce artificial intelligence as a method of ensuring that applicants with different ideologies receive fair opportunities in their job applications.<sup>50</sup>

### **B. Interviews**

According to one study, if there is only one woman in your candidate pool, there is statistically no chance she'll be hired.<sup>51</sup> In fact, “there are more CEOs of large U.S. companies who are named David (4.5%) than there are CEOs who are women (4.1%).”<sup>52</sup> Notably, David is not even the most common name among CEOs – the name John represents 5.3% of CEOs in large U.S. companies.<sup>53</sup>

From this research, major law firms and corporate legal departments have adopted the “Mansfield Rule” named for Arabella Mansfield, the first American woman admitted into the legal profession in 1869. The Mansfield Rule requires firms and departments to actively consider diverse candidates for at least 30% of open leadership and governance roles. If there are ten applicants, three would be diverse. In commercial real estate, it is noteworthy that at JLL, 40% of the company’s board of director seats are women and this is more than twice the average of the Fortune 1,000.<sup>54</sup>

At least one study indicates an implicit bias in the hiring process.<sup>55</sup> The first involves discussions relating to interviews. Many of the discussions take place without minorities present, and involve discussions of whether a prospective minority hire was subjected to the same qualifying criteria as others, whether there are certain client pressures to hire diverse people, driving down the qualification criteria, and concerns that minority hires may not be successful in the firm. Second, partners making hiring decisions were very concerned that “affirmative action” amounted to a lowering of standards in the process of hiring. Including diverse partners in the hiring process and in the discussions related to the hiring process is a step in the right direction in eliminating such implicit bias in this process.

### C. Sponsorship and Mentoring

Having a mentor has been shown to be fundamental to career success, but having a more senior mentor can result in more promotions and greater compensation.<sup>56</sup> Studies show that men have benefited more from mentorship than women. Notably, the men’s mentors were more senior.

The benefits of mentoring continue past the time of mentorship. Mentored women become mentors themselves.<sup>57</sup> A sponsor vouches for a person’s competency and leadership abilities. A person with a sponsor is motivated to achieve. One study showed that women with sponsors are 27% more likely than non-sponsored women to ask for a raise and they were 22% more likely to ask for assignments that would build their reputations.<sup>58</sup>

Corporate legal departments seem to have done a better job in lessening the effect of implicit bias. Studies find that in-house lawyers are encouraged to mentor and promote diverse talent. Although corporate legal departments have made drastic improvements in tamping down the effects of implicit bias, more work needs to be done.<sup>59</sup>

### D. Work Assignments

Assign work equally, giving thorough thought as to which employee is receiving what type of assignment. Frequently, repeat work is given to a trusted colleague because there is time pressure. Automatically assigning important projects can exclude diverse employees from career-building opportunities and prevents them from showcasing their talent. Taking time to train diverse candidates and invest in their career development helps to create a deeper bench that will save time and money in the future.<sup>60</sup> When difficult assignments are available, check in with yourself to question why you have an impulse to assign the project to a certain individual and make sure that rationale is not rooted in bias.<sup>61</sup> For example, consider whether you are assuming that a woman would not want to take the assignment because she is working from home and caring for children. When in doubt, it is better to offer the assignment to the employee to give them the opportunity. If they take the assignment, check to see if you start to worry about the children and think less of the employee. If they do not take the assignment, check to see if you think the employee is less committed. Both thoughts are signs of wrongful bias and indicate a need for implicit bias training.

### E. Performance Reviews

As mentioned earlier, similarity bias leads us to favor people who are more like us. Even where employers say they are “blind” to certain characteristics like gender and race, individuals in the “out-group” still must work harder to gain attention and praise from their employer.<sup>62</sup> This can lead to harsh performance reviews on people who managers feel like they have nothing in common with.<sup>63</sup> To combat similarity bias, try finding something that you have in common with the employee before giving them a performance review. Finding commonalities primes the employer to see the employee as a member of their “in-group,” even if that commonality is just being coworkers with similar goals.<sup>64</sup>

An employer should also be aware of expedience bias during performance reviews – the tendency to favor answers that seem obvious, often at the overlooking answers that may be more relevant or useful.<sup>65</sup> Employers should go beyond data that is the easiest to get, such as revenue targets. Instead, employers should focus on an individual’s ability to motivate other team members and meet their own personal goals. Employers should proactively have employees outline goals ahead of time in order to get a more comprehensive performance evaluation.<sup>66</sup> This transparency will also make it easier to talk about the employee’s progress towards those goals.

Performance standards in evaluating attorneys also appear to be affected by implicit bias.<sup>67</sup> There remains the typical “home and family” implicit bias toward females. Even though firms have implemented flexible work systems,

there is some evidence that some supervising lawyers tend to assume that a person working flexible or more limited hours is not as committed to the legal practice. Further, some supervisors seem to not give female lawyers high profile assignments because of this “home and family” bias; then this fact is held against her when making partnership decisions.

A similar bias also seems to apply to minority attorneys. Supervising attorneys tend to view the writing skills of Black attorneys as lower than the skills of their White counterparts. One study sent the same memo with intentional spelling and grammar errors to 60 diverse partners. The study found that, even though the participants were diverse, more errors were found in the “Black” memo than the “White” memo. A further study indicates that although there is a high attrition rate among minority attorneys, there is some indication that this fact is because of the lack of integration into the work and relationships of the firm.

Keeping these facts in mind when engaging in performance evaluations and in reviewing an employee’s work is a good first step in combatting implicit bias.

#### F. Compensation

Studies show an imbalance between men and women’s salaries in the commercial real estate industry. In 2015, the industry median annual compensation was \$115,000 for women and \$150,000 for men – an average income gap of 23.3%. The income gap was widest in the C-Suite at 29.8%.<sup>68</sup> One cause for this has been the notion that women do not ask for raises. A 2016 study showed that women do ask for raises as often as their male counterparts, but they get what they want 25% less often.<sup>69</sup> Knowing what the compensation levels are may also influence whether diverse employees ask for higher salaries. Sixty-two percent of respondents in the CREW Network 2016 survey believe that pay would be more equitable if employers were required to share compensation information.<sup>70</sup>

One of the main issues of this implicit bias affecting compensation in the legal field is origination credit.<sup>71</sup> Beginning in the nineties, compensation shifted from those doing the work for “firm” clients to work “originated” by individuals. Therefore, compensation is many times based on an individual “winning” a client. Studies have shown a gender bias here. Women tend to be responsible for preparing the “dog and pony show”; however, they are rarely afforded the opportunity to make the pitch themselves.

Further, women and minorities tend to leave firms at a greater rate, some of which is based on the implicit bias. Turnover cost the 400 largest firms almost \$10 billion in 2014. Further studies indicate that firms that consistently dedicate themselves to diversity and inclusion are not only more likely to keep top talent, but also to improve customer and employee satisfaction.

Firms should encourage diversity in the typical “dog and pony” show. This inclusion will also impress clients who have diversity requirements for third party vendors as well. Second, firms should dedicate themselves to be more inclusive with diverse partners and associates. The more one feels like they are part of the team, the less likely they will leave the firm.

#### G. The Power of Words

Lawyers are uniquely focused on word selection. We can both work on our own implicit bias, as well as encourage broader organizational changes, by improving our understanding of words we might be in the habit to use that could have unintended effects. One way to change our word choice habits is to notice and practice making them gender-neutral, as described in the attached Appendix I resource, and the below sample list:<sup>72</sup>

<b>Biased</b>	<b>Unbiased Alternatives</b>
You Guys	Everyone, all of you, team, y'all
The kid	The young person, young lady, young man
Oh man/Oh brother	Wow, ugh, yikes
Man-sized job	Big job, challenge, huge opportunity
Attendees and their wives are invited	Attendees and their guests
Congressman	Member of Congress, Representative, Legislator

<b>Biased</b>	<b>Unbiased Alternatives</b>
Mankind	Humankind, humans, people
Manpower	Personnel, staff
Salesman	Salesperson
Manmade	Synthetic, manufactured, machine made
The common man	The average person, ordinary people

But, many additional opportunities exist to study and improve our vocabulary beyond mere gender implications. Often we are not aware that a phrase or saying could be offensive to others based on race, ethnicity, religion, socio-economic opportunities or status, physical characteristic, or other attribute.

#### H. Individual Behavior Awareness and Changes

A starter list of examples of individual behavioral awareness and changes includes:<sup>73</sup>

- Take the IAT.
- Find motivation to reduce implicit bias
- Be self-observant/critical, and learn from surprises such as when you are surprised when you meet someone who you have talked to on the phone or emailed in the past, and they are totally unlike you imagined.
- Remind yourself of your own implicit bias
- Make yourself uncomfortable
- Expose yourself to counter-stereotypical situations.
- Commit to mentoring, training, and supporting your organization's efforts to address bias.
- Commit to speaking out against insensitive or wrongful comments in the workplace, rather than staying silent.<sup>74</sup> Methods available to respond include: assume good intent/explain the impact, ask a question, interrupt and redirect, reveal the contradiction, and humor.

#### I. Loving-Kindness Meditation

A new approach toward bias elimination is loving-kindness meditation (LKM). The six steps in this process are:

- Settling the mind through mindfulness meditation;
- Bringing to mind someone you care about, noticing the feeling of compassion, offering words and thoughts of well-wishes;
- Extending this sense of caring and compassion toward yourself;
- Offering compassion toward others;
- Bringing compassion toward all beings; and
- Imagining taking away the suffering of others.

LKM or similar tools can interrupt and allow us to acknowledge our own implicit bias and see how it harms others. As more of us realize this fact, then we can create a more diverse and inclusive legal profession.<sup>75</sup>

## VI. Select Recent Topics, Trends, and Solutions Affecting Workplace Bias

#### A. Bias Against Remote Workers

The COVID-19 pandemic brought many challenges to our lives and workplaces, along with escalating a different form of bias – distance bias. Distance bias embodies the principal "out of sight, out of mind."<sup>76</sup> In other words, people tend to favor what is closest to them – both in time and proximity.<sup>77</sup> Distance bias existed before the pandemic; however, the increase in remote work situations has led to an increase in awareness towards distance bias. In this segment, we are going to cover the different forms of distance bias, the effects of such bias, and steps to minimize the harmful effects that distance bias has on workers and companies.



## 1. Employer's Bias Towards Remote Workers

Distance bias mostly impacts an employer's ability to prioritize resources or employees when assigning projects. For example, studies show that fund managers unconsciously preferred local firms for their portfolios instead of firms in other cities.<sup>78</sup> Similarly, an employer is naturally going to trust and give attention to their employees who are physically present in the office because they are at the forefront of the employer's mind.<sup>79</sup> This form of bias can lead employers to rely on employees that are more visibly prevalent rather than assessing which employee would be the best choice for the given objective.<sup>80</sup> This causes productive employees who are working remotely to risk receiving fewer opportunities because they have less time face-to-face with their employer.

Imagine that a high-stakes, emergency project comes up at work and you need to delegate it to a co-worker. If you immediately chose the individual in the office instead of the remote worker just because they were close by, you are engaging in distance bias. Similarly, choosing a remote worker who is single without kids at home without giving the matter serious consideration, you may be engaging in unconscious distance bias by not considering the remote worker who is also a caretaker for their family.<sup>81</sup> Bias may expose itself in even the most well-rounded teams, especially in the midst of scenarios where there are increased levels of stress and uncertainty, like the COVID-19 pandemic.

Company leaders need to be aware of the unconscious bias that may be at play during this time of remote work, especially as remote work becomes more prevalent and may carry on well past the end of the pandemic. Leaders should be especially aware of the bias they may experience in remote work situations and avoid making assumptions about team members – for example, when they hear a child in the background of a phone call or see a pet walk past the camera on a video meeting.<sup>82</sup>

Distance bias can also present itself in situations based on time. For example, an employer may recall an employee's recent performance easier than performance over the past year.<sup>83</sup> Even if the employee has improved dramatically over the past year, the employer may defer to recent performance because it is easier to recall. This form of distance bias can hurt the way the employer views the employee, damaging their career growth and the health of the company, especially where the employee overall deserved a promotion.<sup>84</sup>

## 2. Remote Worker's Bias Towards Their Job

Bias may also arise with how remote workers view their job and the tasks on their to-do list. Employees who work from home may have different attitudes about work and the projects they are currently working on, allowing them to be placed on the back burner. This is a similar principal of distance bias – feeling less motivated to work on certain projects because work feels arbitrary.<sup>85</sup> Additionally, large tasks may seem difficult to complete remotely, causing an employee to put the project on the back burner until they are able to meet in person.<sup>86</sup> This sort of bias creates a lack of productivity and a slow working environment, which can have serious harsh effects on an office or firm.

## 3. Mitigating the Effects of Distance Bias

### (a) Employer Steps –

An employer can adopt multiple methods that help mitigate distance bias:

- Keep a Journal

The best way for an employer to avoid distance bias during performance reviews is to keep a journal-like record of information.<sup>87</sup> If you keep a journal, think about how you feel when you review old entries. We often forget events and how those events made us feel – journals help combat this issue. By keeping a detailed journal of employee performance, by the time annual performance reviews take place, the employer will have a full record of their evaluations to refer to, reminding them of the employee's good performance throughout the year instead of defaulting to the latest performance.<sup>88</sup>

- Conversational Turn Taking & Active Listening

Conversational turn taking and active listening will help amplify the voices of those working remotely, allowing them to feel valued, contribute, and ensure the employer is capturing all ideas. Likewise, the employer should emphasize to their team members that they are a priority, that the leader will make time for them, that they must reach out, that the leader wants them to reach out, and the leader should be proactive in reaching out to their employees.<sup>89</sup>

- Recognize Introverted Personalities

Distance bias can often cause employers to forget or overlook introverted individuals.<sup>90</sup> The employees who are extroverted and comfortable with technology will likely adapt to remote work easily. However, introverted employees may feel distanced and unconnected. Because we naturally focus on those in front of us, leaders must pay particularly close attention to those who do not often speak out and are more naturally introverted – reach out and give them a platform to ask questions or voice their opinions.<sup>91</sup>

(b) Employee Steps –

An employee can take steps to mitigate the effects of distance bias. Being aware of distance bias and the potential for an employer to overlook remote workers should encourage remote workers to reach out to the employer with questions, comments, and concerns in order to stay at the forefront of the employer's mind. Additionally, employees who are struggling with putting difficult tasks on the back burner should brainstorm with team members to create strategies and deadlines to help complete the task or project remotely and foster a sense of connectivity.<sup>92</sup>

Takeaway: if you aren't working on your bias, your bias is probably working on you. Confronting your own personal bias is a big step; however, mitigating the effect of distance bias in the workplace must be a group effort.

B. Bias in Political Ideologies

Working from home is not the only challenge we have seen in the workplace over the past two years. The recent election brought many controversial conversations along with it, some of which would bleed into the workplace. Open discussions of political preferences are no longer as taboo as they once were.<sup>93</sup> Controversial political conversations could become a debilitating issue if coworkers were to have a heated conversation.<sup>94</sup>

Political affiliation may be protected under some state laws; however, federal law does not protect against discrimination based on political ideologies.<sup>95</sup> Discrimination based on political ideologies is not protected under Title VII, the ADEA (ADEA), or the ADA.<sup>96</sup> Likewise, the political affiliations of employees working for private employers are not covered under the First Amendment.<sup>97</sup> Bias based on political ideologies can easily be misinterpreted as unlawful prejudice based on a protected class such as gender, race, age, or disability.<sup>98</sup> It is essential to know what your state's laws are before you make any policies for your business.

Bias may introduce itself at many stages during the employment process. Studies show that hiring managers and recruiters tend to gravitate toward candidates with matching beliefs, also known as "similarity bias," and an employee's location tends to be one of the first things employers see on an application. Some cities have a strong political population that leans towards a certain party, which may create an unconscious bias for the employer before even knowing the employee's political ideologies.<sup>99</sup>

Private employers can limit political activities during work hours and prohibit the display and circulation of political materials that could create tension in the workplace. The key is to communicate to employees the leader's intent behind restricting political displays to keep employees from feeling censored. However, if an employer decides to restrict political activity, they must do so in a way that does not favor a particular ideology.<sup>100</sup>

C. Bias in Social Justice Reform

A surge of social justice reform has emerged over the past year regarding equality. The United States has reached a turning point with bias as we've seen a greater amount of social activism from our peers in our daily lives.<sup>101</sup> However, gross disparities among black employees still exist in company hiring practices. A study found that 47% of White respondents believed their upper management understood racial differences, while only 34% of Hispanic and 19% of Black respondents believed so.<sup>102</sup>

The country has recognized a need for change but where do employers go from here? Those seeking social justice reform seem to have a unanimous opinion that one or two virtual trainings was never enough to defeat bias and employers must do more than reverting to the status quo. Suggestions for creating long-lasting and meaningful action include investing in proper employee education, such as unconscious bias and allyship trainings; building connection and community by checking in on each other and establishing authentic connections; and going beyond recruiting and hiring tactics to ensure equality in work assignments and performance management.<sup>103</sup>

## **VII. Polling Questions for Group Discussion**

1. What bias-limiting methods has your workplace tried, whether formal or informal?
2. What worked, did not work, or do you know? Why? These reflections might regarding attitudes or conduct leading up to, during, and after the training or method is implemented. Or, your reflections might be about results, impact, or lack thereof, or measurability, or intended compared to unintended effects.
3. What advice do you have regarding bias-limiting in your organization?
4. What questions do you have regarding bias-limiting in your organization?
5. Have the past two years changed your thoughts and responses to these questions?
6. Do you anticipate your responses to these questions changing in the next two years?

## To He or Not to He

### How to Make Your Writing Gender Neutral

as published on wordrake.com

When I was growing up, everybody was automatically a *he*—mathematicians and doctors, shoppers and writers, swimmers and inventors. It was the norm. That's why a writer in the U. S. Patent & Trademark Office would write:

If the applicant is the inventor, he must explain how and when he first used his invention

When I was growing up, everybody was automatically a *he*—mathematicians and doctors, shoppers and writers, swimmers and inventors. It was the norm. That's why a writer in the U. S. Patent & Trademark Office would write:

If the applicant is the inventor, he must explain how and when he first used his invention.

Apparently, the writer at the PTO forgot that women invented the first computer language, Liquid Paper, Scotchgard, the rotary engine, medical syringe, submarine periscope, Kevlar. I'll stop there.

Being a boy and then a man, I never thought about it. Then I raised (or reared, for the grammatically washed) two daughters, and I realized that throughout my life pronouns had been automatically excluding a little over half the world. Even E. B. White referred to everyone as *he*. Look at his sentence from *The Elements of Style*, copyright 1959:

But to write a biography, the writer will need at least a rough scheme; he cannot plunge in blindly and start ticking off fact after fact about his man, lest he miss the forest for the trees and there be no end to his labors.

That sentence says that only men can write and that no woman would ever be interesting enough to warrant a biography. Today, almost everybody agrees we should avoid sexist language, but how do we avoid it *without making our writing awkward*? Alternating between *she* and *he*, as we see in books about babies, still jars our reader. *She/he* is out, so is *s/he*, and *he or she* is no better than the other two.

If we compare *The Elements of Style*, copyright 1959, to *The Elements of Style*, copyright 2000, we find that editors have quietly replaced White's sexist language, using six methods that also keep White's writing smooth. Were White alive today, I'm sure he would agree with the changes.

*The Elements of Style* copyright 2000 editors recast White's sentence above like this:

But to write a biography, you will need at least a rough scheme; you cannot plunge in blindly and start ticking off fact after fact about your subject, lest you miss the forest for the trees and there be no end to your labors.

The British might substitute *one* and *one's* for *you* and *your*, but that's one way to avoid sexist language: **#1: USE THE SECOND PERSON, YOU.** Here's another sentence from *The Elements of Style* 1959 . . .

A deeply troubled person, composing a letter appealing for mercy or for love, had best not attempt to organize his emotions; his prose will have a better chance if he leaves his emotions in disarray . . . .

. . . and how the 2000 version deals with the sexist language:

If you are deeply troubled and are composing a letter appealing for mercy or for love, you had best not attempt to organize your emotions; the prose will have a better chance if the emotions are left in disarray . . . .

If you are deeply troubled and are composing a letter appealing for mercy or for love, you had best not attempt to organize your emotions; the prose will have a better chance if the emotions are left in disarray . . . .

In that example, besides substituting *your* for *his*, the editors also **#2: REPLACE HIS WITH THE ARTICLE THE:**

his prose will have/the prose will have

and **#3: WRITE IN THE PASSIVE VOICE:**

if he leaves his emotions/if the emotions are left

The editors turn another of White's sentences into a non-sexist statement when they **#4: REPEAT THE ACTOR:**

Only the writer whose ear is reliable is in a position to use bad grammar deliberately; only he-this writer knows for sure when . . . .

Where White uses a singular noun and *he/his*, the editors **#5: MAKE THE NOUN AND ALL RELATED PRONOUNS PLURAL:**

~~The reader needs~~ Readers need time to catch his-their breath; he-they can't be expected to compare everything with something else . . . .

If one of those solutions does not solve the problem, do what the editors do frequently in the 2000 version **#6: REWORD THE SENTENCE TO ELIMINATE THE NEED FOR A PRONOUN:**

The reader will become impatient or confused if he finds-upon finding two or more versions of the same word or expression.

I know that a few of you will still insist that *he* is a perfectly good pronoun to represent both sexes, that over millennia, writers everywhere have accepted it as universal. Don't believe it; the women are just being polite.

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<sup>3</sup> Model Rules of Pro. Conduct r. 5.1 (Am. Bar Ass'n 2018).

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<sup>7</sup> Malcolm Gladwell, *Blink: The Power of Thinking without Thinking* (New York: Back Bay 2005).

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<sup>10</sup> *Id.* at 3.

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