This workshop was held at the 2018 Equal Justice Conference in San Diego, California.

Title:

**Who Me, Biased? - Recognizing & Responding to Bias & and Microaggression in the Legal Profession**

**Presenters:**

Latonia Haney Keith, Concordia University School of Law, Boise, ID

Lillian Moy, Legal Aid Society of Northeastern NY, Albany, NY

As our profession is grounded in principles of integrity and objectivity, it can be challenging to accept that implicit bias plays a role in legal practice. But humans are hardwired to be biased; it is just part of who we are. Such bias though can lead to explicit discrimination and prejudice or microaggression (such as micro-insults, micro-invalidations and micro-assaults) based on, for example, race, ethnicity, gender, gender identity, sexual orientation, national origin, age, weight or ability. This interactive session will teach lawyers how to recognize and respond to implicit bias and microagression and implement techniques to mitigate, override, interrupt and confront bias in their legal practice.
Who Me, Biased?
Recognizing and Responding to Bias &
Microaggression in the Legal Profession

EQUAL JUSTICE CONFERENCE

TANYA DOUGLAS,
LATONIA HANEY KEITH
& LILLIAN M. MOY

MAY 11, 2018
What is Implicit Bias?

Guidelines/Group Norms

- Be present
- Agree to disagree
- Respect – Not okay to shame blame or attack
- Listen (without running internal commentary)
- Speak from your own experience – “I” Statements
- Cell phones on vibrate
- Confidentiality

- Others…
Learning Objectives

- What is implicit bias?

- How does implicit bias trigger skepticism and belief in legal services work?

- What are micro-aggressions?

- How do you handle micro-aggressions against you, colleagues, or clients?
How Bias Operates to Distort Accuracy and Thwart Justice

1. Implicit Bias
2. Ethnocentricism
3. Micro-aggressions
4. Racial anxiety
How Bias Operates to Distort Accuracy and Thwart Justice

1. Implicit Bias

- Unconscious thoughts about race, sex, etc.
- Our race schemas may be activated without our awareness
- Even though we may fight them, implicit biases are in us
- Often socially unacceptable or embarrassing, so we try to hide them – but still our unconscious bias exists
2. Ethnocentricism
Micro-Aggressions

- **Definition:**
  - Illustrates structural oppression on a small-scale
Micro-Aggressions

- Why does it occur?
  - Implicit bias
  - Stereotyping
  - Failure to recognize another person’s experience
  - Clash of racial realities
  - Belief in post-racial world and denial of race discrimination
  - Belief that micro-aggressions are minor and not harmful
4. Racial Anxiety
WELCOME TO STARBUCKS

LET'S DISCUSS YOUR WHITE PRIVILEGE
Schemas

- Mental Shortcuts
- Organize & Categorize Information
- Automatic / Reflexive
Schemas – Social Categories & Stereotypes

- Parents/Family
- Friends/Peers
- School
- Media
- Direct or Vicarious Experiences
- Positive or Negative Associations
Bias in the Courtroom
SmithKline Beecham Corp. v. Abbott Labs

740 F.3d 471 (9th Cir. 2014)
State v. Kirk
157 Idaho 809 (Idaho Ct. App. 2014)

“OH, I WISH I WAS IN THE LAND OF COTTON.
GOOD TIMES NOT FORGOTTEN.
LOOK AWAY. LOOK AWAY.
LOOK AWAY.”
Bias in the Workplace
“[I]N OUR PROFESSION, OUR RECORD [OF SUPPORTING WOMEN AND MINORITIES] IS . . . ABYSMAL. WE HAVE FEW WOMEN EQUITY PARTNERS, AND FEWER MINORITY PARTNERS. AND IN TERMS OF DIVERSITY AND INCLUSION, OUR RECORD IS POOR. WE ARE LOSING THE WAR ON RETENTION, ALLOWING WOMEN AND MINORITIES TO LEAVE THE PROFESSION BECAUSE THEY FEEL UNPROTECTED AND UNDervalued.”

WENDI S. LAZAR, IMMEDIATE PAST CHAIR OF THE ABA COMMISSION ON WOMEN IN THE PROFESSION
The legal profession is 36% female.

Women represent:
- 21.5% of law firm partners
- 29% of non-equity partners
- 17.4% of equity partners
- 6% of law firm managing partners
- 25% of Fortune 500 general counsels

Female equity partners earn 80% less than male counterparts

NALP Diversity Infographic: Women (2015-2016)
The legal profession is 88% Caucasian.

Minorities represent:
- 14% of law firm attorneys
- 22% of associates
- 9.5% of non-equity partners
- 5.5% of equity partners
- 11% of Fortune 500 general counsels

Minority women represent:
- 2.5% of law firm partners
- 4.4% of Fortune 500 general counsels
Within large law firms:

- 5% of summer associates identify as LGBT
- LGBT lawyers comprise only 2% of equity partners

Of the 38% of graduates who self-reported sexual orientation, 4% self-identified as L, G, or B.

Of these graduates, more than half were male and 3/4 were white.

Less than 1/3 were white women.
Within large law firms:
- 0.39% of associates
- 0.30% of partners self-identify as having a disability.
Demographic Segment by Job Title 2017

NOTE: 1 SUPERVISING ATTORNEY AND 7 NON-SUPERVISING ATTORNEYS IDENTIFIED AS TRANSGENDER
# Executive Director

## by gender and race

<table>
<thead>
<tr>
<th>Year</th>
<th>White Men</th>
<th>White Women</th>
<th>Men of Color</th>
<th>Women of Color</th>
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Senior Level Officials (Non-Attorneys) by gender and race

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<tr>
<th>Year</th>
<th>White Men</th>
<th>White Women</th>
<th>Men of Color</th>
<th>Women of Color</th>
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<tr>
<td>2015</td>
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<td>88</td>
<td>54%</td>
</tr>
<tr>
<td>2016</td>
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<td>101</td>
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<tr>
<td>2017</td>
<td>28</td>
<td>16%</td>
<td>85</td>
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Non-Supervising Attorneys
by gender and race

<table>
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<th>Year</th>
<th>White Men</th>
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<th>Men of Color</th>
<th>Women of Color</th>
</tr>
</thead>
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<td>2017</td>
<td>256</td>
<td>579</td>
<td>125</td>
<td>408</td>
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</table>

Note: 7 Non-Supervising Attorneys identified as transgender
### Supervising Attorneys

**by gender and race**

<table>
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<tr>
<th>Year</th>
<th>White Men</th>
<th>White Women</th>
<th>Men of Color</th>
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<td>69</td>
<td>181</td>
<td>29</td>
<td>84</td>
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Note: 1 Supervisor identified as transgender
## Openly Gay Individuals, By Job Title

<table>
<thead>
<tr>
<th>Year</th>
<th>Chief Executive</th>
<th>Senior Level Officials (Non-Attorneys)</th>
<th>Senior Level Managers</th>
<th>Supervising Attorneys</th>
<th>Non-Supervising Attorneys</th>
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<tbody>
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<tr>
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<td>7%</td>
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<td>6%</td>
<td>4%</td>
</tr>
<tr>
<td>2015</td>
<td>5</td>
<td>8</td>
<td>9</td>
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<tr>
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<td>7%</td>
<td>4%</td>
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<tr>
<td></td>
<td>8%</td>
<td>8%</td>
<td>10%</td>
<td>8%</td>
<td>3%</td>
</tr>
</tbody>
</table>

On average, 5% of employees in IOLA-Funded organizations are openly gay.
### INDIVIDUALS WITH DISABILITIES, BY JOB TITLE

<table>
<thead>
<tr>
<th>Year</th>
<th>Chief Executive</th>
<th>Senior Level Officials (Non-Attorneys)</th>
<th>Senior Level Managers</th>
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<tr>
<td>2016</td>
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<td>3</td>
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<tr>
<td>2017</td>
<td>2</td>
<td>3%</td>
<td>4</td>
<td>6</td>
<td>3%</td>
</tr>
</tbody>
</table>

On average, 2% of employees in IOLA-Funded organizations have disabilities.
Forming New Habits to Combat Your Bias

- **Practice Non-Judgment** of yourself and others – identify and challenge assumptions, focus on facts

- **Give Benefit of the Doubt** – be curious about the other person’s true meaning

- **Practice Makes Progress** – new habits only form with steady practice
Micro-Aggressions

What’s the harm?
- Assault on emotional/mental health
- Drain on emotional energy
- Manifests in physical health problems
- Creates inequities
- Perpetuates stereotype threats
- Lowers confidence, problem-solving abilities, and productivity
- Creates hostile work environment
“DISCRIMINATION AND HARASSMENT ON THE BASIS OF GENDER, RACE, ETHNICITY, SEXUAL ORIENTATION, DISABILITY, MARITAL AND SOCIOECONOMIC STATUS IS, AND UNFORTUNATELY CONTINUES TO BE, A PROBLEM IN OUR PROFESSION AND IN SOCIETY.”

PAULETTE BROWN, IMMEDIATE PAST-PRESIDENT, AMERICAN BAR ASSOCIATION
“It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.”
“A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice.”
“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.”
“Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.”
Race/Ethnicity
Gender
Nationality
Age
Economic Status
Social Status
Language
Sexual Orientation
Skin Color
Disability
Physical Appearance
Marital Status
Role in Family
Birth Order
Immigration Status
Religion
Status
Access
Weight

PROJECT IMPLICIT
https://implicit.harvard.edu/implicit/
You are an attorney of Caucasian descent and you and your colleague of African-American descent have been preparing for a criminal trial for weeks. On the first day of the trial, you and your colleague enter the courtroom, both dressed in your best suits, and the judge assumes your colleague is the defendant and directs him to the defendant’s seat at the table.
You are an attorney in a public interest law firm. You join your supervisor in an interview of a law school student for a summer externship. Despite the student, who is of Latino descent, having been born in the U.S., your supervisor expresses admiration for his command of the English language, “complimenting” him for being so articulate and well spoken.
You are a mediator in a landlord/tenant matters. An attorney in a small law firm, who has been out of law school for about two years, is negotiating a settlement for a client. The opposing counsel is roughly 20 years older.

Opposing counsel repeatedly refers to the junior attorney as “young man,” interrupts him, asks when he got out of law school, and continuously references his inexperience: “When you have tried as many cases as I have, you will understand . . . .”
Debiasing

“MOTIVATION TO BE FAIR MAKES A DIFFERENCE.”

JERRY KANG, NAT’L CT. STATE COURTS, IMPLICIT BIAS, A PRIMER (2009).
EDUCATION
• Mindfulness
• Awareness

EXPOSURE
• Contact
• Positive Exemplars
• Perceptive Taking

APPROACH
• Higher Level Processing
• Reduced Cognitive Load
• Audit

DEBIASING TECHNIQUES TO OVERCOME OUR UNCONSCIOUS BIAS

Forming New Habits to Combat Your Bias

- **Practice Non-Judgment** of yourself and others – identify and challenge assumptions, focus on facts
- **Give Benefit of the Doubt** – be curious about the other person’s true meaning
- **Practice Makes Progress** – new habits only form with steady practice
A new client named Sofia Gómez called your intake coordinator yesterday. She is a 58-year-old born in Colombia, who immigrated to the US in 1996 due to death threats because of her perceived sexual orientation, and is a survivor of domestic violence. She became a permanent resident in 2005.

She is a native Spanish-speaker; she can verbally communicate in English, but has trouble reading and writing in English.
Exercise: Victim of Discrimination?

- She is currently homeless, couch surfing a bit, but needs something more permanent.
- She has difficulty finding and holding on to steady work. She says she has been discriminated against at work and elsewhere.
- She needs help figuring out what kind of public benefits and resources she might be eligible for.
Exercise: Victim of Discrimination?

- You invite her in for a more complete intake. When she arrives, you see that she has a pronounced Adam’s Apple and a 5-o’clock shadow on her face.

- When you ask for her identity documents, you see that her green card has a male gender marker, and both it and her social security card display the name Guillermo Gómez.
Exercise: Victim of Discrimination?

- You mention the mismatch, and ask which name she prefers you use with her. She says she has only gone by the name Sofia since she was a teenager, but hasn’t gotten it legally changed yet, or updated her IDs.

- You ask how she would like to be addressed, using yourself as an example of which pronouns you use. She doesn’t know what a pronoun is, but says she is a transgender woman and goes by ‘she’ and ‘her’.
Exercise: Victim of Discrimination?

- Ms. Gómez says she survived on sex work for the first decade she lived in the US, and has two criminal convictions for solicitation.

- She says she no longer does sex work, but she is regularly stopped by police anyway for suspected prostitution, just because she walks down the street as someone perceived to be transgender.
Following the two convictions, she was incarcerated in men’s facilities without any regard of her female gender identity. She was forced to shower with men, who sexually assaulted her and called her homophobic and transphobic slurs. Grievances with sheriffs and guards were ignored.
Exercise: Victim of Discrimination?

• She has had incredible difficulty finding steady work. At the job last year, her co-workers consistently misgendered her (refer to her as he, him, shim, he-she, and it). When she complained to managers, they said she should be more patient and compassionate toward her coworkers. The employer eventually fired her for being ‘aggressive’ and ‘personality differences.’

• This same happened at three other jobs.
Exercise: Victim of Discrimination?

• Three months ago, Ms. Gómez started working as a live-in domestic worker for a family in town. The family knows she is transgender and doesn’t seem to care, but her boss often withholds her pay and beats her if she asks about it.
She recently went to a local women’s domestic violence shelter for help, but was turned away because the shelter “doesn’t serve men.”
Ms. Gómez expresses that she has always been a fighter, and she knows this must sound like a lot, but she has struggled for so long, and she is becoming very depressed and hopeless, lonely, and scared for her personal safety and security, especially as she gets older.
Exercise: Debrief

- What insights are gained when we place ourselves initially on a scale of belief and doubt?
- Why do we hear the same information and align differently?
- When do we move? Why do we move?
- Confirmation Bias – can we change our first judgments? How do we process contrary information? Evaluate it differently?
- Pure Doubt vs. Pure Belief
• **Methodological Belief** – consider all the facts and *believe everything*, no matter how unlikely or repellant

• **Methodological Skepticism** – consider all the facts and *doubt everything*, no matter how compelling it might seem

- What do you notice about each view?
- What virtues or strengths might we otherwise miss?
- What flaws or contradictions might we otherwise miss?
Cultural humility incorporates a consistent commitment to learning and reflection, but also an understanding of power dynamics and one’s own role in society.

There are three main components to cultural humility: lifelong commitment to self-evaluation and self-critique, fix power imbalances, and develop partnerships with people and groups who advocate for others.

Source: http://en.wikipedia.org/wiki/Cultural_humility
30 day challenge

- What will I commit to do within 30 days?
- Please email to tdouglas@lsnyc.org
Takeaways and Resources

- Take an IAT at (www.projectimplicit.net)
- Find a partner (or two or three) to go on this journey with you and explore definitions together
- Check out National Center for Transgender Equality (www.transequality.org/) for additional resources on laws, best practices guidelines, and model policies regarding transgender individuals.
- This is a long road and an iterative process.
- The end goal is to change the systems perpetuating inequity.
**Equality**

The assumption is that **everyone benefits from the same supports**. This is equal treatment.

**Equity**

**Everyone gets the supports they need** (this is the concept of "affirmative action"), thus producing equity.

**Justice**

All 3 can see the game without supports or accommodations because the cause(s) of the inequity was addressed. The systemic barrier has been removed.
Equality vs. Equity vs. Social Justice
What does this mean and how is this about me?