
Professionalism in the 21st Century

Use Your Lawyering Skills to Address Implicit Bias in the Legal Workplace

As a licensed Pennsylvania attorney, your character, conduct, and good judgement are essential in maintaining integrity in the delivery of justice and the institution of law.

Through a collaboration with educators, practitioners and bar leadership, the Pennsylvania Continuing Legal Education Board has developed this ethics program to explore implicit bias in the legal profession. This interactive, facilitator-led program will present you with an opportunity to choose how you would react as a bystander in realistic workplace situations. Non-judgmental group discussion will provide an opportunity for reflection on conduct decisions and provoke an examination into professional responsibilities.

Scenario 1: Motions Court

An exchange between a court clerk and a young attorney prompts an awkward situation during motion filings. How would you react?



Larry / Bystander



Stephen / Target



Court Staff

Participant Notes

Scenario 2:
Conversation with Supervising
Attorney

When a supervising attorney volunteers a personal
observation about an associate, things get a little
uneasy. What would you do?



Michelle
Supervising Attorney



Ana
Associate



Sidney
Bystander

Participant Notes

**Scenario 3:
Law Firm Meeting**

An annual review meeting includes the topic of professional image. What choices would you make?



**Other Partner
Bystander**



**Keisha
Attorney**



**Bill
Senior Partner**



Jo
**Joe
Other Attorney**

Participant Notes

**Scenario 4:
Case Assessment**

A conversation during a case assessment meeting in the firm prompts some remarks, and a reaction. What steps could/should be taken?



Attorney



Maddison/Intern



Shonda/Intern



**Malika
New Attorney**



**Amy
Attorney**



**Cynthia
Sr. Attorney/Bystander**

Participant Notes

WHAT IS IMPLICIT OR UNCONSCIOUS BIAS?

For the legal profession, understanding implicit bias and ways to debias one's approach to law-related issues and decisions is critical to a fair and representative perception and reality of access to justice and equity.

The problem of implicit bias has been described by one researcher as follows:

We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail—such as the elderly—we will not raise our guard. If we think that another category is foreign—such as Asians—we will be surprised by their fluent English. These cognitions also include attitudes, which are overall evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term “implicit bias” includes both implicit stereotypes and implicit attitudes.

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities.

-Jerry Kang, *Implicit Bias: A Primer for Courts*, prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, Aug. 2009.

Malcolm Gladwell discusses implicit bias in his bestseller, *Blink* this way:

All of us have implicit biases to 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.

Source: American Bar Association's Implicit Bias Task Force

PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT
§ 81.1. PREAMBLE: A LAWYER'S RESPONSIBILITIES.

- (1) A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice.
- (2) As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
- (3) In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.
- (4) In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.
- (5) A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.
- (6) As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.
- (7) Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

- (8) A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.
- (9) In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.
- (10) The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.
- (11) To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.
- (12) The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.
- (13) Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Note: On August 29, 2023, in a unanimous, precedential decision, the United States Court of Appeals for the Third Circuit rejected the plaintiff's challenge to the current revised version of Rule 8.4(g) of the Pennsylvania Rules of Professional Conduct, prohibiting knowing harassment and discrimination in the practice of law. The Court found that the new Pennsylvania rule does not interfere with the plaintiff's right to speak or teach continuing education seminars on controversial topics. Rather, the rule covers only knowing or intentional harassment or discrimination against a person on the basis of one or more of the demographic classifications enumerated in the rule and accompanying comments. A copy of the rule can be found on the website of the Unified Judicial System of Pennsylvania at <https://www.pacourts.us> or at Title 204 Chapter 81.4 of the Pennsylvania Code.

Full Version of PA Rules of Professional Conduct for Lawyers:

<http://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/204/chapter81/chap81toc.html&d=reduce>

TAKEAWAYS FOR THE BYSTANDER

Goal of the Experience

This exercise is intended to expose you to a thought process. There is no correct answer. It is up to you to decide what the correct thing to do is.

Creating Inclusive Climates

- Collective positive climate change, not punishment.
- All members of the legal profession look forward to coming to work feeling safe, affirmed, appreciated, and with a sense of inclusion and belonging.
- Decrease moments of exclusion.
- Increase bystander intervention in these moments.
- The idea is that target feels supported. Not to educate the offender.

Working through Obstacles for Bystanders

- It will be awkward if I say something ... the others will label me a radical.
- How do I know if he/she/they want my support?
- It is not my responsibility to fix this.
 - Social psychology – diffusion of responsibility.
 - Once you know about that, it is more likely you will counter with your own behavior.
- It is not that big of a deal.
- You don't know what to do.
- Lack of recognition of harm.
- Lack of recognition of subtle bias and satisfaction with all the justifications.
- Excepting/needing others to step up.
- Conflict avoidance.
- Fear repercussions.
- It all happens too fast: paralysis, confusion as to what to do, unsure what to say.

Individual Strategies for Success

- Prevention – know what your colleagues want in advance, build real relationships.
- Speak up if in doubt – courage and humility are muscles you can strengthen.
- Just say anything. Rehearse a few go-to responses.
- Speak up to support the target, not to change the offender.
- Expect the offender to be defensive; just start the conversation.

RESOURCES

- "Implicit Bias in the Law" <https://libguides.law.uconn.edu/implicit/home>
- Glossary of Terms: <https://www.americanbar.org/groups/litigation/about/diversity/task-force-implicit-bias/glossary/>
- Implicit Association Test <https://implicit.harvard.edu/implicit/>