

Implicit Bias and Civility: Enhancing Professionalism in Legal Practice

DECEMBER 13, 2024





What is Unconscious Bias?

Level 2 – Unthinking and Automatic



- **Automatic** decision-making hard wired into everyone (e.g. fight or flight).
 - Used to assess whether an object, animal or person is dangerous. Not a negative trait. It is a necessary one.
- Bias is a subjective, predetermined preference towards a viewpoint about roles, behaviors or individuals
- Unconscious perceptions influence many of the most important decisions we make (hiring, mentoring, promoting, etc.)
- Social stereotypes about groups of people that impact our interactions, perceptions and beliefs about others that are outside of our consciousness.

Unconscious Biases

- Unconscious biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control.
- A Few Key Characteristics of Unconscious Biases:
 - Unconscious biases are **pervasive**. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
 - The unconscious associations we hold **do not necessarily align** with our declared beliefs or even reflect stances we would explicitly endorse.
 - We generally tend to hold unconscious biases that **favor our own ingroup**, though research has shown that we can still hold unconscious biases against our ingroup.
 - Unconscious biases are malleable. Our brains are incredibly complex, and the unconscious associations that we have formed **can be gradually unlearned** through a variety of debiasing techniques.

Adapted from the Kirwan Institute



Types of Biases

Affinity Bias

- The tendency to be partial to people who are similar to us

Perception Bias

- The inability to make an objective judgment about a person because they belong to a group about which the decision-maker has a preconceived notion

The Halo Effect

- When a decision-maker allows a positive trait influence their evaluation of other, unrelated traits

Types of Biases

Confirmation Bias

- When a decision-maker seeks out information that confirms their preexisting beliefs, often this involves selectively drawing from available information and only acknowledging the information that aligns

Groupthink or Conformity Bias

- When a decision-maker holds back their own thoughts/opinions in order to fit in with a particular group



What Do We Think?

Survey Data Over the Years

Deloitte survey of 3,129 individuals in late 2013 examines the concept of “covering”



Appearance-based covering concerns how individuals alter their self-presentation—including grooming, attire, and mannerisms—to blend into the mainstream. For instance, a Black woman might straighten her hair to de-emphasize her race.



Advocacy-based covering concerns how much individuals “stick up for” their group. A veteran might refrain from challenging a joke about the military, lest she be seen as overly strident.

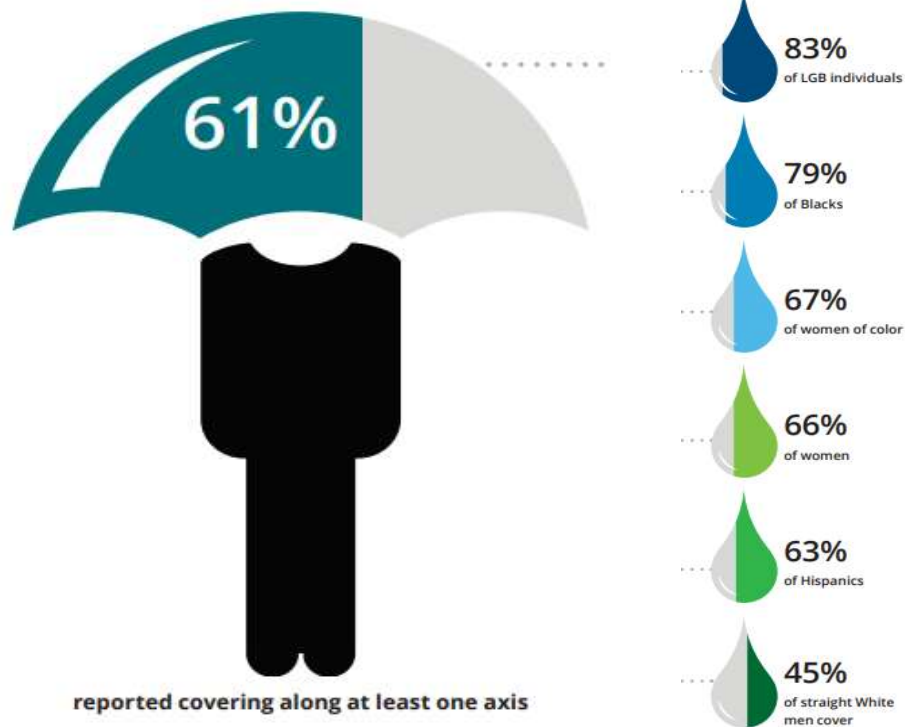


Affiliation-based covering concerns how individuals avoid behaviors widely associated with their identity, often to negate stereotypes about that identity. A woman might avoid talking about being a mother because she does not want her colleagues to think she is less committed to her work.



Association-based covering concerns how individuals avoid contact with other group members. A gay person might refrain from bringing his same-sex partner to a work function so as not to be seen as “too gay.”

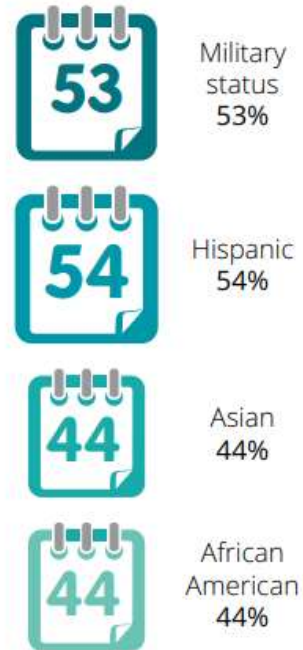
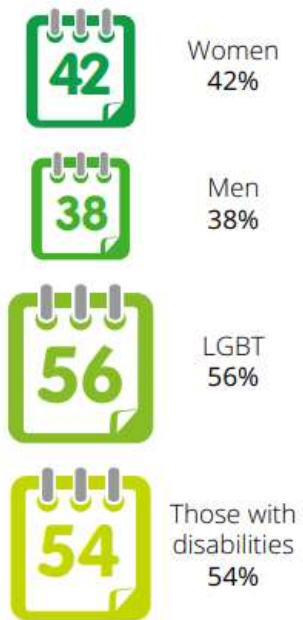
Survey Data Over the Years



Further, 53% of respondents reported a belief that their supervisor expected them to cover at least 1 axis, and 48% reported a belief that the organization expected them to cover.

Survey Data Over the Years

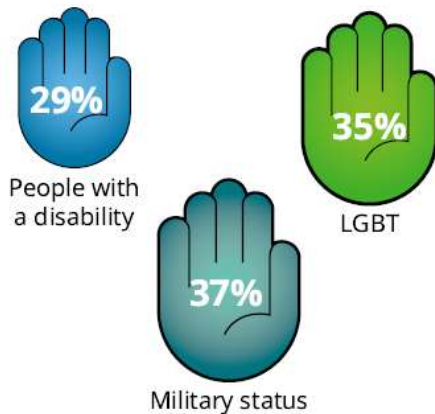
Do you feel that you've experienced bias at least once a month?



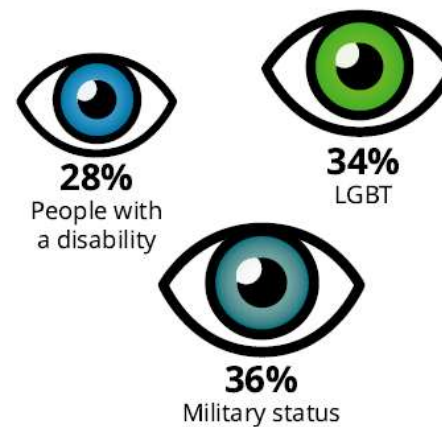
Survey Data Over the Years

These groups also reported to perceiving frequent bias in the workplace

Do you feel that you have experienced bias at least once a week?



Do you feel that you have witnessed bias at least once a week?



Compared to 10% of respondents overall who witnessed and/or experience bias at least once a week

Civility



What is Civility?

Civility is about treating others with courtesy, dignity, and respect.



Rule 9.7. Oath required when admitted to practice law



In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

Why Addressing Civility is a Requirement



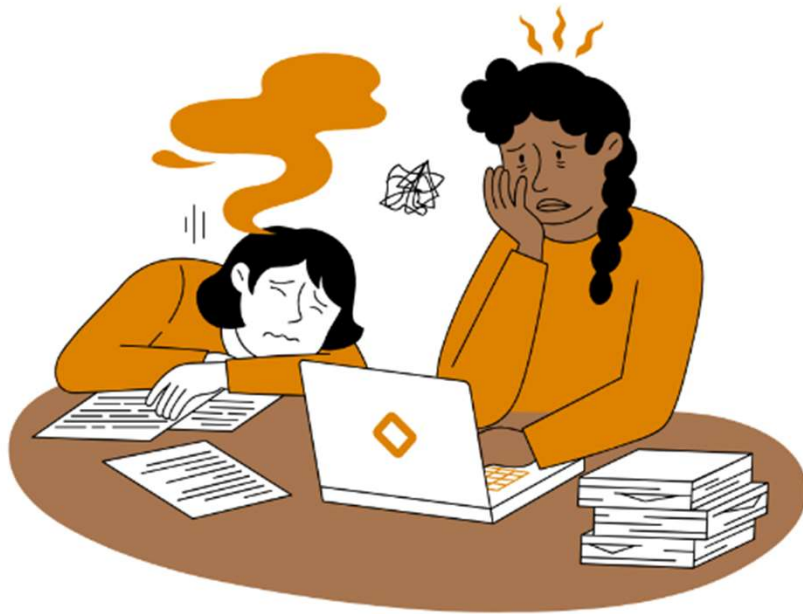
- Nearly 92% of surveyed lawyers believe treating others with courtesy and respect is necessary for the success of a new lawyer. (See Foundations for Practice: The Whole Lawyer and the Character Quotient, Educating Tomorrow's Lawyers, (July 2016)).
- In the 2007 Survey on Professionalism of the Illinois Supreme Court Commission, 95% of the respondents reported that the consequences of incivility made the practice of law less satisfying.
- Left unchecked, incivility begets more misconduct in an unfortunate downward spiral of unpleasantness. (See, e.g., Anderson & Pearson Tit for Tat? The Spiraling Effect of Incivility in the Workplace (1999) 24 Acad. Mgmt Rev. 452).

The High Cost of Incivility



- Incivility may violate the rules of professional conduct. Though lawyers are expected to zealously represent their clients, the rules forbid bullying and abusive conduct because that conduct delays or prolongs the proceedings and results in needless expense.
- Incivility increases the likelihood that a lawyer will face a legal malpractice or fee dispute claim, and it makes those claims harder to defend.

The High Cost of Incivility



- Incivility causes individuals to feel less satisfied with their work, to cut back on their efforts, and to experience greater job stress.
- When clients perceive bias perpetuated through civility in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law.
- Studies show incivility can result in adverse psychological effects such as stress, anxiety, depression, burnout, or a loss in self-esteem. (Cortina, *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013)).

The Intersection of Bias & Civility

Bias is not an entirely separate issue. It is a subcategory of incivility in the legal profession, resulting from expressions of explicit and implicit biases. All forms of bias-driven incivility negatively impact the workplace

Examples

- When the attorney being interrupted is a young woman, the attorney interrupting may be motivated by a combination of biases held against women and young attorneys.
 - A 2017 study conducted at the Pritzker School of Law at Northwestern University concluded that female US Supreme Court justices are interrupted three times as often as their male counterparts.
- Assuming people of color are non-lawyers.
 - An American Bar Association study found that women of color are mistaken for law firm, court, or janitorial staff at a rate 50 percentage points higher than White men.
- Attorneys subjected to bias-driven incivility often experience incivility in the form of being critiqued on their physical appearance and attire.
 - An attorney's choice to wear religious garb (e.g., a Sikh turban or a hijab) or to present in gender nonconforming ways may also increase the chances of being misidentified as a nonlawyer. (Cooper, The Appearance of Professionalism (2019) 71 Fla. L.Rev. 1, 9–14).

Impact of Bias-driven Incivility



Attorneys subjected to bias-driven incivility often expend emotional and mental labor to determine what role their identity played in their mistreatment, to process their mistreatment, and to protect themselves accordingly. (Torino et al., Everything You Wanted to Know About Microaggressions but Didn't Get a Chance to Ask in Microaggression Theory: Influences and Implications (2019)).



Protecting oneself from bias-driven incivility may result in additional identity performances by the affected diverse attorney that can further impact his or her psychological well-being. (See Carbado & Gulati (2015)).



Bias-driven incivility negatively impacts the entry, retention, and promotion of those impacted by biases and stereotypes in the workplace, which in turn affects the number of diverse attorneys remaining in the law or rising to supervisory and leadership levels within in-house legal departments. ([Proof That Positive Work Cultures Are More Productive \(hbr.org\)](https://hbr.org)).

Micro-aggressions

Examples:

- Complimenting someone for speaking “perfect English” or “being articulate”
- Male employee constantly interrupting a female colleague
- Repeatedly mispronouncing someone’s name
- Repeatedly using the wrong pronoun for a co-worker
- Unsolicited denial of bias (*e.g.*, “I’m not a racist, I have lots of black friends”)
- Telling someone to “calm down”

Civility in Action



- Re-read your communications to others before you send them to eliminate demeaning statements, passive-aggressive verbiage, and unnecessary threats to seek sanctions.
- When someone acts inappropriately, and you have a personal rapport with the individual, addressing the issue can be a powerful way to advocate for the values of civility.
- Leadership and senior attorneys should strive to provide junior attorneys and staff with safe and effective mechanisms to report mistreatment.

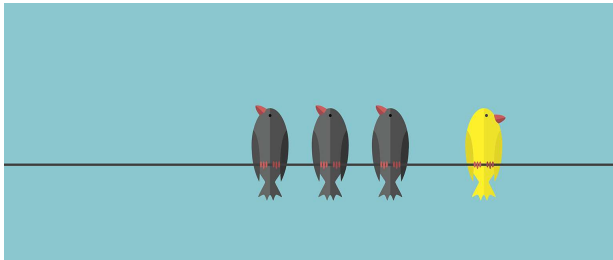
Civility in Action



- If a colleague handled a difficult situation with grace and restraint, commend them on how well they handled it, and point it out to others. In doing so, you will help promote a culture of civility.
- Addressing disputes with opposing counsel professionally, seeking to find common ground and mutually beneficial solutions rather than escalating conflict.
- Being mindful of cultural and personal differences and respecting those differences in all interactions.

Best Practices for Addressing Implicit Bias and Incivility

Recognizing and Addressing Implicit Bias and Incivility



- Have a basic understanding of the cultures from which your clients, coworkers, opposing counsel and the judiciary come
- Try to recognize situations that magnify stereotyping and bias
- Call out or report behavior that occurs based on gender, race, ethnicity, and other protected characteristics
- Understand that it is a long-term endeavor
- Anonymize where possible
- Be conscious of areas where bias can impact institutional decision making (especially when communicating with opposing parties or counsel)

Thank You

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