CEB®

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Dealing with Juror Implicit Bias

Speakers: Sonia Chopra, Ph.D & Jean Hyams

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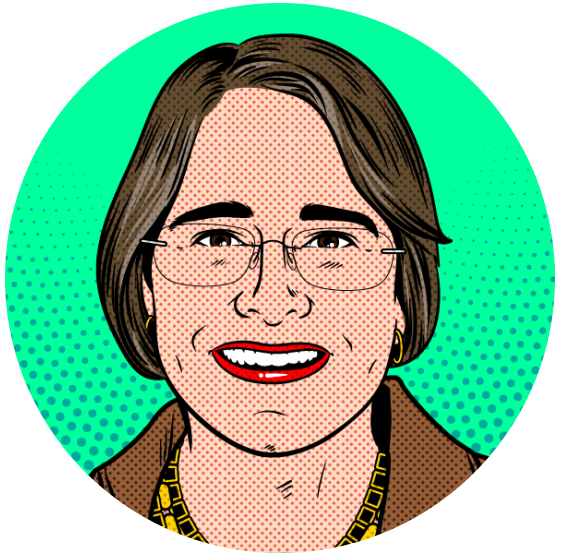


Sonia Chopra, Ph.D.,

Chopra Koonan Litigation Consulting

Dr. Chopra is president of Chopra Koonan Litigation Consulting, and cofounder of Virtual Courtroom™. Dr. Chopra combines over 25 years of trial consulting experience with current social science theory to develop winning case strategies, effective witness preparation techniques, valuable pre-trial research, and game changing jury selection methods. Dr. Chopra has been involved in over 1000 cases, ranging from multi-million-dollar civil litigation to high stakes criminal trials. She provides clients with assistance in litigation and settlement strategy, storytelling and theme development, damages valuation, opening statements and closing arguments, focus group and trial simulation research, witness preparation, and jury selection.

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Jean K. Hyams, Trial Attorney

Levy Vinick Burrell Hyams, LLP

Jean Hyams prosecutes employment civil rights lawsuits as a partner with the Bay Area firm Levy Vinick Burrell Hyams LLP. The peer-review *Super Lawyers* process has repeatedly ranked her as one of Northern California's "Top 100 Lawyers." Colleagues frequently call on her to co-counsel employment discrimination, harassment and whistleblower cases, including stepping in as eleventh-hour trial counsel. She was President of the California Employment Lawyers Association and received CELA's highest accolade, the Joe Posner Award, in 2018. In the wake of the #MeToo movement, Ms. Hyams has testified before the California Assembly to address sexual harassment in the Capitol and played an active role in reforming California's sexual harassment laws. In addition to her litigation docket, Ms. Hyams maintains an active private mediation practice.

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Learning Objectives

- Explore the issues of juror implicit bias and what it means.
- Review best approaches to voir dire.
- Evaluate the risks of raising implicit bias with jurors.
- Examine how implicit bias impacts perceptions of witness credibility.
- Consider strategies for reducing the impact of juror bias in the legal system.

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Agenda

1. Implicit Association Tests
2. How Implicit Bias Impacts the Legal System
3. Jury (De) Selection Goals
4. Attorney Biases/Stereotyping in Jury Selection
5. Decreasing Implicit Bias
6. What CA Attorneys Need to Know
7. References & Resources

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What is Implicit Bias?



Project Implicit

https://www.projectimplicit.net

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Implicit Association Tests



Image Source: https://implicit.harvard.edu/implicit/selectatest.html

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Implicit Association Tests

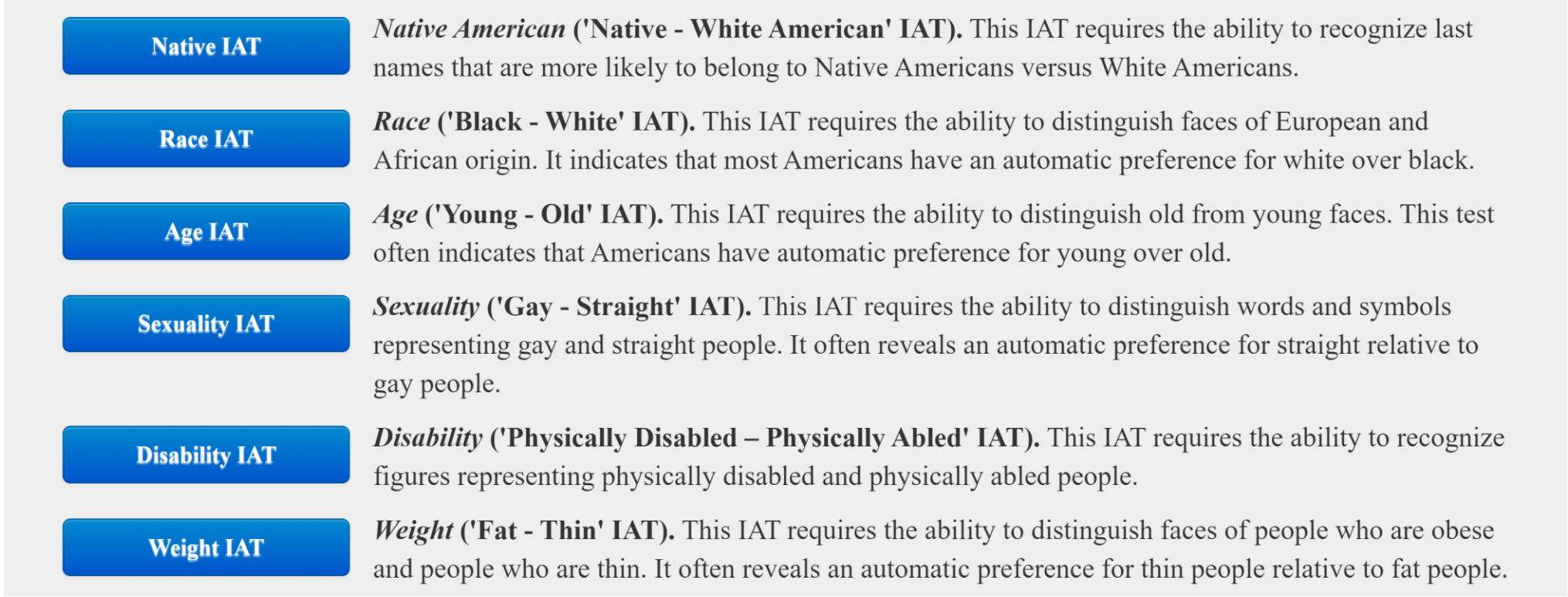


Image Source: https://implicit.harvard.edu/implicit/selectatest.html

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Implicit Association Test: Instructions

Implicit Association Test

Next, you will use the 'E' and 'I' computer keys to categorize items into groups as fast as you can. These are the four groups and the items that belong to each:

Category	Items
Male	Man, Son, Father, Boy, Uncle, Grandpa, Husband, Male
Female	Mother, Wife, Aunt, Woman, Girl, Female, Grandma, Daughter
Science	Astronomy, Math, Chemistry, Physics, Biology, Geology, Engineering
Liberal Arts	History, Arts, Humanities, English, Philosophy, Music, Literature

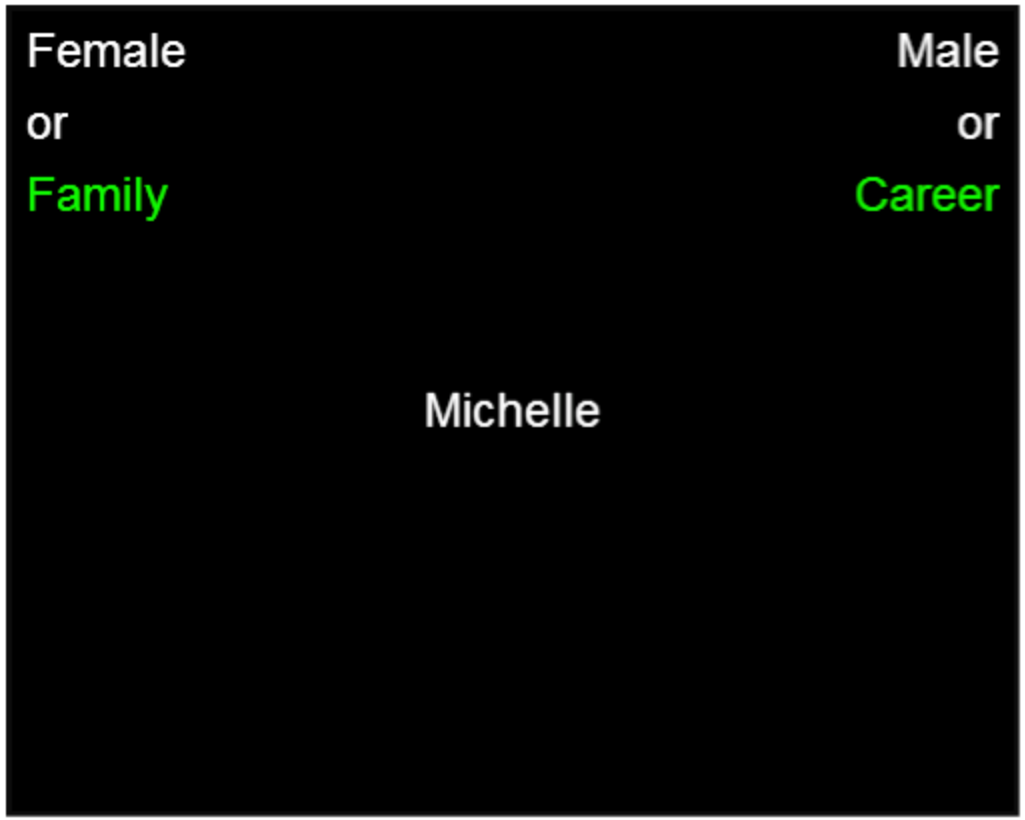
There are seven parts. The instructions change for each part. Pay attention!

Continue

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Implicit Association Tests: Example



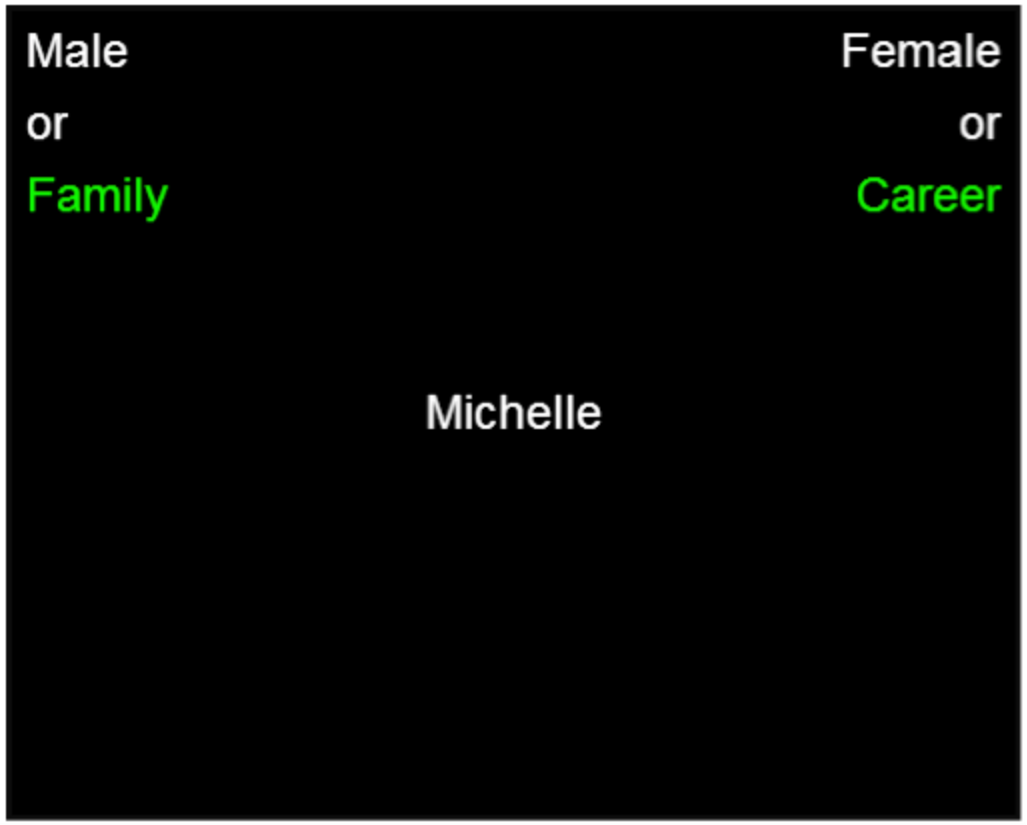


Image Source: https://plato.stanford.edu/entries/implicit-bias/

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Implicit Association Tests: Example

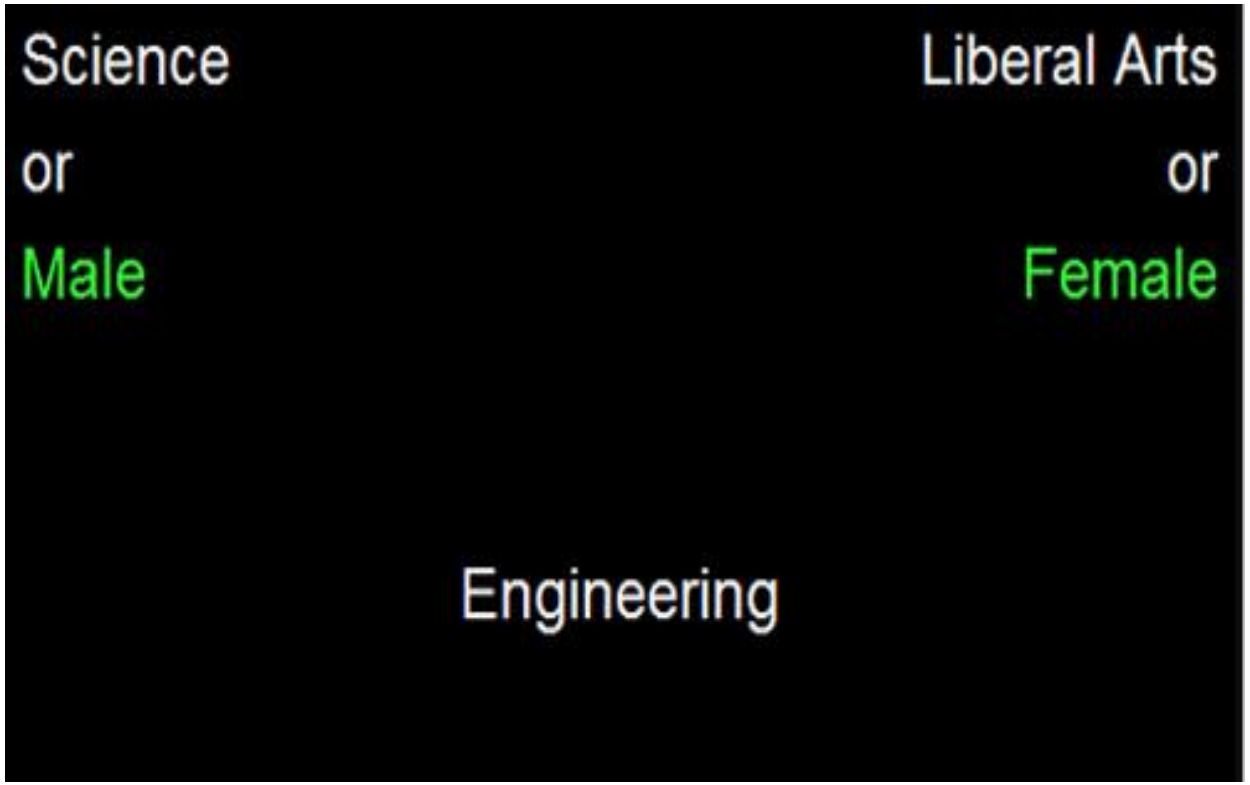


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How Does Implicit Bias Impact the Legal System?

Trial Participants

- Jurors
- Attorneys
- Judges
- Witnesses

Other Decision Makers

- Mediators/Arbitrators
- Adjusters
- Clients

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Implicit Biases: Attorneys

- Case Selection
- Jury Selection
  - Juror Profiling
  - Questioning Style
  - Questioning Patterns
- Witness Selection
- Witness Preparation
- Settlement Negotiations
- Trial Assignments



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Implicit Biases: Judges, Arbitrators, Mediators

- Jury Selection
  - Hardship
  - Voir Dire Questions & Limitations
  - Challenges for Cause
  - Batson/Wheeler Motions
- Settlement Recommendations
- Interactions With Counsel
- Post Trial Rulings
- Exercise of Judicial Discretion



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What California Attorneys Need to Know

Court's Duty to prevent bias: *New* CRC Standard 10.20(b). Each court, its judicial officers, and its employees have the duty to ensure the integrity and impartiality of the judicial system.

(1) *Refrain from and prevent biased conduct*

In all court interactions, each court, its judicial officers, and its employees should refrain from engaging in conduct and should take action to prevent others from engaging in conduct that exhibits bias, including but not limited to bias based on … whether that bias is directed toward counsel, court staff, witnesses, parties, jurors, or any other person. The court, judicial officers, and court employees may consider such classifications only if necessary or relevant to the proper exercise of their adjudicatory or administrative functions.

(2) *Ensure fairness*

Each judicial officer should ensure that courtroom interactions are conducted in a manner that is fair and impartial to all persons.

(3) *Ensure unbiased decisions*

Each judicial officer should ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests **and are not influenced by stereotypes or biases.**

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Implicit Biases: Judges

- Judicial Education

  Hidden Injustice: Bias on the Bench, American Bar Association (2016)

  Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 Ct. Rev. 78 (2021)



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Implicit Biases: Jurors

- Impressions of Parties
- Evaluation of Evidence
- Witness Credibility
- Reactions to Attorneys
- Interactions with Fellow Jurors
- Attributions of Responsibility
- Assessment of Damages



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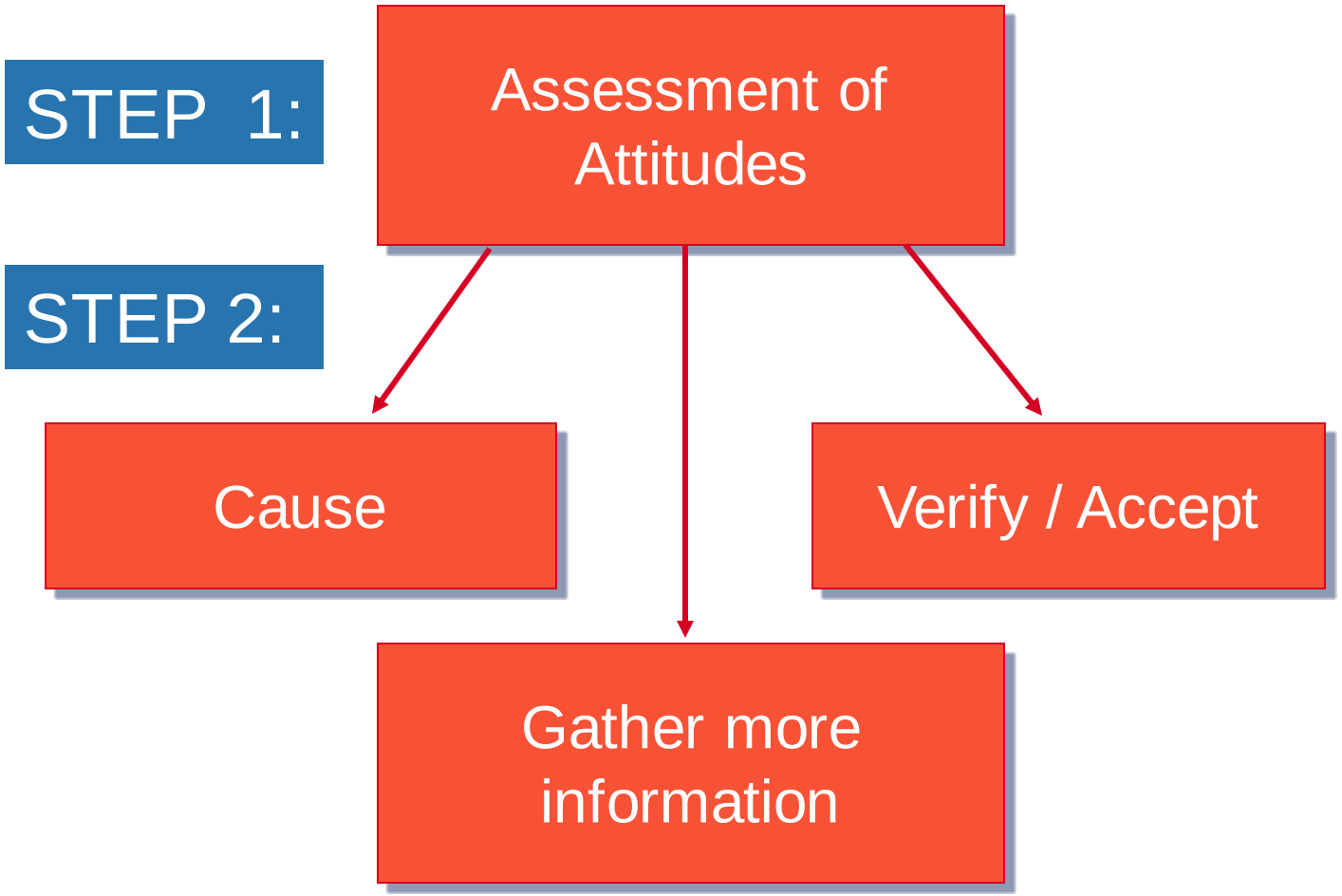
Jury (De)Selection Goals

- Information Gathering
  - Life Experiences
  - Attitudes & Beliefs
  - Active Listening
- Eliciting/Identifying Juror Biases
  - Setting the Tone
  - Question Wording
  - Follow Up Responses



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Different Jurors = Different Goals



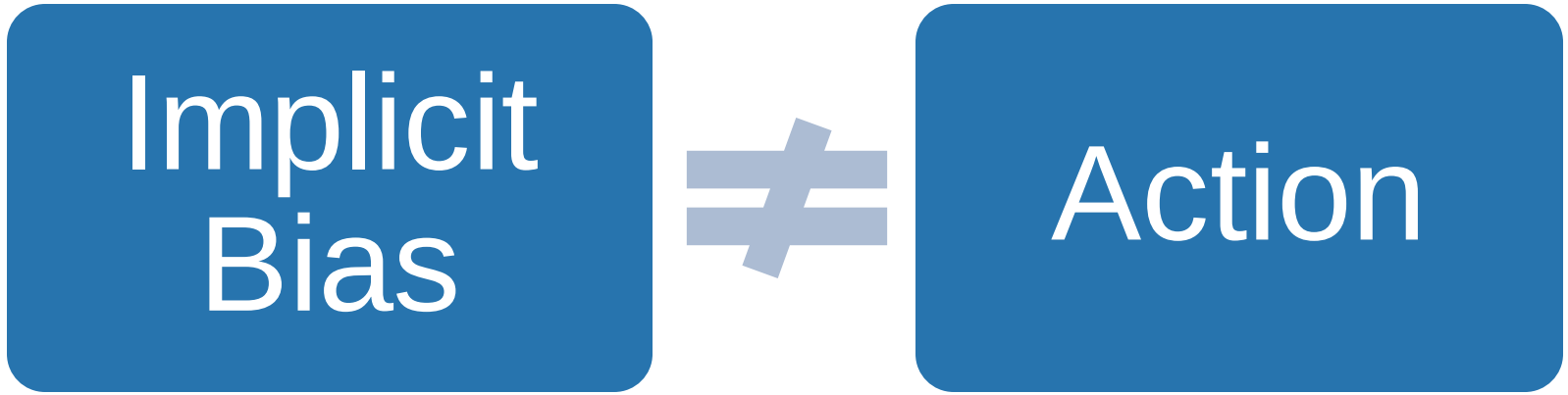
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Attorney Biases / Stereotyping in Jury Selection

- Demographic Based Juror Profiles
- Assumptions of Shared Characteristics (aka Stereotyping)
- Differential Questioning Patterns
- Ignoring / Discounting Responses
- Undue Influence of Personality / Attractiveness

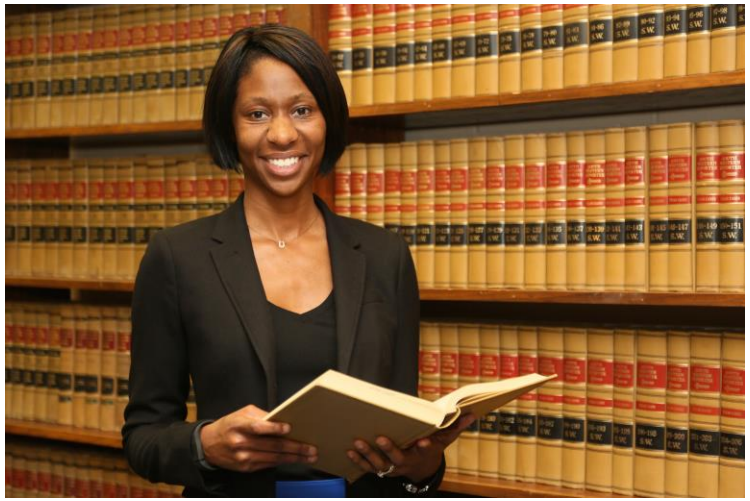
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Debiasing Strategies



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Decreasing Implicit Bias



- Exposure to Counter Stereotypical Associations
  - Positive Outgroup Member Character Portrayals
  - Positive Counter Stereotypical Role Performance

Nilanjana Dasguta & Shaki Asgari, Seeing is Believing: Exposure to Countersterotypic Women Leaders and its Effect on the Malleability ofAutomatic Gender Stereotyping, 40 J. Experimental Soc. Psychol. 642 (2004)







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Reducing the Influence of Bias on Behavior

- Recognizing Blind Spot Bias

  Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot,* 43 J. Experimental Soc. Psychol. 565 (2007).

- Education about Unconscious Processes

  Jerry Kang, Judge Mark Bennett, Devon Carbasdo, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom,* 59 UCLA L. Rev. 1124, 1182-1183 (2012).

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Reducing Biased Decision Making

- Increase Diversity

  Samuel Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations,* 90 J. Personality & Soc. Psychol. 597 (2006).

- Encourage Discussion

  Samuel Sommers & Phoebe Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions,* 27 Behav. Sci. & L. 599 (2009).

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Reducing Biased Decision Making

- Addressing Jury Selection Procedural Issues
  - Increase in Stereotyped Decision Making:
    Stress, time constraints, ambiguity, lack of information.
  - Demand Characteristics

  Remedies:

  - Questionnaires for Sensitive Topics
  - Latitude in Attorney Questioning
  - Judicial Openness to Bias Disclosures

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What California Attorneys Need to Know

Scope of Questioning: CCP § 222.5 (b)(1): "Counsel for each party **shall** have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel **to intelligently exercise both peremptory challenges and challenges for cause**. The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion subject to the provisions of this chapter. During any examination conducted by counsel for the parties, the trial judge should permit **liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court**. The fact that a topic has been included in the trial judge's examination shall not preclude appropriate follow-up questioning in the same area by counsel. The trial judge shall permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning."

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What California Attorneys Need to Know

Jury Questionnaires, **CCP § 225.5(f): A trial judge shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires**, the contents of which are determined by the court in its sound discretion, when requested by counsel. If a questionnaire is utilized, the **parties shall be given reasonable time to evaluate** the responses to the questionnaires before oral questioning commences.

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What California Attorneys Need to Know

Cause Challenge Criteria, **CCP § 225**(b)(1)(B): **Implied bias--**as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror."

(b)(1)(C) "**Actual bias--**the existence of a state of mind on the part of the juror **in reference to the case**, or to any of the parties, which will **prevent the juror from acting with entire impartiality**, and without prejudice to the substantial rights of any party."

Cause Challenge Criteria for Implied Bias, **CCP § 229**: A challenge for implied bias may be taken for one or more of the following causes and for no other:

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

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References & Resources

- Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice. 58(7) Duke Law Journal 1477 (2009).

- 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 (National Center for State Courts, August 2009).

- Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, Daivid Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, Implicit Bias in the Courtroom, 59, UCLA L. Rev. 1124 (2012)

- Justin Levinson & D. Young, Implicit Gender Bias in the Legal Profession: An Empirical Study, Duke Journal of Gender Law & Policy, 18(1), 1-44. (2010)

- Justin D. Levinson, Mark W. Bennett, and Koichi Hioki, Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes, 69 Fla. L. Rev. 63 (2017). Available at: https://scholarship.law.ufl.edu/flr/vol69/iss1/2

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CEB Resources to Check Out

Other Related CEB CLE Programs:

- *Bias From the Bench* (recorded 8/30/2022)
- *Implicit Bias in the Legal Profession* (recorded 10/28/2022)
- *The Focus of Effective Voir Dire* (recorded 7/27/2021)

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History

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Business & Professions Code 6070.5(b)(2) Certification

Business & Professions Code 6070.5(b)(2) Certification

I have either academic training in implicit bias or experience educating legal professionals about implicit bias and its effects on people accessing and interacting with the legal system as set forth in my biography and discussed during this CLE Program.

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