Bias 2.0: What Every Employee Advocate Should Know

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Top 10 Dos & Don'ts For Using Social Science Regarding Bias In Your Practice And At Trial

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Understanding biases related to protected categories (race, national orgin, gender, age, etc.) are particularly important for our practices and proving discrimination cases, but many other biases exist. According to Wikipedia, "[a] cognitive bias is a pattern of deviation in judgment that occurs in particular situations, leading to perceptual distortion, inaccurate judgment, illogical interpretation, or what is broadly called irrationality." (http://en.wikipedia.org/wiki/Cognitive_bias).

Not all social scientists agree on the terminology or classifications of different biases (see: List of cognitive biases - Wikipedia.). However, even the most "doubting Thomas" among them (i.e., Dr. Phil Tetlock) will acknowledge that our biases unconsciously affect perception, impression formation (memory) and judgment (i.e., decision-making). Examples of such biases include:

Anchoring – the tendency to rely too heavily, or "anchor," on a past reference or on one trait or piece of information when making decisions.

Bias blind spot – the tendency to see oneself as less biased than other people, or to be able to identify more cognitive biases in others than in oneself.

Confirmation bias – the tendency to search for or interpret information in a way that confirms one's preconceptions.

Empathy gap – the tendency to underestimate the influence or strength of feelings, in either oneself or others.

Fundamental attribution error – the tendency for people to over-emphasize personality-based explanations for behaviors observed in others while under-emphasizing the role and power of situational influences on the same behavior.

Ingroup bias – the tendency for people to give preferential treatment to others they perceive to be members of their own groups.

Just-world hypothesis – the tendency for people to want to believe that the world is fundamentally just, causing them to rationalize an otherwise inexplicable injustice as deserved by the victim(s).

Mood congruent memory bias - the improved recall of information congruent with one's current mood.

Primacy effect, Recency effect & Serial position effect - that items near the end of a list are the easiest to recall, followed by the items at the beginning of a list; items in the middle are the least likely to be remembered.

Stereotyping – expecting a member of a group to have certain characteristics without having actual information about that individual.

Suggestibility - a form of misattribution where ideas suggested by a questioner are mistaken for memory.

As litigators, our job is to persuade - whether through a brief, questioning a witness, or delivering an argument. At trial, we try to make one of two or more possible scenarios seem more likely to have occurred despite gaps in information, inconsistent evidence and faulty memories or perceptions. We encourage judges or juries to focus on the one thing we impeached a witness about in arguing they should disregard other things the witness said that seem credible (e.g., relying on the "halo effect"). And, of course, in discrimination cases we rely upon "ingroup bias" and "stereotyping" to help prove disparate treatment.

Thus, as litigators, we trade in cognitive biases daily (just like marketers). Knowingly or not, we find ourselves relying on cognitive biases or attempting to

overcome them, as circumstances dictate. Understanding these biases and how they work is central to what we do on a daily basis.

As the authors discussed what lessons about using bias science that we could impart, we realized we had as many questions as answers. The perception of the "newness" of the science about "implicit bias," the uniqueness of each employment case and uniqueness of the judges and jurors who decide them make rendering universally-applicable advice impossible. We cannot offer you hard and fast rules to follow and at times may even disagree with each other. But we've prepared a Top 10 list of "dos and don'ts" for you to consider as you use the science of bias to benefit your practice or in a particular case.

1. <u>Don't</u> Underestimate The Possibility Unconscious Bias Is Affecting You

Social psychology teaches us that the human mind is prone to numerous judgment and perception errors that have very little to do with race, gender, age or other protected categories. Confirmation bias is one example. As litigators, confirmation bias can be an asset - it helps us turn neutral or bad facts into good ones by figuring out how they fit into our client's narrative. As counselors and risk assessors, however, confirmation bias can obscure objectivity and lead to overestimating a favorable outcome. It may cause us to mis-perceive the importance of evidence or fail to inquire about certain facts in discovery. Thus, like all cognitive biases, we must be mindful of confirmation bias and the effect it can have our decisions.

We also can't forget that our minds play these tricks on us without us ever knowing it. Cognitive biases operate unconsciously. As the materials prepared by the National Center for State Courts (reproduced in these materials) explain, we are at risk of unconsciously relying on biases when a decision involves "discretion" or "distracted or pressured decision-making circumstances." It's hard to think of decisions we make as litigators that *don't* involve those circumstances.

We should always try as much as possible to remember that our biases can unknowingly impact our decision-making at every stage of a case (e.g., case selection, pre-trial, discovery, settlement, etc.).

2. <u>Do</u> Use What You've Learned About How We Process And Recall Information

Social psychology also teaches us that human beings perceive information more effectively through a relatable, familiar story or narrative. Trial lawyers know better

than anyone that jurors are looking for a good guy and a bad guy - and we need to make sure the judge or jury puts the white hat on our client.

Unfortunately, witness scheduling and subject matter can get in the way of telling a good story - or telling it sequentially. But every lawyer is familiar with the notions of primacy and recency. Take advantage of this and other well-known biases as you try to provide disjointed information within your framework. Address juror expectations (e.g., that your client will testify first) and explain the logistical problems the trial process presents in opening arguments.

Cognitive bias science also teaches us that judges' and jurors' memories are neither precise or consistent. Plan for that and use it to your advantage. Your ability to create emotion as testimony comes in or as you discuss it again in closing will affect how the jury remembers the evidence in deliberations. Ask yourself why marketers use puppies or babies or sex appeal. It's scientifically proven to help you remember their product (e.g., mood congruent recall).

Use that knowledge in your trial planning. And ask for a closing argument, even in bench trials, to help reinforce your narrative and explain complicated subjects - especially if you are using an expert to discuss bias science.

3. <u>Do</u> Humanize Biases (i.e., Don't Let People Feel Bad For Having Them)

Whether you are questioning a witness, writing a brief, or making an in-person argument, your audience will recoil the moment they realize you're suggesting they might make biased decisions based on race or gender. Plan for that and try to let them off the hook. Explain that when it comes to information processing, the human mind is not a computer. All humans have some types of biases. Claiming to be "bias-free" is like claiming to live without oxygen or water. Explain that as early and often as possible.

We all know our minds play tricks on us. When things happen without us knowing about it, there isn't much we can do about it. Introduce and acknowledge those notions before introducing stereotypes or in-group bias as an example of those tricks. Try to overcome the negative connotation associated with race or gender biases by first discussing familiar, common mental errors people will readily acknowledge before discussing stereotypes.

When you get to race, gender or age biases, many witnesses will freely admit *other* people hold stereotypes. They may even give you examples of positive

stereotypes they know. But we won't admit that *we* have ever acted upon race, gender or age biases because of stigma (which contributes to the "bias blind spot").

When possible, overcome the negative connotations by sharing your own biases (e.g., in voir dire, opening, etc.). Try to use clear, simple examples of decisions we all make based on stereotypes without really thinking about it (e.g., wanting to know the gender of a baby or child so you know what color clothes to buy or whether to buy a truck or a doll). That's how implicit bias works - without us really thinking about it. Try to let people off the hook and get past the blame and shame that comes with beliefs we all struggle to avoid acting upon to ensure we are not treating people based on preconceived gender roles.

4. <u>Don't</u> Underestimate The Biases Your Fact-Finder/Decisionmaker May Hide

We all think we can identify someone who is racist or sexist. But we've also all learned to bury those thoughts and to try hard not to act on them. That doesn't mean our minds still don't have them, though. Never underestimate your fact-finder's ability to hide his or her biases.

Plan for the inaccurate preconceptions that defense lawyers are working to create in the collective mind of the judiciary (e.g., good workers can find jobs and won't sue; every plaintiff is looking for a quick pay day; employment lawsuits are all frivolous; all blacks will eventually play the race card; harassment isn't really as unwelcome as you'd think). Address them head on - both factually and legally through pleadings and court appearances. Distinguish your case from the "other" employment cases.

5. <u>Do</u> Introduce Your Judge To The Science Without Offering "Evidence"

Experts are expensive and your case may or may not warrant using one. But you don't have to have an expert to introduce your judge to bias science. You can rely on the concepts by citing social science journal articles, law reviews, symposia and even information on the internet in court submissions or pleadings (e.g., discovery motions, opposition to motions to dismiss or summary judgment, motions in limine, etc.).

If you do introduce the subject, your opposing counsel (or perhaps even your judge) may refer to "implicit bias" as junk science. Respond by citing nationwide efforts to use the science to help improve the court system by educating judges (e.g., through National Center for State Courts website or the ABA Task Force On Implicit Bias). Certainly evidence the ABA deems important enough for judges to learn about to improve the courts should be considered as evidence in them. Consider referencing the

fact that social science evidence about stereotypes and attitudes was relied upon in *Brown v. Board of Ed. of Topeka Kansas*, 347 U.S. 483, 494 n.11 (1954) (citing numerous articles and even Gunnar Myrdal's "An American Dilemma: The Negro Problem and Modern Democracy" (1944)).

Undermine market-theory-based preconceptions that profit-seeking companies would not engage in discrimination because it is not profitable by citing studies showing otherwise. For example, a recent study found that black applicants for entry level jobs in New York City were half as likely as equally qualified whites to receive a callback or job offer *and* that employers preferred white applicants just released from prison equally with black and Latino applicants without criminal records. See, e.g., Pager, Western & Bonikowski, "Discrimination in a Lw-Wage Labor Market - A Field Experiment," American Sociological Review October 2009 74:777.

Use helpful caselaw. One judicial decision helpful to introducing the notion of *unconscious* bias relied upon law review articles (which cited social science journals). *See Thomas v. Troy City Bd. of Educ.*, 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004) ("[t]he judicial focus on the search for unconstitutional discriminatory animus obscures the fact that it is possible that the [employer] chose the individual it perceived to be the 'best' candidate and, yet still, that [the plaintiff] was subjected to discrimination; the two are not mutually exclusive" (citing Charles R. Lawrence III, The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 325-25 (1987)). As explained in *Thomas*:

> Such subjective decision-making processes are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of—hence the difficulty of ferreting out discrimination as a motivating factor. "Thus," Professor Lawrence explains, "an individual may select a white job applicant over an equally qualified black and honestly believe that this decision was based on observed intangibles unrelated to race. The employer perceives the white candidate as 'more articulate,' 'more collegial,' 'more thoughtful,' or 'more charismatic.' He is unaware of the learned stereotype that influenced his decision. Moreover, he has probably also learned an explicit lesson of which he is very much aware: Good, law-abiding people do not judge others on the basis of race. Even the most thorough investigation of conscious motive will not uncover the race-based stereotype that has influenced his decision."

302 F. Supp. 2d at 1309 (quoting Lawrence, The Id, at 324-25).

One of the most helpful decisions addressing implicit bias involved no expert testimony. *See Kimble v. Wisc. Dept. of Workforce Development*, 690 F. Supp. 2d 765, 776 (E.D. Wis. 2010). The court, however, relied upon the science in entering judgment for plaintiff, stating:

> [W]hen the evaluation of employees is highly subjective, there is a risk that supervisors will make judgments based on stereotypes of which they may or may not be entirely aware.

The court also credited the work of Anthony Greenwald (and others) in explaining that stereotyping occurs as "a form of categorizing," where "[i]ndividuals draw lines and create categories based in part on race … and the stereotypes they create can bias how they process and interpret information and how they judge other people" and this can happen "whether or not the supervisor is fully aware that this is so."

Use the cases, the law reviews and the social science journals and studies to undermine doctrines like "the honest belief" rule. If nothing else, the law clerk reviewing your briefing (very likely a social science major) may find the literature interesting and pause longer to consider your case (leading to a more accurate perception of the evidence, as you now know).

6. <u>Do</u> Focus On What Employers Should Do To Protect Employees From Bias

When a male manager calls a female a "stupid bitch," it's easy to find someone to wear the "black hat." But it's often hard to find a villain in cases involving implicit bias. Emphasizing the unconscious nature of bias makes it harder - we want to absolve judges and jurors for acting on their own biases, while holding the employer accountable. That makes it very difficult to point to someone wearing the "black hat."

Consider arguing the company "knew better" and, thus, should be held to a higher standard. As you conduct discovery develop a narrative or theme, focus on all the things the company should have done to help protect the decision at issue from being affected by bias (i.e., HR review, internal analyses and/or oversight by senior management).

Try to prove the organization knows of risks of discrimination based on commonly held stereotypes (like blacks aren't trustworthy or women want to be mothers). HR witnesses want to show you how knowledgeable they are about cutting

edge topics (occasionally, even implicit bias). Try to prove HR knows that the company needs to guard against decisions being made based on those stereotypes or biases. HR witnesses typically will readily justify their own existence by describing the important role they play in helping managers prevent stereotypes or gender, race or age biases from influencing employment decisions.

Try to prove the decisionmaker was susceptible to risks of stereotypes - consciously or unconsciously - or at least failed to guard against them (this, of course, is the really hard part, for the reasons described in *Thomas*). Even without that, you can show policies designed to reduce risk of bias weren't followed or oversight didn't occur (i.e., the same type of "hindsight is 20/20" critiques you can always make). Like in harassment cases, build HR up as the protector of your client and show all the ways they failed to do what they knew or the company's policies say they should have done to protect your client.

7. If You Use An Expert, Explain The Social Science In Context

If you use an expert, make sure you know what you want the expert to opine about and how it fits into your case. Because of what you know about how humans process information, also be sure to *explain* how you want to use the evidence and how it fits your overall narrative or story.

As you introduce the topic, place stereotyping in historical legal context. You might not reach as far back as *Brown v. Board*, but consider reminding the court of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (which introduced the stereotyping method of proof) and *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730-731 (2003) (in which Chief Justice Rehnquist expounded upon the importance of overcoming gender-stereotypes about care-giving in holding states could be sued for money damages under the FMLA).

Additionally, introduce the social science in historical context. Stereotyping research dates back decades. Long before development of the Implicit Association Test ("IAT") social scientists universally agreed stereotypes affected people's judgments. They demonstrated this phenomena using numerous methodological tools (interviews, the case study method, field experiments, etc.). The IAT was a breakthrough, because it confirmed well-established phenomena by measuring unconscious bias through a better methodological tool - one that helped researchers demonstrate the prevalence of unconscious bias among Americans.

Resist the notion that the IAT or implicit bias is still "new." The IAT now has nearly two decades under its belt. Through 1,000+ peer-reviewed publications, IAT research shows bias can operate unconsciously and that unconscious "protected category"-based biases are widely prevalent among Americans. As one law review explained:

> In fact, implicit bias as measured by the IAT has proven to be extremely widespread. Most people tend to prefer white to African-American, young to old, and heterosexual to gay. The only major exception is that African-Americans themselves are divided in their preferences; about equal proportions show an implicit preference for African-Americans and whites. Note, however, that unlike whites, African-Americans taken as a whole do not show an implicit preference for members of their own group.

See C. Jolls and C. Sunstein, 94 Yale L. Rev. 969, 971 (2006) (footnotes omitted).

Does the research show people who have these biases *always* act upon them? Of course not. Biases operate sporadically, not consistently (just as overtly prejudiced bigots don't call *every* minority an epithet). However:

> we know enough to know that some of the time, those who demonstrate implicit bias also manifest this bias in various forms of actual behavior. For example, there is strong evidence that scores on the IAT and similar tests are correlated with third parties' ratings of the degree of general friendliness individuals show to members of another race. ... In the employment context in particular, even informal differences in treatment may have significant effects on employment outcomes, particularly in today's fluid workplaces.

Id. at 972 (click to read).

Don't be afraid to turn the tables and attack the employer's expert - very likely Phil Tetlock - as outside the mainstream or even an outright zealot. Tetlock has a well-known business relationship with UVA Law Professor Greg Mitchell. The purpose of their business entity, generally speaking, is to prevent what they believe is unreliable social science from being admitted in court. As of January 2012, Tetlock had never testified in court - perhaps because in an e-mail exchange with Anthony Greenwald, he characterized Greenwald's work as "Mertonian" (i.e., conforming to scientific norms).

8. Don't Be Afraid To Try

Never be afraid to use scientific knowledge to advance the cause of your clients or the goal of equality in society. Charles Hamilton Houston, mentor and educator to Thurgood Marshall and founder of Howard Law School, wrote "a lawyer's either a social engineer or he's a parasite on society." Be the social engineer. If you're at this conference or have reviewed the conference materials, you probably already know more about this subject than most judges and defense counsel. Don't be afraid to act like it.

Perhaps your concerned your efforts to introduce evidence of implicit bias will lead to a nationwide headline that courts have rejected the theory of implicit bias. Fear not. A group of well-intentioned, hard-working lawyers (including one of the authors) have relieved you of that burden (Google: "Judge Rejects Implicit Bias"). And luckily, while the headline was wide-spread, that decision is being appealed and bears little precedence outside of Iowa.

In fairness, numerous legal scholars have written about how neither legal doctrine nor the legal system is equipped to handle what we now know about bias. Absent efforts by us - advocates working from within the system - neither ever will be.

9. Do Rely On NELA And Other Public Advocacy Groups

Through NELA you have access to the best and brightest employee advocates - many of whom spend considerable time thinking and working on how best to use this science to uphold and advance the law. Other advocacy groups - like the ones helping sponsor this seminar - are committed to those goals and often are less constrained by professional responsibility obligations accompanying the attorney-client relationship.

Use those resources. Through them, you can obtain support, knowledge and access to otherwise unavailable materials. For example, through NELA's generous lawyers, you can obtain deposition transcripts and outlines for deposing experts and sample briefs which introduce implicit bias concepts to courts (e.g., in discovery motions or in opposition to summary judgment or *Daubert* motions). You might even receive unpublished gems like the two orders denying *Daubert* motions seeking to exclude stereotyping and implicit bias evidence in individual discrimination cases (attached).

10. Do Be Persistent

Certain times you just know you're right and the law is wrong. A middle-aged white man referring to an African American male of similar age "boy" is wrong, too. And it is evidence of racial bias. Whether you live in Birmingham, Dallas or Chicago, it just is. It's not a "stray remark" - it's the type of context that provides the best insight available into whether an individual holds biases that affect employment decisions.

Convincing judges of that may be difficult, and there may be multiple setbacks along the way. As the multi-year efforts dedicated to cases like *Ash v. Tyson* show, persistence is necessary. It may not always seem worth it. And without the legal victory, you and your client may be left literally empty-handed. But being persistent matters. Even in defeat, you and your client will enhance opportunities for groups that historically have not received their fair share.

Of course, you know we're trying to make you feel good by saying that. But it just so happens we have some social science evidence on our side to help prove it. *See* A. Kahlev and F. Dobbin, "Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time" Law and Social Inquiry, Vol. 31, Issue 4, 855-903 at 889 (Fall 2006) ("Repeated lawsuits reduced the subsequent proportion of white men and increased the subsequent proportions of white women, black women, and black men in management") (click to read). So keep fighting.