

# Section K

## Five Reasons Lawyers Should Care about Implicit Bias

Thomas Newkirk

Newkirk Zwagerman PLC

521 E. Locust

Des Moines, IA 50309

tnewkirk@newkirklaw.com

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# **Five Reasons Lawyers Should Care about Implicit Bias**

**Thomas Newkirk**  
**Newkirk Zwagerman PLC**  
**515 E. Locust, Suite 300**  
**Des Moines, Iowa 50309**  
**515-883-2000**  
[tnewkirk@newkirklaw.com](mailto:tnewkirk@newkirklaw.com)  
[tnewkirk@mera-law.com](mailto:tnewkirk@mera-law.com)  
[www.newkirklaw.com](http://www.newkirklaw.com)

## I. Introduction to Why You Care and Why You Don't Care

The first question is not why lawyers should care, but why they often don't care. To encourage lawyers (or anyone) to care about the effects of implicit bias, I begin by getting my personal moral judgment out of the way. To everyone I say:

**“I don't care why you care about implicit bias.”**

The most altruistic lawyer and the most self-centered lawyer both have the same problem when it comes to implicit bias. They are both prevented from caring and potentially from taking action to prevent biased decisions because of several internal, and often subconsciously driven, mental blocks. I refer to these mental blocks as a) the challenge of defensiveness, 2) the problem of polarization, 3) the impact of bias itself, and 4) the systemic lack of knowledge. Before I move forward with proactive reasons to care, I will try to reduce these mental blocks.

### 1. Don't be defensive.

We are all defensive when we talk about bias. By we, I mean members of the in-group or people who look like me. We interpret every conversation about bias as an accusation or an implied threat of being labeled as a “racist” or “sexist.” So, let me take care of that one.

**No one is calling you or anyone a racist or sexist.**

### 2. Bias is not an either/or proposition.

We also approach bias in a very polarized way or think about bias as an either/or proposition. One is either very biased or one is not biased at all. Polarization also causes to think of bias as if it only occurs within a person who possesses a very specific prejudice against others. The result of this *polarized approach* is that when we interpret data showing racial or gender imbalances, we will interpret that negative data as an either/or proposition. *Either* the bad data about blacks or women is the result of “racism/sexism” and therefore certainly not my problem, *or* the bad data reflects a problem created by “something wrong with the minority group” itself. For example, low unemployment rates for blacks (data showing harm) is interpreted *either* as the result of *racism in a few employers*, or it is some problem with the blacks who apply, such as qualifications. The data showing unequal pay for women in law firms is *either*, the result of *sexism in one or two firms*, or, something about the female lawyer, such as failing to negotiate or having children.

**Stop that. The cause is not racism/sexism, but the effect of implicit bias.**

### 3. Bias is itself is the enemy.

Many of us are possessed by some form of these implicit biases. It is therefore often *the bias itself that prevents our mind from accepting the scope of the problems created by implicit bias*. This mental block prevents “good” people and good lawyers from caring about the problem.

Lawyers and judges also believe that when we put on our “lawyer” hat or don our judicial robes, that we are immune from biases.<sup>1</sup>

**Time to look in the mirror folks. Lawyers have bias just like everyone else.**

4. No one can know, what they do not yet know.

The last barrier is a lack of knowledge. It is however, challenging to remind lawyers that they are missing a core piece of knowledge necessary to even understand how to solve a problem. And, reminding lawyers of this flaw creates well, defensiveness. Lack of knowledge is therefore a block that can also trigger another mental block.

**There is no shame in recognizing the need for more knowledge**

Because this one is particularly challenging for lawyers, let me offer a bit more on this point. First, why would any lawyer know about this? We still do not teach any of this in law school and you cannot learn this reading case law. The entire concept is also fairly new.

The implicit association test (IAT) was really “invented” in 2000.<sup>2</sup> Personally, I began looking into this in 2002 and I was one of only a handful of practicing lawyers in the United States doing so. In 2003, I was the only practicing lawyer invited by the inventors of the IAT to Harvard to collaborate with law professors and social scientists on how to introduce implicit bias into the law. I am one of the few in the United States to credibly prove implicit bias, in 2014.

**If I can do it, so can you.**

Iowa has had a very central role in these advances—partly because of the work of Justice Cady and also Mark Bennett, who has been pushing the ball forward in the judiciary.<sup>3</sup> There are also now increasing numbers of articles written by law professors and judges accepting the idea of implicit bias.<sup>4</sup> There are now articles discussing biases within lawyers and judges and articles and exposing how these biases are connected to our ethical obligations.<sup>5</sup>

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<sup>1</sup> Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009) (reporting that 97% of judges in an educational program rated themselves in the top half of the judges attending the program “in their ability to avoid racial prejudice in decision[-]making”).

<sup>2</sup> Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995);

<sup>3</sup> Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 150 (2010).

<sup>4</sup> Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012). Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012) Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 974 (2006). Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 265 (2009); Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, U. CIN. L. REV. 97, 143 (2010);

<sup>5</sup> Nicole Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, Vol 4 St. Mary’s Journal on Legal Malpractice & Ethics, 278 (2014); Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 769 (2004) (noting the potential for implicit bias to negatively affect the attorney-client relationship, and

## II. Five Reasons Lawyers Should Care about Implicit Bias

Now that we addressed some subconscious barriers to why you will not care, let me give you proactive reasons that may help you care about learning more about implicit bias.

My five reasons are:

- I. Making Money
- II. Making a Difference
- III. Making Sure You Don't Get Sued
- IV. Making Extra Sure You Don't Get an Ethics Complaint
- V. Making Damn Sure Iowa Remains a Leader, not a Follower

Each of these reasons are connected by two serious questions. Those questions are first, whether you, as a lawyer believe that implicit bias exists and second, if you believe bias exists, do you then believe it causes harm on a way that affects your world?

Saying that reducing implicit bias can “make a difference” or wanting Iowa to be a “Leader in reducing bias” sounds nice, but such platitudes do no matter if you fail to appreciate that implicit bias causes harm to other people. Saying that you could get sued or an ethics complaint sounds serious, but not if you have no idea why that could ever happen. Finally, using implicit bias to “make money” sounds great, but not if the entire concept is entirely foreign to you. To even have a discussion about these five reasons requires that we dig into what bias is, how it works, how it causes harm and how that relates to the law.

**Only then can each of you decide if you care, and if so, why you care.**

There are a few basic concepts to help grow your appreciation for implicit bias.

### 1. Foundations for Why You Care - General Concepts of Implicit Bias

The **Nature of Bias** is a description of or understanding of how bias, if present in a person or organization, works to affect perception, judgment and decisions. To help explain what I mean, consider the following questions:

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urging lawyers to acknowledge those biases in order to work toward overcoming them); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 415–16 (2002) (calling for lawyers to “confront their own cultural identity, including the biases and prejudices that accompany that identity”). Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1578 (2013) (positing that unconscious bias can affect interaction with clients); Nicole Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, AKRON L. REV. 29–33 (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2164325](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164325) (discussing studies of judicial decision-making and the influence of implicit biases). Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1161–63 (2009) (finding that black judges and white judges perceive racial harassment differently, which means that the decision-making process is not completely objective; judges bring their personal experiences, or lack of experience, to bear when deciding cases).

If we agree that a person has some bias toward blacks, for example, *how* will that bias work on the mind? How will that bias cause harm?

If we agree that a person has some bias toward women, again, *how* will that bias work or cause harm?

The **Extent of Bias** is simply an expression of the *probability* that bias exists in a given situation. In short, it provides the missing answer to the question of *if or whether* bias may be present in a decision-maker or group.

Again, ask yourself a couple of questions tied to examples.

If we know a black man is applying for a janitor position and another is seeking a job as a bank teller, what is the *probability* that racial bias will affect each situation?

If we know that a female is seeking a customer service job and another seeking to be hired as an architect, what is the *probability* that gender bias will affect each?

A third concept requires appreciation for what I call the **micro effects of bias**. Within a series of decision-makers, such as a discussion between team lead, a first-line supervisor, a manager and a director, there can be a series of biased decisions that *accumulate to result in harm*.

With that foundation we turn to how bias might affect the judgment of lawyers.

## 2. Foundations – Bias Affects Perception, Judgment and Decision-Making

What do lawyers do? Obviously, we meet human beings, we assess their claims or defenses and we then engage with that human being or organization composed of other human beings to represent their interests—defending a claim, pursuing a claim, and advising on a host of issues.

All the above is founded upon our perceptions and our judgments based on the accumulation of hundreds or thousands of pieces of information. We use our perception and judgment along with our understanding of the law to determine how to represent our clients, what is in their best interests and how best to pursue their claims consistent with the law.

What does the *nature of bias* tell us about the risks we face in the practice of law?

**If bias exists in our mind, or in the mind of our partners, or in the mind of our staff, that this bias can independently or cumulatively impact the advice we give to our clients.**

### A. Why you Care - Our Ethical Duty

Lawyers are people and they have biases—biases about blacks, women and older persons. These biases affect our perception, our judgment and therefore our decisions and our *advice*. Without proper attention they will affect how we assign credibility to our client and how we may assign value to a person or a case. The question of whether bias is impacting our decisions also clearly related to our ethical duty to our clients and to the court.

## Foundations in Iowa's Ethical Rules

1. As lawyer's we have a duty to work to improve the justice system. Implicit bias creates injustice in our legal system, and it is our role as lawyers to work to correct that injustice. Iowa Rules of Professional Conduct Preamble paragraph (6).
2. Attorneys have a professional obligation not to engage in "unlawfully discrimination in the practice of law." Iowa Rule of Professional Conduct 32:8.4(g)
3. A lawyer has a duty to zealously advocate for the interests of his clients. Iowa Rule of Professional Conduct Preamble paragraph (2):

Think about these questions as you determine, **whether you care?**

- What if your ability to be a zealous advocate was affected by implicit bias?<sup>6</sup>
- What if your interest in advocating for your client, was affected by implicit bias?<sup>7</sup>
- What if you appeared to be "unlawfully discriminating in the practice of law" but you did not realize it because of implicit bias?

The following example is from a study about the advice bankruptcy lawyers provide to clients:

We report on racially disparate uses of chapter 13 bankruptcy. Although chapter 13 can offer some legal advantages for persons seeking to protect valuable assets, it generally offers less relief and costs more than the alternative available to consumers, chapter 7.<sup>8</sup>

**Even after controlling for financial, demographic, and legal factors that might favor a chapter 13 filing, African Americans are much more likely to file chapter 13, as compared to debtors of other races.** The second study reports that attorneys **were more likely to recommend chapter 13 when the hypothetical debtors were a couple named "Reggie & Latisha,"** who attended an African Methodist Episcopal Church, as compared to a couple named "Todd & Allison," who attended a United Methodist Church.

Results from the experimental vignette study suggest consumer bankruptcy attorneys may be playing a very important, although likely unintentional, role in creating the racial disparity in chapter choice.

If an attorney is permitting any degree of bias – unfavorable for black or favorable for white – to affect his or her advice, then there is a problem. However, this also can lead to lawsuits.

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<sup>6</sup> A prosecutor who exercises preemptive strikes on the basis of race in violation of *Batson v. Kentucky* has violated his professional duties. *People v. Allen*, 188 Cal. Rptr. 3d 718 (Cal. Ct. App. 2nd Dist. Div. 6 2015).

<sup>7</sup> An attorney violated state anti-discrimination laws by choosing to only represent women in her divorce practice. *Nathanson v. MCAD*, 2003 WL 22480688 (Superior Ct. Mass. September 16, 2003).

<sup>8</sup> Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 Journal of Empirical Legal Studies 393 (September 2012) Available at <http://ssrn.com/abstract=1989039>.

## **B. Why You Care – Lawsuits and Malpractice Claims**

If bias affects how lawyers interact or advise clients, it will also **affect hiring decisions, assessments of performance and decisions on pay and division of opportunity** with regard to women and persons of color.

One example is the many equal pay lawsuits against large law firms.<sup>9</sup> Those pay imbalances for women in the law continue, *for some reason*.<sup>10</sup> They also represent an increasing risk.

- **[BREAKING: Ex-Jones Day Associates Hit Firm With \\$200M Bias Suit](#)**  
A group of former Jones Day associates hit the BigLaw powerhouse with a \$200 million discrimination suit on Wednesday, accusing the firm of systematically underpaying women, devaluing the work of female associates and pushing out lawyers who have children.
- **[Ogletree Atty Hits Firm With \\$300M Gender Bias Class Action](#)**  
An Ogletree Deakins attorney has hit the management-side powerhouse with a \$300 million class action alleging the firm's male-dominated leadership disproportionately favors men over women in pay, promotions and development opportunities. [Read more »](#)

### **[Another University of Denver law professor sues school alleging gender and wage discrimination](#)**<sup>11</sup>

The trick is appreciating that pay imbalances are often the result of implicit gender bias in lawyers making decisions about pay and access to pay. However, before throwing stones, does anyone honestly think implicit gender bias is limited to big law firms?

## **C. Why you Care – Making Money**

In 2005, I took my first case for a female coach. We won that case, against ISU, in 2008. After that I began noticing a problem facing female coaches. That problem was that female athletes will often make complaints about female coaches --call them bullies or abusers. Universities would then respond to these complaints and fire these female coaches.

In 2014, a female coach walked into our law office. That was Tracey Griesbaum the former head field hockey coach at the University of Iowa. She came in after being subjected to a 45-day investigation about allegations of abuse and bullying. These complaints were made by *female athletes*, all of whom the coach had personally recruited and who chose to play for her as their coach. These complaints made by those females were then investigated by an *all-female investigation team*. The resulting report found no policy violations by Coach Griesbaum, but the report suggested there were “concerns” about her communication and coaching methods. The

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<sup>9</sup> Bell, *What 12 Gender Bias Complaints Say about BigLaw*, Law360 (May 28, 2019).

<sup>10</sup> A new study reveals that male lawyers can earn 53% more than their female partners.  
<https://www.cnn.com/2018/12/19/success/high-paying-occupations-wage-gap/index.html>

<sup>11</sup> [http://www.abajournal.com/web/article/another-university-of-denver-law-professor-sues-alleging-gender-and-wage-discrimination?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/web/article/another-university-of-denver-law-professor-sues-alleging-gender-and-wage-discrimination?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email)

AD, Gary Barta, then terminated her contract. He did not terminate her “for cause” and paid out the liquidated damages clause in her contract worth over \$200,000.

How would a female client, who gets complaints from females and who is investigated by females and who has a supervisor (under Barta) was also a female, prove gender discrimination? How did we prove that case and in 2017, get the University of Iowa to write Coach Griesbaum a **second check for \$2,500,000**, in addition to the \$200,000 she was already paid?

The answer is because of a high-level understanding of implicit bias. We understood why generally, a female is at risk from bias and why a female coach is at higher risk. We understood how we socialize young men and women and encourage female athletes to report differently. We appreciated how bias creates complaints about a female, almost out of thin air and how bias affects perceptions of investigators and administrators regardless of their gender. Without the micro-level appreciation for how bias really works, Coach Griesbaum had no case.

This is what I have done with this knowledge. Our firm is also working on other systemic problems for race and other gender issues. However, this knowledge can help each of you.

- Do you know that bias affects medical care? A doctor might have his or her decisions affected by the gender, race or national origin of your client?

**Do you care personal injury or work comp lawyers?**

- Do you know that bias affects the jury pool and affects women one way and blacks another and immigrants yet another? Bias in the jury affects perceptions of evidence, assessment of liability and damages?

**Do you care Trial Lawyers?**

- Do you know that bias affects the entire process in criminal justice?

**Do you care, criminal defense or juvenile lawyers?**

#### **D. Why you care – Making a Difference and Keeping Iowa as Leader**

In addition to making money, our firm (Newkirk Zwagerman) has been fortunate to make a difference. We help women in addressing systemic pay claims and help coaches recover damages. I also travel to universities all over the united states to educate and to avoid the harm as much or more than our firm works to recover damages from the harm. We help persons of color recover damages, but I also try to help educate and address systemic racial problems. That includes bias in the discipline of black students and the biases that affect juveniles of color.

I do not make money from those efforts, but they are efforts to make a difference.

**Each of you can do the same.**

Other states are making progress and catching up. I hope more of you will take action to learn more about this issue. Iowa has been a leader and should stay that way, but we need more help.