

Elimination of Bias 2018 Bench and Bar Conference

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What is Bias (Black's) ?

- Black's Law Dictionary defines “bias” as an inclination, bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. It is a condition of the mind which sways judgment and renders one unable to exercise his or her functions impartially in a particular matter. Black's defines “Prejudice” as a fore judgment; bias; partiality; preconceived notion. A leaning towards one side of a cause for some reason other than a conviction of its justice.

What is Bias (Webster's) ?

- Webster's Dictionary defines a “bias” as an inclination of temperament or outlook. It can be a highly personal and unreasoned distortion of judgment. Webster's defines “prejudice” as 1. injury or damage resulting from some judgment or action of another in disregard of one's rights; *esp*: detriment to one's legal rights or claims, 2 a (1) : preconceived judgment or opinion (2) : an adverse opinion or leaning formed without just grounds or before sufficient knowledge. ...

Who has bias?

- Is bias a natural phenomenon, or is it something acquired during the process of assimilation?
- Is there anyone who is free of bias?
- How might one overcome bias?
- Why might one fake a bias or prejudice?
- Is bias something that has a rational basis, or is it irrational in nature?
- My first memorable experience with racial bias.

Federal Laws—Title VII—Disparate Treatment

- UNLAWFUL EMPLOYMENT PRACTICES
- SEC. 2000e-2. [Section 703] *Civil Rights Act of 1964*, 42 U.S.C.
- (a) Employer practices
- It shall be an unlawful employment practice for an employer -
- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII--Retaliation

- **OTHER UNLAWFUL EMPLOYMENT PRACTICES by Statute**
- SEC. 2000e-3. *[Section 704]*
- (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
- It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on—the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Title VII—Disparate Impact—Case Law and Statute

- (1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if-
- (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
- (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Title VII—Disparate Impact (cont.)

- (B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
- (ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.
- (C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".
- (2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

Sexual Harassment-by EEOC

Regulation approved by Case law

- Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964.
- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.

Other Federal Laws

- The Pregnancy Discrimination Act

This was an amendment to Title VII which makes it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Other Federal Laws

- The Equal Pay Act of 1963 (EPA)

This law makes it illegal to pay different wages to men and women if they perform equal work in the same workplace. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Other Federal Laws

- Title I of the Americans with Disabilities Act of 1990 (ADA)

Makes it illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business.

Other Federal Laws

- **The Family and Medical Leave Act of 1993 (29 U.S.C. Section 2601)**
- Covers all qualified employees (employer employs 50 or more employees within 75 miles and employee has worked for more than 12 months and more than 1,250 hours per year) and provides covered employees job protected and unpaid leave for qualified medical and family reasons, including: personal or family illness, family military leave, pregnancy, adoption, or the foster care placement of a child.

California Fair Employment and Housing Act--*Govt. Code 12940*

- Prohibits an employer from discriminating on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age sexual orientation, or military and veteran status of any person.

Ca. FEHA (cont.)

- **Prohibited Employment Practices:**
- The Fair Employment and Housing Act specifies:
- Prohibits discrimination in all aspects of employment including hiring, termination and terms and conditions or privileges of employment.
- Prohibits harassment of employees or applicants and requires employers to take all reasonable steps to prevent harassment from occurring.

Ca. FEHA (cont.)

- Requires that all employers provide information to each of their employees describing the forms of sexual harassment, its illegality, the internal and external complaint processes and legal remedies.
- Requires employers to reasonably accommodate employees or job applicants with disabilities in order to enable them to perform the essential functions of the job.
- Requires employers to provide leaves of up to four months to employees disabled because of pregnancy or childbirth.
- Requires an employer to provide reasonable accommodations requested by an employee, with the advice of her health care provider, related to her pregnancy, childbirth, or related medical conditions.

Ca. FEHA (cont.)

- Requires employers of 50 or more persons in a 75 mile radius to allow eligible employees to take up to 12 weeks leave in a 12-month period for the birth of a child, the placement of a child for adoption or foster care, for an employee's own serious health condition, or to care for a parent, spouse, or child with a serious health condition. (Employers are required to post a notice informing employees of their family and medical leave rights.)
- Requires employment agencies to serve all applicants equally; to refuse discriminatory job orders; to refrain from prohibited pre-employment inquiries or advertising.
- Prohibits discrimination by unions in membership or employment referrals.
- Prohibits retaliation against any person who has filed a complaint with the Department, participated in a Department investigation or opposed any activity prohibited by the Act.

California Labor Code Sec. 1197.5

California Fair Pay Act—SB 358

- The equal pay provisions of California law were revised in the 2015 legislative term in a bill authored by Sen. Hannah Beth Jackson.
- Previous law required that an employer not “pay any individual in the employer’s employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions”. Exceptions exist for payment based on a seniority system, merit system, a measurable quantity or quality of production system, or a bona fide factor other than sex.

SB 358 Amendment

- This bill makes a legislative finding that the gender gap at present in California is 16 cents on the dollar. It amends the Labor Code to read:
- “(a) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for **substantially similar work**, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions, except where the employer demonstrates:
- (1) The wage differential is based upon one or more of the following factors:
 - (A) A seniority system.
 - (B) A merit system.
 - (C) A system that measures earnings by quantity or quality of production.”
- Or other specified bona fide factors, such as education, training or experience.
- Thus, “equal pay for equal work” becomes equal pay for substantially similar work.
- And, the “same establishment” requirement is eliminated.

Important Changes Effective-2018

- AB 168: Adds Labor Code Sec. 432.3-prohibits an employer from asking about or considering a prospective employee's salary history information.
- AB 450: Adds sections to the Government Code and Labor Code which: limit how much California employers may accommodate some requests from federal immigration officials. Employer cannot consent to immigration enforcement agent entering a nonpublic work area without a judicial warrant, or grant access to employee records, except for I-9 verification purposes.
- SB 396: requires large employers (50+) to expand anti-harassment training to include gender identity, gender expression, and sexual orientation.
- SB 295: Strengthens Labor Code provisions requiring Sexual Harassment Prevention Training for farm labor contractors. First such laws were in 2014 after release of PBS documentary "Rape in the Fields". --This issue has come to the fore in legislatures, the film industry and all levels of the workforce.

California Business and Professions Code Section 6068

- It is the duty of an attorney to do all of the following:
 - (a) To support the Constitution and laws of the United States and of this state.
 - (b) To maintain the respect due to the courts of justice and judicial officers.
 - (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

California Rule of Professional Conduct 2-400 (B) (2)

- (B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race , national origin, sex, sexual orientation, religion, age or disability in:
 - (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
 - (2) accepting or terminating representation of any client.
- Under CRPC 2-400 ©, the State Bar cannot initiate disciplinary proceedings for violation of this rule until the offense is proven in a civil court and appellate rights concluded.

ABA Model Rule 8.4, Misconduct, and Comment 3

- It is professional misconduct for a lawyer to:
- (d) engage in conduct that is prejudicial to the administration of justice;
- [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

Hypothetical

- You are asked to represent a resident of Calipatria State Prison. Your potential client, Alan Baker, has a shaved head with a tattoo reading “666” superimposed over a swastika, superimposed over a clover on his scalp. The rest of his body is similarly adorned with body art that shows his clear affiliation to “The Brand”, the latest iteration of the Aryan Brotherhood. You know that the AB is only 1% of the prison population, but is deemed by prison authorities to be responsible for 20% of prison murders.
- You are asked to defend Baker who is charged with attempted murder in the County Jail. He is accused of slashing another white inmate who may have disrespected Baker.
- You are asked to defend Baker in a civil suit brought by the slashed inmate against Baker and the criminal enterprises run by the AB in the prison system. What rules govern your decision to represent?

ABA Model Rule 1.2 (b) and Comment 5

- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.
- *Note:* There is no Ca. Rule 2-400(B)(2) issue because any discrimination is not based upon a protected classification.

ABA Model Rule 6.2 Accepting Appointments and Comment 1

- A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.
- [1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.
- See rules regarding Competency of Representation and Withdrawal from Representation.

Judges and Elimination of Bias

- With respect to fairness and preventing bias, under the Code of Judicial Ethics, a judge must:
- Dispose of all judicial matters fairly, promptly, and efficiently. The judge must manage the courtroom in a manner that provide all litigants the opportunity to have their matters fairly adjudicated in accordance with the law. *Cal Rules of Ct., Code of Judicial Ethics, Canon 3 (b) (8).*
- Perform judicial duties without bias or prejudice. “A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice including but limited to bias or prejudice based upon race, sex (read “gender”) religion, national origin, disability, age sexual orientation, or socioeconomic status, or (2) sexual harassment.” *Canon 3 (b) (6)*

Judges cont.

- Require lawyers in proceedings before you to refrain from manifesting by words or conduct, bias or prejudice based on race, sex (gender), religion, national origin disability, age sexual orientation (including gender identity), or socioeconomic status against parties, witnesses, counsel or others. This canon, however, does not preclude legitimate advocacy when one of these factors is an issue in the proceedings. *Canon 3 (B) (6)*
- Require staff and court personnel under the court's direction and control to observe appropriate standards of conduct and to refrain from manifesting bias or prejudice based on....(the prohibited circumstances)...in the performance of their official duties. *Canon 3 © (2)*

Elimination of Bias

- Constantly check your own perceptions. Be conscious of the fact that you may be influenced by a bias or prejudice.
- When it happens, imagine the opposite, or an alternative that negates the bias. Have a conversation with the self.
- Consciously strive to get back to neutral.
- You speak a foreign language (legaleze). Translate in order to demystify.
- Be sufficiently familiar with the law so that you can recognize when your client may have a cause of action for discrimination. You may need to refer him or her to a litigator in that field.
- Keep your antenna sharpened. Be aware that others over whom you have influence might, even inadvertently, express bias.
- Consider an expression that would counter the potential bias. Whether this is a light or a serious endeavor depends on the circumstances.
- Give respect in order to earn it. Treat others as you would have them treat you.