

The Cost of Bias in the Legal Profession

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A. Bias, a Fact of Humanity.

Bias is a fact of human life. Since the law profession is largely populated by humans, that means bias is a fact of the legal world. This is the case despite the best wishes or intentions of any one of us. Accept it as true.

So, as a collective of legal minds, where do our biases lie? The answer, as we know from *voir dire* is that the human capacity for prejudice and bias is pretty much infinite. Even so, there are areas of bias against certain groups that we know are especially critical. The most prominent include bias based on characteristics such as: gender; race or ethnicity; national origin; religion; age; sexual orientation and; social status (ie., poverty).

Why do we even care whether there is bias in our profession? Well, it has to do with the very essence of our role as agents of justice. After all, our founding fathers declared:

"We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness -- That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness." Declaration of Independence (July 4, 1776).

Upholding the essential dignity of the human being is a core value in our system of government and by extension, our system of justice. Yet, the face of today's society differs considerably from that seen by the founders. Consider, for example, the social evolution taking place in present day California:

The California Judicial Council has established access and fairness in the judicial system as its number-one priority. In part, this concern has evolved from the realization that the state's demographic profile has changed dramatically in the past 20 years and will continue to do so. For example, Whites, who are now 57 percent of the state's population, will decrease to 40.5 percent by the year 2020. The 224 different languages or dialects now spoken are expected to increase, primarily because of immigration.

Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts (January 1997) at p. 1.

This phenomenon of demographic transition is not limited to California. It is a national phenomenon that will dramatically impact our profession in the years to come.

According to demographic trends compiled by the American Bar Association, by 2005, the [legal] workforce will be 73 percent white, 12 percent black, 11 percent Hispanic, 4 percent Asian and other minorities and women will make up 34.8 percent. By 2020, minorities will comprise 36 percent of all Americans. The future population will be composed of more older whites and younger minorities, and nontraditional families will proliferate. Chenault, Director's Dialogue Fostering Diversity in the Legal Profession (<http://www.michbar.org/journal>).

Still, even though our nation is undergoing an demographic metamorphosis of a magnitude not seen since the massive immigration influx of the late 1800s, there is still a significant proportion of the population who do not "buy into" the notion that bias against those of a different race, creed, gender or such characteristic, creates any sort of problem for either the profession or society. This is particularly true of classes that are not subject to discrimination or bias in their daily lives.

In a 1999 interview, Philip S. Anderson, then President of the ABA, recounted how he was struck by how it is still difficult for many whites, particularly white males, to recognize that there is bias in the justice system. . . . Anderson recalled observing an open discussion among conference attendees during which "the white men said they saw no racial or gender bias in the justice system and [minority women] said they had all experienced it." Although Anderson went on to say, "I came to the conclusion that if [the minority women] saw [bias], it's there," this is not the same thing as recognizing these conditions independently of being told they exist. The Intersection of Racial and Gender Bias at p. 542.

The perception that our legal system is biased against one class of individual or another undermines public confidence in our justice institutions and in general, has a negative effect on social systems intended to aid in smoothing human interaction rather than creating discord.

Bias doesn't always appear in an expected form. For example, one author has concluded that there is pervasive bias against men in the Family Courts of Canada, arguing the fathers are unable to obtain justice in child custody matters purely because of their gender. Colman, Gender Bias in the Family Courts of Canada: FACT OR FANTASY? (1999). The upshot of this bias, the author stated, was the men were unable to obtain justice in matters having to do with visitation and support in a justice forum.

Indeed, the California Judicial Council has expressed concern that bias colors the judgment and justice of the bench in our Golden State. One pamphlet directed at judges asks:

Have you ever:

Told an off-color joke in chambers? . . .

Remarked to a female attorney how her family commitments might interfere with her responsibilities to the Court?

Hesitated to award a father primary child custody or given a smaller support order if the paying spouse is the mother primarily because of their gender?

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WELL, CONSIDER THIS:

According to a survey conducted in a large metropolitan legal community, California judges have done all that and more. Apparently we are not the enlightened, with-it bench of the 90's we thought we were.

Lawyers who practice before us, the support personnel who work with us, and our very own colleagues report that we sometimes adopt a degrading and demeaning tone and attitude toward women give fathers a raw deal and are harder on male defendants in criminal matters, afford less time for women in oral argument and find the same argument less persuasive when made by a woman. Gender Bias Guidelines for Judicial Officers (Cal. 1996) at pp. 1, 4.

B. The Cost of Bias.

The ultimate cost of bias goes beyond undermining the rights of those whom our justice system is intended to serve. It also has a profound corrosive effect on practitioners and the judiciary. Take the experience of United States Supreme Court Justice Sandra Day O'Connor.

In 1952, after Justice O'Connor graduated third in her class from Stanford Law School, she tried to find a law job in San Francisco. No firm would interview her.

Ms. O'Connor finally got a job offer at the Los Angeles office of Gibson, Dunn & Crutcher through a friend, future attorney general William French Smith. The offer, however, was a job as a legal secretary. Ms. O'Connor turned the position down. She eventually found employment in the public section, the traditional stepping stone of the minority practitioner, and was hired as a deputy county attorney in San Mateo County.

So, that was 1952, you might say. Things are different today.

That may be true for some. Yet, for others, it is not quite so, even in these enlightened times.

In the 10-year period from 1984 to 1994, the number of minority law school students almost doubled, increasing from 3,169 to 6,099, or from 8.6 percent to 15.5 percent, of total graduates. . . . Despite these increases, the total number of minorities at the partnership level in major private firms nationwide is 1,160, or 2.8 percent of the total. Nationwide statistics support the claim that despite the growing numbers of minority law students graduating from top-ranked law schools, the country's largest private law firms are recruiting minimal numbers of minority attorneys and retaining even fewer minority attorneys at the senior associate and partner levels. Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts (January 1997) at p. 6.

So, bias costs our profession by depriving us of our best and brightest minds simply because they are not the "correct" gender, color or from the "proper" background. In an egalitarian society, this is an intolerable waste of human capital, not to mention morally indefensible.

C. Remedies for Bias in the Legal System.

Our best ally in eliminating bias in our profession are our own good sensibilities. The literature is filled with discussions on identifying bias, eliminating bias and developing our own sensitivities towards our treatment of others. We should read, discuss and reflect on a constant basis.

Of course, sometimes, self-enlightenment doesn't take. So, the law also provides us with tools to address bias where it affects ourselves or our clients.

The primary anti-bias weapon in the federal arena is Title VII of the Civil Rights Act of 1964. (42 U.S.C. 21 § 2000e et seq.) Title VII prohibits employment discrimination based on race, religion, color, gender or national origin and covers all state and local government employers, all private and public educational institutions and all private employers of 15 or more individuals.

Under Title VII it is illegal to discriminate in hiring and firing, compensation, assignment, transfer or promotion, recruitment, pay and many other terms and conditions of employment. An excellent primer and CLE-type quiz by Gregory Alan Rutchik, Esq., regarding Title VII can be found on the internet. (See, Rutchik, Accommodating Religion in the Workplace.)

California anti-discrimination laws overlap the federal statutes and are found at Government Code § 12940 et seq. In the California statutory scheme, the definition of employer is much more liberal than under Title VII.

Where bench officers act in biased fashion or practitioners exhibit bias in a courtroom, the offending parties they may find themselves in violation of Canons 3B(5) and (6) of the California Code of Judicial Ethics, which provide:

(5) A judge shall 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 not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status against parties, witnesses, counsel, or others. This Canon does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

Section 1(a) of the Standards of Judicial Administration (Appendix to the California Rules of Court Division 1) advises each judge:

§ 1. Court's duty to prohibit bias

(a) [General] To preserve the integrity and impartiality of the judicial system, each judge should:

(1) (Ensure fairness) Ensure that courtroom proceedings are conducted in a manner that is fair and impartial to all of the participants;

(2) (Refrain from and prohibit biased conduct) In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants;

(3) (Ensure unbiased decisions) 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.

C. Conclusion.

So, first we must acknowledge that we all carry around our own particular biases. It's part of being a human being.

Then, we must recognize that, as officers of the American justice system, we are duty-bound to ensure that our halls of justice provide equal justice to all who are in need. That means eliminating bias at all levels of our profession; for a biased justice system is inherently unfair.

Bias has a cost to our legal system because it undermines society's confidence that disputes will be resolved fairly and that we truly live in a nation of laws not men.

We do our part by recognizing bias in ourselves and striving to eliminate it from our profession. Let's be vigorous in carrying out our charge.

Bill Daniels regularly publishes a variety of articles and videos to keep you abreast of legal developments and case law that affect our society.

[Everything Matters: Secrets of Building a Better Plaintiff Practice](#). Seven Rules for Picking Cases. [Trial Lawyers Should Read Unmasking The Face By Paul Ekman And Wallace V. Friesen](#). Trial lawyers are in the truth-seeking business.

These previous and other articles/videos can be found in the Learning Center section of www.BillDanielsLaw.com

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