

# A Framework for Recognizing and Overcoming Implicit Bias in the Legal Profession

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Consilio Institute

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# A FRAMEWORK FOR RECOGNIZING AND OVERCOMING IMPLICIT BIAS IN THE LEGAL PROFESSION

If you're human, you have biases.

There's no way to change this—the human brain is evolutionarily wired to take shortcuts in our decision-making. In the modern world, these shortcuts cause all of us to have implicit or unconscious biases around race, gender, and other inherent characteristics of our fellow humans. If you think you don't—that you are a unique exception to the general rule—that's an example of [blind spot bias](#).

So, as the Broadway song goes, [everyone's a little bit racist](#). . . Or at least everyone's a little bit implicitly biased. The important question, then, isn't whether you're biased; it's what you're doing about it. That applies equally to individuals and to the organizations in which they work.

This paper explores how implicit bias affects the legal profession. We'll take a closer look at what implicit bias is, how to recognize the impacts it can have on a lawyer's career, and what law firms and corporate legal departments can do about it.

## What Is Implicit or Unconscious Bias?

Implicit bias is any automatic, unconscious “mental shortcut” that our brains use to process information and make decisions quickly. Implicit bias isn't necessarily about clear demographic markers like race, age, or gender. Individuals may make generalizations about people based on their appearance, weight, hair style, disability, family or socio-economic status, religion, politics, or any other observable feature.

These biases or shortcuts are drawn from every one of our lived experiences, including our cultural background, upbringing, education, and environment; the life events we've experienced or heard about; the shows we've watched and the music we've listened to; and all the information we've consumed throughout our lives. Implicit bias is based on the societal messages we've all received, not on our chosen individual values or beliefs.

Why do we develop these biases? They are our brain's way of coping with an overload of sensory

and experiential information. Our [brains process a staggering 11 million bits of information every second—but our conscious minds can only manage about 50 bits](#) of that information. We therefore use unconscious processes to determine which bits of information deserve conscious attention and where we can use “mental shortcuts” to draw conclusions based on past experiences.

Here's an easy example. Imagine you're enjoying a peaceful afternoon stroll through the woods when you suddenly see a snake on the path just ahead. Do you pause to consciously evaluate whether that is, in fact, a snake, or just a stick? Or do you instantly jump back, heart racing? We wouldn't have survived long as a species if we took the time to rationally think our way through every possible scenario in a life-or-death situation. Instead, we jump—sometimes literally—to conclusions.

Do you want to see these shortcuts at work in your own brain? There are [numerous implicit bias tests you can take](#) to determine where you have existing unconscious biases and how strong those biases are.

## Examples of Mental Shortcuts

There are a few common mental shortcuts that we tend to take in professional settings.

*Intuitive thinking* is when we use instinct or intuition to make near-instantaneous decisions with minimal cognitive thought. These are the situations—like the snake example—where we “trust our gut,” and they’re efficient and effective in many situations. But our instincts aren’t a good measure of everything. The more complex a problem, and the less we understand all its facets, the more we need to rely on rational and analytical thinking to untangle it. In those situations, our intuition is of minimal value. Our “intuitions” about people may be almost entirely the sum of our various unconscious biases. With a prospective hire, for example, we may immediately draw conclusions about them based on their name and the rank of their law school. From there, the next mental shortcut kicks in.

*Confirmation bias* occurs when we only observe or notice information that affirms our established beliefs while overlooking or discounting information that would contradict those beliefs. We all have a tendency to credit information that tells us what we already believe to be true and to preferentially listen to people who share our perspectives. This dynamic plays out every day on social media—but it also infiltrates the workplace.

Research has demonstrated that [confirmation bias leads supervising lawyers to unconsciously judge the writing of African American lawyers more negatively](#) than the writing of Caucasian lawyers. In one study, researchers compiled a memorandum that included 22 deliberate errors, ranging from minor typos to analytical errors. They then distributed the memorandum to 60 partners of varying races and genders along with a description of the fictitious third-year associate who had drafted it. The researchers asked the partners to edit the memos for errors and rank them on a scale from one to five. Half of

the partners received a description that said the associate was Caucasian, while the other half received a description that said the associate was African American.

Partners who believed the memo was from a Caucasian associate scored it an average of 4.1, noting that the associate “has potential” and displays “good analytical skills.” Partners who received the exact same memo but who were told that it was drafted by an African American ranked it almost a full point lower, an average of 3.2, noting that it was “average at best” and “needs lots of work.” One reviewing partner even stated that they “can’t believe [the hypothetical African American associate] went to NYU.”

Interestingly, there was no substantial correlation between the race or ethnicity of the reviewing partner and their score. Unconscious biases are based on societal messages that are communicated and incorporated to everyone—even when they result in discrimination against people with whom we share traits.

*Preference for the familiar* is another implicit bias that creeps into decisions affecting our professional colleagues. We tend to want to work with and associate with people who are like us, and we tend to judge people similar to ourselves more favorably than those who are different from us. Those preferences can influence decisions we make about who to hire, who to promote, who to choose for work assignments, who to mentor, and who to invite to workplace social events.

## Impact of Implicit Bias in the Legal Industry

The legal profession is both difficult to enter and difficult to succeed in, and unconscious bias makes it even harder for people of color, women, and especially women of color. As a result, the legal industry is noticeably less diverse—in terms of both

gender and race or ethnicity—than the population of the U.S. as a whole. According to the [American Bar Association's latest demographics survey](#), 85 percent of lawyers in 2021 were non-Hispanic whites; this reflects a mere 3 percent increase in the number of lawyers of color since 2011. While 13.4 percent of the overall U.S. population is Black, only 4.7 percent of lawyers were Black as of 2021, nearly unchanged from 4.8 percent in 2011. Only 37 percent of lawyers are female, up slightly from 33 percent in 2011.

How does implicit bias manifest in law firms and corporate legal departments? See whether any of these scenarios sound familiar:

- ▶ **The *prove-it-again* disparity**, whereby women and people of color must do more to “win” the same respect and recognition that their white male counterparts receive by default
- ▶ **The *tightrope* disparity**, which prescribes a narrower range of “acceptable” behavior for some groups, such as women, who are expected to act “feminine,” and Black men, who cannot safely express anger or frustration
- ▶ **The *maternal wall***, which causes women who have had children to be passed over for promotions or given “mommy track” assignments that lead to fewer opportunities for advancement or recognition

Many diverse lawyers also experience treatment that amounts to death by a thousand papercuts. These *microaggressions* and *microinequities* are small actions that single out, discount, or ignore individuals. It may be as simple as not greeting some colleagues in passing, not introducing them at meetings, or interrupting them more often. These slights are perhaps insignificant by themselves, but cumulatively and over time they can materially and negatively impact someone's professional experience.

All told, unconscious biases affect hiring, performance evaluations, mentoring, work assignments, pay, and promotions—adding up to less diversity the higher you go in legal organizations.

## Bias Interrupters: Systemic Responses to Implicit Bias

Counteracting implicit bias calls for a two-pronged approach. Ideally, of course, we would learn to catch ourselves when we make snap decisions based on our own biases and then consciously re-evaluate those decisions. That approach is significantly limited, however, by the unconscious nature of implicit bias. Becoming aware of our mental shortcuts—especially while navigating the high stakes and high pressure of legal work—is a lifelong challenge.

Systemic responses that negate the opportunity for biased decisions and mitigate the effects of implicit bias are therefore more useful in producing measurable change. Consider implementing the following seven procedural safeguards to interrupt the transmission of bias in your organization.

1. *Acknowledge the existence of implicit bias.* The first step in addressing any problem is accepting its existence. Organizations that deny the existence of implicit bias or refuse to recognize that it occurs within their ranks are powerless to counteract its effects.

2. *Learn to recognize situations where mental shortcuts may occur.* Pay attention to decision points where leadership may be influenced by implicit bias. For example, if you host networking events, how do you choose those events? Golf tournaments at private country clubs may feel familiar and welcoming to you, but that sentiment might not be shared by everyone. Try to develop the habit of consciously noticing the decisions you make so that you can bring your rational mind to bear instead of relying on unconscious bias.



3. *Rebuild your hiring processes.* It's all too easy to choose the familiar when hiring new associates—which is why it's important to implement systemic controls. For example, an organization might:

- ▶ Limit or eliminate referral hiring
- ▶ Solicit diverse candidate pools and insist that recruiters supply diverse candidates
- ▶ Create “blind” resumes by removing personal and demographic markers
- ▶ Structure interviews to ask the same questions of all candidates and rely more on performance-based or behavioral interview questions, which are less biased and better at predicting work success
- ▶ Define “cultural fit” in specific, work-related terms before using it as a criterion for hiring

4. *Create systems that guarantee opportunities for advancement are equitably distributed.* Left to their own devices, partners and senior associates will tend to assign plum opportunities to junior associates who they relate more closely to—which tend to be those associates who they perceive to be similar to themselves. When diverse associates don't receive the same access to mentorship and the “glamour work” that leads to promotions, their progress is stifled, and they may choose to leave the organization or the profession entirely. Instead, build a system for randomly rotating mentorships and assignments as well as the “office housework”—those routine, sometimes tedious assignments that must be done but that do not contribute to professional fulfillment or advancement.

5. *Define objective criteria for evaluations.* Don't leave room for confirmation bias. Write out clear, objective, and specific performance-based criteria for evaluations and apply those criteria equitably to all associates. Be careful to separate actual “performance” from “potential.” There's a proven

tendency to rank white men based on future potential while ranking women and people of color solely based on past performance.

6. *Develop a culture that calls out bias.* Encourage everyone in the organization to be alert to microinequities and implicit bias, and build a process that empowers people to interrupt bias when it occurs. This demands a culture of nonjudgment where people are not penalized either for displaying unconscious bias or for calling it out. Remember that implicit bias is not conscious or intentional; using the mental shortcuts that have been programmed by our society is not a moral failing. Refusing to consciously re-evaluate those decisions when they are pointed out, however, should be frowned upon.

7. *Don't just counteract bias; actively foster inclusion.* Noticing and interrupting microinequities is a good start, but it doesn't go far enough. Law firms and corporate legal departments should seek to create a culture of inclusion where diverse lawyers are valued and respected. That includes paying them well, giving equitable access to prime assignments, and providing mentorship and networking opportunities.

To measure the success of these efforts, law firms can use the [Minority Corporate Counsel Association's Diversity Scorecard](#) to evaluate their diversity. Those firms that are serious about creating meaningful change can seek [Mansfield Rule certification](#), which requires them to commit to considering “at least 30 percent women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.” Law firms that adopted the Mansfield Rule in 2017 as part of the inaugural certification process have diversified their top ranks at a rate

that far exceeds that of their peers. For their part, corporate legal departments can expedite change by prioritizing work to those firms with higher diversity scores or Mansfield Rule certification and explaining their assignment criteria to the nondiverse firms that they pass over.

Our unconscious brains are good at keeping us safe from physical threats like snakes, but that doesn't mean we should leave them in charge of decisions about hiring, mentoring, or promoting lawyers. Similarly, learning to recognize and counter your own mental shortcuts is a worthy pursuit, but its success is limited by the unconscious nature of bias. Systemic changes that remove opportunities for biased decisions are therefore more likely to produce measurable change.

For more information about how to implement bias interrupters, check out the [Bias Interrupters Toolkits](#) and "[You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession](#)," a report from the ABA Commission on Women in the Profession and Minority Corporate Counsel Association.

## ABOUT THE AUTHOR

Maureen O'Neill is the Senior Vice President of Strategic Client Experience. Drawing on more than 25 years of experience providing dedicated client service as an attorney and consultant, Maureen engages with Consilio's customers to ensure a best-in-class client experience. She works cross-functionally across the company to develop and deploy best practices that embed Consilio's commitment to service excellence, and to deliver the highest levels of quality and value. She seeks opportunities to create differentiating moments for clients—from bespoke educational sessions to loyalty programs to peer networking events—to foster client satisfaction and loyalty. Maureen also serves as Consilio's Diversity & Inclusion Officer. She leads the development and implementation of the company's strategies, policies, and programs for ensuring a diverse, inclusive, and equitable workplace.



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