The Alternative Dispute Resolution and Women’s Sections proudly present ...

**#8 UNVEILED TRUTHS ABOUT IMPLICIT BIAS IN THE EVERYDAY PRACTICE OF LAW**

Nicolás C. Vaca, Ph.D. (Contra Costa County Superior Court Senior Self-Help Facilitator)
Barbara S. Bryant (Attorney/Mediator, Mediation Law Offices of Barbara S. Bryant)
Honorable Diana Becton (Contra Costa County Superior Court Judge)

Moderator: Joscelyn Jones Torru (Attorney, Jones Torru Law Offices)

**Agenda**

1. Introduction

2. Bias in the Law – Overview of Implicit Bias Aspects of Race and Culture and Its Impact in Mediations

3. How Implicit Bias Shapes the Legal Landscape – Gender Aspects and Litigation

4. Implicit Bias in Judicial and Courtroom Decision-Making
Speaker Biographies

Nicolás C. Vaca, Ph.D.
(Contra Costa County Superior Court Senior Self-Help Facilitator)

Nicolás C. Vaca, is a graduate of Harvard Law School and received a Ph.D. in sociology from the University of California at Berkeley. Mr. Vaca was an Assistant Professor of Sociology at the University of California, Santa Cruz, California, a Research Sociologist at the University of California, Berkeley, California, a Lecturer at the University of California, Davis California and a visiting scholar at the University of California, Berkeley, California.

Mr. Vaca has also been a contributing writer to the California Lawyer. Mr. Vaca has been a faculty member of the National Institute of Trial Advocacy (NITA), during which time he instructed attorneys on how to conduct civil trials and how to take and defend depositions. In addition, Mr. Vaca was a faculty member with the American Bar Association’s Rule of Law Initiative teaching trial advocacy in Mexico to Mexican attorneys and law school faculty. Mr. Vaca was also an instructor with the Conference of Western Attorney Generals’ Alliance Partnerships teaching trial advocacy throughout Mexico to Mexican attorneys, judges and law school faculty.

Mr. Vaca is the author of The Presumed Alliance: The Unspoken Conflict Between Latinos and Blacks and What It Means for America published by Harper Collins. Mr. Vaca is currently working with the Contra Costa County Superior Courts in Martinez, California as the Senior Self-Help Facilitator.
Barbara S. Bryant
(Attorney/Mediator, Mediation Law Offices of Barbara S. Bryant)

Barbara S. Bryant, M.S.W., J.D., is a mediator and workplace investigator specializing in employment matters, and discrimination/harassment in employment, housing, educational and business settings. Prior to becoming a full-time ADR Neutral, she litigated individual and class actions in these same areas in both state and federal courts. She has been a mediation coach for training programs of the First and Third California Courts of Appeal and Stanford Law School. She has taught the Sexual and Gender Harassment Law course at the University of California, Berkeley Law, for 25+ years, and teaches MCLE classes on the Elimination of Bias.

Ms. Bryant has been an executive board member of the California State Bar Labor & Employment Section; the Contra Costa County Bar Association ADR Section; and Equal Rights Advocates. She is a former District Governor and Vice President of CWL and a lifetime member. She writes and speaks frequently on sex discrimination, sex roles, gender, bias and diversity.
Honorable Diana Becton  
(Contra Costa County Superior Court Judge)

Judge Diana Becton is a Superior Court Judge in Contra Costa County, assigned to a Felony Trial Department. Judge Becton was appointed to the bench in 1995, and has served in numerous leadership roles including, Presiding Judge, Assistant Presiding Judge, Supervisor Civil Fast Track, Supervisor Felony Criminal Calendar, Supervisor Richmond Branch Court, and Presiding Judge of the former Richmond Municipal Court. She was assigned to the First District Court of Appeal to sit as Judge Pro Tempore from October 2013-July 2014.

Judge Becton has received the following honors: CABL Bernard S. Jefferson, Judge of the Year (2016); California Women Lawyers, “Rose Bird Memorial Award” (2012); Honor for positive contributions to the City of Richmond (2016); National Organization of Black Law Enforcement, “Trail Blazer” for Community Service (2014); BWOPA Honoree 2013; American Business Women’s Association (2012) “Women of Distinction”; California Women Lawyers, (2011-2012) Women of Distinction”; KGO Channel 7 “African American Salute (2012); “Judicial Excellence Award,” California Association of Black Lawyers, Judicial Section (2011); “Judge of the Year” Alameda-Contra Costa Trial Lawyers Association (2007); “Award of Judicial Excellence, Charles Houston Bar Association” (2006); Black Women Lawyers of Northern California (2011). In 2007 she was inducted into the Castlemont High School Hall of Fame, receiving the highest honor, as a “Knight in Shining Armor,” and she received the “Dumlao Martial Arts Image Award” (2011) for leadership and character within the martial arts studio.

Judge Becton continues to participate in many community outreach activities. In 2016, she convened “Clean Slate Day” at her church in Richmond, where she and her team helped over 800 individuals clean up their criminal records and traffic tickets. In 2015 Judge Becton served as Co-Chair of the “Know Your Rights” Youth Symposium for West Contra Costa County, as part of a national dialogue to educate communities.

She serves on the Board of Directors for Castlemont High School Alumni Association, and organizes a Career Day for the students. She mentors many students who are frequent visitors to her courtroom. In 2012 she accepted the invitation to join the Advisory Board supporting the law academy at De Anza High School in Richmond, CA. Judge Becton is the co-convener and moderator for “Get Your House in Order,” a panel of experienced professionals who volunteer to provide tools for a full circle of care, including end of life preparations.

Judge Becton serves as faculty, teaching theology for the Leadership Institute of Allen Temple. In October 2015 she was a panelist for the 4th Annual J. Alfred Smith Sr. Lecture Series. She served as faculty/lecturer for the following: Viet Nam Criminal Courts, Presenter, Judicial Diversity (2015); “So You Want To Be A Judge” California Women Lawyers, (1999, 2009, 2011, 2012/13); Senate Committee Hearing, State of California;” Public Access to Justice in the Wake of Budget Cuts” (2012); “You Should Be A Judge”, Golden Gate University (2012), Dean Judith McKelvey Women’s Reunion; Panelist, “Miss Representation” Screening (2012); Public Safety Realignment Forum (2011); Social Media-Pushing the Limits of Legal Ethics (2011), Contra Costa Bar Association Women’s Section; Courtroom Control (2010), CABL, Judicial Section;
Judge Becton was appointed to The State Bar Council on Access and Fairness Committee (2013–2016), and is Vice Chair. In 2008, the Chief Justice, appointed her to the Judicial Council Advisory Committee on Civil Jury Instructions, and in 2007 to the Judicial Council Access and Fairness Advisory Committee (re-appointed 2010; 2014), where she Chaired the Women of Color Subcommittee, and she Chaired development of a Mentoring Program for court staff and managers. In 2015 she was appointed to the State Bar Mentoring Task Force. She was appointed to serve on the California Community Corrections Coordinating Committee in 2010, the Judicial Branch Leadership Development Curriculum Committee (2010 - 2015), the New Judges Education Committee (2007-2009), the Access and Fairness Education Workgroup (CJER) (2012), the Trial Court Presiding Judges Advisory Committee (TCPJAC), elected to the TCPJAC Executive Committee, (2011-12), and the Executive Board of the California Judges Association. She is Co-Chair of the Contra Costa Superior Court Diversity Committee that developed a Judicial Mentoring Program, matching judges and lawyers who are interested in seeking a judgeship.

Judge Becton is a member of the National Association of Women Judges (NAWJ), was elected President (October 2016). She served as President-Elect, Vice President of Publications, Secretary and District 14 Director representing California and Nevada (2011-13). Judge Becton served as the Judicial Liaison (North) for California Women Lawyers. She is a member of the National Bar Association, where she serves as Treasurer. Judge Becton is former Co-Chair of the Judicial Section of the California Association of Black Lawyers (term ended 2015). She is a member of the California Judges Association, the Charles Houston Bar Association, Black Women Lawyers Northern California, and California Women Lawyers.

Judge Becton has two adult sons. In her spare time she enjoys travel, golf, cooking, reading, and is a student in martial arts.
Implicit Bias In Decision-Making
Hon. Diana Becton

Defining Implicit Bias

- Implicit bias is an unconscious, unintentional bias.
- These biases are likely formed by schemas or associations in the brain that link two ideas together.
- Associations likely form through a combination of early experiences, affective experiences and learned cultural biases.
- The implicit associations we hold do not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse.
Why Should We Talk About Implicit Bias?

- Implicit biases are pervasive. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
- Research has demonstrated implicit bias toward people based on perceived race, ethnicity, gender expression, age, physical disability, body size, and many more characteristics.
- Implicit biases are malleable. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of de-biasing techniques.

Science in General

A Peek Into the Emerging Neuroscience of Implicit Bias

The Biased Brain
Our Minds Automatically Place Incoming Information Into Categories

CATEGORIES

CATEGORIES

Categories: Chairs, Stools, Sofa, Armchair, Posters
Time For A Baggage Check?

Risk Factors

- Emotional Distress
- Ambiguity
- Salient Social Categories
- Low-effort cognitive processing
- Distracted or pressured decision making
- Lack of feedback
Risk Factors
Emotional Stress

Risk Factors Cont’d
Ambiguity
Risk Factors cont’d
Salient Social Categories

Risk Factors cont’d
Distracted or Pressured Decision Making
Low Effort Cognitive Processing

- Distracted of Pressured Decision Making
- Low Effort Cognitive Processing

*social categorization*
the process by which people are placed into groups based on characteristics like race, gender, or ethnicity
Risk Factors cont’d
Lack of Feedback

Strategies for Change
Combatting Implicit Bias

- Raise awareness of implicit bias.
- Motivation to Change
- Routinely check thought processes and decisions.
- Identify distractions and sources of stress in the decision making environment.
- Institute feedback mechanisms.
- Increase exposure to stigmatized groups.

Where Do We Go From Here?

Where do we go from here?
INTRODUCTION

➔ How implicit bias, based on sex and/or gender, and often conjoined with race and/or socio-economic status, operates in litigation/courtroom dynamics;

➔ Bias based on sex and/or gender, also is created explicitly by socially accepted practices;

➔ Eliminating bias requires dealing with both implicit and explicit practices - at both the individual, organizational and societal level.

I. IMPLICIT BIAS IN LITIGATION/COURTROOM ROLES

❖ Most of us have biases relating to our expectations of how men and women do exhibit, or should exhibit, human traits such as Authority, Competency, Compassion and Emotion.

❖ Many of us are uncomfortable or resentful when those expectations are breached, and act out against, or devalue, the non-conforming person.

Examples: Women Litigators

❖ Women litigators often share stories with each other about the sexist comments and attitudes used against them during the litigation, to quiet them, rebuke them for an assertive act, to demean them in their clients’ eyes or the like.

❖ Recent example of an unusually express and public sexist remark to a female litigator.

❖ At times, keeping women “in their place” as litigators, is furthered by opposing counsel being extra complimentary or helpful to the female opponent in ways they never would be to male opposing counsel. Then if the woman attorney is not appropriately grateful
or accommodating, they react with hurt, disdain or hostility.

- Sadly, some judges will do it too. The power imbalance here, and the very real power of the judge to make rulings against an attorney, or demeaning comments in front of opposing counsel, co-counsel, or a jury, can do very real harm to her reputation, standing within her firm or to a jury.

- These attitudes and results also exist within firms.
  - Work assignments made based on woman as nurturer or denied a litigation assignment because she is not perceived as “tough enough” or in order to paternalistically protect her from a difficult client.
  - Assumption that a woman plans to have a child in the near future.
  - Perceiving a strong-willed woman as not a “team-player,” when a similar man would be considered a “go-getter.”

**Example: Women Judges**

Women judges often walk a slippery path as a judge between authority and compassion. They are imbued with authority as part of the role and are expected to wield that authority appropriately. However, as women, they also are expected to show the compassion and emotion considered natural to the gender roles of women.

All these dynamics can become even more difficult for an employee belonging to more than one protected category, such as an older woman of color.

**II. SOCIALLY ACCEPTED EXPLICIT BIAS**

**A. Socially-Constructed Gender Roles for Individuals**

- In the United States, it is considered normal and natural for adult males to exhibit a certain set of traits, and for normal adult females to exhibit a different set of traits.

- At the same time, we have a belief system that women and men should behave in these different ways, and our society is structured around these assumptions. In essence, men are seen as having more competency/independence traits and women more expressive/caring traits......

- Many Western societies, including our own, then value competency/independent traits more highly than expressive/caring traits, particularly in much of the work-outside-the-home settings.
These differences are seen as “natural to each sex” even though children from birth are systematically taught to repress certain traits and enhance others based on their sex to fit the child into the normative roles for her or his biological sex.

At times, it is hard to differentiate between the explicit and implicit bias directed at women: (current events):

Voter: “I’d never vote for a woman President - they aren’t tough enough.”
Voter: “I want a woman President, but I’d never vote for one who shouts.”

B. Socially-Constructed Gender Roles Reflected in Societal Systems

In the United States, most of our social systems are gendered, that is developed and based more on Competency values than on Expressive ones. Our legal and economic systems are predominantly based on Competency values such as winning, aggression, dominance and competition. Legal disputes typically have a winner and a loser. Jurors are told not to be swayed by their emotions.

Resolution of legal disputes is premised on finding the “wrong-doer” rather than providing a space for each side to better hear, understand and respect one another.

Alternative systems, such as Restorative Justice, Non-Violent Communication, and some Mediation processes, do seek these objectives, but remain a distinct minority in our overall dispute resolution system.

Other systems, such as Economic and Scientific, also traditionally are dominated by Competency values over Expressive ones. Not only can this exclude many women from its ranks, but society as a whole loses out on the rich and creative wisdom women can bring to the table.

C. Socially- Constructed Gender Roles Reflected in Organizations.

Many of our country’s organizations are created and run on the premise that they will be most successful by fostering a work environment dominated by Competency Traits with little attention to Expressive Traits. Organizational goals typically are stated in Competency terms, e.g., “the bottom line”, “dominance in the field,” rather than number of satisfied customers, happy employees, and/or best addressing the needs of the community in which they are located.
III. CONCLUSIONS - Actions to combat bias and create a more meaningful and fulfilling society:

1) Eliminate socially-constructed gender roles;

2) Raise all children to develop and express both Competency and Expressive behaviors and attitudes.

3) Write job descriptions/performance criteria for all businesses and organizations that incorporate both Competency and Expressive traits;

4) Get training on Implicit Bias/the Implicit Association Test, etc.;

5) Modify the legal standard for actionable discrimination, to include conduct based on Implicit Bias, with modified damages.
BIAS IN THE LAW

Contra Costa Bar Association
MCLE Spectacular
November 18, 2016
1:45-3:45 p.m.
Panelist: Nicolás C. Vaca, Ph.D.

ASSUMPTION OF THE GENERAL PUBLIC OF THE LEGAL SYSTEM

• The public believes that the legal system is administered in a neutral, unbiased manner.
• It rests this belief only the perceived neutrality of the judiciary, the legal process and the legal profession itself.
• As a consequence, examining bias in the judiciary, the legal process and the legal profession is essential in fulfilling this expectation.
EXPLICIT BIAS AND IMPLICIT BIAS

**EXPLICIT BIAS**
- Expressed directly
- Aware of bias/operates consciously
- Example: Male attorneys who openly express that women attorneys have no understanding of how to conduct litigation.

**IMPLICIT BIAS**
- Expressed indirectly
- Unaware of bias/operates sub-consciously
- Example: A male attorney who assumes, but does not express, that he will prevail in litigation because males are more aggressive and therefore better litigators than women who are not as assertive.

WHY WE SHOULD FOCUS ON UNDERPININGS OF IMPLICIT BIAS

- Implicit bias is thoughts and feelings of which we are unaware.
- We have an implicit bias when, rather than being neutral, we have a preference for (or aversion to) a person or group of people.
- As a consequence our actions are guided by feeling and perceptions over which we have no knowledge and control.
- Unless we develop tools to recognize and correct these perceptions, we will continue to act on them.
HOW DO WE KNOW THAT IMPLICIT BIAS EXISTS (Part 1)

- In 1998 something called Project Implicit was founded in 1998 by three social psychologists scientists - Tony Greenwald (University of Washington), Mahzarin Banaji (Harvard University), and Brian Nosek (University of Virginia).
- Project Implicit is devoted to international collaboration between researchers who are interested in implicit social cognition, or thoughts and feelings outside of conscious awareness and control.
- In 1998 Greenwald and his associates created the Implicit Association Test (IAT) which is maintained by Project Implicit.

HOW DO WE KNOW THAT IMPLICIT BIAS EXISTS (Part 2)

- Grenwald and his associates have gathered data from over 15 million IATs taken globally.
- That data shows that most people, even those who explicitly and sincerely acknowledge egalitarian view, hold what has been described as unconscious or implicit bias against such groups as Black American, women, gay people, obese people, the elderly and disabled.
- This means that our implicit biases often predict how we will behave more accurately than our conscious values.
WHERE DOES IMPLICIT BIAS COME FROM?

- Developmental History
- Affective Experience
- Culture
- The Self
DEVELOPMENTAL HISTORY

• Implicit bias can develop over time with the accumulation of personal experience.

• Personal experiences includes social learning experiences. Implicit biases in children are positively correlated between the implicit biases of their parent.
AFFECTIVE EXPERIENCE

Implicit bias may develop from a history of personal experiences that connect certain racial groups with fear or other negative/or positive affect.
CULTURE

People share a common social understanding of the stereotypes that are pervasive in our culture, and this knowledge can foster implicit biases even if a person does not necessarily endorse the cultural stereotype.

ASIANS ARE GOOD AT MATH

![Image of a child in front of a blackboard with math equations]
ONE VIEW OF LATINOS

THE HOODY DEFINES THE PERSON
THE SELF

• People tend to possess consistent and strongly positive attitudes toward themselves, and this positive attitude about the self can transfer very easily to other things, people, and groups that share attributes with the self.

• Fundamental attitudes toward the self may underlie implicit racial bias by facilitating a general tendency to prefer one’s in-group (a group with which one identifies in some way) over out-groups (any group with which one does not affiliate).

MENTAL JUSTIFICATION FOR IMPLICIT BIAS

“Our minds automatically justify our decisions, blinding us to the true source, or beliefs, behind our decisions. Ultimately, we believe our decisions are consistent with our conscious beliefs, when in fact, our unconscious is running the show.”

Howard Ross, Kirwin Institute, 2008
POGO HAS KNOWN THIS FOR SOMETIME

WE HAVE MET THE ENEMY AND HE IS US.

WHY ADDRESS OUR IMPLICIT BIASES?

Bias that we do not acknowledge but that persists, unchallenged, in the recesses of our mind, undoubtedly shape our interactions with each other.
WHY IS ADDRESSING IMPLICIT BIAS IN THE LAW IMPORTANT?

• It affects attorneys in their roll as advocates.
• It affects attorneys in their relationship with other attorneys, judges, and clients.
• It affects mediators in obtaining consensus among litigants.
• It affects judges in rendering decisions and in their relationship with counsel and counsels’ clients.

WHY ELIMINATING BIAS IN MEDIATION IS IMPORTANT (Part 1)

• Mediator neutrality is foundational to the medication process.

• Other essential values, such a confidentiality and party self-determination, rest upon the parties’ perception of the mediator as an unaligned participant.

• Mediator neutrality legitimizes the mediation process because the parties, and not the mediator, are in control of decision-making.
ELEMENTS OF NEUTRALITY

• There are four key elements of neutrality:
  – No conflict of interest;
  – Process equality;
  – Outcome-neutrality; and
  – Lack of bias, prejudice, or favoritism toward any party.

IN OTHER WORDS, MEDIATORS ARE SUPPOSE TO BE LIKE SWITZERLAND
ROLL OF NEUTRALITY IN MEDIATION

• Mediator neutrality makes it possible for parties to discuss issues of their choosing, negotiate with opponent and design their own agreements.

• Mediators must meticulously avoid even the appearance of partiality or prejudice throughout the mediation process.

CAN WE CORRECT OUR IMPLICIT BIAS?

Implicit biases are deeply entrenched in the subconscious, researchers agree that biases can be changed and that implicit associations can be unlearned.
STRATEGIES FOR COUNTERING IMPLICIT BIAS

Researchers argue that the motivation to break the prejudice habit stems from three sources.

– First, people must be aware of their biases and,
– Second, they must be concerned about the consequences of their biases before they will be motivated to exert effort to eliminate them.
– Third, people need to acknowledge when biased responses are likely to occur and how to replace those biased responses with responses that are more neutral in nature.

STEREOTYPE REPLACEMENT

• This process involves replacing stereotypical responses for non-stereotypical responses.
• This requires recognizing that a response is based on stereotypes, labeling the responses as stereotypical, and reflecting on why the response occurred.
• Finally, one considers how the biased response can be avoided in the future and replaces it with an unbiased response.


COUNTER-STEREOTYPIC IMAGING

• This approach requires imagining counter-stereotypic others. These others can be abstract (e.g. non-threatening black or Latino males), famous (e.g., Barack Obama), or non-famous (e.g., a personal friend).

A DIFFERENT VIEW

I AM CERTAIN THAT HE WEARS HOODIES ONCE A WHILE
INDIVIDUATION

• This approach relies on preventing stereotypic inferences by obtaining specific information about group members.

• Using this strategy help people evaluate members of the target group based on personal, rather than group-based attributes.


PERSPECTIVE TAKING

• This approach requires taking the perspective in the first person of a member of a stereotyped group.

• Perspective taking increases psychological closeness to the stigmatized group, which mitigates automatic group-based evaluations.

THE ULTIMATE ACT OF PERSPECTIVE TAKING

INCREASING OPPORTUNITIES FOR CONTACT

• This approach involves seeking opportunities to encounter and engage in positive interactions with out-group members.

• Increased contact can mitigate implicit bias through a wide variety of mechanism, including altering the cognitive representation of the group or by directly improving evaluations of the group.

FULLFILLING THE PUBLIC’S EXPECTATIONS

• By recognizing and overcoming implicit bias, the legal profession can progress toward fulfilling the public’s expectation that the law is neutral in its application.
• By so doing, it reinforces the legitimacy of the practice and application of the legal process.