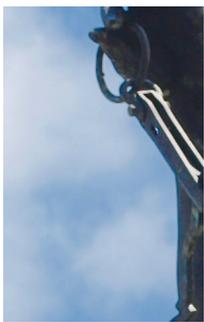


Demonstrating Respect, Neutrality, and Fairness:

Guidelines for the Pennsylvania Courts



Pennsylvania Interbranch
Commission for Gender, Racial,
and Ethnic Fairness

The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness ("Commission") has produced this guide to provide simple guidelines to participants in the justice system as a means of advancing fair treatment for all. The guide reviews the history of the Commission, starting from the Pennsylvania Supreme Court's appointment of a special committee to study racial and gender bias in the Pennsylvania justice system in 1999, through the production of the Committee report in 2003 and the establishment of the Commission in 2005.

The next section of the guide sets forth several pertinent findings from the original study and more recent research, and the efforts of the Supreme Court and the Commission to address the ongoing problem. The guide then provides suggestions for judges, court staff, and attorneys to address bias within the legal profession and the courts. The final section provides a listing of actual court and disciplinary cases as examples of conduct prohibited by Court policies and ethical codes of conduct.

It is our hope that this guide will help ensure that all who interact with the justice system, employees, attorneys, judges, or users of the system, are treated with the respect to which they are entitled, regardless of their race, color, sex, sexual orientation, gender identity or expression, national origin, age, disability, or religion.

Acknowledgements

We acknowledge the Supreme Court of Pennsylvania for its support of this project and the Interbranch Commission in general. We would also like to thank our Executive Director, Lisette McCormick, Esq., and her staff, Margaret Hannapel Ogden, Esq., Robin Hitchcock, and intern Erin Holliday; our Committee members; and the Administrative Office of the Pennsylvania Courts, for their invaluable assistance in developing and reviewing this handbook.

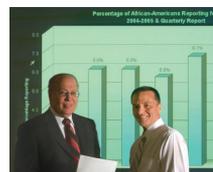
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24 Commission Members

Including judges, attorneys, legislators, executive branch policy makers, academic scholars, and members of non-profit and community organizations



Our History

The statewide effort to address bias in the justice system began in 1999, when the Pennsylvania Supreme Court appointed a committee to look into claims by women and members of minority communities of discriminatory treatment in their business with the courts. After three and one half years of extensive examination of the justice system, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System published its report on racial, ethnic and gender bias in our state courts. The report, based upon statistical and anecdotal research into fourteen related topics, contained 173 recommendations to the Supreme Court and other entities for addressing inequities identified within the justice system.

In response to these findings, **the three branches of Pennsylvania government established the Commission in 2005**, to implement the report's recommendations and to promote fairness and equality within the justice system. The Commission is comprised of 24 members appointed by each of the branches. Members include judges, attorneys, legislators, executive branch policy makers, academic scholars, and members of non-profit and community organizations.

In addition to other more substantive areas of law, one of the chapters of the report, *"Perceptions and Occurrences of Racial, Ethnic and Gender Bias in the Courtroom"*, was devoted to the personal experiences of judges, attorneys, and court personnel while performing their functions in court-related business. In order to gather this information, the Committee held six public hearings and conducted a series of ten focus group discussions throughout the state.¹

One of the problems identified by the participants in the sessions at that time was the treatment of women and people of color during their contact with the court system. Regardless of what role they were playing in the justice system - attorney, litigant, witness, judge, or court employee - women and people of color reported incidents of demeaning behavior towards them in the justice system throughout the Commonwealth. While some of the incidents were intentional, most simply demonstrated a lack of understanding or knowledge about the impact of their actions on those to whom the actions were directed. A sampling of some of the reflections collected during the discussions

173 recommendations

to the Supreme Court and other entities for addressing inequities identified within the justice system

provides insight into perceptions of bias in the courts at that time.

- Power and responsibility to set the tone in the courtroom and effect change rest with the judiciary."
- "Everyone, regardless of position, brings assumptions and prior experiences into the courtroom. Some people are more conscious of this than others; education and training should deal with this fact and redress any consequent problems."
- "Racially- and ethnically-biased actions in court compromise minority attorneys and minority court personnel in the performance of their responsibilities."
- "Economic status and class intersects with gender and race, has a significant effect on a litigant's courtroom experience, and can affect the outcome of a case."ⁱⁱⁱ

Since the report was published, the Commission and the Supreme Court have worked to establish a Policy on Non-Discrimination and Equal Employment Opportunity that prohibits discrimination and harassment by judges, attorneys, and court personnel. The policy also provides a process for discipline and remedial action

regarding such conduct for the Unified Judicial System's personnel, related staff, and court users in the courthouse. This policy was last revised in July of 2016 to extend non-discrimination protections to those based on an individual's gender identity or expression.ⁱⁱⁱ The Commission and the Court also worked together to amend the Judicial Conduct Code to specifically prohibit discrimination and harassment based on an expansive list of protected categories. A final critical component of the effort to address this conduct is anti-bias training, which both the Court and the Commission have conducted for the judiciary, court personnel, and members of the legal profession over the years since the report was published.

Despite these efforts, however, biased behavior continues to occur and complaints continue to be filed against members of the legal profession and the judiciary. This has been documented by statistical evidence and anecdotal surveys conducted by the American Bar Association,^v the Allegheny County Bar Association,^v and other research institutions. The findings often reflect the continued discriminatory treatment of women and minorities in law firms and in the performance of their duties, both outside and within the courts.

What is bias?

Bias is the "pre-judging of a person based on his or her, perceived or actual, status of being a member of a particular group, without regard to that person's actual conduct or performance."^{vi} Researchers who study how human brains work to process information and make decisions have identified two types of bias - explicit bias and implicit bias. The distinguishing feature of each form of bias depends on the extent of an individual's awareness of the bias. Thus, people who knowingly, and sometimes openly, embrace a stereotype or bias are exhibiting explicit bias. On the other hand, implicit bias involves far more subtle stereotypical associations. People are unaware that they are thinking or acting in a particular way because of the influence of that bias.

Researchers have learned that individuals are more likely to rely on the automatic processing by their brains, sometimes referred to as "intuition" or "gut feelings," when they must make decisions quickly.

When they have more time to evaluate information using their analytical skills, according to the researchers, people's decisions are more thoughtful and deliberate, that is, less influenced by implicit bias.

Empirical research has also determined that automatic brain processing is just as common among key decision-makers in the justice system as it is among lay people.^{vii} Judges, prosecutors, defense attorneys, police, witnesses, jury members, probation officers, and court personnel all hold implicit biases that may lead them to make decisions based on their biases, rather than on the facts of the case, without even intending it. As neurologists and social scientists continue to examine human decision-making, recent studies have increased our understanding of how both explicit and implicit bias can impact court users' experiences and case outcomes.

The following are a few examples of the ways in which bias can influence decision-makers in our justice system:

- **Implicit bias can play a large role in how fact-finders assess witness credibility.** For instance, studies show that female expert witnesses are seen as more informed in cases that take place in family court, likely because of gender stereotypes that associate women with child-raising.^{viii} Conversely, male experts are seen as more persuasive on topics perceived as masculine, like price-fixing or calculations of economic damages.
- Numerous studies have demonstrated that **determinations about the "seriousness of the offense" and the "dangerousness" of the defendant can be influenced by the implicit racial and ethnic bias** of prosecutors, judges, and jurors regarding bail, charging, plea bargaining and sentencing decisions.^{ix}
- **Implicit bias can impact how juries in capital murder cases determine who receives the death penalty.** According to findings from a 2017 study of capital punishment in Pennsylvania, capital defendants with White victims were more likely to receive a death sentence than those with Black victims, suggesting a racial bias that places a higher value on White victims.^x
- In civil cases, jurors' implicit bias relating to race and poverty can have tangible outcomes on monetary judgments. A study found that, when juries had discretion (such as in setting pain and suffering damages), Black plaintiffs were awarded less than White plaintiffs.^{xi} Thus, **implicit biases that associate Black individuals with poverty undervalue them as victims, resulting in lower civil jury verdicts.**

Neither the Commonwealth nor any person **shall deny** to any person discriminate against any person *in the*

Guidelines for Advancing Non-Discriminatory Behavior and Communication

The following sections contain suggestions for judges, attorneys, and court personnel to use in guiding their own personal conduct and for use in their roles as stewards of the justice system.

Addressing Implicit Bias on an Individual Level

Because of its subconscious nature, implicit bias is more difficult to observe than explicit bias, and thus, more difficult to examine and address. However, neuroscientists and legal scholars have collaborated to create straightforward strategies to mitigate the influence of implicit bias on decisions and actions.^{xiii}

- Raise awareness of implicit bias by attending educational sessions, taking an Implicit Association Test, and reading relevant research.
- Use decision-support tools and other bias interrupters, such as note-taking, checklists, and bench cards, to promote deliberative, as opposed to intuitive, thinking.
- Allow more time for hearing cases and for making decisions in which implicit bias may be a concern. Consider ways to clear your mind, such as with meditation, before reviewing facts and committing to a decision. Doubt your own objectivity.
- Improve the conditions of your decision-making. Re-examine decision-making criteria before reviewing case-specific information, such as the importance of various types of evidence.
- Institute feedback mechanisms that are consistent and egalitarian. Keep track of data on your past decisions and consistently re-evaluate them, looking for indicators of implicit bias that may only be seen by viewing these decisions in the aggregate.
- Participate in diversity training that focuses on multiculturalism and associate with those who are committed to egalitarian goals.
- Increase exposure to stigmatized group members, and reduce exposure to stereotypes.

political subdivision thereof
on the enjoyment of any civil right, nor
exercise of
any civil right.

—Article I, Sect. 28, Constitution of the Commonwealth of Pennsylvania

Institutionalizing Fairness

VALUE FAIR TREATMENT

- Provide an atmosphere in which court staff realize the importance of fair treatment.
- Make sure that a commitment to fairness is communicated to all staff.
- Make fairness a part of the long-range planning of the courts.

HIRE A DIVERSE STAFF

- Establish effective recruitment, hiring, promotion, and retention practices that are inclusive of minorities and women.
- Develop or adjust personnel practices to promote a representative workforce.

STUDY FAIRNESS AND IMPLEMENT SOLUTIONS

- Collect the necessary data to monitor fairness in the courts.
- Periodically assess whether the recommendations are being implemented.
- Analyze efforts for effectiveness, and then adjust accordingly.

EDUCATE AND TRAIN STAFF

- Develop training programs in fairness, diversity awareness, cultural competence, and cultural sensitivity.
- Provide tools and definitions for creating a clear understanding of what is acceptable behavior, and what is not.
- Encourage or require staff to attend training programs.
- Make sure that training programs are available in every sector of the justice system.

DEVELOP COMPLAINT POLICIES AND PROCEDURES

- Follow the UJS Policy on Non-Discrimination and Equal Employment Opportunity in response to complaints of bias, in accordance with the procedures established by the AOPC.

COLLABORATE WITH OTHERS

- Collaborate with both governmental and non-governmental individuals and groups outside the courts that might be able to assist with studying fairness, recruiting a diverse workforce, or education and training efforts.

Promoting Equitable Conduct

CONDUCT ON THE BENCH

- Exhibit leadership and let your personal behavior set the standard for non-biased communication and disposition in the courtroom and judicial operations.
- Correct discriminatory attitudes or comments made by any participants.
- Be alert to how your words and/or behavior are received by listeners.
- Use appropriate and consistent titles for individuals, and gender-neutral or gender-inclusive terms when addressing a group.
- Refrain from comments on physical appearance.
- Be aware that non-verbal communication is also important.
- Consider giving brief remarks about your role and intention to demonstrate respect, neutrality, and fairness to all involved. This should include court reporters and court interpreters, among others.
- Regard all litigants, attorneys, and court employees with respect, fairness, and dignity.
- Eliminate any personal biases in decision-making and court interactions.
- Be mindful of bias, even in chambers. Do not communicate racial, ethnic, sexual, or stereotypical remarks, gestures, jokes, or other analogous biases in the court or chambers.

COURT STAFF

- Regard judges, litigants, attorneys, and other court personnel with equality, respect, and courtesy.
- Monitor and correct all bias-based behaviors and attitudes.
- Expect non-biased treatment from judges, litigants, and attorneys.
- Be conscious of the diversity among court staff.

- Be aware that diverse ideas and values enhance the management and direction of a court.
- Understand that cultural differences and customs can underlie behaviors. Appreciation of those differences and customs can be a powerful safeguard against costly misunderstandings, employee dissatisfaction, and turnover.
- Do not communicate racial, ethnic, sexual or stereotypical remarks, gestures, jokes or other analogous biases in the court.
- Refrain from comments on physical appearance.

ATTORNEYS

- Regard judges, litigants, court personnel, and other attorneys with equality, respect, and courtesy.
- Represent all clients professionally, regardless of their race, color, gender identity or expression, sexual orientation, national origin, age, disability, religion, or social class.
- Carefully evaluate your approach and mind-set in order to eliminate unconscious attitudes and behaviors that may be biased.
- Do not personally communicate racial, ethnic, sexual, or stereotypical remarks, gestures, jokes, or other analogous biases in the court, and discourage gender- or racially-biased statements or remarks made by judges, attorneys, or court staff.

THE COURTROOM ENVIRONMENT

- Provide signs in languages appropriate to the users of the court.
- Displays reflecting the ethnic and cultural diversity in your particular community are helpful in reducing anxiety about being in an otherwise unfamiliar setting.

Disciplinary Cases Involving Bias

The following cases are offered as concrete examples of inappropriate conduct by judges and attorneys that were found to be in violation of non-discrimination policies and ethical codes of conduct.

SEXUAL HARASSMENT OR MISCONDUCT

A federal Circuit Court judge was accused of sexual misconduct by 15 women, including three former clerks, who alleged, in incidents over the span of more than three decades, that the judge had shown them explicit images in chambers, fondled and grabbed them, and kissed one without warning at a legal community event. Upon initiation of proceedings, but before a hearing took place, the judge resigned. *Judicial Council of the Second Circuit*, Docket No. 17-90118-jm

A Pennsylvania Supreme Court Justice was sanctioned and fined following his resignation for participating in the exchange of improper emails and videos with friends and professional acquaintances, including other judges, prosecutors, and defense attorneys. *In re Eakin*, 13 JD 2015 (Pa. Ct. Jud. Disc. 2015).

A Pennsylvania MDJ overseeing a treatment court received sanctions after he began an inappropriate relationship with the girlfriend of one of his treatment court participants, including sending her inappropriate text messages. *In re Shaw*, 5 JD 2016 (Pa. Ct. Jud. Disc. 2015).

A Pennsylvania MDJ was sanctioned for viewing and displaying pornographic videos and photographs in his chambers during office hours. *In re Muth*, 2 JD 2017 (Pa. Ct. Jud. Disc. 2017).

A Pennsylvania MDJ was removed from office for sexually harassing a female employee. He had repeatedly made sexually-charged statements to his

female staff members and shared photos of nude women with them. In addition, the judge described in graphic detail child pornography from a proceeding before him, despite the staff members' protests. *In re Berkheimer*, 877 A.2d 579 (Pa. Ct. Jud. Disc. 2005).

RETALIATION AND IMPROPER DEMEANOR

A former Pennsylvania MDJ was reprimanded for retaliatory behavior against a person who cooperated with an investigation of the judge's conduct, and for violating the MDJ ethical rules. The judge was accused of engaging in frequent, angry and caustic outbursts against his court staff in the presence of litigants, witnesses, lawyers, court staff and officials, and others with whom the MDJ dealt in an official capacity. The judge's behavior included belittling, cursing, and often yelling at clerks, followed by retaliation against them for filing complaints and assisting or cooperating with the Judicial Conduct Board's investigation of his conduct. *In re Tidd*, 3 JD 16 (Pa. Ct. Jud. Disc. 2018).

A Pennsylvania MDJ resigned following his suspension for engaging in improper conduct toward a clerk. The conduct included inviting the clerk on dates despite her refusal, and engaging in a retaliatory manner, such as refusing to speak with the clerk, or speaking in a sarcastic manner to her, reassigning some of her duties to other clerks (creating an added burden for them), and yelling and behaving in an angry manner toward his clerks in general. *In re Hladio*, 6 JD 16 (Pa. Ct. Jud. Disc. 2017).

A Florida judge received a public reprimand from the Florida Supreme Court for berating and belittling a victim of domestic violence who failed to respond to a subpoena to testify in the trial against her abuser. The Court found that the judge's actions were in violation of the state Judicial Code of Conduct. Furthermore, the Court found that the judge's behavior created the appearance of partiality toward the state. *In re Collins*, SC16-548 (Fla. 2016).

RACIAL AND ETHNIC BIAS

A former Pennsylvania MDJ was reprimanded for making racially- and ethnically- derogatory statements about minority members of the community in the presence of his staff. He was also reprimanded for his practice of publicly criticizing his female staff members while using derogatory and demeaning language. *In re Brown*, 907 A.2d 684 (Pa. Ct. Jud. Disc. 2006).

A California judge was publicly admonished for comments she made after inquiring into a respondent's place of birth. She stated that she was "concerned about the throwing of rocks and the spitting," and added, "usually that is the kind of behavior I see in Middle Eastern clients." The judge also stated that, "[I]f the declaration says, 'He drags me around the house by the hair,' it's almost always a Hispanic client." CA Public Admonishment of Judge Nancy Pollard (2011), available online at https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Pollard_07-13-11.pdf.

A California judge's repeated use of racial slurs was found to have violated the state ethics code, even though most of the remarks were made during in-chambers conferences, and not in open court. *In re Stevens*, 6445 P. 2d 99, 100 (Cal. 1982).

Additional Resources

Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness

<http://www.pa-interbranchcommission.com/reports.php>

The National Center for State Courts Gender and Racial Fairness Resource Guide

www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/Resource-Guide.aspx

The American Bar Association's Implicit Bias Initiative

www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/

The National Consortium on Racial and Ethnic Fairness in the Courts Research and Resources

<http://www.national-consortium.org/Research-and-Resources.aspx>

Conference of State Court Administrators, Position Paper on State Courts' Responsibility to Address Issues of Racial and Ethnic Fairness

www.cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/raciaethnicwhitepapr.ashx

Endnotes

ⁱ *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*, (2003) available at http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf

ⁱⁱ *Id.*

ⁱⁱⁱ Unified Judicial System of Pennsylvania Policy on Non-Discrimination and Equal Employment Opportunity, available online at <http://www.pacourts.us/assets/files/setting-435/file-214.pdf>

^{iv} American Bar Association Commission on Women in the Profession and Minority Corporate Counsel Association, *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession* (2018) available at <https://www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.pdf>

^v Allegheny County Bar Association, *Report and Recommendations of the Gender Equality Taskforce*, (2007).

^{vi} Chris Chambers Goodman, *Shadowing the Bar: Attorneys' Own Implicit Bias*, 28 La Raza L. J. 18, 19 (2017).

^{vii} Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich, Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1196, 1197 (2008-2009).

^{viii} Tess M. S. Neal, *Women as Expert Witnesses: A Review of Literature*, University of Nebraska Public Policy Center 7, 8 (March 2014).

^{ix} See Caisa Royer, Daniel Hido, and Michael Slotnick, *Defining Implicit Bias*. Available at https://courses2.cit.cornell.edu/sociallaw/student_projects/Definingbias.html. See also Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Settings*, 46 Stan. L. Rev. 987, 992 (1994); Roger J. Smith & Justin D. Levinson, *The Impact of Implicit Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 813-14 (2012), citing *Task Force on Race and the Criminal Justice Sys., Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623, 647 (2012); Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 Boston College Law Review (2018, forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036726; Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 Justice Quarterly, 223-253 (2018); Justin D. Levenson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 309 (2010); Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black and White Disparities in Sentencing*, 12 Empirical Legal Stud. 395 (2015).

^x Kramer, John, et. al., *Capital Punishment Decisions in Pennsylvania: 2000-2010, Implications for Racial, Ethnic and Other Disparate Impacts*, Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, (October 2017) available at http://www.pa-interbranchcommission.com/_pdfs/PSU-death-penalty-study-report_101217.pdf

^{xi} Girvan, Erik, and Marek, Heather, *Psychological and Structural Bias in Civil Jury Awards*, Journal of Aggression, Conflict, & Peace Research, Vol. 8, p. 247-57 (2016).

^{xii} These strategies are adapted from Kang, Jerry, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012). See also Casey, Pamela, et. al., *Addressing Implicit Bias in the Courts*, Court Review, Vol. 49 (2012).

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March 2019

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