

IMPLICIT BIAS

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WHAT IS IMPLICIT BIAS?

Implicit bias is a negative attitude or stereotype of which one is not consciously aware, against a specific social group. Implicit bias is thought to be shaped by our experiences and based on learned associations between particular qualities and social categories, including race and/or gender. Individuals' perceptions and behaviors can be influenced by these implicit biases, even if they are unaware that they hold them. Implicit bias is a component of implicit social cognition: the phenomenon that perceptions, attitudes, and stereotypes can operate prior to conscious intention or endorsement.

WHAT IS IMPLICIT BIAS?

“All of us have implicit biases to some degree. This does not necessarily mean we will act in an inappropriate or discriminatory manner, only that our first “blink” sends us certain information. Acknowledging and understanding this implicit response and its value and role is critical to informed decision-making and is particularly critical to those whose decisions must embody fairness and justice.”

MALCOLM GLADWELL: BLINK: THE POWER OF THINKING WITHOUT THINKING (2007).

**LEGAL
PROFESSION
RESPONSE TO
COMBAT
IMPLICIT BIAS**

AMERICAN BAR ASSOCIATION

CALIFORNIA BAR

LAW SCHOOLS

Rule 2.72 Anti-Bias Requirement

(as of January 1, 2022)

THE STATE BAR OF CALIFORNIA

At least two hours dealing with the elimination of bias. Of the two hours, at least one must focus on implicit bias and the promotion of bias reducing strategies.

AMERICAN BAR ASSOCIATION

STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS

Standard 303: Curriculum



(C) must provide education on cross-cultural competency, bias, and racism (1) at the start of the program and (2) at least once again before graduation, and



Additional Guidance: While law schools need not add a required upper-division course to satisfy this requirement, law schools must demonstrate that all law students are required to participate in a substantial activity designed to reinforce the skill of cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession.

WHERE DOES IMPLICIT BIAS EXIST IN THE LEGAL PROFESSION?

IN THE COURTROOM

JUDICIAL DECISIONMAKING

LEGAL WORKPLACES

LEGAL HIRING

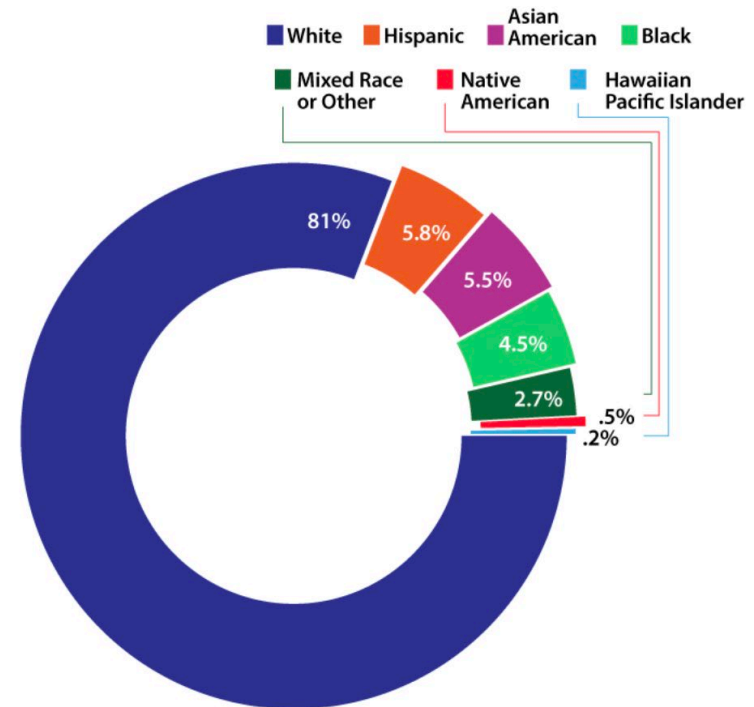
LEGAL EDUCATION

ASSIGNMENTS

AND BEYOND.....

NATIONAL DATA ON DIVERSITY IN LEGAL PROFESSION

Lawyers by Race and Ethnicity: 2022



ABA National Lawyer Population Survey

NATIONAL DATA ON DIVERSITY IN LEGAL PROFESSION

2021 NALP Report on Diversity in U.S. Law Firms:

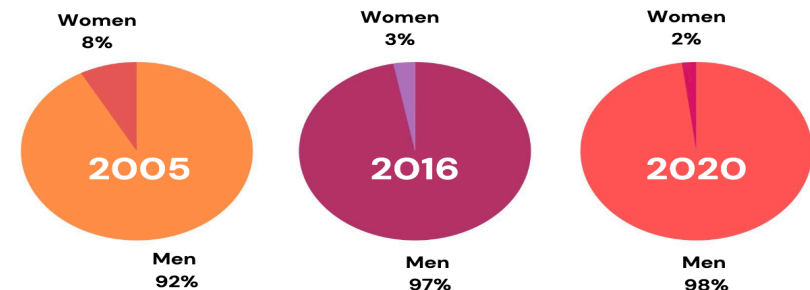
10.75% law firm partners were lawyers of color

2021 NAWL Survey on the Promotion and Retention of Women in Law Firms:

22% of equity partners in nation's largest law firms are female

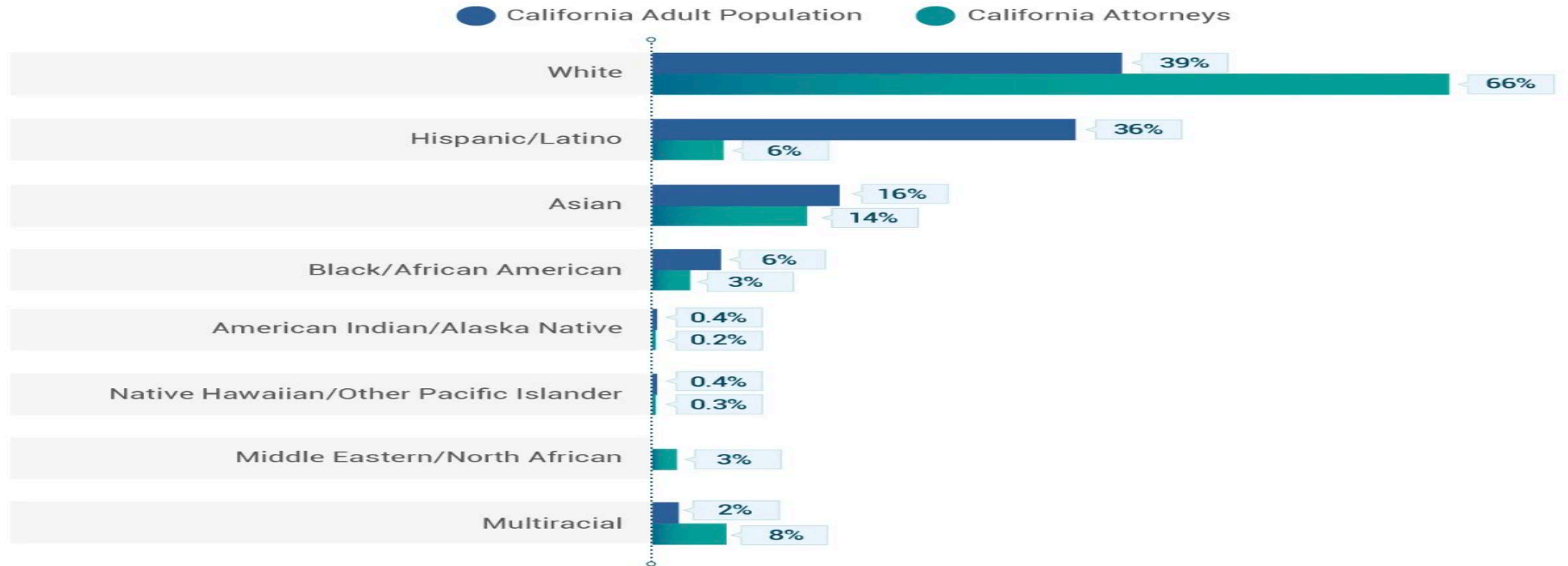
The most significant wage gap exists among equity partners, although female associates and non-equity partners are still paid less than their male counterparts across the board.

Gender of Most Highly Compensated Attorney in the Firm (%)




DATA ON DIVERSITY IN LEGAL PROFESSION- CALIFORNIA

Figure 1. Race/Ethnicity
California's Adult Population Compared with
California's 2022 Attorney Population



The State Bar of California's Report Card on the Diversity of California's Legal Profession



DOES THE LACK OF DIVERSITY IN
THE LEGAL PROFESSION—
ESPECIALLY IN POSITIONS OF
LEADERSHIP AND POWER—
REFLECT SYSTEMIC
DISCRIMINATION AND IMPLICIT
BIAS?



MANIFESTATION OF IMPLICIT BIAS IN THE LEGAL PROFESSION:

PERCEPTIONS OF LEGAL WRITING

Written in Black & White Exploring Confirmation Bias in Racialized Perceptions of Writing Skills (Lead Researcher Dr. Arin N. Reeves):

- Study explored the hypothesis that unconscious confirmation bias in a supervising lawyer's assessment of legal writing would result in a more negative rating if that writing was submitted by an African American lawyer in comparison to the same submitted by a Caucasian lawyer. Study was similar to others that have explored bias based on resumes.
- Study Conclusions: (1) commonly held racially-based perceptions about writing ability unconsciously impact our ability to objectively evaluate a lawyer's writing and (2) these perceptions = confirmation bias, impacting evaluation of legal writing (i.e., more errors when we expect to see errors, and fewer errors when we do not expect to see errors)

MANIFESTATION OF IMPLICIT BIAS IN THE LEGAL PROFESSION:

EXAMPLES FROM PRACTICE

Excerpts from the ABA & MCCA Report, *Bias Interrupters, You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession:*

- *Women lawyers of color were eight times more likely than white men to report that they had been mistaken for janitorial staff, administrative staff, or court personnel.*
- *White women reported doing more administrative tasks (such as taking notes) than their colleagues at a level 21 percentage points higher than white men, and women of color reported doing more of this type of office housework at a level 18 percentage points higher than white men.*
- *Most of the biggest findings of the survey had to do with bias existing in the basic business systems of attorneys' workplaces. Women and people of color reported higher levels of bias than white men regarding equal opportunities to:*
 - *Get hired*
 - *Receive fair performance evaluations*
 - *Get mentoring*
 - *Receive high-quality assignments*
 - *Access networking opportunities*
 - *Get paid fairly*
 - *Get promoted*
- *80% of white men, but only 63% of white women, 59% of men of color, and 53% of women of color reported that they had equal opportunities for high-quality assignments.*

SELECT STRATEGIES TO COMBAT IMPLICIT BIAS

TALK ABOUT IT

Start the conversation!
Share anti-bias resources with senior lawyers at your firm, organization, court, or agency.

HOLD TRAININGS

Implement anti-bias trainings for leaders and evaluators and decision-makers in your workplace.

RECONFIGURE EVALUATIONS

Reconfigure evaluation processes for current employees [i.e., summer associate blind evaluation of writing assignments].

REVISE HIRING PRACTICES

Revise hiring practices [from assembling hiring committee to developing candidate pool to conducting interviews].

USE METRICS

Use metrics to evaluate success. Analyze, reflect, correct, repeat!

Adapted from: ABA Report: Interrupting Bias in the Legal Profession, *You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession* AND Arin Reeves, *Written in Black & White Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*

ADDITIONAL RESOURCES ON IMPLICIT BIAS

- *American Bar Association Profile of the Legal Profession 2020*,
<https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>
- *American Bar Association Implicit Bias Initiative Annotated Bibliography*,
<https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox/annotated-bibliography/>
- *California State Bar Annual Diversity Report*, <https://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf>
- Donald J. Polden and Jenna M. Anderson, *Leadership to Address Implicit Bias in the Legal Profession*, 62(1) *Santa Clara Law Review* 63 (2022),
<https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2928&context=lawreview>



RUTH BADER GINSBURG

“A system of justice is the richer for the diversity of background and experience of its participants. It is the poorer, in terms of evaluating what is at stake and the impact of its judgments, if its members—its lawyers, jurors, and judges—are all cast from the same mold.”