

Recognize The Bias



**A REVIEW OF PROTECTED CLASSES AND A PRACTICAL
SUGGESTIONS FOR THE ELIMINATION OF BIAS
IN THE PRACTICE OF LAW**

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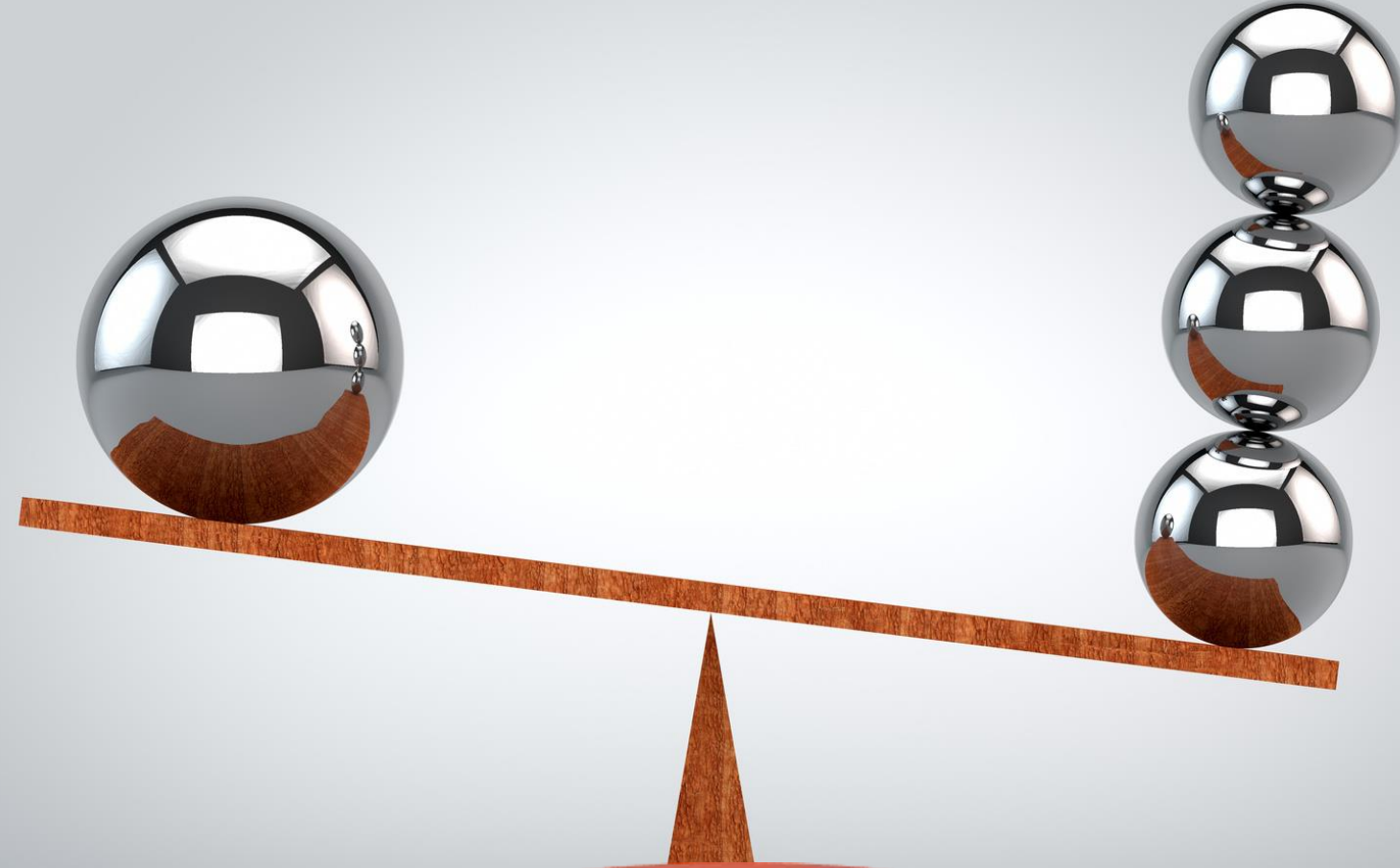
SURPRISE!

**I'm Biased
You're Biased
Everyone is Biased**

What is Bias?

- Prejudice in favor of or against one thing, person or group compared with another, usually in a way considered to be unfair.
- The term bias refers to the tendency of a person to favor one thing, idea, or person over another. In a legal context, bias can lead an individual, such as a judge or juror, to treat someone unfairly, in spite of the fact that hearings and trials are designed to be unbiased assessments of the facts of a case.



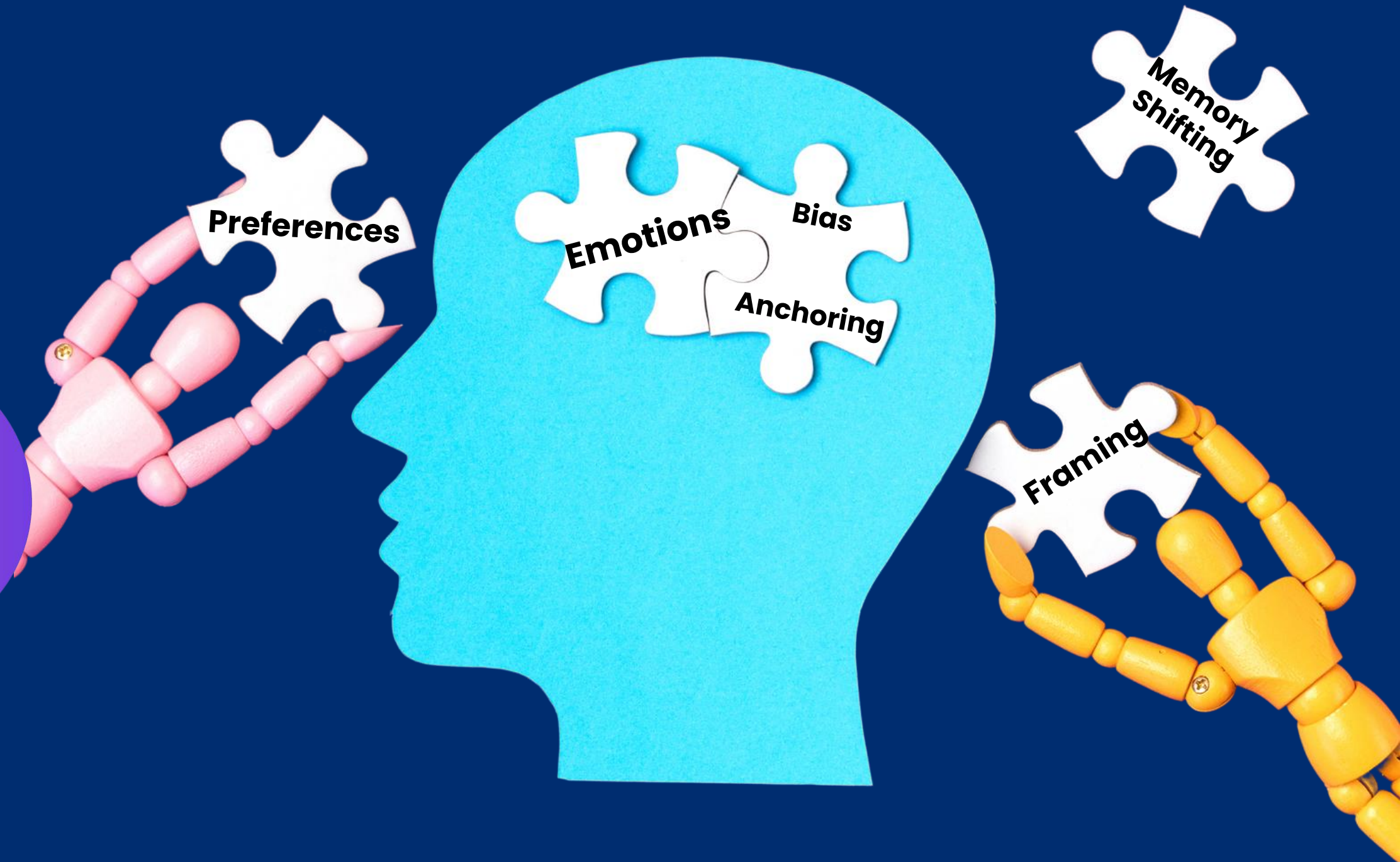


Can a Person be Unbiased?

Generally, no. Everyone has [some degree of bias](#). It's human nature to assign judgment based on first impressions. Also, most people have a lifetime of conditioning by schools, religious institutions, their families of origin, and the media. However, by reflecting critically on judgments and being aware of blind spots, individuals can avoid stereotyping and acting on harmful prejudice.

Cognitive Errors and Bias

WE ALL KNOW IT'S THERE



Why We Permit Juror Voir Dire

- To determine perspective juror bias – both favorable and unfavorable
- To eliminate the removal of a perspective juror for undisclosed discriminatory reasons



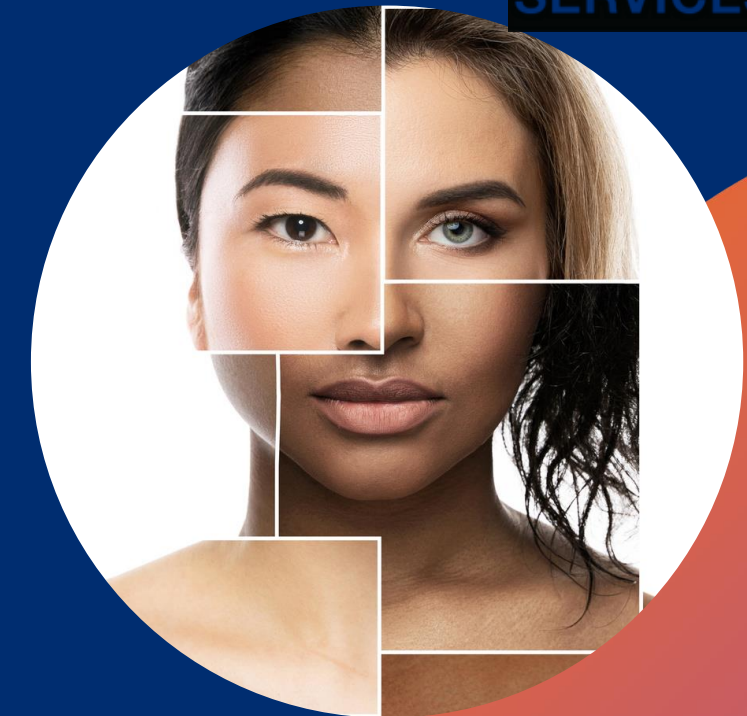
Eliminate Bias In Jury Selection

Batson v. Kentucky (1986) 476 U.S. 79 (Batson) and People v. Wheeler (1978) 22 Cal.3d 258; Can't exercise peremptory challenges bases on race.

Unzueta v. Akopyan (2022) _ Cal.App.5th _ , 2022 WL 16748570

A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in [Section 11135 of the Government Code](#), or similar grounds." CCP 231.5

"No person in the State of California shall, on the basis of **sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation**, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity....." Government Code 11135



We construe [section 231.5](#) and [Government Code section 11135](#) together to prohibit use of peremptory challenges to excuse prospective jurors on the basis a person with whom the juror is associated has a disability.

Unzueta Holding



On September 30, 2020, California Governor Gavin Newsom signed a landmark piece of legislation into law.

AB 3070 (codified in CCP Section 231.7) increases transparency in jury selection by requiring an attorney exercising peremptory strikes to show by **clear and convincing evidence** that his or her action is unrelated to that juror's membership in a protected group or class. **AB 3070 will take effect in criminal trials beginning on January 1, 2022, and in civil trials beginning on January 1, 2026.**

Section 231.7 (a):

A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

Starting Jan. 1, for criminal trials and on Jan. 1, 2026 for civil trials, judicial oversight of jury selection will be designed to not only prevent intentional discrimination but **to end implicit bias**

The court will no longer assess whether the peremptory was exercised as a result of **purposeful discrimination**, as held in *Batson v. Kentucky*, 476 U.S. 79 (1986) and *People v. Wheeler*, 22 Cal. 3d 258 (1978). Instead, the court must consider whether there is a substantial likelihood an **objectively reasonable person**—defined as one who is aware of unconscious bias and its impact on the justice system—would view the challenge as related to the juror’s race, ethnicity, gender, gender identity, sexual orientation, national origin or religious affiliation.

Thus, rather than assessing the actual, subjective motivations of the attorney or party exercising the peremptory, this new, objective test considers how a reasonable person, aware of and **sensitive to the issues of unconscious bias**, would view the juror challenge.

Unlawful Bias

Based on both Federal & CA State statutes, these are the protected categories

Sexual Orientation

Gender identity and gender expression

Race

Color

Ancestry

National Origin

Religion

Sex

Medical Conditions

AIDS/HIV

Disability (Physical or Mental)

Age (40 or older)

Genetic Information

Marital Status

Military or Veteran Status

Political Affiliations or Activities

Status as a victim of domestic violence, assault, or
stalking

CA State Statutes

- Fair Employment and Housing Act 12940 — Unlawful Practices.
- See also Americans with Disabilities Act (ada.gov); Title VII of the Civil Rights Act of 1964

What is Expected of a Judge?

Code of Judicial Ethics

(Partial Summary of California Judicial Handbook – Section 1:32)

Conduct

- Eschew bias and prejudice, be impartial, and maintain an open mind
- Avoid impropriety and appearance of impropriety .
- Maintain integrity, probity, uprightness, soundness of character, high standards of conduct and follow the law, court rules and judicial ethics; Promote public confidence in the judiciary

Where Biases Can Lurk



Hiring Practices



Compensation



**Law Offices'
Operations**



**Privileges of
Employment**

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not: (1) unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic; or (2) unlawfully retaliate against persons.* (b) In relation to a law firm's operations, a lawyer shall not: (1) on the basis of any protected characteristic, (i) unlawfully discriminate or knowingly* permit unlawful discrimination; (ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or (iii) unlawfully refuse to hire or employ a person*, or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment;*

Self-Identification

How to identify your own biases, and thereby eliminate or minimize their effect

1

**Acknowledge/recognize
that you have biases**

2

Strive to understand their perspective – empathy. You'll be a more effective litigator if you can understand where they're coming from. Just listen, obtaining information. Put yourself in their shoes– Why are they thinking the way they do ??

Eschew Bias and Prejudice, Be Impartial, and Maintain an Open Mind

Summary of Judicial Handbook Section 1:34

- Natural for humans to make assumptions and to harbor biases and prejudices
- Humans jump to conclusions and make assumptions - often automatically without thought or consideration
- Once conclusion made - whether based on a bias or fact, it is difficult to accept something as "fact" contrary to that conclusion

Identification of Personal Biases

First Step to Elimination of Bias



How?

Open Mind - Evidence rather than assumption - Ruling based on articulatable fact rather than "feeling"

Judging "book by the cover" - Questioning upon what facts the conclusion is based

Willingness to listen to a theory contrary to life experience - WHY?

Keeping an Open Mind

EASIER SAID THAN DONE

- California Code of Judicial Ethics - Canon 3, 3B(4)
- Requires Judges to treat those before a court with fairness impartiality, and courtesy (Canon 3B(5), 3C(1) and 3C(5))
- Judges to perform duties "without bias or prejudice" and to require attorneys and court staff to refrain from manifesting bias or prejudice (Canon 3B(6), 3C(3))



Empathy

Requires us to understand that others may experience life in a manner totally different from your life experience.

"Empathy - The cognitive ability to understand a situation from the perspective of other people, combined with the emotional capacity to comprehend and feel those people's emotions in that situation" (Colby, In Defense of Empathy(2012) 96 Minn. L. Rec. 1944,1945)



Conclusions

01

Biases

We all have biases – they are unavoidable

02

Effects

These biases can affect our decision making and in certain contexts are illegal

03

Step 1

The first step to the elimination of bias is the recognition of biases.

04

Step 2, and onwards

The next step to the elimination of bias is to listen & reflect, Before you make a decision – or open your mouth

Thank You



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