



Texas Center for  
**LEGAL ETHICS**  
*Professionalism in Practice*

**UNCONSCIOUS BIAS – WHAT YOUR BRAIN IS UP TO  
WHEN YOU AREN'T PAYING ATTENTION**

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## AUTHOR BIOGRAPHIES



**The Honorable Audrey F. Moorehead** is the first woman to be elected Judge of Dallas County Criminal Court #3. She just completed her term serving as the only African American female on the Board of Directors of the State Bar of Texas 2015-2018. Based in Dallas, for fourteen years, Moorehead had her own practice specializing in Criminal Defense, Domestic Relations, Wills, and Trusts. Moorehead holds a Master of Business Administration and is a graduate of Texas A&M School of Law, (formerly Texas Wesleyan University School of Law).

Moorehead began her professional career in executive management with the Visiting Nurse Association of Texas in Long Term Care. She was a Judicial Clerk for the Honorable Judge Jay Patterson, 101st District Court and Judicial Intern for the Honorable Judge Sam A. Lindsay, Northern District. Moorehead is the former Secretary/Treasurer for the Dallas Bar Association Board of Directors and was just reelected to serve on this same board.

She is a former Regional Director of the National Bar Association and is the former President of the African American Lawyer's Section for the State Bar of Texas. She recently completed two terms on the Board of Directors of the Texas Criminal Defense Lawyer's Association (TCDLA) and the only African American to serve on the Executive Committee. Moorehead is a faculty member and frequent lecturer for the Texas Center for Legal Ethics - James A. Baker Legal Ethics Series. Recently she served as a Dallas County Commissioner's Court appointee to the Dallas County Child Welfare Board and also serves on the CASA Advisory Board. Moorehead has served as the Vice President of the Dallas Black Criminal Bar Association. Moorehead is a member of the 2017 class of Leadership Texas, Dallas Bar Foundation and Texas Bar Foundation. Ms. Moorehead was named the Best Criminal Defense Attorney in Dallas County for Juveniles as voted on by her peers in the Dallas Criminal Defense Lawyers Association for 2015, 2016 and 2017. She serves on the board of directors for Dallas Legal Hospice, Dallas Women Lawyer's Association, Texas Women Lawyers Association and serves on the Advisory Board for Unlocking Doors, an innovative prison reentry program. Moorehead has received many other awards of distinction and recognitions. Moorehead is an active member of Alpha Kappa Alpha Sorority.



**Jonathan E. Smaby** has served as the Executive Director of the Texas Center for Legal Ethics in Austin, Texas since July 2009. The Center promotes the ethical practice of law by attorneys and educates the public regarding legal ethics and the legal system. The Center also administers the Justice James A. Baker Guide to Ethics and Professionalism in Texas CLE course, a four-hour program required of all newly-licensed attorneys by the Supreme Court of Texas.

Prior to being selected as Executive Director, Smaby practiced law in Dallas, where he was the managing shareholder of Roberts & Smaby, PC. He was a longtime member of the Advertising Review Committee of the State Bar of Texas and currently serves as Chair of the Consortium on Professionalism Initiatives for the American Bar Association.

Smaby is a frequent speaker, primarily on the topics of legal ethics, professionalism, and lawyer advertising. He has spoken at events sponsored by the American Bar Association, the State Bar of Texas, the University of Texas Law School, the NAACP, and numerous local bar associations throughout Texas. He is a member of the College of the State Bar of Texas and a Fellow of the Texas Bar Foundation.

Smaby is a graduate of the University of Minnesota and the University of Michigan Law School, and he is licensed to practice law in Texas and Minnesota.

## UNCONSCIOUS BIAS – WHAT YOUR BRAIN IS UP TO WHEN YOU AREN'T PAYING ATTENTION

Do you remember the first time you ever got behind the wheel of a car? Did it feel strange? Did you find it a little scary because of all the things you had to think about at once?

If you did, you're pretty normal. Getting the feel for maneuvering an automobile while operating the accelerator and brakes with just the right touch – while being mindful of road conditions and other vehicles on the road, all at the same time – takes experience. While you were learning, you probably devoted considerable brain power to mastering the various tasks involved in safely operating a motor vehicle.

Contrast that feeling with how you approach driving now – you likely drive a car without ever thinking about the myriad of different skills you need to operate a two-ton hunk of steel at relatively high rates of speed. Not only do you drive on autopilot, but you are so confident about driving that you probably perform numerous other tasks while driving – talking to passengers, keeping kids in line, singing along with the radio, speaking on the phone (on speaker only, we hope), and who knows what else? You can do those things because your brain knows how to perform most of the complicated tasks to operate a car without you being conscious of it. This frees your brain up for other, more conscious activities. How does that work?

**Your Brain's Role.** Your brain *consciously* processes about [40 bits of information per second](#), which sounds like a lot. And it is. But your brain also *unconsciously* processes [11 million bits of information](#) per second. Most of what your brain allows you to do just to get through the day operates outside your awareness. Which is a good thing. If it didn't, you'd have to consciously think about how to walk, how to operate a doorknob, or how to tie your shoes. Imagine how many tasks you perform each day that you don't even think about, and how taxing it would be if these were all conscious decisions.

The reason your brain does this is to preserve energy. The brain wants to be as efficient as possible, and it does this by processing large amounts of information unconsciously, because that uses less energy. This is particularly true when the brain senses danger. The brain of early humans quickly evolved to develop an instinct to retreat from danger, like an angry lion or bear. People who didn't or couldn't do that didn't live very long. Your instant decision to slam on the brakes to avoid a collision with another vehicle or pedestrian – without even consciously thinking about it in advance – helps keep you alive.

While these unconscious thoughts are useful – and, in fact, critical – to our ability to stay safe and get through our daily routines, they also can have unintended negative consequences. When you meet a new person, your brain is unconsciously assessing that person on many levels. You may assume that someone is educated or uneducated by their appearance, attire, speech,

or mannerisms. You may be drawn to or repelled by some people based on these same factors. You may think that you are making these decisions consciously, but the evidence shows otherwise.

**System One/System Two.** In Daniel Kahneman's book, [\*Thinking, Fast and Slow\*](#), he describes decision-making processes as System One or System Two. System One decisions are emotional judgments made intuitively and nearly instantaneously. These judgments are fast, automatic, and effortless. System Two decisions are slower, conscious, and deliberate. It is also where skeptical thought takes place. But in the time that it takes to complete a System Two decision, the subconscious emotional conclusion already reached by System One has taken hold. Too often, the slower and more deliberate brain is subconsciously influenced by System One to the point that the initial subconscious, emotional assessment becomes an unconscious belief. As Kahneman says:

*System Two is more of an apologist for the emotions of System One than a critic of those emotions – an endorser rather than an enforcer. Its search for information and arguments is mostly constrained to information that is consistent with existing beliefs, not with an intention to examine them.*

System Two is not as rational as you might assume. And it interferes with your ability to use your slower, more deliberative brain.

**Unconscious Bias.** One consequence of this phenomena is unconscious bias, also known as implicit bias. Unconscious bias refers to the attitudes or stereotypes that affect our thoughts, actions, and decisions in an unconscious manner. They can be favorable or unfavorable and are activated without a person's awareness or control.

As a result, we all have unconscious feelings and attitudes about other people based on characteristics such as race, ethnicity, age, gender and appearance that may not necessarily align with our conscious beliefs, such as believing that we are not biased against other groups of people. Other subconscious bias triggers may include accent, language, culture, socioeconomic status, height, weight, appearance, disability, political views, and occupation (such as bias against the legal profession). Inevitably, implicit bias affects our day-to-day interactions with others as well as our assessments of others' behavior. We all engage in it, and we all are affected by others exhibiting these biases against us.

So, what does implicit bias look like? Consider this riddle that was popular many years ago:

*A man is driving with his son next to him in the front seat. They are suddenly involved in a severe car accident, and the man is killed instantly. The son is unconscious but alive and is rushed to a hospital, where it is determined that he needs immediate surgery. The surgeon walks into the operating room and – after*

*looking at the boy – says “I cannot operate on this boy. He is my son.” How is this possible?*

If you came up with the correct answer, good for you. If you didn't, you're not alone. Many people have been puzzled by this riddle over the years. But when you know the answer, you may better understand unconscious bias. The answer, of course, is that the surgeon is the boy's mother.

Why does this riddle fool so many people? Because for many, even today, the description of a “surgeon” subconsciously conjures up an image of a male doctor. The subconscious brain often fills in what it expects to see, and historically most people have thought of surgeons as male, even though many surgeons are women. That certainly is how they have been historically portrayed in the media, even now.

**InGroup/Out-Group.** A key player in unconscious bias is a psychological concept known as the [In-Group/Out-Group](#) phenomenon. An in-group is a social group with whom a person identifies and feels a part of. Out-groups are those with which a person does not identify. In-groups can be family, friends, occupations (like attorneys), geographic regions, religious affiliations, sports teams, colleges or other educational institutions, etc. A person can have many in-groups at the same time.

The interesting thing about this phenomenon is that in-groups are judged differently than out-groups, and are in fact judged in [different parts of the brain](#). A member of your in-group is judged less harshly and with more sympathy and understanding than is someone in your out-group. For example, you may be more likely to overlook a moral or ethical lapse by a candidate in your preferred political party than you are of the same action by a candidate you oppose. You are certainly more likely to judge your *own* bad behavior more favorably than others engaging in that same behavior. And your assessment of whether a football referee made the right call on defensive pass interference may vary depending on whether you are rooting for the defense or the offense. You are, quite literally, hard-wired for hypocrisy.

**Impact on the Legal Profession.** For both lawyers and judges, implicit bias can have a significant impact on how they go about their jobs. Most notably, judges are required to be impartial in their decisions, but what if they are operating on a subconscious level with biases of which they aren't even aware? For example, what if they – based on their own personal religious views – are unaware of an unconscious bias against people who don't share that particular religion? Or those who aren't religious at all? Likewise, what if a criminal judge has an unconscious bias against certain racial groups and is unaware that he or she is handing down longer sentences to defendants outside the judge's in-group?

Lawyers face a variety of professional situations in which unconscious bias can be harmful:

- **Clients.** Do you treat all your clients equally? Even the one with whom you don't identify or don't particularly like? What about those who are in a lower social socio-economic class? Different treatment of different clients can result in different levels of professionalism and varying degrees of zealous advocacy or honesty.
- **Opposing counsel.** Do you treat opposing counsel in different ways depending on how you feel about them and whether you like them or not? For example, are you more willing to make accommodations to those who graduated from the same law school as you or live in the same neighborhood as you?? The level of respect you afford opposing counsel can vary depending on your level of unconscious bias.
- **Opposing parties and witnesses.** Likewise, the level of respect with which you treat opposing parties in depositions or trial settings can also vary based on your internal biases.
- **Co-workers.** Do you treat all of your colleagues and co-workers with the requisite degree of professionalism and respect that our profession demands? Do you treat paralegals or other support staff the same as lawyers? Are associates afforded the same degree of respect and collegiality as partners?
- **Job applicants.** Hiring decisions are rife with unconscious bias problems. People tend to hire candidates who are like them, even if the job requires a different skill set or personality traits. Initial assessments of a new person based on appearance and personality can be very wrong, though we often have great confidence in these initial judgments.

There are many other situations in both your personal and professional life in which you make decisions about people or situations based on your unconscious biases.

**If these biases are unconscious, why should I care?** First, we hope we can all agree that bias can be harmful, whether conscious or unconscious. If a person is inappropriately treated differently than others because of race, gender, socioeconomic status, appearance, etc., the harm is the same whether the instigator is aware of it or not. Moreover, our ethics rules expressly frown upon bias because they already prohibit *willful* bias. [Rule 5.08\(a\)](#) of the Texas Disciplinary Rules of Professional Conduct – entitled “Prohibited Discriminatory Conduct” – states:

*A lawyer shall not willfully, in connection with an adjudicatory proceeding . . . manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.*

[Comment 1 to the Rule](#) states that the rule “applies to misconduct transpiring outside of” court and “conventional litigation.”

Likewise, the Texas Code of Judicial Conduct also prohibits bias. [Canon 3\(B\)\(6\)](#) states:

*A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.*

Moreover, a judge has the additional duty of ensuring that lawyers don't engage in conduct reflecting bias. [Canon 3\(B\)\(7\)](#) states:

*A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.*

The takeaway from the rules and judicial canons is that bias is prohibited when willful. Therefore, attorneys and judges have a moral and ethical obligation to avoid exhibiting bias, which suggests that the prudent attorney will take the time to learn about unconscious bias and take steps to address it in their own professional affairs.

**What can I do about it?** Addressing behavior that is subconscious is not easy, but the most important step is to recognize that it exists and look for it in your own behavior. There are a number of ways to do that. These include:

- **Consciously evaluate people as individuals.** Rather than looking at people as part of a group or how they present themselves, keep an open mind and pay attention to who they really are before you start making assumptions on too little information or what others may have told you.
- **Counter-stereotypic imaging.** This involves challenging your stereotypes by imagining people in roles different than your stereotypes. For example, to counter the riddle above, you might [think about a female surgeon](#) you know or are aware of to counter a subconscious belief that all surgeons are men.
- **Implement in your workplace.** Utilize training and reinforcement to ensure that everyone is treated equally in hiring, evaluations, promotions, staffing, and leaves of absence. Create in-house programs or bring in outside experts.
- **Look for it in your own life.** Be aware of your own biases and think about when and how you employed unconscious biases against others. Likewise, think about times when you were the recipient of unconscious bias.
- **Understand how your brain processes information.** Research demonstrates that [our brains are not as reliable or logical](#) as you might think. The brain has many



ways to rationalize biased and other negative behaviors, and the best way to counter it is to spend some time to learn how the brain really works.

- **Take an Implicit Association Test (IAT).** An [IAT](#) is a test that you can take online to find out what unconscious biases you may have. They test on [a number of different biases](#), such as race, gender, sexuality, religion, age, weight, and disability.
- **Visit the American Bar Association's Implicit Bias website.** The ABA has assembled a variety of resources on its ["Implicit Bias Videos and Toolkit"](#) website.

**Conclusion.** Unconscious bias is part of the human condition. We all engage in it, and we all are the recipients of it. But as attorneys and professionals, we should strive to understand how it works and to look for it in our own actions and the actions of others. In our profession, the brain's ability to utilize our brain to assess, analyze, and act upon that information is paramount. Accordingly, anything that can interfere with the way our brains process information and make decisions is worth addressing. You will find that once you look for unconscious bias, you will see it regularly in your daily life, both in yourself and others. But you will also be equipped to see it and prevent it from interfering with your ability to be the best attorney you can be.