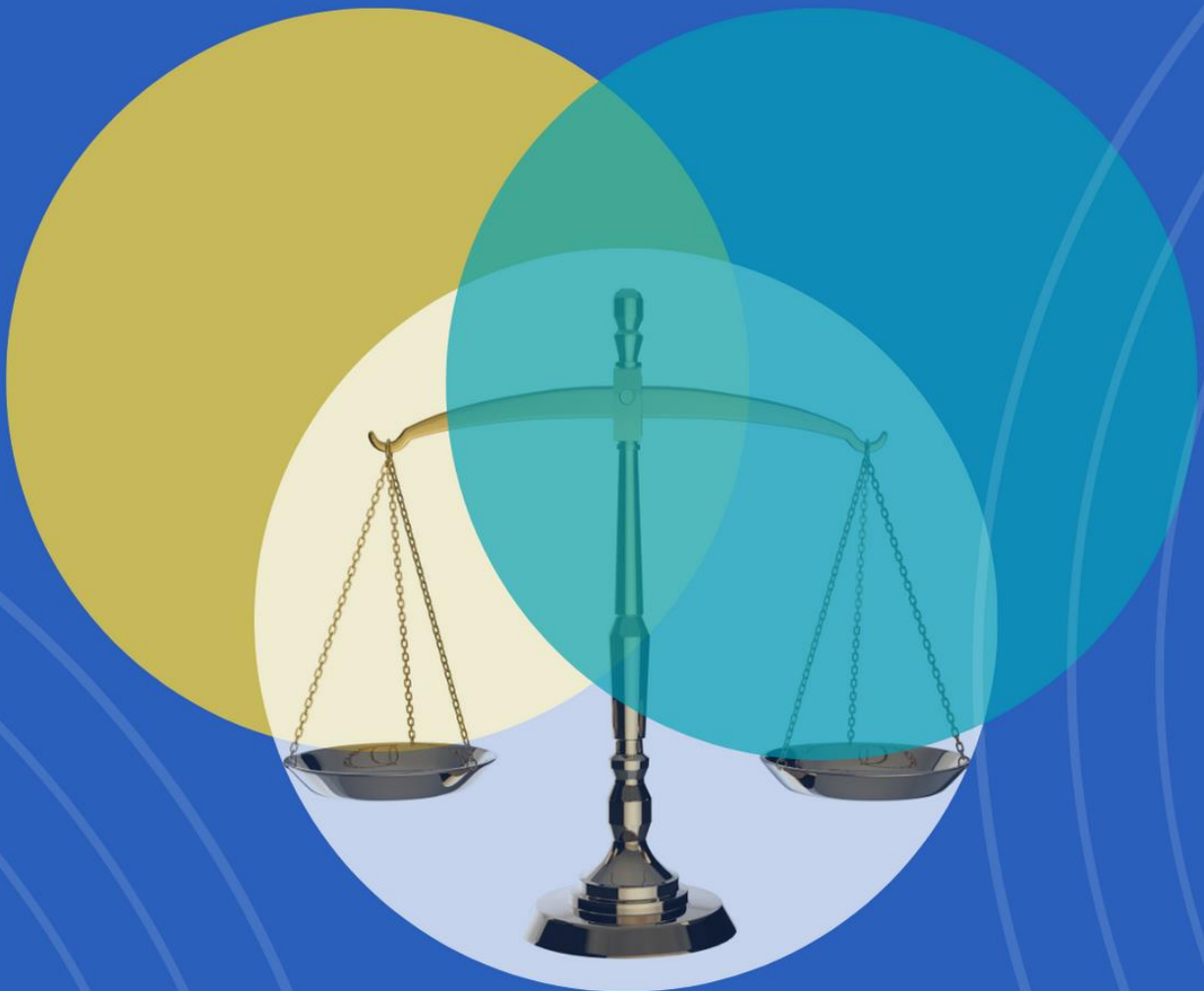


# THE EMPATHETIC PROSECUTOR

REDUCING BIAS WHEN WORKING  
WITH VICTIMS, SURVIVORS, AND  
WITNESSES



MAY 2022





# The Empathetic Prosecutor: Reducing Bias When Working with Victims, Survivors, and Witnesses

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## ACKNOWLEDGMENTS

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This paper was written by Kristine Hamann, Executive Director of Prosecutors' Center for Excellence; First Assistant District Attorney Audrey Moore, Senior Trial Counsel Linda Ford and Assistant District Attorney Luis Morales all of the New York County District Attorney's Office; Deputy District Attorney Sophia Roach and former Deputy District Attorney Sherry Thompson-Taylor both of the San Diego District Attorney's Office; and Chief Diversity and EEO Officer Tyear Middleton of the Queens District Attorney's Office. Excellent assistance was provided by Brittany Appleby-Rumon, a student at Georgetown Law School.

Deep gratitude and respect goes to the prosecutor advisory group who provided guidance and editorial oversight for this paper. The group included the writers listed above as well as Assistant District Attorney Renee Gregory of the Brooklyn District Attorney's Office, Witness Aid Director Beverly Gilchrest of the New York County District Attorney's Office, Deputy Commissioner Janine Gilbert of the Department of Information Technology, and Assistant District Attorney Nigel Farinha of the Office of the Special Narcotics Prosecutor of the City of New York.

This project was supported in part by the Innovative Prosecution Solutions Grant No. 2017-YX-BX-K002, awarded by the Bureau of Justice Assistance to AEquitas. The Bureau of Justice Assistance is a component of the U.S. Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the Department of Justice.

# The Empathetic Prosecutor: Reducing Bias When Working with Victims, Survivors, and Witnesses

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## INTRODUCTION

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Up until now, Francisco's mother had only heard rumors, news stories, and scant details from detectives about the case against the rival gang member who shot and killed her son in the middle of a busy street. Today she was headed to court for the trial. Though she deserved compassion and empathy, what she got at the courthouse was a security screening that made her feel like she had done something wrong, contempt from a busy receptionist, and a long wait for the prosecutor. This was after she and her family members had navigated downtown in traffic and paid \$30.00 to park close enough so they would not be late. When she met the prosecutor, the murder was repeatedly referred to as a gang fight, not an attack, as if to suggest her son deserved what happened to him. By the time they got to court, she barely registered the whispers of the court personnel who made the family feel unwelcome, even threatening expulsion after involuntary expressions of anguish occurred during the prosecutor's display of autopsy photos. Francisco's family was poor, some suffered from addiction and mental health issues, some had been previously incarcerated. This certainly was not the first or last time they had been made to feel "other-than" in a court room setting and they suppressed hope that this time would be different, so they could get through the trial.

As this example, taken from real experiences, shows that not all victims or survivors feel supported by the system and it is important for prosecutors to recognize that bias can pervade all aspects of a criminal case, retraumatizing victims, survivors, and witnesses. These conscious and unconscious biases may lead to disparate treatment, discounting a witness's credibility, and undervaluing a victim's loss. While anti-bias efforts have been mostly focused on treatment of an accused person, fair and unbiased treatment of victims, survivors, and witnesses is also necessary for a healthy criminal justice system.

This article discusses common forms of bias that can affect a prosecutor's evaluation of victims, survivors, and witnesses, provides practical advice for

recognizing and reducing bias from decision making, suggests communication techniques designed to cultivate trust and understanding, and highlights prosecutor programs designed to reduce the impact of bias.

We acknowledge that prosecutors work with victims, survivors, and witnesses; for the purposes of this paper, they will sometimes be referred to collectively as “witnesses.”



## WHAT IS BIAS?

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All people have biases that range from conscious to unconscious. Bias is driven by the cognitive processes of the brain that are designed to order information regarding sense and emotion and to assign value based on what is seen, heard, and felt.<sup>1</sup> This natural process is impacted by many factors including upbringing and environment.<sup>2</sup> It is exacerbated by the proliferation of printed, televised, and

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<sup>1</sup> See Emily Kwong & Pragya Agarwal, *Understanding Unconscious Bias*, Short Wave NPR (July 15, 2020) (“Our conscious mind” cannot process all the information “coming at us” in a “very rational, logical manner. Otherwise, we would be agonizing over every decision we make.” Instead, the brain “sometimes take[s] cognitive shortcuts to help make those decisions easier, shortcuts that can lead to...bias”).

<sup>2</sup> See Emily Kwong & Pragya Agarwal, *Understanding Unconscious Bias*, Short Wave NPR (July 15, 2020) (When we process information while making “rushed” decisions, “we’re matching the information to pre-existing



posted media that has become an important source of information about “others” with whom we have little actual experience. The unrelenting barrage of information from the media can perpetuate positive and negative feelings about people based on many factors including gender, race, ethnicity, religion, politics, sexuality, gender identity and expression, socio-economic status, age, and ability.<sup>3</sup>

The role of the prosecutor is to dispense justice without fear or favor and to govern impartially. In their role as public officers, prosecutors must deal fairly with all involved in the criminal prosecution of a case, which necessitates an evaluation of the impact of bias in their work. The following are forms of bias that deserve attention as they most immediately impact a prosecutor’s interaction with witnesses.

## Types of Bias

All people have biases, it is part of being human. It is important for prosecutors to understand their own biases and the possible biases of their witnesses. These crosscurrents of bias happen in many different and complex ways depending on the people involved.

- **Explicit Bias:** Explicit bias is, as the name suggests, obvious and outward revealing. It is the manifestation of overt racism, sexism, and other intolerances. Explicit bias is present in prosecution offices, as evidenced by the recent discovery of racist emails between two prosecutors pertaining to an Asian American defendant and racist comments about Mexicans sent out by a supervising prosecutor on a communication app.<sup>4</sup> In both instances negative racial stereotypes were the basis of “jokes.” Prosecutors need to create an office culture that eschews racist comments, jokes, and other forms of explicit bias.
- **Implicit Bias:** Implicit Bias is unconscious and springs from brain functions that automatically classify and categorize information.<sup>5</sup> It requires self-awareness

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stereotypes... stereotypes... we pick up over time from the environment around us – our family, our school, our community, [and] the media”).

<sup>3</sup> See Emily Kwong & Pragya Agarwal, *Understanding Unconscious Bias*, Short Wave NPR (July 15, 2020).

<sup>4</sup> See Debra Cassens Weiss, *After judge cites prosecutors’ racist emails, DA declines to retry Asian American woman for murder*, ABA Journal, Oct. 5, 2020; see also Meagan Flynn, *A black defendant’s lawyer harbored such ‘extreme’ racist views that a court has granted his client a new trial*, The Washington Post (Jan. 22, 2020) (Capital defense attorney “regularly made racist comments about his own clients” including that a “Hispanic defendant “deserved to fry”).

<sup>5</sup> Kirwan Institute for the Study of Race and Ethnicity, *Mythbusters: Implicit Bias Edition, Clearing Up the Confusion Surrounding Implicit Bias*, The Ohio State University (2020) (“Implicit biases are activated involuntarily and beyond

to detect, reduce, and avoid actions that are based on unscrutinized, intuitive thoughts. Given its unconscious nature, implicit bias can be particularly troublesome when a prosecutor is busy and must make quick decisions.

- **Confirmation Bias:** Confirmation bias, also referred to as “tunnel vision”, exists when a person has a preconceived idea or interest in the outcome. Confirmation bias can happen when a conclusion comes from a trusted person, such as a respected detective or a well-liked witness. As evidence in criminal cases is rarely neat and straightforward, it is possible to give interpretations to the facts that are skewed by confirmation bias. This bias can lead to the superficial review of facts and the overlooking of evidence so that the desired conclusion is supported.
- **Affinity Bias:** Affinity bias or “in-group” and “out-group” bias can be manifested both implicitly and explicitly. It is the feeling of kinship with others who share something in common, such as allegiance to a sports team, attendance at a college, racial or ethnic background, gender, political party, etc. Affinity bias can lead a prosecutor to favor or disfavor a witness based on their mutual affinity, but unrelated to the facts of the case.

The following example illustrates how affinity bias and lack of diversity can impact a prosecution: A white prosecutor who grew up in a white neighborhood, went to a white religious institution, attended a largely white school, and works in a mostly white office may have only met people of color in the context of a criminal prosecution. Thus, the scope of the prosecutor’s experience with people of color is focused on criminal matters. The prosecutor is not interacting with people of color as neighbors, churchgoers, or students, all of whom are overwhelmingly law-abiding citizens. Failing to recognize this limited view of people of color may interfere with the prosecutor’s ability to assess the credibility of a witness or evaluate the strength of a case.

Prosecutors need to develop critical thinking and communication skills that target the identification and reduction of harmful biases of all kinds. They need to also understand that witnesses may develop biases, based on their life experience and the impact of systemic racism or other social inequities, which impair their trust

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our awareness or intentional control. Implicit bias is concerned with unconscious cognition that influences understanding, actions, and decisions....”) **Error! Hyperlink reference not valid..**



of the prosecutor. It is the prosecutor's responsibility to forge a trust-based relationship with the witness.



## Impact of Bias in the Criminal Justice System

An important step in creating an equitable criminal justice system is to recognize the existence of bias and its influence on every stage of a case. Some critical junctures where bias can have an impact include:

- **Assessing Credibility:** Assessing credibility of witnesses is a significant part of a prosecutor's job and can be impacted by a prosecutor's bias. A prosecutor may believe that when people lie, they have trouble looking you in the eye and shift in their seat. However, the witness's actions may be a cultural communication style or they may be driven by concerns other than the matter being discussed. Also, the prosecutor may disagree with choices made by a witness, such as engaging in criminal behavior before the commission of the crime, and thereby discount the witness' statement. There is no iron clad method of assessing credibility other than comparing a statement against known facts. Improved interview techniques discussed below can assist with an objective assessment of credibility.
- **The Uncooperative or Hostile Witness:** An uncooperative or hostile witness is difficult for a prosecutor, particularly if negative biases are at play. The

prosecutor may feel frustrated or uncomfortable and therefore assume that the witness is lying or not worth the effort. However, every witness must be given a full opportunity to be heard with an open mind. It is still a prosecutor's duty to evaluate credibility and compare the witness's account with other undisputed facts.

- **Charging:** Prosecutors must conduct an objective assessment of an officer's arrest and evaluate the witnesses to determine appropriate charges. At this stage, prosecutors must be vigilant that charging decisions are not based on preconceived notions and biases, but on the facts of the case. This can be especially challenging if incomplete information is available at the time of the evaluation. Prosecutors must also be aware of the possibility that other people's biases may play a role in reported observations by witnesses.
- **First Appearance:** First appearance or arraignment is where defendants are apprised of the charges and bail is set. This process can be fast paced and require prosecutors to make snap decisions. When there is little time to weigh all the circumstances of the case, prosecutors must be wary of biases that can influence their decisions.
- **Plea Bargaining and Sentencing:** Prosecutors must make reasoned decisions about plea bargaining and sentencing that are not swayed by biases. For example, plea offers for similar crimes should be the same whether the victim lives in a wealthy part of town or in an underserved neighborhood. Collateral consequences, such as loss of a job, should also be considered, as they vary depending on the person.

## INITIATIVES FOR INTERRUPTING AND REDUCING THE IMPACT OF BIAS IN A PROSECUTOR'S OFFICE

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Acknowledging implicit bias and defining its many variants is just the beginning. Once a prosecutor's office has completed the work of identifying existing biases, it must develop a framework for interrupting and reducing their impact, while also fostering cultural humility and cultural competence.<sup>6</sup> Prosecutors must ask

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<sup>6</sup> See, Cultural Humility vs Cultural Competence and Why Providers Need Both, Healthy City (March 9, 2021), <https://healthcity.bmc.org/policy-and-industry/cultural-humility-vs-cultural-competence-providers-need-both>. (Last viewed 8/28/2021). \_National Center for Cultural Competence, *Definitions of Cultural Competence*, Georgetown University Center for Child & Human Development (last visited June 9, 2021) ("Cultural competence is defined as a set of values, behaviors, attitudes, and practices within a...organization...or among individuals...which enables them to work effectively cross culturally. .... [I]t refers to the ability to honor and respect the beliefs,

and answer the question: How does race or culture impact the dynamics of criminal prosecution? To do so, a prosecutor's office should look both internally and externally. Office resources and office size will influence the type and frequency of trainings and initiatives that can be offered. However, prosecutor offices of any size can take significant steps through self-reflection, training, and community outreach.

It is encouraging to note that improving interactions between prosecutors and witnesses will result in better case outcomes, enhanced community trust, and a stronger sense of justice for the witnesses and the community the prosecutor serves.

## INITIATIVES IN THE PROSECUTOR OFFICE

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Prosecutors should conduct a self-assessment of their approach to victims, survivors, and witnesses. This may reveal many areas of improvement. Several steps can be taken to reduce bias including training, improved interview techniques, development of checklists to identify relevant factors, implementation of procedural justice initiatives, data collection, accountability for prosecutor actions, and community outreach. Though limited resources may restrict the ability to accomplish all the objectives immediately, every office has an opportunity to do something meaningful.



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language, interpersonal styles and behaviors of individuals and families receiving services, as well as staff who are providing such services. Striving to achieve cultural competence is a dynamic, ongoing, developmental process that requires a long-term commitment.”).

## Training

Many prosecutor offices have taken the laudable step of requiring implicit bias training for their staff. However, the focus may be on bias that impacts the accused rather than witnesses. A prosecution office should assess existing training and, if needed, expand it to include witness-focused programming. The following suggestions demonstrate how a prosecutor's office can work toward that goal.<sup>7</sup>

### Training Topics

Implicit bias training covers many topics and is conducted in a variety of ways.<sup>8</sup> This paper does not review all aspects of bias training; instead, it focuses on the principles that apply to witnesses. Ultimately, anti-bias discussions should be infused in all training programs, so that they “become part of the DNA of training”.<sup>9</sup> The following are issues and practical tips that should be included in bias training applicable to witnesses.

- **Have Empathy:** A core principle of bias training is that prosecutors should have empathy for their witnesses. The Golden Rule states “Treat others as you wish to be treated yourself.” Scientific studies show that this simple admonition may hold a cure for eliminating harmful biases.<sup>10</sup> Following this principle, prosecutor staff should place themselves in the role of the witness and imagine how the witness feels. For example, the prosecutor should consider that many witnesses have never been in a courthouse or met with a lawyer. They may have trauma from the event itself, they may be losing time from

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<sup>7</sup> The Tolerance Museum and Fair and Impartial Policing have both worked on prosecutor based anti-bias programs and videos are widely available on the internet for those who desire more information about how to detect and disrupt bias. <https://fipolicing.com/resources/>; <https://www.museumoftolerance.com/for-professionals/programs-workshops/tools-for-tolerance-for-law-enforcement-and-criminal-justice/>

<sup>8</sup> See resources from Prosecutors' Center for Excellence, <https://pceinc.org/wp-content/uploads/2019/11/2-20170321-The-Conscious-Prosecutor-Interactive-Implicit-Bias-Toolkit-PCE.pdf> (last viewed May 22, 2021) and the ABA Diversity and Inclusion Center, <https://www.americanbar.org/groups/diversity/resources/implicit-bias/> (last viewed June 1, 2021).

<sup>9</sup> Assistant District Attorney Renee Gregory, Chief Diversity Officer, Brooklyn District Attorney's Office (May 21, 2021)

<sup>10</sup> The “consider the opposite” theory has its roots in early bias science. In the seminal article published in December of 1984, *Considering The Opposite: A Corrective Strategy For Social Judgment*, authors [C G Lord](#), [M R Lepper](#), [E Preston](#) found that considering an opposing position, fact or viewpoint is an “effective method of retraining social judgment.” Newer studies, as recent as 2020, have confirmed the efficacy of this strategy.

work or worrying about childcare, or they are distrustful of police and prosecutors. Simply arriving at the courthouse, which is often severe and unwelcoming, will be daunting for many witnesses.

- **Refrain from Judgement<sup>11</sup>:** Prosecutors should not be judgmental when meeting with witnesses. Witnesses come from all walks of life, from every race and every neighborhood. They may also have issues such as mental illness, joblessness, or substance use disorder. In contrast to some witnesses, prosecutors are well educated and have stable jobs with benefits. Thus, prosecutors and their witnesses may respond to circumstances very differently. Prosecutors should keep an open mind and engage in empathetic and meaningful communication. Witnesses are more likely to respond with trust and cooperation if they are treated with respect and not judged for their lifestyles or decisions. This will aid a prosecutor in obtaining and evaluating the evidence needed to develop a case. When there is concern regarding a witness's statement, the prosecutor should explore this directly with empathy and in context of other factors that might have impacted the statement.
  - **Increase Communication:** The workings of the criminal justice system are unknown to most witnesses. Thus prosecutors, victim advocates, and paralegals need to explain criminal procedures in layperson's terms, set expectations for the courtroom, provide a timeline of events, and decide how and where to meet - based on the witness's needs.
- **Meet with the Witness:** Considerations for meeting with the witness include:
  - **Meeting in the Office:** Prosecutors, office staff, and security guards should be trained to make witnesses feel invited and comfortable when they come to the prosecutor's office. The meeting should be in an appropriate, private space and be accessible to those with disabilities. Having bi-lingual materials or materials regarding various issues that can impact witnesses, such as sexual orientation, disabilities, or gender identity and expression, can help to make some witnesses more comfortable in the prosecutor's office.
  - **Meeting At Home:** When meeting in a witness's home it is important not to be judgmental about the appearance of the home. The safety of the

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<sup>11</sup> Judgement as used here, means making assumptions about the values or reactions of a person based on your own hypothetical response. While you must always use your best judgement in pursuit of a case, you should avoid making a detached moral assessment of the actions of others and instead view choices in context to the larger framework of a witness' life as impacted by resources, education, community, trauma, victimization, threat, and other factors.



witness should be considered, as in some instances it is not safe for a prosecutor to be seen at a witness's home.<sup>12</sup>

- **Meeting in a Neutral Location:** Some witnesses would rather meet away from their home and the prosecutor's office. This can be a restaurant, a church, or a park, provided the location is safe and accessible.
- **Be on Time:** The prosecutor should respect the witness's time and not make them wait unnecessarily. Though court schedules are unpredictable and cause many delays, the prosecutor should explain this to the witness in advance, so they are prepared. Paralegals or victim advocates may be able to meet with the witness if the prosecutor is unexpectedly unavailable.



- **Avoid Microaggressions:** Microaggressions are a subtle form of bias that manifest themselves in comments, questions, and assumptions about a person based on their identity. They are the everyday indignities that members of marginalized groups endure in their routine interactions with people in all walks of life. People are often unaware that they are communicating through subtle cues, such as talking over a person, ignoring their comments, or walking

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<sup>12</sup> A detailed discussion of steps prosecutors can take to protect their witnesses is beyond the scope of this article. However, see *Witness Intimidation – What You Can Do to Protect Your Witness*, Prosecutors' Center for Excellence (2016) (<https://pceinc.org/wp-content/uploads/2019/11/20160610-Witness-Intimidation-What-You-Can-Do-To-Protect-Your-Witnesses-PCE.pdf>) (last viewed May 22, 2021).



away from a conversation. These small actions convey a prosecutor's lack of respect for the witness. If a prosecutor is confronted about a microaggression, they should replace defensiveness with empathy and apologize.

- **Avoid Offensive Comments:** Well-meaning people trying to make a connection with a witness or issue a “compliment” can unintentionally offend and reveal their biases. Comments that can easily offend include:
  - Telling people of color or immigrants that they are articulate or well spoken.
  - Touching or asking to touch Black people's hair.
  - Asking Black women if their hair is real.
  - Telling Asian women to smile or commenting that they look upset.
  - Asking non-white, Hispanic, or Asian people “Where are you from?”
  - Discussing irrelevant personal sexual or relationship questions.
  - Commenting on one's use of a religious garment (Hijab, yarmulke).
  - Commenting on women's appearance and weight.



### *Who Should be Trained?*

Training on implicit bias, cultural competency, and humility as it impacts witnesses should be required for all prosecution staff that encounter witnesses. It can be productive to bring relevant staff members together for the trainings, such

as prosecutors and victim advocates.<sup>13</sup> The staff that should receive the training include:

- Prosecutors
- Paralegals
- Trial Assistants
- Interns
- Victim Advocates
- Office Security staff
- Receptionists
- HR staff

The office can also consider officewide training, so that leadership can convey the importance of the issue to all staff and demonstrate the office's commitment to reducing bias in prosecutorial work. Attendance by the chief prosecutor at bias training sends an important message that the training is valued.

#### Example: Bias Training

*The San Diego County District Attorney provides bias training to all new interns, post-bar clerks, and prosecutors. The training varies for each group and combines scientific education about the formation and disruption of bias as well as practical exercises that focus on prosecution activities at various stages in a case. The Tolerance Museum and Fair and Impartial Policing have both worked on prosecutor based anti-bias programs and videos are widely available on the internet for those who desire more information about how to detect and disrupt bias.<sup>14</sup>*

#### Who Should Conduct the Training?

Training can be conducted by internal and external trainers. A significant consideration for selecting a trainer is whether they can credibly deliver the

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<sup>13</sup> The New York County District Attorney's Office conducts joint trainings for prosecutors and victim advocates on issues relating to victims and witnesses.

<sup>14</sup> Interview with Deputy District Attorney Sophia Roach, San Diego District Attorney's Office (May 2021).

desired message to the staff. Trainers can include a variety of people, alone or in combination, such as:

- Prosecutors from within the office
- Prosecutors from other offices
- Implicit bias experts from outside the office
- Victim advocates
- Victims or witnesses who have experienced implicit bias
- Community members

### *When to Train?*

Implicit bias training is relatively new to prosecutor offices and is not always warmly received. To overcome resistance and to instill a deeper understanding of the issues, an office should consider a training strategy that includes:

- **Mandatory Training:** All staff that have contact with witnesses, both legal and non-legal, should be required to attend the training.
- **On-Boarding:** The new employee training for all staff, legal and non-legal, should include implicit bias training.
- **Follow-Up Training:** As prosecutors progress to more serious cases, such as assaults, sex crimes, and homicides, they should receive additional training on implicit bias and cultural competence and cultural humility regarding their witnesses.
- **Annual Training:** The office should support annual events that address implicit bias and cultural competence.

### *How to Train*

To improve engagement by the participants in the training, various interactive approaches can be taken:

- **Breakout Groups:** It is helpful to include breakout groups after training lectures. This allows the staff to discuss the points made in the training, raise questions, and examine new approaches to working with witnesses and victims.
- **Interactive Exercises:** Trainings can also go beyond the traditional lecture format and can involve sessions that include interactive exercises and direct participation. These can place the trainee in the role of the victim or witness, which can foster empathy and a greater understanding of the communities

that the office serves. Consider blind casting these roles, so as not to unintentionally reinforce biases or stereotypes.

#### Example: Workshop on Intergenerational Poverty

*In 2021, the San Diego District Attorney's Office partnered with Jodi Pfarr, the author of "Bridges out of Poverty," for a workshop on intergenerational poverty, which included interactive exercises and simulations.<sup>15</sup>*

- **Walk in the Shoes of a Witness:** Another exercise requires prosecutors and prosecutor staff to walk into the courthouse and the office, as if for the first time. They are then then asked questions such as: What is the first impression of the office? Was it clear where to go? Are staff helpful? Are there offensive materials posted in the office? How can the space be improved?
- **Invite the Community to the Office:** In addition to training on implicit bias, it is important to bring the voice of the community into the training room. A prosecutor office can regularly host panels and presentations where community members provide insight into the public's view of the intersection of public safety, prosecutors, and law enforcement. This will promote a better understanding of the witnesses with whom the prosecutors work.

#### Example: Community Panel

*In February 2021, the New York County District Attorney's Office hosted a panel on "The Complexities of the Relationship Between the Black Community and Prosecutors." The panel consisted of community members and was organized with the goal of amplifying the voice of community members, enhancing the office's relationships with the communities it serves, and promoting racial equity.<sup>16</sup>*

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<sup>15</sup> See, <https://www.sdcda.org/Office/diversity/community-involvement>. See also, <https://www.bemidjipioneer.com/236782-bridges-out-poverty-professionals-study-ways-change-social-situations> (last viewed June 18, 2021).

<sup>16</sup> Interview with First ADA Audrey Moore, New York County District Attorney's Office, June 9, 2021.

## Focusing on the Witness – Science-Based Interviewing

Science-Based Interviewing teaches interviewers to be active listeners and takes into consideration the values and perspective of witnesses.<sup>17</sup>

Using the science-based approach, interviewers plan and prepare for questioning by conducting a detailed review of the case, making distinctions between what is known (facts), what is believed to be true but not verified (information), and what is supposition based upon underlying knowledge (inference).



By analyzing the available evidence in an objective, structured manner, the interviewer can identify premature assumptions and weed out conclusions that are unsupported by the facts. Any beliefs that are the result of implicit bias and not grounded in the facts can be identified and discarded through this process. The planning process also helps interviewers anticipate and plan for implicit

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<sup>17</sup>This approach encourages interviewers to take a non-confrontational, non-coercive stance with interview subjects, whether they be victims or witnesses. See also, <https://crestresearch.ac.uk/comment/perspective-eliciting-information>. (Last viewed 8/31/2021).



biases that may be held by the interviewee. During the interview, the interviewer maintains an open, non-judgmental approach based on the principles of Motivational Interviewing and Observing Rapport-Based Interpersonal Techniques to gather information (ORBIT)<sup>18</sup> to encourage the interviewee to be an information-provider rather than question-answerer.

These open ended approaches help to prevent the interviewer from influencing the witness' statement. One common form of influence is the witness feeling pressure to please the interviewer, another is the witness conforming their statement in favor of an interviewer's expectations about the sequence of events.<sup>19</sup> Without these types of influences, the witness or victim can give their account free from two major sources of contamination.

Introductory training on this approach can last one day, while more advanced interactive training can last several weeks.<sup>20</sup>

## Officewide Procedural Justice

Procedural justice is based on four central principles: "treating people with dignity and respect, giving citizens 'voice' during encounters, being neutral in decision making, and conveying trustworthy motives."<sup>21</sup> These principles should apply to how prosecutors interact with their witnesses.

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<sup>18</sup> Rosengren, D. Building Motivational Interviewing Skills: A Practitioner Workbook. Guilford Press (2018); Kim, S., Alison, L., & Christiansen, P., Observing rapport-based interpersonal techniques to gather information from victims, Psychology, public policy, and law. (2020).

<sup>19</sup> El Dorado District Attorney Vern Pierson, President of the California District Attorneys Association, has adopted Science-Based Interviewing (also called Subject-Centered Interviewing) in his County and is a leader in advancing the methodology across California to eliminate false confessions, encourage witness cooperation, and ensure procedural justice.

<sup>20</sup> Tailored Training Programs (TTP) has partnered with the Los Angeles Police Department, the New York City Police Department Intelligence Division, and several federal law enforcement agencies to transition cutting edge human behavior research into science-based interview and interrogation techniques. For additional information about their Science-Based Interview Training, you may contact Kristin Richmond at [krichmond@ttp-usa.com](mailto:krichmond@ttp-usa.com).

<sup>21</sup> National Initiative for Building Community Trust and Justice, at <https://trustandjustice.org/>, (last visited June 18, 2021). See also, **Error! Hyperlink reference not valid.** Center for Court Innovation and Institute for Innovation in Prosecution's free 2-part curriculum toolkit and accompanying PowerPoint presentation on Procedural Justice to improve public trust and confidence. <https://www.courtinnovation.org/publications/procedural-justice-prosecutors> (last visited June 9, 2021).



## *Guidelines for Interactions with Witnesses*

An office can do an assessment of how witnesses are treated and whether it comports with procedural justice. To do so, a prosecutor office can convene a procedural justice working group to develop guidelines for interacting with witnesses at various stages such as: interviews prior to charging, office visits, case updates, trial preparation, and court appearances. The working group should involve representatives from all sections of the office including attorneys, paralegals, administrative staff, receptionists, witness and victim advocates, and security personnel.

### *Make the Office Inviting and Appropriate*

Prosecutor offices and courthouses are not usually welcoming spaces; however, efforts can be made to make the space more inviting. Posting clear signage is one simple step that will help witnesses navigate through unfamiliar space. Also, prosecutor offices should be free of offensive material. Political cartoons or memes, photos of offenders or crime scenes, and other potentially upsetting items, are not uncommon in a prosecutor's office. Since witnesses often come into a prosecutor's office, all employees should understand that certain photos, posters, or other materials may make some people uncomfortable or offended. The office should have a policy that outlines what can be in public view based on what might be considered offensive by members of the community.



## Hiring

Hiring a diverse staff can help to reduce the impact of bias. Offices should create targeted recruitment programs to increase racial and ethnic diversity among prosecutors, especially in underrepresented communities impacted by the work of the office. Simply working with people who are different from oneself can provide valuable insights. The office can also develop an internal committee where all staff can regularly discuss diversity and inclusion issues.<sup>22</sup> Staff diversity should include not only prosecutors, but all staff, including victim advocates.<sup>23</sup> Victim advocates often have more contact with witnesses than any other staff and should be trained to be sensitive to cultural norms and possible bias.

<sup>22</sup> See PCE Website, Talking with Dan Clark about Race, Social-Justice and Equity in a Prosecutor's Office, <https://pceinc.org/talking-with-dan-clark-about-race-social-justice-and-equity-in-a-prosecutors-office/> (last viewed May 29, 2021).

<sup>23</sup> The various approaches for recruiting and retaining a diverse staff is beyond the scope of this article.

## Data Collection

One way to examine the impact of implicit bias is to collect data to determine if similarly situated witnesses are treated differently. Data collection and analysis will promote the awareness and self-evaluation essential to improving prosecutorial practices. Prosecutors should consider gathering data on the race, gender, and other status information on witnesses and defendants to identify whether there are discrepancies in charging decisions, plea bargains, and dispositions. If such discrepancies exist, a further analysis is needed to determine if it is driven by bias, other factors, or both. At the very least, the data may reveal areas where more training or community outreach is needed. Once new procedures are implemented, a re-analysis of the data can uncover areas for further improvement. While collecting and analyzing data about potential bias is complex, detailed, and time consuming, it is a needed tool to detect inequities requiring further analysis.<sup>24</sup>

## Accountability

The chief prosecutor and office leadership must demonstrate by word and deed that they are committed to reducing bias. Developing the programs described in this article sends a clear message to the office about the prosecutor's commitment to this issue. Leadership can also attend the trainings along with staff to show commitment to the issue and that staff at all levels can benefit from bias training.

The office's evaluation process should include a component that gauges the staff member's commitment to procedural justice, reducing bias, and community service activity. One indicator of this can be the amount of community outreach work done by the prosecutor. Another might be the techniques developed by a trial prosecutor, who cannot participate in community outreach due to scheduling, but embeds anti-bias practices into meetings with witnesses and conduct in the courtroom.

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<sup>24</sup> A full discussion of data collection on this issue is beyond the scope of this article. To see more on how prosecutors have gathered data on a variety of topics, including the race of defendants and witnesses, see, for example, the Vera Prosecution Project, <https://www.vera.org/projects/reshaping-prosecution-program> (last viewed 8/28/2021) and PCE's Did You Know on public facing prosecutor data dashboards at <https://pceinc.org/prosecutor-data-dashboards/>. (Last viewed June 9, 2021).

Prosecutors should be sanctioned for misconduct, including acting inappropriately towards witnesses or community members.<sup>25</sup> The degree of the sanction will depend on the nature and gravity of the offense.

## INITIATIVES OUTSIDE THE PROSECUTOR OFFICE

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Prosecutors can have an impact on reducing bias by forming partnerships outside their office. Several excellent programs have been spearheaded by prosecutors. A few of those programs are highlighted in this section.

### Meet Community Members

It is critical that a prosecutor's office not limit itself to classroom instruction and internal training. Countering bias requires getting out of the office and directly interacting with the people that the office serves. By engaging with the lived experiences of those in the community, prosecutors will better understand commonalities between themselves and their witnesses and will be more likely to recognize their own biases. Increased collaboration between prosecutors and their community will also improve the public trust of the office. Some prosecutor offices have staff that work with the community on a consistent basis.<sup>26</sup> In these

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<sup>25</sup> See Charles Maldonado, *Federal appeals court affirms denial of immunity for prosecutors who used fake subpoenas*, The Lens (April 21, 2020); Jon Campbell, *Fired Louisiana Prosecutor Had 'Whites Only' Sign in Property He Owned*, The Appeal (March 26, 2020).

<sup>26</sup> See, for example, the Baltimore City State's Attorney's Office has a Baltimore's Court in the Community and they have staff that go into Community Centers and discuss issues around the Court and prosecution, <https://www.stattorney.org/community-affairs/community-engagement>. (Last viewed 8/28/2021).

offices, it may be helpful to have staff rotate into these positions for maximum exposure of office personnel.



## Training in Schools and the Community

Prosecutors can establish partnerships with local schools, non-profit organizations, and other community hubs to schedule regular visits and to create programming that focuses on meeting their needs.<sup>27</sup>

### Example: School Programs

*The New York County District Attorney's Office has a Community Partnership Unit that develops curriculum for local schools and arranges opportunities for prosecutors to facilitate those workshops throughout the school year. The office also has a Moot Court competition at a school in lower Manhattan.<sup>28</sup>*

<sup>27</sup> Wendy Gu & Priscilla Hamilton, *Confronting Racial Bias Against Black and African American Victims in the Prosecution of Sexual Violence, Domestic Violence, Stalking, and Human Trafficking*, AEquitas & the National Black Prosecutors Association (April 2021) (prosecutors can form and strengthen relationships with the community through organizing listening sessions in community centers and conducting written surveys).

<sup>28</sup> <https://www.manhattanda.org/our-work/community-partnerships/> (last viewed June 18, 2021)



### Example: School Mentorship

*The San Diego District Attorney's Office has developed a weekly after-school program for 3rd through 6th graders centered on social and emotional learning, facilitated by prosecutors, investigators, and DA staff. This year long program pairs youth with mentors in a group setting to encourage self-confidence, emotional development, and problem-solving skills.<sup>29</sup>*



### Internships and Mentoring

Some prosecutors have created internships and mentor opportunities that serve the dual goal of bringing prosecutors into the community and the community into the prosecutor's office.

### Example: Interns

*Each summer, the New York County District Attorney's Office hosts a diverse cohort of interns who are representative of*

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<sup>29</sup> <https://www.sdcda.org/content/office/SDCDA%20Midterm%20Report%202021.pdf>, p. 78 (last viewed June 18, 2021).



*Manhattan. The office uses a structured interviewing process to eliminate bias and ensure fairness in the selection process. In 2018, the office expanded its programming and launched a gun control advocacy fellowship for two graduating high school students who were survivors of gun violence.<sup>30</sup>*

## Community Outreach and Satellite Offices

Prosecutors can designate staff to work regularly with community members to form relationships that encourage witnesses to participate in the criminal justice system.

### Example: Community Outreach

*The San Diego County District Attorney employs four Community Partnership Prosecutors who do outreach to a wide variety of community groups including businesses, faith-based organizations, schools, and non-profit groups to assist in meeting the needs of their various communities. The office also maintains a Community, Action, Resource, and Engagement Center open to the public. The center provides a hub for food, shelter, clothing, and job seeking services for justice-involved community members and the general public. In addition, there are regular meetings with faith advisory and youth advisory boards that serve to inform the office of community needs and ideas.<sup>31</sup>*

Prosecutor offices of any size can convene community advisory boards, made up of respected members of the community, that can regularly meet with the prosecutor to provide advice about how they can best serve their communities and encourage witness participation.

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<sup>30</sup> <https://www.manhattanda.org/careers/internship-opportunities/>

<sup>31</sup> See <https://www.sdcda.org/office/Community-Partnership-Prosecutors/>; see also <https://www.sdcda.org/office/care/index>

In larger jurisdictions, prosecutors have established satellite offices in communities that are geographically isolated from the main prosecutor's office. This provides easier access for witnesses who need to meet with the prosecutor.

#### Example: Community Based Offices

*The New York County District Attorney's Office, which is physically located on the southern end of Manhattan, opened locations in Harlem and Washington Heights to establish a presence for communities on the northern end of Manhattan. Those offices are staffed by personnel from various units, including Community Partnerships, Domestic Violence, Immigrant Affairs, and Witness Aid Services.<sup>32</sup> Services are available in many languages.*

## Training of Law Enforcement

Prosecutors should collaborate with law enforcement partners to ensure that police officers and investigators receive training on the impact of bias. This is particularly important as officers are usually the first point of contact with a witness and that initial meeting can determine whether a witness is willing to come forward.

Example:  
Awareness



Cultural  
App

*The San Diego County District Attorney's Office created a mobile application that provides key cultural knowledge about San*

<sup>32</sup> <https://www.manhattanda.org/victim-resources/> (last viewed June 18, 2021).

*Diego County's various, diverse communities to help law enforcement officers respond respectfully during non-emergency situations. The Cultural Awareness Project (CAP App) was developed under the guidance of the DA's Interfaith Advisory Board, which conducted focus groups with various community representatives to inform its content. The app provides information on cultural norms across 11 communities including African American youth, Mexican/Mexican American, Asian, Vietnamese, East African/Somali, East African/Somali Youth, Muslim, Samoan, Native American and more. The Board continues to provide cultural insight to law enforcement officials in non-emergency situations.<sup>33</sup>*

## CONCLUSION

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To move towards an equitable criminal justice system, prosecutors must embark on a journey that identifies and reduces bias in their work with victims, survivors, and witnesses. Prosecutor offices of any size should engage in this self-reflection and improvement. Everything cannot be done at once, but one step forward will lead to another. The ultimate goal is for victims, survivors, witnesses, and the community to see their prosecutor as a public servant who is committed to public safety, equal protection, and justice for all. They deserve no less.

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<sup>33</sup> <https://www.sdcda.org/office/cultural-awareness/>, (last viewed June 18, 2021).

## APPENDIX

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American Bar Association, *Diversity and Inclusion Center*, (last visited June 4, 2021).

American Bar Association, *Diversity and Inclusion 360 Commission Toolkit Introduction* (2016).

American Bar Association, *Implicit Bias Toolkit*, (last visited June 4, 2021).

Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587 (March 2006).

Cory Collins, *What is White Privilege, Really?*, Learning for Justice (2018).

Rachel D. Godsil & Alexis McGill Johnson, *Transforming Perception; Black Men and Boys, Executive Summary*, Perception Institute (March 2013).

Wendy Gu & Priscilla Hamilton, *Confronting Racial Bias Against Black and African American Victims in the Prosecution of Sexual Violence, Domestic Violence, Stalking, and Human Trafficking*, AEquitas & the National Black Prosecutors Association (April 2021).

William C. Hubbard & Sherrilyn Ifill, *Joint Statement on Eliminating Bias in the Criminal Justice System*, American Bar Association & NAACP Legal Defense and Educational Fund, Inc. (July 2015).

Akhi Johnson, *What's in a Name? A Small Step Prosecutors Can Take to Build a More Humane System*, Vera Institute of Justice (July 24, 2020).

Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, Wellesley College for Research on Women (1990).

National Museum of African American History & Culture, *Being Antiracist* (last visited June 4, 2021).

Keith Payne, Laura Niemi, & John M. Doris, *How to Think about 'Implicit Bias,'* Scientific American (March 27 2018).

Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 Fordham L. Rev. 667 (2018).

Prosecutors' Center for Excellence & National Black Prosecutors Association, *The Conscious Prosecutor Implicit Bias Toolkit for Prosecutors* (March 21, 2017).

Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle University L. Rev. 795 (April 25, 2012).

### **Literature Exploring Bias**

"From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America" by Elizabeth Hinton

"The New Jim Crow: Mass Incarceration in The Age of Colorblindness" by Michelle Alexander

"How to Be an Antiracist" by Ibram Kendi

"So You Want to Talk About Race" by Ijeoma Oluo

"White Fragility" by Robin DiAngelo

"White Rage: The Unspoken Truth of Our Racial Divide" by Carol Anderson

"The Origin of Others" by Toni Morrison

"Stamped From the Beginning" and "How to Be an Antiracist" by Ibram X. Kendi

"Racism Without Racists" by Eduardo Bonilla-Silva

"Caste" and "The Warmth of Other Suns" by Isabel Wilkerson

"Conquest" by Andrea Smith

"City of Inmates" by Kelly Lytle Hernández

"Racism: A Short History" by George Fredrickson

"When Police Kill" by Franklin E. Zimring

"Why I'm No Longer Talking to White People About Race" by Reni Eddo-Lodge

"God's Bits of Wood" by Ousmane Sembène

"They Were Her Property: White Women as Slave Owners in the American South" by Stephanie E. Jones-Rogers

"Killing the Black Body: Race, Reproduction, and the Meaning of Liberty" by Dorothy Roberts

"The Color of Law" by Richard Rothstein

"Katrina's Legacy" by Eric Mann

"Chicano Students and the Courts" by Richard Valencia

"Talking to Strangers" and "Blink" by Malcolm Gladwell

"Letter to My Daughter" by Maya Angelou

[List of Ethnic Slurs](#)

[List of Disability Related Slurs](#)

[List of Religious Slurs](#)

[List of LGBTQIA+ Slurs/Slang](#)