

2017 UT System Legal Conference

September 29, 2017, 1:00pm to 2:00pm

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Title: You're Not Doing Anyone Any Favors – Bias and Credibility in Investigations

"I think unconscious bias is one of the hardest things to get at. My favorite example is the symphony orchestra. When I was growing up, there were no women in orchestras. Auditioners thought they could tell the difference between a woman playing and a man. Some intelligent person devised a simple solution: Drop a curtain between the auditioners and the people trying out. And, lo and behold, women began to get jobs in symphony orchestras."

"That device of the dropped curtain isn't so easy to duplicate in other areas."

*Ruth Bader Ginsburg*¹

Introduction²

As lawyers and investigators, we all strive to conduct objective, fact-based investigations devoid of bias. We have been trained to think of evidence as objective and rules or laws as blind, with legal outcomes being the neutral product of the application of facts to law. We claim not to rely on intuition, assumption, or feelings regarding persons, groups or particular outcomes. We believe in equality and strive to treat complainants, respondents, and witnesses equally, regardless of race, gender, age, disability, or sexuality. If questioned, we would confidently state that the conclusions contained in our reports are based on the impartial application of the evidence, and not based on subjective viewpoints or biases.

¹ Up through the 1960s, less than 10% of the musicians in major orchestras across the country were women. The use of blind auditions began to increase in the late 1960s and 1970s, and it is a common practice today. Partially as a result of blind auditions (combined with increased participation in music schools), the percentage of women in orchestras has grown dramatically. See C. Goldin & C. Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REVIEW 4 (2015). As of 2004, the American Symphony Orchestra League reported that the percentage of women in the top 25 symphonies in the United States was 34.7%. See D. Wakin, *In American orchestras, more women are taking the bow*, N.Y. TIMES, July 27, 2005. More recent reports indicate that representation continues to increase, with the League of American Orchestras reporting 47% female musicians across its 800 league-member orchestras as of September 2016.

² This paper is the joint work product of its authors, Ashley Palermo and Darren Gibson, and it reflects their personal viewpoints. Nothing in this paper shall be considered the official position, or an authorized statement, of The University of Texas System or any of its member institutions, or of Littler Mendelson P.C.

Yet, research suggests that most people are biased to some degree in various ways, although presumptions cannot be made about any individual based solely on their membership in a group. By bias, we are referring to unconscious or implicit bias, not conscious preferences or intentional prejudice. Over the past two decades, a large volume of research by psychologists has supported the concept of implicit biases and that an individual's implicit biases affect the individual's actions. This research has also indicated that most people have a tendency to unconsciously favor people who are like themselves and to disfavor groups that are unlike themselves or that society disfavors (or out-groups).

As investigators, we should be aware of this research, and we should assume that we are rarely immune from these findings or their implications. Rather, we should strive to understand this research and work to minimize the effect of any implicit bias on our investigations. In certain circumstances, simple ways exist to minimize potential bias (such as blind auditions for symphonies noted by Justice Ginsburg). However, such simple tools are not particularly useful in investigations, where identity, group affinity, and allegations of prejudice are often fundamental aspects of the investigation. In addition, investigators rely on in-person interviews and fact-intensive investigations, during which we uncover detailed (and often intimate or embarrassing) information about witnesses. In short, it is impossible to conduct "blind" investigations to avoid the possible effects of implicit bias.

To minimize the potential effects of implicit bias on our investigations, we need to recognize and acknowledge the possibility of implicit biases, understand how they can affect the investigative process and decision-making, and utilize techniques to minimize the effect of bias on the outcome of our investigations.

One of the primary ways that bias impacts investigations is in credibility assessments. By their very nature, credibility assessments call for investigators to rely on our own experiences to judge an individual's character and truthfulness. Recognizing the potential for implicit bias is the first step in ensuring that credibility assessments are made as bias-free, as possible. Later in this paper, we will explore the basics of credibility assessments as well as the peculiarities of credibility assessments when interviewing complainants in Title IX matters who have experienced traumatic events.

Part I: Bias

Acknowledging Implicit Bias

What do we mean when we say implicit bias, and how is implicit bias different from neutral preferences, on the one hand, and discriminatory prejudices, on the other? In this paper, we use the word "bias" to refer to implicit or unconscious bias, which lies somewhere between preference and prejudice.

Preference simply refers a greater liking for one alternative over another, such as preferring steak over shrimp. Preferences tend to be acknowledged and based on historical data

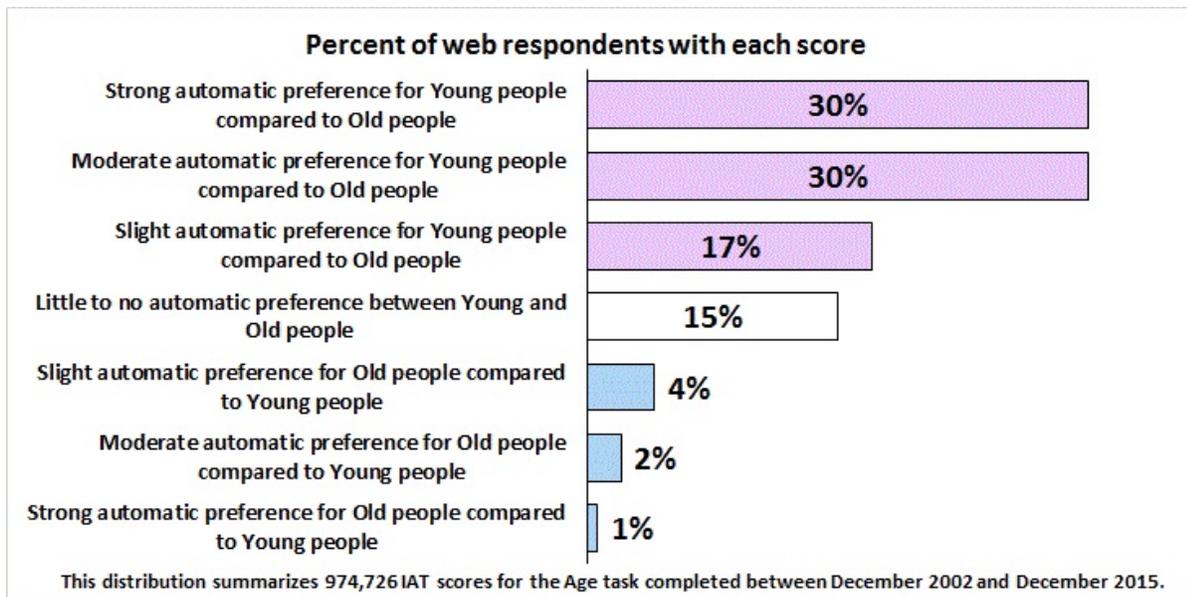
that has established preferences (e.g., eating both steak and shrimp and forming a preference). Bias refers to a preconceived judgment or opinion without just grounds or based on insufficient knowledge. Bias can be conscious or unconscious. For example, you may express a conscious bias against sushi by claiming it to be repulsive, even though you have never tried it and have no interest in doing so (explicit bias). Alternatively, you may genuinely believe that you like apples just as much as you like pears, yet you always choose apples over pears when given a choice. This would show an unconscious or implicit bias towards apples. Similarly, you may genuinely believe in equality and value diversity, yet you may unknowingly express an implicit preference for certain groups of people over others.

This paper does not equate implicit bias towards groups of people with prejudice or intentional discrimination. Social psychologists use the word prejudice to describe people who report and approve negative attitudes toward out-groups. Most people with an implicit bias for one group over another (e.g., white versus black, straight versus gay) are not necessarily “prejudiced” by this definition. However, research suggests that implicit biases may be predictive of discriminatory behavior. As investigators, we must be mindful of the possibility for implicit biases to result in biased outcomes.

Identifying Bias

As lawyers, it is difficult to admit that we may have unconscious biases, much less that they may be affecting our “objective” and “rational” decisions. One well-accepted tool for self-assessment is a free online test known as the implicit association test (IAT). The IAT was created and is maintained by Project Implicit, a group of research psychologists from Harvard University, the University of Virginia, and the University of Washington. The IAT purports to measure the strength of associations between concepts or groups (e.g., straight people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The theory is that a person’s answers in responding to two concepts is faster and more consistent when closely related items share the same response key. The IAT is based on the idea that if a person has an implicit preference for straight people relative to gay people, that person will be faster to categorize positive words with being straight, and faster to categorize negative words with being gay.

The various IAT tests have been taken by over two million people. For example, one of their tests purports to determine whether the test taker has a preference for older or younger people. Here is the outcome:



Interestingly, the Implicit Project website reports that this test reflects an implicit bias for young people across the entire age spectrum, with older people showing the same bias.³

While the IAT test may seem simplistic, research suggests that the results of the IAT correspond to actions reflecting a preference for one group over the other. For example, research reports that the following behaviors are predicted by the Race IAT's measure of an automatic White preference: judging White job applicants more favorably than equally qualified than Black applicants; emergency room and residency physicians recommending the optimal treatment less often for a Black patient than a White patient presenting the same symptoms; and college students being more ready to perceive anger in Black faces than in White faces.⁴

Even the Implicit Project recognizes that the IAT test results can rarely be explained solely by membership or exclusion from a group. However, recent research indicates that group dynamics are key drivers of implicit bias. Recently, researchers set out to assess the impact of tribalism or "otherness" by testing whether such group dynamics would influence how severely people would punish someone outside their group. Researchers had volunteers play a game in which the volunteers witnessed one player stealing another player's money. The volunteers were given the opportunity to punish the perpetrator by confiscating some or all of the perpetrator's money and removing the perpetrator from the game. The experiments were manipulated so that the perpetrator appeared to be a member of either the same group as the volunteer or a different one. The groups ranged from fans of football teams to national citizenship. When asked for an initial punishment decision, volunteers punished out-group members more harshly, and they treated members of their own group more leniently. Participants could overcome these

³ <https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq16>.

⁴ MAHZARIN BANAJI & ANTHONY GREENWALD, *BLINDSPOT* 49 (2009) (summarizing research). The Project Implicit website and *Blindspot* are excellent resources to learn more about identification of hidden biases, in general, and the IAT, in particular.

tendencies, however, by engaging in rational deliberation. When volunteers were given the chance to reflect on their decision, the biases were mitigated, and volunteers tended to hand out equal punishments to in-group and out-group members.⁵

Thus, all hope is not lost in our efforts for rational, evidence-based investigations.

Possible Effects of Implicit Bias on Investigations: Confirmation Bias and Priming (or Anchoring)

Now that we have a better understanding research regarding implicit bias, it is important to understand the various ways that implicit bias may affect an investigation. According to psychologists, this occurs through cognitive bias—i.e., the systematic pattern of deviation from norm or rationality in judgment, whereby inferences about other people and situations may be drawn in an illogical fashion.⁶ This paper will focus on two common types of cognitive biases that can affect how we gather and assess information and make decisions with that information: confirmation bias and priming (or anchoring).

Confirmation Bias

Confirmation bias refers to the tendency to seek out, favor or interpret information in a manner that supports or confirms previously existing beliefs. A related concept, asymmetrical skepticism, refers to the tendency to be more skeptical of information that challenges a strongly held belief, as compared to information that is consistent with that belief.

Confirmation bias not only impacts how people gather information, but it also affects how people interpret information and recall details of past events. When we are presented with information that conflicts or challenges an existing belief, we perceive what is called “cognitive dissonance.” Research shows that after making a difficult choice between two equally preferred items, the act of rejecting a favorite item induces an uncomfortable feeling (cognitive dissonance), which in turn motivates individuals to change their preferences to match their prior decision (i.e., reducing preference for rejected items). This cognitive dissonance response has been shown to exist not only with psychology studies, but also in MRI studies of brain activity.⁷ For an investigator, confirmation bias and cognitive dissonance can result in placing more weight on evidence that confirms existing beliefs or stated positions and hypotheses, while disregarding conflicting evidence.

Research has repeatedly shown that this type of confirmation bias and cognitive dissonance can affect investigations. For example, in a study involving fingerprint analysis,

⁵ D. Yudkin, T. Rothmund, M. Twardawski, N. Thalla, N., & D. van Bavel, *Reflexive intergroup bias in third-party punishment*, 145 J. Exp. Psychol. Gen. 145(11) 1448-1459 (2016).

⁶ M.G. Haselton, D. Nettle, & P.W. Andrews *The evolution of cognitive bias*. In D. M. BUSS (ED.), THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY 724-746 (2005).

⁷ K. Izuma, et al., *Neural correlates of cognitive dissonance and choice-induced preference change*, PNAS 107:51 22014-19 (2010).

forensic experts were less likely to find a fingerprint match when given facts from the investigation suggesting that a match was less likely.⁸ Similarly, another study showed that early identification of suspects in criminal investigations leads to confirmation bias among the investigators in interpreting ambiguous or inconsistent evidence and in assessing what additional investigation needs to be conducted. In addition, investigators who were actively asked to consider why their hypothesis might be wrong exhibited less bias than those who merely considered alternative suspects.⁹

A recent study in the legal world presents evidence that lawyers are not immune from the effects of implicit bias and confirmation bias. As part of the study, the researchers drafted a research memo from a hypothetical third year litigation associate at a law firm that incorporated spelling, grammatical, and analytical mistakes. This memo was then disseminated to 60 partners from 22 different law firms who agreed to participate in a “writing analysis study.” Of these partners, 23 were women, 37 were men, 21 were racial/ethnic minorities, and 39 were white. This diverse group of lawyers received demographic and biographical information about the writer, including that he was a third-year associate named “Thomas Meyer” who graduated from NYU Law School. In addition, half of the reviewers were told that Mr. Meyer was White, and the other half were told that Mr. Meyer was Black. The partners were then asked to edit the memo to correct mistakes and to rate the overall quality of the memo from a 1 to 5, with “1” indicating the memo was extremely poorly written and “5” extremely well written. White Meyer received an average score of 4.1, while Black Meyer received an average score of 3.2 for the same memo. The reviewers were much likely to notice and correct spelling errors for Black Meyer than for White Meyer (5.8/7.0 versus 2.9/7.0). Qualitative comments on the memos also favored White Meyer, who had “potential,” “good analytical skills,” and was a “generally good writer but needs to work on X,” while Black Meyer “needs lots of work,” was “average at best,” and a scorer “could not believe he went to NYU.”¹⁰

It is hard to imagine that anyone who claims to believe in equal treatment regardless of race would not be appalled by the results of this study. As investigators, it is critical that we are aware of the potential impact of both implicit bias and confirmation bias in our investigations.

Priming or Anchoring

Unlike confirmation bias (which refers to the effect of internal attitudes on our response to external stimulus), priming or anchoring refers to the effect of external information or inputs on our subsequent responses to subsequent input or information. Priming is the implicit effect of the external stimulus on what one might expect to be an independent variable, such that exposure to the first stimulus influences our response to the second.

⁸ I. Dror, D. Charlton & A. Person, *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 FORENSIC SCIENCE INTERNATIONAL 74-78 (2006).

⁹ B. O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 Psychology, Public Policy & Law 4, 315-334 (2009).

¹⁰ A. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, Nextions, Yellow Paper Series (2014).

Priming occurs more easily than you might imagine. In one study, MIT students were first asked to write down the last two digits of their Social Security number. They were then asked to estimate the price of common computer components (e.g., a trackball mouse).¹¹ Logically, no connection should exist between the two answers. However, the students' responses indicated a strong correlation between the magnitude of the last two digits of their Social Security number and their willingness to pay for a trackball mouse. The results were:

Last two digits of SSN	Price of trackball
00 to 19	\$8.62
20 to 39	\$11.82
40 to 59	\$13.45
60 to 79	\$21.18
80 to 99	\$26.18

That's more than a **three-fold increase** in the willingness to pay, simply based on identification of two digits seemingly disconnected from the price.

This simple experiment shows that a seemingly random "anchor" can result in completely different answers, outcomes, and actions. Or put another way, anchoring is a cognitive bias that describes our common tendency to rely too heavily on the first piece of information we receive. Once an anchor is set, a bias exists toward interpreting subsequent information based on that anchor.

In the context of investigations, priming or anchoring can be seen by the impact wording of questions can have on answers, with minor word changes completely changing testimony and even giving rise to unknowingly false testimony. In a famous early study in this area, researchers showed participants a video of a car accident. Half the participants were asked, "How fast was the car going when it hit the other car?" The second half were asked, "How fast was the car going when it slammed into the other car?" The second "slammed" group gave higher estimates of the speed of the vehicle than the first "hit" group. Moreover, the participants in second group were more likely to mistakenly insert a memory of broken glass at the accident scene even though there was no broken glass in the video.¹² Thus, it is not difficult to imagine how confirmation bias of an investigator might influence what questions are asked and how they are phrased, combined with the anchoring bias of a witness, can easily influence the outcome of an investigation.

The impact on anchoring in legal proceedings is well documented. For example, in studies involving settlement conferences, two groups of judges were given the same fact pattern involving a car accident by a negligent truck driver. The control group was not given any information about a demand by the plaintiff. The second group was told that the plaintiff's lawyer

¹¹ DAN ARIELY, PREDICTABLY IRRATIONAL (2008).

¹² E. Loftus & J. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 15 J. VERBAL LEARNING & VERBAL BEHAVIOR 585-589 (1974).

had demanded \$10 million. Needless to say, the \$10 million demand served as the anchor to influence the outcome. Judges in the control group awarded \$808,000, on average, whereas the judges in the anchor group awarded \$2,210,000, on average.¹³ (Now we know why Plaintiff's attorneys begin mediations with ridiculously high demands. This research also suggests that defendants may need to be more willing to extend low settlement offers early in a case.)

Mitigating the effects of priming in investigations is more difficult than you might think. One study has shown that even when subjects were told that the initial piece of evidence was wrong and that they should ignore it, the incorrect evidence continued to have an effect on the outcome compared to the control group, who never received the incorrect information.¹⁴

Techniques For Minimizing the Effects of Bias on Investigations

As investigators, there are numerous techniques to mitigate the effects of implicit biases and cognitive biases on our investigations. The following steps can be taken at each stage of the investigation process.

Before the investigation:

1. **Take the IAT tests at implicit.harvard.edu.** The Implicit Project offers multiple tests across various topics, including race, gender, age, disability, sexuality, and weight, to name a few. Before starting an investigation, take (or retake) the relevant test or tests to reconnect and reexamine possible sources of biases. Regardless of the outcome, the process acknowledges the possibility of bias and sets the tone for the rest of the investigation.
2. **Assign diverse investigators.** When implicit bias and out-group dynamics have the potential to affect an investigation, staff the investigation with investigators that are not in the same relevant groups, if possible (i.e., female and male, black and white, gay and straight). Empower both investigators to play active roles in conducting interviews, reviewing and assessing evidence, and finalizing the report. Regardless of position, recognize the potential for bias, and empower each investigator to speak up if either believes that implicit bias is playing a role. Sometimes, the second participant need not be a professional investigator, but can be simply be a second set of eyes to participate in the entire investigation and provide input.

During the course of the investigation:

3. **Identify the objective criteria governing the investigation.** At the outset of an investigation, it is important to set forth the objective criteria that will govern the

¹³ C. Guthrie, J. Rachlinski, & A. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1 (2007).

¹⁴ J. Golding, & J. Hauselt, *When Instructions to Forget Become Instructions to Remember*, 20 Personality & Soc. Psychol. Bull. 178 (1994).

outcome of investigation. What are the elements of the alleged policy or legal violation? What evidence will be sufficient to prove a violation? Identify who bears the burden of proof of establishing a violation and what evidentiary standard will be used.

4. **Avoid focusing on early hypotheses and recognize the potential for all possible outcomes.** Avoid anchoring your investigation in early theories based on partial or incomplete information. Write down multiple possible explanations so that you are sure to consider alternative scenarios. Sometimes the best proof that certain events occurred is to consider and eliminate alternative explanations.
5. **Find commonality with witnesses.** Prepare for interviews by learning as much as possible about interviewees to facilitate a comfortable discussion as free as possible from the effects of social distance. Find something that creates common ground, especially with witnesses who are from out-groups relative to the interviewer. However, do not focus too much time on witnesses who are like you and get lost in in-group confirming dynamics. Make sure to ask appropriate follow-up questions of persons in both groups to allow for context and explanations.
6. **Open-ended questions.** When conducting your interviews, ask more open-ended questions than closed questions. Open-ended questions are shown to reduce confirmation bias and minimize priming of witnesses by investigators.¹⁵
7. **Obtain and consider all relevant evidence.** In today's world, electronic communications are a critical resource for evidence in investigations. Read the entire chain of email or text conversations, rather than merely a single section that supports the hypothesis. Ask both sides for the same evidence, particularly given that electronic evidence can be easily manipulated. Do not presume that the email or text string that was provided by one side is complete or accurate. Ask witnesses what additional information you should be considering. Seek out information that could alter or conflict with the allegations and, when it is identified, give it appropriate consideration. Never fail to seek out important information simply because it is difficult to obtain (known as availability bias). Conduct follow-up interviews, when necessary, to fill in any gaps.
8. **Prepare a detailed chronology of information and evidence.** Organize information and evidence chronologically in a timeline to understand the historical context and implication, rather than pointing to individual pieces of information out of context. Sometimes a few individual pieces of evidence appear to confirm a hypothesis, but when the entire timeline of activities and evidence is viewed, holes or inconsistencies appear. Allow sufficient time for evidence to develop and avoid explanations for failure to completely investigate (e.g., heavy workload, insufficient resources, unavailability of witnesses, difficulty in obtaining evidence).

¹⁵ *Id.*

Writing the report:

9. **Cite to evidence and acknowledge credibility determinations.** Final reports should be more than findings and conclusions. Include a detailed statement of the facts, with direct quotes to documents and witness interviews and detailed footnotes to reference sources of evidence. Attach key evidence as exhibits to the report, and acknowledge and address conflicting evidence. Where a credibility assessment is required, acknowledge it, and explain the basis for the credibility determination. This methodology makes it less likely that you will ignore or discount evidence that is inconsistent with the findings.
10. **Obtain outside input and feedback mechanisms.** One of the best ways to mitigate the effects of potential bias is to utilize a peer review of your work. Find someone you trust who is unconnected to the investigation to review the draft report and challenge its logic and conclusions. If you are making findings against someone in an out-group, find someone in that out-group to review the report. In addition, seek expert assistance when necessary, particularly if you are required to interpret technical information.

Sanctions:

11. **Track sanctions across investigations and consider a sanctions matrix.** Consider tracking the sanctions across investigations to determine if sanctions are being administered consistently based on a given violation. You may want to also consider a sanctions matrix to ensure that assess consistency across different populations.

Part II: Credibility Assessment

Assessing credibility is essential during any investigation. As an investigator, your assessment of the witness's credibility will often tip the scales for or against a finding of responsibility. This is especially true in the classic "he said/she said" types of cases – where additional supporting evidence for or against a finding is absent. When interviewing witnesses, investigators must cut through the background noise and extraneous facts, zero in on the heart of the matter, and assess the information to discern the likely facts. While you assess credibility daily (is your six-year-old lying or not, for example), some guidance can assist investigators in making better credibility assessments.

The EEOC last provided guidance on this subject in 1999, but its recommendations are still relevant today. The EEOC guidance makes clear that credibility determinations must be made where there are "conflicting versions of relevant events."¹⁶ As the EEOC explains, "the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the

¹⁶ *Equal Employment Opportunity Commission's Enforcement Guidance: Vicarious Employer Liability for Supervisor Harassment (1999)*. www.eeoc.gov

complainant’s credibility, since harassment often occurs behind closed doors.” Employers must evaluate credibility and make a determination.¹⁷

A number of credibility factors come into play during investigations. Consider the following he said/she said scenario: Susan, a female employee in the College of Liberal Arts at State University alleges that her boss, the Dean, has made numerous sexual comments to her, including comments about the size of his penis and masturbation. All of the comments were made when they were alone. Susan also alleges that the Dean follows her into areas of the office he has no need to go. For example, she states that he’ll sometimes appear in the copy room or the supply room when she is alone. Since it is well-known around the office that the Dean does not know how to work the copy machine or order supplies, she questions his reasons for showing up in those places. She alleges that her failure to engage in discussion with the Dean about these topics led him to decrease her responsibilities in the office and pass her over for a promotion. As the investigator, you should evaluate the following “top six” credibility factors in determining whether Susan’s story has merit.¹⁸

(1) Plausibility.

In one description of the alleged harassment, Susan claims that one morning while she and the Dean were both getting coffee in the kitchen, the Dean grabbed her butt. Susan stated there had been no other “touchings” by the Dean, even though the two had been alone on many other occasions – even in the Dean’s private office. Susan stated that the Dean did not say anything to her before, during, or after the alleged touching. When pressed by the investigator, Susan could not recall the specific date that the touching occurred, and she did not mention it to anyone for six months.

Here, the investigator should rely on her own experience with people and determine that, more likely than not, this scenario does not seem plausible. First, Susan stated that she and the Dean had been alone on numerous occasions, and nothing like this had ever happened. It seems implausible that the Dean would take such a huge risk to touch Susan in a public area – the workplace kitchen. Moreover, the fact that Susan could not remember exactly when the touching had occurred and did not report the behavior for a full six months, make the story that the Dean grabbed Susan’s butt more implausible.

(2) Source of Information.

¹⁷ *Id.*

¹⁸ It is important to note, however, that the credibility factors listed in this section may require more thought and consideration in a Title IX investigation. Later in this paper, we explore the intricacies of investigating matters where the complainant has experienced trauma and recognize that a complainant’s demeanor may differ from the “norm,” and her recollection of events may be non-linear in nature.

The adage “consider the source” certainly comes into play in investigations. In addition to speaking with the parties directly, you also want to get a sense of what type of employees they are, as well as their character, generally. To this point, make an effort to interview co-workers, subordinates, and superiors. Question whether those individuals have a positive or negative opinion of both the complainant and respondent. Also, review the personnel files of the key players. Has the complainant complained about similar conduct from others previously? Has the respondent been accused of similar behavior in the past?

In our hypothetical, the investigator learns that this is the first time the complainant has accused another employee of inappropriate conduct. The Dean, however, has been the subject of a sexual harassment investigation previously. That investigation found that there was not enough evidence to support the allegations of harassment. This information is a “plus” in the credibility column of the complainant and a “minus” in the credibility column of the respondent. The investigator knows that it is more likely than not that the complainant is not one to make frivolous claims, and she knows that the respondent has been suspected of bad behavior in the past.

(3) Detail of the Testimony.

In our hypothetical above, Susan is able to describe in vivid detail the comments the Dean made to her. Indeed, she not only recites the comments, themselves, but she is also able to tell the investigator what she was doing when the Dean made the comments. As she describes the behavior, she becomes visibly upset, seemingly flashing back to when the behavior occurred. The investigator makes note of Susan’s ability to provide the same details of the story consistently over time. She also notes that Susan does not evade any of her questions but, instead, tries to answer each question fully and honestly. The investigator continues to assess Susan’s credibility by asking the same questions each time she meets with Susan, each time in a slightly different manner. The investigator probes for details and looks for inconsistencies. Similarly, the investigator uses the same techniques with the respondent. When the respondent was presented with a calendar showing the dates of the alleged incidents, he contradicted his previous testimony as well as documentary evidence, lowering his credibility.

(4) Demeanor.

How a witness acts during the investigation can be extremely telling to the investigator, but like the other factors, a witness’s demeanor is not the only determinative factor. As an investigator, to learn the most about your witness, you should first build a rapport with the witness and allow the interviewee to feel relaxed

and at ease. Gaining the witness's trust will go a long way toward assisting you in seeing the "true" demeanor of the witness. You can easily form a rapport with the witness by first asking about everyday conversational matters – the witness's job, recent vacations, etc. Let the witness relax before you turn to the key points of the interview. Once you begin questioning the witness about the events in the complaint, carefully observe the witness's body language. Does the witness maintain his calm demeanor, or does he look agitated? Does she maintain eye contact, or are her eyes cast downward?

Consider, again, our hypothetical above. When Susan was questioned about the allegations in her complaint, she maintained eye contact with the investigator. Though she became a bit weepy in describing the unwanted comments, she was able to fully describe the Dean's behavior, with the same level of detail she provided in her written complaint. In contrast, the Dean appeared nervous when the questioning turned to Susan's allegations. His answers became short, and he nervously shifted in his seat. While not determinative, the witnesses' demeanor is another tool the investigator can use in evaluating credibility.

(5) Corroborating or Conflicting Testimony

Though as an investigator you may be dealing with a "he said/she said" scenario like our hypothetical, that fact should not stop you from diligently interviewing other individuals who may provide testimony that corroborates or conflicts with the allegations in the complaint. Moreover, you should review any other documentary or video evidence that could lend credibility to or detract from the credibility of either party.

Here, the investigator began by contacting all of the other employees in the Dean's office. She learned that most women in the office had a poor opinion of the Dean. While they thought he was good at his job in academia, they generally got a "bad vibe" from him and tried to keep their distance. They all stated that Susan was the fifth person in her position in an eight-year time frame. All of the other employees who occupied her position (all women) had departed in just short of one year's time on the job. Regarding Susan's claim that the Dean followed her into rooms that he did not need to be in, the investigator checked the access key card swipe data. On several different occasions, she found that the Dean had swiped his key card to enter a room that Susan had entered minutes before. This piece of information also served to corroborate Susan's claims.

(6) Bias.

The final factor to consider in evaluating credibility is bias or impartiality. As an investigator, you should consider what motive the witness has to impact the investigation. If you determine that the witness is biased or has a motive to lie, you may not be able to rely on that witness's testimony. Reasons for bias could include a past relationship with one of the key parties, a dispute with the organization, or a desire for promotion.

In the hypothetical described above, the sole witness who spoke highly of the Dean was an employee who would likely be promoted if Susan left the University. The investigator determined that this individual's testimony was not credible, given the stark contrast to the other employees' testimony as well as this witness's bias.

Conclusion

Credibility determinations are difficult but necessary. Even in classic "he said/she said" scenarios, investigators have to make credibility determinations, and they must reach a conclusion. A finding of "inconclusive" is not acceptable. In evaluating credibility, the investigator should consider the aforementioned six factors: (1) Plausibility; (2) Source of Information; (3) Detail of Testimony; (4) Demeanor; (5) Corroborating or Conflicting Testimony; and (6) Bias.

In the next section, we'll discuss important credibility considerations for investigators in Title IX matters.

Credibility in Title IX Matters – Trauma Informed Credibility Assessments

Individual complainants in Title IX matters are unique witnesses. They are unique because the content of their complaints often includes some sort of trauma. To minimize the possibility of re-victimization, to conduct better investigations, and to operate with a best practice, we strive to conduct trauma informed investigations.¹⁹ When determining who on your campus should be trained in trauma, OCR tells us that, "any school officials responsible for discussing safety and confidentiality with students should be trained on the effects of trauma and the appropriate methods to communicate with students subjected to sexual violence."²⁰

So, what *is* trauma? Psychological trauma is the unique individual experience of an event or enduring conditions, in which: (1) the individual's ability to integrate his/her emotional experience is overwhelmed or (2) the individual experiences (subjectively) a threat to life, bodily

¹⁹ See, e.g., OCR's Questions and Answers about Title IX and Sexual Violence (April 14, 2014); University of Virginia Resolution Agreement, OCR Docket No. 11-11-6001 (Sep. 17, 2015).

²⁰ 2011 OCR Questions and Answers, E-2, *available at*: <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

integrity, or sanity.²¹ Esther Giller explains that, “[T]rauma is defined by the experience of the survivor. Two people could undergo the same noxious event and one person might be traumatized while the other person remained relatively unscathed.”²²

Understanding the effects of trauma on the body can help investigators not only conduct a better investigation but can also help clear away some of the pre-conceived ideas we have about individuals who have suffered trauma. Often, when confronted with an individual who potentially experienced a traumatic event, the initial position is to question the complainant’s response or lack of response. “Why didn’t she scream?” “Couldn’t she just leave?” “Why didn’t he fight back?” “Can it really be rape if she didn’t say ‘no’?” These are all questions that frequently arise when we learn of a new Title IX matter. These questions, however, reflect an uninformed view of trauma and a lack of understanding of how physiology and psychology can affect an individual’s response to a traumatic event. Before diving into an investigation with this inherent bias, we should consider the physical and psychological manifestations of trauma and how to take those manifestations into account during an investigation.

Response During Assault

(1) Fight or Flight

When a person is under severe stress, the body responds accordingly. Indeed, a cocktail of chemicals are released by the brain: catecholamines, steroid hormones and the stress hormone cortisol, and neuropeptide S.²³ Catecholamines activate an area inside the brain called the amygdala, which triggers an emotional response to the stressful event.²⁴ In the case of a sexual assault, the primary emotion is most likely fear. Cortisol is released to organize the systems in the body (including the heart, lungs, immune system, skin, circulation, and metabolism) to deal with the traumatic event.²⁵ Neuropeptide S is a small protein that “modulates stress by decreasing sleep and increasing alertness.”²⁶ This protein produces the “flight” response and motivates a person to flee from her attacker.

During a fight or flight response, an individual experiences many physical symptoms. She experiences increased heart rate and blood pressure, hyper ventilation, and an increase in glucose to major muscles. Her digestive and immune systems will likely shut down in an effort to conserve energy for fight or flight. Her brain is also affected – rational thought is typically impaired (e.g., may not realize that the door is open or that someone in the next room would

²¹ Esther Giller, *What is Psychological Trauma?* Sidran Institute, (1999), available at: <https://www.sidran.org/resources/for-survivors-and-loved-ones/what-is-psychological-trauma/>

²² *Id.*

²³ Harvey Simon, M.D., *Stress & Anxiety – The Body’s Response*, N.Y. TIMES, January 30, 2013, available at: <http://www.nytimes.com/health/guides/symptoms/stress-and-anxiety/the-body's-response.html>

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

hear her if she screamed). Her focus is on survival, so she may lack memories of “what happened.”

(2) Freeze, Tonic Immobility, and Collapsed Immobility

Fight or flight is the most common response that we hear about, but it is not the only response one may experience. Sometimes one’s body completely shuts down or “freezes.” “In freezing, brain and body are primed for action. But in tonic immobility, the body is literally paralyzed by fear – unable to move, speak, or cry out. The body goes rigid. Hands may go numb.”²⁷ This “deer in headlights” response occurs when the parasympathetic nervous system is activated. Symptoms of tonic immobility include: playing dead (also called collapsed immobility), inability to speak, relaxed muscles, endorphins released to numb pain and increase survival, glazed look while still conscious, numbness, and disassociation from emotions.²⁸

The thought that a person would “freeze” during trauma is counter-intuitive to all that we have learned about trauma; you do not freeze – you fight or flee. So, why would a person freeze? “Research studies with animals have documented that sometimes the best way to protect the body is to freeze, to play dead, fighting back or fleeing would only prolong the threat and endanger the body even worse (maybe even risk death). In other words, sometimes the safest solution isn’t fight-or-flight. The safest option is to freeze and so the brain and body work together to hold the organism still until the threat has passed.”²⁹

“According to individual accounts, tonic immobility in humans appears to present as a loss of the ability to move or call out and is thought to occur when a person is in imminent or actual (and great) danger, when a threshold of sympathetic arousal has been reached, but when escape or winning a fight is not possible or is perceived as not possible. Victims describe subjective experiences of fear, immobility, coldness, numbness and analgesia, uncontrollable shaking, eye closure, and dissociation (derealization and depersonalization), as well as a sense of entrapment, inescapability, futility, or hopelessness.”³⁰

Tonic immobility is associated with increased self-blame.³¹ Moreover, individuals who experience tonic immobility are less likely to seek help, and they may tell no one about the trauma, even in an investigation.³²

Trauma and Memory

Under extreme stress, the initial sorting of explicit and implicit layers continues, but processing is interrupted. This means that a person’s memories of a traumatic event may be crystal clear in some places but murky in others. The hippocampus may go into a “super

²⁷ James W. Hopper., *Why Many Rape Victims Don’t Fight or Yell*, THE WASHINGTON POST, June, 23, 2015, available at: https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/?utm_term=.00dab4f2b863

²⁸ *Id.*

²⁹ Dr. Rebecca Campbell, Professor of Community Psychology, Michigan State University

³⁰ Kozłowska, K., et al., *Fear and Defense Cascade: Clinical Implications and Management*, HARVARD REVIEW OF PSYCHIATRY, July/August 2015, Vol. 23, Issue 4, pp. 263-287.

³¹ *Why Many Rape Victims Don’t Fight or Yell*, THE WASHINGTON POST

³² *Id.*

encoding” state briefly after the fear kicks in.³³ Individuals may remember in exquisite detail what was happening just before and after they realized they were being attacked, including context and the sequence of events, but they are likely to have very fragmented and incomplete memories for much of what happens after that.³⁴ The rationale for this phenomenon is simple, “[i]f an animal is to survive, it’s most important to remember what predicted an attack, not exactly what happened after the attack was underway.”³⁵

<p>Memories of a Traumatic Event: Stored in amygdala (“implicit”) Non-linear recall of events Poor recall of contextual information (like the layout of a room) Details are fuzzy Focus may be on what someone did to survive event; what are perceived as important details to victim may seem odd to investigator</p>	<p>Memories of a Non-Traumatic Event: Stored in hippocampus (“explicit”) Linear recall of events Specific details “Significant details” make sense to investigator</p>
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Behavior During Interviews

Some complainants’ behavior during interviews may appear odd. Remember that they may continue to be affected by the “chemical cocktail” associated with trauma when recalling a traumatic event. Various “normal” responses include: extreme emotions, crying, hysterical behavior, flat affect – seeming numb, laughing, light-heartedness, and inappropriate cycling of emotions. It is important that you remember, as investigators, that no “normal” response to trauma occurs, and when you are judging a complainant’s credibility, you need to let go of our preconceived notions of how a complainant *should* respond.

Moreover, no magical amount of time exists for an individual to recover from the traumatic event, and the body’s reaction to trauma could last for years. Indeed, as Van der Kolk wrote in *The Body Keeps Score*, “even years later, traumatized people often have enormous difficulty telling other people what has happened to them. Their bodies re-experience terror, rage, and helplessness, as well as the impulse to fight or flee, but these feelings are almost impossible to articulate. Trauma by nature drives us to the edge of comprehension, cutting us off from language based on common experience or imaginable past.”³⁶

³³ Hopper, J., *The Impact of Trauma on Brain, Experience, Behavior, and Memory*, April 1, 2016, available at: www.jimhopper.com

³⁴ *Id.*

³⁵ *Id.*

³⁶ Bessel Van der Kolk, MD., *The Body Keeps Score* 43 (2014).

Conclusion

In interviewing individuals who have experienced trauma, we must understand the body's reaction to the events and know that the reaction can last years after the traumatic event. A person's demeanor may not seem "normal," and his/her memory could range from absolute clarity to no recollection at all. To become better investigators, we must constantly educate ourselves on the effects of trauma.

Additional materials on bias in investigations:

There are numerous studies and articles addressing implicit bias and cognitive biases and their impact on investigations and adjudication, including the resources cited in this article. We recommend the following to get started:

Mahzarin R. Banaji and Anthony G. Greenwald, *Blind Spot: Hidden Biases of Good People* (2016).

Guthrie, Chris; Rachlinski, Jeffrey J.; and Wistrich, Andrew J., "Blinking on the Bench: How Judges Decide Cases," 93 *Cornell L. Rev.* 1 (2007).

Zack G., "Implicit Bias — The Hidden Investigation Killer," *Law360* (Dec. 8, 2015).

Lane, Kristin A. et al., *Implicit Social Cognition and Law*, 3 *Ann. Rev. L. Soc. Sci.* 427, 431 (2007).