ART LAW:

Ethics: Bias, "Unconscious" Bias and Discrimination in the Workplace:

Rules, Laws & Visuals Guide

March 24, 2025

PRESENTED BY ALEXANDRA DARRABY

THE ART LAW FIRM® ***Successful Strategies for Creative Endeavors™***
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Source: *These Words Are Disappearing in the New Trump Administration*), Karen YourishKaren Yourish, Annie DanielKaren Yourish, Annie Daniel, Saurabh DatarKaren Yourish, Annie Daniel, Saurabh Datar, Isaac WhiteKaren Yourish, Annie Daniel, Saurabh Datar, Isaac White and Lazaro Gamio (NYT March 7, 2025)

ALERT!

- BIAS and derivations, e.g., Biases
- Implicit Bias
- Unconscious Bias
- Various media sources: Complete no-go word list
- THIS CLE COURSE IS PRESENTED BECAUSE BIAS IS A REQUIRED CLE CREDIT FOR ATTORNEY LICENSURE BY CALIFORNIA AND OTHER STATES

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PRESENTATION OUTLINE

- O. BIAS --LIKE DNA, HUMANS HAVE IT
- I.UNCONSCIOUS BIAS--HUMANS HAVE IT--CANNOT BE “ELIMINATED”
  - Multiple definitions along many vectors, pro and con
  - Psychiatry and Psychology
  - Business, Law, Economics, Science, Politics
  - Labor and Workplace Practices, Federal Agencies
- II. LEGAL REGULATION
  - White House Directives, Executive Orders, Governmental Agencies
  - Workplace Rules re Bias
  - CLE Policies
  - State Supreme Court Rules Bias and Licensing
  - State Cases re Bias, Licensing, Speech, First Amendment
- III. VISUAL IMAGES

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Dictionary Definitions from Oxford Languages/Google

- **BIAS**
- "1. noun
- *prejudice* in favor of or against one thing, person, or group compared with another, [*usually* in a way considered to be unfair] cf. science, anthropology, etc.
- 2. Statistics
- a systematic distortion of a statistical result due to a factor not allowed for in its derivation.
- 3. verb
- cause to feel or show inclination or prejudice for or against someone or something.
- 4.Statistics
- distort (a statistical result); introduce bias into (a method of sampling, measurement, analysis, etc."

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INTERNATIONAL: Royal Society Paper on Unconscious Bias

- https://royalsociety.org/-/media/policy/Publications/2015/unconscious-bias-briefing-2015.pdf
- "*The ability to distinguish friend from foe helped early humans survive. The ability to quickly and automatically categorise people according to social and other characteristics is a fundamental quality of the human mind that helps give order to life's complexity. Although we all like to think we are open minded and objective, research shows consistently across all social groups that this is not the case. We are heavily influenced in ways that are completely hidden from our conscious mind in how we view and evaluate both others and ourselves*." Professor Uta Frith

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HOUSEKEEPING

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SUBJECT MATTER OF THIS CLE PROGRAM: What it is and What it is not

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- YES: Experts agree humankind has unconscious biases. These biases express themselves internally along many vectors. This program is about how those vectors are identified by the legal profession and others and how that impacts regulation of legal practice.
- NO: This is not an anthropological or psychological study of validity or ability of regulations to "eradicate" or "eliminate" the unconscious.

- YES: The CLE materials include attorney licensing regulation; court rules, court opinions on bias. The objective is self-awareness in general and how one's own self awareness may inform professional legal practice.

  NO: The unconscious is the unconscious, not eradicable.

- YES: This presentation includes information about "tests" developed by researchers and universities that they claim evaluate bias.
- NO: This program is not about psychological testing, diagnostics, profiling, or advocating a test or any test as a predictor or indicator.

- YES: The brain responds to visual cues and visual images. Consider visual cues received zoom and teams, and platforms. This presentation is about individual responses to images and colors as an aid to your own internal beacon.
- NO: This is not about the reactions, opinions or interpretations of others--friends, law firms, family, colleagues, etc.

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Alexandra Darraby

Practice

Alexandra Darraby, a rated Super Lawyer®, represents creators, foundations, corporations, business and creative start-ups, estates, copyright, trademarks, cultural bodies, boards, appraisers, and others. is founder and principal of The Art Law Firm, a leading authority on arts, architecture, new media, technology, intellectual property, estates and trusts, insurance and risk management. Alexandra is author of **DARRABY ON ART LAW** published by global media publisher Thomson Reuters West. A former Director and owner of a contemporary gallery, Alexandra's model agreements are used in various arts industries by museums, collectors, artists, curators and art consultants. As law professor, Darraby taught ethics and co-chaired Ethics Committee for the ABA International Section. She teaches Ethics CLE courses required for attorney licensure..

In addition to private practice as advocate she is a named **Arbitrator** on the **National Roster of Arbitrators for the American Arbitration Association**. She has served as a court appointed expert, a specialist abroad for the U.S. government Department of State, a keynote and featured speaker in the USA, Russia, the UK, the EU, and Czech Republic.

Commentator, Publications, Media

Alexandra's byline and features articles are are published in dozens of art, design, architecture, business and law journals in addition to being honored as legal commentator on the Art Law treatise. Her articles on Andy Warhol and Fair Use were featured as Cover Stories on Intellectual Property Journal in California. Media coverage and interviews are published in *New York Times, Los Angeles Times, Art & Auction, Newsweek.com, MSNBC.com, NPR The World, Designers West, Smithsonian Institution*, *Royal Charter of Surveyors.* Visit the website for more information https://www.artlawfirm.com

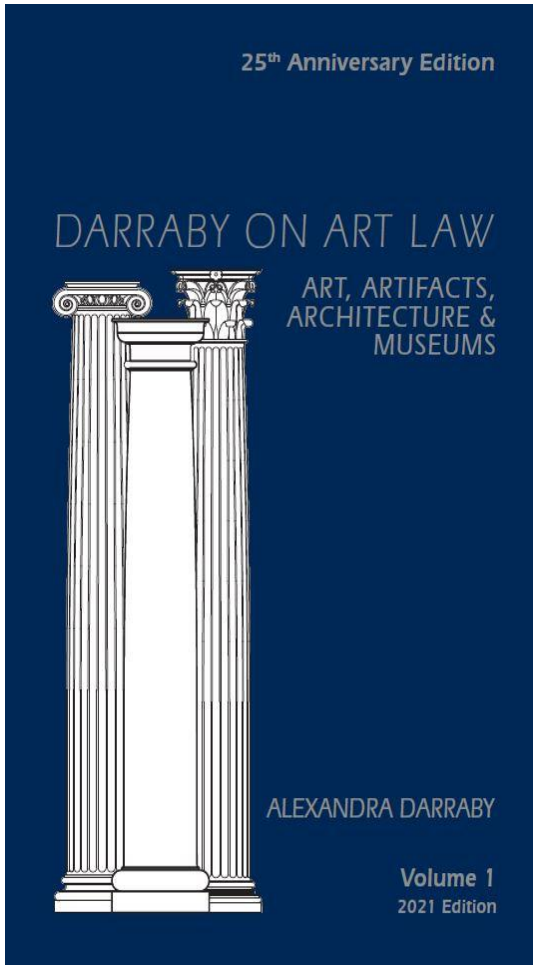
Leadership Darraby is Division Chair of International on the ABA Forum on Entertainment and Sports Law, Past Chair of the International Section of California Lawyers Association, formerly the State Bar, and former chair of copyright of the ABA International Section, a former member of the Council and of the Governing Committee of the Forum. She served as Reporter to the Uniform Law Commission on cultural property and authored a multipart series on UCC consignment and sale of artworks.

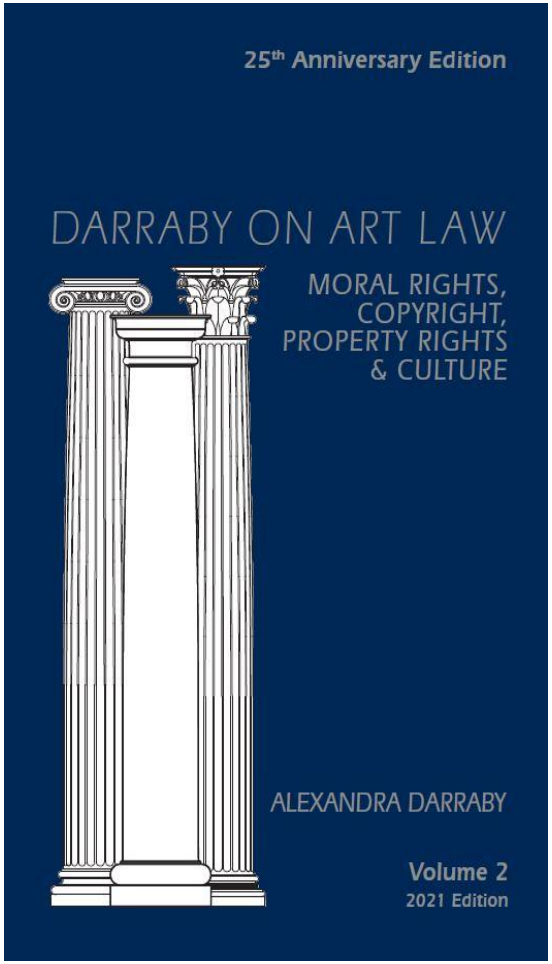
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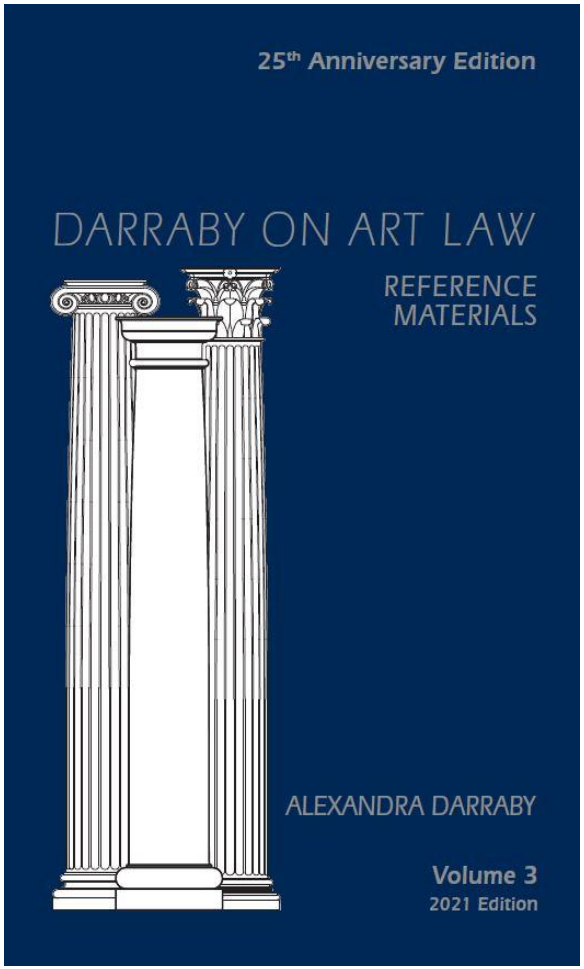
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https://store.legal.thomsonreuters.com/law-products/Treatises/Darraby-on-Art-Law-2021-ed/p/106706573

Thomson Reuters West Publisher Discount to CLE Attendees







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CONTACT DATA AND SELECTED PRACTICE AREAS
THE ART LAW FIRM® : *SUCCESSFUL STRATEGIES FOR CREATIVE ENDEAVORS™*
www.artlawfirm.com

Contact Data: Alexandra Darraby

Art Law Firm®
1801 Century Park East, Suite 2400
Los Angeles CA 90067
310 361-8589

Contact Form: *www.artlawfirm.com*

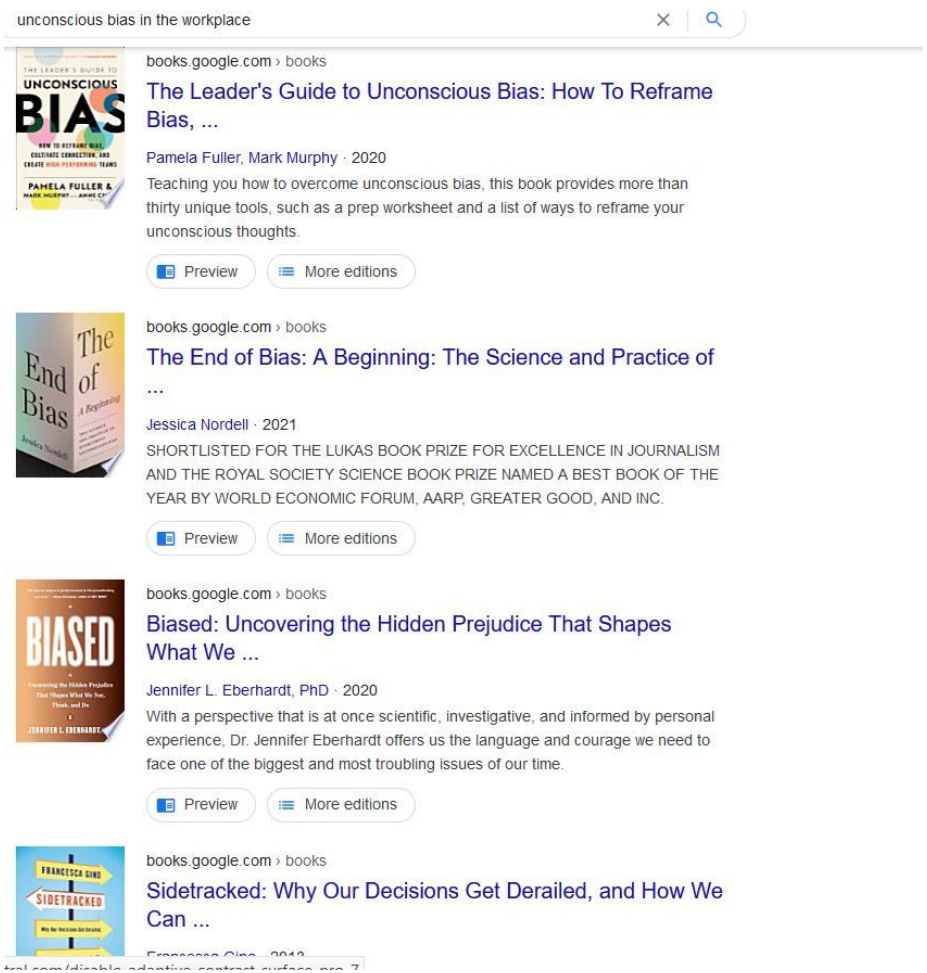
email: darrabya @ artlawfirm.com

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I. PRESENTATION: MULTIPLE SOURCES, DIVERSE OPINIONS

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BIAS: SCOPE OF SOURCES, RANDOM GOOGLE PAGE



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BIAS IN LEGAL PROFESSION

- INTELLECTUAL PROPERTY OWNERS ASSOCIATION WHITE PAPER ON BIAS
- Prepared by IPO Women in IP Committee's Push Forward Subcommittee
- https://ipo.org/wp-content/uploads/2017/11/Implicit-Bias-White-Paper-2.pdf

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Dalai Lama, 7 Facial Emotions, Emoticons, Pixar

https://www.paulekman.com/resources/universal-facial-expressions/

- Drs. Paul and Eve Ekman create the Atlas of Emotions (2016) at the request of the Dalai Lama. The Atlas is an interactive tool which builds your emotional vocabulary and illuminates your emotional world, “not a scientific work intended for peer review.”

- Dacher Keltner, a professor of psychology at the University of California, Berkeley, counsels Pixar on establishing and depicting the emotional characters for “Inside Out” and advised Facebook on its emoticons.

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APA Official Position Statement on Bias

- "Bias-related incidents arise from discrimination and intolerance based on race/ethnicity, color, gender, age, religion/spirituality, places of birth and growing up, migrant status, socioeconomic status, sexual orientation, gender identity, physical and mental illness or disabilities, and veteran status among other characteristics. Biases, both intentional/explicit/conscious and unintentional/ implicit/unconscious, underlie these incidents that are widespread in society and continue to be a source of social disruption, individual suffering, trauma, and health and mental health inequities. These bias-related incidents, occurring in both urban and rural areas, consist of acts of violence, harassment, intimidation, and microaggressions based on stereotypes that devalue the human dignity of stigmatized individuals, families, and communities. These bias-related incidents result in despair and hopelessness that undermine the mental health and well-being of affected individuals and ultimately affects the whole nation."

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Harvard University Study on Unconscious Bias

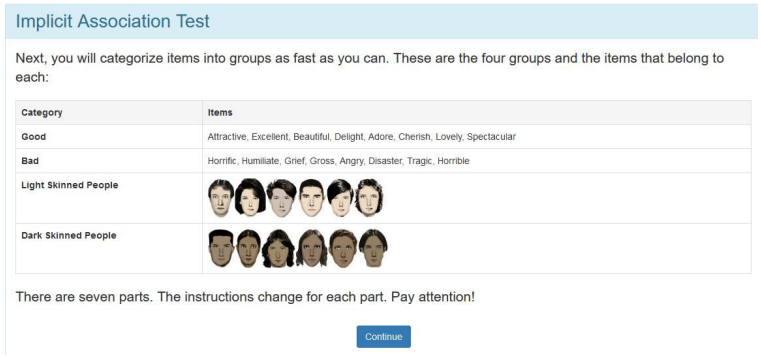
"What is the meaning of unconscious bias?

Unconscious biases are social stereotypes about certain groups of people that individuals form outside their own conscious awareness. Everyone holds unconscious beliefs about various social and identity groups, and these biases stem from one's tendency to organize social worlds by categorizing."

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Harvard University and other universities IAT Example:

disclaimer: https://implicit.harvard.edu/implicit/ (test free , results confidential, but tagged for research purposes)



Important disclaimer: In reporting to you results of any IAT test that you take, we will mention possible interpretations that have a basis in research done (at the University of Washington, University of Virginia, Harvard University, and Yale University) with these tests. However, these Universities, as well as the individual researchers who have contributed to this site, make no claim for the validity of these suggested interpretations. If you are unprepared to encounter interpretations that you might find objectionable, please do not proceed further. You may prefer to examine general information about the IAT before deciding whether or not to proceed.

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Self Test Pop Quiz

- HOW IS BIAS DESCRIBED?

- OXFORD LANGUAGES GOOGLE
- AMERICAN PSYCHOLOGICAL ASSOCIATION
- HARVARD UNIVERSITY
- DALAI LAMA
- OTHER SOURCES

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PROS AND CONS

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Beneficial claims from various sources, quoted as noted

- innovation, productivity, and creativity
- "relationship and community-building"
- "greater inclusion, equity and appreciation for diversity" *
- self-awareness

* The words "inclusion, equity and diversity" as of March 2025 are disfavored by current administration and according to media being removed from federal agencies

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Criticism of Implicit Bias

- ""Implicit bias" seems to be everywhere. What is it? "Bias," to your average layperson, seems to mean something like prejudice or discrimination. "Implicit" is usually taken to mean unconscious or outside of awareness. So "implicit bias" is, supposedly, something like prejudices of which people are not even aware.

- However, the research on so-called implicit bias has its serious critics. Almost everything about implicit bias is controversial in scientific circles. It is not clear, for instance, what most implicit bias methods actually measure; their ability to predict discrimination is modest at best; their reliability is low; early claims about their power and immutability have proven unjustified. And yet some colleges and corporations have been rushing to institute "implicit bias trainings" in attempts to reduce discrimination (attempts that are, in my view, misguided and unlikely to be effective)."

  Author: Lee Jessum, Ph.D Psychology Today (Dec. 2, 2017)
- https://www.psychologytoday.com/us/blog/rabble-rouser/201712/mandatory-implicit-bias-training-is-bad-idea

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II. LEGAL REGULATION

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ABA RULE 2.3 “BIAS PREJUDICE HARASSMENT”

- (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

- (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.

- (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

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Revised ABA Rule 8.4(g)

ABA Model Rule 8.4
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

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AMENDED DC RULE 9.1

- **Rules of Professional Conduct**
- **Rule 9.1: Discrimination in Employment**
- A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

Comment

[1] This provision is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.

[2] The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. Such experience may involve, among other things, methods of analysis of statistical data regarding discrimination claims. These agencies also have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination.

[3] If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Disciplinary Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Disciplinary Counsel and material allegations involved in such other proceedings. *See* §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.

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ABA Rule 8.4(g)

- Rule 8.4(g): lawyers must not "knowingly engage in conduct constituting harassment or discrimination" on several grounds, including race, sex and religion.
- U.S. District Judge Chad Kenney holds ABA rule adopted last year by the Pennsylvania Supreme Court is overbroad and conflicts with the First Amendment.
- Greenberg v. Goodrich, Case 2:20-cv-03822-CFK Filed 03/24/22

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California AB 242 (effective 2019)

- "Research shows individuals can reduce the negative impact of their implicit biases by becoming aware of the biases they hold and taking affirmative steps to alter behavioral responses and override biases."
- "…all licensees under this chapter [Cal lawyers] include() training on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system."

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California Supreme Court New Rule 8.4.1

- "…requires lawyers to notify the California Bar Association of "any criminal, civil, or administrative action premised, in whole or in part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding."
- --stricter approach to disciplining attorneys for discrimination, harassment, and retaliation in law practice and legal representation.
- --grants State Bar power to investigate and prosecute discrimination and harassment claims
- --failure to advocate corrective action violates rule

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ABA Trade Association and Court Rules

- ABA:
- CLE programs with three or more panelists, including the moderator, must have at least one member from a diverse group. Programs with five to eight panelists must have at least two diverse members, and programs with nine or more panelists must have at least three diverse members. (March 2017)

- FLORIDA SUPREME COURT RULING (December 16, 2021)
- "The Florida Supreme Court on Thursday reaffirmed a decision that bans Florida lawyers from receiving continuing legal education credit for programs that require diversity among panelists—including the ABA's CLE programs.
- Florida court: ABA's diversity policy imposes "quotas" on CLE panels that "smacks of stereotyping or naked balancing."
- Florida Supreme Court: "We reject the notion that quotas like these cause no harm. Quotas depart from the American ideal of treating people as unique individuals, rather than as members of groups. Quotas are based on and foster stereotypes. And quotas are divisive."

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ABA ALTERS POLICY, FLORIDA SUPREME COURT REINSTATES ABA CLE PROGRAMS
https://www.reuters.com/legal/legalindustry/aba-revises-diversity-policy-lawyer-education-programs-after-setback-2022-04-08/

- April 2022
- ABA's revised CLE policy:
- program organizers will "invite and include" program moderators and speakers from historically underrepresented groups," dropping any specific requirements from the 2017 version.
- ABA Goal III: "eliminate bias and enhance diversity within the legal profession."
- Florida re-instated ABA CLE programs.

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IV. VISUAL EXAMPLES

- SELF TESTS
- NOTETAKING NEEDED

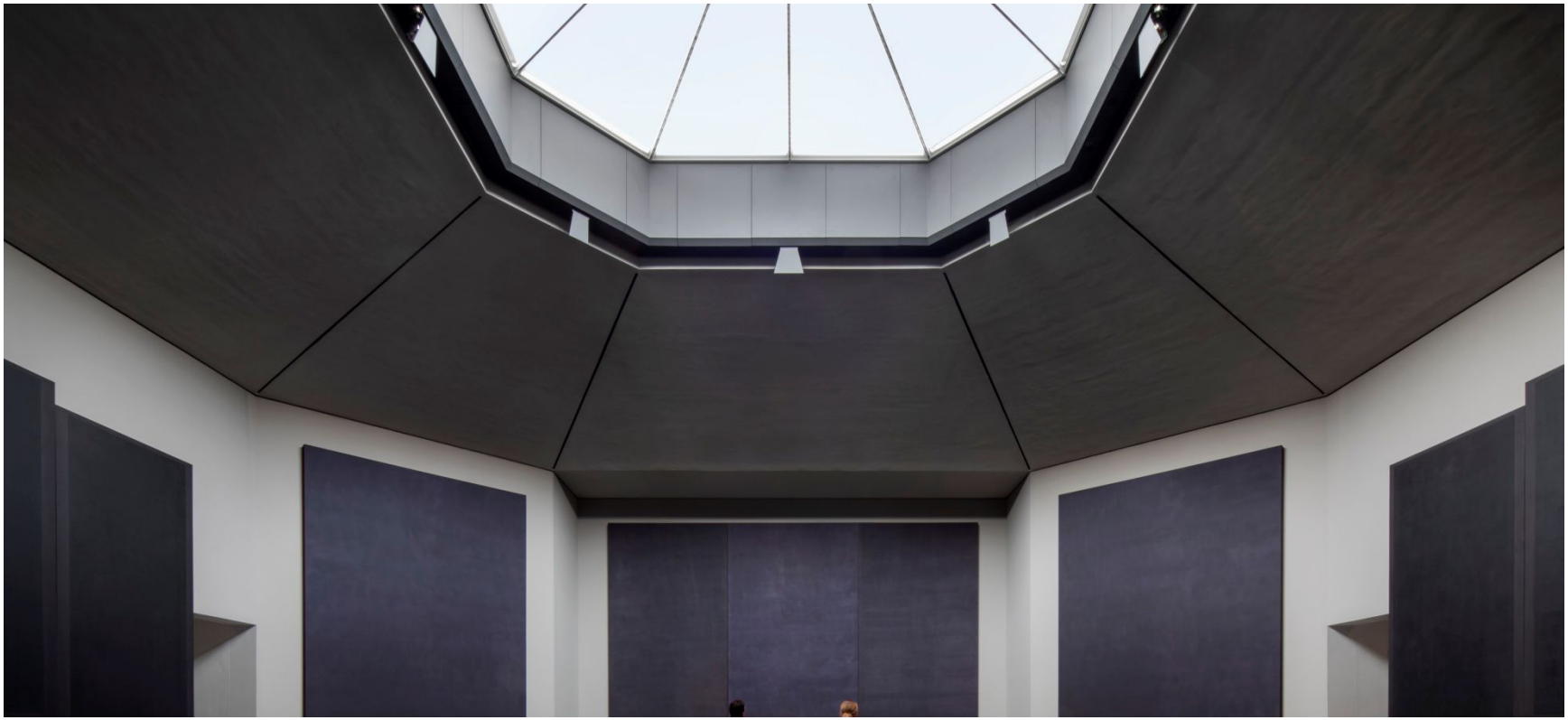
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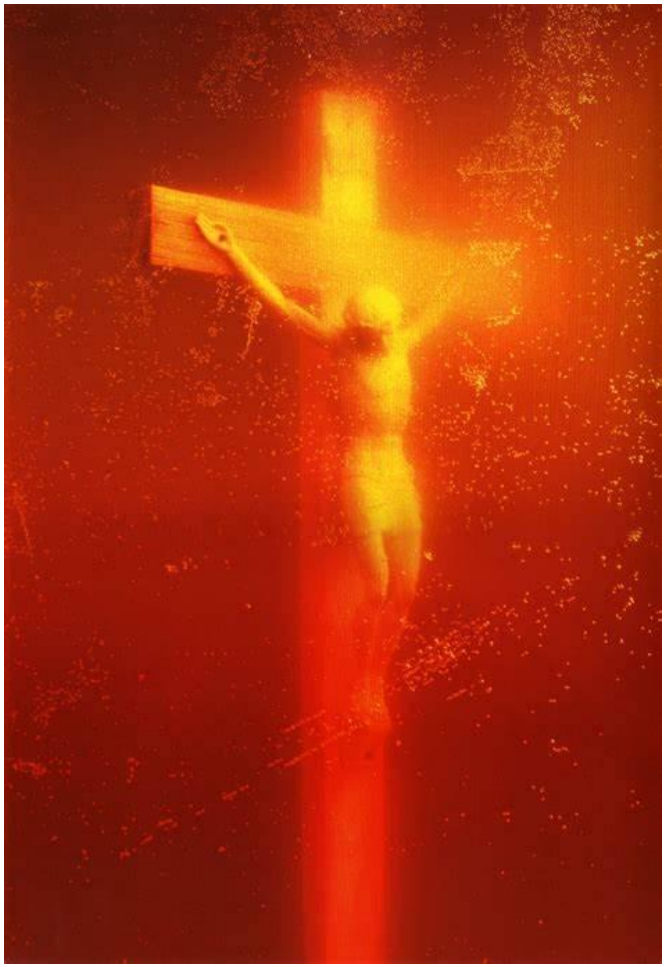
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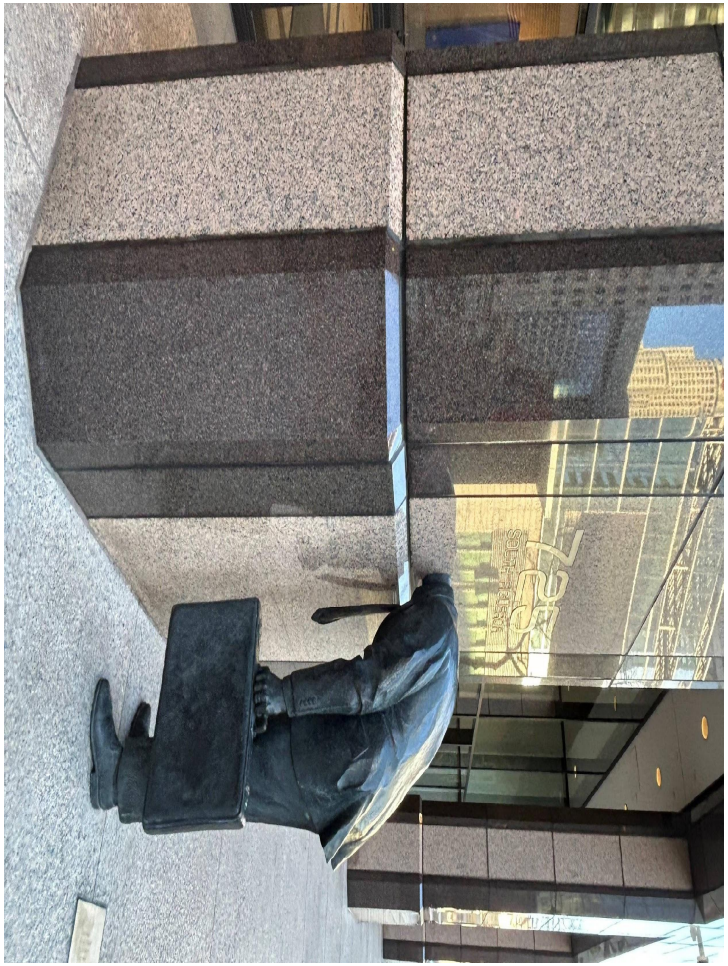
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