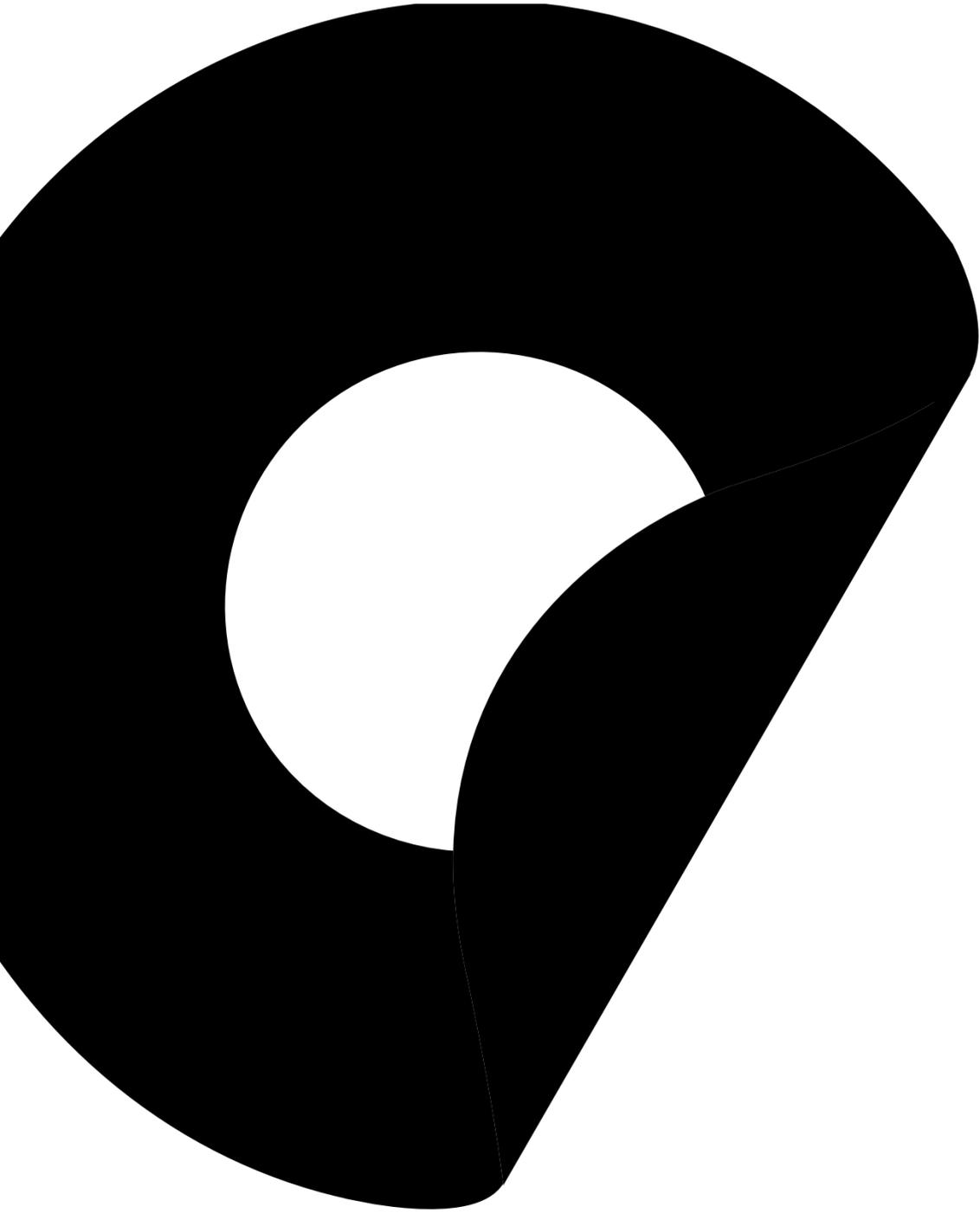




# **UNCONSCIOUS BIAS**

**Christina J. Ro-Connolly**  
Oppenheimer Investigations Group, LLP

**1:00 p.m – 2:00 p.m.**



# **The Impact of Unconscious Bias in Investigations**

CSU Chancellor's Office

July 27, 2023

Oppenheimer Investigations Group LLP

[www.oigl.com](http://www.oigl.com)



# OVERVIEW

## Biases: The Shortcuts our Minds Take

- Implicit biases, preferences and stereotypes
- Our implicit biases against disadvantaged groups

## More Shortcuts: How Cognitive Biases Impact our Decisions

- Intuition vs. Deliberation
- Confirmation Bias

## Putting It All Together: Addressing Implicit Bias

- How biases impact investigations
- Investigator biases
- Addressing and eliminating the impact of biases on our investigations



# **BIASES:** THE SHORTCUTS OUR MINDS TAKE

## Who Wants to Be Unfair?

How many of you conduct investigations because you want to treat people unfairly?

Make unfair decisions?

Be biased towards or against a particular group?

©

Investigations Group

## Attention

Where we place our attention biases us towards particular conclusions. Our brains naturally take shortcuts by paying attention selectively.



# How many of each animal did Moses put on the ark?



© 2023 Oppenheimer  
Investigations Group  
LLP

**The answer is ...**

- a) One
- b) Two
- c) Two of each
- d) None of the above

It was **Noah** who put the animals on the ark



© 2023 Oppenheimer  
Investigations Group  
LLP

## Implicit/Unconscious Bias

Implicit bias is a form of bias that occurs automatically and unintentionally, that nevertheless affects judgments, decisions, and behaviors.

*National Institute of Health* (<https://diversity.nih.gov/sociocultural-factors/implicit-bias>)

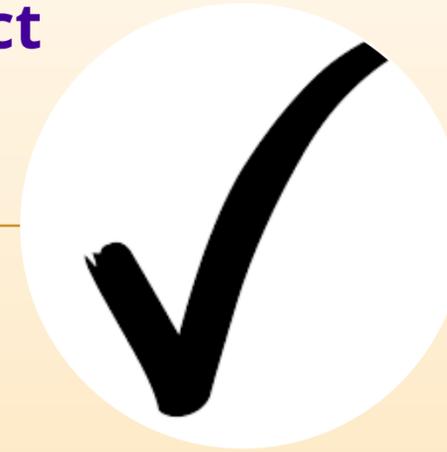


## Why Does It Matter?

It undermines essential  
fairness

It is visible to others -  
biases leak out!

## The “Not Me” Effect



We all have biases and act from them in unconscious ways.



The more we can consciously acknowledge this, the more we can overcome our biases.



People who explicitly know they have biases and admit to them show *less* implicit bias.

## It is normal

- It is a normal cognitive process; it's what makes us human.

## It is unconscious

- It operates *without conscious intent.*

## It can be nefarious

- It tends to mostly impact members of traditionally-disadvantaged groups.

## The Impact of Racial Bias

# ABA Study of Law Firm Partners Evaluating a Legal Memo (2014)



The memo had 22 errors: 7 minor spelling or grammar errors, 6 substantive technical writing errors, 5 errors in fact and 4 errors in analysis.



Reviewers participated in a “writing analysis study.” Half were told the memo was written by an African-American male and half were told it was written by a White male.

# Results of the Study



The African-American male received a 3.2 out of 5.



The White male received an average rating of 4.1 out of 5.

## The Impact of Racial Bias (cont.)

White  
interviewers

- White interviewers were videotaped interviewing White and Black job applicants.
- The White interviewers:
  - spoke to and smiled more at the White applicants
  - hesitated more and made more speech errors when speaking to Black applicants, which led the interviewees to make speech errors due to "mirroring"
  - sat further back, leaned away, and gave shorter interviews with the Black applicants.

©

Investigations Group

## White interviewers

- When White interviewers were trained to act towards the White applicants the way they had towards the Black applicants, the White applicants:
  - performed worse;
  - were more uncomfortable; and
  - judged the White interviewer to be less friendly.

Word, Carl O., Zanna, Mark P. and Cooper, Joel, *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. Experimental Soc. Psychol. 109 (1974).

McConnell, A. R., & Leibold, J. M. (2001). *Relations Between the Implicit Association Test, Explicit Racial Attitudes, and Discriminatory Behavior*, Journal of Experimental Social Psychology, 37, 435-442.



# MORE SHORTCUTS: COGNITIVE BIASES

## Cognitive Biases

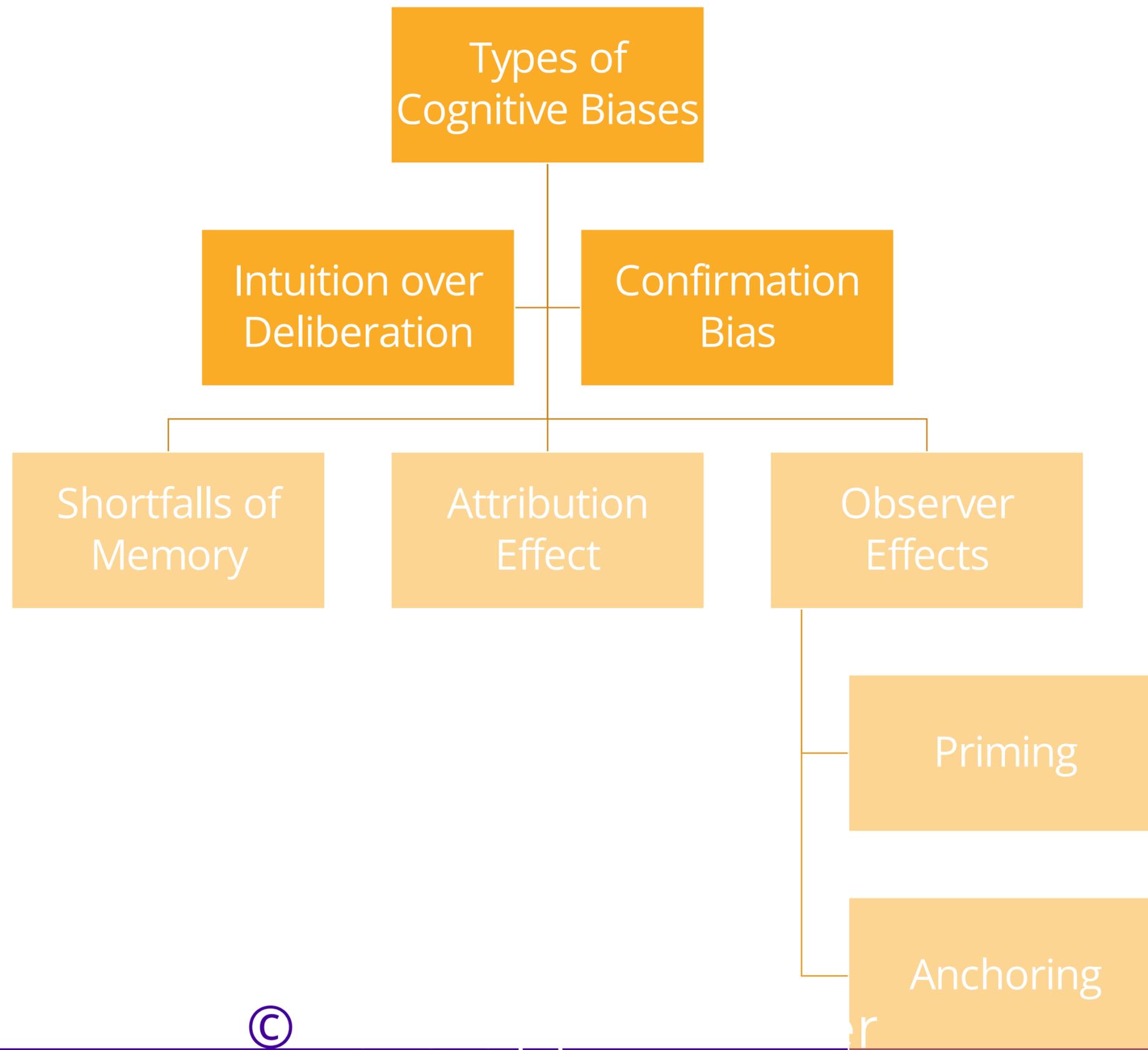
Cognitive bias refers to the systematic ways in which the **CONTEXT** and **FRAMING** of information influences our judgment and decision-making.

- These are different from preferences and stereotypes.
- They are additional ways our brains “play tricks” on us.
- Cognitive biases are based on the way we process information from the external input we receive.

©

Investigations Group

LLP



## Deliberation or Intuition?

A bat and a ball cost \$1.10 in total

The bat costs \$1.00 more than the ball

How much does the ball cost?

©

Investigations Group

## The answer is ...

A bat and a ball cost \$1.10 in total.

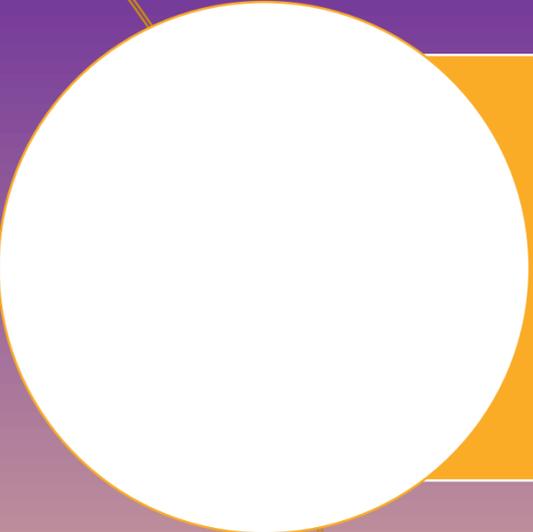
The bat costs \$1.00 more than the ball.

How much does the ball cost?

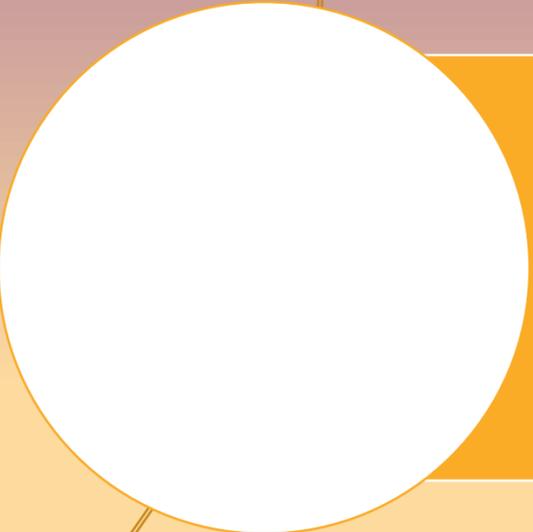
The answer is 5 cents.

\$1.05	\$1.00	Cost of the bat
.05	.10	Cost of the ball
<hr/>		
\$1.10	\$1.10	Total cost
[\$1.00 more]	[.90 more]	

## Cognitive Reflection Test



The CRT has a correct answer that is easy to discern upon reflection. It also has an intuitive but incorrect answer that immediately jumps to mind.



The CRT responses provide evidence that ordinary adults have dual-processing systems in which intuition tends to dominate, but this can be overcome by deliberation.

## Confirmation Bias

*It is difficult to avoid the subconscious tendency to reject for good reason data which weaken a hypothesis, while uncritically accepting those data which strengthen it.*

*— Seymour Kety*

12  
ABC  
14

The tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence

This is done unconsciously, but it impacts how we interpret information

## Confirmation Bias

Participants were asked, before reviewing all of the evidence in a case, to form a hypothesis about who was guilty.

Forming a hypothesis based on incomplete information caused participants to look for reasons to find this person guilty, even in the face of evidence tending to exonerate the person.

Then, some of the participants were asked to explain **why their initial hypothesis might be wrong**. Others were asked to generate two additional suspects.

Those who considered why their initial hypothesis about who was guilty might be wrong showed less confirmation bias than did those who were asked to name additional suspects.



**PUTTING IT ALL  
TOGETHER:  
ADDRESSING IMPLICIT  
BIAS**

## Impact on Investigations

We are all likely to adopt dominant social biases, even against groups to which we belong, and these biases are strong when we investigate cases with witnesses from disadvantaged groups.

Implicit biases may prevent an investigator from digging deeper to understand facts and motives.

- Confirmation bias and priming may be hard at work under the surface, leading an investigator to predetermined outcomes.

## Bias in favor of a witness

Witness who articulates an experience the investigator has had might not be questioned in detail because investigator unconsciously “fills in the blanks.”

- The witness who articulates sexual harassment/discrimination
- The witness who is crying and clearly upset

Witness who holds a position of power or looks very professional might be presumed credible or may feel “beyond

## Bias against a witness

Witness who comes from a background or articulates something that investigator is biased against may be stereotyped.

- The witness who is a jerk but might be “an equal opportunity jerk”
- The witness who uses terms that trigger the investigator

**The Question Primes the Answer**

***“The Misinformation Effect”***

*Information received after an event interferes with prior memory of the event*

Version One

How fast were the cars going when they hit each other?

Version Two

How fast were the cars going when they smashed into each other?

## The Question Primes the Answer

Version One

Do you get headaches occasionally?

Version Two

Do you get headaches frequently?

Group asked “occasionally” reported an average of .7 headaches per week

Group asked: “frequently” reported an average of 2.2 headaches per week

## The Question Primes the Answer

Version One

How loudly did she yell?

Version Two

What was the volume of her voice?



How the investigator asks the question influences the responses about volume. Make sure to ask about the volume of someone's voice rather than how loudly they yelled.

*Studies were derived from Elizabeth Loftus © "The Misinformation Effect" research papers.*

# Investigator Biases

Anything  
that makes  
our job  
easier

Favoring  
our  
employer  
or client

Delivering  
bad news

Workplace  
"whiners"

Majority  
rule

People we  
sympathize  
with

People with  
power

# Techniques to Reduce Investigator Bias

Be careful not to take in information about the client/decision maker's theories of the case/witnesses

Be careful what documents you review prior to interviews; consider postponing for after certain witness interviews

Have a consistent, well-planned process

Note any emotional reactions you are having to the case and consider how they may bias you towards/against certain witnesses or hypotheses

Utilize a peer reviewer

See Ashley Lattal, *The Hidden World of Unconscious Bias and its Impact on the "Neutral" Workplace Investigator*, 24 J. L. & Policy 411 (2016).

©

Investigations Group

# Techniques to Reduce Investigator Bias

## *Prepare Your Mindset*

*Prepare your mindset*

Remind yourself that you are a neutral factfinder

Make sure the words “neutral,” “objective,” and/or “independent” appear in your introduction to interviewees to remind YOURSELF of the goal.

# Techniques to Reduce Investigator Bias

## *Interviewing Witnesses*

Refrain from forming an early hypothesis regarding guilt or credibility

Ask open-ended, non-leading questions

Make sure the respondent has sufficient notice of the allegations and a sufficient chance to respond

# Techniques to Reduce Investigator Bias

## *Credibility Assessments*

Refrain from relying on appearance  
(e.g., dress, body language, affect)

Focus on auditory cues (i.e., vague?  
contradictory? tends to exaggerate?  
forthcoming? willing to admit  
disadvantageous information?)

Consider motive,  
possible fabrication of  
allegations, negative  
feelings one witness  
may have against  
another

# Techniques to Reduce Investigator Bias *Evidence*



© 2017 Oppenheimer

Investigations Group

LLP

# Techniques to Reduce Investigator Bias *Findings*



Consider alternative hypothesis, that is, consider why your current hypothesis could be wrong



Give your findings "strict scrutiny"

- Draft difficult findings both ways - for and against the respondent
- Have another investigator read your report and provide feedback



# Any Questions?



©

Investigations Group

LLP



---

INVESTIGATIONS | TRAININGS | MEDIATIONS

# Thank you!

Oppenheimer Investigations Group | [www.OIGLaw.com](http://www.OIGLaw.com)

© 2023 Oppenheimer  
Investigations Group  
LLP