



# HOW TO SEE AND USE IMPLICIT BIAS IN MEDIATION

WHY SCOUTS BUILD TRUST AND WARRIORS CAN'T

VCBA – 1/21/2023

Robert Cohen

Sidney Kanazawa

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## HOW MANY OF EACH ANIMAL DID MOSES PUT ON THE ARK?



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## ASIAN WOMEN MATH STUDY

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- Two identity groups
  - Asian
  - Women
- Three questionnaires
  - Asian identity
  - Women identity
  - Control



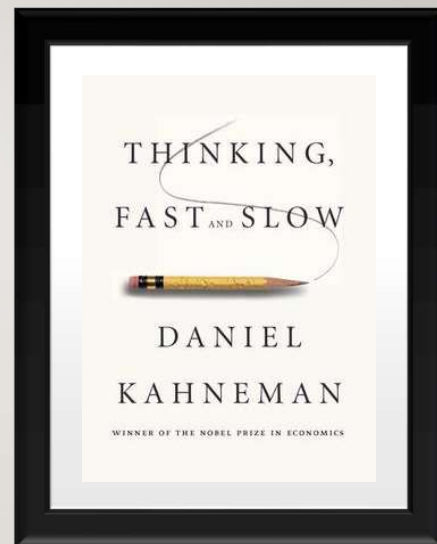
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## THINKING FAST AND SLOW

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Daniel Kahneman


Winner of Nobel Prize in Economics



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ABA  
Implicit  
Bias  
Initiative


SCAN ME



A slide with a light gray background and a wooden floor at the bottom. On the left, the text 'ABA Implicit Bias Initiative' is stacked vertically. A thin red vertical line is to the right of the text. On the right, there is a black speech bubble pointing down containing the text 'SCAN ME', and below it is a QR code enclosed in a black square frame.

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3,355  
convicted  
exonerated  
since 1989



SCAN ME

A slide with a light gray background and a wooden floor at the bottom. On the left, the text '3,355 convicted exonerated since 1989' is stacked vertically. A thin red vertical line is to the right of the text. On the right, there is a QR code enclosed in a black square frame, and below it is a black speech bubble pointing up containing the text 'SCAN ME'.

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Is this a  
problem?

Lawyers = warriors

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## ABA CANNONS OF PROF. ETHICS (1909 – 1963)

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“In America, where the **stability of Courts** and of all departments of government rests upon the **approval of the people**, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the **public** shall have **absolute confidence** in the **integrity and impartiality** of its administration.”

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GIBSON DUNN & CRUTCHER  
(1952)  
“CHECKERS SPEECH”

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JOSEPH NYEWELCH (1954)  
SENATOR JOSEPH MCCARTHY HEARINGS



**“Senator . . . At  
long last, have  
you left no  
sense of  
decency?”**

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## ABA MODEL CODE OF PROF. RESP. (1969 – 1980)

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“The continued existence of a **free and democratic society** depends upon the recognition of the concept that justice is based upon the **rule of law** grounded in **respect** for the **dignity** for the **individual** and his capacity through reason for enlightened **self-government**. Law so grounded makes justice possible . . . . Lawyers, as **guardians of the law**, play a vital role in the preservation of society. . . .”

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## “ZEALOUS” – 1983 ABA MODEL RULES P. C.

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- A **lawyer** . . . is a representative of **clients** . . . .
- As advocate, a lawyer **zealously** asserts the **client's** position under the rules of the adversary system. As negotiator, a lawyer seeks a result **advantageous** to the **client** but consistent with requirements of honest dealings with others.

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## “ZEALOUS” – 1983 ABA MODEL RULES P. C.

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- A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an **opposing party is well represented**, a lawyer can be a **zealous** advocate on behalf of a client and at the same time **assume that justice is being done**.

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## “ZEALOUS” V. “GUARDIANS”

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### “ZEALOUS” WARRIOR

- Zero-Sum Game
- Loyalty only to client
- Interested in **destroying enemies – my way**

### “GUARDIANS OF THE LAW”

- Rule of Law Justice
- Loyalty to integrity/impartiality/fairness
- Interested in **principled collaboration – our way**

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**PUBLIC PERCEPTION OF LAWYERS**

**Pew Research – Lawyer Contributions to Society (2013)**

- 18% say lawyers contribute **a lot** to society
- 43% say lawyers contribute **some**
- **34% say lawyers contribute not very much or nothing at all**

**Gallup Poll – Very High or High Honesty & Ethics (2022)**

- 79% - Nurses
- **21% - Attorneys**

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**ABA STUDY OF PUBLIC PERCEPTION (2016)**

74% - “lawyers are more interested in winning than in seeing that justice is served.”

69% - “lawyers are more interested in making money than in serving their clients.”

57% - “lawyers are more concerned with their own self-promotion than their client’s best interests.”

51% - “we would be better off with fewer lawyers.”

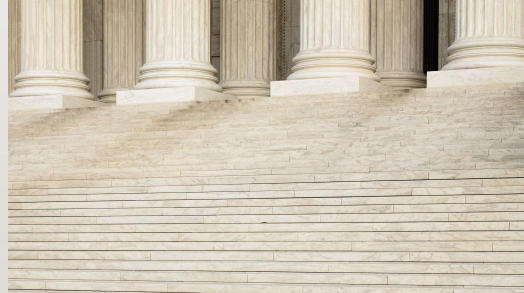
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## 2018 CAL. R. OF PROF. CONDUCT -

### GUARDIANS OF LAW

- The following rules are intended to **regulate** professional conduct of lawyers through **discipline**. . . . to **protect** the **public**, the **courts**, and the **legal profession**; protect the **integrity of the legal system**; and promote the administration of justice and **confidence in the legal profession**.



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## California

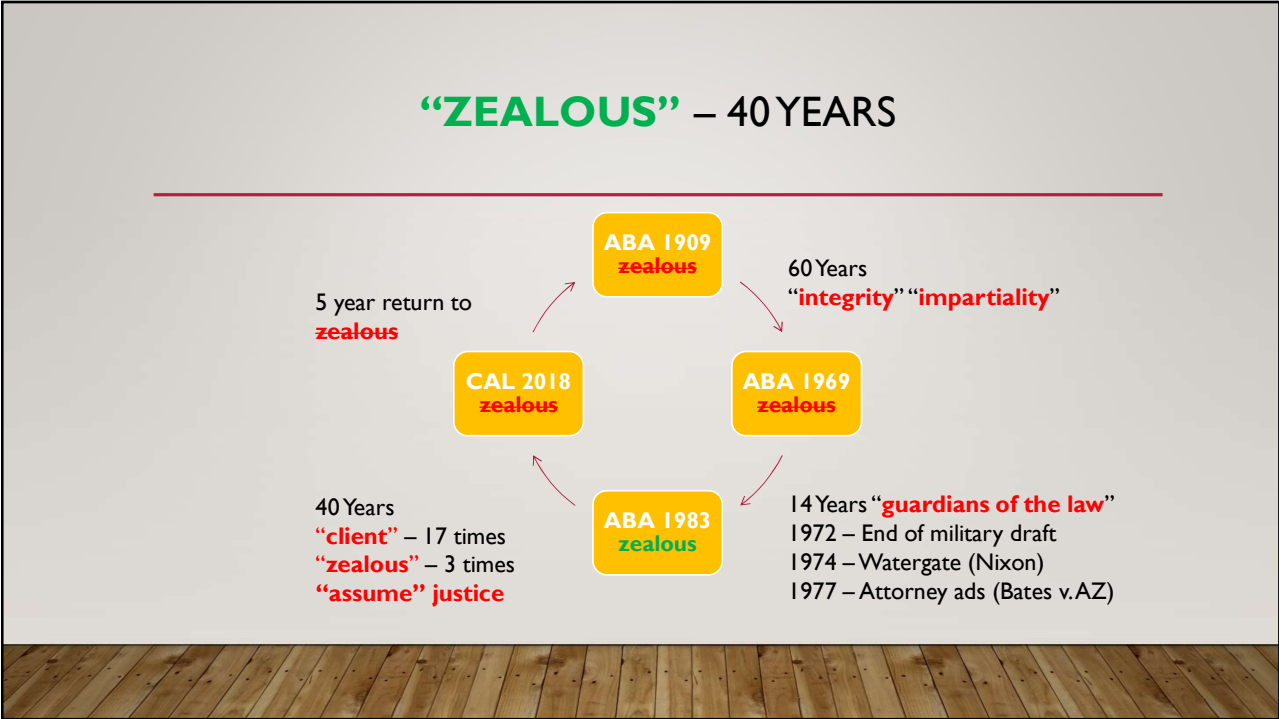
### FAIR AND TRUTHFUL

Rule 3.3 – “**Candor** Toward the Tribunal”

Rule 3.4 – “**Fairness** to Opposing Party and Counsel”

Rule 4.1 – “**Truthfulness** in Statements to Others” (4.2, 4.3, Rule 7 (Advertising), Rule 8 (**Integrity**))

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## HOW DO WE REFRAME IMPLICIT BIAS IN MEDIATION?

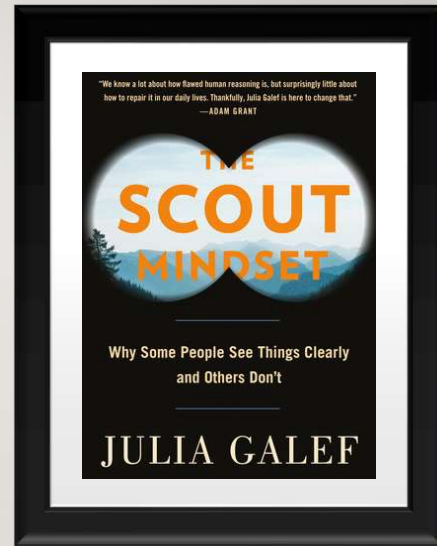
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## THE SCOUT MINDSET:

Why some people see things clearly and others don't

Julia Galef



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## DIFFERENCE?

- **SOLDIERS** – ONE right way – MY WAY – defend, attack, dominate – TO WIN

- Implicit bias
- Who is the enemy?
- How do I defeat them?

- **SCOUTS** – ACCURATE FACTS

- Is it true?
- What is and how do we know?
- How can we solve the problem?



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## SCOUT MENTALITY

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- Present - see what is
- Listen - for opportunities
- Patient – thinking slow



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## SCOUT BUILDS TRUST

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- Warriors cannot be trusted
  - Want to win
  - “Zealous” advocate
- Scouts can be trusted
  - Accurate – what is



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## SCOUT COLLABORATES

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- Humility
- Rapport
- Respect
- "WE" – "OUR WAY"



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## SCOUT SHOWS/INVITES OPEN MIND

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- Sincerity
- Authenticity
- Empathy



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## SCOUT COMMUNICATES

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- Reciprocal – Golden Rule
- Shared briefs – No Hiding
- Acknowledging – wants and needs of both sides
- Asks – not demands
- Proposes – “what if”
- Comfortable being wrong



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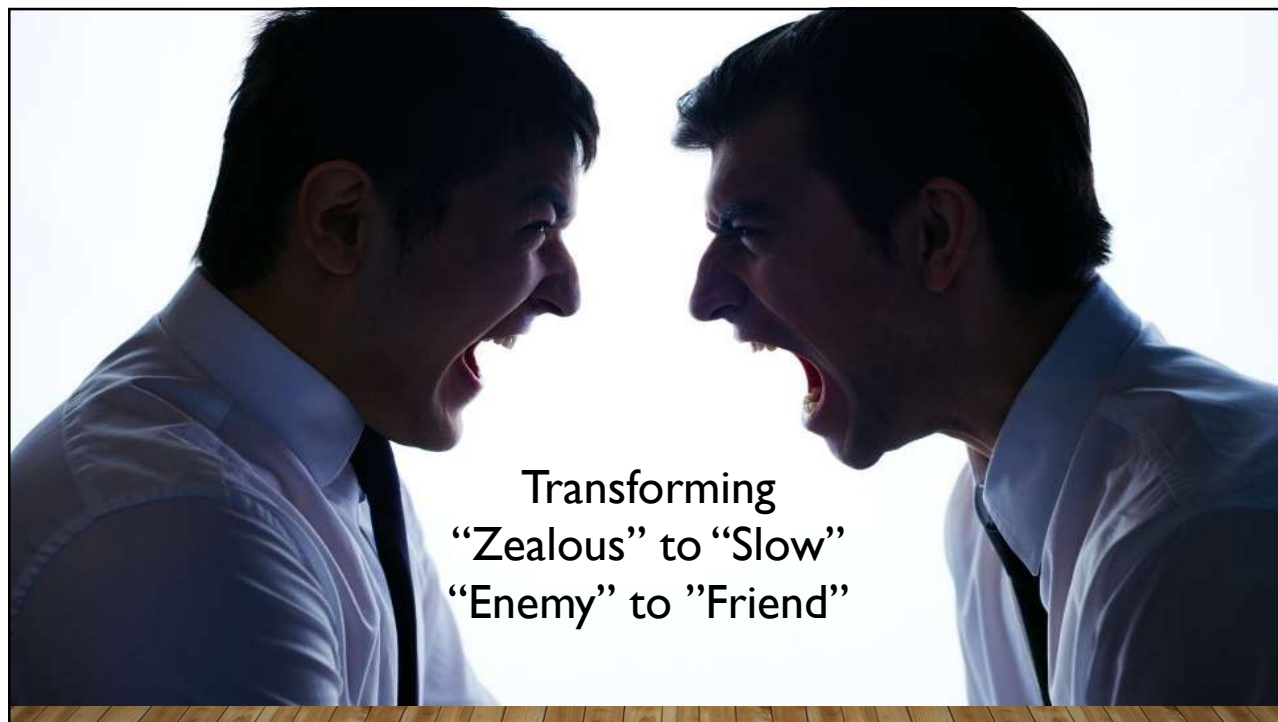
## SCOUT IS CURIOUS

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- Actively listens
- Seeks to understand the “why” behind the position
- But does not ask “why



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CALM – SLOW THINKING

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Looking Forward

Not Back

A framed photograph of a long, straight asphalt road stretching into the distance. The road has a yellow dashed center line and white edge lines. The landscape is a dry, open field with sparse vegetation, and mountains are visible in the far distance under a bright blue sky with scattered white clouds.

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