Implicit Bias in the Legal Profession

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Overview

- What implicit bias is
- Why it matters for lawyers and its impact on diversity in the profession
- Current legal trends
- Best practices
Downton Abbey
A Primer on Bias

John Bates, aspiring valet
Implicit Bias

• Implicit Bias: A valet to the master must be an able-bodied man.

• Conscious Bias:
  • THOMAS (another valet) and O’BRIEN (a ladies’ maid) set out to make Bates look incompetent, kick his cane out from under him.

• Unconscious Bias:
  • MRS. HUGHES (housekeeper): But how can you manage?
  • MRS. PATMORE (cook): Because we’ve all got our own work to do; what about all them stairs?
  • ROBERT (master of the house): And the house hasn’t worn you out with the endless stairs and everything?
  • MR. CARSON (butler): Can you manage, Mr. Bates, or would you rather wait here? There's no obligation for the whole staff to be present.
Why Being Aware of Bias Matters

• Awareness of existence of disparities in treatment helps eliminate disparities in decision making.
• Doctors who learned of racial disparities in treatment showed change in behavior.

Source: (Burgess et al. Reducing racial bias among health care providers: lessons from social-cognitive psychology)
Our Diverse Country

Mapping the USA's Diversity, 1960-2060

The USA TODAY Diversity Index shows diversity has surged in the last 50 years and is expected to continue rising. The U.S. Index rose from 20 in 1960 to 55 in 2010. Driven by changing attitudes and a record wave of immigration, the pace of change varies widely, sometimes even in adjacent counties.

National Data

Diversity Index: 55
Population: 308,745,538

Race Breakdown

*Other* includes any other groups counted in that year.

Hispanic Share

Hispanics can be of any race.

Source: USA TODAY analysis of data from Census Bureau, NHGIS, University of Minnesota, ProximityOne, Alexandria, Va.
Where Former Minorities Are Majorities

- Hawaii – 77%
- California – 62%
- New Mexico – 61%
- Texas – 57%
- District of Columbia – 64%

http://www.census.gov/quickfacts/ 2014 statistics, rounded. Minority = person of color and/or Hispanic
California’s Demographics

- 27% of California’s population born outside of the U.S.

- Same-sex couples are a significant growing percentage of California’s population
  - 2010 – 2%
  - Over half of recognized same-sex couple households resided in California. (2010)

- Minorities comprise 53% of the population of San Diego County

Sources:  http://www.census.gov/quickfacts/table/PST045214/00_06073.06
U.S. Census Bureau: 2010 American Community Survey – Same-Sex Couple Households http://www.census.gov/hhes/samesex/
Diverse But Not Always Integrated

Chicago

2010 Census Block Data
1 Dot = 1 Person
- White
- Black
- Asian
- Hispanic
- Other Race / Native American / Multi-racial
Diverse But Not Always Integrated

Detroit’s 8 Mile Road

2010 Census Block Data

1 Dot = 1 Person

- White
- Black
- Asian
- Hispanic
- Other Race / Native American / Multi-racial
Diverse But Not Always Integrated

San Francisco

2010 Census Block Data

1 Dot = 1 Person

- White
- Black
- Asian
- Hispanic
- Other Race / Native American / Multi-racial
The Diverse Workplace

• Workplaces have become more diverse

• Nationally:
  • 37% minorities
  • 48% women
  • 56% 40 years or older

• In California:
  • 57% minorities (Black, Asian, Hispanic)
  • 45% women

Source: EEOC: 2014 Job Patterns for Minorities and Women in Private Industry (EEO-1)
Bureau of Labor Statistics, 2014 Employment status of the civilian noninstitutional population by age, sex, and race
The Legal Industry

Times they are a-changing:

- Between 1951 and 1965, women made up 3% of law school classes.
- In 1980, only 8% of practicing attorneys were women.
- In 2005, women made up 30% of all practicing attorneys.
- In 2012-2013, 47% of law degrees were awarded to women and women made up 34% of all practicing attorneys.

Source: Martin, Doing Justice, Doing Gender, (SAGE Publications, Inc. 2007)
NALP Bulletin: 2010 Women and Minorities in Law Firms by Race and Ethnicity
Commission on Women in the Profession, ABA – A Current Glance at Women in the Law (July 2014)
## Law Firms – We Can Do Better

<table>
<thead>
<tr>
<th>LAW FIRM DEMOGRAPHICS</th>
<th>2010</th>
<th>2014-2015</th>
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<tbody>
<tr>
<td>Associates</td>
<td></td>
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<tr>
<td>Minorities</td>
<td>20.3%</td>
<td>21.6%</td>
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<tr>
<td>Minority Women</td>
<td>11.1%</td>
<td>11.5%</td>
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<tr>
<td>LGBT</td>
<td>2.7%</td>
<td>1.80%</td>
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<th>LAW FIRM DEMOGRAPHICS</th>
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<tr>
<td>Partners</td>
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<tr>
<td>Minorities</td>
<td>6.7%</td>
<td>7.33%</td>
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<tr>
<td>Minority Women</td>
<td>2.2%</td>
<td>2.45%</td>
</tr>
<tr>
<td>LGBT</td>
<td>1.6%</td>
<td>3.08%</td>
</tr>
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</table>

Commission on Women in the Profession, ABA – A Current Glance at Women in the Law (July 2014)
NALP Bulletin, Dec 2015, LGBT Representation Among Lawyers in 2015
In-House Counsel

• Late 1990s: Less than 10% of Fortune 500 GCs were people of color

• In a Minority Corporate Counsel Association survey of top legal positions in corporate legal departments:
  • 20% were held by minorities
  • 36% were held by women (21% at Fortune 500 companies)
  • 16% were held by minority women

Sources: Lawyers for One America – The Numbers
Minority Corporate Counsel Association (MCCA) - 2011 Sustaining Pathways to Diversity
MCCA Survey: Women General Counsel At Fortune 500 Companies Reaches New High (Aug 3, 2012)
UNDERSTANDING BIAS
Types of Bias

Deliberate discrimination

• Adverse action based on protected class
• Known as “disparate treatment” – requires showing of unlawful motive
• Almost always illegal

“We completely disregard gender when offering compensation. Unless you’re the wrong gender.”
Disparate impact discrimination

• Neutral policy or practice that adversely affects a protected class
• Does not require showing of unlawful motive
• Unlawful unless job related and justified by business necessity
Implicit Bias
Stereotypes

- Learned in childhood, persist through adulthood
- Expectations about groups
- May be generally true but not necessarily relevant in individual cases
- Affect jobs as well as people
Stereotypes*

• Expectations about groups
  • Mothers and the elderly: nice but not competent
  • Feminists and business women: competent but not nice (Operario & Fiske, Stereotypes)

• May or may not be generally true, but are irrelevant to individuals
  • Most women become mothers and have more family responsibilities than men (Correll, Motherhood Penalty)
  • Since I came back from maternity leave, I get the work of a paralegal. I want to say, ‘Look, I had a baby, not a lobotomy.’” (Rhode, Myths of Meritocracy)

• Affect jobs as well as people
  • Most highly paid, high status jobs are seen as masculine

* This section on Stereotypes is based on J. Williams, Understanding and Evaluating Stereotyping Evidence: Presentation on Stereotyping and Implicit Bias, Nat’l Workshop for District Judges (2008)
We Can Be Unaware of Our Biases

“That’s an excellent suggestion, Miss Triggs. Perhaps one of the men here would like to make it.”
Evidence of Unconscious Bias

• Identical briefs from a hypothetical third-year associate, NYU grad, “Thomas Meyer” which contained following errors: 7 spelling/grammar errors, 6 substantive writing errors, 5 errors of fact, 4 errors in analysis

<table>
<thead>
<tr>
<th></th>
<th>African-American “Thomas Meyer”</th>
<th>Caucasian “Thomas Meyer”</th>
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<tbody>
<tr>
<td>Overall Score</td>
<td>3.2 / 5</td>
<td>4.1 / 5</td>
</tr>
<tr>
<td>Spelling errors noted</td>
<td>5.8 / 7</td>
<td>2.9 / 7</td>
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<tr>
<td>Technical errors noted</td>
<td>4.9 / 6</td>
<td>4.1 / 6</td>
</tr>
<tr>
<td>Errors in fact noted</td>
<td>3.9 / 5</td>
<td>3.2 / 5</td>
</tr>
</tbody>
</table>

(Nextions, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*)
Evidence of Unconscious Bias

Gender

- Subjects given identical science papers from applicants with female or male names score male authors higher, particularly when topic is “male”
  (Knoblock-Westerwick, Glynn, Huge, The Matilda Effect in Science Communication: An Experiment on Gender Bias in Publication Quality Perceptions and Collaboration Interest)

- Auditions behind a screen result in 25% to 46% increase in number of women hired for orchestral jobs
  (Goldin & Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians)
Social Science Evidence

• Court denied defendant’s motion to exclude deposition testimony about “implicit bias” and “stereotyping”
  • Prue v. Univ. of Washington, C07-1859RSL, 2009 WL 1174455 (W.D. Wash. Apr. 29, 2009)

• Court cited implicit bias article in finding defendants discriminated against plaintiff in Title VII case
  • Kimble v. Wisconsin Dept. of Workforce Dev., 690 F. Supp. 2d 765 (E.D. Wis. 2010)

• Plaintiffs’ expert permitted to discuss unconscious bias against older workers based on age stereotypes
  • Peterson v. Seagate U.S. LLC, 809 F. Supp. 2d 996 (D. Minn. 2011)
• Justice Scalia and the majority unimpressed by social scientist’s “proof” in *Dukes v. Wal-Mart* (564 U.S. 338, 2011)

• Decisions After *Dukes* Go Both Ways
  • *Peterson v. Seagate US LLC*, 809 F.Supp.2d 996, 998 (D.Minn. 2011)
  • *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 496 (9th Cir. 2012)
Inequities, Big and Small

• Perceptions of bias stem from feelings of being treated unfairly
• Two hot topics in the workplace
  • Bullying
  • “Micro-inequities”
Bullying

- Nasty, rude, and hostile behavior
- Yelling and screaming
- Vulgar language and cursing
- Throwing things

- Kicking cubicles or trash cans
- Threats and intimidation
- Excessive criticism
- Criticizing employees in front of co-workers
Bullying Statistics

• 27% of U.S. workers report being bullied

• 60% of women report bullying, 68% of the time by a another woman

• 32% of Hispanics and 33% of African Americans report bullying

• 72% of employers reactions either condone or explicitly sustain bullying; less than 20% take actions to stop it

Source: Workplace Bullying Institute – 2014 U.S. Workplace Bullying Survey
Bullying Legislative Trends

• Twenty-nine states have proposed anti-bullying legislation, often referred to as a Healthy Workplace Bill (HWB)
  • California was the first state to introduce a HWB in 2003 (did not pass). However, effective Jan 1, 2015, employers must provide anti-bullying training (A.B. 2053).
  • Bills active in ten states
  • New York’s proposed HWB (3250) would allow employees to sue for psychological, physical, and economic harm from being subjected to an “abusive” work environment, eliminating the traditional “protected class” requirement
  • Tennessee in 2014 outlawed bullying in public sector employment.
• Australia, Great Britain, France, Philippines, Sweden, and some Canadian provinces have passed and are enforcing anti-bullying legislation

Sources: healthyworkplacebill.org, Anti-bullying law enacted, The Philippine Star, Sep 19, 2013; Education Act will have strongest anti-bullying legislation in country, minister says, Calgary Herald, Oct 14, 2012; Section 89 of UK’s Education and Inspections Act of 2006; Australia’s Fair Work Act; French Law Prohibiting Bullying in the Workplace, 15-Nov-13.; Bullying be gone, Littler LLP, Oct 2, 2014; www.workplacebullying.org
Bullying is Expensive

Although not cognizable as an independent cause of action (yet), allegations of bullying often support claims of discrimination and harassment. Juries are often sympathetic.

- **New York (2014)** $4.7 million awarded to Yemeni stock clerk where co-worker called him “Bin Laden” and punched him in face. (ED NY 09cv1769)

- **New Jersey (2011)**: $415k award where female recruits for the Department of Corrections were embarrassed, bullied, and demeaned by male instructors

- **North Carolina (2009)**: $15 million settlement for bullied worker

- **Michigan (2009)**: $4.4 million award to veteran bullied by co-workers and supervisor; court later entered judgment as matter of law for defendant

- **California (2008)**: $91k award to employee whose supervisor bullied and singled her out

Source: Man named Osama wins $4.7M lawsuit, NY Daily News, June 8, 2014
Coined in 1974 by an MIT psychologist, “micro-inequities” are small events which are often ephemeral and hard-to-prove, often unintentional and unrecognized by the perpetrator.

Occur wherever people are perceived to be “different”
Be Aware of the Signals You Give

- Small gestures can be perceived as evidence of bias:
  - Negative facial expressions
  - Dismissing the idea of one employee only to embrace it when offered by another
  - Leaving someone off a group email
  - Addressing some employees by chummy nicknames
  - Continually mispronouncing one employee’s name
Reports of Bias Among Lawyers

- Categories of bias reported in 2011 survey of current and former Fortune 500 in-house attorneys

  - Treated differently than peers:
    - Race/ethnicity: 9%
    - Gender: 24%

  - Missed out on desirable assignments:
    - Race/ethnicity: 6%
    - Gender: 19%

  - Lacked access to informal/formal networking opportunities:
    - Race/ethnicity: 9%
    - Gender: 27%

Source: ABA Commission on Women in the Profession – 2012 Visible Invisibility
Cost of Bias
Attrition

• In 2012, turnover costs ranged between 5.8% and 213% of annual salary per exiting employee, according to studies by Center for American Progress

• Monetary costs:
  • Original recruiting
  • Training
  • Development costs
  • Resource shortage
  • Replacement costs
  • Administrative costs
  • Human resources costs

• Non-Monetary costs:
  • Diminished employee morale
  • Lack of mentors for younger employees
  • Client dissatisfaction with turnover
  • Negative impressions of company in recruiting
• Bullying and micro-inequities can push employees on the fence to litigation.
• Hostile work environment: Severe or Pervasive.
• Even non-meritorious litigation is expensive.
LEGAL TRENDS AND
BEST PRACTICES
AB 2053 “Abusive Conduct”

• “[c]onduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person’s work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.”
Expands California Labor Code Section 1197.5
Prohibits an employer from paying an employee wages less than the rates paid to the opposite sex for substantially similar work.
Court considers the “composite of skill, effort, and responsibility, and performed under similar working conditions.”
Shifts the burden to employers to prove wage differential is not based on a sex-based differential in compensation, is related to the job at issue, and is consistent with business necessity
  • Each factor must be “applied reasonably,” and that one or more relied-upon factors is the cause of the pay difference.
Anti-retaliation provisions
Private right of action
Trend
Family Status

- FMLA re-defined “spouse” to include same-sex marriage
- CFRA leave permissible to care for same-sex spouse
- Paid Family Leave expanded definition of “family member” to include grandparents & parents-in-law
- Proposed FEHA amendment to add “familial status” as a protected category under FEHA (SB 404) (did not pass)

source: The California Law-Making Baton Passes from Legislature to Governor, Littler LLP, Sep 8, 2014
OSHA Restroom Access Guide

• Best practices guide published June 1, 2015

• “Transitioning is a different process for everyone”

• Employees should be able to use restroom that fits their gender identity

• Medical or legal documentation should not be required in order to access gender-appropriate facilities

• Employees should not be required to use a segregated facility apart from other employees
Best Practices

• Be Aware of Potential Areas of Bias
  • Hiring
  • Evaluation
  • Assignments
  • Advancement Pay
  • Work-life balance
  • Leaves of absence
  • Succession Planning
What Can In-house Counsel Do?

- Tell law firms diversity is important. Ask if there are minority lawyers who can assist. Just asking is meaningful.
- When approaching a firm about a new matter, make contact with diverse lawyers.
- If you believe a minority lawyer has done a good job, promote that lawyer to your colleagues.
- Send an email to the supervisor of a minority lawyer who has impressed you.
- When contacted by law-ranking publications, mention minority lawyers who have done good work for you.
- If law firms are not responsive to your requests for diverse legal teams, consider assigning work elsewhere.
Being Proactive

- Discussions in management on diversity or sensitivity training
- Employee attitude surveys, newsletters, or staff meetings
- Creating workplace ombudspersons or dispute resolution programs
- Creating affinity groups, which provide outlets to discuss perceived inequities in the workplace
- Creating mentoring programs
Questions