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

John Bates, aspiring valet
Implicit (Automatic) Bias

• Implicit Bias: A valet 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

A county-by-county look at diversity
Racial and ethnic diversity have increased significantly since 2000, new Census data show. The probability that two people chosen at random in each of the USA's 3,143 counties would be of a different race or ethnicity (on a 0-100 scale).

USA TODAY Diversity Index, 2009

The USA TODAY Diversity Index was created in 1991 to measure how racially and ethnically diverse a population is. It uses the percentage of each race counted by the federal government — white, black, Asian, American Indian, Native Hawaiian — and each ethnicity — Hispanic or non-Hispanic — to calculate the chance that any two people are from different groups. The result ranges from 0 (no diversity) to 100. The 2009 national index is 52. That means that the chance of two people being different is slightly more than half. In 1980, the index was 34.

Sources: Source: Analysis of 2009 Census Bureau estimates by Paul Overberg, USA TODAY
Where Former Minorities Are Majorities

- Hawaii – 77%
- California – 65%
- New Mexico – 60%
- Texas – 55%
- District of Columbia – 65%
Diverse But Not Always Integrated

Atlanta

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

Sacramento

2010 Census Block Data

1 Dot = 1 Person

- White
- Black
- Asian
- Hispanic
- Other Race / Native American / Multi-racial
California’s Demographics

- 30% of California’s population born outside of the U.S.
- Same-sex couples are a growing percentage (approx. 2%) of California’s population
- Minorities comprise approx. 33% of the population of San Diego County

Source: U.S. Census Bureau: 2010 American Community Survey – Foreign-Born Population in the United States
U.S. Census Bureau: 2010 American Community Survey – Same-Sex Couple Households
California Dept. of Finance: 2010 Profile of General Demographic Characteristics – San Diego County
The Diverse Workplace

• Workplaces have become more diverse

• Nationally:
  • 35% minorities
  • 48% women
  • 54% 40 years or older

• In California:
  • 55% minorities
  • 45% women

Source: EEOC: 2011 Job Patterns For Minorities And Women In Private Industry (EEO-1)
Bureau of Labor Statistics, 2011 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 2012, women made up 33% 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
ABA’s Commission on Women in the Profession, A Current Glance at Women in the Law, February 2013
Law Firms

- We can do better

<table>
<thead>
<tr>
<th>LAW FIRM DEMOGRAPHICS</th>
<th>Associates</th>
<th>Partners</th>
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<tr>
<td>Women</td>
<td>45.1%</td>
<td>19.9%</td>
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<tr>
<td>Minorities</td>
<td>20.3%</td>
<td>6.7%</td>
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<td>11.1%</td>
<td>2.2%</td>
</tr>
<tr>
<td>LGBT</td>
<td>2.7%</td>
<td>1.6%</td>
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</tbody>
</table>

Source: NALP Bulletin: 2010 Women and Minorities in Law Firms by Race and Ethnicity
NALP Bulletin: 2013 LGBT Representation Up in 2012

This is MoFo.
In-House Counsel

- In a 2011 Minority Corporate Counsel Association survey of top legal positions in corporate legal departments:
  - 20% were held by minorities
  - 36% were held by women
  - 9% were held by minority women

Source: Lawyers for One America – The Numbers
ABA’s Commission on Women in the Profession, A Current Glance at Women in the Law, February 2013
UNDERSTANDING BIAS
Types of Bias

Deliberate discrimination

• Adverse action because of gender
• 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

Disparate impact discrimination

• Neutral policy or practice that adversely affects women more than men
• Does not require showing of unlawful motive
• Unlawful unless job related and justified by business necessity
Implicit Bias

Stereotyping (implicit bias)

- Assumptions about individuals based on perceived group characteristics
- May be conscious or subconscious
- Conscious stereotyping is unlawful disparate treatment
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)
• Prescriptive stereotypes
• Descriptive stereotypes
• Affect perceptions, memory, and inferences
• Shortcuts in everyday life
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 Bias in Hiring

- Subjects given identical resumes from applicants with white or black sounding names significantly more likely to recommend white candidates
  
  (Bertrand & Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal?)

- 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)
Evidence of Bias in Evaluation

- Vocabulary
- Leadership
- Likeability
Social Science in the Courtroom

• 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)*

• Plaintiff’s expert discussed unconscious bias against older workers based on age stereotypes
Dukes v. Wal-Mart Addresses Social Science Proof in Class Actions

• Justice Scalia and the majority unimpressed by social scientist’s “proof” in Dukes v. Wal-Mart

• 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 papers

- Kicking cubicles or trash cans
- Verbal and nonverbal threats and intimidation
- Excessive criticism
- Criticizing employees in front of co-workers
Bullying: Statistics

• 35% of U.S. workers report being bullied

• 58% of the targets are women, and 80% of the time, the perpetrator is another woman

• 40% of Hispanics and 39% of African Americans report being bullied

• 81% of employers reportedly doing nothing to address or correct bullying

Source: Workplace Bullying Institute – 2010 U.S. Workplace Bullying Survey
Bullying: Legislative Trends

• Twenty-five 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).
  • Eleven states currently have 16 workplace anti-bullying bills under consideration.
  • New York’s proposed HWB 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.

• Australia, Great Britain, France, Sweden, and some Canadian provinces have passed and are enforcing anti-bullying legislation.
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 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
Micro-inequities: Defined

- 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, and others more formally
  • Continually mispronouncing one employee’s name when correctly pronouncing other employees’ names

Source: ABA Commission on Women in the Profession – 2012 Visible Invisibility
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

2007 study by the Level Playing Institute:

- 6.3% of all professionals and managers voluntarily chose to leave their jobs, citing unfairness as the only reason for departure
- 9.5% of people of color indicated unfairness was the only reason for voluntary departure
- 24.6% of people of color would have stayed at their jobs if they had a more respectful work environment
- 43.5% of survey respondents cited negative experiences as having a “great deal” of influence on their decision to leave a position

Source: The Level Playing Field Institute – 2007 Corporate Leavers Survey
Attrition is Expensive!

- In 2010, turnover costs ranged between 25% and 250% of annual salary per exiting employee, according to studies by American Management Association and others.

- **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
Cost of Bias: Litigation

- 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
Trend: Gender Identity

FEHA (eff. 1/2012) protects against discrimination on the basis of:

- Gender
- Gender Identity
- Gender Expression
School Success and Opportunity Act (eff. 1/2014):

- Revises Education Code 221.5
- Requires public schools to respect students’ gender identity for purposes of all activities:
  - sports participation
  - facilities, such as restrooms and locker rooms
- Opponents attempting to repeal by ballot initiative
Trend: Military Status

“Military and veteran status”

• Added to list of protected categories under FEHA
• Effective January 2014
Best Practices

• Be Aware of Potential Areas of Bias
  • Hiring
  • Evaluation
  • Assignments
  • Exposure to clients
  • Advancement Pay
  • Work-life balance
  • Leaves of absence
Best Practices (continued)

- Create awareness of potential issues related to bias
- Train supervisors to make fair personnel decisions
- Adopt clear standards for decision makers
- Review decisions for possible bias
- Implement formal complaint process
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 perceived inequities in the workplace
- Creating mentoring programs
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.