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Expert Analysis

The Problem — And Opportunity — Of Implicit Bias In The Bar

By **Daniel Karon** October 2, 2019, 4:27 PM EST

Night had fallen across the city when a police officer saw, deep in an alley, a husky black man pummeling a wiry white man. The black man was fighting to wrest something from the white man's grip.

The officer shouted for the black man to leave the white man alone. But the black man ignored the officer's order. The officer drew his sidearm and shouted a second warning but, again, nothing. So the officer shot. His bullet struck the black man square in the chest. He collapsed to the ground — dead.



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When the white man crawled out from beneath the heavy corpse, the officer saw what the two men had been struggling over. The white man was holding a bloody knife. The evidence would later show that the "victim," a meth addict on a bender, was robbing the black man, a middle school teacher with a wife and three young children. The teacher had been trying to defend himself.

If that scenario is inaccessible, try this one instead. You enter your law firm conference room for a partners' meeting. Seated at the table are a dozen white men, two women and no black, Latinx,[1] Asian American or LGBTQ individuals. Worse yet, none of the white men meaningfully involve the two women, and when the women attempt to participate, the men disregard their remarks.

At first blush, these situations might seem strikingly different. But upon closer examination, they're really not. They spring from the same seed — one where white men ineluctably receive the advantage, inference and opportunity. In this manner, the nature of the problem that these examples demonstrate is the same — implicit bias. The difference, simply, is its degree.

Implicit bias is a quietly crippling problem that stunts our professional growth and our ability to best serve our clients. Just what is implicit bias, how does it affect our profession and how can we use it as an opportunity to become better professional problem solvers?

What Is Implicit Bias and How Does It Develop?

Perhaps your workplace is diverse. But diversity doesn't necessarily mean inclusion. Think of it this way: Diversity is being invited to join the team; inclusion is being asked to play in the game. Implicit bias affects even diverse workplaces.

Bias is a prejudice against any group, person or thing. Conscious biases are those that we are aware of having. Unconscious — or implicit — biases are prejudices that we act upon without even being consciously aware of them. Or as Harvard's Project Implicit puts it, implicit bias is “[t]he process by which the brain uses mental associations that are so well established as to operate without awareness, intention or control.”

According to a University of Virginia study,[2] implicit biases develop at an early age, tend to emerge during middle childhood and develop across the rest of childhood. Renita Jefferson, CEO of Embrace Consulting LLC, a Cleveland-based diversity and inclusion consulting and leadership development services firm, adds that implicit bias derives from filters such as our parents, religious institutions, teachers, schools, coaches, family members and mentors.

Implicit bias occurs when we make quick judgments or assessments about others based on these factors or influences (bolstered by the bombardment of traditional and social media sources), then form opinions without conscious realization. These societal stereotypes, bred from historical and cultural context, then impact our decisions and actions without our even realizing it.

How Does Implicit Bias Affect the Legal Profession?

Nearly one-third of U.S. law school students are minorities, but only 8% of equity partners at U.S. law firms are minorities.[3] More glaringly, more than half of the country's law students are women — yet only 35% of law firm lawyers are female, and barely one-fifth of equity partners are.[4]

What's responsible for such patently unfair numbers? According to Jefferson, on average, we form 11 impressions about people within the first seven seconds of meeting them. From these hastily formed impressions rooted in our implicit biases, we believe we can properly size up people as friendly or cold, honest or untrustworthy, or bright or incompetent.[5]

Although several types of implicit bias exist,[6] personal-similarity bias is especially damaging to the legal profession. This type of bias posits that we tend to favor people who are most similar to us; hence, the police officer's inference, the mostly white male conference room and the hiring numbers described above.

But this bias is natural, because we attribute good personalities and competence to people we can relate to — people who are like us. So, for instance, if an interviewee is similar to you (a bias that any smart interviewee will naturally exploit), you will more likely be inclined to hire this person. After all, where you share things in common with a candidate, such as where you're from, what school you attended, or what sports teams you like, you naturally prefer this person over people with whom you don't share these similarities.[7]

Considering the interview process from the other end, where a candidate shares no similarities with you (you're white and he's black; you're a man and she's a single mom with young kids; you're Catholic and he's Jewish), an adverse, uncomfortable or unfamiliar impression, judgment or realization — especially as compared to other job applicants — can hinder this candidate's fair and proper assessment.

Our snap judgments apply not only to job candidates but also to employees, clients, opposing counsel, judges and jurors. What's more, our employees', clients', opposing counsel's, judges' and jurors' snap judgments apply to us.

Everyone needs to be open to the undeniable idea that we are all biased as only this way can we begin to understand what the unconscious bias hiding inside all of us looks like and how it presents itself.

What Effect Does Implicit Bias Have on Our Advocacy and Professional Growth?

Most visibly (and as suggested above), implicit bias adversely affects law firm hiring. When law firms refuse to hire a diverse workforce — one that reflects the clients the firm represents or the judges, jurors and opposing counsel that the firm intends to persuade — law firms fail in their duty to zealously represent their clients. After all, clients, judges, jurors and opposing counsel are in some undeniable combination female, black, Latinx, Asian American and members of the LGBTQ community. They're even millennials.

A homogenized workforce promotes stunted thinking and reduces marketability. Without attorneys who can relate to and communicate with these subgroups, a law firm cannot reach its full potential by appealing to all of the people who need to receive — and to be persuaded and influenced by — the firm's message.

Considered another way, assuming the recipient of a law firm's message isn't attuned to his or her implicit bias, wouldn't the firm want to exploit this recipient's personal-similarity bias-based shortcoming?

To this challenge, many a white partner might remark, "We're doing just fine as we are; why do we need to change anything?" To this, I'd reply, "Sure, you're doing fine, but wouldn't you like to do even better?" Too many employers, stunted by their history of profits, simply don't know what to do or even where to start. These employers need to consider diversity not as a disruption, but as an opportunity borne from a conviction of spirit.

If law firms are open to inclusion and inclusion's effect on listeners, law firms' productivity and profits can soar. A 2018 report from McKinsey & Co. Inc., a management consulting firm renowned for its emphasis on advancing diversity and inclusion in business and society,

showed that diversity in management positions increases profitability even more than previously thought.

In particular, companies in the top 25th percentile for gender diversity on their executive teams were 21% more likely to experience above-average profits. And companies with more culturally and ethnically diverse executive teams were 33% more likely to see better-than-average profits.[8]

But even if law firms recognize the implicit bias problem and its effect, too few know how to address it. Maybe that's because they look at implicit bias as a problem when it's really an opportunity.

How Do We Turn Our Implicit Bias Into an Opportunity to Help Our Clients, Our Firms and Ourselves?

The opportunity to benefit from our implicit bias begins by recognizing that we have it and that having it is OK. Jefferson suggests that our issue — or challenge — is to understand the way implicit bias influences our decisions by considering our biases inside and outside of our group.

She suggests that we ask how our biases toward our own group impact our organization and its achievements and goals — such as obtaining more clients, achieving concessions from opposing counsel, winning motions and winning trials. Finally, she asks us to consider what parts of our desired outcomes we're missing by excluding certain populations.

More particularly, after acknowledging our biases, we need to proactively commit to diversity. We must create a safe workspace that allows employees to bring awareness to common workplace biases. We must learn about cross-cultural differences and must not expect others to teach us.

When we make a mistake based on our implicit bias, we must own it, since mistakes are an opportunity to learn and to become better. Finally, we must reduce opportunities for bias through structural changes such as updating employee-review processes, formalizing mentorship programs and offering programs that build diversity awareness.

These methods help convert implicit bias from a problem into an opportunity — an opportunity to become aware of our biases, to broaden our thinking because of them and to experience more positive outcomes due to them. Only by observing and questioning our status quo can we hope to achieve the growth and prosperity that, ironically, implicit bias allows.

Conclusion

Recently, my wife and I returned from Singapore, a multiracial and multicultural city-state that combines Chinese, Malay, Indian and Eurasian populations. Our most lasting impression was the way these groups blended seamlessly, flourishing from the fact that they all lived differently together.

When I look back on that experience, I wonder (even more than I already had) why we would want to surround ourselves with people the same as we are. Because it's diversity of viewpoint, attitude and spirit that helps make us the best people — and, so far as the legal profession is concerned, problem solvers — we can be. After all, if our clients are different from ourselves, shouldn't our law colleagues who counsel these clients be different from ourselves, too?

So look at and question the group you surround yourself with. Engage and enlist different people to join you. This will help your clients, which means it will help you. Because when you have sameness, you smother creativity and encourage mediocrity. And mediocrity doesn't attract new talent; new talent is looking for organizations that are open-minded and forward-thinking.

Now, despite all this, you may simply disagree with me. You may believe that I have no designs on the truth even where it concerns something as fundamental as implicit bias. But my goal is not to convert anyone into being inclusive and collaborative — that's up to you. My goal is merely to invite you to ask questions about yourself and to challenge where you think you should be. If you do that, I'm confident that you'll make the right choices or at least observe that you're not. Then, I'll have done my job.

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[1] Latinx is the gender-neutral alternative to Latina and Latino that scholars, activists and journalists are using more and more often. Latinx is also quickly gaining popularity with the general public.

[2] <https://news.virginia.edu/content/study-racial-bias-pain-perception-appears-among-children-young-7>.

[3] Navan Ward Jr., “Taking Firm Diversity to the Next Level,” *Trial* (Sept. 19, Vol. 15, No. 9) (citing Michael Gorman, GC’s Open Letter to Firms as Ultimatum on Diversity, *Law360* (Jan. 28, 2019), <https://tinyurl.com/y4dyzpgc>).

[4] *Id.* (citing Christina Violante & Jacqueline Bell, “Law360’s Glass Ceiling Report, By the Numbers,” *Law360* (May 28, 2018), <https://www.law360.com/articles/1047285>).

[5] If you don’t believe me, take the Implicit Association Test at <https://www.implicit.harvard.edu>. It measures the strength of association between attributes and groups. Professor Mahzarin Banaji provides more detail about this test at <https://www.youtube.com/watch?v=ABSseKU2qJol>.

[6] Some types of implicit bias are the “halo effect,” where our overall impression of a person influences how we think and feel about his or her character; “contrast bias,” where we compare and contrast people, such as where a job candidate seems better than the preceding candidate, we are more likely to rate the later candidate higher than we would in a different context; and “confirmation bias,” where we search for information from people that confirms our preexisting beliefs about them.

[7] This type of bias is sometimes termed “affinity bias.”

[8] Delivering Through

Diversity, https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity_full-report.ashx.