

Unconscious Bias in the Legal Profession by Paula T. Edgar, Esq. (March, 2018)

The *ABA Model Rules of Professional Conduct* state that attorneys have a mandate to be “competent in all professional functions” and indicate that a “lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials”.

As members of the legal profession, we have a responsibility to advance justice for our clients and to assure that our interactions with each other, our staff, members of the Judiciary, and all stakeholders with whom we collaborate and interact are conducted at the highest level of professionalism.

It is imperative that we deliberately work to identify and eliminate potential barriers which might prevent us from engaging equitably and fairly as legal professionals. For this reason, it is essential that lawyers and all members of the legal profession learn about both conscious and unconscious bias, and their effect on how we interact with each other and ultimately how justice is administered.

Many studies and reports have detailed the slow advancement of diversity within the legal profession. Many have attributed the slow progress in this area to unconscious bias because of how that bias affects our interactions, our decisions, and ultimately access to the profession.

Legal organizations and individual attorneys strive to combat the effects of unconscious bias within their institutions by implementing educational sessions and strategies, such as mentoring and the development of inclusion councils, designed to interrupt the effects of unconscious bias. Organizations that thrive must consciously - intentionally - address diversity and inclusion in the context of the greater culture. They must recognize the inevitable impacts that our diversity as human beings and the challenges of creating inclusive relationships have on organizational cultures and sub-cultures.

Bias inhibits innovation, engagement, and opportunity for advancement

Compliance vs. Goals for Inclusion

Varying laws exist at the federal, state, and local levels to provide protections against discrimination based on multiple protected characteristics in the workplace. Organizations generally have a human resources-led imperative to provide training on those protections and to explain organizational policies and procedures. However, in order to effect lasting change, organizational and individual awareness of bias must go far beyond compliance. In particular, for employers within the legal profession, on-going unconscious bias workshops should be an imperative designed to further goals for inclusion, and include components that address recruitment, employee engagement and retention.

Assessment

In order to gauge how unconscious bias is affecting your organization, it is recommended that you conduct an assessment of representation across the organization, in order to get a snapshot of employee demographics across protected classes and underrepresented groups (e.g., race, gender, LGBTQ, religion). The assessment would highlight areas in which there is underrepresentation across job categories and levels. Incorporating demographic information into an organization's succession plan is an effective method for reaching the goal of increasing diversity among the leadership of your organization.

Demographic Data

Several organizations produce annual reports that detail trends and measure any improvements by race, gender, and other factors across levels within legal organizations. The New York City Bar Association's annual diversity benchmarking report tracks law firm diversity within New York City. The National Association of Legal Professionals (NALP) also conducts an annual report on diversity statistics.

Surveys

Many legal organizations implement employee surveys to determine engagement. It is increasingly common for questions on diversity and inclusion to be included in these surveys. Anonymous surveys provide legal employers with the opportunity to learn if employees believe that they are treated with respect and if they believe that their diverse characteristics impact their working relationships with colleagues, clients, and the courts.

Consultants

A best practice is for Legal employers to engage external consultants to develop surveys, conduct interviews, and facilitate focus groups designed to glean direct, discreet information from employees about their experiences related to bias at work. Fully hearing about the experiences of attorneys who have had to navigate the impact of race, gender or age-based bias provides employers with tangible means to address these issues. Focus groups empower employees to contribute solutions and innovative approaches to interrupting bias in the workplace. Interviews and focus groups are much more effective when administered by consultants, as employees are less likely to be concerned about confidentiality and the risk of disclosure.

Law Schools

The effects of unconscious bias can also be found within law schools. How admissions officers perceive an application affects acceptance rates and resulting representation within the school. Additionally, unconscious bias on the part of professors within the classroom can affect student comfort levels, learning capacity, and academic performance. Unconscious biases can also have a detrimental effect on students during their internship and/or job search process. The biases of resume reviewers or interviewers can have a direct effect on whether an offer is tendered.

How does bias show up for attorneys?

The resulting effects of unconscious bias can be seen in the leadership ranks of most legal institutions. While some legal employers have a relatively diverse workforce at the entry level, this diversity is not necessarily reflected within the leadership ranks. In many cases, this situation remains unchanged even when the organization has a stated commitment to increase diversity in recruiting and retention.

Leadership Structure

There are many potential reasons for these results. When reflecting upon what it takes to move up within the ranks of any institution, it is important to factor in the impact of bias. Unconscious bias comes into play clearly in many situations. For example, affinity bias (the tendency to warm up to people like ourselves) is the most prevalent bias exhibited by humans. Within legal institutions this is demonstrated by the “flocking” behavior of members of shared affinity groups. For example, when individuals go to lunch with the same people on a regular basis, they reinforce deeper connections with those who are similar to themselves. This may ultimately result in benefits such as better assignments, more chances to engage with influencers, greater mentoring opportunities, and other advantages that support ascent within the organization.

Recruiting

An organization’s recruiting policies and protocols are often clear examples of how bias can influence the organization and thwart or derail diversity and inclusion goals. For legal employers, preferences for applicants with a certain pedigree, and recruiting strategies that only include certain schools, organizations, and regions narrow the field of potential applicants, and eventually, the diversity of the workforce. Unstructured interviewing strategies, weighted resume reviews, and influenced referrals all increase bias and create disparate opportunity.

Retention

Lack of sufficient support structures for attorneys within the workforce results in undesirably high attrition rates. This occurs when attorneys who are traditionally underrepresented within the legal profession interact less with influencers and are not afforded the same opportunities as their colleagues who are members of the dominant culture. These situations may eventually result in disengagement on the part of either the employee or the institution.

Client Interaction

Bias by clients

Unconscious biases often impact a client’s perception of an attorney’s competency and efficacy. For example, a client might question the ability of an attorney who appears younger because of biases associated with age and ability.

Bias towards clients

Similarly, an attorney’s biases can detrimentally affect their working relationship with a client. For example, an attorney representing an African American client who has an unconscious bias

against African Americans may make assumptions, or not inquire about potential resolutions, which may negatively affect their client's eventual outcome. This can have a detrimental effect on the attorney's intended representation of their clients and the eventual administration of justice.

Supervision of non-attorney staff

In any legal institution, the work done by non-attorney support staff and other office administrators is the engine that allows the organization to thrive. Bias exhibited towards these individuals or groups can make them feel undervalued, unappreciated, or discriminated against, which severely undermines productivity and office morale.

In the Courtroom

Judges

Judges are at the helm of the judicial system and have a higher charge to be equitable and fair in the administration of justice. As such, a judge's unconscious biases can have a lasting negative effect on the administration of justice. This bias may be exhibited in overruling or sustaining an objection, delivering jury instructions, commenting from the bench, sentencing, and other subjective areas in which judicial discretion exists.

Juries

Conscious and unconscious biases come into effect during the jury selection process. Attorneys on either side make decisions about which juror to select based on their perception of how that individual will respond to both their client and the facts/circumstances surrounding the case. Once selected, biases affect empaneled juries' interpretation of the evidence and other circumstances surrounding the case. For example, a juror with a bias against women may not perceive arguments made by a female attorney in a favorable light, regardless of the content or quality of the statement.

Opposing Counsel

Bias also affects interaction between opposing counsel in the courtroom, as well as during pretrial negotiations and depositions. Similarly, bias comes into play during negotiations for transactional attorneys. For example, a more seasoned attorney may perceive a younger attorney as less competent based on his or her age.

Why does this matter?

Lawyers are charged with advocating for and advancing laws and policies which shape our daily lives. Unconscious biases prevent us from achieving our stated organizational goals and have an effect on the public at large. We must implement strategies to interrupt the detrimental effects of bias in order to advance our DEI (diversity, equity, and inclusion) mission and to realize our broader goals within the profession. While not the primary impetus for us to focus on bias, another reason why this matters is that bias inhibits productivity, which may have negative financial ramifications from law school all the way to the boardroom and courtroom.

Biases and challenges

A primary challenge in addressing bias among attorneys is that attorneys (and people generally) are adverse to change and risk. Because of this, there tends to be discomfort or fear of engaging with the subject of bias and its effects on diversity, equity and inclusion. However, avoidance, complacency, and denial of the effects of bias pose even greater risks to our profession.

Bias Interrupters

Individual

There are many strategies individual attorneys can employ to stay vigilant about interrupting bias.

1. Get out of your comfort zone. Attorneys should commit to engaging with people who are different from themselves to learn about cultures, languages, and places that will enhance their cultural competency. This will also combat any existing negative biases they have towards various groups and personal characteristics.
2. Acknowledge and remember that *everyone* has bias. Attorneys who want to take individual steps to learn about their potential unconscious biases can use assessment tools such as the Harvard Implicit Association Test. This test gauges an individual's unconscious biases regarding a variety of characteristics, including race, gender, weight, and age.
3. Mindfulness is a proven tool that can mitigate the effects of bias for attorneys. This can be as simple as deep breathing exercises prior to annual reviews, jury selection, interviews, and other high stake, high-bias-potential interactions.
4. Attorneys should stay committed to learning about and engaging with the topic of bias. Rather than focusing on a compliance-only approach to diversity and equity, take a proactive approach to learning about this topic via training, coaching, and other educational tools. This will enable you to remain vigilant about bias as a top-of-mind challenge that needs to be constantly addressed.

Institutional

1. If there is to be lasting institutional change, a commitment to increasing diversity, advancing equity, and fostering inclusion must come from the leadership of the institution. This commitment trickles down through the organization and demands compliance, innovation, and accountability from management and staff.
2. Institutions should engage in constant self-assessment to determine their progress towards goals. An essential component for assessment is to review policies and procedures, in particular those that affect employee recruitment and retention. Engaging external consultants to assist with this process is a best practice that helps organizations implement this process of assessment in as objective a manner as possible. Consultants can also minimize the potential for retaliation and employee disengagement.
3. Institutions should commit to ongoing training, and when necessary high level coaching, to assist employees with knowledge about and strategies for combating bias.

Conclusion/ Closing Remarks

To combat the harmful and lasting effects of implicit and explicit bias, organizations and individuals must take the deliberate and intentional steps required to advance diversity, equity and inclusion. Lawyers must consciously modulate their management and communication styles to be more inclusive. In addition, lawyers should commit to being receptive to feedback and open to change. As with all efforts to shift the status quo to advance individual and organizational change, lawyers should examine their individual resistance and the resistance of others to self-assessment; this requires empathy, energy and engagement. This commitment, while not a simple endeavor, can have a positive ripple effect on the profession. In the words of Dr. Martin Luther King Jr. "Human progress is neither automatic nor inevitable... Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals".

Additional resources

Bias Interrupters: <http://biasinterrupters.org>

Inclusion Nudges: <http://inclusion-nudges.org/#learn>

Jerry Kang & Arin Reeves Compendium