



Beneath the Surface:

Why Diversity and Inclusion Matter for Lawyers of Color, and What Lawyers Can Do To Address Implicit Bias in the Legal Profession

BY GEORGE C. CHEN

It would not be surprising to hear that an Asian Pacific-American² attorney was mistaken to be a translator or paralegal when she walked into a boardroom to lead complex negotiations on behalf of her client. Similarly, African-American and Hispanic lawyers are far too often assumed to be defendants when they enter courtrooms to defend their clients or prosecute criminals. These lawyers, who were confident and well-prepared before these encounters, might now question their ability to serve their clients with excellence, and their clients might have similar doubts.

These kinds of incorrect assumptions about the roles of people of color in the legal profession often result from negative and untrue attitudes or beliefs about the capabilities and propensities of individuals from certain groups. Oftentimes, such beliefs are not consciously held or recognized as appropriate by the individual holding the beliefs. Rather, these thoughts can stem from unconscious, or implicit bias, which includes “attitudes or stereotypes that affect our understanding, decision-making, and behavior, without our even realizing it.”³⁴

Although efforts to promote diversity and inclusion in the legal profession must certainly include the consideration of the effects of explicit bias, they also must address implicit bias, which can result in much more serious ramifications than in the examples provided above. In fact, implicit bias can be more damaging and more dangerous than overt discrimination because these biases operate outside of our consciousness, which means that we might not be aware of the negative beliefs that are affecting the decisions we make.

What Does Implicit Bias Look Like in the Legal Profession?

Implicit bias might occur, for example, when law firm partners who hold egalitarian beliefs evaluate associates of color more harshly than others, or when judges who support fairness in sentencing sentence similarly situated defendants differently, or when legal employers who value diversity and inclusion view applicants differently based on whether their names are most commonly associated with people from a certain ethnic background. One study involving the editing of a research memo from a hypothetical associate found that law firm partners evaluated the same memo more harshly when the author was identified as African-American than when he was identified as Caucasian.⁵ Other studies have found similar results for Asian-Americans and Hispanics.⁶ Of course, the possible negative ramifications of unconscious prejudice go beyond the legal workplace and into our courtrooms and client relationships. Researchers, for instance, have identified charging and sentencing disparities based on race that were not attributable to race-neutral factors, which means that implicit bias might be affecting the administration of justice for all Americans.⁷

What Is the Representation of People of Color in the Legal Profession?

People of color comprise more than 37 percent of the U.S. population,⁸ but lawyers of color comprise only 12 to 13 percent of the individuals in the legal profession.⁹ Not only is this percentage of lawyers of color significantly less than the percentage of people of

color in the U.S. population, but it also is significantly less than the representation of people of color in other professions.¹⁰ For example, 26.4 percent of accountants and auditors, 36.5 percent of software developers, 28 percent of physicians and surgeons, and 22 percent of the management and professional labor force are people of color.¹¹

Lawyers of color are most highly represented among entry-level law faculty (25 percent), followed by law firm associates (20 percent), United States Department of Justice attorneys (16 percent), and corporate counsel (15 percent).¹² Lawyers of color are represented the least among large law firm partners (6.6 percent).¹³ In terms of the federal judiciary, approximately 12 percent of all active Article III judges are African American, 9 percent are Hispanic, 3 percent are Asian Pacific American, and 0.2 percent are Native American.

There may be a confluence of factors that explains the underrepresentation of lawyers of color in various legal fields, but I firmly believe that implicit bias is a significant factor for the failure of lawyers

According to the 2013 Diversity Scorecard published by *The American Lawyer* magazine, only 3 percent of the lawyers at large law firms are African-American, and only 1.9 percent of the partners are African-American. This number represents a steady decline over the last five years.

SOURCE: www.alm.com/about/pr/releases/american-lawyer-reports-two-surveys-biglaw-s-black-lawyer-count-dropping-second

of color to be represented more equitably in positions of influence and power in the legal profession.

How Do We Mitigate or Eliminate Implicit Bias Among Those Serving in the Legal Profession?

Lawyers, judges, law professors, and even law students can take steps to eliminate or at least reduce implicit biases that could affect the ways in which we treat clients, defendants, opposing counsel, and others in the legal profession. Strategies suggested by researchers in the field that could counter the effects of implicit bias in the legal system include:

- Consciously acknowledge group and individual differences (i.e., adopt a multiculturalism approach to egalitarianism rather than a color-blindness strategy in which one tries to ignore these differences).
- Routinely check thought processes and decisions for possible bias (i.e., adopt a thoughtful, deliberative, and self-aware process for inspecting how one's decisions were made).
- Identify sources of stress and reduce them in the decision-making environment.
- Identify sources of ambiguity and impose greater structure in the decision-making context.
- Institute feedback mechanisms.
- Increase exposure to stereotyped group members (e.g., seek out greater contact with the stigmatized group in a positive context).¹⁴

For lawyers, these efforts should include trainings and workshops specifically intended to raise awareness about implicit bias and to alter negative associations that form the basis for racial (and other) prejudice.¹⁵ The fact that our unconscious beliefs can be in conflict with our conscious commitments to equality, diversity, and inclusion may create internal conflict about taking steps to address implicit bias. The first and key step to addressing implicit bias is for lawyers to cultivate an openness to receiving information that may challenge their longstanding conscious beliefs and ideas and that also may question their self-identities as fair and reasonable persons, and to deliberately consider the perspectives of others during decision-making. Raising awareness about implicit bias is particularly important for lawyers who serve in supervisory or evaluative positions to ensure that the next generation of lawyers of color are fairly supported and promoted, which will, in turn, help diminish the unconscious negative associations about lawyers of color throughout the legal profession. In addition to raising awareness about implicit bias and its affects, lawyers with supervisory and managerial responsibilities must ensure that there is ongoing and consistent support and feedback for lawyers, who, particularly during times of stress or other duress, may revert back to decision-making based on implicit bias. True and meaningful change requires constant vigilance.

Most significantly, lawyers need to actively engage with lawyers of color and support diversity and inclusion efforts. Increased positive exposure to groups who have been associated with negative attitudes and stereotypes can lead to the reduction of implicit bias against individuals in those groups.¹⁶ Research also has found that implicit biases are not permanent and can change over time.¹⁷ Unconscious prejudice can be diminished, or perhaps even eradicated, if we are willing to make long-term investments of time and resources. The inclusion of people of color in the courts,¹⁸ in corporate legal departments, in law firms, and in government agencies is critical so that judges, lawyers, clients, and all Americans are exposed to people of color serving in often counter-stereotypic roles in all aspects of the legal profession. Such diversity and inclusion encourages and supports the creation of new, positive beliefs and reinforces efforts to dismantle negative associations about lawyers of color.

Another significant contributor to combatting hidden biases is to ensure that lawyers of color are included in leadership teams and as part of the decision-making processes.¹⁹ This inclusion is a critical component of battling implicit bias. Relationships between lawyers from different groups who enjoy equal status with their peers, share common goals, and receive the support of their supervisors can create positive associations and reduce intergroup prejudices.²⁰ In addition, the inclusion of lawyers of color as key decision-makers can help ensure that issues of diversity and inclusion are priorities for firm or company leaders.

The national bars of color engage individually and collectively to promote diversity and inclusion in the legal profession and to combat implicit bias. The National Asian Pacific American Bar Association (NAPABA),²¹ along with the Hispanic National Bar Association (HNBA),²² the National Bar Association (NBA),²³ and the National Native American Bar Association (NNABA)²⁴ should be relied upon as resources for firms and companies for networking and leadership development for lawyers of color.²⁵

Why Are Diversity and Inclusion Important?

The face of the legal profession in the United States is changing

as the diversity of our overall population has increased and as the number of people of color entering law school and the legal profession continues to rise. Leaders in the bar have an opportunity and the responsibility to actively counter implicit bias that unfairly limits the success of lawyers of color. Collectively, we can work towards dismantling discriminatory prejudices that lurk beneath the surface and promote a more diverse and inclusive legal workforce. Although diversity and inclusiveness are fundamental components of disabling and eliminating unconscious bias, they also can produce independently meaningful outcomes, including the potential for improved problem-solving and decision-making.²⁶ If we hire, support, and promote lawyers of color in all areas of the profession—from Big Law to federal government to corporate legal departments to academia to our judiciary—we will move closer toward creating an environment and a legal system that cultivate positive attitudes about people of color, ensure a more equitable workplace for lawyers throughout the profession, and move toward a more fair and just administration of our laws. ☉



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statements expressed in this article reflect the views of the author and not necessarily the views of Bryan Cave LLP.

Endnotes

¹I use the term “Asian Pacific American” to include Asian Americans, Native Hawaiians, and Pacific Islanders.

²Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012).

³Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, available at www.nextions.com/wp-content/files_mf/14151940752014040114WritteninBlackandWhiteYPS.pdf.

⁴See, e.g., Dolly Chugh et al., *Professors are Prejudiced, Too*, N.Y. TIMES, May 9, 2014, at SR14 (highlighting study finding that professors were more responsive to hypothetical white male students requesting mentoring than to female, black, Hispanic, or Asian Pacific-American students).

⁵Kang et al., *supra* note 3 at 1140, 1148-50.

⁶*Overview of Race and Hispanic Origin: 2010*, March 2011, available at www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-02.pdf.

⁷African-Americans make up 4.3 percent of lawyers and represent the largest group of lawyers of color in the United States. Asian Pacific-Americans represent between 3.4 to 4.2 percent of lawyers, Hispanics represent between 3.3 and 3.4 percent of lawyers, and Native Americans represent less than 1 percent of lawyers. Elizabeth Chambliss, *The Demographics of the Profession*, IILP *Review 2012: The State of Diversity and Inclusion in the Legal Profession*, at 15 & Table 1, available at www.theilp.com/Resources/DocumentsIILPReview2012.pdf.

⁸*Id.* at 14.

⁹*Id.* at 15 & Table 1.

¹⁰*Id.* at 16.

¹¹*Id.*

¹²*Id.* at Table 1.

¹³Pamela M. Casey et al., *Helping Courts Address Implicit Bias: Resources for Education*, at B-8, available at www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx.

¹⁴If your firm, company, agency, department, or office cannot offer implicit-bias training or testing, there are online resources that can be helpful. For example, Project Implicit, founded by three scientists at the University of Washington, Harvard University, and the University of Virginia, offers online tests that measure implicit biases on various subject matter. See <https://implicit.harvard.edu/implicit/takeatest.html>.

¹⁵Casey, *supra* note 13 at B-9.

¹⁶Cheryl Staats, *State of the Science: Implicit Bias Review 2014*, at 17, available at www.kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf.

¹⁷I recently wrote about the importance of diversifying the state courts in an opinion piece published in the New York Law Journal. See George C. Chen, *A Missed Opportunity to Diversify the State Bench in New York*, NEW YORK LAW JOURNAL, at www.newyorklawjournal.com/id=1202716804865/A-Missed-Opportunity-to-Diversify-the-State-Bench-in-New-York?slreturn=20150210173321. Judicial and executive branch diversity are key areas in which NAPABA focuses a significant amount of resources for advocacy by staff and volunteer leaders. See, e.g., www.napaba.org/?page=JudicialNom.

¹⁸At my own firm, Bryan Cave LLP, I have seen the impact—even in a short period of time—of the recent election of the first woman (Therese Pritchard) to chair the firm in its nearly 150-year history. With Pritchard's election, we now have our first woman (Christine Cesare) on my firm's management committee, which operates as the chief operating officer to govern the day-to-day operations of the firm. We also have increased the racial and gender diversity in other key management positions across our firm, including at the office managing partner level and also at the executive committee level, which establishes the long-term planning and policies for the firm. On a more personal front, I am the chair of the Intellectual Property Practice Group of the Phoenix office of Bryan Cave, and have served in that role since 2008. I also served as the Chair of the recruiting committee for the Phoenix office of Bryan Cave for four years, and as the chair of the firm-wide Lawyers of Color Affinity Group for about six years. I believe that these leadership roles helped me raise my own profile and that of attorneys of color generally both inside and outside my law firm and also helped to cultivate a work environment that is inclusive and supportive of all lawyers.

¹⁹Staats, *supra* note at 20.

²⁰More information about NAPABA is available at www.napaba.org.

²¹More information about HNBA is available at www.hnba.com.

²²More information about NBA is available at www.nationalbar.org.

²³More information about NNABA is available at www.nativeamericanbar.org.

²⁴Other national bar associations focus on women lawyers, LGBT lawyers, and other groups who also are often the victims of implicit bias. Because this article focuses on issues specifically concerning lawyers of color, however, I have not mentioned these organizations



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here, but I recognize their importance to diversity and inclusion in the legal profession.

²⁵See, e.g., Bunkhuon Chhun, *Better Decisions Through Diversity*, Oct. 1, 2010, at www.insight.kellogg.northwestern.edu/article/better_decisions_through_diversity; Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCIENTIFIC AMERICAN, Sept. 16, 2014, at www.scientificamerican.com/article/how-diversity-makes-us-smarter.