Implicit Bias: BigLaw’s Diversity Problem

By Hannah Garcia

IF THE QUESTION were to be asked, most managing partners and sharehold-
ers in Colorado and beyond would talk about their firms’ commitment to diver-
sity, to hiring and retaining minority as-
sociates and making them feel welcome. They might even talk about them as assets
to the profession as a whole, how clients
demand a cultural mix, how difficult it is
to find them and, even more so, to keep them.

But in practice, it could be unconscious mental shortcuts that impede diver-
sity issues within the legal profession as well as society at large.

“Wbez widespread. It’s not just the cul-
ture of law firms — that would have been
significant enough — but also the hiring,
retention and promotion policies that
have been systematically tainted with
implicit biases,” said Eli Wald, a law prof-
essor at the University of Denver Sturm
College of Law.

Wald specializes in legal ethics and
researches both explicit and implicit
prejudice in large law firms. Implicit
bias specifically has been an emerging
research area over the last decade, he said.
It’s a phenomenon that can claim even the
most progressive of managing partners.

Implicit biases or attitudes are “posi-
tive or negative evaluations that occur
outside of our conscious awareness and
control,” according to Harvard’s Project
Implicit. While there is an explicit inten-
tion associated with the idea of discrimi-
nation, emerging research suggests those
unconscious attitudes could be a major
factor in the practical disadvantages ex-
perienced by women and minorities.

While explicit discrimination was
rampant in the 1950s, it tapered signifi-
cantly by the 1990s. With the advent of
civil rights movements for women and
racial minorities in the second half of the
20th century in the rearview mirror, the
perception may be that workplace equal-
ity at least comes close enough to propor-
tional representation. But Wald said that isn’t
the case, citing the “glass ceiling effect” that
keeps most women and minorities out of
positions of power in the corporate world.
Since the 2008 recession, there is evidence
that women in positions of power are ac-
tually on the decline, Wald said.

“It’s simply not the case that we are
experiencing the rise of equality in positions
of power and influence,” Wald said.

About 1 percent of all associates leave
within the first year at a law firm but di-
verse associates leave in increasing num-
ers each year after accounting to statistics
from the National Association for Law
Placement. By the third year, 29 percent
of diverse associates leave compared to
25 percent of non-diverse associates.

After five years, the attrition jumps to 70
percent for diverse associates and 63 per-
cent for non-diverse associates. As far as
lateral attrition, 64 percent of non-diverse
attorneys leave compared to 76 percent of
all diverse attorneys within five years.

According to a 2007 study from the
Level Playing Field Institute, the “Corpo-
rate Leavers Survey,” 6.3 percent of all re-
spondents left their positions voluntarily,
citing unfairness as the sole motivator
compared to 9.5 percent of respondents
who were racial minorities. More than 24
percent of minority respondents said they
would have stayed if the work environ-
ment were more respectful.

In 2011, the American Bar Association
Commission on Women in the Profession
surveyed current and former in-house
attorneys at Fortune 500 companies.
Women in particular reported high rates of
bias — 24 percent of respondents said
they were treated differently than their
peers based on gender while 9 percent re-
ported different treatment based on race
or ethnicity. 19 percent said they missed
out on desirable assignments based on
gender compared to 6 percent based on
race and 27 percent said they didn’t have
access to networking opportunities based
on gender and 9 percent based on race.

Anthony Greenland, a social psy-
chologist at the University of Washing-
ton and one of Project Implicit’s principal
CONTINUED ON PAGE 21...
Implicit Biases
Continued from Page 12...

investigators said ingroup favoritism, the idea that members of a collective are more accommodating to other members of their groups, could be a factor.

"People in high-level management, by giving (people outside of their group) less challenging work, are also denying them the opportunity to demonstrate the type of skill that would get them promoted faster," Greenwald said. "Managers may see it as a form of benevolence, but it may actually be disadvantaging (those not in their affinity groups) opportunities to rise."

In his research, Greenwald cited a 2012 circuit opinion in McKeehann v. Merrill Lynch, which found the company may have discriminated against employees by "allowing a form of company-wide ingroup favoritism involving teams of brokers who could choose to exclude African American brokers." He called it "a sort of precedent-making case."

Wald said he would believe managing partners in Colorado who say recruiting minority partners is difficult. Applying national phenomena to state trends is "always a risky thing to do," according to Wald. And while New York and California have less issues hiring diverse associates, there is what is called "the pipeline problem" in Colorado, he said.

Implicit racial biases within law firms can manifest within the mentorship and culture as well. Research has "consistently shown that implicit bias is far more prevalent in our workplaces than explicit biases," according to business consultancy firm Nextra.

In its 2014 report, "Written In Black & White," Nextra detailed "empirical evidence that supervising lawyers perceived African American lawyers to be subpar in their written skills in comparison to their Caucasian counterparts when we researched unconscious biases in the legal profession over ten years ago."

In a new experiment exploring confirmation bias, Nextra distributed identical memos to 60 partners from 22 different law firms — 23 were women, 27 were men, 21 were racial minorities and 39 were white. The partners were told a third-year associate, who was white, had drafted the memo. Half of the partners were told the associate was black; the other half were told the associate was white.

Of 53 responses, partners consistently gave a higher rating to the hypothetical white associate's memo better feedback and higher grades than the black associate. In comments, partners said the "Caucasian" Thomas Meyer "has potential" and "good analytical skills" while the "African American" Thomas Meyer received comments like "(I) can't believe he went to NYU" and "average at best."

The results were true across the board — not just white male partners but female and minority partners as well graded the African American associate more harshly. Wald called the results "staggering."

"For many diverse attorneys, this report will likely not be surprising," said Karen Hester, GLG's executive director. "Our feedback to be effective, it must be timely, constructive and objective while limiting the impact of the evaluator's biases. Since everyone has biases, it's necessary we all work on it."

Wald called it "a self-fulfilling prophecy": While partners may know there is a retention problem among diverse attorneys, white men still tend to benefit most from quality assignments and strong mentor relationships. Associates who aren't white or male tend to receive subpar training and mentoring and leave in disproportionate numbers.

The judiciary isn't exempt from the influence of implicit biases, either, according to Hester. She pointed to analysis by University of Nevada, Las Vegas, researchers Rebecca Gill and Kenneth Retzl, who found disparities in judicial performance evaluations for male and female judges in Colorado that "cannot be explained away using objective measures of judicial performance."

Wald was involved in two pieces of research on the role of implicit biases: one he authored alone about the different expectations of managers for white male associates and diverse female associates in BigLaw firms and another co-authored with Stanford sociologist Swetha Balasubramanian and Fordham University law professor Russell Pierce about the equal opportunity struggles of large firms — that will be published in the Fordham Law Review later this year.

"I personally don't buy it when large law firms say we didn't cause the problem," Wald said. "That's not true. It is true that implicit biases are affecting all of us."

The focus should be on education and solutions on a consistent basis, instead of ad hoc training some law firms have undertaken in the arena of unconscious prejudice, Wald said. He used mentorship relationships as an example: citing a need for law firms to engage their most powerful members to be active in professional relationships with young, diverse attorneys.

Instead of matching partners and associates based on affinity, which would overburden the smaller number of minority partners, matches should be made based on the nature of the work, he said.

"We have evidence that mentorship works best when it's not divorced from the work," Wald said. "Mentorship works when we work together. Firms need to pair, in particular, women and minority lawyers with the most powerful partners, most of which are white men. If you will, the old rule used to be that everybody was told to practice what the literature calls 'difference blindness.' But that's not the solution: what we need is bias awareness."