

Implicit Bias: BigLaw's Diversity Problem

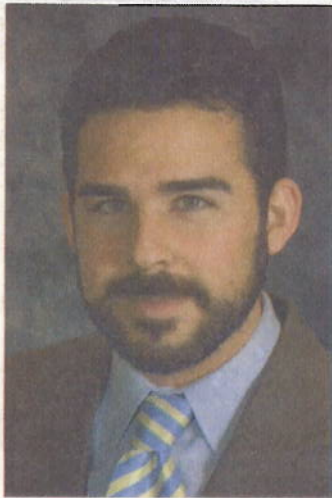
By **Hannah Garcia**
LAW WEEK COLORADO

IF THE QUESTION were to be asked, most managing partners and shareholders in Colorado and beyond would talk about their firms' commitment to diversity, to hiring and retaining minority associates and making them feel welcome. They might even talk about them as assets to the profession at large, 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 impact diversity issues within the legal profession as well as society at large.

"It's widespread. It's not just the culture 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 professor 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.



ELI WALD

Implicit biases or attitudes are "positive or negative evaluations that occur outside of our conscious awareness and control," according to Harvard's Project Implicit. While there is an explicit intention associated with the idea of discrimination, emerging research suggests those unconscious attitudes could be a major

factor in the practical disadvantages experienced by women and minorities.

While explicit discrimination was rampant in the 1950s, it tapered significantly 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 equality at least comes close enough to proportionality. 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 actually 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 diverse associates leave in increasing numbers each year after, according 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 percent 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 "Corporate Leavers Survey," 6.3 percent of all respondents 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 environment 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 reported 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 Greenwald, a social psychologist at the University of Washington and one of Project Implicit's principal

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investigators, said ingroup favoritism, the idea that members of a certain 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 *McReynolds 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 Nextions.

In its 2014 report, "Written In Black & White," Nextions detailed "empirical evidence that supervising lawyers perceived African American lawyers to be subpar in their writing 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, Nextions 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 litigation associate named Thomas Meyer with a law degree from NYU law school drafted the memo. Half of the partners were told the associate was black while the other half were told the associate was white.

Of 53 responses, partners consistently gave 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, CLI's executive director. "For 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 that detailed 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 and female associates in BigLaw firms and another co-authored with Stanford sociologist Swethaa

Ballakrishnen and Fordham University law professor Russell Pearce 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 afflicting 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 mentoring 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."

— Hannah Garcia, HGarcia@circuitmedia.com

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