

The Burden Of Unconscious Bias On Diverse Lawyers And How To Fix The Problem



It seems like yesterday when I hung up my 7 ½-year career as a banker to go to law school back in 2004. My pathway to the legal profession, after graduating from law school and passing the Kentucky Bar in 2008, started out as a management side employment lawyer (which is still one of primary practice areas). My practice has expanded over the years to include other types of civil litigation defense matters. My role now as a partner at Wyatt Tarrant & Combs, LLP has been rewarding and professionally stimulating to say the least. No day is boring or the same for sure!

I would be remiss, however, if I did not acknowledge that the practice of law as a

Black man has its challenges. It most certainly does. I cannot speak for all, but many diverse attorneys all over the country feel they are at a disadvantage their first day on the job. They typically do not have a large book of business (most associates and/or laterals do not regardless of race) and in many instances are not afforded the opportunities to “pitch” for new work (even though their bio might be included in marketing materials). The diverse attorney may not be given meaningful work assignments to showcase their talents or does not have a strong mentor/sponsor at the firm to help show them the ropes like their peers. The diverse lawyer also may not get can-

did and objective feedback so that he/she can improve their work product. The lack of these critical opportunities and feedback can make assimilation within the firm’s culture difficult at best. That often leads to diverse lawyers taking their talents elsewhere with the hope for greener pastures.

In order to not only attract but also to retain and develop diverse lawyers, law firms must tackle head-on the draining effects of unconscious bias in the workplace. We all have biases for sure. However, acknowledging those biases allows us all to begin to reprogram our brains to create new (and positive) associations. The purpose of this article is to shed light on two



R. Joseph (“Joe”) Stennis, Jr. is a member of Wyatt’s Litigation & Dispute Resolution Service Team. One of Joe’s areas of specialization is employment law, where he defends employers against discrimination claims filed by current or former employees with an agency and/or in a court proceeding. Joe has successfully defended his clients on multiple occasions against various employment claims, including: wrongful termination; wage & hour (state and federal); employment-based torts; ADA discrimination; retaliation; ADEA discrimination; ERISA litigation; Title VII; FLSA; and claims of discrimination pursuant to the Kentucky Civil Rights Act.

types of unconscious bias phenomena in the legal profession – and recommend solutions on how to overcome them.

The Unconscious Bias Dilemma

According to the Allegis Group, in an article titled “*Unconscious Bias in the Workplace*,” unconscious bias is “associations that are made between different qualities and social categories such as race, gender or disability and are judgments that are made without conscious awareness.” In an industry where there are numerous deadlines, billable hour requirements, client management responsibilities, and business development responsibilities, it should be no surprise that unconscious bias often appears in the blind spots of partners and other firm leaders. Not being aware of unconscious bias is the symptom. Conversely, doing nothing about it once discovered is a cancer. Since the unfortunate and reprehensible death of George Floyd, there does seem to be more of a focus and purposeful pursuit in law firms to uncover and address unconscious bias. Only time will tell how successful those efforts will be, and for how long. Two common types of unconscious bias – affinity and confirmation – are described below.

Affinity Bias:

Affinity bias causes people to gravitate toward other individuals who have similar likenesses (i.e., similar interests, backgrounds, and appearances) as they do. The result of affinity bias in the workplace is that it promotes people to organize into exclusive homogenous groups based on similar interests. This sort of bias leads to those in the homogenous group being treated potentially more favorably regarding assignments, promotions, not being laid off, etc.

In most large law firms in the United States, the statistics support that the vast majority of partners are white males. It is conceivable that some of these partners unconsciously spend time developing those associates who share similar interests and backgrounds as they do. In turn, diverse associates, who lack those similarities, have less opportunities to connect with partners and therefore less opportunities to enhance their careers at the firm. This can leave the

diverse lawyer frustrated and likely considering other career options over time.

Confirmation Bias:

Confirmation bias occurs when a person interprets a scenario or condition according to pre-existing beliefs. Basically, confirmation bias favors decisions and action that confirm or extend ones already existing beliefs and thoughts.

A popular confirmation bias example is the famous legal memo exercise by the leadership consulting firm Nextion. In a nutshell, Nextion inserted 22 errors in a legal memo. Seven were minor spelling or grammar errors, six were substantive technical writing errors, five were errors in fact, and four were errors in the analysis of the facts.

These simple EDI changes
can encourage retention
of talented employees
that are part of the
LGBTQ+ community.

Sixty partners from 22 law firms agreed to review the memo. Half were told the memo was written by an African American male named Thomas Meyer. The other half were told the writer was a Caucasian male, also named Thomas Meyer. Reviewers of the memo supposedly written by the white male gave an overall rating of 4.1 out of 5, whereas the Black male’s memo received an overall rating of 3.2 out of 5. It was the same memo! The only difference was who the partners *perceived* wrote the memo. This exercise made clear, at least as to some of those 60 partners, the preconceived bias against legal documents prepared by persons of color.

Whether it is affinity or confirmation bias (or some other manifestation of race consciousness), both are damaging to diverse attorneys. But, preconceived notions of work quality, or not sharing similar interests with the homogenous group should not be the death knell to a talented diverse attorney.

However, to the unconscious bias wrongdoer’s defense, she or he can only correct the issue if they become *aware* of their bias. Lawyers by nature are competitive people with schedules that to the average person may seem irrational. Such hectic schedules open the door for biases to creep into the unconscious psyche. I am not making excuses for unconscious bias to exist in any way at law firms. What I am suggesting, however, is that given the nature of our profession, blind spots can occur. To fix the problem, and thereby improve hiring and retention of diverse lawyers, firms must provide adequate training on what implicit bias is in the first place. From there, the following are suggestions for keeping unconscious bias issues at bay and how doing so benefits the firm:

- **Compensation accountability.** Holding partners and other firm leadership accountable to DE&I efforts can be very effective when it is a substantive component of their evaluation and compensation.
- **Have ongoing DE&I training.** Ongoing training for the firm can help to identify and address any issues hopefully early on.
- **Firm leadership needs to lead the charge.** Partners and firm leadership must be purposeful of recognizing their own stereotypic thoughts and intentionally root them out. If managing partners to practice group chairs intentionally work on reprogramming themselves to be more inclusive of diverse attorneys for client pitches, speaking opportunities, and career development, everyone wins.
- **Objective criticism is tough, but necessary medicine to retain top diverse talent.** Talented lawyers, regardless of race, want to learn how to be better practitioners. Thank goodness for those lawyers in my past that provided me objective criticism and did not sugar coat when I needed to improve. Not giving sage advice to a rising diverse star is also a form of toxic bias.
- **It makes good business sense to have a diverse team.** If for no other reason (and it should not be the only reason), overcoming unconscious bias can lead

to enormous business success for a law firm. It has been found that based on a study of over 1,000 corporate counsel, the most diverse outside counsel teams were the highest performing on several measures and earned 25% more in fees than least diverse teams! See, *Get Over the “Why” Hurdle*, Kathleen Nalty, DRI September 2018, citing *Diversity Delivers 25 percent Higher Share of Wallet*, Acritas (May 2016).

- **Courts want to see more diverse talent.** Courts are taking note of young Big Law diverse lawyers who are listed on pleadings, but not involved during oral advocacy. Honorable Gerald Lee, a retired District Judge of the United States Dist. Ct. for the Eastern District of Virginia (and a trial lawyer before serving on the bench), acknowledged

that he saw firsthand bias when to him talented and more knowledgeable attorneys of color were “benched.” Judge Lee stated that “we have to end the meritocracy” and that “in other words, we must stop choosing to only work with someone who looks like us.” *May it Please the Court—Maximizing Black Attorneys in the Courtroom: A Judge’s Perspective*, Aaron Gleaton Clay, Diversity and Inclusion Hub.

- **Accept authenticity.** A truly unbiased work culture embraces diversity and individual personalities. This is crucial to all attorneys in the firm and especially those of color.

Conclusion

Unconscious bias in the legal profession did not occur overnight, so it is not going

to be eradicated quickly. However, any further delay in acknowledging the problem and working toward a “de-bias” culture will continue to adversely impact diverse lawyers. It takes time and effort to recruit talent. Once in the door, the environment should be fulfilling for all. Practicing law is hard enough. In closing, I quote Dr. Mahzarin Banaji, the Harvard Professor who popularized the concept of unconscious bias who said, “The first step to defeating our hidden biases is to be honest with ourselves about the blind spots we have. Having bias is only human. The only shame is in making no effort to improve.” I agree.



seminar

Women in the Law

REGISTER HERE

January 23-25, 2023
Las Vegas, NV

dri™