Why Our Profession is the Nation's Least Diverse

Sybil L. Dunlop

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According to Bureau of Labor statistics, our profession is one of the least racially diverse in the nation.[1] Eighty-eight percent of lawyers are white. And we're not doing much better when it comes to gender equity. While women make up 48.7 percent of summer associates at big law firms, they represent only 18 percent of equity partners.[2] Unfortunately, this isn't just a pipeline issue. These numbers have remained flat for the past 10 years.

So what gives? There are lots of theories. Perhaps it's a lack of mentors for diverse and female associates? It has been suggested that diverse candidates care more about pursuing public sector work and that women eventually prefer jobs with a better work-life balance. But while each of these explanations may describe some people's choices, the latest research on implicit bias suggests that our own subconscious is the single most important factor.

What Is Implicit Bias?

Our brains play tricks on us all the time. As children, we see faces looming in the corner of our bedroom. But when we turn on the lights, we realize the monster face was just a big ol' pile of laundry.

As adults, we still jump to conclusions. Except our conclusions are now informed by our life experiences, including messages that we've received about race and gender. We've received messages suggesting that deeper voices sound more authoritative. We've received messages telling us that competent attorneys look more like Gregory Peck and Tom Cruise than Julia Roberts or Octavia Spencer. And we've received messages suggesting that an African-American male is more likely to be carrying a weapon than a white guy.

Researchers have been working to measure the impact of this messaging since the 1990s. To this end, three scientists—Tony Greenwald (University of Washington), Mahzarin Banaji (Harvard University), and Brian Nosek (University of Virginia)—started Project Implicit in 1998. Their online test offers everyone (you, too) the opportunity to see how quickly we each associate good words with, say, a white face and bad words with an African-American face. Usually, individuals speed through this test and move a bit slower when asked to do the reverse—associate good words with African- American faces and bad words with white faces. In general, 68 percent of test-takers associate African-American faces with bad categories faster than good categories. But implicit bias isn't just about race. We do the same thing with weight, disability, and age. And—on average— we more easily associate women with words describing families than with words describing careers. I am not immune. I've taken the test and was disappointed to learn that my results demonstrate many of these biases.

How Is Implicit Bias Impacting the Legal Profession?

These implicit biases are likely impacting all of the work we do as attorneys. Indeed, this bias is documented to impact the laws that our legislature implements; prosecutorial discretion; jury selection; sentencing/probation decisions; hiring; promotion; and even who becomes a rainmaker at your law firm.

In one of the most telling studies, scientists recently examined the impact of implicit bias on our perceptions of associates' writing skills. To do so, researchers provided law firm partners a memo from a hypothetical third-year associate who attended New York University (NYU) Law School. The memos were exactly the same and contained 22 errors, including spelling and grammar errors as well as analytical errors. Half the partners were told the memo was written by an African American while the other half were told that the author was white. The exact same memo averaged a 3.2 (out of 5.0) rating when the partners thought the author was African American and a 4.1 rating when they thought the author was white. Even worse were the comments. The African-American author was told "needs lots of work" and "can't believe he went to NYU," while comments for the white author read that the writer "has potential" and "good analytical skills."[3] (Also see A Short Guide to Hiring, Retaining, and Advancing Attorneys of Color in this issue.)

These sorts of troubling results play out in study after study. For example, we know that subjects given identical resumes with white- or black- sounding names are significantly more likely to recommend white candidates.[4] We know, too, that professors at top universities are more likely to respond to email inquiries from white males seeking educational guidance than from a female or minority student sending the exact same email.[5] And a study by the New York City Bar Association found that women attorneys were more frequently assigned pro bono matters than their male counterparts, resulting in reduced opportunities to network with potential clients.

All of this information plays a key role in interpreting our profession's diversity numbers. These studies explain why women are less likely to make partner even controlling for other factors, including law school grades and time spent out of the workforce or on part-time schedules. And although blacks, Latinos, Asian Americans, and Native Americans constitute a fifth of law school graduates, these studies explain why they make up fewer than 7 percent of law firm partners. Ugh.

So How Do We Fix It?

When I think about these numbers, I can get depressed. But there is evidence suggesting implicit biases can be addressed. There is hope. Several professions, in fact, already have the jump on us. Orchestras addressed the problem by asking individuals to audition by playing their instruments from behind a screen. The result? A 25 percent to 46 percent increase in the number of women hired for orchestral jobs.[6]

Our problem, of course, is that we can't put applicants for legal work behind a screen—we care about a lawyer's ability to interact with people, influence, and negotiate. But these soft factors are precisely the types of area where our implicit bias can wreak havoc on our desire to ensure that our profession reflects our society's diversity.

A new set of best practices, however, is emerging to address this issue for our profession. Recommended actions include removing names from resumes when deciding whom to interview; ensuring that law firm work is distributed evenly, and not simply to associates with whom partners feel comfortable; creating office chore charts to ensure that women

aren't the only ones planning parties, running committees, and marshalling pro bono efforts; and putting fair origination credit systems into place. And when it is time to refer work elsewhere, we can all take time to think about whether we have included diverse attorneys on our referral list.

We are also learning what doesn't work. A 2010 study by Emilio Castilla and Stephen Benard concluded that emphasizing meritocratic values had a counterintuitive effect, strengthening biases in favor of men over equally performing women.[7] In their study, participants were asked to review profiles of fictional employees to make compensation decisions. When merit was emphasized, participants provided higher raises to male employees over equally qualified females in the same job, with the same supervisor, and equivalent performance evaluations. In other words, simply affirming meritocratic values made things worse. Biases need to be affirmatively interrupted.

To this end, one of the best things we can do is admit that we have a problem. Knowing that these issues exist and taking time to thoughtfully consider the ways in which implicit bias may be impacting our decision processes can help keep biases at bay.

Conclusion

Why do we care? In my mind, this is one of the key civil rights issues of our era. Our country's system of government depends upon our justice system's legitimacy. If enough individuals think that our system is rigged or is simply not fair, I don't think our democracy survives. And part of fairness is, of course, participation. We want our entire judicial system to reflect the society that we serve—we need diverse lawyers, judges, clerks, court reporters, and paralegals because this diversity demonstrates that our system is open to all.

But I'm also selfish, and I want to change our profession for my own nefarious purposes. I regularly work 12-hour days to serve clients. I enjoy spending my weekends honing a legal theory or polishing a brief. I love this profession. But, based on the research, I know that I am at a mathematical disadvantage. I am less likely to rise to the top of our profession than I would be as a white male. This makes me angry. And it makes me want to fight for change. And so I'm sharing this research in the hope that it helps me, it helps my female

colleagues, and it will—eventually—help my 3-year-old daughter make it to the top. Will you join me in this fight?

1 Deborah L. Rhode, "Law Is the Least Diverse Profession in the Nation and Lawyers Aren't Doing Enough to Change That," Washington Post, May 27, 2015, https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is- the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.299c19a2bb1c.

2 A Current Glance at Women in the Law, American Bar Association, January 2017, http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf.

3 Nextions, Yellow Paper Series, Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills, http://www. nextions.com/wp-content/files_mf/1446822647201404011 4WritteninBlackand WhiteYPS.pdf.

4 Marianne Bertrand and Sendhil Mullainathan, "Are Emily and Greg More Employable Than Lakisha and Jamal?" American Economic Review (September 2004), 991–1013.

5 Dolly Chugh, Katherine L. Milkman, and MoDupe Akinola, "Professors Are Prejudiced, Too," New York Times, May 9, 2014, https://www.nytimes. com/2014 /05/11/opinion/sunday/professors-are-prejudiced-too.html.

6 Claudia Goldin and Cecilia Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, National Bureau of Economic Research Working Paper No. 5903 (1997), http://www.nber.org/papers/w5903.

7 Emilio J. Castilla and Stephen Benard, "The Paradox of Meritocracy in Organizations," Administrative Science Quarterly 55 (December 1, 2010), http://journals.sagepub.com/doi/abs/10.2189/asqu.2010.55.4.543.