

Hidden depths: the problem of unconscious bias

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Deep-rooted prejudices continue to blight the legal sector and its D&I efforts. But while many firms have introduced training programmes to tackle unconscious bias, it will take more than quick-fixes to change entrenched behaviour. Muireann Bolger reports.

During his first year in law school, Ellisen Turner, a partner at Kirkland & Ellis, worked as an intern at a different law firm and was thrilled to be offered a kind gesture by a partner. “He couldn’t attend a US National Basketball Association game and gave me his ticket for a seat in the firm’s luxury box,” he says. However, this memory is a bittersweet one.

“When I arrived, the other partners present assumed I was coming to clean the box and take their drink orders,” he explains, recalling just one of the many examples of bias that, as a black IP attorney, he has encountered during his career.

He adds that, frequently, he finds himself interrupted throughout his presentations at hearings, while his opponent, typically a white man, is allowed to present a lengthy and uninterrupted argument. “I fear that some judges are unconsciously more comfortable interrupting minority and female attorneys,” he says.

Cecilia Sanabria, partner at Finnegan, also recalls an incident when she experienced a biased reaction. “I was an associate travelling to a deposition, and when the defending attorney arrived, he asked if I was the court reporter,” she says.

“It was clear I was not based on where I was sitting and the materials I had with me, but he still asked—I often wondered what made him draw that conclusion, maybe the fact that I look younger than I am, maybe the fact that I am a woman in IP, maybe the fact that I am a Latina,” she says.

Bias and decision making

The concept of implicit or unconscious bias was first defined by psychologists Mahzarin Banaji and Anthony Greenwald in 1995. Put simply, this bias occurs when we unconsciously form social stereotypes about certain groups of people and make judgements or decisions about them on the basis of our own deep-seated thought patterns, assumptions or interpretations.

Consequently, these types of bias can affect hiring strategies and promotions in the workplace. Louise Ashley, senior lecturer in organisation studies at the Royal Holloway, University of London, explains: “It is often suggested that recruitment takes place in relation to objective measures of merit alone, but in fact hiring is culturally embedded. That means that the context, history and tradition can also play an important role, including informing our assumptions of who fits where.”

And a failure to tackle the adverse effects of bias can lead to a worrying lack of diversity in leadership positions. Last year, the National Association for Law Placement study, the 2019 Report on Diversity in US Law Firms, found that only one in four partners in US law firms are women and less than 10% are people of colour. Women of colour remain the most underrepresented of all, with Asian women comprising 1.46% of law firm partners, Latin American women making up 0.8% of law firm partners, and black or African-American women comprising 0.75% of law firm partners.

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The lacklustre figures are unsurprising to Gaby Longworth, director at Sterne, Kessler & Fox. An immigrant from Suriname in South America, she believes that aspiring lawyers from diverse backgrounds remain at a distinct disadvantage—even at entry level. “A lot of diverse candidates have names that may be difficult for people of other backgrounds to pronounce, or they may have a different accent,” she says. “I think that some senior people see a name they perceive as difficult, and they have a negative reaction. Unconscious bias really affects law firms.”

Sanabria believes that unconscious bias is particularly problematic in the IP sector. “While the landscape is changing, patent law in particular is known to be a white-male dominated industry,” she says. “As a result, hiring, lead roles, promotions, and even compensation tend to favour white males,” she says.

Powerful barriers

Unconscious bias can manifest in different and subtle forms, according to Raph Mokades, managing director of Rare, a specialist diversity recruitment company. “For example, associating one kind of accent with what ‘authoritative’ sounds like can lead to comments like ‘he or she doesn't sound like leadership material,’” he says.

Meanwhile, a lack of understanding arising from cultural differences can also lead to bias and an unfair outcome. A candidate who defers to his or her interviewer's assertions, when challenged, risks being perceived as lacking conviction in their arguments. But Mokades points out that their reaction may be due to their upbringing in a culture in which arguing with a senior is considered rude, rather than a dearth of insight or enthusiasm.

“Such reactions and assumptions can affect recruitment, management and progression of people from backgrounds less familiar to the people making decisions about their future in the organisation,” he says.

“Unconscious bias leaks out in all sorts of ways that people can sense—an undercurrent relating to what type of people or types of behaviour are ‘okay’ or ‘rewarded’ in the workplace,” agrees Michelle Blunt, partner in the IP practice at Baker McKenzie.

She explains that she has encountered bias since adopting a flexible working pattern following the birth of her son. “It is not entirely smooth sailing to be a ‘part-time’ partner... I do find myself having to explain how it works quite often or needing to provide reassurance that it needn't compromise performance and client service,” she says.

Furthermore, she points out that when her firm implemented more extensive “long lists” for promotional opportunities, the process revealed how unconscious bias had previously held back outstanding candidates.

“Many of the people who had not been invited into the promotion process before on the basis of a gut assessment that ‘they're not ready’, ‘they don't want it’ or ‘they're not hungry enough’, often came out at the very top of the pile when they were included in the assessment process and their merits considered in detail, rather than on an impressionistic basis,” she says.

The costs of bias

Moreover, bias is costing many firms when it comes to retention and innovation. According to research by Coqual, a think tank that explores professional barriers for underrepresented groups, employees at companies who perceive bias are nearly three times more likely to be disengaged at work (20% to 7%).

The report “Disrupt bias, Drive value” also revealed that those who perceive bias are more than three times as likely to say that they’re planning to leave their jobs within a year (31% to 10%). Bias also impedes innovation, noted the study, with those who perceive bias 2.6 times more likely (34% to 13%) to say that they’ve withheld ideas over the previous six months.

And according to a report published by Rare in March 2020, “Closing the ethnicity stay gap”, British law firms still struggle to retain ethnic minority talent. The study showed that while 30% to 50% of British trainees in many law firms come from minority ethnic backgrounds, these recruits spend on average 20% less time in post than their white counterparts. Meanwhile, 84% of lawyers from minority ethnic backgrounds told Rare that they had experienced “implicit racism” at the firms they had worked at.

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Rare’s Mokades points out that this forms of bias can be more insidious than overt discrimination or racism. “The psychological impact of those micro-aggressions on an individual can be damaging and long-lasting, particularly if there are no clear steps an employee can take to report and resolve the situation. Instead, they leave,” he says.

Taking action

On the surface, at least, it seems that firms are taking action. According to data from McKinsey, companies worldwide are spending \$8 billion a year in a bid to tackle unconscious bias in the workplace. Moreover, this form of training has become a bedrock of many D&I initiatives in the legal sector, with many law firms, including DWF, Linklaters, Freshfields Bruckhaus Deringer and Herbert Smith Freehills adopting it.

Meanwhile, in the wake of controversy caused by comments made by its president Larry McDougal relating to the ‘Black Lives Matter’ movement in the summer, the State Bar of Texas immediately

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dictated that all directors take mandatory implicit bias training. There’s just one problem, however—the training doesn’t seem to work. In 2018, an Equality and Human Rights Commission report,

“Unconscious bias training: an assessment of the evidence for effectiveness”, cast doubt on its long-term benefits or effects on behaviour.

Meanwhile, academics from seven US universities, published a report, “A Meta-Analysis of Procedures to Change Implicit Measures” in August 2019, which also questioned the merits of unconscious bias training.

According to the report, following an assessment of 494 previous studies of racial sensitivity training programmes “changes in measured implicit bias are possible, but those changes do not necessarily translate into changes in explicit bias or behaviour”.

“There is very limited scientific evidence that unconscious bias training works, in terms of generating improved outcomes for disadvantaged groups,” says Ashley. One of the problems, she explains, is that the training rests on the belief that once people have been alerted to their bias, they will seek to address them. “The trouble is that hiring and promotion decisions don't really work in that way: power, interest, politics get in the way, and the provision of unconscious bias training does not simply 'magic' all that away,” she says.

Negative consequences

Furthermore, experts have suggested that such training may result in negative consequences.

“Unconscious bias training can create a false sense of having already dealt with the problem, when in fact very little has been achieved,” says social psychologist Keon West, and director of Equalab at Goldsmiths University.

“It can make it harder to spot or deal with real discrimination that happens after the training, it can make life harder for people who try to deal with instances of discrimination that crop up after the unconscious bias training by making them appear less reasonable or sympathetic,” he explains. Alarming, West points out that it can also give people who behave in biased ways the impression that they no longer have to feel responsible.

Mokades also expresses concern that such programmes could be seen as a quick-fire panacea for the ills of deeply ingrained prejudices. “We're talking about addressing years of social conditioning which will take sustained, proactive work from each person to unpick. You couldn't learn a language or how to code in the same length of time as a football match either. It just doesn't make sense to expect that to work,” he says.

Similarly, Laurie Charrington, managing counsel at Intel, warns that law firms need to adopt more meaningful approaches. “Unconscious bias programmes are not sufficient because they don't address the other issues; the inequities, the fact that people aren't on equal footing, and the system that perpetuates these problems,” she says.

She believes that, ultimately, firm leaders need to be financially motivated to implement meaningful changes—and held accountable if they fail to deliver. “I absolutely think efforts should be linked to compensation—unless a law firm in particular or a company is incentivised to make change, it isn’t going to happen.

Creating an equal playing field

However, Longworth points out that in the majority of law firms, D&I aims are still not linked to compensation. “This is a problem—a firm’s leadership needs to answer to the partnership, and list the steps they have taken to promote D&I—and at the moment, that’s just not happening,” she says.

She argues that firms, particularly in IP, need to make more substantial efforts when it comes to D&I. This can be achieved, she argues, by recruiting diverse candidates with STEM backgrounds from technical colleges rather than the traditional pools of graduates from law schools, and providing funding for training in IP law.

“Money continues to be an obstacle for people of colour, and firms have to make an effort and be more creative. People from these different backgrounds are simply not on an equal playing field to others,” she adds.

West explains that while it is important to try to reduce the bias in workplaces, it is pivotal to incorporate these efforts alongside a suite of wide-ranging measures. “These can include a number of things such as anonymised applications, increased transparency and accountability, or an oversight of hiring and promotion decisions with consequences for meeting or failing to meet diversity goals,” he says.

He argues that firms need to treat the achievement of increased D&I similarly to the pursuit of other goals pivotal to company success—such as profit. “We don’t just do profit-awareness training and hope the members of the organisation figure it out with no further encouragement,” he says.

Ultimately, as Blunt notes, because we rely on unconscious bias and assumptions to “short cut” how we experience the world and make decisions, this innate compulsion demands that we continually challenge accepted norms. “We should never become complacent. Unconscious bias is part of being human, so there will always be more to do, another layer deeper to go,” she says.

Types of unconscious bias

Affinity bias

This refers to our tendency to gravitate toward people similar to ourselves. That might mean hiring or promoting someone who shares the same race, gender, age, or educational background.

Ageism

Discriminating against someone on the basis of their age. Ageism tends to affect women more than men, and starts at younger ages.

Attribution bias Undervaluing a person's accomplishments and overvaluing their mistakes based on previous perception of them.

Beauty bias

People perceived as attractive can be viewed more positively and treated more favorably.

Confirmation bias

Confirmation bias refers to the tendency to look for or favour information that confirms beliefs we already hold.

Conformity bias

Common in group settings, this type of bias occurs when your views are swayed or influenced by the views of others.

Gender bias

Preferring one gender over another or assuming that one gender is better for the job.

The Halo/Horns effect

The tendency to put someone on a pedestal or think more highly of them after learning something impressive about them, or conversely, perceiving someone negatively after learning something unfavorable about them.

Name bias

When you judge a person based on their name and perceived background. This is especially important when reviewing CVs.

Weight bias

Judging a person negatively because they are larger or heavier than average.

Source: www.catalyst.org