

IILP Review 2017: The State of Diversity and Inclusion in the Legal Profession

The Scientific Basis for the Ethical Obligation to Require Action to Eliminate Bias and Promote Diversity in the Legal Profession

David L. Douglass

Partner, Sheppard, Mullin, Richter & Hampton LLP

Despite the American Bar Association's August, 2016 adoption of a resolution to add an anti-discrimination and anti-harassment provision to the Model Rules of Professional Conduct, not all lawyers are in agreement as to the need for or legitimacy of such a provision. Here, Douglass approaches the issue and makes the case from a completely different angle: the science behind ethical obligations requiring action to eliminate bias and promote diversity.

I. Introduction

In 2012, the Institute for Inclusion in the Legal Profession (IILP) wrote to the American Bar Association (ABA), requesting that it amend the Model Rules of Professional Responsibility to require lawyers to promote diversity in the profession.¹ The letter observed:

The legal profession continues to lag behind other professions in terms of diversity. Given the importance of our justice system, and the roles and responsibilities that lawyers and judges bear, it is critical for our profession to affirmatively address diversity in the Model Rules of Professional Conduct.²

IILP proposed the addition of a new section:

[The new section] would specifically make efforts to increase diversity and inclusion in the legal profession a matter of ethics and professional conduct. Doing so would align well with both the ABA's existing Goal III, which seeks to "eliminate bias and enhance diversity" in the legal profession, and with existing standards in several states. The worthy objectives of Goal III promote "full and equal participation in the association, our profession, and the justice system by all persons" and the elimination of "bias in the legal profession and the justice system." Goal III and its objectives are indisputably admirable.³

The ABA declined this request: "Model Rule 8.4 Comment 3 already clarifies 'that any conduct that manifest by words or conduct bias or prejudice is prejudicial to the administration of justice and therefore is prohibited.'" The Committee did note that it might be an appropriate issue for consideration by the Diversity Center.⁴

1. Letter from Marc Firestone, Chairman, Institute for Inclusion in the Legal Profession, to A.B.A. (Sept. 14, 2012), <http://www.theiilp.com/modelrules> (last viewed Aug. 9, 2016).

2. *Id.*

3. *Id.*

4. See Letter from Jack Rives, Executive Director and Chief Operating Officer, A.B.A., to Institute for Inclusion In the Legal Profession (Dec. 12, 2012), <http://www.theiilp.com/modelrules> (last viewed Aug. 9, 2016). The letter actually misquotes Comment [3], which does not explicitly prohibit prejudicial conduct or words, but rather links prejudicial conduct back to Rule 8.4(d), which classifies conduct that is prejudicial to the administration of justice as "professional misconduct." The effect of the ABA's response is to overstate the force of the Comment's prohibition. In so doing, it creates the appearance that the ABA treated dismissively a constructive suggestion to address a serious issue by an organization and individuals committed to promoting diversity in the profession.



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II. Implicit Bias

What is implicit bias? Interestingly, the ABA’s Litigation Section offers an explanation:

We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail—such as the elderly—we will not raise our guard. If we think that another category is foreign—such as Asians—we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term “implicit bias” includes both implicit stereotypes and implicit attitudes.

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities.⁵

To oversimplify, the science of neuro-cognition reveals that our subconscious brain processes information faster than our conscious brain influencing our attitudes and actions. Because, by definition, we are unaware of our subconscious processing, we are unaware of these thoughts and how they can influence our attitudes and actions. Scientists, however, can now observe and measure this implicit bias through the Implicit Association Test (IAT), which has been used worldwide for more than twenty years.

5. Jerry Kang, *Implicit Bias: A Primer for Courts Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America’s State Courts* (Aug. 2009), <http://www.ncsc.org/ibprimer>.

The IAT measures our implicit biases by measuring how long it takes a subject to sort words when presented juxtaposed against images of people. The IAT reveals that when positive words—happy, nice, smart—are juxtaposed against a Caucasian face, we can sort them faster than when they are juxtaposed against an African American face. We sort negative words—violent, dumb, mean—faster when juxtaposed to an African American face than when juxtaposed against a Caucasian face. What does that mean? It means that we are so conditioned to associate negative images with African Americans that when a favorable word or concept is associated with an African American face, it takes a heartbeat longer to sort that word properly (and when I say “we,” I mean all of us. The results are universal across racial, gender, and age groups. All of us associate negative traits with African Americans more so than we do with Caucasian Americans).

One’s initial reaction may be, “so what? It’s just a heartbeat, less than a second.” After that heartbeat, the conscious mind kicks in, catches up, takes over, and overcomes that initial split-second reaction. Right? No. Not so much. According to Professor Kang:

There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world—in ways that can have real effects on real lives. Professor John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- implicit bias predicts the rate of callback interviews;
- implicit bias predicts awkward body language, which could influence whether folks feel that they are being treated fairly or courteously;



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If the science of implicit bias reveals that each of us, regardless of our social category, manifests bias or prejudice against socially disfavored groups, then it necessarily follows that all attorneys are violating the Rule's prohibition on bias or prejudice.

- implicit bias predicts how we read the friendliness of facial expressions;
- implicit bias predicts more negative evaluations of ambiguous actions by an African American, which could influence decision-making in hard cases;
- implicit bias predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions;
- implicit bias predicts the amount of shooter bias—how much easier it is to shoot African Americans compared to Whites in a videogame simulation;
- implicit bias predicts voting behavior in Italy;
- implicit bias predicts binge-drinking, suicide ideation, and sexual attraction to children.⁶

To summarize, the science of implicit bias reveals that all of us have subconscious biases against those who society portrays negatively, which impacts our attitudes toward and interactions with members of those groups. In other words, we all discriminate. We can't help ourselves. And our subconscious discrimination perpetuates the social inequalities our conscious minds are committed to eliminating.

III. Implicit Bias and the Model Rules

Comment 3 to Rule 8.4 (Misconduct) provides:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice.⁷

If the science of implicit bias reveals that each of us, regardless of our social category, manifests bias or prejudice against socially disfavored groups, then it necessarily follows that all attorneys are violating the Rule's prohibition on bias or prejudice. The question the ABA must address is whether the fact that we all do it makes it okay. Can it be—should it be—that it is misconduct to consciously discriminate but okay to do so subconsciously when we know that both forms of discrimination invidiously inflict measurable harm on those against whom we have a bias? The answer must be no.

6. *Id.* at 4 (citations omitted).

7. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4.html.

The harm goes beyond our complicity in perpetuating systems of inequality we have committed to eradicate. It harms our clients in ways that also fail to meet our professional obligations. Rule 1.1 provides “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The Comments to the Rule emphasize the importance of thoroughly analyzing and understanding all dimensions of the client’s legal needs.⁸

The business case for diversity, which has become popular in the profession, rests on the premise that in a diverse society, it is essential for companies to understand their diverse customers. Consequently, many companies actively, and some aggressively, promote diversity in their organizations and demand their outside counsel to do the same. I would argue that while there is a business (i.e., financial) case for diversity, there is also an ethical case for diversity. Implicit bias distorts our perception, impairs our understanding with respect to those with whom we interact on behalf of our clients, and blinds us to opportunities. As Sylvia Stevens has observed:

A lawyer who doesn’t recognize cultural differences may be insensitive to a client’s cultural taboos, expectations, family norms or communication and conflict-resolution styles. The lawyer will be less effective in establishing a relationship of trust and confidence with clients from other cultures, and the failure to understand the significance of cultural differences and misinterpretation of client behavior may lead the lawyer to implement ineffective case strategies.⁹

The lack of diversity in the profession deprives lawyers of access to diverse cultural experiences upon which to draw in an effort to meet a client’s needs, whether by failing to understand the client or failing to understand the opposing party. Lawyers that do not associate with diverse lawyers are less able to provide the culturally competent legal counsel to which their clients are entitled. In the face of demonstrable, universal, and persistent forces that frustrate the letter and spirit of the Rules, what should the ABA do? It should acknowledge the science of implicit bias and its demonstrable harm to the impartial administration of justice. The ABA Section of Litigation has already done just that. It has established a “landmark website offering critical information and resources for ABA members and other stakeholders” to “help combat implicit bias in the justice system.”¹⁰

Next, the ABA should acknowledge that it is no longer sufficient to prohibit conscious bias or prejudice; lawyers have a professional obligation to remedy implicit bias. These remedial measures can be as simple moving the offices of diverse lawyers closer to influential lawyers in the firm. Perhaps one remedial measure that is less simple but not burdensome is changing the point in the interview process at which grades are considered to provide space for the interviewer to get to know the candidate. Ensuring that recruitment and evaluation committees are diverse and promoting diverse lawyers to senior positions in the organization have also been shown to improve the success of diverse lawyers. There are many others. The specific measure or measures that a lawyer or firm should adopt should of course be left to the lawyer or firm; however, requiring lawyers to take steps to represent clients more effectively is certainly well-within the spirit if not the letter of the Rules. As Rule 1.3 states:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate

8. See generally, MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 5 (“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation”), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html.

9. See Sylvia Stevens, *Cultural Competency: Is There an Ethical Duty*, OREGON STATE BAR BULLETIN (Jan. 2009), <https://www.osbar.org/publications/bulletin/09jan/barcounsel.html>.

10. See *Implicit Bias Initiative*, A.B.A. Section of Litigation, <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> (last visited Aug. 9, 2016).

a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.¹¹

By amending the Rules to require lawyers to undertake efforts to promote diversity in the profession, the ABA will foster solutions to the enduring lack of diversity in the profession. Delaying action to address implicit bias is itself inconsistent with the Rules:

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions.... Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.¹²

How true. The lack of diversity in the profession has been a persistent and pernicious problem. Delay in responding despite scientific evidence of the nature of the problem and the inefficacy of our solutions thus far is frustrating our clients' demands for a more diverse legal workforce.

For these reasons, the ABA should reconsider its rejection of IILP's request. Acknowledging a professional obligation to remedy implicit bias, which science tells us is necessary to achieve the goals of the Rules, will be a transformative step forward in the ABA's long commitment to promoting equality in the profession.



Ensuring that recruitment and evaluation committees are diverse and promoting diverse lawyers to senior positions in the organization have also been shown to improve the success of diverse lawyers.

11. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3.html.

12. *Id.* at cmt. 3.