

PUBLICATION

How to Interrupt Implicit Bias in the Legal Workplace – Part I

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In 2014, Baker Donelson implemented a Firm-wide training program addressing "implicit bias" in the workplace. Implicit bias refers to the tendency to engage in stereotype-confirming thoughts, which affect our understanding, actions, and decisions in an unconscious manner.

In light of statistical evidence establishing women have not significantly advanced in the legal profession over the past several decades, the American Bar Association's Commission on Women in the Profession and the Minority Corporate Counsel Association worked in partnership with the University of California, Hastings College of Law to conduct research and further understand law firm and in-house lawyers' experiences of workplace bias.¹ The results of the study are staggering, confirming many of the traditional diversity tools organizations have relied on throughout the years have been ineffective in addressing bias.

This article is Part 1 of a two-article series, and will discuss the four main patterns of racial and gender bias in the legal profession as identified in the study. Part 2 will identify two cutting-edge toolkits employers can implement to interrupt racial and gender biases in their own workplaces. The Commission and MCCA tout these toolkits as the "next generation of diversity tools." One toolkit is specific to law firms, whereas the other is tailored for in-house legal departments.

Studies show there are four main patterns of racial and gender bias in the legal profession: (1) the "prove-it-again" bias, (2) the "tightrope" bias, (3) the "maternal wall" bias, and (4) the "tug-of-war" bias. "Prove-it-again" describes the need for women and people of color to work harder to prove themselves. The "tightrope" bias illustrates the narrow range of behavior expected of and deemed appropriate for women and people of color. Notably, both of these groups are reportedly more likely than white men to be treated with disrespect. This finding highlights the fact that these groups are perceived to be subject to a tightrope, as they are expected to behave according to preconceived, limited terms.

"Maternal wall" describes the well-documented bias against mothers. Lastly, "tug-of-war" represents the conflict between members of disadvantaged groups that may result from bias in the environment.

Keeping these patterns in mind, the survey was launched in 2016 to examine how bias affects workplace experiences in the legal profession. The researchers compared the reported experiences of women attorneys of color, white women attorneys, male attorneys of color, and white male attorneys. Respondents were also asked whether they experienced the patterns of gender and racial bias that were documented in experimental social psychology studies over the past several decades. Respondents also were asked whether they experienced implicit bias in basic workplace processes, such as hiring, assignments, business development, performance evaluations, promotions, compensation, and support. Of the individuals who received surveys, 2,827 responded, and 525 of the respondents included comments.

The research report evidences the overall need for law firms and in-house departments to implement calculated measures to disturb workplace bias. For example, in relation to the "prove-it-again" bias, women of color, white women, and men of color reported that they have to go "above and beyond" to get the same recognition and respect as their colleagues. Women of color reported experiencing the "prove-it-again" bias at a higher level than any other group, reporting this experience 35 percentage points higher than white men.

White women and men of color also reported high levels of the "prove-it-again" bias at a rate 25 percentage points higher than white men. Women of color reported being held to higher standards than their colleagues at a level 32 percentage points higher than white men. The research report also showed that men of color and women of all races receive clear messages that they do not fit people's image of a lawyer. Women of color reported they had been mistaken for administrative staff, court personnel, or janitorial staff at a level 50 percentage points higher than white men. This was the largest reported difference in the entire study. White women reported this bias at a level 44 percentage points higher than white men. Lastly, men of color reported the "prove-it-again" bias at a level 23 percentage points higher than white men.

Concerning the "tightrope" bias, women of all races reported pressure to behave in feminine ways, and they reported receiving backlash for exhibiting masculine behaviors. Women of all races reported higher loads of non-career-enhancing "office housework" than men. For example, white women reported doing more administrative tasks (such as taking notes) at a level 21 percentage points higher than white men. Women of color reported doing more of this type of "office housework" at a level 18 percentage points higher than white men.

Research also showed there is a significant bias against mothers reported – and against fathers who take parental leave. Women of all races reported they were treated worse after they had children. They were passed over for promotions, given low-quality assignments, demoted or paid less, and they were unfairly disadvantaged for working part-time or with a flexible schedule. Women also observed a double standard between male and female parents. White women reported their commitment or competence was questioned after they had kids at a level 36 percentage points higher than white men. Women of color reported this at a level 29 percentage points higher than white men. About half of people of color (47 percent of men of color and 50 percent of women of color) and 57 percent of white women agreed that taking family leave would have a negative impact on their careers. A bit surprisingly, 42 percent of white men agreed, indicating the flexibility stigma surrounding leave affects all groups, including majority men groups.

Most of the biggest findings of the survey had to do with bias existing in the basic business systems of attorneys' workplaces. Women and people of color reported higher levels of bias than white men regarding equal opportunities in getting hired, receiving fair performance evaluations, being mentored, receiving high-quality assignments, accessing networking opportunities, getting paid fairly, and getting promoted. In other words, gender and racial bias was reported in all seven basic workplace processes. In almost every workplace process, women of color reported the highest levels of bias. For example, women of color reported they had equal access to high-quality assignments at a level 28 percentage points lower than white men. Similarly, women of color also reported they had fair opportunities for promotion at a level 23 percentage points lower than white men. As a trend throughout the report, women of color reported the highest levels of bias overall.

Turning to the research study's findings related to compensation, large amounts of bias were reported by both white women and women of color, and these were some of the widest gaps in experiences described in the report. The gender pay gap in law has received significant media attention, but much less attention has been paid to bias in compensation systems. Similarly, the racial element of the gender gap is rarely discussed and demands much closer attention. Women of color agreed their pay is comparable to their colleagues of similar experience and seniority at a level 31 percentage points lower than white men. White women agreed at a level 24 percentage points lower than white men. In the same vein, when respondents were asked if they were paid less than their colleagues of similar experience and skill level, women of color agreed they were paid less at a level 31 percentage points higher than white men. White women agreed they were paid less at a level 24 percentage points higher than white men.

Since so much attention is placed on the partner pay gap, in-house is thought to be a more equitable environment for women in terms of pay. However, the report's data suggests this may not be the case.

Surprisingly, in-house white women reported roughly the same level of compensation bias as their law firm counterparts. Looking at the differences between law firm and in-house experiences generally, women of all races and men of color reported lower levels of bias in-house than in law firms. Conversely, white men reported lower levels of bias in law firms than in-house.

The Commission and MCCA's research report also briefly addressed sexual harassment. Findings showed about 25 percent of women, only seven percent of white men, and 11 percent of men of color reported they encountered unwelcome sexual harassment at work. This included unwanted sexual comments, physical contact, and/or romantic advances. Interestingly, sexist comments, stories, and jokes appear to be widespread in the legal profession, with more than 70 percent of all groups reportedly having encountered these. Finally, about one in eight white women, and one in ten women of color reported having lost career opportunities because they rejected sexual advances at work.

Despite the overwhelming evidence that implicit bias is commonplace in the legal profession, the great news is that it can be interrupted. Stereotype activation is automatic, so unfortunately we cannot stop our brains from making assumptions. However, stereotype application can be controlled, meaning we can control whether we act on our assumptions. The report distills its research into Bias Interrupter Toolkits that provide easily implementable, measurable tweaks to existing workplace systems in order to interrupt racial and gender bias in law firm and in-house departments. Ultimately, these bias interrupters could not just level the playing field for women and attorneys of color; they can also help individuals with disabilities, professionals from nonprofessional families, and introverted men in the legal workplace.

The benefits of interrupting bias are abundant, as incremental steps can improve law firm and in-house diversity in ways that yield well-documented business benefits. Research shows diverse workgroups perform better and are more committed, innovative, and loyal. Gender-diverse workgroups have higher collective intelligence, which improves the performance of both the group and of the individuals in the group, leading to better financial performance results. Racially diverse workgroups consider a broader range of alternatives, make better decisions, and are better at solving problems. Lastly, if bias goes unchecked, it affects a wide variety of groups, including modest or introverted men, members of the LGBTQ community, individuals with disabilities, professionals from nonprofessional backgrounds, women, and people of color.

Part 2 of this series will identify the toolkits that can interrupt bias.

¹ <https://www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.authcheckdam.pdf>