

PUBLICATION

Be Kind But Firm: Standing Up Against Implicit Bias as An Attorney

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"Be kind but firm." This is advice I received from a judge for whom I clerked when I asked for his guidance on how to deal with what I perceived to be implicit bias while deposing an opposing party's expert. The expert, a Capitol Hill lobbyist, frequently referred to the race of Black politicians when mentioning them in his testimony. But he never mentioned the race of their non-Black colleagues when speaking of them in the same context. This treatment was subtle but obvious the more times he made the reference throughout the deposition, which frustrated me. His otherwise flippant responses to my questions did not help my frustration.

I addressed his dismissive and flippant responses, objecting to his non-responsiveness. But for some reason, I did not address his references to race. Was it because I was the only Black person in the room? Was it because I was an associate and the individuals on the other side (a lobbyist with 30 years of experience and an experienced partner at a rival firm) were more senior than me? Or was it because I did not know what to say? Would I say, "Objection, implicit bias?" After all, there are no laws or rules of civil procedure providing an "implicit bias" grounds for objection – but in that moment I wished such an objection existed. I later realized that I failed to address this individual's constant inappropriate reference to race primarily under the guise of seeming "professional." I was attempting to overcome stereotypes associated with all Black attorneys.

The impact of implicit bias on the legal profession is wide-reaching. If we are not intentional and conscious in our interactions, implicit biases creep into everything from our depositions, negotiations and mediations, to trials and inter-office interactions. And why wouldn't this be the case? Implicit biases are positive or negative unconscious attitudes and beliefs that manifest involuntarily within an individual's mind, affecting their understanding, actions, perceptions and decisions about others. These implicit biases are not automatically turned off just because we engage in a profession grounded in the principles of, among other things, fairness. Yet, because our profession is premised on concepts of fair trials and justice, we should stand up and address situations of implicit bias that unfairly and unjustly impacts others.

We all have likely been in situations that required us to stand up for ourselves or others we felt were treated wrong, and it is never an easy task. One of the most challenging situations is to stand up as an attorney facing implicit bias in a professional setting. However, an attorney's job is to be an advocate, so action is necessary! As Edmund Burke said, "the only thing necessary for the triumph of evil is for good men [or women] to do nothing." The same is true in the legal profession. The anxiety of addressing implicit bias in a legal setting can be crippling. Still, to create a more diverse and inclusive legal atmosphere, and to ensure relevant and accurate proceedings, we must kindly but firmly address the implicit bias we encounter as attorneys.

Minority attorneys across the nation face implicit bias daily, and many fear the repercussions of standing up for themselves or others. We think about how our reaction will affect our reputation, rapport with our colleagues, the next person who looks like us and overall ability to effectively do our job. It can be difficult, or at least tricky, to react considering these fears. But it is in the best interest of ourselves, our colleagues, our mental health and the legal profession, not to mention principles of integrity and justice, which are at the heart of our work, to directly address these situations in a kind, yet firm manner.

Awareness is the crucial first step to combating implicit bias. But by not standing up, we fail to provide individuals, who may be unaware of how their words and actions may be offensive, with an opportunity to learn and grow. As U.S. Supreme Court Justice Sonia Sotomayor stated, "[t]he way to stop discrimination based on race [or any other grouping] is to speak openly and candidly on the subject . . ." Therefore, I encourage attorneys to do as my judge told me: Stand up for yourself and others with kindness and firmness.