Bias: Its presence and impact in the legal profession

By Sharon J. Arkin

“What is bias? What is prejudice? It is a judgment: It is the determination by a person that some trait, characteristic or quality common to a group of people is undesirable. It is the decision – whether conscious or unconscious – to judge and respond to a particular person negatively because they are a member of that class or group of people. It is the prejudgment of a single person based on a stereotype that may – or may not – apply to that person. And it is, oftentimes, a refusal to look beyond the class or group membership, to look beyond the stereotype to the actual traits, characteristics and qualities of the real person.

Is bias rational? In some respects, yes. The human mind is designed to classify, quantify and categorize information in order to bring order to the chaos of natural existence. And our minds operate to do the same with classes or groups of people. Because bias is based on a judgment of the stereotyped qualities of a class or group of people, and because the social scientists tell us that 70% of stereotyped characteristics may be accurate, there is some reasoned basis for bias.

But, in truth, biases and prejudices are most often irrational, unjustified, unwarranted and damaging. It is never rational to judge an individual solely on the basis of their membership in a “class” or group of people – especially when the categorization is genetically-based, i.e., race, national origin, gender or sexual preference. Each of us is entitled to be judged not on our “membership” but on ourselves – our own special traits, characteristics and qualities that make up who we are as an individual.

Irrespective of the nature of bias, the reality is that it does exist in this world. Indeed, it exists in virtually every one of us. While the worthiest of goals is to eliminate the presence of bias in every person’s mind, that is probably not achievable. What do we do short of that? As Edward R. Murrow once said: “Everyone is a prisoner of his own experiences. No one can eliminate prejudices – just recognize them.” (Edward R. Murrow (1908-1965), television broadcast, December 31, 1955.) That is the key to dealing with bias or prejudice: Identify it, recognize it, bring it to the level of both personal and public consciousness and make the effort necessary to overcome it.

How can bias be overcome? It is often the efforts of a few enlightened people who make it a crusade to challenge the status quo. More often, it is simply the force of law that forces “acceptance.” As Martin Luther King, Jr. put it, “[i]t may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that’s pretty important.” (Wall Street Journal, Nov. 13, 1962.)

But whether the “acceptance” is forced or natural, the ultimate result is that one person comes to know another – not as a member of a different “class,” but as another member of the larger class of humankind. One of the great tragedies resulting from the elimination of affirmative action programs is that it destroyed the legally-forced “acceptance” of one person by another. It eliminated the possibility that members of a minority class would not only have an opportunity to succeed where before doors had been securely closed against them, but it eliminated the opportunity for non-minority people to be exposed to, learn about and become friends with minority people. Even if bias cannot be reasoned out of a person, it can ultimately be lured out and eliminated through a one-on-one relationship.

A graphic example of that was a season of the “Survivor” television series a few years ago in which an elderly, conservative, former Marine joined forces with and was loyal to a homosexual. Amazing what exposure to another lifestyle in the form of a single person – a person who becomes a friend – can do, isn’t it?

Does bias exist in the legal profession? Without question, both with respect to race and gender – not to mention sexual orientation, age and all the other “classifications” of people common to our world. If bias did not exist, standard statistics would tell us, for example, that the ratio of women in the legal profession would be the same as in the population generally and that they would have the same statistical distribution throughout the various areas of practice. But the statistics tell us that is not the case. As reflected in the American Bar Association’s “A Current Glance at Women in...”

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the Law,” July 2014, (available at http://www.americanbar.org/groups/women/resources/statistics.html) women comprise only 34% of all U.S. lawyers — and this is despite the fact that enrollment of women in law school closely matches the proportion of women in the general population. The proportion of women in the judiciary is no better and ranges between 24% to 33%, depending on the court. And women lawyers generally make less than 80% of the salary of male lawyers.

Of course, the argument goes, women have only “recently” become a meaningful force in the legal profession in part because societal pressures kept women out of the workforce altogether until the last couple of decades. Without going into the discussion of the prejudice inherent in those societal pressures, that rationale cannot excuse or explain the fact that women in the legal profession are simply not on an equal footing, even as compared to the rate of their own presence in the profession generally. For example, as noted above, 34% of all attorneys are women. But only 21% of corporate lawyers are women; only 29% of law firm partners nationwide are women; only 17% of equity partners are women and only 4% of managing partners are women. (See http://www.americanbar.org/groups/women/resources/statistics.html.)

And despite intense efforts over the last decade to change the dynamic, survey results demonstrate that little progress has been made. As recently disclosed in the Report of the Eighth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms, February 2014, issued by the National Association of Women Lawyers (available at http://www.nawl.org/p/cm/ld/fid=82#surveys), “[t]here continues to be a disproportionately low number of women who advance into the highest ranks of large firms — in spite of a decades-old pipeline of women law school graduates” (p. 4); “[l]ateral hiring at the level of equity partner favors men” (ibid); a significant gender pay gap continues to exist and is exacerbated by the gender composition of law firm governing and compensation committees (pp 4-5); women continue to lag behind men with respect to credit for rainmaking and client revenue (p. 5) and, advancing women in law firms is not a universal goal (p. 6). These depressing results, despite decades of active effort, are disheartening.

What can be done about bias in the legal profession? The most important thing is consciousness: Make people realize that prejudice — and the effects of prejudice — are real, that they exist. “We will have to repent in this generation not merely for the vitriolic words and actions of the bad people, but for the appalling silence of the good people.” (Martin Luther King, Jr., letter from the Birmingham jail, Jan. 16, 1963.) We cannot sit silent when prejudice “happens” around us. It must be dragged into the open and acknowledged before it can be dispensed with. It must be confronted.

One telling incident is related in the ABA’s Dear Sisters, Dear Daughters — a collection of essays by minority women lawyers. In an essay by Peggy Nagae, a Japanese-American attorney, she tells about a lecture she was listening to by a senior professor from the Harvard Business School. The lecturer used the word “Jap” during his marketing lecture. Ms. Nagae was stunned, but had the courage to speak up and tell him his use of the word was offensive. The lecturer did not apologize, but merely said that some of his clients were Japanese — as if that authorized him to use a derogatory word. (“Some of my best friends are _____ [fill in the blank].”) The rest of the audience remained aloof from the exchange. (See Dear Sisters, Dear Daughters, pp. 10-11.) And that is the real tragedy. This lecturer’s derogatory name-calling should have been challenged by every person in that audience. At the very least, Ms. Nagae’s challenge to him should have been supported by the others. As Martin Luther King, Jr. acknowledged, silence in the face of prejudice is as great a sin as prejudice itself.

Apart from risking embarrassment in front of a group of people in a lecture hall, are their other ways to challenge bias? Of course. One of the reasons for lack of progress by minority lawyers is the lack of formal and informal networking opportunities. Make sure the bar associations you are part of have an outreach for women and minority lawyers. More importantly,

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make a personal effort to mentor women and minority attorneys. The importance of such one-on-one mentoring is probably the most important element of a successful law firm diversity program. Mentoring exemplifies the statement that “a lot of people have gone further than they thought they could because someone else thought they could.”


1. Do a formal analysis of your firm’s cultural barriers and track record in terms of succession, compensation and leadership progression.
2. Test (using diagnostic tools like those developed by Harvard) the current senior management team to be sure that
current leaders, mentors and sponsors are aware of their own biases.

3. Make sure your leader at the top models the behaviors that diminish bias and institute policies and programs that promote the advancement of women into leadership.

4. Develop a robust training program on second generation gender bias aimed first at top leadership, then all levels of management, all partners, all lawyers and all others who support the law firm’s business.

5. Train both men and women how to be better sponsors.

6. Re-evaluate leadership criteria and become educated about what it is that makes the most effective leaders.

7. Design objective and transparent hiring, promotion and compensation practices.

8. Review and modify the way leadership developmental assignments are given to be sure men do not consistently take on strategic and financial roles while women are given operational or administrative roles.

9. Develop and nurture a “safe” learning environment for future leaders, particularly for women as they advance so they will not be unfairly or disproportionately scrutinized just because there are fewer of them in leadership roles.

10. Modify feedback approaches to identify potential traps where gender stereotypes may unfairly influence evaluations and produce “double bind” assessments like the “competence vs. likability” one.

11. Provide coaching and leadership training for high potential women.

12. Build a robust talent pipeline, focus on promoting women in the middle-ranks (senior associates, counsel, non-equity partners) and provide ample leadership development opportunities. An increase of 25% would add significant talent to the high potential leadership pool and eventually to the top of the ranks.

Finally, if you are a woman in the legal profession, the ABA has done a remarkable job in developing information, statistics, direction and help to women attorneys, and especially women attorneys of color, through its Commission on Women in the Profession. (See, http://www.americanbar.org/groups/women.html.) I encourage you to access those resources.

Additionally, the ABA also offers constructive guidance on how to develop and implement an unbiased and fair evaluation process for attorneys. Entitled “Fair Measure: Toward Effective Attorney Evaluations,” the book is in its second edition and can be ordered from the ABA for $69.95 from American Bar Association, Publications Orders, P.O. Box 10892, Chicago, Ill., 60601-0892. (See http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=213649.)

“Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing ever happened.” (Sir Winston Churchill.) The truth is, biases and prejudices diminish us all. Do not be one of those who stumble over that truth and hurry away. Make a difference in not only the life of someone else, but your own. Make diversity happen.