

## **Inclusion Strategies to Eliminate Bias in the Legal Profession**

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*April 2010*

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An examination of the causes of bias, the reality of inclusion in the profession today, and motivating factors and strategies to advance inclusion efforts.

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The purpose of this article is to explain how to create inclusive law firms, where everyone, regardless of social identity, has the opportunity to be a successful lawyer. There are four sections. The first section explains the cause of biases and why everyone is susceptible. Next is a picture of the current reality of the legal profession with regard to inclusion. This is followed by a discussion of the motivating factors to create inclusion. The last section offers inclusion strategies for three levels of the legal profession: (1) the system level comprising various membership organizations; (2) the firm and group levels comprising law firms, law departments and practice groups; and (3) the individual level comprising those people who are at risk for exclusion and those who have the power to exclude or include others.

### **Section I: Why Does Bias Exist?**

**Bias is an unconscious process that helps us to make sense of current experiences based on past experiences. Sometimes it is a helpful shortcut for accurately judging an experience; other times, it is a highly flawed process.**

Social identity is a conclusion we draw about ourselves and others based upon perceptible characteristics like gender, race, age, sexual orientation, able-bodiedness, education and wealth. Think Title VII +. We make sense of our world and our place within in by comparing ourselves to others (Laing, 1961, p. 70). We see similarities and differences and create stories about the meaning of these differences. Privilege is the power connected with any social identity characteristic. Think for a moment about this power of *being* something and contrast it with the competence connected with *doing* something. I'll give you an example to help.

It takes a type of privilege, that of formal education, to become a lawyer. Formal education is barrier to entry and empowers those who have the privilege to access a particular type of opportunity. Lawyers are part of an exclusive group. Successful lawyers, depending upon how one defines success, are part of a different exclusive group. Think about Justice Scalia's remarks at American University's Washington College of law. Unless your law degree is from Harvard or Yale, don't even consider making one of your goals to clerk for him, regardless of your level of competence. This is an example of the power of privilege and the consequence of making privilege the entry price to demonstration one's competence. It's neither good nor bad to think this way; however, it does limit the class of people who have access to certain opportunities.

Privilege leads to stereotyping and unconscious bias; i.e., being influenced to think in a particular way. "Research on stereotypes shows not only that we react differently when we have a stereotype of a certain group of people, but also that stereotyped people themselves react differently when they are aware of the label that they are forced to wear (in psychological parlance, they are 'primed' with this

label)” (Ariely, 2009, p. 169). Consider the outcomes of the following two experiments (Tversky and Kahneman, 1982, 1983). Pretend that you are one of the subjects in this experiment. Experimental subjects were presented with these facts:

*Linda is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in anti-nuclear demonstrations.*

Now ask yourself: Which of these two options is more probable?

1. *Linda is a bank teller.*
2. *Linda is a bank teller and is active in the feminist movement.*

If you are like 85 percent of the subjects, you chose option 2 even though the probability of two separate events occurring together is always less than or equal to the probability of either one occurring alone. This is an example of the effect stereotyping has on decision making. In law firms, this may show up when decision makers ask questions such as: (1) Who will be successful here? or (2) Who will do a good job with this work assignment?

Consider the second experiment. Culturally, we hold stereotypes of Asians as especially gifted in mathematics and women as weak in mathematics. A group of Asian-American women was split into two smaller groups. The first group was primed to think about their race. The second group was primed to think about their gender. Priming was by asking subjects questions related to race or gender. After priming, each group was given an objective math exam. The group primed to think about race outperformed the group that was primed to think about gender (Ariely, 2009, p. 169). In law firms, this may show up in the way women and minority attorneys are spoken to, coached and mentored.

Unconscious bias goes even deeper. It shows up in our perception process. We experience an event and analogize it to past events in a sense-making process. Events get tagged with simple emotions, like good or bad. We might think we recognize something, but in reality it's different from that which is stored in our memories. Superimpose on this that many of our beliefs and emotions about past events aren't even based upon our experiences; they come from others' experiences and stories. Unconscious bias, when flawed, is *stare decisis* with case law, which is not on point and possibly wrong.

## Section II: Current Reality in the Legal Profession

“The legal profession is less racially diverse than most other professions.” This quote is from a recently released ABA [report on diversity in the legal profession](#). On December 21, 2009, Carrie Levin reported in the *National Law Journal* that there has been little progress on diversity within big law firms. James Leopold of NALP, the Association for Legal Career Professionals, suggested that this was due to the structural and cultural barriers of firms. Here are some numbers:

- 15 percent of the equity partners, GC of Fortune 500 and law professors were women in a 2006 National Association of Women Lawyers' report (19.21 percent of EPs are women now, according to NALP)
- 6.04 percent of partners at major law firms are in a minority group in NALP's latest figures
- 1.5 percent partners are minority women in NALP's 2007-08 report

There are several system-level initiatives to change the structural and cultural barriers of firms. The signatory programs of many local bar associations and national organizations like the National Association of Women Lawyers (NAWL) and certification programs like that of the National Association of Women and Minority Owned Law Firms (NAMWOLF) fall into this category. There are programs that bring people together, like those of the ABA Women in the Profession or ABA Women Rainmakers. A recent addition at this level is the Leadership Counsel on Legal Diversity, whose members are large law firms and corporations.

Law firms have introduced programs for attorney development, evaluations, advancement, and compensation and roles intended to facilitate inclusion. However, they create tensions because of time demands on attorneys and open leaders to criticism. For instance, in December 2009, McGuire Woods presented a diversity program, which was lightly attended by associates. Partner Craig Culbertson was criticized for his e-mail to associates indicating that not attending this elective program was "not acceptable."

Micro-inequities continue. Consider which lawyers are subtly devalued when trying to be heard in a meeting and aren't getting the same recognition as those in more privileged groups (Hinton, 2004). Who in your firm is getting the best work assignments and becoming partner and who is hearing that "not every woman wants to be a partner" (Jones, September 30, 2009)? When women attempt to negotiate better terms for themselves, they find out that "nice girls don't get raises" (Hampson, 2009). Even the stories of women's successes are sometimes masked. The women-led litigation team of Diane Elderkin and Barbara Mullin won the largest patent verdict (\$1.67B) in history in June 2009. The AM Law story was told from the perspective of a gaudy award (as if the outcome the team had achieved was unseemly) and the male lawyer's loss:

But it wasn't just the gaudy award that made the win so impressive. Elderkin was also up against one of the best IP trial lawyers around: William Lee of Wilmer Cutler Pickering Hale and Dorr.

IP Law and Business opened their article this way:

News of Monday's record-setting \$1.67 billion patent verdict against Abbott labs had patent lawyers slack-jawed across the country. But perhaps even more surprising to some was the lawyer on the losing side: Wilmer Hale's William Lee, one of the biggest names in intellectual property litigation.

All stories have a bias and these examples hid the story of successful female lawyers.

### Section III: Motivation for Change

Why create inclusion? (1) It's the right thing to do. (2) It's a way to reduce exposure to litigation. (3) Clients expect their law firms to be inclusive. (4) Inclusion creates diversity, which improves innovation and law firms need innovation now more than ever. [Click here](#) for an article about the need for law firm innovation. The first two reasons were surfaced years ago and things have changed very little; thus, it would be fair to conclude that they are not strong motivators. Leaders, who are able to influence their partners of the latter two reasons, will be better able to motivate them to work toward creating inclusion.

Jayne Navarre reported on January 17, 2010, that general counsel expect better [inclusion in their outside firms](#). This quote caught my eye:

*We look for our law firms to institute linkage to balanced work arrangements to retain female counsel. We want our outside law firms to work hard to retain women who need alternative relationships.*

[Art Block, GC of Comcast](#), "want[s] to feel that the firms have a commitment to be businesslike ... [w]e want them to be creative." Diversity is the fuel of creativity and a means to improve systemic performance and sustainability. The external environment, comprising the opportunities, threats and clients' desires, is complex and multifaceted. Having diverse perspectives improves noticing and understanding the impacts of all nuances. Creative thinking and innovative solutions arise from diversity of perception and thinking.

A group of lawyers may share an experience, like working with a particular client on a particular matter; however, each lawyer experiences the situation differently. The same mechanism that leads to unconscious biases that act like blinders also sensitizes some of us to notice one aspect of the experience, while others notice something else about it. The best way to create the most complete analysis of these perceptions and make the best decisions is with a lot of different thinkers. (Finkelstein, Whitehead, & Campbell, 2008, pp. 162-64). Design and implement the best performance strategies through groups infused with diverse members.

### Section IV: Inclusion Strategies

Inclusion is a goal. There are strategies for each level of the legal system: (1) the overarching system; (2) law firms (or other workplaces for lawyers); (3) practice groups (or other divisions of a workplace); and (4) individual lawyers. The overarching system comprises organizations that connect lawyers from various workplaces such as firms, law schools, governmental agencies, in-house law departments and legal services organizations. The workplace levels connect lawyers within the boundaries of a workplace with each other. Think of each level as a field with permeable boundaries. This last section will offer change strategies for each level.

#### Overarching System Strategies

The term "system" refers to the overarching system that envelopes lawyers' workplaces, law schools, licensing organizations, etc., and connects lawyers across the boundaries created by these workplace-

bounded fields. This level includes organized groups like the ABA and its various committees and sub-groups, state and county bar organizations, virtual groups, like Twitter or LinkedIn, and affinity organizations like NAWL and NAMWOLF. These organized groups encourage inclusion by establishing quotas, garnering public statements of intention to take meaningful steps to create inclusion, and sharing knowledge of specific inclusion-related action steps. They also provide certification, which can serve as a strategic differentiator for law firm. Which actions encourage inclusion?

Quotas motivate change. [Click here](#) for an example. People are strongly influenced by what they think others are doing (Thaler, p. 53-60). “[W]hen people are asked what they intend to do, they become more likely to act in accordance with their answers” (Thaler, R.H. & Sunstein, C.R. (2008), p.71). Thus, increase the number of law firm leaders who think that their peer firms are promising to meet quotas and then meeting them and increase the number of inclusive law firms. Associations, such as NAMWOLF, which pin accreditation on meeting quotas, are nudging firms toward inclusion.

Elise Healy, one of the founding partners of Spencer Crain Cabbage Healy & McNamara, PLLC, explained that “these certifications matter” and provide a strategic differentiation for the right firms. They have helped her firm to “get meetings [with] and get in front of decision makers” of certain clients. Spencer Crain opened its doors on May 1, 2008, and has experienced a healthy growth in revenue during a period of time that many other firms are closing their doors.

Many corporate and publicly funded organizations are committed and required to diversify their pool of outside counsel. The *National Law Journal* reported on March 5, 2010, that “[e]leven of the country's major corporations announced Thursday that they will collectively spend \$30 million to hire minority- and women-owned law firms as outside counsel.” Click [here](#) for the article. They need qualified and credible minority and/or women-owned law firms. Many of these clients have publicly committed to diversify. Spencer Crain is certified by NAMWOLF, and as a Women’s Business Enterprise, and a Historically Underutilized Business. All Spencer Crain lawyers have large law firm experience and the loyalty and trust of their clients, who believe that the firm’s lawyers will handle matters the way they expect and to which they are accustomed.

Knowing, on a detailed level, what to do also makes a difference. Consider this classic experiment. Yale seniors who were given a map with the location of the campus health center circled and asked to check their calendars, make a plan for when they would go to the health center for a tetanus shot, and consult the map to decide the route they would take to get there, were 25 percent more likely to get the shot than those who were only told of the benefits for getting the shot and stated their intention to do so (Thaler p. 72).

Organizations such as NAWL have created and distributed [specific actionable steps](#) to advance women and minority lawyers into leadership roles. Combine this information with a program that publicizes which firms are engaged in which inclusion efforts, and public statements by firm leaders of their intentions to follow suit to create a strong nudge toward inclusion.

Finally, since change is always preceded by conversation, putting the right people together to talk about inclusion is a strategy for creating it. The newly formed [Leadership Counsel on Legal Diversity](#) is an

example.. Social media groups are platforms for connecting people for virtual conversations. [Click here](#) for an example of how such platforms can work for collaboratively generating new ways of thinking.

## Law Firm and Practice Group Strategies

**How inclusive is your law firm—to what extent does everyone, regardless of their social identity, have access to the opportunities for developing into a successful lawyer in the firm? The first step to creating inclusion is to assess inclusiveness. Fred Miller and Judith Katz (2007) developed a diagnostic tool.**

- Do people feel pressure to fit in?
- Do people fear speaking up?
- Is who you know more important than what you know?
- Are cliques common and trust outside of cliques rare?
- Do people think that denying differences is a virtue?
- Is it difficult for outsiders to learn the rules for success?
- Does the culture prevent or encourage people to contribute and succeed?
- Is the organization's cultural (the hidden beliefs and the ways things actually work) that success is based strictly on merit?
- Do people confuse style or approach with competency or results?
- Do people refuse to see differences?

Answers of “yes” to these questions may suggest low inclusion. There are probably women and minority lawyers who are not participating fully and do believe that they have access to the opportunities to be successful commensurate with their competence. Inclusion is a process, which begins with conversation. Initial steps for law firm leaders, intending to create inclusion are:

- Acknowledging their desire for the firm to become more inclusive and communicating the motivation for inclusion until it becomes part of the firm values and culture.
- Facilitating conversations about the results of the inclusion assessment where people decide what they mean for the firm, in terms of power, privilege, politics, business development, work assignments, career advancement and competitive positioning of the firm.
- Publicly pledging to meet stated quotas for women and minority lawyers as equity partners, in client relationship roles and in meaningful leadership positions, and to create an inclusive culture.

**The next step is to encourage regular and more detailed conversations about the firm's dominant culture and its role in reinforcing the unconscious biases of individuals. This includes talking about who is included in the dominant culture and who is excluded, how certain people are**

**marginalized by the culture, and how to use one's privileged "in" status to be an ally to others in the non-privileged groups. Examples of conversation starters are:**

- If the dominant culture of success is shaped by the middle-aged white male with the stay-at-home wife, how has that shaped the way success is measured, inclusion is granted and marginalization is created?
- Which norms, beliefs and assumptions arose as a result of our culture?
- How might an inclusive culture advance the goals of the firm?
- What do we believe about our clients that leads us to marginalize certain identity groups?
- Whose perspectives and conversations are accorded significance? Are they tied to beliefs and perspectives connected to one social identity group over another? What would it take to develop a willingness to value multiple perspectives?
- Are we losing out on skills and competencies that would advance our strategic goals because of how they are expressed or who is expressing them?

These are difficult conversations, which may require a neutral and experienced facilitator and will require people to have basic strategic communication skills. These conversations mark the initial stages of the inclusion process. The next stage is about taking specific action steps. It takes multiple change initiatives to create an inclusive culture.

## **Strategy and Structural Changes**

Restructuring the strategy process helps to create inclusion. Working in diverse groups tasked with strategy design and implementation is how people come to understand the positive connection between diversity and innovative strategy and learn how to function effectively in diverse groups. This means that law firms should put diverse members into the groups responsible for strategy design and implementation.

Here is an example of how to create inclusive structures and processes for strategy design. Begin by identifying the law firm's top two to three strategic goals. Divide the goals among groups comprised of diverse members across function, rank, geography, practice group, client representation and social identity. Each group is given three months to work together and is tasked with solving the problems related to its assigned strategic goal. This is an example of an Action Learning Program. These programs usually are designed by an organization development consultant. They link the solving of a real-time organizational problem with individual and group skill building, such as self-awareness, listening, and providing effective feedback.

Restructuring roles and governance structures is another initiative for inclusion. Introduce integrative roles that link inclusion efforts with law firm governance. This requires that the person in such a role has a seat at the highest level of firm governance to facilitate information flow and integrate inclusion into governance, strategy, and attorney development, evaluation and reward processes. I spoke with the chief talent officer at one Philadelphia law firm, who holds precisely that role and has been able to give voice and action to inclusion. Her position sits on the law firm's executive committee. The firm created a

diversity committee with the purpose of monitoring the actions of the firm for alignment with their core culture and value of inclusion. It comprises lawyers and non-lawyers from various practice groups, offices and other divisions within the law firm.

## **Attorney Development, Evaluation and Reward Programs and Processes**

The purpose of development programs is to give attorneys the skills needed to successfully advance their careers, the firm's strategic goals and its inclusion efforts. Advancing one's career in a law firm requires the following: (1) acquiring power, usually through one's book of business; (2) understanding the political dynamics of the firm; and (3) developing the right relationships. Each is an outgrowth of learnable skills and acquirable knowledge. The personal skills necessary to support a firm's inclusion efforts are self-awareness, strategic communication and relationship building. These also are the skills that build strong client relationships and support business development efforts.

The contribution of a lawyer's book of business to her career advancement and success cannot be overstated! Lisa Horowitz, Immediate Past President of the National Association of Women Lawyers and Director of Professional Development at McDermott, Will & Emery, was one of the people who recognized the importance of helping women at her firm to develop business. In 2008, McDermott, through its Gender Diversity Committee, introduced its Women's Business Development Initiative. Since then, approximately 40 women, income and capital partners from across McDermott's global platform, have participated in this program. The result has been individual business development plans, collaboration across offices, cross-selling, cohesive relationships and more business.

The purpose of evaluation and reward processes is to encourage desired behavior. If your firm wants its empowered lawyers to be inclusive and support the advancement of women and minority lawyers, it must measure and reward those behaviors. Does it have processes for (1) identifying and promoting women and minority candidates to leadership positions; (2) identifying the characteristics of successful partners and leaders and publicizing the information (3) identifying and publicizing the factors for career advancement (i.e. books of business, managing teams, practice group status within the firm, management skills, having a champion); and (4) measuring and rewarding inclusion efforts and skills? Firms should publish the standards for advancement, compensation and work assignments and create programs to help people develop the skills and relationships that will empower them to advance their careers and development business. The ABA's book, *Fair Measure*, by The Commission on Women in the Profession, is a helpful resource for designing and implementing unbiased evaluation processes.

According to Horowitz, McDermott has had defined substantive and professional competencies articulated by level since 2004. These competencies support the development of the firm's attorneys and are being linked directly to the firm's evaluation process. The competencies serve as the foundation for the firm's professional development system, which includes extensive training programs, mentoring and individual career plans for all associates. They provide transparency so that all attorneys (associates and partners) know what is expected and necessary for advancement.

Does your firm have a monitored process for assigning lawyers to significant matters? How are partners rewarded for bringing new attorneys into client relationships, promoting diverse teams and assigning significant matters to diverse attorneys? Are there skilled people available to provide opportunities for coaching, mentoring, allies and championing for women and minority lawyers? How are these

opportunities distributed? How are reward systems tested for transparency and fairness? These are a few of the questions to ask when trying to build inclusion through structures, programs and processes.

Horowitz points out that an effective work assignment is very valuable for fostering excellence and inclusiveness. All attorneys need to have an equal opportunity to receive the right (read significant client matter) assignments to develop and demonstrate mastery of essential competencies necessary for advancement. When accountability is brought into the mix by measuring and publishing the whether, when and how goals are met, inclusion grows faster. For example, if a firm publicly states a goal to increase the number of women and minority lawyers in significant roles with clients, then firms should publicize the names of lawyers and the client pitches for which they are chosen, the names of lawyers as relationship managers and the client relationships they manage, and names of lawyers and their roles in client matters.

## **Individual Strategies**

Strategies for individuals to create inclusion fall into two categories. First, there are strategies for individuals who are at risk for exclusion. Second, there are strategies for individuals who want to act as allies, coaches and mentors. Both sets of strategies require an underlying skill set, which includes strong self-awareness, listening and providing effective feedback.

It takes a special type of training with a special type of consultant to develop these skills. The National Training Laboratory (NTL) provides workshops, which are designed for people to discover through experience the way others perceive them in a group situation and how to become more effective in interpersonal and group interactions. MBTI-based strategic communication programs for lawyers introduce concepts of perception and decision-making differences among people and allow people to experience the value of diversity.

## **Strategies for Individuals at Risk for Exclusion**

All strategies require a person to develop the skills to ask for and negotiate the terms for one's own success. This means knowing how to build the relationships integral to your success with allies who will become your champions, coaches who will help you learn what you need to know to position yourself for success, mentors who will help you develop relationships with clients, and clients who will become your book of business. Here is a list of strategic actions:

- Develop a career plan with goals, dates and action steps.
- Become an expert in a particular area of law that matters in your firm and inform decision makers of your expertise.
- Express an interest for firm leadership positions.
- Develop thick-value relationships with firm leaders and clients.
- Exercise leadership roles outside of your law firm in bar associations, industry groups and on boards.
- Advise firm leaders of your leadership capabilities and achievements.

- Ask to be included on client pitches.
- Develop a reputation in practice areas through speaking, writing and appearing at client events.
- Actively search for allies, mentors and coaches.
- Develop skills in relationship building, strategic communication and action planning.

## Strategies for Allies, Coaches and Mentors

If you are in a position of privilege, become an ally to women and minority lawyers. Learn how to coach and mentor others effectively. Initiate conversations with lawyers in your firm who are at risk of marginalization. Learn how to spot instances of marginalization and provide feedback in an effective manner. It is impossible to achieve inclusion without the support of people who sit in privileged roles.

## Conclusion

Lawyers are susceptible to unconscious biases that interfere with inclusion efforts. We are inclined to act autonomously rather than collaboratively, believe that denying differences is good, and that making mistakes is bad. I'll conclude by explaining how these beliefs interfere with inclusion efforts.

Acting autonomously is what we do as lawyers, when representing our clients and making independent judgments as to the best course of action. Developing business strategies is a different process, which benefits from collaboration and inclusion.

Denying differences is what we do when we say that we treat everyone equally, marginalize others by denying their unique attributes, and forget about the standards that we unintentionally apply, and which effectuate discrimination. Malcolm Gladwell in his book *Outliers* talks about the way certain people are given preferential treatment, which translates into opportunities to develop success. In your law firm who gets preferential treatment because of the evaluation standards used or the way in which opportunities are assigned?

Finally, we hate to make mistakes, which we equate with malpractice. Making mistakes is inevitable in inclusion efforts and is how we learn new skills and develop better solutions. We will be imperfect, because we are inexperienced in navigating the inclusive waters and human. We will make mistakes and feelings will get hurt as we learn to communicate effectively about differences and create and implement new structures and processes to encourage inclusion. Think back to the criticism that Craig Culbertson received for his e-mail about attending optional diversity programs. Imperfection is part of the process when balancing competing tensions like those between billable hours and attending optional programs. The bottom line is this: Mistakes, which are the only real opportunities to learn and innovate, are an important part of inclusion efforts. Inclusion is the strategic advantage in law firm growth and competitive positioning.

## About the Author

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