

## How Implicit Bias Impacts Views on Minority Attorneys

Ellen D. Bailey and David M. Laigaie, The Legal Intelligencer

May 12, 2014

We all know what racism is, right? It is Donald Sterling chiding his girlfriend for posting a picture of herself and Magic Johnson on Instagram or attending Clippers games with African-Americans. It is Cliven Bundy musing whether "the Negro ... was better off as slaves, picking cotton and having a family life." These people are undoubtedly racists. But, are law firm partners racists? Well, certainly not the overt kind, like Sterling or Bundy. Yet, an "advancement gap" between minority and majority associates at law firms nationwide raises the question of whether law firm advancement decisions are at least partially motivated by race. And a recent study by a Chicago-based leadership consulting firm called Nextions sheds light on the issue of how "implicit confirmation bias" impacts senior lawyers' views as to the quality of work done by minority associates.

The study, titled "Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills," set out to determine whether law firm partners (both majority and minority) regarded written work from African-American associates more critically than work done by majority associates. The results are fascinating—and a bit scary. A legal memorandum that was carefully crafted by five partners from different law firms was reviewed by 60 partners from 22 law firms (23 women, 37 men; 21 racial/ethnic minorities and 39 Caucasians). A variety of typographical, factual and analytical errors were intentionally included in the memo. The reviewers were told that the author—who was given the name Thomas Meyer—was a third-year associate who had graduated from New York University School of Law. Half of the reviewers were told that the associate was African-American, while the other half were told that he was Caucasian.

The reviewers gave an average grade of 4.1/5 to the Caucasian Thomas Meyer and a 3.2/5 to the African-American Thomas Meyer. Caucasian Thomas Meyer was lauded as being "generally a good writer," that he "has potential," and had "good analytical skills." African-American Thomas Meyer, by contrast, "needs a lot of work," is "average at best," with one reviewer unable to "believe that he went to NYU." Notably, the reviewers were much more likely to notice spelling and grammar errors in African-American Thomas Meyer's work (finding an average of 5.8 of 7 errors as opposed to 2.9 of 7 for Caucasian Thomas Meyer), and to criticize his analytical skills. There was no correlation between the race or the gender of the reviewer and the differing opinion of the work. The authors of the study conclude that

the reviewers expected to encounter more errors in the memo written by an African-American, they therefore noticed more errors, and thereby confirmed their preexisting bias.

One takeaway from this study is the need for law firms to question whether and how advancement decisions are influenced by race. This can be a volatile subject, especially when the decision-makers consider themselves to be well-intentioned, rational and objective. Rather than examine themselves for potential fault, decision-makers have been known to bristle when it is suggested that some form of bias, especially racial, may have played into what they deem to be purely objective decisions.

Take, for example, the Eagles' recent statement that DeSean Jackson was released for "purely football reasons." Jackson is a superstar, one of the leading deep-threat receivers in the league, a three time pro-bowler, who had 82 catches for more than 1,300 yards last season. The Eagles do not have a deep threat to replace him, nor do they have wide receivers to make up for his lost production. And now they will have to use one of their precious draft picks in the hope of replacing a portion of Jackson's productivity instead of addressing glaring defensive needs. Accordingly, cutting Jackson makes sense as a "purely football decision" only if the Eagles are planning to tank next season.

Jackson has numerous tattoos; he pouts; he disappears from games; he refused to play hard when he wanted more money; and, he is reportedly insubordinate to coaches. So, maybe the Eagles released him because he is a jerk. If being a jerk is grounds for release, however, then why did Riley Cooper get a pass for his colossally bad behavior at the Kenny Chesney concert? It's hard not to wonder whether race and implicit or affinity bias played a role in the decision to let Jackson go. Did the predominantly white Eagles' brass feel more empathy for Cooper and more inclined to overlook his transgressions? As comedian Chris Rock tweeted: "So Reilly Cooper gets a raise for saying [N-word] and DeSean Jackson gets fired for being a suspected [N-word]."

The study and the controversy surrounding Jackson's release highlight how racial discrimination exists in both reality and perception. An honest and continuing dialogue about race relations and diversity, whether in sports or the law, can help expose and ultimately diminish issues such as implicit confirmation bias. Such open discussion can also decelerate the rush to judgment that is so often toxic in the workplace.

Both the reality and perception of racial discrimination must be eliminated if we are to achieve full opportunity for all. Within the legal profession, we must strive to ensure that race does not impede access to success for some, while providing an "all access" pass to others.

**Ellen D. Bailey** is a member in the Philadelphia office of Eckert Seamans Cherin & Mellott. She focuses her practice primarily on business litigation, with an emphasis in the areas of general commercial litigation, mass tort litigation, products liability and white-collar criminal defense and investigations. **David M. Laigaie** is a member at the firm and focuses his practice on internal corporate investigations, health care litigation and complex civil litigation. He handles cases involving health care fraud, securities fraud, tax fraud, export violations, pharmaceutical marketing fraud, municipal corruption, defense procurement fraud and public finance fraud. He can be reached at 215-851-8386 or [dlaigaie@eckertseamans.com](mailto:dlaigaie@eckertseamans.com). •