Opening Statement

OWNING UP TO MY BIAS . . . AND STEPS TOWARD MAKING CHANGE

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It happened to be Christmas Eve. At Toys-R-Us, I had successfully wrangled the last available Lego starship and headed for the checkout. All the lines were long. I checked out the customers waiting, and I checked out the cashiers. I went for lane 2 over lane 1. Five minutes later, when lane 2 had not budged, it hit me why I was standing in it: My subconscious, unconscious brain had told me that the characteristics of my cashier—gender, accent, race, body shape, age—would make for a quicker checkout than the next cashier over. My biases were not only unconscious; they were also wrong.

Thirty years earlier, I visited the city clerk's counter in a small Southern city. I was seeking factual data for a potential voting rights case. I was a white law student, relatively clean cut. And I was still able to speak Southern, having grown up and done college in Atlanta and North Carolina. For me, the city's books were opened and facts were found, not only about voting but also about all manner of discrimination in the delivery of public services. A lawsuit was filed (and won) because I received that privilege of easy access.

Inherent Biases That Cloud Our Vision

Our unconscious biases run deep. I, for one, cannot pretend that I recognize all of mine, much less in real time. My implicit assumptions can affect my behavior in litigation as much as in the rest of life. I still find myself fighting stereotypes about what races, ethnicities, or sexual preferences might make better or worse drivers or cooks, dancers or romancers. Why would I believe my subconscious is free of preconceptions about which associates will be good on their feet, which judges will be most effective, or which jurors will be desirable for my venire?

I am not proud to acknowledge the reality of my subconscious. But without accepting where my personal biases start and, in fact, seeking out their sources, I have little hope of neutralizing them.

My personal discomfort in acknowledging my implicit biases, however, is nothing compared with the pain and indignity suffered by those disadvantaged by society's preconceptions on a daily basis. I could, and perhaps should, talk here about the killing of black men by potentially well-intentioned public safety officers who likely fail to compensate for their own prejudices. But I'm not going there now. I'm talking here about the constant and nonviolent disparities in our society, our decision making, and our profession.

National Public Radio recently did a remarkable set of interviews about the fear of black men and the toll it takes on them and on the rest of society. *See* www.npr.org/2015/03/31/396415737/societys-fear-of-black-men-and-its-consequences. The speakers included Paul Butler, a Harvard– and Yale-educated former prosecutor, now a Georgetown law professor. He relayed the too-familiar story of a black man being followed to his home by black police officers insistent that he provide proof that he belonged there. Butler continued:

> When you're in an elevator or walking behind somebody and you feel like you have to perform to make them feel safe, it's like apologizing for your existence. So I am in an elevator with a white woman and I have to look down to make her feel comfortable. It's like "excuse poor black me." And you get angry and you get tired.

It's an experience few of us white men have ever suffered. We are rarely under constant scrutiny, implicitly doubted, and required to prove that we belong, while not offending in the process. The impact on a career cannot be measured.

Disparate treatment is not, of course, limited to black men. Our profession's slow progress in attracting, retaining, and

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advancing black and Latino and Asian attorneys is painful, exacerbated by a pipeline still valved toward shut. In addition, women still have not advanced past 18 percent of the equity partnerships in major law firms, make only 83 percent as much as their male colleagues, and supply less than 25 percent of the first chairs at trial, according to a 2015 ABA study. And all diverse lawyers, including our lesbian, gay, bisexual, transgender, and questioning (LGBTQ) attorneys, continue to face unfounded doubts about their competency and compatibility.

Systemic Responses by the Profession

It is not that the profession does not care about the disparities. The vast majority care deeply. It is that, like everyone else, of every race and background, we don't know what we don't know. We are not fully conscious of our unconscious.

What to do? Of course, the solution will not arrive with a finger's snap. But there is plenty of room to make progress. And only by striving forward will we get there. Through the leadership of the ABA last year, and with efforts of the Section of Litigation this year, we can continue to move our profession, systematically, toward the goal of fully equal access and opportunity.

Under the leadership of former President Paulette Brown and her Diversity and Inclusion 360 Commission, the ABA last year launched a set of initiatives that combined the systemic and the personal. Initiatives ranged from a pipeline program to increase the supply of qualified diverse candidates for the bar, to implicit bias tool kits to train individuals. The ABA's House of Delegates, its policy-making body, enacted measures to encourage courts to provide jury instructions on how implicit bias may affect jurors' judgments. It exhorted state bars to require training in elimination of bias in the profession, following successful models in California and Minnesota.

The House of Delegates also modified Model Rule of Professional Conduct 8.4, to make it a violation to harass or discriminate on the basis of protected classifications including race, ethnicity, gender, and sexual orientation. This change was—and still is, in some quarters—controversial. But it is both warranted and important to our mission of realizing equality. We must articulate and live by antidiscrimination as an ethical standard if our profession is to fulfill its objective of equal opportunity and equal justice for all.

The critics of new Rule 8.4(g) argue that it risks exposing mere insensitivity or "political incorrectness" to disciplinary action. They claim that restricting discriminatory speech could offend the First Amendment or impinge on clients' rights to vigorous advocacy. In fact, there is little risk of any of these dangers. Rule 8.4(g) is a balanced proposal—in part due to the work of the Section of Litigation in obtaining amendments to protect against these very concerns.

Progress Through the Section of Litigation

The Section stands for vigorous advocacy as well as protection against discrimination. These goals are not mutually exclusive. Our ABA delegates and ethics experts worked hard to ensure that the Model Rule, as amended, supported both.

In response to the Section's urging, proposed Rule 8.4(g) was refined to include a requirement that a lawyer may face discipline only for conduct he or she "knows or reasonably should know" to be discriminatory or harassing. Further, the Section of Litigation obtained an amendment providing that "legitimate advice or advocacy" cannot violate the rule. And consistent with that position, the Section also obtained a comment to the rule establishing that a court's mere sustaining of a *Batson* challenge to a discriminatory jury strike, alone, does *not* constitute a violation.

With these amendments, new Rule 8.4(g) takes a resolute stand against invidious discrimination or abuse that we should not tolerate, while giving ample room for vigorous advocacy of clients' interests. There is no reason to believe that this rule will spawn a rash of trivial or retaliatory complaints. Several states have adopted rules of similar import, with no such unintended consequences reported.

As a result, with the Section's amendments and support behind it, the once embattled Rule 8.4(g) ultimately passed the ABA House with close to a unanimous vote.

In the year to come, the Section of Litigation is continuing an energetic and systemic agenda promoting diversity. November 14–16, 2016, saw the Professional Success Summit in Atlanta, drawing over 300 attorneys of color from around the country seeking the skills, contacts, and inspiration to climb to the top of our profession. On May 2–3, 2017, the Section will host the LGBT Forum in San Francisco, the first ABA program ever targeted at LGBT lawyers and issues.

The Section created a new position of chief diversity officer (CDO) in 2016. The CDO will be responsible and accountable for implementation of the Section's Diversity Plan, with a first task of updating that plan this year. And at the Fall Leadership Meeting, the Section's leadership, accompanied by local guests from the Austin, Texas, bar, absorbed a spellbinding and revealing presentation about our own implicit biases, led by Jerry Kang, law professor and vice chancellor for diversity and inclusion at UCLA.

There is much we are accomplishing together to achieve the systemic change we outwardly espouse. Yet, change at its core also requires an inward look at each of our individual preconceptions. It means thinking about which cashier or juror we pick, or which associate we praise. And why. ▪

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