

Issues of Bias and Diversity for the Construction Law Practitioner

By Meredith A. Freeman

Introduction

Justice and equality are foundational to a fair judicial system. Arguably, lawyers impact the judicial system more than anyone else who comes into contact with it. As advisors, advocates, and counselors, lawyers have a special responsibility in shaping whether the judicial system is equal for everyone.¹ To fulfill this responsibility, lawyers must actively combat implicit bias. Lawyers must also be mindful of the challenges faced by their clients, opposing parties and other lawyers who have different backgrounds, perspectives and experiences. Issues of diversity² and bias are also encountered by construction lawyers in the context of laws and policies implementing programs designed to increase participation of minority and woman owned businesses in government procurement.

Bias

Bias is a particular tendency, trend, inclination, feeling, or opinion, especially one that is preconceived or unreasoned.³ Implicit bias is attitudes or stereotypes that impact our understanding, decision making, and behavior without our even realizing it.⁴ Implicit bias is not consciously accessible through introspection.⁵ Rather, implicit bias resides just below the surface in our subconscious.⁶ Although we are unaware of it, these ideas and preconceptions influence and guide our daily decisions.⁷

Implicit biases, which everyone has, can range from largely benign preconceptions to extremely damaging prejudices.⁸ It is crucial to the integrity of our judicial system that lawyers understand and guard against implicit bias. In fact, it is so important that the continuing legal education (“CLE”) requirements for Florida lawyers specifically reference bias elimination.

¹ Lawyers Must Build Trust in the Justice System, 2Civility, 2021. May 8, 2021, from <https://www.2civility.org/lawyers-must-build-trust-in-the-justice-system/>.

² As used herein diversity means “the practice or quality of including or involving people from a range of different social and ethnic backgrounds and of different genders, sexual orientations, etc.” “diversity” Google Dictionary provided by Oxford Languages, 2021 May 8, 2021 Oxford University Press from <https://www.google.com/search?client=firefox-b-1-d&q=definition+of+diversity>

³ “Bias” *Dictionary.com*, 2021. May 7, 2021, from <https://www.dictionary.com/browse/bias>

⁴ Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, et. al., Im-plicit Bias in the Courtroom, 59 UCLA L. Rev. 1124, 1126 (2012)

⁵ *Id.*

⁶ See Yasir Billoo, Implicit Bias and Its Application in the Life of A Lawyer, Fla. B.J., March/April 2019, at 10

⁷ *Id.*

⁸ *Id.*

A. Continuing Legal Education

The Rules Regulating the Florida Bar mandate CLE for Florida Bar members. Each member of the Florida Bar must complete 33 hours of required CLE every 3 years.⁹ Five of the 33 hours must be in the prescribed topics listed in rule 6-10.3(b). On November 19, 2009, the Supreme Court of Florida amended rule 6-10.3(b) to add bias elimination to this list of prescribed topics.¹⁰

Rule 6-10.3(b) of the Rules Regulating the Florida Bar states:

Each member must complete a minimum of 33 credit hours of approved continuing legal education activity every 3 years. At least 5 of the 33 credit hours must be in approved legal ethics, professionalism, **bias elimination**, substance abuse, or mental illness awareness programs, with at least 1 of the 5 hours in an approved professionalism program, and at least 3 of the 33 credit hours must be in approved technology programs. If a member completes more than 33 credit hours during any reporting cycle, the excess credits cannot be carried over to the next reporting cycle. (emphasis added).

The Florida Supreme Court highlights the importance of bias elimination by including it in Rule 6-10.3(b). Indeed, a member who fails to complete and report the minimum required CLE hours by the end of the applicable reporting period shall be deemed delinquent and may not engage in the practice of law in Florida until reinstated.¹¹

B. Oath of Admission

Moreover, a careful reading of the Oath of Admission to the Florida Bar (the “Oath”) reveals imbedded responsibilities to guard against bias. The Oath states:

I do solemnly swear:

I will support the Constitution of the United States and the Constitution of the State of Florida;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

⁹ See R. Regulating Fla. Bar 6-10.3(b).

¹⁰ See *In re: Amendments to the Rules Regulating the Florida Bar*, No. SC08-1890 (Fla. November 19, 2009).

¹¹ See R. Regulating Fla. Bar 6-10.5; 1-3.4

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God. (emphasis added)

A lawyer cannot be fair to opposing parties and their counsel if his or her actions are tainted by bias. Learning about and understanding bias is critical to combating it.

C. Implicit Bias in Law Firms

Starting with the premise that all people have bias, it follows that law firms, which are made up of people also have bias. The Nextions 2014 “Written in Black & White” report (“Nextions Report”) demonstrates how bias can impact supervising lawyers evaluating associates.

The Nextions Report showed how identical memoranda written by hypothetical African-American and Caucasian individuals had substantially different feedback resulting from bias associated with race.¹² The Nextions Report studied the following research question: Does confirmation bias unconsciously cause supervising lawyers to more negatively evaluate legal writing by an African American lawyer? In the study researchers prepared a legal memorandum that contained 22 different errors.

The memorandum was distributed to 60 different partners from 22 different law firms. All the partners received the same memorandum. However, half of the partners were told that the memorandum was prepared by an African American and the other half were told that the memorandum was prepared by a Caucasian.

The study found that the partners evaluating the memoranda found more of the errors in the memorandum they believed was prepared by an African American Associate. Moreover, the

¹² Dr. Arin N. Reed, Nextions, *Written in Black & White* (2014), from <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf>.

feedback on the exact same memorandum was radically different depending on whether the evaluating partner believed the memorandum was drafted by an African American Associate or a Caucasian Associate. See the chart below, which highlights the differences in feedback.

"Caucasian" Thomas Meyer	"African American" Thomas Meyer
<i>"generally good writer but needs to work on..."</i>	<i>"needs lots of work"</i>
<i>"has potential"</i>	<i>"can't believe he went to NYU"</i>
<i>"good analytical skills"</i>	<i>"average at best"</i>

D. Affinity Bias

Generally, people extend greater trust, greater positive regard, cooperation, and empathy to people who they perceive as similar to themselves.¹³ This preference for people like ourselves is largely instinctive and unconscious.¹⁴ Affinity bias manifests not only as a preference for ingroup members, but it may also manifest as a more negative tendency towards outgroup members.¹⁵ For example, we are more likely to withhold praise or rewards from outgroup members.¹⁶ Affinity bias can impact promotions, how work is assigned, and other opportunities such as client pitches.

Diversity

A. Diversity in the Judicial System

According to the American Bar Association, in 2020 just 5% of all lawyers in the U.S. were African American, even though African Americans were 13% of the U.S. population.¹⁷ Male attorneys still greatly outnumber female attorneys in 2020 with male attorneys at 63% of all lawyers and females at 37% of all lawyers.¹⁸ In 2019, 9.6% of partners in law firms were lawyers of color, including Hispanic, African American, Asian, Native American or mixed race.¹⁹ While efforts have been made to increase the number of women and diverse lawyers in law, these efforts have complex challenges.

¹³ Explaining Affinity Bias: Preferring People Like Us, <https://cultureplusconsulting.com/2015/06/19/explaining-affinity-bias/>

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Profile of the Legal Profession 2020, American Bar Association from <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>

¹⁸ *Id.*

¹⁹ *Id.*

On April 15, 2021, the Florida Supreme Court limited the Business Law Section of the Florida Bar’s attempt to increase diversity of faculty in continuing legal education programs. Specifically, the Court added language to rule 6-10.3(d) prohibiting the board of legal specialization and education from approving any course that uses “quotas based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or participants”.²⁰ The Court reasoned that quotas based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation are “antithetical to basic American principles of nondiscrimination.”²¹

Justice Lawson’s concurring opinion agreed with the majority’s holding while expressing support for the Business Law Section’s intention to “adopt a policy aimed at meaningfully broadening participation in the instructor pool for its educational offerings”.²² Justice Lawson goes on to write about the importance of equal treatment under the law and recognizes the role that diversity plays in advancing such equal treatment.

At this Court’s direction, both the Bar and the State Court System have for many years worked diligently to assure a system of justice that is fair for all and that treats all individuals as equal under the law. This Court is steadfast in its firm commitment to these ideals. I believe that these ideals are best advanced when individuals with very different backgrounds and experiences work together. This is because our experiential differences often result in starkly different modes of thought and perception—including deeply divided perceptions surrounding concepts as facially straightforward as “fairness” and “justice.”

It is when those who perceive and think differently come together in an environment of mutual respect and genuine concern for the well-being of others that we can best gain the understanding necessary to fully advance the ideals underpinning our judicial system. It is essential that we continue this work, and I am grateful to the Bar and its sections for their continued pursuit of these core ideals that are

²⁰See *In re: Amendments to the Rules Regulating the Florida Bar*, No. SC21-284 (Fla. April 15, 2021). Rule 6-10.3(d) states: Course approval is set forth in policies adopted pursuant to this rule. Special policies will be adopted for courses sponsored by governmental agencies for employee lawyers that exempt these courses from any course approval fee and may exempt these courses from other requirements as determined by the board of legal specialization and education. **The board of legal specialization and education may not approve any course submitted by a sponsor, including a section of The Florida Bar, that uses quotas based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or participants.** (emphasis added)

²¹ See *id* (citing *Cf. Grutter v. Bollinger*, 539 U.S. 306, 334 (2003))

²² *In re: Amendments to the Rules Regulating the Florida Bar*, No. SC21-284 (Fla. April 15, 2021)(Lawson, J. specially concurring)

central to further advancing the cause of freedom for all, secured for all through the rule of law.

While this opinion demonstrates the Court’s recognition of the importance of diversity in the judicial system, it also highlights limits that exist on methods to advance diversity. In addition to diversity issues generally applicable to the judicial system, construction lawyers may also encounter issues related to diversity in connection with handling matters related to public construction projects.

Diversity in Construction Law

Laws and policies implementing programs designed to increase participation of minority businesses in government contracting are subject to strict scrutiny by Courts such that they must be narrowly tailored measures that further a compelling governmental interest.²³ Understanding the history and rationale upon which these programs are rooted is helpful in representing small businesses, veteran owned businesses, minority owned business and women owned business (“Diverse Businesses”) as well as the businesses who partner with them.

Statutorily enacted government programs have been created to ensure nondiscrimination in the award of government contracting, help remove barriers to Diverse Businesses participating in government contracting, promote the use of Diverse Businesses in government procurement and assist in the development of Diverse Businesses that can successfully compete with majority owned firms in the marketplace.²⁴

The United States Congress enacted the first Disadvantaged Business Enterprise (“DBE”) statutory provision in 1983, which required the Department of Transportation (“DOT”) to ensure that at least 10% of the funds authorized for the highway and transit federal financial assistance programs be expended with DBEs.²⁵ The Federal Highway Administration, the Federal Aviation Administration and the Federal Transit Administration are the primary DOT Operating Administrations involved in the DBE program.²⁶ The Federal Aviation Administration also maintains a separate DBE program for concessions in airports.²⁷

Similarly, Florida has enacted statutes to encourage minority participation in state procurement. The Florida Legislature found that “there is evidence of a systematic pattern of past and continuing racial discrimination against minority business enterprises and a disparity in the availability and use of minority business enterprises in the state procurement system.”²⁸ Under certain circumstances, counties, municipalities, community colleges and district school boards are authorized to use set asides and preferences to encourage public contracting with small and

²³ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

²⁴ See 49 CFR §26.1.

²⁵ Department of Transportation (May 7, 2021), DBE Program Overview, <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-program-overview>

²⁶ See 49 CFR § 26.3.

²⁷ See Title 49, Part 23.

²⁸ § 287.09451, *Fla. Stat.*

minority owned businesses.²⁹ The statutory framework governing programs designed to increase Diverse Business participation in procurement can be complicated. The chart below lists common federal and state Diverse Business programs and references thereto.

Program	Administrative Agency or Entity	Legal Authority
Disadvantaged Business Enterprise (DBE) Program	U.S. Department of Transportation through the Federal Highway Administration, the Federal Aviation Administration and the Federal Transit Administration	49 CFR § 26.3
Airport Concessions Disadvantaged Business Enterprise (ACDBE)	Federal Aviation Administration	Title 49, Part 23
The 8(a) Business Development Program (8a)	Small Business Administration	15 U.S.C. § 636 15 U.S.C. § 637
Minority Owned Business Enterprises (MBE) & Woman Owned Business Enterprises (WBE)	Office of Supplier Diversity	§ 287.09451, Fla. Stat; § 287.093, Fla. Stat; F.A.C. 60A-9
Florida Department of Transportation DBE Program	Equal Opportunity Office	49 CFR § 26.3

Conclusion

Lawyers understanding issues of diversity and guarding against bias is critical to the principals of justice and equality upon which our judicial system is based. Lawyers can guard against bias through education and awareness. Construction lawyers may encounter issues related to diversity in representing clients in matters related to public construction contracts and should be aware of statutes and general legal principals in connection with such matters.

²⁹ § 287.093, Fla. Stat; F.A.C. 60A-9