

# Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community

by Ronald M. Sandgrund, Esq., InQ.



This is the fourth article series by The Inquiring Lawyer addressing a topic that Colorado lawyers may consider often but may not discuss publicly in much depth. The topics in this column are being explored through dialogues involving lawyers, judges, law professors, law students, and law school deans, as well as entrepreneurs, journalists, business leaders, politicians, economists, sociologists, psychologists, academics, children, gadflies, and know-it-alls (myself included).

These discussions may tread on matters sometimes considered too highly regarded to be open to criticism, or even simple examination. I take full responsibility for these forays, and I recognize that I may be subject to assessment and criticism myself. (Please be gentle!) If you have an idea for one of these columns, I hope you will share it with me via e-mail at [rms.sandgrund@gmail.com](mailto:rms.sandgrund@gmail.com).

My thanks to Lauren Kingsbery for her great help with the dialogue, and to Leona Martínez for her excellent suggestions that helped shape this piece. I am grateful to the many dialogue participants willing to go on the record with their frank observations and comments. I am also thankful to those who provided me critical background information—even though they were not comfortable being quoted. Maybe, someday, their concerns will no longer endure.

*The way to stop discrimination on the basis of race  
is to stop discriminating on the basis of race.*  
—Chief Justice John Roberts<sup>1</sup>

*The way to stop discrimination on the basis of race is to speak openly  
and candidly on the subject of race, and to apply the Constitution with  
eyes open to the unfortunate effects of centuries of racial discrimination.*  
—Justice Sonia Sotomayor<sup>2</sup>

This article series covers three topics, starting with a discussion of implicit (unconscious) bias, asking: What is it? What does it look and sound like? How does it feel to be subject to implicit bias and what effect does it have? If implicit bias is unintentional, is it really bias? Can implicit bias be misidentified and, as a result, misconstrued? Can it be mitigated? What is the best way to react when confronted with implicit bias? We'll visit with some majority-minority mentors and mentees and find out what they learned from each other and how they navigated the shoals of implicit bias.

Next, we'll talk about diversity, asking whether purposefully incorporating diverse people—who may have unique perspectives simply by virtue of their race, gender, sexual orientation, ethnicity, or cultural upbringing—into the law office and courtroom fosters better legal thinking, improved work results, and a more socially balanced workplace. We'll ask how (and if) we'll ever know when we've reached a proper and balanced representation—when some hypothetical magic number, which some critics refer to as quotas, has been achieved. We'll ask whether we can and should be satisfied if we simply create an inclusive workplace or courthouse, even if that place is not as diverse as the community surrounding it.

Last, we'll discuss inclusiveness—that is, thinking and acting in ways that make every individual feel like a valued team member. Many people automatically gravitate toward, trust, hire, and like those similar to themselves. This is often referred to as affinity bias, which may be learned, although some claim it has a biological

component.<sup>3</sup> Can an inclusive work environment help foster a more capable law practice and a legal profession that represents a broader spectrum of the community? As long as law firms and courtrooms provide an inclusive work environment, is there anything left to do if they and the judiciary still don't look like the community they serve?

Along the way, we'll hear from some who feel that many diversity efforts are misguided, not because diversity is undesirable, but because of its potentially unintended consequences, such as stigmatization and resentment, and fears about the subordination of merit-based advancement to other goals. Are there inadvertent downsides in seeking to foster greater diversity in law firms, and are there alternative means of moving closer to diversity's goals while avoiding these negative consequences? This last discussion may be uncomfortable for many of us—but everyone I spoke to agreed that only a robust dialogue can move the conversation forward. One thing the dialogue revealed is that a new paradigm—"inclusiveness"—has emerged. Inclusiveness does not expressly seek proportional representation of anyone within the legal community. Instead, it seeks to unleash all lawyers' potential, so they can be evaluated on their actual rather than perceived merits.

## Notes

1. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007).

2. *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (Sotomayor, J., dissenting).

3. See, e.g., Kristof, "Our Biased Brains," *The New York Times* (May 7, 2015), [www.nytimes.com/2015/05/07/opinion/nicholas-kristof-our-biased-brains.html?\\_r=0](http://www.nytimes.com/2015/05/07/opinion/nicholas-kristof-our-biased-brains.html?_r=0) (discussing whether racial bias is a "feature of evolution" or simply the absorption of a "social construct"); Wilson, *The Moral Sense* (The Free Press, 1993) (discussing the bonding that occurs early between mother and child, leading to an affinity by the child toward those who look like the mother).

Series Participants



**Ron Sandgrund**

Ron Sandgrund, of counsel with the Sullan Construction Defect Group of Burg Simpson Eldredge Hersh Jardine, P.C., has been a trial and appellate attorney since 1982, representing, early in his career, primarily product manufacturers, insurance companies, and small businesses, including real estate developers and

builders, and then later, representing mainly property owners and homeowner associations in construction defect, insurance coverage, and class action disputes. He is a frequent author and lecturer on these topics, as well on the practical aspects of being a lawyer. He has handled both prosecution and defense of civil rights and discrimination claims.



**Rich Baer**

Rich Baer is senior vice president and general counsel of Liberty Media Corporation and Liberty Interactive Corporation. Previously, he served as chief legal officer at UnitedHealth Group and general counsel and chief administrative officer at Qwest Communications International, Inc. Before that, he served as chair of

Sherman & Howard's litigation practice. He obtained his BA from Columbia University and his JD from Duke University. He serves on the board of the National Jewish Medical Center and on Duke Law School's Board of Visitors.



**Raven Brame**

Raven Brame is a second-year law student at the University of Colorado Law School, eyeing a career as a prosecutor. She interned at the Colorado Springs District Attorney's Office in 2015.



**S. Kato Crews**

S. Kato Crews is a partner and trial lawyer with Hoffman Crews Nies Waggener & Foster LLP. He has a wide range of experience representing entities and individuals in lawsuits and arbitrations involving business disputes, employment law claims, construction and real estate matters, and other civil conflicts. He has served as a faculty member of the National Institute for Trial Advocacy. He earned his JD from the University of Arizona, where he served on the *Arizona Law Review*. He obtained his undergraduate degree from the University of Northern Colorado (UNC), from which he received the Distinguished Young Alumni Award in 2010. He was appointed by the governor to serve a four-year term on UNC's Board of Trustees in December 2014.

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**Franz Hardy**

Franz Hardy is a partner in the Denver office of Gordon & Rees, LLP, where he serves as chair of its national Diversity Committee. He practices in the area of complex civil litigation, and has frequently spoken and written on the issues of diversity and inclusion in the legal profession.



**Arash Jahanian**

Arash Jahanian is an attorney at Rathod | Mohamedbhai LLC. His practice includes advocating for the civil rights of employees in the workplace and individuals suffering governmental and institutional abuses of power. Before joining Rathod | Mohamedbhai, Arash was an associate in Crowell & Moring LLP's Washington, DC office and a judicial clerk for the Honorable Wiley Y. Daniel, U.S. District Court for the District of Colorado.

U.S. District Court for the District of Colorado.



**Kenzo Kawanabe**

Kenzo Kawanabe is a partner at Davis Graham & Stubbs LLP and a trial lawyer who represents clients in a variety of matters relating to commercial disputes, mass torts, products liability, and intellectual property. Kenzo dedicates significant time to *pro bono* and community work and served as the first-ever general counsel for the

National Asian Pacific American Bar Association, as well as on the boards of the Center for Legal Inclusiveness and Colorado Legal Services, among others. He received his BA from the University of Colorado Boulder and his JD from Georgetown University. He served as a law clerk for the Honorable Mary J. Mullarkey, chief justice of the Colorado Supreme Court.



**Kevin Loughrey**

Kevin Loughrey is a lawyer and businessman, and a graduate of Colorado State University ('68) and the Bates College of Law ('72). He was in private practice in Houston and Colorado Springs for several years, and then went in-house with various mining companies, starting with Rocky Mountain Energy in 1981 and becoming general counsel for Cyprus Minerals Company in 1983, running its legal department. Kevin became general counsel for Thompson Creek Mining Company in 1997, rising to become its CEO and chair. The company went public in 2007. Kevin retired from business and legal practice in 2013.

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**Qusair Mohamedbhai**

Qusair Mohamedbhai is a partner at Rathod | Mohamedbhai LLC. His practice is exclusively in the areas of plaintiff's employment discrimination and constitutional civil rights litigation. He advocates for the rights of employees in the workplace and for the civil rights of all individuals against governmental and institutional abuses of

power. He is also an adjunct faculty member teaching constitutional litigation at the University of Denver Sturm College of Law.

Series Participants



**Vernā Myers**

Vernā Myers is founder and president of the Vernā Myers Company. She is an expert facilitator, a motivational speaker, and a strategic advisor. Her TED talk, “How to Overcome Our Biases? Walk Boldly Toward Them,” offers three ways any person can become an active participant in countering racial bias. She is also the

author of the best-selling books *Moving Diversity Forward: How to Move From Well-Meaning to Well-Doing* and *What If I Say the Wrong Thing? 25 Habits for Culturally Effective People*. A graduate of Harvard Law School and Barnard College (Columbia University), Vernā was the first executive director of the Boston Law Firm Group, served as deputy chief of staff for the attorney general of Massachusetts (1997–99), and practiced corporate and real estate law at Testa, Hurwitz & Thibault, LLP. Vernā has touched more than a million people through her speeches, appearances, and transformative message of power and possibility. For the last two decades, she and her consultant team have helped eradicate race, gender, ethnicity, and sexual orientation barriers at elite international law firms, Wall Street powerhouses, and the 10,000 member Fire Department of New York, with the aim of establishing a new, more productive, and just status quo.



**John Palmeri**

John Palmeri is co-managing partner of the Denver office of Gordon & Rees, LLP, where he handles complex civil litigation matters. He has tried dozens of cases to jury verdict and has argued a number of precedent-setting appeals in federal and state court. He is a member of the American College of Trial Lawyers and the

American Board of Trial Advocates.



**Neeti Pawar**

Neeti Pawar maintains a solo practice focused on mediations, appeals, and employment law investigations. Previously, she was a partner with DiManna & Jackson LLP. She’s been included in Colorado Super Lawyers’ list of “Top 50 Women Lawyers” (2012–14) and was recognized as one of Denver’s “Forty Under 40” by the

*Denver Business Journal* in 2007. She is the founding and past president of the South Asian Bar Association of Colorado. Neeti spends her nonlawyer time skiing, dancing, traveling, and espousing the virtues of slow food and a healthy lifestyle.



**Siddhartha Rathod**

Siddhartha Rathod is a partner at Rathod | Mohamedbhai LLC. His practice areas include civil rights, employment law, and criminal defense. Siddhartha was also a member of the Guantanamo Bay, Cuba *habeas* litigation team, where he represented five detainees from Yemen. Siddhartha has been a faculty member

for the National Institute of Trial Advocacy since 2011 and is adjunct faculty at the University of Colorado Law School.



**Dr. Arin Reeves**

Dr. Arin Reeves of Nextions is a prominent researcher and advisor in the areas of leadership and inclusion. Her first book, *The Next IQ*, focuses on interruption of unconscious bias, and her second book, *One Size NEVER Fits All*, focuses on gender differences in business development. Arin studied business at DePaul University’s College of Commerce, attended law school at the University of Southern California, and received her PhD in sociology from Northwestern University. You can learn more about her research and work at [www.nextions.com](http://www.nextions.com).



**Meshach Rhodes**

Meshach Rhodes is a partner in Armstrong Teasdale’s litigation practice group and an experienced litigator and advisor to senior management in all facets of complex commercial, regulatory, and telecommunications litigation. Meshach also plays a key role in the firm’s Agriculture, Food, and Health subgroup and assists

businesses in enforcement actions to ensure compliance with the Food and Drug Administration, the Federal Trade Commission, the U.S. Department of Agriculture, and other regulatory bodies. She is a graduate of Regis University, where she played collegiate basketball, and the University of Colorado Law School. Meshach serves on the Board of Trustees for Colorado Law, is chair-elect of the Center for Legal Inclusiveness, and is on the Board of Directors for the Colorado Center on Law and Policy and the Colorado Coalition for the Homeless. Meshach co-founded the Latinas First Foundation, which awards scholarships to college-bound women.



**Eli Wald**

Eli Wald is the Charles W. Delaney, Jr. professor of law at the University of Denver Sturm College of Law. A legal ethics and legal profession scholar, Eli has written on topics such as increased lawyer mobility, conflict of interests and attorney disqualification, attorney-client communications, lawyers’ fiduciary duties to

clients, the nationalization and globalization of law practice, and, most recently, the challenges facing lawyers representing clients in the emerging marijuana industry. He is a member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct, the Colorado Bar Association’s Ethics Committee, and the Colorado Chief Justice’s Commission on the Legal Profession. Before joining Denver Law, Professor Wald was a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison. He holds SJD and LLM degrees from Harvard Law School, and LLB and BA degrees from Tel-Aviv University.





## Part I—Implicit Bias



**InQuiring Lawyer:** Before I proposed an article on bias, diversity, and inclusiveness in the legal profession to *The Colorado Lawyer*, I ran the idea past two of my closest friends, whom I have known since law school and whose counsel I have sought regularly over the years. The first friend said flatly, “Don’t do it. You will find yourself embroiled in a fight with a lot of heat and next-to-no light.” He warned that it is not possible to have an honest discussion about race and bias in the United States, and that I would simply be inviting controversy, if not ridicule, in publishing such an article. My other friend said, “If not now, when?” *The Colorado Lawyer* greeted my proposal enthusiastically. I said to myself, “Take a chance. Trust the readers.”

As soon as I started the article, I faced the reality of my own insularity and implicit bias. I realized right away that I didn’t know very many diverse lawyers well enough to begin the interview process, and this was embarrassing. Fortunately, someone who may have anticipated my quandary supplied me the names of folks who might be willing to participate in the discussion.

Early on, I decided it would be appropriate to include the voice of those attorneys who were skeptical of diversity efforts in the legal profession. Incorporating this voice appeared necessary when I realized during my research that the seminal 2007 *Diversity in Colorado’s Legal Profession* survey and study,<sup>1</sup> which sought to measure the depth and breadth of bias within Colorado’s legal profession, left out an important fact: a significant number of prospective participants declined to answer the survey and, instead, commented that they had problems with and were deeply skeptical concerning any diversity efforts. In turn, some who became aware of these comments reacted to them negatively, but without engaging these persons to find out exactly what their concerns were.

In this dialogue, you will hear from diversity proponents regarding their own concerns about the unintended consequences of diversity efforts, and from those skeptical of such efforts. When I found an attorney willing to articulate the views of this latter group, I told him I was worried he might get some serious blowback. He said he could deal with it, and that it was more important for him to participate in a robust discussion. After finishing my interviews, I found that everyone agreed on two things. First, they agreed that diverse perspectives—experiential, cultural, racial, ethnic, gender-based, religious, sexual identity-based, and so on—are intrinsically valuable to all analysis and decision-making, including that of lawyers and judges. Second, they agreed that implicit bias, including that founded on race, ethnicity, religion, sexual orientation, and gender, exists in all of us and needs to be mitigated to the greatest extent possible. Participants disagreed, however, on the means for achieving diversity and minimizing implicit bias. (I am not suggesting that intentional bias is a thing of the past.<sup>2</sup>)

Still, I was worried that by giving a diversity skeptic’s viewpoint a voice, some might see the article as undercutting the substantial efforts by the Colorado Bar Association to improve diversity. In fact, I was worried that by allowing this gentleman to air his views, the article itself would be viewed as politically incorrect, and my friend’s prediction that I would damage my reputation (such as it is) would be realized. I discussed this concern with several people, including leading proponents of Colorado’s diversity efforts. Without exception, they said it was crucial to include this perspective

and to let readers judge for themselves the value of the dialogue participants’ views. As Dr. Arin Reeves, a nationally recognized leadership and inclusiveness expert, said to me, “Many of the skeptics of diversity and similar initiatives see holes in what is being said and done that diversity proponents cannot see, and they can be our best friends in figuring out how to create real diversity.” In particular, Phil Weiser, dean of the University of Colorado Law School (Colorado Law), and Eli Wald, a professor at the University of Denver Sturm College of Law (Denver Law) and nationally recognized legal expert on bias, diversity, and inclusiveness, encouraged this expansive approach. So, I dove in.

Without doubt, some of the interviewees and I will use descriptive terms improperly or with which some readers may take issue, despite the best efforts of the editors to manage this aspect of the article. In the end, some of what is expressed may be deemed awkward or quite politically incorrect, but I think it is more important that the discussion be had than to shut it down because of these fears.

*Implicit (Unconscious) Bias—What Is It?*

**InQ:** Cynthia Mares, president of the Hispanic Bar Association, defines implicit bias as “a positive or negative mental attitude towards a person, thing, or group that a person holds at an unconscious level.”<sup>3</sup> Professor Wald, how do you define this term?



**Eli Wald:** We all maintain unconscious models of reality that help us categorize and process the many bits of information we perceive at any point in time. Implicit bias is one such unconscious, strongly held set of beliefs in favor of people from the “in group.”

**InQ:** Franz, as a Big Law partner, what’s your working definition of implicit bias?



**Franz Hardy:** Implicit bias is based on stereotypes in your brain that you use to quickly appreciate the environment you are in. The challenge with implicit bias is realizing that you are doing it and taking a step back so you do not let that initial reaction pigeon-hole how things “should be.”

**InQ:** Vernā, you’re an expert in this field—what is implicit bias in a nutshell?



**Vernā Myers:** Biases are stories we make up about people before we know who they are. There are many common cognitive biases, including confirmation bias—we often see only what supports our beliefs, not that which contradicts them; attribution bias—errors made when one explains a person’s behavior based on an attribute or stereotype, such as assuming that the reason an employee who is a mother is not available is because she is attending to her children; and affinity bias—feeling favorably toward those who look most like us, to name a few.

**InQ:** Eli, are there any studies that reflect how these biases actually operate in law firms?

**Eli:** Yes, there is a well-known study of implicit bias in which 60 partners evaluated the same legal memo.<sup>4</sup> Those who were told the memo was written by a lawyer of color evaluated it more harshly than those who were told it was written by a Caucasian lawyer. The study demonstrates that law firms’ assessment and evaluation processes are tainted by racial bias. Importantly, the consequences of bias are very real: because of implicit bias, minority lawyers are systematically graded more harshly than their counterparts, and

consequently, over time, receive worse evaluations, are handed worse assignments, and do worse in terms of promotion for partnership.

**InQ:** Kevin, as the former head of several legal departments and a critic of many diversity initiatives, what is your reaction to the study that Eli just described?



**Kevin Loughrey:** That study to me seemed very straightforward. As described, it seemed valid and well done. Do I draw universal conclusions from it about what happens in the workplace? No, it's not sufficient. While I acknowledge the possibility, maybe even a probability, that this sort of bias exists, I don't draw a universal conclusion that it happens all the time and that it's a terrible problem we must deal with. It doesn't move me to that extent.

**InQ:** What sort of evidence might move you closer to the conclusion that there is a significant and pervasive problem of implicit bias and that it's serving as an obstacle to lawyers moving up in a firm?

**Kevin:** I guess more of the same. You asked me about one particular study that, in the world of legal employment, involved a statistically insignificant number, which had, I admit, a profound result. The numbers were telling, and the study seemed to eliminate almost all the variables. So, more studies like that, concluding the same things, coupled with facts that showed similarly talented lawyers weren't rising, would move me. While the study results don't surprise me, I had hiring and supervisory powers for both legal and non-legal personnel for over 25 years, and the study results don't comport with my experience.

**InQ:** Eli?

**Eli:** There are many studies that establish that implicit bias takes place all the time. There is nothing to debate; it's a scientific fact. But implicit bias is often hard to capture and document, because it is unconscious.

**InQ:** Eli, how prevalent is implicit bias in the workplace?

**Eli:** Very prevalent. Implicit bias is not some mystical creature that makes an appearance once a year. It is present every day, in every interaction, and in every assignment. Because implicit bias taints everybody, it is likely that the evaluation, hiring, firing, and promotion decisions at small firms feature the same implicit bias patterns that are easier to document at large firms. The nature of the problem is the same. What we need to combat it are measures of performance that acknowledge the existence of implicit bias and attempt to mitigate it so we all can compete on a meritorious, level playing field.

**InQ:** Rich, you are a white guy who has held many leadership positions in Big Law and Fortune 500 companies. Have you seen implicit bias in operation from that perch?



**Rich Baer:** Of course, everyone is biased. You see bias all the time.

**InQ:** Kevin, despite your general opposition to diversity initiatives, do you believe implicit bias exists?

**Kevin:** It is very much there—we are all a product of a multitude of biases. I've had a legal career and then a purely business career. In both cases I found that everybody, myself included, had these kinds of biases. You try to understand it, and to the extent it is detrimental, weed it out, and get the best evaluation you can, but it is definitely there.

## Implicit Bias in a Lawyer's Everyday Life

**InQ:** I thought it would be useful to gather stories of implicit bias from those who have felt its effects. Those who study this phenomenon, like Eli Wald, warned me that because such bias is unconscious, it is often difficult to detect. The "legal memo" study Eli just described, and his more recent and seminal law review article,<sup>5</sup> underscore this fact: without the controls imposed by the study, it is very hard to gauge in the real world when hiring and promotion decisions are grounded in unconscious bias. Moreover, when confronted with potential bias, each of us naturally articulate a "neutral" reason for our actions, such as "he seemed to connect better with our clients" or "she didn't seem as forceful or persuasive in the courtroom as she needed to be."

**InQ:** Rich, it seems like the focus on hiring the so-called "smartest" lawyer inadvertently pushes out a lot of disadvantaged but talented lawyers. The criteria Big Law uses to determine the "smartest" lawyer—the schools they came from, the grades they got in those schools, and so on—ignore the much broader amalgam of talents and criteria that many great lawyers possess. As general counsel for Liberty Media, how do you feel about that?

**Rich:** I agree. What makes a great lawyer is subjective, by definition. There is no data out there establishing the effectiveness of lawyers. So, law firms are relegated to making subjective decisions dressed up with so-called objective criteria.

**InQ:** Kenzo, you previously had me take Harvard's implicit bias tests,<sup>6</sup> and the results, while intriguing, don't tell us much of how they translate into the real world and actual behaviors. As a partner in one of Denver's largest law firms, can you share some real-world examples of implicit bias in the legal workplace that have come to your attention?



**Kenzo Kawanabe:** Yes, and unfortunately, I have many stories to share from my colleagues at various firms and companies. I need to change some minor details, such as names, to keep the stories anonymous:

Two Asian-American women start as associates at the same firm. While they both graduated from law school the same year, they look nothing alike. However, partners often confuse them for each other. This contributes to each associate wondering whether she is appreciated or even noticed.<sup>7</sup>

A newer African-American attorney is in a nearby parking lot when told by a partner, "I hope you aren't planning to break into that car."

A female attorney has been working 250 billable hours per month preparing for a trial. She hurriedly leaves the building to go meet a witness, and when she passes a partner he asks if she is beginning her "mom time."

A male lawyer, while negotiating a settlement with female opposing counsel, states, "I bet there aren't a lot of men who say 'no' to you."

A female lawyer cross-examines a male medical expert at trial. The expert, in frustration, exclaims to the judge and jury, "I feel like I'm talking to my wife."

Assuming that the male attorney appearing before him is the supervisor, a judge continuously compliments this junior male attorney about the quality of work of his female colleague. The judge does not recognize that the female colleague is actually the chief of the division and is the male attorney's supervisor.

There are two Hispanic women in the courtroom: Ms. Lopez is the attorney and Ms. Gonzalez is the court reporter. Opposing

counsel continuously confuses their names. Finally, when confronted by the attorney, he responds, “Oh, yeah, it’s all the same isn’t it?”

Frankly, the stories are legion, and this is just a sampling.

**InQ:** Franz, any example of implicit bias that comes to mind?

**Franz:** Sure, giving my name to someone on the phone, and then meeting them. They say, “Oh, I didn’t appreciate you would look like you do” or “you don’t look like a ‘Franz.’” If you’ve never met me, you see the name—Franz Hardy—you think what? You think German, white, whatever the connotation that initially comes with that, and then I see the look on people’s faces when I meet them in person.

**InQ:** What’s the look?

**Franz:** The mouth opens for a split second, the eyes widen just a little bit, and they say, “Oh,” but then they quickly pivot to, “Of course, Franz.” Sometimes I get this: “I thought you would be German.” A part of me says, “What makes you think I’m not?”—even though I am not.

**InQ:** Well, I have to admit that you and I had quite a few dealings over the years before we actually met in person some time ago. For a while, I was always confusing the two “German” guys from White & Steele, “Franz and Fritz [Klann].” After meeting you, I never got the two of you confused again. Is it ever more than, “Oh, you’re not German”? Is the message ever, “I didn’t realize my lawyer was a person of color?” or “I didn’t realize I was getting something less than a white lawyer?” Is it ever that obvious?

**Franz:** I haven’t seen that telegraphed, and I certainly don’t mean to imply it’s necessarily a client that I would be interacting with. It could be opposing counsel, it could be anybody, an expert witness, you name it. I don’t get the next question out loud, “Are you as good as a white lawyer?” And I’ve never seen it develop to the point where they say they aren’t comfortable with the relationship. I hope that by the time we get going and I show them what I’m about, they get over it pretty quickly. I also remember, as a new lawyer, co-counsel once mentioning to me that a particular person was black but “seems to be very articulate.” Almost like a compliment. I don’t think he’d say, “Oh, by the way, she’s white, but articulate.”

**InQ:** John, you were Franz’s mentor and are now his law partner—your thoughts?



**John Palmeri:** What Franz says reminds of an example that goes back a while. Former District Attorney Norm Early was on national television when he was running for mayor. The interviewer made the comment, “Oh Mr. Early, you didn’t sound African-American.”

**InQ:** John, you’ve worked with Franz for more than 15 years. From the outside looking in, have you ever seen what Franz just described? Have you ever been the anonymous white guy in the room when Franz steps out and you hear more of the bias come out from others?

**John:** Not that I recall. Frankly, we’ve never talked about this before today, but what he says makes perfect sense. I’ve never seen it, in part because he’s such an impressive person and presents so well, but I’m sure there’s a reaction there somewhere.

**InQ:** Okay Franz—I’m putting you on the spot: you’ve worked closely with John for 15 years, have you ever caught a whiff of implicit bias in his actions or words?

**Franz:** I really haven’t. I think John is sensitive to these things, more than most attorneys. He’s very cognizant. I don’t think it’s because I’m in his presence and if I wasn’t he’d say something dif-

ferent. Knowing him this long, I’ve never thought of John as having this other side. He’s very professional—that is his demeanor all of the time. His judgment is just based on the content of your character. John is the Denver firm’s co-managing partner. John does a wonderful job of appreciating different people’s viewpoints.

**InQ:** John, I have a tough question for you, and I’m sorry to put you on the spot. Don’t even look over at Franz for any nonverbal cues on how you should answer. Are you game?

**John:** Uh-oh. But, yeah, I’m ready.

**InQ:** A client of yours is going to meet Franz inside a crowded Union Station. The client doesn’t know your firm at all, and he says to you, “I understand I’m going to meet this guy Franz Hardy from your law firm—what does he look like?”

**John:** Good-looking guy, fit. I’d probably describe him as a diverse attorney, early 40s. I’m not sure if I would have said he’s African-American or Asian-American. But I think I would give them a head’s up.

**InQ:** Do you think if you told them he’s a “diverse” attorney, that would have been enough information to make sure he hooked up with Franz?

**John:** No.

**InQ:** Okay, then what would you really say to make sure he found Franz?

**John:** I’d probably say early 40s, fit guy; he’s African-American or Asian-American.

**InQ:** Franz, how would you describe yourself to somebody in this situation?

**Franz:** I probably would not mention my race.

**InQ:** How would they find you?

**Franz:** I’d say I’m wearing a blue blazer, with a light-blue polo shirt and slacks. I wouldn’t use race. I’m not saying it’s not accurate and it’s not generally done. I’d never describe you, Ron, to someone who didn’t know you as: Ron is a white guy. I’d never say that. I’d say you have salt and pepper hair, and you’re about 5 foot 10, and you wear glasses. I consciously take that into the equation where I won’t describe people by their race. I’ve never had an occasion where I didn’t find a person because I didn’t know what race they were. Guess what? It usually works out—you connect.

**John:** I’ve described myself as Italian, mid-50s, with salt-and-pepper hair.

**InQ:** Franz, do you self-identify as African-American? Is that the “box” you would check?

**Franz:** That is not a fair question because I identify myself as black and Japanese. That is my makeup. The unfair form of your question really is, “choose one.” And another “box” I can check is “other,” which I also don’t think is a fair description because then I get lost in the wash as I can’t identify as either black or Asian. So, maybe it’s my sensitivities, but I really take umbrage with the form that says “check the box” where I don’t have the option to really identify who I am. It’s “choose one or pick ‘other.’” If you want to talk about bias, that is something that goes over those people’s heads who create those forms.

**InQ:** Neeti, you are a local attorney and mediator, can you share some examples of implicit bias that you’ve run into?



**Neeti Pawar:** My husband recently met someone tied to the law who knew me and who said, in substance, “I love her. I always think of her when I need an opinion on diversity.” It was well intentioned. These types of comments usually are. But they expose the



fact that minority attorneys have to make added efforts to extricate themselves from the limited roles imposed upon us. Attorneys in the majority face much less of this—they have the luxury of defining themselves and their expertise. It’s simply an advantage others have when focusing their efforts without the burden of undoing expectations.

**InQ:** Has implicit bias played a role in your mediation practice?

**Neeti:** Once attorneys and parties have scheduled a mediation with me, I haven’t really felt bias coming into play. However, I do believe that bias influences the selection of a mediator. I have had an exchange with more than one attorney of color commenting that it is difficult to schedule mediations with me, as a mediator who is also of color, because the perception is that I will not be neutral—that I will consciously or subconsciously favor the attorney of color’s side, because “how could it be any other way?” Of course the bias isn’t phrased so explicitly, but close enough: “Are you guys related?” is one way it might reveal itself.

**InQ:** That sounds terribly awkward.

**Neeti:** Again, not awkward, just an observation. I am sure there are some who will read this and think, “Maybe she’s just not a very good mediator, that’s why they don’t want to use her.” Well, that in and of itself could be evidence of implicit bias—reading this interview not to learn, but to dissect and dismantle. This is the kind of bias that lawyers in the majority don’t face. Would anyone ever ask such a question about a mediator who isn’t a person of color, or require this second level of scrutiny? Unlikely.

**InQ:** Have you had any negative courtroom experiences that you associate with possible unconscious bias?

**Neeti:** Once a judge told me that my name “isn’t from around here,” so he shouldn’t be expected to learn how to pronounce it. It makes me wonder if that’s simply his way of asking for forgiveness for continuing to pronounce it wrong, or if there’s subtext I’m supposed to be picking up on. If this is an expression of bias, it adds to a concern that has nothing to do with my job or my client. Am I at a disadvantage compared to the majority lawyer on the other side? Some would say I should just “get over it” and not be so sensitive. This shifts the burden back to me, another point of power the majority enjoys.

**InQ:** I have to admit, when I first reached out to you, Siddhartha Rathod, Qusair Mohamedbhai, Arash Jahanian, and Meshach Rhodes, among others, I was nervous about mispronouncing your names before we first spoke. So, I decided to just apologize for not knowing, and asked.

**InQ:** Are there other courtroom incidents that stand out in your mind?

**Neeti:** When I was still litigating, I was regularly assumed to be the courtroom Spanish interpreter, not the lawyer. I routinely had to reassure my confused client that it was a simple misunderstanding and that it was not an indication of my reputation, credibility, or experience. I had to take time to clear up the misperception, and do so in a way that did not create hostility or embarrassment for those who started the misrepresentation in the first place. The most explicit example I can think of was going to court, in a suit, carrying my black briefcase, and holding a legal-sized file and statute book. I stood in the line designated for lawyers to check in on behalf of their clients. I got to the front of the line and pointed to my name on the clerk’s list of lawyers, identifying myself and letting her know my client was present. She was about to check my name off the list, but then she looked up at me, paused, stared for a

second, and asked: “Are you the interpreter?” When I told her no, I was an attorney, and repeated my client’s name—not a Hispanic-sounding name—she asked, “Does your client need an interpreter?” My client was standing right next to me—tall, white, male, blonde hair, blue eyes. He was nervous to be there as it was. He didn’t understand the confusion and was worried he was being confused with a different defendant. It’s a rare occasion when the example is so explicit: I had every prop and accoutrement of a lawyer. My name was on the list of lawyers. I was in the lawyer line. The clerk had no indication that I was anything but a lawyer—until she looked up and saw my face.

**InQ:** Siddhartha, what experiences have you had with implicit bias?



**Siddhartha Rathod:** I’m routinely called by the name of other minority attorneys. I’m confused for other minority attorneys. Sometimes I’m mistaken for a minority client we represent.

**InQ:** Arash?



**Arash Jahanian:** We have encountered opposing counsel and judges who just don’t see the particular defendant’s behavior as discriminatory, where anyone who is part of the plaintiff’s race, gender, religion, or sexual orientation would tell you that the behavior was clearly so. There’s a disconnect because those lawyers and judges don’t share the same experiences and perspective.



**Qusair Mohamedbhai:** I represented a 2007 Columbus Day parade protestor who was part of a mass arrest. Our client, a white man, was dressed in a business suit at trial. The arresting officer identified me as the defendant, saying, “That’s the man that I arrested for obstructing the Columbus Day parade.” I think his misidentification resulted from his disbelief that a minority attorney would be handling such a high-profile case.

**InQ:** Meshach, you speak often on this subject, what sort of examples of implicit bias do you share with law students and new lawyers?



**Meshach Rhodes:** Back when I was a junior lawyer, I was one of those attorneys who tried to work harder than anyone else. I just took as many assignments and worked for as many partners as I could because I thought it would raise my profile and I would learn more. Frankly, I did that because I was afraid of failure—there was no backstop for me. If I wasn’t successful in this career, there was nothing. I didn’t have a safety net.

**InQ:** What happened?

**Meshach:** It was a Saturday night and some partners and associates, including me, were working late on a case right before Thanksgiving that was slated for trial. One of the partners said to me, “So what do your people do for Thanksgiving?” I thought to myself, “It’s late. I don’t know what you mean. I’m not sure where to take that.” This partner and I had a good working relationship and I don’t think he meant it in any negative way. He was just trying to reach out to me and ask me what I do for Thanksgiving and it came out a little funny. The reason I share the story is that I didn’t know how to handle it then and, to this day, I still don’t know how. I laughed it off as I typically do with most implicit bias situations.

**InQ:** Have you had other experiences along that vein?

**Meshach:** Just recently, I was in court meeting some of the other lead counsel in a class action case where I am lead counsel and someone asked me if I was a lawyer. I had my associate with me. “Yes, I am. I have the briefcase, I have the suit—why would you think I’m not?” And he laughed it off and said, “You look a little younger than most lawyers who are defending class actions.” I gave him that—it’s probably a fair comment. But it also happens about once a month with me.

**Rich:** Do you perceive that happening because of your race or because you actually do look young?

**Meshach:** It’s probably a little bit of both, and I think it depends on the context.

**Rich:** Well, in my mind, I think that was an idiotic statement to make to Meshach, “Are you a lawyer?” Why would you even ask that question? If I saw someone act that way, I’d be very confrontational. How stupid of a question is that?

**InQ:** Meshach, if the lawyer was, in fact, asking simply because you look young to be lead chair on a class action lawsuit, what does it say about your initial reaction? Aren’t you bringing your own biases to your relationships with other lawyers and then, possibly, reacting to a bias that isn’t really there?

**Meshach:** I think that’s fair. That is one of the reasons I spend so much time on this topic. I think it would be hypocritical of me not to recognize my own implicit biases because I have them—everybody does. I think in that instance, it was one of those times where I do not think he asked because I was a bit younger than most folks in the room.

**InQ:** Vernā, you have consulted quite a bit with law firms seeking to minimize bias. What have you observed?

**Vernā:** There are so many ways implicit bias shows up in the legal space. It is invisible, such as in the way assignments are handed out or how choices and assessments are made. Male partners often hire men from the same law school with similar backgrounds. Recently, I saw a stark example of implicit bias that arose in the context of a straight law partner working with a gay law partner. The straight partner knew the specifics of all his other partners’ families, including their children’s names and family highlights. He knew almost nothing about the gay partner’s personal life. The straight partner treats the gay partner with the same affability as he treats the other partners, but he doesn’t see that he is, in fact, treating him differently. In fact, he’s likely to deny it.

### *Implicit Bias—A Law Student’s Perspective.*

**InQ:** Raven, I understand from Dean Phil Weiser’s referral of me to you, that you have a story to share from your experience with the student legal aid program?



**Raven Brame:** Yes. As part of Colorado Law’s Courtroom Observation class, I traveled to Longmont with a law school friend who looks white. This was not our first trip to the courthouse, and we were dressed professionally. The deputy sheriff in the entry area automatically assumed I was a criminal defendant, and he pointed me to the door for defendants. I noticed that he didn’t look at my friend, just at me, when he directed me over there. The deputy sheriff’s actions had nothing to do with how I was dressed or how I spoke—it was simply due to the color of my skin.

**InQ:** How did that make you feel?

**Raven:** I was upset. Look, I know that I’m in a professional field and that I need to control my emotions. But it certainly made me

think: “How can a person feel like they can get justice when they are presumed to be a criminal based on the color of their skin?” I thought it was a sad thing to happen, but, frankly, I’ve gone through this before. Still, I didn’t think I’d go through it again while in law school. You know, I’m proud to have made it to law school, especially being the first in my family to get there. But, honestly, the incident made me feel this small [indicating a tiny space between with her thumb and index finger]. For a moment, my stomach sunk. My achievements felt devalued. I felt devalued. Kind of like I was viewed as a little child, like I was at the bottom of the totem pole.

**InQ:** I understand that you mentioned the incident to your supervisor.

**Raven:** The CU faculty’s reaction was amazing. Phil Weiser sent an email to me personally late that night, explaining how sorry he was for the situation. Professor Ann Roan and my faculty supervisor, Professor Robinson, were very supportive. They wrote a letter to the sheriff and arranged a meeting.

**InQ:** How did that meeting go?

**Raven:** We met in an office space at the Justice Center, and the head commander was very welcoming. He asked, “What route do you want to take?” I said that I didn’t want to get the officer in trouble, I just wanted to pursue an informal route—have a conversation explaining how I felt. After I finished my story, the officer responded, “Honestly, I don’t remember you.” That said a lot to me. The officer then said, “I never use the words you describe. I always ask, ‘Are you here for court?’” He added, “If you took it the wrong way, I’m sorry. You know, I’m one-quarter Latino.” In my head I’m thinking, “You’re missing the point!” He then said that whatever I “thought” he said, he didn’t mean for it to come out that way. His body language seemed very negative to me—but, I’ll admit, my own implicit biases can come into play in these kinds of circumstances.

**InQ:** Raven, have you spoken to diverse lawyers about your experience and asked how they would have handled it?

**Raven:** One person suggested that I should try to “compartmentalize” this experience, that in the long run, this would be better for me. I get that—that sometimes these incidents happen, they are just part of reality, and I must move forward and not let an event like this hold me back. I can’t let it define me or give me sleepless nights.

### *Reacting to Implicit Bias*

**InQ:** Kenzo, any tips for attorneys new to the practice on how to manage these situations?

**Kenzo:** I think that the best way to combat bias—something that exists in all of us—is quite simply to address it. I realize this is easier said than done, and it depends on the situation. But if you observe bias against you or one of your colleagues, at least consider addressing it. For example, in the last real-world story I previously related, concerning opposing counsel who kept confusing the Hispanic attorney with the court reporter, the senior male partner stood up and said, “I think you will find that it most certainly is not ‘all the same’ sir.” Also, help facilitate conversations or trainings about workplace bias. There are many resources available, including at the Center for Legal Inclusiveness in Denver, as well as with the various bar associations in Colorado.

**InQ:** It seems to me that the natural reaction of many who are called out as being “biased” is to become defensive, to deny any bias, and to offer a non-discriminatory reason for their conduct. In



fact, this could occur so fast, and so seamlessly, that the explanation offered might actually be impossible to distinguish from the truth. Conversely, the person claiming bias may be perceiving something that simply isn't there. As a result, no one is happy: the accused feels attacked, and the person challenging the conduct believes they aren't being heard and feels devalued.

**Kenzo:** Listen, unless the bias is explicit with motivations to harm, one does not need to discuss bias in a confrontational way. We first must start with the simple truth that all of us, including me, have bias. Fortunately, we've evolved and can overcome our own biases with reason.

**InQ:** Franz, if the definition of implicit bias is a fair one, that it operates at an unconscious level, how can we change people's behavior? Have you found any techniques or strategies to sensitize people to it without calling them out and maybe making them feel defensive?

**Franz:** There are times when I have called people out. During a large meeting, another lawyer made a comment about a woman we both knew. He said, "She still looks great after all these years." I just cringed. When the meeting was over, I felt enough at ease to say to him, "That made me uncomfortable in there. I'm sure you probably wouldn't have said that about a man." His reaction was jaw dropping. He said, "I didn't mean it like that. I meant it as a compliment." Ultimately, I don't know how my comment affected him. I just know this: if you never say anything, it just keeps going.

**InQ:** It must be hard to speak up sometimes because of the business and political context in which the remark arises?

**Franz:** Look—my job is not to call everybody out because I'm the correctness police. Is it a remark I will always remember about you? Absolutely. Does it mean that I have to speak my mind? Only if it was the right situation. But I've heard comments on many occasions throughout my career. Not in the overt, racist statement. But along the lines of, "Oh, they are a minority, but despite this shortcoming, they seem to be a perfectly nice individual."

**InQ:** Kato, as an African-American, what have been your experiences in facing implicit bias?



**Kato Crews:** I have lived somewhat of a charmed life. I say this because my milestone life experiences have not included any notable encounters with race bias. This is always surprising to me when I consider that I was the only African-American male in my high school of 146 students in Rye, Colorado, and the rarefied air that we as African-American lawyers oftentimes find ourselves in, particularly practicing here in Colorado.

**InQ:** How did you approach that experience in high school?

**Kato:** I never wanted to be given a "pass" for performing poorly in any endeavor based on another's preconceived notions, whether unconscious or conscious, that lesser should be expected from a black male. So I fought daily to surpass the potential unconscious expectations others may have held for me. I chose to fight this battle not because of any overt or direct experiences with bias that I can recall, but rather because I had decided at a young age that I was not going to let others brand me with their subconscious negative assumptions. I graduated high school as salutatorian and with other high achievements, so I believe that my battle to void implicit biases contributed to my positive high school experience.

**InQ:** How did that attitude carry forward for you as a lawyer?

**Kato:** When I first started working for the big firm in downtown Denver in 2001, I aimed to turn in outstanding work product

that left little room for substantive partner scrutiny. Though they may have asked for drafts, it was my aim to submit work product that could be filed with the court or provided to a client without a second thought. It was engrained in me at that time to write in a manner to stymie those who might unconsciously expect to find errors in my writing because of my race. I think that many female lawyers experience the same thing in terms of believing they have to outperform their male counterparts tenfold to receive even a fair comparison. I think this mind-set helped propel me to success at the big firm. I made partner in 2008 and was made head of the firm's labor and employment law practice group before I chose to leave in 2011 to establish my own small-firm practice with a few colleagues. My drive to beat implicit bias has applied equally when I deal with clients, judges, arbitrators, mediators, and jurors—meaning I do what I can to exceed expectations considering the potential that someone may have low expectations of me based on my race alone.

**InQ:** So, it sounds like you choose a "preemptive" approach when it comes to bias.

**Kato:** I guess you could say that. My experience with implicit bias has not been a story of suffering, rejection, or hurt. Rather, I have found empowerment and positive results from pushing myself to outperform biased assumptions. I concede that my combat with implicit bias suggests a bias—perhaps an explicit one—of my own. In other words, I basically expect or assume that others outside of my race are going to have a skewed view of my abilities because of my race. To me, this highlights the complexities of bias and its nuanced effects on those of us who may be forced to confront it.

**InQ:** Have you somehow escaped the effects of implicit bias?

**Kato:** I doubt it. I suppose my approach to fighting implicit bias is itself an effect of implicit bias. And perhaps I have been naïve to recognizing specific instances of explicit or implicit bias directed at me in my legal career. But to the extent those moments have occurred, I have never had a victim’s mentality around those circumstances. By working meticulously to void implicitly biased expectations of my abilities, I have so far reaped the benefits of a solid legal career, a beautiful family, and a positive family-work balance.

**InQ:** In a way, it seems that you have turned implicit bias on its head and made it work for you—is that a fair statement?

**Kato:** Fair enough. I’ve made it work for me from the standpoint of making a conscious decision to refuse to allow others’ negative assumptions of my abilities hold me back.

**InQ:** Meshach, you previously shared a story earlier about a supervising lawyer asking what “your people” do for Thanksgiving. Given that you are now more established, would you handle the situation differently today?

**Meshach:** Recently, when I shared this story, I added the words I failed to use at the time: “Who are you talking about? My people? My family? My lawyer friends?” And one of the people I was talking to said to me, “Don’t you think it is funny that in your response, it seems like all these different types of people around you don’t cross over. Those types of people are very different. That says something about you. That says something about your socioeconomic background, your racial and ethnic background.” And they were right. I think this is something that plays into implicit biases that I carry, which is fair.

**InQ:** That’s interesting. I’ve heard that from so many folks I have talked to. It’s like a Russian nesting doll. Someone encounters what seems like implicit bias, but they see it through a filter of their own implicit biases, which shapes their reaction, which then, in turn, affects the other’s reaction. Meshach, it seems very good that, when the lawyer in that class action case asked whether you were a lawyer, you asked, “Why would you say that?” It forces the person to confront the bias, if any, that they are operating under.

**Meshach:** When I do that, I always do that in jest, because I tend not to be confrontational.

**InQ:** At this point in your life and career, have you reached a comfort level in more pointedly dealing with implicit bias?

**Meshach:** In one’s legal career you get to a point of trust, where you’ve earned a little bit of respect too, and maybe you are not as uncomfortable gently challenging someone and saying, “Hey, that made me a little uncomfortable.” When I was a junior associate, I never would have called someone out because I was not about to put myself in that situation, nor put a colleague, who might have reacted uncomfortably, in that situation. That’s why it is incredibly important to have sponsors and mentors, because as a new lawyer you have to rely on your network to figure out ways to work around these things so they don’t hurt your career. New lawyers need to be able to use these folks as a sounding board, and say, “Hey, this happened to me, I don’t really think it was that bad—what do you think?” I recognize that I do have implicit biases, and I don’t want to be in a position where I think that every single time someone says something that might be a little off-color they are saying it for a negative reason. So, when I bounce stuff off my colleagues, whether they look like me or don’t, I often find some really good value in that.

**InQ:** What about the situation where someone says something that is perceived by another as potentially biased. The person who is the object of the “biased” statement says to the other, “Why did you say that?” or “What exactly do you mean by that?” They say it in a nice way to open up the dialogue and to allow the person to self-examine and think about what they did. But isn’t there a risk of putting that person on the defensive? It seems good to have that dialogue, but can’t it also create a problem?

**Meshach:** Absolutely. With any interaction, you have to be well versed as to whether it is appropriate to bring it up at that time or not. I tend to err on the side of caution and I tend to let things go. A lot of my colleagues do the same thing. I think the reaction often is, “It’s just a bunch of little cuts. It’s not really that big of a deal at the end of the day. It’s not worth it to call someone out on everything.” Listen, you don’t want your reputation harmed. You don’t want to put people on the defensive. I give them the benefit of the doubt. I think growing up in the legal profession and learning about context is helpful. At the end of the day, if you put your head down and work hard, hopefully you will be judged on the merits of your work and be given the same opportunities. Creating additional conflict could derail your career. That’s the concern. It’s a tough balancing act.

**InQ:** I would think that’s a big concern. People are going to worry they might be burning bridges by confronting others, no matter how gently.

**Franz:** I agree with Meshach about picking the right time to say something. As a junior attorney, I didn’t feel like I was empowered to be the one to talk to a more senior attorney and tell him or her what’s what, even though I knew I was right. It just didn’t feel right—I still had a lot to prove. I don’t think any of us can say what we want to say all the time. It’s just not that easy. I don’t think that is a helpful approach given the tremendous number of situations that can arise and the second and a half you have to decide whether you’re going to say something or let it go. I hate to be so subjective about it, but it might even come down to my mood at the time: Do I have the energy to do this right now? Or, do I need to complete this task and move on? More precisely to answer your question: As a new lawyer, I did not feel empowered to do much about it. Now I feel empowered.

**Rich:** Look, I understand that if you are the target of bias, it’s important to evaluate the situation and deal with it effectively. But I think it is incumbent on those who witness the bias to call the person on it. Meshach, you said, “Isn’t there a risk they may become defensive?” Great! As a person in a leadership position, I have no problem if it does create conflict.

### *Can Implicit Bias Be Mitigated if It Happens Unconsciously?*

**InQ:** Studies have shown that implicit racial bias is muted by deep friendships across racial lines.<sup>8</sup> Others propose that each of us employ a “bias” protocol when we become aware of a personal bias: (1) identify the potential bias; (2) describe the facts of the situation to yourself; (3) consider alternative interpretations; and (4) choose the interpretation most in line with the facts.<sup>9</sup> Cynthia Mares urges that, “We don’t have to—and we shouldn’t—throw up our hands and say that if the bias is ‘unconscious,’ it cannot be addressed. Studies have shown that people who pay attention to the assumptions they are making and challenge them can start to change those assumptions.”<sup>10</sup>

**InQ:** Eli, your thoughts?

**Eli:** What we need to combat implicit bias are measures of performance that acknowledge its existence and attempt to mitigate it so we all can compete on a meritorious, level playing field. We know that evaluation of work product both daily and annually is tainted by implicit bias. Partners, unconsciously, will tend to favor the work of members of the dominant “in-group”: white male heterosexual associates. Firms can educate their lawyers about the perils of implicit bias and develop assessment and evaluation processes that are less tainted. Acknowledging that implicit bias exists is a necessary first step. It is hard to get people to admit they harbor biases. Behavior psychologists can be invited to law firms and conduct experiments on the spot showing the partners they are tainted by implicit bias. The next step is systematic training designed to minimize the impact of implicit bias. Pointing out implicit bias, one time, as an abstract phenomenon, will do little to uproot it. But incorporating implicit bias training repeatedly, in the context of the very decision-making processes lawyers engage in, will likely produce positive results. Studies show that after repeated training, decision-makers often get better: they not only become aware of the effects of implicit bias, but also perform better in the sense that biases have less of an impact on their decision-making. Thus, firms need to invest in repeated training regarding implicit bias. Over time, partners will produce evaluations that are less tainted by implicit bias.

**InQ:** Anything else?

**Eli:** Raising awareness and training lawyers to minimize the impact of implicit biases is a significant, time-consuming undertaking! In addition to reducing the likelihood of implicit bias, law firms can try to address some of the consequences of it. For example, firms should monitor how work gets assigned to make sure that all associates get the same kind of quality assignments. This does not mean that firms should only assign quality work to women and minorities. Rather, because implicit bias will tend to result in white heterosexual men, over time, receiving better assessments and better assignments, firms should monitor the flow of work to ensure that all lawyers get assigned quality work.

**InQ:** Is there more that can be done?

**Eli:** Firms can also encourage mentoring and bonding between their partners and associates. Such bonding is relevant to implicit bias because exposure to and interaction with “out group” members can help reduce biases regarding them. In fact, firms can do more than merely encourage mentoring. They can provide their lawyers with ample means and avenues in which to interact, and put in place incentives for mentoring and disincentives for failure to mentor. For example, law firms can pair powerful partners—those with lucrative books of business—irrespective of the race and gender of the partners, with associates of color and female associates such that the associates both work with and are mentored by these powerful partners.

**InQ:** Rich, you’ve been a leader in the legal field—how do you deal with your own unconscious biases?

**Rich:** What I’ve learned from the advocates is that people like me need to be more sensitive to our own biases and more sensitive in how we communicate with and treat other people.

**InQ:** If implicit bias is unconscious and neutral, short of someone calling you on a behavior, how are you to become aware that you are engaging in implicit bias behaviors?

**Rich:** I think we can improve our behaviors by learning about examples of implicit bias, educating ourselves and others to the fact

that we all have these biases, and then using that understanding to change how we act and think going forward. In a sense, to raise our consciousness.

**InQ:** Kevin, how have you grappled with your biases?

**Kevin:** I think I had a bias and was not fair in my evaluation of women early in my career. When I started out, my evaluations tended to rate men as aggressive, competent, very efficient, and cool, yet the same behavior would evoke different adjectives with women. It was just the way I thought about the world. And then I came to realize that was a mistake and I tried to improve.

**InQ:** How did you accomplish this change?

**Kevin:** My experiences with women coworkers were informative, and as a result, I changed. My assistant general counsel was a woman. She and I would talk a lot and that helped me understand a different perspective. I needed to improve my awareness. I was looking at the world in a certain way that tended to predispose me to look at certain behavior by women as unfavorable when I viewed pretty much the same behavior as favorable with men. I came to realize this, and then changed my view of the world.

**InQ:** Given your mind-set, how did you manage to hire a woman as your assistant general counsel in the first place?

**Kevin:** While I had a bias that colored my judgment, I like to think the only quality I really cared about was merit. When I talked with her and ultimately hired her, and then promoted her multiple times, it was always on the basis of merit. While I had the bias, it didn’t prevent me from seeing quality—although my bias did cause me to see things through a prism that wasn’t entirely accurate. Later, in my CEO role, I hired women as general counsel, director of human resources, CFO, director of investor relations, treasurer, associate general counsel, and many other positions. However, I did not hire them because they were women, or despite the fact that they were women. I hired them because they were the best qualified. I was not proud that I hired women. If there had been better male candidates, I would have hired them. I did not care about their superficial characteristics. I cared only about merit.

**InQ:** Other than encouraging your staff to focus on merit, were there any policies you implemented to mitigate the effects of implicit bias?

**Kevin:** No. What we did was to make the greatest effort we could to ensure the evaluation systems were fair, open, transparent, and measurable.

## Conclusion

*Racism is not merely a simplistic hatred. It is, more often, broad sympathy toward some and broader skepticism toward others.*

—Ta-Nehisi Coates<sup>11</sup>

Two years ago, I interviewed students from Colorado Law and Denver Law, and noted that “one of the [Latino] students said that he was not interested in investing time and energy in partnership track because the numbers painted such a grim picture of his chances of gaining partnership due to his ethnicity.”<sup>12</sup> When I raised this student’s concerns with Meshach Rhodes, she said, “I’m not willing to self-select before I even take the chance. I’m really saddened that someone would select out because they think opportunity does not exist for them . . . if you are doing that because you are afraid of failure, I would encourage people to reach out to the legal community before selecting out. I cannot complain about the numbers unless I at least give it a chance.”



In gauging the effects of implicit bias, many of us try to put ourselves in the shoes of the object of such bias. Everyone I have spoken to acknowledged that implicit biases, racial and otherwise, inhabit us all. Several described how they felt that such biases are a part of the human condition and were something to be managed, not eliminated. That these biases affect our daily speech and behavior is often not obvious. I'm an ostensible white guy, and yet I've noticed such biases directed at me many times, albeit under considerably more benign circumstances. Some examples:

- (1) my treatment as a new (and young) lawyer by judges, opposing counsel, clients, witnesses, and jurors, compared to my treatment after I got some grey hairs;
- (2) when traveling overseas, the reaction of fellow American tourists when they ask me what I do and I tell them I am an attorney (and how foreign tourists almost never ask the question), and how the demeanor of these American tourists improved greatly after I began telling them I was a writer or teacher, rather than a lawyer; and
- (3) how the reaction of strangers I am riding the ski lift with changes depending on whether I tell them that I live in Colorado, that I live in Boulder, or that I am a native New Yorker.

It must be very painful at times to encounter others who have a perfectly formed picture in their minds of who you are, what you think, and how talented or qualified you are before you even say hello based on what you look like, how you dress, or who you love.

### Notes

1. Lynn *et al.*, *Diversity in Colorado's Legal Profession* (Colorado Pledge to Diversity Legal Group, 2007), [www.centerforlegalinclusiveness.org/clientuploads/pdfs/CSI\\_Diversity\\_Report\\_August\\_2007.pdf](http://www.centerforlegalinclusiveness.org/clientuploads/pdfs/CSI_Diversity_Report_August_2007.pdf).

2. For those who have not dealt with intentional bias, or who believe it is a thing of the past—despite the headlines of the past couple of years—consider this interview with persons of color trying to rent an apartment, as reported on *This American Life*, Episode 512: “House Rules,” [www.thisamericanlife.org/radio-archives/episode/512/house-rules?act=1#play](http://www.thisamericanlife.org/radio-archives/episode/512/house-rules?act=1#play).

See also Clement, “White Millennials Are Just About As Racist As Their Parents,” *The Washington Post* (April 7, 2015), [www.washingtonpost.com/blogs/wonkblog/wp/2015/04/07/white-millennials-are-just-about-as-racist-as-their-parents](http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/07/white-millennials-are-just-about-as-racist-as-their-parents). Some have written eloquently, if not provocatively, on the subject, seeing institutional, intractable racism on a daunting scale; Coates, “Letter to My Son,” *The Atlantic* (July 4, 2015), [www.theatlantic.com/politics/archive/2015/07/tanehisi-coates-between-the-world-and-me/397619](http://www.theatlantic.com/politics/archive/2015/07/tanehisi-coates-between-the-world-and-me/397619).

3. Mares, “Is Anybody Listening? Does Anybody Care? Lack of Diversity in the Legal Profession,” *The Federal Lawyer* 36, 37 (June, 2015).

4. Reeves, “Yellow Paper Series: Written in Black & White—Exploring Confirmation Bias in Racialized Perceptions of Writing Skills” 2 (Nextions Original Research, 2014), [www.nextions.com/wp-content/files\\_mf/14468226472014040114WritteninBlackandWhiteYPS.pdf](http://www.nextions.com/wp-content/files_mf/14468226472014040114WritteninBlackandWhiteYPS.pdf).

5. Pearce *et al.*, “Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships,” 83 *Fordham L.Rev.* 2407 (2015).

6. See [implicit.harvard.edu/implicit/selectatest.html](http://implicit.harvard.edu/implicit/selectatest.html).

7. Studies suggest there is an “other-race effect,” a cognitive phenomenon that makes it harder for people of one race to readily recognize or identify individuals of another.” Swarns, “The Science Behind ‘They All Look Alike to Me,’” *The New York Times* (Sept. 20, 2015) [www.nytimes.com/2015/09/20/nyregion/the-science-behind-they-all-look-alike-to-me.html](http://www.nytimes.com/2015/09/20/nyregion/the-science-behind-they-all-look-alike-to-me.html). “It is not bias or bigotry, the researchers say, that makes it difficult for people to distinguish between people of another race. It is the lack of early and meaningful exposure to other groups that often makes it easier for us to quickly identify and remember people of our own ethnicity or race while we often struggle to do the same for others.” *Id.*

8. See Kristof, “Our Biased Brains,” *The New York Times* (May 7, 2015), [www.nytimes.com/2015/05/07/opinion/nicholas-kristof-our-biased-brains.html?\\_r=0](http://www.nytimes.com/2015/05/07/opinion/nicholas-kristof-our-biased-brains.html?_r=0).

9. See Lukianoff and Haidt, “The Coddling of the American Mind,” *The Atlantic* 46 (Sept. 2015).

10. Mares, *supra* note 3.

11. Coates, “Fear of a Black President,” *The Atlantic* (Sept. 2012), [www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064/?single_page=true).

12. Sandgrund, “The View From Law School—The Students’ Perspective,” 42 *The Colorado Lawyer* 75 (May 2013), [www.cobar.org/tcl/tcl\\_articles.cfm?articleid=8071](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=8071). ■