

# 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.

*Inclusion cannot be legislated into a society.  
It requires deep changes in attitudes and institutions.*

—Arun Maira<sup>1</sup>

*Without inclusion, diversity really doesn't make a difference.*

—Danyelle Granger<sup>2</sup>

*Diversity is being asked to the party;  
inclusivity is being asked to dance.*

—Vernā Myers<sup>3</sup>

This article series covers three topics. Part I kicked off 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 visited with some majority-minority mentors and mentees to find out what they learned from each other and how they navigated the shoals of implicit bias.

In the second part, we talked about diversity, asking whether purposefully incorporating diverse people—who may have unique perspectives simply by virtue of their race, ethnicity, disability, and cultural upbringing—into the law office and courtroom fosters better legal thinking, improved work results, and a more socially balanced workplace. We asked 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 a quota, has been achieved. We asked 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 surrounding community.

In this final installment, we discuss inclusiveness—that is, thinking and acting in ways that make everyone 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>4</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 have heard and will 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, resentment, “mismatching,” 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. Maira, “Looking Ahead of Growth,” *LiveMint* (Jan. 26, 2016, first published Mar. 10, 2013), [www.livemint.com/Opinion/jWbyAgP2CU4NW1ZuwG9qAO/Looking-ahead-of-growth.html](http://www.livemint.com/Opinion/jWbyAgP2CU4NW1ZuwG9qAO/Looking-ahead-of-growth.html).

2. Wersich, “Exec's Interest in Promoting Inclusion Leads to Multicultural Professionals Network,” *Evansville Courier & Press* (May 6, 2013).

3. Diversity expert and author Vernā Myers at the Texas Conference for Women (Nov. 19, 2013).

4. See, e.g., Kristof, “Our Biased Brains,” *The New York Times* (May 7, 2015) (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.



**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.



**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.



**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* and *What If I Say the Wrong Thing? A* graduate of Harvard Law School and Barnard College, Vernā was the first executive director of the Boston Law Firm Group, served as deputy chief of staff for the attorney general of Massachusetts, and practiced corporate and real estate law. She has touched more than a million people through her speeches, appearances, and transformative message of power and possibility. For the last 20 years, 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.

**Kathleen Nalty**

Kathleen Nalty is a lawyer/consultant who specializes in diversity and inclusion. She has assisted dozens of legal organizations in their implementation of inclusiveness initiatives. In 2015, she published the book *Going All-In on Diversity & Inclusion*. Previously, she co-founded the Center for Legal Inclusiveness (CLI) in Denver and led CLI as its executive director (2007–13). She received her BA from the University of Denver and her JD from the University of Colorado. Early in her legal career, she worked as a federal civil rights prosecutor for the U.S. Department of Justice, where she prosecuted hate crimes, slavery, and police brutality cases. Contact Kathleen at [kathleen@kathleennaltyconsulting.com](mailto:kathleen@kathleennaltyconsulting.com).

**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. She 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 FDA, FTC, USDA, and other regulatory bodies. She is a graduate of Regis University, where she played collegiate basketball, and the University of Colorado Law School. She serves on the Board of Trustees for Colorado Law, is chair-elect of CLI, and is on the Board of Directors for the Colorado Center on Law and Policy and the Colorado Coalition for the Homeless. She 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, conflicts of interest and attorney disqualification, attorney-client communications, lawyers' fiduciary duties to clients, the nationalization and globalization of law practice, and the challenges facing lawyers representing clients in the marijuana industry. He is a member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct, the CBA Ethics Committee, and the Colorado Chief Justice's Commission on the Legal Profession. Before joining Denver Law, he was a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison. He holds SJD and LL.M. degrees from Harvard Law School, and LL.B. and B.A. degrees from Tel Aviv University.

## Part III—Inclusiveness



**InQuiring Lawyer:** Participants in this dialogue have agreed on two major points: (1) implicit biases exist in all of us and serve to distort our perceptions and evaluations of others; and (2) diversity of thought and experience helps inform, if not enhance, our decision-making and analysis. Certainly, however, people disagree on how to reduce implicit biases and increase diversity. One recent journal article argues that many current diversity policies don't help women or minorities and serve to make white male employees feel threatened.<sup>1</sup> This Part III examines whether “inclusiveness” can provide part of the answer, by helping all lawyers realize their potential and by leveling a playing field tilted in favor of those imbued with greater social and political capital by dint of their skin color or socioeconomic background, religion, and other personal characteristics divorced from their talents as a lawyer.

### *Inclusiveness—How Does It Work?*

**InQuiring Lawyer:** Dr. Reeves, how does creating a more inclusive work environment produce better lawyers?



**Arin Reeves:** At the core of inclusiveness is trust—trust that one will be judged on merit alone, and trust that he or she is trusted and can trust others. When you have workplaces that are built on trust, you have lawyers who are thinking smarter and are eager to grow.

**InQ:** Can you provide examples of how developing this kind of trust pays dividends in getting better case results?

**Arin:** Three examples come to mind. The first two involved placing trust in less experienced lawyers to obtain information from witnesses who themselves did not trust the firm's more experienced lawyers.

**InQ:** Your first example?

**Arin:** During a civil rights investigation, the plaintiff's colleagues were hedging their answers. The lawyers handling the interviews felt they knew how to interview just fine. The problem was, however, that the employees did not trust them, especially employees who were people of color. The two white male lawyers interviewing them looked like their managers. A younger lawyer of color within the firm recognized that her colleagues did not perceive the bias that she saw and knew from her own experience. The coworkers did not lie, but they had been giving the white male lawyers unhelpful, monosyllabic answers. Once the younger lawyer was given the lead on the interviews, the coworkers opened up and provided valuable information that up to then had remained hidden from view.

**InQ:** Another example?

**Arin:** A medical malpractice case: There, a female lawyer connected better with the female nurses during the interview process. Again, the male lawyers didn't know what they were missing because they didn't have the perspective to know what they were missing. It helps in so many facets of legal practice when more people trust the lawyers collectively as a team.

**InQ:** And the third?

**Arin:** Last, consider the case of a firm doing bond work with municipalities. Lawyers who had connections with the neighborhoods at which the bonds were directed were more likely to talk to and connect with folks from that neighborhood, which resulted in less conflict and greater cooperation all around.

**InQ:** Vernā, what benefits do you see emerging from an inclusive law firm?



**Vernā Myers:** Lawyers need to work in an environment where people feel free enough to share their differences because this helps inform their decisions. It is better to foster an environment that accepts and adapts to our differences, rather than one that minimizes them. We each need to develop an intercultural competence. Those who argue that, down deep, we are all the same are denying our cultural differences.

**InQ:** You previously suggested I read Kenji Yoshino, who has written about “covering,” the tendency to “tone down a disfavored identity to fit into the main stream.”<sup>2</sup> He notes that in a society as diverse as ours, most people “cover” some aspect of themselves to some extent, often at significant cost.

**Vernā:** Yes, one can play it real, strong, and authentic, or one can play it safe. Kenji's point is that workplaces are demanding this conformity, which ultimately undermines the power of diversity and an individual's ability to show up and engage at the highest level. I think we should choose authenticity. It's good for the organization and the individual. But, as with confronting our biases, we each may need to get uncomfortable before we can get comfortable with our differences.

### *Social and Political Capital*

**InQ:** Eli, experience tells me that it's great to have good attorneys, but if a firm doesn't have business for them to work on, then it can't continue to retain them and its business may fail. In a business like law, one that looks for a business model that will grow over time, is it irrational for firms to look for new lawyers who are more likely to bring and develop a big book of business rather than lawyers who have excellent skills but who lack the ability to bring in and grow a big book of business?



**Eli Wald:** Law firms look for a variety of skills and qualifications in the lawyers they hire, retain, and promote. Social capital—that is, valuable connections and networks—is certainly a relevant consideration. Large law firms typically do not ask their junior associates to have a book of business and instead focus their hiring efforts on educational credentials, skills, and extracurricular commitments. Small firms sometimes do expect their lawyers to develop books of business relatively quickly and do put a premium on social capital or the potential to develop business. Ultimately, all firms value a dynamic mix of merit qualifications and the possession of social, cultural, and identity capital.

**InQ:** Isn't there a tension between the fact that social capital may produce more business and the fact that social capital may derive from being a white, heterosexual male with longstanding ties in the community?

**Eli:** Lawyers get hired based on merit, but also based on the amounts of social, cultural, and identity capital they possess. Moreover, merit and capital may reinforce each other. For example, whether one succeeds in law school depends in part on what capital one possesses. If you are not the first lawyer in the family, you may know what questions to ask and how to start preparing for the first year of law school. Law firms understandably want to hire and later promote meritorious lawyers who also possess social and cultural capital, but those firms also value identity capital and diversity. Balancing all of these considerations in a hiring decision is not

an easy task: even if in certain communities white male lawyers are likely to possess more social capital than their counterparts, they may have lower identity capital endowments.

**InQ:** Doesn't this become a self-perpetuating cycle? There are people who derive social, cultural, or identity capital from the color of their skin—

**Eli:** or pre-existing privilege—

**InQ:** and this becomes a legitimate basis to hire and promote people, because they will more likely grow the law firm's business than someone with a more diverse background. As a result, we end up with a cycle of the privileged serving the privileged and the less privileged not getting the same opportunity because they can't bring the same things to bear, not as far as their lawyering skills, but as far as their rainmaking skills. And if that's true, why aren't we destined to maintain that diversity imbalance, unless, over time, cultural and social forces start to level the playing field, one where a particular diverse population starts to hold the levers of power and can align itself with others who look like them?

**Eli:** Privilege and power do tend to perpetuate themselves, and law practice is no exception to this phenomenon. Privileged lawyers who possess ample social and cultural capital use their connections and know-how to become better lawyers and successful rainmakers and sustain their elevated status atop the profession. This does not mean that the elite lack merit, quite the contrary actually, nor does it mean that outsiders who possess relatively little capital, typically women and minority lawyers, cannot succeed. But it does mean that women and minority lawyers generally face more hurdles than their white male counterparts on the road to professional success. Of course, law firms are relative bystanders vis-à-vis greater social and cultural forces, including the allocation of economic, social, cultural, and identity capital.

**InQ:** So what roles can law firms play to mitigate the cycle of the less privileged having fewer opportunities?

**Eli:** Law firms have a role to play in our ongoing quest for enhanced diversity: they must offer a level playing field and an equal opportunity to all of their lawyers to compete for the prized partnership by combating implicit biases tainting their evaluation and promotion processes and by extending equal opportunities to all lawyers so that they can acquire and develop their professional skills, as well as their social and cultural capital assets.

**InQ:** Is there any room for exploring the hypothesis that cultures that place a high value on occupational achievement may actually enhance a group member's individual performance as a lawyer?

**Eli:** Group membership may enhance a group member's performance for several reasons. First, group membership is a form of social capital—group members may serve as references, mentors, or clients. Second, group membership may be a form of cultural capital, if one is able to learn from members' pertinent knowledge, such as how to successfully apply to law school or how to navigate law firm culture. Finally, membership in a group may trigger stereotypes with beneficial consequences, as in the stereotype that male lawyers can work 24-7 and are loyal to the law firm and its clients.

**InQ:** What about the converse—that certain cultures may diminish a group member's individual performance as a lawyer?

**Eli:** Unfortunately, yes—group memberships trigger stereotypes. Some stereotypes may have a positive impact on one's career; for example, male lawyers often benefit from the presumption of com-

petence. Other stereotypes have negative consequences; for example, female lawyers are sometimes presumed to the detriment of their practice to have divided loyalties to their law firms and clients because of family commitments, irrespective of their actual commitments. And just as group memberships can confer positive social capital in the form of networks and helpful relationships, group memberships can similarly confer negative social capital on its members in the form of harmful or destructive relationships.

### What Does Being Inclusive Involve?

**InQ:** Arin, what role do law firm partners play in creating an inclusive environment?

**Arin:** A firm needs leaders who make it easy for everyone to do the right thing and to make choices that the organization supports. Firms need to ask: What is present in law firm systems that allows biases to creep in? Where does bias thrive? Are leaders not raising awareness? Can we tweak the process so that people choose one behavior over another? Can we reduce bias during the evaluative process? Law firm partners need to lead in this area, just as they lead in any other area affecting their firms.

**Meshach Rhodes:** Look, if you have an inclusive group, and everybody feels they are valued, they are going to work their hardest for you. When you get everybody working his or her hardest and thinking outside the box, you are going to get a better work product. So if you have a team where five people feel they are valued and they are working their hardest, then they are going to put 120% into the job. On that same team, if you have three people who are not feeling that way, they are not going to approach their work with the same fervor. By definition, you are not going to have as good of a work product.



**Rich Baer:** That's a leadership issue, not simply diversity.

**Meshach:** Yes, but I think laced in that is this implicit bias thing. If I bring a team to the table and I favor women versus men, and I treat the women as if they are valued more, then the men aren't going to step up, and I need to be aware of that when I'm leading.

**InQ:** Rich, it's interesting what you just said—that it is a leadership issue. Meshach is framing it as an inclusiveness issue. Are these different sides of the same coin or is there a distinction between the two?

**Rich:** No, I like her amendment to what I had said, which is that part of great leadership is to be inclusive and to address one's implicit biases so that everyone feels included.

**InQ:** Rich, can you share an example of your recognizing implicit bias within an organization you worked, and how that played into creating a more inclusive workplace?

**Rich:** One example at Qwest involved the leadership team—eight or nine vice presidents who reported to the CEO—and I was one of those as general counsel. We would meet every Monday morning. At any one time, only two or three women were among the direct reports. One woman took me aside and then raised the issue with the group later. She said that every Monday morning, from September to February, when we started the meeting, all of the males talked about the football game. She said, "I'm not a football fan and this feels very exclusionary." Everyone sat back and said, "Wow, I've never thought about that." That's a great example

of where our conduct was insensitive. After that, we made a conscientious effort to be more inclusive at those meetings.

**InQ:** John, can you supply an example of addressing bias by adopting a more inclusive approach at your law firm?



**John Palmeri:** Sometimes, you try to address bias head on. Other times, you try to preempt it. We had a client dinner a little while ago. Three women attorneys and I were meeting potential clients. We discussed ahead of time where we were going to sit, who was going to pick up the check, and who was going to order the wine. Initially, I think the presumption was that I, being the male, senior attorney, was going to sit at the head of the table, and the wait-staff would bring me the wine list and then, later, bring me the check. We agreed to address those assumptions. One of the women knew about wine, so she ordered wine. Another ordered the appetizers for the table and so forth. I don't know if it made any difference with the clients, but I wanted the other attorneys to be in a position to be respected by the clients and not subordinate to me. It was partly a good marketing approach and partly doing the right thing. It wasn't, however, "Let's create this facade." It was, "Hey, listen, you know what's going on, you can handle these cases, and if you want, you can take control of this dinner." I don't know if the potential clients had implicit biases, but we tried to preempt any.

### *Inclusiveness—Just the Latest Catchword for Affirmative Action?*

**InQ:** Kevin, it seems that simply trying to make a law office more inclusive so as to provide a more equal opportunity, allow for fairer evaluations, and improve each employee's access to social capital is a pretty benign method for improving diversity in the profession. Your thoughts?



**Kevin Loughrey:** The efforts to promote diversity are, ironically, acts that should be deemed equally discriminatory but are not because they are performed under the patina of "diversity." The efforts at inclusiveness, and the removal of bias, could be compared to the variety of tactics used in the early civil rights era to discriminate in some subtle fashion that achieved the same discriminatory purpose but would somehow not be recognized as discriminatory. Such efforts were dismissed easily by civil rights activists, arguing disparate impact among other things. Inclusiveness would certainly have a disparate impact in that it necessarily disadvantages those whose inclusion does not help achieve diversity.

**InQ:** Rich, your thoughts on inclusiveness?

**Rich:** I know that I'm not going to change some managing partners' views at some law firms, and I've given up talking to them. I don't care what they think. I am, however, going to lunch with two diverse lawyers who want to kick around some ideas about how to develop a practice. That hour is much more effectively spent than going to try to convince a law firm to try to change its ways.

**InQ:** Meshach?

**Meshach:** I'm a big proponent of diversity, but more importantly, I'm a proponent of inclusivity because I think inclusivity is going to spur a lot more change than various diversity initiatives. If you have people who don't feel they are part of the team, for whatever reason, whether racial, ethnic, LGBT status, or socioeconomic status, you are marginalizing a group of people who don't feel included. I think everybody wants to feel included, and if you don't feel like you are part of the team, you are going to leave.

**InQ:** Well, that is the thrust of Eli Wald's recent law review article.<sup>3</sup> But some people say that "inclusiveness" is just the latest catchword, the latest way to dress up a diversity agenda. Other say it's part of an effort to make it look like law firms are trying to be fair, trying to recruit diverse people, but that it doesn't address the underlying social and cultural problems that give rise to disparity.

**Rich:** So what? This guy who is a naysayer, and who is just glibly saying, "Oh, that's just the phrase of the day" and being so dismissive, he should examine how he got to where he is in his career. I'm sure there are people who helped him. Why not pay that back? All these other arguments are really detracting from the fact that this is the right thing to do. We are lawyers—we are supposed to be concerned about justice. We should have justice in our own profession by making sure everyone is allowed an equal opportunity to use the gifts with which they were born.

### *Inclusiveness and Mentoring*

**InQ:** Is mentoring a part of the inclusiveness equation?

**Meshach:** I grew up in an area that was underserved and under-represented, with not a lot of opportunity. I knew a bunch of teachers, but I didn't know any lawyers. When I started out as a lawyer, I didn't know anything, I didn't have the playbook, I didn't know what was what, I barely knew where the bathrooms were. I was one of those people who stepped in with absolutely no network. I realized early on—because I worked for some really great people—that I was going to get the keys to the playbook, that I was going to understand how to be successful if I went to people and said, "You are incredibly successful—can you just share some of your tips with me?" As a result, I asked a lot of questions, and I still do to this day. Many of these people might not have realized that they were mentoring me, but that's fine!

**Rich:** I often use Meshach as an example. A lot of people complain there aren't mentors or sponsors out there. People like Meshach are great at picking the brains of more senior people, in our profession and elsewhere. This is what makes great lawyers. Nothing we do is new. All of our predecessors have done it all and more. Why not leverage off that?

### *Advancing Inclusiveness by Reducing Implicit Biases*

**InQ:** One of the most difficult challenges in improving inclusivity is reducing unconscious biases in our decision-making. Kathleen, you have devoted yourself to combatting bias and improving inclusiveness. In Part I, Eli Wald discussed how law firms can make structural changes to help people interrupt biases by, for example, improving training and encouraging mentoring relationships. Are there things individual lawyers can do to mitigate unconscious biases?



**Kathleen Nalty:** Yes, there are several research-based tactics to identify and interrupt implicit biases that people can employ if they truly want to be meritocratic. First, you have to become aware of your implicit biases. You can do this by (1) taking one or more Implicit Association Tests (IATs), available at no cost on a website hosted by Harvard University, [www.projectimplicit.org](http://www.projectimplicit.org), or (2) beginning to track "surprises" between what you expect from others and what actually happens—this opens a window to unconscious attitudes, stereotypes, and biases.

**InQ:** Once folks become aware of their implicit biases, can they begin to ameliorate them by changing their behavior?

**Kathleen:** In my unconscious bias workshops, I teach over 20 concrete actions people can take to interrupt these biases—things that I work on regularly myself. One type of unconscious bias people can address that would have the biggest impact for advancing legal profession diversity is affinity bias. All lawyers need to reflect on who they invest their time and effort in. If lawyers only mentor or sponsor attorneys in their affinity group, that contributes to marginalizing attorneys in other groups. Just acknowledging and working on affinity bias has been shown to eliminate disparities.

**InQ:** Any examples from your training sessions that reflect this effect?

**Kathleen:** I have met people around the country who have “a-ha!” moments when they learn about affinity bias. Once, after a training session, a Latina lawyer came up to me and said that she didn’t realize she hadn’t been giving work to her practice group’s white male associate because of her unconscious affinity bias, and she vowed to change that. Another time, an Asian female associate told the partner who chaired the firm’s diversity committee that her career trajectory was flatlining compared to her white male peer. The chair shared this with the white male practice group leader, who had his “a-ha!” moment after saying, “I don’t have anything in common with her.” After recognizing their hidden affinity bias effects, both lawyers could act differently. We all need to think about how we’ve benefited from affinity bias in our careers and how we might be contributing to organizational inequities by allowing our affinity biases to remain unchecked.

**InQ:** You have said that research shows that believing one is “color/gender blind” actually makes one more biased—why is that?

**Kathleen:** Good, well-intentioned people often employ the “color/gender blind” tactic. Research shows that people who do this actually score higher on the IAT. On a conscious level, you may firmly believe you aren’t swayed by bias, but your unconscious has a mind of its own that is triggered by the differences you think you are blind to. We are unaware when our implicit attitudes, stereotypes, and biases leak into our verbal and nonverbal behaviors. It is better to acknowledge that each of us has biases and work to address them rather than glossing over them by saying, “I’m color/gender blind.”

## Conclusion

Vernā Myers says that inclusiveness is “not about perfection, but about connection,” and that sometimes “you have to become uncomfortable before you get comfortable.” How many of us have found ourselves feeling uncomfortable while trying to do our best to connect with others? Let me share two moments from a recent trip I took to the former land of apartheid, South Africa.

While in Cape Town one afternoon, I needed to describe my local guide, Obi, to a white storekeeper. I said he was about 6 feet tall and African. She smiled and said, “We are all African.” I froze, not sure what was the proper way to describe Obi. She broke the silence, asking, “Was he white, black, brown, colored, or Asian?” *Black, brown, or colored?* I was lost. The storekeeper saved me with a

smile, a laugh, and a quick and frank lesson. Later during my trip, I asked Obi whether he had trouble understanding the different English accents spoken by the Brits, the Aussies, the English-speaking Europeans and Asians, and the Americans, as I was having trouble understanding some of them. Obi said he had no trouble whatsoever. Later, while sitting around a fire in the bush, and after a few drinks, he added that sometimes he had trouble when black Americans spoke to him using slang words and phrases that he did not understand but that they assumed he would understand simply because he was black. Sadly, I had to draw upon my travel to South Africa to come up with these examples of honest conversations about race from my own life. I should have been able to draw on similar discussions and experiences as a lawyer here in Colorado, but they never occurred.

Some of you may argue that the comments of those who push back against some diversity initiatives are racist; others may view them as offering uncomfortable truths. After reading Part I of this series, one Denver lawyer emailed me, saying the article was “crap” and a “waste of his time” and that it only “enables . . . identity politics.” He concluded by saying, “Can we just NOT talk?” I continue to believe that if we do not talk about these matters because we are afraid that we may be misunderstood or labelled politically incorrect, we will never have a healthy conversation about the things that sometimes separate us, and that the space we share with others will necessarily become less inclusive. As I said in Part I, I “trust the readers,” regardless of what conclusions they may draw in good faith from this discussion.

In this article series, we listened in as lawyers discussed the awkward dance that often occurs among attorneys due to cultural and experiential differences, and how these differences might be navigated successfully with equal parts of sensitivity, awareness, and humor. It is suggested that an inclusive environment fosters greater communication and more equal opportunity. Whether we can develop inclusive habits, become more inclusive in fact, and generate more equal opportunities for lawyers based on their lawyering skills remains to be seen.

No matter which aspect of the diversity debate one embraces, inclusivity can offer growth and opportunity for all. The contours of what makes a space inclusive—whether it is a law office, a courtroom, or a boardroom—remains an ongoing discussion, as does its effectiveness in allowing a more diverse legal community to flourish.

## Notes

1. See Dover et al., “Diversity Policies Don’t Help Women or Minorities, and They Make White Men Feel Threatened,” *Harvard Business Rev.* (Jan. 4, 2016). See also Bregman, “Diversity Training Doesn’t Work,” *Harvard Business Rev.* (Mar. 12, 2012) (“Diversity training doesn’t extinguish prejudice. It promotes it.”).

2. Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House, 2006).

3. See 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). ■