

# STRATEGIES FOR

KATHLEEN NALTY



# Confronting Unconscious Bias



**S**o—what’s in a name? Apparently, a lot. If you are named John, you will have a significant advantage over Jennifer when applying for a position, even if you both have the exact same credentials.<sup>1</sup> If your name is José, you will get more callbacks if you change it to Joe.<sup>2</sup> And if you’re named Emily or Greg, you will receive 50 percent more callbacks for job interviews than equally qualified applicants named Lakisha or Jamal.<sup>3</sup>

A three-part dialogue published in *The Colorado Lawyer* early last year raised awareness about the prevalence of conscious and unconscious biases in the legal profession.<sup>4</sup> While we may be aware of our conscious attitudes toward others, we are typically clueless when it comes to our unconscious (or implicit) biases. This article will help you recognize your unconscious biases and provides research-based strategies for addressing them.

## Why Does It Matter?

Research studies reveal just how much bias impacts decisions—not just on a conscious basis, but to a much greater extent, on an unconscious basis. Experts believe that the mind’s unconscious is responsible for 80 percent or more of thought processes.<sup>5</sup> Yet the conscious mind is simply not capable of perceiving what the unconscious is thinking.<sup>6</sup> You can be two people at the same time: a conscious self who firmly believes you do not have any bias against others because of their social identities, and an unconscious self who harbors stereotypes or biased attitudes that unknowingly leak into decision-making and behaviors.<sup>7</sup> The good news is that we can work to redirect and reeducate our un-

conscious mind to break down stereotypes and biases we don’t agree with by engaging in the research-based activities outlined in this article.

This process is critical to making better decisions in general, and is particularly important as the legal industry struggles to play catch-up with respect to inclusiveness. In addition to eliminating the hidden barriers that keep the legal profession from being more diverse, recognizing and dealing with unconscious biases actually helps individuals become smarter, more effective lawyers. After all, this is a service industry, and our ability to interact with a diverse community and serve a wide variety of clients depends on making decisions free from fundamental errors. Finding the pitfalls in our thinking, taking them into account, and working to eliminate them leads to better decision-making. Individuals who make better decisions also help their organizations perform better. So there is a lot at stake in terms of whether you will invest the time to be more inclusive and become a more effective lawyer by attending to your unconscious biases.

## Types of Unconscious Cognitive Biases

We all have unconscious cognitive biases



that can, and often do, interfere with good decision-making. There are too many to address in this article, but it is worthwhile to learn about a few that are particularly important with respect to diversity and inclusion.

### Confirmation Bias

Confirmation bias is a type of unconscious bias that causes people to pay more attention to information that confirms their existing belief system and disregard that which is contradictory.

Clearly this can harm good decision-making. You can probably think of at least one instance when you advised a client or reached a decision and later realized you dismissed or unintentionally ignored critical information that would have led to a different and perhaps better outcome.

Confirmation bias can also skew your evaluations of others' work and potentially disrupt their careers. In *The Colorado Lawyer's* threepart dialogue, Professor Eli Wald briefly mentioned a research study on confirmation bias in the legal industry that I feel bears further elaboration here.<sup>8</sup> In 2014, Dr. Arin Reeves released results of a study she conducted to probe whether practicing attorneys make workplace decisions based on confirmation bias.<sup>9</sup> This study tested whether attorneys unconsciously believe African Americans produce

also found more technical and factual errors and made more critical comments with respect to African American Thomas Meyer's memo. Even more significantly, Reeves found that the female and racially/ethnically diverse partners who participated in the study were just as likely as white participants to be more rigorous in examining African American Thomas Meyer's memo (and finding more mistakes), while basically giving Caucasian Thomas Meyer a pass.<sup>10</sup>

The attorneys who participated in this study were probably shocked by the results. That is the insidious nature of unconscious bias—people are completely unaware of implicit biases they may harbor and how those biases leak into their decision-making and behaviors.

### Attribution Bias

Another type of unconscious cognitive bias—attribution bias—causes people to make more favorable assessments of behaviors and circumstances for those in their “in groups” (by giving second chances and the benefit of the doubt) and to judge people in their “out groups” by less favorable group stereotypes.

### Availability Bias

Availability bias interferes with good decision-making because it caus-

**With the help of other practicing attorneys, Reeves created a research memo that contained 22 errors (spelling, grammar, technical writing, factual, and analytical). The memo was distributed to 60 partners working in nearly two dozen law firms who thought they were participating in a “writing analysis study” to help young lawyers with their writing skills.**

inferior written work and that Caucasians are better writers.

With the help of other practicing attorneys, Reeves created a research memo that contained 22 errors (spelling, grammar, technical writing, factual, and analytical). The memo was distributed to 60 partners working in nearly two dozen law firms who thought they were participating in a “writing analysis study” to help young lawyers with their writing skills. All of the participants were told the memo was written by a (fictitious) third-year associate named Thomas Meyer who graduated from New York University Law School. Half of the participants were told Thomas Meyer was Caucasian and the other half were told Thomas Meyer was African American. The law firm partners participating in the study were asked to give the memo an overall rating from 1 (poorly written) to 5 (extremely well written). They were also asked to edit the memo for any mistakes.

The results indicated strong confirmation bias on the part of the evaluators. African American Thomas Meyer's memo was given an average overall rating of 3.2 out of 5.0, while the exact same memo garnered an average rating of 4.1 out of 5.0 for Caucasian Thomas Meyer. The evaluators found twice as many spelling and grammatical errors for African American Thomas Meyer (5.8 out of 7.0) compared to Caucasian Thomas Meyer (2.9 out of 7.0). They

es people to default to “top of mind” information. So, for instance, if you automatically picture a man when asked to think of a “leader” and a woman when prompted to think of a “support person,” you may be more uncomfortable when interacting with a female leader or a man in a support position, particularly at an unconscious level.

### Affinity Bias

The adverse effects of many of these cognitive biases can be compounded by affinity bias, which is the tendency to gravitate toward and develop relationships with people who are more like ourselves and share similar interests and backgrounds. This leads people to invest more energy and resources in those who are in their affinity group while unintentionally leaving others out. Due to the prevalence of affinity bias, the legal profession can best be described as a “mirrortocracy”—not a meritocracy. A genuine meritocracy can never exist until individual lawyers and legal organizations come to terms with unconscious biases through training and focused work to interrupt biases.

### How Unconscious Bias Plays Out in the Legal Profession

Traditional diversity efforts have never translated into sustained diversity at all levels. Year after year, legal organizations experience

disproportionately higher attrition rates for attorneys in already underrepresented groups—female, racially/ethnically diverse, LGBT, and those with disabilities.<sup>11</sup> Before 2006 and the first of eight national research studies,<sup>12</sup> no one was sure what was causing higher attrition rates for attorneys in these groups. Now the answer is clear: every legal organization has hidden barriers that disproportionately impact and disrupt the career paths of many female, LGBT, racially/ethnically diverse, and disabled lawyers.

According to the research studies, critical career-enhancing opportunities are shared unevenly by people in positions of power and influence, often without realizing that certain groups are disproportionately excluded. Hard work and technical skill are the foundation of career progress, but without some access to these opportunities, attorneys are less likely to advance in their organizations. Specifically, female, LGBT, disabled, and racially/ethnically diverse attorneys have disproportionately less access to the following:

- networking opportunities—informal and formal
- insider information
- decision-makers
- mentors and sponsors
- meaningful work assignments
- candid and frequent feedback
- social integration
- training and development
- client contact
- promotions

The studies all point to bias as the major cause of these hidden barriers. Certainly, overt discrimination still exists and contributes to this dynamic. But it turns out that a specific kind of unconscious (and thus unintentional) bias plays the biggest role. Affinity bias, which causes people to develop deeper work and trust relationships with those who have similar identities, interests, and backgrounds, is the unseen and unacknowledged culprit. When senior attorneys—the vast majority of whom are white and male—gravitate toward and share opportunities with others who are like themselves, they unintentionally leave out female, LGBT, disabled, and racially/ethnically diverse attorneys.

### Strategies for Identifying and Interrupting Unconscious Bias

Having unconscious bias does not make us bad people; it is part of being human. We have all been exposed to thousands of instances of stereotypes that have become embedded in our unconscious minds. It is a bit unsettling, however, to think that good, well-intentioned people are actually contributing—unwittingly—to the inequities that make the legal profession one of the least diverse. The good news is that once you learn more about cognitive biases and work to disrupt the stereotypes and biased attitudes you harbor on an unconscious level, you can become a better decision-maker and help limit the negative impacts that are keeping our industry from being more diverse and inclusive.

The obvious place to start is with affinity bias; learning and reminding yourself about affinity bias should help you lessen the effect on people in your “out groups.” Affinity bias has been well documented in major league sports. A series of research studies analyzing foul calls in NBA games demonstrates the powerful impact of simply being aware of affinity bias. In the first of three studies examining

data from 13 seasons (1991–2004), researchers discovered that referees called more fouls against players who were not the same race as the referee, and these disparities were large enough to affect the outcomes in some games.<sup>13</sup> Based on a number of studies documenting the existence of “in group” or affinity bias in other realms, the researchers inferred that the differential in called fouls was mostly happening on an unconscious level.

The findings of the first study, released in 2007, were criticized by the NBA, resulting in extensive media coverage. The researchers subsequently conducted two additional studies—one using data from basketball seasons before the media coverage (2003–06) and the other focusing on the seasons after the publicity (2007–10). The results were striking. In the seasons before referees became aware they were calling fouls disparately, the researchers replicated the findings from the initial study. Yet after the widespread publicity, there were no appreciable disparities in foul-calling.

The lesson to be learned from this research is that paying attention to your own affinity bias and auditing your behaviors can help you interrupt and perhaps even eliminate this type of implicit bias. Ask yourself the following questions:

- How did I benefit from affinity bias in my own career? Did someone in my affinity group give me a key opportunity that contributed to my success? Many lawyers insist they “pulled themselves up by their own bootstraps” but upon reflection have to acknowledge they were given key opportunities—especially from mentors and sponsors. Barry Switzer famously highlighted this tendency when he observed that “some people are born on third base and go through life thinking they hit a triple.”<sup>14</sup>
- Who are my usual favorites or go-to lawyers in the office or practice group?
- With whom am I more inclined to spend discretionary time, go to lunch, and participate in activities outside of work?
- Do I hold back on assigning work to attorneys from underrepresented groups until others vouch for their abilities?
- When I go on client pitches, do I always take the same people?
- Who makes me feel uncomfortable and why?
- Who do I avoid interacting with or giving candid feedback to because I just don’t know how to relate to them or because I’m afraid I’ll make mistakes?
- To whom do I give second chances and the benefit of the doubt (e.g., the people in my “in group”) and who do I judge by group stereotypes and, therefore, fail to give second chances?

It is easy for skeptics to dismiss inequities described by attorneys in underrepresented groups (or even the research studies documenting the disparate impact of hidden barriers) until they are presented with concrete evidence that some people simply have more access to opportunities that play a critical, but mostly unacknowledged, role in any attorney’s success. Thus, when implementing inclusiveness initiatives, it is important to actually count who has access to work-related opportunities, such as going on client pitches or participating in meaningful assignments, to counteract skeptics’ tendency to not believe what they don’t (or won’t) see.

Research scientists are learning more about how implicit biases operate, including methods for uncovering and interrupting them.<sup>15</sup> While it is not yet clear whether implicit biases can be completely eliminated, certain techniques have been shown to lessen bias

and disrupt its impact. To rescript your unconscious thoughts and interrupt implicit biases, you have to work your “ABS”: first, develop Awareness of those biases, and then make the Behavior and Structural changes required to disrupt them.

## Awareness

If you make conscious negative judgments about groups that are based on stereotypes, you can challenge your thinking by asking yourself why: Why am I bothered by people in that group? Why do I or why should I care about that? Why do I persist in thinking all members of that group engage in that stereotyped behavior? Then actively challenge those beliefs every time they are activated. Overriding stereotypes takes a conscious act of will, whereas the activation of stereotypes does not because they are often embedded in your unconscious mind.

Two easy ways to develop awareness of your unconscious biases are:

1. Keep track of your surprises (i.e., instances when something you expected turned out to be quite different).<sup>16</sup> Those surprises offer a window into your unconscious. For example, when you pass a slow-moving car impeding the flow of traffic, do you expect to see a very elderly driver behind the wheel? When you see that the driver is actually younger, does that surprise you? You may truly believe you are not consciously biased against the elderly, but you reflexively presumed that the slower driver was elderly. That is a product of unconscious bias. How could that attitude influence decision-making in other areas, such as in interactions with more senior colleagues, witnesses, jurors, or clients?
2. Take a free, anonymous implicit association test (IAT) online at [implicit.harvard.edu/implicit/selectatest.html](http://implicit.harvard.edu/implicit/selectatest.html). This series of tests, sponsored by Harvard University and taken by millions of people since the late 1990s, can reveal areas where you unknowingly harbor unconscious biases. There are over a dozen different tests, measuring unconscious bias with respect to disability, race, age, gender, gender roles, mental health, weight, sexual orientation, religion, and more. The tests measure how quickly or slowly you associate positive or negative words with different concepts. Your unconscious, immediate assumptions reveal themselves in the delayed responses measured by the computer when you struggle to connect words and concepts that are not as readily associated. You might not like, or be in denial with respect to, some of the test results, but they can be useful in revealing often uncomfortable truths about what your unconscious mind is up to.

While awareness is necessary, it is not sufficient, by itself, to interrupt unconscious bias. Behavior changes are also essential.

## Behavior Changes

Like correcting a bad habit, you can retrain yourself to think in less biased and stereotyped ways.<sup>17</sup> Motivation is key; research shows that people who seek to be fair and unbiased are more likely to be successful in purging their biases.<sup>18</sup>

Researchers have identified strategies people can use to change their behaviors to overcome bias. They include the following:

**Retrain your brain.** “The ‘holy grail’ of overcoming implicit bias is to change the underlying associations that form the basis of implicit bias.”<sup>19</sup> To do so, you need to develop the ability to be self-observant. Pay attention to your thinking, assumptions, and behaviors and then acknowledge, dissect, and alter automatic responses to break

the underlying associations.

**Actively doubt your objectivity.** Take the time to review your decisions (especially those related to people and their careers) and search for indicia of bias; audit your decisions to ensure they don’t disparately impact people in other groups. Pause before you make a final decision.

**Question your assumptions and first impressions.** Ask others for feedback to check your thought processes. Ask yourself if your decision would be different if it involved a person from a different social identity group. Finally, justify your decision by writing down the reasons for it. This will promote accountability, which can help make unconscious attitudes more visible.

**Be mindful of snap judgments.** Take notice every time you jump to conclusions about a person belonging to a different social identity group (like the slow driver). Have a conversation with yourself about why you are making judgments or resorting to stereotypes. Then resolve to change your attitudes.

**Oppose your stereotyped thinking.** One of the best techniques seems odd but has been shown to have a lasting effect: think of a stereotype and say the word “no” and then think of a counter-stereotype and say “yes.” People who do this have greater long-term success in interrupting their unconscious bias with respect to that stereotype.<sup>20</sup> To decrease your implicit biases, you might also want to limit your exposure to stereotyped images; for instance, consider changing the channel if a TV show or song features stereotypes.

**Deliberately expose yourself to counter-stereotypical models and images.** For example, if it is easier for you to think of leaders as male, study successful female leaders to retrain your unconscious to make the connection between leaders and both women and men. Research has shown that simply viewing photos of women leaders helps reduce implicit gender bias.<sup>21</sup> Even the Harvard professor who invented the IAT—Mahzarin Banaji—acknowledged that she has some gender bias. To interrupt it, she put rotating photographs on her computer screensaver that are counter-stereotypical, including one depicting a female construction worker feeding her baby during a work break.

**Look for counter-stereotypes.** Similarly, pay more attention and be more consciously aware of individuals in counter-stereotypical roles (e.g., male nurses, female airline pilots, athletes with disabilities, and stay-at-home dads).

**Remind yourself that you have unconscious bias.** Research shows that people who think they are unbiased are actually more biased than those who acknowledge they have biases.<sup>22</sup> There is a Skill Pill mobile app on managing unconscious bias available for enterprise usage ([skillpill.com](http://skillpill.com)). If you play this short app before engaging in hiring, evaluation, and promotion decisions, it could help you interrupt any unconscious biases. But you don’t need an app to prompt yourself to be mindful of implicit bias and its impact. You could create a one-page reminder sheet that accompanies every evaluation form or candidate’s résumé, for instance.

**Engage in mindfulness exercises on a regular basis,** or at least before participating in an activity that might trigger stereotypes (e.g., interviewing a job candidate).<sup>23</sup> Research shows that mindfulness breaks the link between past experience and impulsive responses, which can reduce implicit bias.<sup>24</sup>

**Engage in cross-difference relationships.** Cultivate work relationships (or personal relationships outside of work) that involve people with different social identities.<sup>25</sup> This forces you out of your

comfort zone and allows your unconscious to become more comfortable with people who are different. Those new relationships will also force you to dismantle stereotypes and create new types of thinking—both conscious and unconscious. So find ways to mentor junior colleagues who are different from you in one or more dimensions (e.g., gender, race, age, religion, parental status, etc.), and ask them how they view things. This will open you up to new ways of perceiving and thinking.

**Mix it up.** Actively seek out cultural and social situations that are challenging for you—where you are in the distinct minority or are forced to see or do things differently. For example, go to a play put on by PHAMILY (an acting troupe of people with mental and physical disabilities) or attend a cultural celebration that involves customs and people you have never been exposed to. The more uncomfortable you are in these situations, the more you will grow and learn.

Research demonstrates that believing you are blind to people's differences actually makes you more biased.<sup>32</sup> The better course is to acknowledge these differences and work to ensure they aren't impairing your decision-making—consciously or unconsciously. The world has changed. In the 20th century, we were taught to avoid differences and there was an emphasis on assimilation (the "melting pot"). In the 21st century, we know that being "difference-seeking" and inclusive actually causes people to work harder cognitively,<sup>33</sup> which leads to better organizational performance and a healthier bottom line. Today's mantra should be: "I need your differences to be a better thinker and decision-maker, and you need mine, too."

Awareness of implicit bias is not enough. Self-monitoring is also insufficient. Individual behavior changes often have to be supported and encouraged by structural changes to have the greatest impact on interrupting implicit biases.

**Highly skilled, inclusive leaders make concerted efforts to ensure that hidden barriers are not thriving on their watch. Because bias flourishes in unstructured, subjective practices, leaders should put structured, objective practices and procedures in place to help people interrupt their unconscious biases. Just knowing there is accountability and that you could be called on to justify your decisions with respect to others can decrease the influence of implicit bias.**

**Shift perspectives.** Walk in others' shoes; look through their lenses to see how they view and experience the world. Join a group that is different (e.g., be the male ally in the women's affinity group). This will help you develop empathy and see people as individuals instead of lumping them into a group and applying stereotypes.<sup>26</sup> And if you're really serious about reducing implicit racial bias, research shows that picturing yourself as having a different race results in lower scores on the race IAT.<sup>27</sup>

**Find commonalities.** It is also useful to look for and find commonalities with colleagues who have different social identities from you.<sup>28</sup> Do they have pets? Are their children attending the same school as your children? Do they also like to cook, golf, or volunteer in the community? You will be surprised to discover how many things you have in common. Research shows that when you deliberately seek out areas of commonality with others, you behave differently toward them and exhibit less implicit bias.<sup>29</sup>

**Reduce stress, fatigue, cognitive overload, and time crunches.** We are all more prone to revert to unconscious bias when we are stressed, fatigued, or under severe cognitive load or time constraints.<sup>30</sup> Relax and slow down decision-making so that your conscious mind drives your behavior with respect to all people and groups.<sup>31</sup>

**Give up being color/gender/age blind.** Don't buy into the popular notion that you should be blind to differences; it is impossible and backfires anyway. Your unconscious mind sees and reacts to visible differences, even if you consciously believe you don't.

### Structural Changes

Highly skilled, inclusive leaders make concerted efforts to ensure that hidden barriers are not thriving on their watch. Because bias flourishes in unstructured, subjective practices, leaders should put structured, objective practices and procedures in place to help people interrupt their unconscious biases. Just knowing there is accountability and that you could be called on to justify your decisions with respect to others can decrease the influence of implicit bias.<sup>34</sup>

Leaders, in conjunction with a diversity and inclusiveness (D+I) committee, can examine all systems, structures, procedures, and policies for hidden structural inequities and design action plans to make structural components inclusive of everyone. Structural changes should be designed to address the hidden barriers first, because research shows that these are the most common impediments.

To make the invisible visible with respect to mentorship and sponsorship, one firm simply added the following question to its partners' end-of-year evaluation form: "Who are you sponsoring?" This simple but profoundly illuminating question allowed firm leaders determine who was falling through the cracks. The firm then created a D+I Action Plan with a focus on mentorship and sponsorship. The firm is currently implementing a "Culture of Mentorship" to ensure that all attorneys receive equitable development opportunities so they can do their best work for the firm. After all, a business model where some attorneys are cultivated and others are not makes no sense; the organization could accomplish so much more if every one of its human

capital assets operated at the highest level possible. Imagine the enhancement to the bottom line for organizations that are inclusive and have eliminated hidden barriers to success for everyone.

There are dozens of structural changes that can be made, ranging from small to large. But the structural change with the most potential for lasting change is a D+I competencies framework. Recently, a two-year study of more than 450 companies by Deloitte determined that the talent management practices that predicted the highest performing companies all centered on inclusiveness.<sup>35</sup> Many companies that have instituted D+I competencies and hold employees accountable for inclusive behaviors in their job duties and responsibilities are making real progress with respect to diversity. For example, at Sodexo, implementation of D+I competencies resulted in “double digit growth in representation of women and minorities.”<sup>36</sup>

This type of framework is critical in any legal organization. Many people would do more with respect to inclusiveness if they just knew what to do. Competencies define behaviors along an easily understandable scale—are you unskilled, skilled, or highly skilled in inclusiveness (and, therefore, contributing to the organization’s success in more meaningful ways)? This key component was lacking in the legal industry, so I wrote and published a book in 2015: *Going All In on*

observed the members during prayer. His experience gave him more familiarity and comfort with a group of people that is currently widely disparaged and stereotyped.

After taking an IAT that revealed an unconscious bias against older people and consciously acknowledging he avoids his older colleagues at work, another student decided to confront this tendency by finding commonalities with them. Specifically, the student knew that he shared an interest in gardening with an older colleague with whom he would be working on an upcoming project. So he deliberately struck up a conversation with this co-worker about gardening and found it was then easier to work with him on the project.

Another student decided to consciously observe his reflexive thought processes by noticing what he was thinking or how he reacted to different people and then opposing any stereotyped thoughts. While attending a basketball game, he saw a black man dressed in medical scrubs enter the gym. Immediately, the student observed that he was trying to figure out what the man did for a living. The student noticed that he assumed the man worked as an X-ray technician or medical assistant. At that point, he realized that the man’s race and gender might be triggering these assumptions and the student then visualized the man as a nurse, a home health-aid worker,

## **Many attorneys, judges, and other law professionals in the Colorado legal community are pioneers when it comes to diversity and, particularly, inclusion. Ten years ago, with the establishment of the Deans’ Diversity Council, this legal community was the first in the country to focus on the new paradigm of inclusiveness and how it must be added to traditional diversity efforts to make diversity sustainable.**

*Diversity and Inclusion: The Law Firm Leader’s Playbook.* This book contains individual and organizational competencies frameworks, as well as the tools and strategies law firm leaders need to address the hidden barriers, identify the unconscious biases that allow those barriers to thrive, and make genuine progress on diversity and inclusion.

### **Examples of Bias-Breaking Activities: Stories From the Front Lines**

Implementing the de-biasing strategies outlined above is not a “one and done” proposition. It is an ongoing process and must become second-nature to be most effective. Once you start implementing these strategies, the lessons learned will be impactful.

I teach a class at the University of Denver Sturm College of Law on “Advancing Diversity and Inclusion,” which includes a session on unconscious biases. As part of their learning experience, I ask my students to engage in some of the activities outlined above and write short essays on what they discovered or learned. They had some eye-opening experiences that will help them interrupt their own implicit biases and make them better decision-makers as practicing lawyers.

For instance, one student who is not very religious visited a local mosque to learn more about Muslim people and their faith. The student attended a presentation on Islam during an open house and

or a physician. This student wrote that the exercise made him aware of how often he jumps to conclusions about others based on visible cues and makes assumptions that might be completely wrong.

A female student decided to doubt her own objectivity with respect to how she viewed the support staff at her company. She believes she’s a gender champion but was surprised to realize that she really doesn’t view the support staff (mostly women) as favorably as the sales staff (mostly men). She decided to picture women in sales positions and men in support positions to try to retrain her unconscious mind and the assumptions she was used to making.

Another student, who is white and grew up in an all-white community, chose to observe the “Black Lives Matter” demonstration and participate in the Martin Luther King Day parade. She also later attended a Sunday service at an all-black church and wrote this about the experience:

Overall it was a good experience because I think being uncomfortable can be good for a person. Looking back, I really had no reason to be uncomfortable because everyone was very nice and welcoming; my uneasiness was made up in my head based on assumptions I feared people would make about me.



Putting yourself in situations that are uncomfortable and observing your own attitudes, judgments, and behaviors can flip a switch in your brain and help you learn new ways of thinking and interacting with others. The real-world impact of this is illustrated by a story told to me by an in-house attorney who reassessed a biased assumption before it had an impact on someone else's career. The attorney met with a group of people at her company to discuss staffing a challenging position that would require a lot of travel. The name of a qualified female employee candidate was proposed. The lawyer knew the candidate was a single mother of a toddler and immediately suggested to the group that it might be very difficult for a single mother to handle the extensive travel required. Effectively, this comment removed the woman from consideration. Later, the lawyer attended a workshop on unconscious bias. She realized that she'd made assumptions that might not be true. The lawyer met with the female employee and asked her if she was able to travel for business. The female employee said that travel wasn't an impediment because she had several family members nearby who could help care for her child while she was out of town. The lawyer immediately went back to the group and explained her mistake, asking that the female employee's name be included for consideration for the position.

## Conclusion

Many attorneys, judges, and other law professionals in the Colorado legal community are pioneers when it comes to diversity and, particularly, inclusion. Ten years ago, with the establishment of the Deans' Diversity Council, this legal community was the first in the country to focus on the new paradigm of inclusiveness and how it must be added to traditional diversity efforts to make diversity sustainable. The three-part dialogue on unconscious bias featured in *The Colorado Lawyer* was truly ground-breaking because it addressed challenges not often discussed openly.

The next step is to take action, on an individual and organizational basis, to eliminate hidden barriers and interrupt the unconscious biases that fuel those barriers. It should be deeply concerning to everyone that good, well-meaning people are doing more to foster inequities in the legal workplace—unintentionally and unknowingly—just by investing more in members of their affinity or “in groups” than the harm caused by outright bigotry. This unfortunate dynamic will change only when we come to terms with the fact that we all have biases—conscious and unconscious—and begin to address those biases. Good intentions are not enough; if you are not intentionally including everyone by interrupting bias, you are unintentionally excluding someone.

So now, ask yourself, are you up to this challenge? ☺



*Kathleen Nalty is a consultant specializing in assisting legal organizations with their diversity and inclusion initiatives. She received her J.D. from the University of Colorado and started her legal career as a federal civil rights prosecutor with the U.S. Department of Justice. Nalty was the founding director of the Center for Legal Inclusiveness and currently teaches a course on diversity and inclusion at the University*

*of Denver Sturm College of Law. She can be reached at kathleen@kathleennaltyconsulting.com. Reproduced by permission. © 2017 Colorado Bar Association. All rights reserved.*

## Endnotes

<sup>1</sup>In a randomized, double-blind study, science faculty rated John, the male applicant for a lab manager position, as significantly more competent than Jennifer, the female candidate, awarding him an average starting salary more than 10 percent higher and volunteering to mentor him more often than Jennifer, even though she had the exact same credentials and qualifications. The insidious role of unconscious bias was revealed in the finding that the female evaluators were equally as likely as their male colleagues to exhibit bias for John and against Jennifer. Moss-Racusin et al., *Science faculty's subtle gender biases favor male students*, Proceedings of the National Academy of Sciences (Sept. 2012), [www.pnas.org/content/109/41/16474.abstract](http://www.pnas.org/content/109/41/16474.abstract).

<sup>2</sup>Matthews, *He Dropped One Letter in His Name While Applying or Jobs, and the Responses Rolled In*, Huffington Post (Sept. 2, 2014), [www.huffingtonpost.com/2014/09/02/jose-joe-job-discrimination\\_n\\_5753880.html](http://www.huffingtonpost.com/2014/09/02/jose-joe-job-discrimination_n_5753880.html).

<sup>3</sup>Bertrand and Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, The National Bureau of Economic Research (July 2003), [www.nber.org/papers/w9873](http://www.nber.org/papers/w9873).

<sup>4</sup>Sandgrund, *Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part I—Implicit Bias*, 45 *The Colorado Lawyer* 49 (Jan. 2016), [www.cobar.org/tcl/tcl\\_articles.cfm?articleid=9166](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=9166); Sandgrund, *Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part II—Diversity*, 45 *The Colorado Lawyer* 49 (Feb. 2016), [www.cobar.org/tcl/tcl\\_articles.cfm?articleid=9155](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=9155); Sandgrund, “Can We Talk? Bias, Diversity, and Inclusiveness in the Colorado Legal Community: Part III—Inclusiveness,” 45 *The Colorado Lawyer* 67 (Mar. 2016), [www.cobar.org/tcl/tcl\\_articles.cfm?articleid=9179](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=9179).

<sup>5</sup>Banaji and Greenwald, *Blindspot: Hidden Biases of Good People* 61 (Delacorte Press, 2013).

<sup>6</sup>*Id.* at 55.

<sup>7</sup>*Id.* at 20.

<sup>8</sup>Sandgrund, Part I, *supra* note 4 at 48.

<sup>9</sup>Reeves, *Yellow Paper Series: Written in Black & White—Exploring Confirmation Bias in Racialized Perceptions of Writing Skills* (Nextions Original Research, 2014), [www.nextions.com/wp-content/files\\_mf/14468226472014040114WritteninBlackandWhiteYPS.pdf](http://www.nextions.com/wp-content/files_mf/14468226472014040114WritteninBlackandWhiteYPS.pdf).

<sup>10</sup>*Id.* at 5.

<sup>11</sup>See New York City Bar Association, *2014 Diversity Benchmarking Report* (2015), [www.nycbar.org/images/stories/pdfs/diversity/benchmarking2014.pdf](http://www.nycbar.org/images/stories/pdfs/diversity/benchmarking2014.pdf).

<sup>12</sup>American Bar Association (ABA), *Visible Invisibility: Women of Color in Law Firms* (2006), <http://bit.ly/1DNJRza>; ABA, *From Visible Invisibility to Visibly Successful: Success Strategies for Law Firms and Women of Color in Law Firms* (2009), [www.americanbar.org/content/dam/aba/administrative/diversity/Convocation\\_2013/CWP/VisiblySuccessful-entire-final\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity/Convocation_2013/CWP/VisiblySuccessful-entire-final_authcheckdam.pdf); ABA, *Visible Invisibility: Women of Color in Fortune 500 Legal Departments* (2013), <http://bit.ly/1bZFxWQ>; Bagati, *Women of Color in U.S. Law Firms*, Catalyst, Inc. (2009), <http://bit.ly/1EvTogK>; Cruz and Molina, *Few and Far Between: The Reality of Latina Lawyers*, Hispanic National Bar Association (Sept. 2009), <http://bit.ly/1dxLPxh>; Women's Bar Association of the District of Columbia, *Creating Pathways for Success for All:*



*Advancing and Retaining Women of Color in Today's Law Firms* (May 2008), <http://bit.ly/1DZYgYa>; Minority Corporate Counsel Association, *Sustaining Pathways to Diversity: The Next Steps in Understanding and Increasing Diversity and Inclusion in Large Law Firms* (2009), <http://bit.ly/1biQdyh>; Corporate Counsel Women of Color, *The Perspectives of Women of Color Attorneys in Corporate Legal Departments: Research Report* (2011).

<sup>13</sup>Pope et al., *Awareness Reduces Racial Bias*, Economic Studies at Brookings (Feb. 2014), [www.brookings.edu/~media/research/files/papers/2014/02/awareness-reduces-racial-bias/awareness\\_reduces\\_racial\\_bias\\_wolfers.pdf](http://www.brookings.edu/~media/research/files/papers/2014/02/awareness-reduces-racial-bias/awareness_reduces_racial_bias_wolfers.pdf).

<sup>14</sup>See Shatel, *The Unknown Barry Switzer: Poverty, Tragedy Built Oklahoma Coach Into a Winner*, The Chicago Tribune (Dec. 14, 1986), [http://articles.chicagotribune.com/1986-12-14/sports/8604030680\\_1\\_big-eight-coach-aren-t-many-coaches-oklahoma](http://articles.chicagotribune.com/1986-12-14/sports/8604030680_1_big-eight-coach-aren-t-many-coaches-oklahoma).

<sup>15</sup>One of the best resources for information on bias is an annual review by the Kirwan Institute for the Study of Race and Ethnicity at The Ohio State University: Staats et al., *State of the Science: Implicit Bias Review 2015* (Kirwan Institute, 2015), <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf>; Staats, *State of the Science: Implicit Bias Review 2014* (Kirwan Institute, 2014), <http://bit.ly/Sabh1y>; Staats and Patton, *State of the Science: Implicit Bias Review 2013* (Kirwan Institute, 2013), <http://bit.ly/1KynIcC>.

<sup>16</sup>Reeves, *The Next IQ: The Next Level of Intelligence for 21st Century Leaders* (ABA, 2012). See also Lieberman and Berardo, *Interview Bias: Overcoming the Silent Forces Working against You*, Experience, <http://bit.ly/1GLnTD1>.

<sup>17</sup>“Implicit biases are malleable; therefore, the implicit associations that we have formed can be gradually unlearned and replaced with new mental associations.” Staats et al., *supra* note 15 (citing Blair, 2002; Blair et al., 2001; Dasgupta, 2013; Dasgupta and Greenwald, 2001; Devine, 1989; Kang, 2009; Kang and Lane, 2010; Roos et al., 2013).

<sup>18</sup>Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L.REV. 1195 (Mar. 2009).

<sup>19</sup>Staats and Patton, *supra* note 15.

<sup>20</sup>Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. of Personality and Social Psychology 871 (May 2000).

<sup>21</sup>See Jolls and Sunstein, *The Law of Implicit Bias*, 94 CALIFORNIA L.REV. 969-96 (2006). See also Blair and Lenton, “Imaging Stereotypes Away: The Moderation of Implicit Stereotypes through Mental Imagery,” 8 J. of Personality and Social Psychology 828 (May 2001).

<sup>22</sup>Uhlmann and Cohen, *‘I Think It, Therefore It’s True’: Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 Organizational Behavior and Human Decision Processes 207 (2007).

<sup>23</sup>Mindfulness helps you be more aware; to identify, tolerate, and reduce unproductive thoughts and feelings; to resist having your attention pulled away from what is happening in the moment; to have some mastery over your thought processes; and to reduce stress. For examples of mindfulness exercises, visit the Living Well website at [www.livingwell.org.au/mindfulness-exercises-3](http://www.livingwell.org.au/mindfulness-exercises-3). Also recommended is Stanford professor Shirzad Chamine’s book, *Positive Intelligence: Why Only 20% of Teams and Individuals Achieve Their True Potential and How You can Achieve Yours* (Greenleaf Group Book

Press, 2012) and website, [www.positiveintelligence.com](http://www.positiveintelligence.com).

<sup>24</sup>Suttie, *Can Mindfulness Help Reduce Racism?* Greater Good: The Science of a Meaningful Life (Dec. 9, 2014), <http://bit.ly/1zL2oLf>; Torres, *Mindfulness Mitigates Biases You May Not Know You Have*, Harvard Business Rev. (Dec. 24, 2014).

<sup>25</sup>Brannon and Walton, *Enacting Cultural Interests: How Intergroup Contact Reduces Prejudice by Sparking Interest in an Out-Group’s Culture*, 79 J. of Personality and Social Psychology 631 (Aug. 2013); Kellogg Insight, *Stacking the Deck against Racism* (Oct. 1, 2008), <http://bit.ly/1bZUB6H>. See also Pettigrew, “Generalized Intergroup Contact Effects on Prejudice,” 23 *Personality and Social Psychology Bulletin* 173 (Feb. 1997); Pettigrew and Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. of Personality and Social Psychology 751 (May 2006).

<sup>26</sup>Galinsky and Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 J. of Personality and Social Psychology 708 (Apr. 2000); Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. of Personality and Social Psychology 1027 (June 2011). See also Shih, *Perspectivetaking and empathy: Generalizing the reduction of group bias towards Asian-Americans to general outgroups*, 4(2) Asian-American J. of Abnormal Psychology 79 (June 2013) (empathy reduces implicit bias).

<sup>27</sup>Almendrala, *When White People See Themselves With Black Skin, Something Interesting Happens*, Huffington Post (Dec. 15, 2014), [www.huffingtonpost.com/2014/12/15/virtual-body-swapping-racism\\_n\\_6328654.html](http://www.huffingtonpost.com/2014/12/15/virtual-body-swapping-racism_n_6328654.html).

<sup>28</sup>Gaertner, *Reducing Intergroup Bias: The Common In-group Identity Model* (Psychology Press, 2000) (When we re-categorize others according to features or characteristics we share, we are more likely to see them as part of us and are less likely to discriminate against them as an out group).

<sup>29</sup>Gaertner and Dovidio, *Common Ingroup Identity Model*, The Encyclopedia of Peace Psychology (2011).

<sup>30</sup>Stepanikova, “*Racial-Ethnic Biases, Time Pressure, and Medical Decisions*,” 53(3) J. of Health and Social Behavior 329 (July 2012).

<sup>31</sup>Kang, *Communications Law: Bits of Bias*, in Levinson and Smith, eds., *Implicit Racial Bias across the Law* 132 (Cambridge University Press, 2012).

<sup>32</sup>Richeson and Nussbaum, *The impact of multiculturalism versus color-blindness on racial bias*, 40 J. of Experimental Social Psychology 417 (2004), [http://groups.psych.northwestern.edu/spcl/documents/colorblind\\_final\\_000.pdf](http://groups.psych.northwestern.edu/spcl/documents/colorblind_final_000.pdf).

<sup>33</sup>Phillips, *How Diversity Makes Us Smarter: Being Around People Who Are Different From Us Makes Us More Creative, More Diligent and Harder-Working*, Scientific American (Oct. 1, 2014), [www.scientificamerican.com/article/how-diversity-makes-us-smarter](http://www.scientificamerican.com/article/how-diversity-makes-us-smarter).

<sup>34</sup>Green and Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 Hastings L.J. 1435 (June 2008); Kang et al., “*Implicit Bias in the Courtroom*,” 590 UCLA L.REV. 1124 (2012).

<sup>35</sup>Bersin, *Why Diversity and Inclusion Will Be a Top Priority for 2016*, Forbes (Dec. 6, 2015), [www.forbes.com/sites/joshbersin/2015/12/06/why-diversity-and-inclusion-will-be-a-top-priority-for-2016/#aea220f4bd40](http://www.forbes.com/sites/joshbersin/2015/12/06/why-diversity-and-inclusion-will-be-a-top-priority-for-2016/#aea220f4bd40).

<sup>36</sup>Whyte, *Tying Diversity to Compensation*, Diversity Executive (Dec. 11, 2015), <http://bit.ly/1J7iovb>.