



By Kathleen Nalty

**N**othing will change in the legal industry until champions and allies overcome the “why” by strategically using “inclusion nudges.”

# Get Over the “Why” Hurdle

In a recent survey, over 1,100 people were asked, based on what they read or hear or their own experience, to rate several different sectors and industries on their efforts to attract and retain a diverse workforce. Law firms came in

last. D. McGinn, *Diversity and Law Firms* (2016).

This public perception is based on real data. Last year, according to U.S. Bureau of Labor statistics, the legal industry dropped to last place, compared to other professions with respect to racial and ethnic diversity. Gender diversity is also problematic; it is characterized by unsustained progress for women, especially at higher levels in legal organizations.

## The Role of Unconscious Bias

While no one can rule out the role of bias in these outcomes, conscious, intentional discrimination is not the main culprit. Rather, several national studies point to the greater role of unconscious, unintentional bias—especially affinity bias, which is a bias *for* others who share similar social identities, backgrounds, and interests. Three of four law firm partners in the United States are white men. If they unknowingly spend more time with and give a greater share of intangible, career-enhancing oppor-

tunities to their “mini-me’s,” that means that there are disproportionately fewer of those opportunities available for attorneys in underrepresented groups. Not all white male lawyers do that, of course. But when they do, the cumulative effect of being left out—even slightly more often—can have a profound effect on any individual lawyer’s career.

The typical law firm business model compounds this problem. Historically, many processes in law firms have been unstructured and subjective, which is where unconscious bias thrives. Partners generally have tremendous discretion in who they hire, how they assign work, who they take to client meetings and pitches, who they choose to mentor or sponsor, how they evaluate others, the feedback that they give, and who they spend their time with socially. It is in these moments of interaction that deeper bonds of trust and affinity are cemented.

Additionally, since talent development processes are not billable, law firm part-



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ners do not attend to them in a meaningful way. Many senior lawyers do not have time to develop young lawyers, and even if they did, most have never been trained in effective talent management or professional development practices.

The billable hour model also means that many practicing lawyers' daily lives are spent on cognitive overload in stress-filled, time-crunched, high-stakes situations, which is when unconscious bias is more apt to make its way into decision making and behaviors.

On top of all of that, most lawyers are unaware of their implicit biases. You cannot change what you don't recognize.

Awareness of the pervasive role of unconscious bias is growing in the legal industry. In its recent diversity and inclusion report, Bloomberg Law reported that 69 percent of survey respondents identified implicit bias as the top challenge in advancing diversity and inclusion in law firms. *2016 Diversity and Inclusion Annual Report*, Bloomberg Law (2016). Nothing will change in the legal industry, however, until lawyers and professional staff in legal organizations receive training on the key concepts underlying implicit bias.

Legal organizations intent on getting ahead of the curve will follow the example of their clients. In June 2017, over 150 CEOs banded together to form a new group called "CEO Action for Diversity & Inclusion" (<https://www.ceoaction.com>). Less than a year later, that number has nearly tripled to over 500 organizations—including many law firms—and the nonprofit has a stated goal to collect pledges from each Fortune 1000 company. See "PwC's Tim Ryan Wants Every Fortune 1000 CEO to Sign His Corporate Diversity Pledge," available at <http://www.fortune.com>. One of the required actions for membership is training all employees in the principles of implicit bias.

Once people know about unconscious bias, the next step is to interrupt it. There are two levels for this work: (1) behavior changes, incorporating diversity and inclusiveness competencies into job duties and responsibilities and holding people accountable for exhibiting more inclusive behaviors; and (2) structural changes, embedding bias interrupters into processes and procedures to help people make less-biased decisions.

Before law firms take these steps, however, leaders must be convinced that they are necessary. Many senior decision makers in law firms believe that the system is fair and that their firm is a meritocracy. This mindset is influenced by two powerful unconscious cognitive biases, system justification and the status quo, which keep decision makers blind to inequities. Research conducted at MIT has exposed a paradox: organizations that tout that they are a meritocracy have more biased outcomes for employees in underrepresented groups. E. Castilla & S. Benard, *The Paradox of Meritocracy in Organizations*, *Admin. Sci. Q.* 55 (23010): 543–76 (2010).

To counteract these cognitive biases and flip leaders' mindsets about the necessity of more robust diversity and inclusion efforts, compelling "feel-the-need" inclusion nudges can be implemented. Overcoming the "why" is perhaps the biggest challenge to implementing meaningful change initiatives designed to advance diversity and inclusion.

### **Design Inclusion Nudges to Change Mindsets**

Institutionalizing diversity and inclusion through "inclusion nudges" helps fight unconscious bias at a new level. The term "nudge" originated in the field of behavioral economics, where research revealed that people are not as rational and logical as they think. Rather, decisions and resulting behaviors are influenced greatly by unconscious attitudes, stereotypes, biases, and emotions. In 2008, Richard Thaler and Cass Sunstein published their bestselling business book *Nudge: Improving Decisions About Health, Wealth, and Happiness*, which describes how small changes in processes and procedures can nudge people to make better decisions. A classic example of an economics-focused nudge involves switching the default from "opt-in" for 401(k) contributions to "opt-out," which dramatically increases savings rates while still giving employees a choice.

"Inclusion nudge" was first coined by Tinna Nielsen and Lisa Kepinski in their book *Inclusion Nudges Guidebook* (2015), <http://inclusion-nudges.org>. They encourage advocates to design nudges for all kinds of systems and processes in organizations to help people interrupt their unconscious

biases and foster inclusive workplaces where diversity thrives. Inclusion nudges are defined as "mental pushes that will mitigate unconscious association to help the brain make more objective decisions and promote more inclusive behaviors that will stick." *Id.* Inclusion nudges can also be called "bias interrupters" because they help people recognize and mitigate biases.

## **Due to unconscious**

biases (status quo, system justification, affinity), many law firm leaders, even the most well-intentioned, simply cannot see the inequities that cause higher attrition rates for attorneys in underrepresented groups.

There are three kinds of inclusion nudges: (1) process, (2) framing, and (3) "feel the need." Process nudges involve embedding diversity and inclusion principles as well as bias interrupters into all processes and procedures in a firm. This is very difficult to accomplish in organizations filled with skeptics and resisters—those who cannot or will not see how inequities and hidden barriers operate in their firms. To overcome this hurdle, change agents need to start with "feel the need" nudges that prompt big "aha" moments and change mindsets around diversity and inclusion.

### **Make the Hidden Barriers Visible**

Due to unconscious biases (status quo, system justification, affinity), many law firm leaders, even the most well-intentioned, simply cannot see the inequities that cause higher attrition rates for attorneys in underrepresented groups. Several national research studies have found that female, LGBTQ, disabled, and racially or ethnically diverse attorneys disproportionately

face hidden barriers to career success. See M. Broderson *et al.*, *Women in Law Firms*, McKinsey & Co. (Oct. 2017); Am. Bar Ass'n, *Visible Invisibility* reports. Specifically, they have less access to critical career opportunities, including the following:

1. Networking – informal and formal
2. Insider information
3. Access to decision-makers

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the business case for  
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4. Mentors and sponsors
5. Meaningful work assignments
6. Candid and frequent feedback
7. Social integration
8. Training and development
9. Client contact
10. Promotions

Proving that a firm is not, in fact, a meritocracy, by making the hidden barriers visible, provides powerful “feel the need” nudges for law firm leaders. Thus, change agents should collect data with respect to each of these areas to demonstrate disparate access. Also asking firm leaders how they are unwittingly contributing to the hidden barriers can prompt “aha” moments. For example, one law firm added a question to the yearly partner self-evaluation form, “who are you sponsoring?” to make disparities more apparent.

### **The Business Case for Diversity and Inclusion**

Usually, when discussing the business case for diversity and inclusion, advocates only focus on the external business case, meaning what clients want and need. This tactic can provide powerful “feel the need” nudges, especially if a firm feels the threat

of losing a client due to poor performance on diversity and inclusion. But it is not the only business case that can or should be made when trying to change mindsets.

Research conducted in the last 10 years demonstrates that diverse groups outperform homogenous groups. K. Phillips, *How Diversity Makes Us Smarter*, *Sci. Am.* (Oct. 2014). This research is why corporations are doubling their efforts to diversify their workforces. Not only do people from different social groups and backgrounds bring different perspectives and information to the table (diversity of thought), but working with others who are visibly different (identity diversity) forces people, even if only on an unconscious level, to work harder cognitively, which elevates group performance. This personal business case for diversity is not as well-known, but educating white male lawyers that they can be smarter, better decision makers if they engage with diverse colleagues can help flip their mindsets around the value of diversity.

A strong organizational business case can also be made to partners who may be more motivated by the bottom line. Research studies show that companies with greater diversity are more profitable. V. Hunt *et al.*, *Why Diversity Matters*, McKinsey & Co. (Jan. 2015). Specifically, in the legal industry, a study of over 1,000 corporate counsel found that the most diverse outside counsel teams were the highest performing on several measures and earned 25 percent more in fees than the least diverse teams. *Diversity Delivers 25 percent Higher Share of Wallet*, Acritas (May 12, 2016).

Giving white men in particular strong business reasons for advancing diversity and inclusion is critical. Research shows that men are reluctant and resist advocating for gender parity, for example, because they don't believe that they have the legitimacy to act; they feel that they don't have a “place” in the conversation or that it is their business. E. Sherf & S. Tangirala, *Gender Parity Initiatives*, *Harv. Bus. Rev.* (Sept. 13, 2017). Explicitly communicating about the business imperative and pointing out that their participation is essential to advance diversity and inclusion to make the firm more successful can help get men past the “why” of advancing diversity and inclusion.

### **Engagement with People from Different Social Identity Groups**

Experts in diversity recommend creating situations that put skeptics and resisters into “cognitive dissonance,” which happens when their beliefs come into conflict with the facts or even their life experiences, to flip their mindsets. F. Dobbin & A. Kalev, *Why Diversity Programs Fail and What Works Better*, *Harv. Bus. Rev.* (July/Aug. 2016). Sometimes you can act your way into new thinking, especially when you go from interacting mostly with your “in-group” (people similar to yourself), to having meaningful relationships with “out-group” members. Working side by side with “out-group” members breaks down stereotypical thinking and can switch their status to an “in-grouper.” Thus, it is important to ask senior white men to be involved in recruiting efforts, as well as mentoring and sponsoring attorneys in underrepresented groups, so they develop these critical cross-difference relationships.

### **Accountability**

Social accountability is another tactic that experts point to that helps advance diversity. Everyone has a strong need to look good in the eyes of others. Just knowing that your decisions are being scrutinized and compared to others is a powerful motivator. Bias interrupters can be designed to invoke this sense of accountability. Some bias interrupters include (1) requiring written reasons for talent management decisions (e.g., why a “mini-me” was selected instead of someone in an “out-group”); (2) tracking who gets invited to networking or client events as well as plum work assignments, and circulating this data to partners; (3) using software that tracks demographics, which can cause practice group leaders to compare each other's performance on diversity and inclusion; and (4) rewarding performance related to diversity and inclusion efforts.

Law firms can also embed diversity and inclusion competencies in everyone's job duties and responsibilities and hold them accountable for exhibiting behaviors that foster greater diversity and inclusion. In many firms, partners are asked a general question on their annual evaluation form about their diversity and inclusion efforts.

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Some firms are making this more specific, and compensation committees are having discussions about the level of effort that should be required to meet diversity and inclusion-related goals. Simply attending a specialty bar dinner or a CLE program on diversity and inclusion should not be enough. Diversity and inclusion competencies are lived behaviors that are exhibited every day, not one-offs.

### Storytelling

Although people will say that they are more persuaded by data, stories can be powerful. Sharing anecdotes, especially when they involve clients, can help get leaders over the hump of “why?” The author of this article often tells the “Tale of Two Law Firms” in presentations: how one law firm lost out in a pitch because it lacked sophistication around diversity and inclusion, and how diversity and inclusion was the differentiator for another firm that won the business solely because of its efforts.

### Leveraging Allies

There are many white male law firm leaders who are allies for diversity and inclusion. Some are engaged because it is the right thing to do, and they are motivated by deep, personal compassion and commitment to equity. Some also have personally experienced being excluded themselves, or they have friends or family members who have faced inequities and hidden barriers in the workplace. These male allies are perfectly positioned to advocate for change with respect to diversity and inclusion by using their influence to change mindsets.

### Conclusion

There is a difference between talking the talk and walking it. All law firms say that diversity is important, but what are they doing to back that up? In one 2017 survey of 2,500 lawyers, only 36 percent of the female respondents believed that gender diversity was a priority in their firms, compared with 62 percent of the male respondents. M. Tribe, *Study Shows Despite Plethora of Policies, Big Law Still Struggles with Gender Diversity*, *The Am. Lawyer* (Oct. 31, 2017). This illustrates the tremendous need for “feel the need” inclusion nudges. Nothing will change in the legal industry

until champions and allies overcome the “why” through the strategic use of inclusion nudges, and particularly, through “feel the need” nudges, so that law firm leaders will embrace the “how” of diversity and inclusion. **FD**