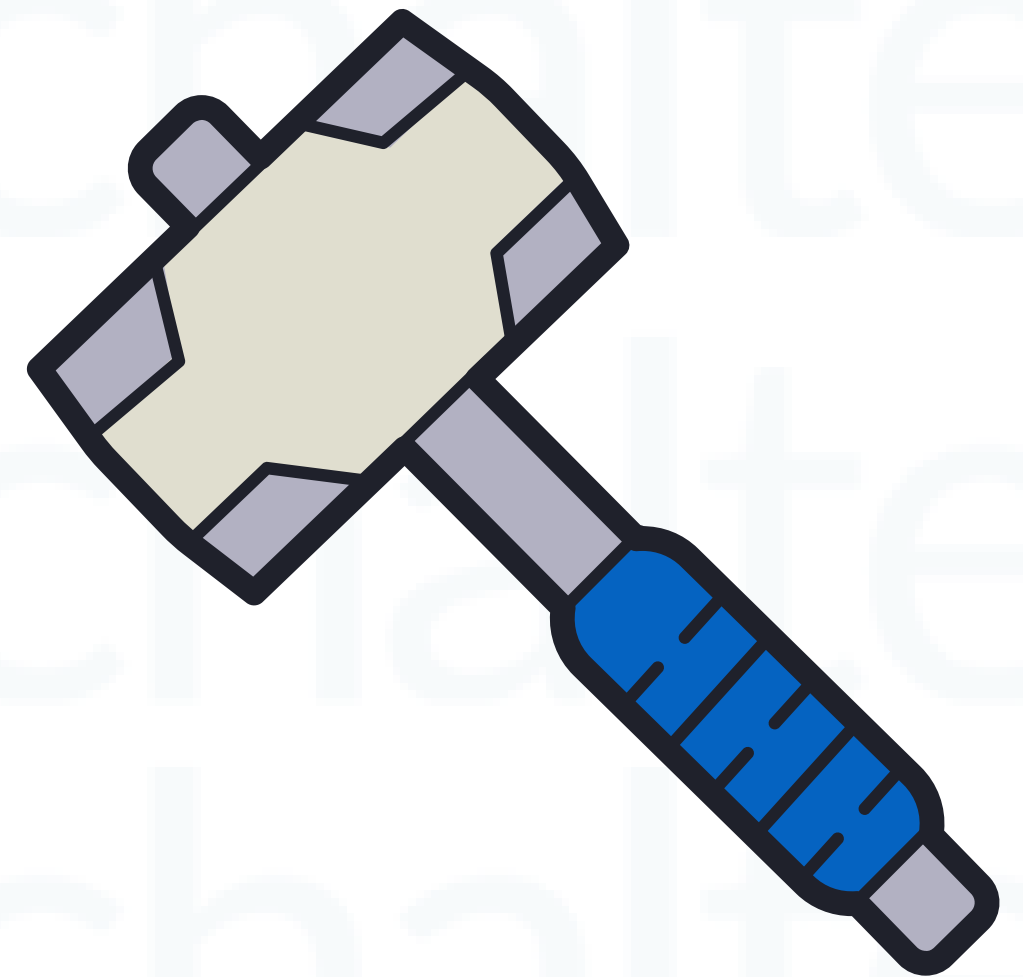
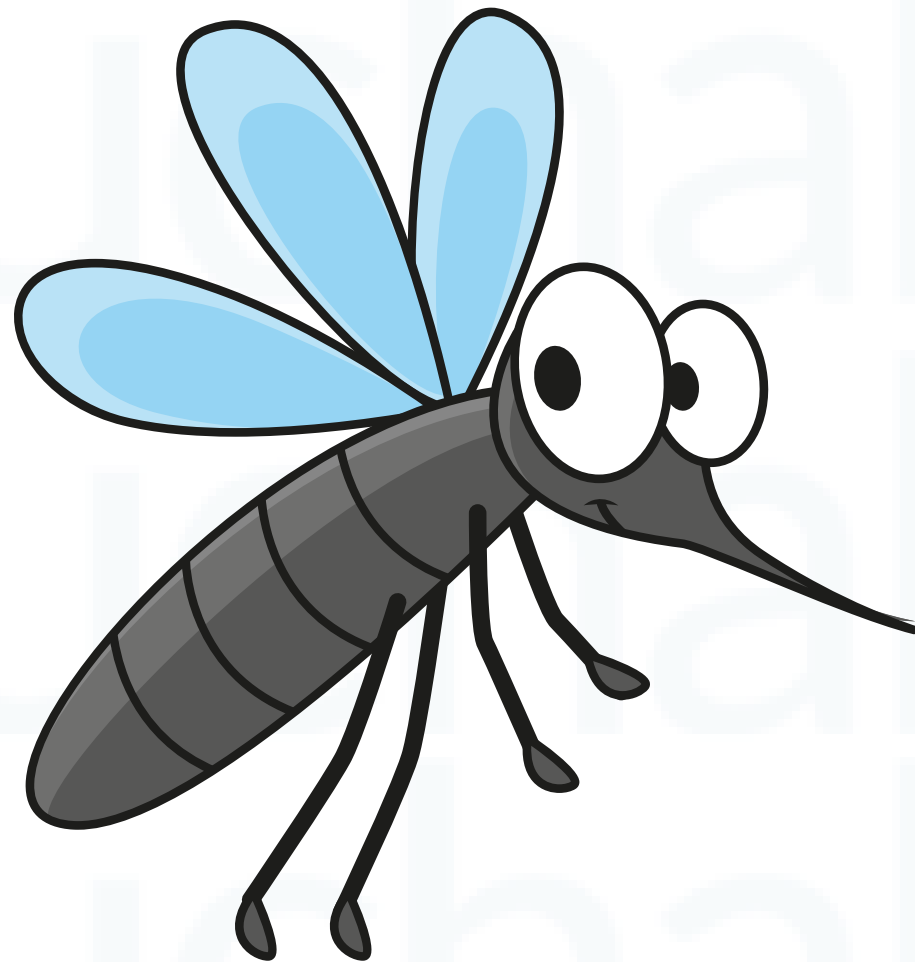


Mosquitoes & Sledgehammers

...and other impacts of unconscious bias

by Jon J. Olafson

Buchalter



Topics

1. Personal identity factor identification
2. How unconscious bias manifests and science behind it
3. Unconscious bias in our practice
4. How to handle unconscious bias



Agreements

- Speak in rough draft – we want an open conversation.
- Use “I” statements – speak for yourself and not for everyone.
- Take with you the lessons learned, but keep here the personal stories shared.
- Respect others when they are talking.
- Disagreement is good, but disrespect is not.
- Your story does not apply to everyone.



Rules of Ethics - Colorado Rules of Professional Conduct



- **Rule 1.1** -- A lawyer shall provide competent representation to a client. Competent representation legal knowledge, skill, **thoroughness** and **preparation** reasonably necessary for the representation.
- **Rule 1.3** -- A lawyer shall act with **reasonable diligence** and promptness in representing a client.
- **Rule 4.4(a)** -- In representing a client, a lawyer shall not use means that have no substantial purpose other than to **embarrass**, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- **Rule 8.4(g)** --Engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or **engender bias** against a person on account of that person's **race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status**, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process;
- **Rule 8.4(h)** -- engage in any conduct that directly, intentionally, and **wrongfully harms** others and that adversely reflects on a lawyer's fitness to practice law.

What is Diversity ? There are multiple approaches:



- Aspects of our identity that differentiate each of us from others, while recognizing that not each of those unique identities have been subject to legal or social marginalization.
- Those who come from traditionally and historically marginalized communities are diverse, drawing a distinction, or “othering,” between them and those from the majority.

Individual Identity Aspects



Adapted from Lee Gardenswartz
and Anita Rowe, *Diverse Teams at
Work*, Irwin Publishing, 2015

Individual Identity Aspects

- Things you keep in your front seat and near you (the sledgehammer factors)
- Things you keep near you but not on you – maybe in the backseat
- Things you keep in your trunk
- Things you store away or keep at home



Individual Identity Aspects



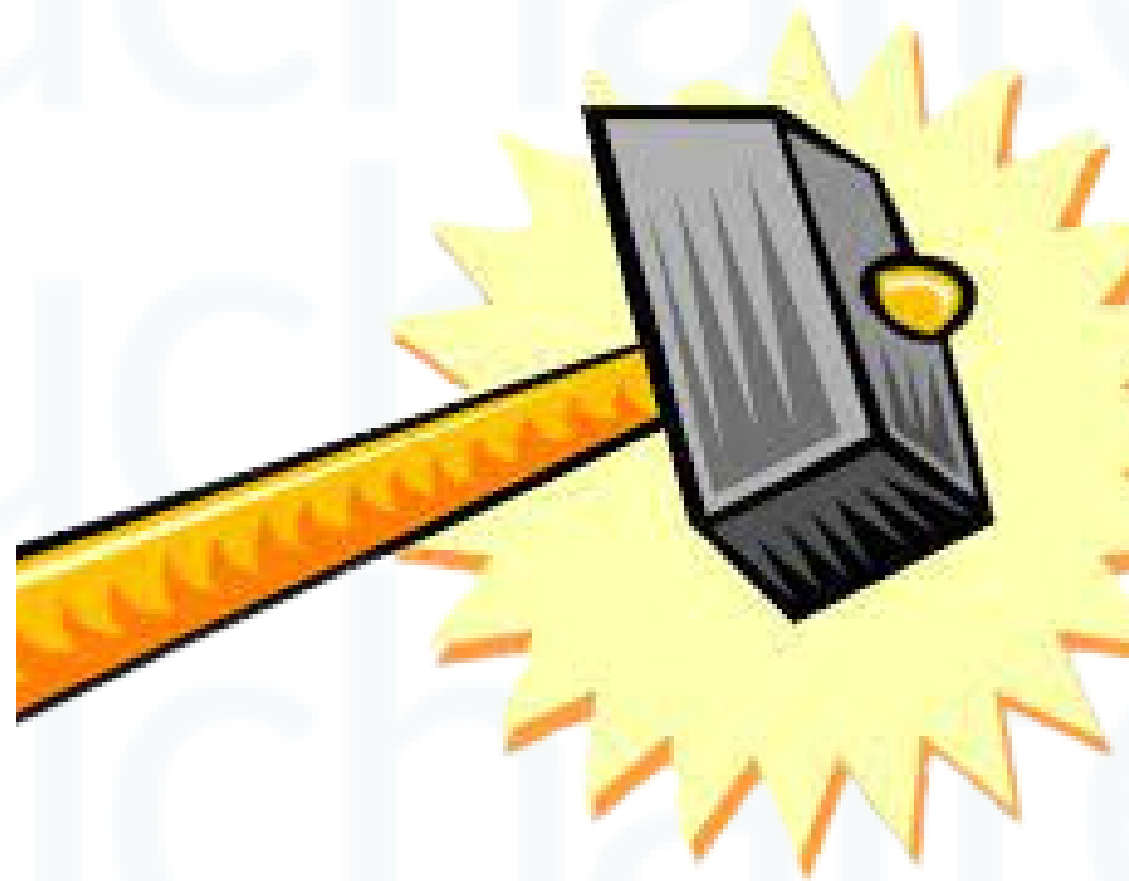
- There is value in knowing what people are carrying more prominently.
- **There is a difference between being diverse and coming from a marginalized community.** There can be overlap, but they are not the same.
- **In our practice, we will work with so many people – understanding their perspectives, and biases, will be invaluable to your client.**

Threshold Matter -- Intent v. Impact

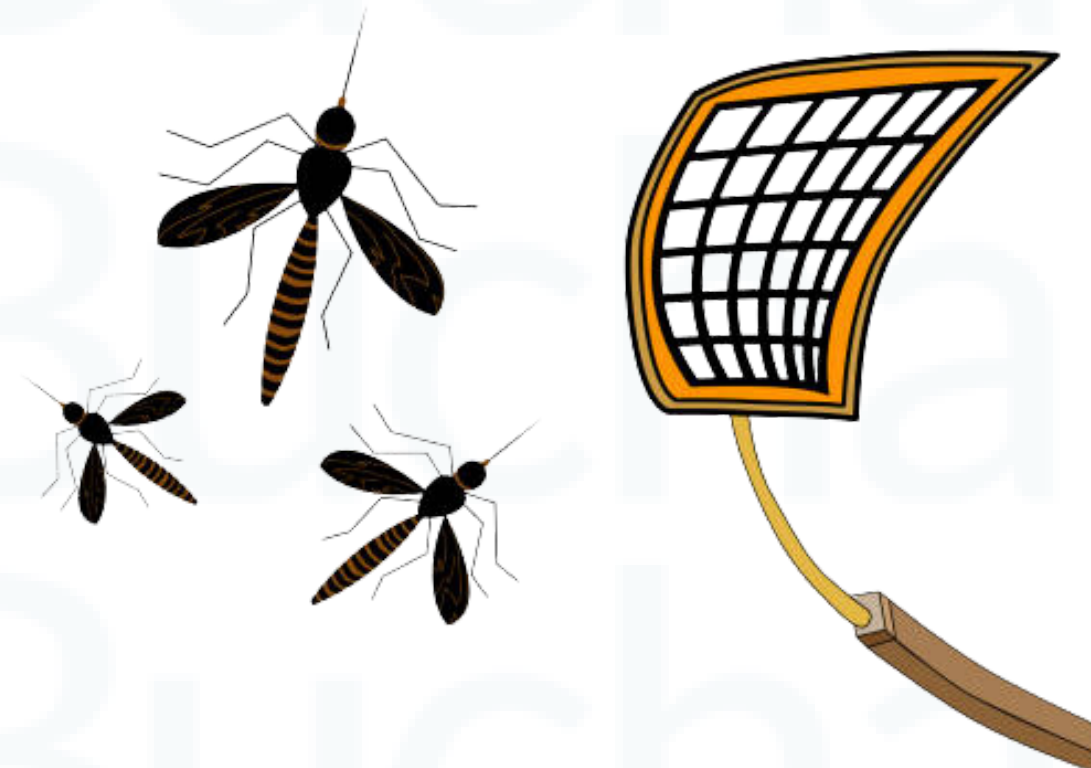
Even intended benign comments about the identity aspects a person keeps close can turn what was supposed to be a fly swatter into a sledgehammer.

BASIC ASSUMPTION: Everyone will get hurt if they are hit by a sledgehammer.
You tend to not trust those who hurt you. *Trust is a critical tool in our profession.*

Your intent will not change the impact.

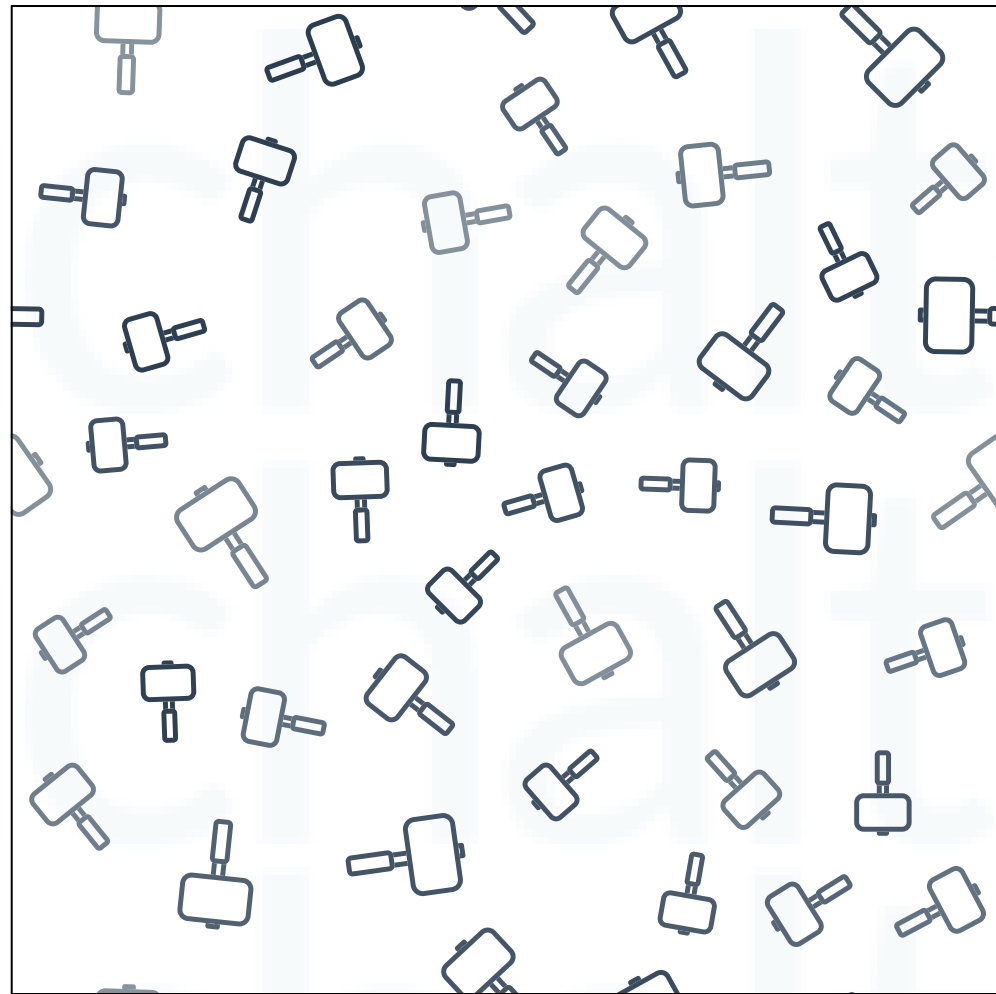


vs.



Impact

Marginalized communities contend with sledgehammers flying at them



They also contend with swarms of bias mosquitoes flying around them, often resulting in lots of mosquito bites.

Impact on Marginalized Communities

This swarm of mosquitoes and their resulting bites come from our governments, courts, judges, political and social leaders, television shows and media, family members, places of worship, banks, bosses, administrative agencies, real estate agents, a stranger on the street, etc... literally everywhere.

This is **systemic marginalization** – which is a macro process wherein people are pushed away from economic, sociopolitical, and cultural participation.



Impact on Legal Representation

Sledgehammers and mosquitoes come from everywhere and attack everyone in a dispute.

The result = distrust, fatigue, anger, and other not-so-good feelings.

NOTE: First impressions are tough to fix!!



Unconscious Bias – Definition & Application

Unconscious Bias = the stereotypes and biases about certain groups, individuals, attributes, and things that people form outside of their own conscious awareness.

NOTE: Unconscious bias impacts everyone -- people have a bias about you and you have a bias about others.

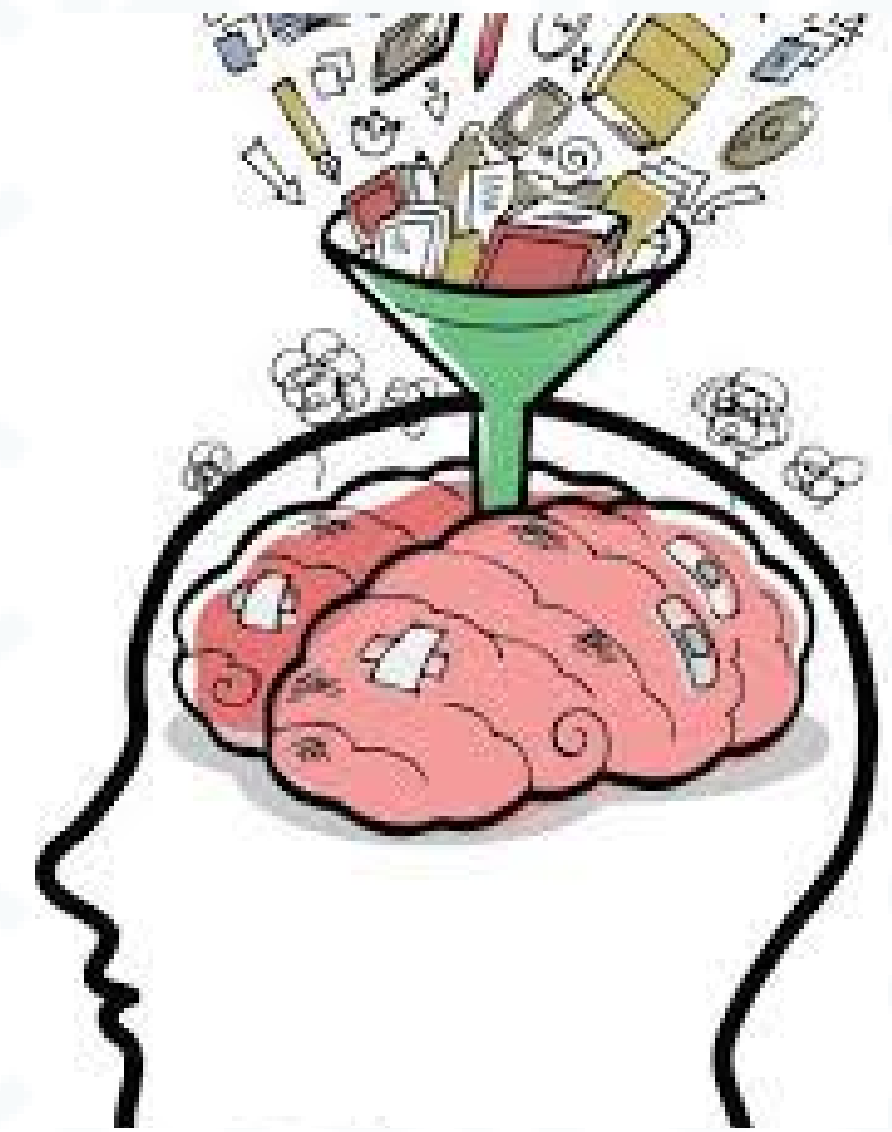


Unconscious Bias – The Science

Unconscious bias is ingrained in our brain's workings. With an overwhelming 11,000,000 information pieces available, we can consciously process only about 4 bits at a time, which is a mere 0.00001% of the incoming information.

Instinctive Filtering -- Through preexisting knowledge structures, our brains create shortcuts to assess likeability and safety quickly.

Consequently, we don't have to evaluate our safety anew with each encounter or exposure to novelty.



Unconscious Bias – The Science

- The look and behavior of a person and their cues help us sort them into our preexisting categories.
- Our brain actively notices and confirms the preexisting bias, but filters out those things that negate the bias.
- Our brain will also “fill in the gaps” & attribute characteristics of a preexisting bias onto the person.
- Our behavior toward that person will actually be informed and directed by that preexisting bias.



Unconscious Bias – Types

Perception Bias – Stereotyping based on assumptions about a specific group

Affinity Bias – Feeling a natural connection with those who are similar to us

Halo/Horn Bias – Positive or negative projections onto individuals without knowing them

Confirmation Bias – Seeking confirmation of pre-existing ideas and punishing deviations

Attribution Bias – Attributing others' behavior to internal traits and our own behavior to external factors



Unconscious Bias – Socialization

Influences such as families, media, places of worship, and schools have a huge impact on how our brain creates our preexisting and unconscious biases.



Unconscious Bias – Socialization

Influences such as families, media, places of worship, and schools have a huge impact on how our brain creates our preexisting and unconscious biases.



Unconscious Bias in Legal Practice - Assumptions

- Being hit by a sledgehammer hurts; no one escapes unscathed
- Mosquitoes buzzing around you is irritating; multiple bites is worse
- Everyone cherishes aspects of their identity; be aware of unintended impacts from seemingly innocuous comments



- Mosquito swarms of marginalization are everywhere, including in the legal profession. Assume people you interact with, especially marginalized communities, have been and are currently being swarmed by mosquitoes and getting multiple bites.

Unconscious Bias in Legal Practice – Where does it manifest?

- Place of work
 - Co-workers
 - Staff
- Depositions
 - Deponent
 - Court Reporter
- Clients
- In the courtroom with:
 - Judge
 - Jurors
 - Court staff
 - Witnesses
 - Opposing and Co-Counsel



Unconscious Bias in Legal Practice – Does it have an impact?

YES! 

You can easily throw a sledgehammer and irritate a mosquito bite.

Examples of negative consequences:

- Jurors, judge, or witness bias about you and your advocacy.
- Jurors, judge, or witness bias about your client.
- Witness discredited.
- You discredited or not trusted.
- Client discredited or not trusted.
- Your case damaged because you threw a sledgehammer or irritated a mosquito bite.
 - Judge impact
 - Jury impact

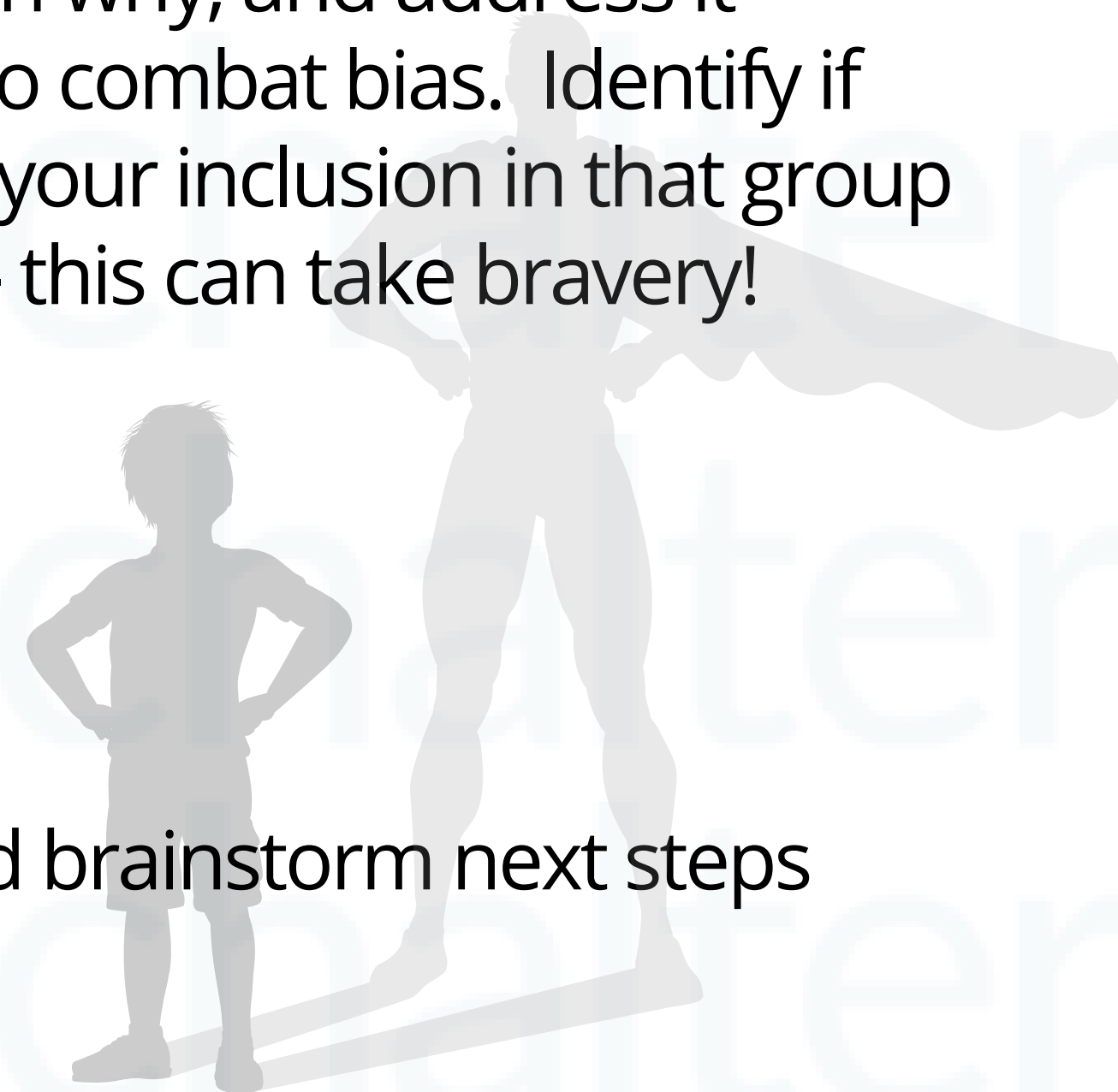
Tools to Address Bias – Use your Superpowers!

Superpowers = Shaping conversation and influencing others based on your status, whether earned or unearned, and you may not even realize you have and benefit from them.

- Analyze situations where you have influence, question why, and address it
- Recognize societal superpowers and leverage them to combat bias. Identify if you are in any of those groups and how you can use your inclusion in that group
- When you see a bias unfold, use your superpowers – this can take bravery!

This can look like:

- Say something and interrupt the bias
- Suggest alternative action that negates the bias
- Ask for or provide instruction about the bias
- Follow-up with person who experienced bias and brainstorm next steps



Tools to Address Bias – Use your Superpowers!

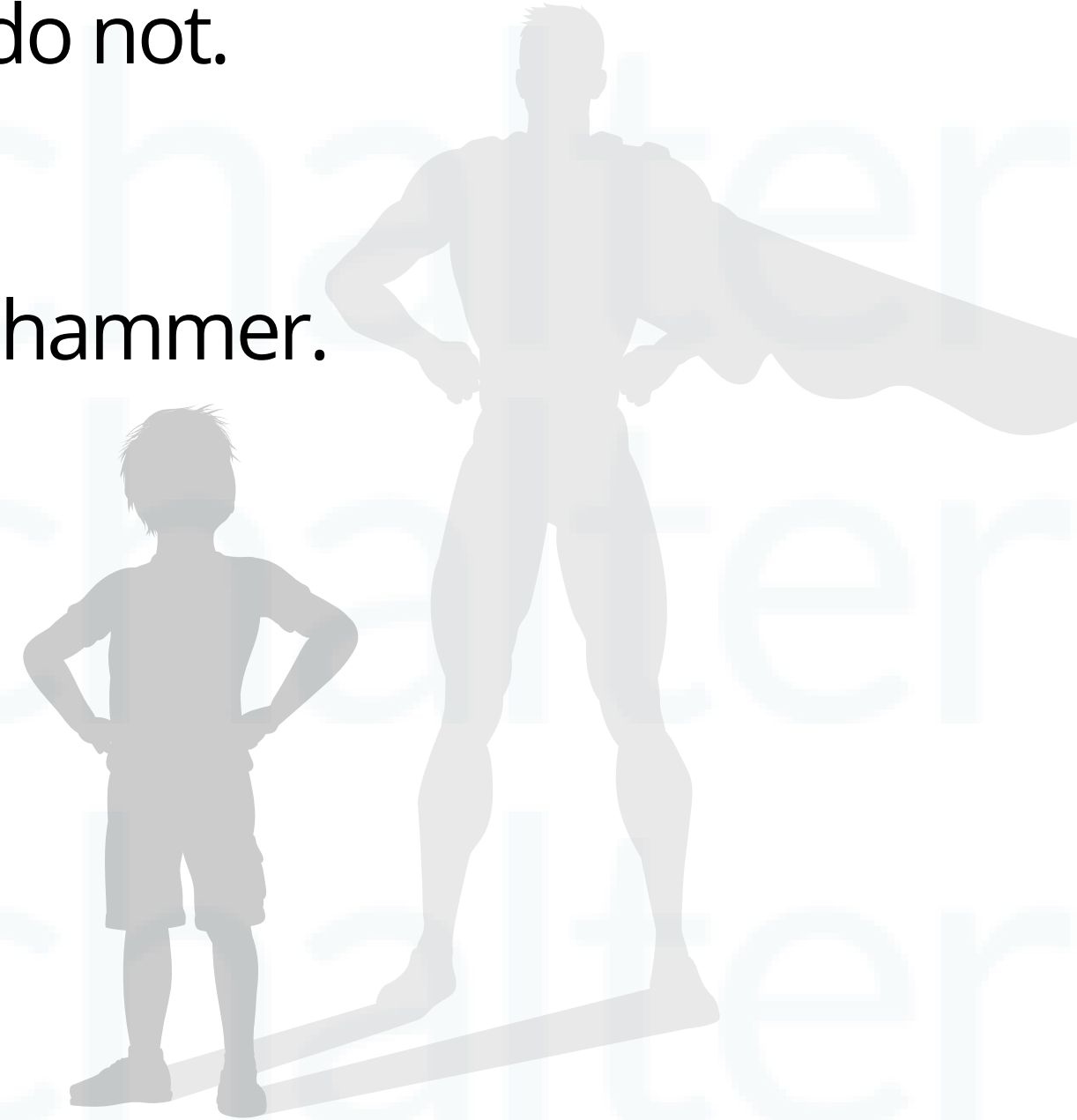
Microaggressions – (sometimes not so) subtle acts of dominance in behavior and interactions from one person with a superpower to those who do not.

- Microaggressions can be unintentional.
- Microaggressions can be both a mosquito bite AND a sledgehammer.

Research shows individuals with superpowers are prone to:

- Speak without interruptions
- Receive credit for others' ideas
- Dismiss others' ideas or disregarding “unconventional” ideas
- Speak for the group involuntarily
- Correct others

TIP: When you have a superpower and see biased behavior, interrupt it! You can properly attribute, give space for speaking, allow for new ideas, and ensure a new idea is heard.



Preparation

Reflect on situations you are or may be in and plan ahead.

IN DEPOSITION: Read the room. Consider the dynamics in play and determine how bias will impact you, your client, and the witness.

AT WORK: Understand the power dynamics and which group(s) have control. Determine tools for interrupting bias when observed. Encourage systemic change.

IN COURT: Examine the players and strategize how to de-bias.

- Does the court practice jury de-biasing? Should you suggest it?
- What bias may impact your client? How can you proactively de-bias? Do you need the court to interrupt that bias?
- What bias may impact you and your trial team? How can you interrupt that bias? Do you need the court to interrupt that bias?
- What bias do you have regarding opposing counsel, the judge, and court staff? What behaviors do you need to have in place to ensure that bias is not manifested?



Preparation - De-Biasing Toolbox

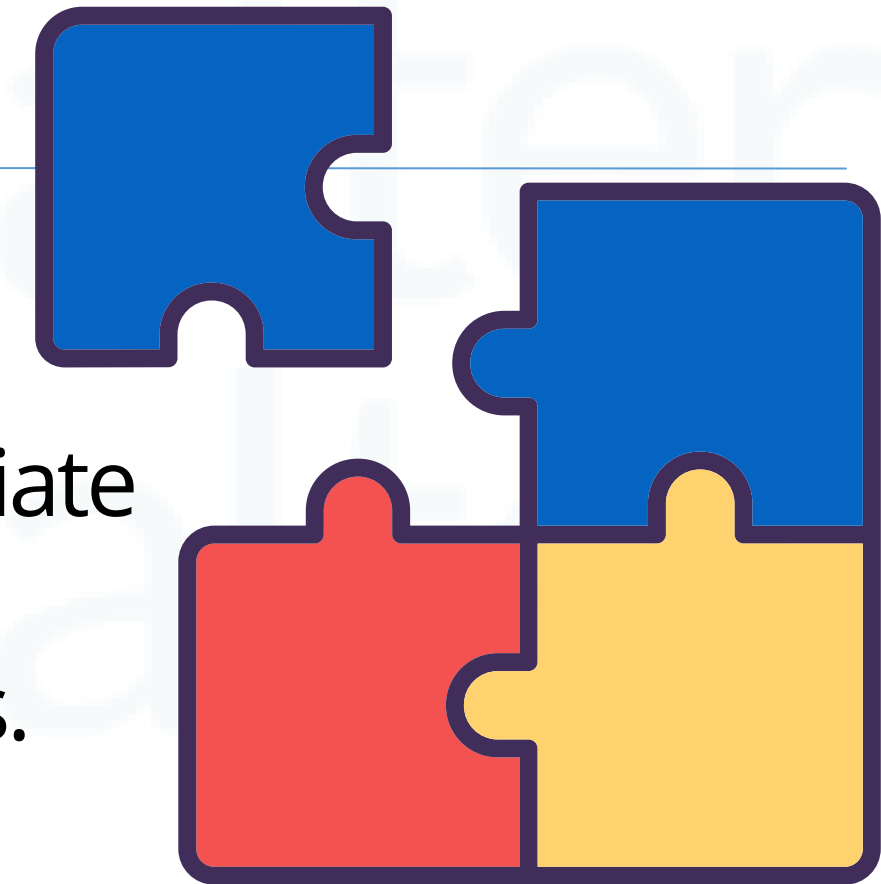
Helpful tips for court presentations:

- Use materials to reflect the community, not your unconscious bias.
- Be conscious of how you treat everyone: is it consistent and appropriate or a manifestation of an implicit bias?
- Train your team so everyone is aware of their own and others' biases.
- Determine protocols for addressing bias when it occurs.
- Consider the role and optics of each team member.
- Remember we all have biases and others' opinions are valuable.
- Assist the court with de-biasing jury instructions.
- Be thoughtful about the biases your team/case presents.
- Create *voir dire* tailored by the facts of your case and the realities of the players
- Address everyone in the courtroom respectfully by asking how they wish to be addressed.

If needed, request Judge make an exception to rules to honor wishes of the individual.

I encourage reading the material in the American Bar Association's de-biasing toolbox.

https://www.americanbar.org/groups/criminal_justice/voir_dire/



Tools to Address Bias – Know your own bias

- Own the fact that you have unconscious bias
- Determine what they are --
<https://implicit.harvard.edu/implicit/takeatest.html>
- Take steps to address them

Exercise: When you see someone with whom you have an unconscious bias, consciously (and internally) note three attributes, cues, or behaviors that contradict the bias.



Final Thoughts



- Understand your own bias and own the fact that you have them.
- The science behind unconscious bias takes the sting away from it – understanding will help address your own bias.
- Consider the five different types of biases. Examine how they manifest with you, how they impact your case, and what you can do to interrupt that bias with your team, the client, and the court.
- Remember that you and our entire system is a work-in-progress. Keep moving forward, even if you get discouraged!

Your Presenter: Jon J. Olafson

Jon is a Shareholder at the Denver office of Buchalter. He advises and represents clients on trade secrets, corporate espionage, corporate and non-profit fiduciary duties, fraud, business torts, complex commercial litigation, and non-profit governance. In addition, he is the national practice group chair and founder of Buchalter's Organizational Inclusion, Diversity, Equity, and Belonging practice group. He is also co-chair the national firm's Equity and Diversity Committee and leads an LGBTQIA+ Affinity Group.

